The Celebrity Stock Market

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Seemingly ripped off the pages of dystopian novels, companies have experimented with celebrity stock markets — human equity trading markets in which investors can purchase "stock" in aspiring athletes, entertainers, and other celebrities and receive a share in the celebrity's future income. An "IPO" provides the aspiring celebrity with a large up-front payment in exchange for a percentage of future earnings, thus sharing both the risk and rewards of future successes with investors. Most prominently Fantex, commonly referred to as the athlete stock exchange, entered into contractual deals with NFL players paying them an upfront, one-time fee in the millions of dollars. In exchange, the company received a set percentage of the athlete's future earnings both on and off the field forever. Fantex then held an IPO for tracking stocks in its share of the athlete's future income, which investors could buy and sell like traditional stock. Although Fantex did not succeed, its serious attempt to expand beyond athletes to include other aspiring entertainment celebrities demonstrates the need to address the many legal and ethical challenges raised by celebrity stock markets. This Article identifies the legal and societal conditions that have made celebrity stock markets a serious possibility going forward. It then considers the various concerns celebrity stock markets trigger, including privacy sorting concerns not yet addressed in the literature. Ultimately, it concludes that these concerns do not make celebrity stock markets demonstrably worse than alternative systems for funding aspiring celebrities. The Article thus proposes some contractual limitations on celebrity stock markets designed to minimize the most serious concerns with such markets, rather than banning them entirely.

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INTRODUCTION

In the dystopian science fiction novel *The Unincorporated Man*, a man wakes up in a future in which all individuals have been incorporated, that is treated like a corporation.[1] In this fictional future, the various people who invest in an individual's development over the course of his or her life — teachers, parents, employers, etc. — all receive shares in the individual's stock.[2] The characters in this novel spend their lives seeking to become majority shareholders in themselves in order to control their own life decisions.[3]

While the fully incorporated world envisioned in this highly engaging novel remains fictional, the concept is not as farfetched or futuristic as it might initially seem. In fact, the practice of investing in people in exchange for a percentage of their future income, sometimes called human equity investments, income-share agreements, or human capital contracts, is very much on the rise.[4] Some of the start-up companies in this space, such as Fantex and Upstart, have even offered alternative trading systems in which investors can buy and sell "stock" or other equities linked to the future success of the individual who is the subject of the investment. These new markets come on the heel of an explosion in relatively new methods of investment funding including crowdfunding. The Securities Exchange Commission ("SEC") has adopted rules permitting and regulating some aspects of crowdfunding ventures from a securities law perspective,[5] and many scholars have weighed in on the legal implications of crowdsourcing markets.[6]

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[1] DANI KOLLIN & EYTAN KOLLIN, THE UNINCORPORATED MAN 11-24 (2009).

[2] *Id.*

[3] *Id.*

[4] *See* Benjamin M. Leff & Heather Hughes, *Student Loan Derivatives: Improving on Income-Based Approaches to Financing Law School*, 61 VILL. L. REV. 99, 104 n.23 (2016) (listing Fantex, Lumni, Pave, 13th Avenue Funding, Base Human Capital and Cumulus Funding as companies in this space); *see also infra* Part I.

[5] Crowdfunding; Final Rule, 80 Fed. Reg. 71387, 71388-91 (Nov. 16, 2015) (to be codified at 17 C.F.R. pts. 200, 227, 232, 239, 240, 249, 269, 274). The Jumpstart Our Business Startups Act of 2012 authorized the SEC to exempt from registration securities crowdfunding offerings for up to $1,000,000 on registered crowdfunding portals. *See* 15 U.S.C. § 77d(a)(6) (2017).

[6] *See, e.g.*, Thomas Coke, *Why the New Crowdfunding Rules are Important but Ultimately a Letdown*, 17 J. BUS. & SEC. L. 217 (2016); Joseph M. Green & John F. Coyle, *Crowdfunding and the Not-So-Safe Safe*, 102 VA. L. REV. ONLINE 168 (2016); Timothy M. Joyce, *1000 Days Late & $1 Million Short: The Rise and Rise of Intrastate Equity Crowdfunding*, 18 MINN. J.L. SCI. & TECH. 343 (2017).

A smaller set of scholars have begun to explore the legal and ethical implications of human equity investments. Many of these inquiries have focused on the use of human equity investments in financing higher education.[7] As such, these human equity investments have been analyzed —and often criticized — in comparison with the current government-backed loan system of financing higher education. Other scholars have undertaken more comprehensive looks at human equity investments[8] and offered proposals for how best to regulate such markets.[9]

This Article builds on that literature by looking specifically at the possibility of a celebrity stock market subset of human equity investments, in which investors can invest in the future of promising artists, athletes, entertainers, and other celebrities in exchange for shares in the aspiring celebrity's future. By design, such celebrity stock markets share risk between the aspiring celebrity and the investors by providing the aspiring celebrity an up-front monetary payment in exchange for foregoing a percentage of future earnings for a contractually specified length of time, including potentially forever. The investments can take the form of a stock-like mechanism that can be traded and whose value is therefore closely linked to the ever-changing personal "brand" value of the aspiring celebrity.

While these celebrity stock markets share some of the legal and societal implications of human equity investments more generally, they also have some unique features worthy of further specific exploration. For example, unlike the existing scholarly debate over the use of human equity investments for financing higher education in which the default status quo is government-backed loan-based financing, celebrity stock markets must be compared to the history of

[7] *See, e.g.*, AM. INSTS. FOR RESEARCH, THE POTENTIAL MARKET FOR INCOME SHARE AGREEMENTS AMONG LOW-INCOME UNDERGRADUATES: AN ISSUE BRIEF FOR POLICY MAKERS AND ADVOCATES 2-8 (2015), http://www.air.org/sites/default/files/downloads/report/Income-Share-Agreements-ISAs-Potential-Among-Low-Income-Undergraduates-Sept-2015.pdf; Leff & Hughes, *supra* note 4, at 102; Michael C. Macchiarola & Arun Abraham, *Options for Student Borrowers: A Derivatives-Based Proposal to Protect Students and Control Debt-Fueled Inflation in the Higher Education Market*, 20 CORNELL J.L. & PUB. POL'Y 67, 117-25 (2010) [hereinafter *Options for Student Borrowers*]; Ritikia Kapadia, Note, *A Solution to the Student Loan Crisis: Human Capital Contracts*, 9 BROOK. J. CORP. FIN. & COM. L. 591, 592 (2015).

[8] *See, e.g.*, Jeff Schwartz, *The Corporatization of Personhood*, 2015 ILL. L. REV. 1119 [hereinafter *The Corporatization of Personhood*].

[9] *See* Shu-Yi Oei & Diane Ring, *Human Equity? Regulating the New Income Share Agreements*, 68 VAND. L. REV. 681, 688 (2015) (arguing that Income Share Agreements [ISA's] should not be regulated under a single unified regulatory framework, but rather by analogy to existing regulatory regimes depending on the details of the ISA).

funding aspiring entertainers in which aspiring artists, entertainers, and athletes have not traditionally had access to government-backed loans to pursue their careers. Furthermore, this is a space in which more income — and conversely, more risk — is linked to brand management, intellectual property, rights of publicity and privacy.

The Article explores the merits of celebrity stock markets in five parts. Part I explains the history of human equity investments including its role as a proposed solution for the financing of higher education and identifies the existing debate over the merits of such a funding model in the education space. Part II explores the historical and existing models for funding aspiring entertainers as a point of reference against which to compare the merits of a celebrity stock market financing strategy. Part III introduces the early startups in the celebrity stock market space including most prominently Fantex's creation of a stock market for athletes. It then explores the aspects of the existing legal system and societal developments that will allow celebrity stock markets to continue to develop in order to establish that there is a real need to consider the consequences of such markets comprehensively. This includes exploring the roles of the right of publicity, the increased recognition of personal trademarks, the democratization of celebrity, the growth of individual branding and the role of social media in creating the conditions for celebrity stock markets potentially to flourish.

Part IV grapples with the various legal and societal implications triggered by celebrity stock markets including impacts of such markets on other areas of the law, diversity and human dignity concerns and previously unrecognized privacy implications. Part V concludes by arguing that it is not apparent that the downsides of celebrity stock markets clearly outweigh the potential benefits they may offer when viewed in comparison to existing funding models for aspiring celebrities. Thus, I argue that celebrity stock markets should be permitted to develop as an additional market option in conjunction with existing options for funding aspiring celebrities. Finally, I propose implementing some contract-based limits on celebrity stock markets in order to reduce the harms potentially triggered by the use of celebrity stock markets for funding aspiring celebrities.

I. HUMAN EQUITY INVESTMENTS FOR HIGHER EDUCATION

The concept of human equity investing — a practice of investing in individuals in exchange for a share of the individual's future income

— has existed for over half a century. In its original conceptualizations,[10] and in many of the policy debates since then,[11] human equity investments were intended as an alternative way to fund higher education. As such, many of the scholarly critiques of human equity investing have operated against a background assumption that human equity investing would offer an alternative to the status quo government-backed educational loan system and therefore have compared the benefits and harms of human equity investing to the benefits and harms of the educational loan system.[12]

A. Early Writings by Milton Friedman

The history of human equity investments is typically traced back to writings by notable economist Milton Friedman, in which he proposes using investments in individuals in exchange for a share of the individual's future income as a way to fund higher education.[13] Friedman appears to have first addressed the concept in a footnote to his 1945 article Income in the Professions and in Other Pursuits, with fellow-economist Simon Kuznets.[14] In their article, Friedman and Kuznets explain the challenges with using a traditional debt based loan model to invest in professional level education. In a traditional debt based loan model, investors lend money with the expectation of receiving a set percentage rate of return on the investment. Friedman and Kuznets explain that the traditional loan model does not work well for capital investment in professional educational training because "the usual profit incentives" do not apply.[15] Investors in professional educational training cannot typically capture an expected return on investment because there is high variability in future income,[16] and if a student defaults on an obligation to pay the debt there is minimal recourse to the lender because the student has no collateral other than himself as security.[17] They conclude that debt is a

[10] *See infra* Part I.A.

[11] *See infra* Part I.C.

[12] *See infra* Part I.C.

[13] Leff & Hughes, note 4, at 102.

[14] Milton Friedman & Simon Kuznets, *Incomes in the Professions and in Other Pursuits*, *in* INCOME FROM INDEPENDENT PROFESSIONAL PRACTICE 62, 90 n.20 (Nat. Bureau Econ. Res. 1945), http://www.nber.org/chapters/c2326.pdf.

[15] *Id.* at 89.

[16] *See id.* at 90 n.20 (explaining that "despite the average profitability of professional training, professional incomes differ greatly so that many individuals fare poorly and would be unable even to repay the principal").

[17] *See id.* at 89 (quoting ALFRED MARSHALL, PRINCIPLES OF ECONOMICS 560-61 (8th

poor mechanism for funding education as "no investor in search of profit would invest in the education of strangers."[18]

As an alternative, in a footnote, Friedman and Kuznets consider what they describe in their own words as "an analogy that at first blush may seem fantastic."[19] They suggest that suboptimal levels of investment in professional training occur because "earning power is seldom explicitly treated as an asset to be capitalized and sold to others by the issuance of 'stock.'"[20] They argue that "if individuals sold 'stock' in themselves, i.e., obligated themselves to pay a fixed proportion of future earnings, investors could 'diversify' their holdings and balance capital appreciations against capital losses."[21] This would mean rather than merely regaining the initial investment with a fixed rate of interest, the educational investors would have a higher upside in capturing the "capital gain" derived from investing in financially successful students that could be used to offset the "capital loss" caused by financially unsuccessful students.[22]

Friedman then expanded on the ideas first espoused in that footnote ten years later when he wrote, *The Role of Government in Education*.[23] He claimed that the government should help fund college education because it has positive externalities for society.[24] Friedman argued, however, that professional schools should be funded by equity investments in people, where investors can buy a share in an individual's future earnings.[25] He found no legal obstacle to private contracts of this kind, but indicated that their lack of use may result from social norms including "the reluctance to think of investment in human beings as strictly comparable to investment in physical assets" as well as "the resultant likelihood of irrational public condemnation of such contracts."[26]

ed. 1950)) ("The worker sells his work, but he himself remains his own property: those who bear the expenses of rearing and educating him receive but very little of the price that is paid for his services in later years.").

[18] *Id.*

[19] *Id.* at 90 n.20.

[20] *Id.*

[21] *Id.*

[22] *See id.*

[23] *See generally* Milton Friedman, *The Role of Government in Education*, *in* ECONOMICS AND THE PUBLIC INTEREST 123 (Robert A. Solo ed., 1955).

[24] *Id.* at 143.

[25] *Id.* at 141.

[26] *Id.* at 138.

B. Entrants into Human Equity Markets for Education

Friedman's hypothetical musings on using equity investments to fund education have been actualized by a number of start-up companies offering variations on such human equity investment models to fund education.[27] The exact form of these models vary from company to company, with some even taking the form of non-profits, but all of them involve paying for tuition in some way in exchange for a percentage of income for a set period of time, rather than traditional debt-based loans which are paid as a percentage of the loan itself.[28]

For example, Lumni USA offers a model to secure supplemental funding for low-income students who are often the first in their families to go to college.[29] Felipe Vergara and Miguel Palacios founded the for-profit company in 2002 in Chile and it financed thousands of students in Latin America before bringing its model to the United States, which had long financed education primarily with traditional government-backed loans.[30] Lumni holds itself out to its investors as an investment with both "social and financial returns" by doing good in helping low-income students obtain an education in addition to doing well by making a profit.[31] The company puts together "diversified pools of students" into "impact investment funds" and then investors are able to invest in these funds rather than being permitted to invest in individual students.[32] Under Lumni's model, the money goes directly to the educational institution rather than to the students.[33]

The students who receive tuition as beneficiaries of these funds are contractually required by their income share agreements to pay back into the fund a set percentage of their future earnings for a

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[27] *See, e.g.*, Jon Xavier, *Why Upstart Abandoned Education Crowd Funding to Become a More Traditional Lender*, SILICON VALLEY BUS. J. (May 23, 2014), https://www.bizjournals.com/sanjose/news/2014/05/23/why-upstart-abandoned-education-crowdfunding-to.html.

[28] *See, e.g.*, Nanette Asimov, *Firm Brings Microfinancial Aid to U.S. Students*, SF GATE (July 18, 2011, 4:00 AM), https://www.sfgate.com/education/article/Firm-brings-microfinancial-aid-to-U-S-students-2354232.php.

[29] *See generally* LUMNI, http://lumni.net/about-2/ (last visited Dec. 31, 2018) (explaining how Lumni uses ISAs to finance students' programs).

[30] *See* Asimov, *supra* note 28.

[31] *Investors*, LUMNI, https://www.lumni.net/partners/ (last visited Dec. 31, 2018) ("Lumni provides opportunities for individuals and institutions to make an investment in impact funds with both social and financial returns").

[32] *Id.*

[33] *See About*, LUMNI, http://www.lumni.net/en/about (last visited Dec. 31, 2018).

contractually predetermined length of time.[34] According to one article, three students who were interviewed each owed 3.71%, 4.98%, and 2.26% of their respective incomes for a ten-year period in exchange for approximately $6,000 per year in tuition funding designed to supplement the amount students received from other sources.[35] The precise percentage of earnings owed, and the length of time for which they will have to make such payments varies from student to student and is spelled out in individual contracts. Lumni's analysts calculate these variables based on a prediction of the individual student's income curves using a scoring system combining quantitative inputs such as grades, SAT's, and graduation rates at the school, with subjective assessments of such factors as resolve and drive, as determined by an interview process.[36]

Another start-up player that sought to move into this human equity investment educational funding space, Upstart, used proprietary data analytics to predict an individual's future earning potential based on the educational degree they were trying to obtain.[37] Upstart used that data to help investors buy equity in the student's education in exchange for a percentage of the student's yearly income over a period of years.[38] Unfortunately for Upstart's model, likely due to the existence of the traditional loan alternatives offered in the United States, students largely sought these loans not to fund traditional education, but rather for short-term courses such as coding boot camps where traditional loan-based funding models are less widely available.[39] Upstart also pointed to regulatory requirements that investors be limited to accredited investors who are high net worth individuals as an additional challenge in getting the model as widely adopted as needed for its success.[40] Thus, Upstart has since transitioned away from human equity financing to a more traditional loan model for these short-term courses.[41]

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[34] *See* Miguel Palacios & Andrew P. Kelly, *A Better Way to Finance That College Degree*, WALL ST. J. (Apr. 13, 2014), https://www.wsj.com/articles/miguel-palacios-and-andrew-kelly-a-better-way-to-finance-that-college-degree-1397428704; *see also* LUMNI, *supra* note 33 (describing how Lumni's business model works).

[35] Asimov, *supra* note 28.

[36] *Id.*

[37] Xavier, *supra* note 27.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *See id.*

Other organizations have taken a non-profit approach. For example, 13th Avenue Funding launched a pilot for a local community-based funding program in Santa Maria, California, in which students paid 5% of their income per year if they earned over $18,000.[42] As a non-profit, 13th Avenue Funding created a platform for other local communities to replicate their model on the condition that they do so in a non-profit manner.[43]

C. Debate over Human Equity Markets for Education

Policymakers and scholars have debated the merits of using various forms of human equity markets for funding higher education. Some advocate the use of such markets, contending that they "ought to be treated as securities and afforded full legal recognition."[44] Supporters of the use of human equity markets for higher education argue that such a contract simply "assigns to the financing party a right to *a portion* of the student's future earnings" and actually "allow[s] students greater employment options because repayment obligations are reasonable in proportion to their income, and because no fixed repayment fee is set."[45] Under this view, ultimately, these contracts would grant students "far greater freedom to pursue employment opportunities than is currently afforded" by the existing student loan infrastructure.[46]

Furthermore, supporters argue that a form of human equity funding, namely income share agreements ("ISAs"), can increase access to education for groups with an "aversion" to traditional student loans, specifically "dependent students who come from lower income families, students who identify as Hispanic or Asian, and students whose parents have lower levels of education[]."[47] ISA-proponents also "point to several benefits . . . including reduced default risk for borrowers, [and] signals about the perceived value of a varied course of study."[48] This encourages firms to adopt "more

[42] 13TH AVENUE FUND, http://www.13thavenuefunding.org/ (last visited Feb. 10, 2019).

[43] *Build Your Own*, 13TH AVENUE FUND (2013), http://www.13thavenuefunding.org/build-your-own/.

[44] Kapadia, *supra* note 7, at 614.

[45] *Id.* at 610. Kapadia argues that student loans give lenders even more control over students, as students effectively must accept only jobs that enable them to make enough money to pay off their loans. *Id.*

[46] *Id.* at 614.

[47] AM. INSTS. FOR RESEARCH, *supra* note 7, at 1.

[48] *Id.* at 8.

inclusive eligibility criteria" to include a larger number of students who could generate modest returns.[49]

Some scholars have proposed a variant of a human equity investment for use in education known as the "Income-Based Repayment Swap ('IBR Swap')."[50] Unlike a "human capital contract," which these scholars claim "may be practically difficult [] and legally problematic," an IBR Swap is not "'equity' in a person."[51] Instead, the student borrows money from a lender and enters into an agreement with an institutional counterparty to pay it a percentage of his or her income for the duration of the loan term. The student uses the loan to pay for tuition and other school expenses, receives the exact amount owed on the loan each month from the counterparty once due, and pays the institutional counterparty a percentage of his or her income each month.[52] This system presents several benefits, as higher-earning students "subsidize" lower earners since the rate of repayment is calculated based on income earned,[53] and investors may have increased information available when making lending decisions.[54] IBR Swaps may be legally favorable as they are "derivatives," not actual human equity investments,[55] but the authors acknowledge that IBR Swaps *are* similar to human capital contracts and thus "raise a host of problematic issues."[56] Ultimately, in their view, IBR Swaps are "better" because "they are more efficient and do not suffer from the same regulatory impediments."[57]

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[49] *Id.* at 7-8.

[50] *See, e.g.*, Leff & Hughes, *supra* note 4, at 100.

[51] *Id.* at 100-01. The student "swaps" their obligation to the original lender for a contractual obligation with the institutional counterparty. *See id.* at 107.

[52] *Id.* at 106.

[53] *Id.* at 113. Additionally, since higher earners subsidize lower earners, taxpayer funds could be diverted to creating programs to increase access to higher education, to grants, or to increase funds for state educational institutions. *See id.* at 114. Other benefits include lower collection costs and a decreased likelihood of default than in a human capital contract since a student, under the IBR Swap, owes obligations to both the government and the institutional counterparty. *Id.* at 121, 125.

