Dryer v. NFL: Can the “Voice of God” Save NFL Films?
Conflict Preemption Under Copyright Law May Be the Best Defense

BY LARRY A. SILVERMAN

NFL Films has become a ubiquitous presence on the sports landscape. Using its vast stockpiles of archival footage and its distinctive production style, it has produced countless television programs, feature films, documentaries, and promotional spots that have helped to ingrain the National Football League (“NFL”) into America’s consciousness. However, a recent court decision in a class action suit brought by retired players raises serious questions about the NFL’s right to market and sell these films without compensating the thousands of players whose images and likenesses play

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A
as International Olympic Committee President Jacques Rogge stated in his
closing speech, the Games in Vancouver provided 16 unforgettable days with
many strong emotions. There were incredible performances, unimaginable
mistakes and failures, and tragically the death of an athlete.

The road to any Olympic Games is long and hard. But, for some, including women
ski jumpers, the road was blocked. In February 2009, women were allowed to compete at
the Nordic World Ski Championships for the first time. The women looked forward to
participating in the Olympic Games and had been lobbying for inclusion in Vancouver.

But the International Olympic Committee ("IOC") selected other sports for inclusion
in the Games in 2006. IOC spokesperson Emmanuelle Moreau stated that, "[w]ith too
few athletes competing in this event, and no world championships until one year before
the Vancouver 2010 Olympic Games, women's ski jumping does not reach the neces-
"sary technical criteria and as such does not yet warrant a place alongside other Olympic
events." Moreau went on to say, "The IOC would like to underline that it understands
the heart-felt emotion with which the Canadian women's ski jumpers are so keen to
compete at their home Olympic Games in Vancouver in 2010. . . . However, decisions to
include an event at the Olympic Games are taken on technical merit and with a global
perspective—universality being a fundamental principle of the Olympic Movement."3

The women argued that there was in fact "universality." They noted the support
within the international community; that the international governing body, Fédération
Internationale de Ski ("FIS"), voted 114–1 to recommend including women's ski jump-
ing in the Vancouver Games; and that there were 83 women ski jumpers from 14 na-
tions jumping at FIS's most elite level of competition, the FIS Continental Cup.4 The
number of women competing in ski jumping actually exceeded those participating in
bobsleigh ("bobsled"), skeleton, and luge—all sports that are currently included at the
Games. Perhaps the hardest punch to take was that at the same time that the ski jump-
ers were denied, the IOC admitted snowboard cross and skiercross, events in which
four athletes raced simultaneously down a course with jumps and turns. Both snow-
board-cross and skiercross have significantly less numbers and universality. When the
IOC Programme Commission recommended snowboard cross, it noted that snowboard
cross has a high appeal for spectators and broadcast, especially in the 15–25-year-old
demographic group, which could “bring additional value to the Olympic Programme.”5

Evidently, women's ski jumping does not have that appeal.

On numerous occasions, women ski jumpers appealed to IOC President Jacques
Rogge. Rogge first responded that awarding medals in women's ski jumping would
dilute the medals of other Olympians.6 Rogge admired their tenacity and passion and
that the women had made a “very strong case” for inclusion, but believed that women's
ski jumping was “not ready” for Vancouver.7 Rogge emphasized that the decision not
to include women's ski jumping was made on technical and not gender grounds; that
women's ski jumping will be part of the 2012 Winter Youth Games in Innsbruck; and
that it may be included in the next Games the next time it may be proposed by FIS.8

The athletes from Canada, Norway, Germany, Slovenia, and the United States
filed suit alleging that allowing men, but not women, to jump was a violation of
Canada's Charter of Rights and Freedoms ("Charter"), which bars gender-based
discrimination.9 The biggest hurdle that they faced, a lesson learned numerous times
before, is that it is not easy to sue the IOC. Realizing this, the women instead sued the
Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter
Games ("VANOC") for implementing the discriminatory policies of the IOC. Cana-
dian courts also have jurisdiction over VANOC and Canadian law is clear on gender
discrimination.10 Ross Clark, the attorney for the ski jumpers, explained their case,
“Our position has always been that since the charter prohibits VANOC from hosting
an unconstitutional ski jumping event . . . VANOC must refuse to do so.”11

The women demanded that if they were denied an opportunity to compete, the
men also should be denied. Finally, the women argued that the IOC decision
was discriminatory in nature, noting that with the new inclusion of Women's
Boxing in the Summer Games, their sport was the only event in either the
Summer or Winter Olympic Games that did not include female competitors.12

VANOC defended on the grounds that the plaintiffs should be suing the IOC,
not VANOC, and that VANOC cannot offer women's ski jumping for women
unless the IOC added that event.

British Columbia Supreme Court Justice Fenlon found that there was
discrimination against the women according to the Charter, but that the
Charter does not apply to the IOC. The court noted that VANOC itself did not make the decision to exclude women's
ski jumping and did not have the power to remedy it. “The IOC made a decision that discriminates against the plain-
tiffs. Only the IOC can alleviate that discrimination by including an Olympic ski jumping event for women in the
2010 Games.”13

The IOC strongly disagreed that they acted in a discriminatory manner and
reasserted that their decision was based on technical issues, without regard
to gender. They noted that the court recognized that they have made strides in
including women and that the IOC has “implemented a wide range of initia-
tives to increase women's involvement in leadership and administration within
the Olympic movement and the wider sporting community.”14

John Furlong, VANOC's CEO, reiterated their support and commitment to
women ski jumpers and for possible in-
cclusion in the Olympic Winter Games.

Furlong states, “We recognize that the
women ski jumpers are committed and
passionate athletes and appreciate how
hard they are working to have their sport
included in the Olympic Winter Games.
The IOC has indicated that there is a
possibility that they could compete in
the 2014 Games; we will continue to do
everything we can to help these athletes
achieve inclusion in future Games.”15

Everyone has expressed support for the
“possibility” of future inclusion, but there

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ATHLETES AND DOPING

The World Anti-Doping Agency (“WADA”) has taken a two-pronged approach in the war against doping. It consists of education and detection/deterrence. This has been a systemic approach implemented through not only the international federations, but also through National Olympic Committees and national antidoping organizations. It was also a central piece of VANOC’s Anti-Doping Program. Beckie Scott, retired Canadian cross-country Olympic gold medalist, emphasized the education prong, “It’s a critically important piece of the antidoping landscape. Athletes and their support personnel absolutely must have access to updated and relevant information, so that they can be educated on the dangers and consequences of doping as well as the importance of competing ethically.”

The education detection/deterrence approach may be working because several top athletes were banned before the Games began. Christian Hoffman, 2002 Olympic Champion in the 30-kilometer race, was suspended by the Natio

are no guarantees, which does nothing to help the current athletes. Even IOC member Anita DeFrantz noted this, saying, “The words I heard were, ‘They’re not good enough.’ . . . I’ve heard that before. I understand discrimination very well. And this is a nearly textbook case of discrimination. . . . It makes me feel embarrassed that our organization, which is built on mutual respect and fair play, is doing this to a group of women. . . . It's just wrong.”

Furthermore, when the IOC is looking to add new sports to the Games, it must also look at the cost and efficiency of conducting the new event. The ski jump in Vancouver will be used on only 5 of the 17 days of the Games. As DeFrantz pointed out, “The ski jump is there. . . . It boils down to the will to do the right thing.”

Yulia Chepalova and Natalia Matveeva tested positive for recombinant erythropoietin (“rEPO”), a blood booster that enhances the production of red blood cells, which carry oxygen. Matveeva is a multiple World Cup winner and Chepalova is one of the most successful skiers of the past decade. Chepalova was Olympic Champion in 1998, 2002, and 2006 and World Champion in 2001 and 2005. Olympic cross-country champion Yevgeny Dementiev and 2006 Olympic bronze medalist Alyona Sidko also tested positive for rEPO and both were disqualified. Both Chepalova and Dementiev retired after their positive tests were announced.

There was more bad news for Russia when three biathletes also tested positive for rEPO. World Champions Albina Akhatova, Ekaterina Iourieva, and Dmitri Yaroshenko were each banned for two years. Akhatova is a five-time Olympic medalist and defending Olympic Champion, Iourieva is a former World Champion, and Yaroshenko is a two-time World Champion. Their bans run through December 2010, keeping them out of the Vancouver Games. Now under International Biathlon Union (“IBU”) rules, they are also banned from the 2014 Winter Games, which will be held in Russia’s own Black Sea resort of Sochi.

What has many concerned is that the athletes tested positive for a “new generation” of EPO and that the problem may be systemic. IBU President Anders Besseberg said, “We're not talking about EPO. This is a completely new medication. . . . I consider this a serious breakthrough in our fight against doping.” Besseberg went on to say, “Unlike previous doping cases, we are now facing systematic doping on a large scale in one of the strongest teams in the world. . . . Is that all or just the top of the iceberg?” IBU has recently doubled its budget to fight against doping. Besseberg said, “We are not proud to have had those three positive cases in the last season. However, we are proud that through the excellent work of our own anti-doping experts we were the first in the world to be able to 'catch' athletes using 'biosimilar' EPO.”

There has been condemnation of these doping cases internationally. Canadian Coach Geret Coyne put it more bluntly, “I don’t think coaches believe it’s just one athlete hiding off in a corner going rogue. . . . This is systemic, and where do you hit them to change their behaviour? The medical community in the IBU has been pretty strong in their testing and catching. The question is whether the penalties are teaching any lesson.”

Even the Russian government has been involved in these cases. Prime Minister Vladimir Putin has called for a “thorough analysis” of the problem and the establishment of a state doping control system and noted that “[t]he issue of sports doping now ranks among the most important problems.” Russian President Dmitry Medvedev said, “We must get rid of this image, which our country seems to have picked up. . . . We need to evaluate the situation and take all necessary measures, including the adoption of new laws.”

Russia was disappointed with their results in the Vancouver Games. They predicted that they would finish anywhere from third to fifth overall in terms of medals. They actually finished 11th overall with only three gold medals, a severe blow to their national pride. The men’s hockey team, one of the favorites to win gold, lost to Canada in the quarterfinals. It was the first time since 1964 that a Soviet or Russian team did not win a gold medal in any of the figure skating disciplines. President Medvedev called for a radical overhaul of the Russian sports system, saying, “Those responsible should take the brave decision and sign a letter (of resignation). . . . If they can't, we will help them.”

Both Leonid Tyagachyov, president of the Russian Olympic Committee, and Gennady Alyoshin, Russia’s Deputy Sports Minister, have resigned. Valentin Piseyev, president of Russia’s Figure Skating Federation, and Vladimir Loginov, head of cross-country skiing, have been removed from the presidential sports council. In 2007, Prime Minister Putin personally led the bid for Sochi to host the Winter Games in 2014 and is widely credited for winning the bid. Russia will not tolerate another poor performance as in Vancouver on their home soil.
**ANTIDOPING AND THE NEW BIOLOGICAL PASSPORT**

The biggest shock before the Vancouver Games was that five-time Olympic Champion and six-time World Champion Claudia Pechstein was banned for two years for a doping offense. Pechstein is Germany’s most successful Winter Olympian and has never failed a drug test. But the International Skating Union (“ISU”) claimed Pechstein’s blood profile indicated abnormal changes in a series of tests in February 2009. ISU suspended Pechstein for two years and said its decision was based on evidence of a sample she provided, “which included abnormal values and abnormal changes of values in a series of tests” and that those abnormal levels indicated a “prohibited method of blood doping,” such as a blood transfusion.34

Pechstein appealed and the Court of Arbitration (“CAS”) upheld the ban. The CAS Panel concluded that:

> bearing in mind the seriousness of the allegation, and based on all the considerations made above, [the Panel] finds that the ISU has discharged its burden of proving to the comfortable satisfaction of the Panel that the abnormal values [and changes] cannot be reasonably explained by any congenital or subsequently developed abnormality. The Panel finds that they must, therefore, derive from the Athlete’s illicit manipulation of her own blood, which remains the only reasonable alternative source of such abnormal values.35

The Swiss Supreme Court issued an emergency ruling allowing Pechstein to compete in a last chance to qualify for the Games, in a race in Salt Lake City where she had set world records in the 3,000 and 5,000 meters in 2002. She finished 13th and was not named to the German Olympic Team.36 In a final attempt, Pechstein went to Vancouver and tried to have her case heard by the Ad Hoc Division of the Court of Arbitration for Sport. The Ad Hoc Division found that it was not the proper forum for such an action and that it lacked jurisdiction.37

Pechstein was the first athlete to be banned under the new WADA “Athlete Biological Passport” Program adopted in 2009 as a new approach to catch cheats. The Biological Passport is different because it is based on monitoring selected parameters of actual competition that will indirectly reveal the effects of doping. It is longitudinal and will provide biological tracing throughout an athlete’s sporting career to detect abnormal variations.38

**EVEN WITH 70 PERCENT MORE TESTING, THERE WERE ACTUALLY ONLY TWO REPRIMANDS AND ONE CASE [OF DOPING] SUBSEQUENT TO THE CLOSING OF THE GAMES.**

The general philosophy of the Biological Passport Program is to provide a global and biological approach similar to medical and forensic science. It is not intended to totally replace traditional blood and urine tests, but rather is another tool as part of several strategies for “an increasingly global and biological approach.”39 It is designed to complement other antidoping efforts, such as urine and blood tests.40 Before proceedings against an athlete can be begin, WADA guidelines suggest that three experts must unanimously agree that a profile shows signs of a prohibited substance.

John Fahey, WADA president, said that Pechstein’s case showed that it was possible to sanction someone based on her blood profile.41 That decision may be far from clear. Recently, Gerhard Ehninger, the head of the German Society of Hematology and Oncology, said that they now had evidence that Pechstein’s blood levels were caused by a disease called hereditary spherocytosis. Ehninger, who had formerly supported Pechstein’s suspension, said that he has subsequently changed his opinion: “I’ve studied all the evidence carefully, and have come to the conclusion that the scales have clearly dipped in favor of Ms. Pechstein. Allegations that she had doped can no longer be maintained.”42 This could be a serious challenge to the validity of Pechstein’s ban.

**DOPING AT THE GAMES THEMSELVES**

Rogge stressed that the war against doping will continue. The president’s Opening Speech at the Games is generally short. However, in every Opening Speech, including in Vancouver, Rogge has specifically encouraged athletes to avoid doping,43 emphasizing how important he views the war on doping. Just before the Games, Rogge said, “We have a zero-tolerance policy for doping. . . . We are going to continue our policy of unannounced, out-of-competition testing. This is a weapon to trace the cheats. We’re also going to store the samples for eight years, like we did in Beijing.”44

There were seven positive drug cases in both the previous Games in Salt Lake City and those in Turin. Rogge was hopeful that there would be less in Vancouver but predicted the amount of cases would be in the double digits. Even with 70 percent more testing, there were actually only two reprimands and one case subsequent to the closing of the Games. The IOC was encouraged by the results and Rogge commented, “There is a strong message from this minimal amount of doping infringements. At least for products we can trace, there has been a deterrent effect.”45

Regarding the reprimands, Russian women’s hockey player Svetlana Terenteva tested positive for tuaminoheptane, a decongestant that is a prohibited substance during competition but not out of competition.46 Terenteva stressed that she took the drug for a head cold but stopped using it on February 3 because she knew the substance would be prohibited beginning February 4, 2010. Slovakian men’s hockey player Lubomir Visnovsky tested positive for pseudoephedrine (from Advil Cold and Sinus) that was in a concentration greater than the WADA limits. The Disciplinary Commission issued a reprimand rather than a sanction because the athlete had declared that he was using the drug and because his tests taken before and after a later game came up negative. The Commission also recom-
SAFETY ISSUES—BOBSLED AND LUGE

There were safety concerns and numerous crashes at the Games. Some were from weather. Some are inherent from contact in that sport, as with short-track, snowcross, and skiercross. But some could be from course design. All courses and designs are approved by the International Federations.

