



# BELMONT ENTERTAINMENT LAW JOURNAL

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HEDGING THEIR BETS: HOW THE STATES SHOULD BALANCE COMPETING INTERESTS TO AVOID CONGRESSIONAL REGULATION IN THE LEGALIZATION OF SPORTS GAMBLING

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*Featuring: Derek Crownover, Lynn Morrow, Tim Warnock, Katie Jelen, Scott Safford, Jennifer Turnbow, and Alex Heiche*



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# BELMONT ENTERTAINMENT LAW JOURNAL

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VOLUME 1

2021

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We are proud to publish the first volume of the Belmont Entertainment Law Journal. We hope this journal lives on to include many voices and serve as a resource in the practice of entertainment law. The members of this student-managed journal wrote these scholarly notes, thoughtfully selected notes for publication, and diligently edited each one.

In February 2020, the Entertainment Law Journal hosted its first symposium, which focused on how the music industry will evolve in the new decade. We thank all the lawyers and music industry professionals who contributed their time and intellect to this event. The transcript of this event is featured in this volume. In February 2021, we co-hosted our second symposium with the United States Copyright Office and look forward to the publication of the transcript from that symposium in next year's journal.

The Entertainment Law Journal greatly appreciates the administrative staff at Belmont, who assisted us in making this journal possible. We especially thank Professor Loren Mulraine, who nurtured and guided us through this process. We also thank the founding members of this journal, Sydney Johnson, Raven Lockwood, Hanna Piantek, and Diamond Stewart.

Lastly, I would personally like thank the officers and staff who were instrumental in laying the foundation of this organization. I am so grateful for Nicholas Clark, Colin Quinn, and John Grant for leading our editing process, Madison Romine for establishing our digital platforms, and Matthew Jafari for creating an incredibly educational symposium. All of the officers thank our staff for their detailed editing work. We look forward to reading future Belmont Entertainment Law Journal publications!

Klare Essad  
*Editor-in-Chief*



HEDGING THEIR BETS: HOW THE STATES SHOULD  
BALANCE COMPETING INTERESTS TO AVOID  
CONGRESSIONAL REGULATION IN THE LEGALIZATION  
OF SPORTS GAMBLING

JACK GRANT

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**INTRODUCTION**

Sports have always captivated the hearts and minds of the American public. Professional and amateur sports leagues such as the NFL, NBA, MLB, NHL, and the NCAA have become so engrained in American culture that even certain holidays are associated with the sporting events that accompany them – a Detroit Lions game on Thanksgiving, college bowl games on New Year’s Day, and a slate of NBA marquee matchups on Christmas Day. Americans use fandom to express their identity and personal pride by wearing team gear, attending games, and creating superstitions believed to impact the outcome of their team’s games.

Many Americans have found a way to be even more invested in the outcome of sporting events: sports gambling. Both sports and gambling have a long history in this country of providing an escape

from everyday life. Logically, people have sought to combine these two interests, adding extra intrigue to any sporting event, regardless of who is playing. Until recently, however, most sports gambling was conducted illegally. In 2015, the American Gaming Association estimated that Americans gambled \$150 billion illegally on sporting events.<sup>1</sup> In contrast, Americans only gambled \$4.2 billion legally on sports in Nevada, the only state in which it was legal at the time.<sup>2</sup>

In 2018, when the Supreme Court held that the Professional and Amateur Sports Protection Act (“PASPA”) violated the Tenth Amendment of the United States Constitution, individual states were left to decide whether to legalize sports gambling within their borders.<sup>3</sup> Since that landmark decision, more than twenty states have legalized sports gambling in some capacity, and several others are projected to legalize the practice in the next few years.<sup>4</sup> While sports in general have a positive connotation in American culture, sports gambling carries with it images of bribery, extortion, and organized crime. In deciding whether to legalize sports gambling, each state must consider how to address such issues to preserve the interests of professional sports leagues, the financial interests of the states, and the integrity of the sports in general.

Though the Supreme Court held that PASPA was unconstitutional under a Tenth Amendment states’ rights theory, the discussion could transition to the issue of interstate commerce as more states legalize sports betting, giving Congress the appropriate constitutional authority to pass new legislation.<sup>5</sup> With so many states eager to implement sports gambling institutions and the emergence of online sports gambling becoming a major vehicle of interstate betting, it is inevitable that Congress will eventually be able to exercise its constitutional right to regulate interstate commerce in passing new legislation that could heavily regulate or even ban sports gambling once again.<sup>6</sup>

Individual states need to consider this potential congressional intervention when constructing their own legislation

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<sup>1</sup>*Memo to President Elect Trump Details Casino Gaming Industry’s Priorities*, AMERICAN GAMING ASSOCIATION (Dec. 20, 2016), <https://www.americangaming.org/new/memo-to-president-elect-trump-details-casino-gaming-industrys-priorities/>.

<sup>2</sup>Dustin Gouker, *Nevada Sportsbook Took Record \$4.2 Billion In Wagers In 2015*, LEGAL SPORTS REPORT (Feb. 4, 2016), <https://www.legalsportsreport.com/7902/nevada-record-sports-betting-2015/>.

<sup>3</sup>*Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

<sup>4</sup>Darren Rovell, *Where is Sports Betting Legal? Projections for all 50 States*, ACTION (Feb. 4, 2021), <https://www.actionnetwork.com/news/legal-sports-betting-united-states-projections>.

<sup>5</sup>U.S. CONST. amend. X.

<sup>6</sup>U.S. CONST. art. I, § 8, cl. 3.

regarding sports gambling in order to safeguard against federal regulation of the industry. Thus, the individual states must balance the desires of professional and amateur sports leagues, the dangers that gambling poses to the integrity of sports, the growth of interstate activity, the influence of online platforms, and the financial interests of the state itself as they draft their own sports gambling legislation in order to stave off federal regulation from Congress.

This article will explore the impact of various external pressures on state sports gambling legislation. Section II of this article will examine the background of sports gambling in this country, touching on the fear of “fixing” games, the history of corruption and bribery in the world of sports, and the policy reasons behind Congress’s passage of PASPA. Section III will discuss the relevant case law that ultimately led to the Supreme Court striking down PASPA as unconstitutional. Section IV will examine the sports betting systems of two of the earliest states to pass such legislation, Delaware and New Jersey, and will argue that states need to balance various competing interests when drafting sports betting legislation. Finally, Section V will analyze the current state of sports gambling and project where the industry is moving.

## **I. THE FIX IS IN: INTEGRITY AND CORRUPTION IN AMERICAN SPORTS**

In November of 2019, the NFL suspended injured Arizona Cardinals defensive back Josh Shaw for one year for betting on multiple games, including Cardinals games.<sup>7</sup> When asked to comment, Commissioner Roger Goodell stated:

The continued success of the NFL depends directly on each of us doing everything necessary to safeguard the integrity of the game and the reputations of all who participate in the league. At the core of this responsibility is the longstanding principle that betting on NFL games, or on any element of a game, puts at risk the integrity of the game, damages public confidence in the NFL, and is forbidden under all circumstances.<sup>8</sup>

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<sup>7</sup> Greg Joyce, *Cardinals’ Josh Shaw suspended indefinitely for betting on NFL games*, NEW YORK POST (Nov. 29, 2019), <https://nypost.com/2019/11/29/cardinals-josh-shaw-suspended-indefinitely-for-betting-on-nfl-games/>.

<sup>8</sup> *Id.*

Even though Shaw is on injured reserve and an NFL investigation found no evidence that any games were compromised, the NFL took this opportunity to express the severity with which it treats any violation of the integrity of its game.<sup>9</sup> While this punishment seems harsh for a player that has no direct impact on the outcome of any games, it demonstrates the historic aversion of professional and amateur sports leagues to sports gambling and the paramount importance of integrity in sports.

Though the actual examples of fixing games are few and far between, these examples leave a lasting impact on sports fans and create a lack of confidence in the integrity of the sport going forward. One of the most famous examples of this type of tampering is the case of the 1919 Chicago “Black Sox.”<sup>10</sup> In that scandal, eight members of the Chicago White Sox were accused of intentionally losing the 1919 World Series in exchange for money from a gambling syndicate.<sup>11</sup> Despite acquittal in a public trial in 1921, the scandal damaged the integrity of Major League Baseball (MLB) to such an extent that the MLB appointed its first commissioner, charged with restoring the integrity of the league, and permanently banned all eight players from professional baseball.<sup>12</sup>

Though there has been very little evidence that fixing actually occurs in major sports, high-profile examples, such as the Black Sox’s scandal, Pete Rose’s expulsion for betting, and George Steinbrenner’s suspension for paying a gambler for information, created a growing concern about the influence of gambling on college and professional leagues.<sup>13</sup> As fixing games remained a great concern, leagues became more wary of the access gamblers have to athletes.<sup>14</sup> To obtain insider information, gamblers would reach out to athletes and referees through various avenues in an attempt to establish a relationship with them.<sup>15</sup> These relationships were concerning because most of these gambling figures had ties to

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<sup>9</sup> *Id.*

<sup>10</sup> Fred Mitchell, *Flashback: Story of 1919 Black Sox scandal still resonates*, CHICAGO TRIBUNE (Jul. 5, 2015), <https://www.chicagotribune.com/sports/white-sox/ct-flashback-buck-weaver-black-sox-spt-0705-20150703-story.html>.

<sup>11</sup> *Id.*

<sup>12</sup> Evan Andrews, *The Black Sox Baseball Scandal*, HISTORY, <https://www.history.com/news/the-black-sox-baseball-scandal-95-years-ago> (last updated Oct. 22, 2018).

<sup>13</sup> Bill Brubaker, *Gambling and Sports A Growing Concern*, THE WASHINGTON POST (Jul. 5, 1990), <https://www.washingtonpost.com/archive/sports/1990/07/15/gambling-and-sports-a-growing-concern/a4039224-a501-49d6-8537-04ccf1a3e066/>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

organized crime and brought suspicion of bribery and extortion.<sup>16</sup> To this day, sports leagues still have an interest in distancing themselves from organized crime for the safety of their players and the integrity of their sport as a whole.

Though most states had outlawed gambling by the end of the nineteenth century, some states began to relax these prohibitions starting in the 1920s and 30s.<sup>17</sup> During the Great Depression, states such as New Jersey allowed betting on horse races to increase state revenue.<sup>18</sup> Throughout the 1950s and 60s, gambling restrictions loosened even further as states allowed churches and nonprofit organizations to host bingo games, and by 1975, thirteen states had started running state lotteries.<sup>19</sup> In 1998, Congress enacted the Indian Gaming Regulatory Act, allowing the development of casinos on Native American lands in order to promote economic development and tribal self-sufficiency.<sup>20</sup> The development of these casinos later led to the construction of legalized casino gambling by many states.<sup>21</sup> However, sports gambling remained illegal outside of Nevada.<sup>22</sup>

Fearing that states would legalize sports gambling, and in response to growing concerns about the deteriorating integrity of professional sports, Congress enacted PASPA in 1992.<sup>23</sup> PASPA made it illegal for states to sponsor, license, or authorize sports lotteries or any other type of sports betting on professional or amateur games. The legislation stated:

It shall be unlawful for--

- (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or
- (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,

a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly

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<sup>16</sup> *Id.*

<sup>17</sup> *Murphy v. NCAA*, 138 S. Ct. 1461, 1468-69 (2018).

<sup>18</sup> *Id.* at 1469.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Professional and Amateur Sports Protection Act, 28 U.S.C.A. § 3702 (1992).

(through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.<sup>24</sup>

In passing this legislation, the Senate reasoned that the problem of sports gambling required federal action because the “moral erosion it produces cannot be limited geographically.”<sup>25</sup> The Senate believed that if one state legalized sports gambling, it would likely entice others to do so as well.<sup>26</sup> The Senate Report adopted the view that sports employ thousands of Americans and are an important part of the lives of tens of millions of Americans while providing the youth with role models and idols.<sup>27</sup> Therefore, it was argued that gambling has no place in sports, professional or amateur.<sup>28</sup> The Report also noted that the government should not be in the business of encouraging people to gamble.<sup>29</sup>

These considerations prompted the Senate to pass PASPA in order to maintain the integrity of sports and protect America’s youth from the dangers of gambling addiction. When PASPA was adopted, however, Nevada allowed sports gambling in casinos and Delaware, Montana, and Oregon hosted sports lotteries and allowed sports pools.<sup>30</sup> PASPA grandfathered in these activities, allowing them to continue despite the new legislation.<sup>31</sup> This grandfather provision gave each of these states, especially Nevada, a head start in sports gambling once PASPA was repealed.<sup>32</sup> Additionally, a separate provision allowed New Jersey to legalize sports gambling only in Atlantic City as long as it did so before January 1, 1994.<sup>33</sup> The state failed to act in the allotted time and subsequently became the leading state in the fight to legalize sports gambling.<sup>34</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> S. REP. NO. 102-248, at 5, reprinted in 1992 U.S.C.C.A.N. 3553, 3556.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 3557.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 3556.

<sup>30</sup> *Id.* at 3562.

<sup>31</sup> *Id.* at 3563.

<sup>32</sup> Patrick Moran, *Anyone’s Game: Sports-Betting Regulations after Murphy v. NCAA*, CATO INSTITUTE (Mar. 11, 2019), <https://www.cato.org/publications/legal-policy-bulletin/anyones-game-sports-betting-regulations-after-murphy-v-ncaa>.

<sup>33</sup> Mark Brnovich, *Betting on Federalism: Murphy v. NCAA and the Future of Sports Gambling*, 2018 CATOSCTR 247, 249 (2018).

<sup>34</sup> *Id.*

## II. BETTING THE HOUSE: NEW JERSEY'S FIGHT TO LEGALIZE SPORTS GAMBLING

Although Congress was able to enact PASPA due to a growing concern for the integrity of professional sports and the protection of America's youth, public support for legal sports gambling grew until finally New Jersey voters pushed the issue into the judicial branch by amending their state constitution. Though PASPA left an exception that allowed New Jersey to legalize sports gambling in Atlantic City, the state did not act within the requisite time period and lost its exception privilege.<sup>35</sup> However in 2011, New Jersey voters amended their state constitution to allow the legislature to authorize sports gambling.<sup>36</sup> The major professional sports leagues and the NCAA then sued under PASPA.<sup>37</sup> In *National Collegiate Athletic Association v. Christie (Christie I)*, New Jersey argued that PASPA unconstitutionally infringed upon the State's sovereign authority to end its sports gambling ban, asserting that Congress may not "commandeer" a state's exercise of its lawmaking authority.<sup>38</sup>

The Supreme Court first addressed anti-commandeering in *New York v. United States*.<sup>39</sup> In that case, the Court held it was unconstitutional to require a State to either "take title" to radioactive waste or regulate it according to congressional standards.<sup>40</sup> The Court traced the rule of anti-commandeering back to the basic structure of government established under the Constitution, empowering Congress to regulate individuals, not states.<sup>41</sup>

While the Supremacy Clause of the United States Constitution states that the Constitution and the federal laws made pursuant to the Constitution take priority over any conflicting state laws, the federal government may not exceed the powers granted to it under the Constitution.<sup>42</sup> The Constitution only endows the federal government with a "limited" and "defined" set of enumerated powers, while reserving most other powers to the states.<sup>43</sup> As a consequence, "States retain broad autonomy in structuring their

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<sup>35</sup> *Id.*

<sup>36</sup> *NCAA v. Christie*, 926 F. Supp. 2d 551, 554 (D.N.J. 2013).

<sup>37</sup> *Id.* at 556.

<sup>38</sup> *Id.* at 567.

<sup>39</sup> *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408 (1992).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 177.

<sup>42</sup> U.S. CONST. art. VI, cl. 2.

<sup>43</sup> *Gibbons v. Ogden*, 22 U.S. 1, 6 L. Ed 23 (1824).

governments and pursuing legislative objectives.”<sup>44</sup> Therefore, unless Congress is acting according to one of its enumerated powers, such as regulating interstate commerce, it is commandeering a power that is reserved to the states.<sup>45</sup>

Later, in *Printz v. United States*, the Court also applied the theory of anti-commandeering to invalidate a law that required state and local law enforcement officers to perform background checks in connection with applications for handgun licenses.<sup>46</sup> Here, the Court stated that the federal government may not “command any of the State’s officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”<sup>47</sup> New Jersey argued that this principle invalidated PASPA because the federal statute restricted the authorization of sports gambling, commandeering the state legislative process.<sup>48</sup> The district court and the Third Circuit disagreed, citing that PASPA does not impose any affirmative commands.<sup>49</sup>

In response to the Third Circuit’s decision in *Christie I*, New Jersey passed a new law that was intended to repeal former regulations on some sports gambling in the state.<sup>50</sup> In *National Collegiate Athletic Ass’n v. Governor of New Jersey (Christie II)*, the Third Circuit once again ruled New Jersey’s law violated PASPA, stating that PASPA preempted the type of partial repeals New Jersey was trying to accomplish because the repealers acted as an authorization by the state.<sup>51</sup> While the Third Circuit admitted that PASPA has its critics, the court affirmed that the primary remedy is “through the repeal or amendment of PASPA in Congress.”<sup>52</sup>

Finally, in 2018, the Supreme Court, in a 6-3 decision, held that PASPA was unconstitutional.<sup>53</sup> In *Murphy v. National Collegiate Athletic Ass’n*, the Court stated that PASPA violates the anti-commandeering rule because it “unequivocally dictates what a state legislature may and may not do [...] state legislatures are put under the direct control of Congress.”<sup>54</sup> The Court, in *Murphy*, acknowledged that Americans “have never been of one mind about

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<sup>44</sup> *Shelby Cty. v. Holder*, 570 U.S. 529, 133 S. Ct. 2612, 2623 (2013).

<sup>45</sup> *New York*, 505 U.S. 144.

<sup>46</sup> *Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365 (1997).

<sup>47</sup> *Id.* at 900.

<sup>48</sup> *See NCAA v. Christie*, 926 F. Supp. 2d 551, 551 (D.N.J. 2013).

<sup>49</sup> *Id.*

<sup>50</sup> *NCAA v. Governor of N.J.*, 799 F.3d 259, 262 (3rd Cir. 2015).

<sup>51</sup> *See NCAA v. Governor of N.J.*, 799 F.3d 259.

<sup>52</sup> *Christie*, 926 F.Supp. 2d at 555.

<sup>53</sup> *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

<sup>54</sup> *Id.* at 1478.

gambling, and attitudes have swung back and forth.”<sup>55</sup> On one hand, sports gambling can be seen as highly addictive and especially attractive to the youth who have a strong interest in sports.<sup>56</sup> Similarly, the Court noted that sports gambling “encourages people of modest means to squander their savings and earnings.”<sup>57</sup> The fear that sports gambling is highly addictive and detrimental to the financial standing of citizens who fall victim to the adage, “money won is twice as sweet as money earned,” supports the federal restriction of sports gambling at the heart of PASPA.<sup>58</sup> However, the Court also noted that legalizing sports gambling would create an enormous revenue potential for the states and strike a devastating blow to the illegal sports gambling business.<sup>59</sup> Additionally, above board sports gambling would provide easier methods of discovering evidence of any corruption in the sporting world.

While the Court acknowledged that the anti-commandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage, it ruled that state authorization is not a preemption because PASPA does not regulate private actors and instead acts as a direct command to the states.<sup>60</sup> Additionally, while Congress may exert pressure on states to act in accordance with congressional objectives or require states to *consider* a federal regulatory scheme, the Court emphasized that the distinction in this instance is that PASPA required the states to *adopt* the regulatory scheme.<sup>61</sup>

Although the ruling in *Murphy* invalidated PASPA and left the states free to legalize sports gambling, the Court warned that its decision in this particular case rested heavily on the interpretation of the meaning of the word “authorization.”<sup>62</sup> Therefore, while the drafting process of PASPA may have failed, Congress could conceivably draft a new statute with more restrictive language that could avoid confrontation with the anti-commandeering doctrine. With the back and forth nature of public opinion regarding sports gambling, the potential that one point-shaving scandal could trigger enough outcry for Congress to revisit its prohibition has to factor

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<sup>55</sup> *Id.* at 1468.

<sup>56</sup> *Id.* at 1469.

<sup>57</sup> *Id.* at 1484.

<sup>58</sup> Mark Brnovich, *Betting on Federalism: Murphy v. NCAA and the Future of Sports Gambling*, 2018 CATOSCTR 247, 247 (2018).

<sup>59</sup> *Murphy*, 138 S. Ct. at 1484.

<sup>60</sup> *See Murphy*, 138 S. Ct. 1461.

<sup>61</sup> *Id.* at 1479.

<sup>62</sup> *Id.* at 1473.

into the states' individual legislative process in legalizing sports gambling within its borders.

While the ruling in *Murphy* allowed states to legalize sports gambling, the Court made it clear that its ruling was on very narrow grounds.<sup>63</sup> Therefore, in passing their own legislation legalizing sports gambling, states must safeguard against the deterioration of the integrity of professional sports and protect the youth from the temptation of gambling addiction so as not to trigger further congressional investigation into the issue of federal regulation or prohibition of sports gambling.

### **III. WORKING AGAINST THE SPREAD: COMPARING DELAWARE AND NEW JERSEY'S APPROACHES TO SPORTS GAMBLING LEGISLATION**

Although New Jersey and Delaware were two of the first states to legalize sports gambling within their borders, these two states have created significantly different structures to implement sports gambling. While Delaware took a reserved approach that allows for sports betting only in a few designated locations throughout the state and does not permit mobile betting, New Jersey opened betting windows in both casinos and racetracks throughout the state and encouraged mobile betting. The differences in these two approaches demonstrate the balance each state must strike among the desire to generate as much revenue as possible, the looming concern of congressional intervention based on interstate commerce grounds, and the protection of the integrity of sporting events conducted in the state. Each state must strike this balance and construct its laws based on the individual state's interests.

#### **A. Playing it Safe: Delaware's Reserved Approach to Sports Gambling**

Though New Jersey's determination to legalize sports gambling forced the Supreme Court to weigh in and invalidate PASPA, Delaware, not New Jersey, was actually the first state to legalize sports gambling following the Supreme Court's ruling in *Murphy*.<sup>64</sup> However, the methods Delaware implemented in order to

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<sup>63</sup> See *Murphy*, 138 S. Ct. 1461.

<sup>64</sup> Rick Maese, *Delaware is the first new state to bet on sports gambling, but it might not pay off*, THE WASHINGTON POST (Jun. 5, 2018),

regulate sports betting have left them far behind many other states, especially New Jersey, in terms of betting volume and overall revenue generated.<sup>65</sup> Despite Delaware's slow start in the sports betting world, its application and regulation may offer more stability than other more established state systems by protecting the integrity of sporting events and limiting the reach of sports gambling to within the state's borders.

Delaware started its legal sports gambling, including single-game wagers and future bets, in June of 2018, becoming the first state to offer single-game betting outside of Nevada.<sup>66</sup> The state of Delaware has a long history of gaming and horse racing and in 1976, the state lottery instituted a parlay system for betting on the result of multiple sporting events.<sup>67</sup> Though this system only lasted one year, it was enough to earn Delaware protection in the form of a partial exclusion from the federal ban that was implemented more than fifteen years later.<sup>68</sup>

Since Delaware had an established system using the state lottery to execute its parlay betting in the past and much of the infrastructure remained in place, the state legislature simply expanded that system to single-game betting once the decision to legalize sports gambling was returned to the states.<sup>69</sup> While its preparedness uniquely positioned Delaware to be the first state to legalize sports gambling, its lottery system has both advantages and disadvantages in terms of revenue produced and integrity of sporting events. Though the addition of single-game betting has increased the overall amount of money placed on sports bets in the state since legalization, the parlay bets that the state lottery was previously offering have a higher risk and produce thirty percent profit margins while single-game bets only generate a five percent margin.<sup>70</sup> While sports gambling is a billion dollar industry, the amount won by the house, or the state through its lottery, is only five percent, and that five percent must be divided among the casinos, the racetracks, and the state.<sup>71</sup>

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<https://www.washingtonpost.com/news/sports/wp/2018/06/05/delaware-first-to-bet-on-sports-gambling-but-it-might-not-pay-off/>.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Delaware Sports Betting*, LEGAL SPORTS REPORT, <https://www.legalsportsreport.com/delaware/> (last visited March 1, 2021).

<sup>68</sup> *Id.*

<sup>69</sup> Maese, *supra* note 64..

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

Delaware has yet to introduce mobile and online betting, contributing to its lack of revenue production and its secondary position in comparison to other states that have legalized sports betting. In order to place a bet in Delaware, a bettor must travel to one of the three physical casinos within the state and place a bet live and in person.<sup>72</sup> Also, in order to cash in a winning bet, a bettor must either cash in the bet at one of the three physical casinos or mail in the winning ticket to the Delaware State Lottery.<sup>73</sup> Though Delaware is a small state, with a population of just over 950,000 covering just less than 2,500 square miles, the inconvenience of the in-person requirement for betting and cashing in has played a role in the limitations of Delaware's sports gambling industry.<sup>74</sup>

While Bill Fasy, president of Delaware Park, one of the three physical casinos located in Delaware, recognized that "it's important to be first to market [...] as a promotional opportunity," he and Denis McGlynn, the CEO of Dover Downs, another physical casino in the state, have stated that the smaller margin in single-game betting may actually have a negative impact on the sports gambling industry within the state.<sup>75</sup> These fears have held true in the months since Delaware expanded its sports gambling to include single-game bets. Though the state did see an initial revenue increase in late 2018, the state's total revenue numbers have decreased.<sup>76</sup> Delaware's revenue report showed that the September handle fell from \$16.8 million in 2018 to \$10.2 million in 2019; October fell from \$14.7 million to \$10.8 million; November fell from \$16.3 million to \$8.8 million; and December fell from \$13.6 million to \$11.1 million.<sup>77</sup> These steadily decreasing figures are a reflection of the impracticality involved in Delaware's strict state sponsored lottery program.<sup>78</sup>

Additionally, Delaware forbids betting on Delaware-based teams within its borders, further protecting the integrity of sporting events that occur in the state.<sup>79</sup> This extra precaution plays an

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<sup>72</sup> Josh Applebaum, *Your Complete Guide to Delaware Legal Sports Betting [June 2019]*, ACTION (Jun. 5, 2019), <https://www.actionnetwork.com/legal-online-sports-betting/delaware>.

<sup>73</sup> *Id.*

<sup>74</sup> *Quickfacts: Delaware*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/DE> (last visited Feb. 15, 2020).

<sup>75</sup> Maese, *supra* note. 64.

<sup>76</sup> *US Sports Betting Revenue 2020*, THE LINES, <https://www.thelines.com/betting/revenue/> (last visited Jan. 13, 2020).

<sup>77</sup> *Id.*

<sup>78</sup> *Sports Pick Delaware Sports Lottery*, DELAWARE LOTTERY GAMES, <https://www.delottery.com/Sports-Lottery> (last visited Jan. 13, 2020).

<sup>79</sup> Applebaum, *supra* note 72.

important role in ensuring public confidence in local sporting events because the citizens of Delaware are presumably more protective of in-state teams to which they have a personal connection. Whether simply being a fan of the local team, knowing players on the team, or being an alumnus of the school for which the teams play, citizens usually have an extra sense of investment in local teams. By restricting the practice of betting on in-state sporting events, Delaware goes one step further in protecting the integrity of professional and collegiate sports to specifically protect the interests of its own citizens in the integrity of those events.<sup>80</sup>

## **B. Going All In: The High Risk and High Reward in New Jersey's System**

Known as the flagship state in the fight for legalized sports gambling, New Jersey celebrated its judicial victory over PASPA by quickly implementing a system of state sponsored sports gambling that rivals that of Nevada in terms of overall revenue generated.<sup>81</sup> Though New Jersey's system has proven fruitful thus far, it risks future congressional regulation based on interstate commerce due to its reliance on mobile betting and an influx of New York residents flooding across the border to place bets.<sup>82</sup>

New Jersey sports betting launched in 2018 in direct response to the Supreme Court decision in *Murphy* and quickly became one of the most robust betting markets in the country.<sup>83</sup> The state holds legal sportsbooks at both casinos and racetracks throughout the state, as well as allowing online betting through mobile apps.<sup>84</sup> Though New Jersey did not have a strong connection to sports gambling prior to its judicial fight, its failure to take the proper steps to apply the grandfather clause of PASPA sprung the state's crusade against the federal legislation and made New Jersey the poster child of legalized sports gambling in the aftermath of the Court's decision.<sup>85</sup> Racetracks and casinos in Atlantic City opened

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<sup>80</sup> *Id.*

<sup>81</sup> Nick Corasaniti, *Move Over Nevada: New Jersey is the Sports Betting Capital of the Country*, THE NEW YORK TIMES (Jun. 29, 2019), <https://www.nytimes.com/2019/06/29/nyregion/nj-sports-betting.html>.

<sup>82</sup> *Id.*

<sup>83</sup> Steve Petrella, *New Jersey Online Sports Betting: Best Sites, Offers, Promo Codes, Apps, FAQ [January 2020]*, ACTION, <https://www.actionnetwork.com/legal-online-sports-betting/new-jersey-online-sports-betting-sites-faq> (last visited Feb. 7, 2020).

<sup>84</sup> *Id.*

<sup>85</sup> *Murphy v. NCAA*, 138 S. Ct. 1461, 1465-66 (2018).

betting windows within days of Governor Murphy signing the formal regulations into laws and mobile betting apps in the state followed soon after.<sup>86</sup>

In New Jersey, both residents and nonresidents can place wagers either in person at a casino, at a racetrack, or on their phone, so long as they are within the state's borders.<sup>87</sup> With less restrictions on how people can place bets, New Jersey has seen an incredible boom in revenue generated through sports gambling. In the twelve months since the legalization of sports betting, New Jersey took in more than \$2.9 billion in sports bets, resulting in nearly \$200 million in revenue for multiple sportsbooks.<sup>88</sup> The state averaged nearly \$366 million in handle in 2019, as opposed to Delaware, which recorded its best month for handle in November of 2019 with just \$17 million.<sup>89</sup>

While New Jersey does require bettors to be present in the state to make a bet, online betting is difficult to police and there is no restriction on out-of-state residents who come into the state for the sole purpose of placing bets on sporting events.<sup>90</sup> While nearby states, such as New York, have subsequently legalized in-person betting in a few locations, New Jersey has essentially turned into "Vegas East," as out of state residents come across the border to place their bets.<sup>91</sup> Although a February 2020 study showed that New York is losing over \$200 million in revenue by not legalizing sports gambling, Governor Cuomo has "drug his feet for online sports betting legislation" until the economic downturn due to the global COVID-19 pandemic.<sup>92</sup> Gov. Cuomo now hopes the addition of online betting will make more money for the state.<sup>93</sup> More than ninety percent of New Jersey's betting handle is done online and since New Jersey requires only physical presence in the state to place a bet, those who actually go to a casino or racetrack to place their bets may not be New Jersey residents.<sup>94</sup> Both online betting and betting from citizens of different states implicates interstate

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<sup>86</sup> Corasaniti, *supra* note 81.

<sup>87</sup> Petrella, *supra* note 83.

<sup>88</sup> Corasaniti, *supra* note 81.

<sup>89</sup> Ryan Butler, *Delaware Sports Betting Revenue Slide Shows Need for Mobile*, GAMBLING.COM (Jan 7, 2020), <https://www.gambling.com/news/delaware-sports-betting-revenue-slide-shows-need-for-mobile-2177500>.

<sup>90</sup> Corasaniti, *supra* note 81.

<sup>91</sup> Rovell, *supra* note 4.

<sup>92</sup> Darren Rovell, *New York Online Sports Betting: Gov. Cuomo Fully On Board, But Wants Lottery Model*, ACTION (Jan. 6 2021), <https://www.actionnetwork.com/legal-online-sports-betting/new-york-online-sports-betting-gov-andrew-cuomo-fully-on-board-will-address-next-week>.

<sup>93</sup> *Id.*

<sup>94</sup> Corasaniti, *supra* note 81.

commerce and leaves the state open to renewed congressional regulation.

Although New Jersey's system of sports betting has less restrictions than most other states, the state did take steps to protect the integrity of sporting events, especially collegiate sports, within the state. For example, there is no betting on college teams from New Jersey allowed, even if the game is being played in a different state.<sup>95</sup> While Rutgers is currently the only FBS football team in the state, there are many Division I basketball programs within the state, including Fairleigh Dickinson, Princeton, and Seton Hall, all of which frequent the annual NCAA March Madness tournament.<sup>96</sup> Similarly, no betting on games that occur in the state of New Jersey are allowed. This restriction includes neutral-site games such as college football bowl games and NCAA Tournament games.<sup>97</sup>

The addition of sports betting in New Jersey not only created more revenue for the state but also benefitted the state in other ways. For example, casinos and racetracks in New Jersey argued vehemently in favor of the legalization of sports gambling, stating that the addition of sports betting windows would be a much-needed "shot of adrenaline," that would bring in more stable, year-round crowds.<sup>98</sup> Although these industries still face their share of problems, Jeffrey Gural, the operator of the sportsbook at the Meadowlands racetrack, is encouraged that the addition of sports betting will help keep his racetrack and others afloat, stating "I don't know how much longer I could have kept that place open losing millions of dollars a year just because I love harness racing."<sup>99</sup> Additionally, sports betting has caused an increase in visitors to Atlantic City.<sup>100</sup> With this added tourism, the state not only generates revenue on the sports bets themselves but also through added patronage of restaurants and hotels.<sup>101</sup> While all this added revenue is desirable, the state's system leaves itself susceptible to congressional regulation under the guise of interstate commerce.

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<sup>95</sup> Petrella, *supra* note 83.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Corasaniti, *supra* note 81.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

### C. Setting the Line: Analyzing the Benefits and Drawbacks of Both Systems

Delaware constructed its state-sponsored sports gambling plan to protect the integrity of sports and avoid interstate commerce issues; however, these restrictions have limited the amount of revenue the state gains through the industry compared to other states. Conversely, New Jersey's less restrictive plan has successfully generated much more revenue than other states, but the plan leaves open the possibility of future congressional intervention on interstate commerce grounds.

Although the physical requirements of Delaware's system may be inconvenient in terms of betting volume and total revenue, these requirements could be essential moving forward in order to prevent sports gambling from falling victim to renewed federal regulation or prohibition under an interstate commerce argument. Among Congress's enumerated powers found in Article I of the Constitution is the ability to "regulate commerce with foreign Nations, and *among the several States*, and with the Indian Tribes" and this power has been construed to give Congress considerable latitude in regulating conduct and transaction.<sup>102</sup> Congress's power to regulate commerce "among the several states" is rather broad.<sup>103</sup> Chief Justice Marshall, in *Gibbons v. Ogden*, stated that the phrase "among the several states" was selected in the framing of the Constitution to exclude "the *exclusively internal* commerce of a state"<sup>104</sup> (emphasis added). Under this view, Congress has broad discretion to determine whether an activity implicates interstate commerce and regulate the activity if it does.<sup>105</sup>

In *Christie I*, the Third Circuit addressed the interstate commerce aspect of sports gambling.<sup>106</sup> The court first acknowledged that wagering and national sports are economic activities, reasoning that wagers are just a contingent contract involving two or more parties that have mutual rights to the money involved and the operation of national sports by leagues provides "for-profit entertainment."<sup>107</sup> The Third Circuit also asserted that professional and amateur sporting events "substantially affect

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<sup>102</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>103</sup> *Gibbons v. Ogden*, 22 U.S. 1, 6 L. Ed 23 (1824).

<sup>104</sup> *Id.* at 195.

<sup>105</sup> *Gibbons*, 22 U.S. 1, 6 L. Ed 23 (1824).

<sup>106</sup> *NCAA v. Christie*, 926 F. Supp. 2d 551 (D.N.J. 2013).

<sup>107</sup> *NCAA v. Governor of N.J.*, 730 F.3d 208, 225 (3rd Cir. 2015).

interstate commerce,” stating that sports leagues are comprised of thousands of clubs and members across the United States.<sup>108</sup> The court even cited the Senate Report in support of PASPA that stated “thousands of Americans earn a . . . livelihood in professional sports. Tens of thousands of others participate in college sports.”<sup>109</sup> Finally, the Third Circuit concluded that placing wagers on sporting events also substantially affects interstate commerce since Americans gamble up to \$500 billion on sports each year and the effects of this gambling “will plainly transcend state boundaries and affect a fundamentally national industry.”<sup>110</sup>

In that case, New Jersey argued that PASPA was overbroad and reached even limited betting activity that could not possibly affect interstate commerce.<sup>111</sup> New Jersey used the example that PASPA would prohibit “a casual bet on a Giants-Jets football game between family members.”<sup>112</sup> The Third Circuit disagreed, citing that PASPA only prohibited gambling “‘schemes’ and only those carried out ‘pursuant to law or contract.’”<sup>113</sup> The court then reasoned that even if PASPA affected these types of bets, the congressional action is still permissible pursuant to Article I of the Constitution if the activity “in the aggregate has a substantial affect on interstate commerce.”<sup>114</sup> Given the reach of gambling, sports, and sports betting, the court ruled that even this type of activity, when combined with conduct by other “similarly situated” individuals, affects interstate commerce and is therefore susceptible to congressional regulation under a claim of interstate commerce.<sup>115</sup> Delaware’s prohibition on mobile and online betting limits the effect the state’s sports gambling industry on interstate commerce in such a way that could stave off further federal regulation in the future.

Conversely, New Jersey’s sports betting system is almost completely reliant on online and mobile betting with over ninety percent of the state’s total betting handle coming from mobile and online betting.<sup>116</sup> Additionally, New Jersey’s total handle numbers are bolstered by a significant number of citizens from other neighboring states, mainly New York, who come into New Jersey

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<sup>108</sup> *Id.* at 224.

<sup>109</sup> *Id.* at 225.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 232.

<sup>114</sup> U.S. CONST. art. I, § 8, cl. 3; *Id.* at 226.

<sup>115</sup> *NCAA v. Governor of N.J.*, 730 F.3d at 226.

<sup>116</sup> *Petrella*, *supra* note 83.

for the sole purpose of placing legal bets.<sup>117</sup> This reliance on mobile and online betting has made New Jersey's system easier to use and more attractive to the average bettor. The average bettor does not spend a lot of time at a casino or racetrack and certainly, in the state of Delaware, the average bettor does not spend a lot of time at one of only three designated places in the state in which a citizen can place a sports bet. By implementing mobile apps and permitting online betting, New Jersey's sports betting system encourages even the most moderate of bettors to spend some time evaluating the lines for upcoming games in their spare time.<sup>118</sup>

The ease of online and mobile betting creates a concern with regard to potential congressional intervention on interstate commerce grounds. First, the flooding of citizens into New Jersey from surrounding states for the sole purpose of betting on sports inherently makes sports betting an interstate commerce issue. When citizens from New York come into New Jersey and use their money to bet on sports in New Jersey, multiple states are implicated in a commercial transaction. These transactions are, therefore, interstate commerce and can be regulated by Congress through its enumerated powers under the United States Constitution.<sup>119</sup> Furthermore, this type of interstate commerce is hard to police absent a state law that makes it illegal for a citizen to bet on sporting events in the state of New Jersey without New Jersey identification. The New Jersey government, however, did not want to implement this type of law because there is so much revenue to be gained through both out-of-state citizens placing bets in New Jersey and the added revenue from tourism.<sup>120</sup> The New Jersey legislature, instead, made physical presence in the state of New Jersey the only prerequisite to betting on sports in the state.<sup>121</sup> While physical presence in New Jersey would seem to at least be an attempt at safeguarding against interstate commerce regulation, the requirement does not stop the flow of interstate commerce.<sup>122</sup> Money from New York and other states is still being transferred across state lines and therefore Congress could deem the commercial activity of sports betting as interstate commerce and exercise its Constitutional power in regulating it.

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<sup>117</sup> Corasaniti, *supra* note 81.

<sup>118</sup> Petrella, *supra* note 83.

<sup>119</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>120</sup> Corasaniti, *supra* note 81.

<sup>121</sup> Petrella, *supra* note 83.

<sup>122</sup> NCAA v. Governor of N.J., 730 F.3d 208, 226 (3rd Cir. 2015).

States also need to consider and defend the integrity of the sporting events themselves to foster confidence in the results of these events, prevent scandal, and avoid potential federal regulation. Both Delaware and New Jersey's sports gambling systems take extra precautions to protect the integrity of sporting events and the confidence of sports fans in the results of these events. By establishing a state-run sports lottery, Delaware's government maintains direct control over the implementation and everyday practice of gambling on sporting events. In fact, one of the first things shown on the Delaware Sports Lottery website is the disclaimer: "The Delaware Sports Lottery is sponsored solely by the Delaware State Lottery and is neither associated with nor authorized by any professional or collegiate sports organization."<sup>123</sup> By clearly stating that the state lottery has no affiliation with any professional or collegiate sports organization, Delaware is hoping to distance the practice of sports gambling within its borders from the concern of corruption and bribery that initially led to the passage of PASPA.<sup>124</sup> While this disclaimer alone does not quell the concerns as a whole, its prominent presence on the lottery website demonstrates the state's dedication to conducting sports gambling in an appropriate, measured manner, consistent with the desires of Congress and the goals of professional and amateur sports leagues.

Though New Jersey chose to allow casinos and racetracks to conduct sports betting windows rather than funnel the industry through a state lottery system, it implemented many of the same rules regarding the integrity of sporting events as Delaware.<sup>125</sup> Despite conducting the sports betting industry through entirely different methods, both Delaware and New Jersey's legislatures recognized the need to protect the integrity of sports within their jurisdiction.<sup>126</sup> If public opinion on sports betting were to sour in the future, Congress, using interstate commerce as its principle justification, could place additional regulations on and even renew a total prohibition of sports gambling.<sup>127</sup> Though public opinion of sports gambling is currently trending more toward acceptance, a single point shaving scandal can change the national perception and trigger congressional review.<sup>128</sup> Given the flippant nature of public

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<sup>123</sup> *Sports Pick Delaware Sports Lottery*, *supra* note 78.

<sup>124</sup> S. REP. NO. 102-248, at 6, reprinted in 1992 U.S.C.C.A.N. 3553, 3557.

<sup>125</sup> Petrella, *supra* note 83.

<sup>126</sup> *Id.*

<sup>127</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>128</sup> Brubaker, *supra* note 13.

opinion regarding sports gambling in the past, states need to consider the potential of congressional intervention when forming sports gambling systems in order to preserve the individual states' right to legalize and regulate the industry as they so choose.

#### **IV. A FUTURES BET: WHERE IS SPORTS GAMBLING NOW AND WHERE IS IT HEADED**

Public opinion on and participation in sports gambling has never been higher than it is right now. CBS Sports announced an official partnership with the William Hill Sports Book; NFL pregame shows have started posting both the total and the official line for their games and giving betting advice and predictions to viewers; ESPN's SportsCenter now features a very popular segment called Bad Beats, in which the host, Scott Van Pelt, reviews games from throughout the week in which a certain bet was busted in unlikely and often incredible fashion.<sup>129</sup>

In the past, the national sports media refrained from discussing sports betting and focused only on the actual results of the games.<sup>130</sup> The media's acceptance and willingness to discuss sports betting reflects the nation's more positive view on sports gambling, despite the threat it poses to the integrity of sports in general. Companies such as FanDuel and DraftKings, which went public in April of 2020, have thrived in the aftermath of the Supreme Court's decision and, with so much additional revenue now available through sports gambling, everyone wants a piece of the pie.<sup>131</sup> Penn National Gaming, a regional gambling operator, is so profitable it expanded its operation and purchased Barstool Sports, a popular digital sports publisher.<sup>132</sup> FanDuel, DraftKings, BetMGM, and other betting hubs have created mobile apps for

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<sup>129</sup> CBS Sports Communications, *CBS Sports, William Hill Sports Book announce official partnership*, CBS SPORTS (Feb. 10, 2020), <https://www.cbssports.com/general/news/cbs-sports-william-hill-sports-book-announce-official-partnership/>; Justin Terranova, *Scott van Pelt: Legal sports betting will change TV, but not my show*, NEW YORK POST (May 17, 2020), <https://nypost.com/2018/05/17/espn-anchor-talks-bad-beats-changes-in-sports-betting/>.