[54] *See id.* at 117. Likely factors include LSAT scores, GPAs, or law school rankings. *Id.* However, some find this aspect "deeply disturbing," as to mitigate risks on return, investors may charge students from lower-ranked law schools higher rates or may even charge women more "based on projected income, since women (including female lawyers) earn less on average than men." *Id.*

[55] *Id.* at 127.

[56] *Id.* at 141. For instance, students may be subjected to differential or discriminatory pricing based on the factors lenders use in determining income percentages, leading to "social inequality." *Id.* at 145.

[57] *Id.* at 141.

However, the IBR Swap model garnered criticism from lawyers and authors Michael C. Macchiarola and Arun Abraham.[58] They argue that first, focusing on "collective societal benefit" may "ring particularly hollow" for the individual students obligated to pay off their debt.[59] Further, the IBR Swap enables schools to "enjoy[] the lion's share of the enterprise's benefit yet bear[] very minimal risk of non-performance."[60] The IBR Swap "externalizes the full costs of the student loan derivative on students and third-party financial institutions," allowing schools to partake in the system without any "skin in the game."[61] Ultimately, the authors recognize the IBR Swap's promotion of an income-based exchange and its improvement over past models but reiterate that schools should bear "at least some of the risk of student non-performance."[62]

In an earlier 2010 article, Macchiarola and Abraham analyzed the Obama administration's income-based repayment ("IBR") system, concluding that the system recognizes but fails to resolve the "serious problem" of "dramatic tuition inflation."[63] The authors instead proposed a "put option" system for funding legal education, which is "a financial contract between two parties whereby a put buyer purchases from a put seller the right, but not the obligation, to sell . . . an underlying security or other item of value at an agreed-upon price."[64] In practice, a prospective student may be offered a put option on their loan which they may exercise a certain number of years after their graduation and only if their earnings "fail to exceed some expected earnings amount."[65] As earning "disappointment" increases, the student's potential loan forgiveness also increases.[66]

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[58] *See* Michael C. Macchiarola & Arun Abraham, *Swapping Past the Law School Graveyard: In Response to Professors Leff and Hughes*, 62 VILL. L. REV. TOLLE LEGE 1, 101-05 (2017).

[59] *Id.* at 9.

[60] *Id.*

[61] *Id.* at 9-10.

[62] *Id.* at 12.

[63] Macchiarola & Abraham, *Options for Student Borrowers*, *supra* note 7, at 101.

[64] *Id.* at 119.

[65] *Id.* at 120. The "minimum expected earnings amount" would be calculated based on the student's expected debt burden and a percentage of the student's "reasonably expected gross professional income" that would be used to pay off their student loans. *Id.*

[66] *Id.* at 122. The authors combat potential criticism that this system would deter students from pursuing public interest positions, as this system "could reduce the Forgiveness amount . . . by the amount forgiven under the public service program." *Id.* at 124.

The authors combat potential criticism of the "put-option" model, countering that schools would likely continue to admit students regardless of their financial background or history and schools could purchase their own insurance or "customized derivatives contracts" to hedge the risk of defaults.[67] Similarly, the authors recognized that the system's reliance on post-law school income assumes that students will, in fact, take the highest-paying jobs available to them during the period after graduation and before the "put" date.[68] To provide students with some flexibility, the authors proposed a "sliding scale" where students may receive an adjustment to their obligation based on their specific career and "profit maximizing" decisions.[69] Ultimately, these debates focus on the particulars of the education market, and so many of the disagreements are not applicable to the celebrity stock market space, which is the primary subject of this Article.

II. EVOLUTION OF CELEBRITY INVESTMENT MODELS

Unlike the educational space, which in the United States has traditionally been funded by government-backed educational loans, in the entertainment space, the history of funding aspiring entertainers is more complex. Over history, society has funded aspiring entertainers by using a number of models including: the patronage model, the studio model, the agency model, and the record label model.[70] In some segments of the sports side of the entertainment industry, there has historically been some individualized experimentation with funding athletes in exchange for a percentage of their earnings, but most aspiring athletes are either funded by a minor league system or a collegiate system controlled by the NCAA.[71] Understanding this history is important in order to understand the alternatives for funding aspiring celebrities against which the merits of the celebrity stock market model must be compared.

A. The Patronage Model

Many of the earliest artists obtained funding via a patronage model, in which a wealthy patron would offer monetary support and status-

[67] *Id.* at 126-27.

[68] *Id.* at 132.

[69] *Id.* at 132-33.

[70] *See infra* Parts II.A–E.

[71] *See* Jeffrey Dorfman, *Pay College Athletes? They're Already Paid Up to $125,000 Per Year*, FORBES (Aug. 29, 2013, 8:00 AM), https://www.forbes.com/sites/jeffreydorfman/2013/08/29/pay-college-athletes-theyre-already-paid-up-to-125000year/#5a26cbba2b82.

based protection to an artist who would in return provide their services and loyalty.[72] The concept of patronage, as one of the earliest models of financial support for the arts, dates back thousands of years and was particularly important between the fifteenth and eighteenth century in early modern Europe.[73] Although not limited to the arts, this patron relationship often manifested with families of influence in the early Roman Catholic church providing support for the development of religious art.[74] The patron model then progressed into the Renaissance era, when a duty to revive art and literature was at the forefront of society.[75] Powerful families such as the de' Medicis and the Sforzas sponsored artists such as Michelangelo and Leonardo Da Vinci, who in turn created some of the greatest artistic works of the era: *The New Sacristy* in the Basilica of San Lorenzo in Florence; *The Last Judgment* in the Sistine Chapel in Rome; and *The Last Supper* in the Convent of Santa Maria delle Grazie in Milan.[76] Patronage played an important role in funding the arts for many reasons, including the fact that modern copyright law did not yet provide the sort of *ex-ante* incentive and *ex-post* reward structure that copyright law's monopoly now provides as a funding source for artists.[77]

Patronage also played a hugely important role in the development of music for a large portion of history. As with the visual arts, the earliest patron of Western musical composers was the Church who encouraged the creation of religious music among its priests.[78] In the

[72] *Patronage*, ENCYCLOPEDIA.COM, http://www.encyclopedia.com/social-sciences-and-law/law/law/patronage (last visited Feb. 18, 2019).

[73] *See id.*

[74] *See id.*

[75] *See* John Mann, *From Mesopotamia to 1980s New York, the History of Art Patronage in a Nutshell*, ARTSY (Feb. 6, 2016, 3:59 PM), https://www.artsy.net/article/the-art-genome-project-from-mesopotamia-to-1980s-new-york-what-art-history-owes-to-its-patrons.

[76] *Id.*

[77] *See* Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L.J. 433, 453 (2007) (explaining the way in which the incentives provided by the protections of copyright law were intended to stimulate authors and artists); *see also Copyright Law Revision: Hearings on S. 1006 Before the Subcomm. on Patents, Trademarks, & Copyrights of the H. Comm. on the Judiciary*, 89th Cong. 65 (1965) (statement of Abraham L. Kaminstein, Register of Copyrights) ("The basic purpose of copyright protection is the public interest, to make sure that the wellsprings of creation do not dry up through lack of incentive, and to provide an alternative to the evils of an authorship dependent upon private or public patronage.").

[78] *See* Michael Hurd, *Patronage*, OXFORD REFERENCE (2011), http://www.oxfordreference.com/view/10.1093/acref/9780199579037.001.0001/acref-9780199579037-e-5038?rskey=qucgu9&result=5517 (noting that "[i]n medieval times . . . the chief patron

late Middle Ages, the religious patronage bled over to the secular sphere where the royal courts served as patrons to musicians.[79] The Church patronage and royal patronage systems continued to play an important role into the seventeenth century, but they were supplemented by private patronage, which also played an essential role in the careers of many composers.[80] These wealthy patrons often dictated the nature of the music created.[81] By the eighteenth century, the patronage system continued in the royal courts and Church, but with the revolution-driven decline of the aristocracy and the royal courts in the latter part of the century, musicians turned to new sources of patronage in the form of professional music societies, concert organizers, and opera companies.[82] By the nineteenth century, many of the most famous musical composers of that era, including Wolfgang Amadeus Mozart and Ludwig van Beethoven, produced their work with patron support.[83]

In addition to supporting various forms of the arts, the patronage model offered a measure of control to a class of individuals wealthy or powerful enough to become patrons. Patrons would propose specific themes, focus, or styles of work, which would shape the topics that were subjects of the art.[84] Therefore, one of the major downsides of the patronage model is that it largely featured a lack of autonomy by the artists over what was produced and disseminated, thus presumably shifting the nature of the art produced to match the taste of the patrons.[85] Despite the downsides of this creative control, the financial investments made by patrons enabled years of artistic genius. Without the support of these patrons, in the absence of copyright protection,

was the church").

79 *See* J. Peter Burkholder et al., A HISTORY OF WESTERN MUSIC 73 (7th ed. 2006) ("[P]rinces, dukes, bishops . . . competed for prestige by hiring the best singers, instrumentalists, and composers, which fueled the development of music until the nineteenth century.").

80 *See* Margit Livingston & Joseph Urbinato, *Copyright Infringement of Music: Determining Whether What Sounds Alike Is Alike*, 15 VAND. J. ENT. & TECH. L. 227, 234-35 (2013).

81 *Id.* at 235.

82 *See id.* at 235-36.

83 *Who Were the Great Patrons of Music — and Which Pieces Would Not Have Existed Without Them?*, CLASSIC FM (Jan. 6, 2017, 2:45 PM), http://www.classicfm.com/discover-music/latest/great-patrons-music/.

84 *Patronage*, *supra* note 72.

85 Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 353 (1996) (explaining that patronage "undermined expressive autonomy" and "fostered a view of the arts as a 'gentleman's,' calling tailored to aristocratic tastes and far removed from common social experience and creative sensibility").

such artistic undertakings might not have been possible without the benefit of the monopoly prices that copyright law today confers on successful artists.[86]

B. The Studio Model

While the absence of copyright law meant that many early Western musicians necessarily obtained funding via the patronage model, by the time that the motion picture industry developed, a robust copyright law doctrine largely replaced the need for a patronage model. With the monopoly prices obtained from copyright protection providing large financial returns to studios from their films, in the early days of the motion picture industry, its artists were primarily funded by a studio model. A plethora of film studios came into existence over a relatively short period from 1912 to 1935.[87] These studios followed a vertical integration model in which the studios owned production facilities, distribution outlets, and theatres and, therefore, controlled every aspect of the film market from production to exhibition.[88]

During this period, the major vertically integrated film studios all instituted arrangements for systematically cultivating and marketing star performers.[89] Studios hired talent scouts to search theatres and clubs for promising new performers.[90] Once signed to a studio, performers would then receive in-house coaching to develop their skills.[91] To secure and protect the potential marketable value of the performer's brand identity produced through this system, the major

[86] *See* Jonathan M. Barnett, *Three Quasi-Fallacies in the Conventional Understanding of Intellectual Property*, 12 J.L. ECON. & POL'Y 1, 24 (2016) ("[L]iterary and musical production in Western Europe prior to the robust implementation of copyright relied primarily on state, church, and private patronage mechanisms."); *see also* Sir Thomas Babington Macaulay, Speech Delivered in the House of Commons (Feb. 5, 1841), *in* FOUNDATIONS OF INTELLECTUAL PROPERTY 310 (Robert Merges & Jane Ginsburg eds., 2004) (arguing the drawbacks that arise from the monopoly conferred by the Copyright system are smaller than the benefits of the copyright system when compared to the preceding patronage system).

[87] JOHN BELTON, AMERICAN CINEMA/AMERICAN CULTURE 63 (4th ed. 2012).

[88] *Id.* at 64; *see also* John M. Kernochan, *Ownership and Control of Intellectual Property Rights in Audiovisual Works: Contracts and Practice — Report to the ALAI Congress, Paris, September 20, 1995*, 20 COLUM.-VLA J.L. & ARTS 359, 365 (1996).

[89] *The Studio System and Stars*, FILM REFERENCE, http://www.filmreference.com/encyclopedia/Romantic-Comedy-Yugoslavia/Star-System-the-studio-system-and-stars.html (last visited Dec. 20, 2018).

[90] *Id.*

[91] *Id.*

studios signed their most promising performers to long-term exclusivity contracts that defined the terms by which a studio had the exclusive commercial rights to exploit a star's image or likeness.[92]

These contracts forbade performers from engaging in non-approved acting activities and regulated their personal behavior,[93] including going so far as contractually prohibiting public laughter.[94] Studios made sure via contract that the performer's off-screen persona closely tracked their on-screen persona in order to convince audiences of the star's authenticity, such that when performers played larger-than-life characters on-screen, they needed to appear larger-than-life off-screen as well.[95] Further, the studios demanded that performers adhere to a "morals" clause and even governed other features of their off-screen appearance, including their hairstyle, choice of clothing, and weight.[96] The contract also served as an instrument of control by which the studio could determine what films and roles a star would be cast in.[97] Lastly, studios required the stars to attend studio publicity functions, publicize their own films, and occasionally, be loaned out to other studios in order to fulfill the same obligation for one or two pictures.[98] Studios thoroughly controlled the performer's identity as their contracts permitted the studios to use the star's name, voice, and likeness to promote studio films and even to do product endorsement without the star's approval or additional compensation.[99]

Because of the controlling terms under which they worked, many performers entered into legal disputes with the studios, usually over restrictive casting or when renegotiating their contracts.[100] From the late 1940s, the vertically integrated studio system was gradually dismantled as Hollywood's market structure internally reorganized following the Supreme Court's antitrust ruling in *United States v. Paramount Pictures, Inc.*[101] In this landmark case, the Supreme Court

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92 Ty Ford, Note, *The Price of Fame: The Celebrity Image as a Commodity and the Right of Publicity*, 3 VAND. J. ENT. L. & PRAC. 26, 26-27 (2001).

93 *Id.*

94 *See, e.g.*, JOSHUA GAMSON, CLAIMS TO FAME: CELEBRITY IN CONTEMPORARY AMERICA 25 (1994) (noting that Buster Keaton's contract prohibited public laughter).

95 Mark Bartholomew, *A Right is Born: Celebrity, Property, and Post-Modern Law Making*, 2011 CONN. L. REV. 301, 327 [hereinafter *A Right is Born*].

96 BELTON, *supra* note 87, at 67.

97 *The Studio System and Stars*, *supra* note 89.

98 *See* BELTON, *supra* note 87, at 67.

99 *See* Bartholomew, *A Right is Born*, *supra* note 95, at 327.

100 *The Studio System and Stars*, *supra* note 89.

101 *Id. See generally* United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948) (finding that the original Hollywood studio system violated federal antitrust laws).

held the vertically integrated system violated antitrust laws and, as a result, issued a decree barring the five major film studios from further expansion, which ultimately eliminated the vertically integrated system.[102] With film production consequently reduced, contracted stars and other leading talent became an expensive overhead.[103]

The industry shift caused by this landmark case caused the studios gradually to phase out the long-term contracting of stars.[104] From the end of the 1940s into the 1960s, stars were no longer bound to the studios in the way they had been in the 1930s and 1940s.[105] Rather, all performers, including stars, became part of a large freelance labor pool for the industry to draw on.[106] Freelance stars had greater freedom to select their roles and negotiate significant increases in their fees between films.[107] They also obtained greater creative power by forming their own independent production companies.[108] Without the use of term exclusive contracts, studios no longer had the same means to control and discipline stars.[109] At the same time, stars could no longer rely on a single long-term exclusive deal to fund their careers but needed to live on the risk of funding being contingent on booking a gig.

C. The Talent Agency Model

The concept of talent agents long pre-dates the more recent ascendancy of talent agents as the predominant employment procurement model for much of the entertainment industry.[110] The talent agency model differs from some of the other funding models discussed above in that it is rarely used as a way to fund aspiring celebrities while they pursue their careers as unproven talent rarely can sign with an agent.[111] Rather, it is a way to lock in celebrities who

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102 *Paramount Pictures, Inc.*, 334 U.S. at 175.

103 *The Studio System and Stars*, *supra* note 89.

104 *Id.*

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.*

110 *See* William A. Birdthistle, *A Contested Ascendancy: Problems with Personal Managers Acting as Producers*, 20 LOY. L.A. ENT. L. REV. 493, 504 (2000) (describing the opening of a vaudeville talent agency in 1898).

111 *See* James M. O'Brien III, *Regulation of Attorneys Under California's Talent Agencies Act: A Tautological Approach to Protecting Artists*, 80 CALIF. L. REV. 471, 480 (1992) (explaining that "unproven artists are seldom able to secure the services of a reputable agent"); *see also* JOSEPH TAUBMAN, IN TUNE WITH THE MUSIC BUSINESS 85 (1980) ("a neophyte often has great difficulty in being signed up by a booking agency

have already established careers and offers minimal help to aspiring entertainers.[112] In 1898, William Morris, Sr., opened his talent agency in New York by declaring himself an agent for Vaudeville, the predominant form of entertainment of that era, before wisely shifting his talent to the up and coming silent film industry.[113] Agencies operated in the background during the heyday of the studio model, with the ability to obtain new work for clients, at least in film, severely limited by the long-term exclusivity contracts required by the film studios.

With the collapse of the studio model for funding and controlling film talent, the agency model stepped in to fill the void in the film industry. By the middle of the twentieth century, the addition of television to the entertainment industry, as well as the loss of film studios' power as the result of the court-mandated dismantling of the studio vertical integration monopolies meant that negotiating clout shifted back to actors from the studios.[114] This permitted talent agencies to become more powerful as they often would package multiple artists together in their portfolios, thus solidifying their central role in the entertainment industry.[115] As the entertainment industry continued to expand into further medium, talent agencies also expanded to include new groups for radio, theater, literature, television, music, motion pictures, and nightclubs.[116]

Under an agency model, agents had a different goal than the studio heads had for the talent. While studios were primarily interested in publicizing their films, talent agents' incentive is to develop the talent as a distinct economic entity separate from any film or studio in order to position the talent for future projects.[117] The agents directly benefited from developing the talent in this way because agents typically took a 10% cut off any revenue earned by their talent clients.[118]

unless the performer has attained celebrity or near-celebrity status.").

[112] *See* Birdthistle, *supra* note 110, at 495 ("The role of talent agents — to secure paying opportunities for artists — has evolved to the extent that agents are now a luxury only the most successful artists can afford.").

[113] *Id.* at 504.

[114] *Id.*

[115] *Id.* at 504-05.

[116] *Id.* at 505.

[117] *See* Bartholomew, *A Right is Born*, *supra* note 95, at 329.

[118] *See* O'Brien, *supra* note 111, at 479 ("As remuneration for their efforts, talent agents customarily collect fees in the amount of [ten percent] of an artist's gross earnings . . . .").

The importance of talent agents to the entertainment industry was reinforced by law with the passing of the California Talent Agency Act ("TAA"), which assured the central role of talent agents in acquiring work for entertainment talent.[119] Although earlier laws regulating talent agents had existed, in its current iteration, the TAA regulates anyone considered a talent agent, which is defined as one who "engages in the occupation of procuring, offering, promising or attempting to procure employment or engagement for an artist."[120]

Individuals failing to abide by these rules faced various penalties including the potential that the client could refuse to pay them and then use the violation of the TAA to legally excuse the failure to pay.[121] Talent agents are also required to be licensed by the state, post a bond, and abide by several other regulatory requirements.[122] Furthermore, in 1982 the TAA was amended to permit individuals not licensed as talent agents to procure employment for talent under the condition that they worked in conjunction with a licensed talent agent, thus again solidifying the importance of the licensed talent agent to the talent management team.[123]

Subsequent case law defined these procurement actions broadly to include even actions traditionally undertaken by transactional talent attorneys. For the first time in 2013, in the case of *Solis v. Blancarte*, the California Labor Commissioner decided to enforce the TAA even against talent lawyers. In this case, the Commissioner found that an attorney representing a sports broadcaster without a talent agent license violated the TAA when he negotiated the client's talent deal with a television station in exchange for 5% of revenue.[124] When the broadcaster stopped paying his fees, the attorney sued for breach of contract, and the talent argued that because the employment had been procured without the required talent agency license, the contract was void and unenforceable, and the Labor Commissioner agreed.[125] The Commissioner rejected the argument that licensed attorneys should be exempt from the licensing requirements of the TAA. Therefore, talent attorneys today are required to work under the exception permitting the procurement of employment when working under the direction of a talent agent, thus again legally solidifying the need for the talent

119 *See* CAL. LAB. CODE § 1700.5 (2018).

120 *Id.*

121 *See, e.g.*, Marathon Entm't, Inc. v. Blasi, 174 P.3d 741, 745 (Cal. 2008).

