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We are proud to publish the third volume of the Belmont Entertainment Law Journal. The members of this journal continue to demonstrate thought-provoking entertainment law scholarship. I am confident this journal will serve as a top reference for entertainment law practitioners around the world. Each of the scholarly notes contained herein were written by members of this journal, carefully selected, and thoroughly edited in preparation for publication.

In February 2022, the Entertainment Law Journal hosted its third annual symposium. The Entertainment Law Journal brought top entertainment attorneys and music industry professionals together to speak on the modernization of the music industry. The transcript of the first and third panels of the 2022 symposium are featured in this volume. In February 2023, the Entertainment Law Journal hosted its fourth annual symposium which was titled "Money Talks: Conversations with Athletes, Creatives, and their Attorneys." We brought together artist managers, athletes, agents, and entertainment attorneys for three incredible panels.

The Entertainment Law Journal greatly appreciates the administrative staff at Belmont College of Law who assisted us in bringing this volume to life. In particular, we thank Professor Loren Mulraine, who has acted as a guide and mentor to the members of the Entertainment Law Journal. Additionally, we thank Kara Tusch for her constant aid throughout planning this year's symposium.

Finally, I would like to personally thank the officers and associate editors, without whom this volume would not exist. Thank you, Katherine Hinkle and Lauren Degen, for leading the editing process on each of this year's various projects; thank you Elizabeth Tirrill for masterfully handling our digital platforms; thank you Noah Zedeck for organizing and hosting an excellent, fun, and educational symposium; and thank you to each of the associate editors whose diligent work made all of this possible. It has been an honor to serve as your Editor-in-Chief, and I cannot wait to see how you shape the Entertainment Law Journal moving forward.

Aaron Steinberg
Editor-in-Chief

TOKENIZED MUSIC RIGHTS: A SOLUTION TO THE MUSIC INDUSTRY'S METADATA CRISIS

AARON STEINBERG

INTRODUCTION

"I'm fully confident that copyright…is in for such a bashing."

[David Bowie (2002)][1]

Technologists and artists hardly blinked when Kevin McCoy minted the world's first non-fungible token ("NFT") in 2014.[2] McCoy, a digital artist, was an early adopter of blockchain technology.[3] Prior to the existence of blockchain technology, digital artists were rarely credited or paid for their digital artwork since digital art is easily copied across the internet.[4] To test the boundaries of this new technology, McCoy created a work of art, called "Quantum," and embedded it onto the blockchain as an NFT.[5] Since "Quantum" was rooted in this NFT, McCoy was able to sell, track, and prove ownership of his work of art which is a feat that no digital artist had been able to accomplish before.[6] While McCoy revolutionized the digital art landscape, other digital artists were slow to jump on the bandwagon. Today, some of the most well-known celebrities and artists are minting their own NFTs and selling them for millions.[7] NFT art sales reached a high of 117.4 thousand transactions in the middle of August 2021.[8] While NFTs

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[1] Jon Pareles, *David Bowie, 21st-Century Entrepreneur,* THE NEW YORK TIMES (Jun. 9, 2002), *https*://www.nytimes.com/2002/06/09/arts/david-bowie-21st-century-entrepreneur.html.

[2] *See,* Valentina Di Liscia, *"First Ever NFT" Sells for $1.4 Million,* HYPERALLERGIC (Jun. 10, 2021), https://hyperallergic.com/652671/kevin-mccoy-quantum-first-nft-created-sells-at-sothebys-for-over-one-million.

[3] See *infra*, Part II.A. (Overview of blockchain technology and tokens, such as NFTs. NFTs are a product of blockchain technology.).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *E.g.,* Natasha Dailey, *Billionaires, celebrities, and influencers from Mark Cuban to Lindsay Lohan are joining the NFT craze,* BUSINESS INSIDER (Mar. 21, 2021), https://www.businessinsider.com/nft-celebrities-grimes-mark-cuban-lindsay-lohan-gronk-shawn-mendes-2021-3. (last visited Mar. 11, 2023).

[8] Statista, *Total number of sales involving a non-fungible token (NFT) in the art segment worldwide over the previous 30 days from April 15, 2021 to November 15, 2022, by type,* https://www.statista.com/statistics/1235228/nft-art-monthly-sales-volume/. (last visited Feb. 19, 2023).

generated a billion-dollar market, the power of its technology has yet to be fully unleashed.[9]

One intriguing application of blockchain technology is the aid it lends to the management of intangible intellectual property assets, such as copyrights.[10] Owners of such intellectual property, also referred to as "rights holders," manage varying amounts of assets.[11] Individual rights holders might own a few assets, while larger corporate rights holders may own thousands.[12] Larger rights holders often utilize digital systems to track rights pertaining to each of their assets.[13] Without an official rights management system, tracking rights for each asset can be a burdensome task for rights holders.[14] To add further complexity, rights holders may license or sell their intellectual property to others in different geographic locations.[15] Rights management systems maintain metadata, such as a rights holder's name, share of the intellectual property, and other descriptive information associated with an asset.[16] However, even with these rights management systems in place, disputes of ownership still frequently arise.[17] Since rights holders maintain their own rights management systems in independent silos, rights metadata

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[9] Chainalysis, *NFT Market Report,* https://go.chainalysis.com/nft-market-report.html (last visited Dec. 2021); *See also, e.g.*, Cherie Hu, *Music NFT market update,* WATER & MUSIC, (Apr. 25, 2021), https://docs.google.com/presentation/d/1ICEKTmNaHFBLPCPatRJJR7HclTVGpUGPMbkpmgv1O5Y/edit#slide=id.gd2f207c450_0_9. For Music NFT-specific sales data.

[10] Alexandra Glover, Note, *New Kids on the Blockchain: A Smart Solution to Copyright Assignments & Terminations*, 11 ARIZ. ST. SPORTS & ENT. L.J. 1, 21 (2022).

[11] Sebastian Pech, *Copyright Unchained: How Blockchain Technology Can Change the Administration and Distribution of Copyright Protected Works*, 18 NW. J. TECH. & INTELL. PROP. 1, 35 (2020).

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] Bill Rosenblatt, *The Future of Blockchain Technology in the Music Industry*, 66 J. COPYRIGHT SOC'Y U.S.A. 271, 274 (2019).

[16] Haley Bridget McCullough, Note, *Closing the Gap Between Copyright Management Information and Metadata: A Critical Analysis of Section 1202 of the Digital Millennium Copyright Act and A Proposal for Sound Recording Standards*, 24 U. DEN. SPORTS & ENT. L.J. 75, 77 (2021).

[17] *E.g.,* Paul Resnikoff, *Spotify Faces Billions in Potential Damages for Infringing 243 Eminem Songs,* DIGITAL MUSIC NEWS (Aug. 22, 2019), https://www.digitalmusicnews.com/2019/08/22/spotify-infringement-eminem. (last visited Mar. 11, 2023).

easily becomes out-of-sync across each system.[18] This issue of conflicting rights metadata commonly occurs in the music business.[19]

As the music business entered the digital age, it was forced to transform decades of old, paper documents into digital records. Since music rights holders, such as record labels, music publishers, and performance rights organizations ("PROs"), store their digital rights in separate, proprietary databases, metadata issues now riddle the music industry.[20] Disparities amongst the various databases create chain-of-title and payment issues. Such issues increase royalty collection costs and diminish revenue for rights holders.[21] Tokenized rights facilitate a more precise and transparent rights management solution to remedy these issues.[22] The purpose of this Note is to provide an analysis of the music business's issues with corrupt music rights metadata in order to propose a more efficient music rights management system that is governed by tokenized rights. The Note contains three parts. Part I describes the music business's complex rights management and metadata issues. Part II briefly reviews the evolution of blockchain technology and discusses the purpose and meaning of tokenized rights. Part III evaluates how the music industry can effectively incorporate tokenized rights into music rights management practices and addresses potential roadblocks to implementing such a solution.

I. SORROW: THE MUSIC BUSINESS'S METADATA CRISIS[23]

Generally, the term "metadata" refers to data that describes the attributes of other data.[24] In the music business, "metadata" primarily refers to the data that describes the attributes of a song.[25] This metadata

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[18] Jaclyn Wishnia, Note, *Blockchain Technology: The Blueprint for Rebuilding the Music Industry?*, 37 CARDOZO ARTS & ENT. L.J. 229, 235 (2019).
[19] *Id.*
[20] *Id.* at 230.
[21] *Id.*
[22] See *infra,* Part II.B.
[23] *Sorrow Lyrics,* Genius, https://genius.com/David-bowie-sorrow-lyrics. (last visited Feb. 19, 2023).
[24] Michael Reed, *Harmonizing the Liner Notes: How the Usco's Adoption of Metadata Standards Will Improve the Efficiency of Licensing Agreements for Audiovisual Works*, 18 CHI.-KENT J. INTELL. PROP. 23, 30 (2019); *see also*, Spotify, *Metadata: What It Is and Why It Matters,* https://artists.spotify.com/blog/metadata-what-it-is-and-why-it-matters. (last visited Feb. 19, 2023).
[25] *Id.*

is born from a musician's tangible creation of a song.[26] Instantaneously, a song procures two types of metadata: "arbitrary" and "rights" metadata.[27] A song's arbitrary metadata attributes include characteristics such as the song's genre, rhythm, or mood.[28] A song's rights attributes include characteristics such as the songwriters' names, or the number of songwriters.[29] While the music business leverages both types of metadata for various purposes, rights metadata plays a paramount role in enabling rights holders to monetize their assets.[30] This section explores (A) the two types of music rights metadata, (B) the innerworkings of the music rights supply chain, and (C) the music business's prominent music rights metadata issues.

A. The Unsung Hero: Ownership and Revenue Rights Metadata

Music rights metadata falls into one of two categories: ownership rights or revenue rights.[31] Ownership rights pertain to a song's owner, or owners, pursuant to copyright law.[32] Two separate copyrights exist for a recorded musical work: the copyright in the sound recording and the copyright in the underlying musical work.[33] On the other hand, revenue rights pertain to an individual's or entity's right to receive a share of a song's revenue earned from its exploitation.[34] Unlike ownership rights, revenue rights holders do not need to be owners of the copyright.[35]

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[26] 17 U.S.C. § 102(a). *See also*, Dmitry Pastukhov, *How Broken Metadata Affects the Music Industry (And What We Can Do About It)*, SOUNDCHARTS (Jul. 15, 2019), https://soundcharts.com/blog/music-metadata#2-ownership/performing-rights-metadata. (last visited Feb. 19, 2023).
[27] Rosenblatt, *supra* note 15.
[28] *Id.*
[29] *Id.*
[30] Dani Deahl, *Metadata is the Biggest Little Problem Plaguing the Music Industry*, THE VERGE (May 29, 2019), https://www.theverge.com/2019/5/29/18531476/music-industry-song-royalties-metadata-credit-problems. (last visited Feb. 19, 2023).
[31] Rosenblatt, *supra* note 15.
[32] 17 U.S.C. § 201.
[33] 17 U.S.C. § 102(a).
[34] *How Music Royalties Work: 6 Types of Music Royalties*, SOUNDCHARTS (Jan. 8, 2020), https://soundcharts.com/blog/music-royalties. (last visited Feb. 19, 2023).
[35] *Id.*

Every copyright owner is granted a particular "bundle of rights."[36] For each copyright, the bundle of rights includes the rights to: reproduce or copy the work, prepare derivative works, distribute copies of the work, display the work publicly, and perform the work publicly.[37] Each of these rights empowers copyright owners with the exclusive ability to copy, transform, and exploit their copyrights.[38] Copyright owners often grant licenses to third parties regarding one or more of the rights associated with their copyright for various monetization opportunities.[39] For example, if a company wants to overlay an artist's sound recording on its television commercial, the company needs to obtain a license from the owner of the copyright in the sound recording and the owner of the copyright in the underlying musical work. This section outlines the key differences between (1) ownership rights and (2) revenue rights.

1. *Ownership Rights Metadata*

Ownership rights derive from the owners of (i) the copyright in the sound recording and (ii) the copyright in the sound recording's underlying composition.

i. *Ownership Rights for Sound Recordings*

Typically, the owner of the copyright in a sound recording stems from the terms of a "record deal."[40] A record deal is an agreement between an artist and a record label[41], also known as a "label," for the recording and promotion of a song or album.[42] In a record deal with a major record label, an artist accepts the major label's funding and

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[36] 17 U.S.C. § 106.
[37] *Id.*
[38] *Id.*
[39] Eric Priest, *The Future of Music Copyright Collectives in the Digital Streaming Age*, 45 COLUM. J.L. & ARTS 1 (2021).
[40] *The Ins & Outs of Signing a Record Deal,* AWAL (Apr. 1, 2022), https://www.awal.com/blog/signing-a-record-deal-decoded. (last visited Feb. 19, 2023).
[41] *Id.* There are two types of record labels: major labels and indie labels. A "major label" refers to record labels such as Universal (e.g., Interscope, Motown, Universal Records, Island, Def Jam), Sony (e.g., Columbia, Epic, RCA) or Warner Music Group (e.g., Warner Music, Atlantic Records). An indie label refers to other record labels that are not owned or controlled by a major label.
[42] *Id.*

promotional resources to aid his or her creation of original recordings.[43] In exchange for the major label's funding and resources, the major label obtains full ownership of the copyright in the artist's sound recordings.[44] However, this is not always the case. An independent artist, or a successful artist with leverage, may maintain or share ownership of the copyright in the sound recording.[45] If the copyright in the sound recording is jointly owned, the copyright is split into equal shares based on the number of authors, unless a contract declares otherwise.[46]

To demonstrate sound recording ownership rights, let's look at a hypothetical (hereinafter referred to as the "Bowie Hypothetical"). Imagine that David Bowie signed a record deal in 2015. Bowie felt inspired by the launching of the Ethereum blockchain and wanted to release an important song. Bowie inked a deal with Fungible Records ("FR"), where FR agreed to fund, release and promote Bowie's next single. Since FR desperately wanted to work with Bowie, it agreed to let Bowie maintain complete ownership of the "master."[47] Thus, in this hypothetical, Bowie is the sole owner of the copyright in the sound recording associated with the record deal.

ii. *Ownership Rights for a Sound Recording's Underlying Musical Work*

The owner, or owners, of a copyright in an underlying musical work stems from the creation of two components of a song: the lyrics and the composition.[48] Typically, the copyright in the underlying musical work is split-up into more pieces than the copyright in a sound recording.[49] If the copyright in the musical work is jointly owned, the copyright is split into equal shares based on the number of owners unless a contract declares otherwise.[50] While one songwriter may single-handedly write the lyrics and compose the music of a song, more

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[43] *Id.*
[44] *Id.*
[45] AWAL, *supra* note 40.
[46] 17 U.S.C. § 201.
[47] *E.g., Why Owning Your Master Recordings Means Everything,* AWAL (Sep. 19, 2018), https://www.awal.com/blog/maintaining-ownership-rights-as-an-artist. The term "master" refers to the rights to an artist's master sound recordings.
[48] U.S. Copyright Office, *Musical Works, Sound Recordings & Copyright,* https://www.copyright.gov/music-modernization/sound-recordings-vs-musical-works.pdf. (last visited Feb. 2023).
[49] Deahl, *supra* note 30.
[50] 17 U.S.C. § 201.

frequently, multiple individuals collaborate to form a musical work.[51] In fact, some of the most popular songs in the world credit more than nine songwriters per song.[52]

Furthermore, songwriters may sign a "publishing deal," which further complicates the copyright shares of a musical work.[53] A publishing deal is an agreement between a songwriter and a publishing company[54], also known as a "publisher," in which a songwriter accepts a publisher's funding and administrative services to enable the songwriter to better monetize his or her musical works.[55] In exchange, the publisher may obtain a share of the copyright in the musical work.[56] Like record deals, the terms of publishing deals vary and depend upon the stature of the songwriter. Veteran, well-known songwriters may maintain full ownership of their copyright, while up-and-coming songwriters may share ownership with a publisher pursuant to a publishing deal.[57]

As an example of composition ownership, imagine that, after Bowie signed his record deal with FR in the Bowie Hypothetical, he co-wrote a song called "Tokenize Me" with Vitalik Buterin.[58] At the moment the song was written on a piece of paper, the composition "Tokenize Me" was protected by copyright law. Bowie and Buterin agreed to split ownership of the composition copyright and publishing revenues equally. Therefore, Bowie and Buterin each own fifty percent of the composition copyright for "Tokenize Me." As soon as word got around that Bowie wrote a new hit song, publishers initiated a bidding war to sign Bowie. He signed with the publishing company Tokenized Writes ("TW"). Since TW offered Bowie a generous "advance" paid in

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[51] *Id.*

[52] *E.g.,* Tim Ingham, *How to Have a Streaming Hit in the USA: Hire 9.1 Songwriters (And a Rap Artist),* MUSIC BUSINESS WORLDWIDE (Jan. 6, 2019), https://www.musicbusinessworldwide.com/how-to-have-a-streaming-hit-in-the-us-hire-9-1-songwriters-and-a-rap-artist. (last visited Feb. 19, 2023).

[53] Henry Schoonmaker, *Which Kind of Publishing Deal is Right for You?,* SONGTRUST (Jan. 25, 2022). https://blog.songtrust.com/music-publishing-deals. (last visited Mar. 11, 2023).

[54] *Id.* A publishing company exploits and administers compositions on behalf of a songwriter or producer.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *See*, *The History of Ethereum*, Ethereum (Jan. 31, 2022), https://ethereum.org/en/history. (last visited Mar. 11, 2023). Vitalik Buterin is the founder of Ethereum.

Ethereum, he agreed to share ownership of his portion of the composition copyright and publishing revenues in "Tokenize Me."[59] Thus, Bowie, TW and Buterin all share an ownership stake in the composition copyright for "Tokenize Me."

Regardless of whether a copyright owner is a record label, publishing company, recording artist, or songwriter, maintaining copyright metadata is an onerous task. Copyright owners typically maintain a vast catalogue of copyrights and are tasked with tracking important metadata associated with each copyright. Such metadata for a song includes attributes such as the copyright owners, the song title, the writers of the work, and the third parties licensing the copyright.[60] Copyright owners' accurate maintenance of their metadata is paramount for the successful exploitation of the associated musical work.

2. *Revenue Rights Metadata*

Those with revenue rights are entitled to receive revenues that derive from (i) the exploitation of the copyright in the sound recording or (ii) the copyright in the sound recording's underlying composition.[61]

i. *Revenue Rights for Sound Recordings*

Revenue rights for sound recordings are typically negotiated terms under record deals and producer agreements.[62] Part of these revenue rights include the "master royalties," which are the shares of revenue derived from the exploitation of sound recordings. [63] Those who are entitled to a share of master royalties receive revenue from the exploitation of an associated sound recording.[64] Such revenue might include licensing revenues from digital service providers (DSPs), performance revenues from non-interactive radio stations such as Sirius Radio, and neighboring rights revenues. [65]

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[59] Schoonmaker, *supra* note 53; *See also infra* Part II.A for more information about "Ethereum."
[60] Reed, *supra* note 24.
[61] Wishnia, *supra* note 18.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *See*, *What Are Neighboring Rights*, ROYALTY EXCHANGE (Feb. 2, 2017), https://www.royaltyexchange.com/blog/what-are-neighboring-rights. (last visited Mar. 11, 2023). "Neighboring Rights" are public performance royalties paid to sound

In a major label deal, a record label may take between eighty to eighty-seven percent of the master royalties, depending on the artist's experience or stature.[66] Artists that sign with an independent label, or artists with more leverage, might be able to retain fifty percent or more of the master royalties.[67]

A producer agreement, on the other hand, is an agreement between an artist and the *producer* of an artist's sound recording.[68] A producer often receives about three percent of the artist's master royalties, depending on the producer's and artist's experience or stature.[69] These producer royalties are often referred to as "producer points."[70] The number of producer points that a producer receives also depends on the producer's leverage.[71] In most major label deals, artists and producers do not earn any master royalties until the record label recoups its initial investment in the artist.[72]

To demonstrate sound recording revenue rights, refer back to the Bowie Hypothetical when Bowie signed record deal with FR. In the record deal, although he maintained ownership of the masters, he agreed to grant FR seventy-five percent of the master royalties earned from the exploitation of the sound recording of "Tokenize Me." Furthermore, Satoshi Nakamoto produced the sound recording for "Tokenize Me." Bowie agreed to give Nakamoto three producer points as compensation for his work on the record. Thus, the breakdown of revenue rights for master royalties earned from the exploitation of "Tokenize Me" is seventy-five percent for FR, twenty-two percent for Bowie, and three percent for Nakamoto.

ii. *Revenue Rights for a Sound Recording's Underlying Musical Work*

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recording copyright holders. The U.S. notably does not pay neighboring rights royalties while many other countries do.

[66] Donald S. Passman, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* (2019); *see also The Ins & Outs of Signing a Record Deal,* AWAL (May 7, 2019), https://www.awal.com/blog/signing-a-record-deal-decoded. (last visited Feb. 19, 2023).

[67] *Id.*

[68] *Id.*; *see also* Karl Fowlkes, Esq., *How Do Songwriters and Producers Get Paid*?, THE COURTROOM (Feb. 13, 2019), https://medium.com/the-courtroom/the-basics-how-do-songwriters-and-producers-get-paid-5d5debef25c7. (last visited Feb. 19, 2023).

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

Revenue rights for a song recording's underlying musical work are typically negotiated terms under publishing deals and between songwriters.[73] The shares of revenue that derive from the exploitation of a musical work are referred to as "publishing royalties."[74] Those who are entitled to a share of the publishing royalties receive revenue from the exploitation of a musical work.[75] Publishing royalty revenues include mechanical royalties from the reproduction of the musical work, public performance royalties based on radio and broadcast play, and synchronization revenues from film or television placements.[76]

Under a traditional publishing deal, a publishing company may take up to fifty percent of the publishing royalties, leaving a songwriter with fifty percent.[77] A songwriter with more leverage may sign a co-publishing deal, where a publishing company takes up to twenty-five percent of publishing royalties instead of fifty percent.[78] Under traditional and co-publishing deals, the publisher both exploits a songwriter's musical works and provides royalty collection services. Alternatively, a songwriter can opt to sign an administration agreement, where a publishing company only provides royalty collection services in exchange for ten to fifteen percent of the publishing royalties.[79]

Furthermore, revenue rights may vary based on the geographic territory.[80] For example, a songwriter may provide a publishing company with revenue rights for a particular song, but only for publishing royalties earned in the United States. The songwriter is then free to sign a publishing deal with another company to share revenue rights in other parts of the world.

To demonstrate composition revenue rights, refer back to the Bowie Hypothetical when Bowie signed a publishing deal with TW and co-wrote "Tokenize Me" with Vitalik Buterin. In the publishing deal, Bowie agreed to share his publishing royalties with TW in exchange for

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[73] *Id.*
[74] Passman*, supra* note 66; *see also Music Royalties 101 – Publishing Royalties,* ROYALTY EXCHANGE (Feb. 10, 2021)*,* https://www.royaltyexchange.com/blog/music-royalties-101-publishing-royalties. (last visited Feb. 19, 2023).
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] Schoonmaker*, supra* note 53.
[80] Tran Ngoc Linh Tam, *Music Copyright Management on Blockchain: Advantages and Challenges*, 29 ALB. L.J. SCI. & TECH. 201, 207 (2019).

its exploitation and royalty administration services. Thus, the revenue rights holders for the exploitation of the underlying composition in "Tokenize Me" are Bowie, TW, and Buterin.

Revenue rights metadata ensures that the correct parties are paid for the exploitation of a musical work. Revenue rights metadata includes attributes such as the names of the participating parties, their respective shares, and territorial limitations. Revenue rights holders must accurately maintain their metadata to properly collect their respective share of revenue.[81]

B. The Music Rights Supply Chain

On a high level, the entities involved in the music rights supply chain include record labels, publishing companies and administrators, distributors, DSPs, PROs[82], the Mechanical Licensing Collective (MLC)[83], collective management organizations (CMOs)[84], SoundExchange, and the Copyright Office. These entities are responsible for collecting specific royalties on behalf of rights holders. Each song's music rights metadata must be shared amongst these various entities for rights holders to successfully receive a song's associated revenues. If rights metadata becomes out-of-sync between any of these parties, payment issues arise. This section will review each entity's role in the music rights supply chain.

The music rights supply chain begins prior to the release of a song. To demonstrate the music rights supply chain, refer to the Bowie Hypothetical when Bowie wrote and recorded the song "Tokenize Me." Ideally, after a song's conception, rights holders can proactively register a song's music rights with organizations that help rights holders collect

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[81] *Id.*

[82] *What Performance Rights Organizations Do: How a PRO Can Maximize Your Royalties*, SOUNDCHARTS (Jan. 28, 2020), https://soundcharts.com/blog/performance-rights-organizations. (last visited Mar. 11, 2023). (Performance rights organizations (PROs) collect performance royalties on behalf of composition copyright owners. The primary PROs in the U.S. are ASCAP, BMI, SESAC, and GMR. SESAC acquired Harry Fox Agency (HFA), which issues licenses and collects mechanical royalties for composition copyright holders, which led to SESAC collecting both performance and mechanical royalties.).

[83] *Id.* (The Mechanical Licensing Collective (MLC) was established by the Music Modernization Act in 2018. The MLC collects mechanical royalties on behalf of composition copyright owners. Similarly, Music Reports, Inc. (MRI) globally collects mechanical royalties on behalf of composition copyright owners.).

[84] *Id.* (Collective Management Organizations (CMOs) collect both performance and mechanical royalties in certain ex-U.S. territories.).

revenue from the song's exploitation. Accordingly, Bowie can register "Tokenize Me" with SoundExchange to collect digital performance royalties on their behalf once the song is released.[85] Furthermore, Bowie, or his publishing company TW, can register "Tokenize Me" with a PRO to collect performance royalties from the exploitation of the composition.[86] To permit Bowie to sue potential infringers of his copyrights, Bowie can separately register the sound recording and musical work with the Copyright Office.[87] While it is best for rights holders to register the music rights proactively, this often happens retroactively.

Once an artist is ready to release a song, the artist's record label typically delivers the song to a distributor.[88] Most major labels own a distribution arm, but some smaller record labels and independent artists require a third-party service, such as Tunecore or Distrokid, to distribute their music to the DSPs for sale and streaming.[89] The DSPs track sales and streaming and report metrics back to rights holders.[90] The DSPs pay sales and licensing revenues to artists and record labels, mechanical royalties to publishers, and performance royalties to PROs.[91] If a songwriter does not have a publisher to directly collect the mechanical royalties for them, the MLC can collect royalties on the songwriter's behalf for payment to the songwriter.[92] For example, in the Bowie Hypothetical, if Bowie's record label FR released "Tokenize Me" through their distributor "Distributed Ledger" (DL), then DL is responsible for accounting the master royalties it receives from the DSPs to Bowie and FR. Bowie's PRO will pay Bowie his share of performance royalties, his publishing company TW will pay him his share of mechanical and synchronization royalties, and SoundExchange will pay him his share of digital performance royalties.

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[85] SoundExchange (Sept. 30, 2020), https://www.soundexchange.com/2020/09/30/artists-and-sound-recording-owners-heres-why-you-should-register-with-soundexchange (last visited Feb. 19, 2023).
[86] Soundcharts, *supra* note 82. (Performance rights organizations (PROs) collect performance royalties on behalf of composition copyright owners.).
[87] U.S. Copyright Office, *Register Your Work: Registration Portal,* https://www.copyright.gov/registration (last visited Feb. 19, 2023).
[88] Karl Fowlkes, Esq., *Why Sign a Distribution Deal?,* THE COURTROOM (Apr. 22, 2019), https://medium.com/the-courtroom/why-sign-a-distribution-deal-b9fd3870d62e (last visited Feb. 19, 2023).
[89] *Id.*
[90] *How Does the MLC Work?*, The MLC, https://www.themlc.com/how-it-works (last visited Feb. 19, 2023).
[91] *Id.*
[92] *Id.*

Record labels, publishing companies, distributors, DSPs, PROs, CMOs, the MLC, SoundExchange, and the Copyright Office all maintain their own independent rights management databases where they store music rights metadata.[93] Yet, all of these organizations require the same fundamental music rights information to properly pay and protect rights holders.