<sup>130</sup> Brian Steinberg, *Media's Big Bet: Sports Wagers Will (Hopefully) Keep Viewers Watching TV*, VARIETY (Jun. 12, 2019), <https://variety.com/2019/biz/features/media-companies-interactive-tv-sports-betting-1203240102/>.

<sup>131</sup> *US Sportsbook and Casino Team Sponsorship Tracker*, LEGAL SPORTS REPORT, <https://www.legalsportsreport.com/sports-betting-deals/> (last visited Feb. 13, 2020).

<sup>132</sup> Peter Kafka, *A casino company is buying Barstool Sports in a \$450 million deal*, VOX (Jan. 29, 2020), <https://www.vox.com/recode/2020/1/29/21113130/barstool-sports-penn-national-deal-dave-portnoy-chemin>.

gambling on the go.<sup>133</sup> These apps routinely check the location of the device to ensure the user is located in a state where the practice is legal.<sup>134</sup> Also, some of these apps include a “reality check notification” which will notify the user when he or she has been on the site for an extended period of time or has bet an inordinate amount of money in a short period of time.<sup>135</sup>

In November of 2020 alone, New Jersey and Nevada posted sports betting handles of \$931.6 million (a new national record) and 609.6 million respectively.<sup>136</sup> Additionally, Pennsylvania, Indiana, Colorado, and Tennessee all posted November 2020 handles of over \$100 million dollars.<sup>137</sup> All of these increases in monthly handles also came despite a multitude of canceled sporting events due to the COVID-19 crisis. However, all of this positive momentum behind sports gambling at the moment could easily dissipate in the wake of a betting-related scandal that fosters doubt in the integrity of the results of sporting events. With all of these various entities investing in the future of sports gambling, the need to avoid congressional intervention and protect the integrity of sports is becoming more important for the states to consider.

While public opinion on sports gambling has been through its ups and downs over the last century, the sports gambling industry has never been as prevalent as it is today. From Super Bowl betting pools, to March Madness competitions, betting on major sporting events has almost become a social exercise rather than a method of making money. While betting seemed deplorable in the past, it is now a regular topic of conversation and a method of demonstrating one’s sports knowledge. Barring a major scandal that undermines the integrity of sports through betting, it seems as though sports betting has become, and will continue to be, socially acceptable and a topic of conversation around the water cooler.

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<sup>133</sup> *The 7 Best Mobile Sports Betting Apps In The US*, SPORTSHANDLE, <https://sportshandle.com/mobile-sportsbooks/> (last visited Jan. 8, 2021).

<sup>134</sup> Jessica Welman, *Five Big Questions About FanDuel PA Launch*, PLAY PENNSYLVANIA (last updated Feb. 8, 2020), <https://www.playpennsylvania.com/common-fanduel-pennsylvania-questions/>.

<sup>135</sup> *Responsible Gaming: User Limits*, FANDUEL SPORTSBOOK, <https://account.pa.sportsbook.fanduel.com/responsible-play> (last visited Jan. 8, 2021).

<sup>136</sup> Peter Amsel, *Nevada’s sportsbooks enjoy record revenue in November despite casino slump*, CALVINAYRE.COM (Dec. 29, 2020), <https://calvinayre.com/2020/12/29/casino/nevada-casino-sportsbooks-record-revenue-november/>; Steven Stradbrooke, *New Jersey sports betting smashes handle record with \$931.6m in November*, CALVINAYRE.COM (Dec. 14, 2020), <https://calvinayre.com/2020/12/14/business/new-jersey-sports-betting-handle-record-november/>.

<sup>137</sup> Ian St. Clair, *Colorado Sports Betting Sets Another Record With November Handle*, PLAY COLORADO, <https://www.playcolorado.com/colorado-sports-betting-record-november-handle/> (last updated Feb. 10, 2021).

## V. CONCLUSION

The legalization of sports gambling has created a ripple effect throughout professional and amateur sports as states, media outlets, and betting companies try to take advantage of the additional revenue stream and satiate a newfound public demand for live betting information during games. With so many different entities having a stake in the legalization of sports gambling, it is imperative that individual states safeguard their right to establish sports gambling systems. To avoid renewed congressional intervention, states must balance several factors, such as the integrity of sporting events, the amount of revenue generated through different betting avenue, and the interstate effects of the commercial activity itself.

Throughout the past century, public opinion on sports betting has ebbed and flowed. However, since the Supreme Court held PASPA to be unconstitutional and returned the right to legalize and regulate sports betting to the states, public opinion on the matter and the national media's willingness to acknowledge sports gambling have increased drastically. While the American public has come to accept sports gambling, a single, major betting scandal could sour public opinion and alert Congress that there is a need to regulate the industry on the federal level. Though the Supreme Court deemed PASPA to be unconstitutional on a theory of states' rights, the methods of implementation of sports betting in individual states has given rise to a potential interstate commerce argument for congressional oversight.

States need to be wary of congressional regulation and take steps to avoid such regulation by limiting the commercially interstate aspects of sports betting. However, limiting the interstate aspects of sports betting will have a negative impact on the revenue the states can generate through the industry. Additionally, states need to protect the integrity of sporting events in order to maintain both fans and bettors' confidence in the results of the events. Protecting the integrity of amateur and professional sports will also stave off attempts at congressional regulation, as Congress will not feel the need to step in and regulate the practice unless public opinion demands it. Though big money is on the success of sports gambling in America, when Congress is on the other side, it's wise to hedge your bets.

MISUNDERSTOOD: WHY THE EMERGENCE OF RAP  
MUSIC IN TODAY’S SOCIETY REQUIRES THE SUPREME  
COURT TO RECONSIDER WHETHER A STATEMENT  
AMOUNTS TO A “TRUE THREAT,” NOT PROTECTED BY  
THE FIRST AMENDMENT.

DIAMOND STEWART

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INTRODUCTION

*“Mainstream music has become about how well a track’s  
message resonates with the typical person.”<sup>138</sup>*

Chance the Rapper, Meek Mill, Yo Gotti, 21 Savage, and Fat Joe have repeatedly encouraged the United States Supreme Court to hear a case involving the young rapper, Jamal Knox. Knox was convicted of making terroristic threats against officers in a well-renowned song titled “F\*\*\* the Police.”<sup>139</sup> After the court’s ruling in *Jamal Knox v. Pennsylvania*, many famous rap artists continue to express their discontent with the way courts have analyzed whether rap lyrics amount to a true threat. The controversies began in 2012 when Jamal Knox was arrested in Pittsburgh on both gun and drug charges as the result of a routine traffic stop.<sup>140</sup> After his arrest, and while charges were pending, Knox recorded the song “F\*\*\* the

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<sup>138</sup> Clara McNulty-Finn, *The Evolution of Rap*, HARV. POL. REV. (Apr. 10, 2014, 9:18 PM), <http://harvardpolitics.com/covers/evolution-rap/> (“[E]ven as artists were carefully constructing their persona, there was honesty in their lyrics. Poppa Sims, a lyricist associated with the major record label Bad Boy Records, emphasized that in writing openly about violence and drugs, ‘90s hip-hop artists forced listeners to consider the ‘underlying reasons behind these things . . . it was survival.’”).

<sup>139</sup> Adam Liptak, *Hip-Hop Artists Give the Supreme Court a Primer on Rap Music*, N.Y. TIMES (Mar. 6, 2019), <https://www.nytimes.com/2019/03/06/us/politics/supreme-court-rap-music.html>.

<sup>140</sup> *Commonwealth of Pennsylvania v. Jamal Knox*, No. 3 WAP 2017, J-83-2017 (Pa. Aug. 21, 2018).

Police.”<sup>141</sup> Knox then posted the song to YouTube and Facebook.<sup>142</sup> Upon discovering the videos, the prosecutors in the case believed the lyrics to be terroristic threats and created with an intent to intimidate.

Moreover, numerous officers testified that the song caused them fear because many of the lyrics mentioned them by name.<sup>143</sup> Knox tried to defend his position with the court by explaining that he did not make the video with the intent to upload it.<sup>144</sup> Instead, he was a rapper who “has to put on an image,” and he adopted that persona into his song.<sup>145</sup> Despite this argument, on March 6, 2013, the Pennsylvania trial court held that Knox’s song was a “true threat” against police officers and not protected under the First Amendment.<sup>146</sup>

In 2018, the Pennsylvania Supreme Court affirmed Knox’s conviction based in part on the rap lyrics he posted on YouTube and Facebook.<sup>147</sup> The Supreme Court of Pennsylvania found that Knox’s speech amounted to a “true threat,” and he could be found criminally liable without violation of his First Amendment rights.<sup>148</sup> Disappointed with the court’s decision to affirm Knox’s conviction based on his lyrics, other music artists in the rap industry argue that this genre is a form of art that people should not take literally.<sup>149</sup> This frustration has prompted their desire to convince the United States Supreme Court to take up their fellow rapper’s First Amendment challenge to his conviction.<sup>150</sup>

Knox’s lawyers argued that Knox did not intend any harm or threats against the officers and, essentially, the court should view him differently than his rap persona.<sup>151</sup> 21 Savage, Meek Mill, and other famous hip-hop artists filed an amicus curiae brief to the United States Supreme Court asking the court to view rap music as “artistic” and “political expression.”<sup>152</sup> This appeal was an attempt to prompt the Supreme Court to take up the First Amendment

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<sup>141</sup> Liptak, *supra* note 2, at 6.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 11.

<sup>146</sup> Ariane de Vogue, *Supreme Court Declines to Take Up First Amendment Case Brought by Rap Artist*, CNN Supreme Court Reporter (Apr. 15, 2019),

<https://www.cnn.com/2019/04/15/politics/supreme-court-jamal-knox-first-amendment/index.html>.

<sup>147</sup> *Commonwealth of Pennsylvania v. Jamal Knox*, *supra* note 3, at 7.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 7, 22.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 10.

<sup>152</sup> *Id.* at 9.

question and redefine the true threat doctrine. Many artists believed that the song was “a political statement that no reasonable person familiar with rap music would have interpreted [to be] a true threat of violence.”<sup>153</sup> Moreover, the Pennsylvania Supreme Court reasoned that Knox intended to threaten and decided not to delve into whether a reasonable person would understand his statements as threats.<sup>154</sup> Despite multiple artists’ attempts to persuade the United States Supreme Court to take up Knox’s First Amendment challenge to his conviction, the Supreme Court Justices declined to hear Knox’s case.<sup>155</sup> As a result, there is a lingering ambiguity as to whether the First Amendment should provide protections for this type of speech in particular contexts.

Historically speaking, rap music was a form of expression for artists to talk about their success, violence, crime, and life in poverty.<sup>156</sup> Scholars state that “rap was the story of the ghetto life and the anthem of gangsters, which prevented hip-hop from joining pop and rock in the mainstream.”<sup>157</sup> Furthermore, rap music stems from a background built in the fight against social and economic oppression.<sup>158</sup> This genre serves as a platform for artists to voice their opinions regarding inequalities and the disparities between racial lines.<sup>159</sup> Due to the background in which rap music developed, most of the music in this particular genre consists of violent references, fictitious descriptions of criminal conduct, exaggeration, or even desires for revenge.<sup>160</sup> The court in *Commonwealth of Pennsylvania v. Jamal Knox* acknowledged that rap music stems from a unique background because of the history and social environment from which it arose.<sup>161</sup>

Before the rise of social media and the internet, artists’ success depended on creating connections with their fan base, typically by capturing a music label’s attention.<sup>162</sup> Rap artists were

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<sup>153</sup> de Vogue, *supra* note 8.

<sup>154</sup> Liptak, *supra* note 2.

<sup>155</sup> Jack Denton, *The State v. Hip-Hop*, Pacific Standard (Apr. 26, 1998), <https://psmag.com/social-justice/the-state-v-hip-hop>.

<sup>156</sup> McNulty-Finn, *supra* note 1.

<sup>157</sup> *Id.*

<sup>158</sup> Becky Blanchard, *The Social Significance of Rap & Hip-Hop Culture*, ETHICS OF DEVELOPMENT IN A GLOBAL ENV’T (Jul. 26, 1999), [https://web.stanford.edu/class/e297c/poverty\\_prejudice/mediarace/socialsignificance.htm](https://web.stanford.edu/class/e297c/poverty_prejudice/mediarace/socialsignificance.htm).

<sup>159</sup> Becky Blanchard, *The Social Significance of Rap & Hip-Hop Culture*, ETHICS OF DEVELOPMENT IN A GLOBAL ENV’T (Jul. 26, 1999), [https://web.stanford.edu/class/e297c/poverty\\_prejudice/mediarace/socialsignificance.htm](https://web.stanford.edu/class/e297c/poverty_prejudice/mediarace/socialsignificance.htm).

<sup>160</sup> *Commonwealth of Pennsylvania v. Jamal Knox*, *supra* note 3, at 22.

<sup>161</sup> *Id.*

<sup>162</sup> McNulty-Finn, *supra* note 1.

continually forced to portray themselves in a particular “persona” because that was the character they had to be to thrive.<sup>163</sup> Essentially, rappers adopt a stage persona, which is usually different from who they are as an individual, to appeal directly to the audience of this particular genre.<sup>164</sup> This music genre, centered on individualism, gave each artist a sense of freedom and the chance to tell their own story.<sup>165</sup>

Today, rap music has emerged and is continually used as a non-traditional mode of artistic expression.<sup>166</sup> Due to the rise of the internet and social media, the definition of what it means to be a “mainstream” rapper has significantly changed today.<sup>167</sup> Likewise, rap music today has transitioned into “how well a song’s message resonates with the typical person” because when songs are more widely known, they correspondingly reach a larger audience and fanbase.<sup>168</sup> Furthermore, rap lyrics are continually presented without proper contextualization in courtroom settings. Courts are frequently allowing the use of rap lyrics as evidence in criminal cases. For example, New Jersey admitted rap lyrics into evidence at trial in almost 80% of cases.<sup>169</sup> When rap lyrics are presented in the courtroom, attorneys use them as character evidence to prove “motive and intent.”<sup>170</sup> As a result, artists of this particular genre are more susceptible to criminal prosecutions than artists in other music genres.<sup>171</sup>

Additionally, scholars who express their disdain toward the use of rap lyrics as character evidence in criminal cases believe that “there is a distinct difference between listening to a song in a certain context and having the words read aloud in a courtroom” because they are “not being understood in their artistic context.”<sup>172</sup> Academics believe that the lyrical evidence cases are “direct precursors to the most recent true threat cases, like Jamal Knox’s,” and set a precedent for allowing rap lyrics to be brought into court as evidence and for subsequent “non-artistic interpretations” by

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<sup>163</sup> *Commonwealth of Pennsylvania v. Jamal Knox*, *supra* note 3, at 22.

<sup>164</sup> *Id.* at 23.

<sup>165</sup> Blanchard, *supra* note 20.

<sup>166</sup> *Id.*

<sup>167</sup> McNulty-Finn, *supra* note 1.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Deborah C. England, *Rap Lyrics in Evidence: Is it a Crime to Rhyme?*, Criminal Defense Lawyer (2021), <https://www.criminaldefenselawyer.com/resources/rap-lyrics-evidence-is-it-a-crime-rhyme.htm>

<sup>172</sup> Denton, *supra* note 17.

courts as a consequence.<sup>173</sup> These prosecutions have become widely common across courts. For instance, in 2014 alone, around 1,500 people were charged under federal law for making threatening communications.<sup>174</sup> Consequently, Jamal Knox's case is not the only case proposing this question amid the controversy between rap lyrics and the true threat doctrine.

Similarly, Daniel Hernandez, more commonly known by his rap name, "Tekashi 6ix9ine," recently agreed to act as a witness for the prosecution against two members in the Bloods gang.<sup>175</sup> In his testimony, Tekashi 6ix9ine explained that his art reflects reality and that there is no difference between his life and the art he portrays.<sup>176</sup> This case notably demonstrates the blurred line between rappers' artistic and real-life credibility in courtroom settings and in the mainstream music industry.<sup>177</sup>

This note focuses on the use of rap music in today's society. It addresses whether its emergence requires reconsideration of the appropriate standard used by courts in determining if and when a statement constitutes a true threat of violence, not protected by the First Amendment. Section I uses case law to detail the First Amendment background and points out the inconsistencies lingering since the development of the true threat doctrine. Section II analyzes the role that the internet and social media have played in the emergence of rap music and how courts should reexamine their prior understanding of the true threat doctrine based on these changes. Finally, Section III presents a solution to rap music's emergence in today's society that attempts to prompt reconsideration of the appropriate standard used by courts in determining if and when a statement constitutes a true threat of violence. Moreover, this section suggests that the Supreme Court should give better guidance in deciding what constitutes a true threat since the internet and social media have enhanced how we communicate in today's society and the government's capability to monitor speech.

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<sup>173</sup> *Id.*

<sup>174</sup> Liptak, *supra* note 2.

<sup>175</sup> Marc Hogan, *Why Tekashi 6ix9ine's Testimony Matters for the Future of Hip-Hop on Trial*, PITCHFORK (Sep. 23, 2019), <https://pitchfork.com/thepitch/why-tekashi-6ix9ines-testimony-matters-for-the-future-of-hip-hop-on-trial/>.

<sup>176</sup> *Id.*

<sup>177</sup> Hogan, *supra* note 36.

## I. BACKGROUND OF THE FIRST AMENDMENT & TRUE THREAT DOCTRINE

*“Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”*<sup>178</sup>

The First Amendment guarantees freedom of speech to protect both autonomy and self-fulfillment in encouraging the freedom of thought and communication.<sup>179</sup> Essentially, the First Amendment enhances freedom in individuals to find knowledge and truth in the marketplace of ideas to prevent “chilling” legitimate protected speech.<sup>180</sup> In other words, courts do not want to prevent people with valuable ideas, the chance to freely communicate, thus resulting in individuals feeling the need to silence themselves.<sup>181</sup> Over time, the United States Supreme Court has grappled in trying to balance the government’s interests in preventing fear and discord amongst society and preserving autonomy and individualism on the other.<sup>182</sup> Moreover, the free speech clause of the First Amendment prohibits governments from infringing on an individual’s right to speak freely and protects against regulation of “protected speech.” Yet, interpretation has varied distinctly across courts regarding what speech is “unprotected speech.”<sup>183</sup>

Thus, certain categories of speech can be regulated because they are considered unprotected speech. These categories include but are not limited to fighting words, obscenity, defamation, commercial speech, speech likely to incite imminent lawless action, and true threats.<sup>184</sup> Since governments have greater leeway to

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<sup>178</sup> U.S. CONST. amend. I.; § 1:1. Early development of the first freedom, Legal Almanac: The First Amendment: Freedom of Speech § 1:1.

<sup>179</sup> Lori Weiss, *Is the True Threats Doctrine Threatening the First Amendment? Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists Signals the Need To Remedy an Inadequate Doctrine*, 72 FORDHAM L. REV. 1283, 1287 (2004).

<sup>180</sup> *Id.*

<sup>181</sup> Sherry F. Colb, *The Supreme Court Considers “True Threats” and the First Amendment*, VERDICT LEGAL ANALYSIS AND COMMENTARY FROM JUSTIA (Dec. 10, 2014), <https://verdict.justia.com/2014/12/10/supreme-court-considers-true-threats-first-amendment>.

<sup>182</sup> David L. Hudson Jr., *When Do Rants Exceed First Amendment Boundaries and Become True Threats*, A.B.A. JOURNAL (Aug. 1, 2018, 12:05 AM), [http://www.abajournal.com/magazine/article/threatening\\_words\\_courts\\_protected\\_speech](http://www.abajournal.com/magazine/article/threatening_words_courts_protected_speech).

<sup>183</sup> Victoria L. Killion, *The First Amendment: Categories of Speech*, CONG. RES. SERV. (Jan. 16, 2019), <https://fas.org/sgp/crs/misc/IF11072.pdf>.

<sup>184</sup> *Id.*

regulate unprotected categories of speech, inconsistency has arisen amongst the courts due to the steady change in these categories over time.

## A. The True Threat Doctrine

Essentially, the true threat doctrine arose to provide a boundary between speech that warranted protection under the First Amendment and unprotected true threats.<sup>185</sup> The First Amendment does not protect expression that amounts to true threats.<sup>186</sup> Speech is considered a true threat Meaning when speaker uses it with an intent to commit an act of unlawful violence to an individual or particular group of individuals.<sup>187</sup> Traditionally, courts understood the definition of true threat as speech that causes a “reasonable person” to fear for his safety; it is thus not protected by the First Amendment.<sup>188</sup> Yet, the Supreme Court has no definitive guidance explaining how to identify what speech amounts to a true threat.<sup>189</sup> However, there appears to be some agreement that the speaker must intend to make a threat and that a reasonable listener would have understood the statement to be a threat.<sup>190</sup>

In *Watts v. United States*, the court established that political hyperbole is not a true threat and is protected speech. In this case, the court found a draft protestor’s rallying cry, “[i]f they ever make me carry a rifle [,] the first man I want to get in my sights is L.B.J.” to be a political hyperbole and not a true threat.<sup>191</sup> This case developed the Supreme Court’s understanding of the true threat doctrine by creating an exception to free speech. Correspondingly, the court emphasized that the statement must be viewed in its situational context and distinguished from political hyperbole or satire.<sup>192</sup> Interestingly, critics against the true threat doctrine believe that the tests used to determine whether speech amounts to a true threat are overly sensitive to identifying threatening speech.<sup>193</sup> As a

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<sup>185</sup> Hudson Jr., *supra* note 43.

<sup>186</sup> Killion, *supra* note 44

<sup>187</sup> *Id.*

<sup>188</sup> Jessica Ferranti, *True-Threat Doctrine and Mental State at the Time of Speech*, J. OF THE AM. ACAD. OF PSYCHIATRY AND THE L. ONLINE, June 2016, 44(2) at 138-144.

<sup>189</sup> *Jamal Knox v. Pennsylvania*, No. 18-949, at 6 (Mar 3, 2019),

[https://www.supremecourt.gov/DocketPDF/18/18-949/90997/20190306174437391\\_18-949%20-%20Knox%20v.%20Pennsylvania%20-%20Cato%20Inst.%20et%20al.%20cert.%20amicus.pdf](https://www.supremecourt.gov/DocketPDF/18/18-949/90997/20190306174437391_18-949%20-%20Knox%20v.%20Pennsylvania%20-%20Cato%20Inst.%20et%20al.%20cert.%20amicus.pdf).

<sup>190</sup> *Id.*

<sup>191</sup> *Watts v. United States*, 394 U.S. 705, 706 (1969).

<sup>192</sup> Ferranti, *supra* note 48.

<sup>193</sup> Weiss, *supra* note 42, at 1320.

result, the true threat tests infringe upon the First Amendment rights of speakers entitled to the right to engage in wide-open debate.<sup>194</sup>

Moreover, *Watts* indicates that a “true threat” must be objectively threatening to a reasonable listener and subjectively intended by the speaker.<sup>195</sup> In comparing *Watts* to Jamal Knox’s case, some attorneys and scholars argue that “Knox did not intend to harm the officers any more than Watts intended to shoot L.B.J.”<sup>196</sup> Over time, there continues to be no proper guidance in determining whether speech amounts to a true threat. In essence, apparent inconsistencies exist between a true threat in 1969 and a true threat in today’s society. The *Watts* case raises questions about how Watts’s speech did not amount to an intent to kill. Yet, when rappers adopt a “gangsta” persona and threaten to kill people, their language is unprotected speech with an intent to carry out a threat.<sup>197</sup>

Similarly, inconsistencies between today’s understanding of the true threat doctrine and past interpretations are shown in the well-known case, *Cohen v. California*. Here, the Appellant was convicted of maliciously and willfully disturbing the peace, in violation of a statute, when he wore a jacket that said “F\*\*\* the Draft.”<sup>198</sup> The Court of Appeals held that he was not disturbing the peace by offensive conduct because offensive conduct refers to behavior which “has a tendency to provoke others to acts of violence or to disturb the peace.”<sup>199</sup> Moreover, the court held that the state could not make the display of a four-letter word a criminal offense consistent with both the First and Fourteenth Amendments.<sup>200</sup> Interestingly, the court in Jamal Knox’s case took a seemingly different approach to what type of language constitutes “protected speech” and stood by the proposition that four-letter political criticisms like “F\*\*\* the Draft” were protected, but not in Knox’s circumstance. Correspondingly, this raises the proposition that courts may need to reconsider the test for what constitutes a true threat since inconsistencies amongst courts still exist regarding what constitutes speech worthy of protection consistent with First Amendment precedent.

Traditionally, many courts have consistently shown high regard to the First Amendment and are hesitant to classify words as

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<sup>194</sup> *Id.*

<sup>195</sup> *Jamal Knox v. Pennsylvania*, *supra* note 51, at 5.

<sup>196</sup> Denton, *supra* note 17.

<sup>197</sup> *Id.*

<sup>198</sup> *Cohen v. California*, 403 U.S. 15, 16 (1971).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

a true threat. For instance, in *NAACP v. Claiborne*, white merchants brought an action against participants of the boycott and civil rights organizations after they participated in civil rights boycotts.<sup>201</sup> The Supreme Court held that the NAACP's statements advocating the boycott of certain white-owned businesses did not constitute an incitement to lawlessness or a true threat.<sup>202</sup> The Court made clear that “mere advocacy of the use of force or violence” does not limit speech protection under the First Amendment.<sup>203</sup> Furthermore, the speeches focused on unifying black citizens and did not incite lawless action because the court reasoned that advocates are free to stimulate their audience with emotional appeals.<sup>204</sup> Many scholars argue that advocates should have the opportunity to be free to stimulate their audience with emotional appeals to express unity.<sup>205</sup> Correspondingly, they suggest that when these actions do not incite the imminent lawless action, they are no longer unprotected speech. Thus, to ignore advocates the right to express their views ignores the national commitment that debate on public issues should be both robust and wide-open.<sup>206</sup>

Additionally, in *Waller v. Osbourne*, two parents sued Ozzy Osbourne for the death of their son. They argued that Ozzy Osbourne’s subliminal messages in his songs “Suicide Solution” and “Blizzard of Oz” were the proximate cause of their son’s wrongful death, inciting him to commit suicide.<sup>207</sup> The court reasoned that classifying the song lyrics as subliminal messages would mean that “all rock music, or any music for that matter” could be found to hold subliminal messages, which would result in endless litigation.<sup>208</sup> Essentially, the court was not convinced that the song lyrics were meant to incite imminent lawless activity, which was the standard adopted by previous courts because there was no evidence that Osbourne’s songs were directed toward any particular person or group of persons. Thus, the defendants, in this case, were protected by the First Amendment.<sup>209</sup>

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<sup>201</sup> *NAACP v. Claiborne Hardware Co.*, 102 S. Ct. 3409, 3409 (1982).

<sup>202</sup> *Id.* at 3433.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 3434.

<sup>205</sup> Eugene Volokh, *Flag Burning and Free Speech*, WALL ST. J. (Jul. 3, 2019), <https://www.wsj.com/articles/SB124657642816289111>.

<sup>206</sup> *Id.*

<sup>207</sup> *Waller v. Osbourne*, 763 F.Supp. 1144, 1144 (M.D. Ga. 1991).

<sup>208</sup> *Id.* at 1149.

<sup>209</sup> *Id.* at 1152.

## B. Intent & The True Threat Doctrine

Many scholars have recognized that the true threat cases fail to provide clear guidance from the Supreme Court.<sup>210</sup> The question of intent has been at the forefront of controversies concerning the true threat doctrine. Some courts follow the trend of focusing primarily on the general, rather than specific, intent of the speaker, which considers the reasonable speaker's perspective or reasonable listener.<sup>211</sup> However, more commonly, most courts interpret threats through an objective standard based on the speaker's intent.<sup>212</sup> Analyzing from this perspective shifts the focus from the court's analysis of the speaker's intent to how the listener perceived the threat.<sup>213</sup> These inconsistencies and lack of guidance from the courts create division and constant confusion in deciding when it is acceptable to prosecute individuals based on their speech.<sup>214</sup>

In *Elonis v. United States*, the Petitioner Anthony Elonis was prosecuted and convicted of threatening his estranged wife, the state and local police, and a kindergarten class after posting self-styled rap lyrics on his Facebook page.<sup>215</sup> The District Court instructed the jury could find Elonis guilty if a reasonable person would foresee that his statements would be perceived as a threat.<sup>216</sup> Elonis argued that instead, the court should require the jury to find, as a prerequisite to conviction, that he subjectively intended for his words to cause fear. Furthermore, the court held that an individual's subjective intent is the critical question in determining whether speech warrants protection. Correspondingly, some courts still use a subjective standard that requires that the speaker actually intended to threaten someone.

On the other hand, some courts use an objective standard in determining whether speech is a true threat by looking at "the reasonable listener." Factors in determining whether language is a true threat to the "reasonable recipient" includes whether he or she felt threatened, whether the threat was conditional, whether the speaker made threats before, whether the speech was delivered directly to the victim, etc.<sup>217</sup> Once again, it is apparent that there is

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<sup>210</sup> Ferranti, *supra* note 48.

<sup>211</sup> Volokh, *supra* note 63.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Jamal Knox v. Pennsylvania*, *supra* note 51, at 7.

<sup>215</sup> *United States v. Elonis*, 730 F.3d 321, 324 (3d. Cir. 2013).

<sup>216</sup> *Id.* at 327.

<sup>217</sup> Ferranti, *supra* note 48.

no true consistency amongst the courts. Interestingly enough, the Supreme Court did not decide whether prosecuting Elonis' lyrics was a violation of his First Amendment rights, which was another reason that the Knox appeal urged the Supreme Court to take up this question.<sup>218</sup>

The trend in all of the aforementioned cases demonstrates how courts typically show deference to the First Amendment. More specifically, courts are concerned with protecting the free flow and exchanging ideas to prevent the chilling effect from occurring. However, when courts face the challenge of determining whether lyrics, particularly those of rap artists, should be portrayed as a true threat, there is no proper guidance or consistency across the courts. Moreover, when rap artists' lyrics come into question in criminal cases, the use of the "objective" test to determine the basis of a threat could be particularly troubling. On the same token, measuring the level of intent based on the reasonable listener could be a fault concerning rap lyrics when they are negatively presented in courtroom settings without proper contextualization in hip-hop and black American cultures.<sup>219</sup>

In juxtaposition, measuring intent based on the reasonable listener could be an advantage to the defendant if that individual has a knowledge and background of rap music. There is tension amongst rappers who maintain their authenticity in rapping about their own experiences and those who immediately associate rap with violence and negative connotations.<sup>220</sup> Accordingly, bias often develops when jurors and recipients of the lyrics, who are unfamiliar with rap music and the background of hip-hop, make assumptions based on the nature and negative connotations associated with these lyrics.<sup>221</sup> Numerous scholars argue that, if a speaker's subjective intent is not taken into account, a person who holds negative stereotypes about the rap music genre will automatically portray the words as a "threat of violence or unlawful conduct."<sup>222</sup> Essentially, the "misinterpretation and misunderstanding" may cause political and artistic expression to be punished wrongfully.<sup>223</sup>

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<sup>218</sup> Denton, *supra* note 17.

<sup>219</sup> *Id.*

<sup>220</sup> Dre'Kevius O. Huff, *Rap On Trial: The Case For Nonliteral Interpretation of Rap Lyrics*, 5 SAVANNAH L. REV. 335, 360 & 364 (2018).

<sup>221</sup> Elizabeth Shumejda, *The Use of Rap Music Lyrics as Criminal Evidence*, NYSBA ENTMT, ARTS AND SPORTS L. J. (2014).

<sup>222</sup> Brendan O'Connor, *Why are Rap Lyrics Being Used as Evidence in Court?*, MUSIC BY VICE (Nov. 3, 2014, 5:30 PM), [https://www.vice.com/en\\_ca/article/rdaba6/rap-lyrics-as-evidence](https://www.vice.com/en_ca/article/rdaba6/rap-lyrics-as-evidence).

<sup>223</sup> *Id.*

## II. THE EMERGENCE OF RAP MUSIC

*“An artist’s very participation in hip-hop is painted as a moral shortcoming that suggests a propensity for real world violence and degeneracy.”*<sup>224</sup>

As briefly discussed, rap lyrics are not presented to courts with proper contextualization in hip-hop and black American cultures.<sup>225</sup> Nevertheless, courts automatically classify lyrics as more offensive and in greater need of regulation when they are rap lyrics as opposed to country, pop, rock, etc.<sup>226</sup> Essentially, rap music is viewed as an especially “telling” form of expression.<sup>227</sup> Meek Mill, Yo Gotti, 21 Savage, Fat Joe, and others explained to the Justices hearing the Jamal Knox case, “[a] person unfamiliar with what today is the nation’s most dominant musical genre or one who hears music through the auditory lens of older genres such as jazz, country, or symphony may mistakenly interpret a rap song as a true threat of violence.”<sup>228</sup>

Due to the increase and popularity of internet use, the hip-hop genre has correspondingly been significantly affected.<sup>229</sup> Social media provides an increased visibility and fan base for artists, and likewise, the definition of a “mainstream” rapper and the relationship between artists and labels have changed tremendously.<sup>230</sup> Scholars argue that before the rise of social media, a record label was an artist’s means to establish a fan base.<sup>231</sup> However, social media outlets such as YouTube, Facebook, SoundCloud, and Twitter give listeners and followers a completely different amount of access into an artist’s life on a day-to-day basis.<sup>232</sup> These social media platforms are now standard for artists to establish a network and fan base, which replaces the traditional

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<sup>224</sup> Briana Younger, *The Controversial Use of Rap Lyrics as Evidence*, THE NEW YORKER (Sep. 20, 2019), [https://www.newyorker.com/culture/culture-desk/the-controversial-use-of-rap-lyrics-as-evidence?source=EDT\\_NYR\\_EDIT\\_NEWSLETTER\\_0\\_imageneewsletter\\_Daily\\_ZZ&utm\\_campaign=aud-dev&utm\\_source=nl&utm\\_brand=tny&utm\\_mailing=TNY\\_Daily\\_091919&utm\\_medium=email&bxid=5bd6785924c17c104801c3f9&cndid=40391526&esrc=&mbid=&utm\\_term=TNY\\_Daily](https://www.newyorker.com/culture/culture-desk/the-controversial-use-of-rap-lyrics-as-evidence?source=EDT_NYR_EDIT_NEWSLETTER_0_imageneewsletter_Daily_ZZ&utm_campaign=aud-dev&utm_source=nl&utm_brand=tny&utm_mailing=TNY_Daily_091919&utm_medium=email&bxid=5bd6785924c17c104801c3f9&cndid=40391526&esrc=&mbid=&utm_term=TNY_Daily).

<sup>225</sup> Denton, *supra* note 17.

<sup>226</sup> *Id.*

<sup>227</sup> McNulty-Finn, *supra* note 1.

<sup>228</sup> Liptak, *supra* note 2.

<sup>229</sup> McNulty-Finn, *supra* note 1.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

view of record labels.<sup>233</sup> Social media sites are the most frequently used forms of online communication, which are an essential and necessary part of everyday interaction.<sup>234</sup> As a result, artists have more freedom in crafting their message while maintaining complete control over the music, ideas, and words they portray to their fan bases.<sup>235</sup> As the barriers between artists and their fans break down due to the emergence of social media and the internet, authenticity has become an integral part of an artist's longevity and a record's success.<sup>236</sup>

Scholars suggest that since the idea of the "mainstream" rapper has developed consistently with the excessive reliance on social media, there is a greater likelihood of chilling speech that occurs online and on social media platforms.<sup>237</sup> For instance, YouTube, Facebook, Instagram, and other online forms of expression for individuals to engage freely in protected First Amendment activity.<sup>238</sup> Over time, the internet has continued to become one of the most prevalent places where an audience takes place in the "exchange of views."<sup>239</sup> The First Amendment protection extends to online speech to protect the exchange of ideas in "vast democratic forums."<sup>240</sup> However, internet speech can still be regulated because it spreads information instantly and is easily accessible.<sup>241</sup> For instance, in *United States v. Alkhabaz*, the court held that a student's email messages depicting a woman's attack were mere fantasy and did not constitute a true threat because they did not convey the messages to effect some change or achieve some goal through intimidation.

Nevertheless, Knox was convicted based on rap lyrics that he did not specifically direct at the officers.<sup>242</sup> Instead, the police found the lyrics online because the officers were actively monitoring his social media.<sup>243</sup> Consequently, rap music's emergence in a world revolving around the internet proposes more challenges when courts begin to use rap lyrics as evidence in criminal cases. The internet

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<sup>233</sup> *Id.*

<sup>234</sup> *Jamal Knox v. Pennsylvania*, *supra* note 51, at 17.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 9.

<sup>240</sup> *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868 & 870 (1997).

<sup>241</sup> Ronald Kahn, *Internet*, FIRST AM. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1119/internet>.

<sup>242</sup> *Jamal Knox v. Pennsylvania*, *supra* note 51, at 17.

<sup>243</sup> *Id.*

enhances individuals' freedom and ability to communicate and express their views while enhancing the government's ability to police communication and expression.<sup>244</sup> Since police officers, prosecutors, and other authorities have an easy ability to monitor speech when it's online, not having a consistent method of examining whether speech is a true threat has a chance of resulting in a chilling effect.<sup>245</sup>

Since First Amendment protection applies to online and internet expression, it is necessary that when courts consider whether lyrics amount to a true threat, they consider the fact that the internet and social media have become significant platforms for expression. Furthermore, music continues to emerge into different mediums of communication, forcing artists to change how they communicate with their fan base. With this in mind, it may be beneficial for courts to create a new doctrine for online expression or reconsider the longstanding approaches to free speech by developing a test for speech that amounts to a true threat consistent with the constantly changing societal norms.

### III. RECONSIDERATION OF THE TRUE THREAT DOCTRINE

*“The notion that one could commit a ‘speech crime’ by uttering an objectively harmless statement with bad intent is profoundly chilling.”*<sup>246</sup>

Returning to *Knox v. Pennsylvania*, after Knox's arrest on gun and drug charges, he subsequently recorded a song and posted it to both YouTube and Facebook. Essentially, the lyrics included descriptions of killing police officers and called the officers out by name who were involved in Knox's arrest and scheduled to testify.<sup>247</sup> One of the officers even testified that the video made him fear for his safety and prompted him to leave the Pittsburgh Police Department.<sup>248</sup> After the prosecutors heard the song, Knox was charged with issuing terroristic threats and intimidating witnesses because the song made them both nervous and fearful. The Pennsylvania Supreme Court stated that Knox's lyrics primarily

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<sup>244</sup> Sarah Lustbader & Vaidya Gullapalli, *Poetry or Threat? The Supreme Court May Weigh in On Rap Lyrics As Evidence* (Mar. 15, 2019), <https://theappeal.org/poetry8-or-threat-the-supreme-court-may-weigh-in-on-rap-lyrics-as-evidence/>.

<sup>245</sup> *Id.*

<sup>246</sup> Adam Liptak, *supra* note 2.

<sup>247</sup> *Commonwealth of Pennsylvania v. Jamal Knox*, *supra* note 3, at 23.

<sup>248</sup> *Id.*

portrayed violence toward the police because they were threatening and “highly personalized” to the victims.<sup>249</sup> The Court also acknowledged that Knox’s song lyrics referred to when the officers’ shifts ended, etc.<sup>250</sup> Disappointed with the court’s decision to affirm Knox’s conviction based on his lyrics, Knox’s lawyers and many other artists in the rap music industry argue that rap is a form of art that should not be taken literally.<sup>251</sup> Instead, they believe that a reasonable listener with even a casual knowledge of rap would understand that the lyrics are not intended to portray literally the messages that the artists are trying to convey.<sup>252</sup> The rappers went even further to compare the court’s use of rap lyrics as evidence of an intent to commit a true threat of violence as no different from “stop and frisk” and simply a form of racial profiling.<sup>253</sup>

Furthermore, Knox argued that he never meant to threaten anyone with the lyrics he wrote and that they were solely artistic expressions.<sup>254</sup> The videos were never communicated directly to the officers, and the conviction was based solely on the words he conveyed rather than looking at other contextual factors.<sup>255</sup> When there is a conflict between what the speaker intended and how another individual portrayed it, there is the chance that the suppression of lyrics could have a chilling effect on speech. In *Watts*, referenced earlier, the court looked to objective factors in holding that the statement made was not a true threat, including the context in which the statement was made, its conditional nature, and the reaction of the audience.<sup>256</sup> Essentially, the court acknowledged that contextual circumstances should factor into a court’s analysis of whether the speaker acted with the necessary intent.<sup>257</sup> Moreover, taking into account the context in which words are presented, such as on social media platforms versus directly to an officer, may be necessary to understand whether the artist intended to communicate a threat. Also, it may be necessary for courts to shift the focus away from analyzing the intent of the person who is writing the lyrics to whether the statements could be reasonably interpreted as making threats of violence or understood as threats.

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<sup>249</sup> *Id.* at 614.

<sup>250</sup> *Id.*

<sup>251</sup> Liptak, *supra* note 2.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Commonwealth of Pennsylvania v. Jamal Knox*, *supra* note 3, at 9.

<sup>255</sup> *Id.*

<sup>256</sup> *Jamal Knox v. Pennsylvania*, *supra* note 51, at 6.

<sup>257</sup> *Id.* at 21.

Furthermore, after *Watts*, numerous other courts also adopted objective standards rather than looking solely at the speaker's subjective intent. Under the objective analysis, a threat is analyzed based upon the reasonable person's perception of the communication.<sup>258</sup> Some courts focused on the reasonable listener and how they would perceive the speech in its context, while others geared their focus toward the actual or hypothetical reasonable listener.<sup>259</sup> Since the First Amendment favors more speech and not less, Knox's lawyers argued that speech should be objectively threatening and subjectively intended as a threat.<sup>260</sup> They stand by the proposition that the Pennsylvania Supreme Court's decision will lead to the suppression of speech and criminalization of free expression because analyzing the writer's subjective intent only will lead to more criminal convictions when, in context, the speech is not objectively threatening.<sup>261</sup> Essentially, they argue that lowering the bar for deciding true threats dangers free speech and will correspondingly have a chilling effect on speech.<sup>262</sup> Additionally, they explain that uncertainty of the true threat doctrine will continue to remain, especially when there are new avenues and platforms designed exclusively for speech expression.<sup>263</sup>

The emergence of new forms of communication requires reconsideration of longstanding approaches to free speech. Consistent with Knox's lawyers and other rap artists' opinions, the true threat doctrine test would be more beneficial if it were an objective analysis to help distinguish between genuine and protected threats because of the context in which they are portrayed.<sup>264</sup> Knox's lawyers contend that the context in which speech is portrayed is necessary, especially when speech is conveyed online.<sup>265</sup> Background facts can be hard to ascertain where hyperbole is common and where words, images, and media are used to portray meanings.<sup>266</sup> Furthermore, the objectivity requirement can help ensure that only real true threats are subject to prosecution.<sup>267</sup>

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<sup>258</sup> David T. Holland, *Eleventh Circuit Holds True Threats Doctrine Analyzed Under Objective Standard*, SUFFOLK L. REVIEW, Vol. XLVII.

<sup>259</sup> *Commonwealth of Pennsylvania v. Jamal Knox*, *supra* note 3, at 14.

<sup>260</sup> *Jamal Knox v. Pennsylvania*, *supra* note 51, at 12.

<sup>261</sup> *Id.* at 13.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 21.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 22.

Scholars suggest that only analyzing speech with a subjective analysis maximizes the potential for chilling speech. If courts transitioned to a more objective analysis when determining whether speech is a true threat, there could potentially be inconsistency if the reasonable listener is not aware of the history and background of rap music. Perhaps, it could be beneficial for courts to consider whether the “offended” recipient who is offended by the lyrics is familiar with rap. Although the First Amendment is not absolute, the fact that speech may be alarming should not automatically warrant that speech to be perceived as a true threat. Consistent with the desire to prevent the chilling effect of speech, courts should consistently try and protect speech under the First Amendment even when the speech is unpopular or violent.

Moving forward, the Supreme Court has not been transparent in determining what constitutes a true threat since the internet and various modes of expression have enhanced how individuals communicate in today’s society. To transition away from stereotypes and beliefs that are accompanied by the negative connotations associated with the rap music genre, the Supreme Court should give better guidance in determining what constitutes a true threat. Because speech today is more commonly portrayed through social media and other online outlets, solely deeming speech as a true threat based on the subjective intent of the speaker may not be consistent with the enhancement and constant changes of communication experienced in today’s society.