122 LAB. § 1700.5.

123 *Id.* § 1700.44 (2018).

124 Solis v. Blancarte, TAC-27089 (Cal. Lab. Comm'r. Sept. 30, 2013).

125 *See id.* at 9-10.

agent in order to at least officially procure entertainment employment.[126]

Propped up by the TAA, talent agents during the agency era have operated as gatekeepers to the entertainment industry as aspiring talent have often needed to get the support of an agent to get their foot in the door.[127] Because the TAA forbids procuring work for aspiring entertainment talent without a license, aspiring talent are caught in a catch-22. In order to get any traction in the industry, they need someone to help open doors for them, but talent agents often won't work with unestablished artists.[128] At the same time, the talent cannot become established because individuals who are not licensed talent agents, such as entertainment managers, are technically not permitted to help procure employment under the TAA.[129] In reality, of course, entertainment managers do in fact help procure employment for early stage aspiring talent, but they do so at the risk of not getting paid and typically require a larger fee to do so.[130] Thus, as a practical matter, although talent agents "still play a pivotal role in most employment deals in Hollywood, they are no longer the masters of the universe they were" when they served as an absolute "gatekeeper to the stars."[131] Nonetheless, the continuing importance of the talent agent system means that aspiring entertainers do not have a good system of funding themselves while they pursue their entertainment career, and therefore typically turn to other sources of funding that are not directly helpful to the pursuit of their art, such as waiting tables.

D. The Record Label Model

Although talent agents play some role in the music industry as well, traditionally the record labels have served as the predominant

126 *See id.*

127 *See* Heath B. Zarin, *The California Controversy Over Procuring Employment: A Case for the Personal Managers Act*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 927, 928 (1997) (describing an aspiring actress trying to "'get her foot in the door,' but her efforts are an exercise in futility" without a talent agent, but the talent agents refuse to represent her as an unestablished artist, and "without a talent agent, she continues to encounter only closed doors").

128 *See* Luaine L. Quast, *Musicians, Their Representatives, and the Agreements Between Them*, *in* 1990 ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK 191 (John D. Viera & Robert Thorne eds., 1990) (stating that the unestablished artist rarely gets an agent because "[i]t is easier for an agent to sell a big name than to sell many small ones").

129 *See* Zarin, *supra* note 127, at 930.

130 *See id.* at 930-31.

131 Birdthistle, *supra* note 110, at 506.

gatekeeper for the music industry and for aspiring musicians to pursue their music.[132] The record industry created a way for aspiring musicians who were able to sign a record deal to get funding upfront while they pursued recording their album. Typically, an artist (or band) would sign a recording agreement with a record label in which the artist would receive an up-front fee known as an advance in exchange for their recording services with the record label.[133] The artists then use that advance to pay their expenses in recording their album.[134] A negotiated advance would usually be an amount to cover the artist's recording costs, in addition to some other expenses, before retaining the balance as income for the artist.[135] Then if everything goes well and the album is released and climbs its way up the Billboard charts, ideally everyone should be happy with their compensation. In reality, however, the amount of the advance must be recouped by the label before any royalties make their way to the musicians.[136] The record label will withhold all royalties from the artist until such recoupment is made. Thus, for multiple reasons, including the fact that the artists rarely understand that an advance is a loan, it is easy for the artists to spend their entire advance in recording their album, leaving them with little to no income.[137]

Furthermore, recording agreements are often exclusive, multi-album deals.[138] However, the record label has the discretion to decide when, if ever, the second, third, or fourth album is recorded.[139] A record label may never exercise its option to record another album.[140] Furthermore, the subsequent albums are almost always cross-

[132] *See* Henry H. Perritt Jr., *New Business Models for Music*, 18 VILL. SPORTS & ENT. L.J. 63, 73 (2011) (describing labels as gatekeepers and writing that a "musician had no prayer of making a record unless he hooked up with a recording studio").

[133] DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 83 (8th ed. 2013).

[134] *See id.*

[135] Remember, artists usually must also pay their lawyer, agent, and manager a commission out of the advance.

[136] PASSMAN, *supra* note 133.

[137] *See* Jay Mason All, *Again, From the Top! The Continuing Pursuit of a General Public Performance Right in Sound Recordings*, 22 ALA. L.J. SCI. & TECH. 1, 5 (2012) ("Today, scores of performers find themselves buried in debt before they release their first album and spend years repaying advances and production costs.").

[138] PASSMAN, *supra* note 133, at 107.

[139] *See id.* Usually, for a new artist, a record company will sign the musicians to a six-album deal. *Id.* at 104. However, only the first album is guaranteed, whereas the other five albums are merely options. *Id.*

[140] *Id.*

collateralized.[141] This means that if the advance costs of the first album is not yet recouped, then all royalties made on the second album will be withheld from the artist until the advance from the first album is recouped in full.[142] Only then does the record label begin the process on repaying themselves for the advance on the second album.[143]

Record labels were traditionally necessary because they had the means of distribution as they could produce the physical goods as well as market them.[144] However, this has changed in recent years.[145] It is cheaper and easier than ever to record a quality track.[146] Additionally, the internet, despite the proliferation of piracy, has made it fairly easy for artists to self-distribute their music digitally.[147] Services and markets like Spotify, iTunes, and Apple Music provide greater legal digital access to music. Because distribution has changed so much, record labels are not quite as necessary as they used to be. This potentially opens the door for alternative funding models to fund up-and-coming musicians.

E. The Sport-Specific Professional Athlete Funding Models

In addition to the celebrities discussed so far in the traditional entertainment spaces, athletes are also celebrities who typically receive large amounts of money at the back-end when they achieve success but need to figure out how to fund themselves while they pursue their goals. And just as television, music, and other forms of entertainers have developed different funding models, the same is true for the financial models of sustaining an athlete's competitiveness across different sports. Athletic competitiveness across all sports requires both talent and money.

Once they have "made it," most athletes playing for professional sports franchises such as in baseball, football, basketball, soccer, and hockey, receive salaries from the teams on which they play. The precise levels of pay are typically limited by various player association union agreements and salary cap rules, but are nonetheless typically incredibly large sums of money. These athletes, also, however, can receive large amounts of money from endorsement deals, and in some

141 *Id.* at 86-87.
142 *Id.*
143 *Id.* at 87.
144 *Id.* at 68-69.
145 *Id.* at 69-71.
146 *See id.*
147 *Id.*

cases earn more from their endorsement deals than from their team salaries.[148] Athletes in professional golf, racing, and tennis strictly receive winning-prize money and endorsement deals because the athletes do not play for a team.

At the front end, one predominant form of funding athletes, as they develop their skill set, is the educational model where athletes receive scholarships to schools who help mold them and train them. In exchange, the schools receive large sources of revenue, none of which goes to the athletes directly in the form of payment under National Collegiate Athletics Association ("NCAA") rules, other than the cost of tuition.[149] This is the model primarily used for developing football talent for the National Football League ("NFL"), and basketball talent for the National Basketball Association ("NBA").

Under the educational model, while in high school either taxpayer dollars or the students' parents pay for sports programs in schools.[150] College recruiters then recruit high school football and basketball players to play for their university programs with the promise that if the student-athlete performs well enough, he will be drafted to play in the professional ranks.[151] At the college level, students are usually given scholarships and living expenses, but are not financially compensated in amounts comparable to what the schools they are playing for are earning from its sports programs, particularly for the colleges in the *Power Five* conferences.[152]

The NFL has consistently thrived on the college ranks for talent since its inception.[153] Once the student-athlete is drafted, he enters the

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[148] Andre McNeil, *Athletes Who Make More from Endorsements than Sports*, FREE AGENT SPORTS (Feb. 4, 2015), http://www.freeagentsports.com/articles/02.15/athletes-who-make-more-from-endorsements-than-sports.html.

[149] *See* Dorfman, *supra* note 71; Amanda Ripley, *The Case Against High-School Sports*, ATLANTIC (Oct. 2013), https://www.theatlantic.com/magazine/archive/2013/10/the-case-against-high-school-sports/309447/.

[150] Ripley, *supra* note 149; *see* Bob Beatham, *Are Highschool Athletics Worth the Cost?*, PRESS BOX (May 9, 2014), http://pressbox.bangordailynews.com/2014/05/09/home/are-high-school-athletics-worth-the-cost/.

[151] *See College Player Development*, NFL, https://operations.nfl.com/the-players/development-pipeline/college-player-development/ (last visited Dec. 23, 2018).

[152] *See* Ron Clements & Joe Rodgers, *Power Five NCAA Schools Pass New Scholarship, Concussion Proposals*, SPORTING NEWS (Jan. 18, 2015, 8:04 AM), http://www.sportingnews.com/ncaa-football/news/power-5-ncaa-schools-vote-new-scholarship-concussion-proposals-autonomy/mdv2pvwbc6py1e6v16tsa0ew8.

[153] *See* Richard Johnson, *New Titans Coach Mike Vrabel Said the Thing Everyone Knows About College Football*, SB NATION (Jan. 23, 2018, 1:05 PM), https://www.sbnation.com/college-football/2018/1/23/16923966/mike-vrabel-nfl-college-football-minor-system.

professional ranks, is paid, and pursues whatever endorsement or business endeavors he can. There has been some brief discussion of minor league football, but nothing has come to fruition at this point.[154] Until the system changes, college athletic departments are feeders for the National Football League.[155]

The NBA is nearly an exact replica of the NFL. Basketball does have a second alternative less prevalent in football, which is that a number of players go to play overseas in order to develop their basketball skills without going the college athletic route.[156] Both the NFL and NBA have benefited from "one-and-done" and similar rules that force high school athletes to go to college for at least a year before they can declare for the professional draft for those sports.[157] These rules allow professional team recruiters to scout talent at colleges, and allow colleges to bring in revenue for their educational and athletic programs.[158] The NBA's G-League is officially the league's minor league system, but the salaries and talent are not to the level of the professional baseball, hockey, or soccer levels.[159] Numerous scholars and commentators have pointed to the many drawbacks of the NCAA funding system for these athletes including a recurrent critique that the system is exploiting the athletes for the financial gain of the educational institutions without adequately compensating the athletes themselves.[160]

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[154] *See* Evan Grossman, *Tom Brady's Agent Don Yee Bucks Against Football System and NCAA with Pacific Pro League*, N.Y. DAILY NEWS (May 27, 2017), http://www.nydailynews.com/sports/football/don-yee-bucks-system-ncaa-pacific-pro-football-article-1.3201543; The Ringer Staff, *How Could the XFL Persuade You to Watch?*, RINGER (Jan. 25, 2018, 6:35 PM), https://www.theringer.com/sports/2018/1/25/16934380/xfl-vince-mcmahon-return-staff-nfl-football.

[155] Johnson, *supra* note 153; B. David Ridpath, *The College Football Playoff and Other NCAA Revenues Are an Exposé of Selfish Interest*, FORBES (Jan. 17, 2017, 1:13 PM), https://www.forbes.com/sites/bdavidridpath/2017/01/17/college-football-playoff-and-other-ncaa-revenues-is-an-expose-of-selfish-interest/#87cc71f4e1af.

[156] *See* Kevin O'Connor, *The NBA Fan's Guide to the Best Prospects in College Basketball*, RINGER (Nov. 13, 2017, 8:05 AM), https://www.theringer.com/nba/2017/11/13/16642064/nba-prospects-ncaa-college-basketball-2018.

[157] *See, e.g.*, Daniel Rapaport, *Report: Adam Silver, NCAA Officials Discuss One-and-Done Rule*, SPORTS ILLUSTRATED (Nov. 17, 2017), https://www.si.com/nba/2017/11/17/adam-silver-michele-roberts-ncaa-officials-one-and-done-draft-rule.

[158] *See* Will Hobson, *Fund and Games*, WASH. POST (Mar. 18, 2014), https://www.washingtonpost.com/graphics/sports/ncaa-money/.

[159] *See* Kevin O'Connor, *The Future of the NBA Could Be the G-League*, RINGER (June 6, 2017, 8:30 AM), https://www.theringer.com/nba/2017/6/6/16077542/nba-draft-adam-silver-age-limit-ben-simmons-51cc9cfbc034.

[160] *See, e.g.*, Darren A. Heitner & Jeffrey F. Levine, *Corking the Cam Newton Loophole, a Sweeping Suggestion*, 2 HARV. J. SPORTS & ENT. L., 341, 342 (2011) (noting

In contrast to the NCAA dominant model used to prepare aspiring celebrities for the NFL and the NBA, other major sports use a hybrid system including funding and developing talent both through the NCAA as well as through robust minor league systems. For example, in contrast with the NBA's minimal reliance on the G-League, Major League Baseball ("MLB") thrives on its minor league system for financing talent development.[161] Minor league baseball teams are affiliated with MLB franchises but are owned by individual owners who are not affiliated with the MLB franchise.[162] High school athletes, much like in the football and basketball models, are funded through taxpayers, institutions, and private contributions. The difference is that baseball players have the option to either choose to declare for the draft at seventeen years-old or to attend college, an option not available to basketball or football players who may not declare for the draft at that age.[163] The college baseball model is exactly like football and basketball in terms of financial assistance, but college baseball programs are not as well-funded because the television dollars are in

that "while the NCAA trumpets its philosophy of amateur competition, an increasing refrain points to the hypocritical nature of the Association, as its financial success is built on the sweat of amateur athletes"); John K. Tokarz, *Involuntary Servants: The NCAA's Abridgement of Student-Athletes' Economic Rights in Perpetuity Violates the Thirteenth Amendment*, 2010 WIS. L. REV. 1501, 1501 (2010); Taylor Branch, *The Shame of College Sports*, ATLANTIC MONTHLY (Oct. 2011), https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/ (contending that "the real scandal is . . . the noble principles on which the NCAA justifies its existence . . . are cynical hoaxes, legalistic confections propagated by the universities so they can exploit the skills and fame of young athletes"). *See generally* WALTER BYERS & CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES (Univ. Mich. Press 1995) (arguing that NCAA collegiate athletes do not have the same access to the market that their coaches and institutions do).

161 John Dittrich, *What Makes Minor League Baseball So Important? Why Do Some Organizations Never Win?*, BALLPARK BUS. (Nov. 14, 2013, 6:37 AM), https://ballparkbiz.wordpress.com/2013/11/14/what-makes-minor-league-baseball-so-important-why-do-some-organizations-never-win/; James McKinney, *Is It Time for the NFL to Create a Minor League System?*, PHINSIDER (Jan. 20, 2014, 10:01 AM), https://www.thephinsider.com/2014/1/20/5326224/is-it-time-for-the-nfl-to-create-a-minor-league-system; *see* Joel Reuter, *Ranking All Thirty MLB Farm Systems, Post-2017 MLB Draft*, BLEACHER REP. (June 20, 2017), http://bleacherreport.com/articles/2715921-ranking-all-30-mlb-farm-systems-post-2017-mlb-draft; *see also* Jeremy M. Evans, *The Maturation of the Los Angeles Dodgers,* DODGERS NATION (Aug. 7, 2017), http://www.dodgersnation.com/maturation-los-angeles-dodgers-je1083/2017/08/07/.

162 *MiLB.com Frequently Asked Questions*, MiLB.com, http://www.milb.com/milb/info/faq.jsp?mc=business (last visited Dec. 26, 2018).

163 *First-Year Player Draft: Official Rules*, MLB, http://mlb.mlb.com/mlb/draftday/rules.jsp (last visited Dec. 26, 2018).

football and basketball, except for the College World Series.[164] The minor leagues pay their players' salaries ranging from $500 a month with housing and meals to $6000 a month with housing and meals, plus cash bonuses for higher draft pics.[165] Rookie Ball, Winter Ball, Arizona Fall League, Single-A, Double-A, and Triple-A round out the minor league levels.[166] Professional scouts watch and recruit talent at all levels, and once the player is drafted, he is paid by the minor league club and eventually the major league club.[167]

For those who toil in the minor leagues, however, the going is tough, with many players being paid significantly below the poverty wage.[168] As scholars have noted, even as major league payrolls have increased, minor leaguers have fallen further behind often limited by "exploitative adhesion contracts that offer salaries significantly below the federal poverty line."[169] With baseball having an antitrust exception,[170] and therefore no access to an open market to shop their talents, minor league players "are paid virtually nonnegotiable salaries,

[164] *See* Steve Jordon, Paige Yowell, & Cindy Gonzalez, *College World Series' Economic Impact, National Exposure and Attendance All Knocked It Out of the Park for Omaha*, OMAHA WORLD-HERALD (June 30, 2017), http://www.omaha.com/money/college-world-series-economic-impact-national-exposure-and-attendance-all/article_356512d5-ffe0-5deb-a653-bd3e0686abf4.html; Kyle Peterson, *The State of College Baseball on Opening Day*, ESPN (Feb. 16, 2018), http://www.espn.com/college-sports/story/_/id/22467023/the-state-college-baseball-opening-day ("Football has [eighty-five] full rides, basketball has [thirteen]. There are 11.7 scholarships allotted to Division 1 baseball and a full-ride is a rarity.").

[165] *See, e.g.*, Ted Berg, *$12,000 a Year: A Minor Leaguer Takes His Fight for Fair Pay Public*, USA TODAY (Jan. 31, 2017, 9:18 AM), http://ftw.usatoday.com/2017/01/minor-league-baseball-pay-fair-labor-standards-act-minimum-wage-lawsuit-kyle-johnson; Ian Gordon, *Minor League Baseball Players Make Poverty-Level Wages*, MOTHER JONES (July-Aug. 2014), https://www.motherjones.com/politics/2014/06/baseball-broshuis-minor-league-wage-income/.

[166] *MiLB.com Frequently Asked Questions*, *supra* note 162.

[167] *See* David Schoenfield, Looking Ahead to Baseball's 2018–19 Free-Agent Bonanza, ESPN (Nov. 9, 2017), http://www.espn.com/blog/sweetspot/post/_/id/84604/looking-ahead-to-baseballs-2019-free-agent-bonanza.

[168] *See, e.g.*, Brandon Sneed, *This Is What It's Like to Chase Your Pro Baseball Dreams . . . For 12 Bucks an Hour*, BLEACHER REP. (Apr. 3, 2017), https://bleacherreport.com/articles/2700299-this-is-what-its-like-to-chase-your-pro-baseball-dreamsfor-12-bucks-an-hour.

[169] Theodore McDowell, *Changing the Game: Remedying the Deficiencies of Baseball's Antitrust Exemption in the Minor Leagues*, 9 HARV. J. SPORTS & ENT. L. 1, 1 (2018).

[170] The Supreme Court has laid out over a number of decisions going back to 1922 that baseball is exempt from the typical antitrust laws and therefore antitrust-based challenges to various baseball practices on the grounds of anti-competitive behavior cannot be brought in baseball. *See generally* STUART BANNER, THE BASEBALL TRUST: A HISTORY OF BASEBALL'S ANTITRUST EXEMPTION 1 (2013).

and they face harsh restrictions on labor movement."[171] This results in a life of "working sixty-hour workweeks, living in an overcrowded apartment on an air mattress and eating a fast-food diet," as the result of earning a salary less than the federal poverty level. Perhaps there is no surprise that some minor league athletes might be interested in alternative means of funding themselves while pursuing their dream of a lucrative career in major league baseball.

Just as the NBA is a mirror image to the NFL, the National Hockey League ("NHL") is a mirror image to the MLB with a dual-track draft or college model.[172] The NHL's talent comes from the draft, either straight out of high school or after college, as athletes have the choice to declare for the draft at eighteen years old rather than play college hockey.[173] The high school and college funding models are very similar if not identical to other sports through scholarships and taxpayer dollars,[174] but once the athlete is drafted, the affiliated minor league club or the professional club pays the athlete to play.[175] The NHL has a minor league system like the MLB, going from Single-A to Triple-A levels.[176] The difference between the NHL and MLB is that the NHL is much more like the NBA in also drafting international talent from foreign leagues.[177] Hockey is inherently an expensive sport to play between the equipment and the ice, but having the option to choose college, minor leagues, or the foreign professional ranks helps an athlete's ability to determine his financial future.

Some other team sports with professional athletes rely more heavily on a minor league and club play system and less on the educational funding models. For example, soccer, also known as international

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171 Shauna Teresa DiGiovanni, *Underpaid, Unrepresented, Unprotected: A Call for a Change in the Status Quo of Minor League Baseball*, 22 SPORTS LAW. J. 243, 244 (2015).

172 *See* Jamie Fitzpatrick, *How the NHL Draft Works*, THOUGHTCO. (Apr. 6, 2018), https://www.thoughtco.com/how-the-nhl-draft-works-2779285.

