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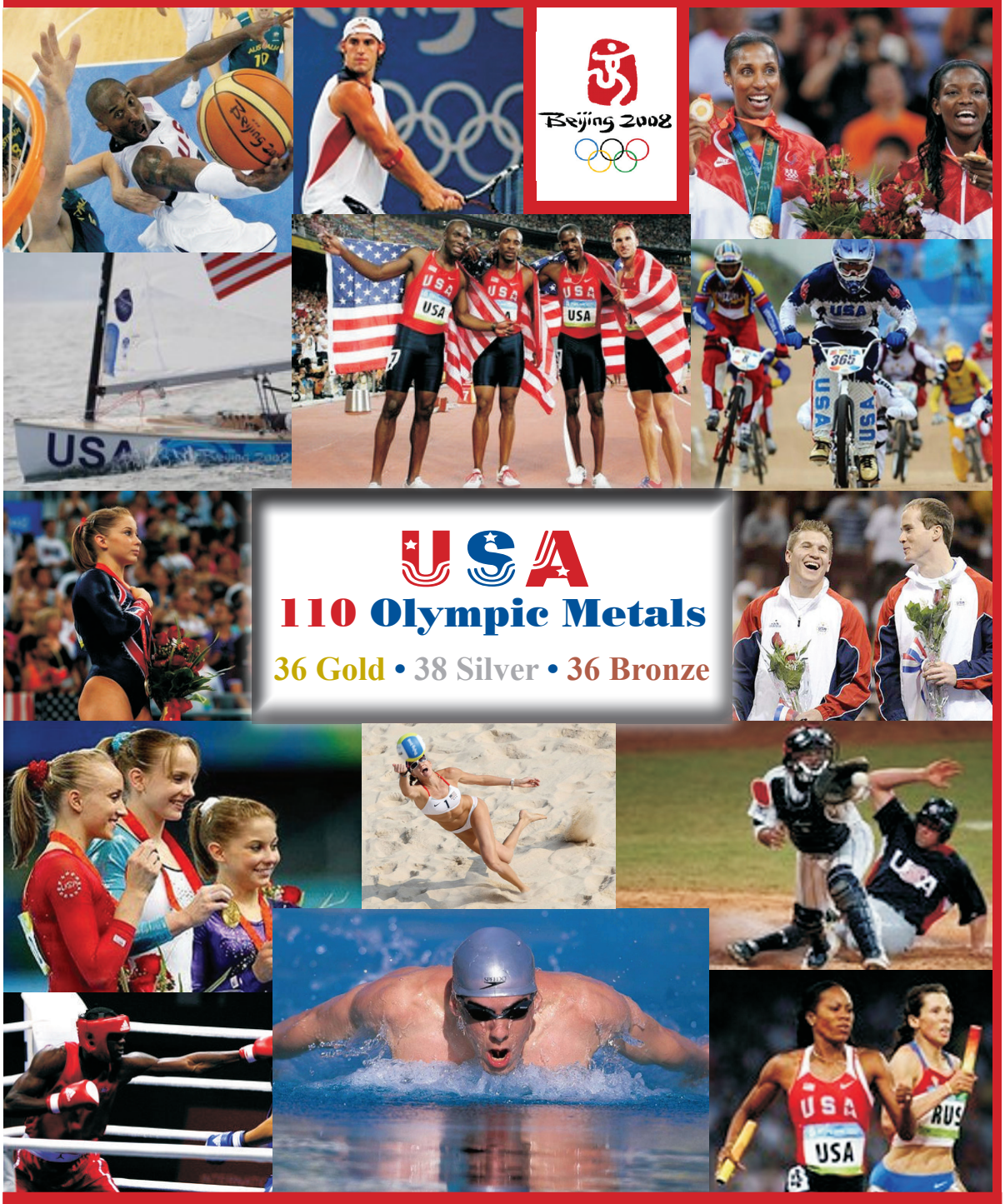

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CHAIR'S REPORT

Thank you for your membership in TESLAW, the State Bar of Texas Entertainment & Sports Law Section. Each year, your Council members give their time and effort to provide you with valuable resources and assistance for your practice. We sincerely hope that you will take advantage of the resources provided by TESLAW and that they will be useful to you. I am pleased to have the opportunity to work with this wonderful and generous group of people – your TESLAW Council members – and to serve as the Section Chair for 2008-2009.

The valuable resources that you receive in return for your TESLAW membership dues include the outstanding Texas Entertainment and Sports Law Journal, published in conjunction with the South Texas College of Law. The Journal is published twice per year and includes numerous articles with insights for entertainment and sports law practitioners. Archived Journal issues and other resources are available through the TESLAW website, www.TESLAW.org. Your membership also entitles you to use the TESLAW listserve (eandslawsection@yahoogroups.com), which is a convenient (and free) way to network and get helpful practice hints from other Section members. Your TESLAW Council Legislative Committee members also actively follow and report on proposed legislation at the state and federal levels that may affect the entertainment and sports law practice areas.

Additional benefits of TESLAW membership include free CLE programs in connection with the Section's annual meeting. Our most recent annual meeting CLE presentation included a panel of Major League Baseball lawyers and executives discussing the legal management of a Major League Baseball team. We were fortunate to have Pam Gardner, President of Baseball Operations for the Houston Astros, Kate Jett, Associate Counsel for the Texas Rangers, and Caleb Jay, Associate General Counsel for the Arizona Diamondbacks, in attendance. We were also pleased to welcome Mathew Knowles, President and CEO of Music World Entertainment (and the father and manager of Beyonce Knowles of Destiny's Child) and Hank Fasthoff, outside counsel for Music World Entertainment, for a discussion of the latest business and legal trends in the music industry.

Yet another benefit of TESLAW membership is a registration fee discount for the 2008 Entertainment Law Institute, which will be held on October 2-3 at the Hyatt Regency Hotel in Austin. The Entertainment Law Institute features nationally known experts speaking in multiple tracks on topics including copyrights and film, music, sports, and digital media. And October is always a great time to be in Austin, Texas!

If some portion of your practice is in the entertainment or sports law areas and you would like to get more involved, we welcome you to serve on any of the TESLAW committees and/or the TESLAW Council. Please contact any of the Section officers and let us know what you'd like to do. We will do our best to find a spot on the team for you!

Thanks again for your involvement, and I offer my best wishes for a very successful year.

Alan W. Tompkins
atompkins@unityhunt.com

SOLICITATION OF NOMINATIONS FOR THE CINDI LAZZARI ARTIST ADVOCATE AWARD

The TESLAW Council is now soliciting nominations for the recipient of the 2009 Cindi Lazzari Artist Advocate Award. The award is named for the late Cindi Lazzari, a Texas attorney who went far beyond the call of duty in her efforts to protect the rights of artists in the music industry. Each year the Council recognizes an individual working in Texas who has been actively involved in advocating and supporting artist's rights in the music business. Nominees need not necessarily be attorneys. Nominations should be sent by e-mail only to LazarriNomination@gmail.com and should include the following information: (1) the nominee's name; (2) the nominee's employment and contact information; (3) a brief statement (not to exceed 100 words) as to why the individual believes the nominee should receive the award; and (4) a short bio of the nominee (if available). Nominations will be accepted through December 31, 2008.

Check out the Section's Website!

Check it out at www.teslaw.org. The password for members is "*galeria3*". Should you have any comments or suggestions to improve the site please feel free to e-mail Yocel at Yocelaw@aol.com or the editor at srjaimelaw@comcast.net …

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FOR THE LEGAL RECORD ...

NCAA Rules Interpretation prevents "Gridiron Bash" at your favorite school …

MSL Sports and Entertainment arranged for "football celebration" events at big name schools Alabama, Tennessee, Ohio State, Penn State and LSU, to "use student-athletes' [ ] to promote" musical acts. However, the NCAA's response resulted in the events being tentatively postponed until next spring. NCAA representative Erik Christianson indicated that the "use of student-athletes to promote events and allow athletes into the concerts for free" violated NCAA rules. MSL blamed the delay on the "NCAA's last-minute interpretation" and the NCAA countered that "While it has been stated that the organizers have been planning this event for a year and a half, they did not contact the NCAA to ensure compliance [until very late in the process] …" MSL's concept as described by Ed Manetta, a former athletics director at St. John's and a partner in MSL, "was always intended to be a football celebration …" tied to spring football games. MSL had sixteen colleges on board with the concept. LSU had scheduled Kid Rock and Sara Evans, and had advance sales of 1,500, with hopes for a large walk-up crowd. With NCAA approval, a new way may be on the horizon for schools to promote their programs and their athletes? …

NCAA Avoids $5 Million Verdict …

A University of Alabama booster sued and won a $5 million verdict. Timber dealer and avid UA booster Ray Keller was labeled, along with others, "rogue boosters," "parasites" and "pariahs" in announcing penalties against Alabama in 2002. Keller sued the NCAA for slander accusing it of libeling him. Although the NCAA said it did not publicly name Keller, it portrayed him as "a rabid fan who lost all perspective on the game." In granting the NCAA's request for a new trial, Circuit Judge William Gordon ruled that jurors were "swayed by passion or prejudice during the trial." Apparently, passionate college football fans don't make for dispassionate jurors. …

Butting Heads with Dick Butkus, wound up in federal court …

The Butkus Award, awarded for twenty-three years by the Downtown Athletic Club of Orlando, will now be presented by the Butkus family in Chicago. The former Chicago Bear and NFL hall of fame linebacker sued the Orlando based nonprofit group for control of the Butkus Award, trademarked in 1987. In return for returning the trademark to the Butkus family, who will use the award to raise charitable funds from its Chicago base, the Athletic Club will use the name with other fund-raisers. The lawsuit was brought in Los Angeles federal court in 2007 and after a year long litigation, the parties settled with the club's president Chip Landon being quoted as saying "We're glad it's over, but we're sad. You hate to give up when you know you're in the right. But there comes a point when we really had to think about the kids who won the award the past twenty-three years. They're proud of that. We didn't want to see that go away." Nice to have someone thinking about the kids and avoiding more litigation. …

Front Season Neutral-Site Bowls …

Chick-fil-A may have started a trend in college football by offering big named schools with large followings large amounts of money to play away games at neutral sites. In getting Clemson and Alabama to play in the inaugural Chick-fil-A College Kickoff, Chick-fil-A Bowl president Gary Stokan believes there is "fertile ground" for an annual neutral-site game in Atlanta, because it is "a hotbed of college recruiting, and the city is the biggest alumni base for nearly every SEC and ACC school." Stokan was quoted as saying "If an AD had seven home games … What is he going to do with the four non-conference games? Let's create a bowl atmosphere on the front side of the season." Fiesta Bowl executive director John Junker considered the concept for the University of Phoenix Stadium. "It's easier to do in the Southeast because of driving distances," Junker said. "Two hours outside of Phoenix, what you find is death by thirst."

Louisiana Tech's Derek Dooley, describes the concept as "… market-driven. It's economics. If you're bringing in 95,000 into a home game, you're making well over $3 to $4 million." With the Chick-fil-A College Kickoff being at a neutral-site each team netted about $2 million without having to surrender a future home game by taking a home-and-home game or paying a smaller schools' ever increasing high six figure dollars "victim's fee" to play at big name schools. Stokan has Virginia Tech playing in Atlanta for 2009. Other schools are discussing their future participation. Bowl games in August and September and fewer patsies for big time schools, only money could get them to do it. …

Entertainment industry's war on piracy continues …

Twenty-seven year old Kevin Cogill learned how serious the industry is taking piracy, after being confronted by five FBI agents at his home in Culver City, California, and arrested and charged under a three-year old federal anti-piracy law that makes it a felony to distribute a copyrighted work on computer networks before its release. Assistant U. S. attorney, Craig Missakian built the case. Missakian said "in the past, these may have been viewed as victimless crimes. But in reality, there's significant damage. This law allows us to prosecute these cases". Cogill was accused of posting nine songs from an album not yet released. Guns N' Roses had been working on the album *Chinese Democracy* since the 1990s.

The Recording Industry Association of America has used civil lawsuits to fight piracy. The Family Entertainment and Copyright Act of 2005 has given the industry felony charges and stiff penalties to attack such illegal postings. Historically the law has been used against commercial piracy rings, but Cogill's prosecution demonstrates that the industry will take action against individuals as well. "I hope he rots in jail," said Slash, former guitarist for Guns N' Roses. "It's going to affect the sales of the record, and it's not fair. The Internet is what is, and you have to deal with it accordingly, but I think if someone goes and steals something, it's theft."

Pre-release piracy "pops the balloon," said Eric German, a lawyer with experience in fighting piracy on behalf of the recording industry. Cogill faces up to three years in prison and $250,000 in fines if found guilty. Parents advise your children, and lawyers advise your clients accordingly. …

Barbie, Bratz, and the Law …

Everybody is familiar with ***Barbie*** and its maker Mattel, but what about ***Bratz***? Designer Carter Bryant conceived of the *Bratz* doll concept, dolls with what has been described as a "saucy, urban-influence," while, the jury found, Bryant was under an exclusive deal with Mattel. However, the jury found that all but four of the concept drawings belong to Mattel.

Bratz maker MGA Entertainment and Mattel engaged in a three month trial and Mattel won a $100 million jury award. The jury found that MGA, its subsidiary MGA Hong Kong and its chief executive Isaac Larian were liable, awarding $10 million for copyright infringement, and $90 million related to breach of contract claims.

MGA began marketing the *Bratz* dolls in 2001 and since its inception made in excess of $779 million. However, after the verdict intellectual property attorney Oren Warshavsky said "The jury found that at some point the dolls infringed, but the question is, was it the earlier dolls or the later dolls or all of the them?" MGA Chief Executive Larian said the jury's relatively small award for copyright infringement - roughly ten percent of the total - showed the panel felt only the earliest dolls were based on Bryant's initial sketches and that later dolls belonged to MGA."

Because the jury was not asked to identify which dolls they found violated Mattel's copyright, Mattel made it clear that they would move for an injunction to prevent MGA from continuing to make the dolls. Jack Lerner, an intellectual property professor at the University of Southern California, said "The jury made a determination about damages, but it didn't make a determination about the connection between the drawings and the damages."

U. S. District Court Judge Stephen Larson is potentially left with having to determine the jury's intent, with the potential that MGA would have to cease marketing some or all of the dolls, or pay Mattel royalties to continue to produce the "saucy, urban- influenced dolls." Who would have thought that playing with dolls could be so much fun…

Your comments or suggestions on the Section's website may be submitted to Yocel Alonso at Yocelaw@aol.com and as always your comments regarding the Journal may be submitted to your editor at srjaimelaw@comcast.net …

Sylvester R. Jaime--Editor

NCAA Rule Enforcement after *U.S. Department of Education v. NCAA*: Will there be a Chilling Effect on the Self-Reporting of Violations?

By: Bryan V. Swatt[1]

Bryan V. Swatt is a J.D./M.B.A. candidate at Loyola Law School and Loyola Marymount University (May 2009). He would like to thank Ryan M. Rodenberg for his insightful comments in the course of preparing this comment.

I. INTRODUCTION

Collegiate athletics are meant to represent the purest form of sport. Athletes participate because they love the game; they are not paid vast sums of money like their counterparts on the professional level. They selflessly sacrifice in the name of representing the university which they attend. Collegiate athletes learn valuable life lessons such as hard work, discipline, and integrity. However, as television revenues and media exposure reach record heights,[2] college athletes and their universities are tempted to break the rules. The National Collegiate Athletic Association ("NCAA") acts as the governing body for almost all college athletics,[3] establishing and enforcing rules ranging from the recruiting of student-athletes to determining the amount of money a student-athlete may be allotted for meals on road trips. [4]

In *United States Department of Education v. National Collegiate Athletic Association*, the Seventh Circuit Court of Appeals affirmed the decision of the lower court holding that the NCAA was not entitled to a protective order for information requested by a Department of Education ("DoE") subpoena since its burden of compliance was speculative and outweighed by the government's investigative needs.[5] In doing so, the court jeopardizes the confidentiality of NCAA internal sources, resulting in a potential disruption of the NCAA's ability to conduct internal investigations that prevent (and punish) rule violations by member-institutions.

Part II of this Comment provides a synopsis of the facts and procedural history of the case. Part III summarizes the analysis used by the Seventh Circuit to reach its conclusion that the NCAA did not meet the substantive requirements to warrant a protective order pertaining to information disclosed as a result of a DoE subpoena. Part IV questions the majority opinion and argues that the NCAA is not requesting the court to create a new area of privilege. Instead, the NCAA is merely asking for protections that are warranted under existing authority. Part V discusses social consequences of the decision including a possible chilling effect on the self-reporting of NCAA violations by member-institutions. Part VI concludes that the court should have granted a protective order over documents and statements requested by the DoE to preserve the confidentiality of the whistleblower who reported the violations to the NCAA.

II. STATEMENT OF THE CASE

The NCAA creates and enforces the rules by which member-institutions agree to abide.[6] A violation may result in the NCAA imposing heavy fines or sanctions on the violating-institution, which may cause a severe competitive disadvantage.[7] Examples of punishments include forbidding the school from participation in post-season competition[8] or reducing the number of scholarships the athletic department may provide. There are many levels of violations, and the NCAA seeks to levy punishment in accordance with the severity of the infraction.[9] Furthermore, a member-school may minimize the impact of NCAA sanctions if it self-reports violations to the NCAA before they are discovered. It is this issue of self-reporting and the future viability of internal whistleblowers that were the integral focus in this case.[10]

During the 2004-2005 basketball season, the University of the District of Columbia ("UDC") self-reported rules violations to the NCAA.[11] Without going into detail, the court stated that the infractions included a misappropriation of federal funds in connection with the men's and women's basketball programs.[12] Upon learning of the alleged violations, the DoE launched its own investigation, separate and distinct from the NCAA's own investigation into the matter.[13] Along the way, the DoE issued a subpoena to the NCAA requesting documents that UDC submitted in connection with its self-report indicating the violations.[14] The DoE filed suit in order to compel the NCAA to deliver documents in accordance with the subpoena. In response, the NCAA requested a protective order from the court with the ultimate hope of requiring the DoE to give the NCAA notice five days prior to disclosing any of the documents to a third party. The lower court denied the NCAA's motion and they appealed on the matter of the protective order.[15] According to the lower court, any burden the subpoena placed on the NCAA was speculative and the importance of the DoE's investigation outweighed the NCAA's need for a protective order.

III. THE COURT'S REASONING

At the Court of Appeals level, Judge Posner, in a unanimous decision, found multiple reasons for rejecting the NCAA's request for a protective order prohibiting the dissemination of subpoenaed materials to outside sources. First, he noted a lack of judicially recognized privilege in this area. Next, Judge Posner doubted the NCAA's need for the protective order since the DoE benefits directly from the information provided and has its own incentive to maintain the confidentiality of the source, regardless of whether it is mandated to do so or not. Lastly, he found that the investigatory needs of the DoE outweigh any speculative concern that the NCAA may have pertaining to its own ongoing investigation.

A. Privilege

Judge Posner ruled that there is no court-recognized privilege that applies to this case.[16] Therefore, in asking for a protective order, the NCAA was essentially requesting that the court invent a new area of privilege.[17] Judicially recognized forms of privileges, such as between an attorney and a client, prevent the government from using information in connection with an investigation.[18] The attorney-client privilege even extends so far as to apply to an attorney's agents (which may include a private investigator). However, this privilege was found to be inapplicable in the instant case as the whistleblower did not seek out an attorney who then consulted the NCAA.[19] As such, there is no privilege extended to a NCAA investigation in a situation with these facts.[20]

The court likens the NCAA's request for a protective order to that of a media reporter's request for a similar order while investigating a news lead.[21] However, no such privilege exists in this instance either.[22] If the news media were able to conceal its sources from the government, it would certainly aid in their ability to conduct investigations.[23] Since no privilege is extended to news media, they do not have the luxury of protecting their sources. Similarly, the NCAA does not meet any of the judicially recognized forms of privilege and its investigation, according to Judge Posner, is similar to that of a media outlet.[24]

B. Policy Justifications

Next, the court noted that if a court order were granted instead of allowing the NCAA to claim privilege, it would still hamper the government investigation.[25] This would permit the DoE to collect the materials pursuant to the subpoena but restrict their use.[26] For instance, if the DoE wanted to deliver the documents to the Department of Justice prosecutor in connection with a possible grand jury, the DoE and Department of Justice would likely face a lawsuit from the NCAA.[27] Clearly this has a negative impact on the government investigation and would severely limit its ability to fully conduct its investigation. Thus, regardless of the outcome of the NCAA's prospective lawsuit, the restriction placed on government is unnecessary and unjustified.[28]

Next, Judge Posner noted that even though the DoE is not required to maintain the confidentiality of the NCAA's sources, it actually

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benefits by doing so.[29] The DoE does not want to "kill the golden goose by promiscuously disclosing information it receives from the NCAA."[30] This would have the effect of deterring whistleblowers from coming forward.[31] However, the court further noted that the Department of Justice requires federal investigators to notify the Attorney General when there are reasonable grounds to believe that the federal criminal law has been violated.[32] However, this court does not have the authority to override the DoE's requirement to report to the Department of Justice by creating a new privilege.[33]

The NCAA next advanced the argument that even if the DoE privately agreed to not share the identity of the whistleblower, the Freedom of Information Act ("FOIA") would require the government to provide public access to the records. Judge Posner rejects this theory by stating that the FOIA does not require government release of "records or information . . . [that] could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution *which furnished information on a confidential basis*."[34] He concluded that the italicized portion of the quotation applied to this case even though it was unclear whether or not the NCAA would have been considered to have furnished the information "on a confidential basis."[35]

Judge Posner further opined that the NCAA did not require a judicial protective order because "confidentiality is always a matter of degree."[36] A whistleblower who reports a violation to the NCAA might desire confidentiality to the extent the NCAA can guarantee it.[37] However, an informant should be aware that by reporting the violations to the NCAA, the protection can only go so far.[38] If the whistleblower makes it clear to the NCAA that he wishes to remain anonymous to the extent the NCAA can do so, then he/she may gain protection under § 7(D) of the FOIA.[39] The NCAA could then remind the whistleblower that while every effort will be made maintain his/her anonymity, the possibility of a government investigation (and thus a potential loss of confidentiality to the extent necessary) may exist.

Judge Posner noted that the distinction between a judicial subpoena and an administrative one (as we have here) was unimportant. The district court focused much of its opinion in this case on this subtle difference and how it applied to the standard of review.[40] However, the court of appeals believed that this was unnecessary because the DoE was operating well within the "substantive scope of its investigative powers."[41] The NCAA noted that an administrative subpoena, unlike a judicial one, may be quashed if compliance were "excessively burdensome so as to threaten the normal operation of the party's business."[42] However, Judge Posner rejects this theory by stating that the information subpoenaed in a case such as this will confer a greater public benefit than that "sought in a run-of-the-mill tort case, . . . [and thus] will have to demonstrate a greater burden of compliance in order to get it quashed."[43]

C. The Burden Placed on the NCAA

Lastly, the court concluded that the overall burden faced by the NCAA in complying with the subpoena was far outweighed by the investigative needs of the DoE.[44] The court believed that the need for a protective order was speculative at best, as the DoE was looking into a possible federal offense by UDC and had to be able to fulfill its duty to the general public. The DoE's need for the subpoenaed material was more important than the prospective confidentiality concern brought forth by the NCAA.[45]

PART IV: ANALYSIS OF THE COURT'S REASONING

The court erred in its analysis because it failed to take into the account the importance of internal investigations. The court should recognize a privilege pertaining to documents collected in the NCAA investigation because prior similar instances have allowed for it. Furthermore, the importance of internal investigations, and in particular whistleblowers, should be acknowledged. Without the aid of these important informants, the DoE and other governmental agencies would likely remain unaware of purported violations in cases akin to that of UDC.

A. Precedent

The NCAA argued to the trial court that compliance with the subpoena, absent basic confidentiality protections, would compromise the ongoing internal investigation.[46] In addition to factual information in support of its claim, the NCAA Senior Vice President for Enforcement, David Price, testified via affidavit about "the negative impact unprotected compliance with the [s]ubpoena would have on the NCAA and its fundamental enforcement activities, and the negative impact prior disclosures in similar circumstances have made."[47] The NCAA requested a basic protective order to ensure the confidentiality of its whistleblowers because recapturing sensitive materials after their public disclosure would be impossible. Such an order would provide practical relief by controlling the information and limiting its production to those parties who have subpoenaed the records.[48]

If the government is permitted to make unrestricted use of the materials provided in response to the subpoena, the identities of the whistleblowers will no longer be confidential.[49] This poses a particular threat to the investigatory process set forth by the NCAA. In order to promote universities to self-report rules infractions, which aid in the enforcement and deterrence effect of violations, the NCAA needs to protect the whistleblowers who come forward. Without such self-reporting, the NCAA opens itself up to cover-ups and far reaching scandals that may result in the crippling of collegiate athletics. Whistleblowers limit violations by bringing them to the immediate attention of the NCAA, which can react swiftly to punish and rectify the situation. Failing to protect their identities has the practical effect of eliminating their important role.

Precedent exists whereby courts provide protective orders of confidentiality to private organizations. This is done primarily because once the information is disseminated to the public, the harm has already occurred. Protective orders, such as in *North Atlantic Instruments, Inc. v. Haber*, provide protective relief by controlling, to the extent possible, use of documents collected in an investigation.[50] The NCAA is merely asking that the DoE restrict its use of the subpoenaed materials in order to provide anonymity to the whistleblowers. The NCAA is not objecting to delivering the DoE with the requested information; it simply is asking for protection with regard to how the DoE manages it.

B. Policy Justifications for Recognizing Privilege

Furthermore, the absence of a judicially recognized privilege does not prevent the court from providing the NCAA with a protective order maintaining confidentiality.[51] There are several instances where courts limit the use of subpoenaed or discoverable materials in order to maintain the confidentiality of the source.[52] For instance, the court in *Berst v. Chipman*, limited discovery under its supervisory powers even when a specific privilege did not apply.[53] Furthermore, the NCAA's fear in this case is even more significant since the DoE expressed its intentions to make further disclosures of relevant documents.[54]

Additionally, courts have ruled that a qualified privilege may be granted to communications made in good faith, relating to any subject matter, in which the disclosing party has an interest or a duty to protect the interest of another.[55] The privilege extends to those cases where the duty is not legal, "but where it is of a moral or social character of imperfect obligation. . . . It is grounded in public policy as well as reason."[56] The court in *Pate v. Service Merchandise Company, Incorporated* further notes that certain conditional privileges may cover many types of interests including a common or public interest.[57] The argument certainly may be made that in the instant case, a common interest privilege exists. All parties are ultimately interested in achieving the same result: discovering the full extent of the administrative and legal violations and levying just punishment in connection with such a finding. Providing a whistleblower with basic confidentiality protections is a relatively harmless, yet crucial, action to take to ensure the future cooperation of internal informants who aid both NCAA and government investigations.