#### IV. CONCLUSION

Jamal Knox’s case is a reminder that inconsistencies between today’s understanding of the true threat doctrine and past interpretations are shown when cases such as *Cohen v. California* and *Watts* are compared. In those cases, the courts did not believe that letters on a jacket stating, “F\*\*\* the Draft” or remarks to kill L.B.J evidenced an intent to commit a true threat, thus warranting protection of the First Amendment. However, Knox’s case appears to be at tension with these earlier cases. Moreover, Jamal Knox’s case is just one of many examples of how classifying words and lyrics as a true threat have become particularly troublesome in the rap culture when courts are unfamiliar with the message or intent behind the words. More particularly, this becomes troubling to African Americans and correspondingly threatens to pose a chilling

effect on speech and rap music, which is why many rap artists have challenged the court to take up Knox's First Amendment challenge to his conviction.

Since there has been no clear and consistent guidance applied across courts, when rap lyrics are used as evidence in criminal cases, there is a greater likelihood that those lyrics will automatically be presumed as a true threat depending on the context in which they are portrayed. Furthermore, the rise of social media has correspondingly affected the hip-hop genre.<sup>268</sup> More specifically, the ease and popularity of the internet and social media give police officers and prosecutors easier access to govern online speech.<sup>269</sup> Once again, this could have a chilling effect on speech. The controversies amongst the objective and subjective intent of a threat, the reasonable listener, and how speech was perceived prompt reconsideration of the appropriate standard used by courts today in determining if and when a statement constitutes a true threat of violence. The United States Supreme Court should perceive the various rappers' attempt at urging the Justices to take up the question of Knox's First Amendment challenge as an eye-opener that cases like these may continue to multiply in the future without clear guidance.

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<sup>268</sup> McNulty-Finn, *supra* note 1.

<sup>269</sup> Lustbader & Gullapalli, *supra* note 102.

MUSIC IN THE MIDDLE OF A FIREFIGHT: ELECTRONIC  
DANCE MUSIC AND THE FIGHT BETWEEN ENFORCING  
COPYRIGHT LAW AND ITS CONSTITUTIONAL  
FOUNDATION

COLIN QUINN

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**INTRODUCTION**

“Congress shall have power to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”<sup>270</sup> This is the Constitution’s stated purpose in allowing creators or musicians to have monopolies on their works.<sup>271</sup> However, since its inception, Congress has attempted to balance incentivizing development and protecting creators. As new generations use the latest technologies to create new music genres, they test the intentions of fifty-year-old copyright laws.<sup>272</sup>

A genre feeling the adverse effects of these outdated copyright laws is Electronic Dance Music (referred to throughout

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<sup>270</sup> U.S. Const. art I, § 8, cl. 8.

<sup>271</sup> *Id.*

<sup>272</sup> 17 U.S.C. § 504; 17 U.S.C. § 107.

this note as “EDM”).<sup>273</sup> EDM, like many other genres, has many subcategories.<sup>274</sup> The subcategories are grouped based on beats-per-minute (BPM).<sup>275</sup> These subcategories have turned out a variety of artists such as Malaa (House 115-130 BPM), Armin Van Buren (Trance 120-140 BPM), Skrillex (Dubstep 135-145 BPM), Showtek (Hardstyle 150 BPM), and Netsky (Drum & Bass 160-180 BPM).<sup>276</sup> However, while these genres can all differ as to their styles and BPM’s, one thing they all share is that their performances, or “sets,” all consist of a combination of their music and music of other artists.<sup>277</sup>

EDM music started from disc jockeying (DJing) in the early 1980s with 303 bass synthesizers and 808 drum machines.<sup>278</sup> Before the 21<sup>st</sup> century, most performances were conducted using vinyl records, where an entire DJ’s performance consisted of other people’s pre-released music.<sup>279</sup> In the early 2000s, Pioneer (a leader in DJ music equipment) came out with a compact disc player that acted like a turntable, making it possible for digital files to be played and recorded.<sup>280</sup> This technological development played an important role in ushering in EDM’s new era.<sup>281</sup> EDM gained additional traction through the incorporation of modern pop and hip-hop tracks in DJs’ performances. One famous example of this trend is the 2009 hit “I Gotta Feeling,” in which DJ David Guetta collaborated with the Black Eyed Peas, a musical group.<sup>282</sup> However, it was not until Daft Punk launched a worldwide tour in 2006-2007 that EDM DJs achieved the mainstream success that gave many producers a vision for where this music genre could take them.<sup>283</sup>

One thing is abundantly clear: Congress did not create copyright law with EDM music in mind. In 1831, the initial protection period of copyrighted works was from fourteen to

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<sup>273</sup> Michaelangelo Matos, Electronic Dance Music, ENCYLOPAEDIA BRITANNICA (Feb. 13, 2020, 11:01 AM), <https://www.britannica.com/art/electronic-dance-music>. [hereinafter BRITANNICA]

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> Tempo and genre, ABELTON, (Feb. 13, 2020, 11:06 AM), <https://learningmusic.ableton.com/make-beats/tempo-and-genre.html>.

<sup>277</sup> *Supra* BRITANNICA.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

twenty-eight years.<sup>284</sup> Copyright law did not even protect musical compositions until 1897, sixty-six years after Congress passed the first copyright act.<sup>285</sup> However, Congress amended the 1790 Act to protect derivative works in 1870.<sup>286</sup>

While it can be argued that “writings” refers only to copyrights and “useful arts” pertains only to patents, these interpretations have been refuted in historical analysis of the copyright clause.<sup>287</sup> As stated in Congressional hearings on copyright development, “there is no direct evidence which conclusively establishes the intended scope of the copyright clause.”<sup>288</sup> In analyzing *The Federalist*,<sup>289</sup> James Madison points out that there is “no limitation, either direct or implied, upon the scope of the clause but rather intimates that the types of objects protected will expand when the common law sees fit to expand them.”<sup>290</sup> Article I, Section 8, Clause 8 “was not intended to deal specifically with subjects of copyright but merely to assure uniform protection through nationwide laws.”<sup>291</sup> In doing so, the phrase “to promote the Progress of Science and useful Arts” in fact “defines and colors the entire clause, and that whatever may be construed as promoting science and the useful arts *falls within the definition of ‘writings.’*”<sup>292</sup>

The Supreme Court left open some room for the law's evolution when deciding its first copyright case, *Wheaton v. Peters*, in 1834.<sup>293</sup> The Court established that “copyright is not a natural right, but derived from statute and subject to the condition it imposes.”<sup>294</sup> This interpretation is consistent with James Madison’s

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<sup>284</sup> [The 18<sup>th</sup> Century](https://www.copyright.gov/timeline/timeline_18th_century.html), U.S. COPYRIGHT OFFICE (Feb. 13, 2020, 11:12 AM), [https://www.copyright.gov/timeline/timeline\\_18th\\_century.html](https://www.copyright.gov/timeline/timeline_18th_century.html). [hereinafter U.S. COPYRIGHT OFFICE].

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *The Meaning of “Writings” in the Copyright Clause of the Constitution: Hearing Before the Subcomm. on Patents, Trademarks, and Copyright*, 86 Cong. 1 (1960).

<sup>288</sup> *Id.*

<sup>289</sup> “The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the Inventors, The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.” *The Federalist*, No. 43, at 278 (Modern Libr. ed. 1937).

<sup>290</sup> *The Meaning of “Writings” in the Copyright Clause of the Constitution: Hearing Before the Subcomm. on Patents, Trademarks, and Copyright*, 86 Cong. 1 (1960).

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* (emphasis added)

<sup>293</sup> *Supra* U.S. COPYRIGHT OFFICE; *See also Wheaton v. Peters*, 33 U.S. 591 (1834).

<sup>294</sup> *Supra* U.S. COPYRIGHT OFFICE; *See also Wheaton*, 33 U.S. 591.

view that since the “legislature has the authority to change the common law by statute,” then Congress may “expand by statute ... copyright.”<sup>295</sup> The Court’s opinion in *Wheaton* gave Congress the control of copyright law, which means Congress can adjust the law to fit the development of music.<sup>296</sup>

Congress showed its desire to modernize copyright when it passed the 1909 Copyright Act. While the Act primarily consisted of formalities requiring notice, publication, and registration, it also included a significant adjustment to the music industry by creating the compulsory mechanical license.<sup>297</sup> Compulsory licensing allows the general user to use a person’s work without their permission, provided the user was afforded the opportunity to make the first publication.<sup>298</sup> A distinction made in the first mechanical license case, *White-Smith Pub. Co. v. Apollo Co.*, was that piano rolls (or other mechanical recreations of the work) were not copies, but devices which “performed” the work.<sup>299</sup>

The industry became accustomed to having the freedom to use and play music at the consumer’s discretion.<sup>300</sup> Congress, in its creation of the 1976 Copyright Act, developed the mechanical license slightly.<sup>301</sup> The Act gave musicians more considerable compensation, establishing a \$0.091 royalty on copies permitted by compulsive licensing.<sup>302</sup> With compulsive licensing established, the industry began to seek enforcement of “performances” through the lens of performance rights organizations (referred to from hereon as “PROs”).<sup>303</sup>

So, what is the problem for EDM music? The Supreme Court has shown a desire to leave copyright interpretation up to Congress.<sup>304</sup> With this ability, Congress has demonstrated its willingness to protect derivative works.<sup>305</sup> Through Congress’s passing of the 1909 Act, the music consumer gained additional

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<sup>295</sup> *The Meaning of “Writings” in the Copyright Clause of the Constitution: Hearing Before the Subcomm. on Patents, Trademarks, and Copyright, 86 Cong. 1 (1960).*

<sup>296</sup> U.S. Const. art. I, §8, cl. 18.

<sup>297</sup> *Supra* U.S. COPYRIGHT OFFICE.

<sup>298</sup> *Section 115 Compulsory License, Before the Subcomm. On Courts, The Internet and Intellectual Property of the Ho. Comm. On the Judiciary, 108th Cong. 2 (2004)* (statement of Marybeth Peters, Register of Copyrights).

<sup>299</sup> 209 U.S. 1 (1908).

<sup>300</sup> *Supra* note 29.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> Spotify, Ep. 28: David Israelite, *And the Writer Is...* (2020),

<https://open.spotify.com/episode/3rew1K4UKOoWFDRXHMCZyd?si=cRHQVMDfT7e7m6DQed3ASA> (last visited Feb 1, 2020). [hereinafter *Writer*]

<sup>304</sup> *Wheaton*, 33 U.S. 591.

<sup>305</sup> *Supra* U.S. COPYRIGHT OFFICE.

rights through Congress's compulsory licensing creation.<sup>306</sup> The Supreme Court's decision in *White-Smith* made the critical distinction that the mechanical usage of a song is not a "copy."<sup>307</sup> While these developments have aided in understanding copyright law, the advancements have not helped EDM.<sup>308</sup> EDM is still facing a significant copyright problem. The entire genre is handcuffed by the current laws facing derivative works.<sup>309</sup> Ultimately, since these developments in copyright interpretation, courts have strayed from the Constitutional foundation of promoting science and the useful arts.<sup>310</sup> From this foundational departure, DJs are inhibited from free creation, face costly negotiations, and delay the creative process.<sup>311</sup> DJs must technically contact every artist or their management team for each set to receive permission for each use.<sup>312</sup> What started as an already tricky creative endeavor is aggravated by red tape and legal technicalities.<sup>313</sup>

## I. PUBLIC VERSE PRIVATE USAGE

Congress has consistently articulated its preference to allow the expansion of music purely in the private sphere. First, section 115(a)(1) of the Copyright Act explicitly says that a mechanical license is only available to someone whose "primary purpose ... is to distribute phonorecords to the public for private use."<sup>314</sup> Secondly, the "Fair Use Doctrine," derived originally from common law roots, specifically considers the user's intent.<sup>315</sup> Third, case law has specifically left the question open for interpretation of whether derivative works, while prohibited under current statutory copyright law, could warrant an exception.<sup>316</sup> Considering the historical development of copyright law, the Constitutional hook emphasizing "the promotion of science and the useful arts," and technological advancements in music, is it time for copyright law to change?

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<sup>306</sup> *Id.*

<sup>307</sup> *Supra* note 29.

<sup>308</sup> Sayers, Jeffrey John, "The Wrong Mix: Electronic Dance Music and its Copyright Problem" (2014). Law School Student Scholarship at Seton Hall. 566.

<sup>309</sup> *Id.*

<sup>310</sup> U.S. Const. art I, § 8, cl. 8.

<sup>311</sup> *Supra* note 39

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> 17 U.S.C. § 115(a)(1).

<sup>315</sup> *Harper & Row, Publs. v. Nation Enters.*, 471 U.S. 539, 549 (1985)

<sup>316</sup> *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).

## A. The History of the Fair Use Doctrine

The Fair Use Doctrine has advanced from common law protection to a statutory one.<sup>317</sup> Throughout the years, courts have wrestled “to bring some order out of the confusion [of copyright law] surrounding the question of how much can be copied.”<sup>318</sup> At this time, there is no clear-cut answer.<sup>319</sup> However, the Copyright Office has stated that “a broad underlying premise for the doctrine of fair use is supplied by the notions that: (1) the user has unlimited use of a great deal of unprotected material embodied in a copyrighted work and (2) the user, under any circumstances, may copy an insignificant portion of protected material.”<sup>320</sup>

Additionally, a mainstay in the theory of the Fair Use Doctrine is that in exchange for a monopoly on a musical work, the author impliedly consents to “certain reasonable uses [...] to promote the ends of public welfare.”<sup>321</sup> This theory is based on the “constitutional purpose of copyright.”<sup>322</sup> For there to be advancement, there needs to be a “certain degree of latitude[...]for ‘the Progress of Science and the Useful Arts.’”<sup>323</sup> Without the ability to borrow, quote, and change some aspects of work, it is challenging to develop an artform.<sup>324</sup>

A secondary, the historical application of the Fair Use Doctrine has been based on custom.<sup>325</sup> This theory evolves from the idea of implied consent, saying that fair use is based on what is “reasonable and customary.”<sup>326</sup> What is reasonable and customary is a legal concept that courts have applied to decipher what is acceptable within a given industry.

The emphasis on the public as opposed to private usage has experienced contention throughout the development of the Fair Use

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<sup>317</sup> *Elsmere Music, Inc v. Nat'l Broad. Co., Inc.*, 482 F. Supp. 741 (S.D.N.Y. 1980) (holding that the statutory criteria for fair use and the statutory fair use exception in general were intended by Congress to codify, not supplant, the common law doctrine of fair use).

<sup>318</sup> 14 *Notre Dame Lawyer* 443, 449 (1939).

<sup>319</sup> *Bridgeport Music*, 410 F.3d 792 (6th Cir. 2005) (intentionally leaving open for decision whether or not sampling minute portions of songs could be permitted under the fair use doctrine).

<sup>320</sup> *Studies Prepared for the Subcomm. on Patents, Trademarks, and Copyrights: Hearing on S. Res. 240 Before the S. Comm. on the Judiciary*, 86th Cong. 2d Sess. 14 (1960).

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> *Id.* (See *W.H. Anderson Co. v. Baldwin Pub. Co.*, 27 F.2d 82, 89 (6<sup>th</sup> Cir. 1928); Chafee, *Reflections on the Law of Copyright*, 45 *COLUM. L. REV.* 503, 511 (1942)).

<sup>324</sup> *Supra* note 51.

<sup>325</sup> Note, 15 *SO. CALIF. REV.* 249, 250 (1942).

<sup>326</sup> *Shapiro, Bernstein & Co. v. P.F. Collier & Son Co.* 26 U.S.P.Q. 40, 42 (S.D.N.Y. 1934).

Doctrine. Until 1960, case law was nonexistent on the issue.<sup>327</sup> It had even been argued that “private use is completely outside the scope and intent of restriction by copyright.”<sup>328</sup> Congress even articulated that, given the nature and purpose of private use, an individual could be absolved of all liability to pay damages for infringement.<sup>329</sup> However, there was no direct authority for the Fair Use Doctrine until Congress codified it in the Copyright Act.<sup>330</sup>

## B. The Statutory Component

Section 107 of the Copyright Act codifies the requirements for determining what is or is not fair use.<sup>331</sup> Section 107 looks at four factors: “(1) the purpose and character of the use, *including whether the use is of a commercial nature* or is for nonprofit educational purposes (emphasis added); (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”<sup>332</sup> Courts consider each of these factors equally in determining if a work falls under the Fair Use Doctrine, and none of the factors should carry more weight than another.<sup>333</sup> Instead, courts should consider the Fair Use Doctrine’s purpose “to prevent strict enforcement of copyright law when its enforcement would inhibit the very progress of science and useful arts that copyright intended to promote.”<sup>334</sup>

## C. The Hole Case Law Has Left Open

The Fair Use Doctrine is framed as a privilege of the people, as opposed to the copyright owner, “to use copyrighted material in a reasonable manner without his consent.”<sup>335</sup> Additionally, fair use is *not* an infringement of copyright.<sup>336</sup> Some courts have also

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<sup>327</sup> *Implied Consent*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A voluntary yielding to what another proposes or desires”); *Studies Prepared for the Subcomm. on Patents, Trademarks, and Copyrights: Hearing on S. Res. 240 Before the S. Comm. on the Judiciary*, 86th Cong. 2 (1960) (Citing *Cohem op cit.*, note 7, *supra* at 58.)

<sup>328</sup> Shaw, “*Publication and Distribution of Scientific Literature*,” 17. *Coll. & Rsch. Libr.* 294, 301 (1956).

<sup>329</sup> *Id.*

<sup>330</sup> 17 U.S.C. § 107

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> *Rubin v. Rooks/Cole Pub. Co.*, 836 F. Supp. 909 (D. Mass. 1993).

<sup>334</sup> *Id.* at 916.

<sup>335</sup> *Hustler Mag. Inc. v. Moral Majority Inc.*, 796 F.2d 1148, 1151 (9th Cir. 1986).

<sup>336</sup> *Penelope v. Brown*, 792 F. Supp. 132, 136 (D.Mass. 1992). (*Emphasis added*)

addressed the Constitutional implications of copyright law and the Fair Use Doctrine, saying First Amendment considerations are within fair use.<sup>337</sup> The Fair Use Doctrine “permits courts to avoid rigid application of the copyright state when[...]such application would stifle the very creativity which copyright law is designed to foster.”<sup>338</sup>

Various courts have attempted to narrow the Fair Use Doctrine's scope, intending to strike a balance between progress and protection.<sup>339</sup> The Fair Use Doctrine recognizes “circumstances in which (the) Copyright Act’s goals of encouraging creative and original work are better served by allowing the use of copyrighted work than prohibiting such use.”<sup>340</sup> The courts have also emphasized economic incentives are not the sole, nor even the most probative, consideration in determining what the Fair Use Doctrine protects.<sup>341</sup> However, courts have also denied the argument that copying beyond fair use in a large-scale work would promote the development of great works.<sup>342</sup> Courts have viewed the statutory creation of the Fair Use Doctrine as clear evidence of Congress’s desire to “limit the exclusive right of a copyright owner.”<sup>343</sup>

In *Bridgeport Music, Inc. v. Dimension Films*, the Sixth Circuit considered the issue of sampling and derivative works.<sup>344</sup> It concluded that the copyright owner has the “exclusive right to ‘sample’ his own recording.”<sup>345</sup> However, the court also said that “there was no necessity to consider the affirmative defense of ‘fair use’” since the district judge found no infringement.<sup>346</sup> Since the *Bridgeport* decision, there have been numerous articles critiquing the court’s decision for: (1) its improper legal reasoning and

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<sup>337</sup> *New Era Publs. Int’l ApS v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir. 1989).

<sup>338</sup> *Iowa State Univ. Rsch. Found. v. ABC*, 621 F.2d 57, 60 (2d Cir. 1980).

<sup>339</sup> *Rubin*, 836 F. Supp. 909 (holding factors should be considered in light of purpose of fair use doctrine which is to prevent strict enforcement of copyright law when its enforcement would inhibit the very progress of science and useful arts that copyright is intended to promote); See *Nat’l Bus. Lists, Inc. v. Dum & Bradstreet, Inc.*, 552 F. Supp. 89 (N.D. Ill. 1982) (holding while fair use of research is broad... public interest in dissemination becomes progressively stronger as we move along spectrum from fancy to fact); See also *Authors Guild, Inc. v. Google, Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013) (holding that an internet search engine operator engaged in fair use [because] ... operator provided significant public benefits, including advancing progress of arts and sciences, while maintaining respectful consideration for rights of authors and other creative individuals, and operator provided libraries with technological means to make digital copies of books that they already owned).

<sup>340</sup> *Robinson v. Random House, Inc.*, 877 F.Supp. 830, 839 (S.D.N.Y. 1995).

<sup>341</sup> *Lish v. Harper’s Mag. Found.*, 807 F. Supp. 1090 (S.D.N.Y. 1992).

<sup>342</sup> *Lotus Dev. Corp. v. Borland Int’l, Inc.*, 788 F. Supp 78 (D. Mass. 1992).

<sup>343</sup> *Key Maps, Inc. v. Pruitt*, 470 F. Supp. 33 (S.D. Tex. 1978).

<sup>344</sup> *Bridgeport Music* 410 F.3d at 801.

<sup>345</sup> *Id.*

<sup>346</sup> *Id.* at 805.

misinterpretation of the purpose of copyright law;<sup>347</sup> (2) how judicial economy incentivized the court to apply a test that does not actually derive justice for users;<sup>348</sup> and (3) how the decision handicapped EDM by instituting a bright-line rule.<sup>349</sup> These criticisms effectively show that if the purpose of copyright law is to encourage the advancement of science and the useful arts, the court put forward a counter-intuitive ruling.<sup>350</sup>

EDM performances rely on sampling and the creation of derivative works.<sup>351</sup> How can various courts implement tests that suggest that the “exclusive right to sample the recording, no matter how brief or unrecognizable the sample” belongs to the author?<sup>352</sup> Moreover, sampling is a norm in EDM, whereas, in genres like country, jazz, and rock, artists consistently perform their creative works or those they own.<sup>353</sup> It cannot be justified for the Sixth Circuit, which has little experience or knowledge of EDM, to make a ruling that potentially handcuffs generations of DJs based on its misunderstanding.<sup>354</sup>

## D. The Damages Discrepancy

### 1. Statutory Damages

Being a DJ is not the most financially lucrative profession in the world, but when done right, it can be very profitable. The top-earning DJs in 2019 were The Chainsmokers, a duo who brought in \$46 million of pre-tax income.<sup>355</sup> On average, between festivals and

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<sup>347</sup> John Schietinger, *Bridgeport Music, Inc. v. Dimension Films: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DePaul L. Rev. 209 (2005) [hereinafter *Missed a Beat*].

<sup>348</sup> Mark R. Carter, J.D., Ph.D., *Applying the Fragmented Literal Similarity Test to Musical-Work and Sound-Recording Infringement: Correcting the Bridgeport Music, Inc. v. Dimension Films Legacy*, 14 Minn. J.L. Sci. & Tech. 669 (2013).

<sup>349</sup> David Fagundes, *Efficient Copyright Infringement*, 98 Iowa L. Rev. 1791 (2013).

<sup>350</sup> *Id.*

<sup>351</sup> Robert M. Vrana, *The Remix Artist's Catch-22: A Proposal for Compulsory Licensing for Transformative Sampling-Based Music*, 68 Wash. & Lee L. Rev. 811 (2011).

<sup>352</sup> *Missed a Beat*, 55 DePaul L. Rev. 209.

<sup>353</sup> *Supra* BRITANNICA.

<sup>354</sup> About the Court, UNITED STATES COURT OF APPEAL FOR THE SIXTH CIRCUIT (Feb. 15, 2020, 3:00 pm) <https://www.ca6.uscourts.gov/about-court>. (“The United States Court of Appeals for the Sixth Circuit has jurisdiction over federal appeals arising from the states of Kentucky, Michigan, Ohio, and Tennessee.”); See Zach Landis, Top 10 Cities in the US for EDM, iEDM (Feb. 15, 2020, 3:15 pm), <https://www.forbes.com/sites/monicamercuri/2019/07/29/the-worlds-highest-paid-djs-of-2019/#1795c4287a97>. (which outlines that one of the top ten cities in the U.S. for EDM sits in the Sixth Circuit’s jurisdiction).

<sup>355</sup> Monica Mercuri, The World’s Highest-Paid DJs 2019: The Chainsmokers Topple Calvin Harris with \$46 Million, FORBES (Feb. 15, 2020, 3:18 pm).

private shows, the group pulled in mid-six-figure sums per night.<sup>356</sup> The duo emphasizes collaboration.<sup>357</sup> Member Alex Pall said, “[a]ny time we work with someone, it’s because they offer something to us creatively that inspires us.”<sup>358</sup> However, copyright law does not currently favor such collaboration.

The current copyright law landscape provides that an infringer is liable for either actual damages or statutory damages.<sup>359</sup> In calculating actual damages, a copyright owner “is required to present proof only of the infringer’s gross revenue, and the infringer is required to prove his or her deductible expenses and ... profit attributable to factors other than the copyrightable work.”<sup>360</sup> This can be an incredibly speculative and arbitrary analysis. For reference, if someone published a single song onto Spotify or Apple Music, that artist would get paid \$0.0032 or \$0.0056 per stream, respectively.<sup>361</sup> International electronic artists get paid less under the same streaming services, \$0.00292 or \$0.00544 on Spotify or Apple Music, respectively.<sup>362</sup> For sites better equipped to post complete DJ sets, YouTube offers various streaming royalties dependent upon the music’s category.<sup>363</sup> Artists receive \$0.00148 per stream on YouTube Official Music Content and \$0.00656 per stream on YouTube Red, while on YouTube ContentID, artists receive \$0.00122 per stream.<sup>364</sup>

Hypothetically, if a DJ posted a sixty-minute set on YouTube and received one million views, that artist would receive anywhere between \$1,220 and \$6,560 in streaming revenues.<sup>365</sup> If each song consisted of sixty one-minute portions of other artists’ songs with no original music, each song would earn that artist between \$20.33 and \$109.33.<sup>366</sup> If a label or an artist wanted to sue that DJ for actual damages in this hypothetical, that label or artist would be looking at a possible judgment anywhere from \$20.33 to

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<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> 17 U.S.C. § 504

<sup>360</sup> 17 U.S.C. § 504(b)

<sup>361</sup> What Music Streaming Services Pay Per Stream (And Why It Actually Doesn’t Matter), SOUNDCHARTS BLOG (Jan. 25, 2020, 6:32 pm) <https://soundcharts.com/blog/music-streaming-rates-payouts#youtubes-multi-channel-payout-system>.

<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> *Id.*

<sup>366</sup> These numbers come from dividing the total potential infringement \$1,220 or \$6,560 and dividing it by sixty.

\$109.33 per song that the DJ used. These amounts are likely not enough to justify any legal action.<sup>367</sup>

This lack of compensation is where statutory damages under copyright law come into play. Under the current framework of the copyright law, “a copyright owner may elect [...] an award of statutory damages [...] for which any one infringer is liable [...] in a sum of not less than \$750 or more than \$30,000.”<sup>368</sup> However, if the court finds willful infringement, where someone copies a work knowing it is copyrighted, the court may award a sum of not more than \$150,000.<sup>369</sup> To prove willful infringement, a plaintiff must show: (1) that the defendant was aware of the infringing activity, or (2) that the defendant’s actions were the result of reckless disregard for, or willful blindness to,<sup>370</sup> the copyright holder’s rights.<sup>371</sup> Conversely, if an individual was “not aware and had no reason to believe that his or her acts constituted an infringement of copyright,” a court could reduce statutory damages to \$100 per work.<sup>372</sup> That means, in comparison to the actual damages of a set that receives one million streams, the infringer could be liable for \$12,000 to \$9 million, regardless of how many streams that set received.<sup>373</sup> If successful, actual damages are almost obsolete in this context, and statutory damages could land the copyright holder a significant payday.

Congress alluded to a potential ability to protect infringers from excessive statutory damages.<sup>374</sup> The copyright act reads, “[a] single infringer of a single work is liable for a single amount between \$250 and \$10,000 range is to be made ‘for all infringements involved in the action.’”<sup>375</sup> That means if a DJ used a song multiple times or conducted multiple “infringements,” the DJ would only be

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<sup>367</sup> [Copyright small claims](https://copyrightalliance.org/news-events/copyright-news-newsletters/copyright-small-claims/), COPYRIGHT ALLIANCE (Feb. 19, 2020, 2:45 pm) <https://copyrightalliance.org/news-events/copyright-news-newsletters/copyright-small-claims/> (Describing how on Oct. 22, 2019, the House, by an overwhelming majority, passed the CASE Act, which is a bill that would create a small claims court within the U.S. Copyright Office “to handle copyright infringement claims from individual creators and small businesses that cannot afford to defend themselves in federal court.”).

<sup>368</sup> 17 U.S.C. § 504(c)(1)

<sup>369</sup> 17 U.S.C. § 504(c)(2)

<sup>370</sup> *Willful Blindness*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A voluntary yielding to what another proposes or desires”) (deliberate failure to make a reasonable inquiry of wrongdoing despite suspicion or an awareness of the high probability of its existence).

<sup>371</sup> 17 U.S.C. § 504(c)(2).

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> H.R. REP. NO. 94-1476 (1976)

<sup>375</sup> H.R. REP. NO. 94-1476. *See also XOOM, Inc. v. Imageline, Inc.*, 93 F. Supp. 2d 688 (E.D. Va. 1999) (where the court held that there can only be one award of statutory damages per copyright registration regardless of number of infringements or number of products containing infringing images).

held liable for one penalty.<sup>376</sup> If the DJ was an “innocent infringer,” a court could reduce the liability to \$100.<sup>377</sup> However, it is unclear if DJs fall into the innocent infringer section because, as Congress stated in the House Committee report, copyrights should not have “unlimited expansion into areas completely outside the present congressional intent.”<sup>378</sup> However, Congress preceded this statement with clear intent that copyright needs to be free to expand because “it is impossible to foresee the forms that these new expressive methods will take” such as electronic music.<sup>379</sup>

The committee continued, saying, “the minimum and maximum amounts are to be multiplied where multiple ‘works’ are involved in the suit.”<sup>380</sup> If multiple works from one artist are used, statutory damages would be multiplied.<sup>381</sup> The same is not true concerning multiple copyrights, multiple owners, multiple exclusive rights, or multiple registrations.<sup>382</sup> Therefore, every artist or copyright owner would get their opportunity to receive damages in court,<sup>383</sup> leaving the infringer open to suit for the same act multiple times.<sup>384</sup> As a DJ, that means one set posted to a website has opened him or her up to a seemingly infinite amount of possible lawsuits.

## 2. *Due Process Limitations to Statutory Damages*

The District of Massachusetts attempted to limit statutory damages by saying that statutory damages can violate the Due Process Clause.<sup>385</sup> However, the First Circuit Court of Appeals rejected that interpretation.<sup>386</sup> In *Sony BMG Music Entm’t*, the First Circuit used Supreme Court precedent from 1919,<sup>387</sup> long before the adoption of the 1976 Copyright Act and its relevant amendments, to conclude that a \$675,000 reward did not violate the Due Process Clause.<sup>388</sup> The court explicitly rejected the District Court’s finding that Due Process could potentially limit statutory damages.<sup>389</sup> The

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<sup>376</sup> *Id.*

<sup>377</sup> 17 U.S.C. § 504(c)(2).

<sup>378</sup> H.R. REP. NO. 94-1476.

<sup>379</sup> *Id.*

<sup>380</sup> *Id.*

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

<sup>385</sup> *Sony BMG Music Entm’t v. Tenenbaum*, 721 F. Supp. 2d 85 (D. Mass. 2010).

<sup>386</sup> *Sony BMG Music Entm’t v. Tenenbaum*, 719 F.3d 67 (1st Cir. 2013).

<sup>387</sup> *St. Louis, I.M. & S. R. Co. v. Williams*, 251 U.S. 63 (1919)

<sup>388</sup> *Tenenbaum*, 719 F.3d at 69.

<sup>389</sup> *Id.*

First Circuit expressly held that the only Constitutional limitation on damages would occur if “the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.”<sup>390</sup>

The First Circuit referenced the Supreme Court’s decision in *Bmw of N. Am. v. Gore*,<sup>391</sup> which laid out Due Process “guideposts” for a court’s consideration of punitive damages.<sup>392</sup> A court is to consider: (1) the degree of reprehensibility of the defendant’s conduct, (2) the ratio of the punitive award to the actual or potential harm suffered by the plaintiff, and (3) the disparity between the punitive award issued by the jury and the civil or criminal penalties in comparable cases.<sup>393</sup> However, the First Circuit in *Tenenbaum* explicitly held that statutory damages and punitive damages do not require the same constitutional analysis.<sup>394</sup> The *Tenenbaum* court further rationalized that *Gore*’s foundation was based upon notice to a defendant; since statutory damages specify the award set out, the notice requirement is satisfied.<sup>395</sup> Additionally, the *Tenenbaum* court articulated that the second Due Process consideration, ratio of the punitive award to the actual harm, does not apply to statutory damages because “a plaintiff ... under the Copyright Act need not prove actual damages.”<sup>396</sup> Lastly, the *Tenenbaum* court said statutory damages are themselves authorized civil penalties, and therefore the court need not apply the third factor of *Gore*.<sup>397</sup> In its conclusion, the *Tenenbaum* court sided with the Sixth<sup>398</sup> and Eighth Circuits.<sup>399</sup> It ruled that the correct test to apply in evaluating the fairness of statutory damages was the pre-1976 Copyright Act test articulated in *St. Louis, Iron Mountain & Southern Railway Company v. Williams*.<sup>400</sup>

In altogether abandoning a more recent Due Process analysis, the *Tenenbaum* court continued its evaluation of the award under the *Williams* standard.<sup>401</sup> The *Williams* standard evaluates statutory damages as to whether “the penalty prescribed is so severe

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<sup>390</sup> *Id.* at 70.

<sup>391</sup> *Bmw of N. Am. v. Gore*, 517 U.S. 559 (1996).

<sup>392</sup> *Tenenbaum*, 719 F.3d at 70.

<sup>393</sup> *Id.* (citing *Gore*, 517 U.S. at 575-580).

<sup>394</sup> *Id.*

<sup>395</sup> *Id.*

<sup>396</sup> *Id.* at 70-71.

<sup>397</sup> *Id.*

<sup>398</sup> *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 587 (6th Cir. 2007).

<sup>399</sup> *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 907 (8th Cir. 2012).

<sup>400</sup> *Tenenbaum*, 719 F.3d at 70-71 (citing *St. Louis, Iron Mountain & Southern Railway Company v. Williams*, 251 U.S. 63, 40 S.Ct. 71, 64 L.Ed. 139 (1919)).

<sup>401</sup> *Tenenbaum*, 719 F.3d at 71.

and oppressive as to be wholly disproportionate to the offense and obviously unreasonable.”<sup>402</sup> However, “[t]he *Williams* standard is far too deferential to Congress and its use has resulted in patently unfair and obviously unreasonable statutory damages awards against” musicians.<sup>403</sup> In contrast, the *Gore* standard addresses Congress's interests and fundamental fairness.<sup>404</sup>

### 3. *Performance Rights Royalties*

As for public performances, the damage system for infringement is not as clear-cut. Performance Rights Organizations (PROs) heavily regulate public performances.<sup>405</sup> PROs are associations, corporations, or other entities that license the public performance of nondramatic musical works on behalf of copyright owners of such works.<sup>406</sup> In the United States, these organizations consist of the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.<sup>407</sup> The U.S. Department of Justice in the 1940s placed a “consent decree” on BMI and ASCAP.<sup>408</sup> A consent decree strips the PROs of the ability to operate on a free-market basis, preventing them from setting the price on the use of intellectual property.<sup>409</sup> Instead, a federal judge in New York dictates the royalty rate the PROs must pay, and the PROs must oblige.<sup>410</sup>

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<sup>402</sup> *Williams*, 251 U.S. at 233.

<sup>403</sup> Kate Cross, *David v. Goliath: How the Record Industry is Winning Substantial Judgments Against Individuals for Illegally Downloading Music*, 42 *TXTLR* 1031 (2010).

<sup>404</sup> *Id.*

<sup>405</sup> *Supra* Writer

<sup>406</sup> [Why ASCAP Licenses Bars, Restaurants & Music Venues](https://www.ascap.com/help/ascap-licensing/why-ascap-licenses-bars-restaurants-music-venues), ASCAP (Feb. 1, 2020, 7:28 pm) <https://www.ascap.com/help/ascap-licensing/why-ascap-licenses-bars-restaurants-music-venues>. [hereinafter ASCAP]

<sup>407</sup> 17 U.S.C. § 101

<sup>408</sup> *Supra* Writer

<sup>409</sup> *Id.*

<sup>410</sup> *Id.*

Artists or songwriters make their money from mechanical reproduction,<sup>411</sup> public performance,<sup>412</sup> or synchronizations.<sup>413</sup> Most songwriters earn their money through either mechanical reproduction, “regulated by a World War I era law,” or the public performance, “regulated by a World War II Era consent decree.”<sup>414</sup> For seventy-five percent of the revenue songwriters earn, the price is set by the federal government.<sup>415</sup>

Many owners of restaurants, bars, or nightclubs pay PROs for a general licensing fee.<sup>416</sup> According to ASCAP’s website, “individual licensing fees vary based on a number of factors, including how a business uses music, its seating capacity, how many nights it hosts live music, etc.”<sup>417</sup> However, it also suggests that these venues could pay as little as “a dollar or two a day.”<sup>418</sup> ASCAP also details the current status of the law and where the liability falls: Some people mistakenly assume that musicians and entertainers must obtain licenses to perform copyrighted music, or that businesses where music is performed can shift their responsibility to musicians or entertainers. The law says all who participate in, or are responsible for performances of music are legally responsible. Since it is the business owner who obtains the ultimate benefit from the performance, it is the business owner who obtains the license. Music license fees are one of many costs of doing business.<sup>419</sup>

PROs long have advocated for protecting songwriters’ and artists’ rights and have valiantly tried to ensure these artists retain compensation for their intellectual properties.<sup>420</sup>

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<sup>411</sup> 17 U.S.C. § 106 (“Reproduction. – Read together with the relevant definitions in section 101 [section 101 of this title], the right “to reproduce the copyrighted work in copies or phonorecords” means the right to produce a material object in which the work is duplicated, transcribed, imitated, or simulated in a fixed form from which it can be “perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”).

<sup>412</sup> *Id.* (The right of public performance under section 106(4) [clause (4) of this section] extends to “literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works and sound recordings” and, unlike the equivalent provisions now in effect, is not limited by any “for profit” requirement. The approach of the bill, as in many foreign laws, is first to state the public performance right in broad terms, and then to provide specific exemptions for educational and other nonprofit uses.)

<sup>413</sup> Types of Copyright, BMI (Feb. 15, 2020, 5:16 pm)

[https://www.bmi.com/licensing/entry/types\\_of\\_copyrights](https://www.bmi.com/licensing/entry/types_of_copyrights). (Saying that Music Publishers issue licenses as copyright owner or his agent, usually to a producer, granting the right to synchronize the musical composition in timed relation with audio-visual images on film or videotape.)

<sup>414</sup> *Supra* Writer

<sup>415</sup> *Supra* Writer

<sup>416</sup> *Supra* ASCAP

<sup>417</sup> *Id.*

<sup>418</sup> *Id.*

<sup>419</sup> *Supra* ASCAP

<sup>420</sup> *Supra* Writer

Venues are subject to the same legal standard as an individual when evaluating damages from copyright infringement.<sup>421</sup> PROs act as a mitigating force to ensure artists get paid for their music.<sup>422</sup> In *Broadcast Music, Inc. v. Prana Hospitality, Inc.*, BMI and its co-parties brought suit against Prana Hospitality, Inc., who hosted a DJ that played unlicensed music. The court acknowledged that there “was no practical way of determining the actual damages sustained by the [performing rights society] as a result of the defendant’s infringement.”<sup>423</sup> However, in this case, it appeared to be motivated in part by a blatant disregard for payment demands.<sup>424</sup> There was a “significant threat of future copyright infringement” due to the venue owner’s repeated disregard of letters, emails, phone calls, and visits asking to cease the infringement.<sup>425</sup> In determining the statutory damages for infringement, the court considered:

- (1) the infringers state of mind;
- (2) the expenses saved, and profits earned by the infringer;
- (3) the revenue lost by the copyright holder;
- (4) deterrent effect on infringer and third parties;
- (5) the infringer’s cooperation in providing evidence concerning the value of infringing material; and
- (6) the conduct and attitude of the parties.<sup>426</sup>

Ultimately, the Southern District of New York held the venue liable rather than the DJ.<sup>427</sup> The court relied upon the statutory damages analysis and determined the proper remedy was \$15,000 for each act or \$45,000 total.<sup>428</sup> Notably, the *Prana* court said the DJ was not liable for a single dollar<sup>429</sup> in harmony with ASCAP’s policy.<sup>430</sup>

Therefore, hypothetically, a DJ can perform a sixty-song set at a nightclub, get paid for his performance, have one million people hear his music, and have potentially no liability for potential copyright infringement.<sup>431</sup> However, by uploading that same sixty-song set to a streaming service and making little-to-no money off it,

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<sup>421</sup> *Supra* ASCAP

<sup>422</sup> *Id.*

<sup>423</sup> *Broadcast Music, Inc. v. Prana Hospitality, Inc.*, 158 F. Supp. 3d 184, 195. (S.D.N.Y. 2016)

<sup>424</sup> *Id.*

<sup>425</sup> *Id.*

<sup>426</sup> *Prana Hospitality*, 158 F. Supp. 3d 184., at 27.

<sup>427</sup> *Id.*

<sup>428</sup> *Id.* at 192.

<sup>429</sup> *Id.*

<sup>430</sup> *Supra* ASCAP

<sup>431</sup> *Supra* ASCAP

that DJ is potentially liable for anywhere from \$6,000 to \$9 million in statutory damages.<sup>432</sup> The discrepancy between the two is shocking and clearly shows how current copyright law disproportionately harms EDM.

## II. THE SOLUTION

### A. Removal of Statutory Damages

The asserted purpose behind statutory damages is to “discourage wrongful conduct, as well as to provide reparation for injury.”<sup>433</sup> However, in practical application, statutory damages do not always have their intended effects. For example, the hypothetical infringement scenario put forward earlier in this note would still leave a DJ liable for a *minimum* of \$12,000 in damages when in reality, his actions caused *at most* \$6,560 in lost profits. If one of the stated purposes behind copyright laws is to promote science and the useful arts, does depriving artists of the incentive to create music justify unnecessarily harsh statutory minimum damages? Unfortunately, no empirical data reflects how many of these infringers are being placed on notice or having fines handled outside the court.

Even if empirical data proved statutory damages were not indiscriminately pursued against young and naïve infringers, it would not justify a statutory framework on the books that allows disproportionate harm. The solution could be as simple as removing the existing statutory floor for infringements. Adhering to the Constitutionally mandated punitive damages cap that does not allow for damages to exceed ten times the actual damages would also be a solution.<sup>434</sup> The current statutory framework unnecessarily handcuffs artists from fulfilling a Constitutional purpose of copyright law: advancing the useful arts.

As of 2013, only twenty-four of the 177 World Intellectual Property Organization’s (WIPO) members (13.56 percent) allow for the recovery of statutory damages.<sup>435</sup> In the United States, about

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<sup>432</sup> 17 U.S.C. § 504(b).

<sup>433</sup> *Prana Hospitality*, 158 F. Supp. 3d 184 at 197-98.

<sup>434</sup> *BMW*, 517 U.S. 559.