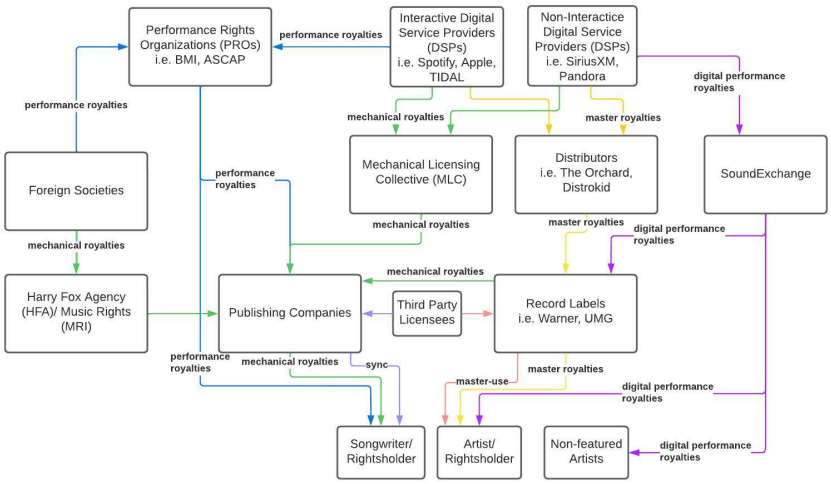

Figure 1

C. The Mega-Metadata Problem

Prior to the internet, metadata lived on physical paper, stored in manila folders. After the emergence of the internet, rights holders converted paper records into digital records. Rights holders created their own internal databases to serve as new rights management systems. This transformation required immense coordination between all rights holders in the music business. To communicate and exchange data more effectively, rights holders formed two uniform data standards. In 2006, leading companies and rights holders in the music business developed the Digital Data Exchange, "DDEX."[94] DDEX became the industry standard data format for communicating music rights metadata between rights holders, DSPs, and distributors all over the world.[95] Separately, a data format called Common Works Registration (CWR) became the

[93] *See* Figure 1 (Royalty flow from music organizations to rights holders.).
[94] Reed, *supra* note 24; *see also* Mathilde Neu, *What is DDEX,* Reprtoir (Jul. 19, 2021), *https*://www.reprtoir.com/blog/what-is-ddex. (last visited Feb. 19, 2023).
[95] *Id.*

PRO's and CMO's metadata standard for the collection of global performance royalties.[96]

While the implementation of these standards helped organizations interface with each other, it did not prevent incongruencies amongst music rights metadata. The primary reason that music metadata becomes out-of-sync is because no single source of truth exists for music rights.[97] For example, in order for DSPs, such as Spotify, to make accurate payments to rights holders, the DSPs must be able to link a sound recording to its exact underlying musical work to identify the correct parties to pay.[98] DSPs rely on rights data sent from various distributors, publishers and other rights holders. Each distributor relies on rights holders to relay accurate rights data.[99] Furthermore, revenue rights shares are frequently negotiated amongst rights holders after the release of a song and applied retroactively, which exacerbates the issue of inaccurate metadata.[100]

The inaccuracies also stem from rights holders themselves.[101] Rights holders for a song can change over time, such as when a rights holder sells its rights or grants a license to its rights.[102] If the rights holders for a song changes, it is often the rights holder's administration team that is responsible for communicating this change to all relevant music business entities.[103] Quite often, rights holders do not communicate these changes correctly, and this creates conflicts downstream.[104] Again, the lack of a reliable validation mechanism enables the data conflicts to grow exponentially.[105] Due to the improper metadata, *billions* of dollars are not paid to the proper rights holders.[106] However, rights holders are not incentivized to take on the significant

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[96] *Id.*; *see also* Mathilde Neu, *What is DDEX,* Reprtoir (Jul. 12, 2021), https://www.reprtoir.com/blog/what-is-cwr (last visited Feb. 19, 2023).
[97] Wishnia, *supra* note 18.
[98] *Id.*
[99] *Standing Committee on Copyright and Related Rights,* World Intellectual Property Organization (Jun. 1, 2021), https://www.wipo.int/edocs/mdocs/copyright/en/sccr_41/sccr_41_2.pdf (last visited Feb. 19, 2023).
[100] *Id.*
[101] Deahl, *supra* note 30.
[102] Buck McKinney, Creating the Soundtrack of Our Lives: A Practical Overview of Music Licensing, TEX. J. BUS. L. 1, 5 (2020).
[103] *Id.*
[104] Rosenblatt, *supra* note 15.
[105] *Id.*
[106] Deahl, *supra* note 30.

burden to clean the metadata or create a single source of truth, as the initiative would be a costly and time-consuming undertaking.

There have been many attempts to create global transparency of music rights metadata.[107] First, in 2000, the International Music Joint Venture formed in an effort to administer copyrights more effectively.[108] Next, in 2008, a working group consisting of the major music publishers, collection societies, and digital music distributors came together to try to create a single source of truth, a Global Repertoire Database (GRD), for music metadata.[109] Finally, in 2011, the World Intellectual Property Association created the International Music Registry (IMR).[110] Unfortunately, none of these efforts were successful. In 2014, the GRD was shut down after $13.7 million was spent towards its development.[111] A contributing factor toward its demise was a wide-spread fear of a single, centralized organization controlling the music rights data.[112]

Most recently, the Music Modernization Act established the MLC to collect and pay out unclaimed "black box" mechanical royalties to rights holders that the DSPs accumulated overtime due to inaccurate metadata.[113] One of the more significant issues is the DSP's and MLC's inability to match a substantial percentage of sound recordings to its correct underlying composition.[114] This results in the unclaimed black box mechanical royalties that fail to reach the correct composition rights holders.[115] The MLC also created the Data Quality Initiative (DQI), where it hopes to provide a way for music publishers, administrators, songwriters, and CMOs to compare their music rights data against the MLC's data to address any discrepancies and improve the MLC's

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[107] *Blockchain + the Music Industry, Succeeding Where the GRD Failed,* QVEST, https://qvest.us/wp-content/uploads/2020/08/wp_blockchain-1. (last visited Feb. 19, 2023).
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] Music Modernization Act, H.R. 5447, 115th Cong. (as passed by H.R. Apr. 25, 2018), https://www.congress.gov/bill/115th-congress/house-bill/5447; *see also* Chris Castle, *What the MLC Can Learn From Orphan Works*, MUSIC TECHNOLOGY POLICY (Apr. 16, 2021), https://musictechpolicy.com/2021/04/16/what-the-mlc-can-learn-from-orphan-works. (last visited Feb. 19, 2023).
[114] *Id.*
[115] *Id.*

data.[116] While this initiative is a step in the right direction for cleansing music rights data and paying rights holders, the MLC created another separate centralized database that does not address the long-term metadata validation issues. The metadata issues will persist if the music rights supply chain enables incorrect rights metadata.

II. REBEL REBEL: THE EMERGENCE OF BLOCKCHAIN TECHNOLOGY AND TOKENIZED RIGHTS[117]

The origin of blockchain technology begins with Satoshi Nakamoto.[118] The identity of Satoshi is unknown.[119] On October 31, 2008, Satoshi published a paper outlining the implementation of a revolutionary "electronic cash system" called "bitcoin."[120] Satoshi's paper cites a number of researchers that informed the creation of blockchain technology.[121] On January 9, 2009, a group of software engineers, with the help of Satoshi, launched the first blockchain; the bitcoin network.[122] Bitcoin is a form of digital money, or "cryptocurrency," that is exchanged as a store of value on the bitcoin network. The creation of the bitcoin network sparked extensive technological innovation. This section will discuss (A) the background and evolution of blockchain technology and (B) how blockchain technology enabled the innovation of tokenized rights.

A. What is Blockchain Technology?

This section will explain the fundamental concepts relating to blockchain technology by outlining (i) important blockchain terminology and (ii) the evolution of blockchain technology.

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[116] *Data Quality Initiative,* The MLC, https://www.themlc.com/data-quality-initiative-0. (last visited Feb. 19, 2023).
[117] *Rebel Rebel* Lyrics, Genius, https://genius.com/David-bowie-rebel-rebel-lyrics. (last visited Feb. 19, 2023).
[118] Paul Vigna, *Who Is Bitcoin Creator Satoshi Nakamoto? What We Know-and Don't Know,* WALL STREET JOURNAL (Dec. 7, 2021), https://www.wsj.com/articles/who-is-bitcoin-creator-satoshi-nakamoto-what-we-knowand-dont-know-11638020231. (last visited Feb. 19, 2023).
[119] *Id.*
[120] *See generally* Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System* (unpublished manuscript), https://bitcoin.org/bitcoin.pdf. (last visited Feb. 19, 2023).
[121] *Id.*
[122] Vigna, *supra* note 118.

1. *Blockchain Terminology*

A "blockchain," such as the bitcoin network, is essentially a "ledger" (a collection of accountings or transactions) with three defining characteristics: it is immutable, trustless, and decentralized. First, a blockchain is "immutable" because the ledger's entries cannot be edited or changed.[123] For example, if a person transfers one bitcoin to another person, the record of that transaction is memorialized on the bitcoin network forever. The information related to the transaction cannot be changed by any person or party.

Second, a blockchain is "trustless" because it is self-maintaining; there are mechanisms in place that enable each party involved to arrive at a consensus without dispute.[124] For example, on the bitcoin network, each time one person initiates a transfer of bitcoin to another, a "bitcoin miner" verifies that the person initiating the transfer has sufficient funds to send.[125] Bitcoin miners are incentivized to prevent fraudulent transactions because the bitcoin network rewards miners for accurately verifying transactions.[126] Upon verification of sufficient funds, the miner is paid bitcoin for its service, each person's bitcoin balance is updated, and the transaction is recorded on the bitcoin network for anyone to see.[127] Transactions are stored in "blocks" of transactions. The aggregate of all blocks is a "blockchain."[128]

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[123] *See*, *e.g.*, Andrea Tinianow & Caitlin Long, *Delaware Blockchain Initiative: Transforming the Foundational Infrastructure of Corporate Finance*, HARV. L. SSCH. F. ON CORP. GOVERNANCE & FIN. REG. (Mar. 16, 2017), https://corpgov.law.harvard.edu/2017/03/16/delaware-blockchain-initiative-transforming-the-foundational-infrastructure-of-corporate-finance ("Distributed ledgers ... create a single record of transactions among multiple parties, providing one immutable, "golden copy" of data that all parties see at the same time and can trust as valid").

[124] *See*, *e.g.*, Trent J. MacDonald et al., *Blockchains and the Boundaries of Self-Organized Economies 8* (2016) (unpublished manuscript), https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2749514 ("blockchain technology is trustless, meaning that it does not require third party verification (i.e., trust)"); *see also, What does Trustless Mean?*, CYPTOPEDIA (Jun. 28, 2022), https://www.gemini.com/cryptopedia/trustless-meaning-blockchain-non-custodial-smart-contracts. (last visited Feb. 19, 2023).

[125] Andreas M. Antonopoulos, MASTERING BITCOIN: UNLOCKING DIGITAL CRYPTOCURRENCIES 173-74 (2014); *see also, What is mining?*, Coinbase, https://www.coinbase.com/learn/crypto-basics/what-is-mining. (last visited Feb. 19, 2023).

[126] *Id.*

[127] *Id.*

[128] *Id.*

Lastly, a blockchain is "decentralized," meaning no single person or entity owns or controls it in majority.[129] A blockchain does not live on a centralized server; it is supported by many servers across the globe. Each server that supports the blockchain is called a "node."[130] The more nodes on a blockchain, the more secure the blockchain becomes.[131] Since blockchains are not supported or owned by central servers or entities, transactions flow in a peer-to-peer manner.[132] For example, on the bitcoin network, if a person transfers one bitcoin to another, the transaction is directly between those two people. The funds are readily available and do not need to be cleared by a bank or other intermediary. Thus, a blockchain is an "immutable," "trustless," and "decentralized" ledger.

2. *The Evolution of Blockchain Technology*

After the implementation of the bitcoin network, other developers conceived new blockchains for different purposes. In 2013, Vitalik Buterin published a white paper that led to the birth of the Ethereum blockchain in 2015.[133] Ethereum was created to facilitate transactions for any digitized asset; not solely for payments.[134] Ethereum's "smart contract" functionality empowered others to build their own decentralized applications (dApps) on top of the Ethereum blockchain.[135] "Smart contracts" are hard-coded conditions that are programmed onto the Ethereum blockchain.[136] Smart contracts enable dApps to launch representations of their own digital assets, or "tokens,"

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[129] *See* Vitalik Buterin, *The Meaning of Decentralization*, MEDIUM (Feb. 6, 2017), https://medium.com/@VitalikButerin/the-meaning-of-decentralization-a0c92b76a274. (last visited Feb. 19, 2023).
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] Vitalik Buterin, *A Next Generation Smart Contract & Decentralized Application Platform*, ETHEREUM https://ethereum.org/en/whitepaper (last visited Feb. 19, 2023). ("The Ethereum network includes its own built-in currency, ether, which serves the dual purpose of providing a primary liquidity layer to allow for efficient exchange between various types of digital assets…").
[134] *Id.*
[135] *Id*. ("'Ether' is the main internal crypto-fuel of Ethereum, and is used to pay transaction fees.")
[136] Jared Arcari, *Decoding Smart Contracts: Technology, Legitimacy, & Legislative Uniformity*, 24 FORDHAM J. CORP. & FIN. L. 363, 370–71 (2019) ("Fundamentally, smart contracts are instruments written in code that control and record the exchange of consideration between two or more parties.").

to be transacted on the Ethereum blockchain.[137] Two of the most popular token protocols that dApps utilize are "ERC-20" and "ERC-721" tokens.[138] ERC-20 tokens, also referred to as "fungible tokens," generally represent assets that are identical and interchangeable.[139] ERC-721 tokens, also referred to as "non-fungible tokens" or "NFTs," generally represent unique assets, such as collectibles or artwork.[140] By nature, these unique assets are *not* interchangeable like ERC-20 tokens. Tokens are managed via digital wallets."[141] Digital wallets are secured by means of private and public key cryptography.[142] When a digital wallet is created, the owner of the wallet sets a password and is responsible for safely storing the private key.[143] Only those with access to the private key may access the wallet.[144]

The ability to mint, transact, and track custom digital assets on the Ethereum blockchain generated excitement amongst all industries.[145] As the popularity of the Ethereum blockchain continues,

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[137] *Id.*; *see also*, *Ethereum Explained: A Guide to the World Supercomputer*, CYPTOPEDIA (Dec. 23, 2021), https://www.gemini.com/cryptopedia/ethereum-blockchain-smart-contracts-dapps#section-ethereums-d-app-ecosystem. (last visited Feb. 19, 2023).

[138] Tonya M. Evans, *Cryptokitties, Cryptography, and Copyright*, 47 AIPLA Q.J. 219, 248 (2019). ("The ERC-20 standard provides a common list of the minimum coding instructions necessary to create a token that is consistent with the general class of identical [fungible] tokens…ERC-721 is a finalized coding standards interface for non-fungible tokens… evidencing ownership of both wholly digital crypto assets and physical assets represented in token form [i.e., tokenized assets].").

[139] *See generally* Fabian Vogelsteller & Vitalik Buterin, ERC-20 Token Standard, GITHUB: ETHEREUM (Nov. 19, 2015), https://github.com/ethereum/EIPs/blob/master/EIPS/eip-20.md (providing a technical explanation of the ERC-20 standard and its Ethereum Improvement Proposal (EIP) history).

[140] *Id.*

[141] *Id.*at 234; *see also, What is a crypto wallet?,* Coinbase, https://www.coinbase.com/learn/crypto-basics/what-is-a-crypto-wallet. (last visited Feb. 19, 2023).

[142] *Id.*

[143] *Id*. ("[F]or example, when Alice sends Bitcoin to Bob from her digital wallet, she uses her private key to digitally sign (i.e., approve) the transaction from her account to Bob's public key. Alice's private key is the only one that can approve transactions involving the uniquely paired public key.").

[144] *Id.*

[145] *E.g.*, Kate Vitasek et. all, *How Walmart Canada Uses Blockchain to Solve Supply-Chain Challenges*, HARVARD BUSINESS REVIEW (Jan 5, 2022), https://hbr.org/2022/01/how-walmart-canada-uses-blockchain-to-solve-supply-chain-challenges. (last visited Feb. 19, 2023). ("Walmart Canada applied blockchain to

scalability is becoming an issue.[146] Currently, the Ethereum blockchain can only process approximately 15 transactions per second.[147] The rising demand to transact on the Ethereum blockchain is resulting in a considerable rise in transaction fees, which are also referred to as "gas" fees.[148] In 2022, the Ethereum development team implemented a solution to reduce energy required to verify transactions. [149] Another major upgrade to increase the number of transactions per second is scheduled to occur in 2023 or 2024.[150]

B. What are Tokenized Rights?

One of the most popular use-cases for blockchain technology is for the tracking of rights related to a particular asset.[151] Both tangible assets (such as real estate and artwork) and intangible assets (such as intellectual property) may be represented on a blockchain in token form.[152] The process of creating a digital representation of an asset in the form of a token on a blockchain is called "tokenization."[153]

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solve a common logistics nightmare: payment disputes with its 70 third-party freight carriers.").

[146] Justin Mart & Connor Dempsey, *Scaling Ethereum & crypto for a billion users,* COINBASE (Nov. 23, 2021), https://blog.coinbase.com/scaling-ethereum-crypto-for-a-billion-users. (last visited Feb. 19, 2023).

[147] *Id.*

[148] *Id.* ("Since Ethereum's popularity far exceeds 15 transactions per second, the result is long waits and fees as high as $200 per transaction.").

[149] *The great renaming: what happened to Eth2,* Ethereum (Jan. 24, 2022), https://blog.ethereum.org/2022/01/24/the-great-eth2-renaming. (last visited Feb. 19, 2023).

[150] The Ethereum Upgrades, *Upgrading Ethereum to radical new heights*, https://ethereum.org/en/upgrades (Dec. 28, 2022). (last visited Mar. 11, 2023).

[151] *E.g.,* Debbie Kestin-Schildkraut, *Helping artists sleep at night: Digital rights management with blockchain*, IBM Supply Chain and Blockchain Blog (Mar. 3, 2021), https://www.ibm.com/blogs/blockchain/2021/03/helping-artists-sleep-at-night-digital-rights-management-with-blockchain. (last visited Feb. 19, 2023).

[152] *What is Tokenization in Blockchain?*, Cryptopedia (August 11, 2021), https://www.gemini.com/cryptopedia/what-is-tokenization-definition-crypto-token#section-security-tokens-utility-tokens-and-cryptocurrencies. (last visited Feb. 19, 2023).

[153] Wishnia*, supra* note 18. ("Tokenization is the process of converting rights to an asset into a digital token on a blockchain. The earliest form of proof to demonstrate how this could potentially work is comparable to a phenomenon known as the 'Bowie bond.' In 1997, David Bowie bundled up almost 300 of his existing recordings and copyrights into a security that paid its buyer. The so-called Bowie bonds were among the first in what would become a wave of esoteric asset-backed securities deals based on intellectual property.").

Tokenization becomes a powerful concept when one's right to a particular asset is tokenized to create a "tokenized right."[154]

Tokenized rights may be represented by non-fungible and fungible tokens. Non-fungible tokens ("NFTs"), are best suited to represent ownership rights.[155] For example, as described in the introduction, Kevin McCoy created an NFT to represent the ownership rights of his work of art, "Quantum." When McCoy held the NFT in his digital wallet, anyone in the world was able scan the Ethereum blockchain to see that McCoy's wallet held this artwork; thus, the NFT defined his ownership of "Quantum."[156] Furthermore, when McCoy sold his artwork to the highest bidder, McCoy received payment for the NFT and it flawlessly transferred from McCoy to the new owner. The transaction was trustlessly verified and written to the Ethereum blockchain; McCoy and the new owner did not need to trust an intermediary to facilitate the transaction. Since the new owner now holds the NFT in his wallet, he is able to prove that he is the owner and rights holder of "Quantum." Thus, NFTs are useful for representing ownership rights of assets.[157]

Next, fungible tokens frequently represent a share of ownership.[158] For example, in 2016, an Ethereum-based start-up, SingularDTV, made history when it launched its entertainment revenue rights tokenization portal.[159] As a proof of concept to demonstrate the technology, SingularDTV produced and distributed a documentary about blockchain technology called "Trust Machine."[160] SingularDTV minted fungible tokens to represent each of the film's stakeholder's revenue rights in the film.[161] These tokens were sent to the wallets of the stakeholders of the film based on each stakeholder's backend participation in the film.[162] The token holders, as well as their associated shares of the revenue rights tokens, are transparently displayed on the

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[154] *Id.*
[155] Kristen Morrill, Note, Smart Contracts: *The Future of Blockchain in the Entertainment Industry*, 11 ARIZ. ST. SPORTS & ENT. L.J. 43, 52 (2021).
[156] *See intra* Introduction.
[157] Buterin, s*upra* note 133.
[158] *Id.*
[159]Zach LeBeau, *TOKIT is Here! The Evolution of Entertainment Begins,* MEDIUM (Nov. 6, 2017), https://medium.com/singulardtv/tokit-is-here-the-evolution-in-entertainment-begins-1d3e9eaff348. (last visited Feb. 19, 2023).
[160] SingularDTV, *The Next Phase of the Trust Machine Experiment,* MEDIUM (Jun. 14, 2019), https://singulardtv.medium.com/the-next-phase-of-the-trust-machine-experiment-463e52b7061f. (last visited Feb. 19, 2023).
[161] *Id.*
[162] *Id.*

Ethereum blockchain.[163] Revenue for the film was then distributed pro-rata amongst stakeholders.[164] As this example demonstrates, since percentages of revenue related to an asset, such as a film, are uniform in nature, fungible tokens are a useful mechanism for representing such rights.[165]

Once rights are tokenized on a blockchain, they are verifiable by any party.[166] Since blockchains are immutable, ownership and rights related to assets are clearly delineated and cannot be changed without consensus between transacting parties.[167] Fungible and non-fungible tokens have the ability to represent rights related to an asset. Therefore, blockchains have the capacity to serve as an effective rights management system.

III. LET'S DANCE: TOKENIZED RIGHTS CAN SOLVE THE MUSIC BUSINESS'S METADATA ISSUE[168]

The music business requires a more accurate and efficient rights management system.[169] Since PROs, publishing companies, record labels, DSPs, and the MLC all manage music metadata in their own proprietary databases, accurate maintenance of rights is not possible without impeccable communication.[170] Even so, additional communication requires an increase in head-count and overhead costs for these companies.[171] Each entity is not incentivized to share its proprietary data, and the data migration effort to consolidate all rights data into one database will likely result in an astronomical

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[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] Tonya M. Evans et. al., *Panel 2: Art Law and Blockchain*, 37 CARDOZO ARTS & ENT. L.J. 589, 591 (2019).
[167] *Id.* at 603. ("Once the information is on the blockchain, it becomes immutable."); *see also* Michael Buchwald, *Smart Contract Dispute Resolution: The Inescapable Flaws of Blockchain-Based Arbitration*, 168 U. Pa. L. Rev. 1369, 1371 (2020). (Potential resolutions for blockchain-based disputes.).
[168] Let's Dance Lyrics, Genius, https://genius.com/David-bowie-lets-dance-lyrics. (last visited Feb. 19, 2023).
[169] Wishnia, *supra* note 18. ("The main problem with music rights management is that there is no single authoritative source for mapping recordings to their underlying composition.").
[170] *See generally infra* Part.I.
[171] *Id.* (Further, while this could create political and public relations pressure-points, such change is justified economically and existing jobs can be reformatted to support the shift in technology.).

expenditure of time, effort, and money.[172] However, a shared rights database or protocol amongst all entities in the music business will increase efficiency.[173] With blockchain technology, rights holders can create a transparent rights management system to more effectively manage and exploit their rights.[174] This section will discuss (A) a proposed tokenized rights management solution to solve the music industry's metadata issues and (B) the solution's potential impact on copyright and obstacles to overcome for a proper implementation of the solution.

A. Tokenized Music Rights Management Within the Bounds of Copyright Law

As outlined in Section I, a modification to music rights metadata, such as a change in a songwriter's publishing company, can create global incongruencies across many organizations in the music business.[175] A rights holder's ability to maintain accurate records of its own rights would allow for seamless transitions of rights between rights administrators.[176] This section will describe (1) a wallet-based tokenized rights management system and (2) potential obstacles tokenized rights must overcome for successful music industry adoption.

1. *Wallet-Based Tokenized Rights Management*

Rights holders would maintain accurate records by storing and managing their tokenized ownership and revenue rights via digital wallets.[177] For example, if a sound recording or composition changes ownership, a token can seamlessly be sent from the prior rights holder's wallet to the new rights holder's wallet.[178] A blockchain will transparently reflect any change of ownership.[179] Every entity in the

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[172] *Id.*
[173] *Id.*
[174] *See generally infra* Part.II.B.
[175] *See generally infra* Part.I.
[176] *Id.*; *see also* David Idokogi, *Decentralizing Creativity: A Tenable Case For Blockchain Adoption In The Entertainment Industry*, 47 RUTGERS COMPUTER & TECH. L.J. 274, 277.
[177] Coinbase, https://www.coinbase.com/learn/crypto-basics/what-is-a-crypto-wallet. (last visited Feb. 19, 2023).
[178] *Id.*
[179] *Id.*

music business would be able to stay informed of the change of ownership at the same time.[180] This enables global synchronized rights in a matter of minutes.[181] Thus, a wallet-based tokenized rights system offers an elegant solution for rights holders to transfer rights to others.[182]

Many digital wallets are available as a simple web or mobile application.[183] Some digital wallets are even developed specifically for music rights management.[184] For example, Revelator, an Israeli start-up, already launched a mobile wallet for tokenized music rights management.[185] The wallet, called Original Works, empowers creators to tokenize their music rights and receive instantaneous payments for exploitation of those rights.[186] If music rights are managed via creator wallets, any entity in the music business could interface with the creator to determine the correct rights holders related to a particular work.[187] Moreover, since the music rights within the wallet would be written to a blockchain, which serves as a single source of truth, any entity can view the accurate rights metadata, which limits rights disputes and increases speed of payment to creators and administrators.[188] Thus, each ownership or revenue right related to a creator's works can be represented by its own token.

To account for Copyright law, a creator's wallet must reflect whether the creator's rights are related to the sound recording or the sound recording's underlying composition.[189] Therefore, to properly manage its rights, the artist should have two separate tokens representing that particular work: one token for the sound recording and one token for the composition.[190] For example, if an artist both recorded

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[180] William J. Blackford, Note, *Hashing It Out: Blockchain As A Solution for Medicare Improper Payments*, 5 BELMONT L. REV. 219, 223 (2018). (Institutional interoperability is paramount for a transparent rights ecosystem across the music industry. Thus, until blockchains are each interoperable, rights should be confined to a single blockchain, such as Ethereum.).

[181] Arya Taghdiri, Note, *How Blockchain Technology Can Revolutionize the Music Industry*, 10 HARV. J. OF SPORTS & ENT. LAW 173, 179.

[182] *Id.*

[183] Carol Goforth, *The Lawyer's Cryptionary: A Resource for Talking to Clients About Crypto-Transactions*, 41 CAMPBELL L. REV. 47, 114 (2019). (Web, mobile, and hardware wallets are available to store and manage tokenized assets.).

[184] *See, e.g.*, Original Works, https://original.works/en. (last visited Feb. 19, 2023).

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *Id.*

[189] 17 U.S.C. § 102(a).

[190] *Id.*; *see also*, Figure 2.

and wrote a song, it would likely have a stake in both the sound recording and the sound recording's underlying musical work.[191] Moreover, each sound recording and underlying composition may be associated with different ownership and revenue rights holders. To account for this, each sound recording and composition can be represented by two separate tokens: one for ownership rights and another for revenue rights.[192] For example, a record label might be the legal owner of a sound recording, but the artist also has revenue rights associated with the sound recording. Compositions work similarly; a publishing company might be the legal owner of a composition. However, the songwriter has revenue rights associated with the composition. While out of the scope of this Note, a tokenized rights metadata standard will need to be created in tandem with the implementation of this system to determine what metadata is associated with each token.

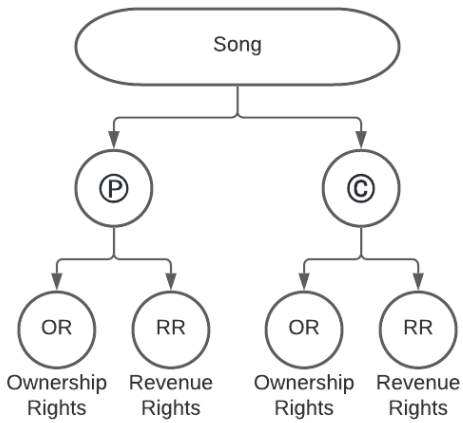

Figure 2

2. *Ownership as Fungible Tokens*

Legal ownership of a work often resides with the creator or creators of the work.[193] Ownership of sound recordings and compositions can be represented by NFTs, as ownership rights are unique to each owner.[194] To demonstrate the representation of ownership as a non-fungible token, refer back to the Bowie

[191] *Id.*
[192] *See,* Figure 2.
[193] *See infra* Part II.B.
[194] Buterin, *supra* note 133.

Hypothetical. In the hypothetical, Bowie signed a record deal with FR and recorded the song "Tokenize Me." Prior to the exploitation of the "Tokenize Me" sound recording, Bowie and FR can generate an NFT for each owner of the sound recording. In this case, Bowie is the sole owner, thus only one NFT needs to be created. Once the NFT is generated, the "Tokenize Me" sound recording NFT will reside in Bowie's digital wallet.[195] Each sound recording NFT can contain an embedded unique identifier, such as the ISRC, as well as its underlying composition's ISWC, the song title, and artist name.[196] Furthermore, in the case of contractual reversion rights in a record deal related to copyright ownership, such reversion rights can be programmed into the smart contract to enable the sound recording NFT to return to the artist after a certain time period or revenue is earned.[197]

Similarly, composition copyright owners can also represent their ownership rights by creating an NFT. For example, for the underlying composition of "Tokenize Me," each composition owner, prior to its exploitation, can generate an NFT to represent their ownership of the composition.[198] In this Bowie Hypothetical, Bowie, Buterin, and TW hold ownership rights with regards to the underlying composition of "Tokenize Me." Once the "Tokenize Me" NFT is generated, separate composition NFTs will reside in each of the owners' digital wallets. Each composition NFT can contain an embedded unique identifier, such as the ISWC, composition title, and songwriter names. In the case of contractual reversion rights in publishing deals related to copyright ownership, such reversion rights can be programmed into the smart

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[195] *See* Figure 3.

[196] Michael Reed, *Harmonizing the Liner Notes: How the Usco's Adoption of Metadata Standards Will Improve the Efficiency of Licensing Agreements for Audiovisual Works*, 18 CHI.-KENT J. INTELL. PROP. 23, 31–32 (2019). ("The two most widely used forms of standardized metadata are the International Standard Recording Codes ("ISRC") and International Standard Music Work Codes ("ISWC"). While these identifiers have a good deal of support from the industry, they have not been universally adopted by rights holders…The ISRC is usually applied for by a musician's record label through an office designated to issue these identifiers in that region… ISWC identifies the author of published compositions, otherwise known as the underlying work.").

