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FLORIDA ENTERTAINMENT & SPORTS LAW REVIEW

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FLORIDA ENTERTAINMENT AND SPORTS LAW REVIEW

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LETTER FROM THE EDITOR

The Florida Entertainment and Sports Law Review is proud to present the first issue of its fifth volume.

This issue centers on legal challenges arising from rapid technological advancement, new trends, and accelerating investment in the entertainment and sports industries. Across each piece, readers will see legal doctrine struggling to keep pace with innovation or capital moving faster than established regulations. The articles examine how these developments are reshaping the future of sports, music, and gaming.

We begin with our Career Spotlights, featuring Jenna Harris, whose litigation and transactional practice spans fashion, music, and art, and Simon Pulman, who offers a unique perspective on the television, film, and gaming industries. These spotlights highlight the wide range of paths available in entertainment law and provide valuable insight into the persistence and passion required for students navigating these fields.

Our commentary is particularly timely, as Tim Kappel and Loren Wells of Wells & Kappel LLP analyze a recent Fifth Circuit decision holding that songwriters may rely on U.S. copyright law to reclaim their works worldwide. As a law student hoping to work closely with musicians and advocate for artists' rights, this decision represents a meaningful victory.

The articles in this issue span a diverse range of topics. Christopher Ruckdeschel examines how private equity investment in college athletics may enable universities to fund revenue-generating opportunities rather than placing additional strain on costs and non-revenue sports. Kirk Wolff analyzes the Sixth Circuit's decision in *Bridgeport Music, Inc. v. Dimension Films*, focusing on the de minimis standard and its implications for live music recordings, including the heightened infringement risks faced by artists and producers. Finally, Sophia Simeoni explores the impact of Section 230 of the Communications Decency Act, going beyond social media to examine its consequences for the video game industry.

Serving as Editor-in-Chief has been an immensely rewarding experience. This role has allowed me to continue cultivating a dedicated space for entertainment and sports law at the University of Florida Levin College of Law. The position has reinforced my belief that success in this field requires even more than academic excellence. It demands genuine passion, creativity, and persistence.

I would like to extend my gratitude to our authors for their impactful contributions. I also thank our Publication Manager, Lisa Caldwell, and Professor Rachel Arnow-Richman for their support. I am deeply grateful to our staff and senior editors for their dedication. Finally, this publication would not have been possible without this year's incredible executive board, including Sophia Simeoni, Alex Nazareth, Julie Wittenberg, Lauren Austin, Katie Chronister, Logan Ansted, Keano Jacobs, and Braden Ridlehoover.

Kayleigh Thomas

EDITOR-IN-CHIEF

FLORIDA ENTERTAINMENTAND SPORTS LAW REVIEW

VOLUME V **FEBRUARY 2026** **ISSUE I**

CAREER SPOTLIGHTS

COMMENTARY

NOTES

CAREER SPOTLIGHT: JENNA HARRIS, ESQ.

Jenna Harris is an accomplished attorney who specializes in the entertainment, fashion, music, media, and arts industries. With extensive experience in handling complex business disputes, Jenna provides integral legal counsel to her clients on transactional matters and federal and state court litigation involving copyright, trademark, branding, and contract issues. Jenna has represented and counseled clients on a wide range of disputes, including corporate and entertainment litigation, intellectual property enforcement, licensing, brand development, and First Amendment matters. As dedicated as she is to her clients, Jenna makes time to give back to her community through outreach and pro bono work. Jenna actively volunteers with Volunteer Lawyers & Professionals for the Arts (VLPA) and was formerly a Chair of the Entertainment and Sports Law Section of the Tennessee Bar Association. Demonstrating both passion and expertise in her field, Jenna unwaveringly tackles a broad range of complex issues for her clients.

QUESTIONS & ANSWERS

1. Please briefly explain your career path and what led you to your current position.

I moved to Nashville, Tennessee with the dream of intersecting my legal career with the entertainment and fashion industries. After taking the bar, I worked as an associate attorney with the Volunteer Lawyers & Professionals for the Arts and, through some professional connections there, landed my first job at a boutique litigation firm in town. I worked on a variety of cases from copyright to securities disputes, with the goal always being to narrow my practice into the entertainment industry; the icing on the cake would be if I could also work with fashion and apparel clients. I cut my teeth there and really learned how to practice law and the "soup to nuts" of litigation. Six years later, a client contact of mine introduced me to some members of the firm I am with today, and I joined Ritholz Levy Fields a year after, realizing my dream of combining my work as a litigator with the art, fashion, and entertainment worlds. I've been with Ritholz Levy Fields for seven years now.

2. During the early stages of your legal career, how did you develop your interests in complex business disputes and intellectual property matters, and what key experiences shaped your practice today?

Ever since I was little, I was always fascinated by the arts—music, literature, film, visual art, fashion, etc. I loved singing, writing poetry, and styling clothes, but I also always knew that I wanted to be a lawyer. When I was in law school, taking courses in copyright, trademark,

entertainment, and patent law, a light bulb went off, and I truly discovered which areas lit me up and sparked a passion inside. I realized working in this area of law would allow me to combine two worlds I had always daydreamed about. Working with artists and arts organizations at the VLPA gave me first-hand experience counseling on behalf of the artists and servicing the needs of nonprofit organizations. Once I started at a law firm, representing artists, labels, and publishers allowed me to dive deeper into the nuances and complexities of copyright law, and representing companies broadened my knowledge of corporate formalities, trademark liability, and damages. Those areas make up a large portion of what I do today. The satisfaction of representing the interests of those clients and getting to advocate on such technical (and ever-changing) aspects of the law keeps me challenged but also grounded—I do not take for granted that I get to work with some really cool clients. That is, after all, why I became interested in intellectual property; it allowed me to work in an area I loved and respected, i.e. the arts.

3. You are licensed in both New York and Tennessee, both known for prolific fashion and music industries. What differences do you see in the cultural landscapes of these industries across the two jurisdictions, and what unique challenges arise in your practice as a result?

The most significant cultural difference is simply what you would expect—personal interaction. The South is slower-paced and built on trust and hospitality. That bleeds into the industry and clients' interactions with whom they do business. It is not very confrontational, and it is more collaborative than competitive. New York is quite the opposite—fast-paced and competitive but also more saturated. As a result, we see many disputes with clients in the South that originated with handshake deals or arrangements where clients failed to paper terms because they "trusted" the person/business or just never imagined they would ever be in litigation. No one imagines that. Compared to New York, where it is more business-focused than personal, clients tend to operate more in writing. Each side presents a unique situation; we must deal with it as best we can under applicable state law, along with what we can establish regarding the parties' intent at the time certain deals were made.

4. You have worked extensively on matters involving copyright and trademarks. How do you approach protecting and enforcing intellectual property in today's rapidly changing digital environment, especially with the evolving landscape of branding and online assets?

It is critical to stay up to speed on case law and federal court decisions across the United States. We have a subscription service that sends me articles daily covering a variety of decisions on intellectual property cases so that we can stay aware of court decisions in real time. This emphasis on current events has been particularly important with the popularity and use of artificial intelligence, an area where we are only recently beginning to have law as it relates to the ability to use and own copyrights and trademarks. As far as enforcement, we also lean on third parties who have created entire business models designed specifically for policing infringement. Chasing after this content on our own is a constant game of whack-a-mole, so utilizing technology that can scan the internet in a fraction of the time and cost as an attorney makes it much more worthwhile for the client.

5. As someone who provides both litigation and transactional services, how do you balance advocating in court by helping clients strategically build and maintain their brands outside of litigation?

Over eighty percent of my practice is litigation. I enjoy it and have done it for years. Getting to work with transactional clients, however, is such a fun and positive experience. I find it—and I think the clients do, too—far less stressful than litigation because it is exciting and positive to build something together. I enjoy being part of a client's story and dream from the beginning, and working with them to protect that dream. When those worlds collide at times, it is helpful to offer transactional clients a litigator's perspective, because I've seen where and how things go south, so I can offer a unique point of view in that regard that not all transactional attorneys possess. I would say that is one of the most beneficial elements that I can offer clients by giving an extra "risk management" approach to the transactions I am involved in.

6. You have served as a volunteer attorney for Volunteer Lawyers & Professionals for the Arts, which provides low-cost legal services to artists and nonprofit arts organizations in your state. How important is providing these services to artists who may not have the means for traditional legal services to the broader landscape of intellectual property and the entertainment industry? How has this experience shaped your approach to client representation?

Everyone should have access to justice, especially artists and creators who quite literally put their blood, sweat, and tears into creating the content, clothing, food, art, etc. that we all consume and enjoy. No one should be left to feel like their creations can be infringed upon simply because they do not have the means to enforce their rights. Similarly, the nonprofit organizations I have worked with have done so much good and provided so much opportunity, especially for young creators who end up growing into artists of their own, that I cannot imagine what it would be like if they were shut down (or never started) because of a lack of funding for basic legal needs. My experience with the VLPA certainly made me sensitive to the costs of litigation, being proactive in your business, and protecting and enforcing your rights. I do my very best to work pro bono when I can and where it is best served and otherwise counsel clients who cannot afford full legal representation on how they can be their own advocates.

7. In your work with defamation and First Amendment protections, what trends or challenges do you see emerging in today's media environment, and how do you counsel clients who are facing these issues?

The most common issue we see here is reposting content that may have originated with someone else and the context in which it was posted. Those questions can weigh heavily for or against liability, intent, and, specifically, whether something can be capable of defamatory meaning. Many young content creators today are also boldly outspoken on political and social issues, which is amazing, but this can lead to challenges when it comes to deals with big brand sponsors. It involves toeing the line between staying authentic while not polarizing partners and diverse customers.

8. What emerging issues in the entertainment and fashion industry excite or challenge you most right now, and why?

There has been a huge push toward sustainability and transparency from brands within the fashion industry. Over the last decade, more has

come to light about the amount of waste associated with "fast fashion," which I think has caused consumers to take a step back and consider the role they may be playing in it. As a result, consumers are driving a more environmentally conscious fashion ecosystem, and we've seen many "green" brands reach success as a result. We've also seen many longstanding brands make bold changes to existing business models and goods to stay in good graces with their consumers. This focus on consumer perceptions fueling an environmental ecosystem also presents many challenges from a legal perspective because it can involve a complete recalibration of supply chains and the way businesses have operated for years. On the other hand, it is exciting because we've seen the introduction of new materials, designs, and crafts, as designers are finding creative ways to incorporate greater sustainability into their brands.

9. You have participated in forums addressing the impact of unlicensed music on social media and the growing complexity of global branding issues. How do you help clients navigate the legal risks and opportunities presented by digital marketing, social media platforms, and the international marketplace?

From a trademark perspective, we try our best to ensure our clients are protected in every geographic area in which they do business. We assess when, where, and how they are using their marks and advise accordingly on whether it makes sense to extend trademark protection to police against international infringers, which is made easier by the Madrid Protocol. On the copyright side, it is much more difficult because there is no uniformity in laws or international treaties to streamline protection. As a result, we rely on contracts and agreements with the platforms to enforce our clients' rights and, as always, undertake cost-benefit analyses when it comes to utilizing those types of platforms and marketplaces to run their businesses and promote content.

10. Intellectual property law is increasingly relevant for startups, content creators, and established brands. What advice would you give young attorneys or law students who want to blend personal interest with professional expertise to create a fulfilling, specialized career path like yours?

Stick with it because we need you! This is a growing industry that is constantly changing and always in need of fresh perspectives by individuals who are truly passionate about the underlying subject matter. That passion shows through not only in your work but also in the way you interact with clients and other attorneys. It is clear who came into this

space because of the title and who wants to be in it because they truly appreciate intellectual property and the arts. Continue to make connections in all aspects of the industry—not just legal—because you never know who will need representation or who may know someone who they can connect you with. If you've set your eyes on this goal and a similar path for the right reasons, it will happen for you. Just stay the course and make little things happen along the way. There is always a need for new IP and entertainment lawyers!

CAREER SPOTLIGHT: SIMON PULMAN, ESQ.

Simon Pulman is a leading entertainment law attorney, specializing in transactions and finance in the media and entertainment, film, TV, and podcast industries. Simon has extensive experience in commercial business affairs and sophisticated rights transactions for television, film, podcasting, and interactive clients. He often assists clients in negotiating complex development, production, financing, and licensing deals. Simon frequently represents high-profile clients, including Netflix, Amazon, Apple, NBC, and Peacock. On behalf of both rightsholders and acquiring parties, Simon has negotiated substantial deals for the adaptation of books, articles, video games, podcasts, and more.

Additionally, Simon is considered an industry thought leader at the intersection of entertainment, technology, and culture. He brings a unique perspective to the entertainment law industry through his deep knowledge of genre entertainment and popular culture, as well as his particular interest in gaming, podcasts, comic books, and graphic novels. In addition to being an expert in transmedia and the convergence of gaming and entertainment, Simon is also deeply committed to mentoring the next generation of attorneys through sharing practical advice on breaking into the field and navigating its challenges. Both a respected practitioner and advisor, Simon has become a central voice in shaping the future of entertainment law.

QUESTIONS & ANSWERS

1. Please briefly explain your career path and what led you to your current position.

I've been deeply curious about the entertainment industry since I was a teenager. I consumed tons of movies, TV, and games growing up in the UK, and I remember asking questions like "Why does that person have an 'and' credit? and "Why did they change the theme song to that TV series when it was imported to the UK from the U.S.?" The answer, of course, is "contracts."

I went to law school in Nashville, Tennessee, with the goal of pursuing entertainment, and I interned at CMT while I was there. After moving to New York, it took me some time to break into entertainment law. I'm indebted to a producer named Jeff Gomez, who is a big proponent of cross-platform storytelling, or "transmedia." I met Jeff around 2009 or 2010, and he encouraged me to study the emerging field and start publishing my own thoughts. That period of time—learning, synthesizing, and writing—was invaluable and helped set me up for my later career. Jeff then later introduced me to the managing partner at my first entertainment law firm, Cowan, DeBaets, Abrahams & Sheppard LLP, in New York. I spent over ten years there working in independent

film finance, production and distribution, rights deals, and television business affairs before I moved to Pryor Cashman around two and a half years ago. I made the move alongside several colleagues, in large part because we wanted to be able to service clients more broadly.

2. For law students interested in entertainment law, what specific skills or experiences do you think are undervalued but crucial for success?

I look for a few things when I review a resume. There has to be some kind of through line—has this person demonstrated a genuine interest in entertainment law? Ideally, you have several entertainment internships on your resume by graduation. Think about the story that your resume is telling. Beyond that, I don't expect or presume any actual knowledge from a newly graduated lawyer. I'm looking at intellect and attitude—are you smart, do you make sure things happen for the benefit of our clients, are you prepared to work? This is generally not a glamorous job, despite what people may think.

Honestly, I think the traits that make people successful as an entertainment lawyer are those that make people successful in general—attention to detail, communication, follow-up, and seeking to provide value to clients. I would only add that there are two ways that current law students can differentiate themselves from their peers. The first is to show up in person. It's impossible to reach your potential or build influence in an organization via remote work. The second is to build personal resilience. You are going to face many challenges. The key is how you react to them. Entertainment lawyers encounter many difficult personalities, and matters often get very contentious relative to their dollar value. You have to learn to become conflict-tolerant and psychologically resilient.

3. The entertainment industry often operates under immense time pressure. How do you balance the need for speed in negotiations with the importance of protecting long-term rights?

The first question in any apparently exigent situation is whether it's a bona fide emergency. Often, producers want to close a deal in order to be able to put out a press release. But the endorphins rapidly fade, and press is quickly forgotten—while you may be living with a bad deal indefinitely. Good dealmaking seldom occurs in a rush.

As a representative, my job is to explain deal terms to my clients and make recommendations. That often involves walking through the repercussions of certain deal terms across low-, mid-, and best-case scenarios for a project. While negotiating upfront money is a critical part

of our day-to-day, other deal terms relating to rights, profit participation, and subsequent productions may turn out to be more important in the long term. The toughest thing for any dealmaker is when something is an outsized success, because that's when our work is really scrutinized. It's imperative that we consider those scenarios, even if seemingly unlikely. Most of the time, our goal is to move deals along at a pace that supports the creatives and keeps projects alive, while trying to ensure our client is protected and participates fairly in success.

4. You have previously recommended that students learn as much as possible about industry areas of potential growth, including podcasts, gaming, and esports. How has your role as an advisor to creatives and companies evolved as streaming and digital platforms have reshaped the industry?

I give that advice because opportunities often arise in new and emerging areas. As a second-year attorney, you are unlikely to teach a partner something new about independent film financing—but you might be able to provide vital context and insight in relation to a deal involving a platform like Roblox or TikTok.

And yes, of course. Streaming has disrupted the traditional entertainment life cycle and necessitated the creation of new financial structures. We have to keep on top of developments such as the streamers introducing revised "bonus point" models. Looking beyond that, part of this goes to what we consider "entertainment." I take a broad view—entertainment is what people do to entertain and distract themselves, and to that end, video games and YouTube are just as valid as motion pictures and television. A dollar is a dollar. An eyeball is an eyeball.

5. With the rise of artificial intelligence in content creation, what unique legal or ethical issues do you see emerging for entertainment lawyers? When negotiating on behalf of rightsholders, what new considerations does artificial intelligence warrant?

There are a myriad of issues, and there probably isn't the space to cover them all in this feature. From a dealmaking perspective, the comment we see most often from talent lawyers is probably "No AI!" They want to preclude its use entirely without approval. That goes beyond the terms negotiated by SAG-AFTRA in 2023, and it's probably not practical either. There are many workflow applications of artificial intelligence that don't involve creating content from whole cloth using generative AI or using an LLM tool to materially alter an actor's likeness or performance. So, we are starting to craft more nuanced language around permissible AI usage.

To your broader question, putting aside the copyright concerns, there are going to be many new uses and abuses involving generative AI that touch every area of the entertainment and media businesses, so it's important that we continue to follow developments in the area. Technology is moving faster than the law can keep up.

6. You recently spoke at the 2024 International Content Investment Forum. In your experience, how do international co-productions complicate the legal landscape, and what strategies do you use to navigate cross-border deals?

That event was hosted by KOCCA, which is a Korean government organization that supports its creative endeavors. At that event, I discussed how Korean content companies and creators can participate in the ownership and upside of content, because so many Korean projects have been financed and ultimately owned by U.S. companies. More broadly, there are many challenges with co-productions. In addition to the deal issues, which include ownership, financing obligations, revenue share, crediting, and distribution rights, you are often operating across time zones and seeking to broker a deal between two different cultures. Patience and clear communication are critical—and so is the willingness to be flexible.

7. You often talk about video games and franchises that you are passionate about and discuss what you would like to see those companies do going forward. Are you ever able to use that passion in negotiating deals for clients in a way that gives them more practical guidance as opposed to just legal guidance?

I think it's beneficial in a few ways. In every rights deal, we are always thinking about what could happen if it succeeds. Is this likely to be a one-shot story, or is there franchise or ongoing potential? The answer to that question may guide how we approach certain deal terms.

More specifically, understanding the details of a specific IP allows you to be a more thoughtful and thorough dealmaker. In the case of a video game, there may be some DLC (downloadable content) that falls outside of the scope of the base game but is important to capture in the granted rights. Perhaps it's an IP where the music is incredibly important, so you want to ask early on who controls that music and ensure that your client can use it. Or when representing the rightsholder, you may be aware that there are certain things that are very important to the IP creatively and thus suggest to the client that they prioritize protecting those elements on a creative level.

Where possible, I try to read (or in the case of a podcast, listen to) the source material, pitches, and scripts for projects because it helps me do my job. I will occasionally offer thoughts if it's an IP I know extremely well, but usually that's outside of my purview. And I will say that deals for things that you are personally passionate about can sometimes be the most difficult. You have to detach yourself from your own fandom and do what is best for your client and the project.

8. In the age of nostalgia and adaptations, how do you navigate legacy IP, and is there any way to know whether an adaptation or reboot will strike the right chord with audiences?

There are several challenges with older "legacy" IP. The first is chain of title. Properties that are over twenty years old (I've worked on IPs that date back to the 1920s) often have a very complex chain of title. There may be multiple prior productions, with those parties having some type of ownership or entitlement. There could be parties with creative approvals or first opportunity rights. The IP may have been through an M&A event, asset purchase, or bankruptcy. So often, you want to start by understanding the potential encumbrances on the rights and what is legally possible.

The next challenge is valuation. What is an IP worth? You can model that out financially in some cases, but it's very hard for a property that may have been fallow, or underexploited for many years (or sometimes decades). We are seeing a huge resurgence in nostalgia properties from the 80s and 90s, but it's not always clear that something will resonate (and therefore justify a big financial outlay).

As for "striking the right chord with audiences," that largely lies with the creative team. Should the IP be initially rebooted as a movie or series? Which elements should be emphasized and placed at the forefront? Can you update the IP without losing its soul? Attaching the right creative team is absolutely critical in navigating those questions.

9. Recently, we have seen the creation of "AI influencers" and Tilly Norwood, an AI-generated "actress." What new challenges have or could arise in the entertainment law field as a result?

It's the Wild West. Tilly Norwood is what SAG-AFTRA would call a "synthetic performer." If adopted broadly (and accepted by audiences), synthetic performers risk putting human actors out of work. They never tire, they will reshoot scenes endlessly, and they don't need to be fed. They do their own stunts. They can promote a movie everywhere at once. That's one reason why SAG-AFTRA has come out with some strongly

worded statements about synthetic performers, and is advocating for "economic equivalency as a deterrent to synthetic performers" (presumably by removing the economic incentive to use AI).[1]

From there, there are questions over who owns and gets to use a synthetic performer. The output is presumably entirely or primarily LLM-generated, and thus not protectible under copyright. Tilly Norwood is not a real person, so she doesn't have a right of publicity or privacy. I suppose there's a world where you could claim trademark ownership for use of her name in commerce in certain circumstances, but that wouldn't protect all uses, not presumably a use of her likeness without her name. In short, there are unanswered questions.

1. SAG-AFTRA, *SAG-AFTRA Statement on Synthetic Performer* (Sep. 30, 2025).

RETURNING MUSIC TO ITS CREATOR

Tim Kappel[*] *& Loren Wells*[**]

*** This Commentary was finalized in December 2025, prior to the U.S. Court of Appeals for the Fifth Circuit's January 12, 2026, decision in favor of Cyril Vetter, holding that songwriters may rely on U.S. copyright law to reclaim their songs worldwide.[1]**

1. In *Vetter v. Resnik*, the U.S. District Court of the Middle District of Louisiana returned to songwriter Cyril Vetter the full scope of his copyright in the hit song "Double Shot."[2] The court settled the question of whether a rightsholder can terminate a global copyright license to the full extent of the rights granted.[3] How does the ruling change the power balance between songwriters and publishers, especially those who previously granted their rights early in their careers?

Our victory in the District Court was a major vindication of a position that was too quickly dismissed as fringe or even ignorant. As delighted as we are with the District Court's decision, we wouldn't say it "settled" the question. The decision is being appealed, and there are still plenty of people who disagree with the ruling. That said, we don't encounter knee-jerk dismissiveness around the issue as much anymore–and that's been

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* Tim Kappel is a founding partner of the law firm Wells & Kappel, LLP, where he represents a variety of creators, professionals, businesses, and organizations in the music industry. His practice includes both transactional work and complex civil dispute resolution, advising clients throughout all stages of their career. In addition to his practice, Mr. Kappel is an assistant professor at Loyola University in New Orleans, teaching courses in music law, revenue streams, and public policy. Additionally, Mr. Kappel currently serves as the President of the Board of Governors for the regional Memphis Chapter of the Recording Academy and sits on the boards of a number of music nonprofits, including Louisiana Music Partners, Wolf Moon Entertainment, and the Partnership for Creative Louisiana.

** Loren Wells is a founding partner of the law firm Wells & Kappel, LLP, where he represents recording artists, producers, songwriters, and other creative professionals. Mr. Wells has guided Grammy-winning and multi-platinum clients through recording, publishing, and business negotiations. Outside of his practice, he is a lecturer in the Music Business program at Columbia College Chicago. Mr. Wells created *The Discography: The Legal Encyclopedia of Popular Music,* the largest database of U.S. music-industry litigation, and authored the chapter *Record Labels and Record Deals* in the newest edition of *The Musician's Legal and Business Guide.*

1. *See* Vetter v. Resnik, No. 25-30108 (5th Cir. 2026).
2. *See* Vetter v. Resnik, No. 23-1369, 2024 WL 3405556 (M.D. La., July 12, 2024).
3. Tim Kappel & Loren Wells, *Songwriters Who Unknowingly Signed Away Their Rights Finally Get a Real Second Chance: The Promise of Vetter v. Resnik (Guest Column)*, VARIETY (Feb. 6, 2025, at 08:06 PT), https://variety.com/2025/music/opinion/songwriters-who-signed-away-their-rights-get-second-chance-vetter-resnik-1236298492/ [https://perma.cc/PW8X-PK4U].

refreshing. People are having to engage with our arguments, and that's obviously something we welcome. Ultimately, of course, this issue will need to reach the Supreme Court to be truly "settled."

As to the balance of power, most songwriters and publishers are in a wait-and-see mode. If the Fifth Circuit comes down on our side, it should give terminating songwriters leverage they never had before. That is our ultimate goal.

2. The court held that a U.S. copyright termination can result in the recapture of worldwide rights. What are the legal and policy arguments for and against that interpretation?

From a policy perspective, Congress has sought to guarantee authors the ability to recapture copyrights previously transferred away since 1790. And for just about as long, industry intermediaries have tried to weaken or circumvent those rights. You saw this with the renewal rights regime that existed in the United States prior to the 1976 Act. Publishers would require authors to assign both the initial and the renewal term of protection, even though Congress intended the renewal term to be a second bite at the apple for authors and their heirs. It was an end-run around what Congress actually wanted, and, unfortunately, the Supreme Court gave it a stamp of approval in *Fred Fisher Music Co. v. M. Witmark & Sons*.[4] That's why Congress made termination rights in the 1976 Act inalienable. So, in our view, it's very clear what Congress was attempting to accomplish.

Yet, we still see attempts to chip away or deny authors and their heirs the promise of recapture rights, for obvious reasons. Publishers aren't wild about divesting themselves of valuable assets. They would argue that we're trying to upset the compromise struck between authors' rights groups and industry representatives in the 1960s. Resnik and his supporters take the view that excluding foreign exploitation rights in the termination provisions of the 1976 Act was a conscious choice that should be respected.

But that's not how we think Congress saw things. Termination rights are intended to "relieve authors of the consequences of ill-advised and unremunerative grants that had been made before the author had a fair opportunity to appreciate the true value of his work product."[5] In our view, the only way to accomplish these goals is to return to the author (or the heirs) exactly what the author transferred away. Not a geographic sliver of those rights. That's been a compelling argument for us so far.

4. Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643 (1943).
5. Mills Music, Inc. v. Snyder, 469 U.S. 153, 172–73 (1985).

The legal arguments are complicated, and a basic familiarity with the facts helps to understand the legal issues. To summarize the facts, in the summer of 1962, Cyril Vetter and Don Smith wrote a song called "Double Shot (of My Baby's Love)." In 1963, Vetter and Smith entered into an assignment agreement with Windsong Music Publishers, Inc., in which they sold their respective copyright interests in the song for one dollar. The transfer included all worldwide rights in the song for the entire duration of copyright protection, including any renewals thereof. In 1966, Windsong filed for copyright registration of the song, thereby securing federal copyright protection for an initial twenty-eight years. Smith died unexpectedly in 1972.

In 1994, at the conclusion of the original term, Vetter, along with Smith's heirs, obtained a renewal copyright for the song. Because Vetter was alive when the renewal period commenced, in accordance with the Supreme Court's decision in *Fred Fisher*, his promise to assign the renewal copyright to Windsong was enforceable. Conversely, because Smith was deceased, his heirs took his renewal copyright interest free and clear of any rights claimed by Windsong. In 1996, Vetter acquired Smith's copyright interest in the song from his heirs. In 2019, Robert Resnik acquired Windsong's interest in the song, but not before Vetter had served notice of termination pursuant to Section 304I of the 1976 Act on Windsong.

When Vetter's interest reverted in 2022, he took the position that, together with the renewal interest he acquired from Smith's heirs, he was the sole owner of the copyright in the song. Thus, Vetter believed he had the sole right to exploit the work without interference. Resnik took the position that the renewal in 1994 and the termination in 2022 had domestic effect only, and thus, Vetter could only exploit the song within the strict confines of the United States. As to the other 180 countries with which the United States has copyright relations, Resnik asserted that he had the sole right to control or exploit the song in all of them. We sued on Vetter's behalf and asked the District Court to declare that Vetter was the sole owner of the work and that Resnik had no rights to exploit it.

This case is a unicorn because no court has ever had to interpret the scope of both renewal rights under the 1909 Act and termination rights under the 1976 Act. The legal arguments are somewhat different depending on which set of rights you're talking about. On renewal rights, the right to obtain a renewal copyright is in Section 24 of the 1909 Act, and there's nothing in the text that limits that property estate geographically. Resnik mostly relies on "territoriality" arguments to impose a geographic restriction on the scope of such rights. On termination rights, in addition to the "territoriality" argument, there's an exception in the 1976 Act which states that termination only affects rights in the original transfer that "arise under this title" and that termination

doesn't affect rights "arising under other Federal, State, or foreign laws." Resnik argues that this exception limits Vetter's termination interest to the United States. And to be clear, that has been a common industry reading of the statute. We just don't agree with it.

Taking each of these issues in turn, there is a longstanding principle that, unless a contrary intent appears, legislation of Congress is meant to apply only within the territorial jurisdiction of the United States.[6] The basic premise that United States law governs domestically but does not rule the world is expressed through a canon of statutory construction known as the "presumption against extraterritoriality."[7] To be clear, this is a rebuttable presumption about a statute's meaning, and does not limit Congress's power to legislate.[8] When Congress gives a clear indication that a statute should apply extraterritorially, courts must apply the law as intended.[9] Or, relevant here, if Congress intends for a statute to apply without regard to geography, there should be no geographical restrictions imposed.