PART V: IMPLICATIONS

A. Chilling Effect: A Brief Historical and Definitional Background

The term chilling effect was first coined in the mid- 1900's[58] and has been used by judges and scholars primarily in the First Amendment (free speech) context.[59] A chilling effect occurs "when individuals seeking to engage in lawful activity are deterred from doing so by a governmental regulation not specifically directed at that activity."[60]

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For example, an individual may be chilled from donating money to particular organizations for fear that the organization's list of donors may become public record.[61] Not only is the individual whose actions are "chilled" harmed as a result, but society as a whole incurs a loss which results from the individual's freedoms are inhibited.[62] The extent of the chilling effect generally depends on the level of public humiliation or stigmatization the individual will feel for speaking out or acting in accordance with his/her true beliefs and moral conscience.[63]

B. Chilling Effect: On Whistleblowers

A chilling effect seems imminent given the opinion handed down by the Seventh Circuit. This decision removes any guarantee of confidentiality that the NCAA may attempt to provide should the government step in with a subpoena.

1. Lawsuits

Without the promise of confidentiality, whistleblowers have to fear multi-million dollar lawsuits filed against them should they attempt to inform the NCAA about possible infractions.[64] Not only do they face lawsuits from those institutions which they disclose information about, they face issues of their own job security. In the *Fulmer* case, the report involved the head football coach at the University of Tennessee reporting possible violations of another school. However, one must also look at the likely possibility of a whistleblower reporting infractions committed by his/her own university.

The NCAA has seen the negative impact that exposing the identity of a whistleblower can have. Head football coach at the University of Tennessee, Phillip Fulmer,[65] informed the NCAA of possible violations committed by the University of Alabama[66]. The NCAA delivered this information to a grand jury as part of a subpoena. Soon after, Fulmer and the NCAA were hit with a $60 million defamation lawsuit.[67] As Judge Posner noted in the opinion, the incentive to self-report was "diminished not only by the threat of a defamation suit but also by the fact that, the fewer whistleblowers there are, the less likely violators of the NCAA's rules are to be caught and so the less incentive they have to turn themselves in."[68] The NCAA used this argument to show the need for a confidentiality protection. Without the protective order, the DoE has the right to disclose the identity of the informant, thus discouraging the self-policing nature of the NCAA's member institutions.

2. Job Security

Without a guarantee of confidentiality, the whistleblower has to worry about job security and whether or not this action will result in him/her having to find a new profession since it is unlikely that any other university would be willing to hire an administrator who willingly reports his/her university to the NCAA (and possibly to governmental authorities) for sanctions.[69]

3. Chilling Effect on Self-Reporting

In looking at the repercussions of this decision from the prospective of the NCAA, it potentially diminishes the NCAA's ability to catch and punish member-institutions for committing violations. With self-reporting a key component of the NCAA's enforcement mechanism, the resulting chilling effect may negatively impact its ability to police its own rules. Furthermore, since the NCAA is generally more lenient with regard to institutions which self-report violations, this practice is in jeopardy. This leaves the door open to more severe scandals in college athletics.

Without whistleblowers, rules violations may go on for years before they are discovered, if they are in fact uncovered at all. Depending on the nature of the violation, whistleblowers may be fearful that their disclosures could be viewed by non-NCAA parties at a later date, resulting in a wide range of possible consequences including, but not limited to, a defamation lawsuit and/or loss of job. If an athletic department administrator was aware of an NCAA violation taking place at his/her school, he/she would think twice about reporting it absent basic confidentiality protection from the NCAA and any subsequent organization which the NCAA complies with. As a result of this opinion, rules violations will likely go unreported and possibly undetected. Ultimately, this may mean that an alleged violation of federal law as in the UDC case may go unnoticed if whistleblowers are not provided anonymity.

C. Result: A Less Productive NCAA Means the Government Receives Less Important Information

Perhaps most importantly, how will the chilling effect created by this decision impact government investigations into NCAA member-institutions? While the predominate government interest was the underlying justification for the opinion, it may in fact have a directly adverse effect on the government's investigations. Ignore for a moment, the significant number of NCAA violations that take place each year. While most of them do not involve the legal system, there are select examples, such as the UDC case, where gross violations of federal law are alleged. In these instances, it is not the federal, state, or local authorities uncovering the scandal. Instead, it is the NCAA, in large part due to its self-policing culture, which is able to detect, investigate, and ultimately punish member-institutions who violate its rules and, more importantly, the law.

The government has every right to intervene where appropriate and conduct its own investigation where matters of law are in question. However, the government should take a long look at whether or not it wants to bite the hand that feeds it. Without the NCAA doing much of the legwork, administrative agencies would have no knowledge of these situations. Providing confidentiality to important informants serves the interests of all parties involved. Indirectly discouraging whistleblowers from coming forward and reporting NCAA and potentially legal violations is not a productive practice for the courts. Encouraging those in a position of knowledge to come forward with valuable evidence is in the best interest of the government. Creating a chilling effect by failing to provide basic confidentiality protections for informants clearly inhibits the goals of all interested parties, particularly the government.

IV. CONCLUSION

Failing to grant the NCAA's request for a protective order may have long-standing repercussions. The NCAA has a history of self-regulation which may be in jeopardy if whistleblowers are not guaranteed anonymity. The court may in fact be doing a disservice to the DoE because valuable information that the NCAA collects during investigations may no longer be available to the DoE's investigatory arm.

1 Bryan V. Swatt is a J.D./M.B.A. candidate at Loyola Law School and Loyola Marymount University (May 2009). He would like to thank Ryan M. Rodenberg for his insightful comments in the course of preparing this comment.
2 Richard Sandomir, *N.C.A.A. Fans Courted With Free Webcasts*, N.Y. Times, March 14, 2006.
3 The lone exception remains the National Association of Intercollegiate Athletics which maintains a membership of approximately 360 universities and colleges. *See History of the NAIA*, http://naia.cstv.com/genrel/090905aai.html (last visited May 3, 2008).
4 The NCAA is a voluntary association of about 1,200 institutions, conferences, organizations and individuals that organizes the athletic departments of many colleges and universities in the U.S. Member schools vow to abide by the rules set forth by the NCAA. The mechanism to enforce the NCAA's legislation was created in 1952 after careful consideration by member-schools. Allegations of rules violations are referred to the NCAA's investigative staff. A preliminary investigation is initiated to determine if an official inquiry is warranted and then the level of the alleged violation is categorized based on its severity. The university is notified (unless they self-reported) and has the right to appear on its own behalf before the NCAA Committee on Infractions. *See About the NCAA*, http://www.ncaa.org (last visited Mar. 10, 2008) [hereinafter *About the NCAA*].
5 United States Dept. of Education v. National Collegiate Athletic Assoc., 481 F.3d 936 (7th Cir. 2007).
6 *See About the NCAA*, supra note 2.
7 *Id.*
8 *NCAA*, 481 F.3d at 937-38. In many instances, television and sponsorship revenue is created and distributed in accordance with post-season competition. If a school is removed from such competition, it can result in a loss of millions of dollars. *Id.*
9 Joe Drape, *Facing N.C.A.A., the Best Defense Is a Legal Team*, N.Y. Times, March 4, 2007.
10 *NCAA*, 481 F.3d at 937-38.
11 *Id.* at 938.
12 *Id.*
13 Id.
14 Id.
15 Id.
16 *Id.* at 938
17 *Id.*
18 *Id.*
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.* *See* Branzburg v. Hayes, 408 U.S. 665 (1972).
23 *NCAA*, 481 F.3d at 938
24 *Id.*
25 *Id.* at 939
26 *Id.*
27 *Id.*
28 *Id.*
29 *Id.*
30 *Id.* at 939-940.
31 *Id.* at 940.
32 *Id.*, *See* Attorney General Guidelines for Offices of Inspector General with Statutory Enforcement Authority, § VII, at 4-5 (Dec. 8, 2003).
33 *NCAA*, 481 F.3d at 940.
34 *Id.*, 5 U.S.C. §552(b)(7)(D) (emphasis added).
35 *NCAA*, 481 F.3d at 940.
36 *Id.* at 941.
37 *Id.*
38 *Id.*
39 According to the opinion in this case, the NCAA must always comply with a subpoena, but may be granted confidentiality by the government agency to the extent the law permits it. If the informant makes it clear to the NCAA that he/she would like to remain anonymous, then this likely would fall under the §7(D) exception of the FOIA and the government agency has the discretion whether or not to make the informant's identity available for public consumption. *See Id.* at 940.
40 *NCAA*, 481 F.3d at 941.
41 *Id.*
42 *Id.*, Commodity Trend Service, Inc. v. CFTC, 233 F.3d 981, 987 (2000).
43 *Id.*
44 *Id.* at 942.
45 *Id.*
46 NCAA Brief to the Court, 2007 WL 3388284 at 3.
47 *Id.*
48 *Id.* at 4.
49 *NCAA* 481 F.3d at 938.
50 Brief to the Court, NCAA, 2007 WL 3388284 at 4. *See*, North Atlantic Instruments, Inc. V. Haber, 188 F.3d 38, 49 (2d Cir. 1999). Isn't the Second Circuit the weird circuit that just puts "d" after its number? I can't remember for sure, but check the Bluebook)
51 Brief to the Court, NCAA, 2007 WL 3388284 at 6.
52 *Id.*
53 *Id.* at 7., Berst v. Chipman, 653 P.2d 107, 187 (Kan. 1982).
54 Brief to the Court, NCAA, 2007 WL 3388284 at 7.
55 Pate v. Service Merchandise Co., Inc. 959 S.W.2d 569 at 576 (Tenn. App. 1996)., quoting Southern Ice Co. v. Black, 189 S.W. 861 (1916).
56 *Id.*
57 *Id.*
58 It is believed that Justice Frankfurter first used the term in his opinion in Wieman v. Updegraff, 344 U.S. 183, 195 (1952). Gayle Horn, ONLINE SEARCHES AND OFFLINE CHALLENGES: THE CHILLING EFFECT, ANONYMITY AND THE NEW FBI GUIDELINES, 60 New York University Annual Survey of American Law 735, at 751(2005).
59 *Id* at 749.
60 *Id.* at 750.
61 *Id.*
62 *Id.*
63 *Id.*
64 Dagnan v. Fulmer, No. 163126-3 (Knox Cty., Tenn., Chancery Ct., Nov. 21, 2005).
65 Coach Fulmer is a high profile football coach who has a well known reputation across the country. He led the University of Tennessee to the National Championship in 1998 and also was honored as the National Coach of the Year. *See Phillip Fulmer – Head Coach Bio*, http://www.utsports.com/football/coachbio.aspx?id=10852 (last visited Mar. 10, 2008).
66 *See Attorney alleges conspiracy between NCAA, Fulmer,* http://sports.espn.go.com/espn/print?id=1719629&type=HeadlineNews&imagesPrint=off (last visited May 6, 2008).
67 Dagnan v. Fulmer, No. 163126-3 (Knox Cty., Tenn., Chancery Ct., Nov. 21, 2005).
68 *NCAA*, 481 F.3d at 939.
69 Perhaps the most notable whistleblower in the world of collegiate athletics was Linda Bensel-Meyers. A former professor at the University of Tennessee, Bensel-Meyers reported what she believed were academic violations in the Volunteer athletic program. She has since left the university to teach at Denver University. After reporting her findings at Tennessee, Bensel-Meyers was "met with institutional threats and public attacks on her character." *See* Tom Farrey, 'It transformed my whole life,' http://sports.espn.go.com/espn/print?id=1632218&type=story (last visited May 7, 2008).

TexasBarCLE presents the 18th Annual

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October 2-3, 2008 Austin Hyatt Regency Hotel

Cosponsored by the Entertainment and Sports Law Section of the State Bar of Texas

Thursday 7.25 hrs

7:45 **Registration and Continental Breakfast**

8:30 **Welcoming Remarks**
Course Director
Mike Tolleson, *Austin*
Mike Tolleson & Associates

8:45 **Recent Court Cases Impacting the Entertainment Industry** *1 hr*
Stan Soocher, *Denver, CO*
Editor-in-Chief
Entertainment Law & Finance

9:45 **Review of Recent and Proposed Legislation** *.75 hr*
Stan Soocher, *Denver, CO*
Editor-in-Chief
Entertainment Law & Finance

Jay Rosenthal, *Washington, D.C.*
Senior VP and General Counsel
National Music Publishers' Association

10:30 **Break**

10:45 **Let the Radio Play: Fleeting Expletives, Payola, Content, Consolidation and Other Hot Topics in Radio** *1 hr / .25 ethics*
Dale Anthony Head, *Houston*
Phillips & Reiter

Michael Newman, *Houston*
New Music Server

Laura Lee Prather, *Austin*
Sedgwick, Detert, Moran & Arnold

11:45 **Break - Lunch Served**

12:05 **Texas Star Award Presentation**
Honoring Donald S. Passman, recipient of the 2008 Texas Star Award for Outstanding Achievement in the field of Entertainment Law

12:15 **Luncheon Presentation: Texas Star Award Recipient** *.5 hr*
Donald S. Passman, *Hollywood, CA*
Gang, Tyre, Ramer & Brown

12:45 **Break**

TRACK ONE
Copyrights and Film

1:00 **Fundamentals of Copyright Terminations - When an Irrevocable Grant of a Copyright Interest is Revocable** *1 hr*
Michael Perlstein, *Los Angeles, CA*
Fischbach, Perlstein, Lieberman & Almond

2:00 **"She Got the Goldmine, I Got the Shaft" - When Copyright Collides with Community Property Rights, What Gives?** *1 hr / .25 ethics*
Michael Perlstein, *Los Angeles, CA*
Fischbach, Perlstein, Lieberman & Almond

J. Craig Barker, *Austin*
Law Office of Craig Barker

Barbara A. Kazen, *Austin*
Friday, Friday & Kazen

3:00 **Break**

3:15 **Voodoo Film Production: Film-making Louisiana Style** *1 hr*
Michael Arata, *New Orleans, LA*
Attorney at Law

Louisiana Film Commission invited

4:15 **Working with the Guilds: Independent Producer's Guide to Hiring WGA and SAG Members in Film, Video-Gaming, and New Media** *1 hr*
Lise Anderson, *Los Angeles, CA*
Writers Guild of America, West

Maureen A. Doherty, *Houston*
Doherty Legal

Bob Jensen, *Los Angeles, CA*
Screen Actors Guild

5:15 **Adjourn**

TRACK TWO
Music

1:00 **Doing It Yourself: Opportunities for Bands in the Digital Era (Texas attorneys talk about the trends)** *1 hr*
J. Craig Barker, *Austin*
Law Office of Craig Barker

Edward Z. Fair, *Austin*
Law Offices of Ed Fair

Buck McKinney, *Austin*
Attorney at Law

Kenneth William Pajak, *Austin*
The Bannerot Law Firm

2:00 **Getting Organized: What Bands Need to Know to Launch a Successful Career** *1 hr*
Edward Z. Fair, *Austin*
Law Offices of Ed Fair

Kenneth William Pajak, *Austin*
The Bannerot Law Firm

3:00 **Break**

3:15 **Management Agreements - The Prenuptial Agreement Between Artists and Managers** *.5 hr*
Buck McKinney, *Austin*
Attorney at Law

3:45 **Music Publishing Agreements for Bands - All for One, or One for All?** *.75 hr*
Steve Winogradsky, *N. Hollywood, CA*
The Winogradsky Company

4:30 **Music Distribution - Licensing Recordings in the Digital Era** *.75 hr*
Steven Corn, *Valley Village, CA*
BFM Digital

5:15 **Adjourn**

Friday
6 hrs including 1 hr ethics

8:00 **Continental Breakfast**

8:20 **Announcements**

8:30 **Music Royalties in the Digital Space: Brave New World or Apocalypse Now?** *1 hr*
Kerri Howland-Kruse, *New York, NY*
BMI

Steven M. Marks, *Washington, D.C.*
Recording Industry Association of America

Kathryn Wagner, *New York, NY*
National Music Publisher's Association

Steve Winogradsky, *N. Hollywood, CA*
The Winogradsky Company

9:30 **Latest Trends in the Music Business including 360 Deals and Digital Media** *1 hr*
Donald S. Passman, *Hollywood, CA*
Gang, Tyre, Ramer & Brown

10:30 **Break**

10:45 **They're Coming to Take Us Away: Orphan Works and ISP Licensing in the Google Nation** *1 hr*
Chris Castle, *Sherman Oaks, CA*
Christian L. Castle, Attorneys

Jay Rosenthal, *Washington, D.C.*
Senior VP and General Counsel
National Music Publishers' Association

11:45 **Lunch On Your Own**

1:00 **Ethics: Not a Game** *1 hr ethics*
Tamera H. Bennett, *Lewisville*
Bennett Law Office

Coyt Randal Johnston, *Dallas*
Johnston-Tobey

2:00 **Break**

TRACK ONE
Music and Digital Media

2:15 **Insurance Issues in the Music Business** *1 hr*
James Chippendale, *Dallas*
CSI Entertainment Insurance

Edward Z. Fair, *Austin*
Law Offices of Ed Fair

Lawrence Temple, *Austin*
Capitol Sports and Entertainment

3:15 **Digital Equivalency and the Law: Teaching Old Lawyers New Tricks in the World of Digital Media Convergence** *1 hr*
Gregg Perry, J.D., *Austin*
Assistant Professor, Digital Media Management Program
St. Edwards University

4:15 **Adjourn**

TRACK TWO
Sports

2:15 **Sponsorship and Endorsement Deals for Celebrity Athletes** *1 hr*
Bill Henkel, *Houston & Kansas City, KS*
Managing Partner, 10 Sports Marketing, LLC
A Sanders Morris Harris Group Co.

Jeff Nalley, *Houston*
Chief Operating Officer & General Counsel, Select Sports Group, LLC
A Sanders Morris Harris Group Co.

Melissa Ravenscroft, *Austin*
President, Corvosi

3:15 **Injury Grievances and Workers' Comp for NFL Players** *1 hr*
John Edward Collins, *Dallas*
Burleson Pate Gibson

Brian Michael Cooper, *Houston*
Haynes and Boone

4:15 **Adjourn**

2008 TEXAS STAR AWARD RECIPIENT

DONALD S. PASSMAN is the author of *All You Need To Know About The Music Business* and a graduate of the University of Texas and Harvard Law School. He practices law with the Los Angeles firm of Gang, Tyre, Ramer & Brown and has specialized in the music business for over thirty years.

Don has been listed in the *Best Lawyers in America* for over twenty years, as well as the *Top 100 Lawyers in California*, Lawdragon's *Top 500 Attorneys in America*, and *Southern California Super Lawyers.*

He has lectured extensively on the music industry, including Harvard Law School, Yale Law School, USC Law School, UCLA Law School, the Los Angeles Copyright Society, and the Beverly Hills Bar Association. Don is also the author of two novels, *The Visionary* and *Mirage*, published by Warner Books.

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THE NCAA'S VIOLATIONS OF ITS STUDENT-ATHLETES' PUBLICITY RIGHTS:
De-Regulation as a Means of Achieving Economic Efficiency and Fairness

Wesley D. Sherman

Wesley D. Sherman is an associate in the West Palm Beach office of Cole, Scott & Kissane, P.A., practicing general civil litigation. Mr. Sherman received a Bachelor of Arts in Economics from Hamilton College, where he was an all-conference soccer player, and he earned his Juris Doctor from The Florida State University College of Law. As a member of the FSU Moot Court Team, he competed in the Tulane Mardi Gras Sports Law Competition, was a semi-finalist at the Henry G. Manne Moot Court Competition for Law & Economics, and was chosen for The Order of Barristers.

I. INTRODUCTION

As collegiate athletics are increasingly commercialized, people often debate whether college athletes should be paid to play or in some other way compensated for their on-field performances. The National Collegiate Athletic Association ("NCAA"), which governs the athletic programs of all major colleges and universities, prohibits its student-athletes from being compensated based upon athletic skill or participation in any form except for tuition, fees, room and board, and books.[1] Although most universities actually lose money on their athletic programs as a whole,[2] the goodwill toward the universities created by visible and successful players and teams, the resulting alumni donations, and a great deal of accounting flexibility may actually produce a net benefit for many major universities.[3] Moreover, the merchandising of items such as jerseys, shoes, apparel, and video games featuring college athletes and logos is a multi-billion dollar industry.[4] Thus, while the merits of a basic pay to play model are tenuous, and the best means of implementing such a system remain even more elusive, the potential violation of many student-athletes' rights of publicity and the resulting damages they may suffer is an issue that the NCAA, the courts, and/or the legislature must address.

The purpose of this paper is not to address whether student-athletes should be paid for play. Even at the highest level of Division I competition in the largest revenue sports (i.e. football and basketball), there are a variety of reasons why attempting to pay players is not an answer to the problems that athletes face.[5] Allowing student-athletes to receive compensation for revenue earned through the use of individual athlete's identities, however, is a much more feasible solution to some of the problems faced by today's highly marketable Division I athletes.

It must first be noted that the number of student-athletes who would benefit from a change in the rules regarding student-athlete compensation for use of their identities is relatively small.[6] The amount of money in question, however, is anything but small. In fact, the NCAA runs a multi-billion dollar business.[7] Therefore, the NCAA should not be able to justify its refusal to share revenues earned from its use of student-athletes identities merely because of its alleged amateurism model.[8] Nor should the NCAA be able to hide behind arguments that it would be difficult to determine what portion can be attributed to which athletes, what portion can be attributed to the schools versus those athletes, or, in the event those numbers could be determined, the small number of athletes who are responsible for earning that revenue.

The easiest way to explain and understand the appropriation of student-athletes' identities by the NCAA and its universities is through the sale of jerseys. To illustrate, the buyer of a number fifteen University of Florida football jersey is clearly purchasing a Tim Tebow jersey, even though the jersey does not have his name on it.[9] It is because of that number fifteen that the purchaser chooses that specific jersey; however, the buyer is also interested in that jersey because it represents the University of Florida ("UF"). Thus, the revenue from the jersey sale is attributable to both Tim Tebow and UF. Without the university and its football team, Tebow would not be able to demonstrate his on-field talents. Without Tebow, however, UF would likely not be able to win as many football games and, as a result, reach the level of notoriety it has achieved. The popularity gained by winning, of course, translates into more jersey sales and more revenue for the school.

Jersey sales, however, are merely representative of a common situation in high-revenue college sports that may arise in a variety of other contexts, some of which are not as easily recognizable as identity appropriations. For example, networks pay large fees to the NCAA to televise football and basketball games. As part of these telecasts, the networks undoubtedly hope to show successful teams with popular players. The network ratings benefit from games between popular schools with large followings (such as UNC's basketball program), but also from games in which superstar players take the court (i.e. Texas' Kevin Durant and Ohio State's Greg Oden during the '06-'07 season). Thus, when the networks, which have bargained with the NCAA (as the representative for the universities) but not with the individual student-athletes, advertise upcoming games by showing highlights of the marquee players, they benefit in the form of increased ratings and ad sales while the universities benefit from the national exposure. The student-athletes, who actually play the game, however, receive nothing. Again, there is some portion of both the university and the players that causes networks to pay the NCAA to televise its games, but the players responsible deserve to be compensated for their portion.

Both of these examples are mere illustrations of a larger issue – whether student-athletes should be permitted to be compensated for the use of their identities by the NCAA and its member institutions. The mere fact that numerous books, articles, and symposia have been conducted to address this issue alone suggests that there are strong arguments to be made in favor of compensating student-athletes. Equally well documented, however, are the problems that would arise with a pay for play system.[10] What I suggest, rather, is that the NCAA revise its bylaws so that its student-athletes are permitted to market their identities. By the NCAA allowing its student-athletes to transact in the open market to be compensated for the use of their identities (and perhaps by setting aside the income earned by the NCAA from the use of their identities for distribution once their college careers are over as well), those student-athletes whose identities are, in fact, earning significant revenue for the NCAA and the universities will be justly compensated for that use. The NCAA and the universities would not, however, be required in any way to compensate student-athletes merely for their participation in NCAA athletics. If the NCAA refuses to change its policies and continues to appropriate the identities of its most popular student-athletes', however, it may soon face a right of publicity claim.

Were the NCAA to follow this suggestion and repeal its prohibition on compensation to student-athletes for the use of their identities for purposes of trade, the NCAA would 1) avoid a potential lawsuits for violation of the student-athletes' rights of publicity; 2) avoid another potential challenge to the antitrust protection it was granted in the *Board of Regents* decision;[11] 3) appease proponents of the problematic pay for play model for NCAA student-athletes; and 4) keep those student-athletes which it values most highly – those whose identities are most marketable – in school longer because they would not be as inclined to leave for professional leagues in order to make a living.