<sup>435</sup> Pamela Samuelson, Phil Hill, & Tara Wheatland, [Statutory Damages: A Rarity in Copyright Laws Internationally, But For How Long?](https://cyber.harvard.edu/people/tfisher/IP/Samuelson_SDs_2013.pdf), HARVARD UNIVERSITY (Feb. 1, 2020, 12:02 pm), [https://cyber.harvard.edu/people/tfisher/IP/Samuelson\\_SDs\\_2013.pdf](https://cyber.harvard.edu/people/tfisher/IP/Samuelson_SDs_2013.pdf)

twelve federal statutes provide for statutory damages.<sup>436</sup> Congress utilizes statutory damages “as a remedy in consumer protection statutes or intellectual property laws.”<sup>437</sup> The generalized policies behind statutory damages are: (1) vindicating a plaintiff’s rights; (2) acknowledging that actual damages are sometimes too small to warrant filing; (3) encouraging access to courts; (4) promoting judicial economy since statutory damages do not require the same level of proof as actual damages; (5) resolving difficulty in quantifying actual damages; and (6) allowing for punitive purposes.<sup>438</sup>

Congress’s reasoning for its continued use of statutory damages attempts to gloss over more significant systemic issues within the music industry. This avenue for copyright owners to seek astronomically extensive damages as a bargaining chip against infringers is not the proper solution. Courts have treated statutory damages as the form of notice Due Process requires.<sup>439</sup> One court in Alabama said that a court *must award* an “amount that will put a defendant on notice that it costs more to violate copyright law than to obey it.”<sup>440</sup> In the view of this Alabama court, the proper form of notice is not for the legislature to advocate for a better law nor to provide platforms to where amateur artists can better and more affordably comply with copyright law. Instead, the court’s job is apparently to give a statutory damages award that would violate the Due Process Clause if framed as “punitive” as opposed to “statutory.”

The income inequality of established artists and songwriters should not befall amateur DJs in using songs of their idols to hone their crafts. As Pall of The Chainsmokers recently said, the most successful DJs in the world got to where they are based on their collaborative inspirations.<sup>441</sup> When a genre is composed solely of performances that sample sixty or more songs of differing artists, it is nearly impossible for amateur DJs to improve their skills without

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<sup>436</sup> Geoffrey S. Stewart, Emerging Issues in Statutory Damages, JONES DAY (Feb. 5, 2020, 2:25 pm), <https://www.jonesday.com/en/insights/2011/07/emerging-issues-in-statutory-damages>.

<sup>437</sup> *Id.* (Some of the most well-known statutes are the Anti-Counterfeiting Consumer Protection Act of 1996, Anti-Cybersquatting Consumer Protection Act of 1999, Cable Piracy Act, Cable Privacy Act, Copyright Act, Fair and Accurate Credit Transactions Act of 2003, Fair Debt Collection Practices Act of 1978, Stored Communications Act of 1986, Telephone Consumer Protection Act of 1991, Truth in Lending Act of 1968, Worker Adjustment and Retraining Notification Act of 1988).

<sup>438</sup> Geoffrey S. Stewart, Emerging Issues in Statutory Damages, JONES DAY (Feb. 5, 2020, 2:25 pm), <https://www.jonesday.com/en/insights/2011/07/emerging-issues-in-statutory-damages>.

<sup>439</sup> *Dream Dealers Music v. Parker*, 924 F. Supp. 1146 (S.D. Ala. 1996).

<sup>440</sup> *Id.* at 1153.

<sup>441</sup> Monica Mercuri, The World’s Highest-Paid DJs 2019: The Chainsmokers Topple Calvin Harris with \$46 Million, FORBES (Feb. 15, 2020, 3:18 pm).

using others' work. However, statutory damages alone have made it possible for attorneys to seek out a reward of \$9 million where actual damages are zero.<sup>442</sup>

In attempting to justify the existence of statutory damages, Congress has provided an ambiguous standard and increased punishment for “willful” infringers.<sup>443</sup> But a straightforward application of statutory damages has proven incredibly elusive. Congress has maintained the statutory maximum of \$150,000 should be reserved only for the most “exceptional cases.”<sup>444</sup> However, Congress has seemingly contradicted itself by also saying, “[n]othing in this paragraph [17 U.S.C. section 504] limits what may be considered a willful infringement.”<sup>445</sup> Some courts have interpreted willful infringement to mean mere knowledge of infringement.<sup>446</sup> Other courts have found willful infringement even when a defendant raises a plausible but unsuccessful fair use defense.<sup>447</sup> Other statutes allowing for statutory damages have faced many of the same issues, saying that “willful” merely requires an unjustifiably high risk of harm.<sup>448</sup> This ambiguity leaves a dangerous and potentially high-stakes game to be played in a courtroom.

The natural skeptic may counter that just because this is theoretically possible, it does not happen in practice. Those skeptics would be wrong. In one case, a court upheld a \$19.7 million award when actual damages were estimated to be between \$59,000 and \$6.6 million.<sup>449</sup> The court decided that based on the Copyright Act's language, statutory damages should be considered without any regard to actual damages.<sup>450</sup> This rationale directly cuts against

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<sup>442</sup> 17 U.S.C. §504; See Geoffrey S. Stewart, *Emerging Issues in Statutory Damages*, JONES DAY (Feb. 5, 2020, 2:25 pm), <https://www.jonesday.com/en/insights/2011/07/emerging-issues-in-statutory-damages>.

<sup>443</sup> 17 U.S.C. § 504(c)(2).

<sup>444</sup> Geoffrey S. Stewart, *Emerging Issues in Statutory Damages*, JONES DAY (Feb. 5, 2020, 2:25 pm), <https://www.jonesday.com/en/insights/2011/07/emerging-issues-in-statutory-damages>.

<sup>445</sup> *Id.*

<sup>446</sup> *Id.*

<sup>447</sup> *Id.*

<sup>448</sup> *Id.*

<sup>449</sup> *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 458-60 (D. Md. 2004); *Accord Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574 (6th Cir. 2007) (upholding an award of \$806,000 (\$31,000 per work) when plaintiff's actual damages were approximately \$18,457.92 in lost licensing fees).

<sup>450</sup> *F.W. Woolworth*, 344 U.S. at 233 (“Even for uninjurious and unprofitable invasions of copyright the court may, if it deems just, impose a liability within statutory limits to sanction and vindicate the statutory policy”); *Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co.*, 74 F.3d 488, 496 (4th Cir. 1996), cert. denied 519 U.S. 809 (1996) (upholding the Copyright Act's then-maximum statutory damages award of \$100,000 per infringed work despite plaintiff's inability to identify

Congress's stated justification to make statutory damages more akin to punitive damages.<sup>451</sup> The Supreme Court specifically said that a \$2 million award in punitive damages, when actual damages were \$4,000, a 500-to-1 ratio of punitive-to-actual damages, directly violated the Due Process Clause.<sup>452</sup> Further, the Supreme Court held that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."<sup>453</sup> However, the court in *Lowry Reports, Inc. v. Legg Mason, Inc.* applied statutory damages instead of punitive damages and found a 334-to-1 ratio permissible,<sup>454</sup> even when the actual damages were merely an estimate and not readily ascertainable.<sup>455</sup> This disproportionate ratio would be a severe departure from the Due Process Clause.

As the First Circuit in *Sony BMG Music Entertainment, et al. v. Tenenbaum* articulated, the justification for not applying the Due Process standards to statutory damage awards lies in the specific statutory framework.<sup>456</sup> The *Tenenbaum* court's rationale says that the Copyright Act's codification of statutory damages provides more notice than multiple Supreme Court cases outlining the Constitutional boundaries of punitive damages.<sup>457</sup> Thus, the First Circuit ruled it entirely permissible for a court to reward a major music label with a \$650,000, \$1 million, or even \$6.5 million judgment against an artist because he is theoretically "on notice." With courts permitted, just as in *Tenenbaum*, to award \$675,000 in statutory damages, when the actual damages were *no more than* \$450 (a 1,500-to-1 ratio, or roughly 150 times larger than the

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damages or lost profits and the fact that defendant's revenue from infringing sales totaled only \$10,200).

<sup>451</sup> *Cass Cty. Music Co. v. C.H.L.R. Inc.*, 88 F.3d 635, 643 (1996). *Accord on Davis v. The Gap Inc.*, 246 F.3d 152, 172 (2nd Cir. 2001) ("The purpose of punitive damages—to punish and prevent malicious conduct—is generally achieved under the Copyright Act through the provisions of 17 U.S.C. § 504(c)(2)"); *Cotra Richmond Homes Mgmt., Inc v. Raintree, Inc.*, 862 F. Supp. 1517 (W.D. Va. 1994) (holding Damages provision of Copyright Act is premised on theory of restitution and unjust enrichment, not punishment; under this restitution scheme, plaintiff must prove its loss or unjust profits of infringer).

<sup>452</sup> *Bmw*, 517 U.S. 599.

<sup>453</sup> *State Farm v. Campbell*, 548 U.S. 408, 437 (2003).

<sup>454</sup> The court estimated that the range of actual damages was somewhere between \$59,000 and \$6.6 million, so the higher end of that ratio would have been a three-to-one difference. *Lowry's Reports, Inc.*, 302 F. Supp. 2d at 458-60; *Accord Zomba Enters.*, 491 F.3d 574 (upholding an award of \$806,000 (\$31,000 per work) when plaintiff's actual damages were approximately \$18,457.92 in lost licensing fees).

<sup>455</sup> *Id.*

<sup>456</sup> *Tenenbaum*, 719 F.3d at 71.

<sup>457</sup> *Id.*

constitutional maximum of punitive damages),<sup>458</sup> there seems to be infinite potential for widespread violations of fundamental fairness.

The reality is that the statutory damages component allows courts to circumvent Constitutional parameters of punitive damages by using statutory damages. In the original hypothetical put forward in this note, where an amateur DJ caused actual damages of \$1,220, as of today, that amateur DJ is *at a minimum* liable for \$12,000 in statutory damages, which is reaching the *Due Process limitations* of punitive damages. However, in instances where many infringers are young kids looking to replicate their idols, the statutory damage floor can hardly be justified.

To prevent further violations and unnecessary exposure of statutory damages to artists ignorant of the law, the legislature needs to act. The solution is removing the current statutory damages from 17 U.S.C. § 504 and replacing it with a punitive damages provision. This article's objective is not to advocate for a free-rider system allowing artists to benefit from the effort of others. Rather, it advocates making the judicial system better reflect the intended purpose of copyright law, promoting science and the useful arts.<sup>459</sup> By adopting a punitive damages standard, the legislature can still comport with the aim of statutory damages, “to compensate plaintiffs and deter defendants from future infringing conduct by making it clear that infringement is significantly more expensive than paying licensing fees.”<sup>460</sup>

It is entirely illogical to believe the reward necessary to “compensate” the copyright holder and “deter” future infringement requires a judgment with a ratio of 1,500-to-1 in statutory-to-actual damages.<sup>461</sup> That reward is a shock-and-awe tactic that would violate the Due Process Clause if it covered purely punitive damages. Instead, as applied to the constitutional limits of punitive damages, the effective reward would be \$4,050 (\$450 multiplied by nine.)<sup>462</sup> This proportional increase allows for just punishments that more closely correlate directly to the damage done.

No genre is in greater danger of the current statutory scheme than EDM. With every performance, every practice, and every chance to upload art comes the unmitigated possibility that a label

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<sup>458</sup> *Id.*

<sup>459</sup> U.S. Const. art. I, § 8, cl. 8.

<sup>460</sup> *Unicity Music, Inc. v. Omni Commc'ns, Inc.*, 844 F. Supp. 504 (E.D. Ark. 1994).

<sup>461</sup> 17 U.S.C. § 504

<sup>462</sup> As the Supreme Court suggested in *Gore*, while there is no set ratio, any ratio above 10:1 would likely be unconstitutional.

could come to seek a payday. With the court system's apparent adherence to statutory damages of the copyright law and the proven track record of allowing 1,500-to-1 damage ratios, this specific change will likely not come from the judiciary. Thus, if the legislature wants to protect an industry worth nearly \$7.4 billion and protect the future of the EDM genre,<sup>463</sup> the copyright law needs to change.

## B. Expansion of Fair Use

If Congress chooses not to act, artists may have no other option but to look to the courts to provide the proper mitigating remedy. While courts have been thus far justified in their application of statutory damages, there could be a potentially valid defense. The precise hole the Sixth Circuit left open in *Bridgeport Music v. Dimension Films, Inc.* could prove to bring a rational solution, expanding the fair use defense.<sup>464</sup>

As the fair use defense is currently codified, it allows courts a great deal of discretion: 17 U.S.C. section 107 asks courts to make their determination based on: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount or substantiality used, and; (4) the effect on the potential market value.<sup>465</sup> This test, much like the standard set forth for statutory damages, is challenging to prove and somewhat subjective. However, if the U.S. court system looks to international precedent, it may find helpful guidance.

Canada has a similar law to Fair Use, what it calls "Fair Dealing."<sup>466</sup> Fair Dealing is commonly referred to as the "user's right."<sup>467</sup> The law is structured similarly to the U.S. Fair Use law. However, Canada examines the commercial purpose factor differently.<sup>468</sup> The law currently reads, "It is *not an infringement* of copyright for an individual to use an existing work ... if (a) the use of ... the new work or other subject-matter is done solely for non-commercial purposes."<sup>469</sup> While a statute placed into effect by

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<sup>463</sup> Jason Karaian, [Avicii's fortunes mirrored the money-spinning rise of electronic dance music](https://qz.com/1258832/avicii-net-worth-reflected-edm-as-a-force-in-the-music-industry/), QUARTZ (Feb. 1, 2020 4:00 pm), <https://qz.com/1258832/avicii-net-worth-reflected-edm-as-a-force-in-the-music-industry/>.

<sup>464</sup> *Bridgeport Music*, 410 F. 3d 792.

<sup>465</sup> 17 U.S.C. § 107

<sup>466</sup> Copyright Act, 2002, R.S.C., c. C-42, s. 29 (Can.).

<sup>467</sup> *Id.*

<sup>468</sup> *Id.*

<sup>469</sup> Copyright Act, 2012, R.S.C., c. C-20, s. 22 (Can.).

Congress would be the most efficient methodology of implementing this commercial purpose standard, the current U.S. copyright law is written somewhat similarly.

The first prong of the U.S. Fair Use law considers “the purpose or character of the use.”<sup>470</sup> Courts could follow Canadian Fair Dealing’s example and easily interpret this language to mean that where there is no commercial purpose, there *is no infringement*.<sup>471</sup> This adjustment would line up better with the goals of copyright law and the omission of moral rights from any statutory provision other than the Visual Artist Rights Act of 1990.<sup>472</sup> The most probative underlying assessment in Fair Use analysis is the economic rights undertone.<sup>473</sup> Two of the factors speak directly to this, the purpose of use and the potential effect on market value.<sup>474</sup> Therefore, it appears that this extension of Fair Use gets to the purpose of copyright law far better than the copyright law currently.

The purpose of the Fair Use Doctrine is “to prevent the strict enforcement of copyright law when its enforcement would inhibit the very progress of science and useful arts that copyright is intended to promote.”<sup>475</sup> If DJs were rightly safeguarded from those seeking to recover large amounts of statutory damages by using a Fair Use defense, it would allow the next generation of artists to be left alone and to create.

The arguments that come up most frequently in the aversion to the expansion of Fair Use are the exclusive rights of a copyright owner.<sup>476</sup> In the realm of DJs and EDM artists, the most problematic of these exclusive rights is the right to prepare derivative works—or essentially, to be an EDM DJ at all, since performances are constructed solely off the use of others’ music or remixes of others’ work.<sup>477</sup> This law was made effective in 2002, before the development of EDM music as we know it today.<sup>478</sup> Understandably, the law essentially neglects music’s evolution to what is now known as “remix culture.”<sup>479</sup> The rigid application of

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<sup>470</sup> 17 U.S.C. § 107(1)

<sup>471</sup> Copyright Act, 2012, R.S.C., c. C-20, s. 22 (Can.).

<sup>472</sup> 17 U.S.C. § 106A

<sup>473</sup> *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, 780 F. Supp. 1283, 1292 (N.D.Cal. 1991) (where the court specifically articulated that one of the aspects of “purpose or character” of a use is whether such a use “is commercial in nature.”)

<sup>474</sup> 17 U.S.C. § 107

<sup>475</sup> *Rubin*, 836, 915 F. Supp. 909.

<sup>476</sup> 17 U.S.C. § 106

<sup>477</sup> *Supra* BRITANNICA.

<sup>478</sup> 17 U.S.C. § 106

<sup>479</sup> Robert M. Vrana, *The Remix Artist’s Catch-22: A Proposal for Compulsory Licensing for Transformative Sampling-Based Music*, 68 Wash. & Lee L. Rev. 811 (2011).

this right could completely dissolve an industry or genre. Without the ability to remix, there is no ability to learn and create EDM.

Just as the sports industry eventually believed that the radio's introduction would kill their industry, it helped it grow.<sup>480</sup> Then came along the television, which caused more concern that technology would ruin the industry; however, skeptics were wrong once again, and the industry grew.<sup>481</sup> As the industry again faces the perceived “threat” of streaming, the industry has adapted and has learned that whenever your craft can be exposed to the largest amount of eyes and ears, it does not prove fatal; it proves to be a rebirth.<sup>482</sup> The same can be said about the music industry.<sup>483</sup> Creative destruction is a necessary evil. EDM was born out of the ability to collaborate and innovate.<sup>484</sup> Now that technology allows the next generation of musicians to bootleg a song off SoundCloud and effectively create an entirely new work out of the chore of another artist’s work, it is time for the copyright law to adapt.<sup>485</sup>

Imputing the commercial purpose standard onto the current fair use analysis acts as an informal middle ground to the artist’s rights and the user’s rights. It allows for a freeing of the creative marketplace for users. DJs can adjust, create, and experiment and develop the useful arts just as the Constitution permits. Where there is no economic harm, there is no infringement. Copyright owners are still capable of standing their ground if their ability to monetize their music is threatened. It does not absolve any potential claim of infringement but merely allows the next generation to create.

### III. CONCLUSION

Under current copyright law, the genre of EDM is severely hindered through unnecessary exposure to statutory damage liability. Statutory damages enable copyright holders to sue EDM DJs at a ratio as high as 1,500 to 1 (statutory to actual damages). Considering EDM performances are made entirely of segments of other people’s music, these damages are capable of reaching north

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<sup>480</sup> The History of Sports Journalism, SPORTS MEDIA GUY (Feb. 16, 2020, 8:49 pm), <https://www.sportsmediaguy.com/blog/2017/5/10/the-history-of-sports-journalism-part-2-of-3>.

<sup>481</sup> *Id.*

<sup>482</sup> Pete Giorgio, 2020 Sports Industry Outlook, DELOITTE (Feb. 16, 2020, 8:51 pm), <https://www2.deloitte.com/us/en/pages/technology-media-and-telecommunications/articles/sports-business-trends-disruption.html>.

<sup>483</sup> *Supra* BRITANNICA.

<sup>484</sup> Monica Mercuri, The World’s Highest-Paid DJs 2019: The Chainsmokers Topple Calvin Harris with \$46 Million, FORBES (Feb. 15, 2020, 3:18 pm).

<sup>485</sup> *Supra* BRITANNICA.

of \$1,000,000. To better enforce the foundational policy behind copyright law, promoting science and the useful arts, the law itself needs to change. These changes can come in many ways; however, this note advocates for two in particular.

First, abolishing statutory damages from the copyright code. Under a Due Process analysis, the current court system incorrectly allows excessive statutory to actual damage ratios. These damage ratios are mainly due to various Circuit Courts' reasoning that statutory damages do not fall under the same analytical framework as punitive damages. It results in courts issuing damages that are not bounded by the single-digit ratio limitation that currently governs punitive damages. Ultimately this structure allows copyright holders to receive significant damage awards, hindering the development of the EDM genre, as the fear of legal action may outgrow the desire to advance the art.

Second, the courts can align the U.S. Fair Use Doctrine with that of Canada. This alteration to the Fair Use Doctrine would allow any users not releasing their work for a commercial purpose to be free from legal action. Considering the minimal amount of royalties EDM DJs receive from streaming sites, publishing sets on these sites are hardly for a commercial purpose. Therefore, DJs can use these published sets to promote the EDM art form without excessive violation of a copyright holder's rights.

While it is imperative to strike a balance between the commercial monopoly of copyright and the user's ability to enjoy the published work, it is more important not to lose sight of copyright law's purpose. Its purpose is to promote science and the useful arts. Allowing excessive damages without some shield for EDM DJs threatens the EDM genre development. While there might not be an easy answer to this complex balancing act, there is a constitutional one. The current structure of statutory damages fails to meet that constitutional threshold.

QUARTERBACKS AND CAR DEALERSHIPS:  
THE FIGHT FOR CONTROL OF STUDENT-ATHLETES’  
NAMES, IMAGES, AND LIKENESSES

MADISON ROMINE

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**INTRODUCTION**

Student-athletes playing Division I, II, or III sports governed by the National Collegiate Athletic Association (NCAA) are the only class of adults who cannot profit from the use of their names, images, and likenesses (NILs). Under the current NCAA rules, a student-athlete is not permitted to use his NILs for commercial or

endorsement purposes.<sup>486</sup> For years, the NCAA refused to reconsider its policy regarding student-athlete endorsements, but lawmakers stepped in. California Governor Gavin Newsom signed the Fair Pay for Play Act on September 30, 2019.<sup>487</sup> When the law goes into effect in 2023, student-athletes can profit from their NILs by entering endorsement deals.<sup>488</sup> The NCAA went on the record opposing the bill, with NCAA President Mark Emmert writing to Governor Newsom in opposition, stating he would prefer that the NCAA enact their own guidelines.<sup>489</sup>

The American public has never been more supportive in allowing student-athletes to profit from their NILs, with a recent study showing sixty percent of the public support it and fifty-nine percent of those people believe that the NCAA should oversee the regulations instead of individual states.<sup>490</sup> In addition, eighty percent of respondents ages eighteen to twenty-nine supported paid student-athlete endorsements.<sup>491</sup> Since California passed the Fair Pay to Play Act on September 30, 2019, Florida, New Jersey, Colorado, Nebraska, and Michigan have passed various similar bills, with most having delayed effective dates.<sup>492</sup> Florida's bill is the first slated to go into effect, becoming effective on July 1, 2021.<sup>493</sup>

With added pressure from the public and lawmakers, the NCAA's governing board announced on October 29, 2019 that it would allow student-athletes to profit from their NILs, but left it up to each division to enact its own rules.<sup>494</sup> On January 8, 2021, the United States Department of Justice weighed in on the NCAA Board of Governors' pending vote on new NIL legislation.<sup>495</sup> Makan

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<sup>486</sup> NCAA Eligibility Center, Promoting or Endorsing Commercial Products or Services, [http://fs.ncaa.org/Docs/eligibility\\_center/ECMIP/Amateurism\\_Certification/Promoting\\_Endorsing\\_Commercial\\_Products\\_Services.pdf](http://fs.ncaa.org/Docs/eligibility_center/ECMIP/Amateurism_Certification/Promoting_Endorsing_Commercial_Products_Services.pdf) (last updated July 2019).

<sup>487</sup> Sen. Bill. 206, 2019 Reg. Sess. (Cal. 2019), [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200SB206](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB206) (enacted).

<sup>488</sup> *Id.*

<sup>489</sup> NCAA, *NCAA Responds to California Senate Bill 206* (Sept. 11, 2019, 10:08 AM), <http://www.ncaa.org/about/resources/media-center/news/ncaa-responds-california-senate-bill-206>.

<sup>490</sup> Rick Gentile, *American Public Supports College Athletes Receiving Endorsement Money for 'Image and Likeness,' as Approved in California This Week* (Oct. 3, 2019), <http://blogs.shu.edu/sportspoll/2019/10/03/american-public-supports-college-athletes-receiving-endorsement-money-for-image-and-likeness-as-approved-in-california-this-week/>.

<sup>491</sup> *Id.*

<sup>492</sup> Gregg Clifton, *UPDATE: Michigan Joins Growing Number Of States Granting Name, Image, Likeness Rights To Collegiate Student-Athletes*, *JDSupra* (Jan. 4, 2021), <https://www.jdsupra.com/legalnews/update-michigan-joins-growing-number-of-3939360/>.

<sup>493</sup> *Id.*

<sup>494</sup> Dan Murphy, *NCAA Clears Way for Athletes to Profit from Names, Images and Likenesses*, *ESPN* (Oct. 29, 2019), [https://www.espn.com/college-sports/story/\\_/id/27957981/ncaa-clears-way-athletes-profit-names-images-likenesses](https://www.espn.com/college-sports/story/_/id/27957981/ncaa-clears-way-athletes-profit-names-images-likenesses)

<sup>495</sup> Steve Berkowitz, Christine Brennan, and Dan Wolken, *DOJ critical of NCAA's view of antitrust compliance; association president Mark Emmert wants voting delay on rules proposals*, *USA Today*

Delrahim, Assistant Attorney General and head of the DOJ's Antitrust Division, sent Emmert a letter warning that parts of the proposed legislation would likely conflict with antitrust law.<sup>496</sup> In particular, Delrahim warned that schools barring student-athletes from endorsing brands that compete with school sponsorships or otherwise conflict with school and NCAA values would limit student-athletes' access to the free market.<sup>497</sup> This Note argues that Division I should adopt a hybrid of California's Fair Pay to Play Act and New York's proposed Collegiate Athletic Participation Compensation Bill, including regulation of agents, prohibition of endorsements that conflict with team contracts during school sanctioned events, protection of scholarships, and establishment of a sports injury health savings account, as well as advocating for either a uniform right of publicity or a federal right of publicity to ensure uniform enforcement of the new rules.

This Note will discuss the right of publicity and its contentious history in the context of the NCAA and student-athletes, as well as the legislation drafted to allow student-athletes to profit from their NILs. Section I looks at the different approaches New York, California, Tennessee, and Indiana take regarding the right of publicity, the lack of a federal right of publicity, and the history of student-athletes and their right of publicity in the NCAA. Section I also discusses relevant NCAA Division I Manual rules regarding amateurism and promotional activities. Section II examines the California Fair Pay to Play Act and the proposed New York Collegiate Athletic Participation Compensation Bill. Section III proposes a hybrid of the Fair Pay to Play Act and the Collegiate Athletic Participation Compensation Bill for Division I of the NCAA to adopt. It also examines why certain elements of California's act and New York's bill would or would not be beneficial for Division I to adopt and why Indiana's definition of NILs should be the basis for a federal or uniform right of publicity. Section III concludes by exploring potential repercussions, different ways student-athletes can benefit from endorsement profits, and professional athletes' reactions and support.

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(Jan. 9, 2021), <https://www.usatoday.com/story/sports/college/2021/01/09/ncaa-mark-emmert-doj-delay-vote-transfer-name-image-likeness/6610895002/>

<sup>496</sup> *Id.*

<sup>497</sup> Ralph D. Russo, *After DOJ warning, NCAA to delay vote on compensation rules*, AP (Jan. 9, 2021), <https://apnews.com/article/athlete-compensation-mark-emmert-legislation-laws-f456f4ffa9869653573c146bf5387a34>

## I. BACKGROUND

### A. Right of Publicity

There is no current federal right of publicity in the United States, and only thirty states recognize and protect the right of publicity in some respect.<sup>498</sup> These various approaches to rights of publicity range from statutory protections specific to the right of publicity, to common law causes of action, to incorporating the right of publicity into the right of privacy, to unfair competition and property law.<sup>499</sup> New York, California, and Tennessee differ in their statutory protections of the right of publicity. Because of these states' entertainment industries, their statutes are some of the most prominent, yet Indiana is considered to have the most comprehensive right of publicity statute.<sup>500</sup>

New York's Civil Rights Law §§ 50-51 protects the right of publicity, but does so under the right of privacy.<sup>501</sup> Under the New York statute, the right of publicity is rooted in privacy rights, is nontransferable, and does not continue postmortem, significantly limiting the actual protections of a person's name and image.<sup>502</sup> Section 50 makes it a misdemeanor to use a living person's "name, portrait, or picture" in advertising or in trade."<sup>503</sup> Section 51 "provides a right to injunctive relief and to actual and exemplary damages when a person's 'name, portrait, picture or voice is used within . . . [New York] for advertising purposes or for the purposes of trade' without first obtaining written consent."<sup>504</sup> Perhaps the most glaring omission in the New York statute is that it does not extend to a person's likeness.<sup>505</sup> New York does not recognize a common law right of publicity, instead keeping it under the privacy umbrella and further limiting the likelihood New York will ever extend the right of publicity to include likeness without a major legislative overhaul.<sup>506</sup>

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<sup>498</sup> Brittany A. Adkins, *Crying Out for Uniformity: Eliminating State Inconsistencies in Right of Publicity Protection Through a Uniform Right of Publicity Act*, 40 Cumb. L. Rev. 499, 500 (2010).

<sup>499</sup> *Id.* at 500-06.

<sup>500</sup> *Id.* at 505.

<sup>501</sup> *Id.* at 505-06.

<sup>502</sup> *Id.* at 506-08.

<sup>503</sup> *Id.* at 506.

<sup>504</sup> *Id.*

<sup>505</sup> *Id.*

<sup>506</sup> *Id.* at 506-08.

California's Civil Code § 3344 was initially adopted in 1971 and has been amended as recently as 2007 in response to litigation and to ensure expansive protections of the right of publicity.<sup>507</sup> California's statute protects "the commercial exploitation of [a person's] personality during life. Specifically, this statute protects the use of an individual's 'name, voice, signature, photograph, or likeness, in any manner.'"<sup>508</sup> By recognizing a common law claim of the right of publicity, California courts have used a broad definition of likeness.<sup>509</sup> California even allows for protection of the right of publicity for seventy years after a person's death, that is "freely transferable or descendible."<sup>510</sup> California law makes a "determination of infringement a question of fact as to whether the use of the individual's persona 'was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required.'"<sup>511</sup>

Tennessee enacted its Personal Rights Protection Act of 1984 in response to Elvis Presley's death and its level of protection lies somewhere between New York's limited approach and California's expansive protections.<sup>512</sup> Like California, Tennessee recognizes the protection of a person's name, image, and likeness, both before and after death.<sup>513</sup> Tennessee's protections are not as expansive as California's though, as Tennessee does not protect appropriation of a person's voice or signature.<sup>514</sup> Tennessee does prohibit using a person's identity to solicit donations or fundraise, and does allow for more injunctive remedies than New York or California, including "seizure, impoundment, disposition, and destruction of infringing goods."<sup>515</sup> The biggest difference between Tennessee's right of publicity protections and those of New York and California involve postmortem rights. Tennessee allows any heir to potentially control a person's NIL, and while the protections are only guaranteed for ten years, they may continue in perpetuity if the heir "commercially exploit[s] the decedent's name, photograph, or likeness at least every two years following the initial ten-year period."<sup>516</sup>

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<sup>507</sup> *Id.* at 508-09.

<sup>508</sup> *Id.* at 509.

<sup>509</sup> *Id.*

<sup>510</sup> *Id.* at 511.

<sup>511</sup> *Id.* at 510.

<sup>512</sup> *Id.* at 512-13.

<sup>513</sup> *Id.* at 513.

<sup>514</sup> *Id.* at 514.

<sup>515</sup> *Id.* at 515.

<sup>516</sup> *Id.* at 516.

Indiana's 1994 Right of Publicity Act distinguishes the right of publicity from the right of privacy and, through its definitions section, expands the scope of those protections considerably.<sup>517</sup> Indiana's definition of a person's right of publicity is "a continuing 'property interest' in, and one's 'personality' as encompassing, an individual's name, voice, signature, photograph, image, likeness, distinctive appearance, gesture, and mannerisms," which explicitly enumerates more protections than any other state.<sup>518</sup> Indiana's definition of a name can be read to include both given and assumed names.<sup>519</sup> Unlike California and Tennessee, Indiana does not make the determination of an infringing use a question of fact. Rather, "Indiana leaves unanswered questions as to the standard of proof a plaintiff must meet to establish a violation of his or her rights, potentially creating problems of over-deterrence if strict liability is imposed."<sup>520</sup>

Indiana also takes a novel approach with postmortem rights. It protects postmortem rights for 100 years after a person's death and those rights are freely transferable and descendible, but any "assignee or devisee...must have 'not less than one-half (1/2) interest of the personality's recognized rights' in order to enforce such rights," which could complicate things in the event a person has more than two children or heirs, though it is unclear exactly how that would work in practice.<sup>521</sup> Indiana also explicitly states whom is in Indiana's jurisdiction:

- (1) anyone engaging in prohibited conduct under the statute within the state;
- (2) anyone who 'creates or causes to be created within Indiana' infringing items;
- (3) anyone who 'transports or causes to be transported' into the state infringing items; and
- (4) anyone who 'knowingly causes infringing advertising or promotional material . . . to be published, distributed, exhibited, or disseminated within Indiana.'<sup>522</sup>

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<sup>517</sup> *Id.* at 518.

<sup>518</sup> *Id.*

<sup>519</sup> *Id.* at 518-19.

<sup>520</sup> *Id.* at 519.

<sup>521</sup> *Id.* at 521-22.

<sup>522</sup> *Id.* at 524.

Under Indiana’s jurisdiction provision, people in other states could bring right of publicity claims in the state, even if they might not have an action in their domicile state.<sup>523</sup>

Currently, there is no federal right of publicity. The U.S. Copyright Office released a report in April 2019, calling for Congress to enact a uniform right of publicity.<sup>524</sup> This report “broadly recommends that any federal law protect ‘an individual’s name, signature, image, and voice against commercial exploitation during their lifetime.’”<sup>525</sup> The report addresses the “wide disparity” among states’ right of publicity laws and leaves readers with the feeling that a statute is the only way to truly solve the disparity problem.<sup>526</sup>

In 1998, the International Trademark Association (INTA) proposed a resolution calling for a federal right of publicity via an amendment to the Lanham Act that would preempt state law, create a uniform policy, make the right of publicity transferable and descendible, incorporate a grandfather clause for fairness, and allow for fair use.<sup>527</sup> In 2019, the INTA proposed another resolution that created minimum standards for the right of publicity:

1. The right of publicity is reserved to natural persons and not companies, animals or objects.
2. The right of publicity would prohibit others from making an unauthorized use of a person's name, likeness, voice or other personal characteristic that identifies that individual to an ordinary and reasonable viewer or listener.
3. To be actionable, the use at issue should be for commercial purposes, and a direct connection between the use and the commercial purpose must exist. The claimant must establish that the use of his or her persona results in injury or damage to the claimant and/or unjust enrichment to the defendant.

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<sup>523</sup> *Id.*

<sup>524</sup> Jennifer E. Rothman, *U. S. Copyright Office Considers a Federal Right of Publicity*, Rothman’s Roadmap to the Right of Publicity (May 2, 2019, 9:30 AM), <https://www.rightofpublicityroadmap.com/news-commentary/u-s-copyright-office-considers-federal-right-publicity>.

<sup>525</sup> *Id.*

<sup>526</sup> *Id.*

<sup>527</sup> *Board Resolutions: U.S. Federal Right of Publicity*, Int’l Trademark Ass’n, (March 3, 1998), <https://www.inta.org/wp-content/uploads/public-files/advocacy/board-resolutions/U.S.-Federal-Right-of-Publicity-03.03.1998.pdf>

4. An individual claimant need not make commercial use of his or her persona to have a right of publicity. The commercial value of a persona may have an impact on any damage amount claimed in a dispute.
5. An individual should have post-mortem rights for a defined term. The rights should be freely transferable, licensable and descendible property rights.
6. Where practicable, a non-mandatory post-mortem registration system would assist an individual's heirs, descendants, survivors, agents or other rights holders in providing public notice that such rights are being claimed, and provide contact information for the use of such rights. There could be incentives to register the claim of rights, such as reserving the ability to obtain monetary relief to only those valid rights holders who registered their claim prior to the commencement of the unauthorized use.
7. There should be general exceptions to publicity rights so as to permit fair use of an individual's persona in protected speech or expression.<sup>528</sup>

While the U.S. Copyright Office and the INTA have both advocated for a uniform or federal right of publicity, there does not appear to be any pending legislation regarding the right of publicity in either the House of Representatives or the United States Senate.<sup>529</sup>

The lack of a federal statute controlling the right of publicity would become particularly problematic from the NCAA's perspective if each state followed California and passed its own version of the Fair Pay to Play Act. Different right of publicity statutes would compound with different student-athlete endorsement statutes and lead to inconsistent enforcement and potential recruiting advantages for states with more protections of rights of publicity. Even if the NCAA adopts its own version of the

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<sup>528</sup> *Board Resolution: Right of Publicity Minimum Standards*, Int'l Trademark Ass'n, (March 27, 2019), <https://www.inta.org/wp-content/uploads/public-files/advocacy/board-resolutions/Right-of-Publicity-Minimum-Standards-03.27.2019.pdf>.

<sup>529</sup> *Search "Publicity"*, Congress.gov, <https://www.congress.gov/search?searchResultViewType=expanded&q=%7B%22source%22%3A%22all%22%2C%22search%22%3A%22publicity%22%7D> (last visited Mar. 12, 2020).

Fair Pay to Play Act that governs all member institutions and their student-athletes, there will be no way to uniformly enforce the policy with the differing right of publicity statutes, or lack thereof, in each state. It is somewhat ironic that the NCAA is based in Indianapolis, Indiana, where the right of publicity is most protected, and yet it took decades after the 1994 Right of Publicity Act for the NCAA to realize that student-athletes' NILs need to be protected.

## **B. Student-Athletes and the Right of Publicity**

Prior to 2015, student-athletes had no control over their NILs and no concrete way to fight NCAA decisions, especially without university and legal support. Reggie Bush, who starred for the University of Southern California (USC) in the early-to-mid 2000s, was found to have received improper benefits while attending school.<sup>530</sup> Consequently, Bush was required to return his 2005 Heisman Trophy, USC vacated 14 victories and the 2004 BCS National Championship, and the NCAA banned USC from the postseason for two years, putting USC on four years of probation, taking away 30 scholarships over three years, and forcing USC to permanently dissociate Bush from its football program.<sup>531</sup>

In 2010, the NCAA sanctioned Ohio State University (OSU) and declared several players ineligible after they were discovered to have sold championship rings, jerseys, and other memorabilia in exchange for tattoos.<sup>532</sup> These sanctions effectively ended star quarterback Terrelle Pryor's collegiate career because the NCAA suspended him for five games in his last season of eligibility. Pryor instead entered the NFL via the supplemental draft.<sup>533</sup> While the NFL suspended Pryor for five games, he still earned money for the rest of the season, which he would not have been able to do if he stayed at OSU for his final season of eligibility.<sup>534</sup>

After the NCAA reprimanded USC and OSU, schools became afraid of what sanctions the NCAA would impose if student-athletes had received impermissible benefits, so some self-

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<sup>530</sup> Arash Markazi, *Column: Reggie Bush Hopes NCAA Will Let Him Return to USC Someday*, LA Times Sports (Apr. 20, 2019, 4:50 PM), <https://www.latimes.com/sports/la-sp-reggie-bush-usc-ncaa-college-football-20190420-story.html>.

<sup>531</sup> *Id.*

<sup>532</sup> *Ohio State Football Players Sanctioned*, ESPN.com, <https://www.espn.com/college-football/news/story?id=5950873> (last updated Dec. 26, 2010).

<sup>533</sup> *Raiders Draft Terrelle Pryor*, ESPN.com, [https://www.espn.com/nfl/story/\\_/id/6885024/terrelle-pryor-oakland-raiders-supplemental-draft](https://www.espn.com/nfl/story/_/id/6885024/terrelle-pryor-oakland-raiders-supplemental-draft) (last updated Aug. 22, 2011).

<sup>534</sup> *Id.*

sanctioned. Affected athletes rarely have the means to bring legal action. Texas A&M University benched star quarterback Johnny Manziel for the first half of a game against Rice University in 2013 for selling autographs, even though there was no evidence anyone paid him for his signatures.<sup>535</sup> Attorney Jim Darnell, who represented Manziel, said that Manziel accepted the half-game suspension even though there was no evidence against him to "get Johnny back on the field."<sup>536</sup> Even with legal representation and star power, individual athletes taking on the NCAA seemed futile.

In 2015, student-athletes got a major victory in *O'Bannon v. National Collegiate Athletic Association*.<sup>537</sup> *O'Bannon* consolidated two cases into a class-action.<sup>538</sup> In the first case, former University of California Los Angeles (UCLA) basketball player Ed O'Bannon sued the NCAA and the Collegiate Licensing Company (CLC) for violating of Article I of the Sherman Antitrust Act because the NCAA's amateurism rules prohibited athletes from being compensated for EA Sports video games using their NILs and were therefore an illegal restraint of trade.<sup>539</sup> In the second case, former Arizona State University and University of Nebraska quarterback Sam Keller sued EA Sports for impermissibly using student-athletes' NILs in its video games, and sued the NCAA and CLC for letting EA Sports misappropriate student-athletes' NILs.<sup>540</sup> It is important to note Keller's suit used Indiana and California's right of publicity statutes.<sup>541</sup>

After class-action certification, in which EA Sports and the CLC reached a settlement agreement with the class of plaintiffs, O'Bannon's antitrust claims alone went to a bench trial.<sup>542</sup> The United States District Court for the Northern District of California held that the NCAA violated the Sherman Antitrust Act and permanently enjoined the NCAA from prohibiting member schools from "(1) compensating FBS football and Division I men's basketball players for the use of their NILs by awarding them grants-in-aid up to the full cost of attendance at their respective schools, or (2) paying up to \$5,000 per year in deferred compensation to FBS

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<sup>535</sup> *Half-Game Penalty for Johnny Manziel*, ESPN.com, [https://www.espn.com/college-football/story/\\_/id/9609389/johnny-manziel-texas-aggies-suspended-1st-half-season-opener-rice-owls](https://www.espn.com/college-football/story/_/id/9609389/johnny-manziel-texas-aggies-suspended-1st-half-season-opener-rice-owls) (last updated Aug. 28, 2013).

<sup>536</sup> *Id.*

<sup>537</sup> *See O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

<sup>538</sup> *Id.* at 1055.

<sup>539</sup> *Id.*

<sup>540</sup> *Id.*

<sup>541</sup> *Id.*

<sup>542</sup> *Id.* at 1056.

football and Division I men's basketball players for the use of their NILs, through trust funds distributable after they leave school.”<sup>543</sup>

On appeal, the Ninth Circuit Court of Appeals affirmed (1) that EA Sports could not use NILs of players without their permission and without providing compensation and (2) that the NCAA had to allow cost of attendance scholarships for players instead of just cost of tuition scholarships, but reversed the lower court’s ruling that member schools had to pay student-athletes above and beyond full cost of attendance scholarships.<sup>544</sup> Even NCAA president Mark Emmert testified that full cost of attendance scholarships “would not violate the NCAA's principles of amateurism because all the money given to students would be going to cover their ‘legitimate costs’ to attend school.”<sup>545</sup> While student-athletes got a major victory with full cost of attendance scholarships and a ruling that EA Sports could not use their NILs without permission and compensation, the NCAA also felt victorious because the Ninth Circuit held that it did not have to pay student-athletes.

After *O’Bannon*, student-athletes gained ground, but ultimately did not have the power to stand up to the NCAA on their own. The Northwestern University football team tried and failed to unionize in 2015 and Emmert called the attempt “grossly inappropriate.”<sup>546</sup> All major American sports leagues have unions to protect players’ interests in negotiations with leagues and owners, yet no such body affords student-athletes any protections from their schools or the NCAA. In 2017, University of Central Florida (UCF) backup kicker Donald de la Haye, a marketing major, had his scholarship taken away by the university because he received ad revenue from his YouTube channel, which featured both athletic and non-athletic videos.<sup>547</sup> While the NCAA did not rule de la Haye ineligible, UCF was taking a proactive approach to avoid potentially

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<sup>543</sup> *Id.* at 1061.

<sup>544</sup> *Id.* at 1079.

<sup>545</sup> *Id.* at 1075.

<sup>546</sup> Joe Nocera & Ben Strauss, *Fate of the Union: How Northwestern Football Union Nearly Came to Be*, *Sports Illustrated* (Feb. 24, 2016), <https://www.si.com/college/2016/02/24/northwestern-union-case-book-indentured>.

