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Know When to Hold Them, When to Fold Them, and When to Walk Away: TikToks Are Professional Sports Franchises' Ace in Collective Bargaining Negotiations

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Know When to Hold Them, When to Fold Them, and When to Walk Away: TikToks Are Professional Sports Franchises' Ace in Collective Bargaining Negotiations

Abstract

TikTok, the social media app, has become both a central force in entertainment, creating a slew of influencers and young celebrities, as well as an important tool in all things branding and marketing. Athletes have recognized the value of social media and fan engagement and have taken to becoming content-creators on the platform. The growing presence of professional athletes on the app brings up important issues of copyrightability and ownership of the content they are producing. This Comment considers the nature of athlete content-creation on TikTok as well as the employment scheme and contractual responsibilities that form a part of professional sports. It concludes that under the U.S. Copyright Act work-for-hire provisions, this content belongs to the professional sports teams that employ the players.

Professional athletes, employees of their respective teams, and parties to league collective bargaining agreements agree to engage with fans, the media, and the public at large as part of their employment responsibilities. Producing content is just one way of furthering this purpose. While the content the athletes produce in team facilities, while wearing team uniforms and logos or using official game footage belonging to their respective leagues, is more obviously within the scope of their employment, all the content athletes produce furthers the purpose for which they are contracted. The nature of professional sports as a business outside of what occurs

on the field, stadium, court, rink, or diamond makes it so these works are classified as works-for-hire that ultimately belong to team owners. However, this ownership does not come without a cost, such as the possible loss of incentives to produce it or concerns about chilling speech or removing players' abilities to speak out on important issues. These costs make it so professional teams should be conscious of players' roles in creating the content. This Comment proposes professional teams leverage their ownership of this content in collective bargaining negotiations and ultimately give back some ownership to the athletes who actually produce and create the content.

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“I intend to have a complete understanding of contracts, jocks, socks, and TV contracts. There’s no way I can look in the mirror if I don’t understand anything about this business.”

- Jerry Jones, in his first press conference after his 1989 purchase of the Dallas Cowboys¹

I. INTRODUCTION

If Jerry Jones intends to keep his promise to know “this business”—the business of sports—he is going to need to freshen up his knowledge of his newest asset: TikToks.² With the increasing popularity of TikTok, multimillionaire professional sports franchise owners, like Jones, might be a bit richer than they think.³ TikTok is a social media platform where users post and watch video clips of up to fifteen seconds depicting people doing dances, making jokes, giving book recommendations, or doing any array of fun attention-grabbing sketches.⁴ While athletes are currently exploring their role as content creators on the platform, the U.S. Copyright Act might have something to say about ownership of the works players are currently producing.⁵ The Big Four professional sports leagues—the National Football League (NFL), National Basketball Association (NBA), Major League Baseball (MLB), and National Hockey League (NHL)—have not anticipated or addressed the issue of social media intellectual property ownership in their collective bargaining agreements.⁶ What these franchises and the respective leagues that negotiate

1. *From Weird to Cringeworthy: The 25 Greatest Quotes from Dallas Cowboys Owner Jerry Jones*, THE DALL. MORNING NEWS, <https://www.dallasnews.com/sports/cowboys/2019/02/25/from-weird-to-cringeworthy-the-25-greatest-quotes-from-dallas-cowboys-owner-jerry-jones/> (Oct. 13, 2022, 8:45 AM).

2. *See id.*

3. See Kim Lyons, *TikTok Says It Has Passed 1 Billion Users*, THE VERGE (Sept. 27, 2021, 9:21 AM), <https://www.theverge.com/2021/9/27/22696281/tiktok-1-billion-users> (“The short-form video app keeps growing despite roadblocks.”); *see also* John Breech, *NFL’s Richest Owners Revealed for 2021: Panthers, Cowboys and Rams Top List of Teams with Wealthiest Owners*, CBS SPORTS (Apr. 9, 2021, 10:26 AM), <https://www.cbssports.com/nfl/news/nfls-richest-owners-revealed-for-2021-panthers-cowboys-and-rams-top-list-of-teams-with-wealthiest-owners/>; Joel Reuter, *The Richest NBA Team Owners in 2022*, AUDACY (Mar. 4, 2021, 6:33 AM), <https://www.audacy.com/national/sports/gallery/the-richest-nba-team-owners>.

4. Rebecca Jennings, *TikTok, Explained*, VOX (July 12, 2019, 4:03 PM), <https://www.vox.com/culture/2018/12/10/18129126/tiktok-app-musically-meme-cringe>.

5. *See* Copyright Act of 1976, 17 U.S.C. §§102, 201 (2021) (discussing works subject to copyright and ownership of those works).

6. *See* NAT’L FOOTBALL LEAGUE PLAYERS ASS’N, NFL COLLECTIVE BARGAINING AGREEMENT

on their behalf may not realize is that they are sitting on a powerful and profitable negotiating tool.⁷ This Comment proposes teams leverage their inherent copyright ownership in collective bargaining negotiations with players' associations—while accounting for the possible public relations and ethical concerns regarding this ownership—to contractually create a joint-authorship scheme that accounts and allocates some profits and control of the TikToks to the players.⁸

TikTok, the popular social media platform, provides an array of relatively untapped revenue potential for sports leagues, teams, and players.⁹ The app is a global phenomenon among younger generations, and the Big Four professional sports leagues and their athletes already use it for creative expression, fan engagement, and product endorsement.¹⁰ Some teams, like the NFL's

334–43 (2020), https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA_CBA_March_5_2020.pdf [hereinafter NFL CBA] (making one reference to intellectual property ownership); MAJOR LEAGUE BASEBALL PLAYERS ASS'N, 2017–2021 BASIC AGREEMENT 337–48 (2017) https://www.mlbplayers.com/_files/ugd/b0a4c2_95883690627349e0a5203f61b93715b5.pdf [hereinafter MLB CBA] (making no reference to intellectual property ownership); NAT'L BASKETBALL PLAYERS ASS'N, COLLECTIVE BARGAINING AGREEMENT, at A-1–45 (2017), <https://cosmic-s3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf> [hereinafter NBA CBA] (making no reference to intellectual property ownership); NAT'L HOCKEY LEAGUE PLAYERS' ASS'N, COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE & NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION 310–21 (2012), https://cdn.nhlpa.com/img/assets/file/NHL_NHLPA_2013_CBA.pdf [hereinafter NHL CBA] (making no reference to intellectual property ownership).

7. See Alex Butler, *NFL Labor Negotiations Might Include Social Media Issues*, UNITED PRESS INT'L (Oct. 15, 2019, 3:00 AM), https://www.upi.com/Sports_News/NFL/2019/10/15/NFL-labor-negotiations-might-include-social-media-issues/4191569601771/ (contemplating the role social media issues will play in future NFL collective bargaining negotiations).

8. See *infra* Parts VI–VII.

9. Joe Drape & Ken Belson, *The E-Sports Generation: Pro Sports Leagues Are Chasing Gen Z Where It Plays*, N.Y. TIMES (Jan. 13, 2022) <https://www.nytimes.com/2022/01/12/sports/video-games-nfl-gamers-gen-z.html> (“The leagues’ marketing officers share a philosophy: Meet young fans where they are. That means using digital tools like Snapchat, Twitch, YouTube and TikTok as a way to get teenagers to engage with their sports and tune into games wherever they’re shown. The leagues have become fluent in the jargon of digital media and say the digital platforms attract billions of views and likes.”).

10. *Id.* (“Major League Baseball recruited influencers to produce TikTok content for the World Series under the hashtag #mlbcreatorclass. . . . The N.F.L., for instance, works with about a thousand pop culture and sports influencers who are football fans. They are not paid, but they are given perks like sideline passes before games or meetings with their favorite players. The influencers, in turn, post videos and photos of themselves on social media, showing young fans how much they love football and the N.F.L. . . . On TikTok, the league is focused more on humor and on-field dialogue between players to highlight their personalities.”).

Pittsburgh Steelers, are known for their presence on the app.¹¹ Steelers' receivers JuJu Smith-Schuster and Chase Claypool film during practices, before games, in the team locker room, and on opponents' fields; fans love the inside look and opportunity to engage with some of the game's biggest stars.¹² The players are aware of the profitability and leverage this following and their presence on the app provides.¹³ Players are posting fun, creative videos their fans want to see and are using these to promote their own sponsors.¹⁴ NBA star and 2021 Finals MVP, Giannis Antetokounmpo, is the most followed NBA player on TikTok, making thousands of dollars from the sponsored videos he posts.¹⁵ But what role and what stake do the teams have in this player-created content?¹⁶

Professional athletes create copyrightable content when they film and post these short videos.¹⁷ When a professional athlete uses his access to team facilities and represents the team by showing the team logo, wearing the team uniforms and gear, or depicting his athletic talents as a professional player in

11. Chris Adamski, *J.J. Watt Pokes Fun at Steelers' Fondness for TikTok*, TRIB LIVE (July 1, 2021, 3:27 PM), <https://triblive.com/sports/j-j-watt-pokes-fun-at-steelers-tendency-to-tiktok/> ("Watt responded, addressing Bush by saying 'you're gonna need to build your own locker room over there bro...' The implication, of course, is that many or all Steelers players have TikTok.").

12. See Chase Claypool (@chase), TIKTOK, https://www.tiktok.com/@chase?is_copy_url=1&is_from_webapp=v1 (last visited Jan. 30, 2022) (showing Claypool's TikTok page featuring TikToks of him in his Steelers uniform, in the Steelers' locker room, and with teammates); JuJu Smith-Schuster (@juju), TIKTOK, https://www.tiktok.com/@juju?lang=en&is_copy_url=1&is_from_webapp=v1 (last visited Jan. 10, 2022) (depicting Smith-Schuster's TikTok page with videos of him on opponent's, Los Angeles Chargers, field, and in Heinz stadium and field).

13. See *Sports Stars on TikTok*, ONLINE GAMBLING, <https://www.onlinegambling.ca/content-hub/tiktok-sports.php> (last visited Mar. 17, 2022) (referencing how much money specific athletes earn per sponsored post).

14. See Giannis Antetokounmpo (@giannis_an34), TIKTOK (Dec. 11, 2021), https://www.tiktok.com/@giannis_an34/video/7040500062899670278?is_copy_url=1&is_from_webapp=v1 (showing Antetokounmpo dancing in an ad for JBL Audio); JuJu Smith-Schuster (@juju), TIKTOK (Dec. 15, 2021), <https://www.tiktok.com/@juju/video/7042005216496995630> (depicting Smith-Schuster wearing a frog onesie while eating a Snickers bar with the Snickers logo present); JuJu Smith-Schuster (@juju), TIKTOK (Dec. 11, 2021), https://www.tiktok.com/@juju/video/7040511666844355887?is_copy_url=1&is_from_webapp=v1 (showing Smith-Schuster dancing over a background in a Got Milk ad); Chase Claypool (@chase), TIKTOK (June 23, 2021), https://www.tiktok.com/@chase/video/6977126216910294277?lang=en&is_copy_url=1&is_from_webapp=v1 (showing Claypool dancing with @sjbleau in a Tinder ad).

15. See Denette Wilford, *Highest-Earning Athletes on TikTok Might Surprise You*, TORONTO SUN (Sept. 2, 2021), <https://torontosun.com/sports/soccer/highest-earning-athletes-on-tiktok-might-surprise-you>.

16. See *infra* Part IV.

17. See *infra* Part III.

his sport, he is acting within the scope of his employment.¹⁸ An athlete's employment does not end when he leaves the field, court, rink, locker room, or stadium.¹⁹ Athletes are public figures contractually obligated to interact with the media.²⁰ They agree to follow team social media policies or morality clauses that govern their off-field conduct.²¹ And by engaging with fans and promoting their own popularity, athletes are doing what they are employed to do: be public figures who garner attention for their teams.²² Teams have an interest in being as popular with fans as possible, and efforts by players to make themselves popular dually serve their own and their teams' purposes.²³ Players' employers, the teams they play for, have a strong argument in favor of classifying the content as a work-for-hire, meaning it belongs to the team

18. See Claypool *supra* note 12; Smith-Schuster, *supra* note 12.

19. See Kelsey Farish, *From Stealing to Kneeling, What Do NFL Player Contracts Say About "Bad" Behavior?*, KELSEY FARISH (Oct. 31, 2018), <https://kelseyfarish.com/2018/10/31/nfl-morality-clauses/> ("The NFL has had a formal policy addressing off-field conduct since 1997.").

20. See NFL CBA, *supra* note 6, at 335 ("Player will cooperate with the news media, and will participate upon request in reasonable activities to promote the Club and the League."); NHL CBA, *supra* note 6, at 311 ("The Player further agrees, . . . to co-operate with the Club and participate in any and all reasonable promotional activities of the Club which will in the opinion of the Club promote the welfare of the Club and to cooperate in the promotion of the League and professional hockey generally . . ."); NBA CBA, *supra* note 6, at A-1 (classifying under the "services" category "promotional and commercial activities of the Team and the League as set forth in this Contract and the CBA"); MLB CBA, *supra* note 6, at 339 ("In addition to his services in connection with the actual playing of baseball, the Player agrees to cooperate with the Club and participate in any and all reasonable promotional activities of the Club and Major League Baseball, which, in the opinion of the Club, will promote the welfare of the Club or professional baseball, and to observe and comply with all reasonable requirements of the Club respecting conduct and service of its team and its players, at all times whether on or off the field.").

21. See Kelsey Farish, *supra* note 19 ("[U]nlike the rest of us, sports stars are often contractually obligated to maintain a positive reputation."); *Social Media Policy*, MLB, http://content.mlb.com/documents/1/0/2/296982102/Social_Media_Policy.pdf (last visited Jan. 14, 2020) ("Consistent with the authority vested in the Commissioner by the Major League Constitution ("MLC") and the Major League Baseball Interactive Media Rights Agreement ("IMRA"), the Commissioner has implemented the following policy regarding the use of social media by individuals affiliated with Major League Baseball and the 30 Clubs.").

22. See 19 FLA. JUR. 2D *Defamation and Privacy* § 107 (2023); 20 S.C. JUR. 2D *Libel and Slander* § 72 (2023) (describing the two kinds of public figures, the person of "pervasive fame or notoriety," who is considered a "public figure[] for all purposes," and the person who voluntarily injects himself or is "drawn into a particular public controversy and thereby become[s] a public figure for a limited range of issues").

23. See *NFL and TikTok Announce Multi-Year Partnership to Bring NFL Content to Fans Around the World*, TIKTOK (Sept. 3, 2019), <https://newsroom.tiktok.com/en-us/nfl-and-tiktok-announce-multi-year-partnership-to-bring-nfl-content-to-fans-around-the-world/> (reporting on the NFL's partnership with TikTok and efforts to increase fan engagement); see also *infra* Part IV.

rather than the players.²⁴

Part II of this Comment explains the monetary value players and teams are currently squeezing out of TikTok.²⁵ Part III explains why TikToks are copyrightable material and why the U.S. Copyright Act governs this issue.²⁶ Part IV posits that professional athletes' TikToks are made within the scope of their employment and therefore belong to their employers.²⁷ Part V analyzes each respective league's collective bargaining agreements and how they fail to address or change the ownership issue.²⁸ Part VI notes that the legal ownership of the TikToks raises some serious concerns regarding free speech as well as possible public relations issues for the teams and leagues.²⁹ Part VII proposes teams take a joint-authorship approach to their ownership of the player-created content.³⁰ To continue players' incentives to create content and express themselves, teams should divide ownership in signed agreements or through collective bargaining and split profits with the players while retaining some of the profitability of these long-term assets.³¹ Teams can and should use this inherent ownership as a bargaining tool to advance their own interests and a positive and fruitful relationship with their players.³²

II. PROFESSIONAL SPORTS LEAGUES AND TEAMS ARE RECOGNIZING AND CAPITALIZING ON THE VALUE OF TIKTOK

TikTok, the video-sharing platform known for its popularity among the Gen-Z population,³³ is now more popular than Google.³⁴ Up from number seven in 2020, it is 2021's most popular domain, surpassing Google,

24. *See infra* Part IV.

25. *See infra* Part II.

26. *See infra* Part III.

27. *See infra* Part IV.

28. *See infra* Part V.

29. *See infra* Part VI.

30. *See infra* Part VII.

31. *See infra* Part VII.

32. *See infra* Parts VII–VIII.

33. *See* Bradian Muliadi, *What The Rise of TikTok Says About Generation Z*, FORBES (July 7, 2020, 8:00 AM), <https://www.forbes.com/sites/forbestechcouncil/2020/07/07/what-the-rise-of-tiktok-says-about-generation-z/?sh=273f93196549>.

34. Sarah Roach, *TikTok Is Now More Popular Than Google*, PROTOCOL (Dec. 22, 2021), <https://www.protocol.com/bulletins/tiktok-google-ranking#:~:text=TikTok%20has%20de-throned%20Google%20as,1>.

Facebook, and Microsoft.³⁵ The business generated \$4.6 billion in 2021 and had 1.2 billion monthly active users in the last quarter of 2021.³⁶ For reference, the Super Bowl, the most watched championship game of the Big Four professional sports leagues, garnered 112.3 million viewers in 2022, game six of the 2021 World Series peaked at 14.3 million, and game six of the 2022 NBA finals peaked at 16.9 million.³⁷ TikTok is known for the wide array of influencers who use the app to promote their brands and grow their platforms, as well as for its potential in helping businesses do the same.³⁸

Never the ones to be left behind, multibillion dollar professional sports leagues have already hopped on the TikTok train.³⁹ Not only do professional teams have individual accounts on each of the major social media platforms, they also have partnerships with the platforms.⁴⁰ TikTok is no exception.⁴¹ The NFL announced its partnership with TikTok in 2019.⁴² In a statement, Blake Stuchin, Vice President of Digital Media Business Development, called the partnership “a natural extension of [the NFL’s] media strategy,” and emphasized the potential access to a “fast-growing global audience of NFL fans and future fans.”⁴³ After the partnership was announced individual NFL teams began joining the app, and some teams currently have upwards of a

35. *Id.*

36. Mansoor Iqbal, *TikTok Revenue and Usage Statistics (2023)*, BUS. OF APPS (Jan. 9, 2023), <https://www.businessofapps.com/data/tik-tok-statistics/>.