II. AN ECONOMIC ANALYSIS OF THE FEASABILITY OF NCAA STUDENT-ATHLETE COMPENSATION

A. Assessment of the Current "Compensation" Scheme

One author estimated that the median hourly wage of a Division IA men's basketball player on full scholarship is $6.82 and that of a Division IA football player is $7.69.[12] If a student-athlete is serious about school and earns a degree, then this is not bad compensation for a "minor league" sport.[13] Thus, students who receive full scholarships to play "non-revenue" sports, such as soccer, tennis, golf, swimming,

Continued on page 10

Continued from Page 9

volleyball, softball, etc., receive generous remuneration for their on-field services considering that their sports generate very little, if any, revenue for their schools or the NCAA.[14] Along with the coaches and athletic directors, then, these student-athletes are the true beneficiaries of intercollegiate sports.[15]

Star players in the revenue-earning Division I sports, however, are paid at the same implicit wage as both their reserve teammates and non-revenue full scholarship athletes.[16] Thus, stars, especially those who gain neither an education nor a degree, do not receive "market" wages in return for their services.[17] Admittedly, it is not viable to increase the value of scholarships because so few schools have surpluses in their budgets.[18] Moreover, paying college athletes a wage not only means payroll taxes, worker's compensation, and other expenses, but also creating a labor market where players receive widely different salaries.[19]

In the end, the number student-athletes who are financially exploited by the current system is relatively small.[20] For one, the top players who produce the most revenue are likely bound for the pros where they will become millionaires,[21] so their inability to capitalize on their talents and marketability in college is forgotten. Second, many well-qualified students who also happen to be athletically gifted receive a valuable college education for free.[22] Third, some athletes are not well-qualified academically upon entering college, but they study hard, earn a degree, and gain skills that they never would have obtained but for their athletic talents, which got them into a particular college and put them through that college for free.[23]

There are a number of athletes, however, that are harmed by the system because they get neither an education nor a degree, and they also do not make it to the pros.[24] Thus, a problem exists with the current system and that problem will only get worse as high-revenue college sports continue to earn more money while some universities do not enforce academic standards on their high-profile athletes. As Andrew Zimbalist accurately summarizes:

> Participants in big-time college sports are all unpaid professionals, but paying them directly for their work on the school team is neither economically feasible nor socially desirable. A reasonable argument, however, can be made that the NCAA places too many restrictions on the top athletes' ability to earn income off the playing fields. For instances, it makes little sense for schools to be able to sell memorabilia that exploit a student-athlete's likeness and for the player to receive no compensation for royalties. Most U.S. Olympians are not paid for their performance in the Olympics, but they are permitted to sign remunerative advertising and endorsement deals.[25]

B. The Coase Theorem

The Coase Theorem provides that the assignment of liability does not matter when there are no transactions costs because all mutually beneficial trades will be made.[26] For situations in which there are transactions costs, however, the outcome is affected by the assignment of liability, and society benefits most by assigning liability to the low cost mitigator (i.e. the party that incurs the lowest costs in achieving an objective). Thus, situations with high transactions costs lend themselves to regulation, but for those in which there are low transactions costs, it may be best to leave the market alone because it will tend to reach the optimal societal outcome through mutually beneficial exchanges.

Take, for example, the businesses of a confectioner and a doctor. Assume that the confectioner's overall benefit from staying in business is 40 while the doctor's benefit from providing his services is 60.[27] The work spaces of the two businesses share a wall, however, and the confectioner's method of production is loud, but the doctor needs quiet in order to run his business effectively. Thus, the doctor is harmed by the confectioner's business. If the confectioner is forced to make his machine quiet, on the other hand, the confectioner's overall benefit suffers. If, as a society, the confectioner is held liable, the best he can do is to shut down his business. By shutting down his business his overall benefit will be 0, whereas it would be negative 20 if he were forced to pay the doctor 60 in damages. By shutting down, however, the confectioner is left with 0, the doctor with 60, and society has an overall benefit of 60. If, on the other hand, the confectioner is not liable, he would get a benefit of 40 from operating. The doctor, recognizing this, will bargain with the confectioner to give him at least 40 and at most 60 in return for discontinuing his business, giving the confectioner a benefit of P (the price paid by the doctor to the confectioner), the doctor a benefit of 60-P, and society 60-P+P, which is 60. Therefore, society is the same off regardless of the assignment of liability.

In some instances, there will be a method of mitigating the harm inflicted by one's business on another's. Take the example of the confectioner and the doctor again, but now assume that the confectioner can sound proof his work space at a cost of 20. If the confectioner is held liable for the sound he causes, he can avoid shutting down by mitigating the problem so that he will have a benefit of 20 (40 minus the cost of mitigation (20)), the doctor will have a benefit of 60, and the total benefit to society is 80. If the confectioner is not liable, however, the doctor will pay the confectioner 20 to sound proof his work space so that the doctor ends up with a benefit of 60-P, where P is less than 60, the confectioner ends up with a benefit of 20+P, and society again ends up with a benefit of 80. Therefore, without transactions costs again, the assignment of liability is irrelevant to the overall benefit to society, assuming the parties are able to agree on P, which will be some amount between 20 and 60.

In most situations, however, there are transactions costs, so it is important to figure out how the assignment of liability will affect society's outcome. More importantly, understanding the effect that the transactions costs have on the assignment of liability will enable us to determine whether, and, if so, which, regulation can improve on the free market outcome. Going back to the confectioner and the doctor, assume now that the confectioner's benefit from operating noisily is 60, the doctor's benefit from operating quietly is 40, the cost to sound proof is 20, and there are transactions costs of 25. If the confectioner is liable, the doctor's benefit is 40, the confectioner's benefit is 40 (60 minus the 20 to sound proof), and society gets 80 overall units of benefit. If the confectioner is not liable, however, he has a benefit of 60 from operating noisily, the doctor will be forced to shut down because it is not worth it for him to pay the confectioner because his initial 40 minus 20 to sound proof as well as the 25 to transact would leave him with a net loss of negative 5. By shutting down, however, society's overall benefit is only 60. Therefore, the law matters, and society benefits by assigning liability to the low cost mitigator – the confectioner in this case.

The affect of politics must be considered in assessing the outcome of any economic situation. In this hypothetical society, which is only made up of the doctor and the confectioner, any vote on the assignment of liability will be one to one. If a government is able to objectively observe the situation, however, it can recognize that society is better off when liability is assigned to the confectioner when transactions costs are 25. In a regulatory ideal, then, the government can decide to assign liability to the confectioner and use the extra 20 units of benefit to society to insure that, at a minimum, some parties are made better off and no party is made worse off. As can often be seen, however, in a political society, the government does not necessarily choose the situation that does not make anybody worse off. Rather, due to political influences, often times governing bodies make some better off at the expense of others.

There are very few transactions costs for exchanges involving the use of student-athletes' identities for commercial benefit. For one, there is already a model available in professional sports. That is, professional athletes are often represented by agents, who help them negotiate deals with companies which use the athletes' identities to sell their products. It would not require much time or money, then, to transition to a similar model for college athletes. By permitting athletes to have agent representation, most mutually beneficial exchanges would be made because the companies seeking to market individual athletes could deal with those athletes' agents. Similarly, athletes seeking extra income while in college would be able to employ agents to seek out companies for the players they represent. Moreover, many player-agent relationships are conducted on a percentage basis, so the arrangement would not require student-athletes to find extra money to hire agents, nor would it encourage agents to prey on athletes who they do not think will be marketable. Thus, in this low-transactions cost situation, eliminating the NCAA's regulation governing athlete compensation for use of their identities would enable most efficient transactions to be taken.

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The sale of jerseys, discussed briefly in Part I, illustrates this point. At the most basic level, a college athlete could sell his or her jersey to a fan who wants the jersey. Aside from the meager costs of finding each other – either a fan expressing an interest in the athlete's jersey or the athlete reaching out to an interested fan – there are no transactions costs associated with this mutually beneficial exchange. Moreover, no party is made worse off as a result of the transaction. Therefore, since each party has maximized its utility and no party has been made worse off, an unregulated market for the sale of jerseys is the optimal outcome (i.e. the maximum level of economic efficiency).

Unfortunately for high-profile student-athletes, despite the low transactions costs, they are subjected to a heavily regulated industry. There are a few reasons for the current state of the NCAA's regulatory scheme. First, the student-athletes are the only ones who actually suffer financially as a result of the NCAA's heavy regulation. As discussed above, the rest of the parties involved in collegiate athletics are free to enter into mutually beneficial exchanges and, as a result, have no desire to see anything change. It is not even that the parties other than the student-athletes are apathetic about seeing changes to the NCAA framework, but many actually are opposed to any changes because any compensation received by the athletes could potentially take away from their slice of the pie.

In addition, even those athletes on the high-revenue teams that do not receive public exposure would likely be opposed to a system that allowed for student-athlete compensation. While the lure of one day becoming the team's marquee player would loom, the fact remains that the current system enables the universities to maximize their revenue by taking the high-profile athletes' endorsement opportunities and then redistributing it to the rest of the team in the form of scholarships. As a result, it is likely up to the individual student-athletes financially injured by the appropriation of their identities due to the current NCAA framework to bring a claim against the NCAA before any regulatory overhaul is ever implemented.

Moreover, the high-profile student-athletes do not have any "political" power to influence a change in the NCAA's regulatory scheme. Aside from being mere 18-22 year old college students, they are also vastly outnumbered and out-powered by those in favor of the current system. Most notably, they are aligned against the NCAA, which, as mentioned above, is a multi-billion dollar organization. Thus, any challenge brought against the NCAA faces the full weight of its resources, legal counsel, and history (a factor that, somewhat surprisingly, the Court is fond of looking to in cases involving sports[28]). Further, any plaintiff against the NCAA also faces a heavy body of NCAA-friendly case law.

III. THE BLOOM DECISION AND THE CURRENT STATE OF THE RIGHT OF PUBLICITY AND ANTITRUST LAW AS APPLIED TO THE NCAA

A. The Right of Publicity

The right of publicity proscribes anyone from appropriating "the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade."[29] Practically, this not only gives every person the right to control the commercial use of his or her identity,[30] but also protects one's persona, including his or her likeness, nickname, performing styles, and voice imitations.[31] Although the right of publicity has been applied in cases involving athletes, it has yet to be addressed in the context of college athletes despite serious violations of NCAA student-athletes' publicity rights.[32] Moreover, while universities are able to enter into endorsement agreements and other contracts for the commercial use of the student-athletes' identities, the players themselves are prohibited from doing so.[33]

The right of publicity developed out of the common law right of privacy. As Dean William Prosser explained, while the first three types of privacy violations redress personal interests, the right of publicity is designed to protect a person's financial interest.[34] A court first recognized an independent right of publicity in *Haelan Laboratories, Inc. v. Topps Chewing Gum*.[35] In *Haelan*, the plaintiff, a chewing gum company, entered into a contract with a professional baseball player granting the plaintiff the exclusive right to use the player's photograph for a stated term.[36] The defendant, a rival chewing gum manufacturer, however, deliberately induced that player to authorize it to use the player's photograph during the term of the plaintiff's contract.[37] Since the plaintiff's contract with the player granted an exclusive "right of publicity," the court held that the plaintiff had "a valid claim against defendant if the defendant used that player's photograph during the term of the plaintiff's grant and with knowledge of it."[38]

With the Prosser analysis and the *Haelan* decision, the right of publicity was born.[39] The Supreme Court eventually recognized a common law right of publicity in *Zacchini v. Scripps-Howard Broad. Co.*,[40] which explained that the right of publicity provides an economic incentive for individuals to develop and use their talent for future creative activities.[41] In *Zacchini*, a freelance reporter for the defendant recorded the plaintiff's "human cannonball" act, which was then shown on the 11 o'clock news.[42] The Supreme Court held that the broadcast posed "a substantial threat to the economic value" of the plaintiff's performance.[43] In addition, the Court explained that "[n]o social purpose is served by having the defendant get for free some aspect of the plaintiff that would have market value and for which he would normally pay."[44]

1. Identity

As the publicity rights doctrine has developed, it has been extended beyond protecting just the names and photographs of individuals.[45] For example, in *Ali v. Playgirl, Inc.*,[46] the court recognized that a celebrity has a right to control the distribution of his or her likeness.[47] In *Ali*, former heavyweight champion Muhammad Ali brought suit against Playgirl Magazine for the unauthorized printing and distribution of an objectionable depiction of a nude black man seated in the corner of a boxing ring and recognizable as Ali.[48] The defendant argued that Ali was not protected by the statutory right of privacy because he "chooses to bring himself to public notice."[49] The court rejected this argument, however, because "such a contention confuses the fact that projection into the public arena may make for newsworthiness of one's activities, and all the hazards of publicity thus entailed, with the quite different and independent right to have one's personality, even if newsworthy, free from commercial exploitation at the hands of another."[50]

Similarly, other circuits have refused to limit the methods that may be used by a defendant to appropriate a celebrity's identity.[51] In *Abdul-Jabbar v. Gen. Motors Corp.*, the defendant car company showed the plaintiff's former name, Lew Alcindor, in an advertisement during the NCAA basketball tournament.[52] Although the defendant did not suggest that plaintiff endorsed its product, it did use the plaintiff's name without his consent and without compensating him.[53] The court, which held that the plaintiff alleged sufficient facts to state a claim of action for appropriation of his identity, reasoned that the defendant's illegal use of the plaintiff's name or likeness is not limited to its present use.[54] In addition, the court explained that it is not important whether the defendant suggested that the plaintiff endorsed its product, but rather that it attracted viewers' attention and gained a commercial advantage.[55]

Courts have also recognized that "[i]t is not important *how* the defendant has appropriated the plaintiff's identity, but *whether* the defendant has done so."[56] In *White*, the defendant ran an advertisement with a robot dressed like the plaintiff, Vanna White, without her consent.[57] In response to her right of publicity claim, the court held that the defendant had appropriated her identity.[58] The court reasoned that although the advertisement did not use plaintiff's name or likeness explicitly, the right of publicity does not require that appropriations of identity be accomplished through particular means to be actionable.[59] Rather, "[i]f the celebrity's identity is commercially exploited, there has been an invasion of his right whether or not his 'name or likeness' is used."[60] As an overarching policy, the court explained that because of the "considerable energy and ingenuity" expended by those who have become celebrities, the law must protect their "sole right to exploit this value."[61]

2. For Purposes of Trade

In order to violate an individual's publicity rights, a party must not only appropriate his or her identity, but the identity must be used for purposes of trade.[62] As the right of publicity began to take shape,

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courts recognized that the use of information about a celebrity "for the purpose of capitalizing upon the name by using it in connection with a commercial project other than the dissemination of news articles or biographies" constituted a violation.[63] In *Palmer*, the defendant sold a game with cards depicting the names and profiles of twenty-three famous professional golfers without the golfers' consent.[64] The court, in holding that the defendant violated the plaintiffs' privacy rights, explained that "[i]t is unfair that one should be permitted to commercialize or exploit or capitalize upon another's name, reputation or accomplishments merely because the owner's accomplishments have been highly publicized."[65] Moreover, the court reasoned that a celebrity's decision not to capitalize on his or her name does not justify others to do so.[66]

In the case of student-athletes, the NCAA is not taking on marketing opportunities that the student-athletes have decided for forgo (though that would still be illegal). Rather, the student-athletes are not even permitted to entertain such opportunities.[67] While not all of the NCAA's publicity rights violations are as clear as the violation in *Palmer*, where the defendant sold a board game featuring cards with professional golfers' names, pictures, and statistics without the golfers' consent, some of its activities would certainly be found by courts to violate the players' publicity rights if they occurred in the professional arena. For example, jerseys depicting both an athlete's team and number clearly represent the athlete's identity. In addition, the sale of the athlete's jersey is a use for purposes of trade and without the player's consent.[68] Thus, a company that manufactures Cleveland Cavaliers jerseys depicting the number twenty-three without LeBron James' consent has clearly violated his publicity rights.

Moreover, in order to satisfy the "purposes of trade" element, all that is required of the plaintiff is to show that the defendant intended to derive a commercial benefit from the use of the plaintiff's identity.[69] In *Doe*, the plaintiff, known as Tony Twist, played professional hockey and had a reputation as being an "enforcer" on his team, the St. Louis Blues.[70] The defendants used a character named after plaintiff with a similar enforcer persona in their comic book, *Spawn*.[71] The appellate court held that the defendants had used Twist's name for a commercial advantage because they used it to attract attention to the product.[72] As the court explained, "Twist was under no obligation to prove that respondents intended to injure Twist's marketability or that respondents actually derived a pecuniary benefit from the use of his name."[73]

Therefore, in a suit against the NCAA for a violation of publicity rights, the "identity" prong may actually be more of an obstacle than the "for purposes of trade" prong outside of obvious identity appropriations such as jerseys.[74] That is, when the NCAA reaches deals with networks to televise contests, or universities contract with apparel companies to outfit their teams with a certain brand, the goal for both the NCAA and its members is to derive a commercial benefit. Thus, it would be up to each individual student-athlete to demonstrate that his or her identity was somehow appropriated in deriving that benefit.

3. The "Fantasy Baseball" Case

The most recent decision addressing athletes' publicity rights involved a fantasy baseball league.[75] In *CBC*, the plaintiff, CBC, sold its fantasy sports products after the expiration of its license agreement with the MLB Players Association in 2002.[76] In 2005, the Players' Association granted Major League Baseball Advanced Media, L.P. ("Advanced Media") the exclusive right to baseball players' names and performance information.[77] Advanced Media offered CBC a license to promote MLB.com fantasy games on CBC's website, but did not offer CBC a license to sell its own fantasy baseball products.[78] Thus, in anticipation of Advanced Media filing suit against CBC if it continued to operate its fantasy games, CBC filed suit against Advanced Media to establish its right to use, without license, the names of and information about MLB players in connection with its fantasy baseball products.[79]

The district court held that there was insufficient evidence to establish both the "identity" and the "commercial advantage" elements,[80] but the Eighth Circuit recognized that the district court was clearly wrong, as a matter of law, because there was no dispute that the fantasy league operators used the players' names for commercial advantage.[81] Thus, the circuit court held that the players had established a cause of action for a publicity rights violation.[82]

Nevertheless, the Eighth Circuit ruled in favor of CBC and held that the First Amendment trumps the players' right of publicity action because "the information used in CBC's fantasy baseball games is all readily available in the public domain, and it would be strange law that a person would not have a first amendment right to use information that is available to everyone."[83] The court's holding, however, and this quoted portion especially, has been highly criticized by legal scholars.[84] Although it was rumored that the U.S. Supreme Court had granted certiorari, the rumor turned out to be false. In the event the issue is ever heard, however, First Amendment jurisprudence, though not addressed in this article, is likely to play a major role in the Court's decision.

B. The Bloom Decision

While many of the cases involving publicity rights violations involve athletes, very few occur in the context of college athletics. One case that did involve the right of a college athlete to control the commercial use of his identity, however, was *Bloom v. Nat'l Collegiate Athletic Ass'n*.[85] Jeremy Bloom, a high school football and track star, received a scholarship to play football at the University of Colorado.[86] Before attending college, however, he competed in both Olympic and World Cup skiing events, winning the World Cup title in moguls in 2002.[87] During the Olympics, he had several modeling and entertainment opportunities, including an appearance on MTV, a chance to host a show on Nickelodeon, and a contract to model clothing for Tommy Hilfiger.[88] Due to concern that Bloom's endorsements and entertainment activities might interfere with his eligibility to play college football, CU requested waivers of the NCAA rules restricting student-athlete endorsement and media activities.[89] The NCAA denied CU's request and Bloom ended his endorsement, modeling, and media activities in order to play football for CU.[90] He also filed suit against the NCAA, however, for declaratory and injunctive relief, arguing that his endorsement, modeling, and media activities were necessary to support his professional skiing career, which the NCAA rules permitted.[91]

Although the Colorado appellate court recognized that Bloom had third-party beneficiary standing to pursue his claims for violation of his contractual rights,[92] it held "that the NCAA's administrative review process is reasonable in general and that it was reasonably applied in this case."[93] It is not sufficient to leave *Bloom* at this, however, as there are several noteworthy points that will be relevant in any potential publicity rights challenge brought against the NCAA.

First, it is important that the court recognized that Bloom had standing to bring a contractual claim against the NCAA. As both the trial court and the appellate court noted, "the NCAA's constitution, bylaws, and regulation evidence a clear intent to benefit student-athletes. And because each student-athlete's eligibility to compete is determined by the NCAA, . . . Bloom had standing in a preliminary injunction hearing to contest the applicability of NCAA eligibility restrictions."[94] Thus, while this holding does not necessarily represent a grant of standing to student-athletes across the board to any challenge brought against the NCAA, it, and other similar decisions,[95] demonstrates that courts will recognize claims by student-athletes against the NCAA as third-party beneficiaries.

The remaining noteworthy points in *Bloom*, however, favor the NCAA. For one, the court explained, as other courts had previously recognized (though the issue was subject to some debate), that "the NCAA is not a state actor and that a state university's adherence to NCAA rules does not implicate the 'state action' necessary to trigger a civil rights claim."[96] In addition, the court recognized the reluctance on the part of the judiciary to intervene in the internal affairs of voluntary associations, such as the NCAA.[97]

The court then turned to the NCAA bylaws,[98] which allow college athletes to play professional sports during the summer and then return to their sports during the school year, provided the only money they accept is salary.[99] Professional skiers, however, receive minimal awards in prize money, but no salary.[100] As a result, they rely on compensation from endorsements to pay for their training and travel expenses.[101] Bloom argued that, under this bylaw, he was entitled to earn whatever income is customary for professional skiers, which primarily comes from endorsements and paid media opportunities.[102] The court rejected his argument, however, because

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"none of the NCAA's bylaws mentions, much less explicitly establishes a right to receive 'customary income' for a sport."[103]

As the court noted, "[t]o the contrary, the NCAA bylaws prohibit every student-athlete from receiving money for advertisements and endorsements."[104] In addition,

> while the NCAA Bylaw 12.5.1.3 permits a student-athlete to continue to receive remuneration for activity initiated prior to enrollment in which his or her name or picture is used, this remuneration is only allowed if "the individual became involved in such activities for reasons independent of athletic ability; . . . no reference is made in these activities to the individual's name or involvement in intercollegiate athletics; [and] . . . the individual does not endorse the commercial product."[105]

Moreover, NCAA Bylaw 12.4.1.1 prohibits a student-athlete from receiving any remuneration for value or utility that the student-athlete may have for the employer because of the publicity, reputation, fame or personal following that he or she has obtained because of athletic ability."[106] Thus, when read together, the court concluded that:

> the NCAA bylaws express a clear and unambiguous intent to prohibit student-athletes from engaging in endorsements and paid media appearances, without regard to: (1) when the opportunity for such activities originated; (2) whether the opportunity arose or exists for reasons unrelated to participation in an amateur sport; and (3) whether income derived from the opportunity is customary for any particular professional sport.[107]

As a result, Bloom was forced to give up his entertainment and modeling opportunities and was unable to host the show on Nickelodeon if he wanted to continue playing college football.[108]

With the standing and statutory interpretation issues addressed, the court turned to the NCAA's primary purpose (at least as seen by the NCAA itself) to support its position.[109] The NCAA Constitution provides:

> 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.[110]

The court also placed significant weight on the U.S. Supreme Court's decision in *NCAA v. Board of Regents*,[111] which recognized that the NCAA served an important societal role by maintaining amateurism in intercollegiate athletics,[112] in concluding that the NCAA's rules retain a "clear line of demarcation between intercollegiate athletics and professional sports."[113]

Unfortunately for Bloom and countless other high-profile student-athletes, however, that line of demarcation only applies to the student-athletes themselves. For the rest of the parties involved, high-profile, Division I college sports are almost indistinguishable from professional sports: the fans pay admission to games; the referees are paid to officiate; the NCAA enters into contracts with networks to televise contests; the coaches receive salaries and often have lucrative endorsement deals; and the universities receive money from a number of sources, including portions of the NCAA's network deals and for attending bowl games. Despite all of the money exchanging hands, the athletes, who actually take the field and make the entire production possible, are prohibited from being compensated, in any form, for the sports they play or, more pressingly, for the money made by other parties that market their identities.

Regardless of the sympathy felt for Bloom, however, the court justified its different treatment of skiers and baseball players on the basis of the differences in salary structure between the two.[114] Although some athletes may, in fact, use the sponsorship money to pay for their athletic endeavors, some would simply take it as profit.[115] In addition, the court believed that it, and other courts in the future, could not distinguish between entertainment opportunities that were a direct result of his skiing ability and those that also derived, at least in part, from the fact that he was also a college football player.[116]

In *Bloom*, then, the issue of whether the NCAA violated Bloom's publicity rights was never addressed because he had contracted for the use of his identity on his own. Rather, the court addressed whether he could engage in such free market transactions under the NCAA bylaws, properly concluding that he could not. Thus, in order to see a day when student-athletes are permitted to contract for the use of their identities (i.e. Bloom's situation), there must be a fundamental change in the NCAA bylaws. In order to compensate student-athletes for the NCAA's violation of their publicity rights, however, there would have to be a change in the deference given by courts to the decisions and rules made by the NCAA. Ideally, both would occur – the NCAA would recognize that the most efficient market outcome would permit student-athletes to market their identities *and* the NCAA would create a system of compensating the players for its use of their identities so that it no longer violates their publicity rights.

C. Antitrust Claims Against the NCAA

The goal of antitrust law is to promote competition in open markets.[117] This goal can be frustrated when economic rivals act collusively to reduce competition or when the market itself is structured such that competition is restricted.[118] Thus, Section 1 of the Sherman Act[119] aims to eliminate anti-competitive collusion while Section 2[120] prevents monopolistic and oligopolistic market structures.[121]

A number of problems arise, however, in attempting to apply antitrust principles to the NCAA and its member institutions.[122] First, the Sherman Act only applies if the activities involve or affect interstate commerce.[123] Second, if the Sherman Act does apply, Section 1 has a duality requirement, which means that if the NCAA is a single organization, not a group of separate entities, it escapes liability under Section 1.[124] Third, as with all antitrust law, courts must determine what constitutes an "unreasonable" restraint.[125] Similar problems arise with determining the relevant market place.[126] Thus, as each layer is peeled back in the analysis of whether the NCAA and its universities violate the Sherman Act, new issues arise that make it difficult to impose liability. This has, at least in part, led to the courts' decisions favoring the NCAA when addressing potential antitrust violations by the NCAA.

