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**He Shoots, He Scores...and Receives Copyright Protection: How the Current State of Intellectual Property Law Fumbles with Sports**

# He Shoots, He Scores...and Receives Copyright Protection? How the Current State of Intellectual Property Law Fumbles with Sports

Giuliana R. García<sup>1</sup>

## Introduction

Throughout sports history, scripted plays and innovative moves performed by athletes have played an important role. There have been groundbreaking plays conceived by coaches either, well in advance of a competition, or thought of in the heat of a close scoring game, perhaps with only a few seconds remaining. There have also been revolutionary moves performed by athletes that have both won important games and completely changed the way particular sports are played.

One of the most famous examples of a scripted sports play becoming “legendary” is the development of the football play, the “T-formation,” by Coach Clark Shaughnessy of Stanford University. Shaughnessy developed the “T-Formation” play in the spring of 1940 as one of American football’s most innovative offenses the sport has seen. Shaughnessy, calling his play “43R” to his players, created the first modern “T-Formation” play in football history. The play made the quarterback the focus of the team’s offense and placed an emphasis on passing. During the 1940-41 season, Stanford became the first college team to use the “T-Formation” as its basic offense. The play dramatically turned around their season, allowing them to go undefeated in their nine regular season games and win the 1941 Rose Bowl with a 21-13 victory over

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Nebraska.<sup>2</sup> Winning the Rose Bowl solidified Shaughnessy's "T-Formation" as the new future of football, as nearly all professional and collegiate football teams use some variation of the "T-Formation" to structure their offense.<sup>3</sup>

In addition to scripted sports plays by coaches that have won big games and revolutionized athletics, particular moves by athletes have also been viewed as extremely innovative and creative. Without a doubt, much skill, thought, and practice has gone into making these moves flawless enough to be performed in pressured game situation. For example, the use of the bicycle kick in soccer was revolutionary in the sport. Although there has been much debate over which player and country "invented" this complicated kick, many credit player, Ramón Unzaga, from the Basque Country in Spain with being the first player to use the bicycle kick in 1914.<sup>4</sup> However, particular countries also assert claims to inventing the kick. In Peru, the bicycle kick is attributed to players from the large port city of Callao, who claim to have invented the move when playing with English sailors in the late 1800s.<sup>5</sup> Players have also attempted to claim the invention of the bicycle kick by further developing or perfecting the move. In the 1930s and 1940s, Leonidas da Silva from Brazil further perfected the bicycle kick.<sup>6</sup> The bicycle kick also became the signature move of the Brazilian player Pelé, Mexico's Hugo Sanchez, and Argentina's Diego Maradona.<sup>7</sup> With this deep controversy over whom to attribute

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<sup>2</sup> Murray Olderman, *This New Formation Fit Stanford's Team of 1940 to a 'T' College football: With Shaughnessy's innovative offense, the Indians, who won one game in 1939, went undefeated and beat Nebraska in the Rose Bowl*, L.A. TIMES, Dec. 25, 1990, available at [http://articles.latimes.com/1990-12-25/sports/sp-7207\\_1\\_college-football](http://articles.latimes.com/1990-12-25/sports/sp-7207_1_college-football).

<sup>3</sup>T Formation: Facts, Discussion Forum, and Encyclopedia Article, [http://www.absoluteastronomy.com/topics/T\\_formation](http://www.absoluteastronomy.com/topics/T_formation) (last visited Nov. 11, 2011).

<sup>4</sup> RICHARD O'BRIEN, THE ULTIMATE SPORTS HANDBOOK: HOW TO STEAL HOME, SLAM DUNK, SCORE A PENALTY KICK, AND PLAY LIKE THE PROS 68 (2005).

<sup>5</sup> ¿Chilena o chilaca?... esa es la cuestión, EL PERIÓDICO DE MÉXICO, <http://www.elperiodicodemexico.com/nota.php?sec=Deportes&id=55799> (Nov. 30, 2006).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

the credit for one of the most unique and complicated moves in soccer, should efforts be made to track down the inventor, so the inventor can be given intellectual property rights?

Furthermore, another question for our rapidly developing athletic industry is whether these types of choreographed moves and plays should be afforded intellectual property protection. Currently, American intellectual property law does not afford protection to athletic moves and plays. In 1996, Robert Kunststadt wrote an article with F.Scott Kieff and Robert Kramer as part of the Hoover Task Force on Property Rights, Freedom, and Prosperity.<sup>8</sup> Their paper<sup>9</sup> addressed the increasing effect the business world was having on the field of sports, and was revolutionary in arguing for the extension of intellectual property rights for sports moves.<sup>10</sup> Kunststadt proposed that patent protection should be considered for moves that enabled a useful result (i.e. longer jumps or quicker race times); copyright protection should be afforded for moves that are “creative,” and trademark or service mark protection should be given to moves that are developed to indicate a unique source (i.e. an athlete or team) of goods or services.<sup>11</sup> On the other hand, comments and articles written in response to Kunststadt’s thesis argue for limited intellectual property protection given to sports.<sup>12</sup> Other commentators argue that intellectual property protection, such as copyright protection, was never intended to protect sports moves and

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<sup>9</sup> F. Scott Kieff et al., *It’s Your Turn, But It’s My Move: Intellectual Property Protection for Sports “Moves,”* 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 765 (2009).

<sup>10</sup> *Id.* at 766.

<sup>11</sup> *Id.* at 767.

<sup>12</sup> Carl. A. Kukkonen, *Be a Good Sport and Refrain from Using My Patented Putt: Intellectual Property Protection for Sports Related Movements.* 80 J. PAT. & TRADEMARK OFF. SOC’Y 808 (1998) (proposing copyright protection for “routine-oriented” sports, patent protection for innovative sports methods, and argues that there should be no trademark protection for sports moves). *See also* Wm. Tucker Griffith, *Beyond The Perfect Score: Protecting Routine-Oriented Athletic Performance with Copyright Law.* 30 CONN. L. REV. 675 (1998).

plays,<sup>13</sup> and by allowing copyright law to protect these athletic ideas would violate the intent of the Framers in writing the Constitution.<sup>14</sup>

In order to maintain the competitive nature of sports, athletic moves and diagrammed or pre-conceived plays should gain limited intellectual property protection. This should be afforded in the forms of copyright protection and trademark protection, but not through patent protection.

Arguments for allowing intellectual property law to provide protection for sports moves and plays vary in scope. First, intellectual property protection would reward the effort by both athletes and coaches. Protection would also validate the principle that new moves by athletes are the result of increasing athletic ability of players. Second, there is undoubtedly a large economic incentive that intellectual property protection would afford the innovators of creative sports moves and plays. Third, one can argue that sports moves and plays should receive protection from intellectual property law because providing such protection would essentially be the same as protecting other art forms. One commentator has noted that scripted sports plays should receive intellectual property protection because they are “no different than other protected works such as theatrical plays, musical songs, or architectural blueprints. The coach serves as the author, composer, and designer of the play as an act of original ingenuity.”<sup>15</sup>

Fourth, it must be noted that in modern society, rapidly increasing developments in technology have made methods of copying extremely easy. The sports world relies heavily on spirited and competitive interactions between teams and athletes. New technologies to allow the

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<sup>13</sup> Brent C. Moberg, *Football Play Scripts: A Potential Pitfall for Federal Copyright Law?*, 14 MARQ. SPORTS L. REV. 525 (2004).

<sup>14</sup> See U.S. CONST. art. I, § 8, cl. 8.