37. Alison Baker, *The Most Watched Sporting Events in the World*, ROADTRIPS (July 25, 2022), <https://www.roadtrips.com/blog/the-most-watched-sporting-events-in-the-world/>.

38. See Rafael Schwarz, *Why and How to Leverage TikTok for Influencer Marketing*, FORBES (May 25, 2021, 7:10 AM), <https://www.forbes.com/sites/forbescommunicationscouncil/2021/05/25/why-and-how-to-leverage-tiktok-for-influencer-marketing/?sh=a3d76a33b791>.

39. See Eddie Moran, *TikTok: Sports’ Next Great Social Media Venture?*, FRONT OFF. SPORTS (Dec. 2, 2019, 12:34 AM), <https://frontofficesports.com/tiktok-in-sports/>.

40. *Id.*; see also *30 Biggest Social Media Accounts in Sport*, 90MIN (Jan. 29, 2020), <https://www.90min.com/posts/6546643-30-biggest-social-media-accounts-in-sport>.

41. See Moran, *supra* note 39 and accompanying text.

42. *NFL and TikTok Announce Multi-Year Partnership to Bring NFL Content to Fans Around the World*, TIKTOK (Sept. 3, 2019), <https://newsroom.tiktok.com/en-us/nfl-and-tiktok-announce-multi-year-partnership-to-bring-nfl-content-to-fans-around-the-world/> (“NFL content will include uniquely packaged highlights, sideline moments, and behind-the-scenes footage. Additionally, the NFL and TikTok will partner together around a series of NFL-themed hashtag challenges, inviting members of the TikTok community to express their passion for their favorite NFL clubs and players on TikTok. The NFL and TikTok will also be partnering together on unique marketing opportunities for brands to activate around NFL content on TikTok.”).

43. *Id.*

million followers on TikTok.⁴⁴ The NBA also partnered with TikTok,⁴⁵ and after joining the app the NBA TikTok account is the most followed sports account on the platform.⁴⁶ As of January 2022, the official NBA account has 14.2 million followers,⁴⁷ compared to the NFL's 7.5 million,⁴⁸ the NHL's 1.7 million,⁴⁹ and the MLB's 4.8 million.⁵⁰

It is not just the teams and the leagues who recognize the benefits of associating with TikTok.⁵¹ Players have long been making money off social media posts, with some athletes like NFL wide receiver Odell Beckham Jr. profiting as much as \$58,699 per sponsored Instagram post.⁵² Athletes are already using TikTok to showcase sponsors⁵³ and make money off of their posts.⁵⁴ Currently, top European soccer players tend to profit the most on the app, with defender Sergio Ramos making about \$40,000 per video.⁵⁵ But JuJu Smith-Schuster, former NFL Pittsburgh Steelers receiver now playing for the Kansas City Chiefs,⁵⁶ is in eighth place among athletes monetizing TikTok

44. See Dallas Cowboys (@dallascowboys), TIKTOK, <https://www.tiktok.com/@dallascowboys?lang=en> (last visited Mar. 2, 2023) (showing 2 million followers); New England Patriots (@patriots), TIKTOK, <https://www.tiktok.com/@patriots?lang=en> (last visited Mar. 2, 2023) (showing 1.2 million followers); Pittsburgh Steelers (@steelers), TIKTOK, <https://www.tiktok.com/@steelers?lang=en> (last visited Mar. 2, 2023) (showing 1.7 million followers); Philadelphia Eagles (@philadelphiaeagles), TIKTOK, <https://www.tiktok.com/@philadelphiaeagles?lang=en> (last visited Mar. 2, 2023) (showing 2.3 million followers).

45. See Moran, *supra* note 39 (“Although the NBA officially launched its TikTok account in October 2016, it didn’t officially partner with the app until two years later.”).

46. *Id.* (“As of December 1, the NBA is TikTok’s most-followed sports account in the world with more than 6.2 million followers.”); Kurt Badenhausen, *NBA Cracks the TikTok Code as U.S. Takes Aim at World’s Hottest Media App*, FORBES (Sept. 10, 2020, 8:06 AM), <https://www.forbes.com/sites/kurtbadenhausen/2020/09/10/nba-cracks-the-tiktok-code-as-us-takes-aim-at-worlds-hottest-media-app/?sh=55eb00072a54> (reporting that the NBA has the most TikTok followers and the most engagement on the platform).

47. NBA (@nba), TIKTOK, <https://www.tiktok.com/@nba> (last visited Jan. 30, 2022).

48. NFL (@nfl), TIKTOK, <https://www.tiktok.com/@nfl?lang=en> (last visited Jan. 30, 2022).

49. NHL (@nhl), TIKTOK, <https://www.tiktok.com/@nhl?lang=en> (last visited Jan. 30, 2022).

50. MLB (@mlb), TIKTOK, <https://www.tiktok.com/@mlb?lang=en> (last visited Jan. 30, 2022).

51. See SGKing, *Odell Beckham Jr. Makes More Than Any Other NFL Player on Instagram*, SIDE ACTION (Mar. 22, 2021), <https://sideaction.com/sports-news/odell-beckham-jr-makes-more-than-any-other-nfl-player-on-instagram/> (including a graphic reporting Beckham gets paid more per post than Tom Brady who makes \$38,853 per post, Russell Wilson who makes \$20,562 per post, Cam Newton who makes \$20,082, and others).

52. *Id.*

53. See sources cited *supra* note 14.

54. Wilford, *supra* note 15.

55. *Id.*

56. *Kansas City Chiefs, JuJu Smith-Schuster Reach One-Year Deal, Source Says*, ESPN (Mar. 18,

posts, and the NBA's 2021 MVP, Giannis Antetokounmpo, ranks in tenth, bringing in \$14,000 per post.⁵⁷ It is not only the star players who use TikTok to grow their brand; lesser known players can utilize the platform to make themselves household names.⁵⁸ One example is Chase Claypool, the forty-ninth overall pick in the 2020 draft,⁵⁹ who has 1.8 million followers⁶⁰—nearly the same amount as the Dallas Cowboys,⁶¹ the world's most valuable sports team.⁶²

What makes TikTok special is the way it allows users to harness their creativity in conjunction with an algorithm that shows users the content they want to see based on content they have already interacted with.⁶³ TikTok is known for focusing on “lighthearted visual content, such as dance videos or memes,” and some have struggled to use the app because “this creativity often does not come naturally,” to those trained more traditionally.⁶⁴ It is this creative nature of TikTok that makes it especially ripe for copyright issues.⁶⁵ The U.S. Copyright Act treats creativity as a requirement for copyright protection, and because TikTok is arguably the most creative social media platform, content creators should receive copyright ownership and protection for the works they post on the platform.⁶⁶ The nature of professional sports makes the issue

2022), https://www.espn.com/nfl/story/_/id/33538762/kansas-city-chiefs-juju-smith-schuster-reach-one-year-deal-source-says.

57. See Wilford, *supra* note 15.

58. See Chase Claypool (@chase), TIKTOK, https://www.tiktok.com/@chase?is_copy_url=1&is_from_webapp=v1 (last visited Jan. 30, 2022) (depicting Claypool's multiple sponsored posts watched by millions of viewers).

59. Billy Heyen, *How the Steelers Stole Chase Claypool in 2020 Draft Despite College, NFL Combine Numbers*, SPORTING NEWS (Nov. 8, 2020), <https://www.sportingnews.com/us/nfl/news/chase-claypool-steelers-college-draft-combine/1198976eafb71n9g6e5tk5oy1>.

60. Chase Claypool (@chase), TIKTOK, https://www.tiktok.com/@chase?is_copy_url=1&is_from_webapp=v1 (last visited Jan. 30, 2022).

61. See Dallas Cowboys, *supra* note 44.

62. Mike Ozanian, *World's Most Valuable Sports Teams 2021*, FORBES (May 7, 2021, 6:00 AM) <https://www.forbes.com/sites/mikeozanian/2021/05/07/worlds-most-valuable-sports-teams-2021/?sh=122ac5373e9e>.

63. Vann Vicente, *Why is TikTok So Popular? Why the Social Network is Unique*, HOW-TO GEEK (Feb. 17, 2021, 8:00 AM), <https://www.howtogeek.com/711824/why-is-tiktok-so-popular-why-the-social-network-is-unique/>.

64. Samuel Ketch, *How to Use TikTok and Instagram to Reach Younger News Audiences*, JOURNALISM (Nov. 22, 2021), <https://www.journalism.co.uk/news/how-to-use-tiktok-and-instagram-to-reach-younger-news-audience/s2/a878507/>.

65. Lydia Bayley, *TikTok: A Copyright Time Bomb?*, IP BYTES (Mar. 29, 2021), <http://blogs.luc.edu/ipbytes/2021/03/29/tiktok-a-copyright-time-bomb/>.

66. See generally Nir Hindi, *Why TikTok is the Most Creative Social Platform*, MEDIUM (Dec. 16,

of copyright ownership even blurrier, and the profitability of TikToks makes this an issue both teams and players have an interest in.⁶⁷ TikTok is a proven revenue-generating tool for professional athletes, and with the platform's continued growth, revenue potential grows with it.⁶⁸ The teams and players' unions should immediately concern themselves with addressing how to account for current and future profits generated by player-created but not player-owned TikTok content.⁶⁹

III. TIKTOKS ARE COPYRIGHTABLE WORKS

For the players' social media posts to be protected by federal copyright law, they must be copyrightable, which requires they be "original works of authorship fixed in any tangible medium of expression."⁷⁰ The TikToks this Comment focuses on would be classified as audiovisual works because they are "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices."⁷¹

To satisfy the originality requirement, a work must be "independently created by the author" and "possess some minimal degree of creativity."⁷² Independent creation simply means an author created the work without copying another work.⁷³ The level of creativity required by the Copyright Act is "extremely low," and is often referred to as more than *de minimis* creativity.⁷⁴ The originality requirement is not a hard obstacle to overcome in the case of TikToks because, while the players follow the trends that other TikTokers use,⁷⁵ the players do not exactly replicate the expression of other influencers—

2020), <https://medium.com/theartian/why-tiktok-is-the-most-creative-social-platform-1ec079c900c2> (noting that TikTok requires "endless creativity").

67. See Wilford, *supra* note 15 (noting the profitability for athletes of TikToks); Badenhansen, *supra* note 46 (noting the interest of teams and leagues in TikTok partnerships).

68. See Wilford, *supra* note 15.

69. See *infra* Parts VI–VII.

70. Copyright Act of 1976, 17 U.S.C. § 102 (2021).

71. *Id.* § 101.

72. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 308 (3d ed. 2021) (quoting *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991)).

73. *Id.* § 308.1.

74. *Id.* §§ 308.2, 313.4(B) ("Works that contain no expression or only a *de minimis* amount of original expression are not copyrightable and cannot be registered with the U.S. Copyright Office.").

75. See Manseen Logan, *The Best TikTok Trends and Challenges Right Now*, COMPLEX (Nov. 17, 2022), <https://www.complex.com/life/best-tiktok-trends-challenges-right-now/> ("Somehow, the app knows which videos to place in front of users and the perfect time to push those videos forward. That

they follow the theme or style while making a series of creative decisions that are more than *de minimis* creativity.⁷⁶ These creative choices include the comments and captions that appear in the videos, the camera angles and perspectives used, the decision to apply filters, the lighting choices made, and other video editing decisions.⁷⁷

The other copyrightability requirement is sufficient fixation, which requires the work be fixed in a tangible medium “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”⁷⁸ Because these videos are posted on social media—sites that permit a viewer to watch the video for its entire length and that keep the video accessible for later viewers—TikToks meet the fixation requirement.⁷⁹

When a work is deemed copyrightable, questions of ownership become critical because the U.S. Copyright Act states the exclusive rights of reproduction, preparation of derivative works, distribution, performance, and display are vested in “the owner of copyright under this title.”⁸⁰ Essentially, whoever owns the work controls it and its profitable uses.⁸¹ Copyright owners also have the right to transfer their ownership to others, often doing so to generate profit.⁸² The question regarding professional athletes’ copyrightable TikTok works then becomes one of ownership: if a player owns the video, he can then control its use and reap its profits, decide what possible commercial and noncommercial uses of the video to approve, and sue if the work is infringed.⁸³ Additionally, if players are the owners of the work, they can

insane algorithm has created one of the best spaces to start viral trends. . . . [I]t always finds a way to evolve to fit the latest trend. With new sounds, dances, and ideas from creators, TikTok has maintained its place at the forefront of hilarious memes and other social media content.”)

76. See Smith-Schuster, *supra* note 12 (depicting Smith-Schuster making videos with the kinds of creative choices the Act covers).

77. *Id.*

78. Copyright Act of 1976, 17 U.S.C. §§ 101–02 (2021).

79. Laura A. Kees, *Pause Before You Post—Copyright Issues in Social Media*, NAT’L L. REV. (Nov. 24, 2020), https://www.natlawreview.com/article/pause-you-post-copyright-issues-social-media#google_vignette (“A work is protected by copyright as soon as it’s in a fixed format—meaning anytime a protectable work is posted on social media, it is protected by copyright.”).

80. Copyright Act of 1976, 17 U.S.C. § 106 (2021).

81. *Id.*

82. See *id.* § 201(d) (“The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.”).

83. See *id.* § 501(b) (“The legal or beneficial owner of an exclusive right under a copyright is

determine if and to whom they transfer the exclusive rights to use the work.⁸⁴ The issue of ownership is not as simple as saying the athletes make the content and therefore are the owners; considering their respective collective bargaining agreements with their professional leagues, and their own employment contracts with their teams, the ownership of copyrightable social media works hinges on contract interpretation.⁸⁵

IV. PROFESSIONAL TEAMS OWN PLAYER-CREATED TIKTOKS DUE TO THE TIKTOKS' WORK-FOR-HIRE NATURE

Though professional athletes are the authors of the copyrightable TikToks, they are not the owners.⁸⁶ Per the Copyright Act, ownership in a work protected by the Act “vests initially in the author or authors of the work.”⁸⁷ However, the USCA includes an exception for a work made for hire.⁸⁸ In these cases, “the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”⁸⁹ In other words, works produced within an employee–employer relationship do not belong to the author-employee who creates them.⁹⁰ There are two instances where a work is classified as a work made for hire: where the creator is an “employee” acting “within the scope of his or her employment,” and where the work is “specially ordered or commissioned” from an independent contractor.⁹¹

The independent contractor category requires the work to be in one or more of the following specific categories: “contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as

entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it.”).

84. *Id.* § 201(d).

85. *See* NFL CBA, *supra* note 6; MLB CBA, *supra* note 6; NBA CBA, *supra* note 6; NHL CBA, *supra* note 6.

86. *See* Copyright Act of 1976, 17 U.S.C. § 201(b) (2021) (noting that the employer is the author of a work made for hire).

87. *Id.* § 201(a).

88. *Id.* § 201(b).

89. *Id.*

90. *Id.*

91. *Id.* § 101.

answer material for a test, or as an atlas.”⁹² TikToks would not be considered specially commissioned works under any of these categories. They would not fall under the motion picture or other audiovisual work because TikToks are independent standalone videos, like YouTube clips, and are not part of a bigger audiovisual work, like a film or television show.⁹³ Additionally, these videos are not made at the direction of the teams, but rather are created on the players’ personal accounts as responses to social media trends and the players’ other interests.⁹⁴

Professional athletes fall under the “employee” work-for-hire definition.⁹⁵ After the Supreme Court decided *Community for Creative Non-Violence v. Reid*, courts must use the agency law definitions of “employee” and “scope of employment” when applying an employee work-made-for-hire analysis.⁹⁶ The “employee” prong is analyzed by considering twelve factors the Court outlined in *Reid*, while the “scope of employment” prong is analyzed looking at the Restatement factors.⁹⁷

A. Professional Athletes are “Employees”

Professional athletes must pass the *Reid* test to qualify as “employees” and therefore have their content classified as works for hire.⁹⁸ At issue in *Reid* was the ownership of a statue made under a contract between a homeless

92. *Id.*

93. See Kahlan Rosenblatt, *TikTok Will Now Let Users Post Videos Up to 10 minutes Long*, NBC NEWS (Feb. 28, 2022, 1:43 PM), <https://www.nbcnews.com/pop-culture/pop-culture-news/tiktok-will-now-let-users-post-videos-10-minutes-long-rcna17965> (“TikTok last increased its maximum video time in July, when it upped video length from one minute to three minutes. As TikTok evolves into a longer-form app with videos closer to the length of content on YouTube, other platforms, like YouTube and Instagram, are trying to capture the magic of short-form videos.”).

94. See Smith-Schuster, *supra* note 12 (depicting videos on Smith-Schuster’s TikTok page that follow the common trend other independent creators on the platform create).