The Supreme Court's decision in *NCAA v. Board of Regents*[127] "has become the foundation of a body of case law insulating the NCAA from antitrust scrutiny with respect to amateurism."[128] In *Board of Regents*, the University of Oklahoma and the University of Georgia filed suit against the NCAA, arguing that the NCAA had unreasonably restrained trade in the televising of college football games by limiting the number of annual appearances each school could make on national television and forcing the universities to share the income.[129] Although such a horizontal price fixing agreement would usually fall under the *per se* rule,[130] the Court refused to apply the *per se* rule because there is some level of horizontal collaboration that has traditionally been allowed in sports entertainment that has not been permitted in other industries.[131] This leeway has been provided because competitive balance is seen as an important element of the product.[132] Thus, the Court applied the rule of reason, under which it looked to whether the conduct is pro- or anticompetitive on the whole by weighing the positive and adverse effects against each other.[133]

In holding for the NCAA, the Court explained that "the NCAA seeks to market a particular brand of college football – college football. The identification of this 'product' with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball."[134] Therefore, even though the Court recognized that the NCAA had placed an unreasonable restraint on the free market of college football, it held that the reasons for such restraints – protecting live attendance and maintaining a competitive balance among amateur athletic teams – were simply not justified in light of the positive competitive effects of lifting the NCAA restrictions.[135]

As Rascher and Schwarz explain, however, "[t]here is a subtlety here that seems to have been missed by later interpreters" of the case.[136] They continue:

> In essence, the [*Board of Regents*] Court said one thing: academic affiliation is what differentiates NCAA football from NFL football, and thus creates a market – i.e., this differentiation is procompetitive. The Court then went on to assume that a particular restraint used to achieve that differentiation – amateurism – is both reasonable and necessary. In [*Board of Regents*], there was no need to determine if amateurism was

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> actually a reasonable and necessary restraint; the Court merely sought to highlight the comparative lack of justification for the NCAA's TV restraints.[137]

Despite this inherent flaw, courts continue to use the *Board of Regents* decision as a starting point for antitrust challenges against the NCAA.[138] For example, in *Law v. NCAA*,[139] the U.S. Court of Appeals for the Tenth Circuit held that the NCAA's rule limiting the amount of compensation an entry-level college basketball coach could earn per year was also an unjustifiable and unreasonable restraint of trade.[140] While this decision seems to support an antitrust claim on behalf of college athletes, the case's holding actually indicates otherwise.[141] Again relying on the necessity of horizontal restraints of trade for the product to survive, the court specifically pointed to rules forbidding payments to athletes and those requiring that athletes attend classes as exempt from antitrust challenge.[142]

Therefore, with the precedent permitting horizontal cartelization of athletic leagues firmly in place and the self-fulfilling "amateurism" justification gaining strength as an insulation to antitrust attack against the NCAA, its appears as though any rule or regulation implemented by the NCAA is safe from being challenged under the Sherman Act so long as it reasonably furthers the amateurism model. Thus, the NCAA has been permitted to flourish because of its insistence that the amateurism model is a unique and indispensable quality of its product. "Yet, if amateurism is what consumers of college sports demand, there ought to be no need to collude to preserve it. If fans prefer high-quality university-affiliated sports, amateurism is neither a reasonable nor necessary restraint to creating a product, and concerted action to preserve amateurism is mere wage fixing."[143] An agreement among all of the NCAA members not to compete for its most important resource, the athletes, is unnecessary and unreasonable because it lowers the quality of the game and exploits the athletes.[144] As Rascher and Schwarz explain:

> This unjustified activity should not be legalized simply by defining it as an essential component of the product being offered, especially without that claim being rigorously scrutinized by the courts. From the point of view of antitrust economics, the NCAA's claims ultimately rest on an unproven assumption: fans preference for amateurism is sine qua non of college sports. If this is not true, the NCAA has no reasonable defense for its otherwise collusive wage fixing.[145]

With that background in mind, then, it seems that some sort of an antitrust challenge to the entire NCAA framework does not have much chance to succeed. For one, the exception to antitrust laws permitting some horizontal collusion applies not only to the NCAA, but to professional sports leagues as well. In addition, if the ultimate goal is to enable student-athletes to either contract on their own for the use of their identities or force the NCAA to develop a model that compensates them for the use of their identities, a more narrow solution may be preferable. Moreover, a court may be hesitant to be the first to expose the NCAA to antitrust liability. While the U.S. Supreme Court could certainly make such a decision, it has traditionally treated both the NCAA and other professional leagues favorably in regards to antitrust attacks.[146] Although problems exist with the rationale that led to the court's protectionist view of the NCAA in antitrust cases, the fact remains that any antitrust challenge against the NCAA faces an uphill battle. Therefore, it may be necessary to turn away from the law and look to economics in order to make a logical argument in favor of any major changes to the NCAA's current regulatory scheme, at least in regard to the revenue generating sports.

IV. IDEAS FOR REACHING THE ECONOMIC IDEAL

The NCAA's refusal to allow student-athletes to capitalize on the marketability of their identities, at least from the perspective of the student-athletes themselves, is a serious problem. It is not simply the fact that the NCAA forbids student-athlete compensation that causes concern, but also its hypocrisy in running a multi-billion dollar operation built on those same student-athletes' hard work. Moreover, the NCAA cannot reasonably maintain that switching to another system is not feasible, especially given the plethora of models available for replication and other potential solutions suggested by proponents of student-athlete compensation.

It is not only the student-athletes that would benefit if the NCAA were to repeal its prohibition on student-athlete compensation for use of their identities. Rather, such a change would also facilitate economic efficiency, which benefits society as a whole. That is, by permitting student-athletes and companies to engage in mutually beneficial exchanges in an environment free from NCAA regulation, the dead weight loss created by forgone mutually beneficial exchanges would be reduced or eliminated because the market for athlete endorsements is a low transactions cost situation, causing both the quantity and price of mutually beneficial exchanges involving student-athletes' identities to move towards the economic equilibrium.

A day may come when the NCAA is forced to compensate student-athletes in some form. As a result, it would behoove the NCAA to weigh the pros and cons of the alternatives to the current amateurism model and preemptively move to a system that best serves its interests and enables it to maintain its supervisory function, but also permits student-athletes to be compensated for the use of their identities. In reaching the optimal model, however, it is imperative to consider the costs that could arise by erring in either direction. Here, the NCAA (or a court, if one ruled in favor of a student-athlete bring a publicity rights claim) must be careful not to move to a system that becomes unrecognizable to the fans of college sports. Although it is unclear whether fans are interested in the amateur aspect of college sports,[147] there is no doubt that college athletics, especially men's basketball and football, have an incredibly large fan base. Thus, any change in the regulatory scheme of the NCAA must be certain not to be so drastic that the new product alienates consumers.

A. Revision of the NCAA Bylaws

The easiest way to reach the economic equilibrium would for the NCAA to eliminate NCAA Bylaws 12.4.1.1 prohibiting "a student-athlete from receiving any remuneration for value or utility that the student-athlete may have for the employer because of the publicity, reputation, fame or personal following that he or she has obtained because of athletics ability."[148] By repealing this regulation, NCAA student-athletes could, quite simply, enter into agreements with companies for the use of their identities in return for money. While such a step would not redress the publicity rights violations created by the NCAA and its member institutions' use of the student-athletes' identities without consent for video game, jerseys, or other memorabilia, it would at least give the players the ability to compete against them in those same markets.

The NCAA, however, is unlikely to take this step on its own for a number of reasons. First, permitting student-athletes to enter into agreements for the use of their identities would drastically reduce the NCAA's annual revenue, an option it would not undertake voluntarily. Second, the NCAA may view student-athlete compensation as a slippery slope in which the repeal of one regulation may lead to the fall of even more of its bylaws. Third, by recognizing that student-athletes have a right to be compensated for the use of their identities, the NCAA may expose itself to liability not only in individual publicity rights lawsuits, but also perhaps other claims against it. Among the gravest concerns of the NCAA would be the success of an antitrust claim brought against it. If any plaintiff was to bring an antitrust claim against the NCAA and succeed, the landscape of college athletics could change drastically and rapidly, potentially leaving the NCAA behind as a thing of the past.

B. Student-Athlete Trust Fund

One way to compensate student-athletes for the use of their identities would be to follow the lead of the International Olympic Committee ("IOC") by creating a student-athlete trust fund.[149] Under the IOC regulations, money from endorsements are collected and entered into a trust fund from which the athlete's expenses are paid and then the money can be withdrawn once his or her career is over.[150] The Athletics Congress, which regulates American track and field athletes, uses a similar trust fund model that includes appearance fees, living and training grants, and endorsement revenues.[151]

If the NCAA refuses to change its bylaws to permit student-athletes to be compensated for marketing their identities, the trust fund alternative could serve as a reasonable compromise.[152] For one,

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the NCAA could limit the source of the funds it permits to be entered into the trust, such as only those associated with revenue earned from marketing a student-athlete's identity.[153] More importantly, however, a trust fund would enable student-athletes who have reached celebrity status the ability to be compensated.[154] It is not enough to say that an athlete who has attained such notoriety should simply wait until he or she leaves college to capitalize on it because being a popular college athlete does not necessarily mean that one will be a popular professional athlete, or a pro at all.[155] Moreover, by employing the trust fund model, the NCAA does not compromise its stated goal of preserving amateurism because the student-athletes would not receive any funds, aside from those used for expenses, until after they stop playing college athletics.[156] Finally, this solution would enable the NCAA to maintain some control over student-athlete compensation as well as to protect the student-athletes' interests by regulating the situations in which they are allowed to withdraw funds while in school.[157]

C. Conference-Level Decisions

Another potential solution that has been suggested is to break the monopsony power of the NCAA's cartel by enforcing the antitrust laws and allowing each university to independently decide what it wants to do.[158] This, however, fails to recognize the necessity of some general agreement among sports competitors in order for the product to exist.[159] Thus, a more reasonable option may be to shift power from the NCAA to the collegiate conferences, which could play the pro-competitive joint-venture role accepted by the courts in their treatment of sports leagues.[160] Each conference, then, could determine how it would deal with the student-athlete compensation, maintaining the necessary competitive balance within that conference, but without an overarching super-cartel controlling the entire market for college-age athletes.[161] The NCAA would still serve a pro-competitive role, however, both by ensuring that on-field rules remain standardized and by establishing levels of competition so that each conference could align itself with other similar conferences.[162]

By allocating regulatory power to the conferences, some could choose to allow their members to pay market rates to athletes in order to attract the highest level of talent.[163] Other conferences, on the other hand, may set a minimum and maximum level of compensation that its members are permitted to pay student-athletes.[164] Still other conferences may choose to maintain the current NCAA amateurism model, offering only in-kind payments, in order to differentiate themselves in the market by offering the "real thing" rather than top talent.[165]

While the NCAA may argue that such a system would create chaos, "this chaos is typically defined in the antitrust literature as a competitive marketplace."[166] Fans would be offered a wide variety of college sports options, causing the conferences to compete for their hearts and wallets.[167] Similarly, the student-athletes would be able to choose among conferences with different compensation schemes.[168] While some may argue that this would cause widely imbalanced programs with very different financial situations to play anytime teams met outside of conference, this situation already exists under the current system when, for example, Syracuse University plays its upstate New York neighbor, Colgate University, in basketball.[169] Were compensation structures to differ between the teams, Syracuse would still be a heavy favorite, but now its players would be compensated closer to their market value.[170]

There are a number of potential effects of moving to a conference-based system. It is likely that conferences would compete for fans by choosing the compensation structure that brought them the best combination of talent and fan appeal.[171] Thus, if amateurism really is what fans want, then few conferences would find it profitable to allow its schools to pay their athletes, and those that chose such a regime would fail in the marketplace.[172] If, on the other hand, fans are drawn to the best talent, those conferences that choose to compensate players would likely gain a large share of the market.[173] In addition, players who would otherwise jump to professional leagues as soon as possible in order to get paid could continue to play college sports, which would mean better games for fans and a more profitable college sports market.[174]

D. Legislative Action

The movement in favor of student-athlete compensation is not merely a scholarly one or a pet project of former college athletes. In fact, the Nebraska state legislature, due in large part to the efforts of Senator Ernie Chambers, has actually signed a bill into law allowing colleges to pay members of their sports teams if the schools chose to do so.[175] California State Senator Kevin Murray followed suit, introducing a proposal, entitled the Student Athletes' Bill of Rights, that would not only permit student-athlete compensation, but which also addresses the NCAA's rules regarding the eligibility of transfers and the ability to retain agent representation.[176] As Christopher Parent explains, "While both the Nebraska proposal and the Student Athletes' Bill of Rights still have hurdles to overcome, the battle lines have been drawn, and the NCAA has been forced to take heed of the need for potential reform."[177]

E. Right of Publicity Lawsuit

The NCAA and its member institutions bring in huge amounts of revenue from the commercialization of college athletics. Most notably, the sale of jerseys depicting the uniform numbers of famous student-athletes and video games in which players have the same positions, characteristics, and uniform numbers as those on the real college teams takes advantage of the publicity value earned by the student-athletes through their on-field performances.[178] This type of marketing violates the athletes' publicity rights and, outside of the NCAA context, entitles them to compensation.[179]

Thus, if the NCAA refuses to 1) revise its bylaws to allow for direct compensation of student-athletes for the use of their identities; 2) move to a trust fund model that would enable student-athletes to be compensated for the use of their identities once they no longer participate in collegiate athletics; 3) transfer power to the conferences so that they can each decide whether and how to pay athletes; 4) adopt some other means of allowing student-athletes to be compensated for the use of their identities; or 5) discontinue the use of student-athletes' identities for commercial benefit entirely, a claim against the NCAA by one of its student-athletes for the violation of his or her publicity rights may be the only option. "In truth, if the NCAA took its mission to be that 'student-athletes should be protected from exploitation by professional and commercial enterprises,' the first and worst offender with which the NCAA should grapple would be the $3.5 billion NCAA itself."[180]

V. CONCLUSION

Given the seemingly minimal transactions costs involved with exchanges between student-athletes and those wishing to use their identities, the market for such mutually beneficial exchanges should be free from regulation so that the optimal economic outcome may be reached. In reality, however, the NCAA's regulation of student-athlete compensation could not be much greater, as the players are prohibited entirely from receiving any compensation for the use of their identities which they have worked so hard to build. Thus, the NCAA's amateurism model injures not only the student-athletes themselves, but also economic efficiency, because in order for any party to market a student-athlete, it must contract with the NCAA alone. With the growing commercialization of Division I athletics apparent to all, the time has come for the NCAA to recognize that its antiquated proscription on student-athlete compensation for use of their identities must give way to a new system. And if the NCAA continues to refuse to make the necessary changes in a way that will allow it to remain relevant, it may be forced into a situation, whether by the legislature or the courts, that will drastically reduce its control over college athletics.

1 Vladimir P. Belo, *The Shirts Off Their Backs: Colleges Getting Away With Violating the Right of Publicity*, 19 Hastings Comm. & Ent. L.J. 133, 134-35 (1996).
2 Christopher M. Parent, *Forward Progress? An Analysis of Whether Student-Athletes Should Be Paid*, 3 Va. Sports & Ent. L.J. 226, 239 (2004).
3 Andrew Zimbalist, Unpaid Professionals: Commercialism and Conflict in Big-Time College Sports 149-52 (1999). In addition, this does not even address whether it even matters if a university athletic department generates money, as their academic departments certainly are not expected to do so. *Id.* at 151.
4 Belo, *supra* note 1 at 134.
5 Zimbalist, *supra* note 3 at 52. Among the problems that would arise with paying student-athletes wages to play collegiate athletics are those stemming from an employer-employee relationship, such as payroll taxes and workmen's compensation. *Id.* Other problems include a de-emphasis on education, the perpetuation of stereotypes and stigmas, and the potential for more Title IX problems. *See* Kristine Mueller, *No Control Over Their Rights of Publicity: College Athletes Left Sitting the Bench*, 2 DePaul J. Sports L. & Contemp. Probs. 70, 90-97 (2004). This discussion, of course, ignores under-the-table money given to student-athletes by boosters in violation of NCAA bylaws. *See* Zimbalist, *supra* note 3 at 23-26 for a summary of payments by boosters to student-athletes.
6 *Id.* at 52.
7 Daniel A. Rascher & Andrew D. Schwarz, *Neither Reasonable nor Necessary: "Amateurism" in Big-Time College Sports*, *in* The Economics of Sport Volume II 503, 507 (Andrew Zimbalist ed., 2001). While a recent and exact revenue figure was unavailable, the NCAA's 2006-2007 budget stood at $564 million, over $508 million of which came from television and marketing rights fees. The NCAA Revised Budget for Fiscal Year Ended August 31, 2007, NCAA.org, *available at* http://www1.ncaa.org/finance/2006-07_budget.pdf. In fact, ten college football teams brought in over $45 million in revenues in 2006-2007 with the University of Texas leading the way with $8.2 million in royalties. Peter J. Schwartz, *The Most Valuable College Football Teams*, Forbes, Nov. 20, 2007, *available at* http://sports.yahoo.com/ncaaf/news?slug=ys-forbescollegeteams112007&prov=yhoo&type=lgns.
8 *See* Allen L. Sack & Ellen J. Staurowsky, College Athletes For Hire: The Evolution and Legacy of the NCAA's Amateur Myth 5-6, 105-09 (1998) for a discussion of the hypocrisy demonstrated by the NCAA as it labels athletes, agents, and alumni as greedy and asserts the importance of its amateurism model and dedication to education (both in courts of law and public opinion) in order to defend its financial interests.
9 Posting of Rick Karcher to The Sports Law Blog, *A Letter to Tim Tebow*, The Sports Law Blog, http://sports-law.blogspot.com/2007/12/letter-to-tim-tebow.html (Dec. 9, 2007).

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10 *See* Zimbalist, *supra* note 3 at 52; Mueller, *supra* note 5 at 90-97. Another problem created by the increased commercialization of college sports is cynicism among non-athlete students. In fact, some students caught cheating have actually excused their actions because of the example set by athletic dishonesty. Zimbalist, *supra* note 3 at 48.
11 *NCAA v. Board of Regents*, 468 U.S. 85 (1983).
12 Zimbalist, *supra* note 3 at 51 (citing Richard G. Sheehan, Keeping Score: The Economics of Big Time Sports (1996)). Sheehan calculated these figures by valuing education at the tuition rate plus room and board, adjusting this number by the proportion of athletes who graduate at the school, and then dividing this adjusted number by the estimated number of hours a student dedicates to his or her sport. Zimbalist, *supra* note 3 at 51.
13 *Id.* At the time, minor league baseball salaries averaged between $850 and $2,500 per month (about $5.00 to $14.50 per hour), depending on the level of play. *Id.*
14 *Id.* at 51-52. "Moreover, male and female students in these sports would experience higher implicit hourly wages because they have higher rates of graduation and most dedicate fewer hours to their sport." *Id.* at 52.
15 *Id.* at 52.
16 *Id.*
17 *Id.* In addition, there are no longer four-year athletic scholarships. Rather, the school gives the athletes a grant to play on its sports team, but if the athlete quits the team or loses eligibility, the school withdraws the financial package. Murray Sperber, College Sports Inc.: The Athletic Department vs. The University 7 (1990).
18 Zimbalist, *supra* note 3 at 52.
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.*
24 *Id.*
25 *Id.* at 53.
26 Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960).
27 The unit of measurement is irrelevant.
28 *See Flood v. Kuhn*, 407 U.S. 258 (1972) in which the Court explained that baseball's antitrust exemption "is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis*, and one that has survived the Court's expanding concept of interstate commerce. It rests on a recognition and an acceptance of baseball's unique characteristics and needs." *Id.* at 282.
29 Restatement (Third) of Unfair Competition § 46.
30 J. Thomas McCarthy & Paul M. Anderson, *Protection of the Athlete's Identity: The Right of Publicity, Endorsements and Domain Names*, 11 Marq. Sports L. Rev. 195 (2001).
31 Mueller, *supra* note 5 at 70.
32 *Id.*
33 *Id.*
34 William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 408 (1960).
35 202 F.2d 866 (2d Cir. 1953).
36 *Id.* at 867.
37 *Id.*
38 *Id.* at 869.
39 Belo, *supra* note 1 at 138.
40 433 U.S. 562 (1977)
41 *Id.* at 576.
42 *Id.* at 563-64.
43 *Id.* at 575.
44 *Id.* at 576 (quoting Kalven, *Privacy in Tort Law Were Warren and Brandeis Wrong?*, 31 Law & Contemp. Prob. 326, 331 (1966)).
45 Belo, *supra* note 1 at 139.
46 447 F. Supp. 723 (S.D.N.Y. 1979).
47 *Id.* at 728.
48 *Id.* at 725.
49 *Id.* at 727.
50 *Id.*
51 85 F.3d 407, 414 (9th Cir. 1996).
52 *Id.* at 409.
53 *Id.*
54 *Id.* at 415.
55 *Id.*
56 *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1398 (9th Cir. 1992).
57 *Id.* at 1396.
58 *Id.* at 1399.
59 *Id.* at 1398.
60 *Id.* (quoting *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983)).
61 *White*, *supra* note 56 at 1399.
62 Restatement (Third) of Unfair Competition § 46.
63 *Palmer v. Schonhorn Ent., Inc.*, 232 A.2d 458, 462 (N.J. Super. Ct. Ch. Div. 1967).
64 *Id.* at 459.
65 *Id.* at 462.
66 *Id.*
67 *See* NCAA Bylaw 12.5.2.1, *infra* note 105.
68 Ignoring the implied consent granted by courts to the NCAA simply by attending an NCAA member institution.
69 *Doe v. TCI Cablevision*, 110 S.W.3d 363, 371 (Mo. 2003).
70 *Id.* at 365-66.
71 *Id.* at 366.
72 *Id.* at 371-72.
73 *Id.* at 370.
74 The U.S. Court of Appeals for the 8th Circuit, however, recently held that mere use of an individual's name is sufficient to satisfy the plaintiff's burden of showing that the name was used as a symbol of identity. *C.B.C. Distribution and Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 823 (8th Cir. 2007). While the decision has created some controversy and debate amongst scholars, much of the disagreement revolves around the court's treatment of the First Amendment analysis as weighed against the players' publicity rights, not the court's publicity rights analysis itself.
75 *Id.*
76 *Id.* at 821.
77 *Id.*
78 *Id.*
79 *Id.*
80 *C.B.C. Distribution and Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1091 (E.D. Mo. 2006).
81 *C.B.C.*, *supra* note 74 at 822.
82 *Id.*
83 *Id.* at 823.
84 *See* Posting of Rick Karcher to The Sports Law Blog, *Eighth Circuit's "Public Domain" Rationale Provides No Workable Standard for Right of Publicity Claims*, http://sports-law.blogspot.com/2007/10/eighth-circuits-public-domain-rationale.html (Oct. 17, 2007).
85 93 P.3d 621 (2004).
86 *Id.* at 622.
87 *Id.*
88 *Id.*
89 *Id.*
90 *Id.*
91 *Id.*
92 *Id.* at 624.
93 *Id.* at 628.
94 *Id.* at 623-24.
95 *See Hall v. NCAA*, 985 F.Supp. 782 (N.D. Ill. 1997); *NCAA v. Brinkworth*, 680 So.2d 1081 (Fla. Dist. Ct. App. 1996).
96 *Bloom*, *supra* note 86 at 624 (citing *NCAA v. Tarkanian*, 488 U.S. 179, 195 (1988)).
97 *Bloom*, *supra* note 86 at 624.
98 "A professional athlete in one sport may represent a member institution in a different sport and may receive institutional financial assistance in the second sport." NCAA Bylaw 12.1.3 (12.1.2 at the time of *Bloom*), *available at* http://www.ncaa.org/library/membership/division_i_manual/2007-08/2007-08_d1_manual.pdf.
99 Laura Freedman, *Pay or Play? The Jeremy Bloom Decision and NCAA Amateurism Rules*, 13 Fordham Intell. Prop. Media & Ent. L.J. 673 (2003).
100 *Id.* at 679-80.
101 *Id.* at 680.
102 *Bloom*, *supra* note 86 at 625.
103 *Id.*
104 *Id.* "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 commercial product or service through the individual's use of such product or service." NCAA Bylaw 12.5.2.1.
105 *Bloom*, *supra* note 86 at 625 (quoting NCAA Bylaw 12.5.1.3).
106 NCAA Bylaw 12.4.1.1.
107 *Bloom*, *supra* note 86 at 626.
108 Freedman, *supra* note 100 at 681.
109 *Bloom*, *supra* note 86 at 626-27.
110 NCAA Const. art. 2.9.
111 468 U.S. 85. *But see infra* Part IIIC, for an explanation of the inherent flaws in the *Board of Regents* decision.
112 *Id.* at 101.
113 *Bloom*, *supra* note 86 at 626.
114 Freedman, *supra* note 100 at 686.
115 *Id.*
116 *Id.*
117 Ray Yasser et al., Sports Law: Cases and Materials 183 (6th ed. 2006).
118 *Id.*
119 Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.
120 Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.
121 Yasser, *supra* note 118 at 183.
122 *Id.* at 184.
123 *Id.*
124 *Id.*
125 *Id.*
126 *Id.*
127 468 U.S. 85 (1983).
128 Rascher & Schwarz, *supra* note 7 at 505.
129 *Board of Regents*, *supra* note 128 at 95.
130 *Northern Pacific Railway Co. v. U.S.*, 356 U.S. 1 (1958). "There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming feature are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. *Id.* at 5.
131 *Id.* at 100.
132 *Id.* at 100-01.
133 *Id.* at 103.
134 *Id.* at 101-02.
135 *Id.* at 119.
136 Rascher & Schwarz, *supra* note 7 at 505.
137 *Id.*
138 *Id.*
139 134 F.3d 1010 (10th Cir. 1998).
140 *Id.* at 1024.
141 Parent, *supra* note 2 at 246.
142 *Law*, 134 F.3d at 1017-18.
143 Rascher & Schwarz, *supra* note 7 at 504.
144 *Id.*
145 *Id.*
146 Most notably, the antitrust exemption for Major League Baseball. *See, e.g.*, *Flood*, *supra* note 28.
147 *See supra* note 138.
148 NCAA Bylaw 12.4.1.1. In order to fully implement a system that allows for student-athlete compensation for use of their identities, the NCAA should also strike 12.5.2.1 (Advertisements and Promotions After Becoming a Student-Athlete) and revise bylaws 12.5.1.3, 12.5.1.4, and 12.5.2.2 in order to maintain consistency.
149 Belo, *supra* note 1 at 154.
150 *Id.* (citing Allen Sack, *Recruiting: Are Improper Benefits Really Improper?*, *in* The Rules of the Game: Ethics in College Sport 71, 74 (1989)).
151 Belo, *supra* note 1 at 154 (citing Kenneth L. Shropshire, *Legislation for the Glory of Sport: Amateurism and Compensation*, 1 Seton Hall J. Sport L. 7, 18 (1991)).
152 Belo, *supra* note 1 at 155.
153 *Id.*
154 *Id.*
155 *Id.* at 156.
156 *Id.* at 155.
157 *Id.*
158 Rascher & Schwarz, *supra* note 7 at 506 (citing Gary Becker, *College Athletes Should Get Paid What They Are Worth*, Bus. Wk., Sept. 30, 1985, at 18).
159 Rascher & Schwarz, *supra* note 7 at 506.
160 *Id.*
161 *Id.* Although Rascher and Schwarz discuss the option of shifting regulatory power to the conferences in the context of a pay for play system, it is equally applicable to a system that would give each conference the ability to decide whether its student-athletes could contract on their own for the commercial use of their identities (or whether to use another one of the suggested solutions, such as the trust fund model).
162 *Id.*
163 *Id.*
164 *Id.*
165 *Id.*
166 *Id.*
167 *Id.*
168 *Id.*
169 *Id.* at 506-07.
170 *Id.* at 507.
171 *Id.*
172 *Id. See also* Parent, *supra* note 2 at 230 (explaining that "[w]hile amateurism is indeed antithetical to the concept of free market, sacrificing amateurism in order to provide student-athletes a portion of the profits they generate (i.e. in shoe sales, video games, television contracts, and gate revenues) may destroy the product from which they will have financially benefited").
173 *Id.*
174 *Id.*
175 Parent, *supra* note 2 at 227. The bill, which passed by a vote of 26-9 and was signed into law by the Governor on April 16, 2003, would only be implemented if similar laws were passed in four other states with schools in the Big 12 Conference. *Id.* at 234.
176 *Id.* at 228-29. The California bill was passed by a vote of 26-10 on May 29, 2003. *Id.* at 235.
177 *Id.* at 236. After engaging in a comprehensive analysis of whether student-athletes should be paid, Parent ultimately concludes that "the only real vehicle for altering the system of compensating college athletes is not legislation, but an antitrust lawsuit, whereby college athletes would seek at least a portion of the compensation generated by the NCAA and their schools." *Id.* at 231.
178 Belo, *supra* note 1 at 156.
179 *Id.*
180 Rascher & Schwarz, *supra* note 7 at 507.