[197] Chase A. Brennick, *Termination Rights in the Music Industry: Revolutionary or Ripe for Reform?,* 93 N.Y.U. L. REV. 786, 793 (2018). ("On the effective date of termination, the rights revert to the terminating party, and that party is free to make further transfers.").

[198] *See,* Figure 3

contract to enable the composition NFT to return to the artist after a certain time period or revenue is earned.[199]

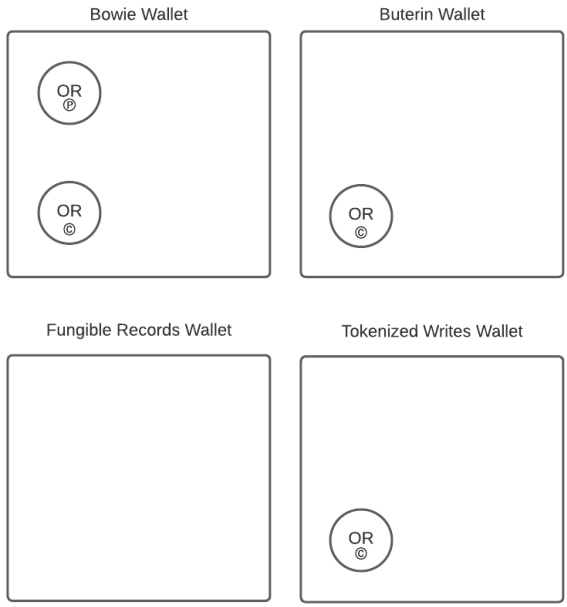

Figure 3

If rights holders store ownership NFTs in their wallets, this will reduce any sound recording and composition matching issues that the MLC was created to remedy; potentially negating the MLC's usefulness altogether. Ownership rights for any sound recording and musical work will be available for any DSP, record label, or publisher to see on a blockchain. While the burden is initially on rights holders to represent their ownership rights correctly, doing so is in their best interest as it would ensure that they get paid correctly and promptly.

3. *Revenue Rights as Fungible Tokens*

Revenue rights for sound recordings and compositions are typically negotiated in record deals, producer agreements, and publishing deals.[200] An artist or producer may have revenue rights to a sound recording without legal ownership of the sound recording.[201] In similar fashion, a songwriter may have revenue rights to a composition

[199] *Id.*
[200] *See*, infra Part I.B.
[201] *Id.*

without legal ownership of the composition.[202] Unlike ownership rights, revenue rights are sufficiently represented by fungible tokens because each percentage of revenue that derives from the exploitation of a work is uniform.[203]

For the "Tokenize Me" sound recording, Bowie, as the sole rights holder, can generate a one hundred fungible tokens, each token representing a percentage of revenue.[204] Bowie can distribute the revenue rights tokens in accordance with his record deal to FR. Also, since he has a producer agreement with Nakamoto, he can distribute revenue rights tokens to Nakamoto to represent the producer points owed to Nakamoto. The distribution of the "Tokenize Me" revenue rights tokens represents the revenue share between all revenue rights holders.

Similarly, Bowie can distribute revenue rights tokens associated with the underlying composition of "Tokenize Me" in accordance with his publishing deal to TW and Buterin since both parties receive publishing royalties.[205] Thus, at any time, an artist's or songwriter's wallet can reflect the revenue splits it has for each sound recording or underlying composition.

If rights holders maintain revenue rights within their wallets, songwriters and publishers will be less inclined to disagree over their respective shares. While it is common for revenue splits for compositions to change based on the publishing administrator, the appropriate percentage of tokens can easily be sent from the old publishing administrator to the next. Fungible tokens will provide increased transparency for more accurate accounting and administration for rights holders.

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[202] *Id.*
[203] *See, infra* Part II.B.
[204] *See* Figure 4.
[205] *Id.*

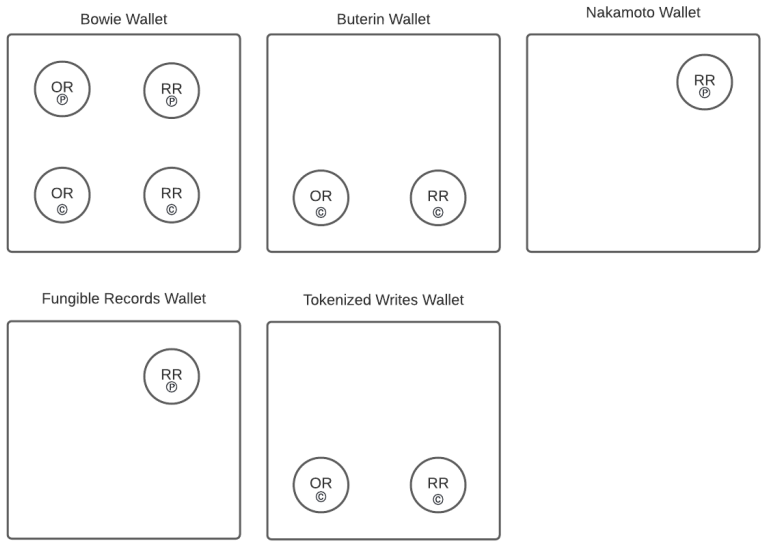

Figure 4

4. *Licenses as Non-Fungible Tokens*

Lastly, while a full analysis of licensing might be beyond the scope of this Note, NFTs could also enable sound recording or composition copyright owners to better manage licenses.[206] Legal owners of a work are entitled to grant exclusive and non-exclusive licenses of that work.[207] While owners of a work may unilaterally grant non-exclusive licenses, a majority of the work's owners must assent to grant an exclusive license of the work.[208] However, an owner of a work may unilaterally grant an exclusive license of its sole ownership share without permission.[209] Both sound recording and composition owners can use the wallet to generate NFTs to represent licenses.

If a copyright owner wants to grant an exclusive license to a third-party on behalf of all owners, the owner can initiate the process. However, a majority of the associated copyright owners will be required to sign off on the transaction.[210] Upon the signature from a majority of copyright owners, the exclusive license can generate in the form of the

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[206] *See*, *infra* Part II.B.
[207] 17 U.S.C. § 106; Eric Priest, *The Future of Music Copyright Collectives in the Digital Streaming Age*, 45 COLUM. J.L. & ARTS 1 (2021).
[208] *Id.*
[209] *Id.*
[210] *Id.*

NFT and be sent to the licensee's wallet. If a copyright owner wants to grant a non-exclusive license to a third-party, the copyright owner may unilaterally grant the license as long as the copyright owner ensures the other owners receive their appropriate share of revenue.[211] Each NFT that represents a license to rights can be embedded with the metadata that indicates whether it is for an exclusive or non-exclusive license, as well as the associated ISRC or ISWC and territory. Upon the expiration of the license, the NFT can be burned, thus terminating the license between the creator and the licensee.[212] If rights holders can easily reference which parties have active licenses for specific works on a blockchain, communication and issues of inconsistent metadata will reduce.

B. Obstacles to Overcome for Tokenized Music Rights

1. *Music Business Obstacles*

While tokenized rights can improve the music business' metadata practices and strengthen copyright, there are various hurdles to overcome. First, with new technology, adoption is always slow.[213] However, with the rise in popularity of NFTs and blockchain technology in the U.S., some estimate that over 27 million people in the U.S. own cryptocurrency.[214] This means many people are familiar with the process of creating a wallet and transacting on the blockchain.[215] Furthermore, roughly 88% of Americans have heard of cryptocurrency.[216] While there are currently throughput inefficiencies on the Ethereum network, making each transaction costly, Ethereum is

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[211] 17 U.S.C. § 101.

[212] *Token Burning, Explained,* COINTELEGRAPH, *https*://cointelegraph.com/explained/token-burning-explained. (last visited Feb. 19, 2023).

[213] Jeremy A. Carp, Autonomous Vehicles: Problems and Principles for Future Regulation, 4 U. PA. J.L. & PUB. AFF. 81, 111–12 (2018) ("The precautionary principle operates on the assumption that it is best to limit or halt the commercial adoption of an emerging technology until it is explicitly shown to be safe or sufficient information exists to calibrate a proportionate regulatory response.").

[214] *Cryptocurrency information about Unided States of America,* TRIPLEA, https://triple-a.io/crypto-ownership-united-states-2021. (last visited Feb. 19, 2023).

[215] *Id.*

[216] Pew Research Center, https://www.pewresearch.org/fact-tank/2022/08/23/46-of-americans-who-have-invested-in-cryptocurrency-say-its-done-worse-than-expected (Aug. 2022). (last visited Feb. 19, 2023).

working on a solution and many other viable blockchains are also available.[217]

Second, for a wallet-based tokenized rights system to function correctly, it is imperative that artists and creators initiate the migration to the new system. If creators embrace the new system, other rights holders downstream will have no choice but to succumb to the new system. Creators will need to find managers and business managers that are tech-savvy and willing to learn to efficiently monetize the creator's catalogue. It is possible that rights holders downstream, such as record labels, publishers, and PROs will attempt to stifle the wallet-based system, however, creators are the source of the works. The tokenized rights system requires cooperation from all parties in order to properly reflect rights metadata on a blockchain. Creators with leverage and a history of success can persuade downstream rights holders to utilize the new system moving forward, as well as pre-existing rights.[218]

Third, it is possible that a fraudulent rights holder could misrepresent ownership rights to a work.[219] However, this is possible in our current copyright system as well. The proposed system will rely on rights holders to report and flag fraudulent activity to ensure that sham rights holders are not unjustly compensated. If anything, since a rights holder's history of rights will be on a blockchain, such transparency makes it clearer when fraudulent activity arises.

Lastly, the legislature has a choice to either inhibit tokenized rights or embrace their effectiveness to improve copyright. The next significant amendment to the Copyright Act is in progress. While the MMA established the MLC to build another separate database of rights, the MLC merely created another out-of-sync rights management database in doing so. If Congress recognizes a token's ability to legally register and transfer a copyrightable work, tokenization will not only bring more utility to copyright, but it will also incentivize the music

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[217] Mart, *supra* note 146.

[218] Ricardo Hernandez, Note, *A Fair Stream: Recommendations for the Future of Fair Trade Music*, 19 VAND. J. ENT. & TECH. L. 747, 768 (2017). (Perhaps creators can come together to form a consortium of sorts, similar to Fair Trade Music International (FTMI). "FTMI is an 'independent, not-for-profit organization overseen by music creators from five continents' that seeks to certify select aspects of the music distribution chain as 'fair trade.'").

[219] Bryan H. Choi, *Software As A Profession*, 33 HARV. J.L. & TECH. 557, 563 (2020). (Perhaps software engineers will be held to a higher, professional standard if their code on the blockchain negligently disregards the law. However, thus far, "courts have uniformly rejected attempts by tort plaintiffs to hold software developers to a professional malpractice standard.").

industry to collaboratively build an accurate and transparent decentralized rights management system. Further, the costs for a blockchain-based rights system are supported by the entire blockchain community and do not require millions of dollars of maintenance costs. Rights holders would only need to develop or license a wallet interface of their choosing.

2. *Copyright Law Obstacles*

Although tokenized music rights can operate within the confines of existing copyright law, the metadata solution could be even more efficient with the aid of copyright law.[220] Copyright law exists to both protect the interests of creators and promote the progress of useful arts.[221] While an original work is automatically protected by copyright upon its tangible expression, creators must register their work with the Copyright Office to be entitled to statutory damages in case of copyright infringement of that work. However, the original purpose of copyright registration is not to proactively prepare for lawsuits, but to have the facts of a copyright on the public record. Moreover, since registration is not mandatory for copyright protection as it once was, there are fewer registrations and recordation filings.[222] Thus, there is a less accurate and reliable snapshot of copyright metadata at the Copyright Office.[223] The Copyright Office is currently conducting a study regarding issues of intellectual property law and policy arising from the use of NFTs.[224] Such a study might inform policy changes at the Copyright Office.

Today, copyright is essentially a means to an end to compensate the rights holders for their work. It is in the Copyright Office's best

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[220] Lauren Spahn, Note, *Emi v. Mp3tunes: Business Model Proposals for the Music Industry in the Context of Emerging Technology*, 2 BERKELEY J. ENT. & SPORTS L. 153, 179 (2013). (This note was written almost a decade ago, yet the same issues persist today regarding the slow adoption of technology in copyright law and the music industry. While the support of the law can empower new technology, the law is not typically proactive or quick to change.).

[221] U.S. Const. art. I, § 8, cl. 8.; *see also* Barton Beebe, *Bleistein, the Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319, 320 (2017).

[222] *Improving the Copyright Office Ownership Database,* COPYRIGHT ALLIANCE, https://copyrightalliance.org/policy/position-papers/improving-copyright-office-ownership-database/. (last visited Feb. 19, 2023).

[223] *Id.*

[224] The Copyright Office, *Non-Fungible Token Study*, https://www.copyright.gov/policy/nft-study/ (Dec. 2022). (last visited Feb. 19, 2023).

interest to improve copyright law and the registration system to make it more efficient for copyright owners. Otherwise, the power of copyright diminishes. Arguably, the Copyright Office is no longer the best source of public record for copyright records. Currently, DSPs, publishing companies, record labels, and PROs likely maintain more accurate copyright records than the Copyright Office because rights holders rely on their records to receive compensation. Rights holders must be incentivized to maintain accurate records. Tokenized rights provide such incentivization, as tokenized rights are multi-purpose. Not only do tokenized rights have the power to represent copyright ownership, but they also serve as a tool to receive timely payments, efficiently grant licenses, and transfer ownership.

IV. CONCLUSION

To conclude, the solution to the music industry's metadata crises is in the hands of creators and rights holders. A tokenized rights management system can co-exist with today's copyright infrastructure and music industry. As artists, producers, and songwriters choose to harness the power of managing their own rights via tokenized rights, the music business entities will have no choice but to conform to the changing practices. Eventually, the legislature can alter copyright law to reflect a tokenized right as a legal representation. Otherwise, "copyright…is in for such a bashing."[225]

[225] Brian L. Frye, *After Copyright: Pwning NFTs in a Clout Economy*, (Dec. 2, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3971240, ("Copyright is just a means to an end, not an end in itself. We always hoped to do better, but never knew how. When an opportunity comes along, we must seize it.").

WHOSE BEAT IS IT ANYWAY? GIVING POWER BACK TO ARTISTS IN DIGITAL SAMPLING AND COPYRIGHT

DANI BHADARE-VALENTE

INTRODUCTION

Think back to an interview with your favorite musician. An interview where she talked about an upcoming album, a song she was especially excited to release, what it meant to her, and how the project came together. She probably discussed her inspirations, both for that song and more generally. Remember how her face lit up reminiscing about the songs she listened to on the way to school growing up and explaining how she finds herself weaving those influences into her music today. Why? Because music is an art that *builds* and *evolves* on itself. It is an art that depends on the influences from the past to help shape the work of the future.

Sometimes these influences are obvious. Consider the bassline from Vanilla Ice's "Ice, Ice Baby"[1] and the bassline in Queen and David Bowie's "Under Pressure;"[2] the synthesizer in Madonna's "Hung Up,"[3] and Abba's "Gimme! Gimme! Gimme!;"[4] or, more recently, the

[1] Vanilla Ice, *Ice, Ice, Baby* (SBK Records 1990).
[2] Queen and David Bowie, *Under Pressure* (EMI 198).
[3] Madonna, *Hung Up*, (Warner Bros 2005).
[4] ABBA, *Gimme! Gimme! Gimme!* (Polar Music 1979).

melodic chorus in Dua Lipa's "Break My Heart"[5] and INXS's "Need You Tonight."[6]

Other times, the influence is subtle, twisted beyond contortion, and indistinguishable. Consider Kendrick Lamar's "Loyalty"[7] and Bruno Mars's "24K Magic"[8] or Rihanna's "Hard"[9] and the Jacksons' "Can You Feel It."[10] While the sampling artists directly pulled from the original work, they integrated a transformed sample into their new, original piece. In fact, these samples are *so unrecognizable* it's impossible to describe what elements were actually used.

As sampling technology allows artists to reinvent these sounds, courts have tried to equitably establish when a sample constitutes infringement and when it does not. Today, the circuits are split. Some adopt the de minimis exception, which enables sampling artists to copy nominal elements of an original work without constituting infringement, while others have strict liability for *any* copying—or sampling—of an original song. This paper addresses this split and offers a new test to keep pace with the ever-changing technology in the field. It first discusses the relative power of the record label, the original artists, and the sampling artists. It then explains the necessity of balancing innovation for future artists and protection of past artists. Most importantly, it highlights the imbalance of record label power in copyright infringement claims and recommends a new approach to tip the scales back.

Section I provides a brief background of copyright law. It first examines copyright's constitutional roots and explains how these roots developed throughout history. It next discusses the two types of copyrights associated with a song and the inherent tension between the original artist and the record label against the sampling artist.

Section II explains the de minimis exception and the application of the exception to sampling issues as adopted by the Ninth Circuit. It then addresses the circuit split that since developed by the Sixth Circuit regarding whether the exception applies to sound recordings. With this split, artists are unsure what constitutes an actionable copyright infringement claim.[11] The circuits have created further uncertainty

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[5] Due Lipa, *Break My Heart* (Warner 2020).
[6] INXS, *Need You Tonight* (Atlantic Mercury WEA 1987).
[7] Kendrick Lamar, *Loyalty* (Interscope 2017).
[8] Bruno Mars, *24K Magic* (Atlantic 2016).
[9] Rihanna, *Hard* (Def Jam 2009).
[10] The Jacksons, *Can You Feel It* (Epic 1981).
[11] Christopher Weldon, *The De Minimis Requirement As A Safety Valve: Copyright, Creativity, and the Sampling of Sound Recordings*, 92 NYULR 1261, 1274 (2017).

because they have not addressed whether the record label and the original artist must agree to pursue a claim for infringement, or whether one may unilaterally bring a claim against a sampling artist without the other's permission.[12]

Section III breaks down the various interests at issue in these cases. It will provide an overview of the interests of the original artist, record label, and sampling artist in three different respects: the legal, the economic, and the cultural.

With these varying levels of interests, Section IV proposes a solution on how to analyze the de minimis exception in sampling copyright and properly balance the interests of the sampling and original artists. Finally, it recommends a way to incorporate the record label's interests without allowing the label to supersede the desires of the original artist or chill sampling artists from creating and innovating music in the future.

I. MUSIC COPYRIGHT: WHERE DOES IT COME FROM? WHY DO WE CARE?

Protecting originality and integrity in the arts and sciences has been a priority since the United States' founding. The Federalists, for example, noted that the utility of the power an inventor or creator has in holding the "exclusive right" to her work "'can scarcely be questioned.'"[13] However, the Constitution still authorized the Federal Legislature to regulate copyright.[14] This decision exemplifies the Framers' commitment to protecting the innovator and encouraging future innovation. This balance is explicit: secure exclusive copyright rights in the original artist for a limited time. Allowing the original artist to reap the unencumbered profits of her work, while also allowing future artists to pull from the public domain established a fair balance to temper the inherent tension found in copyright. Since the founding of the United States, however, courts and the public have struggled to properly implement this balance and temper the tension between these competing interests, especially in the world of sampling.

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[12] *Id.*

[13] The Federalist No. 43, The Powers Conferred by the Constitution Further Considered (James Madison).

[14] U.S. Const. art. I, § 8 ("The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Rights to their respective Writings and Discoveries.").

In 1926, the Second Circuit in *Dymow v. Bolton,* held that copyright does not protect the ideas themselves, but merely the expression of those ideas.[15] A playwright translated a Russian play into English, took inspiration from the plotline, and created a play that pulled on similar themes to the original work.[16] He was subsequently sued for copyright infringement.[17] The Second Circuit held that no infringement had occurred, because copyrighted works are protected to the extent that an ordinary person would confuse the original and copied work.[18] The court explained that copyright "is made for plain people; and that copying which is infringement must be something 'which ordinary observations would cause to be recognized as having been taken' from the work of another."[19] This holding was revolutionary for future artists, because it, for the first time, prioritized their interests. By protecting the *expression* of an idea as opposed to the idea itself, future artists could work without hesitation and allow themselves to be inspired by the world around them. Importantly, the Second Circuit's decision did not disregard the interests of the original artists, either. Instead, it still allowed original artists to maintain control of the way in which they *present* their ideas, themes, and art to the world; it simply restricted their ability to monopolize a thought.

Later, Congress passed the Copyright Act of 1976 ("Copyright Act") to try and clarify issues the courts struggled to resolve.[20] The Copyright Act provides music copyright protection in two forms.[21] The first form is the composition copyright. It protects the elements of the song, such as the melody, musical notes, and lyrics, and it typically belongs to the original artist.[22] A composition copyright protects against the reproduction, creation of derivative works, distribution, public performance, and public display of the original composition without express permission by the original artist.[23] The second is the sound recording copyright, which protects the recorded performance of the composition.[24] This copyright usually belongs to the recording

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[15] *Dymow v. Bolton*, 11 F.2d 690, 691 (2nd Cir. 1926).
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.* at 692.
[20] 17 U.S.C. § 101 (1976).
[21] Lisa Weiss, *Music Licensing*, Practical Law Practice Note 6-584-9909 (accessed October 19, 2021).
[22] *Id.*
[23] 17 U.S.C. § 106 (1976).
[24] Weiss, *supra* note 21.

artist's record label.[25] A sound recording copyright protects against the reproduction, creation of derivative works, distribution, and digital public performance of the original sound recording without express permission by the record label.[26] These protections grant independent power to both the original artist and the record label to sue for copyright infringement.

In 1991, the Supreme Court pulled on the Second Circuit's rationale to clarify that the Copyright Act only protects the *expressive* aspects of a copyrighted work, not the general "fruit of the [artist's] labor."[27] The Court first noted that "originality is a constitutional requirement" to receive copyright protection, because there is a distinction between "creation and discovery."[28] The Court explained that the "mere fact that a work is copyrighted" does not provide automatic protection of every piece of that work; only the original components to the artist are protected.[29] Thus, copyright, as envisioned by the Framers of the Constitution, is to "assure authors the right of their original expression, but encourage others to build freely upon the ideas and information conveyed by a work."[30]

Even with Congress's and the Supreme Court's attempt to clarify the muddy waters of copyright law, a glaring question remained: *What happens if the original artist and the record label disagree on whether to bring an action?* While courts have addressed what level of infringement amounts to an actionable claim for copyright infringement, they have generally failed to rule on what to do when tensions arise between the original artist and her record label about pursuing such a claim. To understand the tension, however, it is imperative to understand how courts approach ruling on actionable infringement claims in the first place.

II. THE DE MINIMIS EXCEPTION AND THE CIRCUIT SPLIT

The de minimis exception has a longstanding history. As early as 1841, Justice Story explained that when an original work is "fused . . . so as to be indistinguishable in the mass of the latter . . . it cannot fairly

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[25] *Id.*
[26] 17 U.S.C. § 106.
[27] *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.* 499 U.S. 340, 349 (1991).
[28] *Id.* at 346.
[29] *Id.* at 348.
[30] *Id.* at 349–50 (citing *Harper & Row Publishers, Inc. v. Nation Enterprises, Inc.*, 471 U.S. 539, 556–57 (1985).

be treated as a piracy."[31] His ruling enabled the honest, everyday citizen to engage in "trivial copyright" without fear of suit.[32] Justice Story provided that, even in instances of unauthorized copying, "the law will not impose legal consequences" if the infringement is "sufficiently trivial."[33]

The de minimis exception hinges on whether the average listener could recognize the appropriation from the original work.[34] The case that first differentiated trivial, sampling copyright infringement claims by composition and sound was the Ninth Circuit's *Newton v. Diamond.*[35] In *Newton*, the Beastie Boys looped a "six-second, three-note segment" from a performance by a jazz flutist.[36] While the Beastie Boys obtained a license to sample the sound from the record label, they failed to obtain one to use the "underlying composition, which was also copyrighted," from the flutist himself.[37] This case differed from cases before it, because the Beastie Boys only obtained a sampling license for sampling, not composition.[38] This meant that the Beastie Boys were legally free to use the recorded pieces of the song pursuant to the recording license, but they could not use the compositional pieces—such as the notes themselves—because they did not have the composition copyright from the flutist.[39] Still, the Ninth Circuit upheld the lower court's decision to grant summary judgment in favor of the Beastie Boys, reasoning that the looped sample merely constituted de minimis infringement and was therefore not actionable.[40] The court explained that copyright infringement claims are actionable only when the copying is "substantial," because "trivial copying" was never intended to be protected in copyright law.[41]

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[31] *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841).
[32] *On Davis v. The Gap, Inc.*, 246 F.3d 152, 173 (2nd Cir. 2001).
[33] *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70, 74 (2nd Cir. 1997).
[34] *See Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986) (holding that de minimis use applies if the average audience would not recognize the appropriation); *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, 150 F.3d 132 (2nd Cir. 1998) (holding that a work is not protected by the de minimis exception when "'the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard [the] aesthetic appeal [of the two works] as the same'") (quoting *Arica Institute., Inc. v. Palmer*, 970 F.2d 1067, 1072 (2nd Cir. 1992).
[35] *Newton v. Diamond*, 388 F.3d 1189, 1190 (9th Cir. 2004).
[36] *Id.*
[37] *Id.*
[38] *Id.* at 1193.
[39] *Id*. at 1192.
[40] *Id.*
[41] *Id*. at 1193.

With this case, the Ninth Circuit established a few things. First, it showed that sampling artists can, and likely will be, vulnerable to copyright infringement claims if they choose to forego obtaining one of the licenses.[42] Second, it definitively established the criteria for the de minimis exception in copyright infringement.[43] The court noted that a use is de minimis if "the average audience member would not recognize the appropriation."[44] Finally, and perhaps most importantly, it introduced a loophole that detrimentally affects the original artist by prioritizing the wrong interests. The Beastie Boys paid for a sampling license of a recorded piece from the record label.[45] The flutist received no benefit from the transaction; he received no payment, no recognition, and no notice of this deal between the band and the label.[46] In this ruling, the court held that not only is the flutist not protected in the legal, compositional sense, but it held that the original artist need not even be *considered* to take his work and recreate it.[47]

Not every jurisdiction, however, recognizes the de minimis exception, thus creating a circuit split on this issue. This Note will later address which approach best adheres to the purpose of copyright law from different angles, but first, it is important to provide the foundational backdrop of this split. Inherent in the circuit split is the tension between protecting the original artists over other interested parties and protecting other interested parties over the original artists. The Sixth and Ninth Circuits exemplify this tension, with the Sixth Circuit protecting the original artist and the Ninth protecting other interested parties.

In *Bridgeport Music v. Dimension Films*, the Sixth Circuit held that infringement in *any* capacity is subject to a music copyright infringement claim.[48] In *Bridgeport*, two music publishing companies and two record labels sued for the sampling of the song "Get Off Your Ass and Jam" by George Clinton, Jr. and the Funkadelics in the rap song "100 Miles and Runnin'."[49] The sample at issue was a two-second segment from a guitar solo, which was lowered, looped to sixteen beats, and lasted about seven seconds.[50] It appeared in "100 Miles" five

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[42] *Id.*
[43] *Id.*
[44] *Id.* at 1193 (citing *Fisher*, 574 F.2d at 434 n. 2).
[45] *Id.* at 1192.
[46] *Id.* at 1191.
[47] *Id*. at 1193
[48] *Bridgeport Music v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).
[49] *Id.* at 795.
[50] *Id* at 796.

times.[51] Despite the district court's finding that "no reasonable juror, even one familiar with the works of [the original artist], would recognize the source of the sample without having been told of its source," the Sixth Circuit held that the record labels had an actionable claim against the "100 Miles" rappers.[52]

In its opinion, the court imputed wrongdoing in its discussion of sampling, remarking that sampling is "never accidental" but rather an act of "taking another's work product."[53] The court insisted that these artists should "get a license or . . . not sample. We do not see this as stifling creativity in any significant way."[54] While this perspective may appear more sympathetic to and protective of the original artist, the court explicitly indicated its decision only "pertain[ed] to sound recording copyrights," so it is unclear what approach the court would use in a musical composition claim.[55] This distinction separated the interests of the original artist—without whom the art would not exist—and the record label—the middleman between the artist and the listener.[56] Furthermore, the court, in its effort to protect the record label, never acknowledged the natural evolution of the arts or the direct influence older art impresses on many artists creating what they may genuinely believe is original work.[57] The Sixth Circuit thus veered away from, and implicitly rejected, the de minimis exception set forth in *Newton v. Diamond*, without ever truly addressing or responding to one of the core arguments supporting the exception itself.[58]

On the other end of the spectrum, the Ninth Circuit—following its precedent in *Newton*—championed the de minimis exception and held that trivial infringement of a musical composition copyright is not actionable. In *VMG Salsoul LLC v. Ciccone*, a record label sued the producer of Madonna's song "Vogue" for sampling a less-than-one-second snippet of the horns section from the song "I Love It (Love Break)."[59] The producer being sued recorded both songs at issue.[60] The Ninth Circuit held that the infringement was de minimis and that the

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[51] *Id.*
[52] *Id.* at 798, 801.
[53] *Id.* at 801
[54] *Id.*
[55] *Id.*at 798.
[56] *Id.* at 799.
[57] *Id.*
[58] *Id.*
[59] *VMG Salsoul LLC v. Ciccone*, 824 F.3d 871, 874 (9th Cir. 2016).
[60] *Id.* at 875.

record label did not have an actionable claim.[61] Whether or not an average audience member or a reasonable jury could recognize the horn samples as appropriations of the original songs was crucial to the court's determination.[62] The court pointed out that a "highly qualified and trained musician listened to the recordings with the express aim of discerning which parts of the song had been copied, and he could not do so accurately. An average audience would not do a better job."[63]

The *Salsoul* court, after serious contemplation, rejected *Bridgeport*'s holding that the de minimis exception does not apply to sound recording copyright claims.[64] In doing so, the court highlighted copyright law dating back to 1841 and noted that, other than *Bridgeport* and its district court progeny, no other court has followed its approach to not recognize the exception.[65] Instead, the *Salsoul* court stated that the de minimis exception "'applies *throughout the law of copyright*, including cases of music sampling.'"[66] The court also pointed to the Supreme Court's reasoning in *Feist* that "protecting only the expressive aspects of a copyrighted work is actually a key part" of copyright law.[67] Under this principle, the de minimis exception necessarily applies because physical notes themselves do not inherently carry the expressive aspect.[68] Through this ruling, the Ninth Circuit properly adhered to the spirit of copyright infringement claims as set forth in the Constitution, as reaffirmed in cases like *Folsom* and *Feist*, and as fairly applied in balancing the competing and relevant interests at stake.