95. See Copyright Act of 1976, 17 U.S.C. § 101 (2021). Players sign contracts that state the club or professional team is employing them for their skilled services as players. See MLB CBA, *supra* note 6, at 337 (“The Club hereby employs the Player to render, and the Player agrees to render, skilled services as a baseball player”); NBA CBA, *supra* note 6, at A-1 (“The Team hereby employs the Player as a skilled basketball player”); NHL CBA, *supra* note 6, at 310 (“The Club hereby employs the Player as a skilled hockey Player”); NFL CBA, *supra* note 6, at 334 (“Club employs Player as a skilled football player. Player accepts such employment.”).

96. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989).

97. *Id.* at 751–52.

98. *Id.*

shelter and Reid, a sculptor.⁹⁹ After its initial exhibition, both Reid and the shelter wanted to take the statue on a tour of the United States, although each disagreed with the other's proposed action, and the shelter ultimately brought suit against Reid.¹⁰⁰ At the time, the circuit courts were using four different approaches to analyze and apply the U.S. Copyright Act's "work for hire" definition.¹⁰¹ The Supreme Court ultimately resolved the circuit split by using the common-law-of-agency definitions of these terms.¹⁰² In establishing this as the appropriate test for determining whether an individual is an employee under the work-made-for-hire doctrine, the Court outlined the following factors:

[W]hether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.¹⁰³

The Court determined no single factor is determinative as to whether the author is an employee.¹⁰⁴

Because of the volume of factors involved in the analysis, some circuit courts have provided additional guidance for lower courts when it comes to applying these factors.¹⁰⁵ In *Aymes v. Bonelli*, the Second Circuit highlighted

99. *Id.* at 733–35.

100. *Id.* at 735–36.

101. *Id.* at 738–39.

102. *Id.* at 738–39, 751.

103. *Id.* at 751–52 (footnotes omitted).

104. *Id.* at 752.

105. Ryan Vacca, *Work Made for Hire—Analyzing the Multifactor Balancing Test*, 42 FLA. STATE U. L. REV. 197, 222 (2014) (“And, although the lower courts now had a multifactor test to help them determine whether the hired party was an employee or independent contractor, all they were told about the test was that no single factor was dispositive. This lack of further guidance led to additional

five factors it considered “significant in virtually every situation,”¹⁰⁶ explained that not all factors will require consideration in a given case,¹⁰⁷ and noted whether the work is part of the regular business of the hiring party and whether the hiring party is in business will generally have “little weight” in the analysis.¹⁰⁸ In *Eisenberg v. Advance Relocation & Storage, Inc.*, which considered the application of the *Reid* factors in a non-copyright case, the Second Circuit stated “a court must disregard those factors that, in light of the facts of a particular case, are (1) irrelevant or (2) of ‘indeterminate’ weight.”¹⁰⁹ In sum, when applying the *Reid* factors to a work-made-for-hire situation, while the factors that matter most are those applicable to the factual circumstances at issue, there are certain factors that will almost always be relevant and thereby also carry greater weight.¹¹⁰

Following these decisions, courts analyzed more work-for-hire cases, and these decisions have produced data regarding the frequency and weight courts give to each factor.¹¹¹ This data grouped the factors into five different continuum groups.¹¹² The three most important factors—tax treatment, employee benefits, and payment method—were in the first group.¹¹³ The next group in importance included the considerations of additional projects, the skill required, and the source of the instrumentalities and tools.¹¹⁴ The final group of factors, at the other end of the continuum of importance, consisted of the “right to control the manner and means, the label used to describe the hired

confusion about how the factors ought to be applied. . . . To provide the lower courts additional guidance in applying the *Reid* factors, the Second Circuit in *Aymes v. Bonelli* suggested that “there are some factors that will be significant in virtually every situation.”)

106. *Aymes v. Bonelli*, 980 F.2d 857, 861 (2d Cir. 1992). The five factors the *Aymes* court considered the most relevant are: “(1) the hiring party’s right to control the manner and means of creation; (2) the skill required; (3) the provision of employee benefits; (4) the tax treatment of the hired party; and (5) whether the hiring party has the right to assign additional projects to the hired party.” *Id.*

107. *Id.*

108. *Id.* at 864.

109. *Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 114 (2d Cir. 2000) (stating the irrelevant factors are ones that “do not meaningfully cut in favor of either the conclusion that the worker is an employee or the conclusion that he or she is an independent contractor”).

110. *See supra* notes 103–109 and accompanying text.

111. *See Vacca, supra* note 105, at 223. The study also found two additional factors courts consider in the analysis: “(1) the hiring party’s right to control the manner and means by which the product is accomplished, and (2) how the hired party and hiring party referred to the hired party.” *Id.* at 225.

112. *See Vacca, supra* note 105, at 229–30.

113. *Id.* at 229.

114. *Id.*

party, and whether the hiring party is in business.”¹¹⁵ The study found that when using only the three most important factors, eighty-seven percent of the cases would be consistent with the courts’ actual conclusion, and when using the factors from the two most important continuum groups, this rate goes up to ninety-one percent.¹¹⁶ This Comment will use this data to analyze professional athletes’ TikToks and predict how a court would rule if a professional team were to sue to enforce its ownership.¹¹⁷

1. The Three Most Important *Reid* Factors Weigh in Favor of Finding Professional Athletes are “Employees”

Professional sports teams are providing the kind of tax treatment, employee benefits, and payment methods—the most important *Reid* factors per the Vacca study—that employees under the common law of agency would receive, thereby making it likely that a court would find professional athletes on these teams are employees.¹¹⁸

When considering “whether the hiring party treated the hired party as an employee or independent contractor for tax purposes,” courts only consider payroll documents and forms filed with the federal government.¹¹⁹ Professional players are treated as employees for tax purposes in that they have their

115. *See id.* at 230.

116. *See id.* (“Using only the three most important factors (tax treatment, employee benefits, and payment method), eighty-seven percent of the cases would be decided consistent with courts’ ultimate conclusion. When this study was done using the most important two groups, ninety-one percent of the cases would be decided consistent with the courts’ ultimate conclusion. In contrast, doing the same analysis using the three least important factors yielded a forty-eight percent success rate. Expanding this to the five least important factors improved the success rate to sixty-three percent. Doing the same analysis for the middle three factors yielded a seventy-eight percent success rate.”).

117. *See, e.g.,* Grant Emrich, *Cracking the Code: How to Prevent Copyright Termination from Upending the Proprietary and Open Source Software Markets*, 90 *FORDHAM L. REV.* 1245, 1265–66 (2021) (“Relying on existing case law, one scholar has conducted a comprehensive study (‘Vacca study’) in order to rank the *Reid* factors by overall importance. These aggregate analyses are likely the best available method of determining the impact of the *Reid* factors on the software industry as a whole.” (citing Vacca, *supra* note 105)); Ann Bartow, *Using the Lessons of Copyright’s Excess to Analyze the Political Economic of Section 203 Termination Rights*, 6 *TEX. A&M J. PROP. L.* 23, 33 (2020) (“As Ryan Vacca noted several years ago, the most important ‘*Reid* factors’ used to assess whether someone is an employee for work for hire purposes weigh in favor of authors of sound recordings as independent contractors, in part because they received advances and royalties rather than paychecks.” (citing Vacca, *supra* note 105)).

118. *See* Vacca, *supra* note 105 and accompanying text.

119. *Id.* at 235.

taxes withheld by their respective teams.¹²⁰ They can deduct certain employee business expenses like agent fees, player dues, training and gym fees, travel specifically related to their careers, and body maintenance expenses.¹²¹ Additionally, professional athletes pay “jock taxes,” which arose due to Michael Jordan’s success, where they must file state tax returns for the games they are employed to play in those states.¹²²

Courts considering employee benefits in their factor analysis can also rely on the presence or absence of benefit forms.¹²³ Professional athletes also receive health benefits as part of their employment with their teams.¹²⁴ Some of the benefits professional athletes in the NFL, MLB, NBA and NHL receive are workers’ compensation benefits, severance pay plans, retirement plans, player annuity plans, player insurance plan, disability benefits, tuition assistance plans, and life insurance.¹²⁵ These are negotiated through the leagues’ respective CBAs, and some are included in the uniform player contracts included in the CBAs.¹²⁶

When considering payment method, courts rely on easily discoverable forms depicting how payment is distributed.¹²⁷ Because professional athletes tend to be paid on a weekly or biweekly basis, rather than in one lump sum,¹²⁸

120. *A Look at an NFL Rookie’s Take Home Pay*, SIGNATUREFD (Dec. 5, 2019), <https://signaturefd.com/signaturepro-look-nfl-rookies-take-home-pay/>.

121. PRO SPORTS TAX, TAX INFORMATION FOR THE NFL ROOKIE (2009), <http://www.prosports tax.com/Images/Attachments/rn4b61f78e0a858.pdf>.

122. Steven Kutz, *This is What a Pro Athlete’s Tax Return Looks Like*, MKT. WATCH (Aug. 29, 2016, 9:51 AM), <https://www.marketwatch.com/story/the-jock-tax-and-why-a-professional-athletes-tax-form-can-be-as-big-as-a-bible-2016-07-27>.

123. *See* Vacca, *supra* note 105, at 235 (“[P]roviding benefits such as insurance is easily verified by looking at enrollment data.”).

124. CHRISTOPHER R. DEUBERT ET AL., *COMPARING HEALTH-RELATED POLICIES & PRACTICES IN SPORTS: THE NFL AND OTHER PROFESSIONAL LEAGUES* 18 (2017), <https://footballplayershealth.harvard.edu/wp-content/uploads/2017/05/Harvard-Comparative-League-Analysis-5.15.17.pdf> (“[F]or each league, we examine: (1) retirement benefits; (2) insurance benefits; (3) disability benefits; (4) workers’ compensation benefits; (5) education-related benefits; and, (6) the existence of health-specific committees jointly run by the league and players association.”).

125. *Id.* at 107–24.

126. *Id.* at 109 (“Without the ability to review those plans in detail, we rely on the summaries provided in the CBAs (which vary in detail) and other publicly available information.”); *see also* MLB CBA, *supra* note 6, at 352; NFL CBA, *supra* note 6, at 338; NBA CBA, *supra* note 6, at A-6.

127. *See* Vacca, *supra* note 105, at 235 (“Similarly, the method of payment is easily determined by looking at paystubs to figure out the frequency and amounts paid.”).

128. *See* California Business Journal Editorial Staff, *NFL Paychecks: How do NFL Players Get Paid?*, CAL. BUS. J., <https://calbizjournal.com/nfl-paychecks-how-do-nfl-players-get-paid/> (last visited Jan. 10, 2022) (“[E]ach NFL player under contract gets paid every week from the start of the

this factor weighs in favor of an “employee” finding.¹²⁹ NFL players are additionally paid “100% of [their] yearly salary under this contract in equal weekly or biweekly installments over the course of a 34- or 36-week period during any of the applicable 2021 through 2029 League Years.”¹³⁰ NBA players are “paid in twenty-four (24) equal semi-monthly payments beginning with the first of said payments on November 15th of each year covered by [the] Contract . . . and continuing with such payments on the first and fifteenth of each month until said Compensation is paid in full.”¹³¹ MLB players are paid “in semimonthly installments after the commencement of the championship season(s) covered by this contract except as the schedule of payments may be modified by a special covenant.”¹³² These three most important factors weigh in favor of finding that professional athletes are employees rather than independent contractors.¹³³

2. The Second Most Important Set of Factors Also Weigh for an “Employee” Finding

Additionally, when considering the second most important set of factors—additional projects, skill required, and source of the instrumentalities and tools—courts would likely find that professional athletes are employees.¹³⁴

The “additional projects” factor looks at “whether a hiring party had the right to assign additional projects” and “is instructive because an independent contractor’s engagement is more likely to be ‘project-by-project,’ . . . with the relationship terminating upon completion of the contractually assigned

season and up to its end. Game checks are usually deposited into the players’ bank accounts on Monday mornings, although the exact day of the week when they get paid could vary from week to week. Each game check corresponds to a portion of the player’s yearly salary, but does not include any monies from bonuses.”).

129. See *Horror Inc. v. Miller*, 15 F.4th 232, 255 (2d Cir. 2021) (citing *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 753 (1989)). Courts find that “a lump-sum payment that is ‘dependent on completion of a specific job’—is ‘a method by which independent contractors are often compensated.’” *Id.*

130. See NFL CBA, *supra* note 6, at 337–38.

131. See NBA CBA, *supra* note 6, at A-2.

132. See MLB CBA, *supra* note 6, at 337.

133. See *infra* Section IV.B.i. See generally *Vacca*, *supra* note 106, at 230 (discussing the most important factors in determining a court’s conclusion in the *Reid* analysis).

134. See *Vacca*, *supra* note 105, at 230.

project.”¹³⁵ In contrast, while professional athletes are contracted to perform in a set number of games and attend a set number of practices a year, they may be asked and agree to “participate upon request in reasonable activities to promote the Club and the League,” like talking to the media after games and taking part in promotional activities for league partners.¹³⁶ Additionally, professional teams have discretion in mandating off-season workouts.¹³⁷ Off-season workout rules limit how many hours coaches can require from players, but they do not prescribe the amount of time teams require within these limits.¹³⁸ Professional athletes’ duties are not limited to playing in seventeen games and attending a pre-determined number of practices each season; teams have the discretion to assign “additional projects” in the form of press conferences and off-season workouts.¹³⁹

When considering the skill required factor, courts weigh in favor of independent contractor status when adjudicating on professional creative artists.¹⁴⁰ Under the traditional, commonly-held view of sports athletes are not “professional creative artists.”¹⁴¹ Per their uniform contracts, professional athletes tend to be employed as “a skilled football player,”¹⁴² “a skilled hockey player,”¹⁴³ “a skilled basketball player,”¹⁴⁴ or for “skilled services as a baseball player.”¹⁴⁵ Because they are employed for their athletic skills—which are not

135. *Horror Inc. v. Miller*, 15 F.4th 232, 254 (2d Cir. 2021).

136. *See* NFL CBA, *supra* note 6, at 335; *see also* MLB CBA, *supra* note 6, at 253; NBA CBA, *supra* note 6, at A-12.

137. John Clayton, *Rules Set for Offseason Workouts*, ESPN (May 7, 2003), https://www.espn.com/nfl/columns/clayton_john/1550442.html (“As the offseason began, coaches and general managers received stern reminders that the NFL and the NFL Players Association wanted more restraints on overzealous conditioning programs and minicamps.”).

138. *Id.* Where previously teams could hold players all day, “[n]ow, the maximum time for a player to fulfill his offseason daily duties is four hours. The team can’t specify more than two hours for the player to do specific things The player has the latitude to spend the other two hours lifting weights if he wishes.” *Id.*

139. *See id.*; *see also supra* note 136 and accompanying text.

140. *Horror Inc.*, 15 F.4th at 251.

141. *Cf.* Maureen Kovich, *Sport as An Art Form*, 42 J. HEALTH, PHYSICAL EDUC., RECREATION 42, 42 (2013) (“[S]ociety has defined art in narrow terms. . . . Today, people fail to see that art is also being performed in our natatoriums, gymnasiums, and playing fields through the medium of sport. The definition of art needs to be expanded to include the skilled athletic performance.”).

142. *See* NFL CBA, *supra* note 6, at 334 (depicting the NFL Player Contract).

143. *See* NHL CBA, *supra* note 6, at 310 (depicting the Standard Player’s Contract).

144. *See* NBA CBA, *supra* note 6, at A-1 (depicting the National Basketball Association Uniform Player Contract).

145. *See* MLB CBA, *supra* note 6, at 337 (depicting the Uniform Player’s Contract).

currently within the definition of creative art—players are not employed for their creative skills.¹⁴⁶

The teams and the professional leagues are the source of the instrumentalities players use in their capacity as athletes and in their TikTok endeavors. The respective leagues and teams provide players with all the necessities for their athletic responsibilities like the “necessary traveling expenses from his residence to training camp; Player’s reasonable board and lodging expenses . . . Player’s necessary traveling expenses to and from . . . football games outside Club’s home city; Player’s necessary traveling expenses to his residence if this contract is terminated.”¹⁴⁷ The teams also provide locker room facilities, parking facilities, and hotel arrangements for players.¹⁴⁸ And, while the players are using their personal phones to film these TikToks, players often include game footage in these videos.¹⁴⁹ This footage belongs to the league, and players must request permission to use it; thus, teams are providing players with an additional tool to execute their creative vision through TikToks.¹⁵⁰

Therefore, the second most important group of factors all likely weigh in favor of finding professional athletes are employees as well.¹⁵¹

3. Analyzing the Remaining Relevant Factors Would Lead to the Conclusion that Professional Athletes are “Employees”

In determining whether professional athletes are “employees,” a court would analyze the remaining relevant factors: the hiring party’s right to control the manner and means by which the product is accomplished, how the hired and hiring parties referred to the hired party, the location of the work,

146. See generally *Horror Inc. v. Miller*, 15 F.4th 232, 251–52 (2d Cir. 2021) (discussing what it means for someone to be employed for his creative skills).

147. See NFL CBA, *supra* note 6, at 337.

148. See NBA CBA, *supra* note 6, at 329–30.

149. JuJu Smith-Schuster (@juju), TIKTOK (Aug. 23, 2021), <https://www.tiktok.com/@juju/video/6999735485497232645> (depicting the end of a run during a Pittsburgh Steelers game against the Detroit Lions).