For example, in *Kirtsaeng v. John Wiley & Sons, Inc.*, the central issue was whether the "first sale" provisions in the 1976 Act, which allow the resale of lawfully made copies without the copyright owner's permission, should apply to textbooks manufactured under license in Thailand and then imported into the United States.[10] The Supreme Court determined that the language, context, and common-law history of the Copyright Act's "first sale" provisions favored a non-geographical interpretation of the statute. Our position in this case is that the renewal and termination provisions were intended to apply, like the first sale provisions, without regard to geography.

Absent a clear indication of intended extraterritoriality or absence of geographical limitation, the question becomes whether the conduct, parties, or interests that the statute seeks to regulate, protect, or vindicate (i.e., the statute's "focus") are domestic or foreign.[11] "If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad."[12] As such, even if the presumption applies to our case, we argue that all of the relevant parties, conduct, and interests affected by the District Court's ruling are domestic, making this a permissible application of the Copyright Act's renewal and termination provisions.

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6. Foley Bros., Inc., et al. v. Filardo, 336 U.S. 281, 285 (1949).
7. *See* Microsoft Corp. v. AT & T Corp., 550 U.S. 437, 454–55 (2007).
8. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010).
9. RJR Nabisco v. Eur. Cmty., 579 U.S. 325, 337 (2016).
10. 568 U.S. 519, 528–29 (2013).
11. WesternGeco LLC v. ION Geophysical Corp., 585 U.S. 407, 416 (2018).
12. *RJR Nabisco*, 579 U.S. at 337.

In addition to the foregoing, Resnik's "territoriality" arguments have an additional twist that can be semantically confusing. There's also the concept of "territorial" property rights. This is a distinct inquiry from the "presumption against extraterritoriality" (which applies to *all* laws, not just those governing intellectual property). This "territorial" limitation is most obvious in patent and trademark law, where not only are the laws governing protection subject to the presumption against extraterritoriality, but the very existence (and, thus, any right to protection) of a trademark or patent must be independently established on a country-by-country basis. Resnik and his supporters argue that copyrights are the same, so that there is a multiplicity of country-specific copyrights in a single work of authorship. We don't think that position is well-founded. In our view, it makes more sense to view copyright as a singular property interest that receives the respect of foreign laws pursuant to international treaties and conventions.

This is consistent with *Itar-Tass Russian News Agency v. Russian Kurier, Inc*., in which the Second Circuit stated that "[c]opyright is a form of property, and the usual rule is that the interests of the parties in property are determined by the law of the state with the most significant relationship to the property and the parties."[13] Likewise, the Fifth Circuit observed last year in *Canadian Standards Ass'n v. P.S. Knight Co., Ltd.*, that the "ownership and essential nature" of a copyright should be determined by the law where the copyright is held.[14] The parties' disagreement on this issue is significant because Resnik argues that renewal and termination of the "United States" copyright has no effect on the "foreign" copyrights. On the other hand, we argue that reversion of a copyright created under the laws of the United States by way of renewal or termination—at least as far as the courts of the United States are concerned—returns the right to enjoy those rights regardless of geographic location.

As for the "under this title" / "under other Federal, State, or foreign laws" exception in the 1976 Act, reasonable minds can disagree as to what Congress intended by this language. In *Kirtsaeng*, the Supreme Court observed that the word "under" evades a uniform, consistent meaning and requires contextualization.[15] Consequently, the rights covered by the grant that "arise under this title," which are subject to termination, and the rights that "aris[e] under any other Federal, State, or foreign laws," which are not subject to termination, present an issue of facial ambiguity. The meaning of those phrases must be drawn from context, and in such instances, it is proper to employ interpretive canons of construction. We believe those canons of construction favor our

13. 153 F.3d 82, 90 (2d Cir. 1998).
14. 112 F.4th 298, 303 (5th Cir. 2024).
15. 568 U.S. at 531.

position, particularly the long-observed interpretive principle that courts should "construe the statute so as to accomplish rather than defeat, the purpose for which it was drawn."[16]

Our interpretation is consistent with what the Supreme Court has told us: Congress's objective of recapture rights is to return control of the work to authors and their heirs.[17] Conversely, Resnik's interpretation leaves the consequences of the transfer intact and the control of the work outside of the author's hands. We simply do not believe Congress intended the termination provisions of the 1976 Act to create second-class ownership saddled with geographic restriction where the Supreme Court has said there is none.[18]

3. What risks or unintended consequences could emerge if termination rights are interpreted as global rather than domestic only?

The premise of the question is slightly overbroad. The only question before the Court here is how courts in the United States should view ownership of American copyrights. It's undisputed that the "country of origin" of the song is the United States and the authors, publishers, and contracts at issue are all American. What the ruling would mean for direct enforcement actions in foreign territories is an open question obviously. The same is true for the effect of the ruling on foreign authors seeking to enforce termination rights in the United States. Those questions will eventually have to be answered in appropriate cases and it's hard to speculate how things will play out in each specific case. Without getting too much into the weeds, we believe that foreign courts—although not bound to decisions in the United States regarding ownership—should show deference to the laws of the country of origin as it relates to property ownership questions. This is exactly what courts in the United States do for foreign copyrights and we'd hope foreign courts would follow that lead.

Additionally, we see a viable path for a court in the United States to recognize foreign authors and their heirs as having termination rights in the United States.

The Second Circuit's decision in *Corcovado Music Corp. v. Hollis Music, Inc*. may offer a preview of how future courts might address these issues.[19] *Corcovado* involved a dispute as to the right to exploit a

16. Ervin v. Alabama, 80 F.2d 432, 434 (5th Cir. 1935).

17. Stewart v. Abend, 495 U.S. 207, 218 (1990).

18. *See Kirtsaeng*, 568 U.S. at 537–38 (explicitly stating that the phrase "owner of copyright under this title" as used in Section 106 of the 1976 Act also has no geographical significance).

19. 981 F.2d 679 (2d Cir. 1993).

Brazilian work within the United States. The Second Circuit affirmed the Brazilian author's renewal rights within the United States even though no such rights existed for the work under Brazilian law. The court did so not because of any national treatment obligations, but because "United States renewal copyrights reflect a vital policy of United States copyright law."[20] That policy—to provide authors a second opportunity to obtain remuneration for their works—is equally reflected in the 1976 Act's termination provisions. Given this, there is no obvious basis to conclude that the District Court's ruling will impair the future recognition of renewal and termination rights for foreign authors in the United States.

Truthfully, we find much of the industry's concern for the treatment of foreign authors to be contrived. After all, when foreign artists like Duran Duran seek to exercise termination rights in the United States, they're hit with breach of contract actions on the grounds that their attempted recapture violates the terms of the foreign contract.[21] Sony did the same thing to Paul McCartney.[22] It's not as if publishers are allowing foreign authors to exercise these rights as it stands today (at least not without a fight). So, the publishing industry's ostensible concerns aren't something we give a lot of credence to. For now, any interpretation of recapture rights that comes at the expense of American authors out of this "concern" for foreign authors should be rejected.

Finally, we don't buy the "chaos" theory that's being vaguely asserted by industry organizations. It's not as if publishers are unaccustomed to full reversions. It happens contractually all the time. So clearly the industry is capable of handling this scenario. It's also worth noting that these exact cries have been heard before and the market "chaos" portended clearly did not come to pass.[23] But at the end of the day, obviously, statutory construction can't turn on industry customs derived from the industry's own self-interested interpretation.

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20. *Id*. at 685.

21. *See* Gloucester Place Music Ltd. v. Le Bon & Ors (2016) EWHC (Ch) 3091 (Eng.).

22. *See* McCartney v. Sony/ATV Publishing, LLC, No. 17cv363, 2017 WL 194336 (S.D.N.Y.) (Trial Pleading).

23. Brief of the Motion Picture Association of America, Inc. & the Recording Industry Association of America as Amici Curiae in Support of Respondent, *Kirtsaeng v. John Wiley & Sons, Inc.*, 2012 WL 3945857; Brief for The Recording Industry Association of America et al. as Amici Curiae in Support of Respondent, *Quality King Distribs., Inc. v. L'Anza Intern., Inc.*, 1997 WL 588827.

4. How should international copyright treaties (like the Berne Convention) factor into how U.S. termination rights are applied in foreign territories?

The Berne Convention[24] presently has 181 member states and is widely considered to be "the principal accord governing international copyright relations."[25] The primary functions of the Berne Convention are to ensure, first, that each member state maintains certain minimum standards of copyright protection and, second, that each member state treats authors from other member countries at least as well as it treats its own.[26] But as to the ownership dispute between Vetter and Resnik in this case, the Berne Convention has no direct role. Domestically, Section 104 of the Copyright Act expressly provides that "no right or interest in a work eligible for protection under this title may be claimed by virtue of the provisions of the Berne Convention."[27] Neither party, then, can premise a claim to ownership of the song on the Berne Convention in a dispute adjudicated in the United States. If this ownership dispute were playing out in a foreign territory, the Berne Convention shouldn't affect the outcome there either because, although it requires national treatment, it does not purport to settle issues of ownership.[28] The prevailing view of national treatment "simply assures that if the law of the country of infringement applies to the scope of substantive copyright protection, that law will be applied uniformly to foreign and domestic authors."[29] Given that renewal and termination rights do not pertain to the scope of protection, but rather *who* is entitled to enforce that protection, it's not clear to us that national treatment obligations have immediate relevance on the antecedent question of copyright ownership.

That said, we've never viewed the Berne Convention as totally irrelevant to the dispute. Even though it is not considered "self-executing"[30] in the United States, its provisions can aid in the interpretation of domestic laws (including federal common law), which are intended by Congress to implement and comply with the Berne Convention's requirements.[31] In that regard, we believe the Berne

24. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971, and amended Sept. 28, 1979.

25. Golan v. Holder, 565 U.S. 302, 306–07 (2012).

26. *Id*. at 308.

27. 17 U.S.C. § 104(c).

28. *Itar-Tass Russian News Agency*, 153 F.3d at 91.

29. *Id.* at 89.

30. To be clear, the Supreme Court has not directly ruled on whether the Berne Convention is self-executing. However, in *Golan*, the Court recognized that the Berne Convention's implementation in the United States required legislative action, which implies that it is not self-executing per *Medellin v. Texas*, 552 U.S. 491 (2008).

31. *See* Itar-Tass Russian News Agency, 153 F.3d 82, 90 (2d Cir. 1998).

Convention supports our view that copyright should be treated as a singular property interest, the ownership and essential nature of which should be adjudicated by the laws of the country with the closest relationship to the work.[32] To be clear, the text of the Berne Convention doesn't explicitly state that there is only a single copyright, but it does distinguish between the existence (i.e., origination) of rights in the country of origin and the enjoyment of foreign protections everywhere else.[33] This is consistent with the notion that domestic protections are simply extended and made available to foreign-origin copyrights by way of national treatment obligations.[34]

Moreover, when compared to the language of the Paris Convention for the Protection of Industrial Property[35] governing patents and trademarks, it seems clear that the Berne Convention does not contemplate "multiple" and "separate" copyright interests. Regarding patents, the Paris Convention states: "Patents applied for in the various countries of the Union by nationals of countries of the Union shall be independent of patents obtained for the same invention in other countries, whether members of the Union or not."[36] Regarding trademarks, the Paris Convention states: "A mark duly registered in a country of the Union shall be regarded as independent of marks registered in the other countries of the Union, including the country of origin."[37] Clearly, then, when the nations of the world come together to craft intellectual property policy through the World Intellectual Property Organization (which oversees both the Berne Convention and the Paris Convention), they know how to make it apparent that there are "multiple" and "separate" interests in each country. This is simply not the case with the Berne Convention.

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32. 112 F.4th at 303 (5th Cir. 2024) (citing *Itar-Tass Russian News Agency*, 153 F.3d at 84).

33. Berne Convention, *supra* note 24, art. 5(2).

34. *See* Unicolors, Inc. v. H&M Hennes & Mauritz, L.P., 52 F.4th 1054, 1078 (9th Cir. 2022) (stating that because the United States joined the Berne Convention, it is required to afford foreign copyright holders the same protection as holders of domestic copyrights); Bridgeman Art Libr., Ltd. v. Corel Corp., 25 F. Supp. 2d 421, 425 (S.D.N.Y. 1998) (following the United States' accession to the Berne Convention, a foreign national of a Berne member state "may seek copyright protection under the Copyright Act although the source of its rights lies abroad").

35. Paris Convention for the Protection of Industrial Property, July 14, 1967, 21 U.S.T. 1583, T.I.A.S. No. 6923.

36. *Id.* art. 4bis.

37. *Id.* art. 6.

5. To what extent does this decision reinforce or diverge from Congress's original intent in enacting termination rights under the 1976 Copyright Act?

In our view, the District Court's decision is in line with Congress's goal of giving the author a second chance to control and benefit from his work[38] and relieving the author of the consequences of ill-advised and unremunerative grants that had been made before the author had a fair opportunity to appreciate the true value of his work product.[39] Conversely, Resnik's position leaves control of the work outside of the author's hands and the consequences of the transfer intact.

The only true way to achieve the intended purpose of renewal and termination rights is to ensure that authors are able to recapture exactly what they signed away. Nothing less. That's what the District Court did for Vetter in this case. Such a result is not only just, but is, in fact, squarely consistent with the fundamental purpose of renewal and termination rights.

6. If the ruling in *Vetter* stands, how might it affect the valuation, licensing, and administration of music catalogs held by publishers?

In terms of the licensing and administration of works, we think it's going to simplify matters. Split ownership licensing is a pain and having a unified source of rights in a work throughout the world is obviously a good thing for efficiency in the licensing process. In terms of valuations, it very much depends on the work at issue. Some works derive substantial portions of their revenue from foreign exploitations. Others do not. It also depends on where a copyright is in its termination "life cycle." If termination rights can't be exercised in, say, the next fifteen to twenty years, the valuation itself probably isn't weighing those future monies very much, if at all, domestically or internationally.

38. *Stewart*, 495 U.S. at 218.
39. *Mills Music*, 469 U.S. at 172–73.

PRIVATE EQUITY INVESTMENT IN COLLEGE ATHLETICS: THE NEW FRONTIER

Christopher Ruckdeschel[*]

Abstract

This Note discusses the funding crunch that universities are facing and why private equity capital can be the answer. The *House v. NCAA* settlement has introduced a $20.5 million yearly expense that universities must pay in order to compete for top-level talent in revenue-generating sports such as college football and basketball. However, declining enrollment and unequal TV rights distributions have left some universities scrambling to figure out how to stay competitive in this new revenue-sharing era. Enter private equity. This Note explains how universities can tap private equity investment to fund revenue-sharing obligations instead of slashing operating budgets and cutting non-revenue-generating sports.

The first part of this Note explains why private equity investment in college sports is not as revolutionary as many people believe. Private equity firms have already entered college athletics indirectly through private-equity-backed companies that help universities grow their multimedia rights and increase NIL opportunities for their student-athletes. Additionally, private equity investment in professional sports has laid a blueprint for how private equity firms can be utilized at the college level. The second part of this Note uses Florida State as a case study and explains why Florida State's proposed private equity investment model would work for many universities even outside the state of Florida. Specifically, this part of the Note dives into the tax consequences of Florida State's proposed private equity model and explains why a private equity investment at the university level is feasible without endangering a public university's tax-exempt status or the tax-exempt status of its support organizations. The final part of this Note discusses possible funding alternatives to Florida State's proposed private equity investment model, such as university bond issuance, private credit, and private equity investment at the conference level. Whether it be through Florida State's proposed private equity model, private credit, or private equity investment at the conference level, universities should take advantage of private equity capital in this new era of college athletics.

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INTRODUCTION

The new era of paying collegiate athletes has recently begun, and universities are now facing a funding dilemma in their quest to attract top student-athletes. The recent *House v. NCAA* settlement has opened the door for universities to directly pay student-athletes up to $20.5 million per year, with that cap increasing by up to four percent annually for ten years.[1] This direct revenue sharing to student-athletes is now in addition to uncapped name, image, and likeness (NIL) payments that third parties (such as NIL collectives) can continue to make to student-athletes,

1. Dan Murphy, *Judge OK's $2.8B Settlement, Paving Way for Colleges to Pay Athletes*, ESPN (June 6, 2025, at 21:28 ET), https://www.espn.com/college-sports/story/_/id/45467505/judge-grants-final-approval-house-v-ncaa-settlement [https://perma.cc/L5KH-RN6L]; Deborah Gubernick & Hayden Burnight, *NIL Developments Pave Way for Athletes in California and Beyond (2)*, BLOOMBERG L. (July 24, 2025, at 12:09 ET), https://news.bloomberglaw.com/product/blaw/bloomberglawnews/exp/eyJpZCI6IjAwMDAwMTk3LWYwMDgtZGFjZS1hNWI3LWY0NTgzNDc1MDAwMSIsImN0eHQiOiJMV05XIiwidXVpZCI6ImdzWEVOVFVFbkZ2UFF2ejUwMWlhUEE9PTV3M0dkTjFVUUFwSWQ1akdhU3B2d2c9PSIsInRpbWUiOiIxNzUyODM2NjY3MzY4Iiwic2lnIjoiMU1mYTFaVmZadjF6anZHQ2doQjNEenUyV0cwPSIsInYiOiIxIn0=?source=newsletter&item=read-text&region=digest&channel=us-law-week [https://perma.cc/K53P-V7RT]; *In re College Athlete NIL Litigation*, No. 4:20-cv-03919 (N.D. Cal. June 11, 2025) (Opinion Regarding Order Granting Motion for Final Approval of Settlement Agreement).

subject to approval by the newly created College Sports Commission LLC.[2] Universities looking to attract top talent will likely do so via a mix of direct revenue-sharing and NIL payments.[3] The million-dollar question left unanswered by the *House* settlement is the following: How are universities going to be able to afford to pay $20.5 million per year in direct revenue sharing without having to tap into the substantial sums of money raised by NIL collectives for NIL payments? Well-funded universities with premier football programs, such as the University of Texas, will likely have no problem affording both revenue-sharing and NIL payments.[4] However, universities with less financial backing have already indicated that they are going to cut some non-revenue-generating sports in order to pay more money to revenue-generating sports, such as football and basketball.[5]

Indeed, the gap between well-funded universities and others is only going to grow larger because of the massive differences in media rights deal payouts, which are massive sources of income for college sports programs.[6] The four major athletic conferences (the ACC, SEC, Big Ten, and Big 12, collectively known as the Power Four) all signed media rights deals with certain TV providers where the conference bundles the exclusive media rights licenses granted to the conference by its member universities, sells those rights for a period of time to the TV provider, and then distributes the sale proceeds to its member universities.[7] However, the deals reached by the SEC and Big Ten far exceed the deals reached by the ACC and Big 12. The SEC signed a ten-year deal that began in 2024 that is worth $7.1 billion, and the Big Ten signed a seven-year deal

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2. Ross Dellenger, *College Sports Commission Informs Schools That NIL Collectives Can Pay Athletes Directly with Limitations*, YAHOO SPORTS (July 31, 2025, at 14:29 UTC), https://sports.yahoo.com/college-football/breaking-news/article/college-sports-commission-informs-schools-that-nil-collectives-can-pay-athletes-directly-with-limitations-135802722.html [https://perma.cc/F8MV-9LV5].

3. *House Rules: Offering Thoughtful Rev Share & NIL Packages in College Athletics' New Compensation Era*, MOULTON, MOORE, STELLA LLP 1, 25 (Jan. 27, 2025), https://moultonmoore.com/wp-content/uploads/2025/02/MMS-House-Rev-Share-Article-FINAL-January-27-2025.pdf [https://perma.cc/C62A-HHGZ].

4. *See* Pete Nakos, *Who Spent the Most? Survey Reveals Top-10 Biggest Spenders in College Football*, ON3 (July 15, 2025), https://www.on3.com/news/who-spent-the-most-survey-reveals-top-10-biggest-spenders-in-college-football/ [https://perma.cc/VE7M-7MKR].

5. *See* Maura Carey, *Universities Cutting Sports, Others Adding Ahead of $2.8 Billion NCAA Antitrust Settlement*, AP NEWS (May 18, 2025, at 10:10 ET), https://apnews.com/article/ncaa-settlement-program-cuts-f734a27c13f7c09e956d630cc2755a6c [https://perma.cc/9NP3-2BY5].

6. Serena Morones & Paul Heidt, *Following the Money in College Sports*, MORONES ANALYTICS (Nov. 17, 2023), https://moronesanalytics.com/following-the-money-in-college-sports/ [https://perma.cc/2Q8E-RJRC].

7. Drew Thornley & John T. Holden, *Rethinking College Football Grant of Rights Agreements*, 34 MARQ. SPORTS L. REV. 319, 320–21 (2024).

that began in 2023 that is worth $8.05 billion.[8] The ACC signed a twenty-year deal that expires in 2036 and is worth $4.8 billion.[9] The Big 12 entered into a thirteen-year deal worth $2.6 billion that was scheduled to expire in 2025 before it signed a six-year extension in 2022 that is worth almost $2.3 billion.[10] In per-year numbers, the ACC will receive $240 million per year, the Big 12 will receive $383.33 million, the SEC will receive $710 million, and the Big Ten will receive $1.15 billion.[11] At the university level, some members of the ACC could end up receiving up to $37 million less per year in media rights payouts than members of the SEC and Big Ten.[12]

To avoid this grim reality, some universities (such as Florida State University (Florida State), Clemson University, and the University of North Carolina) have considered leaving their conference to try to join the SEC or Big Ten in order to stay competitive in this new era of revenue sharing.[13] The problem for these universities has been the massive exit fees required to leave the conference, which can include both a contractual exit fee and the repurchase of the university's exclusive media rights license from the conference.[14] For example, in 2023, Florida State projected the cost to leave the ACC at $572 million;[15] Florida State

8. Michael Smith, *Big Ten Officially Agrees to New Media Deals with CBS, Fox, NBC*, SPORTS BUS. J. (Aug. 18, 2022), https://www.sportsbusinessjournal.com/Daily/Issues/2022/08/18/Media/Big-Ten-Media-Deal.aspx [https://perma.cc/5DQC-AV8Y].

9. *Id.*

10. *Id.*; Arthur Weinstein, *Big 12 Commissioner Says Conference 'Lucky' to Land 'Last Big Media Deal'*, AWFUL ANNOUNCING (Aug. 15, 2023), https://awfulannouncing.com/college-football/big-12-brett-yormark-lucky-media-rights-extension.html [https://perma.cc/MC2X-BDZX].

11. *See supra* notes 8–10.

12. *See* Matt Murschel, *FSU AD Raises Concerns Over ACC's Growing Revenue Gap with Big Ten, SEC*, ORLANDO SENTINEL (Feb. 24, 2023, at 20:24 ET), https://www.orlandosentinel.com/2023/02/24/fsu-ad-raises-concerns-over-accs-growing-revenue-gap-with-big-ten-sec/ [https://perma.cc/T25F-XRBP] ("FSU receives about $42 million annually from the conference, which could be $30 million a year less than Big Ten and SEC schools."); *see also* Andrea Adelson, David Hale & Pete Thamel, *Sources: FSU, Clemson Expected to Reach Settlement with ACC*, ESPN (Mar. 3, 2025, at 10:30 ET), https://www.espn.com/college-football/story/_/id/44093338/sources-fsu-clemson-expected-reach-settlement-acc [https://perma.cc/RU32-7FJP] ("Top earners are expected to net an additional $15 million or more, according to sources, while some schools will see a net reduction in annual payout of up to about $7 million annually . . . .").

13. *See* Ralph D. Russo, *Clemson Joins Florida State, Becomes Second School to Sue ACC As It Seeks to Exit Conference*, AP NEWS (Mar. 9, 2024, at 15:56 ET), https://apnews.com/article/clemson-sues-acc-ec231745cfe4690ec282050c33c144ed [https://perma.cc/9GFE-V5WB]; Alex Byington, *Report: North Carolina exploring potential move from ACC to SEC*, ON3 (July 24, 2025), https://www.on3.com/college/north-carolina-tar-heels/news/report-north-carolina-exploring-potential-move-from-acc-to-sec/ [https://perma.cc/RAH3-W6L9].

14. *See* Complaint at 20, FSU Bd. of Trs. v. ACC, 2023 CA 002860 (Fla Cir. Ct. Dec. 22, 2023).

15. *Id.*

subsequently reached a settlement with the ACC in 2025 that now provides for a member university to exit with its media rights for $165 million in 2026, with that number declining by $18 million each year until it reaches a floor of $75 million in 2030.[16] With universities now tasked with spending $20.5 million per year in order to recruit top talent, it is unlikely that many universities will have tens of millions of dollars to spare on a conference exit fee.

Therefore, in this Note, I suggest an alternative source of funding that will allow many universities to avoid severe budget reductions, including cutting non-revenue sports, and will keep the door open for universities to leave their conference if it is advantageous to do so. That funding comes in the form of a private equity investment. Private equity firms are investment managers that typically invest money into existing businesses in exchange for equity in the business.[17] In other words, private equity firms can inject much-needed cash into a business in exchange for a percentage of ownership in the business or its revenue streams. The first part of this Note discusses why private equity investment makes sense for cash-strapped universities by analyzing the comparable success of private equity investment in professional sports. The second part of this Note uses Florida State as a case study of how a private equity investment would theoretically work, with a specific focus on how the private equity investment would not threaten Florida State's tax status. The third part of this Note will explore alternative investments that universities can explore, such as debt issuance, private credit, and private equity investment at the conference level. Ultimately, the Conclusion will encourage universities to take on private equity investment in order to stay competitive in revenue-generating sports without having to make severe budget cuts.

I. THE PRIVATE EQUITY SOLUTION

Private equity investment in sports is not a new phenomenon. Many private equity firms have taken advantage of the relaxation of ownership

16. Will Backus, *ACC Settles Florida State, Clemson Lawsuits: Revised Revenue Distribution, Lowered Exit Fees Among Key Details*, CBS SPORTS (Mar. 4, 2025, at 13:50 ET), https://www.cbssports.com/college-football/news/acc-settles-florida-state-clemson-lawsuits-revised-revenue-distribution-lowered-exit-fee-among-key-details/ [https://perma.cc/H57B-JL8R]; Steven Muma, *ACC's Implosion Scheduled for 2030*, SBNATION (Mar. 4, 2025, at 13:24 ET), https://www.backingthepack.com/college-football-news/2025/3/4/24377782/acc-settlement-fsu-clemson-college-football [https://perma.cc/V34Q-PVY9].

17. James Chen, *Private Equity Explained with Examples and Ways To Invest*, INVESTOPEDIA (Sep. 2, 2025), https://www.investopedia.com/terms/p/privateequity.asp [https://perma.cc/AQ7P-X7JG].

rules in professional sports to great success.[18] Importantly, private equity firms have shown a willingness to make minority investments in professional sports teams, which underscores private equity's willingness to do the same at the collegiate level.[19] Thus, this part of the Note will discuss how conditions are ripe for private equity to enter the college sports arena. Section A explores specific examples of private equity investment in professional sports, discusses how private equity firms have created value, and explains how similar value creation can occur at universities. Section B discusses how some universities already have experience working with private equity and how others have taken steps to create a standalone athletic department that can support a private equity investment. Section C discusses macroeconomic factors that are precipitating private equity investment, including impending funding decreases and enhanced scrutiny of NIL collectives.

A. *Private Equity in Professional Sports*

Private equity investment in professional sports has exploded recently, both overseas and in the United States. Two-thirds of Major League Baseball and National Basketball Association teams now have private-equity backing, and the National Football League (NFL) voted in 2024 to allow certain private equity firms to own between three percent and ten percent of a NFL team.[20] Importantly, private equity firms that invest in a NFL team do not receive any voting power and must hold their ownership stake for at least six years before selling, making it a truly passive investment.[21] A passive investment is where a private equity firm exerts little to no control or influence over the entity and merely collects distributions from the entity.[22] Private equity firms are not particularly known for making passive investments, often opting instead to buy 100% of the equity in a business and instituting major operational changes to increase profitability.[23] Nevertheless, less than two months after the NFL

18. *See* Lucia Moses, Ashley Rodriguez & Tiara White, *20 Private-Equity Firms Making Big Moves in Sports As Teams Embrace Outside Investors*, BUS. INSIDER (Apr. 23, 2024), https://redbirdcap.com/wp-content/uploads/2024/04/Business-Insider_PE-in-Sports_4.23.24.pdf [https://perma.cc/29X8-JU7P].

19. *See id.*

20. *Id.*; Judy Battista, *NFL Owners Vote to Allow Private Equity Funds to Buy Stakes in Teams*, NFL (Aug. 27, 2024, at 16:50 ET), https://www.nfl.com/news/nfl-owners-vote-to-allow-private-equity-funds-to-buy-stakes-in-teams [https://perma.cc/SL89-Y2XY].

21. Battista, *supra* note 20.

22. *See* Adam Lewis, *The Pac-12 and Private Equity Could Be a Perfect Match*, YAHOO FIN. (June 14, 2019), https://finance.yahoo.com/news/pac-12-private-equity-could-05000 0598.html [https://perma.cc/R5RZ-Q2SU].

23. *See Private Equity (PE): An Overview of the Private Equity Industry, Including Key Functions, Top Companies, and Careers & Salaries*, MERGERS & INQUISITIONS, https://mergersandinquisitions.com/private-equity/ [https://perma.cc/9M2H-GNTW].

voted to allow private equity investment, private equity firms Arctos and Ares each acquired a ten percent interest in the Buffalo Bills and Miami Dolphins, respectively.[24] Private equity firm Silver Lake made a similar passive investment in the New Zealand Rugby All Blacks team, with control over both the rugby team and commercial strategy remaining with New Zealand Rugby after Silver Lake's investment.[25] Private equity firms' willingness to take a passive investment in professional sports bodes well for private equity investment in college athletics because many universities will not want to (or be able to) give up operational control over their athletic department.[26] Nonetheless, private equity firms are more than willing to take a passive position in sports teams that generate consistent revenues.[27]

In other non-NFL professional sports leagues, some private equity firms have taken a more leading role in revenue generation. For example, Silver Lake purchased a ten percent stake in City Football Group, which is the parent company for Manchester City F.C. and other soccer clubs in the United States, Australia, and elsewhere, for $500 million in 2019.[28] Silver Lake immediately began leveraging its technological expertise to enhance fan engagement through digital platforms, personalized experiences, and exclusive content.[29] In just under five years, City Football Group's valuation grew from $4.8 billion in 2019 to over $6 billion in 2023.[30] Similarly, FC Barcelona, one of the premier soccer clubs in the top soccer league (La Liga) in Spain, agreed to sell ten percent

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24. Eric Jackson, *NFL's First Private Equity Deals Approved for Bills, Dolphins*, SPORTICO (Dec. 11, 2024, at 13:01 ET), https://www.sportico.com/business/team-sales/2024/nfl-private-equity-deals-approved-bills-dolphins-1234819983/ [https://perma.cc/LKC7-BWQ3].