The Women's Downhill Skiing saw eight different crashes. Stacey Cook of the United States crashed during the first training run just before the remaining runs were canceled because of thick fog and low visibility. Canadian Georgia Simmerling’s crash was so violent her coaches pulled her from competition. Dominique Gisin of Switzerland flipped numerous times and lost her skis. After seven-time World Champion Anja Pärson hit a designed bump at the end of the course, causing her to fly 60 meters and take out a panel before she collapsed at the bottom, the directors changed part of the course. Women’s race director Atle Skaardal said, “We will try to ease things down a little bit. . . . We wouldn’t push the limits and decided after the training run that it was a good idea to shave the jump a little bit. . . .” Recognizing the dangers, the race directors also lowered the starting gate to reduce some of the speed during the race.

However, it was the Whistler Sliding Centre track that caused the most danger and controversy. The Sliding Centre was the venue for bobsled, luge, and skeleton.

The Centre’s promotional material states that the track is “Steep, challenging, and fast: The Whistler Sliding Centre is not for the faint of heart—this track is faster than any other in the world, reflecting the terrain and environment of its location.” The track included 16 turns, and athletes reached speeds in excess of 90 miles per hour and in excess of five gravitational forces.

There were crashes throughout practices and competition. In the women's bobsled race, World Champions Nicola Minichielo and Gillian Cooke of Great Britain crashed on the third run. Cathleen Martini of Germany, who had never crashed before, was in a spectacular crash and her brakeman, Remy Logsch, was ejected from the sled, sliding head first down the course traveling around 85 miles per hour.

In the men’s competition, there were so many crashes that the start of the second heat was delayed. The reigning World Cup Champion in two-man bobsled, Beat Hefti of Switzerland, withdrew after sustaining a concussion in a crash. The Swiss two-man team of Daniel Schmid and Juerg Egger crashed and withdrew. Egger was carried from the track on a backboard and taken away by ambulance. Teams from Australia, Liechtenstein, and Canada all crashed. John Jackson and Dan Money of Great Britain crashed and an injured Money said, “The track’s fast, the fastest track in the world, but it’s a technical track. If you get it wrong at a high speed, it can go very wrong.” Edwin van Calker crashed in the two-man and withdrew from the four-man, stating, “Some say it’s a brave decision. Some say scared. . . . I have to look after my boys and can’t close my eyes to that. For me, it’s not about performing, it’s about surviving.”

In luge, more than a dozen athletes crashed in practice and competition. Vladislav Juzhakov and Vladimir Machnutin of Russia crashed. Romanian luger Violeta Starmaturaru was knocked unconscious. Even defending champion Armin Zoggeler of Italy lost control and crashed. Megan Sweeney of the United States was airborne at the end of her run. Australian women’s luger Hannah Campbell-Pegg was one of the most outspoken critics of the track, saying, “I think they are pushing it a little too much. To what extent are we little lemmings that they just throw down a track and we’re crash-test dummies? I mean, this is our lives.”

But, it was the crash and death of Georgian luger Nodar Kumaritashvili that was the low point of the Games. Toward the end of a training run, Kumaritashvili lost control of his sled and went over the track wall and struck an unpadded steel pole. Medics were on the scene immediately and an air-rescue helicopter arrived literally within minutes, but it was all too late. After his death, an investigation continued by Canadian police, the British Columbia coroner’s office, and the International Luge Federation (“FIL”) for a report due in April 2010. Kumaritashvili’s family received a settlement through private insurance program set up for the Olympic family, and FIL also established a donation campaign for Kumaritashvili’s family.

The IOC dedicated the Opening Ceremonies to Kumaritashvili, and the Olympic flag was lowered to half mast. President Rogge stated, “This is a very sad day. The IOC is in deep mourning. . . . Here you have a young athlete who lost his life in pursuing his passion. He had a dream to participate in the Olympic Games, he trained hard, and had this fatal accident. I have no words to say what we feel.”

After the ceremonies, FIL President Josef Fendt said, “The track is too fast. We had planned it to be a maximum of 137km/h, but it is about 20km/h faster. We think this is a planning mistake.” Dr. Rene Fasel, chairman of the IOC Coordination Commission for the Games, said, “People say the more danger, the better. This is stupid. . . . Safety of athletes must be the number one priority. . . . We have to put limits.”

However, Tim Gayda, VANOC’s vice president of sport, said, “My heart goes out to Nodar. It is something that has hit us all. But the incident that happened was extremely unfortunate and something no one could have predicted. We’ve always maintained the track is safe. Both federations [FIBT and the luge federation, FIL] are part of the design process. It was they who recommended the designer we used. Both federations signed off on the design of the track.” Gayda also stated, “The FIBT is extremely happy with the track and happy to race on it. We listen to them, they are the experts. To make it 100 percent safe you would need to put the track in a tube and that is not what the sport is about.”

The designer of the track was Udo Gurgel of the firm IBG Designs, Germany. After Kumaritashvili’s death, Gurgel admitted that there needed to be changes, “This is ter-
rible and shocking news. . . . We have developed six Olympic tracks and nobody ever
came off the course. We now have to consider how we can alter the piste. At the exit
area we could increase the height of the walls by some 40 to 50 centimetres.65 The
steel posts were subsequently padded and the starting points were all lowered down the
track to reduce the speeds.

After the crash, President Rogge said that the IOC must consider three issues: “the
competition venue; the competition rules; and the qualification standard and quality of
athletes participating.”64 Rogge said, “We have to find a balance between these three
issues so that this does not happen in the future.”65 In a joint statement, VANOC and
FIL released their findings that the accident was the fault of the athlete and not due to
deficiencies in the track design.66

BUT WHISTLER’S SITE WAS HIGHER, STEEPER,
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REFLECTING THE TERRAIN THAT LED TO A TRACK
WITH TIGHTER TURNS, WHISTLER PRODUCED
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However, recently there was a report that there were warnings about the speed and
dangers of the track before the Games and specifically the location at Whistler.67 But
despite those warnings, other factors led VANOC to move the site from the original
site, Grouse Mountain, to Whistler, the site of the alpine skiing events. VANOC wanted
a smaller environmental impact with multiple events at one site.68 In addition, with the
improvements of the Sea-to-Sky Highway from Vancouver to Whistler, additional
roads and infrastructure to Grouse Mountain would not have to be upgraded. VANOC
also looked at the legacy uses of the venues after the Games concluded. VANOC
planned to use the Sliding Centre to promote sliding sports, host events, and provide
certification programs.69 Gayda said, “In order to make this thing financially sustain-
able, we want it someplace where people will pay top dollar to go whipping down this
thing in both summer and winter. [The luge and bobsledding federations were] pushing
us to look at options at Whistler.”70 But Whistler’s site was higher, steeper, and narrow-
er, and with a topography reflecting the terrain that led to a track with tighter turns,
Whistler produced greater speed and greater danger.

When asked about the site, President Rogge stated, “We never asked for more speed
in the IOC, never. There's never been any requests to say you have to go faster.”71 He
also addressed the issue of responsibility for Kumaritashvili’s death: “Everyone is responsible.
The IOC must make sure we have good games. That's our final responsibility. It's not a
responsibility in judicial terms. It is a moral responsibility. . . . We are morally responsible.
Our responsibility is to make sure that no unnecessary risks are taken.”72 Rogge has urged
the Russians to build a safer, less hazardous track in Sochi for the 2014 Games.73

DETERMINATION AND THE TERRY FOX AWARD

In his closing speech, President Rogge said, “We have shared the joy of dreams
fulfilled. We have been moved by tears of elation and tears of disappointment. We have
witnessed extraordinary acts of courage and exceptional determination by athletes who
refused to give up.”74 Perhaps the best examples of “extraordinary acts of courage and
exceptional determination” were not gold medalists, but actually two bronze medalists,
figure skater Joannie Rochette of Canada and Petra Majdic of Slovenia. The two were
the corecipients of VANOC’s “Terry Fox Award.”

Terry Fox was a Canadian diagnosed with cancer whose right leg was ampu-
tated above his knee. To raise money for cancer awareness and cure, he started
to run across Canada in a “Marathon of
Hope.” Filling the nation with hope, Fox
made it to Thunder Bay before cancer
took his life at the age of 22. More than
$500 million for cancer research has
been raised in his name. The award was
presented to

an athlete who embodies the same
values that Terry Fox did. This athlete
will be someone who is the epitome of
determination in motion, who pushed
on no matter what the pain or obstacles
in their path and touched Canada and
the world by displaying humility and
selflessness in their treatment of others
both on and off the field of play—a
veritable hero.76

Rochette’s bronze medal in figure skat-
ing was Canada’s first in women’s singles
in over 20 years. What made it amazing
was that she competed less than 48 hours
after her mother Thérèse died of a heart
attack. Elite figure skaters face enormous
stress and competition anxiety caused
by high performance standards based on
expected potential and competition anxi-
ety.77 Before her death, Thérèse Rochette
talked about her daughter, figure skating,
and stress: “I always encouraged her to
have confidence in herself, to believe in
her dreams, to consider the progress that
she has accomplished over many years. . . .
But in periods of great stress, I also have
the necessary distance to remind her of
a rule she knows well: above all, skate
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and downs for the next year, the next five years, the next 10 years . . . you never forget your mom . . . I just want to make her legacy live on and make it live through me . . . If this could inspire someone who was in the same situation or anyone who has a mother that can understand how it would feel to lose their mother, I just wanted to show that there is a way . . . 

Petta Majdic, the other corecipient, earned Slovenia’s first medal ever in cross-country skiing. What is amazing is that during a training run she literally fell off the course, dropped into a ravine, and crashed on the rocks, breaking her ski, her ski poles, and her ribs. She was carried out of the ravine, and it was suggested that she go to the emergency room. Instead, she wanted to race. The quarterfinals were the same day, and the race directors started her in last place to give her time to recover. She needed to place in the top 30, and she placed 19th. She made it through the semifinals without taking a painkiller and basically not being able to sit or stand still. By the time of the championship final, word had spread of her fall and what she was trying to accomplish. With cheers from coaches, athletes, and fans from many countries, she amazingly came from behind to place third.

All cross-country skiers collapse at the end of a race. They are literally exhausted. When Majdic collapsed, they took her to the emergency room and x-rays showed that she had skied with four broken ribs and a punctured lung. Her coach Ivan Hubac said simply, “What happened today was a miracle.” Olympic Champion Marit Bjørgen of Norway said, “I think this is a gold for Petra . . . She’s very hurt and she took bronze, so good for her. She is a strong woman.” After her fall she drove to the emergency room and x-rays revealed a broken rib and bruised ribs. She was not even able to sit or stand still. By the time of the championship final, word had spread of her fall and what she was trying to accomplish. With cheers from coaches, athletes, and fans from many countries, she amazedly came from behind to place third.

The Winter Games in Sochi are less than four years away, but there are challenges and changes on the horizon. The Gold Medal Men’s Hockey Game between the United States and Canada was one for the ages. However, the National Hockey League has yet to commit to Sochi. While the players are in favor, the owners have expressed their concerns about shutting down their competition for weeks. Alexander Ovechkin has been an outspoken advocate for the Games. “Everybody wants to play, the Olympics is the biggest tournament in hockey, I think. The Olympics, it’s only one year, you have only maybe one chance to play in the Olympic Games. . . . If somebody says you can’t play in the Olympic Games, it’s going to be no good.” However, the NHL owners have to be concerned about two weeks of lost profit and the risks of injuries to their star players. The current collective bargaining agreement expires in 2011, and this is sure to be a bargaining chip in the negotiations. The IOC also has concerns with Canada and the United States constantly dominating Women’s Hockey. While Women’s Hockey was admitted only in 1998, the IOC is looking for more parity. Rogge stated, “There is a discrepancy there, everyone agrees with that. This is maybe the investment period in women’s ice hockey. I would personally give them more time to grow, but there must be a period of improvement. We cannot continue without improvement.” There is a concern that the women’s game could be lost.

Finally, on March 26, 2010, the Olympic and Paralympic Flags traveled to and were raised in Sochi, Russia, signifying the transition to the next Winter Games. There have been some concerns about Russia’s readiness to host the Games. Medvedev and Putin are trying to put those fears to rest. If they can, the next Games, too, will give us unforgettable experiences.

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Circumventing the NBA’s Salary Cap: The “Summer of LeBron” and Beyond

BY CHRISTOPHER C. KENDALL

For the past couple of years, the biggest story in the National Basketball Association (“NBA”) has not revolved around championships or MVPs, but the summer of 2010—the “summer of LeBron.” Many teams—most notably the New York Knicks—have been clearing salary cap space during this time in order to sign a superstar free agent. And with all of this excitement comes an exhilarating rumor mill, rife with possibilities. Most famously is the rumor that LeBron James has a bonus in his endorsement deal with Nike if he plays in a large media market like New York City. Of course, like most rumors, it is simply not true. Although his rookie endorsement deal was for a massive $100 million, it contains no incentives or bonuses for playing in a large market. However, it is worth asking, what if he did have such a clause? What legal implications would arise? And how would the rules differ under circumstances involving non—maximum contracts or veteran players?

To begin to grapple with these questions, one needs to look no further than the governing body of law for the NBA—the 2005 Collective Bargaining Agreement (“CBA”). The CBA establishes the framework of the salary cap; what constitutes salary cap circumvention by teams, players, and third parties; penalties; and the rules for system arbitration. This article examines what issues related to salary cap circumvention might arise during this “summer of LeBron” and beyond. Section II lays out the rules against salary cap circumvention established in the current CBA. Section III then explores a multitude of scenarios involving players, teams, and sponsors that may implicate salary cap circumvention. Section IV concludes that changes must be made to the current CBA in order to clarify exactly what conduct would constitute a violation.

**SALARY CAP CIRCUMVENTION UNDER THE CBA**

Salary cap circumvention is covered under article XIII of the current CBA. Although it probably goes without explanation, the salary cap “means the maximum allowable Team Salary for each Team for a Salary Cap Year, subject to the rules and exceptions set forth in [the CBA].”

**General Prohibitions**

Section 1 of article XIII lays out the general prohibitions relating to salary cap circumvention. It begins by stating that “[i]t is the intention of the parties that the provisions agreed to herein, including . . . those relating to the Salary Cap . . . be interpreted so as to preserve the essential benefits achieved by both parties to this Agreement.” Therefore, throughout the analysis that follows, it is important to remember that those “essential benefits” must be preserved with regard to both parties.

This initial clause is followed by the general prohibition against salary cap circumvention:

> Neither the Players Association, the NBA, nor any Team (or Team Affiliate) or player (or person or entity acting with authority on behalf of such player), shall enter into any agreement, including, without limitation, any Player Contract (including any Renegotiation, Extension, or amendment of a Player Contract), or undertake any action or transaction, including, without limitation, the assignment or termination of a Player Contract, which is, or which includes any term that is, designed to serve the purpose of defeating or circumventing the intention of the parties as reflected by all of the provisions of this Agreement.

Because this section may be violated by either a team or a team affiliate, it is necessary to know exactly what qualifies as a team affiliate. Putting it simply, the CBA defines *team affiliate* as (i) any individual or entity that holds an ownership interest in the Team of less than 5 percent, (ii) any individual or entity that controls any individual or entity affiliated with the Team, (iii) any individual or entity that is controlled by those described in (i) and (ii) above, or (iv) any entity that holds 10 percent or more of the ownership interests in the Team or entity described in (ii) above.

Section 1(b) of article XIII lays out as the qualifications for salary cap circumvention as follows:

> It shall constitute a violation of Section 1(a) above for a Team (or Team Affiliate) to enter into an agreement or understanding with any sponsor or business partner or third-party under which such sponsor, business partner or third-party pays or agrees to pay compensation for basketball services (even if such compensation is ostensibly designated as being for non-basketball services) to a player under Contract to the Team.