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REDUCING TV VIOLENCE
THE UPS AND DOWNS OF VARIOUS REGULATORY OPTIONS

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"In 1961, I worried that my children would not benefit much from television. But in 1991, I worry that my grandchildren will actually be harmed by it." [1]

-Newton Minnow

I. INTRODUCTION AND THE APRIL REPORT

Democrats are as eager to crack down on TV violence as Republicans are to crack down on TV sex, says an old Washington maxim.[2] But while Congress has banned TV sex—known in legal terms as "indecency"[3]—in the broadcast medium during all but late-night hours, TV violence remains unrestricted. The asymmetry in the regulations is curious. Many studies have found that TV violence is harmful to children, but not one has ever shown the same for indecency.[4] The government seems to have it backwards. And even with increasing pressure to limit the amount of violence in the media, there is a significant legal obstacle frustrating many attempts to regulate: the First Amendment.

In its vast First Amendment jurisprudence, the Supreme Court has tackled both violence[5] and broadcasting,[6] but never the intersection of the two. Courts have rejected restrictions on violent video games, but accepted restrictions on indecent broadcasting. So where does that leave violent broadcasting? And what about cable and satellite TV? These are difficult questions complicated by an inconsistent body of law. One scholar has observed:

There is today, for instance, no general first amendment test at all. Rather, there are merely congeries of tests, each as the Court itself declares, without seeing the irony, "a law unto itself." A random walk through any modern casebook in constitutional law will discover the extent to which the first amendment has been fragmented and scattered virtually out of sight by a miming of the common law process—of carefully sorting, weighing, and balancing each interest with professional detachment, with no particular predisposition to find freedom of speech or of the press more entitled to control the outcome than the other things at stake.[7]

Of course, this constitutional minefield has not deterred our lawmakers from investigating. Periodically, a member of Congress introduces a bill attempting to reduce violence on television, but most of these bills have not passed into law. To date, the only noteworthy regulation has been through the V-chip, a device inserted into television sets that allows a user to block certain categories of objectionable content corresponding to ratings supplied by the programmer. The V-chip was approved in 1998,[8] but it has been criticized as both ineffective and underutilized during its first decade of existence,[9] leading some members of Congress to look into stricter regulations. Amid various bills that have been introduced in the Senate,[10] thirty-nine members of the House of Representatives requested in March of 2004 that the Federal Communications Commission ("FCC") undertake an inquiry on television violence.[11]

In response, the FCC issued a report in April of 2007 (the "April Report"[12]) offering its views on some of the relevant issues. The Commission found that "there is strong evidence that exposure to violence in the media can increase aggressive behavior in children, at least in the short term," and that remedial efforts thus far have been unsuccessful.[13] To combat the problem, the Commission recommended, as both effective and constitutional, two options: (1) Congress could ban or otherwise limit violence in the broadcast medium during hours when children are likely to be in the audience; or (2) Congress could force cable operators to unbundle their tiered channel packages.[14] The April Report acknowledged some free speech concerns but indicated they could be overcome.[15]

Unfortunately, the legal analysis was insubstantial and the recommendations were inadequate. Simply, the FCC punted. As Commissioner Adelstein said, "[T]he Report passes the buck . . . . We leave much of the real work to Congress to tackle the tough issues Congress asked us to help them with."[16] Because the April Report was light on constitutional analysis,[17] this paper will offer a fuller discussion of the free speech issues at stake.

There are a number of different regulatory routes—some better than others—to limit violence on television. But with unpredictable free speech issues lurking, each possible regulatory scheme carries some risk of ultimately being declared unconstitutional. This risk should be balanced against the likely effectiveness and costs of each scheme to determine which is the best course of action. After evaluating each alternative, this paper will conclude that Congress should implement non-coercive solutions in conjunction with the TV industry's input. Specifically, Congress should continue with the V-chip system, but devote more resources to simplify it and adequately educate the public about its use. Congress should also encourage TV stations to mutually commit to a family hour on their own terms.

II. CONSTITUTIONAL CHALLENGES

Because "Congress shall make no law . . . abridging the freedom of speech,"[18] regulations on violence cannot place an impermissible burden on the right to free expression. The First Amendment provides two angles of attack. First, even a carefully considered definition of "violence" may be too vague to be enforced with predictability. As vagueness causes speakers to "steer far wider of the unlawful zone,"[19] the regulations can chill too much protected speech. Second, a ban on violence is a content-based restriction on governmentally disfavored speech, and such laws are subject to stringent judicial review.[20] Each of these challenges will be addressed in turn.

A. Definitional and Vagueness Concerns

In the majority of conceivable regulatory schemes, the government would have to adequately define "violence." How broad would it be? Would it include Peter Pan (when Captain Hook is eaten by a crocodile)? Would it include a hockey game (with occasional fights between players)?[21] Some of the proposed regulations worried the National Hockey League so much that it filed a comment in response to the FCC's notice of inquiry to argue that sports should be specifically excluded.[22]

And even if the FCC were to provide a clear definition of violence, there is the further challenge of parsing out material that should not be regulated regardless of its violent content. Would it include Saving Private Ryan (with its anti-violence message)? Would it include detailed news coverage of a gruesome murder (at the core of First Amendment protection)? Failed attempts to limit violence in video games have yielded a clear lesson: setting a definition is tricky.[23]

1. Context

"Not all violence is created equal."[24] Just as speech that has serious literary, artistic, political, or scientific value is deemed to be not obscene,[25] so too can violence serve legitimate purposes in the message of an artist, entertainer, or news reporter. Violence itself is often necessary to effectively depict the deleterious consequences of violence. In an influential article, Judge Wald of the D.C. Circuit asked, "Do we really want our children protected from true depictions of our country's violent history: lynchings, assassinations of Presidents, wars fought in the name of justice and freedom, the Rodney King tapes?"[26] Similarly, a reference to violence in classic works of literature is common; for example, one commentator noted,

> The magnificent movie "Gettysburg" depicts more deaths than an entire season's worth of TV police shows. Should

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> "Gettysburg" be edited so that it depicts the event as a mere skirmish instead of the bloodbath it was? . . . The works of Shakespeare are leavened with richly drawn accounts of patricide, infanticide, and general mayhem. In terms of sheer gruesomeness, the Bard was way ahead of modern filmmakers. In "King Lear," when Cornwall exclaims: "Out, vile jelly!" he is plucking eyes, not serving toast.[27]

Because context is so critical, regulations would have to evaluate many considerations. In the April Report, the FCC concluded that this sort of adaptable definition is indeed possible, listing several proposed factors that could anchor the standard.[28] The Commission might call such an approach flexible; those opposed to regulation call it vague.

The Supreme Court has long recognized that an overbroad prohibition can deter the legitimate exercise of free speech rights.[29] A vague standard causes cautious speakers to avoid anything approaching the prohibited line, which silences a substantial amount of protected speech. Moreover, vagueness gives the FCC too much latitude in interpreting the standards, opening up the potential for an abuse of regulatory authority.[30] Obviously, formulating a universal standard would be a thorny task. It is somewhat telling that not even researchers studying the harmful effects of media violence have used a consistent definition.[31]

None of this is to say that any definition of violence is inevitably doomed to be vague. On the contrary, past indecency rulings indicate that a carefully worded definition can be sustainable.[32] But this ultimately depends on how the government chooses to word its regulation, and, more importantly, on the inclinations of a particular court.

2. Analysis

We begin the legal analysis with a comparison to video games. Regulations of violent video games have often been struck down on the grounds of vagueness.[33] For example, in Entertainment Software Ass'n v. Blagojevich,[34] the Northern District of Illinois struck down a statute containing a definition providing that "violent video games"

> include [] depictions of or simulations of human-on-human violence in which the player kills or otherwise causes serious physical harm to another human. "Serious physical harm" includes depictions of death, dismemberment, amputation, decapitation, maiming, disfigurement, mutilation of body parts, or rape.[35]

In holding that this provision was void for vagueness, the court reasoned that it is difficult to say for certain what is "human-on-human"; it may or may not include, for example, realistic cartoons or semi-human life forms.[36] The court also noted that game creators, manufacturers, and retailers would only be guessing about whether their speech was subject to sanctions.[37]

Quite the opposite, however, courts have generally upheld regulations of sexually related materials in print and on television.[38] In Miller v. California,[39] the Supreme Court itself set the standard for obscenity:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[40]

There is a good argument that this is no less vague than what the court struck down in Blagojevich. Both definitions require widely discretionary judgments with a gut-instinct feel. Both definitions describe a type of offensive material as best as the English language permits. Both definitions rely on adjudicative bodies, whose function is to interpret language and make individualized determinations.

While the disparate treatment seems arbitrary (and none of the cases explain it), perhaps it is due to American culture. For whatever historical reasons, this nation has traditionally been more hostile to sex than to violence. While Janet Jackson's wardrobe malfunction horrified Americans and generated 540,000 official complaints to the FCC,[41] the major networks today freely average about 4.41 instances of violence per hour during prime time.[42] Many courts and scholarly articles have drawn attention to the violence steeped in many glorified works of literature, often graphic and gratuitous.[43] Blood lust is acceptable; sexual lust is not.

Besides the disparity between sex and violence, another distinction is between video games and television. It is unfair to impose subjective restrictions on video game makers after they have devoted significant time and money into developing each game. After months of research, design, testing, manufacturing, and distribution, video game makers have a large investment in their product. Banning sales can be devastating because altering a video game to eliminate the violence is likely to involve a major restructuring of programming, delaying the final product in an industry where the next best thing is never far away. On the contrary, TV programs that violate the standards are subject to a one-time fine that can easily be absorbed by large television corporations. Whereas video game makers rely on a small number of games to generate a large profit, TV stations can fall back on hundreds of different shows. Banning sales of a particular video game is perhaps too harsh a penalty when subjective judgments are involved.

Definitions of violence do have at least one advantage over definitions of indecency. Without any basis showing what types of indecency are harmful (or for that matter, if any type is harmful), the FCC has been floundering for years attempting to explain why some dirty words are taboo while others are not.[44] In contrast, a wave of studies on media violence are beginning to show exactly which types of violence, and in which contexts, have negative impacts. For example, the April Order spoke favorably of a study performed by Barbara Wilson, a professor at the University of Illinois, identifying eight specific contextual factors thought to be important in determining the impact of violence on young viewers.[45] A definition of prohibited violence could be keyed to a similar list of factors, and the Commission could apply these factors with more predictability than it does the indecency test. Furthermore, such a definition is logically and tightly connected with the asserted governmental interest of protecting minors.

Notwithstanding these considerations, nothing prevents a court from holding that a definition is indeed too vague. With precedents going in both directions, a court would be free to rule as it pleased. On the whole, the vagueness argument adds substantial uncertainty to the constitutionality of any regulation that relies on a definition supplied by the government.

B. Surviving Scrutiny

The second constitutional hurdle stems from the fact that a regulation targeting violence is content-based and subject to judicial review. The general rule is that content-based restrictions are reviewed under strict scrutiny, meaning they are valid only if they are the least restrictive means to advance a compelling governmental interest.[46] But there are exceptions. Each regulatory scheme affects the constitutional balance in its own unique way, and each must be analyzed separately. This section will address some of the issues that are common to each regulatory framework.

1. Asserted Governmental Interest

There are two interests recognized by courts: (1) the well-being of children and (2) aiding parents in supervising their children.[47] In Ginsberg v. New York,[48] the Supreme Court recognized these as independent governmental interests to justify a state law forbidding the sale of literature displaying nudity to minors.[49] It is noteworthy that Ginsberg was decided under rational basis, and the Supreme Court has never explicitly labeled the interests compelling. Nonetheless, in Action for Children's Television v. FCC ("ACT III"),[50] the D.C. Circuit deemed the interests to be compelling for protecting minors from indecent content on broadcast television.[51]

Some critics have noticed that there is an inherent contradiction between the two Ginsberg interests. To rely on both interests at once is to assume that all parents wish to rear their children in an environment free from indecency or violence. But there is a wider variety of parenting techniques. "Some parents may prohibit their children from any exposure to indecent material; some may impose a modified prohibition depending upon the content of the programming and the child's maturity; still others may view or listen to indecent material with their children, either to criticize, endorse, or remain neutral about what they see or hear."[52]

In light of these realities, it may be inherently impossible to advance both interests at once. A regulation aimed at protecting the well-being of minors (e.g. time channeling)53 interferes with a parent's right to use protected speech to aid in rearing his or her children. Likewise,

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a regulation aimed at facilitating parental supervision (e.g. blocking technologies)[54] may not fully protect the well-being of minors because "parents, no matter how attentive, sincere or knowledgeable, are not in a position to really exercise effective control" over what a child sees on television.[55] Despite this logical inconsistency, most courts have permitted the government to assert these interests side-by-side.[56]

The more important question is to what extent the government must show scientific proof that minors are harmed before it can assert a need to protect them. In the April Report, the FCC reviewed a comprehensive body of studies and concluded that exposure to violence in the media can increase aggressive behavior in children.[57] The networks and media associations challenge these findings, generally arguing that the Commission overstates the conclusions of the reports.[58] Because the data is vehemently disputed and it is not entirely clear whether a court would insist on decisive evidence, this is a critical point.

As with the vagueness issue, we begin the analysis with a comparison to video games. And also like vagueness, the cases here tend to be split along two lines. First, there are the "indecent television" cases, where courts have deferentially accepted a bare assertion of harm. Second, there are the "violent video game" cases,[59] where courts have required a strict showing of harm as well as a nexus between the video games and the harm.

In Ginsberg, the Supreme Court admitted it was "very doubtful" that scientific studies showed that sexually explicit magazines impair the ethical and moral development of children.[60] The Court did not require such strict evidence, however, stating that it "d[id] not demand of legislatures scientifically certain criteria of legislation."[61] In ACT III, the D.C. Circuit took a broad reading of Ginsberg and followed this lax approach even under heightened scrutiny, saying the interests were not limited to cases of "clinically measurable injury."[62]

On the other hand, cases involving violent video games have universally struck down regulations for a lack of hard evidence demonstrating tangible, harmful effects. The first and most influential of these cases was American Amusement Machine Association v. Kendrick,[63] where the Seventh Circuit addressed an Indianapolis ordinance seeking to limit the access of minors to video games containing graphic violence.[64] Writing for the court, Judge Posner noted that the studies on which the government relied merely showed a link between violent video games and increased feelings of aggression in children; there was no evidence that video games caused an increase in specific acts of violence or in the average level of violence in society.[65] Kendrick explicitly addressed whether Ginsberg required the court to defer to the legislature's bare assertion of harm:

> Ginsberg did not insist on social scientific evidence that quasi-obscene images are harmful to children. The Court, as we have noted, thought this a matter of common sense. It was in 1968; it may not be today; but that is not our case. We are not concerned with the part of the Indianapolis ordinance that concerns sexually graphic expression. The video games at issue in this case do not involve sex, but instead a children's world of violent adventures. Common sense says that the City's claim of harm to its citizens from these games is implausible, at best wildly speculative. Common sense is sometimes another word for prejudice, and the common sense reaction to the Indianapolis ordinance could be overcome by social scientific evidence, but has not been.[66]

Subsequent video game cases have followed Kendrick's lead: With respect to violence, as opposed to indecency, courts have not indulged the "common sense" justification for regulating.[67]

Interestingly, Kendrick also rejected outright the independent governmental interest of aiding parents in shielding their children from violence.[68] The court reasoned that because eighteen-year-olds have the right to vote, they must be allowed to form their political opinions on the basis of all uncensored speech before they turn that age.[69] The rights belong to the children, not the parents.[70] "People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble."[71] Thus, parents have no right to enlist the state's help in confining their children within the "bubble."[72]

Again, the reason for the difference in treatment between sex and violence is not obvious.[73] As previously mentioned, much of it probably results from cultural attitudes and the way Americans feel about what is appropriate.[74] The difference is reflected widely in First Amendment jurisprudence, as sexual speech is often thought to be of low value. While the Supreme Court has—at times—afforded indecent speech the same protection as any other speech,[75] it has at other times treated sexually explicit materials as on the "outer perimeters of the First Amendment, though . . . only marginally so."[76] In contrast, violent materials have been always given strong protection from the Supreme Court on down. No regulation of violent materials has ever passed constitutional muster.[77]

Because video games are a relatively recent phenomenon, there is not yet a large body of studies on them. Of the two main studies cited in cases—the Anderson study[78] and the Kronenberger study[79]—neither have proven persuasive to the courts.[80] The Anderson study found that aggression in children increases after viewing violent images, but Kendrick rejected the study for failing to show that "video games have ever caused anyone to commit a violent act."[81] Similarly, the Kronenberger study found that violent video games had negative effects on the brain function and behavior of minors, but Entertainment Software Association v. Granholm[82] held that "this research did not evaluate the independent effect of violent video games, and thus provides no support for the Act's singling out of video games from other media."[83]

Television violence has been more exhaustively studied, offering a greater amount of data. One expert testified to Congress, "There is probably no issue in social science that has been studied more over the past 30 years than television violence."[84] However, the increased quantity does not offer more conclusive results. Most of these studies find a correlation between exposure to media violence and one or more of three things: (1) increased antisocial behavior, including imitations of aggression or negative interactions with others, (2) increased desensitization to violence, or (3) increased fear of becoming a victim of violence.[85] While correlation is clear, causation is disputed.[86] A joint statement by various U.S. medical associations listed each of these three phenomena, but stopped short of asserting a causal link.[87]

Under the rigorous requirements of Kendrick, the studies are probably insufficient to show a compelling interest to regulate TV violence. They do not show that it has ever caused anyone to commit a violent act; nor do they show that it has caused the average level of violence to increase anywhere. Any regulatory scheme that triggers strict scrutiny faces high hurdles. Yet not all courts are quite as stringent as Kendrick, and many of the video game cases have hedged, indicating that in some circumstances regulations could be valid.[88] It is possible, especially with mounting public pressure, that a court could take a looser approach akin to ACT III and the indecency cases. In any event, this issue injects more uncertainty into the total equation.

2. Narrowly Tailored

Any restrictions on violence would have to be narrowly tailored so as not to silence any more protected speech than necessary. This requirement has become stricter with more recent cases. In Ashcroft v. ACLU,[89] the Supreme Court upheld a preliminary injunction against enforcement of the Child Online Protection Act (COPA), which criminalized the posting of sexually obscene materials on the internet.[90] Drawing attention to filtering software that could block sexual material from a user's computer, the Court held that the COPA's ban was not the least restrictive alternative. Filtering software, said the Court, could impose selective restrictions at the receiving end rather than broad restrictions at the source.[91]

Likewise, U.S. v. Playboy Entertainment Group[92] struck down a federal law requiring cable channels primarily dedicated to sexually-oriented programming to either fully scramble or block those channels or to limit their transmission to between 10 p.m. and 6 a.m.[93] The Supreme Court reviewed the law under strict scrutiny and held that there were less restrictive alternatives. The Court pointed to "a key difference between cable television and the broadcasting media, which is the point on which this case turns: Cable systems have the capacity to block unwanted channels on a household-by-household basis."[94]

Ashcroft and Playboy stand for the proposition that where technological developments offer a solution that can more selectively filter objectionable content, a broader prohibition is no longer

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constitutionally valid. This is especially important in electronic communications media, where the transmitting and receiving devices are intimately linked to Moore's Law[95] and the rapid improvement of electronic capabilities. An all-encompassing ban is less likely to be accepted if engineers have developed a less restrictive solution.

III. VIOLENCE IN BROADCASTING

With these general constitutional principles in mind, we now turn to the specific case of regulating the broadcast medium. Broadcasting is diminishing in importance, but it is an attractive target because it is, in a constitutional sense, the most vulnerable to regulations. And while currently about 86 percent of households receive their television via cable or satellite,[96] regulations geared toward broadcasting are not as toothless as they might seem. Cable and satellite TV carry the major broadcast networks' programming, and these programs draw the most viewers. As a typical example, the week of February 11, 2008 saw each of the top ten programs on broadcast TV attract more than 11 million viewers, while only two programs on cable managed to attract more than 5 million viewers.[97] If Congress were to regulate broadcasting, then CBS, NBC, ABC, and FOX—comprising 43.4 percent of the TV viewer market share in 2007[98]—would all have to limit violence on their shows. And the broadcasters certainly do not lack gore on their programming. As one journalist said, ". . . a disturbingly grisly procedural in which murder victims are rendered into gorgeously art-directed gore . . . . They have a name in the TV business for that kind of series: a CBS show."[99] Focusing solely on broadcasting would be a partial but not wholly ineffective remedy.

A. Case Law

Regulating broadcast violence has parallels to regulating broadcast indecency, which has been litigated intermittently over the past thirty years. And while enforcing the prohibitions on indecent broadcasting has fluctuated with the political climate,[100] courts have generally held that at least some level of regulation is constitutionally permissible.[101] In order to understand the comparisons, it is necessary to begin with a survey of broadcasting and indecency cases. This section will offer a brief overview of how courts have handled such cases.

To begin, Supreme Court precedent has widely acknowledged that the level of free speech protection depends on the medium.[102] *Red Lion Broadcasting Co. v. FCC*[103] placed the broadcast medium particularly low on the hierarchy. There are a limited number of frequencies that can be used at any given time, and only a tiny fraction of people can ever hope to communicate by TV or radio.[104] According to the "scarcity rationale," the limited availability of spectrum space places a licensee under additional obligations to act in the public interest.[105]

1. Pacifica

Red Lion's scarcity rationale does not by itself justify indecency regulations. While "scarcity has justified increasing the diversity of speakers and speech, it has never been held to justify censorship."[106] Thus, in *FCC v. Pacifica Foundation*[107] the Supreme Court would use additional justifications for upholding regulations on broadcast indecency.

In *Pacifica*, a radio station broadcast a George Carlin monologue entitled "Filthy Words" at 2 p.m. on a Tuesday.[108] The topic of the monologue was, as Carlin put it, "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely couldn't say, ever," and Carlin listed and repeated those words.[109] The FCC issued an order stating that the radio station could have been subject to sanctions,[110] and the case eventually made its way up to the Supreme Court.[111]

The Court addressed the question of "whether the First Amendment denies government any power to restrict the public broadcast of indecent language in any circumstances."[112] Citing *Red Lion*, the Court noted that broadcasting has received the most limited First Amendment protection.[113] The Court then identified two aspects of the broadcast medium that limit its free speech protection as it pertains to indecency. First, broadcast is a "uniquely pervasive presence in the lives of all Americans."[114] Broadcasting invades the privacy of the home, where a nuisance rationale shields homeowners from unwanted intrusions.[115] Second, broadcasting is "uniquely accessible to children, even those too young to read."[116] Unlike written materials, radio and TV can easily be understood by children, and the broadcasts can "enlarge a child's vocabulary in an instant."[117]

Citing Ginsberg, the Court noted interests in both protecting the well-being of its youth and supporting parents' claim to authority in their own household.[118] In light of these interests, and because of the limited protection for broadcasting, the Court held that the sanctions were justified.[119] Finally, the Court explicitly emphasized the narrowness of its holding, declaring that "context is all-important."[120] There was a whole host of variables that justified possible sanctions in this case, most notably the time of day.[121]

2. ACT III

In the late 1980s, ten years after *Pacifica*, the government became increasingly interested in regulating indecency.[122] Following an almost decade-long dance among the FCC, Congress, and the D.C. Circuit,[123] Congress enacted section 16(1) of the Public Telecommunications Act of 1992,[124] which provided that indecent materials could only be broadcast between the hours of midnight and 6 a.m.[125] The provision had a "public broadcaster exception" in which public radio and TV stations that went off the air by midnight were permitted to broadcast indecent materials after 10 p.m.[126] When the FCC implemented this Congressional mandate, the regulations were challenged in the D.C. Circuit in *Action for Children's Television v. FCC ("ACT III")*.[127]

In ACT III, the court addressed a free speech challenge to the new regulations.[128] Performing a traditional First Amendment analysis, the court first defined the proper scrutiny level.[129] The court said that because the regulations were content-based, they were subject to strict scrutiny: They would be upheld only if the "Government's ends are compelling [and its] means [are] carefully tailored to achieve those ends."[130] However, the court noted that *Pacifica* seemed to lower the constitutional level of scrutiny for broadcast indecency.[131] Thus, while the court applied the exacting strict scrutiny standard, it did so with particular sensitivity to "the unique context of the broadcast medium."[132] Under this framework, the court held that *Ginsberg's* two interests were sufficient to justify the ban.[133]

The court also held that the regulations were narrowly tailored, basing this conclusion on data indicating that the number of children watching TV fell sharply during late hours.[134] Thus, channeling indecent material between 10 p.m. and 6 a.m. advanced the interests without overburdening speech.[135] However, because the public broadcaster exception did not bear any relation to the governmental interest, this distinction was arbitrary.[136] The court remanded the case to the FCC with instructions that all indecency prohibitions should be limited to the time between 6am and 10 p.m.[137] The Supreme Court denied certiorari,[138] whether it tacitly approved or just did not want to thrust itself into the case.