25. Eben Novy-Williams et al., *Florida State Taps JPMorgan For Equity Raise As ACC Decision Looms*, SPORTICO (Aug. 4, 2023, at 10:20 ET), https://www.sportico.com/business/finance/2023/florida-state-athletics-jpmorgan-private-equity-funding-acc-1234733152/ [https://perma.cc /2SP4-645F]; Brendan Coffey, *Silver Lake Buying Up to 8.6% of New Zealand All Blacks*, SPORTICO (Feb. 16, 2022, at 16:24 ET), https://www.sportico.com/business/finance/2022/silver-lake-buying-all-blacks-1234661965/ [https://perma.cc/GE7R-UTU8].

26. *See* discussion *infra* Part III.

27. *See* Steven Taranto, *Here's How Much Each NFL Team Made in National Revenue in 2024 As Revealed by Packers Financial Report*, CBS SPORTS (July 24, 2025, at 02:06 ET), https://www.cbssports.com/nfl/news/heres-how-much-each-nfl-team-made-in-national-revenue-in-2024-as-revealed-by-packers-financial-report/ [https://perma.cc/SSV9-UY6D].

28. Marianne Rajic, *How Did Silver Lake Turn Manchester City Into a Growth Engine?*, LINKEDIN (Oct. 29, 2024), https://www.linkedin.com/pulse/how-did-silver-lake-turn-manchester-city-growth-engine-marianne-rajic-9ayhc [https://perma.cc/BC49-D6RA].

29. *Id.*

30. *See CFG Announces US$500 Million Strategic Investment by Silver Lake*, CITY FOOTBALL GRP. (Nov. 26, 2019), https://www.cityfootballgroup.com/post/cfg-announces-us-500-million-strategic-investment-by-silver-lake [https://perma.cc/ARL2-VJ73]; *see also* Ian Whittell, *Financial Doping? Man City Are World's No 1 Football Brand, Says Chairman*, THE TIMES (June 19, 2023, at 12:00 BST), https://www.thetimes.com/sport/football/article/financial-doping-man-city-are-worlds-no1-football-brand-says-chairman-r66xhpjqf [https://perma.cc/HT M3-N7 NQ].

of its La Liga TV rights, as well as 49.9% of its licensing and merchandising arm, to private equity firm Sixth Street.[31] FC Barcelona continues to independently manage its operations but leans on Sixth Street's experience and knowledge of stadium operations to help bolster its economic situation.[32]

Private equity firms, such as Silver Lake and Sixth Street, have experience in sports marketing, including sponsorship and multimedia rights, and can easily leverage that expertise in the college sports sector. For example, these firms can use their expertise in data and analytics to help universities price their football tickets effectively, as well as develop a university's brand to boost advertising revenue.[33] Private equity firms can develop a dynamic ticket pricing approach for universities where football ticket prices vary based on team performance, time of day, and stage of the season.[34] Private equity firms can also promote brand development through social media and other digital entertainment marketplaces.[35] Part of this brand development can involve tapping into previously untapped demographics to leverage local demand for university athletic events.[36] Effective rebranding can also lead to untapped sponsorship revenue opportunities for universities.[37] Private equity firms are also historically known for implementing effective cost-cutting strategies, which can help universities in a more traditional sense by helping them trim their operating budgets to increase profits.[38]

Private equity investment in professional sports proves that private equity firms are eager to invest in the sports arena, whether that be through a strictly passive investment or though taking an active role in value creation. Therefore, the private equity model will work for universities looking for a one-time, passive cash infusion to meet a certain demand (such as a conference exit fee), and it will work for universities looking to create value in order to stay competitive with revenue sharing and NIL spending. Furthermore, the fact that an increasing number of professional sports leagues have voted to allow private equity investment

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31. Luke Bosher, *Barcelona Sell 10% of TV Rights for Next 25 Years to US Firm Sixth Street*, ATHLETIC (Mar. 18, 2025), https://theathletic.com/4169957/2022/06/29/barcelona-sell-10-of-tv-rights-for-next-25-years-to-us-firm-sixth-street/ [https://perma.cc/3ESU-4M8A].

32. *See id.*

33. *See* Andrea Razeto, *Will Private Equity Funds Break Into the European Football Clubs Industry?*, 2021 LUISS 134–35, https://tesi.luiss.it/32626/1/718931_RAZETO_ANDREA.pdf [https://perma.cc/HAQ5-MS8D].

34. *Id.* at 134.

35. *Id.* at 134–35, 139.

36. *Id.* at 147.

37. *See* David Rumsey, *Prime Effect: Colorado Athletics Sponsorship Revenue Up 42%*, FRONT OFFICE SPORTS (Sep. 28, 2023, at 11:45 ET), https://frontofficesports.com/prime-effect-colorado-athletics-sponsorship-revenue-up-42-this-season/ [https://perma.cc/83A3-8RRN].

38. Razeto, *supra* note 33, at 147.

in teams proves that these leagues recognize the value private equity brings; universities should be looking to tap into this value as well.

B. *University Familiarity with Private Equity*

Private equity firms have already entered the college sports arena through sports marketing agencies and NIL consulting partnerships. For example, Learfield, a sports marketing agency owned by six private equity firms, has entered into long-term multimedia rights agreements with over 200 universities.[39] Under the terms of these multimedia rights agreements, a university grants Learfield the right to sell and manage commercial sponsorships relating to the university's athletic program, which can include the university's radio broadcasting rights, ticketing, licensing of merchandise, and brand advertising.[40] In exchange, the university typically receives a lump sum with a certain percentage of revenue above a certain threshold.[41] Similarly, some universities have engaged NIL consulting companies, such as private-equity-backed Altius Sports Partners, to help them navigate the new revenue-sharing era and increase NIL opportunities for their student-athletes.[42] Indeed, the promotion of NIL opportunities has led to the creation of an in-season college basketball tournament, backed by private equity firm RedBird Capital.[43] Therefore, universities partnering with private equity firms is not a novel development, and universities have already recognized the

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39. Daniel Libit et al., *Learfield Cuts $600m in Debt, Raises $150m in Ownership Shuffle*, SPORTICO (Sep. 13, 2023, at 15:56 ET), https://www.sportico.com/leagues/college-sports/2023/learfield-new-equity-debt-clearlake-charlesbank-fortress-1234738520/ [https://perma.cc/PJJ6-DZG3]; Daniel Libit et al., *Learfield's College Deals Prep for Disruption, Plague and NIL*, SPORTICO (Feb. 22, 2024, at 00:01 ET) [hereinafter *Disruption*], https://www.sportico.com/leagues/college-sports/2024/learfield-colorado-agreement-force-majeure-1234767524/ [https://perma.cc/RAJ4-5WL2].

40. *See JMU Athletics Contracts Multimedia Rights with Learfield IMG College*, JMU (Nov. 14, 2019, at 11:00 ET), https://jmusports.com/news/2019/11/14/administration-jmu-athletics-contracts-multimedia-rights-with-learfield-img-college [https://perma.cc/P9V7-TML9].

41. *Disruption*, *supra* note 39.

42. *Altius Sports Partners Acquired by Underdog & Company, Backed by NewSpring Holdings*, PR NEWSWIRE (Nov. 6, 2023, at 08:00 ET), https://www.prnewswire.com/news-releases/altius-sports-partners-acquired-by-underdog--company-backed-by-newspring-holdings-301978478.html [https://perma.cc/Y8AA-9XD2]; *Altius Sports Partners Deepens Partnership with Notre Dame Athletics*, ALTIUS SPORTS PARTNERS (Oct. 31, 2024), https://altiussportspartners.com/notre-dame-athletics-enhanced-partnership/ [https://perma.cc/J532-EXLQ].

43. Dennis Dodd, *Big 12 Considering Private Equity Investment of up to $1 Billion for As Much As 20% of Conference*, CBS SPORTS (June 13, 2024, at 10:28 ET), https://www.cbssports.com/college-football/news/big-12-considering-private-equity-investment-of-up-to-1-billion-for-as-much-as-20-of-conference/ [https://perma.cc/ALL4-HQ2C]; Matt Norlander, *NIL-Driven Players Era Festival Sets Schedule, TV Partners: Alabama vs. Houston is Marquee Game in Las Vegas*, CBS SPORTS (Sep. 6, 2024, at 13:33 ET), https://www.cbssports.com/college-basketball/news/nil-driven-players-era-festival-sets-schedule-tv-partners-alabama-vs-houston-is-marquee-game-in-las-vegas/ [https://perma.cc/4YWG-5LCM].

value that private equity firms can bring with respect to increasing multimedia rights revenue and navigating the NIL space.

In fact, the University of Kentucky (UK) and Boise State University (BSU) have each taken steps to prepare for a new type of private equity investment directly into university athletic departments, proving that universities believe such an investment is both feasible and desirable. In 2025, UK converted its athletic department into a limited liability company (LLC) in order to tap into new revenue streams.[44] Specifically, UK formed a public-private partnership with the new LLC (Champions Blue, LLC) to achieve flexibility with NIL and revenue sharing.[45] In the context of higher education, a public-private partnership is a contract between a public agency and a private sector entity to deliver a public product or service.[46] UK has utilized the public-private partnership model in the non-athletic space through the use of its affiliated corporation Beyond Blue, which serves as a holding company and allows UK to make investments in nontraditional revenue streams, such as real estate, without threatening its status as a public, nonprofit entity.[47] Champions Blue, LLC, is also an affiliated corporation of UK and, because it is a wholly-owned subsidiary of Beyond Blue, it will operate as a "disregarded entity" for tax purposes, with its revenues remaining tied to UK.[48] Champions Blue will help facilitate the distribution of UK's $110 million capital loan for UK athletic facilities and will engage directly in creating NIL opportunities for UK student-athletes, signaling UK's shift away from using third-party NIL collectives.[49] In fact, in August 2025, UK expanded its multimedia rights partnership with JMI Sports in a $465

44. Maura Carey, *Kentucky Changes Its Athletic Department to an LLC, Hoping to Become More Nimble in Finding Revenue*, AP NEWS (May 1, 2025, at 10:10 ET), https://apnews.com/article/kentucky-athletic-department-llc-ncaa-1511ccf2b47bf669faba159174cb8cc8 [https://perma.cc/LL7A-AC52].

45. Myron Medcalf, *University of Kentucky Looks to Make Athletic Department LLC*, ESPN (Apr. 24, 2025, at 21:20 ET), https://www.espn.com/college-sports/story/_/id/44842208/university-kentucky-athletics-department-llc [https://perma.cc/4D9T-AZ24].

46. Kasia Lundy & Haven Ladd, *How the Right Public-Private Partnerships in Higher Education Provide Value*, EY (June 18, 2021), https://www.ey.com/en_om/insights/strategy/public-private-partnerships-in-higher-education [https://perma.cc/EDT3-G944].

47. Office of the President, *Creation of Champions Blue, LLC as an Affiliated Corporation of The University of Kentucky*, U. KY. (Apr. 25, 2025), https://www.uky.edu/trustees/sites/www.uky.edu.trustees/files/PR%206%20Creation%20of%20Champions%20Blue%2C%20LLC%20.pdf [https://perma.cc/HU25-LSQL].

48. *Id.*; Mike Bishop, *University of Kentucky Paves the Way for College-wide Private Equity Lending and NIL Profits with New LLC Formation*, SPORTSACQUISITION.COM, https://www.sportsacquisition.com/post/university-of-kentucky-paves-the-way-for-college-wide-private-equity-lending-and-nil-profits-with-ne [https://perma.cc/BG2G-LQX8].

49. Bishop, *supra* note 48; Alex Frank, *A Look at Champions Blue and the Changes Coming to Kentucky Athletics*, SBNATION (June 12, 2025, at 20:10 EDT), https://www.aseaofblue.com/2025/6/12/24448328/champions-blue-kentucky-athletics [https://perma.cc/E3GR-JM5X].

million deal; as part of the deal, JMI Sports will operate the BBNIL Suite, UK's new in-house NIL collective, which will be housed within Champions Blue.[50] Over the next fifteen years, UK and Champions Blue will receive eighty percent of the net revenue from all inventory and advertising opportunities under the multimedia rights partnership.[51] Importantly, the creation of Champions Blue also opens the door for private equity investment because nonprofit Beyond Blue can sell interests in for-profit Champions Blue to private equity firms for cash, or UK can license its multimedia rights and branding to Champions Blue, and Champions Blue can then transfer the license to a private equity firm for cash.[52]

Roughly two months after UK announced the creation of Champions Blue, BSU followed suit by announcing the launch of Bronco Athletics Growth Solutions (BAGS), a wholly owned subsidiary of BSU's affiliated corporation, the Boise State University Foundation.[53] Just like Champions Blue, BAGS was created to evaluate and accelerate non-traditional revenue opportunities for BSU.[54] However, unlike UK, BSU has explicitly stated that BAGS is looking into different types of private equity investment, and BSU expects to have a private equity deal in place by the end of 2025.[55]

Universities have already shown a willingness to work with private-equity-backed companies to increase the value of their multimedia rights

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50. Nick Roush, *Kentucky Extends Partnership with JMI Sports Through 2040*, KSR (Aug. 12, 2025), https://www.on3.com/teams/kentucky-wildcats/news/kentucky-extends-partnership-with-jmi-sports-through-2040/ [https://perma.cc/7Y6Z-2JAU]; *UK, JMI Sports Ink Historic Multimedia Rights Deal, Focused on Financial Stability, Opportunities for Athletics*, UK ATHLETICS (Aug. 12, 2025, at 10:57 ET), https://ukathletics.com/news/2025/08/12/uk-jmi-sports-ink-historic-multimedia-rights-deal-focused-on-financial-stability-opportunities-for-athletics/ [https://perma.cc/9UD4-ER8K].

51. Roush, *supra* note 50; *UK, JMI Sports Ink Historic Multimedia Rights Deal*, *supra* note 50.

52. Clay Grayson, *Privatization of Collegiate Athletics Begins: Kentucky Announces Champions Blue LLC*, SPORTS BUS. J. (May 20, 2025), https://www.sportsbusinessjournal.com/Articles/2025/05/20/privatization-of-collegiate-athletics-begins-kentucky-announces-champions-blue-llc [https://perma.cc/A5JH-LUBM]; James Parks, *Kentucky to Shift Athletic Dept. to Private LLC Company in Historic Move*, ON SI (Apr. 25, 2025), https://www.si.com/fannation/college/cfb-hq/news/kentucky-wildcats-athletic-department-llc-company [https://perma.cc/NU9U-KXDY].

53. *Boise State Athletics Announces Bronco Athletics Growth Solutions (BAGS)*, BOISE STATE UNIV. ATHLETICS (June 24, 2025, at 08:45 MST), https://broncosports.com/news/2025/6/24/general-boise-state-athletics-announces-bronco-athletics-growth-solutions-bags [https://perma.cc/J9YS-VNRC].

54. *Id.*

55. Amanda Christovich, *Boise State Expects Private-Equity Investment 'Within the Next Six Months'*, FRONT OFF. SPORTS (June 9, 2025, at 17:11 ET), https://frontofficesports.com/ boise-state-expects-private-equity-investment-within-the-next-six-months/ [https://perma.cc/2F VN-D8L3].

and enhance NIL opportunities. Indeed, many universities have granted exclusive multimedia rights licenses to private-equity-backed Learfield in exchange for a fixed payment and a percentage of revenue.[56] Therefore, the next step of private equity investment directly into a university entity is not as revolutionary as many believe. The fact that UK and BSU have already created standalone, affiliated entities to pursue nontraditional revenue sources proves that it is not a question of if private equity will invest in university athletics but when.

C. *University Funding Concerns*

The combination of dwindling economic support for universities, the widening gap in media rights payouts between the SEC, Big Ten, and everyone else, and the enhanced scrutiny of NIL collectives has created the perfect storm for the emergence of private equity in college athletics. Many public universities and small private colleges rely heavily on tuition revenue to fund collegiate athletics.[57] However, college enrollment has declined by fifteen percent between 2010 and 2021, and the number of college-aged students is projected to plummet after 2025.[58] Fewer students means fewer tuition dollars, which means universities are going to have to find a way to supplement that lost tuition revenue, especially with the advent of revenue sharing. Furthermore, the pandemic-era surge in federal support for universities is over, and public universities now find themselves fighting for limited public funds as

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56. *See, e.g.*, *Boston College Athletics Signs Multimedia Rights Deal with Learfield IMG College*, B.C. ATHLETICS (Jan. 14, 2020), https://bceagles.com/news/2020/1/14/boston-college-athletics-signs-multimedia-rights-deal-with-learfield-img-college [https://perma.cc/VUU5-QWNL]; *Houston Athletics and Learfield Announce Multimedia Rights Renewal*, LEARFIELD (Jan. 14, 2025), https://www.learfield.com/2025/01/houston-athletics-and-learfield-announce-multimedia-rights-renewal/ [https://perma.cc/H4K4-MEV2]; *Duke Extends Multimedia Rights Deal with Learfield IMG College*, DUKE ATHLETICS (Feb. 20, 2020, at 11:00 ET), https://goduke.com/news/2020/2/20/athletics-duke-extends-multimedia-rights-deal-with-learfield-img-college [https://perma.cc/65YS-FWN4].

57. Kenneth Jacobsen, *NCAA Student-Athlete Settlement Whips Up Brewing Funding Storm*, BLOOMBERG L. (July 28, 2025, at 04:30 EDT), https://news.bloomberglaw.com/product/blaw/bloomberglawnews/exp/eyJpZCI6IjAwMDAwMTk4LTBmYTEtZDhlNC1hZmY5LWJmYTk4NWEzMDAwMiIsImN0eHQiOiJMV05XIiwidXVpZCI6IkRYUXFWVnBHLzlJejF3dDIyMDZNZkE9PWx1ZlRvTW9uNFdIb05KVGdSd0lCSUE9PSIsInRpbWUiOiIxNzUzNzAwNjEwNjE0Iiwic2lnIjoieXJSblZUNWo1amJNclFUTys1OEpqTjlXTWRnPSIsInYiOiIxIn0=?source=newsletter&item=read-text&region=digest&channel=us-law-week [https://perma.cc/LC2U-9XDF].

58. *Id.*; John Marcus, *A Looming 'Demographic Cliff': Fewer College Students and Ultimately Fewer Graduates*, NPR (Jan. 8, 2025, at 05:00 ET), https://www.npr.org/2025/01/08/nx-s1-5246200/demographic-cliff-fewer-college-students-mean-fewer-graduates [https://perma.cc/KH4V-K8RH].

funding for programs such as Medicaid shifts from the federal government to the states.[59]

Exacerbating the tuition and public support funding issues is the widening gap between the wealthier universities and everyone else. In 2020, only eighteen college athletic departments made a profit, with most of the profitable athletic departments coming from large Power Four institutions.[60] This is due in large part to the difference in TV rights payouts, with Big Ten and SEC schools receiving between $52.6 million and $63.2 million each in 2024, and ACC and Big 12 schools receiving between $37.8 million and $46.4 million each.[61] This gap is projected to widen, with Big Ten schools projected to receive $75 million each in 2025 and Big 12 schools holding at around $50 million each.[62] This is where private equity can step in. A private equity capital infusion can be used to pay for a university's conference exit fee if that university has the opportunity to join the SEC or Big Ten, or a university can use the private equity capital infusion to bridge the TV rights payout gap until the current TV rights deal expires and is renegotiated. In fact, Florida State already considered using private equity to pay for its ACC conference exit fee when it sued to leave the ACC in 2023.[63] Florida State only decided to stay in the ACC after the ACC agreed to modify the TV rights payouts to member universities, with a member university now able to receive up to $15 million extra per year based on viewership metrics.[64] Nevertheless, the revamped ACC distribution model is a band-aid, and Florida State

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59. Jacobsen, *supra* note 57.

60. *Id.*; Scott Hirko, *I Found 18 Profitable & 211 Money-Losing NCAA Division-I Public Athletic Programs in 2020*, LINKEDIN (Sep. 3, 2022), https://www.linkedin.com/pulse/i-found-18-profitable-211-money-losing-ncaa-public-scott-hirko-ph-d- [https://perma.cc/TJ3F-E6ZY].

61. Alexander Turri, *ACC Ranks Third Among Power Conferences in Revenue As Big Ten, SEC Remain Atop*, CLEMSON WIRE (May 18, 2025, at 14:50 ET), https://clemsonwire.usatoday.com/story/sports/college/clemson/football/2025/05/18/acc-football-revenue-big-ten-sec/83710413007/ [https://perma.cc/8RZQ-Q2M4].

62. *See* Olivia Cleary, *How Much Do Oregon Ducks Earn in Big Ten's $7 Billion Media Rights Deal? Beat SEC in Revenue*, ON SI (May 7, 2025), https://www.si.com/college/oregon/football/oregon-ducks-big-ten-billion-media-rights-deal-sec-revenue-conference-contract-dan-lanning-fox-cbs-nbc-college-football-playoff#:~:text=The%20Oregon%20athletic%20department%20is,to%20University%20President%20Karl%20Scholz [https://perma.cc/3K9X-G2ZU]; *see also* Andrew Gluchov & Jeff Sharon, *Big 12: UCF to Receive Full Revenue Shares in 2025-2026*, SBNATION (Aug. 9, 2023, at 14:41 EDT), https://www.blackandgoldbanneret.com/2023/8/9/23826116/ucf-new-big-12-schools-to-receive-full-revenue-shares-in-2024-2025-2026-media-deal [https://perma.cc/763V-YN4U].

63. *See* Novy-Williams et al., *supra* note 25; Complaint at 20, FSU Bd. of Trs. v. ACC, No. 2023 CA 002860 (Fla Cir. Ct. Dec. 22, 2023).

64. Tyler Nettuno, *ACC Settlement Opens Door for Clemson and Florida State to Leave Conference in 2030*, COLL. SPORTSWIRE (Mar. 4, 2025, at 14:05 ET), https://collegesportswire.usatoday.com/story/sports/college/acc/2025/03/04/acc-settlement-florida-state-clemson-leave-2030/81370201007/ [https://perma.cc/5ZPN-VCB3].

should look to private equity again in 2030 to pay the reduced $75 million ACC exit fee and then join the SEC or Big Ten.[65]

Another factor precipitating private equity investment is the recent enhanced scrutiny of NIL collectives. NIL collectives are school-specific entities independent of a university, typically funded by boosters and alumni, that help create NIL opportunities for student-athletes.[66] After the *House* settlement, any NIL payment over $600 must be approved by the College Sports Commission, and the College Sports Commission has stated its intent to prohibit pay-for-play agreements that had become commonplace in the NIL era.[67] Additionally, the Internal Revenue Service (IRS) has denied 501(c)(3) tax-exempt status for some NIL collectives over the last year, finding that the collectives "appear to operate substantially for the private interest of compensating student-athletes" and do not serve a public interest required to qualify as a 501(c)(3).[68] Such IRS determinations are concerning for NIL collectives because the College Sports Commission has stated that NIL deals over $600 must be for "a valid business purpose related to the promotion or endorsement of goods and services provided to the *general public* for profit."[69] Although the tests for qualifying as a 501(c)(3) and receiving approval from the College Sports Commission are not identical, it is possible that the College Sports Commission could use an NIL collective's 501(c)(3) rejection as evidence that the collective is not providing a benefit to the general public and is merely providing for the private benefit of student-athletes.

Universities can avoid this NIL collective scrutiny by moving NIL operations in-house and into a separate, for-profit subsidiary of a nonprofit affiliated corporation, the same way UK did.[70] By doing so, a university can avoid an adverse nonprofit decision by the IRS and can allow the university's athletic department to ensure direct compliance with National Collegiate Athletic Association NIL regulations.[71] Furthermore, the separate, affiliated entity can access more revenue streams than a typical NIL collective, which makes the separate entity a far more attractive investment for private equity.[72] Universities are facing

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65. *See id.*; *see also* Backus, *supra* note 16.

66. Pete Nakos, *What Are NIL Collectives and How Do They Operate?*, ON3 (July 6, 2022), https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate [https://perma.cc/6QP3-T52R].

67. Dellenger, *supra* note 2.

68. Olivia M. Lubarsky, Note, *The IRS's Misguided Playbook for NIL Collectives*, 74 AM. U. L. REV. 1477, 1482 (2025).

69. *Student-Athlete NIL Deals*, COLL. SPORTS COMM'N (emphasis added), https://www.collegesportscommission.org/nil/ [https://perma.cc/H9M2-V53X].

70. Bishop, *supra* note 48.

71. *Id.*

72. *See id.*

an impending funding crunch, exacerbated by differences in TV rights payouts, and affiliated athletic entities are far better equipped to raise money and increase NIL opportunities than are separate NIL collectives.

II. FLORIDA STATE CASE STUDY

The first part of this Note explained how private equity value creation in professional sports can be recreated in college sports, how many university athletic departments have already worked with private equity successfully, and how private equity investment is the best solution to deal with impending university funding issues. Thus, the next question that must be answered is as follows: Are private equity firms allowed to invest in universities, and, if yes, how can they do so? The next part of this Note will answer this question by using Florida State's proposed private equity investment as a case study to prove that private equity investment in college athletics is feasible without debilitating tax consequences. The last section of this part will explore why the Florida State model is repeatable for universities in many states outside of Florida.

A. *Logistics of Florida State's Private Equity Deal*

In 2022, Florida State became the first major Power Four university to consider a private equity investment.[73] A state agency cannot become a joint venture partner or equity partner with a for-profit company, such as a private equity firm.[74] However, there is a workaround called a "super license agreement."[75] Here is how the super license agreement works: (1) Florida State creates a new, nonprofit entity called FSU NewCo, which would be a subsidiary of one of Florida State's direct-support organizations (likely Seminole Boosters, Inc.); (2) Florida State transfers its intellectual property (IP) rights to FSU NewCo; (3) FSU NewCo licenses those IP rights to a private equity firm for cash; (4) the private equity firm grows revenues by using the licensed IP in more efficient or new ways and then splits the revenues with FSU NewCo.[76] A major reason why this super license agreement works is because the state of Florida allows public universities to organize their university groups into separate entities called direct-support organizations (DSOs).[77] A Florida

73. Novy-Williams et al., *supra* note 25.

74. Matt Baker, *Inside Project Osceola: Florida State Sports' 9-figure Private Equity Plan*, TAMPA BAY TIMES (Feb. 6, 2024), https://www.tampabay.com/sports/2024/02/06/florida-state-private-equity-fsu-football-conference-realignment-acc/ [https://perma.cc/KXG2-X8KH].

75. *Id.*

76. *See id.*; Luke Goldstein, *Wall Street Hits the Locker Room*, THE AM. PROSPECT (Aug. 2, 2024), https://prospect.org/power/2024-08-02-wall-street-hits-the-locker-room/ [https://perma.cc/Q9UJ-3TVE].

77. FLA. STAT. § 1004.28 (2025).

direct-support organization is a not-for-profit corporation organized and operated "exclusively to receive, hold, invest, and administer property and to make expenditures to or for the benefit of a state university in Florida."[78] Florida State already uses the following two DSOs to manage Florida State's athletic department: (1) Seminole Boosters, Inc., a DSO that raises money from the private sector to fund the athletic department, specifically athletic scholarships; and (2) the Florida State University Athletics Association (FSUAA), a DSO created in 2019 to house Florida State's athletic department and to coordinate between Florida State and Seminole Boosters, Inc.[79] Therefore, adding FSU NewCo as a subsidiary of Seminole Boosters would be in line with Seminole Boosters' mission to invest and administer property (here, IP rights) for the benefit of Florida State's athletic department. Additionally, structuring the deal as a licensing agreement avoids the issue of investing directly into FSU NewCo because FSU NewCo, as a nonprofit, cannot have equity owners.[80]

There are reports that Florida State was looking for a potential $250 million private equity investment for its IP license, though there were disagreements between Florida State and potential private equity investors about whether the license would be exclusive.[81] Nevertheless, funding the ACC conference exit fee appeared to be one of Florida State's planned uses for the private equity money, especially considering that by January 2023, Florida State had created a "Leave ACC" budget model around the same time that Florida State's talks intensified with private equity firms Sixth Street and Arctos.[82] Florida State and Sixth Street mutually agreed to end discussions by the end of 2023, citing uncertainty with Florida State's lawsuit against the ACC and the impending *House* settlement.[83] Importantly, neither side pointed to concerns over deal

78. FLA. STAT. § 1004.28(1)(a) (2025).

79. Michael McCann, *How Transforming Into a DSO Could Impact Florida State's Athletic Department*, SPORTS ILLUSTRATED (June 11, 2019), https://www.si.com/college/2019/06/11/florida-state-athletics-department-direct-support-organization [https://perma.cc/X2AX-QZPE]; Daniel Libit & Eben Novy-Williams, *FSU Athletic Association Lags in Cash and Clout*, SPORTICO (June 6, 2024, at 08:00 ET), https://www.sportico.com/leagues/college-sports/2024/florida-state-university-athletic-association-1234783071/ [https://perma.cc/G8XK-J3AH].

80. Mollie Cullinane, *Nonprofit Law Basics: Who Owns a Nonprofit?*, CULLINANE L. GRP. (Feb. 11, 2023), https://cullinanelaw.com/nonprofit-law-basics-who-owns-a-nonprofit/ [https://perma.cc/JW2E-JTUD].