173 Kristyn Repke, *NHL Draft 101: Rules and Information*, NHL (June 29, 2013), https://www.nhl.com/bluejackets/news/nhl-draft-101-rules-and-information/c-675546.

174 *See Frequently Asked Questions*, C. HOCKEY INC., http://collegehockeyinc.com/faq.php (last visited Dec. 29, 2018); *NCAA Hockey Recruiting*, C. HOCKEY INC., http://collegehockeyinc.com/recruiting.php (last visited Dec. 29, 2018).

175 *See* Kurt Badenhausen, *The NHL's Highest-Paid Players 2017–18*, FORBES (Dec. 5, 2017, 10:00 AM), https://www.forbes.com/sites/kurtbadenhausen/2017/12/05/the-nhls-highest-paid-players-2017-18/#5be8fb4c2ac3.

176 *See NHL Affiliations 2016–17*, AM. HOCKEY LEAGUE, https://theahl.com/nhl-affiliations-2016-17 (last visited Dec. 28, 2018).

177 *See* Tal Pinchevsky, *Where are the Top Hockey Hotbeds? World Cup Rosters Reveal Sport's Rising Talent Pools*, ESPN (Aug. 10, 2016), http://www.espn.com/nhl/story/_/id/17226880/nhl-where-top-hockey-hotbeds-world-cup-rosters-reveal-sport-rising-talent-pools.

football, has some of the most developed minor league systems and club play of probably any professional sport in the world.[178] Endorsements also play a significant role in financing an athlete's career and lifestyle.[179] The same could be said of high school sports in Europe and around the globe. Interestingly, the MLS is seen by some as a minor league for international soccer making it the only major American sport that plays second fiddle to an overseas league.[180] This dichotomy means that athletes go overseas to play and get paid, while older European and other international players have come to the MLS to retire.[181]

All of these various funding models for funding aspiring athletic celebrities also have numerous downsides and criticisms in addition to the already identified criticisms of student athletes being grossly undercompensated in comparison to how much the schools themselves are making, and minor league athletes living below the federal poverty line. First off, in most of these models athletes are paid only if they "make it," but make almost nothing until that happens, if it happens. That places the entirety of the financial risk of pursuing their celebrity athletic dreams on the athletes themselves. Furthermore, many have expressed an exploitation concern that "in a commercialized model of sports, in which winning is valued above the experience of the game, athletes are essentially commodities, useful only to the extent they advance the goal of winning."[182] Often, this concern is exacerbated by racial concerns, in which often minority athletes are viewed as exploited for the benefit of largely white owners and leadership.[183] These existing funding models for aspiring

[178] *See, e.g.*, MLS Soccer Staff, *The Complete List of MLS-USL Affiliations, Partnerships for 2017*, MAJOR LEAGUE SOCCER (Mar. 23, 2017, 11:50 AM), https://www.mlssoccer.com/post/2017/03/23/complete-list-mls-usl-affiliations-partnerships-2017; Unionoscopy et al., *Top 100 Soccer Clubs in the United States and Canada – Rankings*, BROTHERLY GAME (Aug. 20, 2014, 12:00 PM), https://www.brotherlygame.com/2014/8/20/5992925/top-100-soccer-clubs-in-the-united-states-and-canada-ranking; *DA Club Directory*, U.S. SOCCER DEV. ACAD., http://www.ussoccerda.com/all-clubs (last visited Dec. 31, 2018).

[179] *See Top 100 Highest-Paid Athlete Endorsers of 2016*, OPENDORSE, http://opendorse.com/blog/2016-highest-paid-athlete-endorsers/ (last visited Dec. 29, 2018).

[180] *See, e.g.*, Harold Matskevich, *MLS: The Minor League of World Soccer*, BLEACHER REP. (July 29, 2010), http://bleacherreport.com/articles/427036-mls-the-minor-league-of-world-soccer.

[181] *See* Kevin Kinkead, *If You're Still Calling MLS a "Retirement League," You're Not Paying Attention*, PHILLYVOICE (Feb. 3, 2017), http://www.phillyvoice.com/if-youre-still-calling-mls-retirement-league-youre-not-paying-attention.

[182] Deborah L. Brake & Verna L. Williams, *The Heart of the Game: Putting Race and Educational Equity at the Center of Title IX*, 7 VA. SPORTS & ENT. L.J. 199, 235 (2008).

[183] *See* JOHN HOBERMAN, DARWIN'S ATHLETES: HOW SPORT HAS DAMAGED BLACK

professional athletes also have faced extensive criticism for gender and other forms of discrimination.[184] It is against these existing market mechanisms for funding aspiring celebrity athletes that the celebrity stock markets must be compared.

III. THE DEVELOPMENT OF CELEBRITY STOCK MARKETS

As the existing funding models described above have faced various shortcomings for financing aspiring celebrities in all fields — most significantly the difficulty in getting payment up-front in exchange for anticipated future income — innovative individuals have attempted to change the way that investment works in the entertainment industry on an individual contractual basis. This section addresses some early and isolated experimentation with human equity investments for funding various forms of aspiring entertainers. It then describes and addresses the more comprehensive celebrity stock market experiment offered by Fantex in the athletic space. Finally, it identifies the various legal and societal forces that suggest that such celebrity stock markets will continue to develop.

A. Early Versions of Human Equity Investment in Entertainment

Investing in aspiring celebrities in exchange for a share of their future income is not entirely new. Rather, in some subsets of the sports and entertainment industries, funding rising stars in the field has long occurred in this way.

For example, despite the existence of some high school and college golf programs paid through the traditional educational scholarship model described above, golf is an expensive sport with expensive equipment and requires substantial traveling to play in tournaments. Golf is also primarily not a team sport, does not have a draft, and thus, substantial funding for aspiring golf celebrities comes from parental and private funding.[185] Furthermore, during a golfer's career, he or she

AMERICA AND PRESERVED THE MYTH OF RACE 37 (1997) ("The racial paradox of the NBA and some other sectors of the sports world is that they both exploit and control black violence like a commodity."); SHAUN POWELL, SOULED OUT? HOW BLACKS ARE WINNING AND LOSING IN SPORTS 17, 31-32 (2008) (contending that African American athletes have become commodities that have been lulled into silence by the promise of money and fame).

184 *See generally* Elliot S. Rozenberg, *The NCAA's Transgender Student-Athlete Policy: How Attempting to Be More Inclusive Has Led to Gender and Gender-Identity Discrimination*, 22 SPORTS L.J. 193 (2015).

185 *See* Peter Hoy, *The Price of Raising a Golf Star*, FORBES (June 11, 2007, 12:00 PM), https://www.forbes.com/2007/06/11/golf-cost-kid-forbeslife-cx_ph_0611raise.html#

has to qualify for each tournament annually and is only paid when he or she wins or if he or she is able to obtain an endorsement deal.[186] Therefore, golf is a sport that requires both substantial money and talent to succeed let alone play on a consistent basis.[187] Furthermore, golf lacks a major television deal (at either the college or professional level) and no professional teams are recruiting since it is an individual sport except for the Ryder Cup.[188]

As a result of the missing team structure for funding aspiring athletes, golf has experimented with early versions of human equity investments on an individual contract basis rather than as part of a larger established market. In golf, it is common for investors to support a junior player in exchange for a percentage of that player's future earnings.[189] This system allows the athletes to hedge their risk. What counts as "future earnings" is determined by contract, such that the scopes and terms vary, but typically "any cash the player wins" goes toward recoupment of the debt, and then is split.[190] Former golfer Roger Maltbie, who has entered into these deals before, recommends three limitations on their scope: (1) limit the contract to share tournament winnings and exclude endorsements; (2) create a sliding scale in which the athlete keeps more as more is earned and (3) build in benchmarks to permit the athlete to exit the contract.[191] For similar reasons (i.e., lack of a team, expensive to travel, no draft), there are reports of similar arrangements for aspiring tennis players.

Furthermore, as described above, the minor league model in baseball has its own challenges because minor league salaries are dramatically lower, especially when compared to the ultimate salaries that celebrity athletes who succeed in MLB obtain. Therefore, there is potentially a market opportunity for athletes to share both the risk and the theoretical large upside as they toil through the minor leagues. In

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186 Brian Hill, *How Does a Golfer Get Paid*, GOLFWEEK, http://golftips.golfweek.com/golfer-paid-20160.html (last visited Dec. 28, 2018).

187 *See How to Be a Professional Golfer: Why Ninety-Eight Percent of Young Golfers Will Fail and What You Can Do to Prevent It*, PRO TOUR GOLF C. (Jan. 3, 2014), http://www.protourgolfcollege.com/the-lab/how-to-become-a-professional-golfer-why-98-percent-of-young-golfers-will-fail-and-what-you-can-do-to-prevent-it.

188 *Ryder Cup FAQs: Scoring, History, Format, and How it Works*, RYDER CUP (Sept. 30, 2018, 8:43 AM), https://www.rydercup.com/news-media/usa/ryder-cup-faqs-scoring-history-format-and-how-it-works.

189 Peter Finch, *Money Clip: "The Worst Investment?,"* GOLF DIGEST (Feb. 15, 2012), http://www.golfdigest.com/story/peter-finch-finance-2012-03.

190 *Id.*

191 *Id.*

2008, minor league baseball player Randy Newsom attempted an innovative approach to the problem that minor league baseball players are paid extremely poorly. Newsom attempted essentially to sell a 4% share in himself for $50,000.[192] He did so by selling shares worth two-thousandths of a percent of his pay if he made it to the major leagues at the cost of $20 per share on his website.[193] If all the shares had sold, they would have been worth 5% of his future income.[194] Newsom shut down the attempt out of a concern that he was violating MLB rules.[195] This idea, however, showed the beginning of the perceived need by some for a celebrity stock market to help share risk.

Additionally, beyond the realm of traditional athletics, in the poker industry, it is quite common for investors, often consisting of other players, to front the money for expensive poker tournaments in exchange for a share of the player's profits in what are known as backing or staking agreements.[196] Many investors even have portfolios of poker players, whom they support over the long term in exchange for a percentage of their total winnings, which depends on the terms of the contract but is typically an even split.[197] This concept is colloquially known by the troubling name of having a "stable" of horses.[198] There are even funds that assemble portfolios of players as if they were stocks.[199] While this example shows individuals investing in other individuals in exchange for a share of the action, the action is typically limited to a share of profits from the poker industry. Typically, the investors do not also get a share of income derived by the poker players from their "day job" if they have one, or, importantly, from any advertising or other revenue they may earn even from their prominence within the poker world.[200]

Other aspects of the entertainment industry have also experimented with one-off financial arrangements that in some ways resemble human-equity investing. In the music industry, the late David Bowie

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192 *See* Alan Schwarz, *Buying Low: Minor Leaguer Takes Stock of Himself*, N.Y. TIMES (Feb. 1, 2008), http://www.nytimes.com/2008/02/01/sports/baseball/01minors.html.

193 *Id.*

194 *Id.*

195 *Id.* Interestingly, Newsom is now involved as an executive in Fantex.

196 Alexandra Berzon, *The Hidden Game Behind Professional Poker*, WALL ST. J. (Mar. 28, 2014, 11:02 AM), https://www.wsj.com/articles/SB10001424052702303563304579445351021225902.

197 *Id.*

198 Miikka Anttonen, *The Ugly Truth About Staking in Poker*, UPSWING POKER (Oct. 18, 2016), https://www.upswingpoker.com/staking-truth-stake-makeup/.

199 Berzon, *supra* note 196.

200 Anttonen, *supra* note 198.

experimented with a method of exchanging future royalty income for $55 million in immediate funding by being the first artist to securitize his future copyright interests in his existing works.[201] He did so by securitizing his first twenty-five albums in the form of what became known as a "Bowie Bond."[202] Such bonds offered shares of future royalties on existing intellectual property;[203] in the case of the famed *Starman*, this included future royalties on hits such as *Changes*, *Ziggy Stardust*, and *Space Oddity*.[204] The bonds were comprised of most of Bowie's musical catalog up until its issuance.[205] This allowed Bowie to cash in immediately on his previous work in 1997 instead of living off royalty paychecks for years to come.[206] For obvious reasons, securitization of intellectual property assets presents an attractive option for artists who need cash sooner rather than later. As a result of the impact of the internet and piracy on the music industry, however, the securitization of intellectual property and specifically musical copyrights in this way has become more difficult.[207] In fact, Moody's Investor Services downgraded the rating of Bowie Bonds to the low rating of Baa3[208] at the turn of the century, primarily due to internet piracy.[209]

B. Adding Celebrity Stock Markets to the Mix

While human equity investments have occurred in the entertainment industry on an individualized contractual basis, the idea

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201 Teresa N. Kerr, *Bowie Bonding in the Music Biz: Will Music Royalty Securitization Be the Key to the Gold for Music Industry Participants?*, 7 UCLA ENT. L. REV. 367, 381-82 (2000).

202 Ethan Wolff-Mann, *Bowie Bonds: How David Bowie Securitized His Royalties and Predicted the Future*, MONEY (Jan. 11, 2016), http://money.com/money/4175086/david-bowie-bond-royalties-securitized.

203 *Id.*

204 Alastair Marsh, *Bowie: The Man Who Sold Royalties and Brought Music to Bonds*, BLOOMBERG, (Jan. 11, 2016, 5:28 AM), https://www.bloomberg.com/news/articles/2016-01-11/bowie-bonds-drove-changes-in-markets-leading-to-esoteric-finance. *See* Wolff-Mann, *supra* note 202.

205 *See* Wolff-Mann, *supra* note 202.

206 Marsh, *supra* note 204.

207 Wolff-Mann, *supra* note 202.

208 "The lowest rating of investment grade Moody's Long-Term Corporate Obligation Rating." *See* Baa3, NASDAQ, https://www.nasdaq.com/investing/glossary/b/baa3 (last visited Feb. 14, 2019).

209 *See* Renae Merle, *The "Bowie Bond" Rocked The Financial World Too*, WASH. POST, (Jan. 11, 2016), https://www.washingtonpost.com/news/business/wp/2016/01/11/the-bowie-bond-rocked-the-financial-world-too/?utm_term=.07635c653c99.

of a celebrity stock market would involve systematizing human equity investments in a more structured way. The idea motivating celebrity stock markets is that the various aspiring celebrity-funding models described above often have large downsides where the celebrities receive extensive wealth at the back-end if successful, but have limited and complicated abilities to fund their pursuit of that success. In a celebrity stock market, aspiring celebrities would receive funding upfront to help them pay for the cost of pursuing their chosen form of art. In exchange for that upfront funding, they would promise the investors a share of their future income, where the potential sources of income would be defined by contract ranging from narrowly limited to salary income, to more likely a broader definition including endorsement funds, or perhaps even all sources of income. The time over which the investors receive the percentage of income could be limited to a particular time period or could last indefinitely depending on the terms of the contract at the basis of the celebrity stock market. The investor could then take their share of the aspiring celebrity's future income and sell shares in it in order to divide the risk further across a wide number of smaller investors. Those shares could then be bought and sold in a mechanism resembling a stock market. This celebrity stock market could provide an additional model for funding aspiring celebrities that could supplement or in some cases perhaps replace the existing models.

This notion of a celebrity stock market is not purely theoretical. Recently, a San Francisco-based start-up company called Fantex attempted a variation on such a celebrity stock market initially within the realm of athletics. In doing so, it suggested a real possibility of shifting the hypothetical human equity investment market from its current debates within higher education toward investment in the future income potential of athletes, artists, entertainers, and other celebrities.

Fantex operated by having parent company Fantex Holdings, which included both Fantex Brokerage Services ("FBS") and Fantex, Inc. The way it worked is that Fantex, Inc. entered into contractual deals with its athletes in which it paid the athlete a one-time upfront fee in the millions of dollars, in exchange for the athlete giving the company a set percentage of all future earnings.[210] Significantly, the future earnings were not limited to the athlete's salary earnings on the field, but as defined in the contracts included all forms of future earnings,

[210] Daniel Roberts, *Here's Why Fantex, the Athlete Stock Exchange, Is Working*, FORTUNE (Mar. 31, 2015), http://fortune.com/2015/03/31/athlete-stock-exchange-fantex/.

on and off the field for the rest of the athlete's life even beyond the end of the athletic career.[211] In fact, the contracts potentially extended beyond the life of the athlete because the contracts provided that if the athlete licensed his or her likeness and died, that the investors would continue to profit from the proceeds of the agreement. The company used the language that it had purchased the interest in an "athlete brand," but the contractual language defined this as a set percentage of future income from all sources indefinitely.

To fund the up-front payment, Fantex Inc. permitted individual investors to invest in a Fantex "tracking stock" that is linked to the value and economic performance of a professional athlete's personal brand.[212] Fantex Inc. even filed registration statements with the SEC. The "tracking stock" that Fantex Inc. then offered to investors was really offering them a certain share in Fantex's Inc.'s share of the athlete's future earnings. Those stocks could be bought and sold like any other stock on a market created by Fantex Brokerage Services.[213] FBS was the exclusive trading platform for stocks issued by Fantex, Inc., and is a member of FIRNA, and a registered broker-dealer and alternative trading system with the SEC. The contractual deal between Fantex Inc. and the athlete contained a condition precedent that the deal would only be completed if Fantex Inc. could sell enough shares in the initial public offering ("IPO") to make back the amount of money Fantex needs to pay the athlete the contractually negotiated up-front fee; otherwise Fantex Inc. would not complete the offering.[214]

Fantex was founded in 2012, and it first applied for an IPO with the SEC in Fall of 2013. The first IPO was supposed to be for Arian Foster in a deal in which Fantex would pay him $10 million up front for a 20% share in all of his future income including salary, endorsements, and other related business revenue.[215] Foster got injured, however, before the IPO could occur, and therefore the deal was never completed.[216]

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[211] *Id.*

[212] *See, e.g.*, Alex Barinka, *Athlete-Tracking Stock Startup Fantex Said to Raise $60 Million*, BLOOMBERG (July 22, 2016, 7:42 AM), https://www.bloomberg.com/news/articles/2016-07-22/athlete-tracking-stock-startup-fantex-said-to-raise-60-million.

[213] *Id.*

[214] Roberts, *supra* note 210.

[215] Eric Chemi & Jessica Golden, *Fantex Pulls IPO for Arian Foster. What's Next?*, CNBC (Nov. 23, 2015, 4:58 PM), http://www.cnbc.com/2015/11/23/fantex-pulls-ipo-whats-next.html.

[216] *Id.*

Instead of Foster, Fantex's first successful IPO was with tight end Vernon Davis who at the time played for the San Francisco 49ers[217] and later went on to earn a Super Bowl with the Denver Broncos.[218] Fantex contracted with Davis to pay him $4 million in exchange for a 10% share in all income from his future endeavors.[219] On April 28, 2014, Fantex opened up stock in Vernon Davis for purchase at $10 per share and successfully sold 100% of the 421,000 offered shares.[220] The stock peaked at $12.50,[221] and as of March 4, 2016, was trading for $7.90.[222] Fantex also paid out multiple dividends on the Vernon Davis stock including a total of $1/share in 2014, $0.50/share in April 2015[223] and $1.50/share in September 2016, representing a total of 30% of the initial $10 investment.[224] Fantex also announced that it co-invested in three Jamba Juice franchises with Vernon Davis, as its brand-driven contract gave it the right to co-invest in certain opportunities at a percentage equivalent to the brand income Fantex, Inc. has acquired — in this case 10%.[225] This Jamba Juice deal demonstrated Fantex's intention to have a share in the entire brand attached with an athlete, and not merely his performance on the field.

Since the initial IPO with Vernon Davis, Fantex went on to sign contracts with at least twenty athletes.[226] In total, Fantex completed six IPO's worth over $64 million.[227] Interestingly, Randy Newsom,

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[217] *See* Peter Lattman, *A Second NFL Player Signs Public Offering Deal*, N.Y. TIMES (Oct. 31, 2013, 1:06 PM), https://dealbook.nytimes.com/2013/10/31/fantex-adds-another-athlete-to-its-i-p-o-roster/?_r=0.

[218] *Fantex, Inc. Declares $2.74M in Cash Dividends for Its Athlete Tracking Stocks*, BUSINESS WIRE (Aug. 16, 2016, 11:00 AM) [hereinafter *Fantex, Inc. Declares $2.7M*], http://www.businesswire.com/news/home/20160816005469/en/Fantex-Declares-2.74M-Cash-Dividends-Athlete-Tracking.

[219] Lattman, *supra* note 217.

[220] Daniel Roberts, *NFL Star Vernon Davis Talks About Being a Stock*, FORTUNE (June 6, 2014), http://fortune.com/2014/06/06/fantex-vernon-davis-buck-french-nfl/.

