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In a League of Its Own: Should Intellectual Property Law Protect Sports Moves?

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— Note —

In a League of Its Own: Should Intellectual Property Law Protect Sports Moves?

Abstract

The most famous sports moves rattle the pop culture zeitgeist. Commemoration of these plays can solidify athletes as household names. Yet innovative moments are not often afforded any type of intellectual property protection. This Note categorizes sports moves to determine how each pushes the borders of different types of intellectual property protection. While patents, copyright, and trademarks have historically provided some protection to past moves, none can provide a stable mechanism for future moves. Additionally, enforcement under the right of publicity and trade secrets often fails to fill in the gaps. This Note seeks to explore whether enforcement truly matters by analogizing sports moves to "negative spaces": areas where intellectual property protection does not exist. This analysis aims to provide insights as to whether intellectual property protection of sports moves is truly valuable to future innovation.

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INTRODUCTION

In July 2019, the National Basketball Association partnered with Dapper Labs to create a "revolutionary new experience in which jaw-dropping plays and unforgettable highlights become collectibles that you can own forever."[1] This venture, known as NBA Top Shot, allows users to buy a digital clip, known as a non-fungible token (or "NFT"), of a famous NBA moment—essentially a one-of-a-kind digital trading card.[2] NBA Top Shot advertises that "[n]ow you can make those plays yours, all officially licensed by the NBA and minted on the blockchain in limited supply."[3] Each NFT varies in rarity; some plays sell up to 10,000 copies while others are sold to only one user.[4]

Within five months of its launch, there were more than 800,000 registered accounts with 338,000 users owning at least one NFT on the platform.[5] With over $49 million in sales on the NBA Top Shot app and $460 million in sales on the secondary market, the NFT market was clearly a slam dunk.[6]

Notably, owners of the NFTs do not have any ownership or rights over the moment, but instead they own "a digital certificate, kind of

1. Kyle Irving, *What Is NBA Top Shot? Explaining the Blockchain NBA Highlight Collectables*, NBA (Apr. 12, 2021) (quoting Dapper Labs CEO Roham Ghargozlou), https://ca.nba.com/news/what-is-nba-top-shot-explaining-the-blockchain-nba-highlight-collectables/18nram5ye1ub01hres3lkk3xvd#:~:text=NBA%20Top%20Shot%20is%20a,%2C%20officially%2Dlicensed%20video%20highlights [https://perma.cc/K8RY-AHKR].

2. Jabari Young, *People Have Spent More Than $230 Million Buying and Trading Digital Collectibles of NBA Highlights*, CNBC, https://www.cnbc.com/2021/02/28/230-million-dollars-spent-on-nba-top-shot.html [https://perma.cc/AT26-YKBZ] (Mar. 2, 2021, 8:22 AM).

3. *Collect Epic NBA Moments*, NBA TOP SHOT, https://nbatopshot.com/about [https://perma.cc/XDA7-4ZCG (last visited Oct. 26, 2021).

4. *NBA Top Shot Trading Guide*, NFT TRADING ACAD., https://nfttradingacademy.com/pages/nba-top-shot-trading-guide [https://perma.cc/J6VP-G87J] (last visited Oct. 29, 2021).

5. Brett Knight, *NBA Top Shot Mints a Unicorn: How an Ethereum Competitor Cashed in on the NFT Craze*, FORBES (Mar. 30, 2021, 9:01 AM), https://www.forbes.com/sites/brettknight/2021/03/30/nba-top-shot-dapper-labs-nft-funding/?sh=32969e6467ae [https://perma.cc/23W4-YC84].

6. *Id.* Part of the NBA Top Shot business model is to capitalize on the secondary market as well. Dapper Labs collects 5% of each transaction after first sale. *Id.* Despite the overall NFT-market slowdown in early 2022, Top Shot NFT sales increased "some 70%" according to one report. Langston Thomas, *A Guide to NBA Top Shot NFTs: Videos are the New Trading Cards*, NFT NOW (Apr. 13, 2022), https://nftnow.com/guides/nba-top-shot-guide/ [https://perma.cc/2DQM-W8L9].

like a digital barcode, which certifies that a person owns that specific video clip."[7] Nonetheless, NFTs show how large the potential market for individual sports moves could become, if they can be properly protected. The law has long held that "if [certain works] command the interest of any public, they have a commercial value . . . and the taste of any public is not to be treated with contempt."[8] If intellectual property rights are designed to protect ideas of value, and sports moves have been shown to have value, shouldn't sports moves be protectable?

There are two reasons why athletes may want to obtain legal protection for their movements. First, many athletes have a short window of "primary earning years"[9] and as a result, athletes often try to develop their personal brands off the field as a source of revenue.[10] Cognizant that any moment could result in a career-ending injury or that they could be abandoned by a team, smart athletes adopt long-term strategies to ensure financial safety.

Second, outside of immediate financial concerns, athletes may also want to protect their moves for competitive reasons. Because intellectual property rights encompass a right to exclude others,[11] an athlete with intellectual property rights on a move could prevent their competitors from using it in competition or require their competitors to license the move from them.[12]

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7. Cardiff Garcia & Stacey Vanek Smith, *The $200k NBA NFT*, NPR (Mar. 9, 2021, 7:55 PM), https://www.npr.org/2021/03/09/975450173/the-200k-nba-nft [https://perma.cc/EXL4-ACJX].

8. Wm. Tucker Griffith, Comment, *Beyond the Perfect Score: Protecting Routine-Oriented Athletic Performance with Copyright Law*, 30 CONN. L. REV. 675, 720 (1998) (first alteration in original) (quoting Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 252 (1903)).

9. Laura Depta, *Ridiculous Sports Trademarks*, BLEACHER REP. (Mar. 11, 2015), https://bleacherreport.com/articles/2390759-ridiculous-sports-trademarks [https://perma.cc/7JCH-HQM5].

10. *See* Darren Heitner, *How NFL Draft Prospects Build Their Personal Brands*, FORBES (Jan. 23, 2013, 9:06 AM), https://www.forbes.com/sites/darrenheitner/2013/01/23/how-nfl-draft-prospects-build-their-personal-brands/?sh=713211bf6321 [https://perma.cc/23TV-LU5K] (discussing how NFL draft prospects aim to develop an identity off the field in order to make themselves more valuable to teams and future audiences).

11. Shubha Ghosh, *The Market as Instrument: A Response to Professor Harrison*, 59 SMU L. REV. 1717, 1731–32 (2006) ("[T]his right to exclude translates into the exclusive right to make, use, sell, offer to sell, or import for patent law into the exclusive right to copy, distribute, adapt, publicly perform, publicly display, and transmit digitally for copyright law and into the assorted set of rights under trademark law and state intellectual property regimes.").

12. Derek Bambauer, *Legal Responses to the Challenges of Sports Patents*, 18 HARV. J.L. & TECH. 401, 403 (2005).

While previous works have discussed the limits of legal protection for sports moves,[13] there have been rapid changes in intellectual property law within the past twenty years. In 2011, the Leahy-Smith America Invents Act recodified patentability requirements.[14] Copyrightable subject matter has changed.[15] The trademark system has become an increasingly popular way for athletes to protect their personal brands.[16] While publicity-rights cases historically delineate when an athlete can exclude others from using their identity, identity is a continually evolving concept.[17] Finally, in the post-*Moneyball* era,[18] sports teams themselves are harboring "increasingly sophisticated" information as trade secrets.[19] In light of the changing landscape of both intellectual property law and the sports industry, it is ripe to revisit the extent to which intellectual property rights can protect sports moves.

This Note analyzes whether sports moves are or should be legally protectable under the different mechanisms of intellectual property. Part I proposes four different categories of sports moves and explains the rationale for protecting each. Part II analyzes whether each type of intellectual property could provide a basis for the protection of sports moves. Surprisingly, each type of intellectual property right shows some

13. *See, e.g.*, *id.* (addressing concerns related to patented sports moves); Proloy K. Das, *Offensive Protection: The Potential Application of Intellectual Property Law to Scripted Sports Plays*, 75 IND. L.J. 1073 (2000) (analyzing whether different types of intellectual property can protect scripted sports plays); Griffith, *supra* note 8, at 710 (discussing whether copyright law can protect "routine-oriented athletic performance").

14. Pub. L. No. 112–29, 125 Stat. 284 (2011).

15. *Challenges in the Enforcement of Protection of Copyrights Laws in the Digital Era*, L. GUPSHUP (Dec. 6, 2017), https://lawgupshup.com/2017/12/challenges-in-the-enforcement-of-protection-of-copyrights-laws-in-the-digital-era/ [https://perma.cc/297R-D29C].

16. Alexandra J. Roberts, *Athlete Trademarks: Names, Nicknames, and Catchphrases*, *in* THE OXFORD HANDBOOK OF AMERICAN SPORTS LAW 471, 471 (Michael A. McCann ed., 2018) ("Athletes at all stages of their careers are increasingly attempting to register their names, nicknames, catchphrases, and fan slogans as federal trademarks.").

17. *See id.* at 487.

18. *Moneyball* was a 2011 film based on a 2003 book of the same title written by Michael Lewis loosely based on how the Oakland Athletics used sports analytics to help produce game-winning strategies. *See* Matt Goldberg, *For All Its Stats and Numbers, 'Moneyball' Is About the Enduring Romanticization of Sport*, COLLIDER (Apr. 1, 2021), https://collider.com/why-moneyball-is-one-of-the-best-sports-movies/ [https://perma.cc/S6ZG-WBGT]; *see also* MICHAEL LEWIS, MONEYBALL: THE ART OF WINNING AN UNFAIR GAME (2003).

19. *See* Roger Allan Ford, *Trade Secrets and Information Security in the Age of Sports Analytics*, *in* THE OXFORD HANDBOOK OF AMERICAN SPORTS LAW, *supra* note 16, at 491, 491–92, 500 (describing how trade secrets can protect new innovations in sports analytics).

evidence to suggest future sports moves could be protected under intellectual property's existing structure. Part III explains why there exists a general discomfort with protecting sports moves and discusses the effects on competition if sports moves were to be legally protected. Finally, analogizing to "negative spaces"—other areas that thrive without intellectual property protection—reveals that the argument for the specialized protection of sports moves may be unnecessary.

I. A TAXONOMY OF SPORTS MOVES

"Sports moves" encompass a wide range of potential intellectual property assets. Because sports moves can be enormously valuable, and because there is large variety of moves, it is useful to categorize the moves in a way that predicts whether they can be protected and how far that protection would extend. For instance, a unique moment in sports history may receive different protections than a technique repeated by an athlete over and over. While there are certainly many different ways to divide sports moves, this Note categorizes moves by frequency and purpose. In doing so, it recognizes four distinct types of sports moves: Signature Styles, Singularities, Scripted Plays, and Celebratory Movements.[20]

A. Signature Styles

The first of these categories is Signature Styles. Signature Styles are moves that one particular athlete is known for executing first or can execute better than others. These moves are often frequently repeated by the athlete. If the motion is particularly distinct or it produces excellent results, it will often lead to notoriety for the athlete. As noted by one sports reporter, "[t]he greatest of the great don't just have a style. They have a signature, an indelible stamp that signifies exactly who they are."[21]

One example of a Signature Style is the Fosbury Flop. In 1963, Dick Fosbury was a down-on-his-luck high jumper who frequently lost at track meets.[22] Struggling to adjust to the standard forward-facing jump his competitors used (known as the "Western roll" or "straddle"), Fosbury slowly applied some engineering know-how that kept the

20. The author created these terms to facilitate the discussion in this Note.

21. J.A. Adande, *Secrets of the Skyhook*, ESPN, http://www.espn.com/nba/features/kareem [https://perma.cc/C5CJ-R33L] (last visited Oct. 31, 2021).

22. Tom Goldman, *Dick Fosbury Turned His Back on the Bar and Made a Flop a Success*, NPR (Oct. 20, 2018, 8:12 AM), https://www.npr.org/2018/10/20/659025445/dick-fosbury-turned-his-back-on-the-bar-and-made-a-flop-a-success [https://perma.cc/6GRB-CUEL].

body's center of mass below the bar and perfected a new belly-up technique.[23] While many considered the move to be "weird" and most were skeptical of the technique, Fosbury won the gold medal in the Olympics just five years later.[24] What was once a quirky move became the norm within two decades.[25]

Signature Styles often become embedded in an athlete's personal brand. Moves like the Fosbury Flop, the Ali Shuffle in boxing,[26] and the Axel Jump in figure skating[27] immediately evoke the athletes famous for the moves. The Biles (a double-twisting, double backflip) and the Biles II (a triple-twisting, double backflip) are attributed solely to American gymnast Simone Biles—the only female gymnast who has

23. *See, e.g.*, Brad Fuqua, *Fosbury Takes Track and Field to New Heights*, GAZETTE TIMES (Mar. 29, 2014), https://www.gazettetimes.com/news/local/fosbury-takes-track-and-field-to-new-heights/article_17dcc0d8-b6cc-11e3-850a-0019bb2963f4.html [https://perma.cc/6LPU-TB7D] (recounting the experience, Fosbury said "I knew I had to change my body position, and that's what started first the revolution, and over the next two years, the evolution."); Rose Eveleth, *The Physics of the Olympic High Jump*, SCI. AM. (Aug. 1, 2012), https://www.scientificamerican.com/article/olympic-high-jump-physics/ [https://perma.cc/S9N3-96PW].