<sup>547</sup> Dan Wolken, *UCF Kicker Controversy Wouldn’t Happen if NCAA Gave Athletes the Rights They Deserve*, *USA Today* (Aug. 1, 2017, 6:11 PM),

<https://www.usatoday.com/story/sports/college/columnist/dan-wolken/2017/08/01/ucf-kicker-and-youtube-videos-ncaa-again-plays-villain/530965001/>.

harsher NCAA penalties.<sup>548</sup> Even U.S. Senator Marco Rubio (R-FL) tweeted that the NCAA was “out of control.”<sup>549</sup>

During the 2019-20 NCAA Men’s Basketball season, University of Memphis freshman James Wiseman, a top recruit and potential top NBA draft pick, was ruled ineligible by the NCAA because his family accepted \$11,500 in moving expenses from Penny Hardaway. At the time of the payment, Hardaway was Wiseman’s high school basketball coach before becoming the head coach at Memphis.<sup>550</sup> Hardaway was deemed to be a Memphis booster at the time because he had donated \$1 million to the university in 2008.<sup>551</sup> Wiseman and his attorney successfully got a restraining order on the NCAA’s ruling before dropping it after the NCAA suspended Wiseman twelve games and ordered him to repay the \$11,500.<sup>552</sup> Instead of continuing the fight, Wiseman opted to leave school and prepare for the draft in part because he had no way to come up with the money that his family received on his own, per NCAA rules.<sup>553</sup> Wiseman expressed disappointment that he could not compete for an NCAA title or have a collegiate career because of the stress of the NCAA ruling.<sup>554</sup>

Wiseman’s saga came in the wake of the Rice Commission, which followed the fallout from the NCAA Men’s Basketball recruitment scandal in 2018. Condoleezza Rice, whom the NCAA chose to lead the investigation, recommended “developing a new policy on name, image and likeness,” because “policy is inconsistent on this matter. Olympians already enjoy an exemption and there are other case-by-case exceptions. It should be possible to develop a legally compliant approach that allows student athletes from all sports to benefit.”<sup>555</sup> Even those hand-picked by the NCAA wanted to see changes to the policy regarding the right of publicity, which compounded the pressure from state and federal lawmakers.

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<sup>548</sup> *Id.*

<sup>549</sup> *Id.*

<sup>550</sup> Adrian Wojnarowski, *James Wiseman Opens Up on ‘Heartbreaking’ Memphis Saga*, ESPN (Feb. 21, 2020), [https://www.espn.com/nba/story/\\_/id/28751421/james-wiseman-opens-heartbreaking-memphis-saga](https://www.espn.com/nba/story/_/id/28751421/james-wiseman-opens-heartbreaking-memphis-saga).

<sup>551</sup> *Id.*

<sup>552</sup> *Id.*

<sup>553</sup> *Id.*

<sup>554</sup> *Id.*

<sup>555</sup> Condoleezza Rice, *Condoleezza Rice: Fix College Basketball Now, or It Will Collapse*, USA Today (May 9, 2018), <https://www.usatoday.com/story/opinion/2018/05/09/condoleezza-rice-fix-college-basketball-now-collapse/596276002/>.

## C. **Current NCAA Division I Manual Rules Regarding Amateurism and Promotional Activities**

Currently, the NCAA's Division I Manual lists the following reasons that a student-athlete can lose amateur status and therefore scholarships:

**12.1.2 Amateur Status.** An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual: [Last revised in 2010] (a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport; (b) Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation; (c) Signs a contract or commitment of any kind to play professional athletics, [...]; (d) Receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletics skill or participation, [...]; (e) Competes on any professional athletics team [...]; (f) After initial full-time collegiate enrollment, enters into a professional draft [...] or (g) Enters into an agreement with an agent.<sup>556</sup>

The NCAA also has relevant bylaws regarding promotional activities:

**12.5.2.1 Advertisements and Promotions After Becoming a Student-Athlete.** After becoming a student-athlete, an individual shall not be eligible for participation in intercollegiate athletics if the individual: (a) Accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind; or (b) Receives remuneration for endorsing a

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<sup>556</sup> NCAA, 2019-2020 DIVISION MANUAL § 12.1.2 (2019), <https://web3.ncaa.org/lstdbi/reports/getReport/90008> (last visited Mar. 12, 2020).

commercial product or service through the individual's use of such product or service.<sup>557</sup>

At the same time, the NCAA allows member institutions to use student-athletes' NILs for institutional, charitable, educational, or nonprofit purposes, and allows the sale of promotional items featuring student-athletes' NILs.<sup>558</sup>

## **II. THE FAIR PAY TO PLAY ACT AND COLLEGIATE ATHLETIC PARTICIPATION COMPENSATION BILL**

### **A. Fair Pay to Play Act**

On September 30, 2019, California Governor Gavin Newsome signed the Fair Pay to Play Act into law, making California the first state to adopt legislation allowing for student-athletes to profit from endorsements using their NILs while still in school.<sup>559</sup> This is in direct contrast to current NCAA Division I bylaws, which expressly prohibit student-athletes from participating in any endorsements or advertisements.<sup>560</sup>

Notably, the California Fair Pay to Play Act prohibits any "California postsecondary educational institution," excluding community colleges, from interfering with student-athletes' ability to receive compensation for use of their NILs and still compete in college athletics.<sup>561</sup> The Act explicitly states its purpose:

A postsecondary educational institution shall not uphold any rule, requirement, standard, or other limitation that prevents a student of that institution participating in intercollegiate athletics from earning compensation as a result of the use of the student's name, image, or likeness. Earning compensation from the use of a student's name, image, or likeness shall not affect the student's scholarship eligibility...shall not prevent a student of a postsecondary educational institution participating in intercollegiate athletics from earning compensation as a result of the use of the student's name, image, or likeness...shall not prevent a postsecondary educational institution from participating in

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<sup>557</sup> *Id.* at 77.

<sup>558</sup> *Id.*

<sup>559</sup> Murphy, *supra* note 9.

<sup>560</sup> NCAA 2019-2020 Division Manual, *supra* note 71, at 78.

<sup>561</sup> S.B. 206, Collegiate Athletics: Student Athlete Compensation and Representation, *supra* note 2.

intercollegiate athletics as a result of the compensation of a student athlete for the use of the student's name, image, or likeness.<sup>562</sup>

The Act also prohibits student-athletes from signing endorsements that conflict with team contracts and states all contracts must be disclosed to the college or university.<sup>563</sup> Under the Act, a postsecondary institution cannot revoke a scholarship because a student-athlete is profiting from his NIL, stating that "...[e]arning compensation from the use of a student's name, image, or likeness shall not affect the student's scholarship eligibility," and a "scholarship shall not be revoked as a result of earning compensation or obtaining legal representation pursuant to this section."<sup>564</sup>

Another key provision of the Fair Pay to Play Act requires any agent working with student-athletes to be licensed by the state and in compliance with the federal Sports Agent Responsibility and Trust Act:

(c) (1) A postsecondary educational institution, athletic association, conference, or other group or organization with authority over intercollegiate athletics shall not prevent a California student participating in intercollegiate athletics from obtaining professional representation in relation to contracts or legal matters, including, but not limited to, representation provided by athlete agents or legal representation provided by attorneys.

(2) Professional representation obtained by student athletes shall be from persons licensed by the state. Professional representation provided by athlete agents shall be by persons licensed pursuant to Chapter 2.5 (commencing with Section 18895) of Division 8 of the Business and Professions Code. Legal representation of student athletes shall be by attorneys licensed pursuant to Article 1 (commencing with Section 6000) of Chapter 4 of Division 3 of the Business and Professions Code.

(3) Athlete agents representing student athletes shall comply with the federal Sports Agent Responsibility

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<sup>562</sup> *Id.*

<sup>563</sup> *Id.*

<sup>564</sup> *Id.*

and Trust Act, established in Chapter 104 (commencing with Section 7801) of Title 15 of the United States Code, in their relationships with student athletes.<sup>565</sup>

This helps to protect potentially vulnerable student-athletes from predatory agents and also protects student-athletes from predatory endorsement deals.

The NCAA, and in particular NCAA president Mark Emmert, took issue with the Fair Pay to Play Act even before it was signed into law. The NCAA's main arguments against the Act were that "it would erase the critical distinction between college and professional athletics and, because it gives those schools an unfair recruiting advantage, would result in them eventually being unable to compete in NCAA competitions."<sup>566</sup> Emmert even went so far as to call the Act unconstitutional.<sup>567</sup>

## **B. Collegiate Athletic Participation Compensation Bill**

New York's proposed bill, the Collegiate Athletic Participation Compensation Bill, provides that student-athletes are allowed to "receive compensation including for the use of a student's name, image or likeness [and] seek professional representation," while requiring colleges to "establish a sports injury health savings account to provide compensation to athletes for career ending or long-term injuries...establish a wage fund to be paid out to all student-athletes attending the college [and] take fifteen percent of revenue earned from athletics ticket sales and divide such revenue among student-athletes."<sup>568</sup>

Like the Fair Pay to Play Act, the Collegiate Athletic Participation Compensation Bill allows student-athletes to profit from their NILs through endorsements while preventing any college, university, or governing body from revoking scholarships.<sup>569</sup> The bill allows student-athletes to have professional representation and states must license those representatives.<sup>570</sup>

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<sup>565</sup> *Id.*

<sup>566</sup> NCAA Responds to California Senate Bill 206, *supra* note 4.

<sup>567</sup> *Id.*

<sup>568</sup> Sen. Bill. S6722B, 2019-2020 Reg. Sess. (N.Y. 2019), <https://www.nysenate.gov/legislation/bills/2019/s6722> (last visited Mar. 12, 2020).

<sup>569</sup> *Id.*

<sup>570</sup> *Id.*

The three key differences between the Fair Pay to Play Act and Collegiate Athletic Participation Compensation Bill are the way revenue is distributed, the sports injury health savings account, and the wage fund policy.<sup>571</sup> Revenue distribution would support both the health savings account and the wage fund:

...each college shall establish a sports injury health savings account and a wage fund pursuant to this subdivision. Such savings account and wage fund shall be funded with fifteen percent of the revenue earned from such college's athletics program. Half of such revenue shall be deposited into such sports injury health savings account and half shall be deposited into such wage fund.<sup>572</sup>

The sports injury health savings account is not a far stretch from the current NCAA health insurance policies.<sup>573</sup> The NCAA currently has Loss of Value Insurance, where insurance underwriters can offer coverage usually between one and ten million dollars, which is paid out if a student-athlete is injured and falls in the draft because of the injury.<sup>574</sup> The new sports health injury savings account would apply to “a student-athlete who suffers a career ending or serious injury during a game or practice with compensation upon his[...]graduation,” but the department would determine the amount and the qualifying injury “shall be verified by an independent health care provider not affiliated with such student-athlete's college.”<sup>575</sup>

The wage fund would be a big departure from the NCAA's current policy. The Collegiate Athletic Participation Compensation Bill states: “at the conclusion of each school year, each college's wage fund shall be divided evenly and paid to all student-athletes attending such college.”<sup>576</sup> This wage fund would pay student-athletes for participating in collegiate sports, which goes against the NCAA's amateurism rules:

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<sup>571</sup> *Id.*

<sup>572</sup> *Id.*

<sup>573</sup> *NCAA Student-Athlete Medical Insurance Legislation*, NCAA, <http://www.ncaa.org/about/resources/insurance/ncaa-student-athlete-medical-insurance-legislation> (last visited Mar. 12, 2020).

<sup>574</sup> *Loss-Of-Value Insurance FAQs*, NCAA, <http://www.ncaa.org/about/resources/insurance/loss-value-insurance-faqs> (last visited Mar. 12, 2020).

<sup>575</sup> Parker, *supra* note 74.

<sup>576</sup> *Id.*

Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.<sup>577</sup>

Establishing a wage fund is far from what the NCAA has said it is willing to allow, which is “to allow college athletes to profit from their names, images and likenesses ” “in a manner consistent with the collegiate model.”<sup>578</sup>

### III. PROPOSAL

The best course of action for Division I of the NCAA is to adopt elements from both California’s Fair Pay to Play Act and New York’s Collegiate Athletic Participation Compensation Bill, as well as advocate for a federal or uniform right of publicity; otherwise, enforcement will vary by state. Both the California act and the New York bill include scholarship protection, agent regulation, and a prohibition of endorsements that conflict with team contracts, but by updating the prohibition on conflicting endorsements to only apply to school-sanctioned events and incorporating the Collegiate Athletic Participation Compensation Bill’s sports injury health savings account, Division I can better protect its student-athletes financially both during school and after graduation.

#### A. **Proposed Policy Combining Elements from Both the Fair Pay to Play Act and the Collegiate Athletic Participation Compensation Bill**

The regulation of agents, prohibition of endorsements that conflict with team contracts, and protection of scholarships are all critical components of both the Fair Pay to Play Act and the Collegiate Athletic Participation Compensation Bill. Whatever policy Division I adopts must include these elements, with some updates, for the sake of both the student-athletes and schools.

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<sup>577</sup> NCAA 2019-2020 Division Manual, *supra* note 71, at 3.

<sup>578</sup> Murphy, *supra* note 9.

Regulating agents is imperative to protect student-athletes. By ensuring anyone who represents student-athletes is both licensed with the state, or the NCAA, and compliant with federal regulations, the NCAA can help protect its student-athletes, who are as young as seventeen when they begin their collegiate careers.

Many student-athletes, especially as freshmen, would likely not be familiar with the laws or regulations and would be in danger of unscrupulous agents taking advantage of them. In the entertainment industry, it is industry standard for agents to be licensed by the labor commissioner.<sup>579</sup> In the NBA, the NBA Players' Association must certify all NBA agents.<sup>580</sup> Regulating agents is both a normal and crucial part in player protection.

Prohibiting student-athlete endorsements of brands or products that conflict with team or school contracts is also pivotal, but would likely conflict with antitrust law. One way to allow schools to honor their sponsorship agreements while still affording student-athletes access to the free market could be written in to a student-athlete's letter of intent. The letter of intent could contain a provision that states for any official school or NCAA sanctioned event, the student must wear the school's sponsored apparel. For example, if a student-athlete attends a university that is sponsored by Nike but signed an individual endorsement deal with Adidas, the student-athlete would have to wear Nike gear during all team events and travel, but would be free to wear Adidas while not doing team activities. Conversely, schools could prohibit any conflicting brands from using school logos.

Scholarship protection is arguably the most vital part of any regulations because it will ensure that student-athletes can profit from endorsement deals and brands that use their NILs without losing their scholarships. While it is unclear what percentage of scholarship student-athletes would qualify for need-based scholarships, in many cases a scholarship would likely be worth more than an endorsement deal. Ensuring that student-athletes would be able to keep their scholarships and continue their education while still profiting from endorsements is part of what would make a student-athlete a student-athlete.

Establishing a sports injury health savings account that would pay student-athletes who suffered career-ending injuries in

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<sup>579</sup> See *Wachs v. Curry*, 13 Cal. App. 4th 616, 16 Cal. Rptr. 2d 496 (1993).

<sup>580</sup> *Becoming an NBPA Certified Agent*, National Basketball Players' Association, <https://nbpa.com/agents/becoming-an-agent> (last visited Mar. 12, 2020).

school once they graduate would be more than just good publicity. The NCAA does provide total disability coverage through the NCAA Exceptional Student-Athlete Disability Insurance, but it only covers some sports and student-athletes that have remaining eligibility and are projected to be drafted within the first two rounds of their respective drafts.<sup>581</sup> A sports injury health savings account would better financially protect a student-athlete who suffers a career-ending injury while in school since it would be paid after graduation when the former student-athlete would no longer be covered by school insurance.

## **B. Hope for a Federal Right of Publicity**

While Indiana's definition of NILs is the most student-athlete friendly, this would amount to nothing more than a potentially non-enforceable choice of law provision if Congress does not pass a uniform right of publicity statute. Indiana's definition of a person's right of publicity is "a continuing 'property interest' in, and one's 'personality' as encompassing, an individual's name, voice, signature, photograph, image, likeness, distinctive appearance, gesture, and mannerisms," which explicitly enumerates more protections than any other state.<sup>582</sup> A court could interpret Indiana's definition of a name to include both given and assumed names.<sup>583</sup>

By using Indiana's definition of NILs, the NCAA can protect student-athletes in the broadest, most comprehensive way possible. In particular, the ability to interpret names as a given name or assumed name is vital in the world of college sports, where many players have nicknames. For example, former Texas A&M University quarterback Johnny Manziel was better known as Johnny Football, and his nickname was so strong that he won a case against a company that tried to trademark the nickname before he did.<sup>584</sup> In addition, Indiana's definition would clearly apply to any video games, jerseys, posters, and signed memorabilia.

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<sup>581</sup> *Exceptional Student-Athlete Disability Insurance Program*, NCAA, <http://www.ncaa.org/about/resources/insurance/exceptional-student-athlete-disability-insurance-program> (last visited Mar. 12, 2020).

<sup>582</sup> Adkins, *supra* note 13, at 518-19.

<sup>583</sup> *Id.*

<sup>584</sup> Chase Goodbread, *Johnny Manziel wins 'Johnny Football' trademark case*, NFL.com, <https://www.nfl.com/news/johnny-manziel-wins-johnny-football-trademark-case-0ap2000000335932#:~:text=The%20trademark%20would%20legally%20prevent,for%20a%20fee%20or%20royalty> (last visited April 2, 2021).

Conversely, a choice of law provision could be non-enforceable, but because the NCAA is based in Indianapolis, there is a chance that actions involving the NCAA will use the Indiana statute. For the sake of uniform enforcement, the best-case scenario is for Congress to enact a uniform right of publicity statute because in its absence, it will be difficult to uniformly enforce any policy Division I enacts.

### **C. Why a Wage Fund is Beyond the Scope of Endorsements**

The point of the endorsement system is not to ensure every student-athlete gets paid. The point is to ensure that every student-athlete has the opportunity to profit from his or her NIL. Not every student-athlete will or should be paid the same. Some schools are known for football, and their players should be able to profit accordingly. Other schools have prestigious volleyball, crew, or wrestling programs. The endorsement system would not alter the prestige some schools hold in certain sports. The wage fund is impractical in application because there will never be equality among athletes of different sports. Football and men's basketball are traditionally the only profitable programs at any given school and those revenues have long been used to fund other sports.<sup>585</sup> By not establishing a wage fund, schools that are traditionally strong at certain sports can keep their recruiting edge over programs that would have more money available to student-athletes because of their stronger money-making sports.

### **D. Potential Issues with Student-Athlete Endorsements**

Those who oppose student-athletes' ability to profit from endorsements cite the potential detrimental effects it could have on a team and rifts it could cause between star players and players who seldom see the field or court.<sup>586</sup> Tim Tebow, former star quarterback for the University of Florida, opposes student-athlete endorsements, saying "...now we're changing it from 'us'...from being an alumni where I care, which makes college sports special, to then okay it's

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<sup>585</sup> *Where Does the Money Go?*, NCAA, [https://www.ncaa.org/sites/default/files/18-00180%20NCAA%20101\\_WheretheMoneyGoes-WEB-NEW.PDF](https://www.ncaa.org/sites/default/files/18-00180%20NCAA%20101_WheretheMoneyGoes-WEB-NEW.PDF) (last visited Mar. 12, 2020).

<sup>586</sup> Jenna West, *Tim Tebow on Fair Pay to Play Act: 'It Changes What's Special About College Football'*, *Sports Illustrated* (Sept. 13, 2019), <https://www.si.com/college/2019/09/13/tim-tebow-fair-pay-play-act-playing-college-players-video>.

not about 'us,' it's not about 'we.' It's just about 'me.'"<sup>587</sup> Ironically, Tebow could have been one of the biggest benefactors from a new publicity and NIL policy because he had one of the best-selling jerseys in college football, but he never had the same star power in the NFL.<sup>588</sup>

Mark Cuban, who owns the NBA's Dallas Mavericks, stated concerns about what happens if and when student-athletes are treated as employees:

My guess is [...] that the NCAA may implode, particularly as it applies to football," he said. "I think you may see third parties come in with a lot of money and say, 'You know what? This is about the cash now. You may focus on yourself as a school on your economics as an athletic department. Let us invest in you. Extract yourself from the NCAA. We'll partner with X number of other schools and we'll create our own organization and we'll create our own economics and you'll get to make more money because it's now about the money. We'll be brutally honest about it.' ... The NCAA doesn't allow them to focus on it as a true business.

While the future is unclear, the NCAA is only allowing for student-athletes to profit from their NILs for endorsements and is not allowing schools to pay them directly.<sup>589</sup>

There is always the potential for a star player to become bigger than the team, but that alone is not a good enough reason to prohibit all student-athletes from getting paid. Like any other contract, a star player could negotiate a rider where he would not endorse a brand or product unless his whole team—or offensive line, or defensive backs, or starters—are also included in the endorsement. This type of negotiation is common in the NFL. For instance, star quarterbacks negotiate for a large pay-out and then use that money to pay for gifts for the offensive linemen, who are vital

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<sup>587</sup> *Id.*

<sup>588</sup> *Id.*

<sup>589</sup> Murphy, *supra* note 9.

to quarterbacks' success and safety but receive far less compensation.<sup>590</sup>

## **E. Potential Issues with the Sports Injury Health Fund**

The purpose of a sports injury health fund is to protect players, but it could potentially have the opposite effect. By taking fifteen percent of revenue from college athletic programs, it could take funding away from low earning sports, which are funded mostly by high earning sports and their respective television deals and intercollegiate athletic fees.<sup>591</sup> Sports often lose money for schools unless the college or university is a football or basketball "blue blood." According to the NCAA, "the average Division I school lost \$12.6 million annually on athletics if they don't have a football team, and \$14.4 million if they do."<sup>592</sup> Most schools already have enough trouble funding athletics without losing fifteen percent of revenue to fund the sports injury health fund.

## **F. Professional Athlete Support**

The vast majority of professional athletes and owners who have publicly commented on the Fair Pay to Play Act have been supportive. Most supporters have come from the NBA and NFL, perhaps because in men's college sports, basketball and football teams have the smallest percentage of athletes go pro.<sup>593</sup> Less than two percent of NCAA men's basketball and football players make it to the NBA or NFL,<sup>594</sup> meaning most student-athletes have the best chance to profit from their NILs while in college.

While he never played college basketball, NBA superstar LeBron James was so excited about the Fair Pay to Play Act being signed that he brought California Governor Gavin Newsom on his

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<sup>590</sup> Charles Curtis, *The Best Gifts Given to NFL Offensive Linemen in 2019, Ranked*, USA Today Sports for the Win (Dec. 25, 2019, 8:29 AM), <https://ftw.usatoday.com/2019/12/nfl-offensive-lineman-gifts-2019-ranked>.

<sup>591</sup> David Ridpath, *Who Actually Funds Intercollegiate Athletic Programs?*, Forbes (Dec. 12, 2014, 5:44 PM), <https://www.forbes.com/sites/ccap/2014/12/12/who-actually-funds-intercollegiate-athletic-programs/#1311188a17af>.

<sup>592</sup> Tom Joyce, *In College Sports, Non-Athletes Suffer Just as Much as the Stars on the Field*, The Guardian (Oct. 16, 2019, 5:00 PM), <https://www.theguardian.com/sport/2019/oct/16/college-sports-revenue-loss-making-programs-academics>.

<sup>593</sup> *Estimated Probability of Competing in Professional Athletics*, NCAA, <http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics> (last visited Mar. 12, 2020).

<sup>594</sup> *Id.*

show “The Shop” to formally sign the bill into law.<sup>595</sup> James explained the Fair Pay to Play Act was important to him because he would have been one of the student-athletes that would benefit from the Act had it been in place:

I was one of those underprivileged kids. Obviously, I was fortunate enough and talented enough to be able to skip college. But for sure I would have been one of those kids if I would have went off to Ohio State or if I would have went off to any one of these big-time colleges, where pretty much that 23 jersey would have got sold all over the place without my name on the back, but everybody would have known the likeness. My body would have been on the NCAA basketball [video] game 2004 and the Schottenstein Center would have been sold out every single night if I was there. And coming from just me and my mom, we didn't have anything and we wouldn't have been able to benefit at all from it, and the university would have been able to capitalize on everything that I would have been there for that year or two or whatever. So I understand what those kids are going through. I feel for those kids that have been going through it for so long, so that's why it's personal to me.<sup>596</sup>

James has two sons who will begin to be recruited in the coming years, and before the Fair Pay to Play Act passed, James was none too thrilled about the state of college basketball.<sup>112</sup>

Draymond Green, an all-star on the Golden State Warriors who played collegiately at Michigan State University, had similar feelings: “We spent so much time in college broke, with no money. Yet everybody else was living very well, universities making a ton of money off your likeness...It is the most bankrupt model...It’s backward...The NCAA is a dictatorship.”<sup>113</sup>

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<sup>595</sup> Dave McMenamin, *LeBron James Responds to the Signing of Fair Pay to Play Act*, ESPN (Sept. 30, 2019), [https://www.espn.com/nba/story/\\_/id/27739325/lebron-james-responds-signing-fair-pay-play-act](https://www.espn.com/nba/story/_/id/27739325/lebron-james-responds-signing-fair-pay-play-act).

<sup>596</sup> *Id.*

<sup>112</sup> *Schilken*, *supra* note 95.

<sup>113</sup> *Id.*

Even Mark Cuban, who has gone on the record with his concerns about the Act, called the NCAA “a mess” and said “[t]he interests of the NCAA as an organization are not fully aligned with the economic interests of the schools or the economic interests of the players that are now part of the equation.”<sup>114</sup> Richard Sherman, a pro-bowl cornerback for the San Francisco 49ers, also spoke to the corruption he saw in the NCAA during his time at Stanford University, where he stayed for his fifth year of eligibility to get his degree. Sherman told the *San Jose Mercury News*:

I hope it destroys the NCAA because I think it’s corrupt and it’s a bunch of people taking advantage of kids and doing it under a mask of fair play...It’s going to...make it more fair and more of a symbiotic relationship between players and the NCAA, or it’s going to destroy them in general and start a whole new way of college athletics in general.<sup>115</sup>

Professional athletes who went through the NCAA know how greatly a student-athlete could benefit from his NIL.

## V. CONCLUSION

According to the NCAA itself, of the over 480,000 student-athletes that participate in NCAA sports, only “a fraction” of them will go pro.<sup>116</sup> Rights of publicity, and money from division-wide endorsements such as the EA Sports NCAA franchise, ensure that student-athletes are able to profit from their talents while they are still healthy and playing. The vast majority of student-athletes will not see paychecks for playing a sport in their lifetime and their best chance to make money, from something they dedicate their lives to, is to earn money from their NILs while they are still playing collegiate sports.

Student-athletes are virtually the only class of people that cannot profit from their own NILs. An art student could paint a self-portrait and sell it for profit, and student-athletes are allowed to work

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<sup>114</sup> Cindy Boren, *Richard Sherman Hopes New California Law ‘Destroys the NCAA’*, Washington Post (Oct. 1, 2019, 1:21 PM), <https://www.washingtonpost.com/sports/2019/10/01/draymond-green-richard-sherman-say-its-about-time-ncaa-dictatorship-is-challenged/>.

<sup>115</sup> *Id.*

<sup>116</sup> Estimated Probability of Competing in Professional Athletics, *supra* note 107.

other jobs, but may not profit from their athletic talents under the current system.<sup>117</sup> Now that the NCAA has finally acknowledged that student-athletes need the ability to profit from endorsement deals and brands that use their NILs, the best course of action is for each division to adopt its own rules.

Individual state laws vary too much in their approach to the right of publicity and there is no federal statute to eliminate confusion. Unless and until Congress adopts a federal right of publicity, Division I can best serve student-athletes by adopting a hybrid of California's Fair Pay to Play Act and New York's proposed Collegiate Athletic Participation Compensation Bill—including regulation of agents, prohibition of endorsements that conflict with team contracts during school-sanctioned events, protection of scholarships, and establishment of a sports injury health savings account—giving student-athletes the same ability as anyone else to profit from their NILs while they are still healthy and playing.

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<sup>117</sup> NCAA 2019-2020 Division Manual, *supra* note 72, at 3.

THE RISK OF VIOLENCE AGAINST THE SOUND OF  
SILENCE: THE FORSEEABILITY OF MASS SHOOTINGS AT  
MUSIC FESTIVALS AND THE LACK OF INSURANCE  
COVERAGE

HANNAH PIANTEK

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INTRODUCTION

On October 1, 2017, a lone gunman stationed himself in a high-rise hotel room and fired 1,100 rounds of ammunition downward into a crowd attending Route 91 Harvest Country Music Festival in Las Vegas, Nevada.<sup>597</sup> In only 11 minutes, the gunman became responsible for the deadliest shooting in modern United States history.<sup>598</sup> Following the horrific event, injured parties filed approximately 4,400 claims against MGM Resorts International and Mandalay Bay, LLC (collectively referred to as “MGM Resorts”) and Live Nation. Live Nation was the promoter of the festival and MGM Resorts owns both the hotel in which the gunman stayed and the venue at which the Route 91 Harvest Country Music Festival took place. The claims, among other accusations, alleged negligence for “failing to design, build, provide, and mark adequate exits in case of emergency; and failing to properly train and supervise employees

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<sup>597</sup> *McCutchen v. United States*, 145 Fed. Cl. 42, 45 (2019).

<sup>598</sup> Rhana Natour, *Are Hotels and Outdoor Concerts Any Safer Since the Las Vegas Attack?*, PBS (May 7, 2018, 4:49 pm), <https://www.pbs.org/newshour/nation/are-hotels-and-outdoor-concerts-any-safer-since-the-las-vegas-attack>

with an appropriate plan of action in case of an emergency.”<sup>599</sup> On October 3, 2019, MGM Resorts settled for nearly \$800 million.<sup>600</sup>

This lawsuit is not the first against festival promoters, venue owners, and the like who have been sued and required to pay millions of dollars to injured audience members. On August 13, 2011, a stage collapsed at the Indiana State Fair before country band Sugarland’s performance, killing seven people and injuring nearly 100 others.<sup>601</sup> The victims received a \$39 million dollar out-of-court settlement against the band, concert promoter, and sixteen other defendants.<sup>602</sup> In 2012, an audience member sued artist Steve Aoki and the Hard Rock Hotel for \$10.7 million, claiming she broke her neck and was almost paralyzed as a result of Aoki’s onstage stunts.<sup>603</sup> Likewise, in 2013, a concert attendee sued Live Nation for injuries sustained when a forklift crashed into a booth at a festival, causing the attendee to plummet and fracture his skull.<sup>604</sup> Live Nation offered a \$31 million settlement for the injuries, but the injured attendee took the case to trial instead and was awarded \$101 million from the jury.<sup>605</sup> While settling can help companies avoid costly litigation, the negative implications include leaving critical questions regarding liability unanswered.

For instance, are festival promoters liable for injuries that occur to festival attendees? If so, how can festivals allocate that risk and protect against a massive lawsuit and/or settlement payout? These two questions were almost answered when MGM Resorts filed a lawsuit against its insurer, Zurich International (“Zurich”), for acts arising out of Route 91. Specifically, MGM Resorts alleged that Zurich wrongfully breached “its duty to defend MGM, its duty of good faith and fair dealing, and bad faith conduct.”<sup>606</sup> MGM

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<sup>599</sup> *Aguilar v. MGM Resorts Int., Live Nation Ent., Inc., et al.*, 2017 WL 8772365 (Cal. Super. filed Dec. 7, 2017). (Specifically, the plaintiffs’ central claim against MGM Resorts focused on its do-not-disturb policy, whereas for Live Nation, the Plaintiffs argued that Live Nation negligently failed to have a sufficient number of exits and to allegedly train its employees for emergency situations.)

<sup>600</sup> *Sheppard, et al. v. Mandalay Bay LLC, et al.*, 2019 WL 50877482(D. Nev. filed Oct. 3, 2019). (However, the settlement does not resolve the claims against Live Nation.)

<sup>601</sup> Marissa R. Moss, *Settlement Reached in Sugarland Stage Collapse*, ROLLING STONE (Dec. 27, 2014, 7:27 PM) <https://www.rollingstone.com/music/music-country/settlement-reached-in-sugarland-stage-collapse-229652/>.

<sup>602</sup> *Id.*

<sup>603</sup> Marc Hogan, *When Fans Get Hurt at a Show, Who Pays Up?* PITCHFORK (Jun. 22, 2017) <https://pitchfork.com/thepitch/when-fans-get-hurt-at-a-show-who-pays-up/>

<sup>604</sup> Priscilla DeGregory, Andrew Denney, & Jorge Fitz-Gibbon, *Man wins \$101 Million Verdict from Live Nation After Fall at Jones Beach Event*, NEW YORK POST (De. 15, 2019, 5:56PM), <https://nypost.com/2019/12/15/man-wins-101-million-verdict-from-live-nation-after-fall-at-jones-beach-event/>.

<sup>605</sup> *Id.*

<sup>606</sup> *MGM Resorts International v. Zurich American Insurance Co.*, 2019 WL 2574260(D. Nev. filed June 19, 2019).

Resorts claimed that under its commercial general liability (“CGL”) policy, the shooting was an “occurrence” that triggered Zurich’s duty to defend and pay for all reasonable defense costs.<sup>607</sup> However, the case was dismissed before Zurich filed an Answer, leaving these questions unanswered and festivals still unsure if they are protected.<sup>608</sup>

This Note addresses whether, after the events of Route 91, a festival promoter has a duty to prevent criminal acts by third parties, specifically mass shootings. Part I examines the relationship between festival promoters, like Live Nation, and festival attendees. In the context of mass shootings, liability theories are based on negligence claims, with assertions by claimants that festival promoters should have known the mass shooting could occur and should have taken more robust security measures to prevent or minimize injuries. Thus, Part I analyzes whether a festival promoter owes a duty to protect festival attendees from criminal acts of third parties by considering the evolution of the “no-duty rule” in premises liability and the development of modern standards of liability under tort law. Part II discusses, as a matter of public policy, the need for insurance coverage when mass shootings occur and whether protection should be afforded for a festival under its CGL policy to help allocate such risks. Specifically, this section concentrates on the threshold question for a liability insurance policy: whether the underlying suit alleges a covered “occurrence” or accident.

## I. SETTING THE STAGE: FESTIVAL LIABILITY TO ATTENDEES

Since the Columbine High School mass shooting in 1999, victims and their families have brought lawsuits against property owners and managers, security companies, gun manufacturers, and event promoters.<sup>609</sup> “Throughout the years, many of these cases have resulted in judgments in favor of the defense, with courts finding that civil defendants did not cause the mass shooting or injuries at issue, and/or did not owe a duty to prevent the mass

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<sup>607</sup> *Id.*

<sup>608</sup> Order for Dismissal Without Prejudice, No. 19-CV-01051-JCM-NJK (Dec. 20, 2019).

<sup>609</sup> Monica T. Sullivan, *Insurance Considerations for Mass-Shooting Litigation*, LEXISNEXIS LAW 360 (April 23, 2018).

shooting, which was unforeseeable.”<sup>610</sup> These lawsuits are based primarily on two legal theories: (1) negligence and (2) premises liability.<sup>611</sup>

First, since the middle of the 19th century, victims utilized negligence “as the predominant basis for liability for accidentally caused physical harm.”<sup>612</sup> The negligence theory for physical harm is deeply rooted in the common law and was the typical standard for liability when the plaintiff pleaded trespass on the case.<sup>613</sup> “Trespass on the case was the appropriate writ for harm that was the indirect consequence of the defendant’s conduct.”<sup>614</sup> The justifications for imposing such liability are to remedy an injustice done and provide appropriate incentives to engage in safe conduct.<sup>615</sup> Negligence is defined as

conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. There are generally four essential elements that must be satisfied to state a prima facie claim of negligence; they are: (1) the existence of a duty; (2) breach of that duty; (3) breach was the cause of the resultant injury; and (4) damages.<sup>616</sup>

A person is said to have acted negligently if he or she fails to “exercise reasonable care under all the circumstances.”<sup>617</sup> “Reasonableness” is determined by assessing “the foreseeable likelihood that the person’s conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.”<sup>618</sup>

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<sup>610</sup> *Id.*; see also *Com. v. Peterson*, 749 S.E.2d 307 (Va. 2013) (no duty to warn students about unforeseeable mass shooting at Virginia Tech); *Nowlan, et al., v. Cinemark Holdings, Inc. et al.*, 2016 WL 4092468 (D. Colo. June 24, 2016) (granting summary judgment to defendant movie theatre, finding plaintiffs could not establish theatre was substantial cause of injuries arising out of mass shooting).

<sup>611</sup> *Id.*

<sup>612</sup> Restatement (Third) of Torts: Phys. & Emot. Harm § 6 cmt. c (2010).

<sup>613</sup> *Id.*

<sup>614</sup> *Id.*

<sup>615</sup> *Id.* at cmt. d.

<sup>616</sup> Rebecca Lomazow, *Prosecuting a Festival: Holding Electric Dance Music Festivals Liable For Drug-Related Deaths Occurring Therein*, 13 CARDOZO PUB. L. POL’Y & ETHICS J. 303, 310 (Fall 2014) (citing to *Green v. State*, 222 A.D.2d 553, 554 (N.Y. App. Div. 2d Dep’t. 1995)).

<sup>617</sup> Restatement (Third) of Torts: Phys. & Emot. Harm § 3 (2010).

<sup>618</sup> *Id.*

Second, under the theory of premises liability, a land possessor owes a duty of reasonable care to entrants on the land concerning (a) conduct by the land possessor that creates risk to entrants on the land; (b) artificial conditions on the land that pose risks to entrants on the land; (c) natural conditions on the land that pose risks to entrants on the land; and (d) other risks to entrants on the land when any of the affirmative duties provided in Chapter 7 is applicable.<sup>619</sup>

A land possessor is “a person who occupies the land and controls it; a person entitled to immediate occupation and control of the land; or a person who had occupied the land and controlled it.”<sup>620</sup> “A person is in control of the land if that person has the authority and ability to take precautions to reduce the risk of harm to entrants on the land . . . .”<sup>621</sup> The rationale for using “control” is to “subject to liability the person who could have known of any dangers on the land and therefore could have acted to prevent any foreseeable harm.”<sup>622</sup>

Historically, landowners have no duty to protect others from criminal activity by third persons on their property because the landowner is not an “insurer of the visitor’s safety.”<sup>623</sup> “[T]he Second Restatement provided for varying duties depending on the status of the entrant on the land and the source of the risk, whether due to a condition on the land or to an activity conducted by the land possessor.”<sup>624</sup> “A property owner or occupier is required to use reasonable care toward business invitees.”<sup>625</sup> A “business visitor or invitee is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of land, or whose presence on the land is a direct or indirect source of profit to the landowner.”<sup>626</sup> However, landowners generally do not owe a duty to a trespasser.<sup>627</sup> Thus, courts would have to analyze whether a person is an “invitee” or “trespasser” in order to determine the applicable standard of care.

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<sup>619</sup> Restatement (Third) of Torts: Phys. & Emot. Harm § 51 (2010).

<sup>620</sup> Restatement (Third) of Torts: Phys. & Emot. Harm § 49 (2010).

<sup>621</sup> *Id.* at cmt. c; see e.g., *Wal-Mart Stores v. McDonald*, 676 So. 2d 12, 15 (Fla. Dist. Ct. App. 1st Dist. 1996) (internal citation omitted) (“generally, the duty to protect third persons from injuries on the premises rests not on legal ownership of the premises, but on the rights of possession, custody and control of the premises.”).

<sup>622</sup> *Id.* at Reporter’s Note cmt. c. (citing to *Rhodes v. Wright*, 805 N.E.2d 385-86 (Ind. 2004))

<sup>623</sup> Restatement (Second) of Torts § 343 (1965); 3 LEHR, PREMISES LIABILITY § 43:1 (2018 ed.).

<sup>624</sup> Restatement (Third) of Torts § 51, cmt a (2010).

<sup>625</sup> 3 LEHR, PREMISES LIABILITY § 39:2 (2019 ed.).

<sup>626</sup> *Id.* at § 39:1.

<sup>627</sup> Restatement (Second) of Torts § 343.

While some states<sup>628</sup> still retain the traditional status-based duties, many states abandoned this approach in hopes of eliminating “the complex, confusing, and unpredictable state of the law created by courts.”<sup>629</sup> The Restatement (Third) of Torts adopts a “unitary duty of reasonable care” to entrants on the land and rejects the status-based duty rules for no longer being in “harmony with modern tort law.”<sup>630</sup> Under this theory an “unreasonable risk of harm” no longer needs to be present before a duty of care arises; instead, landowners must use reasonable care concerning any and all risks.<sup>631</sup>

Although both Restatements above deal with duties owed by the owner or occupier of the premises, some courts have held that festival promoters have a duty to exercise reasonable care for the safety and protection of audience members on the premises, even though they do not own the land.<sup>632</sup> In *Morrisey v. Nilon Amusement Services, Inc.*, the plaintiff was attacked and robbed in the parking lot after leaving a Jethro Tull concert held at the R. Mann Music Center in Fairmount Park, Philadelphia.<sup>633</sup> The court, relying on section 344 and section 328E of the Restatement (Second) of Torts, found that both the Music Center and the parking company were in control of the parking lot at the time of the incident, effectively making them both possessors of land.<sup>634</sup>

Likewise, the West Virginia Supreme Court of Appeals found the promoters, organizers, and sponsors of an entertainment event liable for injuries which occurred during a wrestling event.<sup>635</sup> The plaintiff was hospitalized for eight days after a wrestler, “Sweet Stan” Lane, punched the plaintiff, “fracturing the orbit of his left eye and other facial bones,” after a wrestling exhibition at the Raleigh

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<sup>628</sup> Restatement (Third) of Torts § 51 cmt. a (stating that 24 states still retain the traditional status-based duties, including Alabama, Arizona, Delaware, Kentucky).

<sup>629</sup> *Jones v. Hansen*, 867 P.2d 303, 309 (Kan. 1994).

<sup>630</sup> Restatement (Third) of Torts § 51, cmt. a (“However, with the evolution of a general duty of reasonable care to avoid physical harm as recognized in § 7, the status-based duties for land possessors are not in harmony with modern tort law.”).

<sup>631</sup> *Id.* (citing to Restatement (Second) of Torts § 343).

<sup>632</sup> See *Whitfield v. Cox*, 52 S.E.2d 72, 73-74 (Va. 1949); *Pierce v. Murnick*, 145 S.E.2d 11, 12 (N.C. 1965) (holding that although the promoter is not an insurer of the spectator’s safety, he is under a duty to use reasonable care to prevent injury through a defect in the condition of the premises or by the action of any of the contestants in the ring); see also, Maureen Krislov, *Rock in a Hard Place: Determining Mosh Pit Liability at Concerts*, 11 ENT. L. FIN. 3,3, (Dec. 1995) (noting that in California a promoter is required to “anticipate reasonably, probable happenings in order to prevent injury to patrons, and is required to use ordinary care”).

<sup>633</sup> 26 Phila. Co. Rptr. 552, 559 (Pa. C.P. 1993); see also Restatement (Second) of Torts § 344 (defining the scope of duty for a possessor of land); Restatement (Second) of Torts, § 328E (defining who a possessor of land is).

<sup>634</sup> 26 Phila. Co. Rptr. at 559-60.

<sup>635</sup> *Massey v. Jim Crockett Promotions*, 400 S.E.2d 876 (W. Va. 1990).

County Armory.<sup>636</sup> The trial court granted the promoter's motion for summary judgment "on the grounds that 'Sweet Stan's' assault on [plaintiff] was not foreseeable."<sup>637</sup> However, the Appellate Court disagreed, holding that the promoter, "as the organizer, sponsor, and promoter of the wrestling exhibition, was required to anticipate foreseeable happenings on the premises and to use ordinary care to prevent injury to the patrons."<sup>638</sup> According to the Court, part of that duty to exercise ordinary care includes taking steps to "prevent foreseeable altercations between the participants and the spectators and arranging for a sufficient number of security personnel to control the crowd."<sup>639</sup>

Additionally, festival promoters often contract with concert venues or landowners who give the promoters the ability to determine what security measures are undertaken for the show, making the promoters the "occupiers of the land."<sup>640</sup> As such, a strong argument can be made that a promoter legally stands in the same shoes as the venue owner for liability purposes, as the promoter has joint control over access to and security at a venue, giving rise to a duty to use reasonable care to protect concert attendees and performing artists from foreseeable harm.<sup>641</sup>

A recent Florida state trial court decision in *The Estate of Christina Grimmie, et al v. AEG Live et al.*, denied motions to dismiss a complaint brought against a concert venue and promoter in Orlando, Florida, where Christina Grimmie, a 22-year-old singer, was tragically killed by an armed assailant.<sup>642</sup> The Complaint alleged that, as part of the promoter's business, AEG Live entered into contracts with venues and was responsible for assuring the artists' and attendees' health and safety and controlling all tour events.<sup>643</sup> The court determined that, while a property owner is not required to protect an invitee from every possible risk, the property owner does owe a duty to protect against reasonably foreseeable threats, the existence of which is a question for the trier of fact.<sup>644</sup>

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<sup>636</sup> *Id.* at 878.