81. Baker, *supra* note 74; Eben Novy-Williams & Daniel Libit, *FSU's 'Project Osceola' Private Equity Push Began in 2022: Docs*, SPORTICO (Jan. 30, 2024, at 17:13 ET), https://www.sportico.com/leagues/college-sports/2024/fsu-project-osceola-private-equity-jp-morgan-1234764861/ [https://perma.cc/J63Y-YLU9].

82. Baker, *supra* note 74; Novy-Williams & Libit, *supra* note 81.

83. Eben Novy-Williams, *Florida State, Sixth Street Ended Investment Talks About a Year Ago*, SPORTICO (Dec. 10, 2024, at 15:20 ET), https://www.sportico.com/business/finance/2024/florida-state-sixth-street-private-equity-talks-over-1234819808/ [https://perma.cc/W3YA-TRQM].

structure as the reason the deal was abandoned because, as discussed below, the super license agreement is achievable without any major adverse tax consequences to Florida State. Sections B, C, D, and E will each raise a potential challenge to the super license agreement and then explain why those challenges would not threaten the viability of the super license agreement.

B. *Competitive Solicitation & Public Records Law Hurdles*

The first hurdles that the super license agreement must cross are the competitive solicitation hurdle and the public records hurdle. Competitive solicitation is a statutorily prescribed process where state agencies, such as state universities, are required to select vendors that meet a certain set of criteria.[84] Competitive solicitation would not threaten Florida State or FSU NewCo's tax-exempt status, but it would pose a logistical problem to successfully completing a private equity deal. The competitive solicitation process can often be inefficient and drawn out, which is antithetical to the fast-paced nature in which private equity firms normally complete deals.[85] Furthermore, competitive solicitation could force FSU NewCo to choose its private equity firm partner based on a predetermined set of criteria, which could further hamper the prospects of a private equity deal by limiting the number of prospective private equity firms that qualify to do business with FSU NewCo.[86] Nevertheless, Florida's competitive solicitation requirements apply to how *state agencies* purchase contractual services, and DSOs are separately incorporated nonprofits that are not considered state agencies under these rules.[87] Therefore, the subsidiary of a DSO is even further removed from state agency status and thus is not subject to the competitive solicitation statute. Furthermore, even if Florida State's Board of Trustees must approve the super license agreement, such approval does not equate to running a competitive solicitation process.[88]

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84. *Competitive Procurement Processes in the State of Florida*, RADEY ATT'Y & COUNS. AT LAW: NEWS & UPDATES BLOG (Sep. 21, 2021), https://www.radeylaw.com/2021/09/21/competitive-procurement-processes-in-the-state-of-florida/ [https://perma.cc/A62N-AT7M]; FLA. STAT. § 287.057(1)(c) (2025).

85. Vernon J. Edwards, *Competitive Processes in Government Contracting: The FAR Part 15 Process Model and Process Inefficiency*, WIFCON (Apr. 2003), https://www.wifcon.com/anal/analcomproc.htm [https://perma.cc/S7U4-FNT6]; *Time is Money: Why PE "Time to Close" is Slowing Down and What it Means for Investors*, SUTTON PLACE STRATEGIES (Nov. 6, 2024), https://suttonplacestrategies.com/time-is-money-why-pe-time-to-close-is-slowing-down-and-what-it-means-for-investors [https://perma.cc/K7WK-5C47].

86. *See Competitive Procurement Processes in the State of Florida*, *supra* note 84.

87. *See* FLA. STAT. § 287.057 (2025); *see also* FLA. STAT. § 1004.28 (2025).

88. *See generally* Bd. of Governors of the State Univ. Sys. of Fla., Regulation 9.011(2), Delegation of Authority to University Boards of Trustees (Nov. 30, 2018),

Thus, the super license agreement would clear the competitive solicitation hurdle.

The next hurdle that the super license agreement must cross is Florida's public records law. Florida's public records law states that "all state, county, and municipal records are open for personal inspection and copying by any person."[89] Subjecting FSU NewCo to Florida's public records law would hamper a potential private equity deal because any Florida citizen could make a request for documents relating to FSU NewCo's licensing agreement with a private equity firm, and FSU NewCo would have to produce such documents, including disclosing unfinalized deal terms and valuations.[90] Nevertheless, Florida exempts DSOs from public record requests for any records of the DSO other than "the annual auditor's report, any records related to the expenditure of state funds, and any financial records related to the expenditure of private funds for travel."[91] The exemption also only applies if employees of the DSO produced or maintained the records sought.[92] The public records exemption would likely apply to FSU NewCo because FSU NewCo would be wholly owned by a DSO, established solely to advance Florida State's athletic department, and funded entirely by private equity capital. Indeed, the Florida Attorney General has stated that the records of a private nonprofit are not public records if the corporation raised and disbursed only *private funds* and had not been delegated any governmental responsibilities or functions;[93] this reasoning would apply to FSU NewCo because FSU NewCo would be raising entirely private funds, and licensing IP rights is not a traditional governmental responsibility or function. Furthermore, the employees of FSU NewCo would maintain the records regarding the licensing of Florida State's IP rights, thus avoiding public records exposure. Therefore, Florida State's super license agreement would be able to clear the competitive solicitation and public records law hurdles, thereby avoiding a potential snag in completing a private equity deal.[94]

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https://www.flbog.edu/wp-content/uploads/9.011_FINAL_2018_11_30.pdf [https://perma.cc/L3BU-8CHK] (explaining the Board of Governors of the State University System of Florida's delegation of authority regarding DSOs).

89. FLA. STAT. § 119.01(1) (2025).

90. *See* Wait v. Fla. Power & Light Co., 372 So. 2d 420, 424 (Fla. 1979).

91. McCann, *supra* note 79.

92. *See* Eben Novy-Williams, *Florida State Demands 'Sunshine' While Keeping Public in the Dark*, SPORTICO (Jan. 11, 2024, at 05:55 ET), https://www.sportico.com/leagues/college-sports/2024/florida-state-private-equity-records-1234762391/ [https://perma.cc/L9P8-X37L].

93. Op. Att'y Gen. Fla. 87-44 (1987).

94. *See* Novy-Williams et al., *supra* note 25 (noting a possible hurdle to a private equity deal because "many public schools . . . have strict rules around transparent, competitive bidding for university contracts").

C. *Private Benefit Tax Hurdle*

Florida State's super license agreement would also face IRS tax challenges, specifically relating to FSU NewCo's tax-exempt status.[95] FSU NewCo was intended to be organized as a 501(c)(3) nonprofit organization, which means FSU NewCo would be exempt from federal income tax.[96] However, the IRS could challenge FSU NewCo's tax-exempt status by way of the private benefit rule.[97] The private benefit rule says that a 501(c)(3) organization can lose its tax exemption if it "serves a private interest more than incidentally."[98] A nonprofit Florida entity that loses its tax-exempt status would also be subject to Florida's state corporate tax.[99] The IRS has used this private benefit rule to challenge joint ventures with private investors, such as when a hospital forms a joint venture with private doctors to provide outpatient services.[100] The private benefit doctrine can apply to transactions with independent parties who have no influence over the charity (no governance interest in the nonprofit) and can apply to transactions entered into at fair market value.[101] If a transaction appears to be structured in a manner that excessively favors private interests, it is objectionable even though it also serves the 501(c)(3) organization.[102] A 501(c)(3) does not violate the private benefit doctrine if (1) the activity can be accomplished only by benefiting certain private individuals;[103] and (2) the private benefit is insubstantial *when compared to* the overall public benefit resulting from the activity.[104]

FSU NewCo would likely be able to avoid the private benefit doctrine for two reasons: (1) FSU NewCo would remain in control of Florida

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95. *See id.* (noting another hurdle would be to not jeopardize the public university's tax-exempt status).

96. I.R.C. § 501(a)–(c)(3).

97. I.R.S. G.C.M. 39,598, 1987 GCM LEXIS 2, at *14–16 (Jan. 23, 1987).

98. John D. Colombo, *In Search of Private Benefit*, 58 FLA. L. REV. 1063, 1072 (2006).

99. *See Nonprofit Organizations and Corporate Income Tax*, FLA. DEP'T OF REVENUE, https://floridarevenue.com/taxes/businesses/Pages/nonprofit.aspx [https://perma.cc/GR4B-NNZU].

100. John D. Colombo, *The NCAA, Tax Exemption, and College Athletics*, 2010 U. ILL. L. REV. 109, 123 (2009); Rev. Rul. 98-15, 1998-1 C.B. 718, 1998 IRB LEXIS 94, at *1, *22–23 (prohibiting an exempt nonprofit hospital from contributing all its operating assets to a joint venture with a for-profit investor unless the nonprofit retains control of the venture).

101. Colombo, *supra* note 100, at 122.

102. *Id.* at 124.

103. I.R.S. G.C.M. 39,598 (Jan. 23, 1987), 1987 GCM LEXIS 2, at *14–16 (citations omitted).

104. *IRS GLAM Asserts That Many Nonprofit Organizations That Develop NIL Collectives for Student-athletes Are Not Tax Exempt*, EY TAX NEWS (June 19, 2023) (emphasis added), https://taxnews.ey.com/news/2023-1093-irs-glam-asserts-that-many-nonprofit-organizations-that-develop-nil-collectives-for-student-athletes-are-not-tax-exempt [https://perma.cc/AHY8-TLE8].

State's IP rights (unlike the joint venture hospital),[105] and (2) whatever profits the private equity firm earns from the licensed IP are incidental to maximizing opportunities for student-athletes.[106] Florida State's super license agreement can only be accomplished through the involvement of a sophisticated private entity, such as a private equity firm, because the private equity firm has the capital, marketing infrastructure, and strategic expertise necessary to monetize Florida State's IP.[107] Florida State lacks this expertise, as seen by Florida State granting control of its TV rights to the ACC and Florida State contracting with third parties, such as Legends, to manage its multimedia rights.[108]

Furthermore, FSU NewCo would maintain control over Florida State's IP in its licensing agreement with a private equity firm. During its discussions with Arctos and Sixth Street, Florida State sought to grant a non-exclusive IP license to the private equity firm, which Arctos found agreeable.[109] FSU NewCo could easily establish control over the IP if it preserved the right to license it to others; however, even if the license were exclusive, FSU NewCo would be able to maintain sufficient control over the IP by establishing termination rights, maintaining the right to approve sublicensing, or establishing usage limits.

Additionally, FSU NewCo will point to educating student-athletes as the "overall public benefit" resulting from the super license agreement because the IRS has historically considered educating young, collegiate athletes a charitable activity.[110] Unlike nonprofit NIL collectives, which the IRS has indicated can violate the private benefit doctrine,[111] FSU NewCo would be able to argue that private equity compensation is not a fundamental part of maximizing opportunities for student-athletes and is insubstantial (relatively speaking) when compared to the public benefit of promoting academic opportunities for student-athletes. FSU NewCo could argue that an SEC or Big Ten university receiving up to $30 million more in TV rights distributions than Florida State has a direct impact on

105. Rev. Rul. 98-15, 1998-1 C.B. 718, 1998 IRB LEXIS 94, at *1, *22–23 (emphasis added) (prohibiting an exempt nonprofit hospital from contributing all its operating assets to a joint venture with a for-profit investor *unless the nonprofit retains control of the venture*).

106. Colombo, *supra* note 100, at 126.

107. *See* Baker, *supra* note 74.

108. *See* Andrea Adelson, *ACC, Florida State, Clemson Reach Revenue Distribution Settlement*, ESPN (Mar. 4, 2025, at 13:24 ET), https://www.espn.com/college-football/story/_/id/44108761/acc-florida-state-clemson-reach-revenue-distribution-settlement [https://perma.cc/9TLQ-MQL2]; *Florida State University Athletics and Legends Announce Long-Term Multimedia Rights Partnership*, FLA. STATE UNIV. ATHLETICS (July 10, 2024, at 07:48 ET), https://seminoles.com/news/2024/7/10/general-florida-state-university-athletics-and-legends-announce-long-term-multimedia-rights-partnership [https://perma.cc/V3GG-RRTJ].

109. Novy-Williams & Libit, *supra* note 81.

110. Colombo, *supra* note 100, at 113.

111. *IRS GLAM Asserts That Many Nonprofit Organizations That Develop NIL Collectives for Student-athletes Are Not Tax Exempt*, *supra* note 104 (emphasis added).

academics because, for example, student-athlete tutor effectiveness is directly tied to athletic department budgets.[112] For comparison, in 2023, Ohio State University (a Big Ten university) had an athletic department budget that was almost sixty percent larger than Florida State's.[113] Therefore, FSU NewCo could frame the private equity deal as necessary not only to close the TV rights distribution gap but also to close the gap in academic assistance between Florida State and SEC and Big Ten schools. As such, the FSU NewCo private equity deal would maximize opportunities for student-athletes because the licensing fees that FSU NewCo would receive from the private equity firm could be used to provide more academic assistance to Florida State student-athletes, thereby resulting in a direct impact on the education of student-athletes. Thus, the private equity firm's profits from the licensed IP would be incidental to maximizing opportunities for Florida State student-athletes, and the super license agreement would likely clear the private benefit hurdle.

D. *The Commerciality Limitation Tax Hurdle*

The second IRS challenge to Florida State's super license agreement comes in the form of the commerciality limitation rule.[114] The commerciality limitation rule looks at whether a nonprofit 501(c)(3) organization is operating in a manner that is too commercial for purposes of determining whether the organization is operating primarily in furtherance of an exempt purpose.[115] A 501(c)(3) organization violates the commerciality limitation rule if the following two elements are met: (1) the tax-exempt organization conducts "substantial" commercial business activities, measured in terms of revenue to the organization and substantive importance to the organization; and (2) the commercial business activities are not "in furtherance of" a tax-exempt purpose.[116]

The "in furtherance of" question has led to the creation of two different tests: (1) the "functionally related" test, which asks if a

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112. Kyle J. Koehler, Project, *Tutor Effectiveness of Student-Athletes at a Division I University*, 61 MASTER OF EDUC. IN HUM. MOVEMENT, SPORT, & LEISURE STUD. GRADUATE PROJECTS 1, 14–17 (2018).

113. *See* Ira Schoffel, *Florida State Ramps Up Athletics Spending; Budget Soars Over $172 Million in FY2023*, ON3 (Jan. 18, 2024), https://www.on3.com/teams/florida-state-seminoles/news/florida-state-ramps-up-athletics-spending-budget-soars-over-170-million-in-fy2023/ [https://perma.cc/WGT4-WSA2]; *Ohio State Reports Record Athletics Revenue in FY 2023*, OHIO STATE NEWS (Jan. 23, 2024), https://news.osu.edu/ohio-state-reports-record-athletics-revenue-in-fy-2023/ [https://perma.cc/BZ77-AUJW].

114. *See* Treas. Reg. § 1.501(c)(3)-1(c)(1).

115. Erin Bradrick, *Unrelated Business Income and the Commerciality Doctrine*, NEO L. GRP.: NONPROFIT L. BLOG (Aug. 23, 2013), https://nonprofitlawblog.com/unrelated-business-income-and-the-commerciality-doctrine/ [https://perma.cc/K64Q-QAET].

116. Colombo, *supra* note 100, at 127–28.

commercial activity is functionally related to the tax-exempt purpose of the organization; and (2) the "commensurate-in-scope" test, which allows commercial revenues so long as the revenues are used to subsidize charitable outputs.[117] A charity can be exempt even if

> it operates a trade or business as a substantial part of its activities, if the operation of such trade or business is in furtherance of the organization's exempt purpose or purposes and if the organization is not organized or operated for the primary purpose of carrying on an unrelated trade or business.[118]

Florida State reported over $160 million in athletic department revenue in 2023,[119] which is "pretty clearly 'substantial' under any definition of the word."[120] Therefore, Florida State will have to concede that the super license agreement with a private equity firm counts as substantial commercial business activity, especially considering that Florida State sought hundreds of millions of dollars in the licensing deal.[121] However, FSU NewCo will pass the "in furtherance of" inquiry under either test. The IRS has consistently held that college athletics are "functionally related" to educational programs of universities,[122] and the promotion of non-revenue and women's college sports is "clearly" a "charitable activit[y]."[123] Thus, FSU NewCo could successfully argue that the private equity cash infusion is "commensurate in scope" to the charitable purpose of promoting both non-revenue and women's sports because, without the cash infusion, Florida State would likely have to cut both non-revenue and women's sports in order to stay competitive with revenue-sharing and NIL payments to student-athletes.[124]

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117. *Id.* at 127–33.

118. Treas. Reg. § 1.501(c)(3)-1(e) (as amended in 1983).

119. Tommy Mire, *FSU Is Expected to Rank Among the Top 10 Nationally in Revenue and Expenses for 2024*, SPORTS ILLUSTRATED (Feb. 19, 2025), https://www.si.com/college/fsu/florida-state-seminoles-college-football/fsu-is-expected-to-rank-among-the-top-10-nationally-in-revenue-and-expenses-for-2024- [https://perma.cc/L9DT-D7JK].

120. *See* Colombo, *supra* note 100, at 131.

121. Brendan Coffey, *Private Equity off to College As Florida State Goes Pro*, SPORTICO (Aug. 4, 2023, at 15:57 ET), https://www.sportico.com/leagues/college-sports/2023/fsu-private-equity-money-1234733272/ [https://perma.cc/7LK4-GZ98] (alluding to a possible deal with a private equity firm being in the $120 million to $400 million range); Baker, *supra* note 74.

122. Colombo, *supra* note 100, at 132; Rev. Rul. 80-296, 1980-2 C.B. 195 ("An athletic program is considered to be an integral part of the educational process of a university, and activities providing necessary services to student athletes and coaches further the educational purposes of the university.").

123. Colombo, *supra* note 100, at 133.

124. *See id.*; Maura Carey, *Universities Cutting Sports, Others Adding Ahead of $2.8 Billion NCAA Antitrust Settlement*, AP NEWS (May 18, 2025, at 10:10 ET),

With the cash from the super license agreement, Florida State could save its non-revenue sports, thereby providing a "necessary service[]" to student-athletes by giving them the opportunity to continue to play college sports at Florida State.[125] Even if Florida State only used the private equity cash infusion to pay the conference exit fee, the increased TV rights distributions from joining the SEC or Big Ten could still be used to fund Florida State's non-revenue sports, thus serving the same charitable purpose. Therefore, profits from the "commercial" activity of licensing Florida State's IP could be used, for example, to subsidize non-revenue sports by providing those sports with athletic scholarships.[126] Additionally, FSU NewCo would not operate for the "primary purpose" of carrying on an unrelated trade or business because FSU NewCo was designed to maximize the value of Florida State's IP, and the revenue from the licensing agreement would be used to support Florida State athletics.[127] Therefore, the super license agreement would clear the commerciality limitation tax hurdle.

E. *The Unrelated Business Income Tax Hurdle*

The third IRS challenge to the super license agreement is the Unrelated Business Income Tax (UBIT) hurdle. Importantly, the UBIT would not endanger FSU NewCo's tax-exempt status, unlike the private benefit and commerciality limitation doctrines.[128] The UBIT applies to tax net income from (1) a trade or business; (2) that is regularly carried on; and (3) is not substantially related to the exempt organization's accomplishment of its exempt purpose.[129] A trade or business is any activity carried on for the production of income from the sale of goods.[130] A trade or business is normally signified as being "substantially self-funding."[131] Business activity is not substantially related to an organization's exempt purpose if it does not contribute to accomplishing that purpose (other than through the production of funds).[132] The IRS can also use "the fragmentation rule," which "allows the IRS to examine the

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https://apnews.com/article/ncaa-settlement-program-cuts-f734a27c13f7c09e956d630cc2755a6c [https://perma.cc/C4ZG-UXPN].

125. *See* Rev. Rul. 80-296, 1980-2 C.B. 195.

126. *See* Colombo, *supra* note 100, at 133.

127. *See* Baker, *supra* note 74.

128. *See* Colombo, *supra* note 100, at 116, 126–27.

129. *Id.* at 135.

130. I.R.C. § 513(c).

131. Colombo, *supra* note 100, at 136.

132. *Unrelated Business Income Tax (UBIT)*, WM. & MARY, https://www.wm.edu/offices/financialoperations/tax/guidelines/ubit/ [https://perma.cc/2FLZ-7B5D].

sale of each type of item separately and determine if such sales are related or unrelated for the purposes of the UBIT."[133]

Exclusive provider arrangements that limit the "sale, distribution, availability, or use of competing products, services, or facilities in connection with an exempt organization's activity generally results in a substantial return benefit" and are likely subject to the UBIT.[134] Certain types of passive income, such as royalties where there is no active business participation and where management is involved, are exempt from the UBIT.[135] The royalty exemption includes "royalty income received from licenses by the university."[136] However, where the *exempt organization's* involvement is active, the IRS will not characterize the payment as a royalty, thereby excluding it from the UBIT.[137]

In this case, the fragmentation rule allows the IRS to test FSU NewCo's individual revenue streams (such as the licensing of Florida State's IP) that might otherwise be viewed as a part of an overall business enterprise (Florida State as a whole).[138] FSU NewCo would likely be considered "substantially self-funded" because the millions in revenues from the super license agreement would run through FSU NewCo.[139] Thus, the trade or business prong is met. The "regularly carried on" standard is also met because licensing Florida State's IP rights would be the regular conduct of FSU NewCo's trade or business,[140] and the value of Florida State's IP rights includes revenues from "seasonal" activities, such as college football and basketball, that are "carried on in a manner that is similar to the commercial (i.e., professional) product."[141]

However, FSU NewCo would have a strong argument that licensing Florida State's IP rights is substantially related to FSU NewCo's purpose of raising funds for the benefit of Florida State's athletic department, and therefore, FSU NewCo should not be subject to the UBIT. Indeed, the IRS found that an athletic conference's sale of exclusive broadcasting rights for a college bowl game was not subject to the UBIT because college athletics are an integral part of a university's educational program and are therefore substantially related to the exempt purpose of educating

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133. Michele Berger, *Unrelated Business Income Tax Explained*, NEO LAW GROUP: NONPROFIT LAW BLOG (July 23, 2013), https://nonprofitlawblog.com/unrelated-business-income-tax-explained/ [https://perma.cc/2V7A-ZML7].

134. *See* Treas. Reg. § 1.513-4(c)(2)(vi).

135. UNIV. N.M., *Unrelated Business Income Tax*, https://taxation.unm.edu/tax-ubit.html [https://perma.cc/G9GL-F5D9].

136. *Id.*

137. *Id.* (emphasis added).

138. Colombo, *supra* note 100, at 135.

139. *See* Baker, *supra* note 74.

140. Treas. Reg. § 1.513-1(c)(2).

141. Colombo, *supra* note 100, at 136.

student-athletes.[142] Similarly, the (exclusive) licensing of Florida State's IP rights to a private equity firm should not be subject to the UBIT because college athletics are an integral part of Florida State's educational program, and the super license agreement is substantially related to FSU NewCo's exempt purpose of supporting Florida State athletics. Even though the IRS revenue ruling contemplated an exclusive grant of broadcasting rights,[143] FSU NewCo should push for a nonexclusive license in order to avoid the IRS comparing FSU NewCo's licensing agreement to an unprotected exclusive provider arrangement.

If the IRS finds that net income from the licensing of Florida State's IP rights is not substantially related to accomplishing FSU NewCo's exempt purpose, FSU NewCo could alternatively argue that the portion of the revenue that it receives from the licensed IP is exempt as a royalty.[144] Royalties are generally exempt from the UBIT, and FSU NewCo (the exempt organization) would not be active in managing Florida State's IP, opting instead to grant management of the IP to the private equity firm.[145] Additionally, the royalty exemption specifically applies to royalty income that universities receive from licenses,[146] and FSU NewCo would argue that the exemption should also apply to royalty income from licensing university assets (IP), even if the assets are held by the subsidiary of a university's DSO. The IRS revenue ruling, coupled with the royalty exemption, gives FSU NewCo alternative options to argue against the imposition of the UBIT on the super license agreement. As long as FSU NewCo does not grant an exclusive, long-term license based on a license fee unrelated to IP revenues, the super license agreement would clear the UBIT hurdle. Thus, FSU NewCo would likely be able to execute the super license agreement without any major adverse tax consequences, making the super license agreement a viable fundraising option for Florida State.

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142. *Id.* at 141.

143. *Id.*

144. *See* Goldstein, *supra* note 76; David N. Sharifi, *Introduction to IP Licensing Royalties*, L.A. TECH & MEDIA L., https://techandmedialaw.com/ip-licensing-royalties/#:~:text=The%20Role%20of%20Royalties%20in,generated%20by%20the%20licensed%20IP [https://perma.cc/4FJ4-HE7D] ("[Royalties] are typically variable payments made by the licensee to the licensor based on the revenue generated by the licensed IP."); *see also Royalties And Sponsorship Payments: Are They Tax Exempt?*, WALL, EINHORN & CHERNITZER, P.C., https://www.wec.cpa/media-hub/royalties-and-sponsorship-payments-are-they-tax-exempt [https://perma.cc/U582-ZYUT].

145. Baker, *supra* note 74.

146. UNIV. N.M. TAXATION DEP'T., *Unrelated Business Income Tax – Federal Income Tax Exemption*, https://taxation.unm.edu/tax-ubit.html [https://perma.cc/DD7T-ZPFN].

F. *The Repeatability of Florida State's Private Equity Deal*

The previous sections in this part of the Note explained the logistics of Florida State's super license agreement. This section will now discuss why Florida State's super license agreement is repeatable in many public universities outside the state of Florida. Florida State's super license agreement is directly repeatable in those states that allow for entities equivalent to DSOs and is functionally repeatable in those states that allow for university-affiliated corporations, such as Kentucky.

For example, state universities in North Carolina, Georgia, and California can successfully implement the super license agreement. North Carolina specifically allows for "the establishment of private, nonprofit corporations to support the constituent institutions of . . . The University System,"[147] which allows North Carolina state universities to create the equivalent of a Florida DSO to support their operations. Georgia allows for cooperative organizations that are organized primarily for the purpose of "entering into contracts for . . . services to be performed . . . in conjunction with a [University System of Georgia] Institution,"[148] which would apply to a new entity formed for the purpose of entering into a licensing agreement with a private equity firm, where the private equity firm manages the Georgia state university's IP. As an added bonus, Georgia's public records law is similar to Florida's,[149] which could allow the cooperative organization to avoid public records requests the same way that FSU NewCo could. California allows members of the California State University system to establish an auxiliary organization, the purpose of which is to "assist any campus of the California State University, or to receive . . . funds to be used for the benefit of such campus."[150] Thus, a California State University campus can create an auxiliary organization to house its IP and license it out to a private equity firm because the auxiliary organization would be "assisting" the campus or receiving private equity "funds" for the benefit of the campus.

Even if a state does not allow for the creation of a DSO or its equivalent, many state university systems still allow universities to create affiliated nonprofit organizations to receive, spend, and invest funds for the benefit of the university.[151] Accordingly, universities that utilize

147. N.C. GEN. STAT. § 116-30.20 (2025).

148. *Board of Regents Policy Manual | 6.17 Cooperative Organizations*, UNIV. SYS. GA., https://www.usg.edu/policymanual/section6/C2690 [https://perma.cc/9S5N-HSSU].

149. Grace Kenny, *Florida's Direct-Support Organizations Sidestep Public Records Laws*, WUFT (Apr. 27, 2018, at 09:00 EDT), https://www.wuft.org/state-news/2018-04-27/floridas-direct-support-organizations-sidestep-public-records-laws [https://perma.cc/PE9Y-4Z75].

150. CAL. EDUC. CODE. § 89901(d)(1) (2025).

151. Martha T. McCluskey, *Following the Money in Public Higher Education Foundations*, ACADEME MAG. (Feb. 2017), https://www.aaup.org/academe/issues/103-0/following-money-public-higher-education-foundations [https://perma.cc/L76X-ZTV4].

affiliated corporations and public-private partnerships—such as UK and BSU—can still effectively implement a super license agreement through those structures.[152] In fact, most nonprofit-affiliated corporations are permitted to create for-profit subsidiaries, thus allowing for more traditional private equity investment directly into the subsidiary.[153] Furthermore, the absence of explicit public records exemptions for affiliated corporations is not necessarily a barrier because these entities—particularly those formed to generate athletic department revenue—are private organizations that do not perform core governmental functions and are primarily funded by private capital, placing them outside the scope of most public records laws.[154] Therefore, Florida State's super license agreement is viable for state universities outside of Florida, whether that be through a DSO equivalent or through an affiliated corporation, public-private partnership arrangement.

III. PRIVATE EQUITY INVESTMENT ALTERNATIVES

Even though many universities can implement a super license agreement structure, some universities may be functionally prohibited from doing so due to legal, structural, or policy constraints. Universities in states that (1) lack a statutory framework for DSOs or affiliated corporations; and (2) provide only limited authority or mechanisms for public-private partnerships are less likely to be able to implement a super license agreement. Both conditions must typically exist to present a functional barrier because a well-defined DSO or affiliated corporation statute can often provide the structural flexibility needed to overcome limitations in public-private partnership statutes. For example, Florida allows university DSOs to engage in public-private partnerships,[155] but Florida statutorily restricts public-private partnerships to projects involving infrastructure and facility projects.[156] Nevertheless, despite Florida's limited public-private partnership statute, a state university in Florida can still execute a super license agreement because of Florida's comprehensive DSO statute. However, for universities in states without a comprehensive affiliated corporation framework and with limited public-private partnership authority, such as universities in Vermont,[157] a

152. *See* Grayson, *supra* note 52.

153. *See* Bishop, *supra* note 48.

154. *See, e.g.*, Denver Post Corp. v. Stapleton Dev. Corp., 19 P.3d 36 (Colo. App. 2000); *see also* Bishop, *supra* note 48.

155. McCann, *supra* note 79.

156. FLA. STAT. § 255.065(1)(i)(1)–(4) (2025).

157. *See, e.g.*, *State P3 Legislation*, U.S. DEP'T OF TRANSP.: FED. HIGHWAY ADMIN., https://www.fhwa.dot.gov/ipd/p3/legislation/ [https://perma.cc/A2ZA-FFUV]; *Guide to Doing Business in Vermont: A Legal Guide for Out-of-State and Foreign Businesses*, DOWNS RACHLIN MARTIN PLLC, https://www.drm.com/wp-content/uploads/2021/12/Guide_to_Doing_Business_in_Vermont.pdf [https://perma.cc/USF8-USTR].

private equity investment may not be feasible. These universities can instead look to a bond issuance to raise money, which will be discussed in Section A.