Compensation is defined in article I as the “compensation that is or could be earned by, or is paid or payable to, an NBA player . . . in accordance with a Player Contract (whether such payment is sent to the player directly or to a person or entity designated by a player).” Therefore, it is a violation for teams or team affiliates to enter into agreements, or even just implicit “understandings,” to circumvent the salary cap via third-party compensation.

In serving as a burden-shifting regulation, a violation of this section may be inferred by the NBA when

> (i) such compensation from the sponsor or business partner or third-party is substantially in excess of the fair market value of any services to be rendered by the player for such sponsor or business partner or third-party; and (ii) the Compensation in the Player Contract between the player and the Team is substantially below the fair market value of such Contract.

Here, it is important to highlight that the “compensation” discussed in section 1(b)(i) is not the player’s contract with the team, but, rather, the compensation to be received for the sponsorship activities. If the “compensation” is “substantially in excess of the fair market value” of a typical endorsement deal, then a violation may be inferred. By contrast, the “Compensation” described in section
Unauthorized Agreements
In addition, section 2 of article III disallows any unauthorized agreements, whether “express or implied, oral or written, or promises, undertakings, representations, commitments, inducements, assurances of intent, or understandings of any kind” between a player and a team. This section, in combination with the general prohibitions described above, works to prevent the player from reaching a deal with the team to receive Compensation from a third party or sponsor. A violation of this section “may be proven by direct or circumstantial evidence, including, but not limited to, evidence that a Player Contract or any term or provision thereof cannot rationally be explained in the absence of conduct violative of Section 2(a).”

Penalties for Violations
Finally, section 3 of article XIII lays out the penalties for violating the general prohibitions or engaging in unauthorized agreements. Any suspected violation will go in front of the system arbitrator, whose exclusive jurisdiction and authority to resolve disputes arising under article XIII is granted by article XXXII of the CBA. If the system arbitrator finds that a violation of section 1 has occurred, he may (i) impose a fine of up to $2,500,000 on any team found to have committed such violation for the first time; (ii) impose a fine of up to $3,000,000 on any team found to have committed such violation for at least the second time; (iii) direct the forfeiture of one first-round draft pick; (iv) void the contract between the player and team; and/or (v) void any other transaction or agreement found to have violated section 1 above. As for violations of section 2, the system arbitrator may (i) impose a fine of up to $5,000,000 on any team found to have committed such violation; (ii) direct the forfeiture of draft picks; (iii) when both the player and the team are found to have committed such violation, (A) void the contract, (B) impose a fine of up to $100,000 on any player, and/or (C) prohibit any future contracts between such player and such team; (iv) suspend for up to one year any team personnel found to have willfully engaged in such violation; and/or (v) void any other transaction or agreement found to have violated section 2 above. Although wealthier teams may not be deterred by fines, losing draft picks and voiding the contract are quite severe punishments.

While the above sections may be verbose, it is impossible to understand the limits of player and team negotiations without a firm understanding of the salary cap and rules against circumvention.

SCENARIOS
Under the current CBA and the climate of the “summer of LeBron,” there are four noteworthy free agent scenarios that implicate possible salary cap circumvention: (a) what if, while still signing a maximum contract, LeBron James’ Nike contract actually had a bonus for playing in a big media market; (b) what if such a bonus were in substitution of a maximum contract; (c) what if the endorsement deal were with a company that had an NBA ownership connection, such as Microsoft does; and (d) what if a veteran player, wishing to win a championship, were willing to accept less money from a team, but had supplementary income through an endorsement deal?

Nike: A Bonus
If the NBA rumor mill were correct, and LeBron James had been eligible to receive a $100 million bonus from Nike for playing in New York, would this be permissible under the CBA? It depends. If the Knicks had not arranged for this bonus in the first instance, and thus had no underhanded arrangement with Nike, then there would have been no wrongdoing by any of the parties. Everyday players sign endorsement deals, and this one would be treated like any other.

By contrast, there likely would have been a violation if LeBron and the Knicks had an agreement where Nike paid LeBron an additional $100 million to play in New York. Such an agreement would almost certainly have been “designed to serve the purpose of defeating or circumventing the intention of the parties as reflected by all of the provisions” of the CBA as an “agreement or understanding” for a sponsor, business partner, or third party to pay Compensation for basketball services. Such an agreement would seem to be in clear violation of section 1(a) of Article XIII.

However, there is a wrinkle. This Compensation by the sponsor would only potentially be in violation of section 1(a) if either Nike’s deal were “substantially below the fair market value of any services to be rendered by the player for such sponsor or business partner or third-party” or the “Compensation in the Player Contract between the player and the Team were substantially below the fair market value of such Contract.” For Nike, it might be worth $100 million to have a player like LeBron James in the world’s largest media market, and, accordingly, such a tremendous bonus would not be in excess of the fair market value for his endorsement services. And if, as this scenario anticipates, LeBron also is receiving a maximum contract, then he is not paying below the fair market value for his services. Therefore, there would be no burden shifting or inferences to be made suggesting circumvention. Although there would be interference by a third party in terms of player movement, it would not qualify under the CBA’s predetermined inferences.

Nike: In Substitution of a Maximum Contract
If, instead of paying LeBron the maximum contract, the Knicks were to pay him Compensation that was substantially less than his fair market value, while he was still paid a bonus by Nike, then there almost certainly would be a violation of article XIII. In such a scenario, although Nike’s deal with LeBron would still be for fair market value for his endorsement services, the Compensation in his Player Contract would be “substantially below the fair market value” for his basketball-related services. As such, it would be inferred that a violation took place. Either (i) the violation occurred seven years ago when LeBron signed his original Nike deal so long as there was an implicit “agreement or understanding” between Nike, LeBron, and the Knicks or (ii) the parties are in present violation by “undertak[ing] an] action”—signing the lesser contract—for the “purpose of defeating or circumventing the salary cap.

Why would LeBron James agree to be paid less money for his basketball-related

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services? The best conceivable reason is that LeBron would want the Knicks, under the salary cap, to be able to afford the acquisition of other superstar players with which to surround him. As such, it appears that his smaller contract could “rationally be explained” by his desire to compete for a championship. However, although LeBron might consider this desire to be a “rational” one, his actions would be in circumvention of the salary cap, relative to his worth as a player. The “essential benefits” given to players who agree to the CBA require that a player of LeBron’s caliber follow the rules just like everyone else—thus, that parity is possible under the salary cap.

NBA Owners as Sponsors

Next, if instead of the rumored Nike deal, LeBron were to sign an endorsement agreement with a sponsor that, unlike Nike, has an ownership interest in an NBA team, then there would likely be a violation of the CBA’s rules against salary cap circumvention. Although this conceivably could happen with any of the NBA owners’ businesses, it seems most likely to occur with Microsoft and the Portland Trailblazers.

Microsoft would almost certainly qualify as a Team Affiliate of the Portland Trailblazers, whose principal owner is Paul Allen, co-founder of Microsoft. If Microsoft were to offer LeBron James an endorsement deal for any amount of money, and then were to acquire him as a player, it would be in direct circumvention of the salary cap. He would be receiving compensation for his basketball-related services from the same source as his sponsorship activities. Although he might be getting fair market value for both services, there would simply be too much intermingling of funds. It seems almost certain that players would be unable to sign endorsement deals with companies that also employ them for basketball-related services.

Veteran Players: Alternative Goals

Finally, as described above in scenario two, “Nike: In Substitution of a Maximum Contract,” sometimes players are willing to receive less money to play for a team that has a chance of winning a championship. Although a player like LeBron would face hurdles in making such a deal, in that his worth as a player would be undercompensated, that might not be the case for older veteran players.

If a veteran player were to sign with a contender for the fair market value of his services, but also received an endorsement deal, there probably would not be a violation on its face. However, the NBA would need to examine whether there was an arrangement between the Team and sponsor to supplement the veteran player’s income. A violation would be inferred if the sponsorship deal were in excess of the player’s value to the sponsor. But, in terms of fairness, even if there were some sort of quid pro quo, it seems that the NBA would still need to show that the sponsorship deal was determinative in making the player come to the Team. If the player truly only wanted a chance to play for a championship team, then any supplementary income, albeit against the rules, would not have actually circumvented the process of free agency. However, when reading the CBA strictly, it would have circumvented the salary cap, and thus would constitute a violation under article XIII.

CONCLUSION

As this article has demonstrated, the prohibition against salary cap circumvention in the NBA’s CBA can be both overbroad and underinclusive. It is an almost impossible task to determine whether compensation is either substantially in excess of or below the fair market value of a contract for services. Such an analysis is inherently subjective and fails to consider the motivations of players, such as the Gary Paytons and Karl Malones of the world, who would give up their ability to make more money in exchange for the possibility of a championship.24

And so, what next? After the long-awaited “summer of LeBron” comes the much-less-anticipated possibility of a strike or lockout in 2011 when the current CBA expires.25 Although salary cap circumvention will likely take a backseat to the mechanism that controls how the total basketball-related income splits between owners and players, it is all interrelated. If teams were able to make deals with sponsors to supple-

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ENDNOTES

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5. See id.
6. Id. at art. XIII.
7. Id. at art. L.1(lgg).
8. Id.
9. Id. at art. XIII.1(a).
10. Id. (emphasis added).
11. Id. at art. X.1(III).
12. Id. at art. XIII.2(b) (emphasis added).
13. Id. at art. L.1(i).
14. Id. at art. XIII.1(b) (emphasis added).
15. Id. at art. XIII.2(a).
16. Id. at art. XIII.2(c) (emphasis added).
17. Id. at art. XIII.3
18. Id. at art. XXXII. This section goes on to describe, in detail, the many procedures required for such arbitration.
19. Id. at art. XIII.3(a).
20. Id. at art. XIII.3(b).
23. Id. at art. XIII.1(b) (emphasis added).

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A powerful new tool for professional caliber athletes has hit the shelves. An Athlete’s Guide to Agents, now in its fifth edition, goes beyond educating the reader on how to select an agent. Written by sports lawyer, executive, and author Robert H. Ruxin, the book acts as a roadmap, outlining the major risks, rewards, challenges, and unknowns awaiting an athlete facing the decision of whether to turn pro. The writing provides valuable information covering a wide array of topics relating to agent selection, common agent issues, agent regulation, money management, endorsements, and sport-specific issues.

The fifth edition includes updated information, including recent examples and quotes that preface each chapter, which underscore the importance of that chapter. Ruxin also includes a new chapter, written by the SportsAgentBlog’s Darren Heitner, that analyzes a high school baseball player’s dilemma of playing in college or going pro. While athletes will certainly find this book extremely useful, their family members and individuals seeking to enter the field of athlete representation will find value in each chapter, as Ruxin provides key insights into many issues of the agency business.

Ruxin’s book provides the reader a methodical and sound approach to navigating many of the difficult issues an athlete may encounter throughout his or her career. The book is divided into nine sections, each containing short chapters giving the reader important information on key issues. In all, the book attempts to educate the reader by providing him or her an approach to agent selection that has the player’s best interests in mind. Ruxin also positions the athlete to succeed professionally and financially after his or her career concludes.

Each chapter covers an important area of discussion, cutting out the fluff to present the reader with short, well-organized sections that effectively present Ruxin’s main points. Throughout the book, Ruxin helps punctuate the importance of key concepts such as trust, honesty, and regular communication that ensure a successful athlete–agent relationship through the use of short and extremely relevant real-life examples and stories. These ideas are reflected in almost every chapter.

In choosing an agent, an athlete must be wary of individuals who break the rules or promise too much. A prime example of this challenge is resisting the urge to accept money or other benefits from agents while the athlete is still an amateur. To assist the athlete in finding an honest and reputable agent, Ruxin provides the reader with questions to ask and a bullet-point list of signs that identify a potentially unscrupulous agent. The author further suggests that the athlete and his or her family, either themselves or through others, engage in a vetting process of candidates, examining the agent’s background, character, reputation for violating certain rules or laws, technical knowledge, and areas of expertise. This approach helps the athlete stay involved while not becoming overwhelmed by the selection process.

The challenge does not end when an athlete settles on his or her agent of choice. Agreeing to and understanding the athlete–agent contract may be a difficult task. Potential questions that must be answered include defining the agent’s scope of representation (i.e., whether the agent also will handle money management and/or endorsements), determining the agent’s compensation scheme, and addressing potential conflicts of interest. Ruxin discusses the pros and cons of the various methods to calculate agent fees and suggests specific provisions that should always be included in the agreement. An athlete may want to consult another qualified attorney to review the agreement and explain the contract’s meaning in detail; this attorney may even be able to negotiate a better contract for the athlete.

Another major topic in Ruxin’s book deals with preventing the rapid loss of an athlete’s considerable money he or she generates during a short playing career. Many players fail to make wise choices with their money or are left uninformed about how their money is being invested. This lack of knowledge and involvement has led to many former players going broke or finding themselves under severe financial stress not long after retirement. To this end, Ruxin makes it clear that an athlete is going to need help to invest his or her money wisely. However, it is important for that athlete to actively participate in the management of his or her financial affairs so that there is an understanding of what is taking place with their money.

The author illustrates the dangers of whom they trust in their financial affairs to others by presenting stories of wide-scale financial loss involving world-class athletes such as Wayne Gretzky and Kareem Abdul Jabbar. These stories demonstrate the devastating effects of bad business deals or dishonest, unqualified, or incompetent agents acting as money managers. Ruxin provides helpful tips that an athlete should follow before agreeing to any financial management agreement, the first being never to sign a general power of attorney. As difficult as it sounds, an athlete must become personally involved and informed about investment decisions in order to prevent the hijacking of his or her retirement. It is also critical for the athlete to have competent representation that is adept at creating viable short- and long-term marketing strategies and can package the client with compatible endorsers.

An Athlete’s Guide to Agents covers a variety of topics that can often be complicated on multiple levels. This provided Ruxin the challenge of making the book readable, understandable, and enjoyable for his various audiences. However, Ruxin turns this challenge into the book’s greatest strength by explaining concepts in an easy-to-comprehend manner. The text includes elements that every demographic will easily grasp and find interesting. Athletes will relate to the basic ideas punctuated by various narratives.

While Ruxin’s audience may differ, one fact comes across regardless of who the reader is: An athlete faces many challenges and risks when he or she becomes a professional. It is paramount to make an informed decision when selecting an agent and financial manager; these relationships also must be built on trust and disclosure. In order to achieve a successful agency relationship and avoid the pitfalls an athlete may encounter, Ruxin’s An Athlete’s Guide to Agents is a must-read for anyone involved in an athlete–agent relationship.