Still, the Ninth Circuit did not contemplate or address the inherent tensions between original artists and their record labels. In fact, by deciding the case on the de minimis exception, the court utterly failed to address the fact that the producer being sued by the record label worked on both compositions at issue.[69] In doing so, the court implicitly prioritized the record label's interests over the interests of the original artist. The Ninth Circuit chose to jump through the constitutional, historical, and statutory hoops, which resulted in a circuit split regarding the de minimis exception, but it could have avoided the issue by resting its decision on *Feist* and the constitutional purpose for copyright: to

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[61] *Id.* at 874.
[62] *Id.* at 879.
[63] *Id.* at 880.
[64] *Id.* at 880–882.
[65] *Id.* at 881.
[66] *Id.* (emphasis supplied) (citing *Newton*, 388 F.3d at 1195).
[67] *Id.* at 885 (citing *Feist*, 449 U.S. 340 at 349).
[68] *Id.*
[69] *Id.* at 875.

"assure authors the right of their original expression."[70] This inherent preference for the record label's interests is not only detrimental to the original artist, but to the future of creative expression.

III. BREAKING DOWN THE INTERESTS: LEGAL, ECONOMIC, AND CULTURAL

While the Ninth Circuit in *Salsoul* properly balanced the interests of the original artist and the sampling artist, it failed to address the inherent tension between original artists and their record labels. Absent such a discussion, courts cannot prioritize the three competing interests in an equitable manner. As discussed below, these three competing interests include: (1) the interest of the original artist and protecting her from unfair use of her work, (2) the interest of her record label and protecting it from unfair use of her recorded work, and (3) the interest of future artists and the public at large to create and evolve the arts while innocently drawing inspiration from past works. To build an effective solution that benefits all interested parties, it is imperative to break the parties' interests up into three subcategories—legal, economic, and cultural (collectively, the "Competing Interests")—and understand how the Sixth and Ninth Circuits implicitly and explicitly prioritized them.

A. The Legal Interests

Legally, the courts in *Bridgeport* and *Salsoul* prioritized the Competing Interests differently. Beginning with original artists, *Bridgeport* only provided them partial control over infringement claims.[71] Under the *Bridgeport* decision, an infringement in *any* capacity amounts to an actionable claim.[72] Because the Sixth Circuit analyzes composition and sound-recording copyrights independently, an original artist may decide to forgo a claim for infringement of her composition copyright. However, her record label may still pursue a claim for infringement of the sound recording copyright without notifying her of the suit.[73] Treating these copyrights separately, while providing no safeguard for de minimis infringement, strips control and power from the original artist and her own piece of work. Furthermore,

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[70] *Feist*, 499 U.S. at 349 (citing *Harper & Row*, 471 U.S. at 589) (dissenting opinion).
[71] *Bridgeport*, 410 F.3d 273 at 792.
[72] *Id*.
[73] *Id*.

as shown in *Bridgeport*, a record label may be entitled to a large award and never have to share the award with the artist, absent such provision in their contracts.[74]

On the other hand, *Salsoul* implicitly ensures the original artist maintains nearly full control over infringement claims.[75] While *Salsoul* also analyzed the two copyrights independently, it safeguards the sound-recording copyright with de minimis protection.[76] With this protection, if the copying constitutes more than trivial copying, the original artist will most likely choose to pursue a claim herself as well. Even if she does not, the record label will most likely need the original artist's cooperation and support to sufficiently build its infringement claim.[77] Thus, *Salsoul*'s approach implicitly affords original artists more power and control over their work compared to the *Bridgeport* approach, which allows for all infringement actions to continue regardless of the filing party.[78] However, *Salsoul* still leaves artists vulnerable, because it allows the record label to sue the original producer of a song who subsequently worked on the "infringing" song as well. Thus, while the *Salsoul* court gives the original artist some additional power, it still favors the interests of the record label above the interests of original artist.

Unequivocally, record labels maintain far more control under *Bridgeport* than they do under *Salsoul.* Under *Bridgeport,* the record label has the most power. Because any and all potential infringement claims are actionable, a record label has the power to go beyond the desires of the original artist and pursue a claim against sampling artists in its sole discretion.[79] It may do so because it maintains the sound-recording copyright and has the most expendable income to pursue these minor claims.[80] Original artists, aside from successful international stars, will likely not waste time trying to pursue de minimis actions, and the majority of sampling artists likely lack the resources to defend trivial

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[74] *Id.*
[75] *Salsoul*, 824 F.3d at 873.
[76] *Id*.
[77] Amy X Wang, *How Music Copyright Lawsuits Are Scaring Away New Hits*, THE ROLLING STONE (Jan. 9, 2020), https://www.rollingstone.com/pro/features/music-copyright-lawsuits-chilling-effect-935310/?sub_action=logged_in.
[78] Weldon, *supra* note 11, at 1274–75.
[79] *Bridgeport*, 410 F.3d 273 at 791.
[80] *Id*.

actions for de minimis infringement.[81] This power dynamic allows record labels to supersede the original artist's desires if they disagree about whether to pursue a claim, while also allowing the labels to chill sampling artists in their pursuit to create and innovate music.[82] Under *Salsoul*, however, the power dynamic balances.[83] *Salsoul* prevents record labels from chilling sampling artists by protecting de minimis copying.[84] *Salsoul* properly balances the interests between the original artist and the record label, because it prevents the record label from pursuing a claim without input support from the original artist.[85]

Moreover, the *Salsoul* approach protects the sampling artist better than the *Bridgeport* approach. De minimis protection allows the honest, everyday citizen to freely create pieces without fear of improperly infringing upon another artist's work.[86] For example, sampling plays a large role in the hip-hop and rap genres. Allowing artists in these genres to create without fear of a lawsuit against them is an important legal interest courts should seek to protect.[87] Under *Salsoul*, to amount to an actionable claim, the sampling must be substantial enough that an ordinary person would confuse the two songs.[88] Such a standard implicitly requires showing that the sampling artist had the intent to copy the piece without obtaining the proper licensing to do so.[89] This requirement balances competing legal interests, while also encouraging evolution in the arts.[90] It allows sampling artists some legal space to create, while also discouraging blatant and unfair copying of an original piece.

The *Bridgeport* approach, however, likely chills sampling artists from innovating altogether. There is a prohibitive cost in making music if sampling artists constantly fear a potential lawsuit for innocently sampling another artist's work.[91] In fact, many experts have seen this chilling effect in action—especially in the jazz and blues genres, which

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[81] Claire Mispagel, *Resolving a Copyright Law Circuit Split: The Importance of a De Minimis Exception For Sampled Sound Recordings*, 62 St. Louis U. L.J. 461, 481–82 (2018).
[82] *Id.* at 482–83.
[83] *Id*. at 482.
[84] *Salsoul*, 824 F.3d at at 872.
[85] *Id*.
[86] *On Davis*, 246 F.3d at 173.
[87] Weldon, *supra* note 11, at 1273.
[88] *Salsoul*, 824 F.3d at 872.
[89] *Id.*
[90] Weldon, *supra* note 11, at 1273.
[91] *Bridgeport*, 410 F.3d 273 at 794.

don't directly involve sampling but do rely heavily on "musical borrowing."[92] Despite the decision in *Bridgeport* only affecting sound recordings, the decision deters smaller composers and artists from pursuing inspiration in their art "just to be safe" from legal trouble.[93]

B. The Economic Interests

The economic interests are no different. The *Bridgeport* and *Salsoul* holdings prioritize the original artist, record label, and sampling artist differently. Still, both fail to appropriately prioritize the original artist's interests. An original artist has an important economic interest in her piece of work, and as the Constitution requires, she shall have the "exclusive" rights over her work for a limited time.[94] Though at first glance the holding in *Bridgeport* may appear to champion this constitutional requirement, it does not. By allowing courts to analyze sound recording and composition infringement claims independently, *Bridgeport* created a precedent that undermines an original artist's economic interests and allows record labels to supersede her desires in potential infringement claims.[95] Without an original artist's permission, record labels may still file infringement claims on the sound recording of an artist's work with no obligation to pay her a percentage of the proceeds should they obtain a favorable judgment.[96] Practically speaking, this holding allows record labels to override an artist's legal interests for its own economic interests, and then avail her of none of the economic benefits from the lawsuit.[97]

In turn, this holding also champions the record label's economic interest above the sampling artist's interest.[98] In the era of the internet and digital media, sampling is an important part of the music industry. Small, aspiring artists face an even higher barrier to entry in the music industry with the *Bridgeport* decision.[99] Sampling artists being forced to track down and pay for both licensing fees, even if the original artist gives the sampling artist express permission to sample the song, will undoubtedly result in high transaction costs to make the music "legally." Sampling artists are, in effect, faced with three options. First, they may

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[92] Mispagel, *supra* note 81, at 482.
[93] *Id.*
[94] U.S. Const. art. I, § 8.
[95] *Bridgeport*, 410 F.3d 273 at 792; *see also* Mispagel, *supra* note 81, at 482–483.
[96] *Id.* at 481.
[97] *Id.*
[98] *Id.* at 482–83.
[99] *Id.* at 481–82.

either pay for both licenses, which could result in a high barrier to entry into the music space. Second, they may pay for one license and risk being sued by the other. This choice will likely result in the sampling artist to only pay for the sound recording license as opposed to the composition copyright in order to avoid a big lawsuit by the more lucrative and intimidating record label. Such a result not only negatively affects the sampling artist, but unfairly prioritizes the record label's economic interest over the original artist's economic interest. Third and finally, the sampling artist may obtain no licenses and hope that neither the original artist nor the record label sues them for violating copyright law.[100] Again, this will likely chill sampling artists from creating music or expose them to severe infringement penalties by the record labels who have the resources to pursue these nominal claims.[101]

While the approach created in *Salsoul* also fails to explicitly address the competing interests at play, allowing for de minimis infringement at the very least mitigates some of the issues created by the *Bridgeport* approach. While record labels may still pursue claims against sampling artists without the original artist's permission, they are confined to claims that amount to substantial copying, not trivial copying.[102] This approach affords more protection to sampling artists than to the record label and ensures they may continue to cultivate new music without fear of the economic repercussions from pulling inspiration from the world around them.

The *Salsoul* approach, like the *Bridgeport* approach, utterly fails to prioritize the economic interest of the original artist against the economic interest of the record label. *Salsoul* also considers the copyright infringement claims for sound recordings and for compositions independently. In effect, record labels may still supersede the desires of the original artists when deciding whether to pursue a claim, reap the benefits of a favorable judgment, and face no obligation to share the proceeds with the original artist.[103] Such an approach fails to protect the original artist completely—without whom the piece of work at issue would never exist.

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[100] Weldon, *supra* note 11, at 1274 –75 (comparing Gregg Gillis—who has never been sued for infringement despite his frequent unlicensed sampling—and the Notorious B.I.G.—who was sued for one unlicensed sample—to illustrate the "arbitrary and capricious nature of enforcement by copyright owners).

[101] *Id.*

[102] *Salsoul*, 824 F.3d at 872.

[103] *Id.*

C. The Cultural Interests

Arguably, the only category that does not fail to properly prioritize the artists' and labels' interest is the cultural interest category. This category pulls on the Framers' intent.[104] The Ninth Circuit's approach in *Salsoul* is superior because it recognizes the necessity of both original work and innovation in the arts. *Bridgeport*, however, fails to establish any sort of balancing, tipping the scales overwhelmingly in favor of the record label and the original artist.

As explicitly protected in the Constitution, original artists (and, by extension, record labels) have a cultural interest in protecting their art.[105] Once a piece of work is created, the original owner maintains "exclusive" control of the piece for a "limited time."[106] The Constitution also provides that the copyright provision was necessary to "promote" the arts.[107] To progress in a cultural society, artists must have the freedom to create without being plagiarized, but also without fear of being accused of plagiarism for drawing inspiration from the world around them. Thus, to balance these two goals, *Salsoul* acknowledged the de minimis exception.[108] It provided protection for the sampling artist and an avenue for relief, should the exclusive control over a work be stripped from the original artist.[109]

Furthermore, if courts follow the Ninth Circuit's example and allow de minimis infringement, sampling artists can freely and openly sample small pieces of songs. This freedom will enrich the marketplace of ideas in several ways.[110] First, sampling artists will have some creative liberty to expand the music scene.[111] They will not feel the chilling effects of the *Bridgeport* precedent and will instead push the outer bounds of music. Second, sampling may make audiences aware of music they would not have been privy to without the introduction. Take Mac Miller's "Blue World", for example.[112] The track samples the Four Freshman's "It's a Blue World"[113] and introduces young rap fans to a 1950s quartet song—a song not typically found in a rap listener's

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[104] The Federalist Papers, *supra* note 13 (James Madison).
[105] U.S. Const. art. I, § 8.
[106] *Id.*
[107] *Id.*
[108] *Salsoul*, 824 F.3d at 871.
[109] *Id*.
[110] Weldon, *supra* note 11, at 1273–74.
[111] *Id.*
[112] Mac Miller, *Blue World* (Warner 2020).
[113] The Four Freshman, *It's a Blue World* (Capitol Records 1955).

playlist. If the goal, as established by the Constitution and continuously reaffirmed throughout the United States' history, "to promote the arts and create a more diverse, enriched culture within the country," is true, then sampling only aids in that pursuit.[114] While the sample is not easily discernable, an avid Mac Miller fan or a curious listener may watch an interview where the artist discusses his inspiration from the song, search for the original piece, and add a new type of music to their playlist. The Ninth Circuit's approach helps artists thrive within these boundaries while respecting the foundational principle of assuring artists hold the exclusive right to their original pieces of work.

Contrariwise, the Sixth Circuit fails to promulgate these cultural aims. *Bridgeport* fails to balance any such interests and instead wholly protects original artists.[115] In its rejection of the de minimis exception, sampling artists are exposed to liability whether they completely copy a piece of work, manipulate a sample beyond original recognition, or inadvertently pull from an original piece by which it was inspired.[116] While *Bridgeport* does focus its attention on the original artist (a call to action this Note makes) it takes its focus to an unsustainable extreme with its "harsh alternative."[117]

Throughout copyright history, courts have indicated that the purpose of copyright is to protect artists from having their work *confused* with another's work.[118] The copied work must be something that a "plain person" would mistake for the work of another.[119] Copyright protects the expression of an idea, not the idea itself.[120] As the Supreme Court indicated, there is a distinction between creation and discovery.[121] The Copyright provision in the Constitution and the Copyright Act of 1976 aimed to protect *expressive* aspects of an artist's work, not the mechanical components of the work itself.[122] The purpose of copyright is not—though *Bridgeport* disagrees—to protect the original artist from any incidental or coincidental similarities between two pieces of work.[123] The majority of unlicensed sampling plays in the contours of the incidental and coincidental, and for *Bridgeport* to

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[114] Weldon, *supra* note 11, at 1273, 1286.
[115] *Bridgeport*, 410 F.3d 273 at 792.
[116] *Id*.
[117] Weldon, *supra* note 11, at 1295.
[118] *Dymow*, 11 F.2d at 692 (emphasis added).
[119] *Id*.
[120] *Id.*
[121] *Feist*, 499 U.S. at 346.
[122] *Id.* at 346, 348.
[123] *Bridgeport*, 410 F.3d 273 at 792.

prohibit artists from innovating in the music industry runs contrary to the cultural aims of copyright law.[124] Telling future artists to "get a license or do not sample" imposes significant legal and economic barriers and chills creativity in the production of new work.[125]

Despite the circuit courts' failure to address the tension between original artists and record labels in copyright infringement claims, the proper, more constitutionally aligned, and most equitable approach is the Ninth Circuit's in *Salsoul.* There, the court recognized the de minimis exception and, by extension, prioritized the original artist and the future artist above the record label in some capacity.[126]

Despite its attempt at expanding de minimus usage, the *Salsoul* approach still leaves questions unanswered.[127] What specific actions will lead to an actionable infringement claim? Will a record label or an original artist will take priority in a lawsuit? How will social media platforms that allow for unlicensed sampling to occur will be treated under the law? Perhaps the most glaring question remains as to what the courts will do when the original artist and the record label disagree about whether to bring a claim at all. To address this, Section IV proposes a three-step balancing approach that restructures the court's priorities in evaluating copyright infringement claims and balances the interests between protection of original work and promotion of future work.

IV. A FORWARD LOOK: PROPERLY BALANCING THE INTERESTS

When evaluating copyright infringement claims, courts should utilize a three-step balancing test. First, the courts should analyze who is bringing the infringement claim against the sampler. If both the original artist and the record label are bringing a claim together, the court may move to step two. If the record label is bringing a sole claim for sound recording infringement, there should be a rebuttable presumption *against* an actionable infringement claim. This presumption will place the Competing Interests of the sampling artist—and the public at large—above the interests of the record label. To overcome the presumption, the record label must explain why the artist is not joining in the lawsuit or filing her own for the equivalent infringement and explain how a favorable judgement will be shared with

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[124] Weldon, *supra* note 11, 1294.
[125] *Bridgeport*, 410 F.3d 273 at 791–92; Weldon, *supra* note 11, at 1294.
[126] *Salsoul*, 824 F.3d at 875.
[127] Weldon, *supra* note 11, at 1274.

the original artist. If the court finds the explanation acceptable, it may proceed to step two. If not, it should dismiss the claim altogether. If, however, the original artist is bringing a composition copyright infringement claim by herself, there should be no presumption, and the court may move to step two. By adopting these different standards, courts will ensure the original artist maintains the exclusive control of her art and is afforded the highest priority and protection.

At step two, the court should follow the *Salsoul* approach and determine whether the alleged infringement is de minimis or something more. If the copying is trivial, incidental, or unrecognizable, the court should dismiss the claim as de minimis infringement under the Ninth Circuit's approach. If, however, the infringement is substantial, noticeable, and confusing, the court should move on to step three. Courts should reject the harsh *Bridgeport* approach altogether because it does not properly balance the Competing Interests of any of the parties and threatens musical creativity.[128]

At step three, courts should balance the Competing Interests of the parties. Courts must be cautious in their balancing, however, and should favor the holder of the copyright. If the courts did not, holding a copyright would have no legal value. Instead, infringing artists would have no incentive to respect the copyright and could directly steal a song from the original artist.[129] Such a result disrupts the purpose of the copyright provision in the Constitution—to protect original artistic expression.[130]

How much the courts must favor the copyright holder may differ depending on the copyright. For composition copyright claims—claims between the original artist and the sampling artist—the court should have a conclusive presumption favoring the original artist when it balances the legal, economic, and cultural interests. This conclusive presumption ensures that original artists—both large and small—maintain the exclusive control of their expression and protect their expression from substantial copyright infringement. It also ensures that sampling artists pay for a sampling license if they feel inspired enough to pull from a song so substantially.

For sound-recording copyright claims—claims between the record label and the sampling artist—the court should likewise balance the Competing Interests between the two parties, but it should only slightly favor the record label's interests. For both claims, the court may

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[128] Weldon, *supra* note 11, at 1273.
[129] *Id.* at 1294.
[130] *Id.* at 1278.

consider the typical copyright infringement factors in making its judgment. For example, the court may consider the similarity of the works at issue, the genres of the two songs, the relative popularities of both the sampling and the original artists, whether the artists have overlapping fans, the temporal proximity of the songs' release dates, and the likelihood of confusion. This lighter presumption still gives the record label an upper hand in litigation and will encourage sampling artists to still obtain sound-recording licenses. It does not, however, squash musical creativity in a way that will chill the progression of the arts altogether.

V. CONCLUSION

Copyright law, at its core, is a legal field of balanced interests. From its inception, the main concern has always been to protect the expression of original art and encourage artists to create while also addressing the practical realities that advancements in science, technology, and the arts build upon. As the music industry evolves and more artists enter the scene, courts must re-examine the competing interests at issue and adapt to the practical realities of those changes.

The Sixth Circuit's approach in *Bridgeport*, though well-intentioned, fails to balance those core goals of copyright law. If courts continue to follow the Sixth Circuit's approach, original and sampling artists, as well as the public at large will suffer. Original artists will likely not see the benefits of a favorable judgment for sound-recording infringement claims, sampling artists will be discouraged from creating with the same level of freedom as the original artists, and the public will lose the new music that sampling artists stopped creating.

The de minimis exception, coupled with the three-step balancing approach, provides such a solution for the current musical landscape that *Bridgeport* fails to accommodate. This approach properly protects original artists, encourages future artists to continue creating, and recognizes the importance of the record label without allowing it to overpower the other two parties. The result of such an approach will allow artists to do what they do best: create.

THE WILD WEST: THE NIL MARKETPLACE AND THE NEED FOR UNIFORMITY

GAVIN DWYER

INTRODUCTION

In 2015, the United States Court of Appeals for the Ninth Circuit denied student-athletes the right to be compensated for their Name, Image, and Likeness ("NIL") in *O'Bannon v. NCAA*.[1] In the decision, the court vacated the district court's ruling that capped the amount paid to student-athletes for their NIL rights at $5,000 a year.[2] Both the court and the National Collegiate Athletic Association ("NCAA") harped on "preserving amateurism" at the collegiate level of athletics.[3] Fear that payments of $5,000 to student-athletes would cross a line that would have "no defined stopping point," the court sided with the NCAA.[4] Thus, student-athletes were forced to wait six more years until *NCAA v. Alston* to begin earning compensation for their NIL rights.

[1] *See O'Bannon v. NCAA,* 802 F.3d 1049 (9th Cir. 2015).
[2] *Id.* at 1056.
[3] *Id.* at 1078.
[4] *Id.*

Following the *O'Bannon* ruling, state legislatures became the leading advocates for paying student-athletes based on their NIL. States such as California, Florida, New Jersey, and others passed legislation that would allow student-athletes to monetize their NIL rights, despite this being against NCAA bylaws.[5] Mark Emmert, the NCAA president, voiced his displeasure with the states and explained he wanted the NCAA to establish the guidelines regarding student-athletes' NIL monetization, not state legislatures.[6] Following *Alston*, the NCAA saw the writing on the wall and opened the NIL floodgates, leaving state legislatures to wade through the raging waters.[7]

The unanimous Supreme Court opinion in *Alston* did not differ significantly from *O'Bannon.* The Court held that the NCAA violated the Sherman Act when capping the educational benefits conferred to student-athletes.[8] The district court and the United States Court of Appeals for the Ninth Circuit both held the cap on educational benefits violated the Sherman Act, but the other aspects of student compensation (such as NIL) did not violate the act.[9] The Court did not touch on the latter aspect because the student-athletes did not renew their appeal.[10] However, Justice Kavanaugh's concurring opinion put the NCAA on notice that the remaining compensation rules may not survive the "rule of reason" scrutiny.[11] The NCAA heeded the warning and announced they were removing the prohibition on student-athletes monetizing their NIL for the first time in NCAA history.

This paper will analyze the NIL policies that have evolved since *Alston.* A detailed look throughout the country at different state NIL laws will form the groundwork of an NIL proposal for Congress to adopt as a uniform rule to govern NIL in collegiate sports. If the NCAA seeks to retain as much control over its student-athletes as possible, the ideal scenario would be a uniform policy that applies to all. However, the

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[5] Ross Dellenger, *With Recruiting in Mind, States Jockey to One-Up Each Other in Chaotic Race for NIL Laws*, SI.com, https://www.si.com/college/2021/03/04/name-image-likeness-state-laws-congress-ncaa. (last visited Mar. 5, 2022).
[6] NCAA, *NCAA Responds to California Senate Bill 206,* (Sept. 11, 2019), https://www.ncaa.org/news/2019/9/11/ncaa-responds-to-california-senate-bill-206.aspx. (last visited Mar. 11, 2023).
[7] NCAA, *NCAA Adopts Interim Name, Image and Likeness Policy* (June 30, 2021, 4:20 PM). https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx. (last visited Mar. 11, 2023).
[8] *NCAA v. Alston,* 141 S. Ct. 2141, 2165 (2021).
[9] *Id.*
[10] *Id*. at 2154.
[11] *Id.* at 2166-2167.

NCAA has seemingly ceded all of its authority and remains content in letting their power slip away. Multiple proposals have been introduced in Congress to create a federal NIL policy, but none have gained much traction.[12] This paper will analyze the differences and similarities throughout state laws to promulgate a uniform policy. Under this policy, the interests of student-athletes to retain ultimate freedom to contract must be balanced against the NCAA's interest in preserving amateurism and the status quo power structure.

When looking at the NCAA's monopolistic practices, such as student-athlete compensation, the Court will analyze the restraint under the "rule of reason" analysis.[13] While the NCAA consistently avoided major alterations of their bylaws b claiming the restraints "enhanced competition among member schools" and "preserves an amateurism brand of athletics," the courts have chipped away at some of their precious protections.[14] *Alston* seemed like another minor chip away at the impenetrable force that is the NCAA.[15] However, Justice Kavanaugh's concurring opinion fired up the wrecking ball and smashed it right into the foundation of the NCAA. Now the traditional amateurism policies of the NCAA are leaking out to the student-athletes who are holding out buckets and picking up the droplets of benefits as they fall from the NCAA. Recently, the levy broke after new NIL guidelines were handed down from the NCAA allowing Universities to direct their boosters to funnel money into NIL collectives. This paper will look at the possible outcomes and potential side effects of the *Alston* ruling to predict whether the NCAA will be able to patch their foundation back together and hold onto amateurism as we know it, or if Justice Kavanaugh's wrecking ball concurrence will return another blow and destroy the NCAA beyond recognition.

I. O'BANNON

Alston did not begin the onslaught of antitrust challenges to the NIL policies adopted by the NCAA, nor will it be the last. *Alston* did not focus on student-athletes' NIL rights. Rather the focus concerned

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[12] Maria Carrasco, *Congress Weighs In on College Athletes Leveraging Their Brand*, Inside Higher Ed (Oct. 1, 2021) https://www.insidehighered.com/news/2021/10/01/congress-holds-hearing-creating-federal-nil-law. (last visited Mar. 11, 2023).

[13] *O'Bannon*, 802 F.3d at 1053.

[14] *Id.*

[15] *See generally Alston.*

the educational-related benefits universities could offer student-athletes. To fully understand how *Alston* impacted the NCAA's decision to dismantle their oppressive NIL policies toward their student-athletes, one must first look at *O'Bannon* which focused on the rights of student-athletes to profit from their NIL rights.

Ed O'Bannon earned All-American honors as a part of the men's basketball team at the University of California, Los Angeles. During this period, Electronic Arts ("EA") produced video games based on men's collegiate football and basketball with approval from the NCAA.[16] The video games depicted current student-athletes at most, if not all, Division I schools.[17] In an attempt to circumvent violating NIL rights, EA identified each player solely based on jersey number.[18] EA produced NCAA video games in this manner for over two decades.[19] Despite the removal of the names, users of the video games knew the computer-generated players were actual depictions of real student-athletes.[20] The computer avatar matched O'Bannon's height and weight, wore the same jersey number, played the same position at the same school, and even shot the basketball left-handed as O'Bannon did.[21] Ed O'Bannon never consented for EA to utilize his likeness in their video games, nor had he been compensated for it.[22]

The problem arose when O'Bannon wished to be compensated for his NIL use in the EA video games, similar to how an NBA player would be compensated for the use of their NIL in an officially licensed game.[23] However, if EA provided compensation, O'Bannon would have lost his NCAA eligibility. Therefore, O'Bannon brought an antitrust lawsuit alleging that the NCAA amateurism rules that prohibit student-athletes from profiting from their NIL violate the Sherman Act.[24] As an unlawful restraint on trade, the courts looked at the alleged restraint under the "rule of reason" analysis.

The "rule of reason" analysis consists of a three-step analysis to determine whether the restraint constitutes a legal or illegal restraint of trade that has anticompetitive effects.[25] The first step determines if the

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[16] *O'Bannon*, 802 F.3d at 1055.
[17] *Id*.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.* at 1058.
[24] *Id.* at 1055.
[25] *Id.* at 1057-1060.

challenged practice or rule results in an anticompetitive effect on the market in question.[26] Next, the defendant (in this case, the NCAA) must proffer procompetitive purposes that their rule or practice advances.[27] Lastly, the burden shifts back to the plaintiff to identify alternative means of achieving the procompetitive purposes the defendant proffered that are substantially less restrictive than the current practice.[28] When comparing the district court's view against the court of appeals, it becomes clear the district court was ahead of its time, and more in line with the reasoning of *Alston*, decided almost six years later.