Furthermore, alternatives are available for universities that can execute a super license agreement but want to pursue different fundraising avenues instead. In addition to issuing bonds, these universities can pursue private credit agreements and private equity investment at the conference level, which will be discussed in Sections B and C, respectively. This part of the Note will prove that universities have a multitude of ways to access private equity capital, thus making private equity investment in college sports inevitable.

A. *Bond Issuance*

Universities have long issued bonds to raise money,[158] which is part of the reason why universities have thus far been slow to tap private equity firms for capital.[159] However, many states only allow universities to issue bonds to fund capital projects,[160] thereby restricting these universities from using the money raised from the bond issuance to pay student-athletes or pay a conference exit fee. For example, municipal bonds are a common type of bond issued by universities and are used to raise capital needed for large projects.[161] In 2024, Florida State issued $327 million in revenue bonds (a type of municipal bond paid off from revenue from the project) to renovate Florida State's football stadium and construct a new football operations facility.[162] Because the proceeds from Florida State's bonds are restricted to specific capital projects, this limitation likely contributed to Florida State's interest in exploring a private equity investment.[163] Another factor that likely contributed to Florida State's exploration of private equity is the fact that the Florida

158. Justin Ho, *Universities Issue More Bonds as Protection Against Federal Funding Freezes*, MARKETPLACE (Apr. 9, 2025), https://www.marketplace.org/story/2025/04/09/colleges-bonds-universities-federal-funding-freeze-research [https://perma.cc/7Z7J-9XBL].

159. Coffey, *supra* note 121.

160. *See generally Tax-Exempt Financing by Universities and Colleges*, ASS'N AM. UNIVERSITIES (Nov. 20, 2022), https://www.aau.edu/key-issues/tax-exempt-financing-universities-and-colleges [https://perma.cc/Q8H7-8MV6].

161. *See What Superintendents Should Know About Municipal Bonds*, ARK. STATE UNIV. (Mar. 1, 2022), https://degree.astate.edu/online-programs/education/eds/leadership-superintendency/about-municipal-bonds/ [https://perma.cc/F5E2-38U6].

162. Eben Novy-Williams, *FSU Seminoles Eye $327M From Revenue Bonds Amid ACC Fight*, SPORTICO (May 4, 2024, at 17:12 ET), https://www.sportico.com/business/finance/2024/fsu-athletics-bonds-seminoles-acc-fight-1234777813/ [https://perma.cc/47LY-7VG8].

163. *See id.*; *see also* Baker, *supra* note 74.

state legislature can block Florida State from issuing more debt.[164] Most states have established mechanisms to manage their outstanding debt, with some states imposing broad debt limits that restrict the debt issuance of public universities.[165] The super license agreement does not involve a debt issuance and thus avoids (1) the possibility of an adverse state legislature decision; and (2) a university's debt limit.

Nevertheless, bond issuance remains a viable option for universities concerned with funding capital projects and for universities that cannot partner with private equity. Municipal bond interest paid to buyers is exempt from state and federal taxation, allowing universities to offer lower interest rates to buyers.[166] Additionally, universities can issue bonds to fund facilities that will attract students, thereby helping universities tackle issues with declining enrollment.[167] Although university-issued bonds cannot be used to directly fund revenue-sharing or NIL payments, they can still support these efforts indirectly by financing upgraded or new facilities that enhance student recruitment, increase enrollment, and ultimately boost tuition revenue.

B. *Private Credit*

Because many athletic departments are currently still housed within their nonprofit universities, the first private equity foray into college athletics will likely be in the form of a private credit loan.[168] A private credit loan is a non-bank loan, and some private equity firms are looking to lend money to universities through private credit agreements.[169] In a private credit transaction, the private equity firm does not take an equity position in the borrower.[170]

Elevate, a sports business consultant that often partners with universities for ticketing operations, is seeking to introduce private credit to college athletics.[171] In 2025, Elevate launched the Collegiate

164. *See* Coffey, *supra* note 121; *see also* Ed Dixon, *Report: Florida State University Enlists JPMorgan as It Targets Private Investment*, SPORTSPRO (Aug. 7, 2023), https://www.sportspromedia.com/news/florida-state-university-fsu-investment-private-equity-sixth-street-acc/#:~:text=In%20FSU's%20case%2C%20politics%20could,the%20state's%20most%20recent%20budget [https://perma.cc/SA28-GPWU].

165. Michael Moody, *Do State Debt Policies and Oversight Affect How Much Public Universities Borrow?*, 28 MUN. FIN. J. 1 (2007), https://www.civicresearchinstitute.com/online/PDF/182439684Do%20State%20Debt%20Policies%20and%20Oversight%20Affect%20How%20Much%20Public%20Universities%20Borrow.pdf [https://perma.cc/DQ5L-CS9Z].

166. *See* Coffey, *supra*, note 121.

167. Ho, *supra* note 158.

168. Ben Horney, *Private Equity Has Arrived in College Sports*, FRONT OFF. SPORTS (June 10, 2025, at 14:13 ET), https://frontofficesports.com/private-equity-college-sports-elevate/ [https://perma.cc/E8M3-Q7KS].

169. *Id.*

170. *Id.*

171. *Id.*

Investment Initiative, a $500 million private credit initiative funded in part by private equity firm Velocity Capital Management, to help universities fund "key infrastructure and commercial projects, such as . . . multimedia rights optimization [and] NIL platforms."[172] Elevate plans to provide universities with upfront funding, which will be repaid over two to ten years, while also sharing in a portion of the athletic department's revenues once Elevate has recovered its initial investment.[173] If a university decides to use the money for a means other than driving revenue growth, Elevate will seek a security interest in the university's ticket sales or other revenue streams.[174] There were reports that Elevate reached private credit deals with the University of California, Los Angeles and Pennsylvania State University (Penn State), but both schools denied the reports.[175] Penn State is particularly well-equipped to pursue a private equity transaction because, as a state university largely exempt from Pennsylvania public records laws,[176] it would likely avoid having to disclose ongoing negotiations or deal terms. Elevate reported that it has "already closed on eight-figure deals with two Power 4 schools," so private credit will be entering college athletics very soon.[177]

Elevate is not the only private credit mover in the college athletics space, however. Private equity firms RedBird Capital and Weatherford Capital created Collegiate Athletic Solutions (CAS) to invest hundreds of millions of dollars into a select number of college athletic departments.[178] CAS envisions universities creating a new entity (NewCo) to house all athletic department income; CAS would then lend money to NewCo in return for the right to receive a portion of the athletic department's revenue over a defined period.[179] Because CAS would share in future revenue instead of being paid a fixed rate, the CAS lending structure would not reside on a university's balance sheet, thus avoiding issues

172. Meg Ryan & Mike Geller, *Elevate Launches Collegiate Investment Initiative to Support Growth of Athletic Programs*, ONEELEVATE.COM (June 9, 2025), https://www.oneelevate.com/article/elevate-launches-collegiate-investment-initiative-to-support-growth-of-athletic-programs [https://perma.cc/F6U4-9CVE].

173. Tim Casey, *Elevate Raises $500 Million To Invest In College Athletics Departments*, FORBES (June 9, 2025, at 08:00 EDT), https://www.forbes.com/sites/timcasey/2025/06/09/elevate-raises-500-million-to-invest-in-college-athletics-departments/ [https://perma.cc/3QR7-XHCT].

174. *Id.*

175. Horney, *supra* note 168.

176. Kenny, *supra* note 149.

177. Horney, *supra* note 168.

178. Eben Novy-Williams & Scott Soshnick, *Inside CAS: Management Fees, 15-Year Revenue and Waterfalls*, SPORTICO (June 27, 2024, at 08:00 ET), https://www.sportico.com/business/finance/2024/cas-college-sports-investor-private-capital-details-deals-1234785800/ [https://perma.cc/G22M-9B3S].

179. *Id.*

with a university's debt limit.[180] The CAS loan would be a "senior" instrument that takes precedence over a university's junior debt.[181]

Private credit loans are a viable option for universities that (1) can avoid state and university debt limits; (2) plan to invest the money into revenue-generating assets; and (3) are confident in their ability to pay back the loan. Additionally, private credit allows universities to access more capital than they could via traditional bank loans because banks are not likely to be able to "meet the additional financing needs" of college athletics programs.[182] However, universities that plan to use the private credit capital to pay a conference exit fee or pay student-athletes directly need to be cognizant of the senior nature of the private credit loan. For example, if Elevate lends money to a university that is used to pay student-athletes, Elevate would likely take a security interest in that university's ticket sales or other revenue streams because that use of money is not revenue-generating. If the university is then unable to pay Elevate back, Elevate can foreclose on its right to the university's ticket sales and force a sale of the right to the university's ticket sales revenue.[183] The senior nature of the CAS loan raises a similar issue because the CAS loan has priority over athletic department revenue.[184] This means that if a university experiences a decline in athletic department revenue, that university may have to implement budget cuts or sell assets in order to make payments on junior loans because the CAS loan would be taking a larger proportion of the declining athletic department revenue pie.

In contrast, the super license agreement does not put the university at risk of losing its assets or footing the bill from a decline in athletic department revenue. In a super license agreement, the private equity firm shares the risk that the university's IP will have a lower-than-expected valuation, and the private equity firm does not have the right to seek additional compensation from the university in that situation.[185] The university would receive lower revenue-share returns than expected under the super license agreement, but the risk of diminished returns from a decreased valuation of a university's IP is a risk the university bears even without a private equity investment. Therefore, a private credit loan makes sense under the right circumstances, especially if a university's

180. *See id.*

181. *See id.*

182. Sami Vukelj, *Private Credit Set for New Ball Game After NCAA Rule Changes*, PITCHBOOK (Mar. 24, 2025), https://pitchbook.com/news/articles/private-credit-set-for-new-ball-game-after-ncaa-rule-changes [https://perma.cc/Z9FU-VHJC].

183. *See* Phillip L. Kunkel et al., *Foreclosure of Security Interests in Personal Property*, UNIV. MINN. EXTENSION (June 2015), https://conservancy.umn.edu/server/api/core/bitstreams/7b0bbd58-7829-4ea6-96e2-ad5937696b46/content [https://perma.cc/A5GG-ZYTL].

184. *See* Novy-Williams & Soshnick, *supra* note 178.

185. *See* Goldstein, *supra* note 76.

athletic department is not a separate entity, but universities should still look to the super license agreement as a way to manage risk from underperforming revenue sources.

C. *Private Equity at the Conference Level*

Another possible alternative to the super license agreement is private equity investment at the conference level. In 2019, the Pac-12 Conference—a nonprofit athletic conference—explored private equity investment but ultimately rejected an offer of approximately $1 billion from a private equity firm for a fifteen percent ownership stake in the conference's media rights network.[186] According to reports, the Pac-12's broadcast rights, sponsorship rights, merchandising, and all other commercial assets were to be placed in an umbrella company called the Pac-12 NewCo.[187] The Pac-12 Network would retain most of the equity in the Pac-12 NewCo, and the rest (roughly ten percent to fifteen percent) would be offered for sale to private investors.[188] Although the Pac-12 decided not to pursue a private equity investment, other athletic conferences have not been deterred from pursuing private equity.

In 2024, the Big 12 was reportedly considering a private equity investment of up to $1 billion for a twenty percent stake in the conference.[189] The Big 12 was in advanced discussions with private equity firm CVC Capital, with CVC motivated by the upside in the Big 12's media rights.[190] A portion of the money was earmarked to be distributed directly to the Big 12's sixteen conference members.[191]

Similarly, the Big Ten began exploring private equity investment in early 2025, with options ranging from creating a subsidiary to house the Big Ten's media rights to a private credit transaction with the private equity firm being paid back in the form of a percentage of future

186. *See* Jay Rigdon, *The Pac-12 is No Longer Interested in Selling a Media Rights Stake to Private Equity Firms*, AWFUL ANNOUNCING (Sep. 27, 2019), https://awfulannouncing.com/ncaa/pac-12-is-no-longer-interested-in-selling-a-media-rights-stake-to-private-equity-firms.html [https://perma.cc/5TBQ-A26H]; *see* John Canzano, *Canzano: Pac-12 Turned Down $1B Offer to Sell Equity Stake in Conference*, THE BALD FACED TRUTH (July 8, 2022), https://www.johncanzano.com/p/canzano-pac-12-turned-down-1b-offer [https://perma.cc/BWS7-F6AS]; *Pac-12 Networks*, PAC-12, https://pac-12.com/sites/default/files/Pac-12%20Networks%20-%20Our%20Creation%20and%20Our%20Mission_0.pdf [https://perma.cc/V9D4-AELS].

187. Jay Rigdon, *Larry Scott Wants to Sell 10% of the Pac-12 to Private Investors*, AWFUL ANNOUNCING (Dec. 29, 2018), https://awfulannouncing.com/ncaa/larry-scott-wants-to-sell-10-of-the-pac-12-to-private-investors.html [https://perma.cc/KM92-H8MF].

188. *Id.*

189. *See* Dodd, *supra* note 43.

190. *Id.*

191. *Id.*

revenues.[192] Indeed, the Big Ten was in advanced discussions with UC Investments, an investment fund of the University of California pension system, for a $2.4 billion cash infusion for the Big Ten and its member schools.[193] The UC Investments deal contemplated the creation of Big Ten Enterprises, a for-profit subsidiary of the Big Ten, that would house the league's media rights and sponsorship deals.[194] UC Investments would then pay $2.4 billion to the Big Ten in exchange for a ten percent equity interest in Big Ten Enterprises, with the Big Ten member schools receiving uneven distributions ranging from a low of $100 million to a high of $190 million.[195] The deal also contemplated the creation of uneven annual conference distributions to member schools, including performance incentives tied to schools' football and basketball success.[196] The upfront cash and uneven distributions garnered broad support from most of the Big Ten member schools, though it remains questionable whether the deal will reach the finish line.[197]

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192. *See* Daniel Libit & Scott Soshnick, *Big Ten Courts Private Equity Investment, Retains Evercore*, SPORTICO (Jan. 30, 2025, at 14:58 ET), https://www.sportico.com/leagues/college-sports/2025/big-ten-private-equity-investment-evercore-1234826061/ [https://perma.cc/MGB8-P39P]; *see generally* Scott Dochterman, *The Big Ten and Private Equity: Why College Sports' Richest Conference is Doing its Homework*, ATHLETIC (Aug. 6, 2025), https://www.nytimes.com/athletic/6536362/2025/08/06/big-ten-private-equity-tony-petitti/ [https://perma.cc/P8KX-JEXX].

193. Ross Dellenger, *Big Ten execs pressing to make $2.4 billion investment deal — without Michigan and USC if needed*, YAHOO SPORTS (Nov. 9, 2025), https://sports.yahoo.com/college-football/breaking-news/article/sources-big-ten-execs-pressing-to-make-24-billion-investment-deal--without-michigan-and-usc-if-needed-140045573.html [https://perma.cc/6W7Q-6ZZH].

194. Ross Dellenger, *Big Ten nearing decision on $2.4 billion deal with California pension investment fund in landmark move within college athletics*, YAHOO SPORTS (Oct. 10, 2025), https://sports.yahoo.com/college-football/breaking-news/article/sources-big-ten-execs-pressing-to-make-24-billion-investment-deal--without-michigan-and-usc-if-needed-140045573.html [https://perma.cc/N54H-CNFA]; Pete Thamel & Dan Wetzel, *Proposed Big Ten private capital deal in holding pattern*, ESPN (Oct. 16, 2025, at 20:06 ET), https://www.espn.com/college-sports/story/_/id/46620086/proposed-big-ten-private-capital-deal-holding-pattern [https://perma.cc/7T7N-52XN].

195. Ross Dellenger, *Big Ten execs pressing to make $2.4 billion investment deal — without Michigan and USC if needed*, YAHOO SPORTS (Nov. 9, 2025), https://sports.yahoo.com/college-football/breaking-news/article/sources-big-ten-execs-pressing-to-make-24-billion-investment-deal--without-michigan-and-usc-if-needed-140045573.html [https://perma.cc/P3KL-PB5F]; Ross Dellenger, *Big Ten nearing decision on $2.4 billion deal with California pension investment fund in landmark move within college athletics*, YAHOO SPORTS (Oct. 10, 2025), https://sports.yahoo.com/college-football/breaking-news/article/sources-big-ten-execs-pressing-to-make-24-billion-investment-deal--without-michigan-and-usc-if-needed-140045573.html [https://perma.cc/GPQ2-LB63].

196. *Id.*

197. Pete Thamel & Dan Wetzel, *Proposed Big Ten private capital deal in holding pattern*, ESPN (Oct. 16, 2025, at 20:06 ET), https://www.espn.com/college-sports/story/_/id/46620086/proposed-big-ten-private-capital-deal-holding-pattern [https://perma.cc/7T7N-52XN];

Private equity investment at the conference level allows for more overall private capital funding because the combined rights of the conference members are more valuable than the individual rights of any specific member. However, only a portion of the private equity capital would be distributed to the conference members, and private equity at the conference level introduces the issue of needing to appease many different universities with different incentives. For example, the UC Investments deal reached an impasse due to the lack of support from the University of Michigan and the University of Southern California, with Michigan viewing the deal as unnecessary and Southern California concerned about the uneven distribution of revenue and governance rights in Big Ten Enterprises.[198]

Additionally, private equity investment at the conference level introduces the problem of conference realignment. For example, the UC Investments deal and the Big 12's potential 2024 deal with CVC both contemplated a requirement that the member schools sign a new grant of rights to ensure the conference stays together long-term.[199] However, a grant of rights can be problematic, as seen by Florida State suing the ACC to invalidate its grant of rights.[200] Private equity investment at the university level does not raise these same concerns because, in this case, the private equity firm would welcome the university leaving its conference to join a new conference with better revenue distributions. Nevertheless, private equity investment at the conference level is a viable option for universities that are not currently structured to receive a private equity investment and need cash quickly to fund revenue-sharing and NIL payments to student-athletes.

Ross Dellenger, *Big Ten execs pressing to make $2.4 billion investment deal — without Michigan and USC if needed*, YAHOO SPORTS (Nov. 9, 2025), https://sports.yahoo.com/college-football/breaking-news/article/sources-big-ten-execs-pressing-to-make-24-billion-investment-deal--without-michigan-and-usc-if-needed-140045573.html [https://perma.cc/2ZEU-8AR5].

198. Ross Dellenger, *Big Ten execs pressing to make $2.4 billion investment deal — without Michigan and USC if needed*, YAHOO SPORTS (Nov. 9, 2025), https://sports.yahoo.com/college-football/breaking-news/article/sources-big-ten-execs-pressing-to-make-24-billion-investment-deal--without-michigan-and-usc-if-needed-140045573.html [https://perma.cc/2ZEU-8AR5].

199. Dodd, *supra* note 43; Ross Dellenger, *Big Ten nearing decision on $2.4 billion deal with California pension investment fund in landmark move within college athletics*, YAHOO SPORTS (Oct. 10, 2025), https://sports.yahoo.com/college-football/article/big-ten-nearing-decision-on-24-billion-deal-with-california-pension-investment-fund-in-landmark-move-within-college-athletics-170051033.html [https://perma.cc/2EFP-349V].

200. Andrea Adelson, *Florida State Suing ACC Over Grant of Rights, Withdrawal Fee*, ESPN (Dec. 22, 2023, at 11:05 ET), https://www.espn.com/college-football/story/_/id/39167937/florida-state-sue-acc-grant-rights-withdrawal-fee [https://perma.cc/CRY2-HAM6].

CONCLUSION

Universities are facing a looming funding crisis. Faced with an impending enrollment dive and the new revenue-sharing expense, universities will be squeezed at both ends and looking for a lifeline to avoid making severe budget cuts. Private equity investment can be that lifeline. As explained in the first part of this Note, universities are already familiar with partnering with private-equity-backed companies to drive revenue growth, and professional sports have utilized private equity resources to great success. The second part of this Note explained why private equity investment in college sports is feasible without adverse tax consequences, as shown by Florida State's proposed super license agreement. The third part of this Note explained how universities that are hesitant to execute a super license agreement can still explore alternative private equity investments, such as private credit and private equity investment at the conference level. Because private equity capital can be structured and disbursed in flexible ways, universities in different states—and with varying athletic department models—can tap into the private equity lifeline. As Florida State athletic director Mike Alford said, "The future is—we're looking at it—private equity."[201]

201. Dodd, *supra* note 43.

NASHVILLE VERSUS HOLLYWOOD: BRIDGEPORT MUSIC'S EXISTENTIAL THREAT TO LIVE MUSIC ALBUMS

W. Kirk Wolff[*]

Abstract

The Sixth Circuit's decision in *Bridgeport Music, Inc. v. Dimension Films*, which eliminated the de minimis exception for sound recording copyrights, has transformed copyright law into a potential weapon for suppressing artistic expression. By adopting a rigid per se infringement standard, the decision empowers bad actors to exploit copyright law against live music recordings, a uniquely vulnerable and culturally significant medium. Under this standard, even the inadvertent inclusion of an imperceptible sound fragment in a live recording—such as a stray copyrighted ringtone or background music at a festival—constitutes actionable infringement, creating significant legal risks for artists and producers. While the circuit split caused by the contrasting decisions in *Bridgeport Music* and *VMG Salsoul v. Ciccone* has been extensively covered, there is a notable lack of analysis in the literature regarding the potential impact of eliminating the de minimis standard in live music recordings.

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INTRODUCTION

Many reams of paper have been expended lambasting the Sixth Circuit's decision in *Bridgeport Music, Inc. v. Dimension Films*, which eliminated the de minimis exception for sound recording copyrights.[1] Critics have derided the decision's reliance on a logical fallacy,[2] its judicial activism,[3] and the negative impact it has had on the music industry.[4] Nonetheless, a circuit split has persisted since the Ninth Circuit's decision in *VMG Salsoul v. Ciccone*,[5] which allowed for de

1. 410 F.3d 792 (6th Cir. 2005); *see, e.g.*, Christopher J. Norton, *Little Bits Can't Be Wrong: The De Minimis Doctrine in the Context of Sampling Copyright-Protected Sound Recordings in New Music*, 7 BERKELEY J. ENT. & SPORTS L. 14, 28 (2018); John Schietinger, Bridgeport Music, Inc. v. Dimension Films*: How the Sixth Circuit Missed Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209 (2005); Wanjiru (Wan) Gikiri, *The Necessity of the De Minimis Defense Within Music Sampling*, 51 AIPLA Q.J. 561, 585–86 (2023). *But see* Tracy L. Reilly, *Debunking the Top Three Myths of Digital Sampling: An Endorsement of the* Bridgeport Music *Court's Attempt to Afford "Sound" Copyright Protection to Sound Recordings*, 31 COLUM. J.L. & ARTS 355, 362 (2008).

2. *See* 4 Melville B. Nimmer & David Nimmer, *Nimmer On Copyright* § 13D.38[B][3]-[4] (rev. ed. 2025) [hereinafter *Nimmer*] ("Had the Sixth Circuit [consulted Section 114's legislative history instead of dismissing that history as irrelevant,] it would have discovered . . . [that] excerpt [of legislative history] debunks the court's imputation that Congress, when adopting Section 114, intended to dispense with traditional notions of substantial similarity . . . . Moreover, the very process by which *Bridgeport Music* expands the rights of copyright owners through construing Section 114 rests on a misapprehension of the statutory structure."); *see also* VMG Salsoul v. Ciccone, 824 F.3d 871, 884–85 (9th Cir. 2016) (noting the "if-then" fallacy relied upon by the *Bridgeport Music* Court).

3. *See* Spencer K. Gray, *Circuit Split: An Efficient Rule to Govern the Sampling of Sound Recordings*, KY. L.J. (Jan. 26, 2018), https://www.kentuckylawjournal.org/online-originals/index.php/2018/01/26/circuit-split-an-efficient-rule-to-govern-the-sampling-of-sound-recordings [https://perma.cc/4ALF-43XV]; *see also* 2 William F. Patry, *Patry on Copyright*, § 9:209 (updated Mar. 2017) (noting that the *Bridgeport Music* decision is tantamount to rewriting "300 years of copyright law, in the process creating a precedent that will provide a reward for copyright trolls, and which has itself wreaked incalculable havoc on the music industry").

4. *See* Tonya M. Evans, *Sampling, Looping, and Mashing . . . Oh My!: How Hip Hop Music Is Scratching More Than the Surface of Copyright Law*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 843, 862–63 (2011) (noting that since *Bridgeport Music*, "most producers generally sample and loop only one song . . . . So for now it seems the highly artistic and innovative concept of the P.E.-style collage created with musical rather than notational composition is dead").

5. *VMG Salsoul*, 824 F.3d at 885–86.

minimis copying of sound recordings, meaning either approach could become the dominant law of the land. This split represents a Nashville[6] (Sixth Circuit) versus Hollywood[7] (Ninth Circuit) music battle on the legal front: The choice is between the per se standard—the approach of the Sixth Circuit's *Bridgeport Music*, which holds that any copying, no matter how minuscule and inadvertent, is impermissible—and the de minimis standard—the approach of the Ninth Circuit's *VMG Salsoul*, which holds that instances of unrecognizable or inconsequential copying are permissible and have historically applied to every type of creative work.[8] Because per se means without exception or consideration of circumstances, almost no claim of infringement could be deemed frivolous under a per se standard; even a stray ringtone from the crowd in a live performance could render a live album, television show, or other work infringing.[9] While both the Sixth Circuit and the Ninth Circuit discussed the policy implications of their preferred rules, neither court considered the specific impact of their decisions on live recordings, representing an oversight in their analyses. Further, neither court could have foreseen the wide proliferation of artificial intelligence (AI), which is now widely used to make music[10] and necessitates the use of the de minimis standard in sound recording copyright actions.

The de minimis standard properly recognizes that there are minuscule or trivial wrongs that courts should not take the time to correct. In fact, the full phrase from which the standard takes its name, *de minimis non curat lex*, when translated to English is "[t]he law does not concern itself with trifles."[11] While the legal reasoning as to why *Bridgeport Music* was wrongly decided has been well established by other authors,[12] the

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6. Bridgeport Music, Inc. v. Dimension Films, 230 F. Supp. 2d 830 (M.D. Tenn. 2002) (showing that *Bridgeport Music* was originally filed in the Middle District of Tennessee, where Nashville is located).

7. VMG Salsoul v. Ciccone, 2013 WL 8600435 (C.D. Cal. 2013) (showing that *VMG Salsoul* was originally filed in the Central District of California, where Hollywood is located).

8. *Id.* at 885; Norton, *supra* note 1, at 15.

9. *Cf. Per Se Rule*, THOMSON REUTERS PRAC. L., https://us.practicallaw.thomsonreuters.com/8-383-6381 (last visited Oct. 30, 2025) (explaining that under the per se rule, certain agreements are presumed to violate antitrust laws regardless of other factors); *see also* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801 (6th Cir. 2005) ("Get a license or do not sample.").

10. *See* Tim Ingham, *Nearly a Third of All Tracks Uploaded to Deezer Are Now Fully AI-Generated*, MUSIC BUS. WORLDWIDE (Sept. 11, 2025), https://www.musicbusinessworldwide.com/nearly-a-third-of-all-tracks-uploaded-to-deezer-are-now-fully-ai-generated-says-platform/ [https://perma.cc/EU46-82P5].

11. *De Minimis Non Curat Lex*, BLACK'S LAW DICTIONARY (12th ed. 2024).

12. *See, e.g.*, Schietinger, *supra* note 1, at 210 ("[T]he Sixth Circuit's holding in *Bridgeport Music* is a problematic and potentially harmful decision."); *see also* Reilly, *supra* note 1, at 386 ("If anything, the *Bridgeport Music* decision, whether intentionally or unintentionally, has

literature, like the courts, has failed to consider *Bridgeport Music*'s existential threat to live music albums. This Note explores the implications of a rule that holds any unauthorized use of a copyrighted recording, no matter how miniscule and unintentional, is actionable copyright infringement. The main impact is that the inadvertent inclusion of even a single note from another sound recording (no matter how imperceptible, such as a one-decibel, millisecond-long snippet) would constitute actionable infringement. Expanding this standard nationwide would create significant legal risks for record labels when recording live performances.

I. COPYRIGHT LAW'S CENTRAL AIM

The intent of copyright law is outlined in the United States Constitution, which states, "[The Congress shall have Power] [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[13] In Federalist 43, James Madison wrote, "[t]he utility of this power will scarcely be questioned."[14] He further noted the need for uniformity in copyright law writing, "[t]he States cannot separately make effectual provisions for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress."[15] Yet the unresolved circuit split has affronted this constitutional need for uniformity.

While there are two goals laid out in the Constitution, the Supreme Court stated in *Twentieth Century Music Corp. v. Aiken* that the primary purpose of copyright law is to stimulate creativity for the public in art, music, and cultural works, noting that the protection of copyright holders' financial returns supports the ultimate goal of increasing artistic expression and creativity.[16] In *Feist Publications v. Rural Telephone Service*, the Supreme Court held the Copyright Act protects only the expressive aspects of a copyrighted work and not the "fruit of the [author's] labor."[17] The Supreme Court explained in the *Feist Publications* ruling that while copyright holders may feel their rights are

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resulted in a casting aside of all the issues of genre typecasting, underlying racism, and attempts to censor in sampling cases.").

13. U.S. CONST. art. I, § 8, cl. 8.

14. THE FEDERALIST NO. 43 (James Madison).

15. *Id.*

16. *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (reasoning that "[t]he immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good"); *see also* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) (stating that "[t]he primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts'").