<sup>15</sup> Proloy K. Das, Note, *Offensive Protection: The Potential Application of Intellectual Property Law to Scripted Sports Plays*, 75 IND. L.J. 1073, 1076 (2000).

dissection of plays and moves, such as frame-by-frame analysis,<sup>16</sup> and new copying methods allow these in-depth examinations of plays and moves to potentially be abused. It therefore follows that if an athlete's or team's opponents are able to carefully analyze and then copy or even pre-empt the original player's moves or team's plays, this would destroy the true competitive nature of sports. Accordingly, providing an extra level of protection for the hard work and creative effort that goes into developing sports moves and plays serves to the great benefit of society.

On the other hand, some may argue that sports moves and plays do little, if nothing, to benefit our society. Furthermore, those who oppose affording sports moves and plays intellectual property protection argue that it would be difficult to prove infringement by both recreational athletes and those who "copy" and "imitate" moves or plays they have seen. There is also the argument that having such intellectual property protection might negatively affect the "flow" of athletic games. Critics have also noted that giving sports plays intellectual property protection restrict the competitive nature of athletics, thereby offending the principles of fair play.<sup>17</sup> Those against affording intellectual property protection to sports often cite to the Second Circuit's conclusion that "[e]ven where athletic preparation most resembles authorship—figure skating, gymnastics, and...professional wrestling—a performer who conceives and executes a particularly graceful and difficult...acrobatic feat cannot copyright it without impairing the underlying competition in the future."<sup>18</sup> Other opponents of intellectual property protection for sports moves and plays present the idea that perhaps even the athletes<sup>19</sup> and coaches themselves might not think their moves merit protection. Lastly, there are others who argue that while

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<sup>16</sup>Griffith, *supra* note 11, at 681.

<sup>17</sup>DAS, *supra* note 14, at 1076.

<sup>18</sup>Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 846 (2d Cir. 1997).

<sup>19</sup>See Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 677 (7th Cir. 1986).

individual sports, such as figure skating and gymnastics (sports more similar to dance) might deserve protection, team sports are not forms of “art” and should not be afforded intellectual property protection for that reason.

Unlike adversarial sports, which involve direct competition between two teams or individuals, certain forms of skateboarding, snowboarding, in-line skating, and stunt bicycling (for example) are characterized by elaborate movements, often in connection with spectacular aerial jumps and spins, that may be performed for points in a competition, but are just as likely to be executed before an audience entirely for their aesthetic and entertainment value.<sup>20</sup>

Section I of this paper will discuss the applicability of copyright protection to sports moves and plays. In this Section, arguments for why copyright protection is a good fit for athletic moves and plays will be presented, along with how such moves can meet the various requirements for federal copyright protection. Section II will explore the possibility of affording patent protection to such maneuvers and plays by examining the various types of patents and the requirements for each. Lastly, Section III will discuss the merits of having trademark protection for moves and plays in the athletic industry. Section III will also include a discussion of culturally significant athletic moves and potentially trademark-able images. Section IV concludes with the proposed methods of incorporating sports to copyright and trademark law, including detailed discussion of duration, licensing fees, accidental copying, and how to bring claims of infringement.

## **I. Copyright Protection**

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<sup>20</sup> Loren J. Weber, *Something in the Way She Moves: The Case for Applying Copyright Protection to Sports Moves*, 23 COLUM.-VLA J.L & ARTS 317, 322 (2000).



In determining which sports plays and moves are eligible for copyright protection, it must be considered whether or not these plays and moves qualify as the subject matter protected by the Copyright Acts (1909 and 1976). Copyright protection is given to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>21</sup> In other words, a work must be original, fixed in a tangible medium of expression, and within the proper subject matter.

### **A. Originality Requirement**

First, in terms of defining what is an original work, scholars<sup>22</sup> and the Supreme Court held that there are two sub-requirements: originality and creativity. The Supreme Court ruled that “originality” should involve some degree of creativity, however small.<sup>23</sup> Essentially, the Supreme Court in *Feist* added a new requirement for works to receive copyright protection: there must be a creative element.<sup>24</sup>

The originality requirement for copyright protection in sports moves and plays can be met because the work at issue only needs to be independently created; it does not need to be new.<sup>25</sup> Coaches and athletes can develop plays and moves either collaboratively or on their own. The creativity requirement for copyright protection in sports plays and moves can be met because there are numerous arrangements of sports moves or sports plays that can be produced. Coaches and athletes have the ability to structure their plays and moves differently with seemingly never-ending combinations to facilitate their final products. Furthermore, sports

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<sup>21</sup> 17 U.S.C. § 102(a) (2011).

<sup>22</sup> See D. Nimmer & M. Nimmer, *Nimmer On Copyright* §§ 106(A), 1.08(C)(1), 2.01(A)-(B)(i).

<sup>23</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.* 499 U.S. 340, 345 (1991).

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

<sup>25</sup> *Id.*

moves are arguably creative because they add an innovative element to basic physical movements. “Any movement in nature must obey Newton’s laws of motion, but [sports] add something on top of that; in its essence, [sports are] a combination of force and speed as well as skill and creativity—a supreme blend of rationality and irrationality.”<sup>26</sup>

Additionally, the U.S. Supreme Court has commented on the creativity requirement for original works. In 1903, Justice Holmes developed the idea that if certain works “command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt.”<sup>27</sup> That is, works which have a high value to the public qualify as creative enough for earning copyright protection.<sup>28</sup> Athletic games have continuously had an impact on our society, regardless of time period or country. “While sport in many traditional cultures had been an integral part of life (e.g., running, jumping, and throwing as a part of hunting, or skiing and skating as essential modes of transportation), in an increasingly modern, industrial society sports became identified with and reserved for leisure time.”<sup>29</sup> Accordingly, given the seemingly uninterrupted popularity of athletic games in our society, it follows that sports moves and plays can “command the interest” of the public (certainly those who are sports enthusiasts) and therefore qualify as creative in order to receive copyright protection.

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<sup>26</sup> O’BRIEN, *supra* note 3, at 68 (citing a 2002 study conducted by the University of Sao Paulo’s Biophysics Laboratory, “The Biomechanics of Pelé’s Bicycle Kick”).

<sup>27</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 252 (1903).

<sup>28</sup> Kieff, *supra* note 8, at 777.

<sup>29</sup> ROBERT CREGO, *SPORTS AND GAMES THROUGH HISTORY: SPORTS AND GAMES OF 18<sup>TH</sup> AND 19<sup>TH</sup> CENTURIES I* (2003).

## **B. Fixation Requirement**

Second, a work must be fixed in a tangible medium of expression to receive copyright protection.<sup>30</sup> Sports moves and plays can be fixed by recording the action on film.<sup>31</sup> The move or play may also be fixed if someone records the move or play on a videotape or DVD from a television broadcast. “Like choreography, the routine may be explained in a form of notation.”<sup>32</sup> This notation can be a combination of diagrams, such as a coach’s playbook, or video recording.

## **C. Subject Matter Requirement**

Third, a work seeking to receive copyright protection must qualify as one of the eight subject matter categories provided by the Copyright Act: (1) literary works; (2) musical works; (3) dramatic works; (4) pantomimes and choreographic works; (5) pictorial, graphic and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.<sup>33</sup> Although the Copyright Act provides definitions for five of these categories (literary works; pictorial, graphic and sculptural works; motion pictures and other audio visual works; sound recordings; and architectural works), the use of “include”<sup>34</sup> and “such as”<sup>35</sup> support the idea that these definitions are merely illustrative and are not an exhaustive list. Therefore, it may be possible for sports moves and plays to qualify as one of the defined types of subject matter because the definitions in the Copyright Act are non-exhaustive. Furthermore, since musical works, dramatic works, and pantomimes and choreographic works are left undefined by the Copyright Act, it may be possible for sports plays and sports moves to also qualify for copyright protection under these subject matter categories.