150. See *Footage Licensing*, NFL FILMS, <https://pads.nfl.net/FootageLicensing/FAQ.aspx> (last visited Jan. 10, 2022) (“NFL Films, on behalf of the NFL, is the exclusive copyright holder in and to all NFL Footage. Note that ‘NFL game footage’ includes any footage taken of events inside an NFL stadium (whether of game action, sidelines, crowd, etc.) from the period three hours prior to kickoff of an NFL game to one hour after the NFL game has ended.”). There are steps for the different uses players might want footage for, including personal home viewing, commercial ventures, and fundraising. *Id.* There are licensing fees associated with some of these uses. *Id.*

151. See Vacca, *supra* note 105, at 230.

the duration of the relationship between the parties, whether the work is part of the regular business of the hiring party, and whether the hiring party is in business.¹⁵² Because the most important factors likely weigh in favor of finding the players are employees, this analysis would be much less determinative and be given less weight.¹⁵³

In regards to the right to control, teams exercise control over what players can post on social media.¹⁵⁴ Though the teams do not have access to the player's social media accounts, the leagues and individual teams have social media policies and morality clauses in the players' contracts that govern their overall behavior, including the content they post.¹⁵⁵ Here, the hiring party (the teams) refer to the hired party (the players) as employees in the MLB, NFL, NHL, and NBA uniform player contracts, which all state the teams "employ" the athlete as a skilled player.¹⁵⁶ The location of the work factor weighs in favor of an "employee" finding because the bulk of the "athletic" work the players do for the teams occurs at team facilities, either the locker rooms, gyms, stadiums or training fields.¹⁵⁷ And while many of the players' TikToks

152. See Vacca, *supra* note 105, at 229–30.

153. See *id.* at 197.

154. See *infra* note 155 and accompanying text.

155. See Maria Burns Ortiz, *Guide to Leagues' Social Media Policies*, ESPN (Sept. 27, 2011), http://www.espn.com/espn/page2/story/_/id/7026246/examining-sports-leagues-social-media-policies-offenders (describing MLB's policy whereby "[p]layers must abide by rules regarding use of electronic equipment in the clubhouse and on the field. Those rules stipulate that players, uniformed personnel and clubhouse staff cannot use cell phones or other devices on the bench, in the bullpen or on the field after batting practice has started."). In the NFL, "[p]layers, coaches and operations staff cannot use social media less than 90 minutes before kickoff. Social media use can resume after traditional media interviews conclude. Updates to player accounts (by the player or anyone else) are prohibited. . . ." *Id.* In the NBA, "use of cell phones and other electronic devices is banned during games. This period is defined as 45 minutes before tipoff until after media obligations have been completed. Players can use social media during pregame media access." *Id.* The NHL is "[t]he most recent sports body to adopt a social media policy." *Id.* That policy is "similar to the NBA's and NFL's stance," where "[p]layers cannot use social media from two hours before faceoff until media interviews are completed. The policy also makes clear that players are as responsible for statements made in social media as in traditional media." *Id.*; see also Farish, *supra* note 19 ("Despite their fame and talent, at the end of the day, professional athletes are capable of making mistakes just like the rest of us. But unlike the rest of us, sports stars are often contractually obligated to maintain a positive reputation."). "In addition to the NFL Policy, individual player contracts also contain 'morality clauses.' Also known as a 'moral turpitude clause' or 'bad boy clause', this permits an employer to end the contractual relationship if the employee's conduct breaches the moral expectations laid out in the employment or endorsement agreement." Farish, *supra* note 19.

156. NFL CBA, *supra* note 6, at 334; NHL CBA, *supra* note 6, at 310; MLB CBA, *supra* note 6, at 337; NBA CBA, *supra* note 6, at A-1.

157. See generally sources cited *supra* note 6 (referencing the leagues' specific contracts with

are filmed at home, quite a few are filmed at these team facilities.¹⁵⁸ The parties' relationship is for a contracted amount of time, similar to how independent contractors are employed, so this would weigh against the "employee" finding.¹⁵⁹

The factors considering whether the work is part of the regular business of the hiring party and whether the hiring party is in business would weigh in favor of an "employee" finding.¹⁶⁰ While professional teams are in the business of sports (what happens on the field, court, or arena), they are also billion dollar franchises that use media to promote themselves, sell tickets, sell jerseys, and profit from advertising.¹⁶¹ Professional teams are in the business of media relations and interacting with fans through social media; each team has their own Instagram, Facebook, and Twitter pages.¹⁶²

A court analyzing the first prong of the work for hire analysis would likely consider professional athletes to be "employees" rather than independent contractors, meaning the rest of the analysis would then hinge on whether these athletes are creating TikToks "within the scope of their employment."¹⁶³

players).

158. See Chase Claypool (@chase), TIKTOK, https://www.tiktok.com/@chase?is_copy_url=1&is_from_webapp=v1 (last visited Jan. 10, 2022) (featuring multiple videos taken in the practice field, weight room, and locker room at Heinz Field, the Steelers' stadium).

159. See NFL CBA, *supra* note 6, at 334; NHL CBA, *supra* note 6, at 310; MLB CBA, *supra* note 6, at 337; NBA CBA, *supra* note 6, at A-1.

160. See Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989).

161. See Prachi Juneja, *How Sports Became Big Business and Its' Implications for All Stakeholders*, MGMT. STUDY GUIDE, <https://www.managementstudyguide.com/how-sports-became-big-business.htm> (last visited Jan. 10, 2022).

162. See Jessica Swarm, *The Impact of Social Media on the Sports Industry*, BOS. UNIV.: COLL. OF COMMC'N (Oct. 29, 2018), <https://www.bu.edu/prlab/2018/10/29/the-impact-of-social-media-on-the-sports-industry/> ("Teams and players are engaging with fans in unprecedented ways. Social media has also transformed the culture of sports consumption, changing from an individual activity to a group or community-building activity. Twitter has positioned itself as an invaluable resource to all of the major participants within the sports industry: leagues, teams, players, fans, and sports journalists alike. . . . It has become a common practice for team accounts to post real-time game updates on Twitter. With the inclusion of hashtags, gifs, and audio/visual content, information and entertainment are becoming more of the same."); see also *All 32 NFL Twitter Accounts, Ranked for 2020*, COMPLEX (Mar. 4, 2020), <https://www.complex.com/sports/2020/03/nfl-twitter-accounts-ranked-for-2020/>; *Top NBA Social Media Accounts*, LWO SPORTS (Apr. 7, 2021), <https://lwosports.com/2021/04/07/top-nba-social-media-accounts/>.

163. See *supra* Section IV.A.1 (discussing the three most important *Reid* factors weighing in favor of finding professional athletes as "employees").

B. Professional Athletes Create TikToks “Within the Scope of Their Employment”

To analyze the scope of employment prong, courts use the Restatement factors because these factors connote the common law agency definition that the Supreme Court determined was correct in *Reid*.¹⁶⁴ There are three Restatement elements courts apply.¹⁶⁵ The conduct of the employee is within his scope of employment if: “(1) it is of the kind he is employed to perform; (2) it occurs substantially within the authorized time and space limits; and (3) it is actuated, at least in part, by a purpose to serve the [employer].”¹⁶⁶ The employer must prove all three elements.¹⁶⁷

1. Creating TikToks is the Kind of Work Professional Athletes Are Employed to Perform

When professional athletes create TikToks, they exemplify the promotional nature of professional sports and its requisite fan engagement and are engaging in the kind of work athletes are employed to perform. For this first element, courts rely heavily on the employee’s job description and disregard broadly stated contract provisions.¹⁶⁸ Courts will also consider relevant factors like “the degree of control the employer had over the employee’s project, and whether the employee relied solely on knowledge gained within the scope of his or her employment to create the project.”¹⁶⁹

This element may be the hardest for NFL teams to prove, but there are still clear arguments supporting a work-made-for-hire classification. For example, in *Stealing Swagger: NFL End Zone Celebrations and Fortnite’s Fortune*, Alex Avakiantz made a work-made-for-hire argument regarding the end zone celebration dances of NFL players.¹⁷⁰ Avakiantz’s reasoning centered

164. *Reid*, 490 U.S. at 740.

165. See RESTATEMENT (SECOND) OF AGENCY § 228 (AM. L. INST. 1958).

166. *Id.*

167. *Id.*

168. 132 AM. L. REP. FED. 301 § 4 (1996) (“[T]he court found that broadly stated rules or contract provisions, such as ‘Officers shall devote their entire time to the service of the department,’ are insufficient to establish the ‘scope of employment’ element . . .”).

169. *Id.*

170. Alex Avakiantz, *Stealing Swagger: NFL End Zone Celebrations and Fortnite’s Fortune*, 94 WASH. L. REV. 453, 477–78 (2019) (“If the team owner is ultimately interested in making money, and the player’s celebration creates more fan interest, then it is likely also work ‘of the kind he is employed

around the fact team owners are interested in making money and end zone dances generate fan interest, thereby qualifying this kind of performance as the kind a football player is employed to perform.¹⁷¹ TikToks are similar to endzone celebrations—many even feature clips of players celebrating in the end zone—because they also generate significant fan interest.¹⁷² Many of former Steelers player JuJu Smith-Schuster’s TikToks have over a million views.¹⁷³ His Steelers teammate, Chase Claypool, has some TikToks with over 6 million views.¹⁷⁴ NBA star Giannis Antetokounmpo has over 2 million followers and some videos with over 5 million views.¹⁷⁵ While broad contract provisions may be ignored by courts, the uniform contracts of all four major sports leagues include media obligations and clauses about players voluntarily participating in promotional activities, both on behalf of their individual teams and on behalf of the leagues themselves.¹⁷⁶ The NBA CBA includes

to perform.’ This line of reasoning may equally well fit the ‘purpose’ element. Also, the celebration occurs within the ‘authorized time and space limits’ because, though the clock stops after a score, players are transitioning and fans are still watching. Further, the celebration happens on the field and therefore satisfies the ‘space’ aspect as well. Given that a player in the NFL is an employee, and a celebration likely fits within the scope of employment, a player’s copyrightable moves would ultimately belong to the employer.”)

171. *Id.*

172. See generally Chase Claypool (@chase), TIKTOK, https://www.tiktok.com/@chase?is_copy_url=1&is_from_webapp=v1 (last visited Jan. 30, 2022) (showing Claypool’s videos have 34.9 million likes); JuJu Smith-Schuster (@juju), TIKTOK, https://www.tiktok.com/@juju?lang=en&is_copy_url=1&is_from_webapp=v1 (last visited Jan. 10, 2022) (showing Smith-Schuster’s videos have 45.4 million likes); Giannis Antetokounmpo (@giannis_an34), TIKTOK, https://www.tiktok.com/@giannis_an34?lang=en (last visited Jan. 30, 2022) (showing that Antetokounmpo’s videos have 29.4 million likes).

173. See JuJu Smith-Schuster (@juju), TIKTOK (Nov. 8, 2020), https://www.tiktok.com/@juju/video/6892920916070681861?is_copy_url=1&is_from_webapp=v1&lang=en (amassing 5.6 million views); JuJu Smith-Schuster (@juju), TIKTOK (Aug. 25, 2021), https://www.tiktok.com/@juju/video/7000426404919676165?lang=en&is_copy_url=1&is_from_webapp=v1 (accumulating 2.9 million views); JuJu Smith-Schuster (@juju), TIKTOK (Aug. 22, 2021), https://www.tiktok.com/@juju/video/6999283444438109446?lang=en&is_copy_url=1&is_from_webapp=v1 (accumulating 2.5 million views).

174. See Chase Claypool (@chase), TIKTOK (July 28, 2021), https://www.tiktok.com/@chase/video/6990080490132737286?is_copy_url=1&is_from_webapp=v1 (showing 6.2 million views).

175. See Giannis Antetokounmpo (@giannis_an34), TIKTOK (July 30, 2021), https://www.tiktok.com/@giannis_an34/video/6990804392001670406 (accumulating 5.7 million views).

176. See NFL CBA, *supra* note 6, at 335 (“Player will cooperate with the news media, and will participate upon request in reasonable activities to promote the Club and the League.”); NHL CBA, *supra* note 6, at 311 (“The Player further agrees . . . to co-operate with the Club and participate in any and all reasonable promotional activities of the Club which will in the opinion of the Club promote the welfare of the Club and to cooperate in the promotion of the League and professional hockey generally”); NBA CBA, *supra* note 6, at A-1 (classifying “promotional and commercial activities of

“promotional and commercial activities of the Team and the League” under the “Services” heading of its uniform contract.¹⁷⁷

The control factor weighs in favor of finding that creating TikToks is the kind of conduct a professional athlete is employed to perform.¹⁷⁸ Teams have a significant level of control over the creation of the TikToks because they own or rent their team facilities and the leagues own game footage.¹⁷⁹ The teams control the facilities—locker rooms, stadiums, and weight rooms—where many of these videos are being filmed, and the league controls the official game footage players include in their videos.¹⁸⁰ The NFL is famously protective of both its game footage and logos.¹⁸¹ If players want to use game

the Team and the League as set forth in this Contract and the CBA” under the “services” category); MLB CBA, *supra* note 6, at 339 (“In addition to his services in connection with the actual playing of baseball, the Player agrees to cooperate with the Club and participate in any and all reasonable promotional activities of the Club and Major League Baseball, which, in the opinion of the Club, will promote the welfare of the Club or professional baseball, and to observe and comply with all reasonable requirements of the Club respecting conduct and service of its team and its players, at all times whether on or off the field.”).

177. NBA CBA, *supra* note 6, at A-1.

178. *See supra* note 169 and accompanying text; *see also* City of Newark v. Beasley, 883 F.Supp. 3, 8 (D.N.J. 1995) (discussing that courts analyze “the degree of control the employer had over the employee’s project” when analyzing this Restatement factor).

179. *Stadium and Rent Details for All 32 NFL Teams*, L.V. REV.-J. (Mar. 6, 2017, 12:50 AM), <https://www.reviewjournal.com/sports/raiders-nfl/stadium-and-rent-details-for-all-32-nfl-teams/> (explaining how some stadiums, like Miami Dolphins’ home field at the Hard Rock Stadium, are owned by the owners and others are rented out by owners); *see also* NFL FILMS, *supra* note 150.

180. *See* JuJu Smith-Schuster (@juju), TIKTOK (Aug. 8, 2021), <https://www.tiktok.com/@juju/video/6994861218188020997> (depicting a dance filmed in the Steelers’ locker room); JuJu Smith-Schuster (@juju), TIKTOK (Aug. 31, 2021), <https://www.tiktok.com/@juju/video/6991184968290422022> (showing Smith-Schuster playing with camera effects while filming on the Steelers’ practice field); Giannis Antetokounmpo (@giannis an34), TIKTOK (Oct. 7, 2021), https://www.tiktok.com/@giannis_an34/video/7016354428420754693 (depicting Antetokounmpo and a teammate posing in the team media green screen room); Giannis Antetokounmpo (@giannis an34), TIKTOK (Feb. 28, 2021), https://www.tiktok.com/@giannis_an34/video/6934518029988482309?lang=en&is_copy_url=1&is_from_webapp=v1 (showing Antetokounmpo practicing basketball moves during practice on the Milwaukee Bucks court).

181. *See* Elizabeth Craig, *Offense Not Limited to the Field: The NFL’s Aggressive Push to Protect Its Trademarks*, COMMLAWBLOG (Feb. 1, 2021), <https://www.commlawblog.com/2021/02/articles/intellectual-property/offense-not-limited-to-the-field-the-nfls-aggressive-push-to-protect-its-trademarks/> (“Unless you have been hiding under a rock or don’t follow football news at all, you will know by now that the NFL is notoriously tough in enforcing its trademarks. Not only does it hold federal trademark registrations in the term ‘Super Bowl’ in conjunction with a variety of goods and services, including various television, radio, and Internet transmission services, but it holds federal registrations in conjunction with a variety of goods and services for many other trademarks as well, including the popular ‘Gameday’ and ‘Super Sunday.’”). The NFL does not just protect its trademarks; it also zealously enforces its ownership of game film. *Id.* (“[I]n 2007 [the NFL] caught wind

footage, they must request permission from NFL Films and, in many instances, pay a fee.¹⁸² Players must also have permission from the league any time they want a team logo to appear in a promotional activity or endorsement.¹⁸³ As owners of this film through the League,¹⁸⁴ and as owners of the facilities, the individual teams have some control over the players' TikToks.¹⁸⁵ Teams have additional control over the creation of the TikToks through the league's social media and general media policies that players must abide by or get fined for violating.¹⁸⁶ One famous example of just how much control the NFL has over the players' media obligations is Marshawn Lynch's infamous line, "I'm just here so I don't get fined," referring to the NFL's threat to fine him \$500,000 for failing to be available for a media day.¹⁸⁷

The knowledge factor, whether the employee relied solely on knowledge gained within the scope of his or her employment to create the project, is less relevant in the context of these TikToks. In most of these videos, players are either doing whatever dances are trending at the time or adding comedic text over generic music as they walk around the locker room or the field.¹⁸⁸

of a local Indianapolis church which had planned to show the Colts-Bears 2007 Super Bowl game. The League sent a cease-and-desist letter, objecting to the church's plans to charge admission, promote the event using the mark 'Super Bowl,' and use a projector to show the game on a screen larger than 55 inches.").

182. See NFL FILMS, *supra* note 150.

183. See NFL CBA, *supra* note 6, at 30 ("Player agrees not to engage in any sponsorship or endorsement activity, other than through Club, that would reasonably imply Club's sponsorship, approval or involvement, including by way of example, any use of any of Club's names, marks, logos, uniform designs or symbols"); NHL CBA, *supra* note 6, at 157 ("'Picture' and 'likeness' do not include Club uniforms or logos.").

184. See Ryan Gosling, *Who Owns the NFL and Its Brand?*, PRO FOOTBALL NETWORK (Feb. 7, 2023), <https://www.profootballnetwork.com/who-owns-the-nfl-and-nfl-brand/> ("The simple answer is that no one entity owns the NFL. Perhaps the best way to describe who owns the league is that the 32 NFL teams own the league. Therefore, the NFL and its brand lie in the hands of the NFL franchise owners. . . . Because no one entity owns the NFL, it is the executive committee that makes decisions regarding league policy changes. All 32 teams have a representative on the executive committee. For most teams, this is the owner of the franchise."); see also L.V. REV.-J., *supra* note 179 and accompanying text.