17. *Feist*, 499 U.S. at 349.

being abrogated, "[t]his result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art."[18] Thus, it is clear that rewarding copyright holders is but a means to an end of creating more art for society, and any rule that decreases the overall amount of artistic expression is contrary to public policy. It is this unique goal that differentiates copyrights from other property rights (such as chattels or real property) and explains why an entirely different regime governs their use. Copyrights do not provide their owners with the ability to fence their creations off from the world; rather, copyright protections are a means to the end of society receiving more expression.[19]

II. THE COPYRIGHT ACT AND THE CIRCUIT SPLIT

The Copyright Act explicitly imposes a narrower scope of rights for sound recording copyrights when compared with other copyrights. Section 101 of the Copyright Act defines sound recordings as

> [W]orks that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.[20]

Further, Section 102 describes the various types of copyrights and their protections:

> (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
>
> (1) literary works;
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> (2) musical works, including any accompanying words;
>
> (3) dramatic works, including any accompanying music;
>
> (4) pantomimes and choreographic works;
>
> (5) pictorial, graphic, and sculptural works;
>
> (6) motion pictures and other audiovisual works;

18. *Id.* at 350.
19. *See id.* at 349–50.
20. 17 U.S.C. § 101.

(7) sound recordings; and

(8) architectural works.[21]

In addition, Section 106 of the Copyright Act, entitled "Exclusive rights in copyrighted works," lists rights pertaining to various types of copyrights.[22] The only portion of Section 106 that treats sound recording copyrights differently from any other form of copyright is Subsection 6, which makes no mention of disfavoring the de minimis standard and is only concerned with the right of copyright holders to publicly broadcast their sound recordings.[23] Subsection 6 merely states, "in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission."[24]

Sound-recording-specific rights are addressed in Section 114 of the Copyright Act, which explicitly limits the outer bounds of sound recording copyright holders' rights.[25] Further illuminating the intent and meaning of this statute, Congress itself stated in a House Report regarding Section 114 that ''infringement takes place whenever all or *any substantial portion* of the actual sounds . . . are reproduced."[26]

The plain-language and in-context reading of this section shows that if an allegedly infringing sound recording is similar to another and if no actual copying took place between the two, then the sound-alike recording is exempt from liability.[27] Reading the statute in context reveals that Sections 106 and 114 are related, with the former describing the exclusive rights of various copyright holders and the latter providing the only exception for sound recording copyrights. Section 114 cuts against the rights of sound recording copyright holders, limiting them even when another work appears to be identical. If actual copying cannot be proven, then the work cannot be found to be infringing. This stands in sharp contrast to other copyrights, such as those involving visual works that appear similar yet may be found infringing even without proof of literal

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21. 17 U.S.C. § 102.
22. 17 U.S.C. § 106.
23. 17 U.S.C. § 106(6).
24. *Id.*
25. 17 U.S.C. § 114(a)–(b).
26. H.R. REP. NO. 94-1476, at 5721 (1976) (emphasis added).
27. *See Copyright Law – Sound Recording Act - Sixth Circuit Rejects De Minimis Defense to the Infringement of a Sound Recording Copyright.* – Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390 (6th Cir. 2004)*, 118 HARV. L. REV. 1355, 1359 (2005) [hereinafter *Sound Recording Act*] (noting that "[Section] 114 is best understood as *limiting* the rights in a sound recording from all other types of derivative activity such as public performances, not as granting a sound recording copyright holder a stronger or additional right"); *see also Nimmer*, *supra* note 2 at § 13D.38[B][1].

copying.[28] Meanwhile, as noted by Section 114 of the Copyright Act, a sound recording copyright holder does not have a cause of action if another artist parrots the creative properties of a nonidentical sound recording.[29] Thus, the statute treats sound recording copyrights differently in a very narrow case, and it does so to contract, not expand, the rights related to such a copyright.

A. Bridgeport Music, Inc. v. Dimension Films

In *Bridgeport Music*, the court considered one of the nearly 500 claims of copyright infringement brought by the related groups Bridgeport Music, Inc.; Westbound Records, Inc.; Southfield Music, Inc.; and Nine Records, Inc. against approximately 800 defendants in a single action.[30] The plaintiffs in this case claimed a two-second-long snippet of the song "100 Miles and Running" was included in a film entitled *I Got the Hook-Up* without authorization.[31]

The district court found that the use of the two-second snippet of music was de minimis as a matter of law, holding "whether the sampling is examined under a qualitative/quantitative de minimis analysis or under the so-called 'fragmented literal similarity' test, the sampling in this case did not rise to the level of a legally cognizable appropriation."[32] Plaintiff Westbound Records appealed this ruling to the Sixth Circuit.[33] Subsequently, the Sixth Circuit reversed the district court and held that the de minimis standard does not apply to sound recordings, introducing the per se standard into copyright law.[34] The *Bridgeport Music* Court adopted a per se infringement rule by distinguishing sound recordings from other works, reasoning that sound recordings allow for a physical taking of something of value unlike other types of copyrighted works.[35] The court also held that new technology renders sound recordings distinguishable from other copyrights because they are uniquely susceptible to direct copying and intentional incorporation into other works.[36] Despite the limiting language of Section 114 of the Copyright Act, the *Bridgeport Music* Court inferred an expansion of rights from this limiting language due to the insertion of the word "entirely" into the following section:

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28. *See, e.g.*, Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc., 338 F.3d 127, 134 (2d Cir. 2003) (holding that infringement in visual works can be found either "through literal copying of a portion of it, but also by parroting properties" of the work).

29. 17 U.S.C. § 114.

30. Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 795 (6th Cir. 2005).

31. *Id.*

32. *Id.* at 797.

33. *Id.*

34. *Id.* at 802 (noting "our holding arguably sets forth a new rule").

35. *Bridgeport Music*, 410 F.3d at 802.

36. *Id.*

> The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.[37]

The *Bridgeport Music* Court further reasoned that its decision to remove the de minimis standard for sound recording copyrights was justified because it was a better policy choice.[38] The court emphasized the value of setting a bright-line rule that makes judicial determinations inherently easy.[39] Regarding the unauthorized inclusion of copyrighted sounds in new works, the court stated simply, "get a license or do not sample," though this analysis ignored the potential unintentional inclusion of copyrighted sounds in secondary works.[40] The *Bridgeport Music* Court opined that sampling is inherently easy to avoid because "[it] is never accidental," thus justifying this bright-line rule. However, this analysis again focuses exclusively on sampling and ignores the real-world potential for accidental inclusion of copyrighted works.[41]

The *Bridgeport Music* Court reasoned that such a hard-and-fast rule would accelerate the resolution of disputes, promoting judicial economy and eliminating the need for a jury trial if the copying were illegal as a matter of law.[42] The court further noted that such a rule would not stifle creativity because artists desiring to sample can either record their own versions of the "riff" from the copied work or pay the original artist for the sample.[43] The court explained that market forces will then determine the market rate for samples, which would prevent exorbitant prices and allow for creativity.[44] As a result of the *Bridgeport Music* decision, cases in the Sixth Circuit involving minuscule levels of infringement, such as a single word, have resulted in six-figure damages against artists.[45]

B. VMG Salsoul v. Ciccone

In *VMG Salsoul*, the court considered whether the use of a horn break from VMG Salsoul's copyrighted sound recording "Ooh I Love It (Love

37. 17 U.S.C. § 114(b).
38. *Bridgeport Music*, 410 F.3d at 801.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 802.
43. *Id.* at 801.
44. *Id.*
45. *See, e.g.*, Bridgeport Music, Inc. v. UMG Recordings, Inc., 585 F.3d 267, 279 (6th Cir. 2009) (affirming $111,225 in damages against a small-time rap artist for his use of the word "dog" in a song).

Break)" was actionable copying.[46] The sample in question was one quarter note of a four-note chord that lasted 0.23 seconds in the original work.[47] In the allegedly infringing work, the popular song "Vogue" by Madonna (also known as Madonna Louise Ciccone) was transposed to a different key.[48] The producer then used the horn hit from "Ooh I Love it (Love Break)" to make a double horn hit in "Vogue."[49] For the double horn hit, the producer used the same process, except that he duplicated the single horn hit and "overlaid the resulting horn hits with sounds from many other instruments to create the song."[50] The court held that the sample was not infringing, explaining that this conclusion followed from a simple observability analysis (no observer could discern the original) and common sense; in particular, the court noted that the horn hit lasted less than a second and only occurred a few times in the allegedly infringing work.[51] The *VMG Salsoul* Court held that the sample was not actionable copying because the sample was easy to miss without careful attention, and the new work's employment of the sample was transformative.[52] On policy grounds, the *VMG Salsoul* Court again took the opposite tack of *Bridgeport Music*.[53] However, rather than providing a rebuttal to the lengthy policy argument of *Bridgeport Music*, the *VMG Salsoul* Court dispensed with the policy arguments as suited "for a legislature, not a court."[54] This rebuttal, while effective, did not grapple with the counterarguments to the reasoning in *Bridgeport Music*, nor consider the unintentional inclusion of copyrighted works in new records. Both courts exhibited a blind spot to this issue.

III. WHY DE MINIMIS

The concept of the de minimis standard was established at least as early as 1841 in America, making it a time-honored and fundamental aspect of copyright law in the nation.[55] De minimis became the standard for finding actionable infringement because, when compared to alternate regimes such as the per se standard under *Bridgeport Music*, the de minimis standard better supports the dual goals of copyright law and leads to an overall increase in its primary aim of creating artistic

46. VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 877 (9th Cir. 2016).
47. *Id.* at 879.
48. *Id.* at 874, 879.
49. *Id.* at 879.
50. *Id.* at 880.
51. *VMG Salsoul*, 824 F.3d at 880.
52. *Id.*
53. *Id.* at 887.
54. *Id*.
55. Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (introducing the substantiality test for infringement, which held that copying in small or insignificant amounts may not be actionable, a concept later recognized as the ancestor of the de minimis rule in copyright).

expression.[56] This is because the de minimis standard allows creators to more freely produce art without fear of opening themselves to an infringement lawsuit for an inconsequential inclusion, such as the 0.23-second-long horn break that was at issue in *VMG Salsoul*.[57] The de minimis standard affords more than adequate protection to copyright holders to incentivize them to continue creating.[58]

The nationwide elimination of the de minimis standard for sound recording copyrights would result in a tangible loss in creativity and have a chilling effect on the recording industry as a whole.[59] Adoption of a bright-line, per se standard nationwide would lead to a toxic enforcement environment for creators, which consequently would lead to a decrease in artistic innovation, an overall loss for society.[60] One aspect of the toxic enforcement environment that has yet to come to fruition but remains a risk is the weaponized wielding of the per se standard against producers of live music albums. While the *VMG Salsoul* and *Bridgeport Music* decisions both noted policy justifications for the courts' rulings, neither court considered the impact of a per se standard on live music and the recording of real-world events in general.

Additionally, while unforeseeable at the time of the decision, the use of AI technology to augment or even entirely complete the creative process of musicmaking has exploded in recent years.[61] Under *Bridgeport Music*'s per se approach, liability arises if AI output contains any of the "actual sounds" from a copyrighted recording.[62] Because AI is trained on copyrighted material[63] and the AI's decision-making is a "black box," [64] it is difficult or even impossible to determine if an actual sound was lifted

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56. *See* Courtney Bartlett, *Bridgeport Music's Two-Second Sample Rule Puts the Big Chill on the Music Indus.*, 15 DEPAUL J. ART & ENT. L. 301, 324–26 (2005) ("While the Sixth Circuit's decision provides increased protection for copyright holders, its effect on the music industry could be damaging because the creativity of musicians and producers might become increasingly discouraged . . . . The Sixth Circuit's decision in *Bridgeport Music* has created another opportunity for a chilling effect in rap music.").

57. *VMG Salsoul*, 824 F.3d at 874.

58. *See generally* Gikiri, *supra* note 1, at 585–86.

59. *See Sound Recording Act*, *supra* note 28, at 1361 (noting "the chilling effect [that the *Bridgeport Music*] bright-line rule will almost certainly engender").

60. *See generally id.*

61. *See* Tim Ingham, *Nearly a Third of All Tracks Uploaded to Deezer are Now Fully AI-Generated*, MUSIC BUS. WORLDWIDE (Sept. 11, 2025), https://www.musicbusinessworldwide.com/nearly-a-third-of-all-tracks-uploaded-to-deezer-are-now-fully-ai-generated-says-platform/ [https://perma.cc/994W-N26U].

62. *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 800 (6th Cir. 2005).

63. *See* Axel Schwanke, *Generative AI and the Illusion of Originality: Can Machines Ever Truly Create?*, MEDIUM (July 19, 2024), https://medium.com/@axel.schwanke/generative-ai-never-truly-creative-68a0189d98e8 [https://perma.cc/3N3J-RXZY].

64. *See* Lou Blouin, *AI's Mysterious 'Black Box' Problem, Explained*, UNIV. MICH.–DEARBORN NEWS (Mar. 6, 2023), https://umdearborn.edu/news/ais-mysterious-black-box-problem-explained [https://perma.cc/9GL9-JUN9].

by AI. Despite the *Bridgeport Music* Court's claim that such inclusion can "never" be accidental,[65] the advent of AI technology means that such inclusion could be accidental and unknown to the creator; users could inadvertently include a single "infringing" note lifted by AI during their creative processes.[66] This would make far more claims by plaintiffs plausible; if AI was used in any part of the production process, the claim of infringement could be plausible on a minuscule level, resulting in far less judicial economy in contravention of the claims in *Bridgeport Music*.[67]

IV. WHY *BRIDGEPORT MUSIC*'S PER SE RULE THREATENS LIVE MUSIC

A per se rule for copyright infringement poses a significant threat to the creation of live music albums and all forms of live recordings. This threat arises from the unique challenges and characteristics of live recordings such as unavoidable incidental background noise inclusion, which would increase the risk of litigation and the cost of compliance for producers of such albums and potentially result in the loss of the art form. Because copyright infringement is a strict liability offense that does not account for the unintentional nature of the inclusion, accidentally violative recordings could result in massive liability.[68] No claim could be deemed frivolous, meaning all claims must be considered by a court or settled by a defendant.

A. *Increased Litigation*

While the *Bridgeport Music* decision and its proponents claim that a per se standard would be a boon for judicial economy,[69] the opposite is actually true. It is critical to note that the Supreme Court has ruled that the copyright infringement fair use defense requires a case-by-case analysis of factors listed in the Copyright Act that cannot be determined via a bright-line rule.[70] Thus, there will be at least as many lawsuits under the per se regime because fair use must always be determined when

65. *Bridgeport Music*, 410 F.3d at 801.

66. *See* Blouin, *supra* note 65.

67. *Bridgeport Music*, 410 F.3d at 802.

68. Shani Shisha, *Infringement Episodes*, 97 S. CAL. L. REV. 1029, 1036 (2024).

69. *See Bridgeport Music*, 410 F.3d at 802 ("As this case and other companion cases make clear, it would appear to be cheaper to license than to litigate."); *see also* Ryan C. Grelecki, *Can Law and Economics Bring the Funk . . . or Efficiency?: A Law and Economics Analysis of Digital Sampling*, 33 FLA. ST. U. L. REV. 297, 317 (2005) ("The establishment of a bright-line rule in digital sampling copyright law allows for greater judicial efficiency. When a particular element is present, there is a particular result. . . . It creates a hard-and-fast rule that allows judges to ignore creative considerations, resulting in speedier and more predictable litigation.").

70. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576–77 (1994).

infringement is alleged. However, in reality, a bright-line rule would encourage *more* lawsuits.[71]

To prove copyright infringement, plaintiffs must demonstrate that (1) the work is protected by a valid copyright, (2) the defendant copied the work, and (3) the copying was wrongful.[72] While a per se regime would eliminate the need to analyze the third prong if copying harmed the copyright holder, the determination of whether a defendant actually copied would become substantially more litigated, burdensome, and time consuming.[73] This is because it is significantly more difficult to prove whether smaller samples (such as those comprised of one or two notes) are truly samples, even with technology employed by experts.[74] In fact, corporations will be incentivized to file such lawsuits to further consolidate the music industry and challenge competitors or new entrants.[75] This could result in extreme industry control by companies that can acquire expansive portfolios of copyrights.[76] Under a per se standard, the determination of facts becomes much more difficult, with the end result for society being less music and more lawsuits.

B. *The Cost of Lawsuit Prevention*

One of the most significant and overlooked consequences of adopting a per se rule for copyright infringement is the exorbitant cost it imposes during the editing phase of live music album production (or recording during any art form or event in public). Unlike studio recordings, which are created in controlled environments, live performances inherently involve a chaotic mix of sounds—ambient noise, audience reactions, and potential sound bleed from other performances.[77] The adoption of a per

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71. *See* Gikiri, *supra* note 1, at 585–86 (noting wider adoption of this rule would "cause a huge influx of trivial court cases").

72. *See* Zalewski v. Cicero Builder Dev., Inc., 754 F.3d 95, 100 (2d Cir. 2014).

73. *See* Dale F. Roeck II, *'Cause the Samplers Gonna Sample: Should Courts Allow De Minimis Copying of Sound Recordings, or Should They Shake It Off?*, 127 PENN ST. L. REV. 205, 227 (2022) (noting that "an approach that renders all instances of sampling per se infringements creates more problems than it solves").

74. *See id.* (noting that sounds can be indistinguishably reproduced with instruments or sourced from other songs or sample libraries and that "even an expert musicologist would be hard-pressed to identify the source of a single note"); *see also* Schietinger, *supra* note 1, at 246 (noting that "a bright-line rule may make deciding cases more efficient, [but] a rise in the number of infringement claims will frustrate judicial efficiency").

75. *See* Schietinger, *supra* note 1, at 245 (noting "the open-ended nature of this ruling invites all kinds of frivolous lawsuits that will benefit neither artists nor fans").

76. *See id.* at 247 (observing "a single party with a diverse portfolio of copyrights [could] exert disproportionate influence on the entire market").

77. ARCUS SOUNDS, *What is the Difference Between a Live Recording and a Studio Recording?*, https://arcussounds.com/what-is-the-difference-between-a-live-recording-and-a-studio-recording/ [https://perma.cc/GTH5-CKR3] ("The charm of live band recordings lies in their authenticity.").

se standard would force producers to meticulously scour live recordings for any inadvertent inclusion of copyrighted material, no matter how trivial or inconsequential, significantly increasing production costs. Under a per se rule, sound engineers and editors would be required to analyze live recordings with extreme precision, identifying even the most imperceptible fragments of potential copyrighted material. This process would necessitate advanced technology and extended man-hours as teams would need to (1) isolate and scrutinize background noises, (2) use spectral analysis to identify overlapping sounds that might include copyrighted material, and (3) employ musicologists or copyright experts to confirm whether detected snippets infringe on existing works (which may even prove unsuccessful in preventing a lawsuit).

Thus, to comply with a per se rule, producers would need to invest in sophisticated audio-editing tools capable of detecting and isolating faint, unintended sounds. These tools, while advanced, are not infallible and often yield false positives,[78] further complicating the process. In some cases, producers may need to replace portions of the audio or artificially reconstruct parts of the performance, undermining the authenticity that is central to the appeal of live albums. This heightened scrutiny would transform the editing process from a creative endeavor into a painstaking legal minefield, shifting resources away from enhancing the album or video's quality and authenticity toward compliance with a rigid legal standard. Only the wealthiest of artists and recording labels could afford to create such albums, if at all.[79] Measures to avoid this risk would also undermine the appeal of live albums because a critical component of the genre is that these records are recorded in a less controlled environment than a studio. Only recording in completely controlled environments would be safe as even the most careful of editors could miss a single stray note that would be infringing. The counterargument that music producers can meticulously scour their live recordings for any possible infringement only illustrates the absurdity of a per se rule. Whether it is a stray ringtone, an artist on a nearby stage, or a millisecond-long note, tiny portions of copyrighted material are ubiquitous in any recording of the real world and do not constitute what would be considered infringement by the Framers (or any reasonable person, for that matter). This reality is

78. *See* Art Samplaski, *Commentary on Daniel Perttu's "A Quantitative Study of Chromaticism*," 2 EMPIRICAL MUSICOLOGY REV. 55, 57 (2007); *see also* Roeck II, *supra* note 74, at 277 & n.236 (noting that sounds can be indistinguishably reproduced with instruments or sourced from other songs or sample libraries and that "even an expert musicologist would be hard-pressed to identify the source of a single note").

79. *See* Michael L. Baroni, *A Pirate's Palette: The Dilemmas of Digital Sound Sampling and a Proposed Compulsory License Solution*, 11 U. MIAMI ENT. & SPORTS L. REV. 65, 92 & n.207 (1993) (noting that sample clearance is extremely costly and time consuming, "adding tens of thousands of dollars to album production costs . . . [and] some fear that rap may become too costly to produce").

why the de minimis standard was universally applied for hundreds of years to every variety of copyright[80]—that is, until the *Bridgeport Music* decision. Consequently, producers of live recordings would also face significant costs in managing legal risks during the editing process. This could include (1) consulting expensive intellectual property attorneys to preemptively assess the likelihood of infringement claims, (2) purchasing costly indemnity insurance policies to shield against potential lawsuits arising from overlooked material, or (3) negotiating licenses for any incidental inclusions detected, even if the original inclusion was unintentional and barely perceptible.

These costs are particularly burdensome for independent artists and smaller production companies that lack the financial resources of major labels. The result is a disincentive to produce live albums altogether as the potential costs of compliance outweigh the anticipated returns.

C. *Costs Without Benefits*

Critically, these editing costs offer no corresponding benefit to copyright holders or society at large. The *Bridgeport Music* rule simply creates inefficiencies and extra lawsuits for artists. The goal of copyright law is to promote the creation and dissemination of art, not to impose unnecessary barriers to its production.[81] The de minimis standard, by allowing inconsequential inclusions to pass without legal consequence, balances the need to protect intellectual property with the practical realities of artistic production. A per se rule, by contrast, creates a lose-lose scenario where neither copyright holders nor creators benefit, leaving audiences with fewer and less authentic live music recordings.

While proponents of the per se rule may try to write off this possibility as far-fetched, patent trolls and even original holders of copyrights seeking to protect their interests have proven that there is an extreme appetite for such lawsuits.[82] Courts have recognized the issue of intellectual property (IP) trolls, with the Seventh Circuit noting:

> Copyright law protects individual expression while encouraging creativity and maintaining the public interest in spreading ideas. In recent years, however, a cottage industry of opportunistic copyright holders—earning the derisive moniker "intellectual property trolls"—has emerged, in

80. *See* William F. Patry, *Patry on Copyright*, § 9:61 (updated Sept. 2025).

81. U.S. CONST. art. I, § 8, cl. 8.

82. *See, e.g.*, Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005) (a lawsuit over a two-second guitar riff).

> which a troll enforces copyrights not to protect expression, but to extract payments through litigation.[83]

A per se rule would only serve to add another arrow to the quivers of IP trolls.

Real-world examples of inadvertent musical bleed-over during live performances show that the risk is real.[84] It has been noted that "the open-ended nature of this [*Bridgeport Music*] ruling invites all kinds of frivolous lawsuits that will benefit neither artists nor fans."[85] Considering that the defining cases of the circuit split on the de minimis/per se debate are over minuscule inclusions, it is not out of the realm of possibility that such lawsuits would be filed nationwide over claims of infringement during live albums, whether the claims are genuine or part of IP trolls' attempts to garner settlements.[86]

Beyond monetary costs, the chilling effect of a per se rule would extend to the creative process itself. The fear of litigation would compel producers to excessively sanitize live recordings, stripping them of the raw, unfiltered energy that makes them commercially successful.[87] Furthermore, the increased production costs could lead to higher prices for live albums, reducing their accessibility to fans and diminishing their cultural reach.

D. *The Loss of Art*

Such a strict and costly enforcement regime could result in a decrease in artists entering the industry, a chilling effect on the industry, and the elimination of art forms, potentially including live music albums. The loss of art genres is not a hypothetical outcome; these results already exist due to the uncertainty caused by the circuit split,[88] the unresolved nature

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83. Design Basics, LLC v. Kerstiens Homes & Designs, Inc., 1 F.4th 502, 503 (7th Cir. 2021).

84. *See Winning the Bleed: Multi-Stage Sound Separation at Festivals*, TICKET FAIRY (Aug. 23, 2025), https://www.ticketfairy.com/blog/winning-the-bleed-multi-stage-sound-separation-at-festivals [https://perma.cc/XZJ4-HCMR] (discussing the frequent issue of sound bleed between stages at EDM concerts, where prerecorded and copyrighted sound snippets are a defining feature of the EDM genre).

85. Schietinger, *supra* note 1, at 245 (citing Renee Graham, *An Anti-Sampling Court Ruling Limits the Options of Hip-Hop's Best*, BOSTON GLOBE (Sept. 16, 2004) at D1).

86. *Id.* at 245–46.

87. *See, e.g.*, ERIC CLAPTON, UNPLUGGED (Reprise Records and BMG Direct Marketing 1992) (the best-selling live album of all time, selling more than 26 million copies as of 2024).

88. *See* Evans, *supra* note 4, at 862–63 (noting that since *Bridgeport Music*, "most producers generally sample and loop only one song . . . . So for now it seems the highly artistic and innovative concept of the P.E.-style collage created with musical rather than notational composition is dead"); *see also* Norton, *supra* note 1, at 28 (noting industry experts find the *Bridgeport Music* ruling "scary enough that everyone now handles the clearance of samples with white velvet gloves").

of which runs counter to the needs of copyright law.[89] A per se rule will make the creation of live albums (including those recorded at popular music festivals like Bonnaroo, Austin City Limits, etc.)[90] riskier from a legal standpoint as any inadvertent background noise, such as somebody playing a copyrighted sound recording elsewhere but within earshot, could render a recording unlawfully infringing, no matter how minuscule or unintentional. For an example of this, one must look no further than arguably the most legendary concert of all time, Woodstock, which occurred on Max Yasgur's farm in Bethel, New York, in 1969.[91] The open-air nature of the concert, where multiple bands were playing simultaneously on stages in close proximity, resulted in a large amount of background noise on the live album.[92] The background noise was critical to the authenticity of the album, a major component of the appeal for any live recording. This album, which went double platinum and was inducted into the Grammy Hall of Fame,[93] includes portions of music from other artists in the background to some degree. While this inclusion is imperceptible, under the *Bridgeport Music* per se standard, it could be a credible basis for a lawsuit if the artists were playing a prerecorded portion of music, even for a single note.

For a more modern example, in the live recording of a performance by Belle & Sebastian at the Coachella music festival in 2006, a performance by the Foo Fighters on another stage in the distance is audible.[94] Even if the artists themselves consent to potential incidental recording at such shows, musicians at these concerts may employ prerecorded portions of songs or songs that include third-party samples during their live performances; thus, the recording of a Woodstock-style live album would be exceedingly risky for producers seeking to avoid

89. *See* THE FEDERALIST NO. 43 (James Madison) (Jan. 23, 1788) (noting the need for uniformity in copyright law).

90. *See, e.g.*, *Live at Bonnaroo '22*, KING GIZZARD & THE LIZARD WIZARD (Aug. 12, 2022), https://kinggizzardandthelizardwizard.com/release/live-at-bonnaroo-22 [https://perma.cc/ ATS5-T4FC] (a popular live album recorded at the 2022 Bonnaroo Music Festival in Tennessee, an event where DJs played sound recordings simultaneously near other artists who were performing and recording live albums).

91. MARK BERGER, SOMETHING'S HAPPENING HERE: A SIXTIES ODYSSEY FROM BROOKLYN TO WOODSTOCK 168 (2019).

92. *See generally* 60s and 70s Music Love LP, *Woodstock 1969 – Music From the Original Soundtrack And More*, YOUTUBE (July 5, 2024), https://www.youtube.com/watch?v=of19MzftDFc [https://perma.cc/696A-B5ED].

93. *Grammy Hall Of Fame Award*, THE RECORDING ACADEMY (2025), https://www.grammy.com/awards/hall-of-fame-award#w [https://perma.cc/TQ6F-3SA5].

94. TONES' TUNES, *Belle & Sebastian - The Boy with the Arab Strap (Live at Coachella 2002)*, YOUTUBE (Apr. 18, 2023), https://www.youtube.com/watch?v=-LUQbF7qohI [https://perma.cc/S2YC-GYFU].

lawsuits. Those third-party artists who were sampled, or even a company that has acquired a portfolio of samples, could exert control and sue.[95]

This would impact live albums recorded in non-festival settings. For example, a performer may be exposed to potential lawsuits if someone in the crowd at a small comedy show plays a TikTok that includes a copyrighted sound recording; additionally, potential lawsuits may even arise if a phone rings with a ringtone that is a copyrighted song[96] or is even copyrighted itself (as most ringtones are).[97] Because the standard is so low under the per se regime, the inquiry must go to trial or at least be considered by a court, making virtually any claim of infringement plausible because "even an expert musicologist would be hard-pressed to identify the source of a single note."[98]

V. THE VALUE OF LIVE RECORDINGS TO SOCIETY

Live albums are an essential medium for artistic expression and are critical for cultural preservation. Unlike studio recordings, live performances capture the creativity of an artist's performance in real time, creating a unique listening experience that causes many listeners to prefer live recordings to studio recordings.[99] Necessarily, these albums are created in environments that are uncontrolled, a unique aspect of the art form.[100] Live recordings preserve fleeting moments in context, transforming them from ephemeral performances into lasting cultural artifacts.[101]

A. *Cultural Preservation*

Live recordings serve as invaluable documentation of history, preserving not only songs but also the cultural and social context in which they were recorded. Iconic live albums such as *Woodstock: Music from the Original Soundtrack*, Led Zeppelin's *How the West Was Won*, or Johnny Cash's *At Folsom Prison* provide more than just music for audiences—they offer a snapshot of societal attitudes, struggles, and

95. *See* Schietinger, *supra* note 1, at 247 (describing the risk of a bad faith actor who acquires a "diverse portfolio of copyrights"); *see also* William F. Patry, *Patry on Copyright*, § 9:209 (updated Mar. 2017) (noting a per se rule would "provide a reward for copyright trolls, and which has itself wreaked incalculable havoc on the music industry").

96. John Hastings, *Phone Rings in a Comedy Show*, YOUTUBE (Aug. 9, 2023), https://www.youtube.com/watch?v=rOSOH1jL-tA [https://perma.cc/XE4Y-SQN7].

97. *See generally Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding*, 71 Fed. Reg. 64303, 64303, 64307 (Oct. 16, 2006).