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<sup>30</sup> 17 U.S.C. § 102(a) (2011).

<sup>31</sup> Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT, §§ 2.03[B][2] (2008).

<sup>32</sup> Griffith, *supra* note 11, at 711.

<sup>33</sup> 17 U.S.C. § 102(a) (2011).

<sup>34</sup> 17 U.S.C. § 101 (2011).

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

#### **D. Effects of the Merger Doctrine**

Another aspect of copyright law that must be taken into consideration is the “merger doctrine.” The merger doctrine holds that when there is only one or a few ways of expressing an idea, then a court must find that the idea behind the work merges with its expression and the work is not copyrightable. The purpose of the merger doctrine is to prevent copyright owner from having a monopoly in a particular market. Accordingly, applying the merger doctrine, some critics may argue that sports moves and plays should not qualify for copyright protection because there is a limited way in which a person can physically accomplish the goal of catching, shooting, hitting, or kicking a ball (to name a few), and therefore even the most creative idea for making such a move or play would merge with its expression, thus barring copyright protection. However, there are more than a few ways, in fact almost an infinite amount, that an athlete or coach can accomplish the goal of a particular move or play. To argue that there are only one or a few ways of performing an athletic maneuver or play is severely limiting and does not take into account the many unique ways an athlete or coach performs. It is this unique myriad of ways that continues to make athletic games interesting and constantly changing for its fans and viewers. Thus, the merger doctrine should be found inapplicable in preventing federal copyright protection for creative sports moves and plays.

#### **E. Potential Issues with Derivative Works**

Another aspect of copyright law that must be considered is the issue of derivative works. The Copyright Act defines a derivative work as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which

a work may be recast, transformed, or adapted.”<sup>36</sup> A derivative work may obtain its own copyright, provided that it is sufficiently original; it may also be based on another copyrighted work or based on a work in the public domain. In the latter case, copyright in the derivative work applied only to the new creative expression. In considering copyright protection for sports moves and plays, the effect of derivative works must be examined. Critics may point out that many of the same sports moves and plays are used by multiple athletes and coaches across a sport. Would this then allow each new implementation of the move or play copyright protection as a derivative work, provided that the added elements are sufficiently original? If a high school basketball coach teaches his team the play Duke University used to win the 2010 NCAA Basketball Championship, would the high school play qualify as a derivative work since the way they run the play is likely very different from how the college team performed it? Arguably, yes; the high school team most likely changed and tweaked Duke’s play to conform to a high school player’s limited abilities on the basketball court, thus making it an original, copyrightable derivative work. Accordingly, the principle of derivative works would not negatively affect the athletic industry, and that the rules for a derivative work’s copyrightability should remain the same as all other areas already protected by federal copyright law.

#### **F. Why Give Sports Moves and Scripted Plays Copyright Protection?**

Our society needs to adapt its viewpoint of athletic moves and plays, and come to recognize and appreciate the effort and refined technique put into creating these maneuvers. Sports plays and moves should be afforded federal copyright protection because such rights would give proper reward and recognition to coaches and athletes. The Second Circuit has stated that “the economic incentive for artistic and intellectual creation that serves as the foundation for

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<sup>36</sup> *Id.*

American copyright law cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent.”<sup>37</sup> In other words, providing creators, in this case athletes and coaches, with copyright protection for their maneuvers and plays would not only prevent “mutilation” and misrepresentation of their creative works, but also provide a greater economic incentive for such creation and innovation to continue. While some opponents may argue that professional and high-level amateur athletes and coaches already earn more than enough money and further economic incentives and rewards should not be given to them, it must be noted that there are also “thousands of highly-talented athletes who exercise their skills regularly without pay (or nearly so), for example in pick-up games or in informal public exhibitions. In principle, at least, these ‘weekend athletes’ would stand to receive the same level of copyright protection as elite professional athletes like [Michael] Jordan.”<sup>38</sup> In other words, the addition of sports moves and plays to the realm of intellectual property protection will not only economically benefit professional athletes and coaches, but also may help amateurs in a sport reap the economic rewards of their creative athletic endeavors.

It should be noted that only creative and substantially innovative sports moves and plays should be afforded copyright protection, as opposed to basic and universal moves and plays. Creative and inventive moves are essential to athletic games; if plays were boring and never-changing, very few people would continue to be fans. Moves and plays contribute greatly to sports, and as such, it is essential that federal copyright law develop to protect the time, effort

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<sup>37</sup> Gilliam v. Am. Broad. Co., 538 F.2d 14, 24 (2d Cir. 1976).

<sup>38</sup> Weber, *supra* note 19, at 335.

and creativity coaches and athletes put forth in their endeavors.

### **G. How Sports Moves and Plays Can Meet Requirements for Federal Copyright Protection**

The strongest argument for a subject matter category for sports moves and athletic plays is under choreographic work. Because there has been limited case law to define what qualifies as a “chorographical work”<sup>39</sup> and since there is no statutory definition of choreography in the Copyright Act, it seems quite possible for athletic moves and plays to qualify for protection as such. Moves and plays in sports are a combination of steps and gestures, arguably quite similar to works of choreography. Although choreographic works did not qualify for copyright protection prior to 1976, the 1976 Copyright Act revision and case law support works of choreography in receiving copyright protection. The Second Circuit has held that choreography is a form of copyrightable subject matter.<sup>40</sup> In *Horgan*, the court held that the copyright of the famous choreographer George Balanchine in his 1954 work “The Nutcracker” was infringed by MacMillan’s publication of her book *The Nutcracker: A Story & a Ballet*.<sup>41</sup> MacMillan’s book portrayed, in both text and photographs, the New York City Ballet Company’s production of “The Nutcracker” ballet as choreographed by Balanchine.<sup>42</sup>

Accordingly, based on the precedent set by the Second Circuit in *Horgan* and by the revisions made to the 1976 Copyright Act, one may argue that sports moves and plays should receive copyright protection as a form of choreography as well. Since both individual and group routines, such as the ballet moves in *Horgan*, are afforded federal copyright protection, it follows

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<sup>39</sup> Griffith, *supra* note 11, at nn. 132-143

<sup>40</sup> *Horgan v. MacMillan, Inc.*, 789 F.2d 157, 160 (2d Cir. 1986).

<sup>41</sup> *Id.* at 164.

<sup>42</sup> *Id.* at 158.

that sports moves are an expanded form of group and individual choreographic routines. “A scripted sports play is nothing more than a group routine with individuals performing a predetermined set act in cohesion with one another.”<sup>43</sup> It is also important to note that the choreography subject matter category is one of the three categories left undefined by the Copyright Act. This leaves even more room for sports moves and sports plays to be granted a copyright under the choreography category.

Additionally, the types of moves and plays that should be afforded protection by copyright law must be both creative and innovative. Limiting the category of moves and plays that would qualify for protection is essential to bringing copyright protection under the banner of “choreography.” That is, since copyright in choreographical works does not cover basic or simple dance steps and routines,<sup>44</sup> this would arguably carry over to basic athletic moves and plays. Accordingly, it is important that groundbreaking moves and plays be granted copyright protection, as opposed to basic and routine sports maneuvers and plays, because they better satisfy both the originality and subject matter requirements of federal copyright law.