185. See NFL FILMS, *supra* note 150 ("'NFL Footage' means footage captured at NFL games ('NFL Game Footage') as well as at NFL-controlled events (e.g., NFL Draft, NFL Combine, etc.). NFL Films, on behalf of the NFL, is the exclusive copyright holder in and to all NFL Footage.").

186. See Ortiz, *supra* note 155.

187. Kyle Newport, *Marshawn Lynch at Super Bowl Media Day: 'I'm Here So I Won't Get Fined,'* BLEACHER REP. (Jan. 27, 2015), <https://bleacherreport.com/articles/2344416-marshawn-lynch-at-super-bowl-media-day-im-here-so-i-wont-get-fined>.

188. See sources cited *supra* notes 175,180; see also sources cited *infra* notes 194, 199, 207, 221.

However, athletes rely on information gained from team-mandated media trainings¹⁸⁹ and from technique and fitness advice gained from team-provided coaches and trainers.¹⁹⁰ The NBA, for example, has mandated media training, and players, consciously or unconsciously, rely on this team-sponsored media training to create their TikToks and other social media posts.¹⁹¹ At least one MLB team, the New York Yankees, has instituted social media training for its players.¹⁹² Teams have made it a priority to provide their athletes with knowledge and guidance in navigating social media.¹⁹³

Some TikToks feature the athletes doing sports moves, such as Giannis shooting three pointers or jumping over a chair or Claypool running a route or defending against another player.¹⁹⁴ These are the kinds of moves and actions that fall within the typical knowledge realm of a professional athlete.¹⁹⁵

189. Lauren Reynolds, *Media Training Aims at Producing Scandal-Free Athletes*, ESPN (Aug. 6, 2006), <https://www.espn.com/college-sports/news/story?id=2541839>; Steve Contursi, *The Yankees Training Players on Use of Social Media*, FOX SPORTS (Mar. 4, 2020, 11:14 PM), <https://www.fox-sports.com/stories/mlb/the-yankees-training-players-on-use-of-social-media>.

190. See Mike Baldwin, *NBA Employee Breakdown*, OKLAHOMAN (Aug. 24, 2008, 12:00 AM), <https://www.oklahoman.com/story/sports/nba/2008/08/24/nba-employee-breakdown/61550941007/> (“The head coach is the face of the organization. He and assistant coaches devise game strategies and determine roles for each player. The support staff includes a trainer, strength and conditioning coach, nutritionist and equipment manager.”); *How Many People Are on an NFL Team’s Coaching Staff?*, AS (Feb. 1, 2022, 6:22 PM), https://en.as.com/en/2022/02/02/nfl/1643757327_475490.html#:~:text=Sidelines%20stacked%20with%20staff&text=Between%20the%20head%20coach%2C%20the,with%20the%20same%20coaching%20positions (“Between the head coach, the coordinators and assistant coaches there are around 10 members of coaching staff for each team. The number varies by team, but most staffs are equipped with the same coaching positions.”).

191. See Reynolds, *supra* note 189 (“The NBA has done a great service to all of college athletics, in terms of overall media training, by mandating a dress code and media training for everyone.”).

192. See Contursi, *supra* note 189 (“The Yankees conduct what we might call a Media Review Day during Spring Training of each season. Needless to say, these sessions used to be far less complicated and time-consuming than they are today. And that is because ‘the media’ now includes far more than newspaper, television, and radio interviews and exchanges with the team’s beat reporters.”).

193. *Id.*; see also Reynolds, *supra* note 189.

194. Giannis Antetokounmpo (@giannis_an34), TIKTOK (Sept. 23, 2021), https://www.tiktok.com/@giannis_an34/video/7011216553785953541; Giannis Antetokounmpo (@giannis_an34), TIKTOK (July 30, 2021), https://www.tiktok.com/@giannis_an34/video/6990804392001670406; Chase Claypool (@chase), TIKTOK (Apr. 25, 2021), https://www.tiktok.com/@chase/video/6955261088174820613?lang=en&is_copy_url=1&is_from_webapp=v1.

195. See *supra* notes 142–145 and accompanying text. Per the collective bargaining agreements, athletes are employed to perform skills related to the sport itself and agree to take part in official training camps and practices meant to further develop these physical skills. See NFL CBA, *supra* note 6, at 334 (“Player will report promptly for and participate fully in Club’s official mandatory mini-camp(s), official preseason training camp, all Club meetings and practice sessions . . .”); NHL CBA, *supra* note 6, at 311 (“In order that the Player shall be fit and in proper condition for the performance

Teams employ personnel—from head coaches and defensive coordinators, to strength and conditioning coaches, to nutritionists—that provide athletes with the knowledge to further develop the athletic techniques and skills they show off in their TikToks.¹⁹⁶ While players may not have relied solely on the knowledge they gained as professional athletes, players do use knowledge gained from being professional athletes when they create TikToks.

It is not difficult to argue that athletes who have media obligations in their contracts, and are under their team’s control regarding certain elements of what they post, are in the business of generating fan interest and interacting with fans—what these TikToks are essentially doing.

2. Athletes Film and Create TikToks During Team Authorized Time and Spaces

Because professional athletes showcase the facilities, gear, and game footage their teams provide to them, their creation of TikToks “occurs substantially within the authorized time and space limits,” as the second Restatement element requires.¹⁹⁷ The players film many of the TikToks on team property and directly before or after a game or practice.¹⁹⁸ Players film in

of his duties as required by this SPC and the Agreement, the Player agrees to report for practice at such time and place as the Club may reasonably designate and participate in such Exhibition Games as may be arranged by the Club.”); NBA CBA, *supra* note 6, at A-1 (“The services to be rendered by the Player pursuant to this Contract shall include: (a) training camp, (b) practices, meetings, workouts, and skill or conditioning sessions conducted by the Team during the Season”); MLB CBA, *supra* note 6, at 337 (“Player agrees to render, skilled services as a baseball player during the year(s) . . . including the Club’s training season, the Club’s exhibition games, the Club’s playing season”).

196. See Baldwin, *supra* note 190; see also Tucker Bagley, *2022 NFL Coaching Staff Tracker: Changes & Latest News*, SHARP FOOTBALL ANALYSIS (Mar. 30, 2022), <https://www.sharpfootballanalysis.com/analysis/nfl-coaching-staff-tracker/> (reporting all the head coaches, offensive coordinators, defensive coordinators, special teams coordinators, quarterback coaches, offensive line coaches, running back coaches, tight end coaches, defensive line coaches, linebacker coaches, defensive back coaches, etc. for each NFL team).

197. See RESTATEMENT (SECOND) OF AGENCY § 228 (AM. L. INST. 1958); see also *infra* notes 199–209 and accompanying text.

198. See Chase Claypool (@chase), TIKTOK (Oct. 7, 2021), <https://www.tiktok.com/@chase/video/7016352420145958150> (depicting Claypool and a teammate in the Steelers’ locker room); Chase Claypool (@chase), TIKTOK (Sept. 12, 2021), <https://www.tiktok.com/@chase/video/7007169834819652869> (showing Claypool and a teammate celebrating in the Steelers’ locker room after winning a game); Chase Claypool (@chase), TIKTOK (Sept. 12, 2021), <https://www.tiktok.com/@chase/video/6990080490132737286> (depicting Claypool and different teammates dancing in both Heinz field and in the Steelers’ locker room); JuJu Smith-Schuster (@juju), TIKTOK (July 28, 2021), <https://www.tiktok.com/@juju/video/7033183414014528815> (depicting Smith-Schuster

their team locker rooms, in their team stadium, and in some cases, on the field in rival team stadiums.¹⁹⁹ Stadiums and locker rooms are private spaces the public can only access if they pay the team for a tour or buy a game-day ticket.²⁰⁰ Even union organizers “cannot claim even a limited right of access to a nonconsenting employer’s property without a showing of need for access.”²⁰¹ Players are granted access to team facilities in the collective bargaining agreements, but ultimately, the teams are in control of the facilities.²⁰² Any time spent, or filmed, in these facilities is within the authorized limits the employer has set because these are private spaces that nonemployees do not have a right to access.²⁰³

Players film TikToks directly before, after, and during game and practice times—timeframes the teams control, set, and authorize.²⁰⁴ Some players use official game footage, which they must request access to,²⁰⁵ in their TikToks, thereby depicting the time when they are completing their most obvious employee duty.²⁰⁶ Players have also posted TikToks filmed on the field right before a game as the team is warming up,²⁰⁷ or directly after a game as they

filming at Los Angeles Rams’ and Chargers’ SoFi stadium before an away game).

199. See sources cited *supra* note 199.

200. See *Stadium Tours*, ACRISURE STADIUM, <https://acrisurestadium.com/stadium/tours/> (last visited Jan. 21, 2023).

201. See LEE MODJESKA ET AL., FEDERAL LABOR LAW: NLRB PRACTICE § 5:11 (2023) (discussing in the case of union organizers, how “nonemployee organizers cannot claim even a limited right of access to a nonconsenting employer’s property without a showing of need for access”).

202. See NHL CBA, *supra* note 6, at 103 (“Players on Injured Reserve and Injured Non-Roster shall have access to the Club’s primary training and medical facilities during regular business hours provided, however, that the Club may restrict such Players’ access during periods when Players on the Club’s Active Roster are expected to be present at such primary training and medical facilities”); NBA CBA, *supra* note 6, at 330 (“Each Team agrees to provide suitable locker room facilities”); MLB CBA, *supra* note 6, at 63 (“[E]ach Club shall provide first-class rehabilitation facilities”); NFL CBA, *supra* note 6, at 148 (“In addition, nothing herein shall prevent a Club from permitting an individual player to work out on his own on weekends after the Club’s official offseason program has commenced, or at any time after the Club’s official offseason workout program has ended, using Club facilities if he wishes to do so”).

203. See *supra* notes 201–202.

204. See *supra* note 199.

205. See NFL FILMS, *supra* note 150 and accompanying text.

206. See JuJu Smith-Schuster (@juju), TIKTOK (Aug. 23, 2021), <https://www.tiktok.com/@juju/video/6999735485497232645> (depicting the end of a run during a Pittsburgh Steelers game against the Detroit Lions); Chase Claypool (@chase), TIKTOK (Sept. 5, 2021), <https://www.tiktok.com/@chase/video/7004585879645719813> (showing footage of Claypool’s catches during his time as a Steeler and from his time playing college football for the University of Notre Dame).

207. JuJu Smith-Schuster (@juju), TIKTOK (Aug. 22, 2021), <https://www.tiktok.com/@juju/>

celebrate the win in the locker room.²⁰⁸ Both the places where players are filming and the moments they are filming are within limits the teams have authorized and provided for the athletes.

3. Players' Purpose in Creating TikToks Serve Their Team's Business Interests

The final “scope of employment” Restatement element considers whether the work is “actuated, at least in part, by a purpose to serve the master,” with the master in this case being the professional sports franchise.²⁰⁹ Professional sports teams are worth millions, sometimes billions, of dollars—often increasing in value from what the owner initially paid to what the team could be sold for today—and generate revenue through growing media rights, ticket and concession sales, and licensing and sponsorship deals.²¹⁰ At their core, teams are businesses and for the owners, incredibly valuable assets; therefore, team owners are often motivated to increase asset value and generate profit.²¹¹

The sources of revenue that professional sports team depend on can be greatly affected by the popularity of a team and by extension, the popularity of its players.²¹² For example, the number of jerseys a team sells can depend

video/6999283444438109446 (capturing the Pittsburgh Steelers warming up on Heinz Field before a game).

208. Yo' Durtty (@rayraymccloudiii), TIKTOK (Dec. 27, 2020), <https://www.tiktok.com/@rayraymccloudiii/video/6911053366000930053> (depicting Ray-Ray McCloud and fellow Steelers teammates celebrating the AFC North championship win).

209. See RESTATEMENT (SECOND) OF AGENCY § 228 (AM. L. INST. 1958).

210. See generally Ozanian, *supra* note 62 (listing sports franchises and their current values as well as their increasing values over a five year period); Joe Pompliano, *How Do Professional Sports Teams Make Money?*, ROUNDHILL INV. (Apr. 28, 2021), <https://www.roundhillinvestments.com/research/prosports/how-do-professional-sports-teams-make-money> (listing growing media rights, ticket sales, concessions and merchandise, and sponsorships and licensing deals as sources of team revenue).

211. See generally David Turney, *Professional Sports Valuation*, TOP TAL, <https://www.toptal.com/finance/mergers-and-acquisitions/sports-franchise-valuation> (last visited Jan. 14, 2022) (“[D]iscuss[ing] reasons why a business that, per Forbes, had an operating loss of \$2.2 million during the previous season on \$206.0 million in revenue could sell at such a high price and what approach should be applied in estimating the value of a professional sports team.”).

212. See generally Connor Groel, *The Burden of Information: Why Some Sports Are More Popular than Others*, MEDIUM (Aug. 15, 2019), <https://medium.com/top-level-sports/the-burden-of-information-why-some-sports-are-more-popular-than-others-20f34488d24b> (“Sport longevity was already mentioned, but career longevity is important also, allowing a sport’s best and most marketable athletes to carry the sport for longer periods. Emerging sports would also do well to ensure frequent competition, with a longer season spanning a healthy portion of the year and putting the best players and teams against each other often, which inevitably leads to rivalries.”).

on whether the team has a star player with a popular jersey.²¹³ In the same vein, the number of tickets sold often increases when there is player fans want to see.²¹⁴ The players are serving their “master’s purpose” and are within the scope of their employment when they create media buzz or engage with fans, who are likely to follow the team more closely and contribute economically to team revenues.²¹⁵ TikTok is one way of generating fan engagement and increasing fan interest, and thus has the potential to generate significant profit for the team by increasing viewership, the licensing market, and ticket and gear sales.²¹⁶ TikTok popularity is already an interest to teams—many of them have TikTok accounts featuring videos of their players both during game and practice times and during downtime at the team facilities.²¹⁷

Players capitalize the fame they get through their association with a

213. See John Reid, *Tim Tebow Jersey Leads Sales on NFL Shop Less Than 24 Hours After Signing with Jaguars*, FLA. TIMES-UNION (May 24, 2021, 8:00 AM), <https://www.jacksonville.com/story/sports/nfl/2021/05/21/tim-tebow-tops-nfl-jersey-sales-less-24-hours-after-signing-jaguars/5205467001/> (“In fact, the top five items on NFLShop.com are all Tebow’s No. 85 jerseys and men’s and women’s T-shirts donning his number.”).

214. See Sydney Heiberger, *Panthers See Increase in Ticket Sales After Announcement of Cam Newton’s Return*, WSPA (Nov. 12, 2021, 1:47 PM), <https://www.wspa.com/sports/panthers-see-increase-in-ticket-sales-after-announcement-of-cam-newtons-return/>.

215. See Avakiantz, *supra* note 170, at 477.

216. See Suzie Canham, *5 Ways TikTok Boosts Sports Fan Engagement*, ACCURACAST (Mar. 7, 2020), <https://www accuracast.com/articles/social-marketing/tiktok-sports-fans/> (“TikTok may be in its infancy, but it’s already grabbing the attention of sports brands worldwide with its quirky, creative model.”); Mike Koeshartanto, *Value of TikTok for Brands, Marketers*, GILT EDGE SOCCER (Feb. 9, 2021), <https://www.giltedgesoccer.com/value-of-tiktok-for-brands-teams/#4-how-can-a-brand-use-a-tiktok-trend-to-reach-soccer-fans> (detailing how brands can use TikTok to increase fan engagement focusing specifically on professional soccer); Ariella Torv, *TikTok & The Sports Industry: The Perfect Pairing*, PICO (Jan. 23, 2020), <https://www.picogp.com/the-picomag/tiktok-the-sports-industry-the-perfect-pair> (“The Sports Industry is dominating TikTok in both likes and onboarding the next generation of fans.”).

217. See Koeshartanto, *supra* note 217. In the NBA “by our count, 28 of 30 NBA teams have TikTok accounts. The Golden State Warriors have the most followers (2.6 million). Those numbers pale in comparison to the official league account which has 12.3 million followers.” *Id.* In the NFL “the official league account has 6 million followers, while 30 of 32 teams have a presence. The Super Bowl champion Kansas City Chiefs lead the way on the platform with 1.7 million followers.” *Id.* In the MLB “26 of 30 teams have accounts. MLB teams have a smaller footprint on the platform—the Chicago Cubs are the only team with over 300,000 followers. The league account has over 2.1 million followers.” *Id.* And in the NHL, the “team accounts average 66,000 followers, while the league account has garnered 1.2 million. [Twenty-eight] of 31 teams are currently on TikTok with the Detroit Red Wings leading the way in follower count with nearly 221,000.” See generally Warriors (@warriors), TIKTOK, <https://www.tiktok.com/@warriors?lang=en> (last visited Jan. 14, 2022) (linking various videos of the Golden State Warriors team practicing, traveling, filming media reels, and completing other team activities).

professional sports team when they make TikToks and social media pages, but they also know they are creating fan interest that increases their value to the organization.²¹⁸ This in turn sells more jerseys, of which players get a share, and more tickets, a huge revenue source for teams, thereby aligning the players' purposes with the owners' and making it clear the players are, at least in part, motivated by a purpose that serves the owners.²¹⁹

C. *Professional Athletes are Public Figures and Their Off-Field and Non-Game TikToks are Works for Hire*

The players do not create TikToks solely in team facilities or on team time; they also create TikToks from their own homes, on their time away from the stadium, in the offseason, and often doing dances or making references to trends that have nothing to do with their sports.²²⁰ When it comes to the TikToks players make in their free time and without reference to their career—TikToks that any non-professional athlete could make—it is harder to argue that they are made within the scope of the players' employment.²²¹ But professional athletes are public figures, and being in the limelight, having media attention, and cultivating this publicity in a manner that benefits their respective team employers is a part of their jobs.²²² “Public figure” is a term courts

218. See *supra* notes 215–218.

219. See Ahiza Garcia, *Colin Kaepernick Pledges to Donate Money from Jersey Sales*, CNN (Sept. 7, 2016, 5:58 PM), <https://money.cnn.com/2016/09/07/news/companies/colin-kaepernick-donating-money-jersey-nfl/> (“According to the agreement between the NFLPA, the players' union, and the league, players get[] two-thirds of the money made by selling jerseys.”); *supra* notes 215–218.