[221] *Id.*

[222] *Fantex Inc. Vernon Davis Conv. Tracking Stock*, MARKETWATCH, http://www.marketwatch.com/investing/stock/vndsl (last visited Feb. 14, 2019).

[223] *Fantex, Inc. Declares Third Cash Dividend for Fantex Vernon Davis*, BUS. WIRE (Apr. 21, 2015, 9:00 AM), http://www.businesswire.com/news/home/20150421005202/en/Fantex-Declares-Cash-Dividend-Fantex-Vernon-Davis.

[224] *See Fantex Inc., Declares $2.7M*, *supra* note 223.

[225] Daniel Roberts, *Fantex Is Buying Jamba Juices with Vernon Davis*, FORTUNE (Apr. 20, 2015), http://fortune.com/2015/04/20/fantex-vernon-davis-jamba-juice/.

[226] *See* Matthew Perlman, *Fantex Closes $59M Placement of Athlete Tracking Stock*, LAW360 (July 25, 2016, 3:25 PM), https://www.law360.com/articles/821020/fantex-closes-59m-placement-of-athlete-tracking-stock.

[227] *See* William Alden, *Fantex Completes Second Football Player I.P.O., Though Demand Is Slack*, N.Y. TIMES (July 21, 2014, 2:59 PM), https://dealbook.nytimes.com/

who first tried to commoditize his own baseball career, got a degree in law, and then became Vice President of Business Development at Fantex.[228] Other celebrity backers of the system included Jack Nicklaus and John Elway. Fantex initially mostly focused on NFL athletes, but its CEO, Buck French, indicated that he intended to expand not only to other sports but also to other types of celebrities.[229]

More recently, Fantex emphasized the importance of individual branding in its celebrity stock market. For example, Fantex's CEO underscored the importance of branding in deciding which athletes to commoditize in this way. In making such decisions, he indicated that "first and foremost is character."[230] Once that filter has been met, the second filter is "[w]hat . . . their potential [is], both on the field and off the field."[231] This suggests the importance of potential sources of future income beyond that derived directly in salary as an athlete.

Ultimately, Fantex relied internally largely on a commission-based business model, which proved unsustainable at the trading levels it was able to achieve.[232] In March 2017, its CEO left the company after having shut down its trading platform.[233] Despite Fantex's demise,

2014/07/21/fantex-completes-second-football-player-i-p-o-though-demand-is-slack/ (raising $5.2 million); Jim Dalke, *Fantex Sold More than 800,000 Shares of Alshon Jeffery in its Largest Athlete IPO Ever*, CHICAGOINNO (Mar. 19, 2015), http://chicagoinno.streetwise.co/2015/03/19/alshon-jeffery-fantex-stock-begins-trading-online/ (raising $8.4 million); *Fantex Series Michael Brockers Convertible Tracking Stock Begins Trading at Fantex.com*, STREETINSIDER (June 1, 2015, 9:00 AM), https://www.streetinsider.com/Press+Releases/Fantex+Series+Michael+Brockers+Convertible+Tracking+Stock+Begins+Trading+at+Fantex.com/10611181.html (raising $3.6 million); *Vernon Davis Stock Hits $12 in Debut*, ESPN (Apr. 28, 2014), http://www.espn.com/nfl/story/_/id/10852827/vernon-davis-ipo-gains-20-percent-limited-debut (raising $4.2 million); Steve Watkins, *EXCLUSIVE: Investors Paid This Much For Bengals' Sanu Stock*, CIN. BUS. COURIER (Nov. 3, 2014), http://www.bizjournals.com/cincinnati/news/2014/11/03/exclusive-investors-paid-this-much-for-bengals.html (raising $1.6 million); Tom Zanki, *Fantex Primes 6th Football Player Brand's $2.7M IPO*, LAW360 (June 24, 2015, 3:41 PM), https://www.law360.com/articles/671903/fantex-primes-6th-football-player-brand-s-2-7m-ipo (raising $2.7 million).

[228] *See* Randy Newsom, LINKEDIN, https://www.linkedin.com/in/randy-newsom-21067465/ (last visited Feb. 14, 2019).

[229] Eriq Gardner, *Should Jennifer Lawrence Have an IPO for Herself?*, HOLLYWOOD REP. (Oct. 3, 2014, 5:00 AM), https://www.hollywoodreporter.com/thr-esq/should-jennifer-lawrence-have-an-737528.

[230] Roberts, *supra* note 225.

[231] *Id.*

[232] Sujeep Indap & Leslie Hook, *Fantex Founder Leaves Athlete Stock Exchange*, FINANCIAL TIMES (Apr. 3, 2017), https://www.ft.com/content/7a3f4d4e-17d2-11e7-9c35-0dd2cb31823a.

[233] *Id.*

nonetheless, the experiment started by Fantex suggests that other companies could step in with a different business model and re-enter the celebrity stock market space.

The celebrity stock market model suggested by Fantex reflects a close cousin to the example of Bowie Bonds, but there are some key differences. In both scenarios, there is the commonality of issuing interests in the intellectual property of human beings. However, in David Bowie's case, he was issuing interests in future royalties on existing musical works.[234] This involved some level of prediction as to how his musical works would perform in the future, but not an investment in his unknown creation of future work. In the versions of the celebrity stock markets that the Fantex model anticipated, the investment will likely take the form of issuing interests in the future income of the investees including future works and importantly brand-related income. This dichotomy is perhaps more easily be explained as follows: Bowie investors were investing in hit songs that they presumably knew and loved,[235] whereas celebrity stock market investors would be investing in the artist themselves, not their work.

Although it appears that with its demise, Fantex will not continue to operate or grow to enter the broader celebrity stock market beyond athletes to represent other entertainers, its existence shows the non-fictional possibility of such a market. It appears only a matter of time before this funding model shifts from the athletic space to funding individuals in other celebrity and creative pursuits where branding is hugely significant. It takes very little imagination to imagine a similar phenomenon expanding to actors, musicians, filmmakers, artists, and other entertainers.

In fact, other companies have also experimented with models in other aspects of the entertainment funding space. For example, Pave markets itself as a personal loan service for young people between eighteen and forty-years-old who are referred to as "Talent." Although Pave markets itself as a personal loan service, functionally it does not operate as a loan because rather than a set amount that needs to be paid back, the company earns money by taking 3% of what the Talent raises in addition to a 1.5% transaction fee on each repayment. Although Pave appears like more of an example of using human equity funding in the educational space, it operates as a hybrid model because many of the people using Pave did so to fund less traditional

[234] *See* Wolff-Mann, *supra* note 202 (explaining that the rights to Bowie's first twenty-five albums had lapsed back into Bowie's control).

[235] *See* Marsh, *supra* note 204 (stating that Bowie's bond was secured by his catalog, including hit songs such as *Ziggy Stardust*).

forms of education including the pursuit of entertainment industry careers.

Pave opens the door to this possibility by claiming that there is a public policy benefit in providing deserving young people, who do not have the required credit and qualifications to obtain a personal bank loan, the ability to pursue the passions, purpose, and creativity that they wouldn't otherwise be able to without this money. The company encourages people with a lot of money to invest in the future success of young people instead of investing in the stock market, startups, etc. Investors must be SEC-accredited, meaning they (as an individual, not an entity) need to either earn more than $200,000 per year or have a net worth of at least $1 million. Pave also markets itself as a mentor program, meaning that your "investors" will help to "mentor" you through your progression with their money. Analysts look at earning potential, education, test scores, job offers, etc., to determine the amount of future income the "Talent" must assign. These innovative companies are likely just the initial entrants into a market void as the result of the various deficiencies of the existing celebrity entertainment industry funding models. The next subsection addresses some of the legal and societal developments that could aid the creation of such celebrity stock markets, and which suggest that these celebrity stock markets may be the funding model of the future.

C. The Trends Aiding the Development of Celebrity Stock Markets

A number of both legal and societal trends are likely to create the conditions for celebrity stock markets to continue to develop and potentially flourish as alternative funding methods for aspiring celebrities. Traditionally, many forms of entertainers obtained significant portions of their revenue in one of two forms: salaries and copyright revenue/royalties. Entertainers in various fields are increasingly obtaining significant revenue based on other types of rights, namely trademark, rights of publicity, and other so-called life-rights closely linked to individual's ability to commoditize one's personal branding. Expanding legal rights in these areas have created a landscape that will permit celebrity stock markets to continue to expand with a new focus on predicting brand-based revenue. Specifically, a number of legal trends have played an important role in creating a legal landscape where celebrity stock markets can flourish– the growth and expansion of the right of publicity, and the recognition of individual identities as potentially protected under trademark law.

The first legal development that has set the groundwork for a celebrity stock market is the significant expansion of the right of

publicity tort. The right of publicity originally grew out of the traditional William Prosser privacy torts — specifically the privacy tort protecting an individual against the appropriation for the defendant's advantage of the plaintiff's name or likeness.[236] In its privacy form, the misappropriation tort addressed a dignitary interest in preventing someone from having his or her identity exploited in a way that he or she would oppose.[237] The harm in this situation is not that the defendant should have paid the plaintiff for the use of the identity, but rather that the plaintiff objects to the use of his or her identity separate from the failure to pay.[238] In an early case, a Georgia court clearly focused on the dignitary aspects of the claim: "[T]he humiliation and mortification of having his picture displayed in places where he would never go to be gazed upon, at times when and under circumstances where if he were personally present the sensibilities of his nature would be severely shocked."[239] Consequently, the early claims typically required a showing of emotional distress consistent with this dignitary-focused view.[240]

In 1953, with the Second Circuit case *Haelan Labs v. Topps Chewing Gum*, the modern right of publicity was born and named, now no longer focused on remedying dignitary harm, but instead a right based on the "publicity value" of the individual's identity — in that case a photograph.[241] The court described the new "right of publicity" as an "addition to and independent of that right of privacy."[242] In its original forms, the right was narrowly construed and not descendible, thus limiting its value in significant ways.[243] In the 1980s and 1990s, however, the right of publicity expanded in both term and scope. With regard to term, most state legislatures during these decades found the

[236] William Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

[237] Mark Bartholomew, *A Right Is Born*, *supra* note 95, at 309-10 (2011).

[238] *See id.*; *see also* JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 27 (2018).

[239] Pavesich v. New England Life Ins. Co., 50 S.E. 68, 80 (Ga. 1905).

[240] *See* ROTHMAN, *supra* note 238, at 32 ("[E]ven if public figures were able to bring claims for a violation of the right of privacy, they were limited to injunctive relief (stopping the offending use) or only to nominal damages if they did not suffer emotional distress.").

[241] *See* Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

[242] *Id.*

[243] *See* Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454, 455 (Cal. 1979) ("[T]he right [of publicity] is not descendible and expires upon the death of the person so protected."); *see also* Sinatra v. Goodyear Tire & Rubber Co., 435 F2d 711, 713 (9th Cir. 1970) (affirming imitating a celebrity's voice is not actionable).

right of publicity should include postmortem rights such that most courts today agree that publicity rights are descendible.[244] In addition to descendible, the right has become transferable,[245] which strongly helps the ability of commoditization of celebrity and in term helps create the conditions necessary for celebrity stock markets. Simultaneously, the scope of the right of publicity expanded to include such concepts as look-a-likes,[246] sound-a-likes,[247] and even commercials that merely loosely referenced a celebrity.[248] This allows for a wider range of income possibilities with aspiring celebrities who have a brand strong enough to be able to monetize his or her right of publicity in a significant way receiving income from their celebrity as protected by their right of publicity rather than traditional forms of funding such as salary or copyright royalties.

Furthermore, at the same time as the right of publicity has grown, federal trademark law and the Lanham Act jurisprudence has also expanded in ways that facilitate the growth of celebrity stock markets by creating additional incentives with back-end sources of income to justify up front investments. The interpretation of the Lanham Act section 43(a) has expanded to protect celebrities against the use of their identities in situations that falsely suggest that the celebrity has endorsed a product.[249] Section 43(a) has grown by both case law and legislative amendment beyond its initial limited scope to now cover two broad scenarios including both the infringement of unregistered marks and names, as well as false advertising.[250] As this growth has occurred, courts have treated personal identities as trademarks for purposes of section 43(a) thus allowing celebrities a cause of action for falsely suggesting endorsement.[251] This, legally speaking, also

244 *See* Bartholomew, *A Right is Born*, *supra* note 95, at 315-17.

245 *See* ROTHMAN, *supra* note 238, at ch. 6.

246 Prudhomme v. Procter & Gamble Co., 800 F. Supp. 390, 393-94 (E.D. La. 1992).

247 *See* Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1112 (9th Cir. 1992), *abrogated by* Lexmark Intern., Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014); Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988).

248 *See* White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992) (holding that a robot that loosely resembled Vanna White mostly with a blond wig, long dress, and by referencing her Wheel of Fortune accessories violates her right of publicity).

249 *See* Celeste H.G. Boyd & Stuart Paynter, *What a Tangled Family Tree We Weave: Trademarks, Publicity Rights, and the Cross Pollination of First Amendment Defenses Through Video Games*, 4 J. INT'L MEDIA & ENT. L. 69, 70 (2011).

250 J. Thomas McCarthy, *Lanham Act § 43(a): The Sleeping Giant Is Now Wide Awake*, 59 LAW & CONTEMP. PROBS. 45, 51-52 (describing Section 43(a)'s growth including the 1989 amendments to the Lanham Act).

251 *See* Boyd & Paynter, *supra* note 249, at 70.

expands the ability of the celebrity to capitalize on the use of their brand and identity in much the same way as the right of publicity. This has led to the growth of the lifestyle brand where the individual's brand and the business brand are mixed together as a single entangled concept.

Sometimes this can involve protection for the celebrity's likeness in a way that appears reminiscent of right of publicity protection, but that takes place in the context of the Lanham Act. For example, after his death, Bob Marley and his image have been merchandised and attached to a particular laidback lifestyle.[252] His children own a company that acquires and capitalizes on Marley's assets, products, and rights and granted Zion Rootswear, LLC an exclusive license to use Bob Marley's trademarked image on merchandise and clothing.[253] A false endorsement lawsuit under the Lanham Act was then brought against AVELA for selling unauthorized Bob Marley merchandise.[254] The Ninth Circuit Court of Appeals explained that the case presents the question of "when does the use of a celebrity's likeness or persona in connection with a product constitute false endorsement that is actionable under the Lanham Act?"[255] The court recognized that there are unique principles "that underlie celebrity false endorsement claims" and rejected the argument that "the application of those principles results in a federal right of publicity.[256] Specifically, the court found that "in celebrity cases, the court generally applies eight factors to determine the likelihood of confusion." While some of these factors are identical to those used in traditional trademark infringement cases, a number of those factors have been adopted to particularly address the issue of celebrity endorsement including: (1) the relatedness of the fame or success of the celebrity to the defendant's product; (2) the similarity of the likeness used by the defendant to the actual celebrity; (3) the level of recognition that the celebrity has among the segment of the society for whom the defendant's product is intended; and (4) the defendant's intent in selecting the celebrity.[257] Ultimately, applying those factors, the court

[252] *See Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d 1059, 1066 (9th Cir. 2015).

[253] *Id.*

[254] *Id.*

[255] *Id.* at 1067.

[256] *Id.*

[257] *Id.* at 1069.

found that the jury's determination that there was a likelihood of confusion as to Bob Marley's endorsement could be supported.[258]

In other cases, trademark law has been used to protect famous nicknames. For example, Hirsch was a College Football Hall of Fame inductee famous for playing for the University of Wisconsin Badgers where he earned the nickname "Crazylegs."[259] A lawsuit was brought against the manufacturer of a shaving gel for unauthorized use of the nickname "Crazylegs" on the shaving gel in Hirsch v. S.C. Johnson & Son.[260] The Wisconsin Supreme Court found that there was ample evidence to show the likelihood of confusion as to the sponsorship of the product as the result of the use of the name "Crazylegs."[261]

Finally, it is also possible that a third development in the law could, in the long run, support the rise of celebrity stock markets, namely the codification of a cause of action for trademark dilution. As codified in the Federal Trademark Dilution Act of 1995, trademark dilution does not require that the plaintiff show a likelihood of confusion on the part of consumers; instead, a cause of action for dilution exclusively protects famous marks from "tarnishment" or "blurring."[262] Since celebrities, unlike ordinary individuals, are more likely to have famous marks associated with their personal identities this may give them an additional cause of action preventing commercial uses of their names without having to prove a likelihood of confusion as long as they can establish secondary meaning associated with their name.

For example, international superstar Beyoncé has sold millions of dollars' worth of goods and entertainment services in connection with her federally registered Beyoncé trademark. A company began to sell shirts and mugs that said "Feyoncé'" meant to be a unique spelling of "fiancé" as well as clearly a reference to Beyoncé along with phrases such as "He Put a Ring on It" meant to reference Beyoncé's iconic song. Beyoncé filed suit in 2016 alleging that this was likely to dilute the distinctive quality of the famous Beyoncé mark. Similar cases are likely to continue to arise.

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[258] *Id.* at 1071.

[259] *See* Hirsch v. S.C. Johnson & Son, Inc., 90 Wis. 2d 379, 382 (Wis. 1979).

[260] *Id.*

[261] *Id.* at 401.

[262] 15 U.S.C. § 1125(c)(1) (2018) ("[T]he owner of a famous mark . . . shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion . . . .").

The expansion of these distinct but related legal regimes plays an important role in creating an environment for celebrity stock markets to flourish. These legal expansions greatly increase and entrench the commercial value of celebrity branding. This supports and incentivizes the expansion of celebrity stock markets because aspiring celebrities can trade on that future revenue in exchange for guaranteed current payments. Many investors may feel that the future revenue associated with individual branding is more predictable than being able to predict the success of the copyright-based revenue under the traditional models. Absent a strong right of publicity, section 43(a), and dilution, investors who wanted to invest in the future income potential of artists and other aspiring celebrities would be largely limited to predicting and investing in those individuals likely to receive traditional sources of income — salaries, record deals, etc. The right of publicity expands the pool of future income to largely encompass the ability of the celebrity to capitalize on his or her brand financially. Even if branding is not seen as more predictable, it still significantly expands the potential upside of the investment. This in turn strengthens the incentives for celebrity stock market trading because the expanded existence of a right of publicity, section 43(a), and dilution allows the future celebrity — once their personal trademark achieves "famous" status — to prevent others from using their brand without permission in various ways that can cause blurring irrespective of any consumer confusion, thus growing the bundle of rights the would-be investor could recover.

Alongside these legal trends, a number of societal trends also make the conditions ripe for celebrity stock markets to succeed. In recent years, there has been an increased societal recognition and respect for the economic power of celebrity. As Mark Bartholomew has documented, there was a need to rationalize celebrity and fame before legal protections could be given.[263] The public emphasis on fame had historically been seen as irrational and negative. With the growth of the public relations industry, there was a concerted effort to rationalize fame by using two strategies to impact public opinion. First, public relations diffused celebrity power to make it seem less threatening by having the publicist discover a market segment and insert the appropriate celebrity there. This made both fame and the power that came along with the power appear less threatening. Simultaneously, work was done to quantify fame with the

[263] *See generally* MARK BARTHOLOMEW, ADCREEP: THE CASE AGAINST MODERN MARKETING 123-57 (2017).

development of different ratings systems in order to make a celebrity seem more rational and less subject to the random whims of public opinion. These aided advertisers in making their economic decisions regarding celebrity endorsements in a way that felt scientific. The ability to point to quantitative and defined data allowed advertisers to justify and rationalize their economic decisions.

Other societal changes in the treatment of celebrity also helped legitimize and fuel celebrity stock markets. Bartholomew also traces the key development of the quantification of fame.[264] As publicists have developed, and continue to develop rating systems to quantify the selling power of celebrities, this provides tools to investors in celebrity stock markets seeking to predict the return on investment of potential aspiring celebrities. Various firms have developed different celebrity rating systems all based in part on the Q-score system. The Q-score or Q-rating system is "[t]he recognized industry standard for measuring consumer appeal of personalities, characters, licensed properties, programs and brands."[265] Founded by Jack Landis in 1963, the Q-score started as a way to ascertain which celebrity would be the most impactful for advertising and campaigning by measuring likeability which translates into increased consumer involvement.[266] Landis' New York based company, Marketing Evaluations Inc., calculates the Q-score (Q stands for quotient) based on surveys from a representative sample of the population, as well as by demographics, every two years.[267] The sample population is asked whether they are familiar with the celebrity or brand, and if so, they are asked to rate him, her, or it on a scale of "one of my favorites," "very good," "good," "fair," or "poor."[268] The Q-score is then calculated by taking the percentage of individuals who answered "one of my favorites" and

[264] *See generally id.*

[265] *The Value of Q Scores*, Q SCORES CO., http://www.qscores.com/home/Value.aspx (last visited Dec. 23, 2018).