A. The District Court

The district court found two potential markets that were affected by the NCAA rules: the college education market and the group licensing market. The court quickly dismissed that the NCAA does not have any anticompetitive effect on group licensing because the value of group licensing is the entirety of the group.[29] Therefore, the student-athletes were highly unlikely to compete with one another for group licensing for entities like video games because there would be more incentive to cooperate as a whole.[30] Post-*Alston*, it seems clear that the court missed this additional market, and did not realize the competition among student-athletes when individually licensing their NIL rights. As for college education, the court followed two different approaches when viewing it as a market. First, the student-athletes act as buyers for the bundles of services that universities offer.[31] Thus, the NCAA schools and universities behave like a cartel and collude together to fix the price of student-athlete NILs at zero.[32] Alternatively, it could be viewed that the student-athletes act as sellers and rather the schools purchase the athletic services from them.[33] In this line of reasoning, the college education market is a monopsony and the only buyer is the NCAA schools.[34] Under either view, the colleges' agreement to not compensate student-athletes for the school's use of their NILs reduces any competition among them.

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[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.* at 1058.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*

After identifying a market that may be potentially affected by the anti-competitive aspects of the NCAA rules against compensating student-athletes for their NIL, the burden shifted to the NCAA to establish procompetitive reasoning for the restraints.[35] The NCAA offered four competitive purposes for restricting student-athletes from profiting off of their NIL: (1) preserving "amateurism"; (2) promoting competitive balance; (3) integrating academics and athletics; and (4) increasing output in the college education market.[36] The court outright rejected the second and fourth justifications, while accepting the first and third in theory, but ultimately rejecting them in practice[37] The court rejected the second and fourth justifications because neither procompetitive benefit was achieved by the rules in question.[38] Restricting student-athletes from earning compensation for their NIL rights might promote a competitive balance among schools athletic teams, but only if the NCAA didn't allow unlimited spending to every other aspect of the athletic program (coaching, facilities, etc.).[39] As for the fourth factor, increasing the availability of schools to compete in Division I that could not afford to do so fails on its face.[40] Division I schools do not share revenue, thus the savings from not paying athletes NIL rights, are not passed down to low revenue schools.[41] Despite expressing concerns with the first and third offerings from the NCAA, the court ruled they do serve a procompetitive benefit.[42]

When looking at the first procompetitive justification, the court attacks the "long-standing commitment to amateurism" the NCAA bases the restraint on.[43] Primarily, the inconsistencies over the definition of amateurism drew the courts ire.[44] While student-athletes cannot receive compensation from sources outside of scholarships, the NCAA allows tennis players to earn up to $10,000 in prize money before collegiate enrollment.[45] Additionally, the NCAA allows student-athletes to accept Pell Grants over the cost of attendance, thus acting as

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[35] *Id.* at 1058-1060.
[36] *Id.*
[37] *Id.*
[38] *Id.* at 1059.
[39] *Id.*
[40] *Id. at 1060.*
[41] *Id.*
[42] *Id.* at 1061.
[43] *Id.*
[44] *Id.*
[45] *Id.*

payment for enrolling in college.[46] Therefore, the court attacked the justification that "amateurism" constitutes a core principle of the NCAA, rather than a shield it hides behind to refuse NIL payments.[47] However, the court concluded amateurism does play some role in the popularity of the NCAA product, thus serving a procompetitive benefit.[48] The third justification offered by the NCAA similarly drew sharp criticism from the court.[49] The NCAA stated that by restraining compensation for NIL rights, it "improves the quality of education services provided to student-athletes."[50] The court disregarded this justification toward most of the benefits of athletic and academic integration because they are not the result of the rules that are restraining the student-athletes in question.[51] The court acquiesced that the restraint of paying student-athletes large sums of money for their NIL rights prevents a social "wedge" between them and other students.[52] Notwithstanding, that benefit does not justify a "sweeping prohibition on paying student-athletes for the use of their NILs."[53]. Therefore, the court ruled that players should be eligible for up to $5,000 for their NIL rights deferred upon graduation from the institution.

B. United States District Court of Appeals for the Ninth Circuit

Following a defeat at the district court, the NCAA appealed the ruling in an attempt to overturn the academic and NIL benefits granted to student-athletes. On appeal, the NCAA challenged the district court's ruling on the procompetitive aspects of the amateurism principle.[54] The NCAA claimed the district court erred by solely looking at whether amateurism increases consumer demand and the skepticism it displayed for the historical commitment to amateurism.[55] However, the Ninth Circuit agreed with the district court on the procompetitive effects. Despite uniformity with the previous ruling so far, the courts diverged on the final step of the Rule of Reason analysis.

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[46] *Id.* at 1059.
[47] *Id.* at 1060.
[48] *Id.*
[49] *Id.* at 1059.
[50] *Id.*
[51] *Id.*
[52] *Id.* at 1060.
[53] *Id.*
[54] *Id.* at 1073.
[55] *Id.*

The two substantially less restrictive alternatives found by the district court were (1) allowing NCAA member schools to give student-athletes grants-in-aid that cover the full cost of attendance and (2) allowing member schools to pay student-athletes small amounts of deferred cash compensation for use of their NILs.[56] The only divergence in the opinions resulted from the deferred compensation amount. Under the "rule of reason" analysis, the test for the final "least restrictive alternative" is whether the alternative is "virtually as effective" as the challenged practice.[57] Therefore, the NIL compensation must be "virtually as effective" in preserving amateurism as not allowing compensation. Thus, the district court erred in the application of the third prong, and the Ninth Circuit reversed regarding the deferred cash compensation to student-athletes.[58] Ultimately, student-athletes gained grant-in-aid up to the cost of attendance for undergraduate schooling but lost again on NIL compensation.[59] Student-athletes waited until 2021 for another big break in the NCAA's stranglehold on compensation.

II. NCAA v. ALSTON

Alston further interpreted *O'Bannon*, while also exposing the NCAA's same limiting objections to encompassing more avenues to compensate student-athletes. Overall, both cases are similar in terms of what each side fought for and the ultimate result. In *Alston,* the student-athletes brought suit to challenge the compensation restrictions enforced by the NCAA in terms of both educational-related benefits and non-educational avenues of compensation.[60] Similar to *O'Bannon*, the district court struck a middle ground between what the student-athletes sought and what the NCAA wished to hold onto.[61] The court ruled the limitations that the NCAA currently had in place for the educational-related compensation violated the Sherman Act, but the noneducational compensation restrictions did not violate the Act.[62] Both parties appealed, but the judgment was upheld. Attempting to pull off the same magic trick when they appealed *O'Bannon*, the NCAA appealed to the Supreme Court of the United States.[63] Unlike *O'Bannon*, the NCAA lost

[56] *Id.* at 1074.
[57] *Id.*
[58] *Id.* at 1078.
[59] *Id.*
[60] *Alston,* 141 S. Ct. at 2151.
[61] *Id.* at 2147.
[62] *Id.* at 2152-2153.
[63] *Id.* at 2147.

the appeal, and ultimately dug its own grave as the central authority in collegiate sports.

A. NCAA Dug its Own Grave with an Appeal to the Supreme Court

The long war over student-athlete compensation still rages on, but *Alston* acted as a turning point in which student-athletes finally got a major victory over the goliath that is the NCAA. The NCAA, overcome with greed, inflicted this blow upon itself. If the NCAA did not appeal the appellate court's decision, the avenues available to restrict student-athlete compensation would have only been diminished slightly. *Alston* slightly broadened the ruling in *O'Bannon* by allowing universities to offer scholarships for graduate and vocational schools, as well as other educational means of compensation.[64] However, Justice Kavanaugh saw the cracks in the foundation of the NCAA's restrictive compensation policies. While not black letter law, Kavanaugh's concurrence acted as a wrecking ball to the traditional compensation restrictions of the NCAA. Now that the heart of the NCAA is exposed, all it will take is one well-placed shot to cripple the NCAA as the supreme authority of collegiate athletics. The question remains to be seen if the NCAA will be content with a new power structure, or if they will attempt to patchwork their foundation to retain all the power they can. So far, it appears the NCAA has opted to remove itself as the premier power authority over collegiate athletics.

On its face, *Alston* did not appear to be the momentum shifting battle over student-athlete compensation that it has turned out to be. Like *O'Bannon*, it was a small win for student-athletes. It allowed universities to offer more educational-related benefits to compensate student-athletes, such as graduate scholarships, tutoring, legitimate post-graduate internships, etc.[65] However, they again failed to make any dent into compensation unrelated to education.[66] Thus, *Alston* seemed a logical progression from *O'Bannon*, a step to further identify which educational-related benefits the NCAA could still restrict. The NCAA became greedy and refused to relent on any benefits conveyed to student-athletes. It appears they appealed the ruling simply because they did not want to relinquish any of their power to the conferences or schools to make their own decisions. This greed cost the NCAA a great

[64] *Id.*
[65] *Id.* at 2153.
[66] *Id.*

deal of power, evident by switching their stance on NIL compensation almost immediately following the Supreme Court's decision.[67] Before looking at the abstract ramifications of *Alston*, we first need to understand what the ruling of *Alston* actually prohibited and allowed.

Alston, like many of its predecessors, took part of the unilateral authority the NCAA held and redistributed it to the athletic conferences and institutions directly. The horizontal price-fixing by the NCAA involving educational benefits constitutes the core of the *Alston*.[68] By not allowing the different athletic conferences and universities to freely compete amongst each other, the NCAA limited student-athlete compensation below the market rate.[69] However, the lower courts did not take away all of the NCAA's power in this arena. The NCAA still held the power to define what benefits constituted a relationship to education and regulate how conferences and schools provide those benefits. [70] Ultimately, if the conferences and universities felt the same as NCAA toward the educational benefits, they were free to impose tighter restrictions.[71] The court's ruling only prevented the NCAA from imposing a multi-conference agreement on the restriction of educational-related benefits. As the longtime authoritarian over collegiate athletics, the NCAA did not take kindly to the redistribution of its power to control student-athlete compensation to the conferences and universities. After the appellate court affirmed the district court's ruling, the NCAA appealed to the Supreme Court, despite the current and former student-athlete plaintiffs not appealing the appellate court's decision.[72]

B. Justice Kavanaugh's Concurring Opinion Paved the Way for NIL

The unanimous Supreme Court affirmed the district court's ruling, thereby ending the battle over compensation for educational benefits. However, Justice Kavanaugh's concurring opinion will be the lasting legacy of *Alston*. The NCAA filed the only appeal, so the sole issue on appeal was if the district court erred in enjoining the NCAA from restricting member schools from providing unlimited educational-

[67] NCAA, *supra* note 7.
[68] *Alston,* 141 S. Ct. at 2153.
[69] *Id.* at 2152.
[70] *Id.* at 2154.
[71] *Id.*
[72] *Id.* at 2147.

related benefits to compensate their student-athletes.[73] The Court unanimously agreed with the district court.[74] While a significant step for student-athletes in their everlasting fight for just compensation, it was not the ideal outcome they had sought. They wanted more than just educational benefits; they wanted compensation for unrelated benefits that more accurately represented their involvement in a billion-dollar enterprise.[75] However, Justice Kavanaugh left the door unlocked for future litigation to attack the NCAA and its compensation restrictions.

Kavanaugh's concurring opinion acted as a warning shot across the bow of the NCAA and its restrictive compensation rules. While acknowledging this case did not address the remaining compensation rules, he put the NCAA on notice that its current justification of amateurism as the main reason to continually restrict student-athlete compensation will not continue to be sufficient to justify price-fixing labor.[76] He called the amateurism argument "circular and unpersuasive".[77] The NCAA continually justifies not paying student-athletes because of their status as amateur athletes, but that mere definition will no longer be enough when it is clear that if not for the horizontal price-fixing, student-athletes would be paid.[78] "Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate."[79] Kavanaugh attacked the current compensation rules and how they likely would not survive the "rule of reason" analysis under antitrust laws.[80] The idea of players negotiating for a share of league revenues and other potentially lucrative compensation for student-athletes brought the NCAA's attention to the future problems *Alston* will cause. In an attempt to stop the bleeding, the NCAA decided to allow student-athletes to profit from their NIL for the first time since the NCAA became the governing body of collegiate athletics.

Kavanaugh's unanimous opinion for the Court, as well as his concurring opinion, will force the NCAA to adopt change itself or suffer the wrath of the judicial system that will force the changes upon it. Within a few short months following *Alston*, both avenues have been

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[73] *Id.*
[74] *Id.* at 2147.
[75] *Id.* at 2158.
[76] *Id.* at 2167.
[77] *Id.*
[78] *Id.* at 2168.
[79] *Id.* at 2169.
[80] *Id.* at 2168.

explored. In *Johnson v. NCAA*, the NCAA got a slight taste of what may come of future litigation regarding student-athlete compensation.[81] In *Johnson,* the plaintiff student-athletes are bringing suit to force the NCAA to recognize them as employees of the NCAA, therefore entitled to minimum wages while participating in athletics.[82] While only at the beginning stages of litigation, the court denied the NCAA's motion to dismiss on their justification of the long- standing tradition of not paying the student-athletes.[83] The court referenced both Kavanaugh's unanimous and concurring opinions, stating the old adage of refusing to pay student-athletes because they participate in amateur athletics will no longer be sufficient justification.[84] While *Johnson* purports a different legal theory than *Alston*, the lower courts have begun to require the NCAA to produce new legal justification to support not paying student-athletes.[85] It remains to be seen if the NCAA can prove Justice Kavanaugh wrong, and produce sufficient justifications to support their compensation restrictions.

The other avenue requires the NCAA to alter how it functions to maintain some regulatory power, similar to allowing student-athletes to profit from their NIL. The issue the courts take with the NCAA revolves around the restrictions it places on every conference and university in the association. Therefore, a student-athlete cannot sell their labor for a higher price to a different university or conference. With NIL, the NCAA took a step back from their authoritarian rule over student-athlete compensation. Rather than the NCAA deciding the compensation available for NIL, they passed the baton to the state legislatures, conferences, and universities directly.[86] NIL deals boomed since the drastic change in compensation, with no uniformity among universities, conferences, or states. With that explosion, it is important to acknowledge the differences in NIL rules and forecast where this will take collegiate athletics as a whole.

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[81] *Johnson v. NCAA*. No. 19-5230, 2021 U.S. Dist. LEXIS 160488, at *19 (E.D. Pa. Aug. 25, 2021).
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] NCAA, *supra* note 7.

III. THE PROPOSAL

Following *Alston,* collegiate athletics had the biggest makeover since the inception of the NCAA in 1905.[87] Nine days after the ruling came down, the NCAA decided to end its century-plus long drought of monopolizing student-athlete NIL rights.[88] For the first time in the history of the NCAA, student-athletes no longer have to worry about suspensions or losing their eligibility for signing autographs, creating brands, or anything else that stems from their name, image, or likeness.[89] The NCAA punted on creating a uniform NIL policy and left it to state legislatures and/or individual institutions to determine the permissible uses of student-athlete NIL.[90] The result has been thirty different NIL laws passed by state legislatures, with varying degrees of similarity. In states without NIL legislation, individual institutions enacted their own NIL policies creating even more disparities throughout the country.[91] Despite multiple proposals and the NCAA's pleading, Congress has not yet enacted a federal NIL policy.[92] The following section of this paper will dive into the similarities and differences found between different state NIL statutes. After comparing and contrasting points of legislation, a proposal for either Congress or the NCAA will be drafted to create a uniform NIL policy throughout the country.

A. The Three Pillars of a NIL Proposal

Currently, thirty states have NIL legislation in effect or that will go into effect within four years.[93] Even more worrisome, in states without legislation, the universities are free to create their own NIL rules.[94] From this, some policies are more or less restrictive than others. Both student-athletes and the NCAA have called upon Congress to pass

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[87] *O'Bannon*, 802 F.3d at 1053.
[88] NCAA, *supra* note 7.
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] Liz Clarke, *State-by-state Rating System Gives College Recruits Road Map to Evaluate NIL* Laws, THE WASHINGTON POST (Oct. 21, 2021, 12:34 PM), https://www.washingtonpost.com/sports/2021/10/21/name-image-likeness-laws-state-rankings.
[93] Christopher Cody Wilcoxson, *Name, Image, and Likeness: Five Months into the NCAA's New Frontier,* JD Supra (December 2, 2021) https://www.jdsupra.com/legalnews/name-image-and-likeness-five-months-1219411. (last visited Mar. 11, 2023).
[94] *Id.*

a uniform guideline for NIL rights.[95] Other organizations like the National College Players Association ("NCPA") call for guidelines that limit the restrictiveness of policies and maximize the freedom of the student-athlete to profit from their rights.[96] With every side of collegiate athletics calling for uniform policies throughout the country, it will be important to balance the competing interests.

Among the states with NIL statutes, there are three basic principles found within almost every state's bill. Mandatory disclosure of the contract regarding the NIL of a student-athlete constitutes one of the main three principles of NIL legislation passed by the states. Over 96% (29/30) of the states with NIL legislation require the student-athlete to inform his/her university of the agreement to enter into a NIL deal.[97] Where the states differ, is when disclosure is required. The majority of states, approximately 55% (16/29), give the universities discretion to determine when and how disclosure of agreements shall be reported.[98] Just over 30% (9/29) require the student-athlete to disclose his/her agreement prior to execution or before any compensation is received.[99] Three states provide seventy-two hours for disclosure, unless the student-athlete has a scheduled athletic event within that time frame.[100] If within that timeframe, then disclosure is required prior to the athletic event. Oregon is the only state that requires disclosure at the time of the contract, or if an individual is not currently a team member, at the time they seek to become a member.[101] The NCAA will likely prioritize disclosure of NIL agreements to verify they are not in conflict with any state/federal legislation, or any of the NCAA bylaws. With this in mind, some type of disclosure requirement appears vital to any uniform policy. By providing universities with discretion to create disclosure guidelines, they will be able to tinker and tweak their rules until they find the best process for their institution.

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[95] Carrasco, *supra* note 12.
[96] Clarke, *supra* note 92.
[97] *See* Sen. Bill. SB1296, 2021 Reg. Sess. (Ariz. 2021); House Bill. HB1671, 2021 Reg. Sess. (Ark. 2021); Sen. Bill. SB206, 2019-2020 Reg. Sess. (Cal. 2019); etc.
[98] *See* H.B. 1671, 2021 Reg. Sess. (Ark. 2021); House Bill. HB617, 2021-2022 Reg. Sess. (Ga. 2021); Sen. Bill. SB60, 2021 Reg. Sess. (La. 2021); etc.
[99] *See* House Bill. HB5217, 2019-2020 Reg. Sess. (Mich. 2020); Sen. Bill. SB 2313, 2021 Reg. Sess. (Miss. 2021); Sen. Bill. SB 1385, 2021-2022 Reg. Sess. (Tex. 2021), etc.
[100] *See* S.B. 1296, 2021 Reg. Sess. (Ariz. 2021); Sen. Bill. SB20-123, 2020 Reg. Sess. (Colo. 2020); Sen. Bill. SB48, 2021 Reg. Sess. (Okla. 2021).
[101] Sen. Bill. SB5, 2021 Reg. Sess. (Or. 2021), https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureDocument/SB0005/Introduced. (last visited Mar. 5, 2022).

The second consistent principle throughout the country involves the professional representation aspect of the NIL deal-making process. With the implementation of NIL policies throughout the country, state legislatures deemed it imperative that student-athletes are given quality advice and counsel prior to entering into binding contracts. The longstanding NCAA bylaw 12.3, which prohibited student-athletes from engaging with an agent-athlete is another rule that has been affected by the acceptance of NIL rights for student-athletes.[102] Many state legislatures overrode that bylaw with the passage of their respective NIL laws. Approximately 93% (28/30) of states that passed NIL legislation require, or at least allow, professional representation by registered athlete agents or duly licensed attorneys.[103] The two states without this provision are Maryland and Montana. Maryland's legislators originally included the provision permitting student-athletes to obtain professional representation, but it was not included in the final version of the bill that ultimately passed.[104] Montana does not have this requirement because their NIL legislation allows universities to act as the agent for student-athletes in the procurement of NIL contracts.[105] By allowing universities to act as an agent, there becomes a conflict of interest between getting the best sponsorship deals for the university and the best deals for the student-athlete.

Among the twenty-seven states that have the professional representation provisions in their bills, twenty-five of those states require either state or federal licensing/compliance guidelines to ensure the student-athlete receives proper guidance.[106] Approximately 84% (21/25) of those states require the professional representative to be an athlete agent properly registered with the state, or a licensed attorney and in good standing with the respective state bar.[107] Out of those twenty-one states, eight have the additional requirement of the athlete

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[102] NCAA, 2021-2022 DIVISION MANUAL § 12.3 (2021), https://web3.ncaa.org/lsdbi/search/proposalView?id=101770#:~:text=12.3%20Use%20of%20Agents.,or%20reputation%20in%20that%20sport. (last visited Mar. 6, 2022).

[103] See S.B. 20-123, 2020 Reg. Sess. (Colo. 2020); Sen. Bill. SB 646, 2020 Reg. Sess. (Fla. 2020); S.B. 206, 2019-2020 Reg. Sess. (Cal. 2019); etc.

[104] Sen. Bill. SB439, 2021 Reg. Sess. (Ma. 2021), https://mgaleg.maryland.gov/mgawebsite/Legislation/Details/sb0439?ys=2021RS. (last visited Mar. 5, 2022).

[105] Sen. Bill. SB248, 2021 Reg. Sess. (Mont. 2021), https://leg.mt.gov/bills/2021/SB0299/SB0248_X.pdf. (last visited Mar. 5, 2022).

[106] See S.B. 206, 2019-2020 Reg. Sess. (Cal. 2019); S.B. 20-123, 2020 Reg. Sess. (Colo. 2020); S.B. 646, 2020 Reg. Sess. (Fla. 2020); etc.

[107] *Id*.

agent being compliant with the federal Sports Agent Responsibility and Trust Act.[108]Additionally, there are four states that are silent in their NIL legislation with regard to state licensing requirements for athlete agents. However, all four states require compliance with the federal Sports Agent Responsibility and Trust Act.[109]

With a vast majority of student-athletes being young adults, it is imperative they're provided adequate counseling and representation when entering into binding contracts. The individuals representing the student-athletes and negotiating deals on their behalf must be competent to understand the consequences of their negotiations. Any federal NIL legislation must have licensing and/or registration requirements to act on behalf of the student-athletes. Requiring attorneys that are licensed to practice in the state and in good standing with the bar will ensure any legal advice given is adequate and accurate. Additionally, if individuals act on behalf of a student-athlete in the role of an athlete-agent, they should be subject to registration requirements as well. Required registration with the state and compliance with the Federal Sports Agent Responsibility and Trust Act will provide student-athletes with the protection necessary to ensure they are not taken advantage of by people looking to cut corners and exploit them.

The prohibition upon universities from diminishing scholarships to student-athletes who receive NIL compensation constitutes the third basic principle found in all states with NIL legislation.[110] By preventing universities from diminishing scholarships due to NIL compensation, it denies the universities, and the NCAA, the opportunity to punish the student-athletes. While every NIL state explicitly prohibits diminishing scholarships, some states allow NIL compensation to affect need-based financial aid. Only three states explicitly provide for a reduction in need-based aid.[111] No other state mentions a prohibition on the reduction of need-based aid. So while the remaining states remain silent, reduction of need-based aid will likely not receive the same protections as scholarships. Student-athletes must file income taxes on all of their NIL compensation, including any free merchandise they receive from

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[108] *See* S.B. 206, 2019-2020 Reg. Sess. (Cal. 2019); S.B. 60, 2021 Reg. Sess. (La. 2021); Sen. Bill. S685, 2021-2022 Reg. Sess. (S.C. 2021); etc.

[109] *See* S.B. 20-123, 2020 Reg. Sess. (Colo. 2020); House Bill. HB 06402, 2021 Reg. Sess. (Conn. 2021); Sen. Bill. SB 2338, 2021-2022 Reg. Sess. (Ill. 2021); S.B. S685, 2021-2022 Reg. Sess. (S.C. 2021).

[110] *See* S.B. 206, 2019-2020 Reg. Sess. (Cal. 2019); H.B. 06402, 2021 Reg. Sess. (Conn. 2021); S.B. 2338, 2021-2022 Reg. Sess. (Ill. 2021).

[111] *See* S.B. 48, 2021 Reg. Sess. (Okla. 2021); S.B. S685, 2021-2022 Reg. Sess. (S.C. 2021); House Bill. HB1351, 2021-2022 Reg. Sess. (Tenn. 2021).

any company they complete a deal with.[112] Thus, their need-based aid will be affected by the amount of NIL compensation they receive. For a federal proposal, universities should not be allowed to reduce a student-athletes educational or athletic scholarship due to their NIL compensation. However, need-based aid may be altered or diminished if the income exceeds the limits already in place for need-based aid.

B. The Nearly Unanimous and the Outlier Provisions

To round out the remainder of a federal NIL proposal, there must be concessions by the NCAA, collegiate institutions, and student-athletes. A federal policy allows the parties to avoid getting bogged down in negotiations like collective bargaining agreements in other sports.[113] Existing state NIL legislation and the National College Players Association's ("NCPA") report on the "state ratings" reveal drastic differences between NIL policies from state to state.[114] The NCPA gives each state with NIL legislation a rating based on the freedom of contract student-athletes have regarding their NIL.[115] The NCPA focuses on 21 aspects of a state's NIL legislation to determine which states grant student-athletes the most freedom in their NIL contracts and dealings.[116] Based on the different criteria, New Mexico ranks as the most student-athlete friendly NIL legislation, positively scoring on 90% of the criteria set out by the NCPA.[117] The most restrictive states are Illinois, and Mississippi hitting only 43% of the criteria.[118] The right blend of restrictiveness and freedom will lie somewhere in the middle of these states. There are three categories these provisions fall into: nearly unanimous (20 or more states); a small handful of states (less than 5 states); and the controversial (6 to 19 states). Provisions that are either nearly unanimous or only adopted by a small handful of states will be briefly discussed as to the effect on an overall NIL proposal.

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[112] Wilcoxson, *supra* note 93.
[113] *MLB Lockout News: League Could Cancel More Games Without Deal by Tuesday,* The Athletic, https://theathletic.com/live-blogs/mlb-lockout-news-league-could-cancel-more-games-without-deal-by-tuesday/hQyQ4BISyhwq. (last visited Mar. 6, 2022).
[114] *NCPA's Mission: To protect future, current, and former college athletes,* ncpanow.org, https://symposium.us/wp-content/uploads/2021/10/NCPAs-Official-NIL-Ratings.pdf. (last visited Mar. 11, 2023).
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*

For the purpose of this discussion, we will assume the nearly unanimous provisions will be adopted (with the exception of one), and those only adopted by a handful of states will be discarded in a federal NIL policy. For the nearly unanimous category, we have four provisions:

(1) The NIL law does not guarantee student-athletes freedom to receive food, shelter, or insurance from third-parties;
(2) Universities may prevent NIL activities during official team activities;
(3) Student-athletes are not guaranteed money if their NIL is used in team video games, trading cards, or jersey sales and;
(4) Universities are not required to provide financial/life skills to student-athletes.[119]

In states "adopting" provision (1), it is important to understand that the law does not necessarily prevent student-athletes from receiving these benefits, but it does not guarantee them either.[120] It would be difficult to imagine the NCAA or universities punishing student-athletes for free meals when there have been past National Championship winning players who went to bed starving.[121] Concerns over the contractual obligations of the universities make provision (2) necessary. For example, if a university had a shoe deal with Nike for their basketball team, but the star player had a NIL shoe deal with Adidas, then the purpose of either contract may be frustrated. Beyond that simple example, student-athlete NIL deals may portray the universities as endorsing certain products they do not wish to endorse. Provision (3), like provision (1) does not prevent universities from compensating student-athletes for utilizing their NIL, nor does it guarantee student-athletes that compensation either. Practically, this should be a non-issue. *O'Bannon* already ruled that there is a cognizable market for student-athletes NIL in video games, similar to professional athletes.[122] Therefore, student-athletes, if denied this compensation, should be able

[119] *Id.*
[120] *Id.*
[121] Sara Ganim, *UConn Guard on Unions: I go to bed 'starving'*, CNN (April 8, 2014) https://www.cnn.com/2014/04/07/us/ncaa-basketball-finals-shabazz-napier-hungry/index.html#:~:text=But%20the%20University%20of%20Connecticut's,include%20provisions%20for%20meal%20plans.&text=%E2%80%9CHe%20says%20he's%20going%20to,being%20made%20off%20of%20him. (last visited Mar. 11, 2023).
[122] *O'Bannon*, 802 F.3d at 1057.

to bring suit and recover those damage because a guarantee in the NIL legislation should not be viewed as precluding student-athletes from that compensation. Provision (4) should not be included in a federal NIL policy. Universities should be required to provide at least a basic class for student-athletes to explain the various ramifications of NIL deals, such as income taxes. By providing these classes, the universities ensure that their student-athletes receive practical advice and understand the potential ramifications of the NIL engagements. NIL ramifications include, but are not limited to, alteration of need-based financial aid, income taxes, and suspension from athletics if there is a violation of the law or NCAA rules. Choosing not to rely solely on attorneys or agents to educate the young student-athletes will protect both the universities and the student-athletes.