220. See Chase Claypool (@chase), TIKTOK (Sept. 24, 2021), <https://www.tiktok.com/@chase/video/7011626245754572037> (showing Claypool on his couch nodding along to a song); JuJu Smith-Schuster (@juju), TIKTOK (Nov. 16, 2021), <https://www.tiktok.com/@juju/video/7031368641417432326> (depicting Smith-Schuster brushing his teeth, dancing along to a song, and then laying in bed with his dog); Giannis Antetokounmpo (@giannis_an34), TIKTOK (Jan. 27, 2021), https://www.tiktok.com/@giannis_an34/video/6922701709961612549 (showing Antetokounmpo playing with filters over a song); Giannis Antetokounmpo (@giannis_an34), TIKTOK (Mar. 13, 2021), https://www.tiktok.com/@giannis_an34/video/6939367062942878981 (showing Antetokounmpo driving as fans drive by saying hello).

221. See JuJu Smith-Schuster (@juju), TIKTOK (Mar. 24, 2021), <https://www.tiktok.com/@juju/video/6943329757203401990> (depicting Smith-Schuster twerking above a pool).

222. See Richard M. Wise, *The Athlete as Public Figure in Light of Gertz v. Robert Welch, Inc., or Torts in Sports: The Role of the Courts*, 6 COMM. & ENT. L.J. 325, 351 (1983) (“Despite the court's wavering in *Chuy*, both *Chuy* and *Johnston* are useful in classifying athletic personalities as general and limited public figures, affording a logical treatment for both.”). When considering whether *Chuy*, a guard for the Philadelphia Eagles, was a public figure, the Court “reasoned that ‘[p]rofessional athletes, at least as to their playing careers, generally assume a position of public prominence. Their

have previously defined, specifically when it comes to defamation suits.²²³

There are two kinds of public figures: the person of “pervasive fame or notoriety” who is considered a public figure for all purposes and the person who voluntarily injects himself or is “drawn into a particular controversy and thereby becomes a public figure for a limited range of issues.”²²⁴ Athletes fall under the first category of public figures; they are individuals who have general fame and notoriety in their community by nature of their careers.²²⁵ If being a public figure is therefore inherent in these individuals’ profession, the public nature of the career is part of their employment.²²⁶ This is an assertion that league policies and collective bargaining agreement provisions support,²²⁷ even when they do not always explicitly recognize fame as an employee duty.²²⁸

contractual disputes, as well as their *athletic accomplishments*, command the attention of *sports fans*.” *Id.* at 346 (quoting *Chuy v. Phila. Eagles Football Club*, 595 F.2d 1265, 1280 (3d Cir. 1979)) (emphasis in original).

223. See 19 FLA. JUR. 2D *Defamation and Privacy* § 107 (2023); 20 S.C. JUR. 2D *Libel and Slander* § 72 (2023).

224. 19 FLA. JUR. 2D *Defamation and Privacy* § 107 (2023).

225. Frederick Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905, 917 (1984) (“Imagine the kinds of people who, although not involved in the determination of questions of public policy, nevertheless have that ‘general fame or notoriety in the community’ that makes them public figures, at least after *Gertz*. The list would include actors, singers, musicians, [and] athletes . . .”).

226. Cf. Roderick D. Eves, *The Classification of Athletes and Entertainers as Plaintiffs in Defamation Suits*, 4 ENT. & SPORTS L.J. 333, 334 (1987) (“As personalities in the public eye, athletes and entertainers are constantly exposed to public criticism and potentially defamatory media coverage. . . . [T]heir livelihood and income largely depend upon their good reputations . . .”).

227. See NFL CBA, *supra* note 6, at 289 (“The NFLPA will use its best efforts to ensure that the players cooperate with the Clubs and the news media (including television, radio, internet, print) in reasonable promotional activities on behalf of the Clubs and the NFL.”); MLB CBA, *supra* note 6, at 339 (“[T]he Player agrees to cooperate with the Club and participate in any and all reasonable promotional activities of the Club and Major League Baseball, which, in the opinion of the Club, will promote the welfare of the Club or professional baseball”); NHL CBA, *supra* note 6, at 311 (“The Player further agrees . . . to co-operate with the Club and participate in any and all reasonable promotional activities of the Club which will in the opinion of the Club promote the welfare of the Club and to cooperate in the promotion of the League and professional hockey generally”); NBA CBA, *supra* note 6, at 43 (“A player’s obligation . . . [is] to participate, upon request, in all other reasonable promotional activities of the Team and the NBA”).

228. See Tim MacMahon, *NBA Memo: Rules Prohibit Mocking of Opponents on Social Media*, ESPN (Feb. 9, 2017), https://www.espn.com/nba/story/_/id/18655666/nba-memo-urges-teams-follow-social-media-rules-wake-chandler-parsons-cj-mccollum-twitter-war (“[W]e understand that the use of social media by teams, including during games, is an important part of our business”); see also NFL CBA, *supra* note 6, at 334 (“[T]he success of professional football depends largely on public respect for and approval of those associated with the game.”); Farish, *supra* note 19 (“[U]nlike the rest of us, sports stars are often contractually obligated to maintain a positive reputation.”); MLB CBA,

The four major sports leagues acknowledge the public nature of professional sports by imposing media obligations on the players and by defining the players' roles and responsibilities during these duties.²²⁹ However, professional sports go a step further by also including policies governing athletes' behavior outside official team hours and commitments.²³⁰ One way the leagues do this is by implementing social media policies.²³¹ These policies govern more than when players can post; they also govern the content of what players can post.²³² Players are fined in the NFL, NBA, and NHL when they post content that is "prejudicial to the welfare of the league."²³³

Major League Baseball has the most detailed policy of the four major leagues, with many of its rules created with the concern that what players post "might indicate an MLB Entity's approval of Content or create confusion as to attribution."²³⁴ The MLB social media policy expressly prohibits players from posting content that "reasonably could be viewed as discriminatory, bullying and/or harassing" and content that is "obscene or [has] sexually explicit language, images, or acts."²³⁵ MLB's policy directly controls what players can post; it expressly indicates that some "language" is not allowed to be shared by players online because the public nature of their careers might indicate a team affiliation with an idea.²³⁶ In a memo addressing social media policies, the NBA deputy commissioner expressly recognized the importance of social media to basketball when he stated "the use of social media by teams, including during games, is an important part of our business, [and] the

supra note 6, at 276 (confirming an "agreement concerning the Office of the Commissioner's adoption of a policy addressing certain limitations on the uses of Social Media by employees, including Players"); *Social Media Policy*, *supra* note 21; NHL CBA, *supra* note 6, at 343 ("Media Regulations agreed to by the NHL and the NHLPA must be strictly adhered to.").

229. See sources cited *supra* note 229.

230. See *infra* notes 232–244.

231. See MacMahon, *supra* note 229; see also *Social Media Policy*, *supra* note 21; Decker Cady, *Social Media Policies for Employees: Lessons from the Sports Industry*, SD CBA BLAWG 401 (Mar. 14, 2018), <https://blawg401.com/social-media-policies-employees-lessons-sports-industry/> ("The NFL, NBA, and NHL also fine players, coaches, and operations personnel for posts that are prejudicial to the welfare of the league, a member club of that league, or for publicly criticizing an official.").

232. See authorities cited *supra* note 232.

233. See Cady, *supra* note 232.

234. See *Social Media Policy*, *supra* note 21.

235. *Id.* at 2.

236. *Id.* at 1–2 ("Individuals may not at any time engage in the following conduct with respect to the use of Social Media: 1. Displaying or transmitting Content via Social Media in a manner that reasonably could be construed as an official public communication of any MLB Entity or attributed to any MLB Entity.").

inappropriate use of social media can damage the reputation of the NBA, its teams and its players.”²³⁷

The leagues do not only control what players can post online, they also control how players can act outside their online personas and their officially recognized hours of employment.²³⁸ The leagues’ CBAs often include formal policies regarding off-field conduct and morality clauses that permit an employer to “end the contractual relationship if the employee’s conduct breaches the moral expectations laid out in the employment or endorsement agreement.”²³⁹ The NHL controls player conduct with a clause stating the player agrees to “conduct himself on and off the rink according to the highest standards of honesty, morality, fair play and sportsmanship, and to refrain from conduct detrimental to the best interest of the Club, the League or professional hockey.”²⁴⁰ The NFL CBA player contract has a clause on the “integrity of the game,” that states:

Player recognizes the detriment to the League and professional football that would result from impairment of public confidence in the honest and orderly conduct of NFL games or the integrity and good character of NFL players. Player therefore acknowledges his awareness that if he . . . is guilty of any other form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football, the Commissioner will have the right . . . to fine Player in a reasonable amount; to suspend Player for a period certain or indefinitely and/or to terminate this contract.²⁴¹

One example of the way the NFL reacts when players do not conduct themselves in a way that acknowledges that “the success of professional football depends largely on public respect for and approval of those associated

237. See MacMahon, *supra* note 229.

238. See Farish, *supra* note 21 (“The NFL has had a formal policy addressing off-field conduct since 1997. The current 2014 Personal Conduct Policy prohibits physical violence, illegal possession of a gun or drugs, and cruelty to animals—remember Michael Vick and his dogfighting? But the policy also prohibits anything ‘that undermines or puts at risk the integrity of and public confidence in the NFL.’ Even if a player’s conduct does not result in a criminal conviction, the NFL can impose fines, suspension, or even banishment from the league.”).

239. *Id.*

240. NHL CBA, *supra* note 6, at 311.

241. NFL CBA, *supra* note 6, at 340.

with the game,”²⁴² is when the Kansas City Chiefs released its running back Larry Johnson from the team after serving a two week suspension for “conduct detrimental to the team.”²⁴³ Johnson’s conduct consisted of “mocking Coach Todd Haley’s lack of football playing experience on his Twitter . . . using a gay slur on Twitter and again in the locker room . . . and, in the incident that most angered General Manager Scott Pioli, belittling a fan on Twitter by saying he made more money.”²⁴⁴

It is clear that professional sports leagues are concerned with public image, are aware of the fact their players are public figures with the ability to impact the fans’ perception of their teams, and have taken steps to control and dictate the off-field behavior of the players, their employees.²⁴⁵ The players’ off-field behavior is being controlled, and in some ways directed by, the teams, their employers; therefore, it is not difficult to surmise that the off-field behavior of players is also within their scope of employment as professional athletes. In essence, professional athletes are public figures who contractually recognize the public nature of their career and agree to act in a way that acknowledges this as part of their employment contracts. Therefore, the Tik-Toks players make that do not reference their team affiliation and do not take place at team facilities, practice, or games are also works made within the scope of their employment as public figures cultivating fan interest in themselves and their employers, and would also belong to the professional sports teams.²⁴⁶

Through the integrity and morality clauses and the recognition of media obligations, players essentially agree that they are also employed to engage with the public.²⁴⁷ By extending their control to players’ off-field behavior, the time and space limits are essentially expanded to whenever players are in public and associated with their teams and leagues.²⁴⁸ Because teams continue to be motivated by the profit associated with good public standing and players recognize this in their contracts, players are actuated by a purpose to serve the

242. *See id.* at 334.

243. Judy Battista, *As Johnson’s Suspension Ends, So Does His Time with the Chiefs*, N.Y. TIMES (Nov. 9, 2009), https://www.nytimes.com/2009/11/10/sports/football/10chiefs.html?_r=1.

244. *Id.*

245. *See supra* notes 232–244 and accompanying text.

246. *See also* RESTATEMENT (SECOND) OF AGENCY § 228 (AM. LAW INST. 1958) (describing the kinds of conduct that fall within the scope of employment).

247. *See supra* Section IV.B.i; *see also supra* notes 232–233, 239–240 and accompanying text.

248. *See supra* Section IV.B.ii.

employer.²⁴⁹ Thus, because players are employees of their respective teams, and these off-field TikToks are made within the scope of their employment, all the players' TikToks would qualify as works made for hire that belong to each player's team.

V. PROFESSIONAL SPORT COLLECTIVE BARGAINING AGREEMENTS DO NOT ADDRESS THE IMPLICATIONS OF TEAM COPYRIGHT OWNERSHIP

Once it is clear these TikToks are works made for hire, it becomes relevant to ask if current league agreements change this outcome in any way. Copyright ownership vests in the author of a particular work, but in the case of a work made for hire, the employer is considered the author.²⁵⁰ The only way an employee can own rights to the work is if the "parties have expressly agreed otherwise in a written instrument signed by them" that the employee "owns all of the rights comprised in the copyright."²⁵¹ The questions then become: Does such a writing exist within the professional sports world? Have professional teams unknowingly or knowingly relinquished their rights to these TikToks?

The first place to look is at the collective bargaining agreements, which are the most extensive documents relating to team-player relationships. Every point in these are documents is finely negotiated—so finely negotiated that there have been nine work stoppages in the MLB, six in the NFL, and four in the NBA and the NHL over disagreements between the players' union and the owners.²⁵² Because the Copyright Act requires that the parties agree in writing,²⁵³ it is important to note that CBAs are negotiated on behalf of each party but not directly by the parties.²⁵⁴ In the case of the professional athletes, the

249. See *supra* Section IV.B.iii.

250. Copyright Act of 1976, 17 U.S.C. § 201(b) (2021) ("In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title . . .").

251. *Id.*

252. See *Pro Sports Lockouts and Strikes Fast Facts*, ABC 17 NEWS (Dec. 4, 2021, 7:27 AM) <https://abc17news.com/news/2021/12/04/pro-sports-lockouts-and-strikes-fast-facts-2/>.

253. 17 U.S.C. § 201(b) (2021).

254. See Dan Graziano, *NFL CBA Approved: What Players Get in New Deal, How Expanded Playoffs and Schedule Will Work*, ESPN (Mar. 15, 2020), https://www.espn.com/nfl/story/_/id/28901832/nfl-cba-approved-players-get-new-deal-how-expanded-playoffs-schedule-work ("NFL players voted to approve a proposed new collective bargaining agreement with the league's owners, ensuring NFL labor peace through at least 2030."); Gabe Feldman, *Collective Bargaining in Professional Sports: The Duel Between Players and Owners and Labor Law and Antitrust Law*, in THE OXFORD

players' union negotiates the terms, and then the players vote on whether to accept the CBA; in the case of owners, the League represents the owners' interests and binds the owners to the document.²⁵⁵ So, while the parties are not directly signing, they are still bound by the agreement.²⁵⁶

Among the four major sports leagues, only the NFL mentions copyright ownership.²⁵⁷ So in the case of the NHL, MLB and NBA, the CBA would not be a transfer of copyright ownership from the team to the players.²⁵⁸ The NFL CBA only references copyrights in the uniform players' contract, stating that:

Player hereby assigns the NFLPA and its licensing affiliates, if any, the exclusive and unlimited right to use, license and sublicense the right to use his name . . . copyrights . . . for use in connection with any product, brand, service, appearance, product line or other commercial use and any sponsorship, endorsement or promotion thereof, when more than five (5) NFL player Rights are involved, regardless of team affiliation and whether that number is reached using player Rights simultaneously or individually, in any form, media, or medium (now known or hereafter developed) during a consecutive 12-month period (a "group licensing program").²⁵⁹

This clause serves as an assignment of any of the players' copyrights to

HANDBOOK OF AM. SPORTS LAW, 209, 214 (Michael A. McCann ed., 2018), <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780190465957.001.0001/oxfordhb-9780190465957-e-10> ("[P]rofessional sports leagues engage in 'multiemployer bargaining,' whereby the separately owned teams join together to negotiate with the players as one unit. . . . Although professional sports teams also benefit from the efficiencies of a single multiemployer bargaining unit, professional sports teams bargain as one unit (the league) because of the highly interdependent nature of the teams and the need for uniform rules across the league.").

255. *Id.* ("[P]rofessional athlete unions are unique compared to traditional industrial unions. . . . Most professional athletes, in contrast, have highly specialized skills that are difficult to replace. . . . In addition to short careers and nontransferable skills, most top-flight professional sports leagues in the United States have significant market share, which leaves athletes with a limited employment market. . . . Thus, buyers (e.g., consumers) have no substitutes when buying the professional sports product, and sellers (e.g., the players) have no alternatives when selling their services to professional teams."). "For example, free agency restrictions in the NFL are the product of an agreement between the players and the owners and between the owners themselves (as part of the multiemployer bargaining unit)." *Id.* at 215.