<sup>637</sup> *Id.*

<sup>638</sup> *Id.* at 881.

<sup>639</sup> *Id.* at 884.

<sup>640</sup> Brian Caplan, *Concert Venue and Promoter Liability for Violent Acts and Injuries at Concerts*, NYSBA ENTERTAINMENT, ARTS & SPORTS L.J. (Fall/Winter 2018), [www.nysba.org/WorkArea/DownloadAsset.aspx?id=87626](http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=87626)

<sup>641</sup> *Id.*

<sup>642</sup> No. 2016-CA-011056-O, 2016 WL 7406296, at \*1 (Fla. Cir. Ct. 2016) (The lawsuit was dropped on Tuesday, December 3, 2019 for other reasons).

<sup>643</sup> Complaint, at 51-57. *The Estate of Christina Grimmie, et al v. AEG Live et al.*, 2016 WL 7406296, at \*1.

<sup>644</sup> Caplan, *supra* note 44, at 64; see also *Hall v. Billy Jack's Inc.*, 458 So. 2d 760 (Fla. 1984).

The Court noted that “where a party specifically undertakes to provide security, liability for breach of duty can be established without any evidence of prior offenses at that location.”<sup>645</sup> As a result, the trend appears to be that promoters, like landowners, should be liable for reasonably foreseeable injuries.<sup>646</sup>

### A. Sound Check: Is There a Duty of Care to Attendees?

No matter if a jurisdiction follows the Second or Third Restatement, under a general duty analysis, “an actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates risk of physical harm.”<sup>647</sup> Whether such duty exists “depends upon the foreseeability of the risk and a weighing of policy consideration for and against the imposition of liability.”<sup>648</sup> A duty exists for conduct created by the actor or for “a failure to take a reasonable precaution.”<sup>649</sup> Whether a duty exists is a question of law, while the scope of liability is a question of fact.<sup>650</sup>

For instance, a festival promoter can be considered the actor who “creates the risk of physical harm” when audience members are injured due to “festival seating” or general admission seating.<sup>651</sup> When attendees rush to get as close to the performers on stage as possible, attendees begin crushing those towards the front of the crowd, resulting in serious injuries. In *Bowes v. Cincinnati Riverfront Coliseum, Inc.*, numerous lawsuits were filed after eleven people were trampled or suffocated to death.<sup>652</sup> The crowd, after being forced to wait in line until the last minute before “The Who” was scheduled to perform, rushed toward the closed coliseum doors in an attempt to secure the best spots in the venue.<sup>653</sup> The Ohio trial court denied a motion to dismiss by the individual members of The Who, their promotion company, and manager.<sup>654</sup> The Ohio Court of

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<sup>645</sup> *Id.* (citing to *Burns Intern. Sec. Services Inc. of Florida v. Philadelphia Indem. Ins. Co.*, 899 So. 2d 361, 364-65 (Fla. 4th Dist. Ct. 2005)).

<sup>646</sup> See e.g., *Massey*, 400 S.E.2d at 881-81; *Jones v. Live Nation Entm’t, Inc.*, 63 N.E.3d 959, 970-73 (Ill. App. 2016); *McLaughlin v. Home Indem. Ins. Co.*, 361 So. 2d 1227 (La. Ct. App. 1978).

<sup>647</sup> Restatement (Third) of Torts: Phys. & Emot. Harm § 7 (2010); Restatement (Second) of Torts § 344 (1965).

<sup>648</sup> *Melton v. Boustred*, 183 Cal. App. 4th 521, 529-30 (Cal. App. 6th Dist. 2010) (quoting *Erlich v. Menezes*, 21 Cal. 4th 543, 552 (Cal. 1999)).

<sup>649</sup> Restatement (Third) of Torts § 3, cmt. c.

<sup>650</sup> Restatement (Third) of Torts § 7 cmt. a.

<sup>651</sup> Barry Montgomery & Bradley C. Nahrstadt, *A Primer For the Entertainment Community: Legal and Practical Issues About Venue Safety – What You Should Know*, 3 VA. SPORTS & ENT. L.J. 257, 268 (Spring 2004).

<sup>652</sup> 465 N.E.2d 904

<sup>653</sup> *Bowes*, 465 N.E.2d 904 (Ohio Ct. App. 1983).

<sup>654</sup> *Id.* at 907.

Appeals affirmed because there “was a genuine issue of material fact as to whether ‘The Who’s’ tardy arrival, a fact demonstrated in the record, was causally related to the tragedy.”<sup>655</sup>

Additionally, a concert venue can be negligent regardless of whether it provided security that was “customary for the type of venue” if a jury finds that the security was inadequate.<sup>656</sup> During a concert at the Greek Theatre in Los Angeles, a heavily intoxicated patron was yelling profanities and obstructing other attendees' views during the concert.<sup>657</sup> One attendee, the fiancé of Merridy Cress (“Plaintiff”), complained to an usher, who replied that there was nothing they could do about the defendant’s behavior.<sup>658</sup> Afterwards, the patron continued to verbally and physically threaten the Plaintiff and her fiancé, so they decided to leave the concert early. The intoxicated patron followed them out and punched the Plaintiff.<sup>659</sup>

The Plaintiff sued the venue, claiming that the ushers did not have adequate training to deal with intoxicated people and that the venue negligently failed to follow its policies regarding ejecting patrons.<sup>660</sup> In turn, the venue argued that “this was a random act of violence, which it could not have foreseen” and presented expert testimony that the venue provided security that was customary for the type of venue.<sup>661</sup> The jury found that the venue was 60 percent liable and awarded the Plaintiff \$1.05 million in damages.<sup>662</sup>

Nevertheless, there are exceptions to the duty of reasonable care when “overriding concerns of principle or policy exist such that tort liability should be withdrawn or limited.”<sup>663</sup> For example, in *Caldwell v. Let the Good Times Roll*, the scope of a promoter’s duty to provide security was limited when a suit was filed by several injured festival attendees after tornadic force wind bursts uprooted

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<sup>655</sup> *Id.* at 909.

<sup>656</sup> *Merridy Cress v. Bethalia Verle Jones a/k/a Marcia Cooper & Neederlander-Greek Inc.*, No. BC362775, 2009 WL 839226 (Cal. Sup. 2009) (Verdict and Settlement Summary).

<sup>657</sup> *Id.*

<sup>658</sup> *Id.*

<sup>659</sup> *Id.*

<sup>660</sup> *Id.* (Specifically, the Plaintiff argued that it was inadequate and negligent for only 2 of the 15 off-duty police officers present at the concert to have “walkie-talkies for purposes of communicating with each other” and Section C, where the Plaintiff was sitting, “had basically no security at the time of the incident.”).

<sup>661</sup> *Id.*

<sup>662</sup> *Id.*

<sup>663</sup> Restatement (Third) of Torts § 7(b) (“In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.”).

and collapsed the main tent at an outdoor music festival.<sup>664</sup> The plaintiffs contended that the promoters, who hired off-duty uniformed police officers to provide security at the festival, were negligent in failing to anticipate and warn the attendees of a severe weather storm.<sup>665</sup> The Louisiana Court of Appeals disagreed, holding that the promoters did not have a specific duty to warn of such an occurrence only a general duty “to use reasonable care to avoid creating an unreasonable risk of harm to those who attend.”<sup>666</sup> The Court highlighted that no “reasonable festival organizer” would have anticipated or foreseen such an event because there has never been a similar weather event in the area involving a public gathering.<sup>667</sup>

In the case of the Route 91 shooting, the victims claimed Live Nation failed to have an adequate number of exits, inhibiting people from evacuating efficiently.<sup>668</sup> Moreover, while it appears many commentators believe that the actions of the gunman were “so extreme and unusual as to be beyond any reasonable standard of care to prevent,” the Bataclan terrorist attack in Paris in 2015, the Pulse nightclub shootings in Orlando in 2016, and the bombing of the Arianna Grande concert in Manchester in 2017, make this the fourth mass casualty event at an entertainment event in the past three years.<sup>669</sup> These reoccurring tragedies beg the question of what qualifies as a breach of “reasonable care” when clearly it is no longer unexpected for such violence to occur at a music festival or concert.

## **B. Opening the Doors: Are Mass Shootings Foreseeable?**

Under common law, when an invitee is injured by a third party's criminal acts on another's property, the courts generally find that the possessor of the property did not have a duty to protect the invitee because the criminal act is considered to be a supervening act.<sup>670</sup> However, it appears that courts today now analyze whether a duty exists to protect an invitee from a third party's criminal actions in terms of the “foreseeability of the harm” to the plaintiff.<sup>671</sup>

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<sup>664</sup> 717 So. 2d 1263, 1266 (La. App. 2d Cir. 1998).

<sup>665</sup> *Id.*

<sup>666</sup> *Id.* at 1272.

<sup>667</sup> *Id.* at 1273.

<sup>668</sup> *Aguilar*, *supra* note 3.

<sup>669</sup> Michael Goldstein, *Las Vegas Murder, Whose Liability?*, FORBES (Oct. 13, 2017), <https://www.forbes.com/sites/michaelgoldstein/2017/10/13/las-vegas-mass-murder-whose-liability/#2639e821236d>.

<sup>670</sup> *Montgomery & Nahrstadt*, *supra* note 55, at 268.

<sup>671</sup> *Id.*

Therefore, the critical legal question becomes – are mass shootings foreseeable at music festivals.

There are four tests adopted by courts to gauge the issue of foreseeability: (1) the imminent harm test, (2) the totality of the circumstances, (3) the prior similar incidents rule, and (4) the balancing approach.<sup>672</sup> Applying the imminent harm test, foreseeability “is limited to situations where the business owner is aware of the imminent probability of specific harm to its customer.”<sup>673</sup> The totality of the circumstances requires a court to look at all the circumstances surrounding the situation, “such as the existence of security, previous crimes on the property, crime in the surrounding community, and the design of any structure” to determine if a business owner has a duty to protect a patron from the criminal acts of third parties.<sup>674</sup> Using the prior similar incidents test, “a business owner does not have a duty to protect a patron from harm if the patron fails to show that prior similar incidents had occurred on the premises.”<sup>675</sup> Lastly, under the balancing test, the court seeks to “balance the degree of foreseeability of harm against the burden of the duty to be imposed,” using factors such as the foreseeable probability of the harm occurring; the possible magnitude of the potential harm or injury; the importance or social value of the activity engaged in by the defendant; the usefulness of the conduct to the defendant; and the feasibility of alternative, safer conduct and the relative costs and burdens associated with that conduct.<sup>676</sup>

Regardless of the test applied, courts will impose liability upon the owner or possessor of the premises if the attack was “reasonably foreseeable.”<sup>677</sup> The foreseeability element alone causes problems because, although the risk may be considered

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<sup>672</sup> *Id.* at 269.

<sup>673</sup> *Boren v. Worthen Nat'l Bank*, 921 S.W.2d 934, 940 (Ark. 1996); see also *MacDonald v. PKT Inc.*, 628 N.W.2d 33 (Mich. 2001); *Folmar v. Marriott, Inc.*, 918 P.2d 86 (Okla. Ct. App. 1996).

<sup>674</sup> *Montgomery & Nahrstadt*, *supra* note 55 (citing *Stewart v. Federated Dep't Stores*, 662 A.2d 753 (Conn. 1995); *Clement v. Peoples Drugstore*, 634 A.2d 425 (D.C. 1993)).

<sup>675</sup> *Id.* (citing, *Hebert v. Club 37 Bar*, 701 P.2d 847 (Ariz. Ct. App. 1984); *Taco Bell, Inc. v. Lannon*, 744 P.2d 43 (Colo. 1987); *Christen v. Lee*, 780 P.2d 1307 (Wash. 1989); *Hudson v. Riverport Performance Arts Centre*, 37 S.W.3d 261 (Mo. Ct. App. 2001)).

<sup>676</sup> *Id.* at 270. (citing *Ann M. v. Pacific Plaza Shopping Center*, 863 P.2d 207 (Cal. 1993); *McClung v. Delta Square Ltd. Pshp.*, 937 S.W.2d 891 (Tenn. 1996); *Krier v. Safeway Stores 46*, 943 P.2d 405 (Wyo. 1997)); see also Restatement (Third) of Torts § 3 cmt e.

<sup>677</sup> See e.g. *Melton v. Boustred*, 183 Cal. App. 4th 521 (Cal. App. 6th Dist. 2010) (With criminal conduct, an extraordinary high degree of foreseeability is necessary for acts to be reasonably foreseeable); *Johns v. Housing Authority for City of Douglas*, 297 Ga. App. 869 (2009) (A landlord's duty to exercise ordinary care to protect a tenant against third-party criminal attacks extends only to foreseeable criminal acts); *Del Lago Ptnrs. v. Smith*, 307 S.W.3d 762 (Tex. 2010) (The nature and character of the premises can be a factor that makes criminal activity more foreseeable).

foreseeable, it may not necessarily create a duty if it would be unreasonable to place such a duty on the owner. In *Maheshwari v. City of New York*, an individual was attacked in the parking lot at a popular music festival, Lollapalooza.<sup>678</sup> The plaintiff sued the City of New York and the festival promoter, claiming that, despite their distinct duties to protect the individual, neither the city nor promoters assigned any security or police to guard that specific parking lot. Specifically, the plaintiff claimed that Lollapalooza experienced prior criminal incidents that should have put the organizers and the city on notice of potential criminal conduct.<sup>679</sup> The defendants argued the act was a random criminal act.<sup>680</sup>

The New York Court of Appeals held that “a random criminal attack is not a predictable result of the gathering of a large group of people,” finding the defendants not liable.<sup>681</sup> The Court reasoned that “the scope of the possessor’s duty is defined by past experience and the ‘likelihood of conduct on the part of third persons . . . which is likely to endanger the safety of the visitor.’”<sup>682</sup> The court determined that the brutal attack was not foreseeable because “the types of crimes committed at past Lollapalooza concerts are of a lesser degree than a criminal assault, and would not lead defendants to predict that such an attack would occur or could be prevented.”<sup>683</sup>

Similarly, using the imminent harm test, the Michigan Supreme Court concluded that a music festival promoter’s only duty concerning the risk of imminent harm is to *respond* reasonably to such a situation.<sup>684</sup> In *MacDonald v. PKT, Inc.*, audience members began “pulling up and throwing pieces of sod into the crowd,” and the plaintiff fractured her ankle while attempting to avoid a piece of flying sod.<sup>685</sup> Sod throwing incidents occurred at the venue before, prompting concert promoters to post signs indicating that the promoters would not tolerate guests throwing sod.<sup>686</sup> The Court determined that, as a matter of public policy, “we should not expect inviters [sic] to assume that others will disobey the law” because “criminal activity is irrational and unpredictable.”<sup>687</sup> The Court

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<sup>678</sup> 2 N.Y. 3d 288 (N.Y. 2004).

<sup>679</sup> *Id.* at 294.

<sup>680</sup> *Id.*

<sup>681</sup> *Id.*

<sup>682</sup> *Id.* (citing *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 519 (1980)).

<sup>683</sup> *Id.*

<sup>684</sup> *MacDonald v. PKT Inc.*, 628 N.W.2d 33, 34 (Mich. 2001).

<sup>685</sup> *Id.*

<sup>686</sup> *Id.*

<sup>687</sup> *Id.* at 39.

reasoned that the concert promoters responded reasonably to the previous incidents of sod throwing by “ensuring a large police presence at the concert.”<sup>688</sup>

In contrast, a duty to provide security arises if the owner or occupier of a public entertainment venue knows of prior criminal attacks on the premises or previous criminal attacks in the neighborhood.<sup>689</sup> In the case of *Comastro v. Village of Rosemont*, the Illinois Appellate Court held that the Village of Rosemont had a duty to provide security in the parking lot outside the Rosemont Horizon. The court made this determination after evidence showed that the Village made telephone calls to several locations/venues which hosted performances by rock group AC/DC in the past and learned of specific criminal problems encountered by those prior venues.<sup>690</sup>

Likewise, after the mass shooting in Aurora, Colorado, a movie theater patron sued the theater owner for negligence, premises liability and wrongful death.<sup>691</sup> The owner, along with the other defendants, filed a motion for summary judgment, arguing that “Cinemark neither knew nor should have known of the danger.”<sup>692</sup>

The defendant reasoned that

[a]t no time on or before July 20, 2012 did Cinemark or Century know of instances where individuals had entered Cinemark theatres, Century theatres, or other theatres surreptitiously through doors leading directly from a theatre auditorium to the outside – not to ‘sneak in’ to avoid the ticket price, but to commit a violent act.<sup>693</sup>

In denying the defendants’ motion for summary judgment, the Colorado District Court found that “whether the defendants should have known of the particular danger is a question of fact.”<sup>694</sup> The Court cited the Colorado Supreme Court, when stating, “foreseeability includes whatever is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct.”<sup>695</sup> The court recognized that events which would previously be considered “once-in-a-lifetime events” had become more common and what was “so unlikely or unforeseeable in 1984 was not necessarily so in 2012,”

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<sup>688</sup> *Id.*

<sup>689</sup> *Comastro v. Rosemont*, 461 N.E.2d 616, 620 (1984).

<sup>690</sup> *Id.*

<sup>691</sup> *Axelrod v. Cinemark Holdings, Inc.*, 65 F. Supp. 3d 1093, 1097 (D. Colo. 2014).

<sup>692</sup> *Id.* at 298.

<sup>693</sup> *Id.* (citing ECF No. 108-2 at ¶ 17).

<sup>694</sup> *Id.*

<sup>695</sup> *Id.* (quoting *Taco Bell, Inc. v. Lannon*, 744 P.2d 43, 48 (Colo. 1987)).

distinguishing this case from the McDonald's massacre in San Ysidro, California in 1984. The Court reasoned,

One such relevant fact in the setting of modern life is simply the changed landscape in which any school or base or business where large numbers of people congregate operated in July 2012. Although theaters had theretofore been spared a mass shooting incident, the patrons of a movie theater are, perhaps even more than students in a school or shoppers in a mall, "sitting ducks." One might reasonably believe that a mass shooting incident in a theater was likely enough (that is, not just a possibility) to be a foreseeable next step in the history of such acts by deranged individuals.<sup>696</sup>

Applying the same logic to music festivals in 2020, it is foreseeable that a mass shooting may occur at a festival, and attendees are "sitting ducks." Route 91 was the fourth mass casualty event at an entertainment venue in the last three years. Even more troublesome, the two largest shootings in the United States occurred at entertainment venues as well.<sup>697</sup> Thus, there must be a duty upon promoters, venues, and sponsors to protect attendees from mass shootings.

However, the scope of that duty depends on which test the court applies. If a court adopts the same standard in *Maheshwari*, festivals will only have a duty if a similar act occurred in the past at that particular venue or music festival. This standard would negate liability for Live Nation and MGM Resorts because no similar acts have ever occurred at Route 91. As stated by the court in *MacDonald*, the rationale is that promoters should not expect audience members to disobey the law.

The "modern life" standard used by Colorado is more practical because, as mass shootings become more probable at events with large crowds, public policy favors removing the "foreseeability defense" to ensure that promoters, sponsors, venues, and the like are providing adequate security. Since gun violence is arguably no longer unforeseeable to the reasonable person, removing the foreseeability defense aligns with previous societal reactions to the increased frequency and severity of drunk driving injuries.<sup>698</sup> "[T]o preempt the foreseeability defense, most states passed, or courts adopted, dram shop laws making a business that sells alcoholic drinks or a host who serves liquor to someone

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<sup>696</sup> *Id.* at 1101.

<sup>697</sup> Sullivan, *supra* note 13.

<sup>698</sup> *Market Trends: Gun Violence Coverage Issues*, LexisNexis (Nov. 8, 2018).

obviously intoxicated, strictly liable for injuries caused by the drunken guest.”<sup>699</sup>

Arguably, the result of imposing liability on festival promoters is that “inadequate security litigation has undoubtedly resulted in a safer society.”<sup>700</sup> One commentator argues that “much like product liability litigation that caused manufacturers to rethink their designs in terms of consumer safety, premises security cases have forced businesses to recognize those who entice customers also entice crime.”<sup>701</sup> Creating a type of strict liability upon festival promoters, owners, and sponsors, would force music festivals to train employees to be properly prepared for such events, implement strict security protocols, and establish a uniform standard for all entertainment venues to follow.

## II. THE MAIN EVENT: INSURANCE COVERAGE PROTECTION

One purpose for imposing liability for negligent conduct is corrective justice to “remed[y] an injustice done by the defendant to the plaintiff.”<sup>702</sup> To remedy physical harm, the plaintiff may seek monetary damages from the defendant, but if the defendant lacks sufficient funds to make the plaintiff “whole,” then there is no corrective justice. This lack of funds is where insurance can come in. Although public policy prohibits allowing a person from insuring against his or her intentional misconduct, the “majority of courts recognize that an insured may protect themselves against their negligence, even if intentional, by purchasing liability insurance.”<sup>703</sup> “The rationale behind the public policy is that behavior harmful to society will be more likely if an insured believes he or she will not have to bear the financial costs of the intentional conduct.”<sup>704</sup>

The scope of insurance coverage in mass shooting litigation can be significantly helpful for businesses, victims, and the public. Not only does litigation pose a tremendous financial risk to the defendants and their businesses, but it also causes victims great pain

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<sup>699</sup> *Id.*

<sup>700</sup> 2 LEIGHTON, LITIGATION PREMISES SECURITY CASES § 15:1 (2019 ed.).

<sup>701</sup> *Id.*

<sup>702</sup> Restatement (Third) of Torts § 6, cmt. d (2010).

<sup>703</sup> COUCH ON INSURANCE § 101:22 (3d ed. 2006); see also *Lumbermens Mut. Cas. Co. v. S-W Indus.*, 39 F.3d 1324, 1328–29 (6th Cir. Ohio 1994); *Ericsson, Inc. v. St. Paul Fire and Marine Ins. Co.*, 423 F. Supp. 2d 587, 594 (N.D. Tex. 2006); *Loveridge v. Chartier*, 468 N.W.2d 146, 158 (Wis. 1991).

<sup>704</sup> COUCH ON INSURANCE § 101:21 (3d ed. 2006).

as litigation is often a long, costly battle. For the Route 91 incident alone, the insurance industry initially estimated that it could pay more than \$1 billion between life and health insurance, workers' compensation, and property and liability claims.<sup>705</sup> Additionally, businesses involved with such tragedies also face severe impacts from lost revenue due to temporary or prolonged shutdowns.<sup>706</sup> For instance, "Cinemark movie theater complex in Aurora, Colorado was closed for over six months following a 2012 shooting that left 12 dead and 58 wounded – any many victims' families rejected to its reopening."<sup>707</sup> Thus, it is critical for festival promoters to understand their insurance policies and the potential for liability exposure in order to protect against a substantial loss.

Under a CGL policy, the threshold question is whether an underlying suit alleges an "occurrence" or "accident."<sup>708</sup> While "it appears that no court has directly addressed whether a mass shooting implicates an "occurrence" under a CGL policy, some cases addressing coverage for underlying criminal conduct suggest there may be no 'occurrence' if allegations of negligent conduct are inextricably intertwined with allegations of intentional conduct."<sup>709</sup> The Nevada District Court had an opportunity to answer that question after MGM Resorts filed a lawsuit against Zurich for wrongful breach of its duty to defend MGM Resorts, breach of its duty of good faith and fair dealing, and bad faith arising out of the Route 91 shooting.<sup>710</sup> MGM Resorts specifically alleged that Zurich "failed to pay for all reasonable Defense Costs, including substantial amounts due to retained attorneys, expert witnesses, consultants and other vendors that Zurich specifically approved."<sup>711</sup>

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<sup>705</sup> Sonali Basak & Hannah Levitt, *Insurers Face Potential \$1 Billion in Claims for Las Vegas Mass Shooting*, INS. J. (Nov. 13, 2017), [www.insurancejournal.com/news/national/2017/11/13/470933.htm](http://www.insurancejournal.com/news/national/2017/11/13/470933.htm).

<sup>706</sup> *Market Trends*, *supra* note 102.

<sup>707</sup> *Id.*

<sup>708</sup> *Id.*

<sup>709</sup> Sullivan, *supra* note 13; see also *Metro. Prop. & Cas. Ins. Co. v. Spayd*, 2017 WL 3141170, 5 (E.D. Pa. July 24, 2017) (finding no "occurrence" because allegations that insured negligently failed to prevent sexual assault were "inherently intertwined" with allegations of intentional misconduct).

<sup>710</sup> See *supra* Part 1

<sup>711</sup> *MGM Resorts*, *supra* note 10.

## A. The Opening Numbers: Defining CGL Policies and The Duty to Defend

A CGL policy is a “package policy” that provides coverage to an insured for an array of risks.<sup>712</sup> Under such policy, the insurer agrees to provide a defense and indemnity for sums the insured is legally obligated to pay for “bodily injury” or “property damage”<sup>713</sup> caused by an “occurrence”.<sup>714</sup> The duty to defend requires the insurer to appoint and pay for an attorney and other related costs to defend the insured in the underlying lawsuit stemming from a covered occurrence.<sup>715</sup> Whereas the duty to indemnify requires the insurer to pay money damages to a third party to which the insured is legally liable up to the policy limit.<sup>716</sup> A party must establish a duty to defend before there is a duty to indemnify.

An “occurrence” policy covers “any losses for which the insured is liable, no matter when the damage is discovered or when the insurer is notified, so long as the damage occurs during the policy period.”<sup>717</sup> The term “occurrence” means an “unexpected happening rather than one occurring through intention or design.”<sup>718</sup> Likewise, an “accident” is an “unanticipated or unusual result or an unforeseen occurrence, usually of an untoward or disastrous character, with a result that is unintended and unexpected.”<sup>719</sup> The terms in an insurance contract “must be given their plain, ordinary, and accepted meaning.”<sup>720</sup> When a liability policy defines “occurrence” as meaning an “‘accident, including continuous or repeated exposure to the same general harmful conditions,’ courts have construed this to mean injury caused by the negligence of the insured.”<sup>721</sup> “Despite the intentional criminal nature of a mass shooting, mass-shooting litigation may allege an ‘occurrence’ if the

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<sup>712</sup> David Goodwin, Elliott Schulder, & Greg Rubio, *Commercial General Liability* (May 17, 2019) (“We refer to the CGL as a ‘package’ because a variety of coverage is provided within a single, essentially standardized policy.”).

<sup>713</sup> For a closer look at what defines “property damage” see, *Commercial General Liability Coverage Form § V. 17* (Insurance Office, Inc., 2012).

<sup>714</sup> *Market Trends*, *supra* note 102.

<sup>715</sup> *Id.*

<sup>716</sup> *Id.*

<sup>717</sup> 43 Am. Jur. 2d *Insurance* § 679 (2019).

<sup>718</sup> *Id.*

<sup>719</sup> *Id.* See also, *Chochorowski v. Home Depot U.S.A.*, 404 S.W.3d 220, 231 (Mo. 2013).

<sup>720</sup> *Hogins v. Ross*, 988 S.W.2d 685, 687 (Tenn. Ct. App. 1998), perm. app. denied.

<sup>721</sup> *Id.*

underlying complaint asserts that the insured was negligent in failing to prevent the mass shooting.”<sup>722</sup>

When determining whether an insurer has a duty to defend, an insurer must compare the allegations in the complaint with the terms of the policy.<sup>723</sup> However, jurisdictions vary on whether extrinsic evidence not contained in the complaint should be considered as well. In Tennessee, an insurer’s duty to defend is based solely on the factual allegations as alleged in the complaint.<sup>724</sup> “If any part of the cause of action is arguable within the scope of policy,” the duty to defend arises immediately.<sup>725</sup> “The insured need only show that the underlying claim *may* fall within the policy coverage; the insurer must prove it *cannot*.”<sup>726</sup> However, in Nevada, the duty to defend is not limited to the allegations in the complaint.<sup>727</sup> The Nevada Supreme Court has stated that “the purpose behind construing the duty to defend so broadly is to prevent an insurer from evading its obligation to provide a defense for an insured without at least investigating the facts behind a complaint.”<sup>728</sup> Thus, under this broad duty, Zurich had a duty to defend MGM against the numerous lawsuits after the Route 91 shooting if any of the facts could potentially give rise to the potential of liability under the policy.

For example, in *Manzarek v. St. Paul Fire & Insurance Co.*, John Densmore, the drummer of The Doors, sued two of the band’s founding members.<sup>729</sup> Densmore alleged that the two founding members, who were touring as members of the band “The Doors of the 21st Century,” infringed on The Doors name, trademark, and logo in conjunction with their tours and marketing. Additionally, he alleged that, due to their infringement, he suffered economic damages and damage to his “reputation and stature.” The infringement caused people to believe that he “was not and is not an integral and respected part of The Doors band or is one member who

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<sup>722</sup> Sullivan, *supra* note 13 (citing to *Nationwide Mut. Fire Insurance Co. v. Molitor by Molitor*, No. CIV. A. 95-0503, 1995 WL 672397 at \*4 (E.D. Pa. Nov. 9, 1995) (“[A]s a general rule, recovery under an insurance policy is not barred on public policy grounds simply because the underlying ‘occurrence’ involved criminal activity.”); *Allstate Insurance Co. v. Wilson*, 18 F. Supp. 3d 156, 163 (D. Conn. 2014) (analyzing whether insured’s failure to prevent sexual assault constituted an “occurrence.”)).

<sup>723</sup> *Horace Mann Ins. Co. v. Barbara B.*, 846 P.2d 792, 795–96 (Cal. 1993)

<sup>724</sup> *Montrose Chem. Corp. v. Superior Court*, 24 Cal Rptr. 2d 467, 472 (1993); see also *Gravis v. Emp’rs Mut. Cas. Co.*, 497 N.W.2d 254, 258 (Minn. 1993).

<sup>725</sup> *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 165 (Minn. 1986).

<sup>726</sup> *Montrose*, 24 Cal Rptr. 2d at 475. (emphasis in original).

<sup>727</sup> *United Nat’l Ins. Co. v. Frontier Ins. Co.*, 120 Nev. 678, 686-87 (2004)

<sup>728</sup> *Id.*

<sup>729</sup> *Manzarek v. St. Paul Fire & Insurance Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

can easily be replaced by another drummer.”<sup>730</sup> The two members notified their CGL insurer, which denied coverage because, among other reasons, Densmore had not alleged a “bodily injury.”<sup>731</sup> The Ninth Circuit disagreed for purposes of the duty to defend, explaining that “[a]ny doubt as to whether the facts establish the existence of the defense duty must be resolved in the insured’s favor.”<sup>732</sup> The court reasoned that the allegations to Densmore’s “reputation and stature” were “sufficient to raise the potential of an award of mental anguish or emotional distress damages” and trigger the duty to defend.<sup>733</sup>

Furthermore, the duty to defend is only dismissed if the “insurer carries the burden of demonstrating that a policy exclusion applies.”<sup>734</sup> In *Festivals & Concert Events, Inc. v. Scottsdale Ins. Co.*, a music festival sought defense costs and indemnity for an underlying lawsuit involving a sexual assault committed by a security guard.<sup>735</sup> The festival “tendered the defense of the suit to [its insurer], Scottsdale, but Scottsdale denied the claim based on a policy exclusion concerning injuries arising from assault and battery.”<sup>736</sup> The festival argued that “the exclusion in this policy applies only to injuries arising from an ‘Assault and/or Battery committed by any Insured, any employee of any Insured, or any other person,’ and Scottsdale had reason to know that Fanning had not ‘committed’ an assault.”<sup>737</sup> The Eighth Circuit disagreed, holding that “whether or not Fanning ‘committed’ an assault, there was no possibility of coverage under the policy.” The Court explained that “[i]f Fanning did commit an assault, then the assault and battery exclusion applied to defeat coverage, [but] [i]f Fanning did not commit an assault, then [the festival] was not legally obligated to pay damages [], and coverage was not implicated.”<sup>738</sup> Therefore, an insurer’s duty to defend arises if the underlying claim would be covered, regardless of whether the insured committed the act.

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<sup>730</sup> *Id.* at 1033.

<sup>731</sup> *Id.*

<sup>732</sup> *Id.* at 1031 (citation and internal quotation marks omitted).

<sup>733</sup> *Id.* at 1033.

<sup>734</sup> *Face, Festivals & Concert Events, Inc. v. Scottsdale Ins. Co.*, 632 F.3d 417, 420 (8th Cir. Minn. 2011).

<sup>735</sup> *Id.*

<sup>736</sup> *Id.*

<sup>737</sup> *Id.* at 421 (emphasis in original).

<sup>738</sup> *Id.*

## B. Intermission: Effect of Exclusion Provisions

Once it is determined that the underlying claim alleges a “property damage” or “bodily injury” caused by an “occurrence”, the next step is to determine whether any exclusions apply to bar coverage. The California Court of Appeals once said, “[t]he insurer does not, however, insure the entire range of an insured’s well-being, outside the scope of and unrelated to the insurance policy, with respect to paying third party claims. It is an insurer, not a guardian angel.”<sup>739</sup> Insurance companies are free to exclude coverage and many companies have implemented numerous exclusion provisions in liability policies. “Thus, the negligence of a business in failing to warn or prevent an attack generally will qualify as an ‘occurrence’ or ‘accident’ that an insurer is obligated to defend, unless some broader exclusion applies.”<sup>740</sup>

A notable exclusion is the “intentional acts” exclusion, which usually states “this insurance does not apply to: (a) expected or intended injury.”<sup>741</sup> The effect of this language “is that of an exclusion – i.e., to prevent an insured from recovering for damage that was intentionally caused.”<sup>742</sup> The critical issue to determine is “whether the insured expected or intended to cause injury or property damage.”<sup>743</sup> Courts use either an inferred, objective, or subjective approach to determine the insured’s intent.<sup>744</sup> If the court finds intent to injure from the assailant’s actions, it generally will not hesitate to deny coverage on that basis as against public policy.<sup>745</sup> If there are multiple insureds under the same policy, the innocent insureds may still be entitled to coverage. “Generally, if the intentional act exclusion applies to injury or damage expected or intended by ‘the’ insured, courts consider the intent of each insured

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<sup>739</sup> *Camelot by Bay Condominium Owners’ Ass’n v. Scottsdale Ins. Co.*, 32 Cal. Rptr. 2d 354, 364 (Cal. App. 4th Dist. 1994).

<sup>740</sup> Michael Steinlage, *Liability for Mass Shootings Are We At A Turning Point*, 49-WTR BRIEF 10, 15 (Winter 2020).

<sup>741</sup> *Market Trends*, *supra* note 102

<sup>742</sup> Goodwin et. al, *supra* note 116.

<sup>743</sup> *Id.*

<sup>744</sup> *Market Trends*, *supra* note 102; see generally *Donovan v. Commercial Union Ins. Co.*, 493 N.W.2d 581 (Minn. Ct. App. 1992) (applying an inferred approach); *Hawaiian Ins. & Guaranty Co., Ltd. v. Blanco*, 804 P.2d 876 (Hawaii 1990) (applying an objective standard); *Alabama Farm Bureau Mut. Cas. Ins. Co., v. Dyer*, 454 So. 2d 921 (Ala. 1984) (adopting the subjective approach).

<sup>745</sup> *Donegal Mut. Ins. Co. v. Baumhammers*, 938 A.2d 286 (Pa. 2007) (finding no coverage for insured who went on a two-hour shooting spree, killing five people in three different towns); *Germantown Ins. Co. v. Martin*, 595 A.2d 1172 (Pa. Super. Ct. 1991) (injuries caused by a shooting spree were expected or intended and, thus, were not covered under the policy; insured’s intent to shoot and kill ‘everyone; in a house could be transferred to a victim whose identity or present was unknown to the insured at the time).

separately.”<sup>746</sup> On the other hand, “if the exclusion applies to injury or damage expected or intended by ‘an’ or ‘any’ insured, courts often find that intent to injure on the part of one insured bars coverage for all insured.”<sup>747</sup>

In the case of MGM Resorts, MGM’S Policy contained an exclusion for “expected or intended injury,” meaning “[b]odily injury’ or ‘property damage’ expected or intended from the standpoint of *the* insured.”<sup>748</sup> With the language using “the,” the court likely would have considered each insured’s intent separately. But since the court viewed the exclusion in the eyes of MGM Resort, it was not MGM Resorts who expected or intended the injury. This case would have provided an opportunity for the court to apply such exclusion to allegations of inadequate security measures. However, Zurich never filed an Answer to MGM Resort’s lawsuit, so Zurich’s reasons for denying coverage remain unknown.

### C. Encore: How Much is Covered?

If there is no applicable exclusion, how much will be covered under a liability policy? CGL policies may have a “per occurrence” clause that limits the insurer’s liability to a specified amount per accident or occurrence.<sup>749</sup> “In this situation, a finding that the underlying claims arose from multiple occurrences expands the coverage available – at least until the total amount paid reached the aggregate policy limit.”<sup>750</sup> The prevailing view for determining the number of occurrences is the “cause theory,” which “consider[s] whether there is a single cause or multiple causes for the losses sustained.”<sup>751</sup> “Under the ‘cause theory,’ where a single, uninterrupted cause results in all of the injuries and damage, there is but one ‘accident’ or ‘occurrence’ within the meaning of an insurance policy, and if the cause is interrupted or replaced by

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<sup>746</sup> Steinlage, *supra* note 144.

<sup>747</sup> *Id.* (citing *Allstate Ins. Co. v. Freeman*, 432 Mich. 656 (1989)).

<sup>748</sup> *MGM Resorts*, No. 19-CV-01051 (exhibit A) (emphasis added).

<sup>749</sup> *New Hampshire Ins. Co. v. RLI Ins. Co.*, 807 So. 2d 171 (Fla. Dist. Ct. App. 3d Dist. 2002); 44 Am Jur. 2d *Insurance* § 1534 (2019).

<sup>750</sup> Steinlage, *supra* note 144.

<sup>751</sup> 44 Am Jur. *Insurance* § 1534 (2019); see also *Century Sur. Co. v. Casino West, Inc.*, 99 F. Supp. 3d 1262, 1264-65 (D. Nev. 2015) (under Nevada law, injuries arising from multiple causes are nonetheless attributable to single “occurrence,” for purposes of insurance liability, when those causes act concurrently with and are directly attributable to a single first cause.).

another cause, the chain of causation is broken and there has been more than one accident or occurrence.”<sup>752</sup> However, some courts apply the “effect” test, which determines the number of occurrences by examining the effect that an event had, such as the amount of resulting individual claims or injuries.

In *Koikos v. Travelers Ins. Co.*, an insured brought suit for a declaratory judgment against their CGL insurer. The claim alleged that two separate occurrences arose in separate shootings of multiple victims at a restaurant.<sup>753</sup> The certified question for the Florida Supreme Court was “[w]hen the insured is sued based on negligent failure to provide adequate security arising from separate shootings of multiple victims, are there multiple occurrences under the terms of an insurance policy that defines occurrence as ‘an accident, including continuous or repeated exposure to substantially the same general harmful conditions?’”<sup>754</sup> The Court answered in the affirmative, holding that “each shooting of a separate victim constitutes a separate occurrence.”<sup>755</sup> The court disagreed with the insured that “the occurrence was [the restaurant owner’s] negligence and, therefore, in this case there was but a single occurrence—the failure to provide security on the evening in question.”<sup>756</sup> The court reasoned that the “continuous or repeated *exposure*” language expands the definition of “occurrence” by “including ongoing and slowly developing injuries, such as those in the field of toxic torts.”<sup>757</sup> The court found that “[t]he victims were not ‘exposed’ to the negligent failure to provide security. If the victims were ‘exposed’ to anything, it was the bullets fired from the intruder’s gun.”<sup>758</sup>

In the case of the Route 91 shooting, MGM Resort’s CGL policy defined “occurrence” to mean “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”<sup>759</sup> The policy provided an “each occurrence” limit of \$1,000,000 and a general aggregate limit of \$25,000,000.<sup>760</sup> Applying *Koikos*, there is an argument that MGM Resorts should

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<sup>752</sup> *Id.*

<sup>753</sup> *Koikos v. Travelers Ins. Co.*, 849 So.2d 263 (Fla. 2003).

<sup>754</sup> *Id.* at 264.

<sup>755</sup> *Id.*

<sup>756</sup> *Id.* at 267.

<sup>757</sup> *Id.* at 268 (emphasis in original).

<sup>758</sup> *Id.* (citation omitted).

<sup>759</sup> *MGM Resorts*, No. 19-CV-01051, at \*13 (exhibit A)

<sup>760</sup> *Id.*

receive the full \$25,000,000 of the general aggregate limit. The victims' exposure was the bullets from the lone gunman's gun rather than MGM Resort's negligence. However, since the court dismissed the case, there is no way to know exactly how much Zurich ultimately paid for the Route 91 incident. Although, it appears that under Nevada law, "injuries arising from multiple causes are nonetheless attributable to single 'occurrence,' for purposes of insurance liability, when those causes act concurrently with and are directly attributable to single first cause."<sup>761</sup> Therefore, depending on jurisdiction, a "per occurrence" clause can provide significantly more coverage if the courts determine that there were multiple "causes."

### III. CONCLUSION

The tragic events of Route 91 affect the liability of music festivals because mass shootings should no longer be considered unforeseeable as a matter of law. Under both Restatement (Second) and (Third) of Torts, it appears that festival promoters are treated the same as landowners and owe a duty of reasonable care to attendees. More importantly, festival promoters, organizers, sponsors, and venue owners need to be aware that the "foreseeability defense" may no longer protect them against liability in light of the recent incidents at entertainment venues, like Route 91, Pulse nightclub, and the bombing in Manchester.

To allocate risk, festival promoters must ensure that their CGL policy provides adequate protection. As insurance companies continue to re-evaluate their liability policies and broaden the exclusion provisions, festivals must ensure that they are protected. Depending on state law, the state may interpret policies differently. Nevertheless, it is crucial to understand when an insurer owes a duty to defend and indemnify and how much will be covered in the event of a tragedy.

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<sup>761</sup> *Century Sur. Co. v. Casino West, Inc.*, 99 F. Supp. 3d 1262, 1265 (D. Nev. 2015).

**BELMONT ENTERTAINMENT LAW JOURNAL FIRST  
ANNUAL ENTERTAINMENT LAW SYMPOSIUM:  
“WHAT’S NEXT?”**

**Raven:** Good morning, everyone. We just wanted to welcome you to our inaugural Entertainment Law Symposium. We will have three panels today, one at 09:00 to 09:55, 10:00 to 10:55, and one at 11:00. Each with a five-minute break in between. Thank you all for coming, and we hope you enjoy it.

**Jack:** Our first panel will be about artists and legal contracts in the decade. Our attorney panelists today, from your left to right: Derek Crownover, who is a Partner at Loeb and Loeb, and he played baseball at Auburn. Tim Warnock is a Partner at Riley Warnock & Jacobson, and he focuses on entertainment litigation. Lynn Morrow is a Partner at Adams & Reese, and she is a tennis enthusiast.

[laughter]

**First Panel: Entertainment Attorney Panel**

**Loren Mulraine:** Good morning, everyone.

**Derek Crownover:** Good morning.

**Loren:** My name is Loren Mulraine. I'm the Director of the Music and Entertainment Law Studies program here at Belmont. We're excited to have you here. I want to tell you a couple of quick things before we start off with the panel. Of course, the Law School has been here since 2011, and we decided at the very beginning, at the outset, that we wanted Music and Entertainment Law to be a major focus of what we do here. To do that, we have a certificate program where students can take certain classes that prepare them for a career in this area with a wide array of courses in Entertainment Law, Entertainment Practicum, Copyright Law, Trademark Law, IP Law, Media Law, Film and TV transactions, Sports Law, et cetera, that you can choose from in order to get into this field.

Last year, I was asked to start an Entertainment Law Journal. This is our first year of the Journal and our first Symposium. Everything that you see here today, we have our students on the Entertainment Law Journal to thank for. I just wanted to mention their names really

quickly before we start. Our 3L members, Raven Lockwood, Hannah Piente, Diamond Stuart, and Sydney Johnson, who is tragically out with the flu today. She got her work in. Maybe that's why she's sick.