B. Time Channeling as a Regulatory Option

With reduced First Amendment protections, broadcasting is the lone candidate for "time channeling," i.e. fully banning content during specified hours, as in *ACT III*.[139] While this approach is currently only applied to indecency, the concept is not new to violence. In 1975 the broadcasters bowed to governmental pressure and temporarily agreed to experiment with a "family hour," where the first hour of prime time every night was to be free from violence and sex.[140] A federal district court held that the FCC's pressuring the networks into family hour was unconstitutional,[141] but the Ninth Circuit vacated the ruling on unrelated grounds.[142] By the time the case was remanded, the networks had dropped the family hour experiment.[143] In any event, these precedents have been largely superceded by more recent cases, especially *ACT III*.[144]

Legislators have made more direct attempts to import time channeling into TV violence. A 1997 bill introduced by Senator Fritz Hollings would have required periods of television free from violence when a large portion the audience was likely to be children—presumably, like indecency, before 10pm.[145] Partially because this was a time when most people were still optimistic about the V-chip, the bill ultimately failed by a 60-39 vote, with most critics pointing to governmental censorship and vagueness.[146] But the FCC has since lost confidence in the V-chip, and the April Report recommended time channeling instead.[147] This section will address the effectiveness and likely constitutionality of time channeling.

1. Effectiveness

Time channeling advances the governmental interest of protecting

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the well-being of minors (without regard to the interest of supporting individualized parental supervision). This means that violence would have to be broadcast at a time when few children are likely to be watching television. Consistent with *ACT III*, the FCC would probably have to produce statistics to correlate the time of day with the number of children watching TV.148 Time channeling can only be effective to the extent that certain percentages of children, based on numerical averages, are screened from the audience of broadcast television shows. To this end, time channeling is only a partial solution.

2. Constitutionality

In the April Order, the FCC cited *Pacifica* and *ACT III* to defend its assertion that the First Amendment would permit time channeling violence.[149] This assertion warrants further examination. Pacifica relied on two special characteristics of broadcasting—that it is especially pervasive and accessible to children—to justify regulations. But since *Pacifica* in 1978, telecommunications has changed so much that most electronic communications media now share these twin characteristics with broadcasting. As mentioned above, 86 percent of households now receive a cable or satellite TV signal directly into their homes (making them "pervasive"), and very few parents restrict their children's access to the TV ("accessible to children").[150] In spite of these realities, the Supreme Court has always applied a more rigorous standard to content-based restrictions in the cable medium.[151]

Likewise, children are increasingly granted unrestricted access to the internet in their homes. Studies have shown that only 52 percent of parents "moderately supervise" their children's internet use, and 20 percent of parents do not monitor children's internet use at all.[152] Children have become "the computer experts in our Nation's families."[153] And like cable, the Supreme Court has applied heightened scrutiny to speech regulations on the internet.[154] Because there is little meaningful difference between broadcasting and other media in terms of pervasiveness and accessibility to minors, there are good reasons to believe that *Pacifica* should not give the FCC more extensive authority to regulate broadcasting.[155]

Nonetheless, the Supreme Court has never bought into this argument. Notwithstanding the erosion of broadcasting's special attributes, Pacifica is still good law, and the Court has repeatedly expressed confidence in a First Amendment distinction based on broadcasting's characteristics.[156] Following the guidance of the Court, the FCC also stands by *Pacifica*.[157] Even critics of indecency regulations have admitted that the precedent set by *Pacifica* continues to authorize such regulations.[158] The Supreme Court may one day choose to rethink the twin rationales of Pacifica, but for now, we must take them at face value.

Applying these principles to the time channeling of violence, we first note that there is no explicit legal test to anchor the discussion. *Pacifica* reaffirmed that broadcasting receives the most limited First Amendment protection, but it did not define a standard.[159] Confronted with *Pacifica's* ambiguity, *ACT III* used this test:

> In light of these differences, radio and television broadcasts may properly be subject to different—and often more restrictive—regulation than is permissible for other media under the First Amendment. While we apply strict scrutiny to regulations of this kind regardless of the medium affected by them, our assessment of whether section 16(a) survives that scrutiny must necessarily take into account the unique context of the broadcast medium.[160]

ACT III's test sounds somewhat like intermediate scrutiny,[161] but about all that can be said for certain is that a regulation of broadcast violence would be subject to something less than strict scrutiny.

Whether the studies showing that media violence is harmful would pass this level of scrutiny—or any other level of scrutiny—is not clear. A potentially bigger problem is that time channeling is not the least restrictive alternative. It is both overinclusive (often restricting access to adults) and underinclusive (failing to restrict access to all minors). True, the D.C. Circuit in *ACT III* gave its stamp of approval to a blunt, broad-scale time channeling approach that prohibited protected speech for sixteen of every twenty-four hours.162 But a modern court might not be so forgiving. With new technologies come increasingly precise means to keep objectionable content out of one's home. More and more video programming is being delivered via the internet and cell phones, and sophisticated devices offer the potential for enhanced content filtering. What is a "narrowly tailored" solution has changed a great deal since *ACT III*, and time channeling is no longer the least restrictive means. This is especially true after Ashcroft and Playboy, and new digital format delivery offers even greater potential. Yet another problem is that time channeling relies on the government to supply a definition of prohibited violence, leaving vagueness challenges open. Balancing all of these considerations, the constitutionality of time channeling is highly questionable.

IV. VIOLENCE ON CABLE TV AND IN OTHER MEDIA

Cable is the dominant force in television today, and a truly effective regulatory scheme should not ignore cable or satellite TV. Unlike broadcasting, cable receives full First Amendment protection; regulations are dissected under strict scrutiny.[163] The FCC has not unilaterally regulated content on cable television in the past, and it would probably seek congressional approval before it began to do so.

A. The V-chip

It is easy to forget that mild regulations of violence are already in place in today's industry. The Telecommunications Act of 1996 delegated authority to the FCC to implement a ratings system with viewer-initiated blocking.[164] Sections 551(b) and (e) authorized the Commission to propose guidelines and recommend procedures for a ratings system if industry did not create an acceptable one of its own within one year.[165] The industry quickly proposed guidelines for a "V-chip," and the FCC approved.[166]

A V-chip is a device inside a television that allows a user to block programs that contain certain objectionable content. On a voluntary basis, programmers rate their own programs as TV-Y (suitable for viewing by all children), TV-Y7 (suitable for older children), TV-G (suitable for general audiences), TV-PG (parental guidance suggested), TV-14 (parents strongly cautioned), or TV-MA (suitable only for mature audiences).[167] Moreover, there are more specific descriptors accompanying the ratings: S (sexual content), L (language), V (violence), FV (fantasy violence), and D (suggestive dialogue).[168] The rating is embedded into the program signal, and a user specifies which type of programs the V-chip should block. The Telecommunications Act of 1996 mandated that as of January 1, 2000, all television sets manufactured in the United States or shipped in interstate commerce with a picture screen of thirteen inches or larger must be equipped with a V-chip.[169] Outside of this mandate, participation in the system is voluntary.

1. Constitutionality

On first glance it may seem that because the program ratings are voluntary, the scheme cannot run afoul of the First Amendment. However, according to the state action doctrine, conduct can be imputed to the government in instances of coercion or significant encouragement, either overt or covert.[170] Plenty of "encouragement" went along with the birth of the V-chip. Some critics allege that the networks agreed to participate in the ratings system in the hope that the government would give them lucrative spectrum space for digital television.[171] Moreover, television stations were facing pending legislation that was more severe than a self-rating system: For one thing, the FCC was authorized to set up a committee to create its own blocking system if industry did not quickly create one on its own.[172] And even if industry did propose its own system, it was entirely subject to FCC approval.[173] Thus, the V-chip has been called "censorship by congressional intimidation."[174]

Yet this form of regulating by pressure is commonplace in the administrative context, and courts have given the FCC some latitude to engage in jawboning and "regulation by raised eyebrow."[175] And even if a court finds the V-chip to constitute state action, the government could still attempt to justify its regulations as the least restrictive means to advance a compelling interest. Unlike time channeling, the V-chip is narrowly tailored; it filters content on a *per program basis*, allowing fully customizable blocking of objectionable content. Moreover, if the TV programmers perform the ratings themselves, there are no problems with vaguely worded government regulations. On balance, the V-chip is likely constitutional. And all of this assumes that a TV station would challenge the regulations in the first place.

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2. Effectiveness

Unfortunately, few parents take advantage of the V-chip. For instance, a study conducted by the Kaiser Foundation showed that only 15 percent of all parents have actually used the V-chip.[176] In 2000-2001, 14 percent of parents had not even heard of the ratings system; in 2004 that number increased to 20 percent.[177] Eighty-eight percent of parents did not know what the FV rating stood for.[178] A small portion of parents identified it as a positive label, thinking it meant "family viewing,"[179] but in reality it stands for "fantasy violence."[180] Part of the problem is that the system is so confusing: A study by the Annenberg Public Policy Center indicated that only 27 percent of parents could even figure out how to use the V-chip.[181]

And besides the low usage statistics, there have been problems with allowing the programmers to rate their own programming. One study in 2002 found that shows tend to be under-rated. For instance, according to the study, 68 percent of prime-time network shows not having an "adult language" label should have had it. And the problem went well beyond that category: "[I]n all four areas of sensitive material—violence, sexual behavior, sexual dialogue, and adult language—the large majority of programs that contain such depictions are not identified by a content descriptor."[182] The Kaiser study found that many parents concurred with this assessment: 39 percent of parents found the ratings to be inaccurate.[183]

Although many critics have condemned the V-chip as horribly ineffective,[184] the system does work from a technological standpoint. Parents who choose to learn and implement their TV's V-chip are empowered to block a program on the basis of its rating. The system breaks down only as a result of underutilization and inaccurate ratings.

B. Mandatory Ratings Scheme

In response to the shortcomings of the V-chip, Senator Mark Pryor introduced the Child Safe Viewing Act,[185] (commonly referred to as the "super V-chip" legislation), which would oblige the FCC to investigate new blocking technologies across a wide variety of distribution platforms.[186] The Senate Commerce Committee approved the bill in August 2007.[187]

The bill's key phrase directs that the new system "operate independently of ratings pre-assigned by the creator of such video or audio programming."[188] It would seem that there are two ways to accomplish this: (1) keep the core of the V-chip system but have an independent body perform the ratings; or (2) develop entirely new technologies that do not rely on ratings at all. This section will address the former.

An independent ratings body is not a new concept. In the April Report, the FCC addressed this possibility, which it termed "viewer-initiated blocking and mandatory ratings."[189] The goal is to make the ratings more accurate—the networks have proven to be too biased to rate their own programs.

1. Constitutionality

Such government-mandated ratings are extremely vulnerable to First Amendment attacks. While the original V-chip legislation avoided constitutional problems by making the rating of programs voluntary,[190] a mandatory system runs much closer to impermissible governmental censorship. The constitutional analyses are similar, but there are key distinctions. A compulsory system involving a government-sponsored body is clearly state action. The government is not just pressuring; it is forcing. This exposes the system both to strict scrutiny (because the government is showing disapproval with speech on cable TV based on its content) and to vagueness challenges (because the government must supply the definitions). And as a more pragmatic consideration, TV programmers are far more likely to fight a mandatory system in court.

2. Effectiveness

Even aside from grave constitutional concerns, it is not clear that independent ratings would lead to significant improvement. In the April Report, the FCC said, "Experience leads us to question whether such a ratings system would ever be sufficiently accurate given the myriad of practical difficulties that would accompany any comprehensive effort to ensure the accuracy of ratings."[191] Other critics have expressed similar concerns.[192] Given the sheer amount of new TV programming, it would be a massive task for one independent body to rate everything in advance. Some have also questioned whether the ratings system of an independent body would be any more accurate or reliable than the networks' flawed system.[193]

C. Modern Technology

The second alternative of the Child Safe Viewing Act, a system wholly without ratings, is grounded in emerging technology—for example, engineers could invent an advanced filter that would scan a television signal for violent content at the end-user level. Such a filter would seemingly solve all of the shortcomings and drawbacks of other systems. It is nice to imagine one.

Unfortunately, the Act is overly optimistic to the extent that it is intended to make this a reality. Technology is nowhere near such advanced filtering. This is illustrated by failed attempts to filter internet web sites based on their content. The first problem is that a computer is insensitive to context. Internet filters work by matching words found on a web site with words on the filter's predetermined list.

> Thus, any prose, poetry, or educational material mentioning "breast," even in the innocuous sense of referring to a person's upper torso, or "sex," in the educational contexts of gender, safe sex, or sex education, would likely be filtered. This shortcoming was most starkly manifested a few years ago when sports fans were searching for information on "Super Bowl XXX."[194]

Even with extraordinarily simple word-to-word matches, filters have lacked the sophistication to assess content within its context.

The second problem is that pictures—and especially video streams—are too complicated to analyze with an algorithm. Regarding nudity in pictures, one scholar has noted, "The best machines in the world couldn't distinguish . . . a skin-zine from a medical text. And because automatic identification [is] impossible, the theorists told us, automatic filtering was computationally impossible as well."[195] It is true that speech recognition software can detect four-letter words, but scanning a video feed for depictions of violence is infinitely more difficult than scanning an audio stream. The size and density of video data, arranged in two dimensions, elevate the complexity to prohibitive levels. And that problem is compounded by the hopelessness of trying to teach a computer-based filtering device to judge violence within context—a subjective task difficult even for human beings.

D. A La Carte

The April Report spoke favorably about imposing on cable and satellite providers a requirement to offer channels "a la carte" (or "unbundling"), meaning consumers purchase cable channels on an individualized basis rather than buying groups of channels that are tied together.[196] For example, a customer could purchase ESPN and the Discovery Channel without obligation to buy the remainder of the bundled basic-tier cable channels along with them. In recent years, the Commission has been a vocal advocate of unbundling, claiming it would save consumers money and restrict the flow of indecent and violent content.[197]

1. Constitutionality

As an initial matter, not even a primarily economic regulation such as unbundling is completely immune from constitutional scrutiny. In reaction to the April Report, Professor Laurence Tribe testified before Congress that compelling cable networks to unbundle their channels violates the First Amendment.[198] Tribe argued that unbundling interferes with a cable provider's editorial discretion by depriving it of the ability to provide channels in chosen combinations.[199] "For example," testified Tribe, "a cable operator may wish to provide a public service by bundling C-SPAN or local public-access channels with more popular fare such as ESPN."[200] While Tribe may place more emphasis on cable providers' editorial discretion than do others,[201] his testimony nonetheless highlights a potential hurdle for a la carte.

2. Effectiveness

Even if unbundling is constitutional, it does not seem likely to be effective in combating media violence. The problem is that there is a variety of content—some violent, some innocuous—on *each* channel. Violence on television is not segregated by channel, and attempting to make a distinction between "good" and "bad" channels is not helpful. Outside of the premium channels (HBO, Showtime, etc.), there is little difference in the level of violence among any other stations. In fact, network programming is frequently the worst offender,[202] but it does not seem likely that many parents would request, for example, that CBS be blocked from their household. Compounding the problem,

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commercials and promos for shows on other channels, which may or may not be in a viewer's subscription plan, can be just as offensive as the shows themselves.

V. RECOMMENDATIONS

Before recommending the best course of action, we should clearly identify why Congress wishes to regulate in the first place. There are two reasons, closely corresponding to the Ginsberg interests: (1) aiding parental authority to shield their children from TV violence, and (2) limiting all children's exposure in order to decrease violence on a broader societal level. These are two very different aspects of the TV violence problem, and each requires a separate course of action. On the whole, the solutions advanced here are non-coercive. This eliminates First Amendment challenges and invites cooperation between government and industry.

A. Aiding Parental Authority Over Their Children

The first concern is that TV stations are injecting unwanted and inappropriate material into the homes of Americans, bypassing the parents' right to raise their children as they see fit. This is of some concern because parents cannot monitor a child's viewing all hours of the day. But if the focus remains solely on parental rights, the V-chip and other forms of viewer-initiated blocking have mostly solved this problem already.

1. Suggestions

Studies evaluating V-chip usage offer puzzling results. The vast majority of parents think there is too much violence on TV; yet at the same time, the vast majority of parents do not use the V-chip.[203] On first glance, the most obvious answer to the discrepancy is that parents are generally unaware of their ability to block programs. To remedy this problem, the TV industry poured over $550 million into a V-chip education initiative, the "TV Boss" campaign, which began in 2005 and featured TV ads where a mother speaks with fictional characters—a biker gang or the mafia—and explains to them they are inappropriate for her children's viewing.[204] But none of this seems to have worked. The most recent poll, funded by the Parents Television Council[205] and conducted separately in September 2006 and March 2007, asked the following questions:

> 1.) Do you agree or disagree that there is too much sex, violence and coarse language on television?
>
> 2.) In the past week, how many times have you used your V-chip or cable box parental controls to block unwanted content from your television?
>
> 3.) Define the content descriptors D,L,S,V (Dialog, Language, Sex and Violence) by choosing the correct answer out of four options.
>
> On the "too much violence" question, 80% said yes in September, 79% in March; 87% said they had not used the V-chip in September, 88% in March; and only 7% could pick the right descriptors definition in September, 8% in March.[206]

With $550 million spent at their benefit, parents have certainly been given an opportunity to learn about the V-chip.[207] Dozens of websites contain information about the ratings, and almost all television sets are equipped to block violent programs. So why is there still such a wide discrepancy between parental concern and V-chip usage? Though mildly disconcerting, I offer this explanation: Many parents simply do not care as much as they say they do.

Nothing moves industry like consumer demand. Yet after twelve years since viewer-initiated blocking was passed into law, few parents have bothered to take notice. If parents were truly interested in a system that allowed them to shield their children from TV violence, industry would have adjusted to that demand. V-chip interfaces would be user-friendly (they are not); ratings would be in accord with societal attitudes toward what content is inappropriate (they are not); and the term "V-chip" might even be in common vocabulary (it is not). At bottom, the failure of the V-chip is due, at least in part, to the lack of a willing consumer market for it. For all the polls where parents claim to condemn the violent content on TV, their superficial preferences have not moved them to act.

This is not to say that all parents are apathetic. Indeed, 10-15 percent of parents use the V-chip.[208] Of those that do not, many explained the reason was that they were usually present when their children watch TV.[209] Moreover, there are other forms of viewer-initiated blocking. Many cable subscribers have set-top boxes that allow parents to block shows with certain ratings, with certain titles, by time and date, or by channel.[210] Satellite TV subscribers have access to similar features, such as DirecTV's Locks & Limits feature or Dish Network's Adult Guard.[211] Whether by direct supervision or through technological solutions, parents are largely empowered to control content viewed by their children. To the extent that critics have called the V-chip a failure, no one ever claimed that the chip does not do what it is supposed to.

Because the V-chip and other content blockers give parents authority to control their children's viewing habits, Congress should take only minimal efforts on this front. The best solution is to make improvements on the system that is already in place. This is best accomplished by devoting government funds to further public education. The more people know about viewer-initiated blocking, the more common its use will be. The $550 million spent by industry was a start, but the V-chip never entered the public consciousness quite like other outcomes of consumer education—for example, the Y2K scare.[212] Congress recently appropriated $1.5 billion to the digital TV transition campaign,[213] and it may want to consider funding the TV violence campaign as well. As advocated by Commissioner Adelstein's opinion in the April Report, the FCC could initiate a multi-faceted program that would expand industry-led education efforts such as TV Boss; ensure all programming is rated, including news, promotions, and commercials; promote media literacy at schools; and encourage the development of enhanced V-chip capabilities.[214]

A less preferred method of increasing usage is to simplify the ratings categories. For example, parents might be more willing to learn a system based solely on the age-based ratings (Y, Y7, G, PG, 14, MA) without content-based ratings (S, L, V, FV, D),[215] much like movie ratings. However, this simplification comes at a price. Part of the appeal of the V-chip is in its customization capabilities. Some parents might permit their children to watch programs with adult language but deny them programs with violence. The marginally higher cost in complexity is well worth the ability to use combinations of the content ratings to suit a particular parent's taste.

All of this still leaves the challenge of fixing the inaccuracy of the TV programmers' voluntary self-ratings. The FCC's April Report referenced an economist who studied the problem of why networks under-rate their programs.[216] According to James Hamilton, programs with more restrictive ratings command lower advertising rates; so the programmers are responding to economic incentives.[217] As described above,218 the First Amendment likely prevents the government from supplying the ratings, and in any case, the FCC lacks the resources to rate every TV program. Thus, the solution of making the ratings more accurate will have to come from within industry.

This is a serious problem, but it is best reduced through increased public education as well. A greater awareness of the ratings system would lead to more recognition of the discrepancy between the content of a television show and what the ratings say is the content of that show. And if TV ratings were to become familiarly discussed—as much as movie ratings, for example—industry might feel pressure to adjust to consumer preferences. Frequent public discussion, and in particular viewer complaints, would give TV stations a tangible incentive to keep their ratings in accord with society's desires.

2. Advantages

Making adjustments to the current system has several advantages. First, the government would avoid lengthy court battles involving unpredictable cases in front of unpredictable judges. As described above, the TV programmers have an exceptionally weak First Amendment argument against the V-chip, and they would be unlikely to challenge a voluntary system. If persistent public pressure means that content restrictions will probably occur in some form, then the TV stations prefer to have control over the restrictions. The stations are not likely to attack a mild burden, the demise of which could lead to a more onerous burden.

The second advantage is that the system is already in place. Over the past eight years, TV manufacturers have become accustomed to inserting a device into their televisions, TV programmers have become accustomed to rating their programs, and viewers have become accustomed to ratings appearing on their television screens. By merely

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updating the V-chip, the industry does not have to restructure itself. And the V-chip is cheap to manufacture, especially compared to the overall cost of television sets.[219] Moreover, the latest generation of the V-chip technology, which by FCC mandate must be installed in most new digital TVs, can be adapted to modify future rating systems.[220] Such flexibility allows for adjustments in the future. The V-chip is also readily adaptable to computers and cell phones if either one proves to be the dominant video device of the future. Finally, the V-chip offers comprehensiveness and customizable control. The chip works with all TV signals, not just broadcasts, and, rather than fully ban programming, it permits parents to selectively block it.

B. Decreasing Violence in Society

The second problem with TV violence that needs to be addressed is on a broader cultural level—that exposure to violent acts at a young age can contribute to an aggressive, hostile, gun-filled society that is harmful to everyone. The thought is that if children are not desensitized to aggression at an early age, perhaps societal violence will diminish.

Given parents' apparent lack of interest in blocking violent programming, the only governmental solution here is some form of time channeling, as a sort of congressional substitution for good parenting. ACT III-style time channeling can only be applied to the broadcast medium, and even then, it is probably too blunt to be constitutional.[221] A more nuanced solution is in order. Perhaps a voluntary "family hour"—one or two hours during prime time—would be more successful. Congress worked with industry (rather than regulating at industry) to launch the V-chip, and a similar path could work here. To initiate further efforts by TV stations, Congress could consider legislation that explicitly exempts from antitrust law both a family hour and a universal television code.[222] This would permit a comprehensive undertaking from broadcasting, cable, satellite, and advertising companies to establish an inter-industry code for TV violence.[223] With all TV delivery formats cooperating, Congress could encourage a pledge that peak times of children's viewership will be free from violence. It is not a complete solution, but it is probably the best that the First Amendment will allow; and it carves out at least some media violence.

As previously mentioned,[224] the last time that industry banded together to implement a family hour, a federal district court struck it down based in part on the First Amendment and the state action doctrine. Thus, Congress would have to avoid an application of the state action doctrine by limiting governmental pressure and truly letting industry take the lead. While it may be somewhat optimistic to hope that industry will be so accommodating, it is the most effective solution within constitutional boundaries.

VI. CONCLUSION

Acts of aggression and violence in the media are omnipresent—a point with which even the Media Associations agree, as they argued in their comments:

> [T]he effect of regulating "violent" programming, especially as it is broadly defined by some critics, would be far more widespread than with indecency, as it would impose a wholesale reordering of programming available on television. . . . [T]he National Television Violence Study suggested that "[v]iolence predominates on television." As a result, a "safe harbor" requirement for violence could mean that much television programming would be relegated to what the D.C. Circuit has described as "broadcasting Siberia."[225]

To be sure, it is a brash argument by the Media Associations to use their own proliferation of violence as a reason to continue the violence. But they have a point. "Broadcasting Siberia" is the regrettable result of overly severe regulations, and this is neither constitutional nor desirable.

Some price must be paid for free speech. The marketplace of ideas is teeming with good ideas and bad ideas alike. Sometimes it may be tempting to suppress a bad idea that is flourishing, but the First Amendment reflects the reality that "one man's vulgarity is another's lyric."[226] It is no different for media violence, and Congress and the FCC should carefully evaluate their First Amendment limits before leaping to action. The solutions proposed in this article represent the best ways to minimize the harmful effects of TV violence while not running afoul of the First Amendment.