24. Goldman, *supra* note 22.

25. *See id.*

26. *See* George Willis, *Anatomy of the Ali Shuffle: The Dizzying, Mesmerizing Dance*, N.Y. POST (June 4, 2016, 5:35 PM), https://nypost.com/2016/06/04/anatomy-of-the-ali-shuffle-the-dizzying-mesmerizing-dance/ [https://perma.cc/W8TB-6DS8] (outlining the steps and mannerisms Muhammad Ali used in his signature Ali Shuffle). Although Ali popularized the move, it was instead heavyweight Jersey Joe Walcott who had invented the move. NANCY J. HAJESKI, ALI: THE OFFICIAL PORTRAIT OF "THE GREATEST" OF ALL TIME 76 (2013).

27. ELLYN KESTNBAUM, CULTURE ON ICE: FIGURE SKATING AND CULTURAL MEANING 285 (2003) (explaining Axel Paulsen's contribution to figure skating).

landed either move in competition.[28] Moves like Derek Jeter's Jump Throw[29] and Kareem Abdul-Jabbar's Sky Hook[30] also make the list.

Scholars are split on whether these moves should be afforded intellectual property protection. Those in favor argue that these moves are often innovative, forever changing the landscape of the sport.[31] The high jump was never the same after Dick Fosbury. Today, every high jumper uses the Fosbury Flop.[32] Yet opposite these arguments, critics argue against protection of Signature Styles as they would denigrate the integrity of the sport by giving an unfair advantage in competition.[33] Had Axel Paulson received exclusive rights to the famous Axel jump in ice

28. Biles is currently the only gymnast in the world who can perform the Biles. Because of the difficulty of the move, the International Gymnastic Federation gave the move a lower rating because the "move carries increased risks for gymnasts." Colin Seale, *If You Can't Beat Them, Change the Rules: "The Biles" and Unfair Barriers for Excellence in America*, FORBES (Oct. 8, 2019, 9:06 AM), https://www.forbes.com/sites/colinseale/2019/10/08/if-you-cant-beat-them-change-the-rules-the-biles-and-unfair-barriers-for-excellence-in-america/?sh=624b9157160b [https://perma.cc/P5KH-ASCW]; *see also* Shanna McCarriston, *Simone Biles Has Two New Signature Moves that Will Be Named After Her Following World Championships Performance*, CBS SPORTS (Oct. 8, 2019, 11:26 AM), https://www.cbssports.com/general/news/simone-biles-has-two-new-signature-moves-that-will-be-named-after-her-following-world-championships-performance/#:~:text=Vault%20%2D%20%22Biles%22%3A%20Yurchenko,(Double%2Dtwisting%20double%20backflip [https://perma.cc/KTW9-GBNZ].

29. Kevin Kernan, *The What, Where and How of Jeter's Iconic Jump Throw*, N.Y. POST (Sept. 24, 2014, 3:32 PM), https://nypost.com/2014/09/24/the-what-where-and-how-of-jeters-iconic-jump-throw/ [https://perma.cc/TPH6-EKAA].

30. Adande, *supra* note 21.

31. *See, e.g.*, 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, 324 (1999). ("[T]here now exists a large and ever-growing population of athletes . . . developing creative new moves on a daily basis."); Jeffrey A. Smith, Comment, *It's Your Move—No, It's Not! The Application of Patent Law to Sports Moves*, 70 U. COLO. L. REV. 1051, 1082 (1999) ("[S]ociety shares an interest in promoting athletic innovation that improves the overall quality of sports."); Carl A. Kukkonen, III, *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, 829 (1998) (acknowledging that certain moves can be "innovative sports methods").

32. Goldman, *supra* note 22; *see also* Smith, *supra* note 31, at 1072 (1999) ("[T]oday there is not a high jumper in the world who does not use the Fosbury style.").

33. *See* Guiliana R. Garcia, *He Shoots, He Scores . . . and Receives Copyright Protection? How the Current State of Intellectual Property Law Fumbles with Sports*, 11 U. DENV. SPORTS & ENT. L.J. 81, 85 (2011) (citing Das, *supra* note 13, at 1076).

skating back in 1882, sixty years later, Dick Button may not have ever completed the first Double Axel jump in a competition.[34]

B. Singularities

It was Game Five of the 1989 Eastern Conference first-round NBA playoffs. The Cleveland Cavaliers and Chicago Bulls had split the first four games, leaving each team's fate to the final game.[35] The fans were on the edge of their seats for the entire night. In the final minute alone, the Cavaliers and Bulls traded the lead six times.[36] With three seconds left and the Cavaliers ahead by one point, Bulls player Brad Sellers passed teammate Michael Jordan the ball. What happened next would become sports history. Jim Durham, announcing live on the Bulls' Radio Network described the scene: "Here's Michael at the foul line, the shot on Ehlo—*Good! The Bulls win it!* . . . 101–100! 20,273 in stunned silence here in the Coliseum. . . . sixteen years, this is the greatest series I've ever seen!"[37] This remarkable buzzer-beater became known as "The Shot."[38]

"The Shot" is an example of a Singularity. Singularities are moves that are performed one time, sometimes even a once-in-a-lifetime event. These moves are often remembered by fans because of the extraordinary circumstances and context surrounding the move. In Jordan's case, it was that his single shot changed the outcome of the playoffs. Other examples include Willie Mays's celebrated over-the-shoulder catch, simply known as "The Catch," in the 1954 World Series[39] and Bobby

34. Scott Hamilton, *Figure Skating*, BRITANNICA, https://www.britannica.com/sports/figure-skating [https://perma.cc/8NFM-HX7A] (last visited Oct. 31, 2021). Today, only a few female figure skaters can do a Triple Axel Jump. *See* D'Arcy Maine, *Tonya Harding and the Seven Other Women Skaters Who Have Successfully Landed the Triple Axel*, ESPN (Nov. 29, 2017), https://www.espn.com/espnw/culture/story/_/id/21609322/tonya-harding-seven-other-women-skaters-successfully-landed-triple-axel [https://perma.cc/G87J-H6N3].

35. Drew Hammell, *Remembering "The Shot,"* AIR JORDAN (May 2, 2019), https://air.jordan.com/card/remembering-the-shot/ [https://perma.cc/8XUD-A8UF].

36. *Id.*

37. Jason Woullard, *TSL NBA Playoffs Throwback Attack: "The Shot"*, THE SHADOW LEAGUE (May 7, 2014), https://theshadowleague.com/tsl-nba-playoffs-throwback-attack-the-shot/ [https://perma.cc/3QVX-DTUV]; Eric Maltbia, *"The Shot." Alternate View of Michael Jordan's Game Winner w/ Radio Call*, YOUTUBE (July 8, 2017), https://youtu.be/E8rfjwXzPpU.

38. *Id.*

39. This catch consisted of Mays running deep into center field and catching the ball with his back to the infield. It was so influential, it simply became known as "*The* Catch." Gregory H. Wolf, *September 29, 1954: Willie Mays Makes the Catch; Dusty Rhodes Homer Wins Game One*, SOC'Y FOR AM. BASEBALL RSCH., https://sabr.org/gamesproj/game/1022

Thomson's National League pennant-winning home run now known as the "Shot Heard 'Round the World."[40]

Singularities can represent a branding element as athletes become known for moments of exceptionalism. From "Havlicek stole the ball"[41] to "Down goes Frazier,"[42] these moves are remembered by fans, many of whom are able to recount exactly where they were when they saw the moves live. Those in favor of intellectual property protection believe the moves' fame justify allowing the performing athlete to monetize the movement with legal protection.[43]

On the contrary, those against protection argue that these moves are not exactly innovative, but rather the athlete playing the game well.[44] In fact, from a fan's perspective, it would be foolish to give the athlete exclusive rights to the move as they would prefer to see moments of greatness as often as possible. Michael Jordan's "The Shot" is not the only memorable buzzer-beater in NBA history.[45] In fact, it's

eptember-29-1954-willie-mays-makes-the-catch-dusty-rhodes-homer-wins-game-one/ [https://perma.cc/YF2U-DYU3] (last visited Oct. 26, 2021).

40. *See* Tom Jackman, *Baseball's Cheating History Includes Its Most Famous Home Run, the 'Shot Heard 'Round the World'*, WASH. POST (Feb. 13, 2020), https://www.washingtonpost.com/history/2020/02/13/giants-cheating-home-run-1951/ [https://perma.cc/HC7X-2DXH].

41. In the final seconds of the 1965 NBA Eastern Conference Finals, Boston Celtics player John Havlicek stole the ball from the Philadelphia 76ers, advancing the Celtics to the Finals (which they later won). Johnny Most, the Celtics' announcer, called the play: "Havlicek steals it! Over to Sam Jones! Havlicek stole the ball! It's all over! It's all over! Johnny Havlicek is being mobbed by the fans!" Alex Johnson, *John Havlicek, Celtics Legend Who 'Stole the Ball!' Dies at 79*, NBC NEWS (Apr. 25, 2019, 11:08 PM), https://www.nbcnews.com/news/sports/john-havlicek-celtics-legend-who-stole-ball-dies-79-n998771 [https://perma.cc/GH9G-8G6Z].

42. In the 1973 Joe Frazier vs. George Foreman fight, Frazier was defending his Heavyweight Crown. During the first round, Foreman was able to land several devastating blows, resulting in ABC News announcer Howard Cosell to utter the now-famous lines: "Down goes Frazier! Down goes Frazier!" TJ Rives, *Nearly 50 Years Ago– Down Goes Frazier!*, BIG FIGHT WEEKEND (Jan. 22, 2021), https://bigfightweekend.com/news/nearly-50-years-ago-down-goes-frazier/ [https://perma.cc/E87Z-2D9Y].

43. *See infra* Part II.

44. *See* Garcia, *supra* note 33, at 85 ("[S]ome may argue that sports moves and plays do little, if nothing, to benefit our society.").

45. A buzzer-beater refers to a shot that takes place before the end of the period of play, but does not enter the basket until after the clock expires. Mike Lynch, *For the Win! ... NBA's All-Time Leaders in Game-Winning Buzzer-Beaters*, RINGER (Feb. 18, 2020, 7:05 AM), https://www.theringer.com/nba/2020/2/18/21141286/nba-buzzer-beaters-leaders-history. [https://perma.cc/4A5V-4P7A] (analyzing which players have made the most buzzer-beaters in NBA history).

not even the only *playoff-ending* buzzer-beater.[46] Nor was Willie Mays's "The Catch" the only over-the-shoulder catch made by an outfielder.[47] Bobby Thomson's "Shot Heard 'Round the World" was one of many playoff-ending walk-off home runs.[48] These athletes did not invent these plays. Instead, there were similar moments of greatness. This can make it difficult, if not impossible, for Singularities to obtain legal protection, as nothing new is being developed.

C. Scripted Plays

Scripted Plays are pre-planned movements. These can involve anyone from a single athlete to an entire team. Typically, Scripted Plays are limited by the sport. Largely reactionary sports like baseball, where all offense results from a pitched ball from the defense, have few

46. As a more recent example, Toronto Raptor's Kawhi Leonard made a buzzer-beater shot in Game 7 of the 2019 Eastern Conference Semifinals to eliminate the Philadelphia 76ers. Andy Nesbitt, *Kawhi Leonard's Bouncing Buzzer-Beater Had Everyone in Absolute Awe*, USA TODAY (May 12, 2019, 9:56 PM), https://ftw.usatoday.com/2019/05/sixers-raptors-game-7-kawhi-leonard-buzzer-beater [https://perma.cc./9GRC-9MPK].

47. Thomas Harrigan, *Remembering Some of the Greatest OF Grabs*, MLB (July 22, 2019), https://www.mlb.com/news/greatest-outfield-catches-in-baseball-history [https://perma.cc/4G57-98RB]

48. Tom Jackman, *Baseball's Cheating History Includes Its Most Famous Home Run, the 'Shot Heard 'Round the World'*, WASH. POST (Feb. 13, 2020) https://www.washingtonpost.com/history/2020/02/13/giants-cheating-home-run-1951/ [https://perma.cc/L2RP-SCCU]. Some famous playoff-ending walk-off home runs include: Bill Mazeroski's World Series-winning home run in the ninth inning of Game 7 in 1960 to break the tie between the Pittsburgh Pirates and the New York Yankees, Chris Chambliss's walk-off home run in the ninth inning of Game 5 of the 1976 American League Championship Series against the New York Yankees, and Joe Carter's 1993 World Series-winning home run in the ninth inning of Game 6. *See 50 Years Ago Today, Bill Mazeroski Shocked the World*, BLEACHER REP. (Oct. 12, 2010), https://bleacherreport.com/articles/490011-50-years-ago-today-bill-mazeroski-shocked-the-world [https://perma.cc/C6VY-5MLV]; Joseph Wancho, *October 14, 1976: Chris Chambliss' Home Run Delivers Pennant to the Bronx*, SOC'Y AM. BASEBALL RSCH., https://sabr.org/gamesproj/game/october-14-1976-chris-chambliss-home-run-delivers-pennant-to-the-bronx/ [https://perma.cc/F595-M6PK]; Evan Rosser, *Touch 'Em All, Joe!*, SPORTSNET, https://www.sportsnet.ca/baseball/mlb/joe-carter-home-run-blue-jays-1993-world-series/ [https://perma.cc/3CPR-3DM9] (last visited Nov. 8, 2021).