Jeffrey F. Levine is currently involved in business transactions, civil litigation, and scholarly publishing. He also serves as staff writer for the Business of Sports Network and as a guest contributor to the Sports Law Blog. He can be reached at jflevine@onesportsint.com.
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Special Guest: Keenen Ivory Wayans

Keenen Ivory Wayans is an actor, comedian, director, and writer, perhaps best known as the host and creator of the hit FOX sketch comedy series, *In Living Color*, which also starred Jim Carrey, Jamie Foxx, brothers Damon Wayans, Shawn Wayans, and Marlon Wayans, sister Kim Wayans, David Alan Grier, Tommy Davidson and featured Rosie Perez. Wayans is the director/creator of many successful films, including *Scary Movie*, the highest grossing movie ever directed by an African-American, and the hit motion picture, *White Chicks*. He is our keynote “interviewee” for our Friday luncheon . . . live and in living color.
In Defense of Fairey and Fair Use

BY RACHAEL L. SHINOSKIE

SUMMARY OF FAIREY LITIGATION TO DATE

In April 2006, Associated Press (“AP”) photographer Mannie Garcia took a photograph of then-Senator Barack Obama while Obama attended a conference honoring the work of George Clooney in Darfur. Nearly two years later, artist Shepard Fairey created his Obama “Hope” poster. After an informal accusation of copyright infringement by the AP, Fairey filed for declaratory judgment in the U.S. District Court for the Southern District of New York in February 2009. Fairey initially claimed that he used a photo of Clooney and Obama together as his source material and that his use was entitled to a declaratory judgment based on fair use. The AP responded, disputing Fairey’s claim of fair use and countersuing for copyright infringement, asserting that Fairey’s poster was no more than copying and the creation of a derivative work. The AP also contested that Fairey used an up-close headshot of Obama as his reference material rather than the photo of Obama with Clooney that he claimed to have used. Fairey admitted to utilizing the headshot of Obama, taken by Garcia and published by the AP, as reference material for his Obama poster. Thus, a prima facie case for copyright infringement will be established once the copyright ownership issue is settled. Fairey asserts fair use as his defense.

ESTABLISHING COPYRIGHT INFRINGEMENT

A plaintiff establishes a prima facie case for copyright infringement by demonstrating ownership of a valid copyright and a copying of the work by the defendant. The element of copying requires that the plaintiff establish actual copying by direct or indirect evidence and that the copying amounts to improper appropriation. Before continuing, it is important to note that in the case at issue, there is a dispute as to whether the photographer, Garcia, or the AP owns the copyright. However, it is not disputed that a valid copyright exists and that either Garcia or the AP owns it. Moreover, Fairey has admitted to utilizing the headshot of Obama, taken by Garcia and published by the AP, as reference material for his Obama poster. Thus, a prima facie case for copyright infringement will be established once the copyright ownership issue is settled. Fairey asserts fair use as his defense.

ARGUMENT IN FAVOR OF FAIREY—LONG LIVE FAIR USE!

Fair Use and Its Elements

“From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, ‘To promote the Progress of Science and useful Arts.’” As Judge Leval remarked in his landmark law review article on the subject, “excessively broad protection would stifle, rather than advance, the [law’s] objective.” Therefore, fair use should be perceived as an “integral part of copyright, whose observance is necessary to achieve the objectives of that law.”

To date, the U.S. Supreme Court has issued two major opinions regarding fair use: Harper & Row, Publishers, Inc. v. Nation Enterprises and Campbell v. Acuff-Rose Music, Inc. These cases address the absolute extremes of fair use—Harper & Row addresses the verbatim copying of a portion of a nonfictional work, while in Campbell, the defendant took a small part, but arguably the heart, of a popular song and used it for parodic purposes. These two cases, while both landmarks in their own ways, have left many unanswered questions in the fair use landscape and a remarkable amount of room for lower courts to further muddy already complicated waters. Fairey v. The Associated Press, what has become known as the Obama Hope case, sits squarely in this maelstrom. It too has the possibility of becoming a landmark fair use decision, as Fairey asserts fair use as his defense against appropriation.

The Copyright Act of 1976 codified the fair use doctrine, describing four nonexclusive factors that must be considered in determining fair use. In determining whether the use of a work is fair, the factors to be considered shall include:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

“The ultimate test of fair use...is whether the copyright law’s goal of promoting the Progress of Science and useful Arts ‘would be better served by allowing the use than by preventing it.’”

FIRST FACTOR

The first factor in the fair use inquiry, as statutorily provided, is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”

Is the Work Transformative?

Post Campbell, it has become increasingly clear that the heart of the fair use inquiry lies in this first statutory factor, the determination of the purpose and character of the use. The Campbell Court, drawing on Justice Story’s reference in Folsom v. Marsh, explained:

The central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely “supersedes the objects” of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message...in other words, whether and to what extent the new work is “transformative.” Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such transformative works thus lie at the heart of the fair use doctrine’s guarantee of breathing space...
The use of the original work as raw material “in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”

Fairey does not argue that his use was transformative solely because Garcia’s work is a photograph and his is a graphic illustration. Indeed, courts have declined to find transformative use when “the defendant has done no more than find a new way to exploit the creative virtues of the original work.” However, Fairey does assert that his purposes in using the photograph taken by Garcia are acutely different from Garcia's goals in creating it.

Indeed, Fairey’s position in the Obama case, from a fair use analysis standpoint, is synonymous with the artist Jeff Koons’ position in Blanch v. Koons. In Blanch, a fashion photographer brought a copyright infringement action against visual artist Koons after Koons used her copyrighted photograph in a collage painting. Koons saw Blanch’s image in Allure magazine. He scanned the image and incorporated an altered version of it into his collage “Niagra.”

Koons’ objective was “not to repackage Blanch’s ‘Silk Sandals,’ but to employ it ‘in the creation of new information, new aesthetics, new insights and understandings.’” The court in Blanch noted that when the copyrighted work is used as “raw material” in development of specific communicative or creative goals, the use is transformative.

The court determined that the distinctly different objectives that Blanch had in creating, and Koons had in using, “Silk Sandals” confirmed the transformative nature of the use.

Similarly, Fairey’s objectives in his use of the Obama photograph are distinctly different from Garcia’s in taking the photograph. Garcia’s purpose as a photo journalist hired by the AP was clearly to document a newsworthy event. Fairey’s purpose, on the other hand, was to “inspire, convince, and convey the power of Obama’s ideals, as well as his potential as a leader, through graphic metaphor.”

The test for whether Fairey’s use of the Obama image is transformative is whether it “merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with a new expression, meaning, or message.” The court in Blanch noted that “the test almost perfectly” described Koons’ adaptation of “Silk Sandals.”

There can be no doubt that Fairey’s use of the Obama image is similarly transformative. Fairey replaced the real colors with an evocatively patriotic blue and red color scheme; he completely eliminated the blurry background of the original image; he simplified all the details of Obama’s face and rendered the portrait in a highly stylized manner; and crucially, he infused his poster with an entirely different purpose and meaning than that of the photograph. The purpose of the photograph was to convey a newsworthy event and was taken in April 2006, long before Obama announced his candidacy for president. Fairey’s poster, however, was intended to inspire and convey Obama’s presidential leadership potential. The success of Fairey’s intent is evidenced by the evolution of his poster into a symbol of the campaign and of hope. On the other hand, and notably, the photograph, which was available for nearly two years prior to the poster, never became such a symbol. As a result, it is clear that Fairey’s use of the image is transformative.

**Purpose: Money Really Isn’t Everything**

It is undisputed that Fairey made some profit from his Obama images. It is also undisputed whether the use in question is of a commercial nature, which is an explicit part of the first fair use factor. However, the Supreme Court in Campbell rejected the concept that the commercial nature of a use could alone be a dispositive consideration. The commercial nature of the secondary work is merely a subfactor of the first factor. “The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.” Finding a work substantially transformative properly allows the secondary commercial nature of the work to be discounted. As discussed above, Fairey’s use is highly transformative and, as such, its secondary commercial nature shall be deemed insignificant.

Moreover, it cannot be said that Fairey’s economic gains from his Obama images were “to the exclusion of broader public benefits.” “Notwithstanding the fact that artists are sometimes paid... the public exhibition of art is widely and we think properly considered to ‘have value that benefits the broader public interest.’” Fairey’s transformative and artistic use of Garcia and/or the AP’s image published by the AP clearly benefited the public, as evidenced by Democrats’ and disenfranchised Republicans’ enthusiastic embracing the work as a symbol of the Obama campaign.

Based on the foregoing, Fairey’s use is substantially transformative. As such, the secondary commercial nature of the work has little to no bearing on the analysis of the first factor and the weight of the first factor in Fairey’s favor.

**SECOND FACTOR**

“[T]he nature of the copyrighted work” is the second statutory factor. It requires the “recognition that some works are closer to the core of intended copyright protection than
others, with the consequence that fair use is more difficult to establish when the former works are copied.41

Two types of distinctions as to the nature of the copyrighted work have emerged that have figured in the decisions evaluating the second factor: (1) whether the work is expressive or creative, such as a work of fiction, or more factual, with a greater leeway being allowed to a claim of fair use where the work is factual or informational, and (2) whether the work is published or unpublished, with the scope for fair use involving unpublished works being considerably narrower.42

As noted, Garcia's photograph was published. Therefore, under the second of the two considerations, that fact favors Fairey.

Regarding the first consideration, despite the AP's contentions to the contrary, Garcia's photograph is more factual than creative. The AP contends that the photo is creative because of Garcia's selection of that particular moment to capture the president's expression, the type of lens and the light for optimal impact, and the total composition of the photograph.43 In truth, though, Garcia had no creative control in directing Obama's facial expression; he just happened to be at the right place and time with a camera. Nor did Garcia have any control over the lighting at the press conference. Further, in an article published in the New York Times, Garcia stressed that he is not an artist, thereby calling into question the argument about his composition of the photograph being sufficiently creative. "I want to avoid calling myself an artistic photographer. . . ."44

COPIES OF THE ORIGINAL PHOTO ARE NOW SOLD IN THE DANZIGER GALLERY—SUCH WAS NOT THE CASE PRIOR TO THE POPULARITY OF FAIREY'S POSTER.

While the photograph as a whole is sufficiently creative to receive copyright protection, the image simply depicts a newsworthy event, and thus its general publication throughout the United States favors fair use.45

If it should be decided by the court that Garcia's photo possesses the “creative nature of artistic images” and, as such, the court weighs that determination in the favor of the copyright holder, "the second factor may be of limited usefulness where the creative work of art is being used for a transformative purpose."46 As the court noted in Blanch, the second fair use factor has limited weight in such an analysis because Fairey used Garcia's work in a transformative manner. As such, the court would also find the second factor in Fairey's favor.

THIRD FACTOR

The third statutory factor bearing on fair use determination is “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”47 The transformative purpose of Fairey's use and the amount and substantiality of the use must be “explored, and the results weighed together.”48 The question is whether the amount and value of the original work used are reasonable in relation to Fairey's poster's transformative purpose.49

As noted above, Fairey's purpose in using Garcia's image was to create a graphic image that would inspire and convey Obama's leadership qualities. The question is whether, once he chose to copy Garcia's work, he did so excessively—was the use "reasonable in relation to the purpose of the copying."50 Weighing most heavily against Fairey is the fact that his poster is obviously based on Garcia's image—a side-by-side comparison makes it clear that the positioning of Obama's head, the direction of his gaze, and the general scale of the composition are all the same. However, “[d]epending on the purpose, using a substantial portion of a work, or even the whole thing, may be permissible.”51 Fairey has admitted to basing his poster on the image taken by Garcia and published by the AP, but he did not "simply copy the work verbatim with little added or changed."52 As discussed above, Fairey significantly altered the original work, and by doing so imbued it with a different character and transformative purpose. Therefore, the third factor should weigh in Fairey's favor.

FOURTH FACTOR

The final statutory factor is “the effect of the use upon the potential market for or value of the copyrighted work.”53 "In considering the fourth factor, our concern is not whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use usurps the market of the original work."54

The AP contends that Fairey's unauthorized use of the Obama photo has "caused substantial impairment to the potential market for the original photo, namely the AP's ability to license its use. . . ."55 The truth, however, is that not only has Fairey's work not usurped the market for the original, but rather it has increased it. Copies of the original photo are now sold in the Danziger Gallery—such was not the case prior to the popularity of Fairey's poster.56 A stylized poster is not a substitution for a realistic photograph. Moreover, while Fairey's failure to license the work from the AP does prevent the AP from collecting from Fairey's use, it in no way prevents the AP from licensing the work to others. "By definition, every fair use involves some loss of royalty revenue because the secondary user has not paid royalties."57 Because Fairey's work uses the image published by the AP for transformative purposes, Fairey's poster cannot serve as a substitute for the original photograph; the poster is enjoyed for a different purpose. Therefore, Fairey's work is unlikely to serve as a market substitute for the Obama photograph and cause market harm.

Derivative Works

Courts must consider not only harm to the primary market for the original work,
but to “the current and potential market for derivative works.” Possible derivative uses “include only those that creators of original works would in general develop or license others to develop.”

The AP asserts that Fairey’s poster is a derivative work based on the Obama photograph. However, a work is not derivative simply because it is based on a preexisting work. The law in the Second Circuit “has recognized that ‘even when one work is based upon another, if the secondary work sufficiently transforms the expression of the original work such that the two works cease to be substantially similar, then the secondary work is not a derivative work and, for that matter, does not infringe the copyright of the original work.'” In Warner Bros. Entertainment Inc. v. RDR Books, the court held that a lexicon based on the Harry Potter books was not a derivative work because the lexicon did not recast the material into another medium to retell the Harry Potter story, but rather gave the copyrighted material another purpose. Subsequently, the lexicon no longer represented the original works of authorship. The court noted “[t]his distinction is critical to the difference between derivative works, which are infringing, and works of fair use, which are permissible.” Therefore, transformative works, by their very nature, are not derivative; a derivative work may give an original a new mode of presentation, but it does not have transformative purposes.

Fairey’s poster is similar to the lexicon in the Harry Potter case. While it is based on the Obama photograph, Fairey’s image gives the copyrighted material a new purpose and is a transformative work. As such, the Fairey poster is not a derivative work. Because it is not a derivative work, if Fairey’s work does compete with the original photograph, the competition is permissible because, as noted by the court in Warner Bros., competition by a nonderivative work is permissible. Additionally, that court observed that “[t]he market for reference guides does not become derivative simply because the copyright holder seeks to produce or license one.” Similarly, the market for Obama-related artwork does not become derivative simply because the AP seeks to license its photographs for such works.

Based on the foregoing, the fourth factor favors Fairey.

Bad Faith

In light of the recent revelation about the source of Fairey’s image, where Fairey insists that he made a “mistake” in identifying the photo he used as reference, and while the AP calls Fairey’s admission a fabrication and an attempt to destroy evidence, there is plenty of discussion of bad faith in this case. Additionally, the AP alleges that Fairey acted in bad faith because, among other things, he failed to request a license to use the Obama

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Does the ABA Have Your E-mail Address?

You may be missing out on important e-mailings from both the ABA and the Forum on Entertainment and Sports Industries. A growing number of communications from the ABA are being sent by e-mail because of the skyrocketing cost of paper, manufacturing, and postage. Paper consumes a tremendous amount of energy in its production and shipment. Effective May 12, 2008, the U.S. Postal Service started linking its postage rates to the consumer price index. Postage is expected to increase every May for the foreseeable future.

For the present, you will continue to receive a hard copy version of Entertainment & Sports Lawyer. But you may not receive other information unless your e-mail address appears in your ABA membership record. Use one of the following convenient methods to add your e-mail address:

- **By phone:** ABA Member Services at 1.800.285.2221 between 7:30 a.m. and 5:30 p.m., CST
- **By USPS:** ABA Member Services, 16th floor, 321 North Clark Street, Chicago, IL 60654-7598
- **By e-mail:** Service@abanet.org. Or go to www.abanet.org and click on contact us at the bottom of the homepage.
- **By computer:** (1) Go to the ABA homepage (www.abanet.org), (2) Login, (3) Click on the MyABA link (top left of the page), (4) Click edit within the profile module, and (5) Update email address.
photograph, though he has requested at least one license for a similar purpose from other photographers in the past.\textsuperscript{67}

In terms of the fabrication and spoliation issues, U.S. District Court Judge Alvin K. Hellerstein called Fairey's admitted wrongdoing a "serious transgression," but he also stated that he wanted "this case to be decided on the merits."\textsuperscript{68} As mentioned above, Judge Hellerstein reserved sanctions motions until the copyright infringement case is determined.\textsuperscript{69}

As for Fairey's failure to seek the AP's permission to use the Obama image, the court in Blanch noted that "[w]e are aware of no controlling authority to the effect that the failure to seek permission for copying, in itself, constitutes bad faith."\textsuperscript{70} And as noted by the Campbell Court, "[i]f the use is otherwise fair, then no permission need be sought or granted."\textsuperscript{71}

In light of that statement by the Supreme Court, it cannot be said that Fairey acted in bad faith by not seeking or obtaining permission to use the Obama image if the court finds that his use of the photo is fair.