Next, the "outlier" (less than five states have adopted) provisions will not be included in this federal proposal for the sake of uniformity. There are nine of these provisions:

(1) Universities may decide what student-athletes wear to optional campus events;
(2) Law does not allow student-athletes to utilize their athletic ability in NIL deals;
(3) Student-athletes must be enrolled in classes or participating in athletics prior to commencement of NIL deals;
(4) Universities may serve as an agent for the student-athlete;
(5) Universities may require up to 75% of student-athlete NIL money and disperse it to previous student-athletes;
(6) Universities may keep a portion of student-athletes NIL money for up to one year after leaving the university;
(7) The State may fine a student-athlete over a violation of the NIL laws;
(8) Universities may fine a student over a violation of the NIL laws;
(9) The NCAA may determine to alter or eliminate state NIL laws.[123]

All of these provisions severely limit the student-athletes' freedom to contract and should not be included in any federal NIL policy. Provisions (1), (2), and (3) all prohibit contracts that the universities would be unable to control if the student-athletes were normal students. For example, if a student had a successful music career

[123] NCPA, *supra* note 114.

prior to their enrollment and contracted for endorsement deals, the university would not be able to apply any of these provisions. Severely limiting a student-athletes freedom to contract away his NIL rights simply because they participate in athletics should not be entertained as a possible provision in a federal proposal.

Unlike the provision allowing universities to regulate what students wear/promote during athletic events, provision (1) has no similar legal motive for the universities. Provision (4) creates a conflict of interest between the student-athlete and the university.[124] Allowing universities to act as an agent for the student-athlete may limit what companies the student-athlete may contract with. At a minimum it creates a potential conflict in the duty of loyalty to the student-athlete and the university's existing sponsorships. Provision (5) is a Georgia provision that seeks to take the past wrongs of the NCAA and push that burden onto present and future student-athletes.[125] Aside from the obvious logistical nightmare of deciding what former student-athletes receive the compensation and how much they receive, taking 75% of a student-athlete's own NIL money to attempt to rectify a past wrong done by the NCAA would be incomprehensible.

Additionally, provision (6), withholding student-athlete pay for up to a year after departure or graduation, places severe financial implications on the student-athletes. Student-athletes' NIL money allows them to have income during a time where their lives are dominated by academics and athletics, leaving them little time for employment elsewhere.[126] Provisions (7) and (8) punish student-athletes monetarily if they break NIL rules, even accidentally.[127] Punishing a student-athlete for entering into an otherwise valid and legal NIL agreement because they cannot participate in an athletic competition further pushes the narrative that the universities view student-athletes as dollar signs rather than individuals. For a violation, the penalty should be limited to athletic suspension similarly to what the NCAA has done in the past. Finally, provision (9) would be irrelevant in a federal proposal.[128] A federal NIL policy would have the effect of unifying NIL legislation for uniform enforcement throughout the

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[124] *Id.*
[125] *See* H.B. 617, 2021-2022 Reg. Sess. (Ga. 2021).
[126] Peter Jacobs, *Here's The Insane Amount Of Time Student-Athletes Spend On Practice*, BUSINESS INSIDER (Jan. 27, 2015, 10:44 AM), https://www.businessinsider.com/college-student-athletes-spend-40-hours-a-week-practicing-2015-1.
[127] NCPA, *supra* note 114.
[128] *Id.*

country. Allowing the NCAA to pick and choose what provisions to adopt would render a federal proposal unenforceable.

C. The Contentious Provisions

Whether the more contentious provisions are adopted into a federal NIL policy will determine the future outlook of NIL for collegiate athletes. Each provision must balance the NCAA's interest in maintaining amateurism with the student-athletes' rights to freedom of contract. In this section, the remaining six provisions of the NCPA NIL ratings will be explored and evaluated on a balancing scale weighing these competing interests. The remaining provisions left to be discussed are as follows:

(1) Law includes NIL market value cap on compensation;
(2) Law prohibits athletic program boosters from compensating student-athlete for NIL;
(3) Law doesn't guarantee student-athletes freedom to participate in NIL deals in their free time;
(4) Law doesn't allow the student athlete to use the logos/uniforms of the university;
(5) Law limits NIL deal length based upon transfer or graduation; and
(6) Law limits athlete representation strictly to NIL deals.[129]

Between six and fifteen states have adopted these provisions, thus classifying these as the "contentious" provisions. The first provision attempts to limit NIL compensation to strictly NIL activity by constraining the compensation to the "fair market value" of the student-athletes' NIL.[130] The problem underlying this provision is how can one determine what the fair market value of a student-athlete's NIL is. Two companies believe they have the answer, with an algorithm to create a market value guide based on the teams profits, conference profits, student-athlete's social media activity, and reach off the field.[131]

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[129] *Id.*
[130] *See* S.B. 646, 2020 Reg. Sess. (Fla. 2020); H.B. 617, 2021-2022 Reg. Sess. (Ga. 2021); S.B. 2338, 2021-2022 Reg. Sess. (Ill. 2021); etc.
[131] Karen Weaver, *Determining An Athlete's Fair Market Value Is The Next Hurdle For NIL Rights. These Two Companies Could Solve That*, FORBES (May 25, 2021 8:30 AM), https://www.forbes.com/sites/karenweaver/2021/05/25/determining-an-athletes-fair-market-value-is-the-next-hurdle-for-nil-these-two-companies-could-solve-that/?sh=719b0c4e19e2.

However, there are many other factors that go into negotiations for a deal, such as competing companies that will drive up value not accounted for in these projections. A strict adherence to these value guides will increase student-athletes' violations, especially among star collegiate athletes.

States that adopted the second provision aimed to please the NCAA and protect themselves from the dreaded "pay for play" allegations, but the provision reaches further than that. It limits compensation coming directly from boosters, despite student-athletes already being enrolled in the institution. One of the most valuable tools a university can offer is networking with past students and companies. By limiting which entities student-athletes may contract with, it places an unnecessary obstacle in the way of student-athletes that is not present for the rest of the student body. For example, if Congress disregarded this provision in a federal policy, James Wiseman likely would have played more than three games in his collegiate career at the University of Memphis. Before becoming the head coach of Memphis, Penny Hardaway paid for the moving expenses of Wiseman's parents to Memphis, Tennessee from Nashville, Tennessee.[132]However, as a notable alum of Memphis, Hardaway donated $1 million in 2008 to establish the "Penny Hardaway Hall of Fame" at the University of Memphis.[133] Therefore, Hardaway classified as a booster for the University of Memphis.[134] However, if Wiseman were a musician that Hardaway assisted with a move, Wiseman would have been free to engage in any school activities. Punishing a student-athlete for a school's connections when a NIL agreement is not conditioned on enrollment in a particular university should not be included in a federal policy. Instead, boosters should be allowed to be utilized as a tool to disperse more power throughout the NCAA. For example, Travis Hunter, a top five football recruit, committed to Jackson State, a HBCU (historically black collegiate university) over Division 1 schools such as Florida State University.[135] Immediately, there were rumors surrounding a potential lucrative NIL deal with Barstool Sports, the

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[132] Billy Heyen, *Why Was James Wiseman Suspended at Memphis? How No. 1 Recruit's College Career Lasted 3 Games,* Sporting News (Nov. 18, 2020), https://www.sportingnews.com/us/nba/news/james-wiseman-suspension-memphis/txp3bz1tohuw1afoe4p6vda2z. (last visited Mar. 11, 2023).

[133] *Id.*

[134] *Id.*

[135] Mike Seely, *Jackson State, Barstool, and College Football's Thing, Gray Line,* Sports Handle (Dec. 17, 2021), https://sportshandle.com/jackson-state-barstool-college-footballs-nil/. (last visited Mar. 11, 2023).

former employer of Jackson State head coach Deion Sanders.[136] While the rumors remain unsubstantiated, permitting deals like this will allow smaller universities to compete for recruits and create more competition in athletics with major NCAA schools.[137] On October 26, 2022, the NCAA took steps to allow universities to accomplish this.[138] Their NIL guidance announced it was permissible for universities to instruct donors and boosters to give funds to an NIL collective, which will then use the funds for NIL activities for all of their student-athletes.[139]

Provisions (3) through (6) should be included in a federal NIL policy, to an extent. As misleading as provision (3) appears to be based on the (above) NCPA wording, it refers to endorsement of certain products such as alcohol, tobacco, drug paraphernalia, etc.[140] The phrasing by NCPA should not be adopted into a federal policy, but the overall essence of the provision should be implemented. Student-athletes that are not old enough to participate in an activity (i.e. drinking alcohol under 21 years old) should not be allowed to openly endorse such companies. Additionally, all student-athletes should be prohibited from endorsing a product outlawed within the state (i.e. marijuana in a state that has not legalized recreational use). Therefore, a reasonable reading of the provision should be a prohibition against endorsing a company or activity that the student cannot legally participate in or is in direct conflict with a provision of the university's bylaws. Provision (4) strictly prohibits student-athletes from utilizing the marks of their universities.[141] A compromise and likely solution will be to prohibit student-athletes from utilizing the marks of their universities without express written permission.[142] A strict prohibition leads to an unnecessary overreach when general copyright and trademark law can competently govern the area. Therefore, universities should be allowed to license the use of their trademarks to students if they wish. Universities then have greater control over what they second-hand endorse by way of their athletes. Provision (5) should not have a flat

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[136] *Id.*
[137] *Id.*
[138] NCAA, (Oct. 26, 2022), https://www.ncaa.org/news/2022/10/26/media-center-di-board-approves-clarifications-for-interim-nil-policy.aspx. (last visited Mar. 11, 2023).
[139] *Id.*
[140] *See* H.B. 1671, 2021 Reg. Sess. (Ark. 2021), S.B. 646, 2020 Reg. Sess. (Fla. 2020); etc.
[141] *See* H.B. 1671, 2021 Reg. Sess. (Ark. 2021); H.B. 06402, 2021 Reg. Sess. (Conn. 2021); etc.
[142] *See* S.B. 2338, 2021-2022 Reg. Sess. (Ill. 2021).

prohibition on termination upon transferring or graduating from the university.[143] Again, this should be something that is contracted either into or out of a NIL agreement. If a small local company wishes to contract a student-athlete for a sponsorship deal they should be able to contract into the agreement that the contract will terminate if the student-athlete transfers from his/her current university. For example, Quinn Ewers signed a NIL deal with a local car dealership that exchanged a new Ford F-250 for a series of commercials staring Ewers.[144] Some of these commercials aired after he announced he would be transferring from Ohio State to the University of Texas.[145] Had Ewers transferred from the University of Texas to Ohio State, this deal would have been automatically terminated.[146] Allowing the termination upon transfer to a different university to be contracted for presents major problems, namely a pay-for-play agreement. A compromise limited to small local businesses under a certain amount of compensation may be a way to protect business owners while carving out an exception to what the NCAA would surely deem a pay-for-play agreement. Lastly, limiting representation strictly to NIL deals (provision (6)) preserves the NCAA amateurism ideal and keeps the distinction between professional and collegiate sports.

D. The Finalized Proposal

Attempting to create a federal NIL policy to govern the collegiate landscape creates a mountainous feat. No policy will be perfect in the eyes of the NCAA or its athletes. However, the confusion created by the lack of uniformity will be more problematic if left unchecked. Therefore, Congress should consider the following as a potential solution to what currently ails the NIL landscape in the NCAA:

1. Student-athletes are prohibited from the following:
    a. Endorsing products they cannot legally partake in due to age or illicit nature.

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[143] *See* S.B. 646, 2020 Reg. Sess. (Fla. 2020); S.B. 1385, 2021-2022 Reg. Sess. (Tex. 2021); etc.
[144] Scott Rogust, *Ohio State: Quinn Ewers Signs NIL deal with Ohio car dealership,* Fansided, (Aug. 8, 2021). https://fansided.com/2021/08/28/ohio-state-quinn-ewers-nil-car. (last visited Mar. 13, 2023).
[145] *Id.*
[146] S.B. 1385, 2021-2022 Reg. Sess. (Tex. 2021).

    b. Utilizing marks of the University in NIL deals without written permission from the University.
2. Universities are prohibited from the following:
    a. Diminishing scholarships of student-athletes that receive NIL compensation.
    b. Preventing NIL activities during non-mandatory team activities.
    c. Receiving or participating in the NIL income generated by student-athletes.
    d. Retaining portions of student-athletes NIL compensation until graduation from the university.
    e. Serving as the agent for student-athletes.
    f. Fining students for NIL violations.
    g. Imposing a market cap on NIL compensation.
3. Student-athletes may:
    a. Receive compensation if their NIL is utilized in video games or jersey sales.
    b. Utilize athletic abilities in NIL deals.
    c. Enter into NIL contracts prior to enrollment with a university.
    d. Contract with boosters of a university, as long as the compensation is not predicated on attendance or continued enrollment in a particular university.
    e. Contract for, or away, termination of NIL deals upon transfer or graduation from a university.
4. Universities may:
    a. Prevent NIL activities during mandatory team activities.
5. Student-athletes must:
    a. Inform universities of NIL contracts, with the period of disclosure left to the discretion of the university.
6. Universities must:
    a. Provide financial and life skills courses to all student-athletes to explain NIL rules and implications, like taxes.

This solution will not solve all NIL related issues that currently face the marketplace, such as international students' inability to

participate within the sphere.[147] However, that result will only come from Congress altering F-1 visas or creating an exception in the federal NIL policy. All parties in the NIL marketplace call for uniformity, and this proposal for a federal policy will create uniformity while balancing student-athletes' freedom to contract and the NCAA's desire to preserve amateurism in the sport.

IV. CONCLUSION

Despite student-athletes now being able to fully capitalize off their NIL, people remain adamant that paying collegiate athletes is wrong. Individuals believe that paying student-athletes in scholarships for their education outweighs any need to be compensated elsewhere.[148] Individuals making this argument never understood the main issue with the NCAA holding athletes NIL hostage. For that matter, individuals who supported NIL prior to *Alston* did not either. Pro-NIL individuals often cite the billions of dollars in revenue the NCAA and its athletic associations bring in every year as justification for paying student-athletes.[149] However, both stances miss the ultimate point. The arguments of NIL were never about the universities paying the student-athletes. The crux of the NIL argument revolves around the NCAA denying a right to student-athletes for over a century, that every other citizen retains. NIL has never been about universities, or the NCAA for that matter, paying student-athletes out of their budgets. Therefore, universities and the NCAA still enrich themselves off the labor of student-athletes. This greed of the NCAA controlling their subordinates, is why Justice Kavanaugh likened them to a cartel.[150]

While a great step in the right direction, NIL is not without its faults. Understandably, NIL activities (defined as total number of NIL opportunities) heavily favor men's football and basketball.[151] Men's

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[147] Pat Eaton-Robb, *Foreign College Athletes Left Out of Rush for NIL Windfall,* US NEWS (Dec. 24, 2021), https://www.usnews.com/news/us/articles/2021-12-24/foreign-college-athletes-left-out-of-rush-for-nil-windfall.

[148] *Rovell: 'Ridiculous to Pay College Athletes',* espn.com, https://www.espn.com/video/clip/_/id/15067182. (last visited Mar. 11, 2023*)*.

[149] Imogen Francis, *Why Aren't College Athletes Paid?*, The College Post (July 26, 2019), https://thecollegepost.com/college-athletes-pay. (last visited Mar. 11, 2023).

[150] *Alston,* 141 S. Ct. at 2149.

[151] *Nil Industry Insights,* opendorse.com, https://opendorse.com/nil-insights (last updated Dec. 31, 2021). (last visited Mar. 11, 2023).

collegiate basketball alone generates almost $1 billion for the NCAA.[152] Additionally, at schools like the University of Texas, football generates almost 70% of the athletic department's total revenue. For the most profitable sports to have the most NIL opportunities comes as no surprise. Gender inequality remains an important concern in the NIL arena because of the less profitable nature of women's college athletics. For female athletes to bridge this gap they must create brands and a following unlike their male counterparts. Currently, men's football and basketball comprise over 70% of the total NIL compensation.[153] Women's basketball is the highest grossing women's sport at 11.2% of the total compensation from NIL deals.[154]

International student-athletes may benefit the most from a federal NIL proposal. Currently, international student-athletes that attend university face the harsh likelihood of almost certain termination of their F-1 visa's if they participate in NIL activities.[155] Immigration law forces universities to terminate the visa of international student-athletes if they become aware of off-campus employment, including NIL deals.[156] Finding an alternative to allow international students to profit off their NIL must come at the hands of Congress either through federal NIL policy or an alteration of F-1 student visa prohibitions.

After the adoption of NIL, the profits have allowed student-athletes a wide array of chances to give money back to charity, pay back their parents, or even chase their own dreams outside of collegiate athletics. Florida State offensive lineman Dillion Gibbons utilizes his NIL earnings to raise awareness and pay the medical bills of his friend.[157] He also set up a nonprofit organization, Big Man Big Heart, that gives back to people in need that has already raised more than $150,000.[158] Other athletes utilize their NIL to take care of family that raised them and provided them with opportunities to get where they are today. For example, TreVeyon Henderson attributes being able to

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[152] Mark J. Drozdowski, *Do Colleges Make Money From Athletics?*, Best Colleges. https://www.bestcolleges.com/news/analysis/2020/11/20/do-college-sports-make-money. (last visited Mar. 11, 2023).
[153] Opendorse*, supra* note 151.
[154] *Id.*
[155] Eaton-Robb, *supra* note 147.
[156] *Id.*
[157] Allison Torres Burtka, *College Athletes Are Using NILs as a Way to Give Back,* Global Sports Matter (Dec. 7, 2021), https://globalsportmatters.com/culture/2021/12/07/kenny-pickett-college-athletes-nil-give-back. (last visited Mar. 11, 2023).
[158] *Id.*

financially take care of his mother to the passage of NIL laws.[159] NIL also allows athletes to pursue other ambitions without worrying about deciding between athletics and these dreams. Will Ulmer now utilizes his NIL to perform music at venues under his real name, something he was prohibited from doing prior to the adoption of NIL. NIL changed the lives of the student-athletes overnight, now it rests in the federal government's hands to ensure it remains a viable opportunity to all.

Since the *Alston* decision, individuals involved in attempting to regulate NIL deals refer to the current landscape as "the Wild West".[160] Pleas for uniformity in the NIL landscape come from universities, athletes, and the NCAA alike.[161] Uniformity in NIL policies will create a level playing field for universities, and a level playing field in terms of enforcement. Some universities have been under NCAA investigation already, despite complying with their state laws.[162] When universities are unclear on the guidelines, that will trickle down to student-athletes and increase a chance for violations. After only a few months, state legislatures are questioning their state NIL laws.[163] States that started passing legislation prior to the *Alston* ruling molded their laws around the hyper-restrictive policy the NCAA had in place.[164] For states like Florida that passed legislation pre-Alston, their NIL laws rank among some of the most restrictive in the country now.[165] Now these states must either reform or repeal their laws (like Alabama did), or become less competitive in the NIL marketplace. To prevent states from

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[159] Dave Biddle, *NIL Deals 'Life Changing' for One Ohio State Player | Gene Smith Does Not Want NIL Impacting Recruiting,* 24/7 Sports (Feb. 23, 2022, 10:46 AM), https://247sports.com/college/ohio-state/Article/Ohio-State-Buckeyes-football-TreVeyon-Henderson-life-changing-NIL-deals-183334643. (last visited Mar. 11, 2023).

[160] Jim Vertuno, *A NIL Shocker: It's the Wild West,* IM Tribune (Dec. 15, 2021), https://lmtribune.com/sports/an-nil-shocker-it-s-the-wild-west/article_65d3c424-064c-5e72-81b1-acddf7edd7cc.html. (last visited Mar. 11, 2023).

[161] Aaron Beard, *SEC Commissioner Urges NIL Uniformity in Meeting with U.S. Senate Committee*, KUSports.com (July, 1, 2020), http://www2.kusports.com/news/2020/jul/01/sec-commissioner-urges-nil-uniformity-meeting-us-s. (last visited Mar. 11, 2023).

[162] *Lack of Detailed NIL Rules Challenges NCAA* Enforcement, ESPN.com (Jan. 29, 2022), https://www.espn.com/college-sports/story/_/id/33173542/lack-detailed-nil-rules-challenges-ncaa-enforcement. (last visited Mar. 11, 2023).

[163] Josh Moody, *States Rethink Restrictive NIL Laws,* Inside Higher Ed, (Feb. 11, 2022), https://www.insidehighered.com/news/2022/02/11/states-rethink-restrictive-nil-laws. (last visited Mar. 11, 2023).

[164] *Id.*

[165] NCPA, *supra* note 114.

one-upping each other with the least restrictive NIL laws, Congress must step in and create a uniform policy.

The need for a federal policy to regulate NIL will remain prominent for the foreseeable future. When states are incentivized to have no state NIL law so the universities can act unilaterally in creating NIL policy, there will be thousands of different policies across the country. Universities may begin to find ways to profit off the rights of its athletes without the athlete's knowledge. Additionally, the issue of the ban international student's face with NIL cannot be remedied by state policy. Congress must create a federal policy to ensure uniformity and an equal level of access to profit from NIL across the country. Only then will the playing field for student-athletes truly be leveled.

BELMONT ENTERTAINMENT LAW JOURNAL SECOND ANNUAL ENTERTAINMENT LAW SYMPOSIUM: "THE EVOLUTION OF ENTERTAINMENT"

Nathaniel Hobbs: Hello everybody. I hope everyone's doing well, both here and at home. My name is Nathaniel Hobbs. I'm the editor in chief of Belmont Entertainment Law Journal. So, welcome to our 2022 symposium entitled, The Evolution of Entertainment. On behalf of our entire team, I want to thank everyone, every single one of our amazing panelists coming today.

We're going to have a really good time. Everybody is so intelligent and skilled and experienced. It's going to be a really educational day, I think, and I'm really looking forward to it. Our first panel is going to take an introspective look at the entertainment industry and try to predict what might be next. Our second panel will focus more on what it takes to work with creatives and how a skilled attorney or professional can advocate for their clients from the beginning of their careers to the very end. And our final panel today will be dedicated to the more technological side of the modern entertainment industry, and you know so many new forms of media and the lightning-fast turnaround time on what's popular, we're going to try to ponder how to stay relevant and ahead of the curve.

At the end of each panel, we're going to dedicate about 10 to 15 minutes for questions from the audience. Someone from the Entertainment Law Journal will also be monitoring the chat on zoom. So, if you are attending virtually, if you have any questions as the day progresses, you can send them in the chat and any questions that can't be answered during the panels will be addressed during the Q&A session. We are also going to allow for about 10 minutes at the end of each panel for everybody to go to the bathroom, get some food, get some more coffee or more water if you need. So, we will be trying to wrap up promptly at about ten-till each hour.

Thank you all again for coming. I'm really looking forward to this. So, starting things off this morning is our panel Looking Back to Move Forward, moderated by the Entertainment Law Journal's faculty advisor, Professor Loren Mulraine. I will let him introduce himself and our panelists, and we will get this show on the road.

First Panel: Looking Back to Move Forward

Loren Mulraine: Good morning, everybody. I wanted to first just publicly thank the Journal Members for the hard work and putting this together. You know, when you get to the end of a process like this, all you see is the finished shiny products. But, it's sort of like the story about the duck being on the lake and you just see the top of the duck, but underneath it's paddling—there's been a lot of paddling going on. So, I want to thank you guys for all you've done and I'm looking forward to this symposium. We always tell the students when they start off as general members that the biggest event they have each year is putting the Symposium together, and that it's really enjoyable to see them together.

I'm excited this year for a number of reasons, one of which is the connections. There are connections between several of the panel members and myself going back years and years. People that I taught ten to fifteen years ago, people that I taught eight years ago, and people that I worked with twenty years ago. So, so it's really cool.
[Laughter]

I want to start off by introducing the panelists that we have on this panel here, and we'll start at the end. My farthest left. Rush Hicks, who is the partner and of council at Shrum Hicks & Associates. Rush earned his undergraduate degree in Music from Ole Miss. He received his law degree from Mercer University in 1981. Since that time, he has practiced law in Nashville on historic Music Row, representing artists, songwriters, managers, business managers, record companies, record producers, booking agencies and publishing companies. Rush has been an assistant professor of Entertainment and Music Business at Belmont University since 2005. Prior to that, he was at MTSU, which is where he and I met. He's an outstanding attorney and professor, and I look forward to hearing his wisdom.

Rush Hicks: Appreciate it.

Loren: Here in the next to him is Barry Shrum. Barry is a founding partner of Shaun Hicks & Associates. Barry Shrum, Esquire has been practicing law for 25 years. Lots of youngsters . . .

[Laughter]

He started his career as a Philadelphia lawyer in the litigation department of a midsized Center City firm, and then went in house as counsel to a Fortune 500 conglomerate, all while honing his craft for his dream of defending the rights of underrepresented musicians, songwriters, and artists. In 1996, he decided to realize that dream by returning to the site of his roots, Tennessee, and started practicing in Music City. Thank you for being with us.

Barry Shrum: Certainly don't feel like a youngster.

[Laughter]

Loren: It's all relative.

Barry: That's right.

Loren: And then right next to me is one of my prized pupils from our initial graduation class from Belmont Law in 2014, Molly Shehan. She was a member of that class. She's gone on to her current role. She is a partner at Milom Horsnell Crow Kelley Beckett Shehan PLC. And Molly is a graduate of Belmont College of Law and received her BPA in Music from Belmont University. Her experience includes list—I'm sorry—includes interning for the National Music Council for two years, interning for Congressman Jim Cooper in Washington DC, and working as a research assistant Dr. Don Cusic here at Belmont. Molly concentrates her practice in the area of Entertainment and Intellectual Property law and. She is going to be pretty much guiding the train here with the discussion and I'll introduce her and, at this point, turn it over.

Molly Shehan: Awesome. Well, thank you so much. I'm excited to be here today as I know we all are. So, thank you for that introduction, thank you Belmont Law, and thank you Belmont Law Journal for having us.

So. today's topic is sort of an ode to the past to understand the future. And it makes sense, right? We are in a common law system based on precedent. So, 20 years ago if someone said, "I'm going to stream music on my iPhone, on a mobile app," I think people would be like, "What are you talking about? You're crazy. Or, you're a prophet." And likewise, I think if someone says today, which I've heard many times,

“I'm going to buy an NFT using my current digital cryptocurrency of choice using a decentralized autonomous organization.” People are sort of like, “What?” You know, sort of a parallel, because that’s where we’re going.

So, we thought it made sense—we all sort of met this week and figured out where would we start this conversation—and really, it's with twenty years ago with the Internet and digital auto audio files and winning background work. Twenty years ago is where our issues today were planted. And we’re still watering those seeds, and they’re growing into wild weeds that we have to deal with.

So with that, I'm going to turn it over to Mr. Shrum, who's going to sort of walk us through and give us a little bit of history and recap and walk through the analysis related to all of the above: Internet, digital and audio files . . . no small feat, right?

Barry: No small feat. Just forty years’ worth of evolution, and I figure if I've got about ten minutes to do that, it's about twenty-four seconds a year. So, let’s get started.

Molly: Hold on!

Barry: Yeah, hold on to your seats. If I think about a watershed event—or the biggest event in the last forty years—that has affected, and continues to affect, the entertainment and music industry and intellectual property, it would have to be Napster. But you can't just start at Napster. That's about 20 years ago, as you said. You got to go back a little bit earlier than that because there's a whole sea change of culture, technology and thought that went into what happened with Napster and Sean Fanning's mindset and philosophy.

It all really started back in the 1960s with this guy at ARPA, the Advanced Research Project Agency of the Military. This guy's name is Bob Taylor, and his big beef was that he had to move from mainframe to mainframe in a little office chair in order to access the different information stored on the individual mainframes. He's saying, “Why the heck do I have to move to three different terminals? Why can't we just connect all of those?” So that was sort of the early phases of what's called ARPANET, a network of mainframes and computers that

connected not only ARPA, but all of the defense contractors, colleges, commercial entities, organizations, all scattered all across the country.

So, from Taylor's angst, he and his team developed this ARPANET. The network was based on a unique concept, a system of packets -- numbered packets -- and they would transfer this information by breaking a file into numbered packets and send it along various paths through this web of connected computers among these contractors. The reason for that is because at that time, you guys remember this, we were all afraid of nuclear annihilation. We had all seen the movie War Games with Matthew Broderick and Ally Sheedy. We realized that we could just be gone in an instant, and so they wanted a way to move information between contractors and then reassemble it at the other end. So in case Texas gets blown away, my apologies to any Texans, then these packets of information could still transverse pathways amongst the rest of the states, and perhaps reaches ultimate recipient so that most if not all of the packets could reach their final destination. And so that started the process of what we now call the Internet.

The next phase of the evolution was young senator from Tennessee, a computer nerd himself. His name was Al Gore. Al was very fascinated with technology and computers. When he was a junior senator, he introduced legislation that allowed for the research of supercomputing. In 1991, under the Bush Administration, a new law was finally passed that accelerated the evolution of the Internet. That law accomplished two things: first, it established what Al called the "Information Superhighway." In the Act, it was called the National Information Infrastructure; secondly, it moved the Internet from its military origins and commercialized it. Basically, it got a lot of commercial entities like Verizon and AT& T to build out ARPANET into a commercial entity and move it from a private entity, military entity into a *commercial* entity and allow for free commerce and all that.

As you can tell now, in our society as it exists today, it was a successful venture. But of course, you can't just blow it out commercially. You've got to make it accessible to the average guy. And to do that, they established The National Center for Supercomputing Applications at the University of Illinois, Urbana, in the early 1990s. Mark Anderson was the guy who headed up that organization. The NCSA developed the Mosaic browser, which is the kernel that's in Firefox today. And along with that Hypertext Markup language. Why is that important? Well,

now using that online "browser," the average citizen could go in and link to a file and it appear visually on their computer. Prior to that it was all textboxes.