One example of an attempt to procure copyright protection in a sport through the choreography category is the effort by two men from Texas who registered a football formation they developed in the 1980s.<sup>45</sup> While a student at Texas A&M University, Dr. James R. Smith was the quarterback on the football team. Smith’s coach, Emory Bellard, had invented the “Wishbone” offense. In 1975, it came to be Smith’s job to run the Texas “Wishbone” offense. After running the play, Smith felt that the “Wishbone” was too predictable, lacked versatility, deception, passing capability, and scoring potential. Smith accordingly attempted to re-vamp the

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<sup>43</sup>Das, *supra* note 14, at 1086.

<sup>44</sup>COMPENDIUM II OF COPYRIGHT OFFICE PRACTICES, § 450.06 (1984).

<sup>45</sup>*Jerry Campbell Football—Creation of the I-Bone*,

<http://www.jcfb.com/forum/messageview.aspx?catid=36&threadid=14756> (last visited Apr. 13, 2008).



“Wishbone” play and several months later he developed a newly improved play, calling it the “I-Bone” and describing it as a cross between the “Wishbone” and the “Power-I” plays. It wasn’t until 1984, however, that Smith registered his “I-Bone” play for copyright.<sup>46</sup> However, the Copyright Office decided that the registration did not cover the performance of the formation. In November 1984, Smith and his new partner in marketing the “I-Bone,” Joey Lorenzo, published an article in *Texas Coach* magazine about the play. Smith and Lorenzo also attempted, unsuccessfully, to market the “I-Bone” to various college coaches.

Subsequently, on October 22, 1988, Smith and Lorenzo saw a televised football game between the University of Colorado and Oklahoma. Smith and Lorenzo caught Colorado using a play very similar to, if not exactly like, the “I-Bone” play. Colorado called it the “Power Bone.” After the game, Lorenzo and Smith contacted the Colorado coaches and offered to teach them how to use the play properly and more effectively. When that letter went unanswered by the Colorado coaches, Smith and Lorenzo threatened legal action if Colorado did not acknowledge Smith as the inventor of the “I-Bone.” Colorado’s coach claimed that he had never heard of the “I-Bone” and that his assistants had developed the play. The contemplated suit by Smith and Lorenzo never proceeded for judicial opinion. Some scholars believe this to have been a wise decision by Smith and Lorenzo, arguing that “they would have faced a serious hurdle....Unlike patent law, the Copyright Act does not consider independent unknowing derivation of a work completely identical to a previously registered work infringement.”<sup>47</sup> Despite the efforts for protecting and testing the limit’s of Smith’s registered copyright in the “I-Bone” play, it seems that there still remains no clear precedent illustrating the strength of this copyright.

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<sup>46</sup> Copyright Reg. No. TXu000215357, registered Oct. 15, 1985.

<sup>47</sup> Kukkonen, *supra* note 11, at 811.

Given the example of Smith and the “I-Bone” formation, copyright law needs to further develop and improve so as to afford protection for those individuals who work to develop scripted sports plays. An examiner with the U.S. Copyright Office, Julia Huff, was interviewed in 1989 and stated that “[g]ame plays themselves are not copyrightable. They’re considered ideas.”<sup>48</sup> Huff’s argument is based on the provision in the Copyright Act that copyright protection does not exist “for...any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”<sup>49</sup> Although federal copyright law does not protect ideas or facts, one should note that an original work of authorship that uses or compiles these ideas or facts (the expression) may itself be copyrighted<sup>50</sup>. Arguably, the running of the plays and moves themselves, along with the written notation, is the expression of each coach or athlete. Furthermore, this official dismissal of athletic plays by the U.S. Copyright Office as “mere ideas”<sup>51</sup> fails to recognize the possibility of affording federal protection for original sports plays and formations as works of choreography.

Another argument for a subject matter category for sports moves and plays is under audiovisual works. The Copyright Act defines audiovisual works as “works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.”<sup>52</sup> One should note that the second part of this statutory definition

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<sup>48</sup> Craig Neff, *Whose Bone is it, Anyway?*, SPORTS ILLUSTRATED, Jan. 23, 1989, at 7.

<sup>49</sup> 17 U.S.C. § 102(b) (2006).

<sup>50</sup> 17 U.S.C. § 102(a); *See also Baker v. Selden*, 101 U.S. 99 (1879).

<sup>51</sup> Neff, *supra* note 47.

<sup>52</sup> 17 U.S.C. § 101 (2006).

provides that the work is considered to be distinct from the particular object in which it is fixed.<sup>53</sup> Accordingly, sports moves and plays may qualify as audiovisual works if they are recorded on film or DVD. Since it is a common practice to record and televise sporting events, it seems likely that many plays and moves that might seek copyright protection would be already recorded in this manner.

Additionally, one could argue that athletic moves and plays should qualify for federal copyright protection as “dramatic works.” As mentioned above, the 1976 Copyright Act did not provide a definition of “dramatic works.” However, the Copyright Office has defined dramatic work as “one that portrays a story by means of dialog or acting and is intended to be performed. It gives directions for performance or actually represents all or a substantial portion of the action as actually occurring, rather than merely being narrated or described.”<sup>54</sup> Accordingly, both the statutory omission of a definition for dramatic works and the Copyright Office’s suggested definition pave the way for sports moves and plays to potentially qualify for copyright protection under the dramatic works subject matter category. There is no doubt that the dramatic nature of athletics has evolved with the growth of the sports industry itself. One of the best examples of the dramatic nature of sports is in the “non-ball sport” category of figure skating. Often, ice skating routines portray a specific part of a play or opera, or are simply used to tell a unique story via the skaters’ movements and facial expressions.<sup>55</sup> Another good example can also be found in professional basketball. Many modern day NBA teams have adopted the practice of “lights out,” or turning off the lights in the fan seating areas and turning on high-powered lights to spotlight

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<sup>53</sup> Kieff, *supra* note 8, at 777.

<sup>54</sup> COMPENDIUM II OF COPYRIGHT OFFICE PRACTICES, § 431 (1984)

<sup>55</sup> Specifically, Michelle Kwan has portrayed the character Salomé from Strauss’ opera *Salomé* and the lead female character from an Indian fable *Taj Mahal*. See Karen Rosen, *Nagano ’98 Figure Skating, Free Skate: Elegance vs. Power*, ATLANTA CONST., Feb. 20, 1998, at E11.

the basketball court and players. The Los Angeles Lakers were the first NBA team to do so in 2006<sup>56</sup>, and it seems that this practice has caught on with other teams in the league. The practice of shining spot lights on the court to highlight the moves and plays of the game strike a strong resemblance to a theatre company shining spotlights on the stage of a play, musical, or opera.

Despite the strong arguments for sports moves and plays to qualify for federal copyright protection as dramatic works, it is important to take into consideration the opposing views. One of the main counter-arguments is that sports are all about competition, and it is because of this competitive spirit with which they are played that a significant level of unpredictability creeps in. One could argue that sports should not qualify for copyright protection because even if something highly original is created and planned out before a game or even during the game, the chances of it being performed as creatively as intended significantly decreases due to multiple factors: a player may trip and have to quickly recover, changing his intended move; an opposing player could show up somewhere unexpected and unanticipated by the player or coach and significantly change the move or play. However, this argument of the unpredictability preventing federal copyright protection can be refuted by the fact that dramatic works still receive protection yet are just as unpredictable. An actor or singer could forget his lines and improvise something entirely different, yet the work would still receive copyright protection as originally imagined. A prop or actor may be in the incorrect place when needed, and the resulting performance would still receive copyright protection. Accordingly, opponents who suggest that athletics are too unpredictable to receive copyright protection must come to realize that there are similarly unpredictable subject matters that still remain copyrightable and our current laws need to shift to have sports moves and plays included.