CONCLUSION

Having examined the statutory factors and balanced them with the purposes of copyright, it is evident that Fairey's use of the Obama image was fair. Fairey's use was highly transformative; he took an otherwise unmemorable photograph of then-Senator Obama as a senator and transformed it into an illustration that inspired a nation and became the symbol of a historic presidential campaign. Copyright's goal of "promoting the Progress of Science and useful Arts"\textsuperscript{72} is far better served by allowing Fairey's use than by preventing it.

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ENDNOTES

THE LITTLE GREEN BOOK OF GOLF LAW

THE REAL RULES OF THE GAME OF GOLF

Foreword by Gary McCord, CBS Sports Analyst, Champions Tour Player, and author of Golf for Dummies

"Minan has done a fantastic job with this very original effort, giving us 19 horrible and humorous cases we love to read about, and pray they never happen to us."

—The San Diego Union Tribune

Author and Professor of Law John Minan has selected a total of 19 cases to correspond to the typical 18 holes played in a round of golf, plus one for the traditional 19th hole. Each chapter examines a different set of facts and involves an actual case involving golf.

The chapters explore a wide array of legal issues—Tiger Woods' right of publicity, personal injury claims for negligence and products liability, contract disputes involving hole-in-one contests and golf cart rentals, a forfeiture claim under the Endangered Species Act, the Internal Revenue Service's litigation against a taxpayer over tax deductions for golf expenses, patent and trademark disputes, and more. In addition, each chapter identifies the subject matter and the official citation to the case in the chapter heading.

Violating “the law” of golf—as opposed to the rules that govern the game—can have serious consequences. You don’t have to be a lawyer to enjoy this book, which combines two great passions: law and golf.
Cyber-Terrorism vs. Cyber-Warfare
Defending The United Networks of America

BY SHELLY PALMER

Seven-year-old Mark Fielding looked up from his computer. He was very annoyed. “Mommmmm!” He yelled in a way that was sure to get her attention. “The Internet is down again.” It was the last thing she heard before the lights went off. Mark turned on his iPod touch and opened a blank Safari window to use as a flashlight. He found his mother by the front door. She was looking out on a darkened landscape. Neither of them had any idea just how dark it truly was.

Ten minutes earlier, a remarkably powerful computer virus had destroyed six of America’s most important data centers. Five minutes earlier, a different piece of code killed every caching server on the three biggest Content Delivery Networks (“CDNs”). At Zero Hour, the attack culminated in the computer-controlled destruction of the entire power grid in North America. It would take days to fix and months to fully repair, and the cost would be measured in trillions, not billions.

America’s days as an economic superpower had ended. All the financial data at the IRS was destroyed. Six of America’s major financial institutions could not access their records. No one could find a digitized medical record in any database with proper metadata (the data that describes data). With our data destroyed, our economy ceased to be. The subsequent breakdown of social services was immediate and devastating. The doing of life would never be the same. America, as we knew it, was gone.

Who did this? The Chinese? The Russians? Religious extremists? No. It was a small group of unaffiliated, highly motivated computer hackers. Who did they work for? Anyone. Who paid them? No one. Why did they do it? Because they could. What was their punishment? Sadly, they were never found.

What an emotionally unsatisfying way to end a great science fiction story. No enemy? No villain? No narrative? Try selling it as a story to indicate what songs are represented by the data? Let’s consider this. What use are the data on an iPod without a directory to differentiate an invasion from a teenage prank?

Most people interface with The United Networks of America through the World Wide Web. However, access can also be gained through your wireless phone or over the public Internet. The Net may be thought of as Google, Yahoo, eBay, Amazon, or CNN.com, but there are literally millions of private, local area and wide area networks that have access points on Al Gore’s information superhighway. These networks contain all of the information that describes us. I called it Metamerica in an article I wrote last year, and the dictionary does not mention with what sovereignty as tangible stores of value. In the super-digital age, bits of songs (the metadata), the data (any music files) are practically useless. In the Information Age, America without Metamerica also would be practically useless. Where is Metamerica? It is in the data centers at Google, the IRS, our banks and financial institutions, medical facilities, business networks, and even on our home computers. And, for all practical purposes, it is unprotected and unprotectable.

This fact alone should be enough to scare any thinking person. But I have not yet begun to describe the hard part of the problems we are facing.

What is a war? The dictionary says it is an “armed conflict between nations.” The dictionary does not mention with what they have to be armed. What is terrorism? What is a crime?

Moreover, in the Information Age, what is a country? What is a state? What is a nation? What is a tribe? What is a community of interest? What is an enemy? Where do they live? Do they need to be people?

What are weapons? What are military targets? What are civilian targets?

The U.S. Defense Department’s Quadrennial Defense Review highlighted the rising threat posed by cyber-warfare on space-based surveillance and communications systems. “On any given day, there are as many as 7 million Department of Defense computers and telecommunications tools in use in 88 countries using thousands of war-fighting and support applications. The number of potential vulnerabilities, therefore, is staggering,” the Review said.

“Moreover, the speed of cyber attacks and the anonymity of cyberspace greatly favor the offence. This advantage is growing as hacker tools become cheaper and easier to employ by adversaries whose skills are growing in sophistication.”

Defensive measures to combat this threat have already begun. Last June, the Pentagon created U.S. Cyber Command. But, how will we know when we are being attacked by a country, an enemy, a terrorist, a criminal, a mob, a gang, or an individual? When will the military know it is supposed to get into the fight? CIA? NSA? FBI? Google Security? A consortium of concerned citizens with antivirus software on steroids? How can you differentiate an invasion from a teenage prank?

U.S. Deputy Defense Secretary William Lynn described the cyber challenge as unprecedented. “Once the province of nations, the ability to destroy via cyber now also rests in the hands of small groups and individuals: from terrorist groups to organized crime, hackers to industrial spies to foreign intelligence services. . . . This is not some future threat. The cyber threat is here today, it is here now,” Lynn said.

I spend a fair amount of my time counseling my clients on how to deal with the fact that 2010 is the middle of the analog-to-digital transition. Today, we have analog leaders and digital citizens. Analog commanders and digital soldiers. If the pen is mightier than the sword, the “digital pen” is mightier than 1 million ballpoints. Forget the threat of cyber-attacks, and think about how an enemy might use the power of social networking and the ability to instantly publish any type of message globally to his or her advantage.

It is time to rethink the public Internet, computer networks, and the infrastructure of our digital world. The currency of information is as important and valuable to our economic sovereignty as tangible stores of value. In the super-digital age, bits of...
gold dust and bits of information deserve equal protection.

So, will we be a superpower, Cold-warriors, a sovereign nation, a first-world, or a third-world entity in the 21st century? Before assessing the strategy and tactics of fighting and winning a cyber-war, it would be helpful to understand who we are and who we are fighting.

Are fans citizens? That may sound like a strange question. But, in a connected world, fans self-select into communities of interest. When a community of interest forms around a pop-culture icon, a sports team, or a movie, the members of the community are called fans. When a community of interest forms around a political or religious worldview, what should we call them?

Obviously, the tyranny of geography does not apply to a connected world. Global communities of interest can form around any topic in a very short timeframe. Look at any trending topic on Google or Twitter to get a better appreciation of the speed of information in the Information Age.

The colloquial association with terms such as “community of interest” or “fans” is that of a passionate, but casual, affinity toward a particular subject. While this may be true in the traditional sense of the words, one disturbing trend has been the zealfulness and vitriol of passionate, sometimes only partially informed advocates of particular worldviews, and their remarkable ability to voice their opinions as facts.

Internet purists will tell you that the system is self-correcting and that “facts” and “fact checking” are actually overly scrutinized in online settings. There is considerable evidence to the contrary. Just the other day, President Obama quoted the late Senator Daniel Patrick Moynihan who, when arguing with a colleague, said, “...you are entitled to your own opinion, but you are not entitled to your own facts.” Real facts are hard to come by in the Information Age—there is too much noise surrounding them.

One interesting consequence of the Information Age is the ability for people to cocoon themselves in the information with which they agree and wrap themselves in the security of hearing only what they want to hear. This becomes increasingly important as communities of interest metamorphose into social media trust circles, which are simply groups of people whose opinions a person trusts above other sources. In the Information Age, trust circles not only self-assemble; they are among the most powerful forces we face.

In the advertising and marketing business, there used to be complaints about the decentralization of mass media in the United States (truthfully, people are still complaining about it, but putting the toothpaste back in the tube is impossible.) In the mid-20th century, there were three networks and one could inform, enlighten, and entertain (or brainwash and propagandize) a remarkably large percentage of the population by disseminating information from only a few sources.

After the advent of the cable television industry and a new technology called the electronic remote control, the enemy was the fragmentation of the audience—more tools were needed to reach the same number of people in more places.

In the last 60 months, there has been a transition from a 500-channel universe to a multimillion-channel universe. Consumers (viewers) can no longer be described as fragmented; they are atomized. They have not gone away but are simply self-assembled into millions of overlapping trust circles. This trend of consumers taking control of their information consumption and distribution will continue as long as technology progresses. In other words, everything will continue to decentralize at an accelerated rate for the foreseeable future.

Who are we fighting? Is it a nation, or a self-assembled mist of atomized, like-minded individuals? Are there now virtual nation-states?

IN THE INFORMATION AGE, TRUST CIRCLES NOT ONLY SELF-ASSEMBLE; THEY ARE AMONG THE MOST POWERFUL FORCES WE FACE.

If the very definition of government is an “empowered central command,” certain questions are now unavoidable. For example, what popular currencies do governments use to govern?

• Cash. Our money is backed by the full faith and credit of the United States of America.
• Military power. Why do people believe in our money? Could it have something to do with the 10 Nimitz-class supercarriers on active duty around the world? It might. Gunboat diplomacy is well understood and understandable. Our conventional military power is so extraordinary, no thinking nation would attack us with conventional military force. Any version of traditional warfare would be met with such overwhelming force.
• Information. America is the world’s grandest experiment in freedom of expression. As we know, the control of information is directly translatable into cash or military power.

When I discussed these three currencies of government with a rather well-known economist, I was told that cash and information are equivalent for this argument. Because our nation’s wealth is only supported by the belief in our posterity, information or propaganda (choose your own word to describe the Tao of the people) and the military are the two most powerful currencies in the Information Age. According to my friend, they are symbiotic. I am not sure I agree, but I am not an economist. Assuming that information and the military are two sides of the modern coin of the realm, in the Information Age, what constitutes weapons-grade information?

• Top secrets (governmental, corporate, personal, and so forth).
• Data (all our records: financial, medical, consumption, and so forth).
• Metadata (descriptions of data, such as people’s identities and financial data).
• Network topology (our digital infrastructure).
• Telecommunications networks.
• Access to the power grid.
• Access to access points in the networks.

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I have had the remarkable pleasure of speaking with several high-ranking military officials in the last few weeks. The subject has been analog leaders and digital soldiers. I was told that practically every military leader (of sufficient rank) in the U.S. Armed Forces is an expert in the strategy and tactics of wars fought on battlefields. That is very comforting. But the most devastating wars we are likely to fight in this century will not be fought on battlefields. We are going to fight cyber-wars, and they are going to target our economic sovereignty in ways that conventional wars never have.

**BECAUSE OUR NATION’S WEALTH IS ONLY SUPPORTED BY THE BELIEF IN OUR POSTERITY, INFORMATION OR PROPAGANDA AND THE MILITARY ARE THE TWO MOST POWERFUL CURRENCIES IN THE INFORMATION AGE.**

Recently, hackers targeted Google and other tech companies. The attacks were specific, vicious, and successful. The NSA, CIA, FBI, TSA, Homeland Security folks, Army, and Secret Service had no idea. There were no air raid sirens, no red-alert Klaxons, and while the nation did not know it was under attack, it was.

The history of Google is very well told in Ken Auletta’s book, *Googled: The End of the World as We Know It*. In the book, there is a description of what Google is. I am sure it is thought of by most solely as a search engine, with some knowledge by others about its other products and ad-supported businesses. People search for information on Google over 100 billion times per month, and Google has a copy of every search ever done (over its entire 12-year history). It learns from every search, and it is optimized to deliver the best, most relevant advertising to its users based on that search. Don’t be fooled by the business model into thinking that an advertising company cannot possibly have national security value. However, information is “the” currency of the Information Age, and Google has a 100 percent monopoly. No other entity on Earth comes close.

After the attacks on Google, there was much Sturm und Drang about who did what to whom. Was it an attack by the Chinese government or just a couple of unaffiliated hackers? If it was a nation attacking us, how would we know and how would we fight back?

Testifying before the Senate Intelligence Committee, the top U.S. intelligence official warned that the U.S. critical infrastructure is “severely threatened” and called the recent cyber attack on Google “a wake-up call to those who have not taken this problem seriously.”

“Sensitive information is stolen daily from both government and private sector networks, undermining confidence in our information systems, and in the very information these systems were intended to convey,” said Dennis C. Blair, director of national intelligence, outlining the U.S. intelligence community’s annual assessment of threats.

After the Google attack, Secretary of State Hillary Clinton said, “A new information curtain is descending across much of the world,” as she called the growing Internet curbs the modern equivalent of the Berlin Wall. She went on to say, “We stand for a single Internet where all of humanity has equal access to knowledge and ideas,” as she cited China, Iran, Saudi Arabia, and Egypt among countries that censored the Internet or harassed bloggers.

Sorry, Secretary Clinton, bureaucracy and diplomacy are not going to get this done. The U.S. government is practically powerless in this arena. This was not a conventional attack. There were no enemy combatants, no bombers, no nuclear missiles. This was a cyber-attack with a specific target. Could there be a more asymmetrical warfare problem: a few unidentifiable, highly skilled, highly motivated individuals against the United States of America? Just how many Nimitz-class supercarriers would you like to send, and where might you send them?

Here is an idea. Let’s nationalize Google. The only way to punish a nation-state in the Information Age is to cut off its access to information. A combination private and government-crafted information isolation is the economic equivalent of destroying the Ancient Library of Alexandria for any specific country. If China wants to play an Information Age game of schoolyard name-calling, let’s cut off its access to information. It is a level of economic sanction that we could not accomplish any other way.

Obviously, multinational corporations will have a huge problem with this. So will everyone else. It is a war, and when one is at war, people get hurt. That is why there are attempts to avoid wars. But we cannot fool around with this. We have analog leaders who think in analog ways and they are being asked to deal with a remarkably complex set of digital infrastructure issues that, honestly, only a very few people truly understand.

Okay, maybe we cannot nationalize Google, but I have made my point. The only way to fight a cyber-war is with cyber-tools. We need many of them, and we need them fast. To fight and win a war in the Information Age, we need to control the information. In many ways . . . Google already does.
YOU LET MY AVATAR DO WHAT?

Perhaps the biggest legal issue that has emerged for music video games has been whether how an artist’s avatar is allowed to perform in the game context violates the artist’s right of publicity. This issue came to light when Kurt Cobain’s widow Courtney Love and the surviving members of Nirvana expressed their dissatisfaction with the fact that Kurt Cobain’s avatar can be unlocked in Guitar Hero 5 and allowed to sing other artists’ songs, most notably Bon Jovi’s “Livin’ on a Prayer.” While Love had agreed to license Cobain’s likeness and music rights for the game, she stated that she was not aware of the potential to unlock the characters and threatened litigation as a result of this discovery. Interestingly, amid the uproar surrounding the use of Cobain’s avatar, Jon Bon Jovi noted that he had been approached in regard to licensing his avatar for the game and that “no-one even broached the subject with me that I would be singing other people's stuff. I don’t know how I would have reacted to that. I don’t know that I would have wanted it either.”