So. how does that affect us and how does that affect Napster? Alongside of all this technological development was a mental and philosophical shift led by people like John Perry Barlow of the Electronic Frontier Foundation, Lawrence Lessig of *Eldred v. Ashcroft* and *Golan v. Holder* fame, cases he argued and lost in front of the Supreme Court. Lessig is also notorious for the development of the Creative Commons. The attitude among this new Internet culture was, "Hey, if it's on the Internet, it's free. Alright, if I can get it, if I can link on this, download it to my computer, why do I have to pay for it? It's a free world. It's the Wild West." And so that mentality affected Sean Fanning and others who were on the front lines of trying to democratize the music industry.

Fast forward a few years. Now we're up into the 1990s. And Fanning said, OK, well I'm going to create a peer-to-peer network. Because if I have a cassette tape of music, I can hand that to a friend and that's okay, you know, we can give them our music. And that's true. The first sale doctrine allows for that. But that doesn't apply in the digital world.

Fanning either didn't know that, or, more likely, he didn't care. He said, "I want to create a peer-to-peer network on the Internet, so that people can have all their music and files. Then, we'll have a centralized server. People will access that centralized server, get a list of the music, and they can download anything they want. And he did. He put every music, every piece of music and creation online because everybody put their music there.

Even my clients, probably some of your clients [gesturing toward Rush], were downloading music to their hard drives. They're going our and buying additional hard drives so they could download all of their favorite music in MP3 format. I said, Wait a minute, guys. What are you doing? You're getting royalties on some of that music. You realize what you're doing? You're short circuiting our entire paradigm, because all of our contracts, all of our operations were based on the sale of a physical album. We had a CD or record or cassette, whatever was. Mechanical Royalties – gone. You don't get a royalty on free music.

And when that happened, when the consumer gave money to the record store, record labels paid royalties to songwriters and publishers. Now if I can get that for free, that revenue stream dries up.
And then if I can also access the music on the Internet, listen to it there, consume it there, why am I going to listen to a radio? When you cut out the radio, you cut out the performance royalty, because the radio stations pay ASCAP BMI and SESAC, and they distributed to songwriters and publishers. But that's gone, and that's what was happening then. Record stations were switching from top 40s to talk radio because they couldn't make enough money on music. Nobody listening.

And so, long story short, beginning with Napster and the creation of that peer-to-peer network by Sean Fanning, in 1999, global revenues from music sales, according to the IFBI was about $30 billion a year. That was a pretty good year. 10 years later, after the aftermath of Napster and all of this watershed events we're discussing, the industry generated only $10 billion. 66% loss in revenue in *ten* years. Almost no industry can survive that kind of loss in revenue. Now, the music industry is pretty resilient, but that really started the chain of lawsuits, advertising campaigns, and finally lobbying in Congress that led to the formation ultimately, 2 years ago, of music modernization.

Hopefully I didn't take too long, but that's kind of the background of where we've been and how it affects where we are.

Molly: No, that was absolutely perfect. It's interesting, because I feel like during that time period there was a sense of fear, and the initial response was to go after it. There was a lot of this "We need to stop piracy. We need to stop this altogether" mentality, so there was sort of this, slew of
lawsuits. The RIAA came after random individuals that were using Napster, so there was this groundswell of fear. And then, it slowly shifted into, "We are going to have to accept this. This is the future. The way that individuals are conceptualizing content has changed. It's no longer a physical product." So, it was it's a long process, but ultimately there have been huge changes in the legal structure, and it has taken twenty years to get there. The legal system will always trail and have a lag behind technology that. So that did create the formation of the MLC that did plant the seed for the passing of the Music Modernization Act.

I guess I'll pose this for our panelists. Is that the path that you think we should anticipate for other changes in technology? That time flow of fear, resistance, and then acceptance? Or do you think that, in the legal field, there's been a bit of a change in that we're not as fear-based and we're more accepting? What are your thoughts on that?

Rush: You go right ahead.

Barry: I think the reaction of the RIAA in the beginning that you talked about, you know, first they went after the *big guys*—they went after Napster—they went after all the big people that were facilitating this. Then, as you said, their fears, led them to start suing *individuals*. And that's when they had the biggest nightmare of a PR—

Rush: From a PR perspective. But it worked. I've seen the graphs showing where illegal downloading came to a complete stop because people were fearful. It was a chaotic time.

Barry: And that's when Spotify arose. They said, at least to some degree, we're going to compensate these creators. Of course, as we know now, it was one 100th of a percent of what they were being compensated prior, but at least it was something. Spotify kind of evolved out of that environment, and that's really what led to the streaming that we have now.

So, in answer to your question: I don't think we want to respond that way necessarily in the future. You gotta realize the position of the labels as well. It was "All of our contracts are based on albums. We defined the album, the sound-recording, you know. It's based on the suggested retail list price. So, it's all based in brick-and-mortar service, and here are all these kids who are downloading it for free. What we going to do?"

Loren: I think the other thing to remember is that it's a balancing act when there is a challenge. The Disruptor comes along. The Disruptor is inevitably a technological company. The Rights Holders are the ones who have been under this business model for however many number of years. And when the Disruptor comes along, it disrupts how the Rights Holder earns income. The legislatures are always concerned about not squashing the new technology, right? We want to make sure that we encourage new technology under the constitutional framework of IP.

We want to encourage the creation of new works and science and useful arts. And so, we're balancing that, but at the same time making sure that we don't lose out on the rights that the Rights Holders have. And it's taken us 20 years to figure this all out. I think we pretty much have it figured out now. . . until next month when something new comes, right?

Barry: That's right. That's right, yeah.

Molly: But one current struggle on that same balance that's happening right now is about the DMCA. Twenty years ago the DMCA—Digital Millennium Copyright Act—was enacted, which provided the takedown notice process, which I'm sure everyone's familiar with under copyright law. Just last month, or in December, the Copyright Office opened up questions and was seeking advice to say, "Hey, we actually want to know about your thoughts on a filtering system? How could we implement new changes to try to help Rights Holders on the Internet?"

And it's coming because there's all of this response, there's all this disruption from technology companies, from Tiktok, you name it, that are just putting out so much content so quickly. And Rights Holders are just sort of holding on saying "Yes there's this infrastructure in place for monetizing through streaming, but we're moving so quickly." If you go back to that balancing act because there are a lot of people that feel like "Hold on. There are uses where context matters. There's fair use. There's reporting under Umbrella 30s. You can't just set up a filter that says whack-a-mole, whack-a-mole, like YouTube's Content ID system.

So, that balance and sort of determining those two things is the ultimate question, I think, under copyright law. How do you protect Rights Holders and allow Free Speech, fair use, all of those things to exist? And then you also have lobbying groups with their own interests that are weighing in. It's a tough balance that we live in.

Barry: It is, it is. Professor Mulraine, you were talking about the Constitution in trying to balance that. We do want to encourage new technologies. But on the other side of the Constitutional balancing act is the person rights, so we certainly keep that in mind as well.

Loren: I think ultimately what's happened is, for the last 20 years, the record companies—you mentioned the 30 billion in 1999—had to figure out a way to survive when the sky was falling. And I think that the way

they figured out is how segues nicely into what Rush is going to talk about.

Rush: So, the 360 deal. You've probably all heard about this, but seventeen-eighteen years ago, everybody's going like, at least on Music Row, "360 deals, what the heck is this?" And it's all new. And, first off I got to say, I know why I'm on this historical panel, because next year will be forty years since I started practicing on Music Row. To give you an idea of technology at the time, the biggest new invention was something called "FedEx." So, instead of mailing letters to other attorneys, you could get it to them overnight. It was astounding. That's how much we've changed.

So, we had a relatively stable system in the music industry because of this thing called CDs. You'd listen to the radio, hear the music, go into the record store, buy it, and everybody made money. The record companies, publishing companies, the artists, the songwriters. It was really a very stable time.

And the disruption with digital technology occurred in the late 1990s. Suddenly, people are giving away their music for free. CD sales just plummeted. Barry was talking about how much the music business suffered but was still able to survive, but here's what's happened.

So, the record companies were making money selling boatloads of records and the artists were making money by touring and selling merchandise. When the sales just almost came to a screeching halt, record companies had to figure out a way to survive. So, they looked around. They said, "You know, artists, you're making a lot of money touring. We want some of that. You're making a lot of money in merchandise. We want some of that. Publishing. We want your publishing. And on and on and on. That allowed the record labels really to get their footing again. It was probably about 2003-2004 when this concept came.

I was telling my Molly, I had this young lady named Hayley Williams and a group called Paramore. They were offered their very first 360 Deal they ever did. Haley was only 16 years old at the time. And I remember Kent Marcus and I were her attorneys, and I was thinking, "What the heck is this? Why are we giving away this stuff?"

But fortunately, we were able to get some nice things in return, and I think it helped with their career. It was kind of the transition from this idea of a record world to sharing the receipts, the income net receipts. As you grew in your career and as an artist, the record company benefited from this 360 concept, but you also benefited as well because you're getting paid a share of
of the total revenue. I think that helped make the transition until technology allowed for streaming. and now we're kind of in a stable position in in our industry.

Molly: Yeah, absolutely. It's an interesting thing. So, from a 10,000 foot view, a 360 deal is—now I'm sure everyone knows, but I want to make sure we're all on the same foundation—the record label says, "Hey, we're not getting enough for record royalties. We're going to take a little piece of your whole career, hence 360." They take a little bit of your touring, a little bit of your merchandise, a little bit of your publishing, and a little bit of your endorsements, anything you're doing. And they weren't doing that before because they didn't need to. They were selling twelve songs on a physical CD marked up at Walmart. All of a sudden, that went out the door. In their defense, the record label is pouring money into developing an artist, and the artist is out touring, and the label isn't seeing any of it. So that is sort of the foundation.

So one question I want to talk about is a group is how 360 deals have advanced over the last twenty years, what we're seeing today and how other business creative individuals are using that same model and developing artists knowing that, "Hey, we're investing in you as an artist, and we need the publisher doing our settlement deal or producer. I want a little piece of everything."

Rush: So, it really comes out of the artist manager, because that's what they do. They get a percentage of everything. It's not like it's new to the business–the record companies just didn't need to do that, and of course artists were going to push back, especially their lawyer.

Molly: Oh, yeah.

Rush: We, as lawyers, were going to push back about 360. First off, Nashville was the last city to embrace it. Like what is this? But the concept was already there with the artist manager where you get a

percentage of everything that that they do. That's really what the record companies are doing now.

Molly: Yep.

Loren: The problem early on, though, was that the percentage was ridiculous, right? 50%.

Rush: Yeah.

Loren: Like you said, we always pushed back on it from the client-counsel side. But now there's
there's a lot more of a variety of other deals at that point, right. Maybe there's only X percent for this particular segment and Y percent for that segment. Maybe it only kicks in after a certain point in time and so on. So, the deals have become more sophisticated that's what you would expect in anything that's brand new, you know.

Barry: It really is a pragmatic matter, the return on investment in the initial stages, at least. It was, again, a pragmatic reaction to what was going with technology. We can't make money selling records, so how are we going to make this money? We got to take all of the artist's money. And so, and that's when the artists and the lawyers pushed back saying, "Wait a minute, you know, it really needs to be more like a management deal where the labels get 10%, 15%, or 20%, not 50%. So, we started starting getting to numbers that were a little bit more reasonable.

The other thing I found during that time that occurred when the label started doing this is that it really encouraged the independent side of the industry to start thinking, "Well, all the label can do it. We're helping this artist. We can do the 360 deal, too." So, you have a lot of the—I sometimes refer to as the bottom feeders in the industry—started feed into those types of deals, too.

Molly: Yeah, I think it's definitely shaped the 360 deal. A lot of independents are like, "Hold on. I'm almost looking at an artist's career like a tech company, like a start-up, and I'm an early investor. We're constantly, as attorneys, I think fighting that good fight. We're saying, "these are

individuals, these are humans, they're not a commodity. Yes, you need to be rewarded but at what cost, and where is the fairness line?"

Loren: By the way, I think it's interesting to watch, as you look at the deals that we've seen over the last year or two with legacy artists selling their catalogs back to labels. Yesterday, Sting did 300 million right? And in the last few weeks we've had Dylan, couple 100 million. Springsteen 500 million. Paul Simon. Others, right?

What does that really sound like to you? To me, what it sounds like, is exactly what you do in a business plan when you're setting up a new business. And part of the business plan is the exit strategy. That's essentially what these artists are looking at this as, an exit strategy. We're now selling our catalog back and you know, going back to the ranch with $500 million. Sounds like a pretty good strategy, right?

Molly: Yeah, that's it's true. It's interesting that catalog sales are such a hot topic right now, but it copyright 101, right? It's an asset. You have ownership rights in it, and you're selling it. So, yeah, absolutely.

Barry: I also heard that one of the reasons why there's so much of a proliferation of catalog sales, particularly last year and into this tax year for corporations, is that there's speculation that the capital gains tax will be increased. Therefore, they're wanting to get the sales done before that happens.

Loren: I think it's also easier for aging artists to do estate planning based on dollars and cents than on IP rights.

Rush: That's right.

Loren: And I have clients who have had just crazy fights over the family on the IP rights. How do we divide the rights? Do we sell the IP rights? You know, things like that. But you don't have that worry if an artist has $500 million and five kids and they say $100 million each. That's the other story.

Molly: The problem is still there.

Loren: Right.

[Laughter]

Molly: Professor Mulraine figured out World Peace.

[Laughter]

Well, let's shift gears a little bit. We have some questions that Belmont Law students provided us that are a little more personal. We'll just run down the panel with these. So, we'll start with you on this one. What is the biggest change that you can identify from the beginning of your career—other than FedEx—to now?

Rush: The biggest change, well, I mean it still goes back to technology, just the whole streaming concept. I mean it, you know, I can remember 20 years ago, because of the whole disruption with illegal peer-to-peer downloading, people were saying, "You know what, we need something in the music business like the cable in your home. You'd pay monthly subscription fee, say $50.00 or whatever and you get all these choices."

And I remember that. I remember that. It really resonated with me. For about ten years everybody was going "Yeah, that makes a whole lot of sense." Of course, then Spotify gets set up and all that. So, my answer would be this. Streaming, I think, has calmed the waters. It doesn't mean that there's not still some movement or disruption underneath. The music industry right now is in major lawsuits with all the streaming companies, you know, the providers, because everybody's trying to figure out what percentage do they pay and what's going to satisfy the music industry.

But I'm just wondering, what's next? That's the thing about it. I think we went through this period of transition. It's calmed down. The music industry has grown back to where it was literally 20 years ago and are we at peace now. The Music Modernization Act is a is a recognition of everything calming down and working for a while. But for me, I just wonder what's next. What's the next technology that we're going to have to we're going to deal with.

Barry: I think both Rush and Professor Mulraine can probably attest to this. When all of this disruption happened and the flow of revenue stopped going to songwriters, publishers, the record label -- that affects lawyers, too. Everybody in the industry, you know, is paying us to do

work. But if they don't have any revenue, they're going to stop paying us to do legal work. So, for me, it affected my business because I had to expand it to incorporate a broader-based type of entertainment client. That's when I started looking for other clients, found Damon John and other celebrities in different entertainment segments, and started broadening my approach to a licensing focus rather than more of a just a music focus. So, that's how it affected me.

Molly: I think the biggest change I've seen is just social media in general and streaming. I would say those two items. This maybe ages me, but Spotify came out when I had just graduated college. So, for my whole music business education, streaming did not exist. You know, when you grow up with it, it comes with a different reality. But yeah, I think social media has been the biggest change for me because, to Barry's exact point, musicians could go direct to consumer. They did have the opportunity for other deals. They didn't have just one platform with a label that was their
PR team. And now they have followers that can talk to consumers directly.

And so, I think that's been a huge change in my career. Even just seeing FTC regulations and changes as artists, influencers rise. And to answer your question, Rush, of what's next? I think that's probably right on the immediate cusp is there's so many service providers that started. We started with MLC, then SoundExchange for non-interactive, and obviously performance rights.
But there's a lot of licensing and uncaptured revenue that is constantly flowing through TikTok, Instagram and there's this storm brewing under the water. I think we're going to start seeing that more and more, especially as corporate entities are going to have to start battling themselves.

So, it's traditionally been Rights Holders, musicians, record labels against corporations. But now you've got companies that are media companies that want to use music, that are trying to get secure the right licenses, and they want to use social media. You've got this web that's starting to create itself. So, I think that's what's on the cusp.

Loren: I agree with all of the points you guys have mentioned. I would add one more thing. I think that today's artist is far more knowledgeable, far more educated about the system and how it works. So, when I started

in this game back in the 90s, people were dying for record deals. Running across the burning sands for record deals. Now, I'm working with hip-hop artists who don't *want* record deals. Right? We've got our ecosystem set up right here, and if you want to give me this deal, Columbia Records, you've got to come with all these things.

And by the way, I want to have ownership in masters, I want to have this, I want to have that…and it's because, going back to your point, Barry, of the rise of the internet.

Barry: Exactly. That's right.

Loren: So, the information was not readily accessible. Now, all of these artists are growing up with this information. They know how deals are done, and they hear about other people's deals, and they're basically saying, "Hey, I want to have some equity in in what I've created." So, I think that's a long line of social media.

Molly: Which is such an important change when you think about the process. If you think about a record deal from a 1,000 foot view, the record label is going to pay for the recording and put all of these resources, but you're going to recoup, you're going to repay it, *if* you're successful. They will offset that investment. They own it. There is no equity for you, and you receive a small royalty of 16% to 20% on average. If you were to apply that model to almost any commodity, industry, they will go, "Wait a minute, I want to own a piece of it."

Loren: And then on top of that, after you pay for the record, the label still owns it! There's no other industry where that's the case. Doesn't happen when you buy a house or a car. You own the house after you build the house.

Barry: To your point about the educated artists these days, an associate had a situation where he's explaining the law to somebody, and she pushes back and tells him about her Google search. That reminds me of something I saw on a coffee cup that says "Don't mistake your Google search for my law degree."

[Laughter]

Rush: That's right. That's true.

Molly: Oh, goodness. Awesome. Well, our next question is I think probably geared towards our law students a little bit. When we entered into the entertainment industry, which we all did at very different times, what reasons did we have for wanting to be an entertainment attorney and being in the entertainment industry? Also, how have those reasons changed? So, a little more philosophical and personal on this one. Anybody want to take it?

Loren: Rush and I kind of come from the same place.

Rush: We did.

Loren: We were musicians first, right?

Rush: We were musicians, that's exactly right.

Loren: When I moved from D.C., I thought I was this unique animal who could play multiple instruments and sing and write and produce and do law, and like half the lawyers in town had those skills. So, you know, that's what we came from.

Rush: It's true. And a lot of lawyers I've met do have a musical background of some kind.

[Molly raises hand]

Rush: You, too? Are you a singer? What are you?

Molly: I play the clarinet!

Rush: Oh! So yeah, so you had an interest. Which was surprising to me though—I didn't know anything about the music business—I didn't grow up in it. So, that was a shock. It was the misconceptions I had about it. It was amazing, and everybody kind of starts in the same spot. You have to figure out. You know, we didn't have a place like Belmont Law School with teachers like you to explain it. We had to figure out.

Barry: Bookstores and libraries.

Rush: Bookstores and libraries, that's right. And asking other attorneys, "how does this work?"

Molly: It's interesting, sort of coming full circle with the topic of facing the same problems over and over, but it's probably the same solution: it comes down to relationships, and it's hard. I mean, getting into law school is hard. Getting clients, keeping clients, staying up on your game, meeting everybody expectations or stuff like that. It's hard. And the cycle continues, so.

Barry: For me, it was my brothers who got me into entertainment. Like I said, I played drums, my brothers played guitar and keyboards. We had a band growing up. But I decided I wanted to be a geology professor. So, I went off to go do that and sold my drums.

About two years in, I got a call from my brother and they're setting up a music publishing. Now, I say this without any arrogance; I've always been the smartest of the three.

Loren: So, they're not watching today?

[Laughter]

Barry: So say they call me and they say, "We're going to do this. How do we do this?" and I said, "Well, I started researching corporations, music and music contracts. Again, this was at the time when you had to go to the bookstore. You didn't have Google.

Rush: You didn't have Google. You had to figure it out.

Barry: Right. And, I figured it out at the library, and I enjoyed it. So, I started thinking about law school, and I went to law school. The rest is history, and that leads me to something else. You [Molly] mentioned that I like to defend the rights of the creator, and that's textbook for me. That's based on the fact I was trying to protect the rights of my brothers. I have an affinity for that side of the equation. I think that it comes naturally if you have that kind of belief of defending creatives and valuing the creative brain.

Molly: I agree. Oh, I guess I didn't answer the question. Let's see. Yeah, like everybody, I have a passion for music and entertainment. I grew up

playing music, and I loved the idea of being able to help creative individuals. In life I've gravitated towards creative individuals and just wanted to help advocate for a living.

Awesome. Well, are there any questions from the audience? I think we've got a few minutes or have any comment on zoom. We've got some others that the law students sent us, but I want to open it up. Yeah.

Audience 1: You talked about the evolution just going from no Internet to the Internet. And I know going from paper records to digital records, including organizations like the MLC, there's been a lot of disputes about the rights when everyone has their own independent database with rights. Do you see this problem getting any better? Where? Will the organizations come together to make records more clear and more quality or is it getting worse?

Molly: Good question. My personal thought process is having a centralized database has been a conversation that I remember since like the beginning of time of my awareness of the entertainment industry because it is so convoluted and there are so many different rightsholders. I've been to a lot of panels where attorneys and individuals that love to advocated that blockchain can be utilized
and can be a solution. I'm an optimist, so I want to say yes, that there will be a solution maybe 100 years from now. But, I don't think it's going to happen anytime soon. I do think that the MLC has taken a lot of great steps and have added a lot of transparency and want their information to be public.

SoundExchange has gone through the same system of there's always disputes coming in of different rights holders trying claim different masters so that they're pictured artists or they're not. MLC is facing the same thing, and it's not fair to put any of those organizations in a place of an arbitrator or a court. That's not their role. But yes, I think it's a huge issue that's going to have to work itself out, but I don't know. I think everybody says they want a solution, but I think all the rights holders secretly kind of want to hold in their back pocket what they don't want to be.

Barry: You know, the MLC had a year to put it together, and I think they used a conglomeration of ASCAP, BMI, record labels, publishing companies and all these different stakeholders, as you

call them, have different databases, they have different needs for the data, right. Publisher wants to know who wrote the song and what the shares are. Record label might want different information etcetera, etcetera. And so, when you try to cram all that together, you got a lot of clean up, right? And so, I don't know if they're there, quite frankly.

Rush: Yeah. Yeah, right. And they can give great incentive. You get paid if you provide us your
data. Many places cannot do that. You get paid if you provided accurate data. And I think, so far, it's been successful in those regards.

Barry: To some degree. You know, I talked to Dan Hodges, and Dan's got a history in this business. He's a publisher. He's catalogued. He logged into the MLC and looks in there and just about every one of his songs contained incorrect information, incorrect data, when compared to his records. So yeah, it is incentive certainly and they're inspired to do it but it's a job.

Molly: And that's just publishing. I mean, that's the hard part, right? Like we're just talking about one half of our industry. Publishing, not the labels. That's a great question.

Audience 2: These new technologies, particularly streaming, are really, really great for the music consumer. Like, I was on a streaming service, and it's amazing. So how does that factor into this conversation?

Rush: So, from a consumer's perspective?

Audience 2: Yeah. You've talked about these tech companies and the artist, but in the middle is the music consumer. So, how do they affect either side?

Molly: One thing that helps me think about this is actually the pandemic. This is what I always go back to. People want content, and they love music. The core of why we all said we want to be part of the entertainment industry is because we love music. If this industry is an orbit, everything orbits around the sun, and the sun is music. It changes people's lives and makes you feel better. Puts you in a better headspace, whatever.

So, I think that having an artist connecting with consumers is the heartbeat of our industry and it's the core of why everybody keeps going. It's why record labels were like, "We can't fold up, we've got to keep going." I mean I would like to think that. But I think that fans and consumers push industry, and they are the lifeline, and they are what give artists a reason to get up and play every day. So, I mean, I think they're the core of all of it. We're just sort of orbiting around, if that answers your question.

Barry: And the problem is, of course, the balance. Because Napster was all about consumption. I mean, the consumer got everything they wanted, but they got it for free, right? And that can't be the solution, right? Think, from the consumer perspective, are you guys really getting the experience of the music through streaming? You don't own the music anymore, you're licensing it. When we were young, we would open that album, read it cover to cover. We would sit there with headphones and listen to it, and it was an experience. You guys don't have that anymore. Now, you just turn on Spotify and pick your song and listen to this song. Sure, you can download it, but if you unsubscribe from Spotify, it's not yours. You lose it.

So it's definitely, as Molly said, it is what drives the industry, for sure. But we have to balance it against the rights of the creator.

Molly: Yeah, I think we're low on time, but I also think part of it is educating. And that goes back to what the RA did try to do when they were going after this pirating issue. I mean, it really is about educating musicians. Saying, "You have this artist, do you want them to keep working? Pay for their services, come to their shows, buy their sweatshirt, show up." A lot of that is that just education.

Loren: So, tying back into your question, I think that the last link really is, it's great for consumer.
It'll be greatest for the artist when the artist can truly connect with the consumer, right? So imagine a light plug. You're plugging a plug into the wall, and it's not all the way plugged in. The light kind of flickering. I think that's where we are right now. The light is flickering. If we, really can connect to where the artist gets that same access to the data that the tech companies have in order to sell you more stuff, if the artist can get that same access to connect with them directly, then I think we'll really be able to light the room.

Molly: Man, that's just the high note to end on. I'm here. Illuminate. Awesome. Well, if there are no other questions, I think that's our time. Thank you again for having us.

[Applause]

Third Panel: Streaming, Social Media, and Sync Licensing

Nathaniel Hobbs: Hi, guys. Really quick, can you guys hear me at home?

[nods]

Todd Mumford: Yep.

Nathaniel: Perfect, perfect. Sounds like your audio is coming through very clearly here too. That's good. That was our second biggest concern.

[laughter]

Well, hi everybody. Welcome to our third final panel of the day. As I mentioned earlier, my name is Nathaniel Hobbs. I'm the editor-in-chief of the Belmont Entertainment Law Journal. Our final panel today is titled Streaming, Social Media and Sync Licensing. And we're going to attempt to analyze how modern methods of content creation and viewing and sharing have created new opportunities in the entertainment industry as well as new obstacles to be overcome.

So just to my left is Lauren Spahn. Lauren is a partner at Shackelford, Bowen, McKinley & Norton, LLP here in Nashville. She represents the legal and business interests of recording artists, songwriters, publishers, promoters, producers, managers, agents, just about everybody you could name in the industry. Lauren also handles complex transactional and litigation matters related to copyright, trademark, and intellectual property law. She has experience managing international trademark portfolios and advises her clients on licensing matters and infringements cases.

On Lauren's left is Ricky Hernandez. Ricky is associate at Shackleford, Bowen, McKinley & Norris. His experience primarily lies in entertainment, intellectual property, and corporate law with a broad knowledge in the areas of music, technology, commercial lending, mergers and acquisitions. Which, as was noted during the last panel, that is what the entire entertainment industry is built on. Ricky's broad range of experience in complex corporate and entertainment transactions provides him with the opportunity to better understand the marketplace, which in turn allows him to be the best advocate for his clients. This

practice focuses on various aspects of copyright, trademark, and intellectual property law. He's assisted clients in different industries to register and protect their intellectual property, and he understands how important it is to stay informed on the quickly changing world of intellectual property.

Joining us from New York, we have Emilee Morgan. She is the Manager of Creative Licensing at Zync Music. Emilee received a Bachelor of Music degree and Music Education from Georgia State University and a Master of Arts and Music business from New York University. She spent her career coordinating and licensing musical placements across various forms of media. After spending a few years working in Nashville, she returned to New York where she now provides full-service licensing for companies. Zync Music specializes in sync licensing for advertising, film, television trailers, promos and games.

Also in New York is Todd Mumford, Counsel at ByteDance. Todd began his career in California, where he oversaw and managed the day-to-day legal services for a variety of A-list, recording artists, writers, labels, and more. He negotiated and drafted volumes of entertainment industry agreements covering a variety of topics. He was the Director of Business and Legal Affairs at Myspace, advising other departments on various rights issues related to their content programming and event integration. In 2016, Todd became the Vice President of Business and Legal affairs for Roc Nation, working in every aspect of modern entertainment. Todd now serves as Counsel for ByteDance, a multinational Internet tech company and the parent company to the social media powerhouse TikTok.

Thank you, guys, for joining us. Thank you guys as well. Very glad to have you all here.

Lauren Spahn: Thanks for having us.

Nathaniel: Of course. So, one of the biggest questions that we've had pop up throughout most of our panels today is how social media can create more opportunities for people to break through in the industry. But also, with that, it seems to me there comes with it a double-edged sword. There comes too many people breaking into the industry through social media. So, do you guys think that media feeds are innovated with songwriters, producers, performers? Or do you think that having all of

that opportunity just creates more, those opportunities provide for more and more great songwriters and producers to shine through?

Lauren: I mean I think it's a little bit of a double-edged sword. I think that it provides a variety of outlets that creators can exploit their content, get stuff out there, as well as opportunities that they can then monetize. Whether it's through influencer agreements, brand deals, sponsorships, or just the fact that there may be someone that hears their music that's out there, it provides more opportunity than, you know, traditionally the creators have had. In the same regard, you know, there, because there's all these different platforms, you often question which one should I be on and how should I be getting my music out there, and you look at the variety of people that are exploiting their content through, you know, these variety of mechanisms. And so you're left thinking, well, how do I get above the thousands of people that are out there doing the same exact thing as me?