[laughter]

Our 2L members, Madison Romine, Matt Jafari, Nicholas Clark, Klare Essad, and Collin Quinn. I want to thank them publicly for all that they did to make this happen. We're excited about the whole day, but we're excited about this panel because it talks about artist relations and artist issues that are going on in the industry right now. We're going to just get these panelists to really talk about what's happening. I'm going to leave 10 minutes or so at the end for questions from you. Let's see where we go with this.

Let's start with this. This morning I came in, and in my box was the latest *Billboard* magazine, and the headline, "How the Music Business Went from [3] Thumbs Down to [3] Thumbs Up on YouTube," starring its latest success story, Roddy Rich. Then, there's another article in here about WMG going public. There's an article in here about Issa Rae's music empire, and why the music industry is watching. There's an article on the front page about the Bieber documentary.

When you look at those things, there's a lot going on there that wasn't going on 5 years ago, 10 years ago, or 20 years ago, when I met Derek, and when I started teaching Entertainment Law and Copyright Law, back in 1998. A lot has changed in the industry. My first question that I'd like all of you to talk about is, over the last decade, what has been the biggest change that you've seen in your practice with regard to entertainment clients?

**Lynn Morrow:** Well, I can start, do I? Ladies first.

**Derek:** We've got some folks in the audience that need to answer these questions.

**Lynn:** You've got some people in the audience, and they're right in my line of vision.

**Derek:** Yes, so stay awake for everyone asking questions back there.

**Lynn:** A couple of them work for major record labels as well, which is pretty spectacular. Okay. The biggest change in the last 10 years is how music is distributed. In that, it was CDs, it was your contracts when you were negotiating royalty rate, it was based on retail price, it was certain deductions, and you were really focused on that particular method of distribution. Now, everything's portable. How many have Spotify accounts? Or some other form of account? Everything's moving to streaming, it's portable, so that would be it, for me. It's just how music is distributed. The 360 deal has become more and more aggressive in the last 10 years.

**Tim Warnock:** In litigation, probably the biggest consistent change from 1990 to today has been the application of the Fair Use Defense in Copyright litigation. The last time the United States Supreme Court talked about that or wrote about it extensively, was in the 2 Live Crew case, which involved an alleged parody of the Roy Orbison song, *Pretty Woman*. You probably know, the Fair Use Defense is statutorily contained in the Copyright Act. There are four factors that are non-exclusive, and the courts are supposed to consider those.

Over the past 10 years, the one that has probably been the hottest topic for judges has been transformative use. Whether what the alleged infringer is doing with the underlying work is transformative, which means essentially that the portion that is copied is then used to send a different message or tell a different story.

**Derek:** Such as commentary.

**Tim:** Or parody.

**Derek:** Yes. I'd say I agree with Lynn, but in a form of day-to-day practice perspective, the thing that has been the toughest in the last 10 years is response time. Time is your enemy, big time. Everybody wants an answer so quickly, and then you're afraid that, "Oh well, let me give you this answer," [sighs] and it's, like, 75% right. Then you're like, "How do I slow this down so I can actually give them a correct answer?" Because Scott Safford is going to steal a client if I don't give them an answer within a day. He's going to say, "I've got the answer right over here." So, I mean it's very competitive, but it's

also controlling the clients' expectation of getting a good answer. That has been, I think, my hardest thing in the last 10 years to deal with—just controlling a client's expectation. I'm trying to give them what I hope is a good answer. There are times when you have to put a disclaimer in every email that's sent. "I don't know if this is the right answer. I need more time to do this. But if you need an answer today, here's my answer." I see that.

I'll tell you what else I see. Raise your hand if you somehow have worked with me. There you go. What I see lately, in the last five years—not with any of you that have worked with me—is how quick a law student wants to answer something and get it out without thinking about it. In other words, they've thought about it but so quickly, and I think it has to do with our society. I don't think it's the student's side of it.

There are other times when I say to different students that work with us, "Call them back, and tell them this." They'll send an email. "I told you to call them. There's a reason I told you to call them, after practicing for 25 years and getting grey hair and am losing it. It's because this person wants to hear you. They want to hear you tell them. They don't want an email." I see that as a huge issue to think about every day as a new student and up here and out there. I think it's time, efficiency, and client touch. Giving them real advice that they trust and want to hear.

**Loren:** Great. Lynn, you mentioned in your answer about 360 deals changing over the years. Do you want to elaborate on that?

**Lynn:** Sure. I can't remember how long they've been with us because time has gone by so quickly, but Robbie Williams, with EMI, was the first one to have the 360 deal. At the time, it was so startling, because of the amount of money that EMI—back in the time they were a record label—just paid him, a boatload of money for acquiring all of these rights. I think most of you know what a 360 deal is, but it used to be that the record companies would just give the one stream of income for the exploitation of the master recordings. Then, they realized that "Gosh, we are giving—" I'm giving the labels argument and we really should have somebody that works for a label on this panel. I will do my best to give the labels argument. The label is saying, "Gosh, we're giving this artist a platform, and because of our marketing dollars and our leveraging

this particular artist, we should be entitled to receive more than just this one stream of income."

What are the other streams of income that the artist is able to acquire based on us signing this artist to a record deal? That would be merchandise income, live performance income, sponsorships and endorsements, and sometimes their music publishing income if they're a songwriter. It has just expanded to all of these different forms of income and yet, they're really not giving any bigger advance most times because it's a new artist deal. They're just giving the same advance but wanting to sweep up more rights. It's tricky because having to negotiate every single one of those—trying to eliminate as many as you can—is challenging, especially when it's a new artist deal.

**Tim:** Just as an aside, if you want to see a broad analysis of how many different streams of income arise in entertainment, I would encourage you to take a look at Jeff Brabec's book, *Music Money and Success*, because it pretty much outlines just about every way to earn money through entertainment.

**Loren:** Tim, are there any specific changes with regard to litigation that the 360 deal has created?

**Tim:** There really aren't. From a litigator's perspective, it's a contract. It's a broader contract as Lynn has described, but at the end of the day, the issue is what was the intent of the parties? Is it clear? If it's not—whether that's testimony about the negotiations or testimony about in the industry—the things that you learn in contracts are the same things that you'd be talking about if you were analyzing the 360 deal from litigation.

**Derek:** I'll chime in that I've always said, I think—I keep bringing up Scott back there, but we talked about this I think, Scott, years ago—that the 360 deal doesn't create an argument for an effective partnership between you and the label because you're sharing income, and you don't really define it as a joint venture. That's where I see if you have some big fat lawsuit, like let's say the bus goes off the cliff and you get part of the touring income, and now you've got a de-facto partnership. That's the thing that I've always seen as a—

I'm on the label side of how can you protect yourself from that, insurance, self-insurance?

You're just big bailout money, and you're just ready for that. That is the part that years from now, where if somebody goes into bankruptcy or the artist does not have money, yet they still have this money coming from the label, have they created, now, an opening? I don't know the answer, but I think there's an argument there, one day, that we're all going to be looking at in a contract.

**Lynn:** Derek, I'm surprised there hasn't been more litigation over this. Because I don't know how faithful sometimes the artists and the business managers are to account to the label as exactly as they're supposed to account to them, and how good does it look—It's not a good look for a label to sue an artist. I'm sure there's a lot of behind the scenes as far as trying to get that money out of them, as far as the 360 and what they've negotiated. At the end of the day, it's tricky for the labels because they are not going to be looked favorably upon, and perhaps artists aren't going to want to go to a label that's going to be suing their artists.

**Tim:** Would you expect a record label to suggest an audit?

**Derek:** I know some that have.

**Lynn:** Yes, I would expect that.

**Derek:** They've been informed. They want more information.

**Lynn:** They'll probably put a confidentiality clause in the whole procedure or so.

**Derek:** I'm surprised that the labels haven't pushed for arbitration to keep it confidential.

**Lynn:** That's a good point.

**Derek:** I'm really surprised with that.

**Tim:** I can say that during the course of my career, arbitration started off as supposedly a way to save money and a confidential result, but I would say, looking backwards today, arbitration is probably the

worst way to resolve dispute. Because you give up all of your due process rights, and you get nothing in return for that except the potential for confidentiality, but the only way to enforce an arbitration award is to confirm it in court. The one thing that you think you may have, which is confidentiality, goes right out the window if somebody disagrees with it.

**Derek:** What's the standard of review, Tim? It has to be—

**Tim:** Gross fraud.

**Derek:** Gross fraud and unreasonable. Once you get an arbitration judgment from an arbitrator, who could be one person who's arbitrating, then that judgment is final, and it's not—you can't go back and look at all the records. That's it. Yes, I agree with you. I mean, I'm surprised they haven't pushed that a little more because they could.

**Loren:** One of the big changes that we've seen in distribution has been streaming platforms. How is streaming effecting the way deals are done and the way artists are earning income?

**Derek:** Scott.

**Scott Safford:** Is this a Socratic Method class?

[laughter]

**Derek:** You're teaching the CLE. No. Those guys back there, what do you guys have? 30% or 40% of the market share, the artists right back there. Streaming—what we've seen is that it's creating an empowered middle class again. It's getting paid sometimes monthly depending on service. I was telling Loren up here before we got here, we have a client that has an independent artist who has 80 million streams and has already monetized well over \$400,000 related to those streams and does not have a record deal.

He has a manager, just he's being offered a publishing deal. But still, this artist is in country, and radio is such a big driver still. If you were a pop artist, fitting for a seven-figure offer, but in country, he doesn't even have a record deal. He has a distribution deal with a

distributor, and he owns the masters and has interests from other people, but it wasn't big interest because they thought, "Well, that's just one song. We have to see if another one works." He's still getting booking gigs at \$2,500 a night, but if you translate that person into pop, it's an entirely different model. I think we're like five or six years behind in country because we're still—out in the hinterlands, there's still CD players, there's still terrestrial radio that's powerful.

I do see that starting to evaporate slowly and there's this empowered middle class where you can put your team together, you can run a business now without a label. Is it going to be a rocket ship where you go out into that outer space? No, but you can do it. We've seen legacy acts own their own masters, move those masters from one DSP to another, get well over a million dollars for the next record, and still own the next record.

We're seeing just all kinds of deals that are changing big-time based upon this empowerment, and there's been this huge negativity in some ways of Spotify in the very beginning because the publishing rates were low, the master rates are high. They're still low, and there's a ruling right now that Tim may know more about than me, but that is copyright royalty board ruling with Google and Spotify on appeal. The spread is, I think between 14% and 44% of an uptick, and it's going to go back to 2017 as soon as they decide that rate and rate board.

The copyright royalty board, whenever we can't work the rate out, assess the rate for some of these large DSPs because the three-judge panel, they come out and say, "Well, the rate now is going to be this when you stream." In 2017 forward, if I've got a publishing catalog that I'm selling, which I have a few right now, and that rate comes out, and it's 20% higher on all catalogs and I don't put that in my model right now—I know it's going up. I just don't know how far it's going up. Hopefully, it goes up 44%, but certainly, it might be 30%. I might say, "Hey, if you're going to buy this catalog, I want you to pay a 30% premium on the streaming part of this." All those things, you're seeing this middle-class being pulled up, I think, and you could actually run a business now as an artist where before it was like, "Can you please give me a record deal?" "Please can you get my CDs out in London?" I mean, "Can you get my CDs out in Arkansas? I need you to do that." Now it's like, "Hey, I'm going to

hit a button, and I'm going to hit these markets." There's a lot more power there.

That's where you got to be careful, I think, as a lawyer now because you can kind of give away more than you thought you had. I think that's the scariest part. It's like saying no is now half of what I'm trying to do. I'm thinking, how much do I not give away? How do I keep the deal shorter and tighter and not give it away? Even if it's a really big number, I've seen some of these catalog sales there with very big numbers. They also give away every single piece of the writer's share, and it's the last thing left. You're like, "What if that song is pretty limited?" It has five lives.

**Tim:** The litigation issue from a rate court perspective is twofold. Part one will be relevance, and part two will be the type of evidence you use to prove whatever problem. The background in the relevancy issue is "How close can we get to evidence of what a willing buyer and a willing seller would be willing to agree to?" The visibility question would be, "How do you put before the rate court evidence of what a willing buyer and a willing seller would do? Is the license that one side or the other seeks to introduce really a willing buyer and a willing seller or are there collateral issues that affect one or the other points?"

**Derek:** Does Steve Bogard chair? Is he involved here? He testified in a pretty big hearing appearing as a songwriter on some of those issues.

**Lynn:** When it comes to recording artists' agreements and how you negotiate that particular streaming royalty, it really just gets thrown into the rest of the royalty rate. Unless you look at it and go, "Okay, I want it to be one and a half times whatever that royalty rate is that you're giving me on other forms of distribution." You've got to consciously look at it and try to push it up. It can be challenging. It could be challenging to do that, but if you've got some leverage, you're able to do it.

**Loren:** Of course, the justification is they don't have the costs that they've had for the product they had before.

**Lynn:** That's true. There's no physical packaging, the distribution fee, all of that is minimal. If it's a distribution deal, they still take a distribution fee but it's less—the digital distribution fee than the physical distribution fee.

**Loren:** How have these changes affected the relationship between the attorney and the client?

**Derek:** With the streaming around the last 10 years?

**Loren:** The middle class now essentially having a pathway to the audience without the middleman.

**Derek:** I'll answer that. I think if you're really strategizing, I think you're probably relying on a lawyer a lot more than you did before. You were trying to find a lawyer to get the deal before they, set the dominos up, wait on the big machine, and push that over and go. Now you're trying to say, "Hey, how do you build a team? What's his cut? What's her cut? How do you put this thing together now and be creative on this pie that we've got to keep moving? Oh, by the way, we might need to share with a few people on the way. What's our prenup—metaphorical prenup agreement look like? What's our buy-sell look like metaphorically?"

As you keep going and shed these stages, as you do a rocket maybe, more how you keep them on-board without being too much baggage. There's a lot of that now that you really have to think through a little more. I think another thing I'm seeing on a regular basis is that I don't think we do enough work on what the asset is worth before we give it up. I don't think we know. That's why I'm trying to keep it.

I see as a general rule, the lawyers and the business managers not sharing enough information to say, "Hey, if you do this three-record deal and you stream this, how much money is that really worth? How much is the publishing worth? Do you really know what that's worth? Is that a \$30 million mistake or is that a \$3 million mistake?"

**Tim:** Does that make you a stronger record company?

**Derek:** I think that there's no question. It's the best time that I've ever seen in my career to put content together and distribute it at the lowest cost and own it. You've never seen this much power in our system to do that. With The Orchard or TuneCore or Dido or Believe or Symphonic, all those folks, you can literally learn to put your assets in there and learn to populate them and hit send and now it's up to you to break through the noise. It's not like, "Hey, Mr. or Mrs. record label, can you get me a deal?" Did I answer the—?

**Tim:** Yes. I was going to say it sounds like the artist is a stronger record company.

**Derek:** Yes, and the publisher.

**Lynn:** It's a lot. There's a lot of opportunity there, but it takes a ton of brain work as far as [that] and making sure that particular artist gets all the clearances before they go and start on TuneCore or whatever. I mean you've got a producer you've got to look at, you've got—a lot of times, that producer might co-own the master with the artist because the artist isn't able to afford to pay for that particular producer. All of a sudden, we've got co-ownership. Who is going to want to administrate that particular master that's going to be released? You find yourself, if you're an entertainment attorney, you're a business attorney, you're a manager. I feel like you don't, a lot of times, stay in your lane at the very beginning because their needs are so great that they are looking to you for a lot of things to start off before they get their team around them.

**Tim:** Is this lawyer compensated in line with what they bring to the table?

**Derek:** That's a good question. It really doesn't. I was up at three o'clock last night making sure that I send the producer here out to Scott. He hasn't looked at it yet, but you're talking about clearances and that's what we're going through in this particular situation. This client has a lot of heat, he's a Belmont grad, a big fat record deal, and now at a point where, there's these additional masters that need to just be cleared. We got it, we'll work it out, but you've got to get this thing signed. It's like, "What are the splits on the songs?"

Warner's not going to release it until we get that done. In the country world or, believe it or not, the pop world, there's so many more arguments about song splits, it's starting to happen and creep over into the country world because of track writing. You take a track from one writer to the next and next thing you know this track morphs into another one. "Oh wait. I didn't tell you that you could go take it again and split my publishing up."

I'm seeing a lot more song-split agreements in the country world. In the pop world, you saw it all the time. Almost before you walked in, "Hey, here's how we're going to split this up." "I haven't even written the song yet." "I'm Doctor Dre, so I got 50 and you get the rest kiddo." We're seeing that change into country where it's becoming a little bit more because the walls have broken down. In our world, that particular issue of getting releases like we talked about is becoming more and more prevalent every day.

Now, the lawyer has got a lot more on them early, and once again, time is not your friend. If you're trying to put something out, you may say "Oh, go ahead and put it out." Are you creating that liability with them? Say, "You're going to be okay. You won't get sued for infringement but you're going to owe them some money, so go ahead and put it out." To answer your question, I haven't seen the lawyer fees go up or adjust for that. I've seen where you say to the client, "Hey, you only have so much money, we've got to spend our money on this first. This is the most important. Now when you make some more, we'll spend it on this next." That's what I see.

**Lynn:** That's very important because you cannot do everything that you want to do for that particular artist because they've got limited means, and they've got to get an income flowing in so that they can afford—that's the challenge. You've got to pick and choose as far as "What are the most important items that we need to do right now, and what can we put off?" But when you put it off, you've got to remember that you've put it off, and come back and circle back around.

**Loren:** How do you handle the difference between—or is there a difference between how you communicate with a client today versus 20, 25 years ago? There's a lot more information available, yet as

we've just spoken about, the roles of the attorney have expanded as well.

**Tim:** I will tell you that I have more and more texts, and I don't text very well at all. It's a horrible idea to text business communications. They're hard to preserve. You can print an email; you can drag an email somewhere but clients—

**Derek:** Or it's a good idea.

[laughter]

**Tim:** That's a challenge.

**Lynn:** I don't think that the communication—like Derek said, the expectations are, they want an answer quickly, but as far as communications, it's pretty much the same. Although obviously, we've got to remember to pick up your phone and call people because it's so easy to just—

[cell phone ringtone from audience]

[laughter]

Picking up your phone, good example, but I think you can get lost in the technology and forget the human touch like Derek was saying. I was emailing my client as far as logistics to get a contract signed, and it's a very complicated deal. I started typing, and I thought, "I'm just picking up the phone and calling her because that's the most cost-efficient way of doing it." Don't be scared. Don't think you have to have everything in writing, but remember that it's important that they hear your voice as well.

**Tim:** Emails in litigation get angrier as the hours get later. There could probably be a number of explanations for what makes people choose the language that they do as the evening goes on.

[laughter]

But you have to be really, really, careful because, as you said, you sit at home, and you have your iPad or your laptop or your phone,

and you get an angry email from your opponent. If you're a litigator, you're probably competitive to the point where you want to respond in kind, and judges react very, very poorly to uncivil emails so that can be a challenge.

**Derek:** One of my best learning experiences is when I was at the litigation firm, and I saw my email show up on an exhibit and [thought] “Oh, no.” That was a lovely day. I see a lot of the advice of the clients, even prior to litigation, is if there's something that's highly, highly confidential, it probably needs to be in the form of a phone call or face to face. That's just something that makes a lot of sense. I had this law professor at UT and her name is Judy Cornette, and she had a really southern accent. We called her Judy-Judy-Judy, and she just loved it, but she says, “Just imagine everything you say you're saying in front of the judge,” and she goes, “Then, you don't have nothing to worry about.”

She gave me the best piece of legal writing advice, which was, “If you can avoid using the words “it” and “there,” your writing will be significantly better.”

**Loren:** One of my professors told us don't ever do anything you don't want to see in the newspaper.

What about social issues or cultural issues that we have to deal with? It's a great question that one of my students shared with you. The Country Music Association has a number of female artists to represent, which I imagine makes it more difficult for female artists to have as much negotiating power as male artists when it comes to an industry deal. Do you think vows to increase female representation like the ones with CMT to play 50% female videos will make a difference for your female clients from a negotiating point of view?

**Derek:** I'll jump in on that one. I've had a lot of female clients over the years. It's sad because they're very talented, very good, and there's been this underlying premise in country music that I remember back in the '90s when I first got started. That your primary consumer of country music is a female that is between the ages of 18 to 35. That's been the premise for years. Therefore, those 18 to

35 females are wanting to see males. That's the premise. It's been sitting out there for years.

Then, all of a sudden you see Miranda Lambert pop up. You see this female that identifies with real things going on in a female's life between 18 and 35 that are going to the heart of "The House that Built Me" and all those things that are a little bit more empowering. That's been going on, that's been good. It's a joke that it's 10% female. It's a joke. I'm blown away by it, but it's been going on a long time. What I see now is that it's finally come to the forefront of a bunch of other social issues that needed to come up before, but I think that premise is not true anymore. I think they're following the same premise, and that premise now is... I don't know what country music is. I don't know.

The Eagles were a pop band, but they'd be coming up country now. There are a bunch of Lil Nas X. Country is kind of the genre that fits America now. We don't know what it is anymore. I think it will change. It's going to take a second. I think it's just now coming to the forefront, but I think you've got to get the radio. It has a lot to do with country radio. We have a country radio seminar going on in town right now. Some of these conversations are getting a lot deeper than ours, but I think that where this all started was that was the premise of who the consumer was. There were different studies that were performed back then. I think they're still sitting there, but that's how I think it started.

**Lynn:** You make a good point. To me, it's mind-boggling because it seems to be unique in that particular genre. I do a lot of the contemporary Christian and Gospel genre. No problem. We really do well when it comes to females and they're dominating and I'm representing one that's dominating right now. That's a sweet thing. Pop, the same thing. I feel like women are represented well in pop, but I'm going to throw something out. It might be a little controversial, but I'm going to throw it out anyway because I've been thinking about it.

I went to All for the Hall, and I looked at some of the new female artists that were coming out. They're all adorable and they're all this big. There are so many females that don't look perfect, that are amazingly talented, and they have a beauty about them that needs to be embraced. That's my theory is that we need to give more

opportunities to those female artists that deserve a platform. They deserve a platform, and they don't have to be in their 20s.

**Derek:** We've seen that happen in television news. Pretty face up here.

**Lynn:** They don't have to be young because the ones that have experienced life and have been out there and learned how to be a performer, learned how to song- write. They've got something to say, something to express so that's my take on it. We just have to give more females opportunities that deserve opportunities.

**Tim:** I have not seen the litigation arising out of that issue. Are attorneys telling their clients, "You may have a claim here?" Somebody is making decisions based on criteria that are illegal or invalid.

**Derek:** I think that they're hiding behind the creative—"That didn't appeal to me creatively," that what's hiding them, but I think you've seen it in television news. You've seen the Demetria lawsuit. You've seen other ones, Gretchen Carlson. My first job out of school, other than selling books door-to-door at Southwestern after that was with an ABC affiliate in Dothan, Alabama. I did sports through the week, and I anchored on the weekends. I was on the air every night for nine months. That was back in the day when there weren't all these different channels. You had to wait for somebody to die to move up. That's the way it worked.

Somebody had to look around and say, "Oh, I can move to Chattanooga," or "I'm going to move to Columbus," and so I thought, "Well, I'll go to law school." But it was very, very prominent back then that they had to look and act a certain way back then, for sure, as a female and a male, and then, now over time, I've represented these personalities on air and radio and TV. There is no question that there is age discrimination going on in those markets. Therefore, there are larger severance packages. Is this person a really, really good news person that should be on here, no matter how they look? The answer sometimes is yes to the question, but the person with the look gets the job.

Over time, I have actually represented a few and they will even hide behind “Ah, we're just making the change here. Here's a big severance package,” and that's how that goes because this person is now 45 and they don't look the way they did 20 years ago when they first started. I'm sure I would be one to get the severance package now.

**Lynn:** You got Tanya Tucker that comes along, and she wins Country Artist of the Year, Country Album of the Year, and Single of the Year at the Grammy awards. So, there's hope.

**Loren:** Tim, I think perhaps one of the reasons why we don't see the claims is because we fear retribution. If you start to fight the machines—

**Lynn:** Small town.

**Derek:** Makes sense.

**Loren:** Look into your crystal balls, if you would, and tell us what you see coming down the pike in the next few years compared to how deals are done. Go anywhere you want with that.

**Lynn:** That is a tough one because I feel like there's been so many changes that we're just trying to manage those particular changes. Fine, you've still got to look. You've got your— you know, the visual side of things. Your YouTubes are important. Who's participating in the ad revenue. All of those things are continuing to be more important. Streaming. I think CDs are going to go away one day. Vinyl is going to stay. You're looking at streaming and there may be another method of distribution that's not even on our radar right now. For me, it's just realizing that the YouTubes and the streaming are going to continue to be front and center and making that a priority and realizing that music publishing is still going to be an important part of it, of an artist writer's revenue, and making sure that the record company isn't going to get their hands on that.

**Tim:** Well, I guess your perspective of what constitutes copyright infringement and whether the alleged infringement is a fair use.

Those arguments will come more and more nuanced as technology develops.

**Lynn:** I'm sorry, I was just going to say, what about copyright infringement claims? Do you see a lot of copyright infringement claims on songs?

**Tim:** There are a lot of takedown notices. There's a lot of pro se copyright claims. The courts are wide-open. I see more and more claims brought that have absolutely no basis in fact, that are just as expensive to defend as the ones that are valid.

**Loren:** Tim, I'm wondering if the argument for wide dissemination is going to be the mold now because of the fact that in the past we could just look at radio and that sort of thing?

**Tim:** In a copyright infringement case, in order to prove infringement, you can prove access to the copyrighted work and substantial similarity. One of the methods of proving access is widespread dissemination, and plaintiffs now say, "Well, Gosh, you're on the web, so you're distributed throughout the world." There's a growing body of authority that says, "Not so fast." Just being available online does not equate to widespread dissemination, and whereas a hundred plays on a radio station might be widespread dissemination in a particular geographic area, a million streams might not be widespread dissemination. That's a really good point. It's going to become a more nuanced analysis.

**Lynn:** You can get that metadata, right, and see where it actually has been playing, correct?

**Tim:** Somebody can.

[laughter]

**Derek:** What I see is with all the larger companies that the 10¢ deal, or Universal has sold 10% of their stock, 10% for \$3 billion. They've got another option for another 3 billion, which says that that's a \$30 billion company now. Then you've got more and more public. I see the labels as roll-up companies where there are hedge funds out there or where they're trying to develop hedge funds now. I see them

trying to do that, but I also see them creating their own problem because then they're going to have a quarterly report, and they're going to have to hit a number.

At that point, when you've got a bidding war, or you've got something really intense, they're going to cave. They're going to do it because they didn't hit that quarterly report. That's where I see this. There's going to be a catalog. They've all got a catalog or they're trying to—they know the catalog values are going up, but I also see them creating their own problems. When you've got that asset that is real and performing, they're going to try to figure out how to get it, and if they can't get it for their quarterly report and it's not big enough for their report, they'll pass. If it is big enough, they will get it.

I see that coming, and another part that I see really, really clearly is the ability to—because it's so cheap to create an amazing asset now. Your ability to own it is going to continue to be important, and so you're going to see a lot more of the middle-class empowered over time. In the next five or six years, you're going to see a lot of stories coming out about million-dollar deals because this money's going to flow through. It's going to be, "Wow, that kid couldn't pay his rent, and now just got \$2 million or \$3 million, and we haven't heard of him."

You're going to see that coming because the money is flowing so well in that market. The other thing I think we will see is more partnership deals. The last thing we are looking at is that we're looking at influencer record labels. Where we might just need five influencers to launch an act. Those things are coming, too. Now you've got the FTC involved with disclosure issues with influencers, so you've got to figure that part out too, but I think that our next record labels are influencer labels.

**Lynn:** Derek, you make a good point in that. Record companies are getting creative. They have to get creative; they cannot give the same deal they've been giving in the history of the record company. They're willing because they realized that these artists will stay independent if they don't do something creative and custom-make a record deal. To some extent, majors won't do it as much as the independents, but even me being in the Christian music industry—and Mark Maxwell's here, too, and he can attest to this. They're

getting so creative as far as how they're doing deals, which is so refreshing to me.

The net profit type deals, rather than the traditional deals, are very refreshing—or strict distribution deals. You own your master, and you put it into the system. Most of all of them are doing that with some success. An artist has some success. They're renegotiating a contract because theirs is about to expire. They'll be able to own their masters and do a different type of deal. It's fantastic.

**Loren:** What do you think is leading to that change?

**Lynn:** What's leading to it? It's competitive out there. They want to keep the artists, and they realize how much money these artists are bringing in. Also, in Christian deals, it's typically a requirement that it is also a publishing deal with a publishing entity of the Christian label. They realize they're going to lose the publishing as well as the master side, so they've got to figure this out.

**Derek:** I would put a little plugin for some clients because it's been fun to watch them succeed. Like Scott and David, we've done some deals with Big Loud and Creative Nation, but these are small companies, right? They have cut new ground. We saw Big Loud three weeks ago have more streams than any other record label as independent for the first time. I don't know if that's ever been done. Now, you're cutting new ground, but what I'm seeing in these smaller publishers—which you guys represent them too. Boy, they do a really, really good job. The deals are so bad on a major label side that you have plenty of room to be fair to them and make plenty of money because the deals are just so far off.

Now, do you need that big animal sometimes to blow it up? Yes, but there's so much room in between to be good to the artists and still have a deal that makes sense for everybody. If you've got a really good publisher that is really efficient, that can give you the best songs—and I've kind of said this, working with a client, “Live Like You Were Dying” was sung by Tim McGraw, an amazing song. It was so good that you could literally say, “Well, you know, Kenny Chesney, probably could have done this song, too, right?”

There's a lot of power in those publishers delivering these amazing songs that could evolve careers. If you can find out how to capture that and empower that at a minimum level and launch it, that's where a whole lot of power is. I don't think that goes away. It hasn't been going away, but I think we're getting more ability because the distribution channels have come down. To launch out of that and really provide that power of the song that drives this with the artists together and a producer. Now, all of a sudden, you've really got something. When before you hit a wall, like, "Wow, okay. We got to have distribution now," or "We got to have more market." Like, "Whoa, this is so good we got to have distribution, and it's so viral and it's so good, it transcends the marketing plan." If you've got the great songs, it's still the magic but you still got to execute a little bit. That's my two cents on where it might be going. I still think there's room, is my point, to do whatever they call record deals with highly qualified, or quality, publishers that care about the artists.

**Loren:** We've got about seven or eight minutes left, so I'll take some questions from the audience.

**Derek:** We've got one. Did you raise your hand earlier? In the white? I thought I saw you raise your hand earlier.

[laughter]

Scotts got a lot of questions.

**Audience 1:** Do you feel—I guess this is a more of transactional question. Do you feel like there's an interesting balance to strike between maximizing royalties and revenues for the artist versus incentivizing the record label to promote the artist more than they already would, I guess on the 360 side of things? Or are there any particular negotiating points, like in the 360 deal, that you all will fight to keep out of it if it's in that nature?

**Derek:** I want Scott to answer that one.

[laughter]

What do you keep out of a 360 deal if you can? I'll answer some, but you know some of that.

**Scott:** Naturally you want to try to keep as much publishing out of the mix as you can, dear to the heart of the artist. I'm going to get the numbers low as possible. We want to get as many deductions as possible. One of the problems we're seeing country deal with is that streaming isn't in Country what it is in some other genres. Our consumers typically lag behind transferring to new technologies. It was the same way from cassettes to CDs, and probably in my old age, 8track to cassette, cassette to CD, CD to download.

We're always four or five years behind others. I think maybe it's because we have an older demo and a more rural demo. The numbers aren't quite caught up in Country like they caught up in pop and hip-hop. The local labels have a real good argument that, "Hey we're not quite recovered." I know 360 participations are going away in some pop and hip-hop deals because they're coming across artists that have a 150 million streams without them.

They see there's real money, there's people that are in financial positions within these record labels that look, and they do the math. "If we get on this, we'd pay them a couple million dollars now, we'll make \$6 million later. Let's do this. Let's not worry about whether we get 10% of the tour." In the country market, it's still that terrestrial radio's important, still have to go do a \$300,000 tour around the country to meet all the program directors.

Streaming is not where it is. Look at where it is in other genres. I represent a very successful artist that's going through the potential where his deal's up. All right, well, let's go get them. I start looking at the streaming, and I was going, "Man, are we making any money?" It's not as good as I hoped it would be. There's independent hip-hop artists that are out-streaming my successful country artist, and it's not close.

When they come say, "Hey, do we still need these things?" Our deal can't look like a hip-hop deal, it just can't. It's like, "Oh, yes it can, and you're part of the same company, and it will recover; it always recovers," but they're like, "We got numbers to beat next month. I hear what you're saying, Scott, but if you want a deal or not..." And then my clients over here saying, "Don't screw the deal."

[laughter]

It's a tough game. It's getting there everywhere, but what's going to stink is looking at a deal you did [or] I did in 2020—

**Derek:** They all stink.

**Scott:** —and looking at it in 2025, when things have recovered, and you're looking at the facts compared to what somebody did in another genre, and the common struggle with that is if we cave on too many and let them hold the ground that they're not where other genres are, that's going to be tough.

**Audience 3:** I had a different question for you guys. One of the things I see is that there's people coming in from all over the place, investors, European companies, hedge funds. We don't have an answer about whether a copyright is work for hire or not. But I'm seeing all these buyers very intentionally selecting laws in other countries trying to defeat the termination of transfer. So, I'm kind of curious. Tim, if somebody selects the law in an agreement, in an asset purchase, and they select, like hypothetically, UK law or something like that, where do you think we'll land on that?

**Tim:** I don't know, David. There are specific rules that govern choice of law disputes in contracts. Under Tennessee law, if there were not a reasonable relationship between the jurisdiction selected—and I've never seen that applied internationally. Domestically, the test would be, if there's not a reasonable relationship between the state's law that is chosen and the forum, then that provision of the contract would not be enforced.

**Lynn:** David, I've seen that, too, and it's just—You look at it, and you hope that, especially with recapture of copyrights on the song side, if you want to terminate that particular transfer when you sell your catalog, and they want to use UK law because they've got the Duran Duran case which is a pretty good case for them right now, but it's pretty specific on its facts. I don't think it's going to be—in thirty-five years' time, or whenever, I don't know how much relevance it's going to have. I'm hoping that [with] public policy that they say, “It's an American songwriter who wrote most of his songs in the United States.” That public policy says that he should be able,

and his heirs should be able, to have the termination of rights provision under the US Copyright Act and not have to look to UK law to snuff it out.

**Tim:** Is there a UK connection other than just the selection of the country's laws?

**Lynn:** The buyer is located in the UK.

**Loren:** All right, we're going to have to let that be the last word for this panel. Join me in thanking our panelists.

[applause]

### **Second Panel: Publishing**

**Klare Essad:** This is our publishing panel. I would love to introduce them. First, closest to me, we have Katie Jelen. She is from Warner Chappell. She specializes in synch. Prior to Warner Chappell, she worked for an indie publisher. She has ten years of experience in the industry, and we are happy to have her. Next here, we have Scott Safford of Safford-Motley. He was also on our other panel.

[laughter]

**Scott:** Derek decided to head on out.

**Klare:** Lastly, we have Jennifer Turnbow. She's the Senior Director of Operations at NSAI. We're excited to hear from all of them.

**Loren:** All right, let's jump right in. How has the modern music industry changed the way publishing deals are issued?

**Scott:** Oh man, that's a big question. I've seen maybe royalties looking better thanks to the MMA. Maybe there's some optimism. People are projecting publishing royalties after a few years. We're seeing more deals. Deals are slowly getting more favorable to writers and artists. It feels like there's a new fund coming in once a week to Nashville to divest \$150 million into publishing assets. I

look around thinking, “What’re you going to buy?” They're going to have to get really creative.

Thanks to that, the business is out there. There's more opportunities. There's more job opportunities. There's more clients coming in for lawyers. It's all good news for the law students out here, the business is growing. Different genres of music are growing in Nashville. Film and TV is growing in Nashville thanks to people like Katie. We've been doing these panels for years talking about the music business and how terrible things are.

I came in with Napster. I'm partially responsible for what happened with that. We were sort of coinciding, and I missed out on surplus of business in the eighties and nineties. It's always been thin for me, and it's always been doom and gloom for me. So, it's the first time literally in twenty years of doing this where I see positivity about the future. Can you believe that Universal might be worth \$330 billion or whatever the number is? You're looking at Warner Brothers going public, what that means, and all the money, and it's like, “Wow, is this happening?” Maybe people will pay more legal fees.

[laughter]

**Loren:** Don't talk crazy, now. Katie, does this optimism carry over to the Synch world?

**Katie Jelen:** Yes and no. I think on the synch side of things that things have changed a lot since I started in synch. There's more content than ever before with Netflix, and Hulu, and all these streaming platforms popping up. There's just like a constant dump of content. On the advertising side, advertisers now instead of— They would do one big campaign, and you would see it on all media. They're doing more hyper-targeted campaigns now. So, they're licensing a lot more music, but just for smaller fees.

For us, the volume has gone up exponentially, but the fees are also going down. It's changed in that way. But I think to tag on to what Scott was saying, I think I'm seeing that deals are more creative than ever before, which you alluded to. But like Warner Chappell, we're now partnered with a big fund, and we're their creative partner. A

lot of these bigger deals that we can't necessarily compete with, these huge funds of money. We're now able to play in that sandbox, which I think has been really interesting to see that evolve.

**Loren:** When you say, fees have gone down, that's a scary thing for me, because I know that over the last 20 years, we've seen some fees go so down that they're zero. How do we deal with that as far as representing your clientele?

**Katie:** That's something I'm very passionate about. I, at least once a week, am fighting with someone to explain to them that there is value in our music and in our writers and that asking for things gratis is so insulting. My favorite story, that I probably should not share, but I will. I'll try to be general. There was a documentary being made about songwriters, and it was originally asked that we license our music for free. I did not agree to this. Every other publisher had agreed to gratis, and I apparently was the lone holdout, which made me the bad guy. But I held my ground and talked it over with Ben Vaughn, the head of our Nashville office, who is a very huge advocate for songwriters, and we held our ground, and we got the writers paid. It's always about finding middle ground. I always want to support great art. Any platform to get our songwriters out there into the world is, of course, amazing, but a lot of these writers are not at the level of Chris Stapleton. They are working songwriters that have a family and are just trying to make ends meet. If I can get them \$500 or \$5,000, or whatever it is, it's a pennies game. If I have to be [the] bad guy to give them \$500, or \$1,000 in this case, then so be it.

**Loren:** Scott mentioned that part of the reason for the optimism is the MMA. Jennifer, you were integral in that process. Talk to us a little bit about how that is reshaping the industry, or how you hope it will.

**Jennifer Turnbow:** The MMA, in my opinion, is going to reshape the industry in multiple ways. The mechanical licensing collective, which the MMA creates, will open in January 1, 2021, which will transfer us to a blanket mechanical license for digitals that will eliminate fees to collect mechanicals, because the digital companies are going to pay for it. Immediately there's a raise there. We also believe that that will clean up a lot of the data. That suddenly, you're

not going to have six digital companies, all with separate databases. You're going to have one database. If you cleaned it up once, you've cleaned it up for everybody.

In cleaning up the data, you imagine that more money goes to the right places. Then, we also change rate standards for both mechanicals and performance. We haven't seen either of those things come into play yet. We haven't had a CRB trial for mechanicals. We don't have another one for a couple of years. Although work on that will start soon. There are performance rate proceedings, just beginning for ASCAP and BMI. It's yet to be determined whether those will ultimately go to rate court or whether they will settle.

I think it will be really interesting to see how our new standards will play out in rate court, but there's certainly a chance that they'll settle because I think that the service has realized that the new standards, and going to a different judge, and some of the things that have really worked in the services favor in the past, might not. I think there's a chance that they'll settle, which if they settle, it'll be for a significant performance rate in digital.

Like Scott said, all signs point north from the income side, which I'm the same way. I started in this industry 15 years ago, lobbying for better rates for songwriters, and it was always the doom and gloom story that sales are gone, and people can't live off just performance money on the one hit that you might get over the course of the thousands of songs that you write in your lifetime. This is the first time that I think our industry has felt optimistic about the economics of it.

**Loren:** How closely do you work with the Copyright Office on those issues?

**Jennifer:** Really closely. We're really involved, NSAI, with the implementation of the mechanical licensing collective, the MLC. We have a seat on the board. I also sit on the operation's committee. We're involved in all of the decisions that get made on that. The Copyright Office has oversight over the MLC. It's not a government entity. It's a not-for-profit entity, but with some government oversight that lands with the Copyright Office. Obviously, we're working with them on a day-to-day basis on that.

We also work with them on everything from—I'm working with them on different policies for termination notices right now. We work with them on “How can we make it easier?” I'm currently sitting on a task force in the Senate that is hoping to update technology at the Copyright Office and how the Copyright Office uses its allocated resources for those updates, and things like that. Yes, we're working constantly.

**Loren:** Scott, the termination fees. There are two sides of the songs and sound boards, and there have been very different responses, at least publicly, for record companies with regard to those two pieces. Where do you see this going as far as artists and the Copyright Office?

**Scott:** If there's an expert in the room, speak up now, because I'm not. I very intentionally started my practice about twelve years ago with new artists and new songwriters. Those issues are just now becoming relevant to me. I'm not sure where it's going to go. I think when it pertains to sound recordings, I'm not optimistic that we'll ever get to the Supreme Court, because one, you have to really be a martyr as an artist to be part of fighting that battle all the way there. If you're a popular enough artist, the labels are just going to buy you out of that situation so that's not a determination.

I think most people agree that the artists' side of that is going to win if it goes to the Supreme Court. As long as that's not official, the labels have some leverage. It would be a big, gigantic problem for the major labels if for some reason, there was a determination that they could not be work made for hire because that would upset the whole model. I think that in my lifetime, I'd be surprised if it ever gets there. Obviously, on the publishing side, the laws are a little more steady. They're a little more settled on the issue. But I just want to say that publicly, the Nashville Songwriters Association crushed it on the MMA, and we all owe you guys a debt of gratitude.

Lawyers, legal fees, and everything. You guys, when I first came to business, were a bit of a punching bag. “What do they we really even do? Should I even sign up?”, and that's 20 years ago, but in the last 10 years, especially, you guys have answered that question really well.

**Jennifer:** Thank you. I appreciate that.

**Loren:** For all of you, but maybe starting with Katie, how has the transition into the streaming economy changed publishing, or writer relations?

**Katie:** I think it's great. I started on the indie side of things, especially being in Synch. I work with a lot of writers who have come to me with Synch projects. I worked with writers all day to create projects specifically with sync in mind and we write songs for advertising and TV shows. I have one project in particular where we've licensed one of the songs for a ton of campaigns around the world. They threw the song up on streaming sites, and it has more streams than a lot of the major label acts.

They own their masters. I think from that perspective it puts a lot of control into the hands of the creatives which I think is really great.

I think right now there's a lot of people that may be overpaying for things, optimistically saying we'll jump on, whether it's a TikTok hit that's blowing up or something. I think that'll probably settle down a little bit once they see what that really looks like. I think there's a question of, "Are these artists going to build real careers or is this going to be like a flash in the pan sort of thing?" I think publishers, because we're more in the business of long-term development and with Scott [who] worked with a lot of his writers and artists from early days, we're more in it for the long haul. So those crazy deals, we don't necessarily jump on those.

I think it's a little bit different for us. It doesn't feel as volatile, I think, from the streaming side of things, but from the perspective of a lot of my baby acts, being in the driver's seat can be really fantastic to help them work things out.

**Loren:** I'm going to ask a question that you can feel free to plead the Fifth on if you like. That is, do you think that transitioning from a privately held company to a publicly held company is going to change the way you do business?

**Katie:** I'm going to plead the Fifth. I have thoughts, but I think I'm not allowed to say.

[laughter]

**Loren:** Talk about streaming and how it's affected your performance.

**Scott:** It's interesting, one thing when she was talking about Lizzo. In the pop world, oftentimes record deal comes first and the publishing piece is a bit of an auction. It's like, "Who's going to write me the biggest check for 50% of my copyrights?" In the Nashville world, the publisher's often the first person on the team other than the lawyer. Maybe even the first person because they might say, "Hey, we want to sign you to a deal. You need a lawyer," and they have a relationship with the writer or artist before the lawyers do, but they're playing a development role.