[266] *See id.*; *see also Q Score*, MBA SKOOL, http://www.mbaskool.com/business-concepts/marketing-and-strategy-terms/11923-q-score.html (last visited Dec. 23, 2018).

[267] *Using Q Scores and the Fame Index to Help Choose a Celebrity Endorser*, ZABANGA MARKETING (Feb. 10, 2017), https://www.zabanga.us/marketing-communications/using-q-scores-and-the-fame-index-to-help-choose-a-celebrity-endorser.html ("To determine its Performer Q ratings for TV and movie personalities, the company surveys a representative national panel of 1,800 people twice a year and asks them to evaluate over 1,500 performers. For its Sports Q rating, which is conducted once a year, the company surveys 2,000 teens and adults and asks them about approximately 500 active and retired players, coaches, managers, and sportscasters.").

[268] *Id.*

dividing that by the percentage of individuals who stated that they have heard of the celebrity or brand.[269] The higher the score, the stronger the consumer base, which with exposure to their favorite celebrity or brand provides "a greater likelihood to be more attentive, be more involved, have higher recall, and have a more positive image."[270] The Q-score system has paved the way for other score based popularity scales such as the Fame Index[271] or the Nielsen ratings[272] but more companies have relied on the Q-scores to determine who would be the best fit to endorse their cause, product, or business.[273] These quantifications make celebrity stock markets feel more legitimate and less like a random guessing game.

Finally, the proliferation of social media has caused greater access to more celebrities and a wider definition of who counts as a celebrity. Social media has been effective in quantifying celebrity influence in a new way separate from the Q-score system again allowing potential investors in the celebrity stock market a seemingly quantitative way to measure the brand potential of their investment. This is because it is possible to objectively determine the number of social media followers that someone has. Furthermore, social media can be monetized as income for celebrities through sponsored posts where major celebrities can make thousands of dollars per tweet. Celebrity stock markets can identify micro celebrities who have been able to attract a small income from sponsored posts and invest in them prior to them achieving their potential to grow to real celebrities through their work.

All of these societal shifts have allowed for a seemingly objective value to be assigned to a celebrity. That in turn helps create the conditions for celebrity stock markets to flourish because just as advertisers can receive quantitative data to evaluate, similarly investors

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269 *Id.* ("The familiarity score indicates the percentage of people who have heard of the person, while the one-of-my-favorites score is an absolute measure of the appeal or popularity of the celebrity."); *see Q Score*, *supra* note 266.

270 *The Value of Q Scores*, *supra* note 265.

271 *Using Q Scores and the Fame Index to Help Choose a Celebrity Endorser*, *supra* note 267 ("Hollywood-Madison Avenue Group, a firm that arranges celebrity endorsements, has poured over 10 years of research into its Fame Index, which is a database listing more than 10,000 celebrities by 250 criteria such as age, sex, residence, career highlights, charity affiliations, fears, interests, and addictions.").

272 Founded by Arthur C. Nielsen, the Nielsen ratings, ran by Nielsen Media Research, measure the size and demographic of television audiences. *See* John Dempsey, *You Like Me! You Really Like Me!*, VARIETY (Nov. 30, 2003, 5:00 AM), http://variety.com/2003/scene/news/you-like-me-you-really-like-me-1117896302/.

273 *See* Carl Bialik, *Lights, Camera, Calculator! The New Celebrity Math*, WALL ST. J. (Feb. 27, 2010), https://www.wsj.com/articles/SB10001424052748704479404575088143982459472.

in the stock market can feel that there is real legitimate information to help them analyze the future potential of aspiring celebrities from a brand perspective.

At the same time, other aspects of the cultural context in which these changes occurred also provide help for the rise of celebrity stock markets. Mark Bartholomew offers a compelling account for the cultural context in which these legal right of publicity changes occurred. Certainly, part of the story is that celebrities gained in value throughout the twentieth century. As Bartholomew documents, in the 1980s, technology caused the value of celebrity to increase exponentially as celebrities signed endorsement deals with values significantly exceeding the payments they actually received for their performances. This resulted from a proliferation of media outlets allowing celebrities to make themselves known to a greater number of consumers than before combined with globalization increasing "the economic calculus of fame." At the same time, the death of the studio era described above meant that studios were no longer in a position to tightly police their stars' outside commercial appearances. The agency era that replaced it shifted the focus from maximizing publicity for the studios' films to a focus on maximizing economic independence for the individual star.

The growth of the right of publicity tracked this change as an incentive-based justification, for the right of publicity made significantly more sense in a regime in which celebrities had more economic and creative control over their own branding. Once celebrities were viewed as managing their own affairs, as guided by their agents, courts could paint an incentive story for awarding the right of publicity. As the Supreme Court explained in *Zacchini*, the right of publicity, "provides an economic incentive for [the celebrity] to make the investment required to produce a performance of interest to the public."[274]

IV. LEGAL AND SOCIETAL IMPACT OF CELEBRITY STOCK MARKETS

If the legal and societal trends discussed above continue to fuel the conditions for celebrity stock markets to develop, and if the existing funding markets for aspiring celebrities are imperfect and insufficient, then celebrity stock markets as initially attempted by Fantex will continue to develop. If so, then there will soon be a need to grapple with the legal and societal implications of such markets. This section seeks to initially identify some of these implications. Some of these

[274] Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576 (1977).

implications discussed first have not already been discussed in the literature and therefore will be more thoroughly analyzed and evaluated. Others have been discussed by other scholars and therefore will merely be identified and presented for the sake of offering a comprehensive issue-spotter-like look at the challenges celebrity stock markets create. Some of these implications are simply areas of the law that will have to be adjusted to determine how they would interact with these new forms of funding. Others are areas of more substantial concern.

A. Impact of Celebrity Stock Markets on Right of Publicity Law

Somewhat ironically, while the growth of the right of publicity aids the growth of celebrity stock markets, potential celebrity stock markets may undermine some of the proffered justifications for a more robust right of publicity. For example, Daniel Gervais & Martin Holmes have argued that the right of publicity can only be justified as protecting rights in an individual's identity, unlike trademark law which can be justified as benefitting consumers.[275] They argue, "if the right of publicity should exist at all, it should exist as a natural right in an individual's celebrity and identity."[276] Celebrity stock markets would have, at best, a complicated relationship with this justification for the right of publicity. It is not at all clear that this notion of a right that enables an individual to benefit from their own identity continues to have as much power if the individual can essentially sell away a portion of that identity. At the very least, it suggests that the individual should be required to retain a majority share in his or her own right of publicity in order to justify the right of publicity in the first place.

On the other hand, celebrity stock markets can reinforce the incentive justification for the right of publicity. Just as other intellectual property rights are justified under an incentive theory — society offers an incentive for individuals to create a song or book or art protected by copyright, an invention protected by a patent, or the development of a quality brand, which is then protected by a trademark. Some scholars have noted that incentive theory inadequately justifies the right of publicity because it is not clear that society benefits when individuals invest in the creation of a public

[275] Daniel Gervais & Martin L. Holmes, *Fame, Property, and Identity: The Scope and Purpose of the Right of Publicity*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 181, 185 (2014).

[276] *Id.* at 203.

persona or notoriety.[277] With the growth of celebrity stock markets, rights of publicity can, however, be viewed as a secondary incentive that helps reinforce the primary incentives that traditional intellectual property rights create. When an aspiring songwriter or musician is working to create a song, he or she is arguably incentivized by copyright law, knowing that if the song is a success he or she will reap the financial benefits of that success as the result of the temporary monopoly granted by the copyright. Unfortunately, for that musician that financial benefit only comes at the back-end.[278] In the meantime there is no particular way for the musician to pay the bills. In the former model, musicians solved this problem by trying to get record labels to sign them and pay them an advance. The growth in branding that the right of publicity enables, means that musicians would be able to get upfront funds, not necessarily from a record company, but rather from a celebrity stock market in exchange for a future share in the musician's income. In addition, that future share is not limited to only record sales, but includes many other sources of income resulting from the musician's brand such as endorsement deals. In this way, the right of publicity can be viewed as a secondary incentive enabling the celebrity stock markets to flourish, which in turn can enable the creative production incentivized by other intellectual property regimes.

B. Impact of Celebrity Stock Markets on Privacy Considerations

A shift to celebrity stock markets could also have a profound impact on privacy concerns. The existence of celebrity stock markets, just like other forms of markets, can strongly incentivize enterprising individuals to dig up personal information about the individuals being traded on the markets, in the interest of obtaining information that can provide useful information for the value of the traded celebrity stock. In fact, it is possible that such markets could emerge with the sort of disclosure requirements that exist in other more traditional forms of security markets.[279] Even if mandatory disclosure requirements didn't develop, however, the potential to obtain a leg up in the market by having unique knowledge about the individual being

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[277] *See, e.g.*, *id.* at 182; Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 127, 216 (1993) (arguing that the right of publicity incentivizes the overinvestment in celebrity).

[278] *See generally supra* Part II.D.

[279] *See* Victoria Schwartz, *Disclosing Corporate Disclosure Policies*, 40 FLA. ST. U. L. REV. 487, 491 (2013).

traded would still create a financial incentive to pry into many aspects of the inner lives of the individual.

Investors might legitimately care about personal information that could provide some insight into the ability of the talent to perform his or her job. This would necessarily encompass a wide variety of health information that would clearly become valuable not only for the athlete, but also potentially for the singer, actor, or other talent if that health information could mean that the aspiring celebrity would be less able to perform. This would extend also to the health of the individual's family, as the illness or death of a loved one could significantly impact performance. Some of this information is relevant under more traditional funding models as well, but the celebrity stock market would exacerbate it because of the increased potential length of the relationship. So for example, whereas before a record company would want to know whether an individual singer would be healthy enough to fulfill the record contract, now investors want to know for a much longer period of time. Furthermore, the pool of people wanting the knowledge shifts from just the potential employer (record company, sports team, etc.) to the entire general population who could comprise the investor pool, thus further deteriorating privacy.

And because a large part of the potential value of the individual stock would be linked not only to the individual's performance in their chosen field, but also to the individual's ability for branding and obtaining high value sponsorship deals, a much wider range of personal information becomes relevant. Such information as a celebrity having an affair, or otherwise engaging in conduct that a sponsor might deem unsuitable for the brand becomes deeply valuable knowledge in predicting that a stock is likely to drop once that information gets out.

In addition to the obvious cost to the privacy of the talent, there is potentially a broader cost to society resulting from the loss of privacy resulting from the talent's participation in celebrity stock markets. If aspiring athletes, musicians, and other artists even before they have achieved fame and fortune are forced to surrender their personal privacy as the cost of participation in the celebrity stock markets, and if the celebrity stock markets become the prevalent form of early career funding, this will increase the magnitude of the existing negative sorting impact on the talent markets. To understand this sorting effect, it is first necessary to explain that there is significant evidence suggesting that individual privacy preferences are heterogeneous, meaning that certain individuals have more of an

innate taste for privacy than other individuals.[280] Although much of the empirical work done in this space occurred within the consumer context, nothing about the underlying work suggests that consumers have unique characteristics such that their conclusions about heterogeneous privacy preferences cannot be extrapolated to the general population. Indeed, there is almost no difference between the population of individuals who comprise consumers, and the population at large more generally.

Prominent privacy scholar Alan Westin built data extracted from decades of privacy opinion surveys to conclude that the American public can be roughly divided into three categories of privacy preferences.[281] At one extreme are individuals that Westin titled the "privacy fundamentalists," which Westin estimated comprised approximately 25% of the population.[282] Consistent with their name, privacy fundamentalists view privacy as extremely high value and are largely unwilling to trade away their privacy.[283] In the middle, the "privacy pragmatists," estimated to be approximately 55% of the population, take a more nuanced approach to privacy, in which requests for personal information are balanced against the benefits from disclosing the requested information.[284] Finally, at the other end of the spectrum sit the 20% of the population that Westin named the "privacy unconcerned" and who were characterized by having no problem giving up their own information.[285]

Although Westin's methodologies and the breakdown of his categories have been questioned by scholars, none of these criticisms have attacked or even questioned the core conclusion that individual

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[280] *See* Il-Horn Hann et al., *Overcoming Online Information Privacy Concerns: An Information-Processing Theory Approach*, 24 J. MGMT. INFO. SYS. 13, 16 (2007); Victoria L. Schwartz, *Corporate Privacy Failures Start at the Top*, 57 B.C. L. REV. 1693, 1723-27 (2016) (summarizing the existing literature on the heterogeneity of privacy preferences); Alan F. Westin, *"Whatever Works": The American Public's Attitudes Toward Regulation and Self-Regulation on Consumer Privacy Issues*, *in* PRIVACY AND SELF-REGULATION IN THE INFORMATION AGE 1F (Nat'l Telecomm. & Info. Admin. 1997), http://www.ntia.doc.gov/page/chapter-1-theory-markets-and-privacy.

[281] Westin, *supra* note 280; *see also Opinion Surveys: What Consumers Have to Say About Info. Privacy: Hearing Before the Subcomm. on Commerce, Trade, & Consumer Protection of the Comm. on Energy & Commerce*, 107th Cong. 18 (2001) (statement of Alan Westin, Professor Emeritus, Columbia Univ.), https://www.gpo.gov/fdsys/pkg/CHRG-107hhrg72825/html/CHRG-107hhrg72825.htm.

[282] Westin, *supra* note 280.

[283] *Id.*

[284] *Id.*

[285] *Id.*

privacy preferences are heterogeneous.[286] On the contrary, other scholars have been able to replicate Westin's categories of heterogeneous privacy preferences in different contexts using similar survey methodologies, although they found slight differences in the exact breakdowns of the categories.[287] Heterogeneity in privacy preferences has also been found using other non-survey based methodologies. For example, business scholar Il-Horn Hann, and information systems scholars Kai-Lung Hui, Tom S. Lee, and I.P.L. Png also found strong support for their privacy diversity hypothesis that individuals have systematic differences in privacy preferences.[288] Therefore, regardless of where exactly the lines of categories are drawn, it seems likely that individual privacy preferences range a full spectrum from caring deeply, to caring somewhat, to not caring very much at all. In light of all this evidence, privacy scholars have embraced the conclusion that privacy preferences are heterogeneous.[289]

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[286] *See, e.g.*, Chris Jay Hoofnagle & Jennifer M. Urban, *Alan Westin's Privacy Homo Economicus*, 49 WAKE FOREST L. REV. 261, 270 (2014) (challenging "Westin's assumptions in categorizing consumers" into the various segments as well as Westin's depiction of the way that privacy pragmatists are supposed to behave); Stephen T. Margulis, *On the Status and Contribution of Westin's and Altman's Theories of Privacy*, 59 J. SOC. ISSUES 411, 411-29 (2003) (critiquing Westin and Altman's theories of privacy and summarizing the theory and research that have been a consequence of their theories).

[287] *See, e.g.*, Mark S. Ackerman et al., *Privacy in E-Commerce: Examining User Scenarios and Privacy Preferences*, *in* PROCEEDINGS OF THE 1ST ACM CONFERENCE ON ELECTRONIC COMMERCE 1, 2-3 (1999), http://web.eecs.umich.edu/~ackerm/pub/99b28/ecommerce.final.pdf; Sarah Spiekermann et al., *E-privacy in 2nd Generation E-Commerce: Privacy Preferences Versus Actual Behavior*, *in* PROCEEDINGS OF THE 3RD ACM CONFERENCE ON ELECTRONIC COMMERCE 1, 5 (2001), http://www.ischool.berkeley.edu/~jensg/research/paper/grossklags_e-Privacy.pdf.

[288] *See* Hann et al., *supra* note 280, at 21, 30.

[289] *See, e.g.*, Ryan Calo, *Code, Nudge, or Notice*, 99 IOWA L. REV. 773, 788 (2014) ("Consumer preferences are also deeply heterogeneous. Some consumers wish for more privacy while others could not care less."); Daniel J. Gilman & James C. Cooper, *There Is a Time to Keep Silent and a Time to Speak, the Hard Part Is Knowing Which Is Which: Striking the Balance Between Privacy Protection and the Flow of Health Care Information*, 16 MICH. TELECOMM. & TECH. L. REV. 279, 318 (2010) (pointing to the plethora of survey and experimental data supporting the heterogeneity of privacy preferences in the context of evaluating privacy protections in the health context); Pamela Samuelson, *Privacy as Intellectual Property?*, 52 STAN. L. REV. 1125, 1134-35 (2000) ("Although some individuals may value privacy so highly that they will choose not to engage in market transactions about their personal data, others may be quite willing to sell their personal data to firms *A*, *B*, and *C* (even if not to *X*, *Y*, or *Z*)."); Lior Jacob Strahilevitz, *Toward A Positive Theory of Privacy Law*, 126 HARV. L. REV. 2010, 2026 (2013) ("American attitudes toward privacy are highly

The heterogeneity of individual privacy preferences is important because it means that there is the potential for sorting on the basis of privacy. Employees at all levels engage in sorting.[290] Sorting means that individual employees move across different employment situations and even industries in order to maximize the things they prioritize. The sorting phenomenon relies on the assumption that employees have heterogeneous preferences with regards to various features of employment.[291] For example, if a group of individuals highly values schedule flexibility, then those individuals likely sort themselves into employment with employers who offer more schedule flexibility. If, however, an entire industry or position does not offer schedule flexibility, then one would expect individuals who highly value schedule flexibility to sort toward another industry or a different type of position that maximize as many of those individuals' other priorities as possible, but that also allows for increased schedule flexibility.[292] Individuals who do not place a high value on schedule flexibility, however, will sort based on features that matter more to them such as earning higher wages, developing human capital, or achieving more fulfillment in their work.[293] The flip-side of this

heterogeneous . . . ."); Felix T. Wu, *The Constitutionality of Consumer Privacy Regulation*, 2013 U. CHI. LEGAL F. 69, 75 (2013) (noting that notice-and-choice is "normatively attractive because it avoids a one-size-fits-all approach to privacy and potentially opens the space for companies to serve consumers' heterogeneous privacy preferences differently").

290 Naomi Schoenbaum, *Mobility Measures*, 2012 BYU L. REV. 1169, 1177-87 (2012) (explaining the various features of employment law that facilitate such sorting).

291 Sharon Hannes, *Reverse Monitoring: On the Hidden Role of Employee Stock-Based Compensation*, 105 MICH. L. REV. 1421, 1431 (2007) (pointing out that employee stock ownership plans sort among employees who are heterogeneous in their beliefs regarding the firm's prospects in favor of those who are either more optimistic or more risk tolerant).

292 *See* Forrest Briscoe, *Temporal Flexibility and Careers: The Role of Large-Scale Organizations for Physicians*, 60 INDUS. & LAB. REL. REV. 88, 91 (2006) ("If large-scale organizations offer physicians more schedule and career flexibility, then we should expect a degree of labor market sorting in which physicians who value that flexibility disproportionately choose employment in large-scale settings.").

293 *See, e.g.*, Peter C. Coyte, *Specific Human Capital and Sorting Mechanisms in Labor Markets*, 51 S. ECON. J. 469, 470-72 (1984) (explaining that things like probationary contracts act as sorting mechanisms by "discouraging applications from those who believe their probability of passing the test is low"); *see also* Schoenbaum, *supra* note 290, at 1177 ("[S]orting means that individual employees move across employment situations to maximize their labor value. Maximizing labor value may mean finding employment, earning higher wages, developing human capital, or achieving more fulfilling work.").

phenomenon is that the same features that cause individuals to sort into employment with a particular employer, into a particular industry, or into a particular type of position, can cause others to sort out of those exact same employers, industries, or positions.[294] Sorting is not a perfectly efficient phenomenon. The claim is not that every single individual placing a high value on schedule flexibility will sort themselves into a job where they can have schedule flexibility. Individuals need to balance a variety of complex factors, and most employees place a high value on various terms and conditions of employment, and need to figure out how to balance across the options in different job markets. The claim is merely that all else being equal, individuals who place a high value on a particular feature of employment will tend to overall sort themselves into employment containing that employment feature if possible given their other priorities.

Just like other non-monetary aspects of employment for which employees have heterogeneous preferences, individual employees also sort themselves based on their heterogeneous privacy preferences. Within a particular industry or career, individuals can sort toward privacy protective employers if they have both the choice and information to do so. For example, if some big law firms began to engage in various privacy-invasive behaviors such as GPS tracking, keystroke monitoring, etc., one would expect individuals with higher privacy valuations to sort away from those firms and towards firms who do not engage in those privacy-invasive behaviors. If, however, an entire industry or type of job position necessarily involved an invasion of privacy, then individuals who highly prioritize privacy would be expected to sort away from those industries or jobs.