Scripted Plays.[49] But in a sport like football, nearly all offense is the result of Scripted Plays.[50]

One commentator describes legal protection of Scripted Plays as "both logical and ludicrous."[51] Scripted Plays mirror other types of protected property such as choreographed works,[52] so it seems fair to award them protection as well. Scripted Plays are often the product of creative innovation,[53] the very sort that intellectual property law is designed to protect. However, allowing the creator to exclude others would denigrate competition within a sport.[54] Recognizing these dynamics, there is certainly a question as to whether legal protection of Scripted Plays is valuable. Despite these concerns, as discussed below, Scripted Plays may lend themselves well to trade-secret protection.[55]

D. Celebratory Movements

Long after his football career, Ickey Woods is remembered for his iconic touchdown dance, the Ickey Shuffle.[56] One of the first named celebrations in the sport, Woods did so out of happiness, exclaiming that he "just like[d] to see people having fun, . . . [b]ecause that's what the game should be: [t]he game should be fun."[57] His move involved a little shuffle to the right, then to the left, back to the right, then hopping backwards, and finally culminating in throwing the football to the ground.[58]

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49. *See e.g.*, Bob Costas, *Sports Can't Be Scripted*, YAHOO! (July 21, 2020), https://www.yahoo.com/now/sports-t-scripted-125717880.html [https://perma.cc/73LR-9U2G].

50. John Shirley, *Which Teams Are Best at Scripting Plays*?, SHARP FOOTBALL ANALYSIS (Sept. 6, 2019), https://www.sharpfootballanalysis.com/analysis/which-teams-are-best-at-scripting-plays/ [https://perma.cc/7H3M-5KA6].

51. Das, *supra* note 13, at 1076.

52. *See* 17 U.S.C. § 102(a) (listing choreographic works as protectable subject matter for copyright).

53. *See* Das, *supra* note 13, at 1100 ("Playbooks are a coach's most prized possession. They are the product of analysis, hard work, and innovation.").

54. *See infra* notes 211–14 and accompanying text.

55. *See infra* Part II(E).

56. Kalyn Kahler, *Ickey Woods Is Still Shuffling*, SPORTS ILLUSTRATED (Jan. 29, 2016), https://www.si.com/nfl/2016/01/29/ickey-woods-nfl-cincinnati-bengals-ickey-shuffle-super-bowl [https://perma.cc/WC5F-GZK3].

57. Greg Garber, *From the First 'Spike' to the 'Dab,' A Look at the History of the End Zone Celebration*, ESPN (Nov. 22, 2015), https://www.espn.com/nfl/story/_/id/14184303/history-nfl-end-zone-celebrations-homer-jones-ickey-woods-cam-newton [https://perma.cc/6NQ2-Q6NV].

58. Larry Brown, *Ickey Woods Shares Origins of the Ickey Shuffle*, LARRY BROWN SPORTS (Oct. 16, 2014), https://larrybrownsports.com/football/

Since Woods, other football players have developed their own touchdown dances.[59] Touchdown dances are part of the final category of sports moves: Celebratory Movements. Celebratory Movements describe actions performed after a particular achievement in a sporting event. This category includes celebrations for accomplishments like soccer goals,[60] home runs in baseball,[61] or hockey goals.[62] Unlike the previous two categories of sports moves—Singularities and Scripted Plays—Celebratory Movements do not provide a tangible competitive benefit in competition; instead, they are often performed during a break in competition, such as a clock stoppage. This distinct difference may mean that Celebratory Movements can receive intellectual property protection. Yet this category, too, is not without debate. On one hand, these Celebratory Movements can provide value to athletes or teams. As illustrated by some scholars:

> [I]magine that Abel is a professional football player who has developed a particular endzone dance to celebrate the successful engagement and defeat of an opposing team . . . . [T]his endzone

ickey-woods-shuffle-origins/244471 [https://perma.cc/8NB7-4MNE] (explaining how the Ickey Shuffle was conceived and illustrating the motion).

59. *See, e.g.*, Frank Fitzpatrick, Opinion, *The Tiny Dancer Who Made Football History*, PHILA. INQUIRER (Dec. 1, 2017), https://www.inquirer.com/philly/sports/other_sports/billy-white-shoes-johnson-celebrations-chester-county-delaware-county-20171201.html [https://perma.cc/T72L-KXF7] (referring to Billy "White Shoes" Johnson as the "Godfather of Gridiron Gyrations" for his signature touchdown dance); YARON WEITZMAN, *Why Does Cam Newton Do the Superman Celebration?*, SB Nation (Feb. 7, 2016, 10:20 AM), https://www.sbnation.com/nfl/2016/2/7/10915082/cam-newton-superman-celebration-explained [https://perma.cc/V4PF-PETM] (discussing the origins of Cam Newton's Superman celebration).

60. Goal celebrations are a staple in the game of soccer. For an example of just how diverse they are, one journalist identified all of the types of Celebratory Movements during the 2014 World Cup. *See* Andrew Meisel, *Breaking Down All the Different Types of World Cup Goal Celebrations*, COMPLEX (June 30, 2014), https://www.complex.com/style/2014/06/breaking-different-type-world-cup-goal-celebrations/ [https://perma.cc/6X3X-EPW5].

61. *See* Jessica Kleinschmidt, *Relive 11 of the Most Unique and Entertaining Home Run Celebrations of 2017*, MLB:CUT4 (Nov. 20, 2017), https://www.mlb.com/cut4/relive-11-of-the-most-unique-and-entertaining-home-run-celebrations-of-2017-c262 [https://perma.cc/NCK4-7TY4] (illustrating some memorable and well-known player celebrations following home runs).

62. Hockey celebrations tend to be much less distinctive than other Celebratory Movements, probably because of the limiting nature of being on ice. Nevertheless, hockey fans remember many of these Celebratory Movements. *See* Rob Kirk, *Ranking the 15 Best Goal Celebrations in NHL History*, BLEACHER REP. (Jan. 30, 2013), https://bleacherreport.com/articles/1505697-ranking-the-15-best-goal-celebrations-in-nhl-history [https://perma.cc/LQ9U-PZV4].

> dance is so fanciful that TV fans remain glued to their sets through three minutes of commercials following Abel's victory, just to watch this dance (foregoing bathroom breaks and snack refills). Fan identification of Abel's move with the games of Abel's team makes the commercial time during these games more valuable. It is precisely this value that makes trademark protection necessary. If Abel notices that his "Abel-ist" move is being used by brother Cain in an attempt to draw crowds, usurp goodwill, and benefit financially from Abel's creativity, then Abel should be able to sue Cain for trademark infringement.[63]

This example provides a strong argument for the protection of Celebratory Movements. Even still, these moves may not necessarily benefit the public, so protection may be limited.

It is important to note that these categories of sports moves are not mutually exclusive. Any given move may fall into multiple categories. For example, the Biles is both a Signature Style, as only Simone Biles is known for performing the move, and a Scripted Play in that she prepares the move in advance of her floor routine.

II. POSSIBLE SOURCES OF INTELLECTUAL PROPERTY PROTECTION

Intellectual property law protects intangible creations of the mind—a power granted to Congress in order "[t]o promote the Progress of Science and useful Arts."[64] This section explores whether sports moves could be protected by proactive intellectual property rights like patents, copyrights, or trademarks and reactive intellectual property rights like right of publicity claims and trade secrets.

A. Patents

Patents are intended to protect new inventions and improvements on existing inventions.[65] Patents entitle the holder the legal right to prevent others from copying or competing.[66] In the sports industry, patents have been predominantly used to protect sports equipment, although some patents outlining sports moves and processes have been successfully issued.[67] These patents, known as sports-method patents, outline moves or techniques used by an athlete during competition or

63. F.F. Scott Kieff, Robert G. Kramer & Robert M. Kunstadt, *It's Your Turn, But It's My Move: Intellectual Property Protection for Sports "Moves,"* 25 SANTA CLARA HIGH TECH. L.J. 765, 784 (2009).

64. U.S. CONST. art. I, § 8, cl. 8.

65. 35 U.S.C. § 101.

66. Jonathan J. Darrow, *The Neglected Dimension of Patent Law's PHOSITA Standard*, 23 HARV. J.L. & TECH. 227, 229 (2009).

67. Kieff et al., *supra* note 63, at 770–72.

in training. Method patents are quite rarely used for sports moves, particularly because they face difficulties meeting novelty and non-obviousness requirements for patentability.[68]

1. Abstraction and Utility

Only certain ideas or inventions are legally patentable.[69] Patentability was generally understood under the 1980 case *Diamond v. Chakrabarty*[70] "to include anything under the sun that is made by man."[71] But, in the early 2010s, the Supreme Court narrowed this definition in two cases, *Alice Corp. v. CLS Bank International*[72] and *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*[73] These cases, collectively known as the *Alice/Mayo* cases, developed a rigorous test for patentability, tightening the standards of *Diamond*. First, the claim must be for a "process, machine, manufacture, [or] composition of matter."[74] Second, it must not be an abstract idea, law of nature, or natural phenomenon.[75]

Sports moves typically pass the first half of the *Alice/Mayo* test because they constitute a process. According to the *Manual of Patent Examining Procedure*, the manual used by patent examiners at the U.S. Patent and Trademark Office, "[a] process defines 'actions', *i.e.,* an invention that is claimed as an act or step, or a series of acts or steps."[76] Processes are typically described in patents as "methods," though the two terms are interchangeable.[77] The concept of a method does not require rigid or easily definable steps. Instead, an entire fluid motion can be described. This broad definition covers a wide range of processes

68. *See* 35 U.S.C. §§ 102–03.

69. *Id.* § 101.

70. 447 U.S. 303 (1980).

71. *Id.* at 309 (quoting S. Rep. No. 82-1979, at 5 (1952); H.R. Rep. No. 82-1923, at 6 (1952)).

72. 573 U.S. 208 (2014).

73. 566 U.S. 66 (2012).

74. *See* Rebecca Lindhorst, Note, *Two-Stepping Through* Alice*'s Wasteland of Patent-Eligible Subject Matter: Why the Supreme Court Should Replace the* Mayo/Alice *Test*, 69 CASE W. RSRV. L. REV. 731, 741 (2019) (quoting 35 U.S.C. § 100(b)).

75. *Id.* at 745–47.

76. MPEP § 2106.03 (9th ed. Rev. 10, June 2020); *see also* NTP, Inc. v. Research in Motion, Ltd., 418 F.3d 1282, 1316 (Fed. Cir. 2005) ("[A] process is a series of acts." (quoting Minton v. Natl. Ass'n of Sec. Dealers, 336 F.3d 1373, 1378 (Fed. Cir. 2003))), *abrogation on other grounds recognized in* Avid Tech., Inc. v. Harmonic, Inc., 812 F.3d 1040, 1047 (Fed. Cir. 2016).

77. MPEP § 2116.03 (9th ed. Rev. 10, June 2020).

from a method for swinging while on a swing set[78] to a method for automatic 3D-animation communication.[79] Because sports moves are a series of acts or steps and often fall into this broad category, the first step of the *Alice/Mayo* test does not preclude protection of sports moves generally.

The second half of the *Alice/Mayo* test requires that the invention not be an abstract idea, law of nature, or natural phenomenon.[80] Sports moves are not abstract ideas as those consist of mental processes or mathematical concepts,[81] nor are they laws of nature as those include "naturally occurring principles/relations."[82] It is less clear if movements are considered natural phenomena. While legally, natural phenomena are often treated as synonymous with laws of nature,[83] critics of patent protection for sports moves argue that the mere act of human motion constitutes a natural phenomenon.[84]

This argument is not addressed in the *Manual of Patent Examining Procedure* and would likely not prevent patentability. There are many issued patents that contain human movement ranging from a pill swallowing method,[85] to a method for chewing gum,[86] to even a method for demonstrating technique for lifting "a substantially rectangular box."[87] These provide evidence to suggest that bodily movement alone does not qualify as a natural phenomenon. Instead of being the determinative element, these patents often hinge on whether the "move is a 'useful

78. U.S. Patent No. 6,368,227.

79. U.S. Patent No. 9,866,795.

80. Lindhorst, *supra* note 74, at 745–47.

81. The Manual of Patent Examining Procedure outlines three categories of abstract ideas: mathematical concepts, methods of organizing human activity (such as "managing personal behavior or relationships or interactions between people"), and mental processes. MPEP § 2116.04(a) (9th ed. Rev. 10, June 2020).

82. MPEP § 2116.04(b) (9th ed. Rev. 10, June 2020).

83. *See* MPEP § 2116.04(b) (9th ed. Rev. 10, June 2020) (grouping both exceptions together into one cohesive analysis).

84. 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, 819 (1998).