1 This is an old quotation from Newton Minow, a former chair of the FCC. See Emily Watson, There's No Violence in Mr. Rogers' Neighborhood, GUELPH MERCURY, Dec. 20, 2007, at A9.
2 John Eggerton, Violence: The New Indecency? Washington Considers A Crackdown On TV Gore, BROADCASTING AND CABLE, Jan. 22, 2007, at 18.
3 "Indecency" and "obscenity" each have specific meanings in First Amendment cases. See infra Part II.A.1.
4 Violence in the Media: Hearing Before the S. Comm. on Commerce, Science and Transportation, 110th Cong. (2007) (statement of Dr. Dale Kunkel, Professor, Department of Communication, University of Arizona).
5 See infra Parts II.A.2, II.B.1.
6 See infra Part III.A.
7 William W. Van Alstyne, First Amendment Limitations on Recovery from the Press—An Extended Comment on "The Anderson Solution", 25 WM. & MARY L. REV. 795, 818 (1984). Alstyne was writing about libel law, but his First Amendment observations are well applied to this discussion.
8 The V-chip was created by industry in response to the Telecommunications Act of 1996, Pub. L. No. 104-104, § 551, 110 Stat. 139-42 (1996), which authorized the FCC to devise its own system of viewer-initiated blocking. See infra Part IV.A.
9 For a detailed account of the V-chip's effectiveness, see infra Part IV.A.2.
10 On March 14, 2005, the Senator Rockefeller introduced the Indecent and Gratuitous and Excessively Violent Programming Control Act of 2005, S. 616, 109th Cong. (2005). This bill provides that the FCC should closely examine violence on television and, if it determines there is a problem, to take remedial measures such as time channeling. Id. Similarly, in 2007 Senator Mark Pryor introduced the Child Safe Viewing Act, S. 602, 110th Cong. (2007). For more information, see infra Part IV.B.
11 Letter from Joe Barton, Chairman, U.S. House of Representatives Committee on Energy and Commerce to Michael K. Powell, Chairman, FCC (Mar. 5, 2004).
12 Violent Television Programming and Its Impact on Children, 22 F.C.C.R. 7929 (2007).
13 Id. at 7931.
14 Id. The Report also evaluated a third option: continuing with V-chip-like blocking but have the programs rated independently. Id. at 7941. While the Commission opined that this was likely constitutional, it expressed doubts that this option would be effective in practice. See infra Part IV.B.2.
15 Violent Television Programming, supra note 12, at 7931.
16 Id. at 7959 (statement of Jonathan S. Adelstein).
17 Id. ("Specifically, this Report does not deal adequately with the constitutional dimensions of regulating violent content on free over-the-air TV, or subscription-based cable and satellite TV services. In fact, it muddies the issues and legal distinctions . . . .").
18 U.S. CONST. amend. I.
19 Media Associations Comments at 44, Violent Television Programming and its Impact on Children, 22 F.C.C.R. 7929 (2007) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).
20 Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989). See generally RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 4:2 (2007).
21 Many of these examples highlighting the problem of vagueness are taken from Media Associations Comments, supra note 19, at 42-43.
22 National Hockey League Comments, Violent Television Programming and its Impact on Children, 22 F.C.C.R. 7929 (2007).
23 Paul M. Smith & Katherine A. Fallow, Bam! Pow! Splat! Ssssss... FCC'S Proposal to Restrict Violence on Television Won't Work for the Constitution or the Kids, LEGAL TIMES, May 7, 2007, at 70. See also infra Part II.A.2.
24 UCLA CENTER FOR COMMUNICATION POLICY, THE UCLA TELEVISION VIOLENCE REPORT § II.D.1 (1997). The report stated, "The rationale and methodology of this monitoring project are based on the belief that not all violence is created equal. While parents, critics and others complain about the problem of violence on television, it is not the mere presence of violence that is the problem." Id.
25 Both obscenity and indecency carve out exceptions for these categories of speech. See infra Part II.A.2.
26 Patricia M. Wald, Doing Right by Our Kids: A Case Study in the Perils of Making Policy on Television Violence, 23 U. BALT. L. REV. 397, 417 (1994).
27 Lawrence J. Siskind, The Folly and Futility of Censoring Violence: There's Not Much of a Basis for Suing the Entertainment Industry for the Violent Acts of Viewers, and There's Not Much of a Case for Regulation Either, LEGAL TIMES, Nov. 22, 1993, at 28.
28 The Report listed three factors: the presence of weapons, whether the violence is extensive or graphic, and whether the violence is realistic. Violent Television Programming, supra note 12, at 7948-49.
29 Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975).
30 See Media Associations Comments, supra note 19, at 44.
31 American Civil Liberties Union Comments at 4, Violent Television Programming and its Impact on Children, 22 F.C.C.R. 7929 (2007) (citing FEDERAL TRADE COMMISSION, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A REVIEW OF SELF-REGULATION AND INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING, & ELECTRONIC GAME INDUSTRIES (2000)).
32 See, e.g., FCC v. Pacifica Found., 438 U.S. 726, 743 (1978). The Court stated:
It is true that the Commission's order may lead some broadcasters to censor themselves. At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern. The danger dismissed so summarily in Red Lion, in contrast, was that broadcasters would respond to the vagueness of the regulations by refusing to present programs dealing with important social and political controversies.
Id. (internal citations omitted). See also Action for Children's Television v. FCC, 58 F.3d 654, 659 (D.C. Cir. 1995).
33 See, e.g., Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051 (N.D. Ill. 2005); Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180 (W.D. Wash. 2004). One the other hand, one case, Video Software Dealers Ass'n v. Schwarzenegger, 401 F. Supp. 2d 1034 (N.D. Cal. 2005), explicitly refused to hold the definition of a violent video game vague.
34 404 F. Supp. 2d 1051 (N.D. Ill. 2005).
35 Id. at 1077.
36 Id.
37 Id.
38 See, e.g., FCC v. Pacifica Found., 438 U.S. 726, 743 (1978); Hamling v. United States, 418 U.S. 87, 118 (1974); Action for Children's Television v. FCC, 58 F.3d 654, 659 (D.C. Cir. 1995) ("ACT III"). "[I]f acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge is not implicit in Pacifica, we have misunderstood Higher Authority and welcome correction." Action for Children's Television v. FCC, 852 F.2d 1332, 1339 (D.C. Cir. 1988) ("ACT I").
39 Miller v. California, 413 U.S. 15 (1973).
40 Id. at 24.
41 Bruce Horovitz, NFL Strives to Ensure Superclean Super Bowl, USA TODAY, Jan. 20, 2005, at 01A.
42 PARENTS TELEVISION COUNCIL, DYING TO ENTERTAIN 1 (2007), available at http://www.parentstv.org/PTC/publications/reports/violencestudy/DyingtoEntertain.pdf.
43 See Violent Television Programming, supra note 12, at 7947. See also Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001) (Judge Posner referencing classic literature).
44 See, e.g., Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 13299 (2006).
45 The eight factors were: (1) the nature of the perpetrator, including in particular whether the perpetrator is attractive; (2) the motive or reason for the violence, including whether it is morally defensible or unjustified; (3) the presence of weapons; (4) whether the violence is extensive or graphic; (5) whether the violence seems realistic; (6) whether the violence is explicitly rewarded or goes unpunished; (7) the consequences of violence for the victim; (8) whether the violence is portrayed as humorous. Wilson et al., Violence in Children's Television Programming: Assessing the Risks, 52 J. COMM. 5 (2003).
46 Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) ("The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.").
47 Ginsberg v. New York, 390 U.S. 629, 639-40 (1968).
48 Id.
49 Id. at 631-32.
50 Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995) ("ACT III").
51 Id. at 660. The Supreme Court did not grant certiorari. Id., cert. denied, 516 U.S. 1043 (1996).
52 ACT III, 58 F.3d at 678-79 (Edwards, J., dissenting). Judge Edwards wrote a thorough dissent in ACT III, criticizing many aspects of time channeling. See id.
53 See infra Part III.B.
54 See infra Part IV.A-B.
55 Action for Children's Television, 50 F.C.C.2d 17, 26 (1974).
56 See, e.g., ACT III, 58 F.3d at 678-79; Ginsberg v. New York, 390 U.S. 629, 639-40 (1968). But see Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001). Kendrick is an important exception because it rejected parents' rights to enlist the state in aiding them from shielding their children from violent video games. See id.
57 Violent Television Programming, supra note 12, at 7931.
58 Media Association Comments, supra note 19, at 1.
59 See, e.g., Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954 (8th Cir. 2003); Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001); Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051 (N.D. Ill. 2005); Video Software Dealers Ass'n v. Schwarzenegger, 401 F. Supp. 2d 1034 (N.D. Cal. 2005); Entm't Software Ass'n v. Granholm, 404 F. Supp. 2d 978 (E.D. Mich. 2005); Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180 (W.D. Wash. 2004). The common thread running through these cases is a movement toward giving strong protection to video games. See generally Jon B. Robinson, From Pong to Porn: Considering the First Amendment, Violent Video Games, and the Federal Trade Commission's Constitutional Concerns, 52 LOY. L. REV. 409 (2006).
60 Ginsberg, 390 U.S. at 641.
61 Id.
62 ACT III, 58 F.3d at 661-63. "With respect to the second question begged by petitioners, the Supreme Court has never suggested that a scientific demonstration of psychological harm is required in order to establish the constitutionality of measures protecting minors from exposure to indecent speech." Id. at 661-62. See also Bethel School District No. 403 v. Fraser, 478 U.S. 675, 684 (1986) (no requirement of a scientific demonstration of psychic injury where there was an interest in protecting students from an indecent speech at a high school assembly).
63 Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001).
64 Id. at 573.
65 Id. at 578-79.
66 Id. at 579.
67 These cases frequently cite to the Supreme Court case Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997), where an oft-quoted line says that the government must show the "harms are real, not merely conjectural." Id. at 664. It is worth noting that Turner dealt with must-carry provisions whereby cable providers were forced to transmit certain third party signals. See id. at 630-32. The asserted "harm" was completely different, as the regulation was intended to ensure a multiplicity of information sources, not to protect the well-being of minors. See id. at 663.
68 Kendrick, 244 F.3d at 577.
69 Id.
70 Id.
71 Id.
72 Id.
73 It should be noted that some scholars do no think there should be any distinction at all. They have argued that violence should be outside the First Amendment just like obscenity. See, e.g., KEVIN W. SAUNDERS, VIOLENCE AS OBSCENITY: LIMITING THE MEDIA'S FIRST AMENDMENT PROTECTION (1996) ("Violence is at least as obscene as sex. If sexual images may go sufficiently beyond community standards for candor and offensiveness, and hence be unprotected, there is no reason why the same should not be true of violence.").
74 See supra Part II.A.2.
75 Harry T. Edwards & Mitchell N. Berman, Regulating Violence on Television, 89 NW. U. L. REV. 1487, 1524 n.176 (1995). See also Reno v. ACLU, 521 U.S. 844, 874 (1997); Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).
76 Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) (plurality). See also FCC v. Pacifica Found., 438 U.S. 726, 744-45 (1978) (plurality).
77 Media Associations Comments, supra note 19, at 29. See also Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180, 1182 (W.D. Wash. 2004).
78 Craig A. Anderson & Karen E. Dill, Personality Processes and Individual Differences—Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and in Life, 78 J. PERSONALITY & SOC. PSYCH. 772 (2000).
79 See Entm't Software Ass'n v. Granholm, 404 F. Supp. 2d 978, 982 (E.D. Mich. 2005). The Michigan legislature used the Kronenberger study as part of its justification to regulate violent video games. Id.
80 Robinson, supra note 59, at 443.
81 Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 578 (7th Cir. 2001).
82 404 F. Supp. 2d 978 (E.D. Mich. 2005).
83 Kendrick, 244 F.3d at 982.
84 Government's Role in Television Programming: Hearing Before the Subcomm. on Oversight of Gov't Mgmt., Restructuring and the Dist. of Columbia of the S. Comm. on Governmental Affairs, 105th Cong. 3 (1997) (statement of Jeffrey I. Cole, Director, UCLA Center for Comm. Policy).
85 Violent Television Programming, supra note 12, at 7932.
86 Id. at 7934.
87 Id. (quoting AMERICAN ACADEMY OF PEDIATRICS ET AL., JOINT STATEMENT ON THE IMPACT OF ENTERTAINMENT VIOLENCE ON CHILDREN (2000)). The statement said:
• Viewing violence can lead to emotional desensitization towards violence in real life.
• Children exposed to violent programming at a young age have a higher tendency for violent and aggressive behavior later in life than children who are not so exposed.
• Children exposed to violence are more likely to assume that acts of violence are acceptable behavior.

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• Viewing violence increases fear of becoming a victim of violence, with a resultant increase in self-protective behaviors and a mistrust of others.
Id.
88 See, e.g., Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180 (W.D. Wash. 2004). Judge Lasnik did not attempt to hide his contempt for violent video games, and he did not foreclose the possibility of a regulation that could be consistent with the First Amendment. See id. at 1190.
89 542 U.S. 656 (2004).
90 Id. at 661. The Court explained the statute in detail:
In response to the Court's decision in Reno, Congress passed COPA. COPA imposes criminal penalties of a $50,000 fine and six months in prison for the knowing posting, for "commercial purposes," of World Wide Web content that is "harmful to minors." § 231(a)(1). Material that is "harmful to minors" is defined as:
"any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that-
"(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
"(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
"(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." § 231(e)(6).
Id. at 661-62.
91 Id. at 667.
92 529 U.S. 803 (2000).
93 Id. at 806.
94 Id. at 815.
95 Moore's Law predicts that the number of transistors that can be placed on a silicon chip continues to double at regular intervals for the foreseeable future, and this roughly corresponds to a doubling of technological capabilities. John Markoff, It's Moore's Law, But Another Had the Idea First, N.Y. TIMES, Apr. 18, 2005, at C1.
96 Complaints Regarding Various Television Broadcasts, supra note 44, at 13318.
97 See Nielsen Media Research, Top 10 Broadcast TV Programs for the Week of September 18, 2006; Nielsen Media Research, Top 10 Cable TV Programs for the Week of September 18, 2006.
98 R. Thomas Umstead, Nets Survive '24,' 'Idol': Basic Channels Hold Serve Against Broadcast's Best, MULTICHANNEL NEWS, Feb. 5, 2007, at 6. Four networks, with almost half of TV viewership, are dominant. In fact, among households, broadcasting accounted for 348 of the top 349 programs for the 2006-2007 season. Broadcast TV Dominated Program Rankings in 2006-2007 Season, TVB RESEARCH CENTRAL, available at http://www.tvb.org/rcentral/ViewerTrack/FullSeason/fs-b-c.asp?ms=2006-2007.asp.
99 James Poniewozik, An Unkind Cut, TIME, Feb. 14, 2008, at 20. Poniewozik continued, "The network has had a successful formula for years with series like CSI and Criminal Minds, bloody odes to killers and the science nerds who catch them." Id.
100 See generally Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 449-51 (2d Cir. 2007) (noting that after Pacifica in 1978, the FCC would not find another broadcast indecent until 1987, and a restrained enforcement policy continued until 2003 when the frequency of fines dramatically increased).
101 See, e.g., FCC v. Pacifica Found., 438 U.S. 726 (1978); Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995).
102 See, e.g., Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502-03 (1952).
103 395 U.S. 367 (1969).
104 Id. at 388.
105 See id. at 389-90.
106 Pacifica Found. v. FCC, 556 F.2d 9, 29 (D.C. Cir. 1977). Although the government attempted to argue that Red Lion justified regulations on broadcast indecency, the circuit court's opinion in Pacifica articulated the limitations of the scarcity rationale. See id. Spectrum scarcity is a reason for forcing broadcasters to offer diverse viewpoints on political matters; but censorship works in the opposite direction by removing certain types of speech from public discourse. See id.
107 438 U.S. 726 (1978).
108 Id. at 729-30.
109 Id. Pacifica argued that the monologue was a social satire intending to point out that the words are essentially harmless and that society tends to overreact to them. Id. at 730.
110 Id. at 730. While the FCC did not impose formal sanctions, it did issue an order that would be "associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress." Id.
111 See id. at 734.
112 Id. at 744.
113 Id. ("And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection.").
114 Id.
115 See id. at 748-50.
116 Id. at 749. Note that the two rationales cited in this part of the Pacifica opinion have come under intense scrutiny, especially as the evolving structure of the TV and video entertainment industry has changed the unique status of the broadcast medium.
117 Id. at 749.
118 Id.
119 Id.
120 Id. at 750. Listing specific examples of how the case may have come out differently, the Court stated, "This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy." Id.
121 Id.
122 See, e.g., Infinity Broad. Corp. of Penn. et al., 3 F.C.C.R. 930 (1987).
123 The procedural history of this case is indeed a long and elaborate series of events. For a full detail of the procedural posture, see Action for Children's Television v. FCC, 58 F.3d 654, 658-59 (D.C. Cir. 1995).
124 Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949 (1992).
125 Specifically, the law stated:
The Federal Communications Commission shall promulgate regulations to prohibit the broadcasting of indecent programming—
(1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and
(2) between 6 a.m. and 12 midnight on any day for any radio or television broadcasting station not described in paragraph (1).
§ 16(a).
126 Id.
127 Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995) ("ACT III").
128 Id. at 659.
129 Id.
130 Id. (quoting Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989)) (edits in original).
131 Id. at 659-60.
132 Id. at 660.
133 Id. The court stated, "It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling." Id.
134 Id. at 665. At the time, the data showed that while 4.3 million (21 percent) of teenagers watched broadcast television between 11:00 and 11:30 p.m., the number fell to 3.1 million (15.2 percent) between 11:30 p.m. and 1:00 a.m., and to less than 1 million (4.8 percent) between 1:45 and 2:00 a.m. Id.
135 Id. at 667.
136 Id. at 667-68.
137 Id. at 669-70.
138 Id., cert. denied, 516 U.S. 1043 (1996).
139 Cable and Satellite, as well as the internet, have been given stronger First Amendment protections. Time channeling would clearly not be constitutional in any of these media. Also, it is noteworthy that the April Report recommended time channeling as a feasible solution. Violent Television Programming, supra note 12, at 7940-41.
140 See infra Part V.B.
141 Writers Guild of Am., W., Inc. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976). In general, the court held that the FCC exerted too much pressure on the networks, constituting governmental action; that family hour was unconstitutional against the First Amendment; and that the FCC should have followed the procedures of the APA rather than engage in jawboning. See id.
142 Those grounds were that the primary jurisdiction of the case should have rest with the FCC. Writers Guild of Am., West, Inc. v. American Broad. Co., Inc., 609 F.2d 355 (9th Cir. 1979). In holding that primary jurisdiction was with the FCC, the court quoted ACT I:
The Commission, as the expert agency entrusted by Congress with the administration and regulation of the crucial, dynamic communications field, required and deserves some latitude in carrying out its substantial responsibilities. It may not be the sole guardian of the public's interest in broadcasting licensees, the courts and the general public in varying ways share responsibility with it for defining and advancing that interest but, in the formulation of broadcast policy, the Commission nevertheless must continue to play a leading role. If our relationship with the Commission and other federal agencies is to remain a partnership, we may not succumb to the temptation of casting ourselves in the unsuited role of Primus inter pares.
Id. at 366 (quoting Action for Children's Television v. FCC, 564 F.2d 458, 482 (D.C. Cir. 1977)).
143 See The Museum of Broadcast Communications, Family Viewing Time, http://www.museum.tv/archives/etv/F/htmlF/familyviewin/familyviewin.htm.
144 Although ACT III did not mention Writers Guild, its constitutional principles implicitly overturn much of the Writers Guild holding.
145 Children's Protection from Violent Programming Act, H.R. 910, 105th Cong. (1997).
146 See Michelle R. Davis, Senator Sees Progress in Effort to Limit Television Violence, THE STATE (COLUMBIA, S.C.), May 14, 1999.
147 Violent Television Programming, supra note 12, at 7931.
148 The FCC did this in ACT III, which was critical to the validity of its regulation. ACT III, 58 F.3d at 665. At the time, the Commission found:
The data collected by the FCC and republished in the Congressional Record for June 1, 1992, indicate that while 4.3 million, or approximately 21 percent, of "teenagers" (defined as children ages 12 to 17) watch broadcast television between 11:00 and 11:30 p.m., the number drops to 3.1 million (15.2 percent) between 11:30 p.m. and 1:00 a.m. and to less than 1 million (4.8 percent) between 1:45 and 2:00 a.m. 138. Comparable national averages are not available for children under 12, but the figures for particular major cities are instructive. In New York, for example, 6 percent of those aged 2 to 11 watch television between 11:00 and 11:30 p.m. on weekdays while the figures for Washington, D.C., and Los Angeles are 6 percent and 3 percent, respectively.
Id. (internal citations omitted). More recently, the Commission has said that 68 percent of children aged eight to eighteen are reported to have a television set in their bedrooms. Complaints Regarding Various Television Broadcasts, supra note 44, at 13318. Moreover, nearly half of those television sets do not have cable or satellite connections. Id.
149 Violent Television Programming, supra note 12, at 7939-40.
150 Complaints Regarding Various Television Broadcasts, supra note 44, at 13318-19. Moreover, cable stations carry broadcast signals as "duplicates," further blurring the line between the media.
151 U.S. v. Playboy Entm't Group, 529 U.S. 803, 814 (2000) ("[T]he answer should be clear: The standard is strict scrutiny.").
152 Idaho Department of Administration, Information Technology Resource Management Control, Cyber Security Awareness: Protecting Our Children from Online Predators and Other Internet Threats, http://adm.idaho.gov/about/fact_sheets/CyberSecurityOct06.pdf.
153 141 CONG. REC. S8332 (daily ed. June 14, 1995) (remarks of Sen. Coats).
154 See, e.g., Ashcroft v. ACLU, 542 U.S. 656, 666-67 (2004); Reno v. ACLU, 521 U.S. 844, 870 (1997) (stating that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium").
155 See National Association of Broadcasters Comments at 25, Violent Television Programming and its Impact on Children, 22 F.C.C.R. 7929 (2007).
156 See, e.g., Reno v. ACLU, 521 U.S. 844, 867 (1997) (noting that broadcast television has always enjoyed less First Amendment protection than other media).
157 See Complaints Regarding Various Television Broadcasts, supra note 44, at 13318 (providing that "[t]he broadcast media continue to have 'a uniquely pervasive presence' in American life").
158 For instance, the Second Circuit expressed serious doubts about whether the FCC's indecency guidelines are consistent with the First Amendment. Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007). In a long section of dicta devoted to free speech concerns, the court wrote that it was troubled by the vagueness of the guidelines and the notion that the Commission was prohibiting speech based on its subjective view of the speech's merit. Id. at 463-64. But on the contention that Pacifica's rationales have eroded, the court rebuffed: "Whatever merit these arguments may have, they cannot sway us in light of Supreme Court precedent." Id. at 465.
159 FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).
160 Action for Children's Television v. FCC, 58 F.3d 654, 660 (D.C. Cir. 1995) ("ACT III"). The court in ACT III borrowed much from Sable. See Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989).
161 In FCC v. League of Women Voters of California, 468 U.S. 364 (1984), a Supreme Court case addressing a regulation forbidding some public stations to engage in editorializing, the Court used a test that sounds like intermediate scrutiny: "restriction is narrowly tailored to further a substantial government interest . . . ." Id. at 380. Moreover, a footnote in that case arguably confirms that Pacifica was decided under intermediate scrutiny:
This Court's decision in FCC v. Pacifica Foundation, upholding an exercise of the Commission's authority to regulate broadcasts containing "indecent" language as applied to a particular afternoon broadcast of a George Carlin monologue, is consistent with the approach taken in our other broadcast cases . . . . The governmental interest in reduction of those risks through Commission regulation of the timing and character of such "indecent broadcasting" was thought sufficiently substantial to outweigh the broadcaster's First Amendment interest in controlling the presentation of its programming.
Id. at 380 n.13 (emphasis added) (internal citations omitted). Note that the Court distinguished that case from Pacifica: "In this case, by contrast, we are faced not with indecent expression, but rather with expression that is at the core of First Amendment protections, and no claim is made by the Government that the expression of editorial opinion by noncommercial stations will create a substantial "nuisance" of the kind addressed in FCC v. Pacifica Foundation." Id.
162 The bill that prompted the April Report made the empty assertion that time channeling is a narrowly tailored means if viewer-initiated blocking is ineffective.
(19) After further study, pursuant to a rulemaking, the Federal Communications Commission may conclude that content-based ratings and blocking technology do not effectively protect children from the harm of violent video programming.
(20) If the Federal Communications Commission reaches the conclusion described in paragraph (19), the channeling of violent video programming will be the least restrictive means of limiting the exposure of children to the harmful influences of violent video programming.
Children's Protection from Violent Programming Act, H.R. 910, 105th Cong. (1997).
163 See, e.g., U.S. v. Playboy Entm't Group, 529 U.S. 803 (2000).
164 Telecommunications Act of 1996, Pub. L. No. 104-104, § 551, 110 Stat. 139-42 (1996).
165 Id.
166 See Implementation of Section 551 of the Telecommunications Act of 1996, 13 F.C.C.R. 8232, 8232 (1998).
167 Amy Fitzgerald Ryan, Don't Touch That V-Chip: A Constitutional Defense of the Television Program Rating Provisions of the Telecommunications Act of 1996, 87 GEO. L.J. 823, 827 (1999).
168 Id.
169 Telecommunications Act of 1996, Pub. L. No. 104-104, § 551, 110 Stat. 56, 111-112 (codified at 47 U.S.C. § 303(x) (2006)).
170 Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).
171 Fitzgerald Ryan, supra note 167, at 828. See also Denise R. Polivy, Virtue By Machine: A First Amendment Analysis of the V-Chip Provisions of the Telecommunications Act of 1996, 29 CONN. L. REV. 1749, 1772 (1997).
172 Telecommunications Act of 1996, Pub. L. No. 104-104, § 551(b), (e), 110 Stat. 139-42 (1996). See also Fitzgerald Ryan, supra note 167, at 828.
173 Id. § 551(e) (providing that industry's proposal is only valid "if the Commission determines, in consultation with appropriate public interest groups and interested individuals from the private sector, that distributors of video programming have" created an acceptable system).
174 Lawrie Mifflin, Senator Tells Networks to Revamp New Ratings, N.Y. TIMES, June 4, 1997, at C13.
175 Writers Guild of Am., W., Inc. v. American Broad. Co., Inc., 609 F.2d 355, 365 (9th Cir. 1979). While the court was troubled by the FCC's actions in this case, the court eventually deferred to the FCC: "The development of standards governing the agency's use of informal methods to influence broadcast industry policy is an issue 'that should be dealt with in the first instance by those especially familiar with the customs and practices of the industry.'" Id. at 365-66 (quoting Ricci v. Chi. Mercantile Exch., 409 U.S. 289, 305 (1973)).
176 PARENTS, MEDIA AND PUBLIC POLICY: A KAISER FAMILY FOUNDATION SURVEY 7 (2004) [hereinafter KAISER STUDY].
177 Id. at 6.
178 Id.
179 Id.
180 Id.
181 ANNENBERG PUBLIC POLICY CENTER, PARENTS' USE OF THE V-CHIP TO SUPERVISE CHILDREN'S TELEVISION USE 3 (2003).
182 Dale Kunkel et al., Deciphering the V-chip: An Examination of the Television Industry's Program Rating Judgments, 52 J. COMM. 112 (2002).
183 KAISER STUDY, supra note 176, at 5. Additionally, the ratings can even produce the opposite of their intended effect: The well known admonition "parental discretion advised" can have a strong effect on boys' viewing reality-action programs. Violent Television Programming, supra note 12, at 7945 n.106.
184 Violent Television Programming, supra note 12, at 7942. The Parents Television Council used harsher language, calling the V-chip "a failure." Press Release, Parents Television Council, PTC Declares the Industry's V-Chip Education Campaign a Failure: New Zogby Poll Data Shows Blocking Technologies Aren't Used and Aren't Understood (Mar. 15, 2007), available at http://www.parentstv.org/PTC/publications/release/2007/0315.asp.
185 S. 602, 110th Cong. (2007).
186 Id. Notably, this bill applies to the internet as well as all other forms of content distribution, making it broader in scope than similar bills. See id.
187 Brooks Boliek, It's Super V-chip to the Rescue of Kids, MEDIAWEEK, Aug. 6, 2007, http://www.mediaweek.com/mw/news/recent_display.jsp?vnu_content_id=1003621132. "My bill simply lights a fire under the FCC to take a fresh look at new options in the marketplace," said Senator Pryor. Id.
188 S. 602 (emphasis added).
189 Violent Television Programming, supra note 12, at 7941.
190 See generally Fitzgerald Ryan, supra note 167. As Congressman Markey explained the rating system, "At no time will the advisory board or any other governmentally created group rate any of the programs." Id. at 827 (quoting Why the Markey Chip Won't Hurt You, BROADCAST & CABLE, Aug. 14, 1995, at 10).
191 Violent Television Programming, supra note 12, at 7945.
192 See, e.g., Adam Thierer, Convergence-Era Content Regulation? S. 602, "The Child Safe Viewing Act of 2007", PROGRESS ON POINT, Aug. 2007, at 4.
193 Id. ("But, even setting aside the clear First Amendment concerns, there is no practical reason to believe that the government could actually do a better job of assigning ratings or creating parental control tools.").
194 Richard Whitney Johnson, Trademark for Creating a Kid-Friendly Cyberplayground on the Internet, 2006 UTAH L. REV. 465, 478 (2006).
195 Lawrence Lessig, What Things Regulate Speech: CDA 2.0 vs. Filtering, 38 JURIMETRICS J. 629, 658 (1998).
196 Violent Television Programming, supra note 12, at 7949.
197 Ted Hearn, 'War on Cable' Cited in Court, MULTICHANNEL NEWS, Feb. 11, 2008, at 38.
198 Violence in the Media – Part 5: Hearing Before the S. Comm. on Commerce, Science and Transportation, 110th Cong. (2007) (testimony of Lawrence H. Tribe, Carl M. Loeb University Professor, Harvard University) [hereinafter Tribe Testimony].
199 Id.
200 Id.
201 Unbundling would probably be considered content-neutral and subject to only intermediate scrutiny. In Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994), the Supreme Court held that must-carry provisions relating to cable were content-neutral. Id. at 661-62. However, Tribe's testimony distinguished Turner, arguing that strict scrutiny should be applied here because the purpose behind the regulations would be content-based. Tribe Testimony, supra note 198.
202 See supra text accompanying note 99.
203 See supra Part IV.A.2.
204 See Kevin Jackson, 8 of 10 Americans: Too Much Sex, Violence, Profanity on TV, CHRISTIAN POST, Mar. 21, 2007, http://www.christianpost.com/article/20070321/26430_8_of_10_Americans:_Too_Much_Sex,_Violence,_Profanity_on_TV.htm.
205 In the interest of being vigilant of bias in studies, it must be noted that the Parents Television Council is an organization whose purpose is to keep inappropriate content off of television. The PTC favors banning content over selective blocking.
206 John Eggerton, PTC Pans, Valenti Defends TV Boss, BROADCASTING & CABLE, Mar. 15, 2007, http://www.broadcastingcable.com/article/CA6425049.html?display=Search+Results&text=Valenti.
207 Industry leaders often emphasize their voluntary efforts to educate the public about the V-chip. For a sampling of testimony in congressional hearings on this matter, see Images Kids See on the Screen: Hearing Before the Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce, 110th Cong. (2007) (statement of Dan Glickman, Chairman and CEO, Motion Picture Association of America, Inc); Violence in the Media: Hearing Before the S. Comm. on Commerce, Science and Transportation, 110th Cong. (2007) (Statement of Peter Liguori, President, Entertainment, Fox Broadcasting Company); Images Kids See on the Screen: Hearing Before the Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce, 110th Cong. (2007) (Statement of Kyle McSlarrow, President and Chief Executive Officer, National Cable and Telecommunications Association).
208 See supra Part IV.A.2.
209 Diane Hollenbeck, Got V-chip? You Probably Do!, MORALMETRIC, July 2, 2007, http://www.moralmetric.com/articles/entertainment/tv/1091-got-v-chip-you-probably-do.
210 Violent Television Programming, supra note 12, at 7960 (statement of Jonathan S. Adelstein).
211 Id.
212 Congress passed the Year 2000 Information and Readiness Disclosure Act, S. 2392, 105th Cong. (1998), whose stated purposes were, among others, to promote disclosure of information and assist consumers in responding to problems. § 2(b). With respect to Y2K telecommunications issues, the FCC implemented a comprehensive plan to disseminate information through speeches, articles in periodicals, letters to companies and governments, and public forums. THE FEDERAL COMMUNICATIONS COMMISSION AND THE NETWORK RELIABILITY & INTEROPERABILITY COUNCIL, Y2K COMMUNICATIONS SECTOR REPORT (1999). The FCC also boasted about its Y2K "well-designed website that is easily accessible and user friendly," and the Commission carefully tracked the number of visits to the site. Id. at 17.
213 John Eggerton, DTV Hard Date Passes … Again, BROADCASTING & CABLE, Feb. 1, 2006, http://www.broadcastingcable.com/article/CA6304165.html?display=Breaking+News.
214 Violent Television Programming, supra note 12, at 7962 (statement of Jonathan S. Adelstein).
215 It is interesting to note that the TV industry's first ratings proposal only featured the age-based ratings. It is only when this system was criticized that the content-based ratings were introduced.
216 Violent Television Programming, supra note 12, at 7945.
217 Id.
218 See supra Part IV.B.1.
219 Doug Abrahams, Regulators adopt plan for V-Chip, TV ratings, WASHINGTON TIMES, Mar. 13, 1998, at B9.
220 Evan Blass, V-Chip 2.0, or v.gis, Set To Debut in DTVs, ENGADGET, Feb. 24, 2006, http://www.engadget.com/2006/02/24/v-chip-2-0-or-v-gis-set-to-debut-in-dtvs/.
221 See supra Part III.B.2.
222 Violent Television Programming, supra note 12, at 7962 (statement of Jonathan S. Adelstein).
223 Id.
224 See supra Part III.B.
225 Media Associations Comments, supra note 19, at 59 (internal citations omitted) (emphasis added).
226 Cohen v. California, 403 U.S. 15, 25 (1971).