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<sup>56</sup> NBA.Com Lights Out!, [http://www.nba.com/lakers/news/lights\\_out.html](http://www.nba.com/lakers/news/lights_out.html)

Although there is little current case law and precedent on whether sports moves and plays meet the requirements for federal copyright protection, there are some key examples that must be analyzed. In 1986, the Seventh Circuit held that baseball games should be awarded copyright protection.<sup>57</sup> The players on the Orioles team sued Major League Baseball (MLB) to determine ownership of broadcast rights to baseball players' performances during major league baseball games.<sup>58</sup> For many years, the players had been concerned with the allocation of revenues stemming from the televised baseball games.<sup>59</sup> The players argued the games were being recorded and televised without their consent and the property rights in their own performances were being misappropriated.<sup>60</sup> The athletes claimed they retained a right of publicity in their performances in the course of playing baseball and that this right of publicity belonged to them and not the team owners or the MLB.<sup>61</sup> The MLB countered that any right of publicity was preempted by the availability of copyright in the game performance.<sup>62</sup> The District Court held that the MLB and the teams, not the Players, owned a copyright in the telecasts as works-for-hire and that the teams' copyright in the telecasts preempted the athletes' rights of publicity in their performances.<sup>63</sup> The Seventh Circuit affirmed this decision, ruling that federal copyright law preempted any state law publicity interest of the players.

Despite the fact that the *Baltimore Orioles* decision concerned the televising of baseball games (and not the actual playing of the games), the Court's analysis and reasoning supports the conclusion that sports games may be given copyright protection in the future. The Seventh

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<sup>57</sup> *Balt. Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 668 (7th Cir. 1986).

<sup>58</sup> *Id.* at 665.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 667.

<sup>62</sup> *Id.* at 674-79.

<sup>63</sup> *Id.* at 667.

Circuit noted that “the Players’ performances possess the modest creativity required for copyrightability.”<sup>64</sup> Given the Seventh Circuit’s finding that baseball players’ performances during games meet the minimum creativity requirements for an original work, as set forth in *Feist*, this reasoning could later be used by players and athletes seeking to gain federal copyright protection in the actual maneuvers they perform and conceive.

In contrast to the *Baltimore Orioles* ruling, the Second Circuit has held that basketball games do not merit copyright protection.<sup>65</sup> In 1996, Motorola began selling a pager device that transmitted game statistics and scores of live NBA basketball games to customers.<sup>66</sup> Among other claims, the NBA sued Motorola for federal copyright infringement with regard to the underlying games and their broadcasts, seeking to prevent Motorola from disseminating the game information.<sup>67</sup> The Second Circuit concluded that “the underlying basketball games do not fall within the subject matter of federal copyright protection because they do not constitute ‘original works of authorship’ under 17 U.S.C. § 102(a).”<sup>68</sup> The Court continued that athletic events are neither similar nor analogous to any of the listed categories in Section 102(a) of the Copyright Act, and accordingly did not merit protection.<sup>69</sup> Additionally, the Second Circuit reasoned that sports games were not “authored,”<sup>70</sup> and consequently should not be protected under federal copyright law. The Court continued that “[u]nlike movies, plays, television programs, or operas, athletic events are competitive and have no underlying script.... Athletic

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<sup>64</sup> *Id.* at 669 n.7.

<sup>65</sup> *NBA v. Motorola, Inc.*, 105 F.3d 841, 843-45 (2d Cir. 1997).

<sup>66</sup> *Id.* at 843.

<sup>67</sup> *Id.* at 844.

<sup>68</sup> *Id.* at 846.

<sup>69</sup> *Id.*

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

events may also result in wholly unanticipated occurrences...”<sup>71</sup> Despite the Second Circuit’s ruling in the *Motorola* case, it is important to note that their reasoning and holding appears to apply only to athletic events, rather than specific athletic moves and plays. One scholar has noted that the Second Circuit’s decision “suggests by negative implication that individual moves do closely resemble the congressionally-authorized forms of copyrightable subject matter.”<sup>72</sup>

Another case discussing the merits of federal copyright protection in athletic events is *Hoopla Sports & Entertainment, Inc. v. Nike, Inc.*<sup>73</sup> Hoopla Sports developed a “U.S. versus the world” basketball game involving all-star teams of male high school players.<sup>74</sup> The plaintiff argued that even though all-star games, international “U.S. versus the world” games, and high school basketball games had all been played before, this was the first time that all of these elements had been combined into one event.<sup>75</sup> Nike agreed to sponsor the event, which occurred on June 18, 1994 at DePaul University in Chicago.<sup>76</sup> Subsequently, Hoopla Sports learned that Nike was planning to hold a nearly exact replica of the game in Massachusetts on May 13, 1995<sup>77</sup> and brought suit against Nike for copyright infringement, among other claims. The Court denied copyright protection for Hoopla Sports’ game because the event was an unprotectable idea.<sup>78</sup>

Undoubtedly, the *Baltimore Orioles*, *Motorola* and *Hoopla Sports* cases have differing implications for the future of intellectual property law’s involvement in athletics. However, this split in circuit court and district court opinions has the potential to allow a judge the opportunity

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

<sup>72</sup> Weber, *supra* note 19, at 345.

<sup>73</sup> *Hoopla Sports & Entm’t, Inc. v. Nike, Inc.*, 947 F.Supp. 347 (N.D. Ill. 1996).

<sup>74</sup> *Id.* at 349.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 350.

<sup>77</sup> *Id.* at 351.

<sup>78</sup> *Id.* at 354.

to examine new claims of copyright protection in sports maneuvers, and perhaps reach a different conclusion than the Second Circuit. The *Motorola* decision was handed down in 1997. Arguably, thirteen years later, it is high time to revisit issues of copyrightability in sports.

## II. Patent Protection

The question surrounding sports moves and plays and their relationship to patent law is: whether or not patent protection should be afforded to such maneuvers that impart a useful result. Patent law, however, must be recognized as a poor means of protection for sports maneuvers. One of the main reasons that sports moves and plays do not merit patent protection is because human movements are involved and there is a significant amount of variance from one person's motion to another's. Furthermore, under the patent requirements to be subsequently explored, if a "process" is defined as a series of actions leading to an end (i.e. winning), then any athlete could have a monopoly on basic aspects of a game (i.e. dribbling and shooting in basketball)

In contrast, proponents for allowing patent law to offer protection to sports moves and plays argue that such protection should only be afforded to maneuvers that "impart a useful result, such as faster races or longer jumps."<sup>79</sup> Other scholars present the idea that patent protection for sports methods would also have neither a significant, nor negative effect on the innovation of athletes because their salaries are derived from their individual performances.<sup>80</sup>

Furthermore, those who support giving patent protection to sports moves, methods, and plays argue that it must be acknowledged that our legal system has already afforded patent protection to some areas of sports. For instance, a patent has been issued for a particular golf

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<sup>79</sup>Kieff, *supra* note 8, at 767.

<sup>80</sup>Kukkonen, *supra* note 11, at 828.



putter and a method of putting.<sup>81</sup> The Patent Office has also granted a patent for “an exercising method.”<sup>82</sup> Additionally, patent protection has been afforded to particular games for their rules of play and other requirements, such as a method of playing golf on a reduced size course<sup>83</sup> and even to “arena football.”<sup>84</sup> Proponents for patent protection in the athletic industry argue that if such a new sport as “arena football” can receive patent protection, other professional and even recreational sports should as well.