85. U.S. Patent No. 5,643,204 (including protection for a pill swallowing device as well as the method).

86. U.S. Patent No. 3,262,784.

87. U.S. Patent No. 5,498,162.

process,'"[88] a separate patentability requirement.[89] According to intellectual property attorney Carl A. Kukkonen III, "the movement of the human body in a certain way is a natural phenomen[on] in the abstract, but refining the movement to meet a useful end brings an action into patent eligibility."[90] Kukkonen likens patents on sports moves to patents issued for surgical methods, which also faced initial controversy but later were found to be protectable.[91]

The usefulness requirement becomes a barrier for many types of sports moves. In order for an invention to be considered useful, it must have a "specific, substantial, and credible" use.[92] This likely bars Singularities from obtaining patent protection entirely, as Singularities are standalone moments in time and there is no future use for the movement. Additionally, Celebratory Movements face scrutiny as they often lack any sort of utility, especially within the scope of competition.

On the other hand, while still difficult to prove, Signature Styles or Scripted Plays may be considered useful. One such example would be the invention of the curveball, a move that is both a Signature Style and Scripted Play. In the late 1860s, Candy Cummings developed the curveball, a pitch never before seen by players.[93] Adhering to the same scientific principle that defines airplane flight, a curveball's spin creates a pressure differential across the ball, causing it to curve mid-pitch and making it significantly more difficult for players to hit.[94] The Society

88. Kieff et al., *supra* note 63, at 771.

89. 35 U.S.C. § 101 ("Whoever 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 therefor, subject to the conditions and requirements of this title." (emphasis added)); *see also id.* § 102 (enumerating novelty requirements for patents).

90. Kukkonen, *supra* note 31, at 819; *see, e.g.*, Alice Corp. Pty. Ltd. v. CLS Bank Int'l, 573 U.S. 208, 217 (2014) (explaining that "in applying the § 101 exception, we must distinguish between patents that claim the 'buildin[g] block[s]' of human ingenuity and those that integrate the building blocks into something more . . . ." (quoting Mayo Collaborative Servs. v. Prometheus Lab'ys., Inc., 566 U.S. 66, 89 (2012))).

91. Kukkonen, *supra* note 31, at 823 & n.95. Surgical methods were subjected to scrutiny as it was "uncertain[] that any medical method will achieve the desired result." *Id.* at 823 n.95 (quoting 1 DONALD S. CHISUM, CHISUM ON PATENTS § 1.03[3], at 1-147 (2021)).

92. MPEP § 2107(II)(A)(3) (9th ed. Rev. 10, June 2020).

93. David Fleitz, *Candy Cummings*, SOC'Y FOR AM. BASEBALL RSCH., https://sabr.org/bioproj/person/candy-cummings/ [https://perma.cc/9Z82-2UA7] (last visited Oct. 25, 2021).

94. *See* LeRoy W. Alaways, *Aerodynamics of a Curve-Ball: The Sikorsky/Lightfoot Lift Data* 5 (7th ISEA Conference 2008, Working Paper No. ISEA2008_P234, 2008), https://www.researchgate.net/profile/Leroy-Alaways-2/publication/302154777_Aerodynamics_of_a_Curve-ball_

for American Baseball Research describes the effect of his innovation on the sport at the time:

> [F]or several years afterward Cummings was the only pitcher in the nation to claim mastery over the pitch.
>
> The curveball made the 120-pound Cummings the most dominant pitcher in the country. He threw a pitch that none of the batters had ever seen or practiced against, and only when other pitchers learned to throw the curveball would batters learn how to hit it. Any pitcher who sought to copy Candy Cummings would need months, if not years, of steady practice of the type that Cummings had already accumulated.[95]

While arguably his success meant that Cummings did not need a patent to obtain exclusivity, he certainly proved the inherent benefit in his innovation—enough to pass the usefulness requirement.[96]

Though Cummings never filed a patent, there have been several comparable sports-method patents issued. These include patents such as a now-expired method for putting a golf ball[97] and a "fitness method" utilizing resistance between the user's own "coupled hands" to strengthen muscles.[98] Baseball Hall of Fame pitcher Nolan Ryan received a patent for a method of training an athlete to pitch a baseball.[99] It is important to note, the majority of these patents are for training methods rather than methods used in play. This is likely due to the fact that it is easier to demonstrate usefulness in training. So, even though some sports moves may pass the *Alice/Mayo* test, other requirements often prevent sports patents from ever being issued.

2. Novelty and Non-Obviousness

Method patents are less prevalent mostly because of secondary requirements for patentability. The Patent Act also mandates that the

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The_SikorskyLightfoot_Lift_Data_P234/links/592d9cd90f7e9beee72d0aa6/Aerodynamics-of-a-Curve-ball-The-Sikorsky-Lightfoot-Lift-Data-P234.pdf [https://perma.cc/4LKH-WNGX]; Benjamin Radford, *How Does a Curveball Curve*, Live Sci. (July 20, 2010), https://www.livescience.com/32714-how-does-a-curveball-curve.html [https://perma.cc/ JDF7-8P2G].

95. Fleitz, *supra* note 93.

96. *See* Gerard N. Magliocca, *Patenting the Curve Ball: Business Methods and Industry Norms*, 2009 BYU L. Rev. 875, 876 (noting that the curveball may have been patent-eligible).

97. U.S. Patent No. 5,616,089.

98. U.S. Patent No. 6,190,291.

99. Smith, *supra* note 31, at 1072 & n.138 (citing Training Apparatus, Method for Training an Athlete, and Method for Producing a Training Device, U.S. Patent No. 5,639,243).

invention be novel and requires that the invention be non-obvious.[100] Both provisions limit method patents as it is difficult to prove that a specific move had never been discussed nor used before the inventor envisioned it or that it would not be obvious to another athlete, coach, or fan.[101] Since this is often difficult to prove, sports-method patents are rare.

The Patent Act states that "[a] person shall be entitled to a patent unless . . . the claimed invention was . . . available to the public before" the patent was filed.[102] That means if "every element" in a patent application "is found, either expressly or inherently" in a singular public disclosure, the patent application would be rejected.[103] This requirement makes logical sense: the patent system does not want to reward someone for an idea if another person truly invented it. This becomes a substantial barrier for sports moves. Almost every "new" move is conceptualized as building off of another. Achievements in sports often necessarily stand on the shoulders of previous achievement.

Aside from novelty, athletes would have to prove non-obviousness, or that their idea was not obvious "to a person having ordinary skill in the art" (colloquially known as a "PHOSITA").[104] This requirement exists to "prevent[] the patenting of slight variations of known inventions."[105] The interpretation of *who* a person having ordinary skill in the art is has been subject to much consideration.[106] This standard is context-dependent, so each patent may have a different PHOSITA construction depending on the sport and even on the actual move. This requirement, while difficult to generalize, can pose a significant barrier to patentability. If an athlete were to file a patent application for a new method of pole vaulting, it might be obvious to another athlete or coach, but perhaps not a fan. For this reason, PHOSITA construction

100. 35 U.S.C. §§ 102–03.

101. *Id.* § 102(b) (outlining statutory bars for certain types of disclosures); *id.* § 103 ("A patent for a claimed invention may not be obtained . . . if . . . the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art . . . ."); *see also infra* text accompanying notes 104–06 (discussing why some inventions must not be obvious to another athlete or coach while others must not be obvious to a fan).

102. 35 U.S.C. § 102(a).

103. Verdegaal Bros. v. Union Oil Co. of Cal., 814 F.2d 628, 631 (Fed. Cir. 1987) ("A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.").

104. 35 U.S.C. § 103; Darrow, *supra* note 66, at 227.

105. Darrow, *supra* note 66, at 231.

106. *See id.* at 239 (explaining how the legal system has failed to clearly define the PHOSITA standard).

becomes an important component of patent prosecution, sometimes solely determining whether a patent be issued.

Again, because new sports moves are often improvements of existing sports moves, the non-obviousness standard becomes quite difficult to meet. One such example is Tony Hawk's famous 900 spin. This move consists of Hawk making two-and-a-half rotations (900 degrees) while airborne on a skateboard.[107] The move was so impressive that not until five years later did another skateboarder, Giorgio Zattoni, replicate it.[108] Though it was new to the sport, it was obvious. Before Hawk's 900-degree aerial spin, others, including himself, were performing lesser aerial spins like 540s and 720s.[109] This move was not something Hawk conjured up—it was something the skating community as a whole had been eagerly awaiting.[110] It was obvious to everyone in the community that this was the next evolution of aerial spins.

Allowing Hawk to exclude others would prevent further building within the sport. Today, Mitchie Brusco holds the record by completing a 1260-degree aerial spin at the 2019 X Games.[111] Had Hawk obtained protection on the 900, this record likely would not exist as Brusco necessarily needed to be able to do a 900 before he could do a 1260. Therefore, Hawk's 900-degree aerial spin was neither novel nor non-obvious.

Ultimately, it is still unlikely that a significant number of patents on sports moves will be issued in the future due to these requirements.

107. Maggie Maloney, *Tony Hawk Can Still Pull Off His Signature Move at 48*, ESQUIRE (June 29, 2016), https://www.esquire.com/sports/news/a46285/tony-hawk-can-still-pull-off-his-signature-move/ [https://perma.cc/5L76-QVPC].

108. *See* Mackenzie Eisenhour, *Tony Hawk Responds to Allegations Made in* All This Mayhem, TRANSWORLD SKATEBOARDING (June 19, 2015), https://skateboarding.transworld.net/news/tony-hawk-responds-to-allegations-made-in-all-this-mayhem/ [https://perma.cc/3W2A-7RCQ] (noting that Tony Hawk landed the 900 in 1999 and that the second person landed a 900 in 2004).

109. *See id.* (noting that Hawk began to attempt the 900 only after completing a 720).

110. *See id.* (explaining that Hawk was not even the first skater to attempt the 900).

111. Nick Schwartz, *Watch Mitchie Brusco Become the First Skateboarder to Land a 1260*, U.S.A. TODAY SPORTS: FOR THE W!N (Aug. 3, 2019, 7:29 PM), https://ftw.usatoday.com/2019/08/watch-mitchie-brusco-become-the-first-skateboarder-to-land-a-1260 [https://perma.cc/VY47-88KP].

B. Copyrights

Governed by the 1976 Copyright Act,[112] copyright law protects "works of authorship."[113] Like patent law, copyright law serves to incentivize new ideas by granting exclusive protection to the owner. Unlike patent protection, copyright protection often lasts much longer. Today, copyrighted works give rights to the owner for at least seventy years after registration.[114]

1. The Subject-Matter Debate

To protect works of authorship, the law sets forth eight, non-exhaustive categories of eligible subject matter: "(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."[115] Of these categories, the "pantomimes and choreographic works" category appears to be the most analogous to sports moves.

Up until the 21st century, choreography and pantomime were not defined by the Copyright Office, as their definitions were deemed to be "fairly settled."[116] The Copyright Office then released definitions for these terms. Choreography was defined "as the composition and arrangement of 'a related series of dance movements and patterns organized into a coherent whole,'"[117] and pantomime was defined as "the art of imitating, presenting, or acting out situations, characters,

112. Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–810).

113. 17 U.S.C. § 102(a).

114. *See id.* § 302 (stating that copyrights generally last for "the life of the author and 70 years after the author's death," and showing that copyrights that fall within exceptions to the general rule last seventy years or longer). Notably, not all copyright protections last for seventy years after registration. *See How Long Does Copyright Protection Last?*, U.S. COPYRIGHT OFF., https://www.copyright.gov/help/faq/faq-duration.html [https://perma.cc/9CTT-ULCP] (last visited Oct. 25, 2021).

115. 17 U.S.C. § 102(a).

116. Weber, *supra* note 31, at 356 (quoting H.R. Rep. No. 94-1476, at 53 (1976)).

117. U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 805.1, Ch. 800, at 66 (3d ed. 2021) [hereinafter U.S. COPYRIGHT COMPENDIUM] (quoting Horgan v. Macmillan, Inc., 789 F.2d 157, 161 (2d Cir. 1986); *accord* U.S. COPYRIGHT OFF., CIRCULAR 52, COPYRIGHT REGISTRATION OF CHOREOGRAPHY AND PANTOMIME 1 (2021) [hereinafter U.S. COPYRIGHT CIRCULAR 52], https://www.copyright.gov/circs/circ52.pdf [https://perma.cc/P7Y8-PZMQ] (summarizing concepts in the Compendium).

or events through the use of physical gestures and bodily movements."[118] Common factors between choreography and pantomime include developing "[a] story, theme, or abstract composition conveyed through movement."[119]

Under these definitions, many scholars argued that some sports moves are protectable as choreography and pantomime.[120] Copyright protection for certain types of moves, like Signature Styles and Celebratory Movements, is especially persuasive because they are physical expressions of emotion. Celebratory Movements even show a theme, as they are only performed in moments of triumph. Scripted Plays, such as football plays, embody choreography because they are "patterns organized into a coherent whole."[121]

Seemingly in light of these arguments, the 2017 version of *The Compendium of U.S. Copyright Practices*[122] strictly barred sports movements under these categories:

> Competitive activities lack the capacity for uniform performance because each contest usually involves a different set of maneuvers, they lack compositional arrangement because athletic movements are rarely organized into a coherent compositional whole, and any dramatic content involves the "drama" of the competition rather than a story that is told or a theme that is evoked by the players' movements.[123]

118. U.S. COPYRIGHT COMPENDIUM, *supra* note 117, § 806.1, Ch. 800, at 80; *accord* U.S. COPYRIGHT CIRCULAR 52, *supra* note 117, at 1.