RECENT CASES OF INTEREST

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JANET JACKSON'S SUPER BOWL "WARDROBE MALFUNCTION" RULED NOT INDECENT

In July 2008, the United States Court of Appeals for the Third Circuit, in an exhaustive ruling, threw out a $550,000 forfeiture penalty imposed by the Federal Communications Commission ("FCC") upon CBS for broadcasting the "wardrobe malfunction" that allowed 90 million viewers the opportunity to view Janet Jackson's exposed right breast for 9/16ths of a second at the end of her 2004 Super Bowl halftime show with Justin Timberlake. *CBS Corp. v. F.C.C.*, 535 F.3d 167 (3d Cir. 2008). The Third Circuit held that the FCC acted arbitrarily and capriciously under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, in its determination that CBS's broadcast of a fleeting image of nudity was actionably indecent. The Third Circuit's ruling overturned the March 2006 decision by the FCC that applied the two-part test from its 2001 policy statement for indecency and found that CBS's broadcast of the halftime show was indecent because it depicted a sexual organ and was "patently offensive as measured by contemporary community standards for the broadcast medium." *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999, 8002 7-8(2001) ("*Industry Guidance*"). In July 2006, CBS filed a petition for review of the FCC's forfeiture penalty with the Third Circuit.

After taking a comprehensive look at the history of the FCC's indecency policy and using the standard of review for agency decisions as governed by the APA (which authorizes it set aside agency actions are "arbitrary, capricious, [or] an abuse of discretion..." 5 U.S.C. § 706(2)(A)), the Third Circuit reversed the FCC's forfeiture order and imposition of penalties. The court grounded its reversal of the forfeiture order primarily on the fact that the FCC had consistently, for thirty years, exempted isolated or fleeting material from its indecency policy and its forfeiture order against CBS was an unjustified departure from that policy. Under the APA, the FCC is allowed to change its policies so long as it provides notice of and a reasoned explanation for the change, which must include a "rational connection between the facts found and the choice made." *CBS Corp.*, 535 F.3d at 182. In the current case, the court found that the FCC failed to satisfy these requirements because it did not provide any reasoned basis for its departure from a long history of consistently excluding fleeting or isolated instances of indecency.

This ruling followed another recent FCC case, *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007) ("*Fox*"), which reached the same conclusion regarding the FCC's treatment of fleeting expletives. According to that court, fleeting and isolated expletives or utterances had always been excluded from the scope of the FCC's indecency policy until it announced a policy change in the decision that spawned the *Fox* case, *In re Complaints Against Various Broadcast Licenses Regarding The Airing of the "Golden Globes Awards" Program*, 19 F.C.C.R. 4975 (2004) ("*Golden Globes*"). The FCC argued that the CBS Super Bowl case was distinguishable from the *Fox* or *Golden Globes* cases because those cases involved a restriction on fleeting expletives as opposed to fleeting images. However, the court found that the FCC's indecency policy had never made a distinction between words and images. In fact, the FCC applied the exact same test for indecency in 2000 when it rejected a complaint based on nudity scenes in a television broadcast of the film "Schindler's List." *CBS Corp.*, 535 F.3d at 184-186. According to the court, before the FCC can treat indecent images differently from indecent words, the FCC needed to comply with the APA's requirements for notice and explanation.

The Third Circuit also refused to find CBS liable under a variety of other theories. First, CBS could not be liable for Jackson's and Timberlake's conduct under the doctrine of *respondeat superior* because Jackson and Timberlake were independent contractors and acted outside the scope of liability. Second, CBS could not be liable under a theory of vicarious liability based on CBS's non-delegable duties as a broadcast licensee because, under the First Amendment, that would require proof of actual malice or scienter with respect to the content of the performers' speech or expression. The court found that actual malice could not be imputed to CBS. Third, CBS was not directly liable for failing to take adequate measures to prevent potential indecency, which would be a violation of indecency provisions in 18 U.S.C. §1464 and 47 C.F.R. §73.9999 subject to forfeiture penalties under 42 U.S.C. § 503(b)(1)(D).

In the coming months, it will be interesting to see whether the United States Supreme Court grants certiorari and allows the FCC to defend its indecency regime.

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ENTERTAINMENT LAW BIBLIOGRAPHY:

ART

Christopher M. Bruner, *Culture, Sovereignty, and Hollywood: UNESCO and the Future Of Trade In Cultural Products*, 40 N.Y.U. J. Int'l L. & Pol. 351 (2008).

Alexis Derrossett, Comment, *The Final Solution: Making Title Insurance Mandatory For Art Sold In Auction Houses And Displayed In Museums That Is Likely To Be Holocaust-Looted Art*, 9 T.M. Cooley J. Prac. & Clin. L. 223 (2007).

Rachel E. Nordby, Note, *Off The Pedestal and Into the Fire: How* Phillips *Chips Away At the Rights Of Site-Specific Artists*, (Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 2006), 35 Fla. St. U. L. Rev. 167 (2007).

Danwill Schwender, *Promotion of the Arts: An Argument for Limited Copyright Protection of Illegal Graffitii*, 55 J. Copyright Soc'y U.S.A. 257 (2008).

COPYRIGHT

Valeria M. Castanaro, Note, *AIt's The Same Old Song@: The Failure of the Originality Requirement in Musical Copyright*, 18 Fordham Intell. Prop. Media & Ent. L.J. 1271 (2008).

Paul J. Heald, *Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Bestsellers*, 92 Minn. L. Rev. 1031 (2008).

Timothy R. Holbrook, *Patents for Poets*, 52 St. Louis U. L.J. 795 (2008).

Jocelyn Kempema, Note, *Imitation Is The Sincerest Form OfYInfringement?: Guitar Tabs, Fair Use, And The Internet*, 49 Wm. & Mary L. Rev. 2265 (2008).

Alina Ng, *Authors and Readers: Conceptualizing Authorship in Copyright Law*, 30 Hastings Comm. & Ent. L.J. 377 (2008).

Rahmiel David Rothenberg, *Sampling: Musical Authorship Out of Tune With the Purpose of the Copyright Regime*, 20 St. Thomas L. Rev. 233 (2008).

Anu R. Sawkar, Note, *Are Storylines Patentable? Testing the Boundaries of Patentable Subject Matter*, 76 Fordham L. Rev. 3001 (2008).

Holly M. Sharp, Comment, *The Day the Music Died: How Overly Extended Copyright Terms Threaten the Very Existence Of Our Nation's Earliest Musical Works*, 57 Emory L.J. 279 (2007).

Morgan M. Stoddard, Comment, *Mother Nature As Muse: Copyright Protection For Works Of Art And Photographs Inspired By, Based On, Or Depicting Nature*, 86 N.C. L. Rev. 572 (2008).

MISCELLANEOUS

Benjamin Folkinshteyn, *Washington As First Action Hero: Museums Redefined*, 18 DePaul J. Art, Tech. & Intell. Prop. L. 1 (2007).

Stephen Gillers, *A Tendency To Deprave And Corrupt: The Transformation Of American Obscenity Law From* Hicklin *To* Ulysses II, 85 Wash. U. L.Rev. 215 (2007).

Shourin Sen, *The Denial of a General Performance Right in Sound Recordings: A Policy That Facilitates Our Democratic Civil Society?* 21 Harv. J.L. & Tech. 233 (2007).

Peter T. Wendel, *Protecting Newly Discovered Antiquities: Thinking Outside the AFee Simple@ Box*, 76 Fordham L. Rev. 1015 (2007).

MOTION PICTURES

Danielle M. Cantrell, Comment, *New Mexico as Hollywood's Backlot: an Examination of Film Financing, State Tax Incentives, and Constitutional Limitations*, 37 N.M. L. Rev. 533 (2007).

Igor Dubinskyr, *The Race To The Box Office Leads To Cinematic Déjà Vu: Modifying Copyright Law To Minimize Rent Dissipation and Copyright Redundancy At The Mov*ies, 29 Whittier L. Rev. 405 (2007).

MUSIC

Aurele Danoff, Comment, *The Moral Rights Act of 2007: Finding the Melody in the Music*, 1 J. Bus. Entrepreneurship & L. 181 (2007).

Michael A. Einhorn, *Gorillas in Our Midst: Searching For King Kong in the Music Jungle*, 55 J. Copyright Soc'y U.S.A. 145 (2008).

Gabriel Jacob Fleet, Note, *What's in a Song? Copyright's Unfair Treatment of Record Producers and Side Musicians*, 61 Vand. L. Rev. 1235 (2008).

John O. Hayward, *Grokster Unplugged: It's Time to Legalize P2P File Sharing*, 12 Intell. Prop. L. Bull. 1 (2007).

Bennett Lincoff, *Common Sense, Accommodation and Sound Policy for the Digital Music Marketplace*, 2 J. Int'l Media & Ent. L. 1 (2008).

Andre L. Smith, *Other People's Property: Hip-Hop's Inherent Clashes with Property Laws and Its Ascendance as Global Counter Culture*, 7 Va. Sports & Ent. L.J. 59 (2007).

Jeffrey A. Wakolbinger, Note, *Compositions Are Being Sold For A Song: Proposed Legislation and New Licensing Opportunities Demonstrate the Unfairness of Compulsory Licensing To Owners of Musical Compositions*, 2008 U. Ill. L. Rev. 803.

PROFESSIONAL RESPONSIBILITY

William G. Hyland, Jr., *Creative Malpractice: The Cinematic Lawyer*, 9 Tex. Rev. Ent. & Sports L. 231 (2008).

SYMPOSIA

Symposium: The 50th Anniversary of 12 Angry Men, 82 Chi.-Kent. L. Rev. 551 (2007).

Symposium: Perspectives on Cultural Property & the Law, 31 Fordham Int'l L.J. 684 (2008).

Symposium Issue: *Association of American Law Schools Section on Law & Humanities. Law & Order: SVU--Sexuality, Videos and You*, 17 S. Cal. Interdisc. L.J. 231 (2008).

THEATRE

Jeannette Gunderson, Comment, *An Unaccountable Familiarity: A Dual Solution to the Problem of Theft in Theatrical Productions*, 31 Seattle U. L. Rev. 667 (2008).

RECENT SPORTS AND ENTERTAINMENT LAW PUBLICATIONS

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SPORTS LAW BIBLIOGRAPHY:

ADA

Russell Landy, *Do the Washington Redskins Hate Deaf People? ADA Claims for the Captioning of Football Stadiums*, 15 U. Miami Bus. L. Rev. 47 (2007).

AMATEUR SPORTS

Phillip C. Blackman, Note, *The NCAA's Academic Performance Program: Academic Reform or Academic Racism?* 15 UCLA Ent. L. Rev. 225 (2008).

Dionne L. Koller, *Frozen In Time: The State Action Doctrine's Application to Amateur Sports*, 82 St. John's L. Rev. 183 (2008).

Brian Shaffer, Comment, *The NBA's Age Requirement Shoots and Misses: How the Non-Statutory Exemption Produces Inequitable Results For High School Basketball Stars*, 48 Santa Clara L. Rev. 681 (2008).

ANTITRUST

Robert M. Bernhard, Comment, *MLS' Designated Player Rule: Has David Beckham Single-Handedly Destroyed Major League Soccer's Single-Entity Antitrust Defense?* 18 Marq. Sports L. Rev. 413 (2008).

Tim Bezbatchenko, Comment, *Bend It For Beckham: A Look At Major League Soccer And Its Single Entity Defense To Antitrust Liability After The Designated Player Rule*, 76 U. Cin. L. Rev. 611 (2008).

Nathaniel Grow, *A Proper Analysis of the National Football League under Section One of the Sherman Act*, 9 Tex. Rev. Ent. & Sports L. 281 (2008).

Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?* 86 Or. L. Rev. 329 (2007).

Bradley S. Pensyl, Note, *Whistling a Foul on the NCAA: How NCAA Recruiting Bylaws Violate the Sherman Antitrust Act*, 58 Syracuse L. Rev. 397 (2008).

Jack N. E. Pitts, Jr., Comment, *Why Wait?: an Antitrust Analysis of the National Football League and National Basketball Association's Draft Eligibility Rules*, 51 How. L.J. 433 (2008).

C. Paul Rogers, III, *The Quest For Number One In College Football: The Revised Bowl Championship Series, Antitrust, And The Winner Take All Syndrome*, 18 Marq. Sports L. Rev. 285 (2008).

Martin M. Tomlinson, *The Commissioner's New Clothes: The Myth of Major League Baseball's Antitrust Exemption*, 20 St. Thomas L. Rev. 255 (2008).

COPYRIGHT

Tyler Mccormick Love, Note, *Throwing The Flag On Copyright Warnings:How Professional Sports Organizations Systematically Overstate Copyright Protection*, 15 J. Intell. Prop. L. 369 (2008).

CRIMINAL LAW

A. Jerome Dees, *Bring Back The Crowd? How Governing Bodies For Sports Should Provide Victims Of Athlete Doping A Better Remedy*, 9 Fla. Coastal L. Rev. 179 (2008).

James R. Devine, *The Duke Lacrosse Matter As A Case Study Of The Right To Reply To Prejudicial Pretrial Extrajudicial Publicity Under Rule 3.6(c),* 15 Vill. Sports & Ent. L.J. 175 (2008).

Michael J. Mellis, *Internet Piracy Of Live Sports Telecasts*, 18 Marq. Sports L. Rev. 259 (2008).

Tyler M. Simpson, Comment, *Balking At Responsibility: Baseball's Performance-Enhancing Drug Problem in Latin America*, 14 Law & Bus. Rev. Am. 369 (2008).

DISCRIMINATION

Daniel J. Louis, Note, *Nationally Televised Segregation: the NCAA's Inability to Desegregate College Football's Head Coaching Position*, 9 Rutgers Race & L. Rev. 167 (2007).

ETHICS

Melissa Neiman, Fair *Game: Ethical Considerations in Negotiation by Sports Agents*, 9 Tex. Rev. Ent. & Sports L. 123 (2007).

Michael J. Weir, Note, *The Ugly Side of the Beautiful Game: ABungs@ And the Corruption of Players' Agents in European Football*, 14 Sw. J.L. & Trade Americas 145 (2007).

GAMBLING

Jon Boswell, Note, *Fantasy Sports: A Game Of Skill That Is Implicitly Legal Under State Law, And Now Explicitly Legal Under Federal Law*, 25 Cardozo Arts & Ent. L.J. 1257 (2008).

GENDER

Michael E. Buchwald, Comment, *Sexual Harassment In Education And Student Athletics: A Case For Why Title IX Sexual Harassment Jurisprudence Should Develop Independently Of Title VII,* 67 Md. L. Rev. 672 (2008).

Todd Crosset & Lisa Masteralexis, *The Changing Collective Definition of Collegiate Sport and the Potential Demise of Title IX Protections*, 34 J.C.& U.L. 671 (2008).

Ryan T. Smith, Note, A*Bull's Eye@: How Public Universities In West Virginia Can Creatively Comply With Title IX Without The Targeted Elimination of Men's Sports Teams*, 110 W. Va. L. Rev. 1373 (2008).

HISTORY

Mike Balestra, Note, *Thou Shall Not Hunt: A Historical Introduction To and Discussion of the Modern Debate Over Sunday Hunting Laws*, 96 Ky. L.J. 447 (2007-2008).

William B. Gould, IV, *The 1994-'95 Baseball Strike And National Labor Relations Board: To the Precipice and Back Again*, 110 W. Va. L. Rev. 983 (2008).

MEDICAL

Griffin Toronjo Pivateau, *Tackling the Competitive Sports Doctrine: A New Proposal for Sports Injuries in Texas*, 9 Tex. Rev. Ent. & Sports L. 85 (2007).

Lindsay J. Taylor, Note, *Congressional Attempts to AStrike Out@ Steroids: Constitutional Concerns about the Clean Sports Act*, 49 Ariz. L. Rev. 961 (2007).

Joshua H. Whitman, Note, *Winning At All Costs: Using Law & Economics to Determine the Proper Role of Government in Regulating the Use of Performance-Enhancing Drugs in Professional Sports*, 2008 U. Ill. L. Rev. 459.

MISCELLANEOUS

Shannon Carroll, Note, *Golfing On Green Acres: Is the Acquisition of Golf Courses an Appropriate Means of Preserving Open Space in New Jersey?,* 32 Seton Hall Legis. J. 211 (2007).

Phyllis Coleman, *Scuba Diving Buddies: Rights, Obligations, and Liabilities*, 20 U.S.F. Mar. L.J. 75 (2007-08).

James J. Larocca, *No Trust At The NFL: League's Network Passes Rule of Reason Analysis*, 15 UCLA Ent. L. Rev. 87 (2008).

Brian Mahler, Note, *Kick Me Out Of the Ballgame: The Boston Red Sox, the BRA, and the Taking of Yawkey Way*, 42 New Eng. L. Rev. 549 (2008).

James L. Repace, *Benefits of Smoke-Free Regulations in Outdoor Settings: Beaches,Golf Courses, Parks, Patios, and In Motor Vehicles*, 34 Wm. Mitchell L. Rev. 1621 (2008).

Tyler W. Wickman, Comment, *The Battle against Invasive Species: The Clean Water Act and Environmental Protection Agency Regulation Of Recreational Boats*, 91 Marq. L. Rev. 605 (2007).

PROFESSIONAL SPORTS

Omar Hafez Ayad, Note, *Take The Training Wheels Off The League: Major League Soccer's Dysfunctional Relationship with the International Soccer Transfer System*, 10 Vand. J. Ent. & Tech. L. 413 (2008).

J. Bradley Clair, Note, *Why Federal Preemption Is Necessary To Create Uniform Professional Boxer Safety Standards*, 73 Brook. L. Rev. 1173 (2008).

John Dimascio, Note, *The AJock Tax@: Fair Play or Unsportsmanlike Conduct*, 68 U. Pitt. L. Rev. 953 (2007).

Stacey B. Evans, Note, *Whose Stats Are They Anyway? Analyzing the Battle between Major League Baseball and Fantasy Game Sites*, 9 Tex. Rev. Ent. & Sports L. 335 (2008).

Jeffrey P. Gleason, Comment, *From Russia With Love: the Legal Repercussions of the Recruitment And Contracting of Foreign Players In The National Hockey League*, 56 Buff. L. Rev. 599 (2008).

SYMPOSIA

Symposium: Celebrating Thirty-Five Years of Sport and Title IX, 55 Clev. St. L. Rev. 463 (2007).

Sports Law Forum, 18 Fordham Intell. Prop. Media & Ent. L.J. 891 (2008).

TORTS

Paul Caprara, Comment, *Surf's Up: The Implications Of Tort Liability In The Unregulated Sport Of Surfing*, 44 Cal. W. L. Rev. 557 (2008).

Mitchell Nathanson. *What's In a Name or, Better Yet, What's it Worth? Cities, Sport Teams and the Right of Publicity*, 58 Case W. Res. L. Rev. 167 (2007).

TRADEMARKS

Jeffrey F. Levine, Note, *Meeting the Challenges of International Brand Expansion In Professional Sports: Intellectual Property Right Enforcement In China*, 9 Tex. Rev. Ent. & Sports L. 203 (2007).

André Douglas Pond Cummings, *Progress Realized?: The Continuing American Indian Mascot Quandary*, 18 Marq. Sports L. Rev. 309(2008).

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