98. *See* Roeck, *supra* note 74, at 227.

99. *See, e.g.*, Anne Victoria Clark, *Live Albums Are the Best Albums, Actually*, VULTURE (Mar. 1, 2021), https://www.vulture.com/article/live-albums-are-the-best-albums-actually.html [https://perma.cc/N92V-4RJD].

100. *See id.*

101. *See id.*

aspirations at the time of their recordings. *Woodstock: Music from the Original Soundtrack* embodied the countercultural movement of the 1960s;[102] *How the West Was Won* captured Led Zeppelin in what they would later describe as their artistic peak;[103] and Cash's prison recordings amplified the voices of marginalized individuals who were incarcerated.[104] Jimi Hendrix's legendary live rendition of the national anthem at Woodstock, stylized to protest the Vietnam War, is the type of performance that can never be replicated in a studio.[105] Moreover, live recordings often memorialize significant events, such as Leonard Bernstein's concert at the fall of the Berlin Wall, and serve as collective cultural memories that historians use in their research.[106]

B. *Artistic Innovation*

Live music often represents a space for artistic experimentation and improvisation that cannot be replicated in a controlled studio environment. Artists frequently alter their compositions during performances, exploring new arrangements, extending solos, or blending genres. For example, jazz thrives in live settings, with improvisation at its core. Albums such as Miles Davis's *Live at the Plugged Nickel* or Grover Washington Junior's *Live at the Bijou* demonstrate how live recordings can capture an artist's creative process in a way that is dynamic and transformative.

Artists also frequently perform covers of other musicians' music during live performances, such as Nirvana's cover of David Bowie's "The Man Who Sold the World" during their 1993 performance on *MTV*

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102. *See generally Remembering Woodstock: Why the 1969 Festival Still Resonates*, THE ROLLING STONE (Aug. 1, 2019), https://www.rollingstone.com/music/music-news/woodstock-remembered-video-country-joe-david-fricke-greil-marcus-866139/ [https://perma.cc/J3DV-5QPN].

103. *See generally* James Jackson, *Jimmy Page on Led Zeppelin IV, The Band's Peak and Their Reunion*, THE TIMES (Jan. 8, 2010), https://www.thetimes.com/sunday-times-rich-list/profile/article/jimmy-page-on-led-zeppelin-iv-the-bands-peak-and-their-reunion-v6gk39vkwfr?gaa_at=eafs&gaa_n=AWEtsqd0yH8Dwp7gg8JBe3xgxrFzxjg5BLLmV9UL7bS64JTdKDdpdQRMZgjxROGHzkw%3D&gaa_ts=694e0e7f&gaa_sig=Kj-m6miQQO36CRCa6xxokug6YFuVG-e4BQrpxe65H2JAt0aYTh6miBE57l43Rz4kCM2slkQK3LiNZEGT7WmbnA%3D%3D [https://perma.cc/H4EE-EUGF].

104. *See* Alfred G. Aronowitz, *Music Behind the Bars: Johnny Cash at Folsom Prison*, LIFE, Aug. 16, 1968, at 12.

105. *See* Paul Grimstad, *Rewinding Jimi Hendrix's National Anthem*, THE NEW YORKER (Jan. 26, 2021), https://www.newyorker.com/culture/cultural-comment/rewinding-jimi-hendrixs-national-anthem [https://perma.cc/63ZT-TKML].

106. *See, e.g.*, Klaus Geitel, *Exulting Freedom in Music*, THE LEONARD BERNSTEIN OFFICE, https://leonardbernstein.com/about/conductor/historic-concerts/berlin-wall-concert-1989 [https://perma.cc/FD72-6LFQ].

Unplugged.[107] Such covers rarely make it on studio albums but often become fan favorites when released on live albums. Furthermore, live recordings highlight the interplay between performers and their audiences. Even unprompted interruptions, such as a phone ringing or an announcement, add to the realism of the recording.

C. *Accessibility*

Live recordings increase access to the concert experience, enabling individuals who are unable to attend performances due to geographic, financial, or physical barriers to experience live music. For example, with concert tickets for Taylor Swift's most recent tour reaching thousands of dollars per seat,[108] a recording of a concert represents the only way many of Swift's millions of fans will get to experience the show. A person listening to Queen's *Live at Wembley* or Biggie Smalls's final performance can feel the energy and passion of the artists and their crowds without having ever attended, making the live performances of artists like Freddie Mercury and Biggie Smalls accessible to fans who were born after their deaths.

VI. A THREAT BEYOND MUSIC

The adoption of a per se rule for copyright infringement would have profound and far-reaching consequences beyond the realm of live music albums. Because any unauthorized use of copyrighted material—without exception—constitutes actionable infringement, a per se rule jeopardizes the ability of creators to authentically capture live and spontaneous events in any form or medium. This rigidity threatens industries ranging from television production and sports broadcasting to documentary filmmaking and user-generated content, all of which rely on the ability to record and share real-world environments. The rule could even be weaponized by protesters or business rivals. The cultural and societal ramifications of these limitations are significant.

Live television productions, athletic events, or documentaries, particularly those filmed in public, often encounter incidental inclusions of copyrighted material. Ambient music in a café scene, during a live broadcast, or during a timeout in a football game can all result in inadvertent inclusion and distribution of copyrighted sound recordings. While these inclusions are often fleeting and unavoidable, they would nonetheless trigger liability under a per se standard, and audience

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107. *MTV Unplugged*, Nirvana: The Man Who Sold the World (MTV television broadcast Dec. 16, 1993).

108. Bryan West, *Where Did Taylor Swift Tickets Cost the Most? See Which City Cracked $3,000 Per Seat*, USA TODAY (Dec. 7, 2024), https://www.usatoday.com/story/entertainment/music/2024/12/07/where-taylor-swift-tickets-highest-cost/76829276007/ [https://perma.cc/4DVJ-3S7W].

behavior could have an impact in all of these examples, as well. A per se rule would impose substantial burdens on television and documentary producers. Television producers would need to secure licenses for all incidental inclusions, no matter how inconsequential. Documentary filmmakers would need to painstakingly edit footage, replace background sounds, or negotiate licenses for every incidental inclusion. These costs and logistical hurdles would deter filmmakers from addressing important but high-risk subjects, such as political activism or social movements, and curb their ability to document and preserve history. The authenticity and spontaneity central to the documentary genre would be sacrificed.

The rise of user-generated content on platforms like TikTok, Instagram, and YouTube has democratized creative expression. However, creators of live or spontaneous content often inadvertently include copyrighted material. A street performer's song in the background of a video or copyrighted music overheard at a wedding reception are common examples. A per se rule would create a chilling effect on user-generated content as content creators would risk legal claims for even the smallest unintentional inclusions. This could lead to the over-censorship of platforms and discourage everyday users from sharing videos. Platforms themselves would face increased liability, forcing them to implement stricter content moderation systems that could stifle creativity and free expression.

A. *Bad Faith Actors and Weaponization of a Per Se Rule*

A per se rule could be weaponized to suppress the dissemination of speech, concerts, and other public events. By exploiting the rigid nature of this standard, individuals or entities could strategically create scenarios where copyright infringement claims are inevitable, using the law not as a tool for protecting intellectual property but as a means of censorship and control. For example, individuals could blare out tiny snippets of copyrighted sound recordings during public speeches, such as at a political rally for a candidate. This would ensure that any recordings made of the event are subject to potential copyright claims. This type of weaponized copyright law tactic has already been utilized in the real world,[109] though currently the copyrighted sound recording must be played loud enough to be recognizable amongst the other noise of the event. Under a per se standard, disrupters would only need to insert a single note into the recording of a public event in order to make that recording infringing.

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109. *See, e.g.*, Jeremy Lamstein, *"Swifties" or Swift Suppression? How Police Officers Exploit Copyright Law and Practice Online to Evade Public Accountability*, 45 CARDOZO L. REV. 1015, 1017 (2024) (showing that the weaponization or bad-faith use of copyright law to suppress video dissemination is nothing new).

Such tactics could stifle free expression by discouraging journalists and media organizations from covering events for fear of legal liability. This form of weaponization could be particularly damaging in cases where real-time public awareness of the event is critical, such as protests advocating for human rights, climate action, or political reform. Concerts and other live performances, particularly those recorded for release as albums or videos, would also be vulnerable to strategic interference under a per se rule. Individuals or competing entities could intentionally introduce copyrighted material into the recording environment to disrupt the creation or publication of live albums. An industry competitor, disgruntled individual, or even a random audience member could play copyrighted music through portable speakers or devices, ensuring its incidental inclusion in the recording.

A per se rule for copyright infringement, while intended to protect intellectual property rights, creates a legal framework that is ripe for abuse. By implicitly encouraging the deliberate introduction of copyrighted material into recording environments by opponents of speakers or artists, a per se rule empowers bad actors to suppress speech, prevent the publication of live recordings, and stifle free expression. To prevent such weaponization, copyright law must once again universally adopt the de minimis standard, which recognizes the realities of live recording and prioritizes the balance between protecting intellectual property and fostering societal and artistic progress.

B. *A Broader Threat to Creativity and Society*

The ripple effects of a per se rule would extend far beyond individual industries, impacting society's ability to record, share, and preserve authentic cultural and historical moments. The authenticity and spontaneity inherent in live recordings—whether in music, television, sports, or public events—are vital to fostering cultural understanding and preserving the essence of human experiences. By imposing rigid legal standards on incidental inclusions, a per se rule prioritizes property rights over public benefit, the exact opposite of the goal of copyright law, and hinders artistic, journalistic, and cultural endeavors.

To mitigate these harms, copyright law must account for the realities of live and spontaneous recordings. A de minimis standard—which excludes trivial and inconsequential uses of copyrighted material from liability—strikes the constitutionally mandated necessary balance. This approach allows creators to capture and share real-world events, such as concerts, documentaries, and protests, without fear of undue legal risk, ensuring that copyright law serves its ultimate purpose of promoting the progress of science and the arts.

CONCLUSION

The unresolved circuit split over the de minimis standard for sound recordings poses a significant and specific threat to live music albums, a unique and irreplaceable form of artistic expression. While there have not yet been cases that allege infringement in a live music context, the mere fact that a plaintiff could win such a case under a per se rule proves the *Bridgeport Music* rule untenable through *reductio ad absurdum*. Because the Constitution prioritizes the creation of art for society and requires courts to weigh all other factors as less compelling, courts should treat risk to artistic expression as a priority when applying copyright law. The results of a per se regime run counter to the intent of copyright laws, which seek to promote, not stifle, useful art. It also has wider societal implications beyond music. In this battle between the contrary rules set forth by Nashville and Hollywood, the West Coast must reign supreme.

The rigid per se rule in the *Bridgeport Music* decision fails to account for the nuanced realities of live music production, particularly in uncontrolled environments such as festivals and concert venues. Live albums, celebrated for their raw authenticity and ability to capture the spontaneity of a performance, are inherently vulnerable to the risks posed by an unforgiving legal regime. The inclusion of incidental background sounds—whether a faint bleed from a nearby stage, a prerecorded sample used by another artist, or even an audience member's phone ringtone—could expose producers and artists to costly lawsuits.

This chilling effect on the creation of live music albums undermines the ultimate purpose and goal of copyright law: the promotion and progress of the arts. By prioritizing rigid enforcement over fostering creativity, a per se standard sacrifices the broader societal benefit of preserving and disseminating cultural moments, such as the Woodstock concert, public speeches like President Barack Obama's inauguration, and popular sports events. Live recordings are more than commercial ventures; they serve as cultural artifacts, capturing the ephemeral energy of live performances and making events accessible to audiences far beyond the venue.

Properly applying the de minimis standard to sound recordings is not merely a technical adjustment but a necessity to safeguard the viability of live performances. Without this standard, the risks associated with recording live performances—especially in complex, vibrant settings like festivals—will deter producers from investing in these projects. This would leave a void in our cultural landscape, where live recordings currently play a vital role in preserving music history and connecting fans to performances.

If expanded, left unaddressed, or endorsed by the Supreme Court, the *Bridgeport Music* decision threatens to sterilize the live music genre, pushing artists into hyper-controlled environments that strip away the

authenticity of live recordings. Courts and policymakers must reaffirm the de minimis standard to protect live music albums and ensure that copyright law remains a tool for fostering creativity rather than stifling it. The alternative is a music industry increasingly dominated by litigation and risk aversion—to the detriment of artists, producers, and the public alike.

FROM MODS TO MULTIPLAYER: STRATEGIES FOR PROTECTING THE VIDEO GAME INDUSTRY FROM SECTION 230 REFORM

Sophia Simeoni[*]

Abstract

Section 230 of the Communications Decency Act of 1996 has long shielded online platforms from liability for the actions of their users. As calls for its repeal or reform grow louder across the political spectrum, debate has largely centered on social media; however, the video game industry—a significant yet often-overlooked stakeholder in this discourse—also depends heavily on Section 230 protections. From multiplayer servers to online platforms such as Steam, Twitch, and Discord, this Note examines the crucial role Section 230 plays in sustaining the video game ecosystem. It argues that repealing or significantly reforming Section 230 without accounting for the video game industry's unique reliance on it would produce serious unintended consequences: stifling innovation, heightening legal risks, and undermining community-building efforts. By exploring the legal, economic, and interactive dimensions of Section 230 within the gaming sphere, this Note urges lawmakers to strike a balance in reform that preserves Section 230's benefits to industries beyond social media.

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INTRODUCTION

This Note explores the implications of Section 230 reform on the video game industry (VGI), a multi-billion-dollar sector often overlooked in debates on content moderation and platform liability. A central statute in these debates is Section 230 of the Communications Decency Act of 1996 (CDA), which shields "provider[s] or user[s] of interactive computer service[s]" from liability for "any information provided by another information content provider."[1] Within the VGI, interactive computer services such as multiplayer game servers, app stores, and even development platforms like Roblox rely heavily on Section 230 protections to facilitate user interaction, engagement, and content distribution without facing unjust liability.[2]

Section 230 has long been controversial. Critics across the political spectrum argue that it either permits platforms to censor speech unfairly or allows them to evade responsibility for harmful content.[3] Although courts and lawmakers have long debated these questions, the implications for industries beyond social media remain underexplored. The VGI, however, depends extensively on Section 230; developers and publishers use it to shield themselves from liability for in-game communications, user-generated game modifications (mods), and community-driven content distribution. Without these protections, gaming companies could face significant legal and economic risks, including liability for user-based illegal activity that occurs in their online gaming environments.

Recent high-profile cases such as *Gonzalez v. Google* and *Twitter v. Taamneh* highlight the growing scrutiny of Section 230, but they also underscore the Supreme Court's reluctance to limit the statute without legislative action.[4] As political momentum continues to build for reform

1. 47 U.S.C. § 230(c)(1).

2. *See, e.g.*, Angelilli v. Activision Blizzard, Inc., No. 23-CV-16566, 2025 LEXIS 77244, at *13 (N.D. Ill. Apr. 23, 2025) ("If the user-created games and social aspects of Roblox were its only allegedly addictive features, Section 230 would bar all of Plaintiffs' addiction-related claims against Roblox Corp.").

3. Aaron Terr, *Why Repealing or Weakening Section 230 is a Very Bad Idea*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (Feb. 20, 2023), https://www.thefire.org/news/why-repealing-or-weakening-section-230-very-bad-idea [https://perma.cc/8CSC-P8H2].

4. Alan Z. Rozenshtein, *Interpreting the ambiguities of Section 230*, BROOKINGS (Oct. 26, 2023), https://www.brookings.edu/articles/interpreting-the-ambiguities-of-section-230/ [https://perma.cc/E8Q4-2NDP].

or repeal, this Note argues that sweeping changes could unintentionally destabilize industries beyond social media. For example, the loss or narrowing of Section 230 protections could discourage VGI entities from offering multiplayer functionality, silence community-building features like forums and voice chat, and undermine innovation in user-generated content (UGC).

The primary issue addressed in this Note is the impact of potential Section 230 reform on the VGI with an emphasis on legal, economic, and community-building consequences. Part I provides background on Section 230's history and impact. Part II examines the legal and economic implications of increased liability for developers, publishers, and platforms in the VGI. Part III analyzes the challenges of moderating gaming communities and the potential effects of reform on player expression, modding, communication, and esports. Finally, Part IV proposes policy recommendations to preserve Section 230's protections for the VGI. This Note contends that lawmakers should exercise extreme caution in any attempt to reform or repeal Section 230 due to its pervasive hand in the evolution of the internet—industries that are not typically included in the Section 230 conversation will be adversely impacted by such a change.

I. BACKGROUND

A. *A Historical Overview of Section 230*

On April 30, 1993, the World Wide Web became accessible to the public.[5] Shortly after, online platforms increasingly encountered a major issue: although they hosted millions of users, they were legally responsible for every post published on their websites.[6] Because any post could result in a lawsuit, the legal landscape of the 1990s threatened to inhibit the growth of the internet as a space for free expression.[7] In an attempt to solve this issue, the common law before 1996 effectively limited all online platforms to either forgo content moderation entirely or enforce it perfectly.[8] According to the courts, online platforms that did

5. Julian Ring, *30 Years Ago, One Decision Altered the Course of Our Connected World*, NPR (Apr. 30, 2023, 7:00 AM), https://www.npr.org/2023/04/30/1172276538/world-wide-web-Internet-anniversary#:~:text=On%20April%2030%2C%201993%2C%20something,a%20URL%20and%20hit%20return [https://perma.cc/AN8Z-9SLG].

6. Aaron Terr, *Your Guide to Section 230, the Law That Safeguards Free Speech on the Internet*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (Feb. 17, 2023), https://www.thefire.org/news/your-guide-section-230-law-safeguards-free-speech-internet [https://perma.cc/AQ54-5RN9].

7. *Id.*

8. *Department of Justice's Review of Section 230 of The Communications Decency Act of 1996*, U.S. DEP'T OF JUST., https://www.justice.gov/archives/ag/department-justice-s-review-

not moderate their content avoided liability for all of their content, yet online platforms that chose to moderate their content were liable for their remaining published content.[9] This created an all-or-nothing approach to content moderation; any attempt at moderation exposed online platforms to potential lawsuits while a complete lack of moderation allowed them to escape liability.[10] In response, Congress enacted Section 230 of the CDA.[11]

Section 230 famously states, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[12] In establishing a broader framework that aimed to overhaul existing federal communications law, Congress intended Section 230 to be an incentive for online providers to moderate any obscene or explicit content on their websites.[13] As a result, Section 230 protects "interactive computer service[s]" from liability for UGC posted to their platforms.[14] UGC is defined as "any form of content, including text, images, videos, reviews etc., that is created by users and published on online platforms."[15] At its core, Section 230 considers individual users as the publishers or speakers of UGC instead of the online platforms, and it shields online platforms from liability for their choices to limit certain UGC.[16] Despite Section 230's strong protections for online platforms, its power is not unlimited.[17] It does not shield providers that violate federal criminal law, create or distribute illegal or harmful content, or infringe upon the intellectual property rights of others.[18]

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section-230-communications-decency-act-1996#:~:text=In%20the%20years%20lead ing%20up,discretion%20to%20remove%20any%20third [https://perma.cc/K3W8-EAGJ].

9. *Id.*

10. *Id.*

11. Terr, *supra* note 6.

12. 47 U.S.C. § 230(c)(1).

13. *Telecommunications Act of 1996*, FED. COMMC'N COMM'N, https://www.fcc.gov/ general/telecommunications-act-1996 [https://perma.cc/3PFN-LA6W]; Sara L. Zeigler, *Communications Decency Act and Section 230 (1996)*, FREE SPEECH CTR. (May 23, 2023), https://firstamendment.mtsu.edu/article/communications-decency-act-and-section-230/ [https:// perma.cc/W4TL-6T7H].

14. VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW 1 (2024), https://www.congress.gov/crs-product/R46751 [https://perma.cc/XM99-EBUV]; 47 U.S.C. § 230(c)(2).

15. Amy Thomas, *User-Generated Content*, COPYRIGHTUSER.ORG, https://www.copyright user.org/understand/user-generated-content/#:~:text=User%2DGenerated%20Content%20 (UGC),be%20used%20are%20often%20unclear [https://perma.cc/MR6C-JN CZ].

16. BRANNON & HOLMES, *supra* note 14, at 2–3.

17. *Section 230*, ELEC. FRONTIER FOUND. (Mar. 28, 2025), https://www.eff.org/issues/ cda230 [https://perma.cc/8LE3-GVJA].

18. *Id.*

When Congress enacted Section 230, tens of millions of people were already online; now that number has grown to billions globally.[19] Nearly ninety-four percent of the American population is online.[20] In the absence of Section 230, the current large scale of internet activity would burden online platforms to review every user's post for legal compliance.[21] As a result, many sources credit Section 230 with facilitating the free and open internet that all online users, commercial and noncommercial, enjoy today.[22]

B. *The General Effects of Section 230*

The protections under Section 230 safeguard many different types of platforms. The statute defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."[23] Most commonly, this definition implies protections for social media, blogs, and other similar online interactive platforms.[24] However, courts have broadly interpreted "interactive computer service[s]."[25] While critics often link Section 230 to the moderation of free speech on social media specifically,[26] the impact of Section 230 extends into many other industries. One such industry is the VGI. With a population of over 3.2 billion gamers worldwide, the global VGI is valued at $184 billion.[27] In the United States alone, the VGI

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19. *Internet Users 1995-2008*, GLOB. POL'Y F., https://archive.globalpolicy.org/component/content/article/109-tables-and-charts/27519-internet-users.html [https://perma.cc/8Y3A-HHNX]; *Adoption of communication technologies, World*, OUR WORLD IN DATA https://ourworldindata.org/grapher/ict-adoption [https://perma.cc/8TNC-NLEZ].

20. Ani Petrosyan, *Internet usage in the United States - Statistics & Facts*, STATISTA (Apr. 29, 2025), https://www.statista.com/topics/2237/Internet-usage-in-the-united-states/#topicOverview [https://perma.cc/YCK2-Z2AS].

21. ELEC. FRONTIER FOUND., *supra* note 17.

22. *See, e.g.*, *id.*; Jessica Melugin, *Preserving Section 230 Is Key to Maintaining the Free and Open Internet*, COMPETITIVE ENT. INST. (June 23, 2021), https://cei.org/studies/preserving-section-230-is-key-to-maintaining-the-free-and-open-Internet/ [https://perma.cc/5WV6-NQKP]; Terr, *supra* note 6.

23. 47 U.S.C. § 230(f)(2).

24. *See id.*

25. *See* Batzel v. Smith, 333 F.3d 1018, 1030–32 (9th Cir. 2003).

26. *See, e.g.*, James Romoser, *Elon Musk, Internet Freedom, and How the Supreme Court Might Force Big Tech into a Catch-22*, SCOTUSBLOG (Nov. 6, 2022), https://www.scotusblog.com/2022/11/elon-musk-Internet-freedom-and-how-the-supreme-court-might-force-big-tech-into-a-catch-22/ [https://perma.cc/SPU4-585Z] (showing an example of Section 230 being discussed in the sole context of social media).

27. *Video Games Sector*, INT'L TRADE ADMIN., https://www.trade.gov/media-entertainment-video-games-sector [https://perma.cc/8ETU-C9S3].

contributes approximately $66 billion to the gross domestic product and generates more than 350,000 jobs,[28] yet it often goes unnoticed in discussions of Section 230.

Section 230 implicates many types of VGI services.[29] For example, massively multiplayer online games (MMOs) are a type of game that relies on a server to facilitate gameplay and in-game communications among users.[30] Not only is the server of the multiplayer game itself a type of internet "access" provided to users under Section 230, but Section 230 also similarly implicates in-game communication servers like voice chat or text chat as "access."[31] Under the circumstances of this example, Section 230 protects the company that hosts the game server; any harmful acts committed on the server may instead lead to civil liability among or between individual players.[32]

Another example of the applicability of Section 230 to the VGI is app stores or other publishers of games.[33] Some critics claim that Section 230 only protects platforms, not publishers.[34] This position misunderstands the intent of the law, which does not even mention "platforms"; Section 230 aims to shield internet services from liability for UGC while allowing them discretion over content moderation.[35] The relevant inquiry in applying Section 230 is not whether an internet service acts as a "publisher"; rather, it is whether someone other than the service created the contested content.[36] Thus, internet services retain protection even if they engage in extensive moderation of their content.[37] For example, in *Coffee v. Google*, the issue was whether or not Google was liable for the content of a game published to its Google Play Store library, and the court held that Google was not liable.[38] Video game publishers like the Google Play Store, App Store, or Steam (a major online gaming distribution platform) are not liable simply for allowing game developers to list games

28. *Id.*

29. Daniel Garces, *How the Loss of Section 230 Could Affect the Video Game Industry*, FORDHAM INTELL. PROP., MEDIA, & ENT. L. J. (Mar. 5, 2023), http://www.fordhamiplj.org/2023/03/05/how-the-loss-of-section-230-could-affect-the-video-game-industry/ [https://perma.cc/4GKX-3ESV].

30. Nick Webber, *Law, Culture, and Massively Online Multiplayer Games*, 28 INT'L REV. OF L. COMPUTS. & TECH. 45, 45 (2014).

31. *See* Garces, *supra* note 29.

32. *Id.*

33. *Id.*

34. David Greene, *Publisher or Platform? It Doesn't Matter.*, ELEC. FRONTIER FOUND. (Dec. 8, 2020), https://www.eff.org/deeplinks/2020/12/publisher-or-platform-it-doesnt-matter [https://perma.cc/2TKT-H5JK].

35. *Id.*

36. *Id.*

37. *Id.*

38. *See* Coffee v. Google LLC, No. 20-CV-03901-BLF, 2022 WL 94986, at *1 (N.D. Cal. Jan. 10, 2022).

(a form of UGC) on their platforms.[39] The publishers provide access over an internet server to multiple users; therefore, they are an interactive computer service covered by the broad scope of Section 230.

The connection of the VGI to Section 230 also extends beyond the games themselves. People often associate Section 230 with social media platforms, and even the gaming community includes many exclusive online spaces for gamers.[40] Examples include Twitch, a live-streaming service with a special focus on gaming, as well as Discord, a platform primarily used by gamers for voice, video, and text chat.[41] Another example is the Steam Community, a forum and review-based service within the Steam online distribution platform.[42] These gaming social media platforms further demonstrate why the VGI remains closely tied to the protections and implications of Section 230. Social media platforms enjoy a well-established immunity under Section 230; as a result, the aforementioned entities are not liable for any UGC created or published on their platforms.[43]

Overall, Section 230 offers essential protections for many services within the multi-billion-dollar gaming industry. It is surprising that the unintended consequences of any changes to Section 230 rarely consider its very active impact on spaces like the VGI. Nonetheless, the VGI is deeply intertwined with Section 230 and has a significant stake in any potential repeals or reforms that lawmakers consider.

C. *The Current Debate for the Reform or Repeal of Section 230*

As the last surviving provision of the CDA, Section 230 is a controversial topic of debate.[44] One point to which lawmakers seem to agree is that Section 230 should not exist in the same way as it does today, but this position spans varying concerns, proposed changes, and levels of justification.[45] Presidents from both major political parties have called for

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39. *See id.* at *7.

40. Garces, *supra* note 29.

41. *See About Discord*, DISCORD, https://discord.com/company [https://perma.cc/3X85-5ZWW]; *see also We Saved You a Seat in Chat*, TWITCH, https://www.twitch.tv/p/en/about/ [https://perma.cc/Y28D-R3PQ].

42. *See Community Activity*, STEAM, https://steamcommunity.com/ [https://perma.cc/MB3H-T6KD].

43. Brian Hickey, *Can Social Media Sites Be Held Accountable for Users' Posts?*, T. JEFFERSON UNIV. (Feb. 10, 2021), https://www.jefferson.edu/news/2021/02/can-social-media-sites-be-held-accountable-for-users-posts.html [https://perma.cc/HUH4-8BVJ].

44. *See* Reno v. ACLU, 521 U.S. 844, 885 (1997) (striking down every provision of the CDA except for Section 230).

45. Daren Bakst & Dustin Carmack, *Section 230 Reform: Left and Right Want It, for Very Different Reasons*, THE HERITAGE FOUND. (Apr. 12, 2021), https://www.heritage.org/big-tech/commentary/section-230-reform-left-and-right-want-it-very-different-reasons [https://perma.cc/747J-3D4G]; Steven R. Disharoon, *Section 230 of the Communications Decency Act Under Fire Once Again*, WOOD, SMITH, HENNING, & BERMAN (May 31, 2024),

the repeal of Section 230, and other politicians continue to aim to alter the law.[46] The conservative viewpoint regarding Section 230 revolves around the perceived bias and censorship of content on social media platforms, and the liberal viewpoint supports stricter content moderation to limit harmful content online.[47]

With one side claiming it enables censorship of views and another arguing it allows platforms to evade responsibility for harmful content, it is difficult to balance the real goal of Section 230. However, the law protects all internet services, not just major companies, and its elimination would disproportionately hurt smaller platforms and have unintended consequences for other industries.[48] Critics of Section 230 sometimes interpret its purpose differently even though it remains a key factor in the ongoing evolution of the internet.[49] Additionally, Section 230 grants platforms editorial discretion and does not require them to moderate content neutrally.[50] Because of this, Section 230 is often considered the instrument that enables "free speech on the Internet."[51]

Despite the outcry from both sides for change or repeal, the Supreme Court continues to tread carefully in Section 230 cases. A recent case, *Gonzalez v. Google,* was poised as an opportunity to overhaul Section 230 and change the internet forever—yet the Supreme Court left the Section 230 questions unanswered.[52] In *Gonzalez*, YouTube utilized computer algorithms to recommend content to users based on viewing history; as a result, Gonzalez claimed that it assisted the terrorist group ISIS in spreading its message and recruitment videos.[53] The scope of Section 230 was at issue.[54] Instead of making a judgment on Section 230, the Supreme Court favored a rationale based on the Anti-Terrorism Act, effectively dodging the Section 230 question altogether.[55] Similarly, in *Twitter v. Taamneh*, X (formerly known as Twitter) could have been responsible for "aiding and abetting" terrorism, even when the company actively tried to moderate most terrorist content from its site.[56] Just like

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https://www.wshblaw.com/publication-section-230-of-the-communications-decency-act-under-fire-once-again [https://perma.cc/LML4-63HL].