119. U.S. COPYRIGHT CIRCULAR 52, *supra* note 117, at 1.

120. *See, e.g.*, Kieff et al., *supra* note 63, at 777 (arguing choreography closely parallels sports moves); Weber, *supra* note 31, at 355–57 (promoting the application of copyright law to sports moves by analogies to choreography and pantomime).

121. U.S. COPYRIGHT COMPENDIUM, *supra* note 117, § 805.1, Ch. 800, at 66 (quoting *Horgan*, 789 F.2d at 161); *accord* U.S. COPYRIGHT CIRCULAR 52, *supra* note 117, at 1 (summarizing concepts in the Compendium).

122. U.S. COPYRIGHT COMPENDIUM, *supra* note 117. The Compendium is a collection of copyright procedures used by the Copyright Office staff. *See* 37 C.F.R. § 201.2(b)(7) (2020) ("It is both a technical manual for the Copyright Office's staff, as well as a guidebook for authors, copyright licensees, practitioners, scholars, the courts, and members of the general public.").

123. U.S. COPYRIGHT COMPENDIUM, *supra* note 117, § 806.5, Ch. 800, at 84; *id.* § 805.5(B)(3), Ch. 800, at 75 (citing NBA v. Motorola, 105 F.3d 841, 846–47 (2d Cir. 1997) (explaining why sports moves do not constitute choreography using a similar description to the pantomime rationale).

As if overnight, pantomimes and choreographic works could no longer provide the basis for a solid legal argument to protect sports moves under copyright.[124]

Though sports moves cannot be likened to pantomimes and choreographic works, perhaps Scripted Plays could be analogous to dramatic works. Stage plays are defined by the Copyright Office as "a story prepared for production in a theater (i.e., to be performed on a stage for a live audience). The script generally includes instructions for performers and scenery."[125] This definition could fit with Scripted Plays, like staged wrestling matches or plays from a coach's playbook.

But regardless of whether sports movements fall into explicitly defined subject-matter categories, these categories are not exhaustive, but rather expressly illustrative.[126] Thus, the subject-matter requirement is not dependent on the list of categories set forth by the Copyright Office. As a result, sports moves may still be copyrightable.

2. Originality and Creativity Requirements

Assuming the subject-matter requirement can be met, in order to obtain copyright, the work must be creative and original.[127] Copyright law's originality requirement requires a work be created without the benefit or aid of copying a previous work of someone else.[128] Thus, a

124. *See* U.S. COPYRIGHT COMPENDIUM, *supra* note 117, § 806.5, Ch. 800, at 84 (showing that the U.S. Copyright Office explicitly bars sports moves from being classified as pantomimes); *id.* § 805.5(B)(3), Ch. 800, at 75 (showing that the U.S. Copyright Office explicitly bars sports moves from being classified as choreography). Notably, Celebratory Movements may not be barred by this language because some of these movements have a compositional arrangement and may tell a story by the motion. For instance, Tottenham Spurs striker Harry Kane kisses his wedding ring to pay tribute to his wife after every goal he scores. Andy Wilson, *Harry Kane Celebration: How Tottenham Star Honours Wife Kate with Every Goal*, EXPRESS (Dec. 26, 2019, 1:53 PM), https://www.express.co.uk/sport/football/1221249/Harry-Kane-celebration-goals-Tottenham-news-Kane-wife-Kate-Goodland-children [https://perma.cc/X69G-K9FL]. Another player on the team, Son Heung-Min, also has his own sentimental celebration in which he uses his hands to mimic a camera. When asked why he does this, he noted that it was so he could "take a picture so [he has] good memories in [his] mind [of it]." *Son Heung-Min Celebration: What Is the Meaning Behind Tottenham Star's Camera Gesture?*, GOAL (Feb. 5, 2021, 12:22), https://www.goal.com/en-us/news/son-heung-min-celebration-what-is-the-meaning-behind/1swct743e00az1jdg2eukkc4tt [https://perma.cc/7YBS-4LHY].

125. U.S. COPYRIGHT COMPENDIUM, *supra* note 117, § 804.4(A), Ch. 800, at 55.

126. *See* 17 U.S.C. § 101 ("The terms 'including' and 'such as' are illustrative and not limitative."); *id.* § 102(a) ("Works of authorship *include* the following categories . . . ." (emphasis added)).

127. Das, *supra* note 13, at 1085.

128. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345–46 (1991).

work is original if it is independently created.[129] In the 1991 case *Feist Publications, Inc. v. Rural Telephone Service Co.*,[130] the Supreme Court recognized the conundrum of independent creation with the famous hypothetical example of two poets writing identical poems with no prior knowledge of each other.[131] Both poets would be entitled to copyright protection, though neither work would be novel.[132] This argument may be difficult to make in sports. While two athletes may come up with a similar move, they would likely be aware of the other's development because of frequent competition, extensive media coverage, and ready access to statistics.

In *Feist*, the Court extrapolated an extra requirement from originality.[133] The Court found that originality encompasses not only independent creation, but also requires "that [the work] possesses at least some minimal degree of creativity."[134] To wit, the Court later stated that "[t]here remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent."[135] However, though sports are often confined to the rules of the game, one scholar notes that "the infinite combinations that such rules allow permeate the concept that such works should still be deemed creative."[136]

Many moves, including Signature Styles and Celebratory Movements, often require creative expression. Athletes are not just "robots, machines, or 'quasi-human beings,'" they often have moral and personal reasons to be competing.[137] Their movements in competition can convey a larger theme. As noted with the Ickey Woods example above, his motivation for creating the Ickey Shuffle dance was to have fun.[138]

The subject-matter and originality requirements pose significant hurdles to obtaining copyright protection, and, as a result, copyright is likely not a reliable mechanism to protect future sports moves.

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129. *Id.* at 345.

130. 499 U.S. 340.

131. *Id.* at 345–46.

132. *Id.* at 346.

133. *Id.* at 345.

134. *Id.*

135. *Id.* at 359.

136. Das, *supra* note 13, at 1086.

137. Griffith, *supra* note 8, at 724 (illustrating these personal reasons by quoting two-time Olympic gold medalist, Ekaterina Gordeeva: "We were showing them not a program, but the story of our life." (quoting Ekaterina Gordeeva & E.M. Swift, My Sergei: A Love Story 289 (1996))).

138. *See* Greg Garber, *From the First 'Spike' to the 'Dab,' A Look at the History of the End Zone Celebration*, ESPN (Nov. 22, 2015), https://www.espn.com/nfl/story/_/id/14184303/history-nfl-end-zone-celebrations-homer-jones-ickey-woods-cam-newton [https://perma.cc/6YHV-8S7T]. *See also supra* note 56.

C. Trademarks

It's no secret that athletes can earn top dollar off the field, oftentimes far exceeding the money they make playing their sports.[139] Because of the lucrative nature of athletic endorsements and products, many athletes attempt to diversify their earnings.[140] Professional golfer Tiger Woods has "made 97% of his earnings from endorsements."[141] Woods is not alone, as other prominent athletes such as LeBron James and Rafael Nadal attribute over 60% of their earnings to sponsorships and endorsements.[142] Some have commented that athletic brand deals have "grown to the level that an athlete's name is now a designer brand name. You don't have to look any further than the local schoolyard or shopping mall to see a kid wearing Air Jordan's on his feet, Bo Jackson warm-ups, a Shaq t-shirt and a Wayne Gretzky cap."[143] These days, it is not uncommon for athletes to begin building a personal brand before they ever compete at a professional level.[144] In light of this recent upsurge in commercialization,[145] athletes have gravitated towards

139. Nasha Smith, *13 Athletes Who Make More Money Endorsing Products Than Playing Sports*, INSIDER (June 17, 2019, 1:17 PM), https://www.businessinsider.com/athletes-endorsements-nba-golf-tennis-2019-6 [https://perma.cc/G9XU-ZKRF] (illustrating athletes who earn significantly more money from endorsement deals than their athletic careers).

140. *See* Roberts, *supra* note 16, at 471.

141. Smith, *supra* note 139.

142. *Id.* (noting LeBron James and Rafael Nadal have made 61% and 65% of their earnings from endorsement deals, respectively).

143. Sandra H. User, *Image Is Everything: Commercial Exploitation of the Professional Athlete*, 1 DET. C.L. ENT. & SPORTS L.F. 27, 27 (1994).

144. Darren Heitner, *How NFL Draft Prospects Build Their Personal Brands*, FORBES (Jan. 23, 2013, 9:06 AM), https://www.forbes.com/sites/darrenheitner/2013/01/23/how-nfl-draft-prospects-build-their-personal-brands/?sh=713211bf6321 [https://perma.cc/4NV9-8RGS] (detailing how many NFL prospects recognize the importance of developing a personal brand, for both financial and personal reasons, and begin to plan well before they are chosen). Parents also may attempt to establish a personal brand for their children. One such example is Lavar and Tina Ball, parents of Lonzo, LiAngelo, and LaMelo Ball. When Lavar and Tina realized their sons were NBA prospects, they launched the Big Baller Brand in 2016—a full year before their oldest, Lonzo, entered the NBA. *See About Us*, BIG BALLER BRAND, https://bigballerbrandinc.com/pages/about-us [https://perma.cc/NXF4-CKA4] (last visited Nov. 11, 2021); *All about Bulls New Guard Lonzo Ball*, NBC SPORTS: SPORTS CHI. (Oct. 19, 2021), https://www.nbcsports.com/chicago/bulls/all-about-bulls-lonzo-ball-brothers-family-stats-contract#:~:text=Ball%2C%2023%2C%20was%20selected%20second,young%20players%20in%20the%20league [https://perma.cc/55B6-H3V9] (noting that Lonzo Ball entered the NBA in 2017).

145. ROBERTS, *supra* note 16, at 471. Sports sponsorship market size in North America is projected to surpass $20 billion in 2022. Christina Gough,

obtaining trademarks for their personal brands. Because trademarks are used to distinguish the source of goods,[146] many athletes have even opted to trademark their own name[147] or Signature Styles,[148] but to what extent?

Athlete trademarks indicate to a consumer that the athlete is affiliated with, or earns revenue from, a particular product or service. While there are few limitations on what can obtain trademark protection,[149] there are certain criteria that must be met. For example, trademark applicants must prove a "use in commerce."[150]

Originally, obtaining a trademark required proof of actual use in commerce—or that the mark was used to sell a product or service.[151] But in 1988, this stipulation was loosened to the lesser requirement of "a bona fide intention . . . to use a trademark in commerce."[152] Though

Revenue from Sponsorship in Sports in North America 2006–2023, STATISTA (Mar. 1, 2021), https://www.statista.com/statistics/194221/total-revenue-from-sports-sponsorship-in-north-america-since-2004/ [https://perma.cc/8DDN-PTW3]. Data from the graph is available in a series of PwC reports. *2021 Sports Outlook*, PWC, https://www.pwc.com/us/en/industries/tmt/library/sports-outlook-north-america.html#sports-revenue [https://perma.cc/9MAR-U4ZU] (last visited Nov. 17, 2021) (scroll to the bottom of the linked page to see reports from previous years).

146. 15 U.S.C. § 1127.

147. *See, e.g.*, JOHNNY FOOTBALL, Registration No. 5,464,752 (protecting Johnny Manziel's nickname "Johnny Football"); KAEPERNICKING, Registration No. 4,431,402 (protecting the phrase used to describe Colin Kaepernick's kneeling pose, often used during the National Anthem); Chris Trapasso, *Colin Kaepernick Files Trademark for 'Kaepernicking.'* BLEACHER REP. (Jan. 24, 2013), https://bleacherreport.com/articles/1499640-colin-kaepernick-files-trademark-for-kaepernicking [https://perma.cc/5F3V-M29X]; CK7, Registration No. 5,147,112 (protecting Colin Kaepernick's initials and football number).

148. For one example, see *infra* note 157 (detailing Usain Bolt's lightning pose).

149. 15 U.S.C. § 1127 (allowing trademark protection of "any word, name, symbol, or device, or any combination thereof").

150. *Id.*

151. *See* Uli Widmaier, *Use, Liability, and the Structure of Trademark Law*, 33 HOFSTRA L. REV. 603, 613–15 (2004).

152. Trademark Law Revision Act of 1988, Pub. L. No. 100-667, § 103(9), 102 Stat. 3935, 3935–36 (creating 15 U.S.C. § 1051(b)(1)). *See* 15 U.S.C. § 1051 ("A person who has a bona fide intention . . . to use a trademark in commerce may request registration of its trademark . . . ."). Notably, the "intent-to-use" trademark application requires that a Statement of Use be filed within six months after the Trademark Office allows the trademark, proving the mark's use in commerce. The "intent-to-use" trademark application serves only to delay the inevitable.