Though Love has changed her tune, stating that “Kurt would probably think it was funny, even if it was five Kurts singing Spice Girls,” the issue brought to light by Love was further illuminated when the band No Doubt filed a lawsuit against video game publisher Activision over the depiction of the band’s avatars in the game Band Hero. The lawsuit alleges that by allowing the band members’ avatars to be unlocked and sing other artists’ songs, Activision is violating their respective rights of publicity and breaching the contract licensing their music and likenesses for the game. In particular, the band alleges that allowing Gwen Stefani’s avatar to sing the song “Honky Tonk Woman” by the Rolling Stones in a masculine voice is particularly offensive, and not in the manner the band envisioned. The band further alleges that when it voiced its concern to Activision and requested that the avatars be locked in the game to perform only No Doubt songs, the company responded that “doing so would be too expensive and jeopardize their revenue.” In addition to the right of publicity claim, the No Doubt lawsuit also alleges fraudulent inducement and breach of contract on the part of Activision.

Of particular interest in the No Doubt case is the argument made by Activision in their answer and counterclaim against the band. In it, Activision alleges that the ability to unlock characters in the game to perform other artists’ songs has been publicly known for some time, and that the band should have been aware of this feature of the game. Activision has filed counterclaims against No Doubt for breach of contract, as well as unjust enrichment as a result of their failure to perform marketing services to promote the game as stated in the contract. In a statement in response to the suit, Activision noted that the agreement with No Doubt had been “signed after extensive negotiations with their representatives... who collectively have decades of experience in the entertainment industry.” While Activision claims that No Doubt and its representatives should have known of the unlocking feature before entering into the licensing agreement, the contract shown in Exhibit A of Activision’s answer provides for artist approval rights of the use of likeness and name.

This argument by Activision presents an ethical concern for entertainment attorneys negotiating contracts involving new technologies such as music video games: How much due diligence about the new technology must an attorney do to fully inform its client as to the ramifications of licensing content for said technology? ABA Model Rule of Professional Conduct 1.1, which addresses attorney competence, states that “competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” Comment 2 of this Rule states that “[p]erhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge,” and that “a lawyer can provide adequate representation in a wholly novel field through necessary study.” The Comment also recommends associating counsel that is more familiar with the area of law as a means of ensuring competence on a matter. This would seem to indicate that an attorney could be considered competent if he or she undertook a basic understanding of the technology for which the content is being licensed. This discussion is not intended to imply that attorneys should immerse themselves in exploring all of the potential features of a new technology. Rather, it is to make the point that in negotiating content licenses for new technology, it would behoove attorneys to engage heavy users of the game or other technology to research its potential uses and how they may impact their clients. In the case of video games, this could be as simple as having a conversation with a gamer as to what the game entails and what hidden features exist within it. Conducting such research also relates to the topic of diligence, which is addressed in Comment 1 to Model Rule 1.3, which states that “a lawyer is not bound, however, to press for every advantage that might be realized for a client” in representing his or her client. However, if fully researching the technology uncovers an issue that could later present a problem for a client, such as use of his or her image that he or she does not approve of, and avoids later litigation, perhaps the extra inquiry is worthwhile.

The No Doubt case recently survived a motion to dismiss, as Los Angeles Superior Court Judge Kenji Machida rejected Activision’s First Amendment defense in regard to the right of publicity claim. The judge also has rejected Activision’s attempt to remove the suit to federal court.

BY CHRISSEL SCELS

A mong the standout trends of the last few years in video games is the genre of music video games. Starting with Guitar Hero and Rock Band, these games sold millions of copies and introduced music and artists to new generations of fans tapping and strumming away on their plastic, instrument-shaped controllers. As the genre has matured, new technologies have been introduced, and, likewise, new legal issues have arisen around the games.
as a copyright claim, instead of a state right of publicity claim. The outcome of this case could have a significant impact in determining what rights celebrities have to protect their image when licensing it for video games and new media.

ROCK BAND NETWORK

Another challenge that has faced the genre of music video games has been a way to clear the bottleneck of artists trying to get their music featured in the games. With a limited number of programmers to handle the time-intensive process of authoring the tracks and rendering the avatars, artists are somewhat limited in their ability to be featured in a game. Game publisher Harmonix is attempting to clear this bottleneck and provide more artists with the potential exposure of having music featured in the game with the introduction of its new Rock Band Network, which opened for beta testing in September of 2009.

The concept of Rock Band Network is to provide the technology for artists, either on their own or through an authoring company, to sell their tracks to be played in the game. The process, called authoring, is currently only available through Microsoft’s XBox 360 and Creator’s Club service. Harmonix recently launched the Rock Band Network for PlayStation 3 on a limited basis, with five new tracks available each week. The Network has yet to launch on the Nintendo Wii console, though offering a feature similar to that for PlayStation 3 is reportedly in the works.

Artists can submit tracks to Rock Band Network themselves, particularly if they are savvy with recording software. To start, an artist must own or have permission to upload the master sound recording, as well as the publishing rights to the underlying composition. The Submission Guidelines for Rock Band Network do not allow the submission of cover songs, explicit material, or tracks containing samples. The artist then would need an XBox 360 console, as well as a Gold Membership to the XBox Live service, which costs $7.99 a month, and an XNA Creator’s Club Membership, which costs $99 a year. The artist would then need software called Reaper to map the tracks to create the stems necessary for each instrument, as well as set the difficulty, and customize the avatars, camera angles, and lighting for the background video. The process of authoring can be time intensive, as it is estimated that it would take a newcomer to the process 20 to 40 hours to author a single track. After processing the tracks with Reaper, the next step involves software called Magma to create song packs that can be uploaded and auditioned on the XBox Live network. Once a track is uploaded onto the Rock Band Network, the track then is subjected to peer review called “playtesting” by other users and authors. If the track is approved through playtesting, it is then placed in the Network Marketplace and is made available for sale for a price ranging from $1 to $3, of which the artist receives 30 percent.

Perhaps the Rock Band Network will allow more artists to gain exposure and sell tracks through the game, ultimately capitalizing on the growth of track downloads for music video games.

As one can imagine, the process of authoring one’s own tracks for the Rock Band Network is somewhat daunting, particularly for artists less familiar with recording software and technology. In anticipation of this, Harmonix started a program to train game developers and programmers in authoring software and technology. The people trained as part of this program have spawned a number of authoring companies that will author tracks for a fee. Authoring company deals typically involve an upfront fee, such as TuneCore’s fee of $999 (a discount from its standard fee of $2,500) or RockGamer Studios’ fee of $500 per minute of music, or a percentage of royalties earned.

While Rock Band Network was intended to give independent artists access to the Rock Band platform and thus gain greater exposure for their music, when the network was announced, an unexpected result was the move by better-known artists like Creed and Steve Vai to submit their tracks via authoring companies. The potential for increased sales resulting from the exposure of tracks featured in music video games has been shown for both up-and-coming acts, as well as more established acts like Aerosmith, whose song “Same Old Song and Dance” saw a 136 percent jump in sales after being featured in Guitar Hero: Aerosmith. While sales of music games and components have fallen, the growth of downloads for these games has increased, as Rock Band has sold more than 60 million downloads. The prevalence of band-specific games involving royalty deals based on the sales of the game seems also to be declining, particularly given the pushback by executives at companies like Viacom against paying artists royalties based on game sales. While not as lucrative as the royalty deals, perhaps the Rock Band Network will allow more artists to gain exposure and sell tracks through the game, ultimately capitalizing on the growth of track downloads for music video games.

As the video game industry and genres like music video games evolve, new legal and technological issues also will likely continue to develop. Attorneys representing entertainment and sports clients in negotiations for the licensing of content or other rights in new technology must work to understand the ramifications of new technologies and how to best protect the rights of clients while also capitalizing upon the opportunities presented by new technologies.

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Dryer v. NFL: Can the “Voice of God” Save NFL Films?

CONTINUED FROM PAGE 1

starring roles in these productions.

This article will examine that decision (Dryer v. National Football League) and its potential impact on the ability of all professional sports leagues and teams to exploit its copyrighted archival video footage. It also will suggest that the inconsistent interpretations by the courts of the express preemption doctrine under copyright law limits that doctrine’s usefulness as a defense to these types of right of publicity claims. Finally, the article will argue that the conflict preemption analysis in a 2008 opinion from the Court of Appeals for the Third Circuit that, ironically, involved a successful right of publicity claim brought by the so-called Voice of God against NFL Films, may provide the clearest path toward avoiding the collision course between right of publicity claims and copyright law that is epitomized by the Dryer decision.

THE DRYER CASE

On January 26, 2010, the U.S. District Court for the District of Minnesota denied the NFL’s Motion for Judgment on the Pleadings in a class action suit brought by several retired NFL players on behalf of retired players from all 50 states.1 The retired players, including Fred Dryer, a defensive end who played 13 years in the NFL (1969–81) and who later starred as Detective Hunter in the television show Hunter, alleged that for years the NFL had earned substantial revenue and had enhanced the NFL’s brand awareness by producing and selling hundreds of promotional films and videos that featured the images and likenesses of the retired class member players.2 The retired players argued that while the NFL “reaps record breaking revenues,” the players featured in these films and videos have not been compensated for the use of their likenesses and images. The retired players claimed that this commercial exploitation of their identities and likenesses through the marketing and sale of these films and videos violated their rights of publicity afforded by state statutes or the common law of all 50 states.4

The NFL’s motion asked the court to dismiss the right of publicity claims on First Amendment grounds and/or that the claims were barred by express preemption under the Copyright Act.5

The district court in Minnesota denied the NFL’s motion. The bulk of the opinion analyzed the First Amendment issue.6 This article, however, will focus on the copyright preemption issue. On that issue, the court, while recognizing “there is no dispute that the NFL has a valid copyright in the video clips used in the films,” nevertheless rejected the NFL’s claim that the retired players’ right of publicity claims were expressly preempted by § 301 of the Copyright Act.7

At the outset of its decision, the court recognized that the Copyright Act “provides the exclusive source of protection for all legal rights that are equivalent to any of the exclusive rights under the general scope of the copyright.”8 It then referenced the two-part test for express preemption under § 301(a), which provides that a state law claim is preempted if (1) the work at issue is “within the subject matter of copyright,” and (2) the state law right is “equivalent to any of the exclusive rights” within the general scope of the copyright.9

The court concluded that the NFL had failed to establish either prong of this two-part test. First, the court held that the “work” at issue was not the films themselves; rather, it was the retired players’ own identities. Accordingly, “the work at issue” (the players’ personas) was not within the subject matter of the NFL’s copyright.10 Second, the court held that state law rights of publicity are not “equivalent” to the exclusive rights afforded the NFL under its copyright. The court reasoned that rights of publicity protect “the right of an individual to reap the rewards of his or her endeavors,”11 while copyright law “protects the author’s exclusive right to reproduce, distribute, perform or display expressive works.”12 Because rights of publicity “protect very different rights” than the copyright laws, those claims were not “equivalent” to the exclusive rights afforded by the Act.13

Importantly, in its memorandum in support of its motion, the NFL, in a one-sentence footnote, referenced the additional copyright preemption defense afforded by the doctrine of conflict preemption, but stated, “the court need not reach this alternative basis to grant this motion.”14 As a result, the conflict preemption defense to the right of publicity claims asserted by the retired class member players was never addressed in the Dryer opinion.
POTENTIAL IMPACT OF DRYER

Founded in 1962 by Ed Sabol, NFL Films is currently run by Ed’s son, Steve Sabol, and is owned by the NFL. With its now familiar style of slow-motion shots, sideline audio, and narrators with deep, booming voices like Harry Kalas and John Facenda, NFL Films generates over $50 million per year in revenue for the league. Its real value, however, lies in its impact on the NFL brand. In fact, many people believe that NFL Films is one of the key reasons for the NFL’s success.15

The films at issue in Dryer included The Fabulous Fifties and Sensational 60s, both from the NFL Films’ History series. NFL Films also produces, among other things, the Greatest Moments series that details classic games from the 1960s, 1970s, 1980s, and 1990s; the Lost Treasures series, which utilizes old NFL Films’ footage to give an inside, uncut look at the league’s players, coaches, and referees; and a five-part mini-series entitled Full Color Football: The History of the American Football League, which aired in 2009.16

If upheld and followed by other courts, the Dryer decision would have a substantial impact on the ability of the NFL to produce, market, and sell these films, because the “stars” of these films are the thousands of names, images, likenesses, and voices of the players and coaches who appear on screen. Moreover, like the decision of the Court of Appeals for the Eighth Circuit in C.B.C., in which it was held that the use of names and statistics in fantasy baseball games without a license was protected from right of publicity claims by the First Amendment,17 the decision also could have a ripple effect on similar uses of copyrighted films marketed and sold by other pro sports leagues and teams, all of whom make liberal use of archival footage to promote their brand. How much of the revenue pie generated by these copyrighted materials would need to be paid over to the tens of thousands of retired players whose images and likenesses appear in these films if these right of publicity claims are successful is, of course, unknown, but the potential impact of the decision cannot and should not be underestimated by the NFL and the other pro sports leagues and teams.18

THE LIMITS OF EXPRESS PREEMPTION

Whether one agrees with the court’s holding in Dryer or not, the decision highlights the limited usefulness of § 301’s express preemption provision as a vehicle for the disposition of right of publicity claims. Section 301(a) of the Copyright Act provides that

[jn or after January 1, 1978 all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by Section 102 and 103 . . . are governed exclusively by this title.19

In determining whether a right of publicity claim under state law is preempted by § 301(a), the courts have asked two questions. First, is the right the state law claim seeks to protect “equivalent” to a copyright holder’s exclusive rights? Second, does the “work” (the image, likeness, or voice in a right of publicity case) fall within the copyright’s subject matter?20

THE USE OF RETIRED PLAYERS’ IMAGES AND LIKENESSES BY NFL FILMS IS A LEGITIMATE EXPLOITATION OF THE NFL’S COPYRIGHTED MATERIALS.

When deciding whether the state law claim is “equivalent” to the copyright holder’s exclusive rights, most courts have utilized the “additional” or “extra” element test. If the state law claim requires that the plaintiff prove an “additional element” beyond what is needed to prove copyright infringement, the state law claim will not be deemed equivalent to the copyright holder’s exclusive rights. In answering the second question, courts have examined whether the “work” that is the subject of the right of publicity claim comes within the subject matter of the copyright.21

The application of this two-part express preemption test has led to wildly inconsistent results. As Professor David Nimmer has noted, “the interplay between copyright preemption and the right of publicity has seen more volatility than just about any other doctrine canvassed throughout this treatise. Tremendous disarray punctuates the cases.”22 Judge Koziński, in a stinging dissent from the Ninth Circuit’s denial of a request for rehearing en banc in a right of publicity case brought by two of the stars of the TV show Cheers, expressed the growing frustration with the express preemption case law when he opined that the court’s application of the right of publicity “put state law on a collision course with the federal rights of the copyright holder.”23

In its memorandum in Dryer, the NFL relied almost exclusively on the 1986 decision from the Seventh Circuit in Baltimore Orioles v. Major League Baseball Players Ass’n (“MLBPA”).24 In Baltimore Orioles, the MLBPA, on behalf of its membership, argued that the use of their images and likenesses in baseball telecasts violated their rights of publicity. Reasoning that Major League Baseball owned a valid copyright over these telecasts, the court held that the players’ claims were expressly preempted by federal copyright law.25

Although the result in the Baltimore Orioles case was clearly correct, the rationale employed by the Seventh Circuit has often been questioned. The Fifth Circuit called the decision “controversial” and noted it had been “heavily criticized.”26 In 2004, the Seventh Circuit itself took the unusual step of specifically commenting on the criticism from “our sister circuits and several commentators” that the Baltimore Orioles rationale had received.27 The court then proceeded to “clarify” its holding in that case, stating that the Baltimore Orioles decision did not stand for the proposition that the right of publicity was preempted by § 301 “in all instances.” Rather, the Seventh Circuit emphasized that...
even the Baltimore Orioles court had noted (albeit in a footnote) that “[a] player’s right of publicity in his name or likeness would not be preempted if a company, without the consent of the user, used the player’s name to advertise its product.”