There are three types of patents allocated: utility patents, design patents, and plant patents. This paper will only explore the requirements of utility patents as it is the most likely category sports moves or plays could potentially qualify under. Design patents protect the ornamental designs of articles of manufacture in order to foster the decorative arts. Plant patents are afforded to inventors who discover and invent a novel, non-obvious and distinctive variety of plant and subsequently reproduce it. Clearly, sports moves and plays have nothing to do with the underlying standards for design or plant patents. Accordingly, the potential for such maneuvers to receive patent protection must be examined under the requirements for utility patents.

There are four basic requirements for an invention to merit utility patent protection. First, the Patent Act provides that “[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the conditions and requirements of this title.”<sup>85</sup> This

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<sup>81</sup> U.S. Patent & Trademark Office, *United States Patent: 5,127,650* (visited March 25, 2010) <http://www.uspto.gov/patft> ; see also U.S. Patent & Trademark Office, *United States Patent: 5,377,987* (visited March 25, 2010); <http://www.uspto.gov/patft>

<sup>82</sup> U.S. Patent & Trademark Office, *United States Patent: 4,323,232* (visited March 25, 2010) <http://www.uspto.gov/patft> .

<sup>83</sup> U.S. Patent & Trademark Office, *United States Patent: 5,419,561* (visited March 25, 2010) <http://www.uspto.gov/patft> .

<sup>84</sup> U.S. Patent & Trademark Office, *United States Patent: 4,911,443* (visited March 25, 2010) <http://www.uspto.gov/patft> .

<sup>85</sup> 35 U.S.C. § 101 (2006).

general provision allows utility patents to be given if the requirements of the Act are met. The first underlying requirement of this provision is usefulness. It can be argued that sports moves done by athletes and the refinement of those moves through scripted plays help a player or team meet a useful end: winning. Furthermore, moves and plays serve the function of entertaining fans and the general public.

Arguably, under this general requirement, sports moves and plays could only attempt for patent protection as a “process.” The U.S. Supreme Court has defined a process as “a mode of treatment of certain materials to produce a given result. It is an act, or series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing.”<sup>86</sup> Furthermore, the U.S. Supreme Court expanded patentable subject matter to include “anything under the sun that is made by man.”<sup>87</sup> Accordingly, it would seem that sports moves and plays could easily qualify as a process as referenced by the Patent Act and as defined by the U.S. Supreme Court. Additionally, according to the U.S. Supreme Court, patent protection is given if the subject matter is neither a law of nature nor a natural phenomenon.<sup>88</sup> Accordingly, sports moves and plays must be determined not to be laws of nature of natural phenomena. Since sports plays and moves are arguably creative works of a human mind, it seems that they should meet the requirements set forth by the Supreme Court in *Diamond v. Diehr*.<sup>89</sup>

Second, the requirement of novelty (that the invention be new) must be met in order to receive patent protection.<sup>90</sup> However, it will arguably be hard for sports moves and plays to

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<sup>86</sup> *Cochrane v. Deener*, 94 U.S. 780 (1877).

<sup>87</sup> *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980).

<sup>88</sup> *Diamond v. Diehr*, 450 U.S. 175, 185 (1981).

<sup>89</sup> *Id.*

<sup>90</sup> 35 U.S.C. § 102 (2006).

establish novelty since they would need to be new and somehow different as compared to other plays or moves (prior art).

Third, the requirement of non-obviousness must be met.<sup>91</sup> For non-obviousness, the new process, machine, manufacture, or composition of matter must demonstrate “invention” representing more than ordinary skill in the art.<sup>92</sup> Arguably, it is not likely that certain moves and plays would not be obvious at the time of their invention to other athletes or coaches (persons of ordinary skill in the art).

Fourth, the enablement requirement must be met, which holds that an invention claimed for patent protection must be accompanied by a written description in “such full, clear, concise and exact terms as to enable any person skilled in the art to which it pertains” to name and use it.<sup>93</sup> Arguably athletes and coaches are able to easily disclose the workings of their moves and plays in enough detail to be informative to others working in the same field.

Accordingly, because it seems that sports moves and plays can only potentially meet three out of the five requirements for patent protection (usefulness, enablement, and patentable subject matter as a process), allowing such protection is not merited.

### **III. Trademark Protection**

With regard to trademark protection, the question that must be asked is whether or not such protection should be given to moves and plays that indicate a unique source of goods or services (i.e. a particular athlete or team). In general, trademarks serve to distinguish and identify the source of goods in commerce.<sup>94</sup> With that in mind, sports moves and plays should be afforded federal trademark protection because they are easily associated with particular players

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<sup>91</sup> 35 U.S.C. § 103(a) (2006).

<sup>92</sup> *Id.*

<sup>93</sup> 35 U.S.C. § 103 (2006).

<sup>94</sup> 15 U.S.C. § 1127 (2009).

and even specific teams. The importance of such fan identification of the sports moves and plays with a team's or athlete's games will increase the marketability of the games themselves.

The recent expansion of access to sports of all kinds has allowed for the increased commercialization in recent years of organized athletics in general, and of athletes' personas and performances in particular. Today's widespread coverage of sporting events ensures that athletes' triumphs become immediately known to a broad public, and this audience in turn becomes the target of advertising by companies wishing to associate their products or services in fans' minds with the athletes' performances.<sup>95</sup>

One example to note is of an athlete who might notice that his move is being used by another player to draw fans, undermine goodwill, and subsequently benefit economically from the original athlete's creativity.<sup>96</sup> This economic argument presents a strong case for allowing trademark protection.

However, the issue is whether or not the mark may become a recognizable sign by the public and whether or not service and goodwill will become associated with the mark. Athletes' moves and coaches' plays meet this test because moves and plays, like logos, portray famous and easily recognizable people. Sports moves and plays also indicate marketing, manufacturing and distribution sources.

Federal trademark protection is governed by the Lanham Act. The statute holds that a trademark is "any word, name, symbol, or device, or any combination thereof: 1) used by a person, or 2) which a person has a bona fide intention to use in commerce...to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown."<sup>97</sup> With these

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<sup>95</sup>Weber, *supra* note 19, at 326.

<sup>96</sup>Kieff, *supra* note 8, at 784.

<sup>97</sup> 15 U.S.C. § 1127 (2006).

federal requirements in mind, sports moves and plays should have the ability to become symbols used by athletes or coaches to identify their skills and talents in the athletic industry.

Furthermore, the U.S. Supreme Court has described what can qualify as a trademark: “the language of the Lanham Act is not restrictive. Accordingly, the breadth of trademark subject matter is very expansive, and includes just about any mark that can be used to indicate source and embody goodwill.”<sup>98</sup> Arguably, this very broad description of what may qualify for trademark protection seems to be able to allow sports moves and plays to be protected if such plays and moves can indicate their source (the athlete or coach) and embody goodwill (the spirit and competitive nature of sports).

The U.S. Supreme Court has also held trademark protection may be extended to descriptive marks that have obtained secondary meaning among the relevant consumers.<sup>99</sup> In presenting an argument for allowing trademark protection based on such secondary meaning for sports moves and plays, it is useful to consider examples of particular plays and moves. The “Flying-V”<sup>100</sup> hockey play is well known by many generations who enjoyed the *Mighty Ducks* movie trilogy and associated the move with the youth hockey team, the Mighty Ducks. Ozzie Smith, a player for the St. Louis Cardinals from 1982-1996 was very well known for performing back-flips on special occasions while running out to his shortstop position.<sup>101</sup> Babe Ruth, playing for the New York Yankees, was known to both fans and non-fans of baseball for “calling his shot” before blasting a home run hit in the 5th inning of Game 3 of the 1932 World Series.<sup>102</sup> In

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<sup>98</sup> *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 162 (1995).

<sup>99</sup> *Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc.*, 973 F.2d 1033, 1041 (2d. Cir. 1992).