"bona fide intent" has never been explicitly defined,[153] it "can consist of evidence in the form of a written plan of action for a new product or service, a new line of goods, or for the re-branding of an existing line of goods or services."[154] Despite the 1988 change, it is, in fact, difficult to show that movements can be used in commerce because any trademark protection of a sports move relies on another good or service underlying the motion. As a result, sports moves themselves, without a plan to capitalize on them, are likely not sufficient to obtain protection.

Commercialization of athletic moves has largely come in the form of icons or logos. Easily affixed onto merchandise, logos depicting athletes performing Signature Styles of play are an easier way for an athlete to monetize the moves for which they are known. These logos include the likes of Ken Griffey Jr.'s logo of his baseball swing[155] and Shaquille O'Neal's two-handed dunk logo—a logo so important to his identity that he acquired the trademark while still in college.[156] Usain Bolt licenses his trademarked lightning pose[157] to Puma for one of the "biggest sponsorship deal[s] in athletics."[158] Michael Jordan's "Jumpman" logo continues to be a financial success even twenty years after his NBA

153. 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 19:14 (5th ed.), Westlaw (database updated Sept. 2021) ("The term 'bona fide' is not defined in the [Lanham] Act because of the impossibility of identifying every factor that might be determinative of whether an applicant's intent is indeed bona fide at every stage of the registration process." (citing Trademark Law Revision Act of 1988 § 1(b))).

154. *Id.*

155. Ken Griffey Jr. is well-known for hitting many home runs, which his logo conveys through imagery of his swing. This logo was so successful, it became known as the "Swingman," a reference to Michael Jordan's "Jumpman." *See* Jacob Shafer, *How '90s Icon Ken Griffey Jr. Transcended MLB to Become Pop Culture Legend*, BLEACHER REP. (June 21, 2020), https://bleacherreport.com/articles/2896652-how-90s-icon-ken-griffey-jr-transcended-mlb-to-become-pop-culture-legend [https://perma.cc/4MDM-DHH8].

156. Phillip Barnett, *Shaq Believed in Himself So Much He Trademarked His Dunkman Logo in College*, YAHOO! NEWS (Sept. 6, 2016), https://www.yahoo.com/news/shaq-believed-himself-much-trademarked-222626259.html?soc_src=social-sh&soc_trk=ma [https://perma.cc/CT9F-DJ7V].

157. In 2011, Olympic athlete Usain Bolt filed for a trademark on a design of his signature lightning bolt pose. The mark consists of a depiction of a man with one arm extended and pointing upward and the other arm raised and pointing at the back of his head. Registration No. 4,177,904; *see* Martin Rogers, *What's the Origin of Usain Bolt's Signature Celebration?*, USA TODAY (Aug. 14, 2016, 4:39 PM), https://www.usatoday.com/story/sports/olympics/rio-2016/2016/08/14/origin-usain-bolt-to-the-world-rio-olympics-2016/88728420/ [https://perma.cc/8XLH-BGNH].

158. Anna Kessel, *Usain Bolt Signs Biggest Athletics Sponsorship Deal Ever with Puma*, GUARDIAN (Aug. 25, 2010, 2:00 PM), https://www.theguardian.com/sport/2010/aug/25/usain-bolt-biggest-sponsorship-deal-puma [https://perma.cc/W2AD-XP4A].

career. While Jordan made approximately $94 million from NBA salaries,[159] he's netted over $1 billion from Nike deals using the "Jumpman."[160] From these examples, it is clear that an athlete's movement can be a branding element. However, it is more common to obtain a trademark for a visual depiction of a sports movement rather than obtaining a trademark for the movement itself.[161]

Nevertheless, some have still found success monetizing the actual movement, such as Aaron Rodgers's commercial collaboration with State Farm Mutual Automobile Insurance Company. In a 2011 commercial, insurance customers confuse his famous and then-unnamed touchdown dance, thinking the motion alludes to the "Discount Double Check," a promotional State Farm savings campaign.[162] As broken down by one commentator, "the ad's literary effect . . . plays directly at the tension between bodily motion *not usually* being a branding element, and the obvious reality that, for many famous athletes, it is a branding element."[163] The actual motion performed is not legally protected by either Rodgers or State Farm. The word mark, however, the "Discount Double Check," *is* protected by State Farm as it serves as an indicator of State Farm's insurance discount service.[164]

For athletes able to break the use-in-commerce barrier like Rodgers and State Farm,[165] trademarks serve as a lucrative workaround for

159. Kurt Badenhausen, *Michael Jordan and 'The Last Dance': By the Numbers*, FORBES (Apr. 19, 2020, 9:23 AM), https://www.forbes.com/sites/kurtbadenhausen/2020/04/19/michael-jordan-and-the-last-dance-by-the-numbers/?sh=232678e25b15 [https://perma.cc/C2VS-AQKA].

160. Barnaby Lane, *Michael Jordan Has Made $1.3 Billion from His 36-Year Partnership with Nike. He Originally Wanted to Sign with Adidas Before His Parents Made Him Listen to Nike's Offer*, INSIDER (May 5, 2020, 6:34 AM), https://www.insider.com/michael-jordan-nike-billions-wanted-adidas-deal-2020-5 [https://perma.cc/4M55-C3EG].

161. *See* Kieff et al., *supra* note 63, at 781–84 (describing that trademarks are currently commonplace for graphical depictions of sports moves and it would require extensive technological advances to trademark the physical move itself).

162. Havasu Wireguy, *Discount Double Check*, YOUTUBE (Oct. 6, 2011) https://www.youtube.com/watch?v=yF2o5NtlfK0 [https://perma.cc/23L8-EX3S] (posting a video of the State Farm commercial).

163. Joshua A. Crawford, Trademark Rights for Signature Touchdown Dances at 2–3 (2014), https://www.vsb.org/docs/sections/intellect/Joshua_A_Crawford_Trademark_Rights_for_Signature_Touchdown_Dances.pdf [https://perma.cc/QMJ8-7MTG] (unpublished manuscript). This paper does an excellent job breaking down each individual element of the Discount Double Check commercial, including explaining how rare it is that an athlete is able to directly monetize on their signature move. *Id.* at 1–4.

164. DISCOUNT DOUBLE CHECK, Registration No. 3,962,494.

165. Aaron Rodgers represents a small group of athletes who have found success in monetizing their movements. *See also* Chuck Schilken, *Watch Ickey*

protecting sports moves. However, athletes who desire to exclude their competitors from performing their moves will not be able to obtain this protection from trademarks unless the movement itself has a trademark.[166] If exclusion is desirable to an athlete, obtaining a copyright or patent may be a better option.

D. Right of Publicity

While trademarks protect words, names, symbols, or devices that identify a commercial source, publicity rights are a defensive tool to help protect a person's identity from being incorrectly associated with a commercial source.[167] A publicity right is "the inherent right of every human being to control the commercial use of his or her identity."[168] Though publicity rights vary between states, the mechanism for proving a publicity-infringement violation often consists of three elements: "(1) that defendant used plaintiff's identity (2) without consent (3) for commercial purposes."[169]

While elements two and three are relatively straightforward, courts tend to focus their attention on the first element: identity.[170] Defining a person's identity creates a myriad of common-law issues. Typically, the identity element "depend[s] upon the nature and extent of the identifying characteristics used by the defendant, the defendant's intent, the fame of the plaintiff, evidence of actual identification made by third persons, and surveys or other evidence indicating the perceptions of the audience."[171] Determining what constitutes identity has been the

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Woods Bring Back the Ickey Shuffle in Geico Ad, L.A. TIMES (Sept. 5, 2014, 10:26 AM), https://www.latimes.com/sports/sportsnow/la-sp-sn-ickey-woods-geico-20140905-story.html [https://perma.cc/4S2K-4WBE] (explaining that Ickey Woods also monetized his famous touchdown dance, the "Ickey Shuffle," in a series of Geico commercials); Christine Struble, *Subway and Deion Sanders Want You to Do the Footlong Shuffle*, FANSIDED, https://foodsided.com/2020/09/20/subway-deion-sanders-footlong-shuffle/ [https://perma.cc/X4HK-42QH] (last visited Oct. 28, 2021) (discussing a campaign between Deion Sanders and Subway where Sanders performs his signature touchdown dance and calls it the "Footlong Shuffle").

166. *See* Kukkonen, *supra* note 31, at 817 (indicating that if Kareem Abdul-Jabbar were to trademark his signature "Sky Hook" shot, he would not have a cause of action if used by another player during a game).

167. LOUIS ALTMAN & MALLA POLLACK, 6 CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 22:34 (4th ed.), Westlaw (databased updated Dec. 2021).

168. ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 928 (6th Cir. 2003).

169. PETER A. CARFAGNA, REPRESENTING THE PROFESSIONAL ATHLETE 164 (3d ed. 2018).

170. *See id.*

171. *Id.*

focus of many right-of-publicity cases.[172] Clearly, using an image of a person to advertise for a company without the person's consent is problematic.[173] Athletes often sign contracts for still photos of their face or for the use of their names in advertising materials. Another company using a celebrity's appearance to advertise goods may falsely signal to a consumer that that celebrity is endorsing the company's product.

But name and physical appearance are not the only components of an identity. In *White v. Samsung Electronics America, Inc.*,[174] Samsung promoted its VCR using a Vanna White lookalike robot in front of a Wheel of Fortune set without White's permission.[175] White, who was a co-host of Wheel of Fortune, sued and won her case.[176]

In light of this, it is not unreasonable to think that sports moves, particularly Signature Styles and well-known Celebratory Movements, can evoke a particular athlete. This idea was brought up in *Pellegrino v. Epic Games, Inc.*[177] This case involved a popular video game allegedly misappropriating the plaintiff's likeness when characters in the game perform a specific dance while playing saxophone, for which the plaintiff was known.[178] Because the dance was "primarily the defendant's own expression rather than the celebrity's likeness," the court found that

172. *See* Hart v. Elecs. Arts, Inc. 717 F.3d 141 *passim* (3rd Cir. 2013); *see also* White v. Samsung Elecs. Am., Inc., 971 F.3d 1395, 1397–98 (9th Cir. 1992).

173. The Second Circuit first recognized this right in 1953.

> [A] man has a right in the publicity value of his photograph . . . .
>
> . . . This right might be called a 'right of publicity.' For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains, and subways.

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

174. 971 F.2d 1395 (9th Cir. 1992).

175. *Id.* at 1396.

176. *Id.* at 1397–99 (reversing the district court's grant of summary judgment to Samsung on White's right-to-publicity claim); Katherine Boyle, *Vanna White: Let the Great Wheel Spin*, WASH. POST (Sept. 11, 2013), https://www.washingtonpost.com/entertainment/tv/vanna-white-let-the-great-wheel-spin/2013/09/11/f89dbabc-198a-11e3-82ef-a059e54c49d0_story.html [https://perma.cc/JB2P-KRBU] (describing the litigation's ultimate outcome).

177. 451 F. Supp. 3d 373 (E.D. Penn. 2020).

178. *Id.* at 373, 378–79.

Epic Games had transformed the dance and was therefore protected under the First Amendment.[179]

This case suggests that movement alone may not be sufficient to rise to a publicity rights violation. However, the court certainly did not indicate that every use of a person's signature motions would be protected under the First Amendment. For Signature Styles, this implies that a move could be considered misappropriated in some instances. Even if the right of publicity extends to sports moves only in the most extreme cases, it still reaffirms the notion that sports moves can be firmly associated with the athlete who performs them.

Nevertheless, the right of publicity serves only as a defensive tool in some instances that could provide relief when an athlete's move is used in commerce.

E. Trade Secrets

"A trade secret is any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others."[180] Trade secrets can protect any information an entity takes reasonable steps to protect from the public.[181] They are typically protected under state law, although federal regulations, such as the Defend Trade Secrets Act of 2016,[182] supplement the state regimes. As the name implies, there is no registration; rather, trade secrets serve as a defensive tool against wrongful misappropriation of secrets.[183]

Wrongful misappropriation involves a party obtaining or using a trade secret in an unsuitable manner.[184] In recent years, athletes and teams have relied more heavily on using technology and statistics to improve performance.[185] This has resulted in competitors trying to obtain secrets aggressively, and sometimes wrongfully.[186] However, if a

179. *Id.* at 380–81 (internal quotation marks omitted).

180. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (AM. L. INST. 1995).

181. *Trade Secrets/Regulatory Data Protection*, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/ip-policy/trade-secret-policy [https://perma.cc/DM5A-FJ3G] (last visited Nov. 19, 2021).

182. Pub. L. No. 114-153, 130 Stat. 376 (2016) (codified as amended in scattered sections of 15 U.S.C. and 18 U.S.C.).

183. *Trade Secrets/Regulatory Data Protection*, *supra* note 181.

184. Intriguingly, nearly all litigated trade-secret violations contain another cause of action such as tort, breach of contract, or a criminal violation. Ford, *supra* note 19, at 501.