As the result of this phenomenon of privacy sorting, celebrity stock markets could have a significant impact on society. It is true that one would expect that individuals who highly value privacy would not pursue appearing on reality television.[295] That said, there is no reason to believe that there is any correlation between those individuals who are the most athletic or the most talented musicians, or the most

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[294] *See, e.g.*, Jonah Gelbach et al., *Passive Discrimination: When Does It Make Sense to Pay Too Little?*, 76 U. CHI. L. REV. 797, 798-800 (2009) (pointing out that certain compensation packages will attract certain types of workers, but discourage other individuals from applying for or accepting the job).

[295] *See* Jennifer L. Carpenter, *Internet Publication: The Case for an Expanded Right of Publicity for Non-Celebrities*, 6 VA. J.L. & TECH. 3, 30 (2001) (noting that "there may be some truth behind the assumption that most celebrities value exposure, whereas non-celebrities value privacy").

talented actors and those individuals who value privacy. Consequently, society may be deprived of the talents of individuals who would excel in these various fields, but who choose not to do so because the cost to their privacy is too high to justify the choice.

Take for example, the case study presented by Patricia Sanchez Abril of Tiger Woods, probably the world's best golfer, and a man who Abril describes as "known for zealously protecting his privacy."[296] Imagine that someone like a young Tiger Woods who placed a high value on privacy financially needed to turn to the celebrity stock markets to raise funding to pursue his sport as he was making his way up the ranks of golf. Would that player be willing to trade-off the funding available via the celebrity stock market for the lack of privacy that would come along with making that choice? The answer to that question would depend on whether that young player had other options for funding, and other options for his or her career.

This suggests that celebrity stock markets themselves are not likely to be terribly problematic for privacy unless they become such a dominant market force in the way that the studios were during their era and agents have been during their era that individuals have no other good source of funding. Similarly, there will be an issue in those areas that are zero sum games with a limited number of slots for success if celebrity stock markets give individuals a huge boost toward that success at the expense of their privacy. If the young privacy-valuing player or talent does not have other promising funding options, then they have the choice of trading away their privacy or pursuing a different career altogether that would not necessitate such a tradeoff.

Undoubtedly, as the Tiger Woods hypothetical suggests, society would be worse off if some of those highly talented individuals pursued a different career because of valuing their privacy. That sorting away effect would only occur, however, if there were another career that the individual would choose. Whether or not that is true is a question that has been asked at the root of all of intellectual property incentive theory. The idea behind the incentive theory for intellectual property is that we need to give talented creators (e.g., musicians) the monopoly prices that come along with copyright protection to incentivize them to create their art.[297] Some scholars have argued that creators are so driven to create that they would do so without the

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[296] Patricia Sanchez Abril, *"A Simple, Human Measure of Privacy": Public Disclosure of Private Facts in the World of Tiger Woods*, 10 CONN. PUB. INT. L. J. 385, 385 (2011).

[297] *See* Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L.J. 433, 433 (2007).

incentive provided by the government-granted intellectual property monopoly.[298] This paper does not attempt to answer that much larger question, but only notes that the American legal system has bought into the idea that creators have other options that they would choose in the absence of intellectual property incentives. If so, then similarly, talent likely have other options that they would choose in the event that they were unwilling to make the privacy tradeoffs necessary to fund their chosen career by means of the celebrity stock market.

The privacy sorting argument is made more complicated by the fact that for better or worse society has accepted that celebrities who have achieved a certain degree of success are forced to surrender their personal privacy as a price of fame and fortune. Thus, it is possible to argue that the celebrity stock market can have no marginal impact on society or on the choices of individuals because clearly celebrities have so little privacy to begin with, both as a matter of societal reality and legal protection. Many of the same phenomena that make the celebrity stock market possible in the first place — a global information culture, social media, technology, a love for the famous — has also resulted in what Patricia Sanchez Abril calls "the increasingly intense spotlight on celebrities."[299] On the legal side, in the defamation context, the Supreme Court has held that the First Amendment requires that in order to prevail, individuals found to be public figures must prove that the defamatory statement was made with "actual malice."[300] This means that the defendant must have had actual knowledge that the statement was false, or acted with reckless disregard as to whether it was false or not.[301] Furthermore, the actual malice requirement must be proved by clear and convincing evidence.[302] Establishing actual malice in defamation cases has proved extremely challenging, such that receiving public figure status makes winning a defamation lawsuit a long shot.[303] Unsurprisingly, most celebrities are consistently held to

[298] *See, e.g.*, Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29, 29, 35-36 (2011) (arguing that the incentive theory inadequately considers the value creators place on intrinsic factors).

[299] Abril, *supra* note 296, at 385.

[300] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964); Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. REV. 1341, 1379-80 (2011) (explaining further the "actual malice" standard enunciated in the Court's holding in *New York Times Co.*).

[301] *N.Y. Times Co.*, 376 U.S. at 279-80.

[302] Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974); David S. Han, *Rethinking Speech-Tort Remedies*, 2014 WIS. L. REV. 1135, 1184 (2014) (discussing the various rules governing public figures).

[303] *See* St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (finding that petitioner

be public figures. As public figures, celebrities even have a difficult time keeping false and defamatory statements about themselves out of the tabloids, as it is typically difficult to prove that the publication had actual knowledge that the statement was false, when publications cite "unnamed sources" to support their claims.

Thus, unsurprisingly, celebrities find it even more impossible to keep truthful, but personal information private under the existing legal frameworks. Under the public disclosure of private facts tort, individuals can sue to prevent the dissemination of private facts about them that would be highly offensive and objectionable to a reasonable person.[304] Much private personal information about the celebrity, including his or her lifestyle choices, divorce, and health conditions may not be considered shameful enough to meet the offensiveness requirement of the tort.[305] Even if the corporate executive could meet that offensiveness hurdle, however, the tort contains an absolute defense for information that is considered "of legitimate public concern," which has been interpreted by some courts as a finding of "newsworthiness."[306] Newsworthiness appears to be an even lower standard than the public figure test in the defamation context,[307] and

did not act with actual malice when falsely accusing a public official of engaging in criminal conduct); *see also* Tavoulareas v. Piro, 817 F.2d 762, 775-76 (D.C. Cir. 1987) ("It is equally well established that the standard of actual malice requires proof not merely that the defamatory publication was false, but that the defendant either knew the statement to be false or that the defendant in fact entertained serious doubts as to the truth of his publication."); David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 493 (1991) (explaining the difficulty of proving actual malice).

304 RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977); *see* Doe v. Gangland Prods., Inc. 730 F.3d 946, 958-59 (9th Cir. 2013) (explaining the requirements for proving a claim for public disclosure of private facts); *see also* Shulman v. Grp. W Prods., Inc., 955 P.2d 469, 478 (Cal. 1998) (analyzing the public interest element of the publication of private facts tort).

305 *See, e.g.*, Taus v. Loftus, 151 P.3d 1185, 1207 (Cal. 2007) (expressing doubt whether a statement that the plaintiff had engaged in unspecified "destructive behavior" would satisfy the offensiveness requirement because it was an insufficiently "sensitive or intimate private fact").

306 *See, e.g.*, *Shulman*, 955 P.2d at 478 (concluding that the "analysis of newsworthiness inevitably involves accommodating conflicting interests in personal privacy and in press freedom as guaranteed by the First Amendment to the United States Constitution"). The court stated that "where the facts disclosed about a private person involuntarily caught up in events of public interest bear a logical relationship to the newsworthy subject of the broadcast and are not intrusive in great disproportion to their relevance — the broadcast was of legitimate public concern, barring liability under the private facts tort." *Id.*

307 *See* Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232 (7th Cir. 1993) ("People who do not desire the limelight and do not deliberately choose a way of life or course

is often met as long as there is public interest in the matter.[308] The newsworthiness test, in today's society, appears to be met for all information related to celebrities. Celebrities have had minimal legal recourse when unauthorized biographies are written about them, and have rarely successfully won lawsuits for unauthorized disclosure.[309] Similarly, celebrities often face aggressive paparazzi, and have minimal legal options to protect themselves from the constant invasion of privacy that the paparazzi present.[310]

In light of the minimal privacy held by established celebrities in the first place, it may appear unnecessary to raise privacy concerns resulting from a potential shift to celebrity stock markets. Too quick of a dismissal of the privacy concerns, however, would be in error. To the extent that there is any justification for the lack of privacy rights retained by celebrities, such justifications do not appear as certain for the many *aspiring* celebrities that will make up the celebrity stock market. Crucially, despite the name given to it, the celebrity stock market is envisioned as a method for up and coming aspiring entertainment talent to fund their careers based on their prospect for future income. Certainly the goal is to succeed, but mere participation, or attempted participation in the celebrity stock market does not mean that the individual is already a bona fide celebrity — likely quite the contrary.

There are likely numerous talented individuals pursuing a career in athletics and entertainment who do highly value their own privacy. They are aware that if they are one of the relatively small percentage of individuals who becomes famous that the price of such fame will be to regretfully forego much of their privacy. They might undergo a calculation in which they decide that the low probability of obtaining that level of fame makes it worth it to pursue their career despite the

of conduct calculated to thrust them into it nevertheless have no legal right to extinguish it if the experiences that have befallen them are newsworthy, even if they would prefer that those experiences be kept private.").

[308] *See* Wolston v. Reader's Digest Ass'n, Inc. 443 U.S. 157, 167-68 (1979) (suggesting that newsworthiness equates to public interest by stating in a defamation case that plaintiffs actions "no doubt were 'newsworthy,' but the simple fact that these events attracted media attention also is not conclusive of the public-figure issue," and that "[a] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention").

[309] *See, e.g.*, Steven I. Katz, *Unauthorized Biographies and Other "Books of Revelations": A Celebrity's Legal Recourse to a Truthful Public Disclosure*, 36 UCLA L. REV. 815, 817-18 (1989).

[310] *See* Jennifer R. Scharf, *Shooting for the Stars: A Call for Federal Legislation to Protect Celebrities' Privacy Rights*, 3 BUFF. INTELL. PROP. L.J. 164, 164-65 (2006).

chance they will have to give up their privacy should fame occur. They likely assume that at the very least the personal dissatisfaction with trading off their privacy will be compensated with the high level of financial reward that typically comes with that degree of fame. By shifting privacy invasions from those who have already achieved fame to those who are merely aspiring to it, not as an end in itself, but as the necessary result from success in one's chosen field, the celebrity stock market would still change the analysis for those individuals. Now they are forced to endure a potential invasion of their privacy at the hands of the market forces without necessarily the extreme financial reward that would come along with actual fame. This could create a sorting effect beyond that already created by the lack of privacy that accompanies fame.

The best way to limit the societal impact of this sort of privacy sorting, that could cause society to lose talented individuals who care for their privacy, would be to make sure that the existing privacy protections correctly account for individuals who are still in the process of achieving fame. Put differently, currently famous individuals receive little protection from the courts because as public figures the various privacy torts have minimal protection for them. Should celebrity stock markets become more prevalent, courts should not treat talent participants in those markets the same as the traditional public figures of established celebrities. Courts should certainly not infer from an individual's participation in the celebrity stock market that the individual must be a public figure, although in the true technical sense he or she will be a public figure in that a share of his or her future income will be publicly traded. Nonetheless, there ought to be room for an individual to choose to participate in the celebrity stock market, without entirely forgoing the full range of privacy protections that will eventually be lost should fame be obtained.

C. Celebrity Stock Markets, Exploitation, and The Ick Factor

Undoubtedly, for many people the initial reaction to celebrity stock markets is a distaste for the fact that it literally appears to be commodifying human beings and permits for the buying and selling of stocks in that human individual's future. In fact, as discussed above, Milton Friedman recognized this potential problem when he explained that social norms such as "the reluctance to think of investment in human beings as strictly comparable to investment in physical assets" as well as "the resultant likelihood of irrational public condemnation

of such contracts" likely explain the failure of human equity markets to arise.[311]

There is a potential that this social norm concern could also be a legal concern as analogous to slavery in violation of the Thirteenth Amendment. Jeff Schwartz has thoroughly considered this argument in the context of human equity investing more generally and concluded that there is no Thirteenth Amendment objection to human equity trading.[312] While Schwartz acknowledges that there are numerous apparent similarities between human equity investing and slavery, he emphasizes that the key characteristic of slavery is its involuntary nature combined with the full control of the owner over the enslaved person.[313] He points out that the Constitution only outlaws slavery and involuntary servitude.[314] Both terms have been interpreted narrowly with the former confined to "the institution of African slavery as it had existed in the United States at the time of the Civil War."[315] Celebrity stock markets would clearly not fit within this narrow definition of slavery.

"Involuntary servitude" is somewhat broader than slavery, but it too has been interpreted by the Supreme Court fairly narrowly to apply to "situations in which labor is compelled by physical coercion or force of law.[316] The contracts at the base of the proposed celebrity stock markets do not compel labor. Just as the law currently does not permit specific injunctions as a remedy for personal service contracts because of Thirteenth Amendment concerns, similarly here, any lawsuit by investors, for example for breach of the covenant of good faith and fair dealing if a celebrity chose to stop working altogether, would likely prohibit specific injunctions as a remedy. As long as that remedy is removed, there is likely no Thirteenth Amendment concern with compelling labor.

Beyond the legal Thirteenth Amendment concern, however, there remains the public policy concern perhaps best referred to as the "ick" factor where there is a concern with a system of funding that appears to treat human beings as a commodity. This concern has been recognized in the larger debates in education as well. Jeff Schwartz has referred to this concern under the label of commodification addressing the concern that "certain transactions degrade the thing that is

311 Friedman, *supra* note 23, at 138.

312 Schwartz, *The Corporatization of Personhood*, *supra* note 8, at 1135-38.

313 *Id.* at 1135.

314 *Id.* at 1136.

315 United States v. Kozminski, 487 U.S. 931, 942 (1988).

316 *Id.* at 943.

purchased or sold."[317] Some may feel that transacting in human equity has the expressive effect of signaling that people are commodities and therefore degrading what it means to be human.[318]

While this concern is understandable, it must be viewed through the lens of existing models of funding entertainment. It is not immediately clear that the celebrity stock market model has more of a commodification effect than existing models. For example, in the ways in which some professional athletes are currently funded, teams can choose to trade them at any time. Furthermore, the NCAA is making large amounts of money off of the bodies, and sometimes the health of its athletes with the student-athletes themselves being forbidden from receiving any of the proceeds of that labor. However, it is not clear that those models are less commodifying than the celebrity stock market. Nonetheless, the expressive power of human commodification thus remains a legitimate cost to such markets.

Others may be concerned with the implications of celebrity stock markets on discrimination. The argument might go that celebrity stock markets would necessarily reflect the discriminatory views of society and that there is a concern that investors would not choose to invest in women and minorities. This could be because of irrational biases, stereotypes and discrimination, or it could be the market recognizing the fact that minorities and women are typically paid less in all aspects of the entertainment industry as has been prominently in the news lately,[319] and therefore their return on investment is likely to be lower.

Once again, this is a legitimate concern that needs to be contextualized in comparison with the existing models. While it is true that the Celebrity Stock Market may be biased against minorities in different ways, it is not at all clear that it will do so any more than the existing systems. In fact, there is some reason to believe that it will be less discriminatory than the existing system. For example, the existing systems in some spaces are dominated by agents who are primarily white and male.[320] By opening up investments to a wider representation of society it is in fact possible that celebrity stock

317 Schwartz, *The Corporatization of Personhood*, *supra* note 8, at 1153.

318 *Id.* at 1154.

319 *See, e.g.*, Chris O'Falt, *Hollywood's Pay Gap Shame: Why Michelle Williams and Mark Wahlberg Are Just the Beginning*, INDIEWIRE (Jan. 10, 2018), https://www.indiewire.com/2018/01/hollywood-pay-gap-gender-race-1201915967/.

320 *See* James Rainey, *Talent Agencies Defend Their Diversity Programs After Oscar Furor*, VARIETY (Jan. 26, 2016, 11:00 AM), https://variety.com/2016/film/news/diversity-hollywood-talent-agencies-1201688402/.

markets could provide access to individuals who are not able to get access to funding in the current systems. There is undoubtedly a problem in Hollywood and in athletics with disproportionate pay across race and gender, but that problem seems external to the celebrity stock market rather than a feature of that market.

D. Celebrity Stock Markets and Existing Legal Regimes

Celebrity stock markets would also raise issues about how it would interact with a number of existing legal regimes that do not necessarily anticipate their existence.

For example, California Labor Code section 2855 creates what is commonly referred to as California's "seven-year rule".[321] The law provides that a contract to render personal service may not be enforced against an employee beyond seven years from the commencement of service under it.[322] It is this provision that permits television actors to renegotiate their contracts in the seventh year of a television show once they have substantially more leverage because the studio is unable to sign them to a contract for "the duration of the show" in excess of seven years. While at first glance it appears clear that the contracts at the basis of the celebrity stock markets are not traditional employment contracts to the extent that the statutory language includes the term "employee," the beginning of the statute includes the phrase "personal service contract," which appears to be broader than the traditional category of employment. There is no clear-cut definition provided for "personal service." There is at least the potential for an argument that the athlete or aspiring celebrity is providing a personal service to the investor by performing in his or her chosen field and earning money to which the investor is entitled to a share. Alternatively, the investors will likely argue that the athlete or aspiring celebrity is providing a personal service to the team they play on or studio they are employed by. Put differently, the celebrity will have direct employers, and therefore the investors can't be their employers.

Although there are relatively few cases examining what "personal service" means it does not appear that it has been interpreted narrowly. For example, in *De La Hoya v. Top Rank*, Oscar De La Hoya entered into a contract with promoter Top Rank giving Top Rank the

321 *See* 2 ENTERTAINMENT LAW 3D LEGAL CONCEPTS AND BUSINESS PRACTICES § 9:142 (Thomas D. Selz et al. eds., 2018) (discussing contract duration limitations, specifically focusing on California's seven-year rule).

322 CAL. LAB. CODE § 2855 (2019).

exclusive rights to "stage and sell tickets to De La Hoya's bouts, the exclusive worldwide rights to broadcast De La Hoya's bouts in any and all media, and all merchandising rights relating to such bouts."[323] Despite the fact that this was not written or organized as a traditional employment contract, the California district court held that the contract was illegal because it surpassed the seven-year maximum permitted for personal service contracts under California law.[324] This could mean that an expansive reading of "personal service contract" would limit the term of the percentage of income that can be recovered from the celebrity stock market under California law to seven years, which would greatly reduce the amount of money that aspiring celebrities would be paid up front.

There would also be a need to sort out how celebrity stock markets would interact with bankruptcy law, which remains unclear.[325] This is particularly important because it is extremely common for individuals known for their work in the entertainment and sports industries to file for bankruptcy.[326] Indeed, Sports Illustrated has claimed that an overwhelming 78% of former NFL players file for bankruptcy no later than two years after their retirement.[327] When a celebrity falls into bankruptcy, one cannot help but consider any excessive purchases that the celebrity has made, which are usually deemed by the court of public opinion to be a little more than a contributing factor as to why such celebrity is bankrupt.[328] Regardless of cause, there does appear to be somewhat of a persisting issue of celebrities filing for financial relief through bankruptcy;[329] perhaps celebrity stock market investors should consider this risk when purchasing equity in a celebrity's future income.

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[323] De la Hoya v. Top Rank, Inc., No. CV 00–9230–WMB, 2001 WL 34624886, at *1 (C.D. Cal. Feb. 6, 2001).

[324] *Id.* at *14.

[325] Saige Elizabeth Jutras, *Human Capital Contracts and Bankruptcy: Balancing the Equities Between Exception to Discharge and the Opportunity to Prove Undue Hardship*, 50 SUFFOLK U. L. REV. 133, 135 (2017) (explaining that the bankruptcy treatment of human equity investments in the educational space remains unclear).

[326] *See* Sarah Begley, *13 Celebrities Who Went Bankrupt*, TIME (July 13, 2015), http://time.com/3956059/bankrupt-celebrities-50-cent/ (recounting the bankruptcy filings of celebrities such as 50 Cent, Mike Tyson, Burt Reynolds and Larry King).

[327] David Wither, *Is it Possible for Celebrities to Go Bankrupt and Still be Rich?*, HUFF POST (Feb. 26, 2016, 4:24 PM), http://www.huffingtonpost.com/david-wither/is-it-possible-for-celebr_b_9318408.html.

[328] *See, e.g.*, Karen T. Hartline, *How Celebrities Go Bankrupt*, LEGALZOOM (Sept. 2009), https://www.legalzoom.com/articles/how-celebrities-go-bankrupt.