Ricky Hernandez: Yeah, I think it's really interesting. I remember vividly kind of a time, right when like both the equipment and technology and software for creating your own music and putting it online and getting into the masses and marketing, that became much more prevalent. I mean, it really started sort of 10 years ago. I think there was this sense, right, that like finally like the gatekeepers are gone, right. Labels were going down, publishers are going down. We're going to do it ourselves, and I think once that happened and more and more people flooded the market, the role of the, and I don't mean it's a negative term, but the role of the gatekeepers became more important, right?

You still have people that need to be case makers that need to sort of cycle through all of that information and all the different types of music. And so it is sort of a double-edged sword where it's like, yes, you have this sort of ability to go out there and do it yourself as a consumer. It's excellent and it's sort of new, but at the same time it is just a tidal wave at all times of new music and you need someone to help you. So, the role of the label, the publisher, the distributor, the marketing platform, the social media platform has become even more important than it ever has.

Lauren: Same with the role of the algorithms and the data and the information that's collected. That's become even more important, which

again can be a double-edged sword because you're going after the metrics often time instead of, you know, long gone for the most part of the day is where you would have someone at A&R who would go to a bar and see the show and find talent that way. They may still go out and watch people perform, but a lot of times the people are on their radar because of the metrics and the technology that they're using to see what artists are spiking in different ways.

Nathaniel: You mentioned the algorithm. That was actually a question that I had queued up for Emilee. So, in your career with sync licensing and things like that. Is there sort of an algorithm that you guys look for like this will be the hit song that will go perfectly here or is it, you know, is content still, I don't want to say more honest, but is it a little less robotic I suppose?

Emilee Morgan: It is kind of all over the place. So, with sync licensing, it depends on what's hot in the moment a lot of times, especially with ads and promos and things like that, it shifts and there isn't necessarily an algorithm. What we're looking for as far as artists and songwriters for us is, you know, a big professional sounding sound because there is such a wide range of what is needed in TV, film ads, promos, video games, that it can kind of go all over the place. I know you probably don't love the answer.

There's not really an algorithm. It just has to be quality and it has to be good. And to kind of go back to the, what that last question was with social media and having more opportunity, I do think it's great for content creators, for musicians, for artists, because it's a lot easier for me as somebody who's looking for new artists to just pop online and see what they're doing in real time. And it's a lot less time consuming for us. Still go to shows, we still check people out, but from my perspective, I think it's a little bit easier. Yeah.

Nathaniel: Great, thank you. Well, that answers the question about at least getting sync placements. But how pervasive do you guys think the algorithm is on services like TikTok or Instagram Reels when it comes to kind of curating creation on social media platforms to get the initial exposure to then maybe find what's hot at the moment to get a replacement?

Emilee: Sorry, I only heard like the last half of that. My apologies.

Nathaniel: How pervasive is the algorithm on services like TikTok and Instagram Reels and the approach to the creation of the content before you guys ultimately decide, you know, this is what we want right now, this will be perfect for what we've got going on. Do you do you see sort of any mechanical repetitions or content creation there? All of you feel free to join in if you have clients who may be facing similar issues.

Lauren: I mean completely, one of my clients is a company called Song Blitzer, and they are, you know, a technology company that basically at its core, helps to connect music creators, whether it be major labels, independent artists, with influencers and they engage in marketing campaigns to get songs pushed through the influencers, right? That's an algorithm where you're looking at influencers, how many followers they have, the amount of views you think they might get if they put, you know, a specific song to a video that they post, right? All helping to make a song go viral and to push the song across all different types of audiences.

Todd: Yeah, I mean on TikTok there, there's no algorithm used to determine if something's going to be successful. We use an algorithm to determine what content to put in front of the users. And then of course, we have data to see what's trending, what's leaning towards going viral. As most people know, you can't really predict it sometimes because it's so random. I mean, the Fleetwood Mac, cranberry juice thing. No one would have guessed it right? And it's not, it doesn't stick to any kind of like conventional wisdom. Not necessarily the most popular artist or most popular song off TikTok, is going to translate to being the most popular on TikTok. It just comes out of nowhere and next thing you know, everyone's doing a sea shanty.

Ricky: Yeah. No, I definitely think one thing that's been fascinating to me in the last two years has been sort of the initial conflation between something that's viral and stuff that'll make money. And I think the general public just seems, well, if this thing made 1,000,000 likes and was all over the place for one week, well then, that artist must be crushing it and not totally realizing that sometimes that does equate, sometimes it does get them the resources and the connections they need to get into what you would consider successful in music industry. But oftentimes it doesn't.

I think that was initially what you saw during the pandemic. I mean we had this happen with one of our clients where you know, publishers and labels were like “that person's viral, lets sign them right now.” And then come to find out a month, two months, six months later, it was like “why aren't they doing anything? How come this hasn't translated to dollars and cents for us?” So, I think people like shot forward one way, and now they are kind of backing off and thinking “let's see how we can make this work,” and not just solely rely on the metrics and the fact that something went viral on social media platforms.

Lauren: Or there's been people who have been offered deals or companies that have wanted to offer deals to artists based on, right, a song that went viral and they're watching the metrics and they're like if we can't sign it within this amount of time, then their interest in that project just completely goes away. So, we've seen from the perspective of even deal making, the ability to have to act quick and respond quickly and really all while trying to vet opportunities. And to make sure that it really is something that is in our client’s best interest as opposed to they're just really excited their song went viral and these companies are reaching out wanting to sign to various deals. You know are you necessarily taking the best opportunity for you, or should you wait like Ricky said, right stop, wait and see really if that took off you don't know what the ripple effects can be. Which can then you give you more leverage in future deals.

Emilee: I will say from my perspective, I obviously can't speak for every label and publisher, but when we're signing somebody, it's not because they had a viral song like ever. Like if somebody has one viral song, that's awesome and it might catch our attention. But if there's not the stability in their catalog and the stability of their network and the people that they write with or the stability of their, you know, being, are they able to write to brief that like those kinds of things, that's really what we focus on. So again, I can't speak for every label and publisher, but the stability and like kind of the bigness of their, of their, of their body of work is a lot more important than one viral song for sure.

Nathaniel: As a consumer, this is all very reassuring to me because it turns out media that I'm consuming is not just being pumped out by some machine. That's very good to know. There's still some honesty left, and I like that.

One of our biggest questions that we had coming into this symposium and sort of planning this panel specifically is TikTok. You just can't ignore it today and in this day and age every day that I'm on there right I hear a new sound bite or familiar audio and just because of how my brain is a law student and I have a music business degree, I think what kind of nightmare did it take to clear that? To get all the rights together into one place to actually get this song on TikTok. And then my second thought is well surely they didn't actually do this. So, my question is how do you guys think TikTok and the way that audio can be synthesized and created and edited, alter, reuploaded, taken down all in the blink of an eye. How do you think that really affects the rights holders in those musical compositions and recordings and how does it affect you guys representing those people?

Lauren: I mean, I think there's a few things you have to step back and look at right. One, TikTok is a platform that has certain protections in place that help protect them. When you upload your music or you revise, you know, alter something and put it on you're agreeing to their terms of service. Which basically will say you have the right to do that, to put that up there. On the flip side, they have gone in and negotiated pretty broad agreements with, you know, a variety of labels that have certain terms that are attached to it that give the right to create content in a certain way or use content in a certain way.

So, if you're an artist who's or rights holder who's signed to one of those deals, you've likely granted the right in the recording agreement for the label to enter into agreements with third parties that allow them to do certain things. So, from the perspective of, you know, an artist that's been signed, that person, as well as right their attorney that represents the creator, is oftentimes not doing anything with regards to how things are being used because they've already granted that route to their label or publisher.

Todd: Yeah, I mean, TikTok is unique in the sense that it's both a UGC platform and we have a licensed music library. So, you know, to the extent people are creating unauthorized derivative works, we would be subject to Safe Harbor protections as the UGC platform and then users can select from however many millions of songs we've licensed in from labels and publishers around the world. And then some things you see are authorized, you know, it just kind of depends on the context and whether it's the product of something that was intentional.

As far as a campaign or if a user just started with something that people have piled on and it just became something different along the way and I think rights holders aren't as quick to pull the trigger sometimes if it's getting a lot of attention. Even if it wasn't officially authorized, like just say a UGC remix, but it's putting the spotlight on the artist and people are seeing it. It's kind of like the old mixtapes, like actual cassette mix tapes, right? Those were never really authorized or licensed, but they were a way for labels to get their new songs in front of the people they consider tastemakers, and then that would help the project along the way.

Emilee: We don't worry about UGC really like you just use UGC if you like every five videos when you get an ad, though, that's stuff we do license. Specifically, if it's an ad or a campaign, but everything else is blanket.

Nathaniel: So, as you know, we've been circling around digital content creation platforms. We talked briefly earlier about streaming platforms and things like that. How do you guys see these digital content creation platforms changing the job market whether it's for compliance or even for you guys. You know, 20 years ago I would have never so I was very young 20 years ago, but I'm sure other people would not have thought, you know, I could take songs and synchronize them to
add campaigns. 20 years ago and I can make a living doing that. So, do you guys think the job market, so to speak, has changed for content creators and the people who care for content creators or work with them professional?

Lauren: I mean, I think it's evolved. I think that content creators have more opportunities for revenue sources. You know, I think we saw that during the pandemic where artists who couldn't go out and play shows had the opportunity to do, you know, live Instagram shows or they were doing, you know, various influencer agreements for they're putting stories up around certain products or certain brands, right it, it allowed them to continue their money even though they couldn't be on the road and play and perform. So, I think from the creator perspective, it's open doors to new revenue sources and new ways to partner up with, you know what used to be you had a company that would sponsor your tour. Well, now you could have an exclusive deal with a, you know, guitar

company where you're now promoting it on social media as opposed to when you're out on the road.

Todd: Yeah, I think, sorry, go ahead.

Nathaniel: No, I want to hear from you, go ahead.

Todd: I was going to say we also we have to understand what like what are we talking about when we say opportunity, right? And more opportunities or less opportunities and are these people actually making a living? Or are they, is this a revenue stream in addition to their day job? I would say there's probably more money floating out there now to attach brands to individuals who are not necessarily famous creators with some influence or influencers. But, you know, it's kind of a question of whether the pie is the same, it's just getting sliced into smaller pieces or if there's actually more money out there for more people to take part in, right?

I think there's definitely a public misconception that if you're really big on TikTok or some other platform, you're living the life. And I don't think that's necessarily always the case, but I think going back all the way to the first question, yeah, you have an opportunity to put your music, art, whatever it is you're creating in front of more people instantly. But does that mean more opportunities come your way than, say, if you were a band in the 70s out doing live shows trying to get noticed? I don't know. I don't know if that really changes the metric as far as like, if your ultimate goal is to get signed to a record deal, I don't know that it's easier today than it was 30 years ago.

Nathaniel: That's kind of what I was going to say next. You know, we have these opportunities whether they be lucrative career moves or if they're just side hustles, but the opportunity is still there. But kind of again going back to the first or one of the first questions, how can you help your clients or anyone that you're working with sort of shine through all of that? You know if everybody in this room was on TikTok and voting song, you know, maybe one out of the people in this room would go viral and whether or not viral means successful financial or in the long term, how would you guys help anyone who might be on that path sort of shine above the rest so to speak?

Lauren: Authenticity. Authenticity, I mean, I think that it's really hard to sell something if that's not who you are and you don't believe in it. And I think that there's a lot of influencers, content creators who just jumped into all these different projects with brands and pushing different things and their channels became just saturated, right? And I don't want to follow someone who they're just pushing so many things that I can't really focus in on, on what who they are and what they're trying to do. So I mean, I think for me the most, the number one most important thing is that they remain authentic to what brand they want to be represented by, who they are as a person, the type of music and things that they want to put out there. Because that's when people will, will follow and will listen is when they believe that you are who you know you're portraying yourself as.

Ricky: Wholeheartedly agree. I think just as important, but in terms of kind of like practically how to help the client, still think it's two main components. One, education, right? I mean at this point there are so many different ways that content creators can make money, but if they don't know about it, they're missing out on real revenue. I mean sound exchange is a great example of that. The number of new clients that would come to us and one of the first questions we had was "so like you're registered with the a PRO and with SoundExchange?" and they'd be like "what are those?" You know and then you get to sit down and have another conversation of like "well here's ways you could have already been making money" and explaining what things are, where the revenue sources are.

The other aspect like I said, it's just a network. I mean this industry is still very much run on who you know, how to get on what playlists, how to talk to what producers. I mean it's making sure that you're getting those clients in front of the right people at the right time. The right time is important part of that too. You do that too early before they've sort of gotten to where they need to be from the technical standpoint, then they won't get the right shot. So right person, right time, I mean that has been pervasive in entertainment for decades and it has not gone away just because anyone can make a really cool song or really cool video in their garage. And so I think for us as attorneys and as advisors, that becomes as important as ever.

Emilee: I think from a, you know, a content creation perspective, what's also really important is, you know, not just uploading one thing and

hoping that it goes viral and waiting days or weeks before you do more content you like. Content is really important, especially if you're brand new and you're indie. I mean, that seems really, really obvious. But I've spoken with people who kind of expect to pop off, even if the music is amazing, if it's really, really good, but they don't post often enough. And also interacting with people who like your music. That's another thing about social media that's in TikTok, Instagram, whatever. That's been really beautiful for indie artists is that they can talk to their fans on a daily basis, which hasn't happened before, and that is that garners more love and more fans. So just, you know, from an actual content like creative perspective, you know, put the content up and then react with it. This is really important. It's seems so obvious and like a very basic thing, but it's really important.

Nathaniel: I think those very simple things are often the hardest or something we're asked especially because something as simple as a guy riding skateboard holding cranberry juice could go viral, right? So Emilee maybe you could speak to this a little bit more, but I'm curious to get you guys input as well, what would you say are the most lucrative sync opportunities for songwriters and content creators that are out there? And based on her answer to that, how would you guys necessarily advise your clients on finding and getting those opportunities?

Emilee: That's a really interesting question because I kind of have this whole philosophy on it on a sync-by-sync basis. Advertisement is the most money, right? If you do a campaign with Samsung or you know, you know a big company, that's going to be a lot of cash. However, a huge worldwide campaign like that might only come twice or three times in your career. You know, if you're a professional, if you're writing constantly, and if you have a team behind you, honestly. I would say that more steady as far as sync goes is to not necessarily target ads in big brands and campaigns, but to become familiar with the supers who work on film and TV because you can have lots of syncs that add up to that money for longevity, and you're creating relationships with those supers who will come back to you if you're easy to work with and if they like your music. So that's the approach that I like to go for is, I mean, of course, obviously pitch for ads all the time. Like we love getting big ads. It's great. But as far as, again, the stability, I wouldn't wait on a huge, you know, $400,000 ad to come your way. Necessarily, I would kind of focus on TV and film and video games too. Video games are great as well.

Nathaniel: How do you guys necessarily help someone who wants to get a same deal find their way into that space where they do.

Lauren: I mean, I think having a publisher is a big component of that, right? It's a lot easier for you to get your songs, you know, pitched for TV, film, ads if you actually have a team behind you that has the connections you know to help facilitate those pitches. If you don't have a pub deal. I think oftentimes as a writer, writing with people who have pub deals, right, who are, again, if you don't have that team try to surround yourself with people who may so that that helps to further the opportunities. You know and I also know some amazing companies out there who are small, who focus in specific territories. And you know, if they believe in what you're doing, you may sign a deal with them to do one, two, or three songs or more that they pitch for you and they're pitching specifically for those types of opportunities.

So, it's, you know, continuing to put your music out there or to, you know, try to like Ricky said, right it's the network and the people that are around you so that you can have those types of opportunities come your way or people that you have those connections with. So, if you're doing, you know, ten different placements and with Netflix right, for different movies, it might be because you already have relationships there and you know as you continue to hone in on those relationships the more your songs will be out there, the more likely people are to hear it, and hopefully more opportunities will come your way.

Ricky: Yeah, second, all that, especially the relationship part of it is that the deals are out there. There are companies you know obviously publishers, but also just like Lauren mentioned specific companies that that's all they do. You keep your copyright, and they're going to take four or five songs and try to pitch it, but they'll never know you exist if you're just like sitting in your room hanging out. You've got to be out at night. You've got to be outside or finding advisors to help connect with those people. I can't tell you the number of times I've had clients come to me like "this company emailed me, said they heard one of my songs and they love to help with some sync placement." That's not an unlike, not a rare occasion, but you got to be out there.

Nathaniel: And going back to sort of the authenticity that we talked about earlier, obviously authenticity is very important when you pitch

someone try to help them find a placement. Emilee, do you, when you find a song and you want to put it somewhere, does the authenticity ever come across your mind? Like this song is clearly not very authentic, but I want that in my ad?

Emilee: So, again, it just depends on what they're looking for. If as an artist, so I'm looking, I'm looking for artists, I'm looking for songwriters, not necessarily like a song that like I want to pitch because we pitched so much to brief. So, the brief might be, hey, I need a guitar, something with a cool guitar sample and a female voice and it has to have the lyric about the sea in it, you know, like that's very specific and sometimes that happens. So again, it is all over the board. Anything is thinkable. Almost. Almost, because there's so much content out there that needs music. It's insane. Even over my career, which has not been like super long, you know, I haven't been in the industry for 25 years, but even since I started, it's just consistent, consistent, consistent request because there's so much content that needs music in the professional TV and film in space. So sorry to like, not fully answer the question, but it just depends. It just depends. Just be authentic. I'm sure you'll find a space if you are.

Lauren: I think it's being open to some of those opportunities, right? I mean, I've had songwriters or publishers who were given an opportunity. Hey, we have this scene in mind, we can't find a song for it. We need something in the next 48 hours, right? And it's, you know, we've had placements with. Like the Lego Batman Movie is a great one. 48 hours to put it together. They wrote this song, but then they actually loved the artist voice on the track too, and so they ended up using it for both sync and master. But if those people hadn't been there at the right time, they hadn't taken the opportunity to, you know, dive in and spend, you know, all day, all night crafting something with this specific scene in mind, they never would have had that opportunity.

Emilee: And those things do happen, which again goes back to why when we're looking for new artists, we want stability and we need to know that they have the ability to do things like that, because that does happen, not all the time, but it certainly does happen. We've have people right to briefs pretty regularly.

Nathaniel: So, I have sort of a big conclusive question for each of you. We will open things up for Q and A in a little bit. So, we've all seen

digital and social media empire sort of rise and fall over the years. You know, I remember when Myspace was the top social media app in the world, and now it's not. Even just last week, Facebook or Meta rather, just lost I think more than $230 billion market value. So, we know that times change, and nothing lasts forever, but with that in mind, I wonder if each of you based on your own unique perspectives and careers up to this point, you could sort of speculate on what you think might be next based on where technology is, where digital content creation and rights holding and management is, what are your thoughts are on where the entertainment industry as a whole is going?

Ricky: I can start it off, just that nobody else takes my answer. For me, I think this is coming through some clients that have come through recently in the last couple of years, but I think virtual reality is going to be a bigger deal. The way I've seen the virtual reality market is sort of like when iPhones first came out and you saw app developers, OK, who's going to develop this app for a device that almost no one has. Like that's sort of the stage where we are in the VR world, but I think that the virtual headset space is going to explode in the next few years and as those headsets become cheaper and more pervasive and content creation for those type of things is going to become immensely important because people are just going to want it.

They're just going to want to eat it up, and so I'm seeing some of my clients in that space and getting pretty excited and there's a lot of money floating around in that space which, you know, follow the money sometimes. That's how that works, right? So, I think that is going to be sort of another frontier, for better or for worse. I mean argument could be made that it's like, man, like what's the effect on live shows and all sort of stuff, right, like who knows? But I do think that it's coming one way or another. So, kind of being ready for and preparing clients for what that means both from a copyright perspective, both from a revenue perspective and opportunity perspective is just important.

Lauren: I mean, I think NFTS's, Bitcoin, you know, I think we're going to start to see even more opportunities arise and I think with that it becomes important for rights holders to retain the rights and the ownership that they can have so that those opportunities can flow through them. Whether it's with album artwork or it's with certain logos or images that are created in connection with content they're putting out or even just the music themselves. So, I think we're going to start to see

this, you know, complex world continue to get even more complex and that's where it really becomes important to know the rights that you have and to understand, you know, what new opportunities within that realm are out there.

Todd: Yeah, I mean, I don't think there's anything coming after TikTok (says the guy who used to work in Myspace). I mean, I do agree with the virtual reality, augmented reality concept being more prevalent, but you know what we see is iterations on something that's happened before. It's how you execute better than your competitor. Apple is a great example. They didn't invent a lot of things, but they made really good versions of things. You know, so what we're seeing is there's Myspace I think really kind of started this and then it just became too much. They tried once they were purchased by News Corp, tried to bolt too many things on. You know, creative tools, interactivity with people on the platform.

Once the platform starts growing, it kind of feeds itself because more people come in, but the ability to create something quickly, easily, connect with other people, and interact with other people. Those are the things that are working. Then if enough people come on the platform and add interesting content, it just continues the cycle, right? As a platform, we're always innovating, constantly thinking about what to do next and I think all other platforms do the same, and there's plenty of other competitors that exist now and there's people waiting in the wings just watching what is Instagram doing, what is TikTok doing, what is Facebook doing, what is Spotify doing? So, it's just going to continue on the path that we've seen over the last 20 years. It'll look something like it does today 10 years from now, but maybe with features we haven't even thought of yet.

Emilee: Those are all really good answers, y'all. So, I fully agree with the virtual reality and the augmented reality. We saw how Pokémon that Pokémon game just like swept people up. I think if it's a really good example and I think that more of that is forthcoming even to be able to use on your phone. Other than that I mean I feel maybe it's my personal opinion. I do feel like attention spans are kind of wavering, so kind of the shorter snippet, really hot, really funny, really great snippets of things, there's going to be more and more what we see on social media, see that on TikTok and on Instagram and it kind of got shorter and shorter and shorter and I think it still is. So, I think that's where it's going

to go. Virtual reality, augmented reality, and things that are cool for a very short amount of time.

Nathaniel: You actually brought up NFTs, which I know hardly anything about them. They are very complicated to me, but Mattie and I took a class last semester where we learned a lot about, well, we were supposed to learn a lot about NFTS and blockchain technology. I was just wondering, you brought it up, could you elaborate a little bit more on maybe some of the rights that would be implicated in entertainment and NFTs?

Lauren: Yeah, I mean with NFTS, I mean it really depends on what, what are you giving someone? Are you giving them the exclusive ability to own certain content? Are you giving them the ability to reproduce it and to you know, sell it to somebody else? Are you giving them the right to, I mean it, it all depends on exactly what you're giving that person and what they're doing. Can they go create derivatives of it? Can they use it to put it into like a derivative into some other content that then they go sell or exploit? You know, I think people want ownership, people want the ability to have some type of exclusive, you know, exclusive, right that's to them in a product or a service or a, you know, a creation that means a lot to them. So there's just all different ways that it can be segmented out in all different ways that could be implicated, and so I think it just depends on what, what is someone, what are they getting?

Nathaniel: I think the most interesting example that I've seen today, I think it was Kings Of Leon. They released an entire album as an NFT, but I believe that the golden ticket attached for live shows. I thought that was really cool. Still don't understand how it works at all, but you know that it good for you. I'll figure it out eventually.

Lauren: Blockchain, right? I think one of the things we will likely see more of is blockchain ticketing. I think, right, we go to shows. We used to print things out. Now we have a code that's on our phone. I think there are other ways that we're going to use technology to simplify how consumers have to, you know, what they have to do in order to sell a ticket or buy a ticket or go to a show and present the ticket. So again, you know, I think I think technology is just going to continue to evolve in a way where consumers can get ownership and things that they want,

but we can also simplify the process by using the advanced technology that we are starting to get a better understanding of and create.

Nathaniel: Great. I think it was our last panel we actually talked about sort of balancing the interests of the consumer and wanting those things. We want to be able to access them. Also paying artists, creators, their fair share if that makes sense. I hadn't thought about that. We've got just a few minutes left. I know you guys have to run out of here soon, but if anybody has any questions or anybody online has any questions online or in the chat, so feel free to take a look.

Audience Member 1: So, with your predictions with technological advancements with VR and augmented reality, do you think there's a way that the industry can legally prepare for technological developments that are more proactive rather than reactive to these changes?

Ricky: Do I think there are ways? Absolutely. Will the industry do any of that? No. I mean our industry is notorious, right, for do first, you know, ask forgiveness later. I mean what's going to happen is that the industry is going to explode because the hardware is going to become cheaper and everyone's going to get one. It's probably going to be Apple. I know Apple is coming out their own headset and they're really good at marketing this and once they do and once it becomes more pervasive then the content will follow, then copyright lawsuits will follow, then we'll all agree on the fact that how we should treat this, and then a law 10 years after that will follow. That's how it is going to happen.

To answer your question is, yeah, I mean really, typically if you're a content creator and you're getting into these spaces, talk to an attorney. I mean we can and again, a lot of it is education, right, like explaining, OK, "what are you trying to do?" This is exactly what I did with one of my clients who was in this VR space, and he had no idea it was actually a mix of NFT and VR. In the way of like creating these virtual concerts and putting them on the blockchain. He had had the idea and I think he was talking to, I'm not going to say the name, but a major artist at the time, and was like, "I can just get this guy, he's really on board, he loves it. He's going to do this song in this video. We're going to test it out." I was like, well, hang on a second. "Have you talked to his label?" "Why?"

Well, because they probably own his name and likeness rights and even that's a question, but they will probably own the master to that. You've got to talk to his publisher. They're going to own the composition to that and then like explaining those rights to content creators and saying, hey, this isn't just a one stop shop. I mean typically until the framework is created, much like TikTok has done, they've created a much easier framework with all the licenses and sort of the blanket deals. Until that gets set in place, the content creators have to understand what the risks are, what the rights they have to have. Sometimes it's a matter of saying I understand the risk, I'm just going to full send and see what happens. Sorry that was a long-winded answer to say I don't know that there's much they can do other than talk to attorney.

Lauren: I think one thing attorneys can do is to look at the contracts that your clients are getting specifically. You know a lot of them have technology is everything under the sun ever known and created blah blah blah, but it's thinking ahead and thinking about some of these things. You know, like live streaming, right? Making sure that your client has the right to live stream, that they will take, you know, certain precautions in order to monetize that and to grant the rights to it. I just think we can't necessarily contemplate what technology is going to come next, but we can think about how current technology and things that seem to be getting some traction can be interpreted under the contracts we have our clients sign.

Nathaniel: Todd and Emilee, were you able to hear that question at all? I didn't think about on that.

Emilee: I tried to piece it together by their answers, but I couldn't really hear the question.

Nathaniel: In a nutshell, how do you think the industry can sort of prepare for the technological innovation so that we can be more proactive rather than reactive when the time comes?

Todd: I don't think the industry can prepare for anything.

Emilee: Yeah, I fully agree with what he said about not asking permission. You know it's easier to not, whatever the saying is, that's kind of how a lot of people work, especially labels. Less so publishers, but publishers. A lot of labels act that way. You know, I don't think there

is a way, honestly. I think being reactive is kind of the only way that we have to move forward, can't predict the future.

Todd: Yeah, I mean it's an initial reaction to say like when Napster happened. They didn't know what to do. There was a reaction by the labels initially to try and kill it and then they pivoted realizing this is where things are headed as far as delivery of music. They have now adjusted and the way they operate now is fully on board with streaming services and digital delivery. It's hard for a lot of people to see around the corner. I don't think virtual reality is necessarily that different in terms of the rights that are implicated that people will be so caught off guard that they won't know how to deal with it on the legal side as far as what intellectual property rights are implicated. NFT's are interesting, especially when you get into audio visual NFT's. Yeah, I think people need to see it, what the thing is, you know, a lot of times what happens is it just goes out there, someone launches something without permission, and then the initial reaction happens and then the industry adjusts and then they build new practices and standards and customs and go from there.

Nathaniel: We have time for just one more question. Anybody have?

Audience Member 2: This is this is for Mr. Mumford. Do you think we will see more digital content platforms like TikTok come up without getting swallowed up by Facebook? How did TikTok survive and thrive? Was it because it started out in the foreign market?

Todd: Yeah, I think that's exactly what happened. So, TikTok doesn't actually exist in China. It's a different product name. It's the same interface, but it's a different product. It's massive, I mean. It is. It is like by the time TikTok happened in the rest of the world, their Douyin service platform was huge in China, right? TikTok happened, you know, I don't know if people are aware, when ByteDance bought Musically, and then rebranded it and leveraged all of their know how and employee power that was already in place to quickly expand. So, you know, I mean based even on one, ByteDance was never for sale. So, I don't know that they would have even been open to selling to Facebook now Meta. Now I think on a global scale ByteDance, it's just too big. We're probably going to go public anyway. So yeah, I think for a lot for ByteDance is unique in that aspect because there was never an intention to grow the business and sell it.

I think smaller platforms are happy to sell when they see the return on their initial investment. You know, billions of dollars for the founders, it's hard to say no, but I think we've seen you can't just buy your way into success either. You can buy as many platforms as you want, but they still have to have not just a user base, but they have to be engaging. At the end of the day, it's you know, is your product good and fun and usable and enjoyable, and do people like spending time on it?

Nathaniel: I think a recurring theme throughout all of our panels today has to be the importance of education and authenticity. I think for all the students in attendance and for all of the attorneys in attendance both in the room and at home, I think that is a very valuable lesson. So, I want to thank all of our panelists who are still here. Thank you, guys. Thank you very much Todd and Emily for taking the time out of your busy days to come and share your thoughts with us. Really appreciate it. Thank you, guys.

[clapping]

Nathaniel: Thank you everybody for attending. We will be sending out a follow up e-mail shortly. If you have any questions, feel free to reach out to ELJ@pop.belmont.edu. Thank you.