THE VOICE OF GOD TO THE RESCUE

For decades, John Facenda was the narrator of many of NFL Films’ most-watched documentaries. His deep, baritone voice was described as “distinctive,” “recognizable,” and “legendary.” In fact, to many football fans, he was known as “the Voice of God.”

Shortly before his death in 1984, Facenda signed a release giving NFL Films the right to use any audio sequences he had recorded for NFL Films in any manner whatsoever, “provided, however, such use does not constitute an endorsement of any product or service.” After NFL Films used 13 seconds of Facenda’s voice in a 22-minute infomercial shown on the NFL Network to promote the Madden 2006 video game, Facenda’s estate filed suit on a number of grounds, including a claim under Pennsylvania’s right of publicity statute. The district court granted summary judgment; however, the Third Circuit reversed, holding that the estate’s claims were not preempted by federal copyright law.

The significance of the Facenda decision on Dryer and future cases like Dryer lies in the Third Circuit’s conflict preemption discussion. In that discussion, the court provided a path for what should lead to the eventual dismissal of the right of publicity claims asserted by the retired class member players in Dryer. More importantly, if the Facenda court’s conflict preemption analysis is followed by other courts, the decision should provide a coherent, consistent rationale for the resolution of future state law right of publicity claims predicated on the use of the images and likenesses of pro athletes by leagues and teams in copyrighted telecasts and derivative works.

FACENDA’S CONFlict PREemption APPROACH

After concluding that the estate’s right of publicity claim under Pennsylvania’s statute was not expressly preempted by § 301(a) of the Copyright Act, the court proceeded to address whether that claim was barred by the doctrine of conflict preemption. As the court explained, even where the copyright law “does not expressly preempt the right of publicity because an individual’s identity or persona is outside the subject matter of copyright,” in some situations such claims may still be barred because the right of publicity “clashes with the exploitation of a defendant’s copyright.” Facenda stated the conflict preemption issue in right of publicity cases in simple and direct terms: “When does the right of individuals to avoid commercial exploitation of their identities interfere with the rights of copyright owners to exhibit their works?”

To resolve this issue, Facenda adopted the framework proposed by Nimmer “for handling cases at the intersection of copyright, the right of publicity, and contract.” First, the court should examine “how the copyrighted work featuring the plaintiff’s identity is used.” When used “for the purposes of trade,” such as “in an advertisement,” the claims should not be preempted. However, when the defendant’s uses are “expressive works,” right of publicity claims should be preempted. Some of the examples from the Nimmer treatise that were cited by Facenda as commercial or advertising uses and therefore not preempted included a voice imitation in an advertisement; a robot game show hostess’s likeness used in an advertisement; and use of a model’s likeness on product packaging. Some of the examples from Nimmer cited by Facenda as expressive works that would be preempted included distributing a movie in which the plaintiff acted, using public domain footage of an actor in a new video, and using images of individuals in a video game.

In summarizing this first part of the Nimmer framework, Facenda concluded, “[T]he rationale is that state law has a role in regulating practices of trade, including advertising. But limiting the way material can be used in expressive works extends beyond the purview of state law and into the domain of copyright law.” Finding that the NFL’s use of Facenda’s voice in a television production promoting Madden NFL 06 was “a 22-minute promotional piece akin to advertising,” the court held that this use of Facenda’s

CONGRATULATIONS TO KIRK SCHRODER!

The Virginia Film Office honored Kirk T. Schroder of Schroder Fidlow Titley & Davis, PLC, for his service as Chair of the ABA Forum on the Entertainment and Sports Industries with a reception on June 30, in New York City. His rich experience as a nationally renowned entertainment lawyer and his keen interest in and service to education make him a qualified and respected candidate for this role.
voice “does not count as an expressive work,” and therefore application of conflict preemption was not appropriate to the estate’s right of publicity claim.46

Under the second part of the Nimmer framework as adopted by Facenda, even if a plaintiff’s image, likeness, or voice is used for advertising purposes, the claim will still be preempted if the plaintiff “collaborated in the creation of a copyrighted advertising product.”43 Absent such collaboration in the creation of “advertising content,” the plaintiff has a strong argument for asserting “continuing control over the use of his image.”44 Reasoning that Facenda had not consented to “an advertisement for a football video game,” the court held that “Facenda successfully bore [his] burden . . . and preserved his state-law right-to-publicity claim.”45

Importantly, the court made it very clear that it was allowing the state law right of publicity claim to proceed only because Facenda’s voice was “used in a commercial advertisement.” Because Pennsylvania’s statute focused “solely on the commercial—advertising context” and was “targeted at endorsements, not the full universe of creative works,” allowing the case to proceed did not, in the court’s view, “upset copyright law’s balance.”46

EFFECT OF FACENDA ON DRYER’S RIGHT OF PUBLICITY CLAIMS

The Facenda/Nimmer conflict preemption framework, if followed, would appear to provide a path that should ultimately lead to the dismissal of the right of publicity and derivative unjust enrichment claims brought by the retired football players in Dryer. The images and likenesses of the retired players in the films created by NFL Films were not used to “endorse” or “advertise” another product, such as Madden NFL 06. Rather, the images and likenesses of the retired players were used only as part of the “expressive works” created by the NFL as holder of the copyright.47

Using this framework, the right of publicity claims brought by these retired players should be preempted because allowing these state law claims to proceed would “obstruct the accomplishment of the full purposes and objectives of Congress in enacting the Copyright Act.”48

The retired players will argue, of course, that NFL Films is using their images and likenesses for commercial purposes not only because the films generate direct revenues for the league, but also because the films increase the overall value of the NFL brand. While it is certainly accurate that these films have commercial value to the NFL, under the Facenda/Nimmer conflict preemption framework, the distinction between claims that are preempted and those that are not focus on “defendant’s exploitation, drawing a line between entertainment works used for their own sake and commercial works used for advertising purposes.”49

The critical determination in applying the Facenda/Nimmer framework to the facts in Dryer is assessing how these images and likenesses of the retired players are being utilized. As Nimmer explains:

Clearly, while the stars of the various NFL Films’ productions are the images and likenesses of these tens of thousands of retired players, it is equally clear that these players are not endorsing a product when they appear in these films. Rather, the use of their images and likenesses by NFL Films is a legitimate exploitation of the NFL’s copyrighted materials. For that reason, it seems clear that under the principles of conflict preemption set forth in Facenda, the NFL should be able to steer the Dryer lawsuit toward a path that saves its films and like films of all professional sports leagues and teams from right of publicity claims brought by the athletes that star in these films.

CONCLUSION

The decision of the Minnesota district court in Dryer raises troubling questions about the rights of the NFL and other professional sports leagues and teams to legitimately exploit their exclusive rights as copyright holders of the vast archival footage of the athletes that played in the games that are captured on these films and videos. The answer to these troubling questions may lie with the little-used conflict preemption framework employed by the Third Circuit in the right of publicity suit brought by the estate of John Facenda, the so-called Voice of God, against the NFL. If followed, that reasoning should ultimately lead to the dismissal of the right of publicity claims brought by the retired players in Dryer and, even more importantly, should lead to more uniform results in future cases brought by professional athletes who attempt to use right of publicity laws to prevent a professional league or team from the legitimate exploitation of its copyrighted films and videos. It would be ironic indeed if the decision in the “Voice of God” case that went against the NFL serves as the basis for the dismissal of right of publicity claims brought by the tens of thousands of retired athletes who demand compensation from the NFL or other leagues and teams for the use of their images and likenesses in these films and videos. }

ENDNOTES

2. Amended Class Action Complaint at ¶ 2.
3. Id. at ¶ 6.
5. Whether by statute or common law, all 50 states recognize some form of the cause of action known as the right of publicity. This cause of action is designed to ensure that individuals whose name, image, likeness, and/or voice have commercial value are compensated if their person is used for commercial purposes without their consent. Some of the earlier decisions recognizing this cause of action included Haelan Labs. v. Topps Chewing Gum, 202 F.2d 866 (2d Cir. 1953), and Palmer v. Schonhorn Enterers, Inc. 232 A.2d 438 (N.J. Super. 1967).
6. See NFL’s Motion for Judgment on Pleadings, Dryer v. Nat’l Football League, 2010 WL 724112 (D. Minn. 2009) (No. 09-cv-2182). The motion also argued that plaintiffs had failed to state a claim for relief under the Lanham Act and that the unjust enrichment claims were derivative of the right of publicity claims and therefore should be dismissed on the same grounds as those claims.

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had argued that the NFLPA breached its fiduciary obligation to market their names and likenesses in, among other things, certain Madden video games. The court affirmed the jury’s verdict. Parrish v. N.F.L., 2009 WL 88484 (N.D.Cal. Jan. 13, 2009).


22. MELEVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.01(b)(iv)(I) (1997) [hereinafter NIMMER ON COPYRIGHT].

23. Wendt v. Host Int’l, 197 F.3d 1284, 1285 (9th Cir. 1999) (Kozinski, J., dissenting).


25. Id. at 679.


28. Id. at 911 (quoting Baltimore Orioles, 805 F.2d at 866, n.24).


30. Id. at 1012.

31. Id. at 1013 (citing 42 Pa. Cons. Stat. Ann. § 8316. The Pennsylvania statute grants a cause of action to any person “whose name or likeness (defined to also include one’s voice) has commercial value and is used for any commercial or advertising purpose”). 42 Pa. Cons. Stat. Ann. § 8316(a).

32. Facenda, 542 F.3d at 1027–28.

33. Id. at 1028–32.

34. The court found that both prongs of the express preemption test had not been met. First, citing the additional element of “commercial value” required under Pennsylvania’s statute, the court concluded that the estate’s right of publicity claim was not “equivalent” to the exclusive rights of the copyright holders. Second, the court concluded that the “work” (Facenda’s voice) that was the subject of the right of publicity claim was a “persona,” and because a “persona” is not a “writing” of an “author,” it was outside the subject matter of copyright. Id. at 1026–28.

35. Id. at 1028. The Supreme Court has stated that where a state law claim “stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress,” those state law claims are subject to preemption. Edgar v. MITE Corp., 457 U.S. 624, 631 (1982).


37. Id. (citing 1 NIMMER ON COPYRIGHT, supra note 22, § 1.101[B], at 1-88.2(9)–(11)).

38. Id. (citing NIMMER ON COPYRIGHT, supra note 22, at 1-88.2(11)).

39. Id. at 1029, n.14 (citing Midler v. Ford Motor Co., 542 F.2d 460 (9th Cir. 1978); White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992); Toney v. L’Oreal U.S.A., Inc., 406 F.3d 95 (7th Cir. 2005)).


41. Id. at 1029.

42. Id. at 1030.

43. Id. (citing NIMMER ON COPYRIGHT, supra note 22, at 1-88.2(20)).

44. Id.

45. Id. at 1032.

46. Id.

47. There can be no dispute that the various films and videos produced by NFL Films are “expressive works” as that term is used in copyright law. The courts have long recognized that photography and the filming of events involves creative labor. Baltimore Orioles v. Major League Baseball Player’s Ass’n, 805 F.2d 663, 669 (7th Cir. 1986) (citing Burrows-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1984); Midway Mfg. Co. v. Artic Int’l, Inc., 704 F.2d 1009 (7th Cir.), cert. denied, 464 U.S. 823 (1983)).


49. NIMMER ON COPYRIGHT, supra note 22, § 1.101(b)(iv)(I).

50. Id.

NOMINATIONS COMMITTEE

ANNOUNCEMENT

The ABA Forum on the Entertainment and Sports Industries is seeking to fill two positions on the Forum’s governing committee for a three-year term. Service of both governing committee members will commence after the October 2010 Forum Annual Meeting. If you would like to recommend someone to serve on the governing committee, please send the name and contact information of the nominee to Teresa Ucok at tucok@staff.abanet.org no later than 5:00 pm PST on August 16, 2010.

Based on the nominations received, the Forum’s nominations committee, which includes Marcelino Ford-Livene, Christine Lepera, Henry Root, Victoria Traube, and Kirk Schroder, ex-officio member, will make recommendations to the Forum regarding filling those positions.
Digital music piracy has become nothing short of a national pastime for youths in the United States. It is estimated that 96 percent of people between the ages of 18 and 24 have illegally copied music in some form and that youths’ MP3 players contain around 800 illegally copied songs on average. Yet, while the digitalization of music may seem to be little more than a harbinger of lawsuits, lost profits, and policy struggles, music companies’ global revenues from digital music sales in 2008 reached a new high of $3.7 billion. A legal digital music market led by online stores like iTunes and Amazon MP3 has emerged. Music downloads are not an inherent evil that will forever harm the industry via lost CD sales; rather, downloads could be highly profitable for the music industry if it were able to collect money from more than a mere 5 percent of them. Ninety-five percent of all music downloads today are legal.

The Recording Industry Association of America (“RIAA”), the representative of the major U.S. record labels, in 2003 began attacking online music piracy by filing mass lawsuits against individuals who allegedly transferred music illegally. Five years and 35,000 lawsuits later, this approach proved to be inefficient: Costs were high, negative publicity marred the industry’s image, and it did not sufficiently deter piracy. In light of this, the RIAA announced in December 2008 that it was ending its mass suit approach in favor of agreements in principle with Internet service providers (“ISPs”) whereby ISPs will suspend or terminate Internet users’ service after repeated RIAA notices of alleged piracy.

While the logistics of this strategy remain to be seen, this article argues that it will not achieve its desired effect on the digital music market and may not even be legal insofar as it unreasonably restricts users’ access to legal online content and that the RIAA should shift its focus to widespread licensing agreements with ISPs and other retailers, whereby digital music downloads and streams are either bundled with other products and services or sold as separate subscriptions. This strategy would compel ISPs and retailers to compete to acquire licenses and to offer consumers the best deals because, as examples in Europe reveal, products and services inclusive of access to music are more desirable to consumers. This competition would in turn make licensing more profitable for the RIAA and make legal digital music more appealing and affordable alternative to piracy.

The Inaccuracy of RIAA Infringement Allegations

One problem with the RIAA’s enforcement methods stems from the difference between making music available and actually distributing it. Whereas the software used by RIAA private investigators in recent years only detects that copyrighted songs are being made available, i.e., copies of a song appeared in a P2P search for the song title, the Copyright Act only states that copyright holders have the exclusive right to distribute their work. The plain-language meanings of “making available” and “distributing” indicate that proof of the former does not equate to proof of the latter. Therefore, P2P users are arguably not liable for infringement simply because RIAA infringement allegations are often unfounded, are insufficient grounds for restricting users’ Internet access, and are inefficient means for deterring piracy absent a more expansive and affordable legal digital music market.
by making copyrighted music available for download. Realistically, of course, P2P users almost certainly intend to, and do eventually, distribute the music they make available. Courts have been inconsistent in their analysis of the legal distinction between “making available” and “actually distributing” but today require more than just proof of copyrighted music being made available.23 Thus, RIAA warning notices might not be an adequate legal basis for restricting users’ Internet access due to this evidentiary pitfall in the detection process.