[329] *See* Begley, *supra* note 326.

As a threshold matter, it is important to note that bankruptcy provides "a financial fresh start from burdensome debts."[330] A debt is an obligation to repay some specific amount of money to a creditor,[331] whereas a celebrity stock market would deal an equity share in that celebrity's future earnings. The two could not be more discernable — the future earnings are not exactly determinable nor are they finite, therefore a share is granted and the investor collects that share in perpetuity or until some other alienation of the equity securities occurs.[332] Yet even if their equity interests would not be subject to bankruptcy proceedings, celebrity stock market investors should at least be aware of the risks posed in entering financial dealings with a celebrity investee. Celebrities most often file for either Chapter 11 or Chapter 13 bankruptcy due to the somewhat certain nature of their brands.[333]

Chapter 13 bankruptcy, also known as a "wage earner's plan," allows individuals to devise a plan to repay creditors over a period from three to five years.[334] During this period, creditors must place any collection efforts on hold, and may not commence any such additional collections.[335] To be eligible for Chapter 13 bankruptcy, the total unsecured debts must be less than $394,725 and the total secured debts must be less than $1,184,200.[336] Because the individual must be self-employed,[337] this form of bankruptcy is common among celebrities who are frequently engaged as independent contractors, such as actors or musicians.[338] Those who file under this chapter then have an impartial trustee appointed to their case and make disbursements to creditors.[339] While the repayment plan is effected through the actions of the trustee,[340] all collection efforts are placed on hold, including any foreclosures.[341]

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330 BANKR. JUDGES DIV., ADMIN. OFFICE OF THE U.S. COURTS, BANKRUPTCY BASICS 6 (3d ed. 2011).

331 *Debt*, BLACK'S LAW DICTIONARY (10th ed. 2014).

332 An equity security represents an ownership interest, distinct from a debt security which merely represents an obligation to repay. *See Equity Security*, BLACK'S LAW DICTIONARY (10th ed. 2014).

333 Wither, *supra* note 327.

334 BANKR. JUDGES DIV., *supra* note 330, at 22.

335 11 U.S.C. § 1301(a) (2018).

336 11 U.S.C. § 109(e) (2016).

337 *See* BANKR. JUDGES DIV., *supra* note 330, at 22.

338 *See* Wither, *supra* note 327.

339 11 U.S.C. § 1302(a) (2010).

340 *See* § 1302(b).

341 *See* 11 U.S.C. § 1301(a) (2018).

The repayment plan is submitted by the debtor to the court for approval.[342] In such plan, the priority claims (those that are granted priority status by the bankruptcy code and include taxes and court fees) must be repaid in full.[343] Secured claims (those that are backed by some sort of collateral) are the next in line for repayment.[344] Such secured claims must be repaid by the debtor to the extent of the collateral's value.[345] Otherwise, the collateral would be subject to the creditor's possession.[346] Lastly, unsecured claims do not need to be repaid so long as the estimated disposable income of the debtor over the commitment period is paid to the creditors (whether they are priority, secured or unsecured) and such payment, if any, to unsecured equals at least as much as what the unsecured creditors would have received if all the debtor's assets were liquidated.[347] After the repayment plan is executed, then the bankrupt party is entitled to a discharge of indebtedness.[348]

It is not difficult to imagine a case where celebrity stock market equity interests are viewed as mere wage garnishment. In such a scenario, the share of income that is enjoyed by the celebrity stock market investors would be paused during a Chapter 13 bankruptcy proceeding as well as during the execution of a repayment plan. In such a case, it may be prudent for the investors to seek a secured claim against the investee. It would be somewhat paradoxical where a share of future income, which is arguably of unascertainable and infinite value, is backed by some sort of real or intellectual property. This effectively assigns a value to the investor's share of that person's income. Again, such celebrity stock market interests in future income are equity interests, not debt interests, and are thus not subject to bankruptcy discharge. However, it does appear to be like wage garnishment. So, a prudent investor may just end up placing an ascertainable value on their shares merely through seeking extra protection from bankruptcy.

Chapter 13 bankruptcy is not available to corporations, partnerships or limited liability companies, which is why Chapter 11 is the popular, albeit complicated, option for many major companies.[349] Many

342 11 U.S.C. § 1321 (2018).

343 11 U.S.C. § 1322(a) (2018).

344 *Id.*

345 *Id.*

346 *Id.*

347 *See id.*

348 BANKR. JUDGES DIV., *supra* note 330, at 27.

349 *See* Bret A. Maidman, *Chapter 11 Bankruptcy: An Overview*, NOLO,

entertainers contract using a loan-out company for tax and liability reasons.[350] Consequently, many assets are held in these loan-outs which the artist controls and lends their exclusive services to. Additionally, if the entertainer has debts in excess of the Chapter 13 limits, Chapter 11 becomes their only option for bankruptcy.[351]

Chapter 11 bankruptcy does not automatically appoint a trustee to the case, rather, the debtor continues business and keeps possession of all assets.[352] Of course, if the bankruptcy court finds cause, they may appoint a trustee.[353] The bankruptcy court then approves all major decisions made by the debtor during the bankruptcy period, including the sale of assets and the execution of major agreements.[354] Like Chapter 13, a plan must be devised by the debtor for the repayment of certain obligations.[355] A creditor may oppose the ratification of the debtor's plan and submit their own, which is undoubtedly more favorable to that creditor.[356] However, it is more common for the creditor to move to convert the Chapter 11 case into a Chapter 7 case.[357] The bankruptcy court then either affirms or rejects the debtor's plan.[358] In considering such plan, the bankruptcy judge will examine many factors, including without limitation, (1) the feasibility of the plan; (2) the good faith of the debtor; (3) whether the plan is in the best interests of the creditors; and (4) whether the plan is fair and equitable.[359]

The fair and equitable test is important for celebrity stock market investors. Firstly, it requires that the secured creditors be paid the value of their collateral over time.[360] This makes it crucial for financial actors to have a security interest in their dealings. Secondly, it is a

http://www.nolo.com/legal-encyclopedia/chapter-11-bankruptcy-overview.html.

350 *See* Mainline Pictures v. Basinger, No. B077509, 1994 WL 814244 *1, *8 (Cal. App. Ct. Sept. 22, 1994) (reversing a jury award against Kim Basinger as an individual because the production company for *Boxing Helena* only had a binding contract with Kim Basinger's loan out company).

351 *See* Maidman, *supra* note 349.

352 *See* 11 U.S.C. § 1104 (2010).

353 *See id.*

354 *See* 11 U.S.C. § 362 (2010).

355 *See* 11 U.S.C. § 1121 (2018).

356 *See* § 1121(c).

357 Maidman, *supra* note 349. A Chapter 7 bankruptcy involves a complete sale of all the debtor's nonexempt assets, with the proceeds going towards the creditors. *See* BANKR. JUDGES DIV., *supra* note 330, at 71.

358 *See* 11 U.S.C. § 1129(a) (2010).

359 *Id.*

360 *See* § 1129(b)(2)(A).

reorganization form of bankruptcy, meaning equity holders may lose their interests unless creditors are paid in full.[361] If, however, investors contribute new monies for covering expenses in connection with the reorganization, then the court may choose to allow such investors to retain their ownership interests in the debtor organization or individual.[362]

Jeff Schwartz has convincingly addressed the possible applicability of our existing securities laws to human equity investments more generally, and his conclusions appear equally applicable to celebrity stock markets in particular. Schwartz argues that equity shares in people as offered by for-profit companies, such as Fantex, would fall within the existing definition of investment contracts and therefore the typical human-equity investment would qualify as a security that could be governed by securities regulations.[363]

Other laws whose interaction with celebrity stock markets would have to be considered include usury laws, inheritance laws, trust and estates, and community property. For example, can an individual give away his or her future income when that income will ultimately become marital property? If so, is the income being given away the share of the celebrity's half of the community property or the share of the full income? These sorts of issues will have to be determined either as spelled out by the contracts, or by courts as they are put into a position to interpret the contracts.

V. A CASE FOR ALLOWING CELEBRITY STOCK MARKETS

In conclusion, the predicted growth of celebrity stock markets will force society to grapple with numerous legal and ethical challenges. These challenges are legitimate and undoubtedly costs of permitting celebrity stock markets. Ultimately, however, the celebrity stock markets can only be properly evaluated in comparison with the other alternatives available to individuals to receive funding upfront while they work on pursuing their chosen entertainment or sports career. While there are serious concerns with celebrity stock markets, including the privacy concerns raised in this Article, there are also serious concerns that can be identified for all of the other alternative funding systems ranging from the agency model and the record company model to the various models for funding athletes. It is not at all clear that there is a way to compare the costs and harms of this

361 Maidman, *supra* note 349.

362 *Id.*

363 Schwartz, *The Corporatization of Personhood*, *supra* note 8, at 1161.

system with the costs and harms of the existing systems. Therefore, I contend that more funding systems ought to be better systematically than fewer funding systems. More paths to achieve success in entertainment and sports take away the monopoly-like power of entities like talent agencies, the NCAA, and other current major players who currently serve as a gatekeeper role in ways that may also be problematic. The various concerns identified in this Article would be greatly exacerbated if celebrity stock markets were the sole path of obtaining funding, but as long as they become a market-option among other market options, many of the concerns can be reduced, although not eliminated.

Although I conclude that celebrity stock markets should be permitted, that does not mean that there should be no limitations on the contracts that underlie their creation. For example, Jeff Schwartz has proposed a cap on the percent of an individual's equity that people are permitted to sell.[364] A similar restriction seems wise in the celebrity stock market context. Although Schwartz proposes a cap of 35%, he does not explain why that amount makes sense other than suggesting that he fears that if someone agrees to sell more than a 35% share in their future income that there must have been some type of coercion.[365] I disagree and am unable to see why an individual must have been coerced to sell, for example, a 40% share in their future income in exchange for a larger amount of money up front. Therefore, I instead would want to see a requirement that individuals remain majority shareholders in themselves. This reduces the worst concerns of resemblance to slavery, and autonomy concerns. In *The Incorporated Man* dystopian novel that began this discussion, one of the biggest concerns in the fictional society was achieving majority in order to make decisions about one's own future. To avoid entirely this set of concerns from ever developing, a common sense limitation on celebrity stock markets would be to require the aspiring celebrity to maintain a majority share in his or her future income. This would also help reduce, albeit not eliminate, the moral hazard problem as the individual still has incentives to pursue income if the individual will receive a majority of that income.

Jeff Schwartz also advocated limiting the term of the contract to twenty years as a reasonable outside limit such that investors would only get the benefit of the individual's income for up to twenty

[364] *Id.* at 1171.

[365] *Id.*

years.[366] Once again, I share the general intuition, but have a hard time defending the number or the specific point. I do agree, however, that lengthy terms become particularly problematic when talking about young individuals as Schwartz acknowledges that "[w]hat happens to people over their lives is extremely unpredictable, and this is particularly so for . . . young adults."[367] Therefore, I would advocate limiting the term of the contracts for minors.

There is already extensive support in contract law for treating contracts with minors differently. According to the Second Restatement of Contracts, "[u]nless a statute provides otherwise, a natural person has the capacity to incur only *voidable* contractual duties until the beginning of the day before the person's eighteenth birthday."[368] California, for instance, permits minors, defined as individuals under the age of eighteen,[369] to "make a contract in the same manner as an adult," subject to several exceptions.[370] However, contracts entered into by minors are "generally voidable" under what is referred to as the "Infancy Doctrine" or "Infancy Defense."[371] The Infancy Doctrine operates as "a common law defense to liability under a contract to protect those who are legally incompetent from entering into unwise bargains."[372] Some scholars contend the doctrine goes so far as to "essentially allow[] children to avoid liability under unfavorable contracts."[373] Regardless, according to one California

366 *Id.*

367 *Id.*

368 RESTATEMENT (SECOND) OF CONTRACTS § 14 (AM. LAW INST. 1981) (emphasis added). For the purpose of defining "minority," although "the common law fixed the age of twenty-one as the age at which both men and women achieve full capacity to contract . . . [i]t appears that 49 States have lowered the age of majority . . . to less than twenty-one; usually, the age is eighteen." *Id.* § 14 cmt. a.

369 CAL. FAM. CODE § 6500 (2019) (defining a "minor" as "an individual who is under 18 years of age").

370 *Id.* § 6701(a)-(c) (2019) (noting that a minor cannot, however, enter into a contract "[g]iving a delegation of power," "relating to real property," or "relating to any personal property not in the immediate possession or control of the minor"). In one case involving whether minors' social media names and pictures qualified as "personal property," the court clarified that this provision "is directed at *tangible* property." *See* C.M.D. v. Facebook, Inc., No. C 12-1216 RS, 2014 U.S Dist. WL 1266291, at *4 (N.D. Cal. 2014), *aff'd sub nom.* C.M.D. ex rel. De Young v. Facebook, Inc., 621 F. App'x 488 (9th Cir. 2015) (emphasis added).

371 Cheryl B. Preston & Brandon T. Crowther, *Infancy Doctrine Inquiries*, 52 SANTA CLARA L. REV. 47, 47-48 (2012).

372 Victoria Slade, *The Infancy Defense in the Modern Contract Age: A Useful Vestige*, 34 SEATTLE U. L. REV. 613, 614 (2011).

373 *Id.* at 614-15 (summarizing criticism of the doctrine in the modern world as some scholars contend that the infancy defense "is an anachronistic doctrine that

court, "one who provides a minor with goods and services does so at [their] own risk."[374]

The Infancy Doctrine does not, however, enable a minor to evade all contractual obligations, as courts may decline to void contracts for "necessities."[375] Based on this exception to the general rule of voidability, a court may enforce a minor's contract for "goods that are necessary" based on the minor's "position and station in life."[376] When deciding whether to void a contract entered into by a minor, courts have reasoned that legal services, housing, and even cars could qualify as "necessities."[377] The Infancy Doctrine additionally does not permit minors to evade their obligations when the minor retains the benefits of the contract sought to be voided.[378]

Given the nature of certain sports, such as gymnastics where the height of success can occur prior to the age of legal majority, I would not advocate entirely forbidding minors from joining celebrity stock markets, as many minors, such as Simone Biles, are extremely successful athletes and entertainers. The law has already recognized the ability to uphold reasonable contracts entered into by minors especially when ratified when they reach their majority. For example,

stifles commerce and is unsuitable in modern society" due to children's earlier maturation and technological competence which can surpass an adult's).

374 Berg v. Traylor, 56 Cal. Rptr. 3d 140, 144-45 (Ct. App. 2007) (holding that a child actor from the show "Malcolm in the Middle" could disaffirm an agreement with a manager due to his minority status).

375 Preston & Crowther, *supra* note 371, at 52.

376 5 WILLISTON ON CONTRACTS § 9:18 (4th ed. 2019) (noting that this "liability, though often treated as arising from the promise of the infant, is in reality a quasi-contractual obligation").

377 *See* Rodriguez v. Reading Hous. Auth., 8 F.3d 961, 964 (3d Cir. 1993) ("Shelter may constitute a 'necessary' if a minor's parents or guardian cannot or will not provide it."); Zelnick v. Adams, 561 S.E. 2d 711, 715-16 (Va. 2002) ("Certainly, the provision of legal services may fall within the class of necessaries for which a contract by or on behalf of an infant may not be avoided or disaffirmed on the grounds of infancy."); Andrew Smith & Kristin Ware, *Helping Pregnant and Parenting Teens Find Housing*, 29 CHILD. L. PRAC. 65, 72 (2010) ("Courts in most states have held that housing can be a necessary, but only if the minor's parents or guardians are not willing or able to provide housing for the minor."). *But see* Bowling v. Sperry, 184 N.E. 2d 901, 904 (Ind. Ct. App. 1962) (holding that although "the automobile is as important to the modern household as food, clothing and shelter," and "many" high school boys owned cars at the time, the teenaged boy in this case failed to meet his burden of establishing a car was "so vital" to his existence to constitute a necessity).

378 5 WILLISTON ON CONTRACTS § 9:14 (4th ed. 2019) ("When the infant has received consideration that he or she still possesses, however, the minor cannot, upon reaching majority, keep it and refuse to pay . . . . If an infant enters into any contract subject to conditions or stipulations, the minor cannot take the benefit of the contract without the burden of the conditions or stipulations.").

NBA star Kobe Bryant entered into a written licensing agreement at the age of seventeen and later sought to disaffirm the contract based on his then-minority.[379] The New Jersey Bankruptcy Court clarified that "the right to disaffirm a contract is subject to the infant's conduct which, upon reaching the age of majority, may amount to ratification."[380] The Court found it "clear that Bryant ratified the contract," as he deposited a check owed to him under the contract and signed autographs, effectively performing his obligations when he reached the age of majority.[381] Similarly, in a suit involving a soap opera child actor similarly seeking to disaffirm a contract with his manager based on minority, a New York court cautioned that "[i]n the event that the minor cannot return the benefits obtained, he is effectively precluded from disaffirming the contract in order to get back the consideration he has given."[382] Further, allowing an infant to "use[] the privilege of infancy as a sword rather than a shield . . . would undermine the policy underlying the rule allowing disaffirmance."[383]

Specifically, in the entertainment context, minors' contracts in California are governed by what is referred to as the "Coogan Law," named after child actor Jackie Coogan.[384] The Coogan Law applies to contracts "entered into between an unemancipated minor and any third party . . . on or after January 1, 2000 . . . pursuant to which a minor is employed or agrees to render artistic or creative services, either directly or through a third party, including, but not limited to a personal services corporation (loan-out company), or through a casting agency."[385] This provision encompasses contracts where a minor provides the services of an "actor, actress, dancer, musician, comedian, singer, stunt-person, voice-over artist . . . songwriter, musical producer or arranger, writer, director, producer, production executive, choreographer, composer, conductor, or designer."[386] The Law also governs contracts where a minor purchases, leases, or sells their "literary, musical, or dramatic property, or use of a person's likeness, voice recording, performance, or story . . . or any rights

379 *In re* The Score Bd., Inc., 238 B.R. 585, 590 (D.N.J. 1999).

380 *Id.* at 593.

381 *Id.*

382 Scott Eden Mgmt. v. Kavovit, 563 N.Y.S.2d 1001, 1002-03 (Sup. Ct. 1990).

383 *Id.* at 266.

384 *Coogan Law*, SAG-AFTRA, https://www.sagaftra.org/content/coogan-law (last visited Dec. 31, 2018).

385 CAL. FAM. CODE § 6750(a)(1) (2019).

386 *Id.*

therein" for use in movies, television, recordings, on stage, or some other medium.[387] The Coogan Law is not solely limited to the creative arts, as contracts where "a minor is employed or agrees to render services as a participant or player in a sport" are also included.[388]

If a minor's contract qualifies under the categories mentioned above, 15% of the minor's gross earnings under the contract must be set aside until they reach the majority age.[389] Under the Coogan Law, the minor cannot disaffirm the contract as a minor or upon reaching the majority age if the contract was approved by the superior court in the county where the minor resides or where a party to the contract has its principal place of business.[390] California is not the only state regulating minors' contracts in the entertainment or sports context, as New York enacted its own version of the Coogan Law, the "Child Performer Education and Trust Act," in 2004.[391] The existence of these laws suggest that it would also make sense to place reasonable limitations on the abilities of minors to enter into contracts by which they would sell away their share of their future income in exchange for money up front. This is particularly true because there would be a concern that the money up front would be going to the parent or guardian figure rather than to the benefit of the minor. Therefore, an extension of the logic of these laws to the celebrity stock market context would be to develop reasonable limitations and safeguards protecting minors against irrationally selling away their future income.

Ultimately, placing some limitations on the ability of all individuals from selling a majority share in their future income as well as limitations on the ability of minors to sell a share in the future income for too long of a period of time would help minimize some of the largest concerns triggered by celebrity stock markets.

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387 *Id.* § 6750(a)(2).

388 *Id.* § 6750(a)(3).

389 *Id.* § 6752(b) (2019). Funds cannot be withdrawn from Coogan accounts unless done with court approval. Austin Siegemund-Broka, *Child Actors Win Appeal Claiming Bank of America Illegally Charged Fees*, HOLLYWOOD REP. (Apr. 30, 2015, 3:20 PM), http://www.hollywoodreporter.com/thr-esq/child-actors-win-appeal-claiming-792620.

390 FAM. § 6751(a) (2019).

391 N.Y. COMP. CODES R. & REGS. tit. 12, § 186-3.5 (2019). Parents or guardians of child performers must also obtain a "Child Performer Permit" under the state's laws governing employed minors. *Id.* § 186-3.2 (2019).