<sup>100</sup> See Appendix Figure 1. <http://my350z.ru/index.php?key=flyingv> .

<sup>101</sup> See Appendix Figures 2-4. Mel Antonen, *My Hall votes go to Ozzie Smith, Carter*, USA TODAY, Jan. 7 2002, available at <http://www.usatoday.com/sports/baseball/comment/antonen/2002-01-07-antonen.htm> .

<sup>102</sup> See Appendix Figure 5-6. *Babe Ruth the PR Guy. How he described his “called shot.”* <http://www.russpage.net/babe-ruth-the-pr-guy-how-he-described-his-called-shot/> .

the 1954 World Series, Willie Mays was playing in shallow center field and made an incredible on-the-run, over-the-shoulder catch on the warning track to make the defensive out; this move has come to be known as “The Catch” or “Basket Catch.”<sup>103</sup> Lastly, perhaps one of the most well-known signature moves in sports is Michael Jordan’s “Air Jordan” slam dunk.<sup>104</sup>

Arguably, the aforementioned plays and moves have obtained secondary meaning amongst both the general public and sports fans. With these moves, the question that arises is what happens when another athlete or coach tries to perform or even associate himself or herself with the original athlete’s moves or coach’s play? If LeBron James were to perform the “Air Jordan” dunk<sup>105</sup>, which has subsequently become a logo for many Nike products, or even something substantially similar to it, would fans and consumers be confused that James might be advertising for or even sponsored by Nike? This confusion is certainly a possibility, and one that can be avoided if trademark protection were afforded to sports moves and plays. Therefore, our legal system must develop itself so that federal trademark protection may afford protection to sports moves and plays that indicate a specific athlete, team, or coach.

#### **IV. Conclusion**

Our modern athletic industry has progressed significantly. There is no doubt that the sports moves and plays discussed in this paper reflect a growing creative athleticism that should be protected by intellectual property law. As such, federal copyright law should be changed to incorporate sports moves and plays as a category of protected works.

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<sup>103</sup> See Appendix Figure 7. Jim McClure. *York, Pa.'s, Vic Wertz made baseball history - but there's a catch* Nov. 1, 2009, available at <http://www.yorkblog.com/yorktownsquare/york-sports/>.

<sup>104</sup> See Appendix Figure 8. Sept. 8, 2009. <http://thesportsbrareports.wordpress.com/2009/09/08/top-15-basketball-poster/>.

<sup>105</sup> See Appendix Figures 9-10. [http://www.jordanzone.com/about/jumpman\\_logo.html](http://www.jordanzone.com/about/jumpman_logo.html) and <http://theshoegame.com/articles/lebron-drops-out-of-slam-dunk-contest.html>.

However, with the proposed incorporations for intellectual property law, each case of possible infringement should be determined and analyzed on a case-by-case basis. Many plays and moves are innovative and creative on different levels. Some moves and plays are very innovative, but do little to change a particular sport completely and do not have a groundbreaking impact. Therefore, the scope of protection given via trademark and copyright law should vary accordingly based on the substantial innovation used in creating or re-developing a play or move, as well as the effect the newly imagined play or move has on the specific sport. The duration of copyright and trademark protections in athletic moves and plays should be significantly shorter than what is currently afforded under the Copyright Act and the Lanham Act. Both copyright and trademark protection should have a duration of fifteen years, with options to apply for renewal based on whether or not the move or play is still significant to the particular sport. In the same way, derivative works of an underlying copyrighted move or play will also get a fifteen-year copyright in the new and original aspect the inventor added.

In order to maintain the competitive spirit of athletic games, copyright and trademark violations that may occur during an athletic event should not be enforced while a game is in play. Rather, notes should be taken on which athletes or coaches potentially infringe on existing copyrighted and trademarked moves or plays. When an infringement occurs, the infringer must take reasonable measures to attribute and make known the source of the move he copied. This could potentially be done in post-game press conferences, in interviews with TV and radio stations, or even on an athlete's or coach's Twitter, blog, or social networking website.

Where infringement occurs, there should be a standard penalty fee that fluctuates based on the income and profession of the infringer. For instance, if a young high school basketball player performs an "Air Jordan" slam dunk evocative of Michael Jordan and does not make

reasonable efforts to attribute the move to Michael Jordan, he will have to pay a fine proportionate to his income and status as a basketball player. However, in all cases it will be up to the copyright or trademark holder to bring infringement claims. Such claims under the recommended intellectual property adaptations should only be allowed to be raised by the athlete or coach that originated the move or play. However, if a player or coach wishes, they shall still be permitted to assign copyrights and trademark rights to another. For example, these rights may be assigned to either an athlete's or coach's family, or even to a particular team the individual plays or coaches for. By retaining the rights to transfer that currently exist in copyright and trademark law, this will ease the transition in adapting the new application of copyright and trademark protection to athletic moves and plays.

However, one large concern of opponents to these proposed changes in copyright and trademark law is the issue of accidental copying. Critics may argue that it would be impossible to reconcile the fact that people may not know they are performing someone else's move or play, or even may perform the maneuver or scripted play spontaneously, in the "heat of the game." Accidental copying is a reality of the vast sports industry, not only on a domestic level but also globally. Accordingly, accidental copying would remain subject the penalties of infringement, but that only nominal damages be imposed. Examples of nominal damages may be to pay a very small fee, such as \$1 for every incident of accidental copying. Given this small nature of these damages, it is likely that copyright and trademark holders would not choose to raise claims against accidental copiers, which would thus protect those who unknowingly repeat another's protected move or play.

Another way to ensure that the competitive nature of athletic games be maintained is to implement licensing fees. If a player or coach wishes to adapt a particular move or play into their



repertoire, he should have the option to pay a compulsory licensing fee. The licensee must provide notice and a fee to the original copyright or trademark holder. Again, this paper proposes that the licensing fee be proportionate to the significance and relevance of the particular move or play in the particular sports. Additionally, a player or coach should be afforded the option to contract around infringement by bargaining with the original innovator-player or innovator-coach himself.

The practical and real world effects that would stem from implementing intellectual property protection in athletics also must be taken into consideration. Many critics are concerned that having copyright and trademark protection for sports moves and plays would hinder the competitive elements that are essential to athletic games. These opponents may ask whether having such protection is practical; is it realistic to expect that players or coaches, either amateur or professional, would stop themselves before performing another's copyrighted move or play? Would athletes and coaches who feel that their specific move or play is infringed even take action to file infringement claims? Based on existing copyright and trademark protections, innovators who are athletes and coaches would indeed follow through on any infringement of their creative works. While it may, however, not be practical for athletes to restrain and limit specific moves used in games due to fears of violating intellectual property laws, the proposed solution of implementing licensing fees and proportionate penalties on infringers will be an effective way to regulate copyright and trademark protection that will not deter athletic competition.

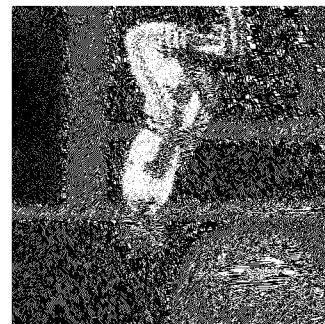
Developing copyright and trademark law in this way would reward the effort by both athletes and coaches. Protection would also incentivize, especially economically, efforts by athletes to increase their athletic abilities in order to be able to perform more innovative and

groundbreaking moves. Intellectual property law should be developed to include sports moves and plays because providing such protection is essentially the same as protecting other art forms. Allowing such copyright and trademark protection would also help deter the negative effects of new technology allowing opponents to dissect the plays and moves of others. Without a doubt, evolving intellectual property law to afford both copyright and trademark protection to athletic moves and plays would provide an extra level of protection for the hard work and creative effort that goes into developing sports moves and plays by athletes and coaches serves to the great benefit of society.