256. *Id.*

257. NFL CBA, *supra* note 6, at 336.

258. See NHL CBA, *supra* note 6; MLB CBA, *supra* note 6; NBA CBA, *supra* note 6.

259. NFL CBA, *supra* note 6, at 336.

the NFLPA, the players' union.²⁶⁰ But this clause does not assign any copyrights that are owned by the NFL teams.²⁶¹ Because these TikToks are works for hire, the players do not own them and cannot assign them.²⁶² Therefore, even in the case of the NFL, the only CBA that addresses copyright ownership, there is no legal transfer of team copyrights to players, and the teams retain all the rights associated with copyright ownership.²⁶³ The only thing that would change this to possibly give players ownership rights is if there were some separate document assigning copyright ownership. This could come in the form of internal team policies, league policies, or independently negotiated contracts between teams and players, but there is nothing indicating that these documents currently exist.²⁶⁴

Being the legal owners of the TikToks grants teams the right to reproduce the TikTok, prepare derivative works based upon the TikTok, distribute copies to the public, perform the TikTok in public, and publicly display images of the TikTok.²⁶⁵ As sole owners, the teams alone control how the TikTok may be used and can refuse the player or any other entity permission to use the TikTok; they alone control the TikToks' monetization.²⁶⁶ If a player were to download the TikTok he made without the team's specific permission, he'd be in violation of the reproduction right.²⁶⁷

Certain features of TikTok make copyright infringement a minefield for players and fans.²⁶⁸ TikTok includes a duet feature where an individual can

260. *Id.*

261. *See id.*

262. *See* Copyright Act of 1976, 17 U.S.C. § 201(b) (2021). If the TikToks failed as works for hire, players would not own them because of this assignment, and the players' union would then have a legal dispute with the NFL teams. *See* NFL CBA, *supra* note 6, at 336.

263. *See* §§ 201(b), 106(1)–(6).

264. *See* Stephen Townley, *Intellectual Property and the Specificity of Sports*, WORLD INTELL. PROP. ORG. (Apr. 2019), https://www.wipo.int/wipo_magazine/en/2019/02/article_0008.html (“On the other side of the fence are the intellectual property (IP) rights afforded to literary, dramatic, musical and artistic works. Athletes have seen protection for actors, singers, musicians, dancers, and others, while performing copyrighted works, but typically, have not themselves benefitted from such protection. . . . The current sports industry approach to monetizing its assets relies on an amalgam of contract rights, IP rights, and a basket of analogous and neighboring rights that are often specific to an event or jurisdiction. These rights are first aggregated within a structure that might involve a team, league, competition, game, federation or similar and or any combination thereof.”).

265. *See* 17 U.S.C. § 106(1)–(5) (2021).

266. *See id.*

267. *See id.* §106(1).

268. *See* Bayley, *supra* note 65 (“As you can imagine, TikTok is bursting with copyrightable content. TikTok is especially popular for its viral dance videos. These are one of the major copyrightable

react to another individual's previously made TikTok, and the resulting TikTok displays the original video side by side with the video of the subsequent individual.²⁶⁹ This can become complicated because a non-player reacting to a player's TikTok would technically be performing the player's original TikTok, the one the team owns.²⁷⁰ Additionally, if a player were to use another player's TikTok in his own TikTok, he would be violating the derivative work, performance, and reproduction rights of the other player's team.²⁷¹ If a player allowed a sponsor to include his TikTok in an advertisement or any other promotional material, he would be infringing on the team's reproduction, distribution, and performance rights.²⁷² Something as simple as promoting his TikTok with a still image on his other social media platforms would violate the public display right.²⁷³ These are all things players have either already done or could potentially do.²⁷⁴

Players are also using TikTok as a means of endorsing products and getting paid for these advertisements.²⁷⁵ The current endorsement schemes in the leagues vary.²⁷⁶ All the leagues allow players to sign individual endorsement

categories of work showcased on the app. Additionally, the songs in each video are each subject to their own copyright, which may or may not have been used with authorization by the music's copyright owner.").

269. See *How to Duet on TikTok: What Brands Should Know*, FANBYTES, <https://fanbytes.co.uk/what-everyone-should-know-about-tiktok-duets/> (last visited Jan. 14, 2022).

270. See *id.*

271. See Copyright Act of 1976, 17 U.S.C. § 106(1)–(2), (4) (2021).

272. See *id.* § 106(1), (3)–(4).

273. See *id.* § 106(5).

274. See Chase Claypool (@chase), TIKTOK (Aug. 6, 2021), <https://www.tiktok.com/@chase/video/6993399199224139014> (depicting a video of Claypool side by side with a video @florida-boyvell created); Darryn Albert, *Tyronn Lue Explains His Funny TikTok Ad with Allen Iverson*, YARD BARKER (Nov. 21, 2021), https://www.yardbarker.com/nba/articles/tyronn_lue_explains_his_funny_tiktok_ad_with_allen_iverson/s1_127_36508106 (explaining one way TikTok is interested in and has used the marketability of sports figures).

275. See Giannis Antetokounmpo (@giannis_an34), TIKTOK (Dec. 11, 2021), https://www.tiktok.com/@giannis_an34/video/7040500062899670278?is_copy_url=1&is_from_webapp=v1 (showing Antetokounmpo dancing in an ad for JBL Audio); JuJu Smith-Schuster (@juju), TIKTOK (Dec. 15, 2021), <https://www.tiktok.com/@juju/video/7042005216496995630> (depicting Smith-Schuster in a frog onesie eating a Snickers bar with the Snickers logo present); JuJu Smith-Schuster (@juju), TIKTOK (Dec. 11, 2021), https://www.tiktok.com/@juju/video/7040511666844355887?is_copy_url=1&is_from_webapp=v1 (showing Smith-Schuster dancing over a background in a Got Milk ad); Chase Claypool (@chase), TIKTOK (June 23, 2021), https://www.tiktok.com/@chase/video/6977126216910294277?lang=en&is_copy_url=1&is_from_webapp=v1 (showing Claypool dancing with @sjbleau in a Tinder ad).

276. See NFL CBA, *supra* note 6, at 30, 288; Jasper Berg, *Are Player Endorsements Ever Allowed?*,

deals, though some place restrictions on what the players can endorse and how the endorsements look in regards to what kind of team affiliation the players are allowed to depict.²⁷⁷ For example, the NFL policy states, the “[p]layer agrees to use all reasonable efforts to pursue media and marketing relationships with Club’s sponsors and media partners,” and that the “[p]layer agrees to provide Club with the name and contact information of his Primary Marketing Representative and to keep the Club up to date with respect to any changes to his marketing representation.”²⁷⁸ Additionally, the policy forbids players from entering into agreements “[t]hat would reasonably imply Club’s sponsorship, approval or involvement, including by way of example, any use of any of Club’s names, marks, logos, uniform designs or symbols.”²⁷⁹ Whereas the NHL policy states that when a “[p]layer enters into an endorsement, sponsorship or licensing arrangement for himself, he may mention the name of his Club for identification purposes without needing the consent of his Club or paying for its use,” but that the player will not use the insignia without consent of the team.²⁸⁰

Because the leagues allow players to sign endorsement deals so long as they abide by the policies the leagues set out, when does a TikTok go from a creative work that players make within the scope of their employment to a contract requirement that becomes part of a sponsorship deal or promotion?²⁸¹ If players do not own the TikToks because they are works for hire, a player would be violating the team’s reproduction and distribution rights, and the sponsor would be violating the performance, distribution, reproduction, and potentially the derivative works and display rights.²⁸² This is a grey area that any extensive league policy will need to address. Endorsements form a large part of player compensation, and players are unlikely to give up this revenue

ROYAL SPORTS GRP. (Mar. 21, 2017), <https://royalsportsgroup.info/player-endorsements/> (explaining the MLB endorsement scheme); NHL CBA, *supra* note 6, at 168.

277. See *NBA Endorsements*, DOAN SPORTS MGMT., <https://doansportsmanagement.com/nba/nba-endorsements/> (last visited Jan. 14, 2021); NFL CBA, *supra* note 6, at 30; NHL CBA, *supra* note 6, at 157; Berg, *supra* note 277.

278. See NFL CBA, *supra* note 6, at 30.

279. See *id.*

280. See NHL CBA, *supra* note 6, at 157.

281. See generally *Influencer Agreements: What You Need to Know*, IRONCLAD, <https://ironcladapp.com/journal/contracts/influencer-agreements-what-you-need-to-know-about-managing-influencer-marketing-contracts/> (last visited Jan. 14, 2021) (“[T]he influencer marketing agreement may detail that the influencer is to provide three Instagram posts and five stories by a certain date.”).

282. See Copyright Act of 1976, 17 U.S.C. § 106(1)–(5) (2021).

stream.²⁸³ Social media is the future of celebrity endorsements and advertising due to the focus millennials have placed on it.²⁸⁴ If players want to lock in and grow this revenue source, they will need to manage or create pages that sponsors and brands will want to pay them for access to.²⁸⁵ This is something professional sports leagues need to account for when deciding how to approach the ownership of TikToks and other social media tools.

VI. TEAM COPYRIGHT OWNERSHIP IMPLICATES ETHICAL AND PUBLIC POLICY CONCERNS

Another issue is the fact players are already operating under the idea that they own these TikToks. There have been no cases between the players and teams related to ownership of a TikTok, and players have already started using TikTok as an additional revenue source through ads and sponsorships they carry out on the platform.²⁸⁶ Players will likely fight against any attempt to take away this revenue source—and with collective bargaining negotiations having just taken place contentiously in the MLB, and coming up in the NBA in 2024 and the NHL in 2026—this may become a big issue of contention.²⁸⁷ Players are no strangers to staging lockouts when they do not agree with the terms of collective bargaining agreements; in fact, the MLB just experienced

283. See Andrew Lisa, *24 Athletes Who Make Most of Their Money from Endorsements*, GO BANKING RATES (Sept. 24, 2021), <https://www.gobankingrates.com/net-worth/sports/athletes-roger-federer-money-endorsements/>; *Biggest Athlete Endorsement Deals in Sport*, PLEDGE SPORTS, <https://www.pledgesports.org/2017/10/biggest-athlete-endorsement-deals-in-sport/> (last visited Jan. 14, 2022).

284. Kaitlin M. Davis, *Social Media, Celebrity Endorsers and Effect on Purchasing Intentions of Young Adults* (2017) (M.S. thesis, West Virginia University) (on file with Research Repository, West Virginia University), <https://researchrepository.wvu.edu/etd/7319> (“Millennials were the focus of this study due to their involvement with social media, their pre-existing parasocial interactions with celebrities on social media and their increased likelihood of buying products endorsed by celebrities with the hope of being more like them.”).

285. See *id.*

286. See *supra* Part II.

287. See Adrian Wojnarowski, *Sources: NBA, NBPA Agree to Extend CBA Termination Deadline Through September*, ESPN (May 11, 2020), https://www.espn.com/nba/story/_/id/29161104/nba-nbpa-agree-extend-cba-termination-deadline-september; Tim Stebbins, *Next Round of CBA Negotiations Yet to be Scheduled*, NBC SPORTS (Jan. 3, 2022), <https://www.nbcsports.com/chicago/cubs/mlb-lockout-no-negotiations-scheduled-new-year-begins>; Tom Gulitti, *NHL, NHLPA Ratify CBA Extension Through 2025-26 Season*, NHL (July 10, 2020), <https://www.nhl.com/news/nhl-nhlpa-ratify-cba-extension-through-2025-26-season/c-317377214>.

a lockout in 2022.²⁸⁸

Players value TikToks for more than their ability to generate sponsorship deals. Players can leverage their star power and popularity to remain in their professional sports leagues and to sign better contracts; one example is Jeremy Lin's 2012 "Linsanity" rise to stardom and the subsequent salary increase, resulting in him ultimately taking home \$65 million after beginning in the NBA with a \$500,000 a year salary.²⁸⁹

Some players receive second chances to play their sports or opportunities to play different sports professionally because of their vast popularity; there is no better example than Tim Tebow, who began playing minor league baseball for the New York Mets after he was not picked up by an NFL team in free agency.²⁹⁰ In fact, the Mets had to exploit a particular contractual loophole to create a Tebow Mets jersey because he was not on their forty-man major league team roster.²⁹¹ This turned out to be a great business decision, considering the loophole allowed the team to split jersey sales with just the Mets (rather than all MLB teams), Tebow, and the manufacturer.²⁹² It is expected the jersey sales might even make up the \$100,000 Tebow received for signing with them.²⁹³ Though the Mets organization insisted Tebow was not picked up as a marketing ploy, Tebow had last played organizational baseball ten years prior to the signing and was the oldest player on the minor league roster.²⁹⁴ Players know the value of their popularity, so they are capitalizing on their existing popularity and doing what they can to increase it and their professional value.²⁹⁵ TikToks are just one way players increase their value; but

288. See Stebbins, *supra* note 288.

289. Joe Kozlowski, *Jeremy Lin Made \$65 Million in the NBA, But He Just Revealed a Major Regret About 'Linsanity' That Has Nothing to Do with Basketball*, SPORTSCASTING (Mar. 23, 2021), <https://www.sportscasting.com/jeremy-lin-made-65-million-just-revealed-major-regret-about-linsanity/>.

290. Joseph Milord, *The Mets Found a Sneaky Way to Make Tons of Money off Tebow's Baseball Career*, ELITE DAILY (Sept. 20, 2016), <https://www.elitedaily.com/sports/mets-loophole-tim-tebow-jerseys/1616715>.

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. See Chris Kutz, *Build Your Audience: How Athletes Can Establish Value by Posting More on Social Media*, OPENDORSE (Feb. 24, 2021), <https://opendorse.com/blog/more-posts-valuable-audiences/>; Mike Murphy, *Professional Athletes Have Become the New 'Social Media Influencers'*, MEDIUM (Sept. 24, 2018), <https://medium.com/@mikemurphy017/professional-athletes-have-become-the-new-social-media-influencers-8cf6915bb791>.

they are aware TikTok is one of the “most-used and one of the fastest-growing social media platforms,” making it an especially important popularity tool, so they will not easily let go of the ownership they believe they already have.²⁹⁶

An immediate concern with automatic team ownership of these player-created TikToks is that players are currently making these of their own volition; teams have never required players to create social media posts or videos of any kind, even if the creation of these kinds of materials would fall within the scope of their employment.²⁹⁷ Players have a right to express themselves publicly, the same as any other individual in the United States, and TikToks are a mechanism of free speech and expression.²⁹⁸ Would team ownership of these TikToks cause a chilling effect on players’ speech? Would it disincentivize players from making these TikToks and expressing their creative voice?²⁹⁹

Copyright law is no stranger to concerns regarding free speech, and the tension between the two is one that must be acknowledged and addressed.³⁰⁰ Players could argue that because social media is not an explicit part of their employment contracts, their TikToks are actually a method of expressing

296. See Marissa Dellato, *TikTok Hits 1 Billion Monthly Active Users*, FORBES (Sept. 27, 2021, 12:18 PM), <https://www.forbes.com/sites/marisadellato/2021/09/27/tiktok-hits-1-billion-monthly-active-users/?sh=6518539744b6>.

297. See *supra* Section IV.B. See generally NFL CBA, *supra* note 6 (excluding any mention of social media quotas or incentives); NHL CBA, *supra* note 6 (refraining from mentioning social media quotas or incentives); MLB CBA, *supra* note 6 (failing to mention social media quotas or incentives); NBA CBA, *supra* note 6 (lacking any mention of social media contractual quotas or incentives).

298. Gregg Leslie, *TikTok and the First Amendment*, SLATE (Sept. 29, 2020, 10:55 AM), <https://slate.com/technology/2020/09/tiktok-wechat-first-amendment-free-speech.html> (“TikTok users have free speech rights . . .”).

299. See generally L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 37 (1987) (“The chilling effect that the new act had on the constitutional purpose of copyright—the promotion of learning—was subtle, but consequential.”). Patterson discusses the unintended effects of the new act, stating:

And if, as modern doctrine tells us, the right of free speech encompasses the right to hear as well as to speak, to read as well as to publish, it is obvious that Congress made these fundamental changes in copyright law with little regard for their effect on free speech rights.

Id. at 3.

300. *Id.* at 2 (“Three modern developments portend a conflict between these two clauses of the Constitution [the Copyright Clause and the First Amendment]: (1) the emergence of the doctrine that free speech encompasses the right to have access to, as well as the right to disseminate, ideas; (2) the elimination of the requirement of publication, which historically ensured the right of access, as a condition for statutory copyright; and (3) the codification of the fair use doctrine, traditionally relied on to avoid conflict between copyright and free speech . . .”).

themselves and preserving their voices.³⁰¹ This is not a far-fetched argument; TikTok is known to provide a platform for social justice issues and is where young people are organizing regarding these important causes.³⁰² Players have a right to participate in and contribute to these causes; in fact, the leagues have recognized the importance of player and league participation in social justice causes and have supported various related initiatives.³⁰³ Leagues have recognized players' right to speak up, and it would be inconsistent, and even hypocritical, if they stuck to a copyright ownership scheme that would chill the speech of players.³⁰⁴

VII. PROFESSIONAL SPORTS TEAMS AND LEAGUES SHOULD PROPOSE A JOINT-AUTHORSHIP SCHEME FOR TIKTOK OWNERSHIP

If keeping full ownership of the player-created TikToks poses a public-relations problem for sports leagues—in the form of player dissent, refusal to continue creating content, and speech concerns—a contractually created system, similar to how joint authorship works under the Copyright Act, can aid professional teams in capitalizing on the leverage full ownership affords, while helping appease players' ethical concerns.³⁰⁵ Under a joint authorship

301. See *supra* note 298 and accompanying text; cf. Sara Hawkins, *How Free Speech and Social Media Fit Together*, SOC. MEDIA EXAM'R (Mar. 8, 2012), <https://www.socialmediaexaminer.com/how-free-speech-and-social-media-fit-together/> ("When employees act as private individuals and not as representatives of the company, it's difficult for companies to prohibit their speech or expression. Does it happen? All the time! . . . Recently, the National Labor Relations Board (NLRB) has taken on several cases where employees were fired based on status updates to Facebook or information posted on their personal blogs outside of work. While the NLRB has gotten involved with recent clashes with speech and social media when it comes to employment, there is no clear-cut set of rules . . .").