185. Ford, *supra* note 19, at 491–508.

186. As one example, in 2008, New England Patriots coach, Bill Belichick, was found to be illegally taping opponents' defensive signals. *Goodell: Destroying Spygate Tapes Was 'Right Thing to Do'*, ESPN, https://www.espn.com/

competitor obtains secret information in a legitimate way, such as through independent development, reverse engineering, or innocent information from a third party, the law will not intervene.[187]

As a result, only Scripted Plays are temporarily subject to potential trade-secret protection. For example, when a football player is traded, the player must return the coach's playbook.[188] One commentator explained the argument for why trade secrets should protect playbooks as follows:

> If a player is not permitted to leave a team with a coach's playbook, then it is a solid claim that the playbook may be considered property. But the purpose of the illustration is to show the damaging effects of allowing an individual to travel from competitor to competitor even without any tangible books or files. Thus, the property protected is not just the playbook itself, but the ideas or information contained within the playbook. These, of course, amount to protection for individual scripted plays.[189]

Teams typically have developed tiered levels of secrecy to overcome these problems.[190] On the other hand, as Signature Styles, Singularities, and Celebratory Movements are moves readily accessible to the general public—they are generally not considered secret.

III. THE UNEASY CASE FOR PROTECTION

Generally speaking, the idea of legally protecting sports moves is a sensitive topic. The first subsection will explore why, pointing to the "competitive spirit" as a source of this uneasiness. Next, the second subsection re-evaluates those arguments by comparing the sports industry to so-called "negative spaces"—industries where, despite a lack of intellectual property protection, fierce competition flourishes. Finally, the third subsection evaluates the strength of internal mechanisms in the sports industry, such as private league rules and fan support, to determine whether intellectual property protection is even necessary.

A. The Discomfort in Protecting Sports Moves

There are a variety of reasons to protect sports moves. "First, intellectual property protection would reward the effort" and innovation of

nfl/news/story?id=3244687 [https://perma.cc/YW4R-D2MT] (Feb. 14, 2008, 2:01 PM).

187. Ford, *supra* note 19, at 501.

188. Today, coaches' playbooks are often electronic, so they can be easily erased from a player's device when she leaves. Ford, *supra* note 19, at 496.

189. Das, *supra* note 13, at 1095–96 (footnote omitted).

190. *See* Ford, *supra* note 19, at 501.

players and coaches.[191] However, critics argue, further economic incentives for player performance are unnecessary because athletes are already greatly compensated based on their individual performances.[192] While certainly the best athletes bring in larger amounts of money, especially from endorsement deals, high earners are not evenly spread across sports.[193] With protection, "the degree of athletic and financial success increases as the relative advantage conferred by the [protected] technique increases."[194]

Second, critics against protection argue that since sports are competitive, there is no further incentive needed to necessitate legal protection,[195] yet protecting sports moves serves the same purpose as protecting other performative art forms.[196] Competition exists for ideas already protected by intellectual property. For instance, ancient Greek Olympic festivals included competitions for poetry, oration, and music between bouts of athletic competition.[197] Today, televised dance competitions are so popular that they are viewed by millions.[198] Depending on the sport, these competitions directly mirror already-protectable forms of competition. In action sports like skateboarding, white-water kayaking, and BMX biking, athletes compete for scores just as in dance competitions or public speaking events.[199] The point value of movements in action sports relies not only on the complexity and difficulty of movements, but also the grace and style of their execution.[200]

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191. Garcia, *supra* note 33, at 84.

192. Kukkonen, *supra* note 31, at 828 ("Widespread patent protection for sports methods probably would not have a big effect on the innovation of athletes, because their performances are what shape the levels of their future salaries." (footnote omitted)), *cited in* Garcia, *supra* note 33, at 102.

193. Weber, *supra* note 31, at 335 & n.70; *see also* ROBERT H. FRANK & PHILIP J. COOK, THE WINNER-TAKE-ALL SOCIETY 65–66, 79–82 (1995) (finding a skewed distribution of endorsement earnings for top professional tennis players and describing a dramatic increase in sports revenue more generally), *cited in* Bambauer, *supra* note 12, at 403 & n.11.

194. Bambauer, *supra* note 12, at 403.

195. *See infra* Part III(B)

196. *See* Garcia, *supra* note 33, at 84.

197. Das, *supra* note 13, at 1083.

198. *See* Rick Porter, *'So You Think You Can Dance' Renewed for 16th Season on Fox*, HOLLYWOOD REP. (Jan. 14, 2019, 11:30 AM), https://www.hollywoodreporter.com/live-feed/you-think-you-can-dance-renewed-16th-season-fox-1175882 [https://perma.cc/3MAR-VJ9X] ("Season 15 of the series averaged a . . . total audience of 2.7 million viewers.").

199. Weber, *supra* note 31, at 321 ("[N]umerous other sport-forms . . . in marked contrast to traditional team sports place their principal emphasis on individual participation, intense risk-taking, and creative personal expression.").

200. *See id.* at 322 & n.20.

Third, creating protection for sports moves would force public disclosures which, in turn, could increase competition through readily accessible information.[201] As one commentator notes, this would "create[] perfect information of all plays that can be used by a particular club. Perfect information breeds perfect competition."[202] In this regard, protection of sports moves could compound innovation even faster than what would naturally occur. Time that is now spent reverse engineering the competitor's movements could be spent honing the craft.

As for reasons against protecting sports moves, some legal scholars push back on whether they constitute forms of art[203] or whether protection would benefit society overall,[204] and whether enforcement costs would be excessive.[205] Further, and perhaps more importantly, scholars challenge whether sports, as a whole, even fits within the goals of intellectual property, as legal protection may not encourage innovation.[206]

If moves became protected, this change would require a complicated system of enforcement to resolve instances of potential infringement.[207]

201. Das, *supra* note 13, at 1098–99. It is important to note that while this may be beneficial for certain types of moves, it is largely irrelevant for moves like Singularities, where disclosing the technique typically does not give the competitor an advantage.

202. *Id.* at 1098.

203. This question typically is directed towards adversarial team sports only. *See, e.g.*, Weber, *supra* note 31, at 322 ("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."), *cited in* Garcia, *supra* note 33, at 85–86.

204. *See* Garcia, *supra* note 33, at 85 (noting a scholarly disagreement about whether or not sports moves provide a benefit to society); Kukkonen, *supra* note 31, at 827 ("It is not clear that the patenting of a sports method benefits the welfare of the Nation. While the patentee has potential for economic gain from the exclusive use of the covered invention, there is little if any benefit to society.").

205. Kukkonen, *supra* note 31, at 824.

206. *See* Garcia, *supra* note 33, at 83–84 & n.13 ("Other commentators argue that intellectual property protection, such as copyright protection, was never intended to protect sports moves and plays . . . ." (citing Brent C. Moberg, Comment, *Football Play Scripts: A Potential Pitfall for Federal Copyright Law?*, 14 MARQ. SPORTS L. REV. 525, 549–50 (2004))).

207. If a move is protected, others who want to use it would have to license it. *See* Bambauer, *supra* note 12, at 420 ("Patents on competitive techniques are . . . unusually harmful, because monopoly control creates high costs.").

Time and effort would be expended to develop a firm evidentiary record.[208] Even in recorded competitions, several camera angles would likely be necessary to determine if the motion was infringed.[209] One scholar even proposed on-site legal counsel at professional events to monitor potential infringement.[210]

Perhaps the strongest reason against protection lies in the obvious competitive advantage granted to athletes, that "the concept of restricting the competitive elements of the playing field through the use of societal law offends the notions of fair play and competition that sports enthusiasts cherish."[211] Each form of intellectual property grants the right to exclude others.[212] While it is easier to rationalize rights for athletes looking to gain off the field, what happens on the field? Athletes gaining a competitive advantage in their sport by securing a monopoly on certain moves seems inherently unfair. It is foreseeable than an athlete would prevent their competitors from using a technique in competition or require their competitors to license the move from them.[213] This could be especially lucrative in the "winner-take-all markets" that professional sports often have.[214] Suppressing competition is antithetical to the goals of intellectual property and sports.[215]

The balancing of differing concerns ultimately boils down to how society should reward a person to "make the labor and risk of creating works financially worthwhile, while simultaneously limiting the breadth of that protection enough to prevent a[] . . . monopoly from distorting

208. *See, e.g.*, Kukkonen, *supra* note 31, at 824 (describing potential efforts required to develop an evidentiary record for a golf movement).

209. *Id.* at 824.

210. Das, *supra* note 13, at 1099.

211. *Id.* at 1076.

212. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 749 (1998). Notably, the scope of protection differs. While patents and copyrights can exclude all others from use, trademarks prevent others within the scope of commerce. *Compare* 15 U.S.C. § 1125(a) (stating that only those who improperly use others' trademarks "in commerce" are infringers of that trademark), *with* 17 U.S.C. § 501(a) (stating that "[a]nyone" infringes another's copyright if she violates one of the copyright owner's exclusive rights), *and* 35 U.S.C. § 271(a) (stating that "whoever without authority makes, uses, offers to sell, or sells any patented invention . . . infringes the patent."). *See also* Ghosh, *supra* note 11, at 1730–31 ("[T]his right to exclude translates into the exclusive right to make, use, sell, offer to sell, or import for patent law into the exclusive right to copy, distribute, adapt, publicly perform, publicly display, and transmit digitally for copyright law and into the assorted set of rights under trademark law and state intellectual property regimes.").

213. Bambauer, *supra* note 12, at 403.

214. *Id.* (citing FRANK & COOK, *supra* note 193, at 65–66, 79–82).

215. *See* Das, *supra* note 13, at 1088 ("It is a futile effort to issue protection when such protection would ultimately serve little or no purpose.").

consumer welfare and harming society by interfering with the maximal diffusion of knowledge."[216] Essentially, it is a balance of benefit to the athlete with benefit to the sport.

B. Negative Spaces and Their Effect on Innovation

Intellectual property scholars define negative spaces as "a series of nooks, crannies and occasionally oceans—some obscure, some vast—where creation and innovation thrive in the absence of intellectual property protection."[217] The understandable societal discomfort in protecting competitive motions implies that sports moves as a category may fall into the realm of negative space.

Negative spaces affect a wide range of industries, some of which go without protection altogether. Recipes, even at the highest Michelin-starred restaurants, are not protected by intellectual property law.[218] Stand-up comedians go on stage and tell jokes they know could be stolen by others.[219] Fashion design houses consistently copy one another's designs.[220] When billionaire fashion designer Ralph Lauren was asked how he continues to reinvent, he simply responded: "You copy. Forty-five years of copying; that's why I'm here."[221] Two legal scholars even noted: "[F]ashion not only survives despite copying; *it thrives due to copying*."[222]

While negative spaces exist in a broad range of industries, they share common characteristics. Elizabeth L. Rosenblatt, Director of Intellectual Property Law at Whittier Law School, identifies four commonalities among all negative spaces: (1) the incentives to create

216. Weber, *supra* note 31, at 333–34.

217. Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 COLUM. J.L. & ARTS 317, 319 (2011). The term "negative space" was developed in 2006 by Kal Raustiala and Christopher Sprigman. *See* Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1764 (2006).

218. *See* KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION 58 (2012) ("[W]hile a cookbook can be copyrighted as a whole, the individual recipes can be borrowed and republished by anyone—as a brief tour of the Internet, and popular cooking Web sites like Epicurious, will make clear.").

219. *Id.* at 98 ("For many decades copying was an accepted part of the comedy world. But since roughly the 1960s, when stand-up comedy began to move away from strings of one-liners and toward longer, more personalized routines, social norms have played an important role in regulating copying among comedians.").

220. *Id.* at 3–5 (illustrating one fashion house, Faviana, that specializes in knock-offs of high-end, celebrity fashion).

221. *Id.* at 19 (quoting Eric Wilson, *O and RL: Monograms Meet*, N.Y. TIMES (Oct. 25, 2011), https://www.nytimes.com/2011/10/27/fashion/oprah-winfrey-interviews-ralph-lauren.html [https://perma.cc/CY43-BDMG]).

222. *Id.* at 5.

in these spaces have rewards not tied to exclusivity; (2) these industries benefit from the absence of protection; (3) the public or the community has an interest in free access; and (4) the reinvestment in creation is preferable to intellectual property protection.[223]

First, these communities thrive without the existence of intellectual property rights because they are already encouraged to innovate. The fashion cycle continuously feeds off new trends, which require designers to develop new ideas each season.[224] Chefs continuously change their menus to attract customers. When one successful chef, Carrie Nahabedian, was asked why this was necessary, she simply responded: "Life is too short to dine mundane."[225]

Within negative spaces, potential benefits of awarding creators' intellectual property rights are often outweighed by the excessive transaction costs that would occur.[226] One such suggestion of having on-site legal counsel at games to resolve ongoing intellectual property disputes illustrates one potential transaction cost. [227]

The seasonal nature of most sports requires constant innovation to win. When Dick Fosbury brought his signature style to the 1968 Olympics, he was the only one to use his belly-up technique.[228] Four years later, at the 1972 Olympics, twenty-eight of the forty jumpers used the Fosbury Flop.[229] Even without legal protection, Dick Fosbury benefitted from being the first to use his move, securing the gold medal in 1968.[230] Nevertheless, the need to constantly reinvent is ever present in all sports, raising the question of how effective protection would be during competition.