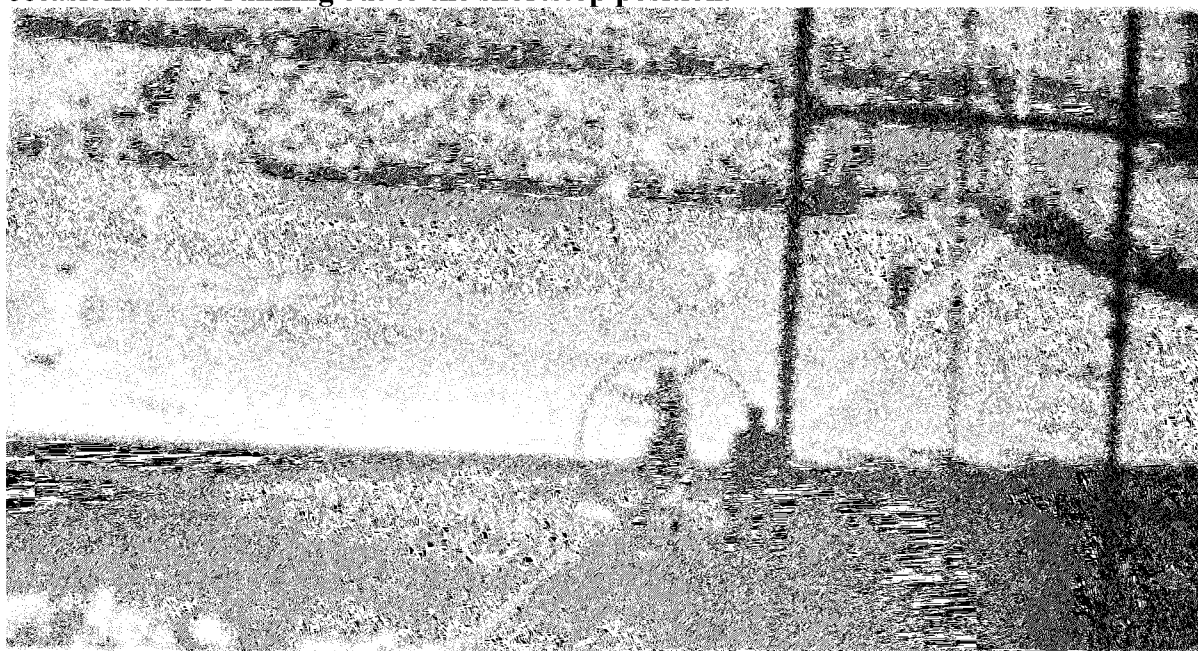
### **Appendix of Images**



**Figure 1. The Might Ducks' "Flying-V" hockey formation.**



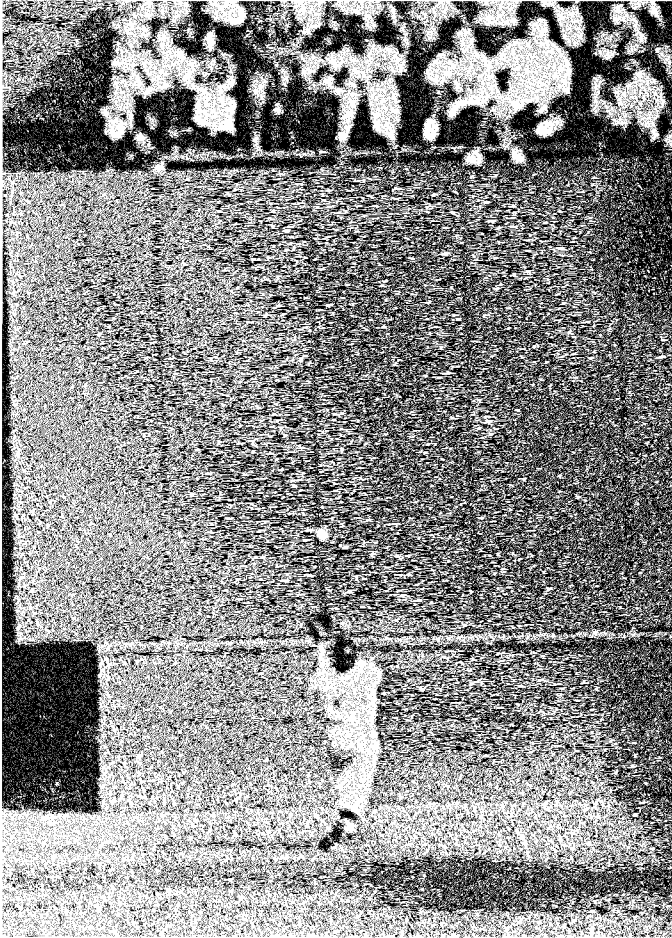
**Figures 2-4.** Ozzie Smith (St. Louis Cardinals 1982-1996) performed back-flips on special occasions while running out to the shortstop position.



**Figure 5.** Babe Ruth “calling his shot” (home run hit on October 1, 1932 in the MLB World Series).



**Figure 6. Babe Ruth “calling his shot.”**



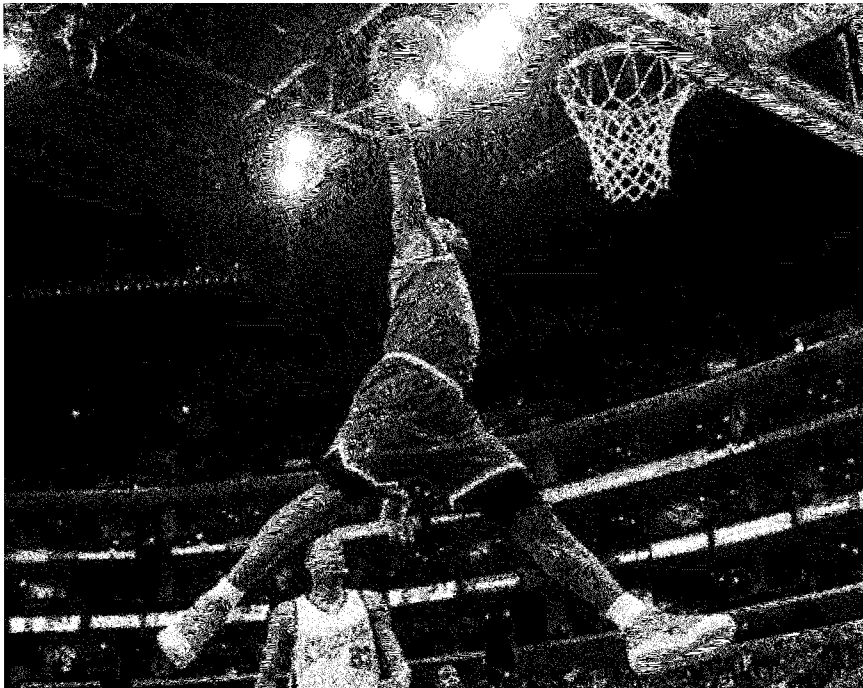
**Figure 7.** The “Basket Catch” by Willie Mays (Sept. 29, 1954, MLB World Series).



**Figure 8.** Michael Jordan slam dunk (1988 NBA Slam Dunk Contest).



**Figure 9.** Nike “Jumpman” logo (used to promote Michael Jordan merchandise).



**Figure 10.** LeBron James slam dunk.