302. Janae McKenzie, *Social Justice TikTok is Where Young People Go to Organize*, HER CAMPUS (July 1, 2021), <https://www.hercampus.com/culture/tiktok-activists/> ("The niche areas of TikTok are probably much better known than the sweeping TikToks on social justice are, but beyond frogtok, witchtok, and even beantok, Gen Z and Millennial users in particular have been using the app to raise awareness for several issues in our society, particularly over the last year or so.").

303. Ramsey Khabbaz, *Sports and Social Justice*, HARV. BUS. REV., <https://hbr.org/2021/01/sports-and-social-justice> (last visited Jan. 14, 2022) ("Throughout this reckoning, some leagues—namely, the NBA and the WNBA—have emerged as beacons of corporate social justice."); Deepi Sidhu, *Texans Inspire Change Game Caps Off a Big Year of Social Justice Initiatives*, HOUS. TEXANS (Jan. 4, 2022, 2:29 PM), <https://www.houstontexans.com/news/texans-inspire-change-game-caps-off-a-big-year-of-social-justice-initiatives> ("The NFL has designated Weeks 17 and 18 of the 2021 regular season as Inspire Change games across the league, highlighting social justice efforts in the community.").

304. See *id.*

305. See *supra* Part VI.

scheme, “[e]ach joint author has the right to exercise any or all of the exclusive rights inherent in the joint work,” and may “[g]rant third parties permission to use the work on a nonexclusive basis without the consent of other joint authors[,] [t]ransfer their entire ownership interest to another person without the other joint authors’ consent[, and u]pdate the work for their own purpose.”³⁰⁶ In addition to the right to use the work the way any owner may, a joint author “must account to the other joint authors for any profits received from licensing the joint work.”³⁰⁷ Joint authorship under the U.S. Copyright Act also allows for profit accounting to be “altered through an agreement among joint authors.”³⁰⁸ Though a written or oral agreement is not necessary, clarifying ownership interests, use of the work, and profit accounting in writing is always a sound decision.³⁰⁹ In other words, joint authorship grants co-owners equal control over the work and equal right to profit from it.³¹⁰

Teams and players do not actually qualify as joint authors because “[e]ach parties’ contribution must represent an original expression that can stand on its own as the subject matter of copyright and the parties must have intended to be joint authors at time work was created in order for a work to be considered a joint work for copyright purposes.”³¹¹ There is currently no input or “contribution” of “original expression” on the teams’ part towards the creation of players’ TikToks, nor is there proof that the teams and players intend to be joint authors.³¹² These player-made TikToks are works for hire, and any proposal addressing ownership will have to be made contractually.³¹³

A system similar to how the Copyright Act treats joint authors would allow the teams to leverage ownership in collective bargaining. As works for hire, teams wholly own the TikToks and they alone have the power to offer players control and a share of the profit made from TikToks.³¹⁴ Teams can

306. *Joint Authorship and Collective Works*, UNIV. OF CAL., <https://copyright.universityofcalifornia.edu/ownership/joint-works.html#:~:text=Co%2Dauthors%20own%20the%20work's,inherent%20in%20the%20joint%20work> (last visited Feb. 3, 2022).

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. LAWRENCE A. WAKS, & BRAD L. WITLOCK, TEXAS PRACTICE GUIDE BUSINESS TRANSACTIONS § 4:184 (2022).

312. *See supra* notes 302–305 and accompanying text.

313. *See* Copyright Act of 1976, 17 U.S.C. § 201(b) (2021) (noting that the parties must agree in a signed writing if they do not want the employer to be considered the copyright owner).

314. *See supra* Parts IV,–V (explaining that TikToks are works for hire and how this affects control

propose a joint authorship system where the parties' portion of ownership and share of profits can be a bargaining tool the teams can exchange for other bargaining points when the time for drafting a new collective bargaining agreement comes.³¹⁵ It is already predicted that social media issues will be considered in CBA negotiations.³¹⁶ Mike Tannenbaum, formerly an executive with the Miami Dolphins, said he believes Twitter and Amazon "will become more pronounced at the collectively bargained level than they have in the past."³¹⁷ Intellectual property disputes are another relevant consideration.³¹⁸ Because social media and intellectual property issues will already be on the minds of those present at the negotiating table, it will be advantageous to the team to have a valuable bargaining chip to offer, without relinquishing all control or ownership, to leverage against other player demands.³¹⁹ Players would be incentivized to accept some level of control or ownership where they currently have none, which would also legally entitle them to profit from the TikToks.³²⁰

Though the NFL CBA is effective until the 2030 season, there are several other professional sport collective bargaining agreements that are either currently up for re-negotiation and re-drafting or will be soon.³²¹ Major League Baseball just recently experienced a ninety-nine-day lockout because their

of the rights granted by the U.S. Copyright Act).

315. See Alex Butler, *NFL Labor Negotiations Might Include Social Media Issues*, UPI (Oct. 15, 2019, 3:00 AM), https://www.upi.com/Sports_News/NFL/2019/10/15/NFL-labor-negotiations-might-include-social-media-issues/4191569601771/ (stating that social media use will come up in NFL CBA negotiations).

316. *Id.* (quoting former Miami Dolphins executive vice president of football operations Mike Tannenbaum).

317. *Id.*

318. *What is Collective Bargaining in Professional Sports?*, ST. THOMAS UNIV. (July 17, 2020), <https://online.stu.edu/articles/business/collective-bargaining-in-professional-sports.aspx> ("Several bargaining agreements are set to expire within the next several years, including those of the NFL (2021), MLB (2021), NHL (2022) and Women's National Basketball Association (2022). Ongoing litigation, intellectual property disputes and league rules may shape future negotiations . . .").

319. *Id.*; see also Butler, *supra* note 316 and accompanying text.

320. See *supra* Parts IV–V.

321. See *NFL Player Vote Ratifies New CBA Through 2030 Season*, NFL (Mar. 15, 2020, 3:14 AM), <https://www.nfl.com/news/nfl-player-vote-ratifies-new-cba-through-2030-season-0ap3000001106246>; *Collective Bargaining Agreement (CBA)*, NAT'L BASKETBALL PLAYERS ASS'N, [https://nbpa.com/cba#:~:text=Collective%20Bargaining%20Agreement%20\(CBA\)](https://nbpa.com/cba#:~:text=Collective%20Bargaining%20Agreement%20(CBA)) (last visited Feb. 3, 2022) ("The current Agreement was ratified by NBPA membership in December 2016, took effect on July 1, 2017, and runs through the 2023–24 NBA season."); Gulitti, *supra* note 288 (reporting NHL CBA extension effective until 2025–26 season).

CBA expired in 2021 and the new agreement was not reached until mid-March.³²² If the MLB harnesses social media, it has the potential to completely change the game and the future of the league.³²³ MLB viewership “has been declining rapidly over the past few years,”³²⁴ and with the average audience age of a baseball fan being fifty-nine, baseball is in dire need of an infusion of young fans.³²⁵ TikTok’s popularity among the younger demographic is proven, with the app used by sixty-three percent of Gen-Z youth, surpassing Instagram and Snapchat in use by young Americans.³²⁶ Major League Baseball needs viewership to stay alive and be profitable, but instead of harnessing the power and popularity of social media, baseball teams are firing their in-game social media coordinators.³²⁷ If MLB team owners want to keep baseball popular, increase viewership, and profit from the boon increased popularity comes with, they should prioritize social media use the way other more watched professional sports leagues are doing.³²⁸ But keeping ownership of

322. See Mike Axisa, *MLB Lockout: 10 Important Under-the-Radar Changes in CBA, Including New Schedule Format and Loss of Game 163*, CBS SPORTS (Mar. 15, 2022, 4:17 PM), <https://www.cbssports.com/mlb/news/mlb-lockout-10-important-under-the-radar-changes-in-cba-including-new-schedule-format-and-loss-of-game-163/> (“The 99-day owner-initiated lockout is a now a memory and spring training camps are open across Arizona and Florida. . . . Like always, the new collective bargaining agreement is a massive legal contract that checks in at over 100 pages. MLB and the MLBPA spent the last several months haggling over minimum salaries and competitive balance tax thresholds, and that stuff is very important, but it’s also tedious.”); Mark Feinsand, *Significant Progress Made in CBA Meeting*, MLB (Jan. 25, 2022), <https://www.mlb.com/news/mlb-mlbpa-cba-talks-progressing>.

323. Tatiana Snedeker, *How a New Wave of MLB Social Media Presence is Encouraging Fan Engagement*, ELITE SPORTS NY (July 7, 2021), <https://elitesportsny.com/2021/07/07/mlb-social-media-encouraging-fan-engagement/> (“In order to combat the lack of enthusiasm surrounding baseball, MLB’s social media accounts have been taking matters into their own hands in an effort to facilitate more fan engagement.”).

324. *Id.*

325. See Badenhausen, *supra* note 46.

326. Gitanjali Poonia, *TikTok Usage Surpasses Instagram Among Youth Ages 12 to 17*, DESERET NEWS (Nov. 22, 2021, 5:00 PM), <https://www.deseret.com/2021/11/22/22797158/tiktok-usage-instagram-snapchat-facebook-survey-data> (“The survey found that 63% of Gen Z youth use TikTok on a daily basis, compared to the 57% who use Instagram, and 54% who use Snapchat.”).

327. Erica Block, *Does MLB Recognize the Value of Social Media? Nope.*, SB NATION PINSTRIPE ALLEY (Feb. 14, 2021, 10:00 AM), <https://www.pinstripealley.com/2021/2/14/22282187/yankees-mlb-social-media-game-coordinator-layoffs-reaction> (“In laying off in-game coordinators, the league cuts a small fraction of its payroll at the expense of baseball’s long-term growth.”).

328. Evan Schwartz, *Major League Baseball Remains a Step Behind the Times*, SPORTS TV JOBS, <https://www.sportstvjobs.com/fa-sports-and-social-media-mlb-nba-nfl-2/> (last visited Feb. 3, 2022) (“The Fan Cave is a monumental step forward for Major League Baseball which has lagged behind the NFL and NBA when it comes to professional sports and social media. MLB is positively

TikToks might not be the right move for MLB owners. If players do not see a reason or profit in creating TikToks, they will not be as motivated to create them or to engage with fans on the platform, and the MLB would lose out on what could ultimately help it catch up in popularity with the NFL or NBA.

The three big issues that held up CBA negotiations in baseball are free agency, reducing revenue sharing, and expanding Super Two eligibility.³²⁹ The proposals offered so far “included significant increases in pay for players with two-plus years of service time, with the best players earning even more in bonuses based on performance.”³³⁰ These proposals show that players are concerned about compensation,³³¹ an issue that is not unique to major league baseball.³³² If the professional leagues treat TikTok ownership as a means of adding to player compensation, they can counter some of the players’ current demands to increase their compensation methods and avoid public relations issues associated with completely owning and possibly disincentivizing players from using and posting on TikTok.³³³

A joint authorship system would allow the teams to continue owning at least some part the TikToks, which enables them to control and use the content for the teams’ own sponsorship or endorsements.³³⁴ While the rapidly-changing nature of what is popular on TikTok might make long-term ownership seem less valuable to teams, in recent years ESPN has produced multiple miniseries on big name players like Michael Jordan and Tom Brady that feature

dinosauric in comparison to the two other leagues—they are quick to strip all game clips off YouTube and send cease-and-desist letters to any websites that host game footage. . . . MLB has about a million less Twitter followers than the NBA and NFL, and about 10 million combined less Facebook fans. Baseball, with its rich history and billions of dollars in revenue, is almost a non-entity online.”)

329. Mark Feinsand, *MLB, MLBPA Met Again on Tuesday*, MLB (Jan. 25, 2022), <https://www.mlb.com/news/mlb-mlbpa-in-person-cba-meeting> (“Free agency was just one of three core issues for which the players have been seeking massive changes, a source said; reducing revenue sharing and expanding Super Two eligibility remain two issues the players are pursuing, though those have been non-starters for the league.”).

330. *Id.*

331. *Id.*

332. See Dan Graziano, *2021 NFL CBA Negotiations: The Nine Biggest Looming Issues*, ESPN (July 3, 2019), https://www.espn.com/nfl/story/_/id/27103713/2021-nfl-cba-negotiations-nine-biggest-looming-issues (citing revenue split, the franchise tag, fifth-year option and fully funded rule as issues that came up in the NFL CBA negotiations).

333. See also *supra* Part VI.

334. See sources cited *supra* note 276 and accompanying text; see also Dianna Dilworth, *Snickers NFL Campaign Celebrates the “Hungriest Players,”* BRAND-INNOVATORS (Sept. 23, 2020), <https://www.brand-innovators.com/news/snickers-nfl-campaign-celebrates-the-hungriest-players> (referencing the current NFL-Snickers partnership).

game footage as well as personal footage relating to the players' lives.³³⁵ The leagues already own and profit off the game footage, but if producers want to help build the image of the athletes, they will want to include elements of their personalities, meaning TikToks created by the players could be key.³³⁶ As part-owners of the videos, the teams would receive a share of the profits from this additional revenue source.³³⁷ Depending on how the terms are drafted, teams could retain all ownership and control and just account for profits to the players, giving the teams more leverage to obtain credit, production roles, or creative input on future miniseries, movies, or other works that might feature the TikToks.³³⁸

The particular splits of ownership and profit in each league would be left up to the negotiation power of the unions and teams.³³⁹ TikTok is growing in popularity, and with that growth comes the potential to profit from the platform's increased popularity and reach.³⁴⁰ Professional teams and sports leagues have the potential to make a huge profit from TikToks, but they should keep in mind the players' role in making the content.³⁴¹ Cooperation between teams and players has the potential to foster and grow the popularity of both parties.³⁴² Sharing ownership and profits facilitates the player to benefit from using the team's profile and following for his own endorsement deals while simultaneously allowing the team to market itself and sell more tickets and jerseys using the star power of the player.³⁴³ A joint authorship scheme accounts for the role and pull each party brings, while helping to foster a positive

335. See Jill Goldsmith, 'Man In the Arena: Tom Brady' Series to Debut On ESPN+ Nov. 16, DEADLINE (Nov. 9, 2021, 7:00 AM), <https://deadline.com/2021/11/tom-brady-espn-man-in-the-arena-nfl-films-1234870507/> ("[T]he series features Brady and others from his life and career deconstructing milestones of his legendary NFL career, mining the psychological and emotional terrain of victory and defeat. Each episode focuses on a single Super Bowl appearance . . ."); Bryan Armen Graham, *The Last Dance: Is Michael Jordan Documentary a Dressed-Up Puff-Piece?*, GUARDIAN (May 9, 2020, 3:00 AM), <https://www.theguardian.com/sport/2020/may/09/the-last-dance-michael-jordan-netflix> ("Buoyed by the narcotic allure of nostalgia, the slick blend of archival footage, present-day interviews and spare-no-expense soundtrack breathes fresh life into even the most familiar plot points of Jordan's trajectory from precocious amateur to larger-than-life symbol both overexposed and mysterious.").

336. See *supra* notes 150, 182, 185 and accompanying text.

337. See *supra* Part V.

338. See *supra* notes 333–338 and accompanying text.

339. See *supra* note 319 and accompanying text.

340. See *supra* Part II.

341. See *supra* Parts II, VI.

342. See *supra* Parts II, VI.

343. See *supra* Parts II, IV.

relationship in an industry where each side has incredible power in influencing the future of the sport.³⁴⁴

VII. CONCLUSION

The relationship between professional athletes and the teams they play for is ever-evolving, with new issues that need to be negotiated popping up constantly.³⁴⁵ The presence and profitability of social media in an industry that relies on popularity and viewership to generate revenue is both a blessing and a curse, providing new avenues for profit but also bringing up new issues to complicate already complex and intricate relationships.³⁴⁶ The key to preserving a fruitful and mutually beneficial relationship between both parties is knowing when to give and when to take.³⁴⁷ A joint authorship scheme protects athletes' expression and ability to build their brand and following while allowing teams and owners a new bargaining tool to offset other demands.³⁴⁸

The problem with such an intricate industry is that a solution can only go so far before new issues arise.³⁴⁹ A joint authorship scheme only solves one element of a complex issue.³⁵⁰ TikTok might be "a copyright time bomb," raising a slew of intellectual property disputes.³⁵¹ Ownership might mean becoming a target for intellectual property litigation.³⁵² Teams will need to decide what risk and liability they want to carry and keep and which they should shift to the players who are in the driver's seat when it comes to creating the actual content.³⁵³ The increasing popularity and profitability of social media platforms like TikTok raise a series of new concerns for all parties involved, and teams need to take a proactive approach and stay up to date with legal questions if they hope to avoid costly litigation.³⁵⁴

344. See Brian Wakamo, *Professional Athletes and the Power of a Union*, INST. FOR POL'Y STUD. (Sept. 2, 2020), <https://ips-dc.org/professional-athletes-and-the-power-of-a-union/>.

345. See *supra* Part VII.

346. See *supra* Parts II, VI.

347. See *supra* Part VII.

348. See *supra* Part VII.

349. See *supra* Part VI.

350. See *supra* Part VII.

351. See Bayley, *supra* note 65.

352. See Bayley, *supra* note 65 and accompanying text.

353. See *supra* Parts IV, VII.

354. See *supra* Part VI.

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