46. Mike Brand, *Section 230 and Disinformation*, MCCAIN INST. (Aug. 14, 2023), https://www.mccaininstitute.org/resources/blog/section-230-and-disinformation/#:~:text=Former%20President%20Trump%20and%20President%20Biden%20have,for%20scrapping%20Section%20230%20in%20its%20entirety.

47. Bakst & Carmack, *supra* note 45.

48. Disharoon, *supra* note 45.

49. Bakst & Carmack, *supra* note 45.

50. *Id.*

51. Terr, *supra* note 3.

52. *See* Garces, *supra* note 29; Gonzalez v. Google LLC, 143 S. Ct. 1191, 1192 (2023).

53. *See Gonzalez*, 143 S. Ct. at 1191-92.

54. *Id.*

55. *Id.*

56. Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1216–17 (2023).

in *Gonzalez*, however, the Supreme Court avoided narrowing Section 230 in favor of using the Anti-Terrorism Act as justification for its ruling.[57] These cases illustrate the Court's hesitance to alter Section 230 despite its very controversial status among political actors. The integral nature of Section 230 to the internet's existence in the United States may be the source of the Court's hesitance to speak on the issue.

Furthermore, the courts might treat Section 230 cases with caution because it safeguards free expression on the internet. Any significant reduction, modification, or repeal of its immunity could raise serious free speech concerns. Given the judiciary's consistent rulings on content moderation, it is well established that such moderation constitutes protected speech.[58] Under the current legal framework, civil liability for content moderation is virtually nonexistent.[59] Courts have repeatedly upheld this principle, rejecting numerous lawsuits from private parties challenging platforms' decisions to remove content.[60] Consequently, any legislative effort to impose greater regulation on content moderation under Section 230 might conflict with the established legal precedent linking content moderation to free speech protections for online hosts.

In the end, these concerns do not and will not stop politicians and legislators from championing the end or alteration of Section 230. Section 230 is a highly contentious topic that boils down to content moderation and free speech concerns among many entities in the media and technology law space. Because of these concerns, many entities focus on social media as the only important consideration under Section 230 when the reality is much more extensive.

II. LEGAL AND ECONOMIC IMPLICATIONS OF SECTION 230 ON THE VGI

A. *Legal Challenges for VGI Developers and Publishers*

Repealing or reforming Section 230 could expose game developers and publishers to heightened legal risks. Although Section 230 is widely criticized, it remains a crucial safeguard for many platforms within the VGI.[61] Without its protections, video game companies could face extensive legal implications in the form of liability for any UGC shared or posted on their platforms and servers, including in-game communications, modding communities, and player interactions.[62]

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57. *Id.*

58. Enrique Armijo, *Reasonableness as Censorship: Section 230 Reform, Content Moderation, and the First Amendment*, 73 FLA. L. REV. 1199, 1228 (2021).

59. *Id.*

60. *Id.*

61. *See* Casey Newton, *Everything You Need to Know About Section 230*, THE VERGE (Dec. 29, 2020, 4:50 PM), https://www.theverge.com/21273768/section-230-explained-Internet-speech-law-definition-guide-free-moderation [https://perma.cc/RC2C-8UA8].

62. *See* Romoser, *supra* note 26.

This issue is particularly pressing in the gaming community, where in-game communications are frequently characterized as "toxic" and often serve as a breeding ground for abusive, inappropriate, harassing, extremist, or predatory behavior.[63] In fact, as of July 2023, an alarming seventy-five percent of video game players across the United States, United Kingdom, and South Korea reported witnessing or experiencing such behavior firsthand.[64] To clarify, the individual users exhibit this behavior, not the video game companies. Despite this fact, the absence of Section 230 could make entities in the VGI liable for threatening or defamatory remarks made by players, independent streamers, or even apps distributed over publishing platforms like Google Play.[65]

The absence of Section 230 would pose significant challenges for the VGI, but even a narrowing of its protections could have far-reaching legal consequences. Take, for example, cases like *Gonzalez v. Google*—if predictions about the case had materialized, platforms might have lost immunity for algorithmically promoting certain content.[66] Many companies within the VGI rely on similar algorithms to filter and categorize content for users.[67] Without Section 230's safeguard against imperfect content moderation, navigating this complex landscape could become nearly impossible for the VGI.[68]

In the event that the Section 230 legal landscape becomes too complex to safely navigate, the VGI may simply remove UGC opportunities from their platforms, games, and servers to avoid liability altogether.[69] This solution is reminiscent of the early days of the internet when Section 230 did not yet exist and when the common law made interactive computer services choose between complete moderation or no moderation.[70] In *Sanders v. Acclaim Entertainment*, one court considered this idea; it balanced whether or not a company could operate with such "burdensome and impractical obligations."[71] In *Sanders*, the court decided that the only way to comply with these burdens would be to completely cease making games.[72]

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63. *See Types of Toxic Behavior Players in Select Countries Have Experienced or Witnessed While Playing Multiplayer Online Games in The Past 12 Months as of July 2023*, STATISTA, https://www.statista.com/statistics/1480875/toxic-behavior-witness-encounter-online-multiplayer [https://perma.cc/8FAN-4EQL.

64. *Id.*

65. *See* Romoser, *supra* note 26.

66. Garces, *supra* note 29.

67. *Id.*

68. *See* Romoser, *supra* note 26.

69. *See* U.S. DEP'T OF JUST., *supra* note 8.

70. *See id.*

71. Sanders v. Acclaim Ent., 188 F. Supp. 2d 1264, 1274–75 (D. Colo. 2002).

72. *Id.* at 1281 (citing Watters v. TSR, Inc., 904 F.2d 378, 381 (6th Cir. 1990)).

Overall, the legal consequences of limiting or eliminating Section 230 could be profound. Developers may be deterred from incorporating online servers, multiplayer functionality, or in-game chat into their games. Furthermore, major publishers like Steam, Google, and Apple—dominant companies in the online gaming marketplace—could be forced to radically rethink their business models.[73] In a similar way, live-streaming services such as Twitch might be burdened if they sustain services without the protections afforded by Section 230.

B. *The Economic Risks of Increased Liability*

The financial consequences of Section 230 reform for the VGI are significant. As has been discussed thus far, Section 230 laid the groundwork for a diverse digital ecosystem, allowing online entities from small personal blogs to large social media platforms to exist. By protecting individuals from being held accountable for the speech of others, Section 230 ensures that creators and hosts can engage freely without fearing lawsuits for the content shared by users.

As it stands, the law encourages platforms to act against harmful content because they are not required to over-censor or avoid moderating content in fear of liability.[74] Removing or narrowing Section 230 would reverse this effect, exposing small platforms and startups to costly litigation and forcing them to either shut down or severely limit their services.[75] Increased liability exposure would likely deter smaller developers and publishers from creating multiplayer games or enabling UGC.[76] Larger companies may survive the added costs of compliance, legal counsel, and litigation, but indie studios, which often rely on community engagement to grow their player bases, would be disproportionately affected.[77]

For example, multiplayer games often include voice and text chat systems that enable players to communicate during gameplay.[78] In real

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73. *See, e.g.*, *India Competition Watchdog to Investigate Google's Gaming App Policy*, REUTERS (Nov. 28, 2024, 9:52 AM), https://www.reuters.com/technology/india-competition-watchdog-investigate-googles-gaming-app-policy-2024-11-28/ [https://perma.cc/45D5-R33H] (suggesting that antitrust investigations at Google have altered business practices).

74. *See* U.S. DEP'T OF JUST., *supra* note 8 ("[Section 230] was meant to nurture emerging internet businesses while also incentivizing them to regulate harmful online content.").

75. Aaron Mackey & Joe Mullin, *Sunsetting Section 230 Will Hurt Internet Users, Not Big Tech*, ELEC. FRONTIER FOUND. (May 20, 2024), https://www.eff.org/deeplinks/2024/05/sunsetting-section-230-will-hurt-Internet-users-not-big-tech [https://perma.cc/VQ5L-SK5A].

76. *See id.*

77. *Id.*

78. *See* Andy McAdams, *Lawful Neutral: What MMO Gamers Need to Know About Section 230*, MASSIVELY OVERPOWERED (Mar. 3, 2023, 12:00 PM), https://massivelyop.com/2023/03/03/lawful-neutral-what-mmo-gamers-need-to-know-about-section-230/ [https://perma.cc/5LCF-D5YC].

time, these interactions are frequently unmoderated or only lightly monitored to preserve effective player communication.[79] If Section 230 protections were removed, developers could be held accountable for harmful speech, harassment, or other problematic behavior occurring on their platforms. As a result, developers or publishers might need to heavily invest in monitoring systems and legal defense mechanisms, diverting resources from game development and creative initiatives. Platforms like Steam and the Epic Games Store, which host thousands of games from a wide array of developers, could face increased scrutiny and legal risks; the cost of implementing comprehensive moderation systems across their platforms might lead to higher fees for developers or reduced accessibility for smaller entities.

Furthermore, platforms that allow modding—a practice that contributes significantly to the longevity of games like *Minecraft* and *Skyrim*—would face new challenges. Modders often introduce third-party content that may not align with legal or ethical standards.[80] Without Section 230, game publishers could be held liable for the actions or content of these independent creators, potentially leading to the restriction or elimination of modding support and UGC.

The removal of Section 230 could also impact revenue models. For example, live service games depend on continuous player interaction and monetization strategies, such as microtransactions, battle passes, and downloadable content.[81] If companies are forced to limit or disable features like in-game communication or forums, it could reduce player engagement and, consequently, revenue. Moreover, legal uncertainties may deter investors from funding innovative projects, stifling the growth of the VGI.

III. COMMUNITY AND CONTENT MODERATION IMPLICATIONS

A. *Impact on Player Communities and User-Generated Content*

Player communities are vital to the video game experience, facilitating spaces for gaming discourse on the internet. Section 230 has enabled video game communities to thrive by protecting platforms from liability for user interactions and content. Reforming Section 230 could threaten

79. *Understanding In-game Chat*, PARENT ZONE (July 17, 2023), https://parentzone.org.uk/article/game-chat [https://perma.cc/C4NZ-RSB7].

80. Amy Kang, *Legal Risks for Modding in Video Games?*, THE UNIV. OF B.C. (Nov. 24, 2023), https://iplaw.allard.ubc.ca/2023/11/24/legal-risks-for-modding-in-video-games/ [https://perma.cc/L8ZR-GPPG].

81. *Interview with Aaron Ludlow: Engaging Players and Navigating Challenges in Live Service Games*, LIVE SERV. GAMING SUMMIT, https://www.iqpc.com/events-live-service-gaming-summit/blog/interview-with-aaron-ludlow-engaging-players-and-navigating-challenges-in-live-service-games [https://perma.cc/6NEJ-7JUM].

this dynamic because companies may feel compelled to overly restrict or monitor user activity to mitigate potential legal risks.

For example, platforms like Discord rely on Section 230 to provide flexible moderation tools while empowering users to self-govern their spaces.[82] Removing these protections might force platforms to adopt blanket moderation policies, stifling community diversity and creativity. Similarly, UGC platforms like Roblox, which depend on player-created content, could face challenges in ensuring compliance without eliminating the core of their current operations and alienating their user base.[83]

The consequences could also extend to esports and other competitive gaming spaces. Esports organizations often use third-party platforms, publishers, and developers for player communication and event coordination.[84] Stricter liability standards might lead to reduced functionality or the elimination of these platforms, disrupting competitive environments and diminishing player engagement.

B. *Balancing Moderation Practices with Liability Protections*

Section 230 provides online platforms with broad immunity from liability for content posted by third-party users while allowing them to engage in content moderation without being treated as publishers.[85] This legal framework has enabled the growth of digital platforms by shielding them from excessive litigation, and the VGI is no exception. However, the delicate balance between content moderation and liability protections has become a point of significant debate.[86]

Section 230(c)(1) states that online platforms shall not be treated as the publishers of third-party content, thereby shielding them from legal claims based on such content.[87] Simultaneously, Section 230(c)(2) grants platforms the ability to moderate content in good faith without assuming

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82. *See generally Identifying and Assigning Server Moderators*, DISCORD, https://discord.com/community/identifying-assigning-moderators [https://perma.cc/9YTX-7UGH].

83. *See, e.g.*, Danny Avershal, *The Wild Rise of Roblox, In-Game Currency, and User-Generated Content*, STRIXUS (Dec. 14, 2022), https://strixus.com/entry/the-wild-rise-of-roblox-in-game-currency-and-user-generated-content-17985 [https://perma.cc/QVD7-7VBM].

84. Mo Hallaba, *The Role of Third-Party Developers in Esports and Gaming*, MEDIUM (Oct. 7, 2019), https://medium.com/@statshelix/the-role-of-third-party-developers-in-esports-and-gaming-ef944497f00d [https://perma.cc/QGL4-XPNU].

85. 47 U.S.C. § 230(c)(1)-(2).

86. Danielle Draper, *Summarizing the Section 230 Debate: Pro-Content Moderation vs Anti-Censorship*, THE BIPARTISAN POL'Y CTR. (July 5, 2022), https://bipartisanpolicy.org/blog/summarizing-the-section-230-debate-pro-content-moderation-vs-anti-censorship/ [https://perma.cc/E4QY-YLKW].

87. 47 U.S.C. § 230(c)(1).

liability.[88] This is why platforms like Twitch or Discord can ban users or remove harmful content without being liable for the content they leave published.

Section 230's dual protection is intended to encourage responsible content management while fostering free expression.[89] While Section 230 provides protections for online platforms, concerns have emerged regarding how these protections interact with content moderation policies.[90] Some critics argue that platforms engage in excessive moderation, potentially stifling "legal and legitimate" speech and leading to claims of bias.[91] This issue is particularly relevant in the video game industry, where online multiplayer games rely on UGC and interactions. The complexity of moderating UGC in online games is further underscored by research identifying challenges such as delays in moderation actions, ambiguity in defining toxic behavior, and the difficulty of applying appropriate penalties.[92] These issues can lead to inconsistent enforcement and diminished player trust in moderation systems.[93] For example, games like *League of Legends* have faced criticism for their vague behavioral standards.[94] The broad discretion granted under Section 230(c)(2) allows platforms to remove content deemed "objectionable."[95] Still, there is little oversight on whether such decisions align with consistent policies, leading some to believe that gaming communities experience arbitrary enforcement of rules.[96]

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88. *See* 47 U.S.C. § 230(c)(2).

89. *See* ELEC. FRONTIER FOUND., *supra* note 17.

90. *See id.*

91. Ash Johnson & Daniel Castro, *Fact-Checking the Critiques of Section 230: What Are the Real Problems?*, INFO. TECH. & INNOVATION FOUND. (Feb. 22, 2021), https://itif.org/publications/2021/02/22/fact-checking-critiques-section-230-what-are-real-problems/ [https://perma.cc/K6PT-ZTDQ]; *see, e.g.*, Mark Sellman, *Marvel Game 'Bans' the Words 'Free Taiwan' and 'Winnie-the-Pooh'*, THE TIMES (Jan. 5, 2025, 6:00 PM), https://www.thetimes.com/uk/technology-uk/article/marvel-rivals-video-game-blocks-words-taiwan-winnie-the-pooh-0hj3ltkgg [https://perma.cc/74HG-SPS5] (exemplifying the types of content moderation in modern games).

92. Rafal Kocielnik et al., *Challenges in Moderating Disruptive Player Behavior in Online Competitive Action Games*, 6 FRONTIERS IN COMPUT. SCI. art. 1283735 (2024), https://www.frontiersin.org/journals/computer-science/articles/10.3389/fcomp.2024.1283735/full [https://perma.cc/FLZ3-6L59].

93. Renkai Ma et al., *Transparency, Fairness, and Coping: How Players Experience Moderation in Multiplayer Online Games*, ACM DIGIT. LIBR. (Apr. 19, 2023), https://dl.acm.org/doi/full/10.1145/3544548.3581097 [https://perma.cc/P9GA-EPNZ].

94. Yubo Kou & Xinning Gui, *Flag and Flaggability in Automated Moderation*, CONF. ON HUM. FACTORS IN COMPUTING SYS. (May 7, 2021), https://doi.org/10.1145/3411764.3445279 [https://perma.cc/XM27-FMKX].

95. 47 U.S.C. § 230(c)(2)(A).

96. *See* Edward Lee, *Moderating Content Moderation: A Framework for Nonpartisanship in Online Governance*, 70 AM. U. L. REV. 913, 1039–40 (2021).

At the same time, insufficient moderation can result in the proliferation of harmful or illegal content such as misinformation, hate speech, and harassment.[97] This problem is evident in gaming platforms like Roblox, where UGC can sometimes expose players, particularly younger audiences, to inappropriate material.[98] Critics argue that platforms should bear more responsibility for failing to curb content that causes real-world harm.[99] Many gaming platforms face criticism for perceived inconsistencies in their content moderation policies, and allegations of bias or selective enforcement lead to public backlash and calls for reforming Section 230's protections to require greater transparency and accountability.[100]

Given the concerns surrounding Section 230, various legislative proposals seek to recalibrate the balance between liability protection and content moderation responsibilities.[101] Proposed reforms include requiring transparency in content moderation, narrowing immunity for certain harmful content, and differentiating between large and small platforms to ensure smaller companies are not disproportionately burdened.[102] Some lawmakers advocate for platforms to disclose their moderation policies clearly and apply them consistently, while others suggest limiting Section 230 protections for platforms that knowingly

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97. *See* CLARE Y. CHO & LING ZHU, CONG. RSCH. SERV., R46662, SOCIAL MEDIA: CONTENT DISSEMINATION & MODERATION PRACTICES (2025), https://crsreports.congress.gov/product/pdf/R/R46662#:~:text=Some%20Members%20of%20Congress%20have,%C2%A7230 [https://perma.cc/N4KH-EQK9]; Johnson & Castro, *supra* note 91.

98. *Navigating the Virtual Playgrounds: Protecting Children in Minecraft, Roblox, and Fortnite*, YK COMMC'NS, https://www.ykc.com/navigating-the-virtual-playgrounds-protecting-children-in-minecraft-roblox-and-fortnite/#:~:text=Children%20may%20be%20exposed%20to,grooming%2C%20or%20other%20unsafe%20interactions [https://perma.cc/6TJA-VQNF].

99. Johnson & Castro, *supra* note 91.

100. Mark MacCarthy, *Back to the Future for Section 230 Reform*, LAWFARE (Mar. 17, 2021), https://www.congress.gov/118/meeting/house/115561/documents/HHRG-118-IF16-20230328-SD026.pdf [https://perma.cc/N4D8-MHTP].

101. *Senate Judiciary Committee Unanimously Approves EARN IT Act*, U.S. SENATE COMMITTEE ON THE JUDICIARY (May 4, 2023), https://www.judiciary.senate.gov/press/rep/releases/senate-judiciary-committee-unanimously-approves-earn-it-act [https://perma.cc/GVH8-F8KF]; Mark R. Warner, *Legislation to Reform Section 230 Reintroduced in the Senate*, WARNER.SENATE.GOV (Feb. 28, 2023), https://www.warner.senate.gov/public/index.cfm/2023/2/legislation-to-reform-section-230-reintroduced-in-the-senate-house [https://perma.cc/6NH4-5UEB]; Justice Against Malicious Algorithms Act of 2021, H.R.5596, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/5596 [https://perma.cc/F72K-J6T2].

102. Matt Perault, *Section 230 Reform: A Typology of Platform Power*, CPI ANTITRUST CHRON. (May 2021), https://scienceandsociety.duke.edu/wp-content/uploads/CPI-Perault-low.pdf [https://perma.cc/J6SA-VW8J]; S*ection 230 — Nurturing Innovation or Fostering Unaccountability?*, U.S. DEP'T OF JUST. (June 2020), https://www.justice.gov/ag/media/1072971/dl?inline= [https://perma.cc/P29W-88L3].

allow illegal content to persist.[103] These proposals could significantly impact the gaming industry, potentially requiring companies to take a more proactive approach in curating UGC or risk increased liability. At the same time, some of these proposals raise First Amendment concerns because they would force online platforms to make specific moderation decisions that should remain within the platforms' discretion.

The challenge of balancing content moderation practices with liability protections under Section 230 continues to evolve. While the law has played a pivotal role in fostering the growth of the internet, ongoing concerns about overreach and accountability create widespread agreement that some level of reform may be necessary.[104] Any changes to Section 230 should carefully navigate the fine line between preserving free speech in moderation decision-making and ensuring responsible platform governance, particularly within gaming communities where freedom, creativity, and safety should all coexist.

IV. POLICY RECOMMENDATIONS FOR SECTION 230 REFORM

Given the significant legal, economic, and community-building implications of Section 230 for the VGI, policymakers should adopt a balanced approach to reform. The gaming industry's reliance on UGC, real-time player interactions, and community-driven content could make broad repeals or sweeping modifications to Section 230 particularly risky. Social media-focused reforms could inadvertently discourage innovation, increase liability risks, and force companies to restrict user engagement, fundamentally altering the gaming ecosystem. Instead of a one-size-fits-all approach, legislative efforts should account for the distinct ways gaming platforms operate and ensure that any changes to Section 230 do not stifle the participatory nature of online gaming. A tailored approach to reform should consider the following policy recommendations:

1. Industry-Specific Carve-Outs to Preserve Gaming Protections

To prevent unintended consequences for the VGI, lawmakers should consider:

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103. Press Release, Office of Sen. Brian Schatz, *Schatz, Thune Reintroduce Legislation To Strengthen Rules, Transparency For Online Content Moderation, Hold Internet Companies Accountable*, U.S. SENATOR FOR HAWAI'I BRIAN SCHATZ (Feb. 16, 2023), https://www.schatz.senate.gov/news/press-releases/schatz-thune-reintroduce-legislation-to-strengthen-rules-transparency-for-online-content-moderation-hold-Internet-companies-accountable [https://perma.cc/H7WG-J5C6].

104. Stephen Engelberg, *Twenty-Six Words Created the Internet. What Will It Take to Save It?*, PROPUBLICA (Feb. 9, 2021, 2:00 PM), https://www.propublica.org/article/nsu-section-230 [https://perma.cc/7XHT-4HVM].

a. Explicit exemptions for in-game communication tools, modding platforms, and user-generated assets to ensure that liability protections extend to these essential elements of the VGI.
b. A distinct liability standard for interactive entertainment companies, recognizing that moderation in gaming environments differs from content moderation on traditional social media platforms.
c. Safeguards against unnecessary restrictions that could discourage developers from enabling UGC in fear of legal exposure. By differentiating gaming platforms from traditional content-hosting services, lawmakers can protect the gaming industry's participatory culture while still ensuring accountability for harmful content.

Rather than applying a one-size-fits-all approach to Section 230 reform, legislators should create tailored carve-outs that recognize the unique impact of Section 230 on different platforms, including the VGI. Most Section 230 discourse focuses on social media platforms; therefore, lawmakers should avoid accidental collateral effects on other industries by creating specific carve-outs for their intentions.[105] Given that video game companies host interactive entertainment rather than traditional social media discourse, an industry-specific exemption could maintain protections for in-game communication, modding communities, and multiplayer functionality.

2. General Clarification on How Content Moderation Interacts with the First Amendment

Possible reforms for Section 230 could include clarification on the interplay between content moderation and the First Amendment. A major criticism of Section 230 is that it allows platforms to engage in inconsistent or biased content moderation.[106] At the same time, the First Amendment protects non-governmental decisions to moderate content on platforms as a form of free speech.[107]

In *Moody v. NetChoice, LLC*, the Supreme Court instructed that First Amendment protections are afforded to social media platforms when they

105. *See, e.g.*, Romoser, *supra* note 26.

106. *See* Elliot Harmon, *No, Section 230 Does Not Require Platforms to Be "Neutral*," ELEC. FRONTIER FOUND. (Apr. 12, 2018), https://www.eff.org/deeplinks/2018/04/no-section-230-does-not-require-platforms-be-neutral [https://perma.cc/M6WA-KK7A] ("Online platforms are within their First Amendment rights to moderate their online platforms however they like, *and* they're additionally shielded by Section 230 for many types of liability for their users' speech").

107. Moody v. NetChoice, LLC, 603 U.S. 707, 716 (2024) ("[P]latforms make choices about what third-party speech to display and how to display it . . . and in making millions of those decisions each day, produce their own distinctive compilations of expression.").

engage in expressive activity, such as curating and moderating third-party content.[108] In other words, platforms' editorial decisions (including how they compile and present third-party speech) constitute their own expression and are thus protected under the First Amendment.[109] One potential reform could involve defining the scope of Section 230 immunity to better clarify the protection of platforms' editorial discretion in the context of content moderation.

Additionally, the Court in *Moody* rejected the idea that the government could compel platforms to host or amplify certain viewpoints to "balance" the marketplace of ideas because such actions would infringe on the platforms' First Amendment rights.[110] This suggests that lawmakers should tread carefully on this issue. To prevent constitutional challenges, any reforms should avoid imposing government obligations on private platforms to carry specific content. Overall, reforms would need to carefully navigate the tension between fostering a diverse and open internet and protecting the rights of platforms as private entities engaged in expressive activities protected under the First Amendment.

3. Distinguishing Between Active Platform Control and Third-Party Content

To prevent gaming companies from being unfairly exposed to liability for third-party content, lawmakers should clarify that:

a. Hosting player-generated mods, chat functions, and community content does not constitute editorial control.
b. Platforms should only be held liable when they actively shape, promote, or modify user content in ways that materially alter its message.
c. Courts should distinguish between facilitating content (e.g., providing tools for modding) and actively curating content (e.g., promoting specific user submissions as platform-endorsed material).

A core tenet of Section 230 is that platforms should not be treated as publishers of third-party content.[111] However, courts have struggled to define when a platform crosses the line from passive host to active

108. *See id.* at 742–43 (explaining that Texas's regulation of content moderation policies inherently creates a speech preference that the First Amendment forbids).

109. *See id.*

110. *Id.* at 719, 741.

111. 47 U.S.C. § 230(c)(1).

participant in content creation.[112] Lawmakers should clarify that hosting user-created mods, chat functions, and community forums does not equate to editorial control. This would prevent gaming companies from being unfairly exposed to liability while ensuring accountability for truly harmful actions.

4. Incentivizing Voluntary Moderation Efforts

Lawmakers should create incentives for voluntary moderation, such as:

a. Providing legal safe harbors for platforms that invest in good-faith content moderation efforts (e.g., artificial intelligence (AI) content detection, human review teams, and proactive community guidelines enforcement).
b. Encouraging industry self-regulation, allowing gaming companies to collaborate on best practices rather than imposing rigid government mandates.

Instead of penalizing platforms for moderating content, reforms should encourage best practices by providing safe harbor protections for good-faith moderation. If something is common practice in the VGI, gaming companies that invest in AI-driven moderation tools, community reporting systems, and content filtering mechanisms should not face increased liability risks. This would ensure that companies have the flexibility to balance the VGI's ability to moderate content freely with player safety without fear of liability.

CONCLUSION

As policymakers debate the future of Section 230, it is essential to consider its broader implications beyond social media. While much of the public discourse around Section 230 immunity focuses on social media platforms, Section 230 is equally foundational to large industries such as the VGI. Online multiplayer games, modding communities, and digital distribution platforms rely heavily on UGC and real-time interactions, both of which benefit from the protections afforded by Section 230. Ill-conceived reforms that impose excessive liability on online platforms could disrupt these ecosystems, fundamentally altering how players engage with games and with each other.

112. *See, e.g.*, Lunney v. Prodigy Servs. Co., 94 N.Y. 2d 242, 250-51 (N.Y. 1999) (deciding whether a website was a "publisher" because of the defamatory nature of pre-populated answers that users were required to input in the course of using the platform).

From player-created levels and in-game economies to streaming and community discussions on gaming forums, the VGI thrives on user-driven interaction. Independent developers and large studios alike rely on UGC to enhance their games, foster community engagement, and drive innovation. Features such as user-created mods, in-game chat, and content creation would be at risk if platforms were forced to assume responsibility for every piece of content that their users share. Without the protections of Section 230, companies might preemptively restrict user expression, implement overly aggressive moderation policies, or eliminate certain interactive features altogether to mitigate legal risk. This could lead to a chilling effect on creativity, innovation, and the participatory culture that defines modern gaming.

While reforms to Section 230 may be necessary to enhance accountability and transparency, any changes should be carefully crafted to avoid unintended consequences for the gaming industry and constitutional rights. Overly broad legal restrictions could discourage investment in new gaming technologies, limit the development of AI-driven gameplay experiences, and create significant compliance burdens for smaller studios. Moreover, lawmakers should account for the unique challenges of moderating content in interactive, fast-paced gaming environments. Unlike static social media posts, which can often be managed with preemptive tools like word filters, in-game interactions happen in real time. This makes it far more difficult for platforms to screen harmful content in advance without also suppressing some of the spontaneous communications that commonly occur during gameplay.

A calculated, industry-informed regulatory approach is crucial to preserving the vibrancy of online gaming while addressing legitimate concerns about platform responsibility. Lawmakers should work collaboratively with game developers, industry stakeholders, and digital rights advocates to craft nuanced policies that protect the interests and rights of platforms and users without dismantling the nature of gaming. By doing so, lawmakers can ensure that the legal framework governing online content remains adaptable and supportive of both creative expression and responsible platform governance. With thoughtful and balanced reform, the VGI can continue to flourish as a space for innovation, community building, and interactive storytelling while maintaining Section 230's safeguards against harm.

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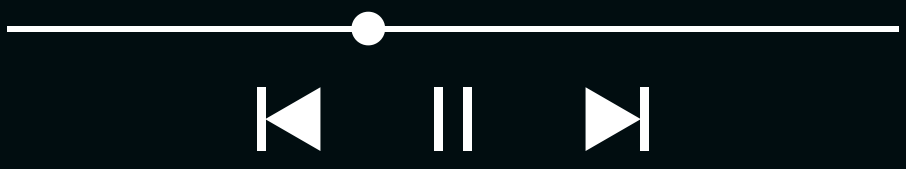

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