Where I think it's impacted publishing is it's making them turn into record labels to a degree because the game in getting a record deal for a new country artist is to try to make some noise, try to build a story, and what's happened is you've got a lot of people who have no marketing expertise, including publishers and lawyers, who are trying to help an artist and the artists themselves build a story, and we don't know what we're doing. I make fun of them, I'm like, "Point me to the marketing department of [insert publishing company] that warrants you actually getting ownership of these masters. Tell me who is going to be in charge of the release schedule." The answer is no one is but they're all trying to figure it out.

The intention is good because we're all in this boat together. It's how can we help an artist who's looking around saying, "Okay, what do I do now?" All right, put something on Spotify. Okay, great it's up there amongst 20 gazillion songs. Great, your stuff's on Spotify. Your mom and your friends have streamed it, you've got 12 streams. I streamed it five times just to help you out. It's a lonely, lonely place, so you're looking around, "Who's my partner?" If you are the publisher who has invested in the artist it's like, "Okay, we can either let them sit there and hope something good happens or we can dig in and try to see what we can do to help out."

Streaming has become a means for new artists to gain attention. Maybe you went to the label first, and they said, "No, we don't think you got it." 30 million streams later their decision may be changed, so how do we all get 30 million streams? That's the pragmatic issue or the business issue of trying to make that happen. But at the back end of that, if you're Warner Chappell, and you're going to be part of that, "Wait a minute, we've never been a record label before. We're going to dedicate resources to this. Shouldn't we get something more than we usually get?" The problem I'm trying to solve with [publishers] is like, "Okay, yes, we need you to put out a record, but you really don't have a marketing department. So should you get what a record label would get that has a marketing department, or should you get something less than that?"

**Loren:** Do you see these changes, the ones you just described Scott, as leading to more co-pub deals as opposed to traditional?

**Scott:** It's really all over the board. It's really all over the board, and it's a matter of leverage in each situation.

**Loren:** Is it genre-related?

**Scott:** Yes, it's definitely genre related. If you have a manager or a lawyer that's dealt primarily in genres other than country, and you tell them, "Hey, for the first three periods, there may not be co-publishing on the deal." They look at you like, "He's trying to do a publishing deal with no co-publisher."

[laughter]

You have to explain to them, "Hey, publishing works a little different in Nashville than it works in other genres." A good publisher with a good song plugger will come alongside the artist-writer or writer-writer and be almost like a personal trainer. That's what I tell people. When the relationship's great, you're dedicated song plugger is your songwriting personal trainer.

When I first started doing publishing deals, I was negotiating. A lot of lawyers for the Nashville companies were in New York, and I went to see a friend of mine in New York, Steven Dallas, we'd never met in person. But I went to the EMI offices and I'd been to his

office, and he was showing me around. I was like, "Man, where are the writer rooms?," and he goes, "Our writers don't come here to write." I was like, "Wait a minute, what?" I made an assumption that everywhere else did business like Nashville did. I maybe said this earlier, but in other genres—I don't want to diminish what song pluggers and creative supporters do in those genres, but I think it's more of an environment of, "We think you're going to be great."

Lizzo. That album is blowing up. You're not going to come along Lizzo at this point and suggest who she should be co-writing with and who should be on her calendar next Wednesday, but you sure would want to have a piece of that income stream. So, if you can write her a big enough check to where you get that as part of your market share as a publisher, and you hope one day maybe a 1,000 years from now you can actually make that money back on that particular deal. It can be a good arrangement. I was talking in circles, sorry what was your question?

**Loren:** Co-publishing versus—

[laughter]

**Scott:** Co-publishing, it becomes a matter of leverage. It's funny. I tell clients all the time, what you can get on a pub deal or record deal is all dependent on how far you've been taking it without that partner. The further you take it in your artist career, the better your revenue, the further you are along in your writing career, the better the publishing deal. If you come and everybody else has passed on you and one publisher says, "There's a glimmer of hope, this guy might be good one day." You're probably not going to start out with a full co-publishing deal, but if you come with a level of expertise and a level of gifting or whatever it is beyond the normal, two or three people are interested, and hopefully we're talking about co-publishing then.

**Loren:** One of the challenges in the new economy, so to speak, is proving that value and part of proving that value is that there is some challenge that we had with that, and I think that the MLC might be designed to clean that up a little bit. What are your thoughts on that?

**Jennifer:** Yes, certainly, that's the hope. The good part of the MLC is one, it's free to the creator and the music industry, and we're going to bring everything in under one building where songwriters and publishers are on the board and see all the things and have much more control over that data. That said, I think the MLC can only go so far. They need to build a really fabulous portal that's really easy to use where if I'm songwriter Joe Smith, I can go in and type in Joe Smith and see everything that is currently attributed to me, what the splits are, who the publisher is noted as, all of that, but the community has to get on board with it, too.

If Joe Smith doesn't go in and check that stuff, it's never going to get fixed. Bad data in results in bad data out. If the community isn't willing to go in and spend that time, if Warner Chappell isn't willing to put manhours into, "Okay, we need to go through and check everything that the MLC has that they say Warner Chapel has a piece of," and make sure that piece is right, that the writer's attached to it are correct, and all of that, then it's not going to get fixed. The MLC has the job of going out and educating people and making sure that it's really easy to use.

I also think it's going to be hard for the MLC, but really important that they go out to "where people live." We know that the hardest part of this is going to be what we call "the long tail." These folks who are on streaming services but don't have a publishing deal, so they are their own publisher. They are typically the artist. Sometimes they don't even know—I've talked to some groups where they don't know that they should be getting publishing money.

They're expecting a sound exchange check because they're the artist, but they've never really considered the fact that they also wrote the song, and they should be getting the publishing check for the same stream. Getting out to where these people are and educating and making it easy. The MLC can't just build something beautiful online and expect people to flock. They have to go out and find people. The good news is we did work into the MMA that the streaming services are required to help educate, so hopefully on that ingestion point, people will be directed to also sign up with the MLC.

It doesn't cost anything. You're going to get some money from it. The Copyright Office is mandated to do education, and certainly,

organizations like NSAI. We've been out for the past two years, speaking everywhere that we can and getting information everywhere we can, and that will only ramp up from here.

**Loren:** We have a fair number of students in the audience. What would you maybe suggest students can do at this point to prepare for the changes that are happening in your world?

**Katie:** You just kind of have to do it. I went to undergraduate in the music industry, but then I went to law school and graduated 10 years ago. The things that we learned then are—it's a different universe now. I'm figuring it out every day. We just did a deal. We had a brand come to us, and they wanted to do a campaign through TikTok. I had no idea how to license the song for a brand through TikTok where an unknown number of users were going to generate content using our copyright within the platform. But we figured it out, and we made it happen, and literally, that's what most of us are doing. Anyone in the music business who tells you that they have it all figured out all of the time is full of it.

**Loren:** Not only did you not learn that 10 years ago, but they're not learning it now because there's nothing to teach them yet.

**Katie:** Yes.

**Loren:** Right, we're all trying to figure that out.

**Katie:** Yes, some professor told me this in law school or somewhere along the way, but the thing I carry with me all the time is I think we get too wrapped up in what the deals actually say—which is great, and that's important, and I love contracts—but what's more important is the relationship at the heart of that deal. If the relationship is real and steady, and there's trust and understanding there, really the contract should just be there to outline and support that. I've seen it time and time again. You have deals with artists or writers for years and let's say, circumstances change, or something happens, and no one— At least where I work, maybe it's different in other places, we don't want to screw anybody. We'll have real conversations and sometimes if that means amending deals or getting someone more money because maybe a deal said one thing, but we really believe in this person, and we just need a little bit more

time. It wasn't necessarily the deal that dictated that, it was the relationship. I think even as you're going through law school and out into the world, yes, the deals are very important. The law is very important, but if you don't have the relationship to back that up, then it's kind of meaningless.

**Loren:** Scott, on that, to tail along with that, what does that conversation look like for you when a new artist walks into your office? What is that first conversation look like for you?

**Scott:** Oh, it varies. What I try to do with my clients is to educate them. I want them to understand what the deal points are, I want them to understand who their partners are. One of my favorite things to do when somebody comes in with a deal or an offer, they want me to look at it, "Read over it, let me know what you think."

They want to bring it in and hand it over to me expecting me to read over it, and I turn it over and—most the times, I do this knowing the answer to the question. But I say, "Okay, before we look at this one, why don't you articulate to me how the person on the other side of that deal is going to help you with your career objectives." And then they start talking and I'm like—

But then that's part of an education of "Let's try to keep new artists away from bad people with bad intentions." People with good intentions that maybe don't have the ability to help you and try to steer them towards people like Katie who can help them. The other thing I like to do is when we're talking about deals— I won't tell the Ben Vaughn and Phil May's of the world, those are the people who work with Katie, this but I'm also educating my client as to the perspective of the person on the other side of the table so that they understand, "Okay, well, I'm not going to paint Warner Chappell as the big bad monster knowing that I've got a client in my office that's about to do a deal with them, whether I make it any better or not," because often times that's the case.

They're like, "I want to work with Christine Wiltshire," and come hell or high water, I'll make it happen, and I'm just trying to make things as good as possible before that actually happens. If I paint Warner Chappell as this evil monster, it's just not good for anyone's relationship, so I explain, "Okay, these are Warner Chappell's interest. I don't like the fact that they've asked for 3% of your entire

income for the next 10 years, but here's why and here's how I'm going to make them to take that out of the agreement."

[laughter]

I think a lot of lawyers make the mistake of vilifying the other side of the deal and ultimately, everyone needs to be in a good relationship. I've found out over time that if you don't do that, and you work on having friends on the other side of deals that you're very respectful towards and you know about their families and know about their histories and you had lunch together that had nothing to do with a business deal, it's a lot easier to get to get deals done. Back to what's coming and what I see—and Derek, I'm sorry, but I'm going to preach a little here.

It dawned on me a lot of people that are my age—and when you're old, you start bitching about generations below you, and so I'm cognizant of that fact—but what we all see is young lawyers not paying attention to details. I'm like, "Man, was I that bad?" I wish I would call Kathy Woods out of retirement who was my first boss and ask, "How bad did I really suck? I know I wasn't good, but am I not remembering this or are new lawyers really worse at details?" I think I can objectively say that new lawyers are worse at details than new lawyers were 20 years ago.

It hit me, as Derek was talking, you guys have grown up in a texting world. The fastest form of communication, get it back in the other direction, doesn't matter if there's typo, misspellings, sometimes it fixes your spelling's anyway, emoji, emoji, LOL, whatever whatever, then bam, my communications over. So, you guys have grown up in an era where information comes fast and details in how you were communicating wasn't like how we grew up communicating. As young lawyers, it's going to be harder for you guys than it was for us to, "Okay, I've got to change my brain and realize the typos in a contract that addresses what might be \$30,000 of rights today that could turn into \$30 million worth of rights 10 years from now, and if that detail's wrong, there's lots of consequences." When I first started at Sony Records and I had to do my first 38-page record deal—before I knew there were drugs that could help you with this—but I fixed six cups of coffee, and then I would sit there, and I'm like, "Okay. Let me go through this one

more time before I give it to Kathy to make sure I didn't screw this up." And we go over and over it.

I didn't have to deal with the way you guys grew up in a fast-moving, details-are-less-important environment. You guys have got to work twice as hard as I did to say, "Okay, I've got to pay attention to every detail in a 40-page contract." It's hard. That's the sucky part about being a lawyer, at least for me. I hate it, but it's part of the game. We have to do it. It's part of our responsibility. So somehow, figuring out a way, based on how you've grown up and how you've processed information to become great at details, is you all's biggest challenge, in my opinion, in what I'm seeing from where I sit at.

**Loren:** That brings to the forefront the issue of technology. How has technology affected or how is it affecting the way you do deals, and the way artists are getting paid in a positive or negative way? Just a really broad question about technology, what do you think?

**Scott:** Well, from a deal standpoint, it means our clients don't come to see me anymore because everybody signs via DocuSign, and that's sad in a lot of ways. It's lonely in my office. Really positive advancements on— For years, going back to how there was no money in the music business is— If you were in the business in 2007, while everyone was losing money, and you raised your hands and said, "Hey, I got that an idea. These royalty systems are a little antiquated. I know we lost money in the last five years. What you say we invest about \$10 million in upgrading this technology."

They'd be like, "Okay, Safford, you're fired. Who else are we going to get to be in legal and business affairs?" The industry limped along with dated technology for years and now, we're in a position where with money flowing and people with really— Kobalt to the world of folk, kind of forcing the rest of the industry to become more technologically advanced in how they account and how they do royalties. We're making progress there. SESAC, what do they pay, monthly now? There's being able to move funds along through technology and pay people faster. I'm not sure things have gotten more accurate. There's still problems there, but there's definitely an ability that exists amongst big companies to pay people faster and more transparently.

**Loren:** Of course, the hope from the artist side is that the development of that technology then leads to more transparency and then leads to fewer disputes as to—

**Katie:** I think it's kind of a double-edged sword. For my world, I think artists and writers think that they want access to certain information, for example, they turn a song into me, and I start pitching it. They don't know where I'm pitching that song, if I've got any interests from the clients and I think there's that debate of, "Well, do we want them to know we pitched it for this or that client?" Because then, they start to get in their minds the potential of a \$100,000 synch, when I know the reality and the chances of that spot landing are very slim.

Then, they get fixated and "When do we follow up?" and "What's the status of that?" and blah, blah, blah, blah, blah. I only like to communicate things that I know are real. If I'm getting excitement across the board about a song or artist, I'll communicate that, but really, I only like to let them know if I think something has a really good chance. So I think there is that negative side of technology if we're getting too much. Like, I know songwriters get obsessed with looking at charts and checking hourly how it's doing. Is that a good thing? I really think it can be really good and really bad at the same time.

**Loren:** Jennifer, how has technology impacted what you do?

**Jennifer:** From my perspective, it's a little bit different than what you guys are doing. Like we said, we've made some advances in getting writers paid on new technologies a little better than they have been for the past 10-15 years. We hope that that continues to improve. That said, there's still issues in technology that the people don't talk about as much anymore as we've moved on in technology. Piracy is still huge issue for the music and entertainment communities that we talked a lot about 15 years ago that we don't really talk about now, but it's still a huge issue. It will continue to be, in my opinion, as technology advances, and it does become easier and easier to share larger and larger files that are better quality.

I think technology is great, and it's where we're going, and I love that we have more ways to get to audiences quicker and more directly and in a very specific way, but there are still improvements that we have to make. The Digital Millennium Copyright Act was written 20 years ago and certainly did not anticipate the digital world we live in today. There are certainly still improvements to be made in how the law works around current technology.

**Loren:** We'll open up the floor to questions from the audience now.

**Audience:** I have a quick question. Have you guys had any experience with—I know YouTube has fingerprint technology to catch infringers that way. Do you see any other platforms putting in those safeguards for songwriters and property owners when things blow up on TikTok or Instagram?

**Katie:** I think this is going to be a huge issue in the next couple of years. There's an enormous problem right now that actually Spotify and Apple music are facing. A lot of young kids are getting very savvy, and they're uploading bootleg versions of songs to their platforms, and you think, "Oh, well, streaming is legal on Spotify and Apple." But literally, so there was one song recently that blew up on TikTok, and while there was a sample in the song and while the label was sorting out the rights for the sample to release it, it was literally Whac-A-Mole that these little kids were uploading this song because they heard it on TikTok, and they wanted to be able to stream it with their friends.

They kept uploading on different artists and because it didn't exist on the platform yet, the technology wasn't grabbing it. Literally, kids were like making thousands of dollars from uploading the song illegally before the label was able to get it up officially, and it was between 50 to 100 million streams from bootleg uploads. It's happening more and more. There's a whole issue now with instead of uploading them as songs, they'll upload them as podcasts. If you go into podcasts on Spotify right now, there are TikTok podcasts and really, they're just illicit uploads of these songs that they want to share with their friends.

They're making money off of it. Same thing with TikTok. The majors pretty much all have deals with TikTok now, but kids want

to upload their version. They want to slow it down. They want to blow out the bass, so it sounds cool and distorted. You know it's great if your song blows up on TikTok because you're hoping you're going to make money from streaming and driving traffic to other places, but there's a lot of people making money off of content creators that shouldn't be right now. They're going to have to figure out some sort of technology to stop it.

**Jennifer:** Yes, and really, the law works against us in this case because the onus is not on the services to fingerprint and take down all of the illegal stuff. The onus is on the copyright owner to go in, and one page at a time saying, "No, this is illegal. No, this is illegal. Oh, that popped up again. Yep, that's illegal." It's so incredibly labor-intensive and time-consuming that no one could ever possibly keep up with it.

The good news is the Senate is actually currently undergoing a review of the Digital Millennium Copyright Act. That is a huge portion of it, the notice and take down system and whether we can make changes to that because the technology does exist. I mean if you tell—YouTube can say they can't—but I say, if you tell YouTube that this copyright is not a legal use, they can find that over other pages on YouTube, but they don't have to right now.

**Katie:** It seems like they're maybe putting—at least for Spotify and Apple—they're putting a lot of the responsibility on the distributors. So, you know, Spotify, they'll go to the distributors and say, "Hey, if you want to continue to be one of our preferred partners, you're going to have to figure out your systems to not let these things get through." That might be a partial solution, but it's just going to get worse, I think, before it gets better.

**Loren:** All right. If there are no other questions, join me in thanking our panel.

[applause]

Thanks, that was so great. Our next presenter starts at 11:05, and we'd love to have you back in your seats. Thank you.

[background conversation]

**Loren:** All right. We're going to get started for our next session.

### **Keynote Speaker**

**Loren:** For our keynote speaker this morning, Alex Heiche. I'd like to tell you a little bit about him, about his company. I met him a couple of months ago when we were both at a conference several thousand miles away. We were actually in Panama, and I was impressed by what he was sharing on that particular panel, and I came up to him afterwards and asked him about being involved in something we had here.

One of the things that really drew me to him, besides what he was talking about, was the fact that we are both Terps, University of Maryland fear the turtle. Yes, I know how you feel about it. His company is called Sound Royalties, a privately owned, specialty finance firm that helps music industry professionals fund personal and professional projects without ever taking ownership of their copyrights, allowing for pass-through income and empowering creatives to choose from a variety of flexible pricing options.

The company's core business is offering royalty advances of anywhere from \$5,000 to \$10 million by advancing artist, producer, and songwriter royalties paid through music labels, distributors, publishers, and PROs. Sound Royalties works with a wide range of leading music industry professionals including Grammy award winners, platinum recording artists, and notable music industry executives in every genre.

Alex has done quite a bit of work in this area and speaking on this area and has been featured in Billboard, Rolling Stone, Music Business Worldwide, The Tennessean, Music Connection, and Digital Music News. The title of our presentation today is "What's Next?" With that in mind, I was very excited about something that he talked about back in November, which was the streams of income and the multiple streams of income that come from the stream economy. Without further ado, I'll turn it over to Alex Heiche.

[applause]

**Alex Heiche:** Thank you. What I'm going to do is I'm going to talk about what's next, where the industry is headed. Before I do that, I'm going to give you two short slides. One about Sound Royalties that will show you a little bit of what the company is, and then one about how I gathered this knowledge and came to a point I can actually feel that I might be able to share a little something about which direction the industry is headed. The first is a very short 40-second teaser.

[teaser plays]

**Alex:** I've got five kids, and we always talk about what they're trying to accomplish. Can they ever accomplish some of the things that my generation was able to accomplish or get to that stage in life? Looking forward, it's always difficult. You look at Sound Royalties and, "Wow, it's doing great and doing amazing things," but as it started—and I'll tell you how I started—as it started, we were just clawing forward, and it never ends.

I'm still just clawing forward and trying to grow and make a difference in the music industry. Looking back, we can connect all the dots, and it makes sense. Looking forward, you're just kind of working your way forward. When I started as a kid, I was actually what they'd call a band geek. I loved music. I loved to ride my bike, and that was about it. I did zero sports, and it was music, music, music, all the way until college when at the University of Maryland College Park, I had a little luck in software and started doing specialty software for the petrochemical, chemical, and nuclear power plants.

We had a software company that went from 10 people to offices in 15 countries, practically overnight. Next thing I know, I was a software guy and a high-tech guy. That lasted about a decade. Then I did specialty finance, fell into that for about a decade. That took us to 2013 where this story, in my opinion, gets more interesting because I started to be able to focus on what I was really interested in, and that was the music industry. In 2013, I was fine, comfortable, happy, but not excited about what I was doing. I decided to jump off a cliff and build an airplane on the way down. That airplane was going to be a music company.

The first thing when you're freefalling off of that cliff that you do is try to figure out, "Can I just buy one?" I started to look at the music industry as a whole. The first thing that I saw that blew my mind is how complex it was. We'll talk about those complexities. That's partly what created this gap. You got the compositions, that seems simple enough. You've got sound recordings. Two copyrights, but there's not two royalty streams. There are dozens and dozens of royalty streams and different rules that apply, and who they apply for.

It's a very complicated processing system and as I dug into it, I started to realize there wasn't a business out there that I could have an impact with or make a difference, that I would just play a small role and do specialty financial I understood for the music business, and I created Sound Royalties under three basic principles. One, I didn't want to buy copyrights. Creators, I believe in creators; I love creators. What they create, they should retain the ownership. That was in tune as things started to go streaming where independence and ownership of the creative was key. I didn't know that. I just did something that I thought was right and the right thing to do.

Two, the industry at that time and to this day, if you take an advance from a publisher, if your client takes an advance from a label, they don't see a penny till they recoup. They do something that's called 100% recoupment. I said, "Why do that?" If I'm expecting \$2 a year from someone and they make \$6, let them have \$4. I want them to be a client longer. I don't want to choke them out of their income stream. I want to make it easier for them to work with me. We didn't do 100% recoupment. That was revolutionary for the industry. Nobody else was doing that.

Now that started to change. I didn't know that at the time. Then, we wanted to compete with lot of banking alternatives by creating fair solutions and that's where it started. That's the foundation of how I started in the music industry, but what was striking at the time was the complexities of it, and whether it was lawyers, managers, publishers, labels, people were very knowledgeable in a specific area of the business. They may know a lot about the performance royalties because they are a PRO, but they may not know as much [about]—they just know the term

and what it is—synch and mechanicals, but not necessarily how to get them, how to work them, what rights were behind them.

A lot of lawyers were specialties in certain areas. If you think about it, the PROs, even ASCAP and BMI, are curious about what the other's doing, what SESAC is doing, but they don't have a view into that. They certainly don't have a view into the labels, and what the labels are doing. Since we're providing funding and financing, we see a little bit of everybody's and that became a lot of everybody's, and to have a view on that data, it gave us an insight that nobody else had at the time. It gave us a different perspective on things. I didn't expect to become some part of the group of the most knowledgeable in royalty streams. That evolved over time.

Because of that wealth of data, because of not just the vertical view of performance royalties, or synch and mechanical, or label income, or streaming income, or seeing thousands of YouTube streams being paid direct and what that meant as opposed to collecting through someone else, it gave us a different perspective, and it gave us the knowledge to be more knowledgeable and to help, and part of the mission in Sound Royalties is to educate. That's what I'm going to share with you, what I've learned. I am also going to leave with you some guides and some links to where to find these royalty streams, how to collect them.

I was asked to talk today about where the industry is heading as a whole, what can we expect for the next decade. We're wrapping up a decade. It was a good decade. What's next? I'll share that with you, but I'm going to give you my legalese first by saying that talking about the music industry and trends in royalties when things are changing with technology and distribution and consumption so fast, it's difficult to pinpoint even if you're painting with broad strokes. So know that I'm going to speak more from data and share that data, maybe share some of my thoughts, but you'll have to make your own conclusions on where things will actually head.

Frankly, in the end, we'll connect the dots 10 years from now, and it will make sense. Right now, we're doing the best we can just trying to figure it out.

A quick example is TikTok. At the beginning, if I had been here last year at this time, I would have never brought up TikTok in the conversation. Now, it's the talk and buzz in the industry with 800 million subscribers. How are we getting revenue from it, how are they paying, and where is that revenue coming from? The market consumption is very, very important. It sounds logical, but people haven't been talking about the consumption of music until streaming came about as much.

Every day they talk about it more and more. It's not now that it's just digital. What platforms are they collecting it on? Let's talk about that. Where does the bulk of creators' revenue come from? It varies by genre. Right now, 43.6%, if you are rock fan, in this row up here. If we look at physical album sales, rock fans love a good vinyl. 43% of the industry's revenue are going to rock if it's physical album sales. If we go to streaming, 29.6% is R&B and hip-hop.

That's as a creator where you want to be focusing and making sure your ducks are in order first, maybe from a legal perspective, the key parts or areas that you should be focusing on, or as you were mentioning earlier, country being a genre that lags, it gives you the advantage of seeing where the buzz is headed. The other interesting thing that I've noted on this slide that we will come back to a little later, look at Latin, 7.3% of on-demand streams. That trend tells us the direction of where streaming is headed.

Total on-demand streams, I want to talk about streaming and it's important. 80% of the revenue in this industry is coming from streaming, 80%. We can talk about album sales. We can talk about other areas of the business, but 80% of the revenue is coming from streaming, and many creators are still complaining about it. In the last two panels, as a group, we were talking about, you know, "Streaming's pennies, it's micro-pennies." Quincy Jones once said, "We love publishing," and people were saying "Why?" and he says, "It's a penny business, but there's a whole lot of penny."

[laughter]

Streaming is a micro-penny business, but there's a whole lot of micro-pennies. 80% of the total industry revenue right now is coming from streaming. As we start into a new decade, we're

wrapping up five straight years of double-digit growth for the industry. As we finish 2019 and the numbers are released, global recorded music industry revenues are projected to finish at \$20.5 billion. By 2030, Goldman Sachs is saying it'll more than double to \$45 billion. Revenue is growing. It's good time. We just need to know where to look for the money, how to guide the clients into getting it. That's another reason that ownership is king right now.

Let's look at where the population is and who is streaming because I think that tells part of the story. Historically, if you think about the music business, money came from the United States. We paid more for music than anybody else. American music was king. American music generated most of the revenue in the industry, and that's not disputed. Furthermore, American artists then grew and became worldwide superstars because more money was put into marketing that music, more money was put into polishing it, attaching videos to it. All these different things and more money was put into recording. That's about to change.

If you look at the world population, as we go into the legitimization of the consumption of music, it's the easiest way that I can put it. As we legitimize the consumption of music and what I mean by that is whether you're in India, whether you're in Africa, digital music—which was once considered the cause of the death of music because it made it so easy to pirate,—has now flipped and it's more protective than ever and it's easy.

It's more of a hassle to get 10 songs from your buddies and put it on your phone than to pay \$10 a month and stream it and have all the songs. The rest of the world is coming online with that. As they do, they're not going to pay \$10. They will pay 10 Yuan, they will pay 10 Rupees, they will pay with their eyeballs for YouTube and look at advertising to get free music. That legitimizes the consumption of music and the money flow now comes through to the creators and the industry.

So many people are not streaming at this point. As they come online, what's going to happen, where's that money coming from? Where is it going to go? How is it going to change music? That's what I'm going to share with you a little bit.

Now, if we look at growth trends, we need to consider consumption of music. The first one here is Latin. India, China. When India is 1.3 billion, China is 1.4 billion. That's a two-point gap there; that's 36% of the world's population. Latin America, 611 million population compared to our 300. Latin is still the next to grow in my opinion because they're quickly coming online with streaming. They're paying faster. They're adopting this new model much faster than some of the other countries.

Now, the other countries around the world are coming online, but I think Latin seems to be seeing the most rapid increase in the adoption rate of streaming through Latin music. Latin is something that in this next decade—in probably the beginning of it, I think you'll see India and China dramatically grow—but in the next just couple years that 7% that I showed you is going to increase. When I talk to writers, when I talk to creators, I'm excited about Latin music. What else am I excited about? Who else stands to grow? Jazz, classical, children, country. Why?

Country is king when it comes to radio. It has a long, slow rise. It's hard to get the momentum going with country music, but once it's going, it just keeps going, and going, and going. Country fans love their country music. Go around America and don't look at Middle America, look at the radio dock. There you have six pop stations, you'll have three or two country stations to choose from, one Christian station, maybe zero jazz, zero children. As Middle America starts to stream, they can ask for what they want, and they are. They're asking for country They're asking for jazz. They're asking even for classical.

Those who come online—this dawned on me about a year ago. I was at Amazon. They showed me their charts, and what people were playing. I had just looked at the billboard charts, and then clicked in my head, and I started to look at the two. At the time—and I put a paper out on this—if you looked at the top 10 billboard songs that were being played, eight were urban. Most consumption of urban music. If you looked at Amazon, it's zero in the top 10 because who's asking for it?

As more of us use phones to stream, as we start to use an Alexa dot and that housewife in the middle of America starts asking for music,

she's going to ask for what she wants, and that music consumption will then translate through to the industry. Aside from jazz, classical, another one that's not focused on geography, there's so many Christians around the world. Now they're able to say, not "Hey, I want Christian music." They're able to say, "I want Christian metal. I want Christian rock. I want Christian rap." You're starting to see genre-specific music, and those individuals are actually making money from that.

The other thing is the Smart Play Listening. We used to compete for about 30,000 new songs a year and try to get them on the radio. That was the industry maybe a decade ago. A year ago, it was released that Spotify was uploading 20,000 new songs a day. Last month, it became 40,000 new songs a day. It's easier to get your music up there, but now the industry's changed, and how do we get people to find our music? They find it through different ways, Smart Play Listening. Anybody who's listening to Spotify, you finish that album, it starts to recommend songs.

Think of it back to the crate digging of the '90s that we used to do or that you may have heard of, or going in the record store and digging the crates or the sale items or looking at the vinyl. Now, it's through Smart Play Listening, or radio stations, or Spotify recommendations, or Spotify's playlists, Discover Weekly, New Music Weekly. We will find the new music, and it will perpetuate throughout. Going back to the heat map, we need to consider, again, the world population. 200 million people today are on premium subscriptions and paying for a stream. By 2025, that's expected to be a billion, so that's just in the next five years.

From there, if you look at the top 10 music markets, what's missing from there? Latin America is not on there at all. India is not on there at all. 1.3 billion people in India. That's almost five times the people in the American market. Latin America's two times the people, and they're starting to stream. Beyond streaming revenues, also the MMA which came up a little bit will have a huge impact because it's additional income that wasn't being paid by the streaming services. A lot of people are asking me, "What does that mean for a songwriter?" It means they're adding income that they weren't seeing before.

Someone asked me to put that in the numbers, and while we don't know, I've heard from several people very close to it that they expect the mechanical stream would be almost double what the performance fee as a writer is. That's a significant amount of income. Somebody says, "Hey, I'm going to get you double your paycheck." It's nice. As Quincey Jones said it, "You have 12 notes. What are you going to do with them?" What do we have to say now? "You have 30 seconds. What are you going to do with them?" A song needs to be streamed for 30 seconds in order to earn revenue. If you want to get paid on it, you've got to find creative ways to have it playlisted, have someone hear it.

Then, how do you keep their attention? This guy Paul Lamere in 2014 looked at billions of Spotify plays and look at the skip rates. He quickly saw that a quarter of the people skipped within the first five seconds of the next song, 29% skipped within 10 seconds, 35% skipped within 30 seconds, 48% skipped before the song finished. People were skipping, on average, about every four minutes to the next song 14 times per hour.

The structure of music has also changed. How is it changing? If you think about it and go back to tapes—if you go back to listening money coming from radio, people could turn to that station at any time and hear your song at the 30-second mark, the 60-second mark, the two-minute mark. Now, they're almost always hearing it at the zero-second mark. The focus and what we hear in the industry and what the talk's about is, "What are you doing with those first 30 seconds?" People are going back to the '50s before the DJs on the radio would talk into new record.

There's having the energy right. They're starting right with the chorus. They're starting with a lot of energy, just dropping on the hook. Think of "Tutti-frutti, oh Rudy," starting right with that. That's changing the structure of the music, and it already has started to change. Songs will continue to get shorter. Think about it from a monetary perspective. If you're playing an eight minute Guns & Roses song, and you play a two-minute Avicii song. They're both making the same money, but with Avicii, if you listen to eight minutes of his music, he's getting four times the revenue for one eight-minute song.

Just over the last year, the average track length of top 40 was three minutes and seven seconds. That's 30 seconds shorter than the year before. That's an interesting trend because it's pretty dramatic. Because of the digitation of music, it's becoming easier to track and follow this type of data. What are we doing with it, this data? We want to know about the trends in terms of money. It's the music business. But if we want to do that, let's first understand what are the common royalty streams? What are being missed? Then from there, what are all the different royalty streams?

First, let's understand why we call them music royalties. Anybody have any clue? I've never had anybody say yes. The term royalties comes from late middle English time, 1150 to 1500. At that time, the gold and silver mines were owned by the crown. In order for people to mine from the gold and silver mines, they had to pay a royalty to the crown. If we translate that to today, music royalties, the creator's king. All royalties should flow through to the creator, it doesn't happen all the time, but in the business, that's our job to ensure we protect our clients' rights and that they're getting those royalties.

Here's some of the most common ones that they're not. Songwriters—I'm going to do songwriter, artist, and producer. Then I'm going to blow it up to the real complex ones. The basic ones, songwriters, most commonly we see songwriters who sign up with a PRO. They don't create a pub designee, and they don't sign up with a publisher. They think they're getting their publishing right now. The next stage is, they sign up with—they create a pub designee and go to BMI or ASCAP, and they have two accounts. Now, they're collecting their publishing.

They don't do a publishing deal either because they don't know they're not collecting synch or mechanical, or they don't hire an administrator because they don't know they're doing that, or even more commonly, they don't understand mechanical royalties that are being paid each time their song is on an on-demand stream and that money that will come with that because the mechanical royalty is not paid through the performing rights they sign.

There's so many of them that leave that on the table and don't understand the huge value that the publishers or administrators

provide beyond just performance royalty publishing share. Then, there's the creative of plugging and pushing the music and getting it out there and getting people to cut the song. As an artist, it was—five years ago the story was about digital performance royalties. I actually had breakfast with an artist that has a couple hundred million streams and didn't even know about SoundExchange this morning. That kind of surprised me, but I think people are catching on that the digital performance royalties are important.

I met with a global multi-platinum superstar about week ago. When we looked at his streams, he was collecting his SoundExchange. Are you collecting SoundExchange? Yes. He had been through many label deals, and he owned some of his masters, and he didn't have a rights owner account. It's almost like a songwriter not collecting their publishing. He was collecting SoundExchange as an artist, and he was collecting it through various labels he worked with, but didn't have the rights owner account for the rights that he owned.

There's a lot of gaps that we continually see even with the best teams. It's amazing the amount of money that's out there that people don't even realize. If you go to the producers, the producers are bridging the gap. They're not collecting their publishing royalties on the writer shares that they're getting. They're not collecting their digital performance royalties. In terms of 50 cents of every dollar that goes in SoundExchange goes to the artist. No, 50% goes to the label, 45% goes to artists, 5% to the background musician. In the artist share is the producer's share.

The problem is that, once the song starts to hit, we say, "Hey, go get your producer share." They go to SoundExchange and SoundExchange says, "Give me a letter of direction." What more and more attorneys are telling me that they're doing is when they do a producer's agreement, they're including that letter of direction in it and having it signed and having it long-term because it's such an uncomfortable conversation to say, "Hey, can I get a piece of your SoundExchange," later. They don't want to do it because they want to work with that artist again. I would say a majority. I won't give you a percentage. I'd like to say 90 some percent, but I don't know.

Almost everybody that I look at producer-wise is not collecting on the major hits their producer share because they don't want to go ask

and have that uncomfortable conversation. The other thing about producers that they don't realize is, there's a background musician and there's 5% of that SoundExchange, most of that goes to AFM SAG-AFTRA. Producers are the modern-day instrumentals. In the studio, they're sitting there with a keyboard and they're banging out the cymbal, banging out the drum or doing it on the computer keyboard and that's ending up on the final track.

If we think about it, they're background instrument. They're the instrumentalists on the track. Most producers don't understand that and aren't collecting, but they're starting to. At the end of the day, I can't cover all the different common ones. These are some of the charts that I've looked at over time when I first started to try to understand music royalties, and these are legitimate. If you search on the internet, you may recognize some of them if you want to know you're own rights and royalties and you search the internet. These are all right and some are wrong in certain areas which is misleading, but it's confusing.

Part of our mission is to kind of help educate our clients. What we put together—and it's something I had a great idea about a year ago, and I thought it'd be out in a month. I've been telling people, "Oh, I got something coming out." It just got released yesterday, and this is on our website. This is a royalty guide. It's 50 income streams every creator should know about and where to find them. Basically, if you're a creative, if you're advising a creative, you can look through and read through every one, "Does my client qualify for this?" and then there's a hyperlink on where to go collect them or understand more about them.

We're distributing that freely. It's on our website. There's links going on social media. It's just going live now, but we tried to kind of organize the various income streams that were out there. We talked about the consumption of music and the structure of music, but at the end of the day, it's all about what's popular. What is pop music? If you go back to the '20s when the records first came into serious play, reaching the average household, and they were getting out there. That's when we can first really track what popular music was because that's when the masses were listening to it. At the time, it was ragtime. You jump to the '40s, it was big band, and '50s, it was rock and roll.

You jump to today, it's urban, and that's because of what people are consuming music. Music is just evolving. It's not dying as people have said. It's not being killed. You have the hardcore fans that say "EDM and urban's killing music." I beg to differ. Everybody said rock and roll killed music in the '60s. The Beatles, Beach Boys, they were rock and roll and they killed it. In the '70s, they said Janis Joplin, Jimi Hendrix, Jim Morrison, The Doors, James Brown, they were killing music. Really? That's what they thought at that time.

In the '80s, they said The Police, Bon Jovi, Whitney, killing music. Michael Jackson absolutely was killing the music industry. In the '90s, Boyz2Men, Spice Girls, Dr. Dre, Seal. Was that killing music? We get to the 2000, Mary J. Blige or OutKast. OutKast, "is that really music?" I hear people say. Yes. We don't know what the evergreen hits of today—we know what the hits are, but we don't know what the evergreen hits are. In reality, it's not killing music. It's just evolving which is a great thing to be part of. I look forward to see where it evolves over the next decade.

As I open this up a little bit to questions, I'm going to share with you a little bit about why we do what we do. Why focus on how music is consumed? Why track the flow of money through music? Why worry about the structure of music and the consumption of music? As I open up to questions, I'll share why I think we do what we do, and why we want to be part of the industry now.

[video begins]

**Video:** One of the most driven, courageous people on the face of the earth. They deal with more day-to-day rejection in one year than most people do in a lifetime. Every day, they face the financial challenge of living a freelance lifestyle, the disrespect of people who think they should get real jobs, and their own fear that they'll never work again. Every day, they have to ignore the possibility that the vision they have dedicated their lives to is a pipe dream. With every note, they stretch themselves emotionally and physically, risking criticism and judgment.

With every passing year, many of them watch as the other people their age achieve the predictable milestones of a normal life, the car,

the family, the house, the nest egg. Why? Because musicians are willing to give their entire lives to a moment, to that melody, that lyric, that chord, or that interpretation that will stir the audience's soul.

Musicians are beings who have tasted life's nectar in that crystal moment when they poured out their creative spirit and touched another's heart. In that instant, they were as close to magic, God, and perfection as anyone could ever be. In their own hearts, they know that to dedicate oneself to that moment is worth a thousand lifetimes.

[video ends]

**Alex:** Thanks, guys. Are there any questions? Thanks for humoring my thoughts as informative.

**Audience:** This may be a dumb question. Can you get Spotify in communist countries?

**Alex:** I'll tell you a short story before I answer that question. By saying it's a dumb question, that made me think of this. Einstein, as he gained popularity, spent a lot of time giving lectures and talks. One day, he was with his chauffeur driving down the road and complaining to him and the chauffeur looked back to him and said, "You know, boss, I've seen so many of your lectures. I can probably do it." The two concocted up and thought "You know what, go ahead." He look kind of like him, the same body structure, and so when they walked into the room to give the talk. Einstein donned the chauffeur's cap and went to the back of the room, and the chauffeur went up and did a beautiful rendition of the speech. He even answered some of the questions and then, this professor, who was more self-serving, started to ask this huge, long question, went on and on and on, and then he started talking about in the matter, this and that, and wrapped it up with a question. Everybody's wondering what's the answer. The chauffeur looked at the professor and said, "Professor, that is the stupidest, most simple question, so much so that my chauffeur over there can answer it."

You ask, but that's not a stupid question. Actually, I was going to Cuba to talk about how to collect royalties, and people said, "You can't do that," and "Are they allowed to collect them?" They're

earning them if it's streamed elsewhere, and they're paying for the music properly, and are they allowed to collect them? I'm being told that they are, and that they are collecting them in some cases, and in other cases, the government state is acting like the label as a rights owner, taking what's theirs. I don't know if that's fact. When I went to go talk to Cuba, that's what they were telling me was the case.

**Audience:** It seems in countries where governments censor the internet, I would be surprised if they would allow Spotify.

**Alex:** Well, that's—whether they're letting Spotify in is another question. Deezer, Spotify are getting into India and China and other countries, and so they, as a company, are required to pay based on what they're earning. Now, what they're charging for it or if they're doing loss leader, that kind of stuff—because what I see happening is you're going to see less and less of the global superstar, but you're going to see local artists become regional stars because people can ask for their type of music. Okay, I had a producer that creates urban Indian trap. I was like, "Is there a consumption for that?" He was like, "Yes, in India they're going crazy over it."

Not sure if that fully answers your question. That's as much as I know about it. Anybody else?

**Audience:** Do you have a link for— You said there's a chart on Sound Royalty's site?

**Alex:** Yes. It's on our site, 50 royalty streams, and I can send you a link to it, as well. There's a link on this presentation.

**Audience:** Is it under a heading on your site?

**Alex:** I'm not sure. They put it up last night, but I do know that there's a link. Oh, here it is. Right, there it is because I bounced around the presentation. I know this works right here and the bottom right there. Let me click on it. There you go. I'll go back to where you see it. You want to type that. You can even maybe email to everybody that registered.

**Loren:** Okay. I saw another hand back there.

**Alex:** Yes.

**Audience:** So, for all the data that you're collecting, are you able to connect, project or at least, get a sense of American music as it expands into these larger areas, like China, India, or South America?

**Alex:** What has happened historically is they're asking for American music, and they're being suggested through playlisting and stuff, the popular stuff, and they're pulling our playlists because they don't have playlists. I presume over time, it'll spread out. We don't know. The ownership is so important, more than ever. You're doing a deal for a song that's making nothing. You don't know 10, 20 years from now what some people are going to be asking for, and so I know a lot of people that have different Christian music that was making nothing. That people were buying it for pennies on the dollar. They were smart enough to know that things are changing, and that's happening today as we speak.

In the short term, we know that American music is popular. It's worldwide popular and so, it'll continue to be, but I think it was somewhat diluted by regional superstars, but the consumption is so much greater. It's a hell of a lot of micro-pennies. Very good. Thank you, guys.

[applause]

**Loren:** I always tell my students that this is an exciting time to be in this space because so much is evolving, and so much is changing. Let me tell you how much is changing. When I met Alex in November, he said, "I'm working on this project. It's called 23 Streams of Income."

**Alex:** That's right.

**Loren:** You saw what the number was today? 50. I think I heard you say 51.

**Alex:** Yes, there's 51. We just stopped at 50.

**Loren:** 50, yes, but that's why I say, it's exciting to be incoming. Also, some of the things we heard earlier today, where there are

these areas that are developing and evolving, such as TikTok and so on. We're figuring it out, and I'm asking you, "Hey, What's TikTok?" Right, so what do we teach about it? We've had conversations about influencers, and the impact that they have on the industry, so all of this is changing, and it's a specific as well as a general question to say,

"What's next?" Hopefully, you guys are able to glean something from the last three hours on what's next in the industry.

Thanks again to the Entertainment Law Journal members who put this all together. Can you give them a hand?

[applause]

**Loren:** Thank you to all of you for coming out. We hope that for those of you who it's your first time here, you'll come back, and those of you who have been here before, thanks for coming back again. We hope you have a great afternoon.







MEMORANDUM FOR THE RECORD

DATE: 1/1/2021

TO: [REDACTED]

FROM: [REDACTED]

SUBJECT: [REDACTED]

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