Second, negative spaces benefit from the absence of protection. Rosenblatt describe this phenomenon by noting that "vibrant creation in each area—particularly those influenced by IP forbearance—implies that legally enforcing exclusivity would impose a cost on creators that

223. *See* Rosenblatt, *supra* note 217, at 336–57 (discussing each commonality in detail).

224. *See id.* at 352 ("[E]ven designers of the most timeless fashions have relatively little to gain from obtaining design patents, especially considering how many designs a fashion house may generate in a single season.").

225. Megy Karydes, *Do Restaurants Need to Change Their Menus?*, FORBES (Dec. 7, 2015, 8:00 AM), https://www.forbes.com/sites/megykarydes/2015/12/07/do-restaurants-need-to-change-their-menus/?sh=6add20a49460 [https://perma.cc/P4AQ-M9Y2].

226. Rosenblatt, *supra* note 217, at 351–53.

227. *See* Das, *supra* note 13, at 1099.

228. Goldman, *supra* note 22.

229. *Id.*

230. This is known as the "first mover advantage." *See* Rosenblatt, *supra* note 217, at 346–48 (describing the overall advantages to being the first to create in a given space).

would exceed the benefit of exclusivity to those creators."[231] Rosenblatt even explains that sports moves exhibit this quality because "athletes know that they benefit more from being able to imitate and build upon the work of their skilled colleagues than through legal protection."[232]

Third, when there is "a high public interest" in maintaining free access to innovations, the law is less likely to interfere as "[l]aws are designed to serve the public interest."[233] In sports, the public values close competition. While the "free access" they desire would be the ability to see competitors compete on even playing fields, there is also an interest in being able to perform the move in amateur competition. As an extreme example, children looking up to their favorite athletes should not be penalized for emulating their favorite athlete's protected moves.

Fourth, negative spaces are likely to occur when there is a desire to reinvest resources into the next creative achievement rather than in intellectual property protection.[234] This consideration is similar to the first, except that it specifically emphasizes the long and costly process of obtaining protection and enforcing it. This factor is less applicable to sports moves as a whole because of the sheer variety of sports and athletes. Rosenblatt identifies roller derby participants as a group with relatively few resources—winners often do not take home cash prizes.[235] While roller derby participants may not have the money to obtain protection, many athletes do. Because of the variation in all kinds of sports, making a determination on this factor's presence would require an overgeneralization.

Overall, it is clear that sports moves constitute a negative space. Negative spaces, like fashion, cuisine, stand-up comedy, and more, continue to exist and flourish despite a lack of protection. Because of non-legal incentives to create in these spaces, innovation exists already. And if creative production within sports is occurring already, athletes do not need protection as an extra incentive. In fact, added protection in the space may not only be superfluous, but could even be harmful by limiting future creativity.

C. Private Rules and Community Norms

In the absence of intellectual property protection, inherent mechanisms exist to provide informal measures of protection for sports moves. On an individual level, social media provides a direct pipeline

231. *Id.* at 336.

232. *Id.* at 349. See also *supra* Part II(A)(2) for a discussion of the evolution of skateboarding aerial spins. Skateboarders like Mitchie Brusco have greatly benefitted from their predecessors showing what was possible.

233. Rosenblatt, *supra* note 217, at 350.

234. *Id.* at 351–57.

235. *Id.* at 352.

for fans to post, communicate, and express opinions on athletes. This in turn impacts how higher institutions, like Halls of Fame, perceive an athlete's overall impact and legacy in the sport.[236] Finally, leagues can implement rules and regulations to prevent the overprotection of moves.

Fan support can greatly influence an athlete's actions. Fans have always impacted sports, especially at the professional level. To some degree, this is obvious: fans fuel the industry. Without monetary support from ticket sales and merchandise, professional sports would not exist. But the fanfare can become quite aggressive. Sports fans typically see the teams they support as "an expansion of a fan's sense of self"; there are a lot of emotions involved in sports.[237]

In this way, creative achievements in physical movement are often protected in the fans' memories rather than formal institutions. This fan control also plays out in other negative spaces, such as stand-up comedy. Comedians known to steal jokes could face the wrath of an increasingly angry audience detailing allegations on comedy blogs and YouTube channels.[238]

In the sports industry, an athlete perceived as violating norms could be hit where it hurts—their wallet. They risk losing the support of their fans, which greatly impacts their future earnings. Athletes are often informally punished for their ridiculous antics.[239] In this regard, fan

236. Some sports leagues have formalized fans' influence by letting fans vote for their favorite players, awarding additional points to the most popular players. *See* Joseph Rigal, *'Their Input Is Integral' – Fans Influence ATP & WTA Hall of Fame Nominees*, TENNISHEAD (Oct. 29, 2021), https://tennishead.net/their-input-is-integral-fans-influence-atp-wta-hall-of-fame-nominees/ [https://perma.cc/SV3K-2WPF]. Even in leagues without direct fan voting, the public nature of social media gives fans the ability to exert pressure on those tasked with selecting the finalists. *See* Jacob Feldman, *How Social Media Created Baseball's First Unanimous Hall of Famer*, SPORTS ILLUSTRATED (Jan. 24, 2019), https://www.si.com/media/2019/01/24/baseball-hall-of-fame-mlb-social-media-mariano-rivera-cris-carter-interview [https://perma.cc/SP3V-CLUB] (describing how fans used Twitter to strong-arm baseball writers into voting for their favorite players).

237. Eric Simons, Opinion, *The Psychology of Why Sports Fans See Their Teams as Extensions of Themselves*, WASH. POST (Jan. 30, 2015), https://www.washingtonpost.com/opinions/the-psychology-of-why-sports-fans-see-their-teams-as-extensions-of-themselves/2015/01/30/521e0464-a816-11e4-a06b-9df2002b86a0_story.html [https://perma.cc/R3WP-T69F] ("In all kinds of unconscious ways, a fan mirrors the feelings, actions and even hormones of the players. Self-esteem rides on the outcome of the game and the image of the franchise.").

238. RAUSTIALA & SPRIGMAN, *supra* note 218, at 11 (noting that comedian Dane Cook received pushback from these online communities when he was accused of stealing jokes from comedian Louis C.K.).

239. For instance, despite obvious talent, Terrell Owens struggled to maintain a spot in the NFL because he continually "destroyed the relations of his teammates and coaches by running his mouth to the press, insulting and

perception serves as a strong deterrent against an athlete falsely attributing a move, perhaps a Signature Style, to their own personal brand.

This fan perception is so critical to an athlete's or team's continued success that external regulatory bodies are influenced by it. For many communities, self-policing controls the dissemination of ideas and denotes ownership.[240] As one example, clowns regulate ownership of makeup and personae with the Clown Egg Register.[241] Many sports have similar parallels. Halls of Fame chronicle the best players to ever play the sport. Many of these Halls of Fame function as museums, cataloguing moments of innovation in the sport, even those involving players who were not inducted.[242] The idea of becoming immortalized and leaving a legacy drives many people, especially in sports. This desire for a legacy influences the actions of athletes further from another perspective. Where fan support indicates the athlete's current standing in the sport, Halls of Fame indicate their long-term standing.

Finally, if a player obtains intellectual property protection for their move, these intellectual property rights would not necessarily override private agreements between players and the leagues. When an athlete joins a professional sporting league, they sign on to abide by league rules.[243] Many leagues have a history of developing rules that affect the player's conduct outside of competition.[244]

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criticizing the players who throw the ball to him." Michael Kimble, *Terrell Owens: 5 Reasons the Controversial Wide Receiver Must Retire*, BLEACHER REP. (Jun. 28, 2011), https://bleacherreport.com/articles/750911-terrell-owens-5-reasons-the-controversial-wide-receiver-must-retire [https://perma.cc/KJR2-F7VN].

240. *See* David Fagundes & Aaron Perzanowski, *Clown Eggs*, 94 NOTRE DAME L. REV. 1313, 1332–33, 1332 & n.148 (explaining that clowns rely on informal systems to protect their intellectual property).

241. *See id.* at 1344 (describing a self-regulating register for clown makeup).

242. For example, one of the Pro Football Hall of Fame's missions is to "Celebrate Excellence EVERYWHERE." *Mission*, PRO FOOTBALL HALL OF FAME, https://www.profootballhof.com/mission-values-vision/ [https://perma.cc/B35V-W5PV] (last visited Oct. 31, 2021). This emphasis on excellence everywhere can be seen throughout the array of articles that highlight all players, regardless of their induction status. *See generally 2020 What to Look For - Week 7*, PRO FOOTBALL HALL OF FAME (Oct. 21, 2021), https://www.profootballhof.com/2021-what-to-look-for-week-7/?pg=2 [https://perma.cc/6V4F-CN4J] (discussing noteworthy players, some of whom are inductees and some of whom are not).

243. *See, e.g.*, Conner Christopherson, *What Do Frank Clark's Arrests Mean for His Contract with the Chiefs?*, SPORTS ILLUSTRATED (Jul. 15, 2021), https://www.si.com/nfl/chiefs/gm-report/what-do-frank-clarks-arrests-mean-for-his-contract-with-the-chiefs [https://perma.cc/CJT9-B4AR] (explaining potential consequences for a player who violated one of the NFL's default contract provisions).

244. *See id.* ("One . . . default clause [in] most NFL contracts is that guaranteed money will void if a player violates the personal conduct policy of the NFL.").

Legal scholars have proposed solutions for how leagues could regulate any future protection of sports moves. Leagues could require a compulsory license of protected moves, so all players could benefit.[245] In instances where an inventor with legal protection on a move was not a member of the league, the league could ban the movement entirely or purchase a license so all athletes could utilize the move.[246] Another alternative would be for leagues to limit protection of a move, particularly Scripted Moves, for only a season and then allow others to use it thereafter.[247] Leagues have many options to address these potential conflicts, none of which require legal intervention.

In light of the discomfort with protecting sports moves, there are persuasive reasons why specific protection may not be needed. The lessons learned from negative spaces apply to sports moves as well. Community norms and athlete motivations serve as a reminder that legal protection can be superfluous to these goals. Sports can continue to thrive even without direct legal protection.

CONCLUSION

During Bill Walsh's tenure as the head coach of the San Francisco 49ers, he led the team to three Super Bowl titles.[248] His secret weapon was an offensive strategy that would later become known as the "West Coast Offense."[249] With a focus on short passes and incremental gains, the 49ers would maintain possession of the ball for long amounts of time.[250] As a result, the opposing team would have less opportunity to score. When asked how he developed the strategy, he noted it was during his time with the Cincinnati Bengals: "I personally was trying to find a way we could compete. The best possible way to compete would be a team that could make as many first downs as possible in a contest

245. Kukkonen, *supra* note 31, at 828.

246. *See* Magliocca, *supra* note 96, at 876 n.8.

247. Das, *supra* note 13, at 1098. This type of seasonal advantage is not unheard of in sports regulation. For instance, in the 2020 Formula One season, the Mercedes team unveiled a new technology on its car known as Dual Axis Steering. While it was allowed during the 2020 season, a 2021 rule change banned future use of the technology. *See* Ayush Manjunath, *'A Shame that It Is Banned' — Mercedes Originally Had Greater Plans for DAS in F1*, ESSENTIALLY SPORTS (Dec. 29, 2020, 2:49 AM), https://www.essentiallysports.com/f1-news-a-shame-that-it-is-banned-mercedes-originally-had-greater-plans-for-das-in-f1/ [https://perma.cc/GB2C-Y3GN].

248. *Bill Walsh*, PRO FOOTBALL HALL OF FAME, https://www.profootballhof.com/players/bill-walsh/biography/ [https://perma.cc/M78J-PMK8] (last visited Oct. 31, 2021).

249. RAUSTIALA & SPRIGMAN, *supra* note 218, at 128.

250. *Id.*

and control the football."[251] Walsh focused his attention on the big picture: incremental gains turn into something much bigger over time.

In some ways, innovation parallels the West Coast Offense. It is the persistent building of ideas that creates many cherished innovations. This Note serves not to say that intellectual property protection is wholly undesirable, but instead serves as a cautionary reminder that different types of moves serve different types of purposes. Where one type of move may be suitable to protection, another may not. Patent protection may be solely limited to useful Signature Styles. Copyright may serve Signature Styles as well as Scripted Plays and Celebratory Movements. Trademark potentially covers all four categories, depending on the move being monetized. Defensive tools, like right of publicity claims and trade secrets, prevent others from robbing athletes of their creative achievements. For these reasons, it is important to distinguish which types of moves are valued and why these values exist.

In the meantime, not all hope is lost for sports innovators. Incentives to create are still plentiful, and there are options for athletes to maximize gains from innovating in their respective sports. As the market for sports moves grows, this discussion will continue just like all other types of innovation: incrementally.

Perhaps Bill Walsh's approach to innovation is best: "I directed our focus less to the prize of victory than to the process of improving—obsessing, perhaps, about the quality of our execution and the content of our thinking; that is, our actions and attitude. I knew if I did that, winning would take care of itself . . . ."[252]

Jacqueline Kett[†]

251. Dennis Georgatos, Game of My Life 104 (2007).

252. Bill Walsh with Steve Jamison & Craig Walsh, The Score Takes Care of Itself: My Philosophy of Leadership 21 (2009).

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