It may well only be a matter of time before RIAA private investigators develop more sophisticated software that resolves this pitfall, but there remain numerous other barriers to accurate, efficient, and legally sound RIAA infringement allegations.25 The RIAA is not an impartial party, and its detection system must be very expensive. IP addresses change, and people share computers. Additionally, copyrighted works can be transferred for various fair uses, such as criticism and personal use.26 In determining whether use of a copyrighted work is infringing or fair, courts apply a complex, four-factorued, and fact-specific analysis that cannot be replicated by software.27 Admittedly, likely few P2P transfers are fair uses, but the RIAA’s over-enforcement of antipiracy measures due to unawareness of the purpose of the use is well-documented.28 Even if the RIAA’s new plan included an appeals process allowing users to assert a fair use defense, copyright holders are not entitled to decide whether others’ uses are fair, and anything short of judicial adjudication raises serious due process questions.

Network Neutrality Violations and the FCC

ISPs might subject themselves to liability by restricting Internet access at the RIAA’s behest because, in light of the flaws of the RIAA’s detection system, doing so may not constitute “reasonable network management” under the Federal Communications Commission’s (“FCC”) Internet Policy Statement.29 Though the DMCA indemnifies ISPs from liability if they take down allegedly infringing content pursuant to an RIAA notice,30 this will likely not protect ISPs in the context of restricting Internet access.31 Users should be able to access and download the legal Web sites and applications of their choosing without undue interference. The FCC, the government agency charged with monitoring Internet policies in the United States, preserves this policy by prohibiting ISPs from discriminating against certain types of online content.32 In 2008, for example, the FCC forced Comcast to end a practice of causing the termination of P2P users’ connections by poisoning packets of data on the network.33

DOWNLOADS COULD BE HIGHLY PROFITABLE FOR THE MUSIC INDUSTRY IF IT WERE ABLE TO COLLECT MONEY FROM MORE THAN A MERE 5 PERCENT OF THEM.

“Reasonable network management” constitutes an exception to this network neutrality principle.34 ISPs can manage the flow of Internet content if their policies “clear a high threshold,” “further a critically important interest,” and are “narrowly or carefully tailored to serve that interest.”35 Comcast’s policy did not distinguish between legal and illegal content with enough accuracy,36 and neither will the RIAA’s new plan because users may lose their increasingly important Internet access due to an RIAA mistake or fair use. Thus, while an interest in preventing copyright infringement may well be critically important, the RIAA’s flawed detection measures likely preclude ISP restrictions on Internet access from being narrowly tailored to achieve that interest.

Unlikelihood of Deterrence

Warning letters and threats of restricted Internet access will not deter piracy because such efforts further drive user demand for undetectable illegal downloading. For example, open-source IP filters hinder detection of P2P users’ identities and are both free and readily available for download online.37 The demand for such antidetection capabilities will likely only increase in proportion to the strength and frequency of RIAA detection measures and warning letters because such efforts at best address only one of two distinct and critical realities in the music industry today. The appeal of online music piracy likely stems from a common belief that (a) buying music is too expensive and (b) illegally downloading it is easy and low-risk. Detection measures and warning letters could help combat the latter but not the former. The RIAA therefore also needs to make legal digital music a more flexible, affordable, and expansive market, as only then will downloading music illegally become less appealing than paying for it.

WIDESPREAD LICENSING AS A VIABLE ONLINE MUSIC PIRACY SOLUTION

Now we understand why RIAA-ISP collaborations under the new plan—should an ISP ever agree to one, that is—will be unsuccessful and litigious in combating online music piracy. The efficient detection and deterrence of illegal music transfers would continually be hampered by, among other things, cost, the fair use doctrine, network neutrality concerns, and antidetection technologies. The latter part of the article proposes that deterrence efforts be maintained to some degree, but that the RIAA otherwise shift the focus of its antipiracy strategy to widespread licensing to ISPs and retailers. The competition between licensees that such a strategy would promote would in turn make licensing more profitable for the RIAA and would give customers a wide array of appealing and affordable alternatives to illegal downloading.

ISP Licenses

RIAA-ISP licensing agreements could greatly benefit both parties involved. From the position of an ISP, these agreements are attractive alternatives to piracy in that they
create competitive advantages for the ISP by making its broadband service more desirable to consumers.39 An ISP is in a superior position to market legal digital music downloads to the millions of users already subscribing to its broadband service. Downloads from a catalog of licensed songs can be bundled with Internet service, making them easy for the ISP to market and easy for consumers to purchase and use. RIAA-ISP licenses are also promising because users who are satisfied with their Internet service will likely regard the ISP as a more trusted and reliable seller of music downloads than online stores and Web sites with which they have not previously done business.

Finally, ISPs can bundle music downloads in a variety of ways, i.e., by limited downloads as part of their standard Internet service or unlimited downloads for an extra fee, which will promote healthy competition between ISPs and online stores. Those ISPs that market the most attractive deals will retain more of their current Internet subscriber base, draw new subscribers, and tap into digital music stores’ revenue streams. This competitive market would boost demand for music licenses to the RIAA’s benefit. It also would provide consumers with a host of affordable music services from which to choose, thereby making piracy less popular.

European ISPs began licensing and bundling music downloads in recent years, and the results have been dramatic.40 In April 2008, Danish ISP TDC began offering free, unrestricted access to its catalog of over 2 million songs to its mobile and broadband subscribers.41 Monthly subscriptions have soared, and the rate at which subscribers leave for competitors has plummeted.42 TDC now offers its customers an array of other bundled music download services. French ISP Neuf Cegetel began offering similar music access services in 2007 and has reported a marked increase in broadband subscriptions.43 Today, other ISPs in France, the United Kingdom (UK), Finland, and Sweden also license and sell music, with some services being bundled to Internet service, others not.44 These examples indicate that the alignment of ISPs and the entertainment industry offer limitless business potential. The United States should and very well may be following suit in light of the recent Comcast-NBC merger.

### Licensing to Retailers in Related Markets

The RIAA also should strive to license music collections to retailers in related markets for many of the same reasons.45 The RIAA’s digital music catalogs could then be marketed to consumers through sales of devices like cell phones, MP3 players, and laptops. Here again retailers could gain a competitive advantage by bundling music services with their products and services. This further strengthens and diversifies the competitive market for digital music, giving consumers still more options and the RIAA even greater control over revenue streams by being able to dictate license pricing with retailers from various industries. Nokia and Sony Ericsson both now sell mobile phones bundled with music downloading services in the UK and Sweden, respectively.46

### Online Store and Radio Station Licenses

The RIAA should continue to license digital music to stores and radio stations like iTunes and Pandora, services that are already helping the legal music market expand.47 Though the widespread licensing scheme for which this article advocates would threaten the sustainability of some of them, the current digital music market does not offer consumers a sufficiently broad range of attractive alternatives to illegal downloading. Whereas the current legal market primarily offers access to music by streaming it on radio stations or buying it from stores à la carte, extensive licensing to ISPs and other retailers would give consumers a much-improved selection of music services, ultimately making piracy less appealing.

### Comparative Advantages of a Widespread Licensing Policy

Whereas the RIAA currently only profits from roughly 5 percent of music downloads,48 it could obtain much greater control over downloading via widespread licensing to ISPs and other retailers. As aforementioned, the market for legal downloads would surge because competition between retailers from various industries would provide consumers with a host of more affordable and flexible music access services. The RIAA for its part would likely experience increased licensing revenues and increased control over various markets by dictating licensing terms. This solution frees both the RIAA and ISPs of the legal issues and negative publicity that would surround restrictions of users’ Internet access. It also would make notices of alleged infringement—the RIAA, of course, can still sue for infringement if it so chooses—more of a deterrent because users would have various new and affordable alternatives to piracy.

Some European nations are trending toward either having a government body monitor online piracy49 or forcing ISPs to take a more active role by implementing their own antipiracy technology.50 While these alternatives could be improvements to the RIAA’s new plan insofar as RIAA infringement allegations would be relied on less in taking action against users, many of the same barriers to accurate detection would remain, i.e., fair use, network neutrality, and demand for antidetection technologies. Both systems would likely further alienate digital music consumers, if not Internet subscribers altogether, and both would force either taxpayers or ISPs to pay for antidetection measures when it should be the industry that does so.

Others propose collective licensing schemes in which Internet users pay a small monthly rate for the right to access music however they choose without risk of punishment.51 Proceeds are then distributed to artists in proportion to how often their music is downloaded. The digital music market has (hopefully) not reached a point of desperation where such last resorts are needed, a point where online music piracy is decriminalized and artists are essentially paid to forfeit all ownership rights to digital versions of their works. Decriminalizing the illegal downloads also would damage or altogether destroy the current legal digital music market, i.e., iTunes. Finally, if the RIAA and ISPs are so incapable of detecting and filtering out illegal music downloads such that they should simply resort to decriminalizing piracy, it is unclear how they would nonetheless be able to track downloads with enough accuracy to distribute proportionate shares of the licensing proceeds to artists.52

### CONCLUSION

Illegal music downloading will not be halted by a plan revolving around ISP restrictions of Internet access pursuant to repeated RIAA infringement allegations. The efficient detection and deterrence of illegal music transfers would continually be
A home run! Professor Minan’s book is a highly entertaining and informative book about our favorite sport. It is easy to imagine this book being used as the text of a “History of American Law” course. Lawyers, baseball fans, history lovers, and non-fiction readers will love this book.

— Attorney Judy Zeprun Kalman, Boston, MA

From free agency and scalping tickets to the infamous Bartman Ball, this book has it all. The game of baseball has often resulted in brawls, both on the field and in the courtroom, and from the 1890s on, much of what baseball is today has been shaped by the law. In 18 chapters, this eye-opening book discusses cases that involved rules of the game, new stadium construction, ownership of baseball memorabilia, injured spectators, television contracts, and much more.

This book will appeal to lawyers and sports fans alike, and is written in a short-story format with additional references to movies, songs, history, and other asides that will add to the reader’s enjoyment. Discover an entirely new facet to America’s favorite pastime with this one-of-a-kind book!
hindered by, among other things, cost, the fair use doctrine, network neutrality concerns, and antidetection measures like open-source IP filters. The RIAA will not be able to smother the illegal digital music market unless and until it couples its deterrence efforts with more flexible, affordable, and pervasive access to its digital music collections, as only then will users have attractive alternatives to illegal music downloading. This expansive legal digital music market can best be promulgated by engaging ISPs and retailers in licensing agreements whereby music access services are either conveniently bundled with other products and services or offered as a subscription service. Bundling would render those products and services more desirable, thus presenting retailers with various possible competitive advantages. The competition between licensees promoted by that scheme would, in turn, make licensing more profitable for the RIAA and give customers an array of appealing and affordable alternatives to illegal downloading. This, coupled with deterrence efforts such as notices threatening judicial action, would finally give the RIAA the upper hand in its war on online piracy.

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ENDNOTES

3. Id. at 4.
6. See id.
7. Id.
8. See Int’l Fed’n of the Phonographic Indus., supra note 2, at 6–10 (noting how ISPs and retailers have profited from bundling access to music with their products and services).
10. Id.
11. Id.
14. See id.
15. See id.
17. See Rampell, supra note 13.
19. See McBride & Smith, supra note 5.
20. Id.
25. See generally Seay, supra note 22, at 276–79.
Profile: Andrew Brandt
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described as an alternative legal career, although it began like most in sports, with an avid interest in tennis and basketball and his hometown Washington Redskins. After attending Stanford University and, later, Georgetown University Law Center, where he has since taught sports law, Brandt was admitted to the Pennsylvania Bar.

Spending a decade on each of the player and team sides respectively, Brandt spent his early professional years as a trainee and agent at ProServ, one of the largest sports agencies in the 1980s and early 1990s. At ProServ, he found the industry to be a natural fit for himself. He worked under the tutelage of David Falk, most notable at the time for managing the career of a young Michael Jordan entering the height of his success. In this capacity, he was taking an active role in the career development of numerous stars including Jordan, as well as Patrick Ewing and Boomer Esiason, who were all members of Falk’s team sports stable. Brandt’s responsibilities were diverse, ranging from drafting contracts to prospecting marketing opportunities and recruiting future clients. Brandt credits this experience for developing the business acumen and negotiation skills that would later become essential to his role on the team side of football. He recalls his willingness to engage in all aspects of sports agency as the key to his early success, saying that it is critical for all junior practitioners to “be willing to raise your hand when something is needed as it prompts more meaningful projects down the road.”

After a number of years with ProServ, Brandt was negotiating a contract with the Minnesota Vikings for one of his clients, Chris Doleman, with then-Vikings owner Mike Lynn. During this negotiation, Lynn asked Brandt if he would be interested in running a team in the NFL’s World League of American Football, for which Lynn was a driving force. He also was approached by Tex Schramm, the former general manager of the Dallas Cowboys, who was serving as commissioner of the league that sought to bring the game to Europe and eventually Asia. Schramm and Lynn made Brandt the youngest general manager in North American sports history, naming him GM of the Barcelona Dragons. Brandt, despite being fluent in Spanish, was faced with a daunting three-month mobilization project in which he had to assemble a team to begin operations overseas but had “no coaching staff, no player roster and no front office in place.” Initially drafting 80 players, the team was cut to a 40-man roster, then headed to Florida for an intensive training camp, and then to Europe. After interviewing such coaches as Tony Dungy and Pete Carroll, Brandt turned to former Boston College coach Jack Bicknell, who eventually led the team to the first World Bowl ever played.

Upon arrival in Barcelona, Brandt discovered that the team, with a stadium capacity of 40,000 seats, had sold a total of 173 tickets. Brandt recalls he was constantly required to step outside his role as counsel and football strategist and invoke elements he had learned in other disciplines, such as marketing, to keep the team viable. One novel tactic that the team employed was to put on an exhibition of American football at half-time of an FC Barcelona soccer match. The strategy paid off, and the team was able to maintain attendance levels of 15,000 fans per game. The league itself was incorporated as a single entity, and Brandt recounts that the legal wrangling presented by a foreign legal system were
many and varied as the team was subject to Catalan law and its “foreign customs.”

Upon returning to the United States, Brandt went to work for Woolf Associates, a staple of Boston sports management, where he worked alongside hockey legend Bobby Orr. At Woolf, he worked predominately with basketball and football players, with one of his more notable clients being Ricky Williams, who at the time was an aspiring baseball prospect, prior to his success at the University of Texas as a Heisman Trophy winner.

Through his representation of Matt Hasselbeck, Brandt had extensive dealings with the Green Bay Packers and their then-general manager Ron Wolf, who became a trusted mentor in matters of pro personnel. With the Packers looking for a business-savvy executive to take carriage of the team’s salary cap, Brandt accepted the role of vice president/general counsel and resident “capologist” with the team. While the advent of statistical analytics that are in operation today had not yet dawned on the NFL in 1999, Brandt notes that his designation as a “capologist” was a well-defined one. It became clear that his role was a specialized position necessary for any modern-era NFL team to succeed because player costs between $100 million and $150 million were the norm.

Despite the commonly held notion that it is difficult to transition from player representation to team administration due to the dynamics that can evolve between agents and teams, Brandt says that his transition was seamless. He cites former agent and now Redskins general manager Bruce Allen, among others, as another example of an agent who went on to successful team-side work for several teams. Further, the Green Bay organization is one of the more interesting in professional sports, as it is constituted as a publicly held corporation. Brandt says that this allowed him great autonomy in his role and during his tenure. Among the changes Brandt made in the contract structure for Packer players, he started approaching players early in their careers toward contract extensions; implemented an incentivized salary structure that deemphasized signing bonuses; and redistributed money with a view to team-related performance, a strategy that has since been widely adopted across the league.

**BRANDT RECALLS HE WAS CONSTANTLY REQUIRED TO STEP OUTSIDE HIS ROLE AS COUNSEL AND FOOTBALL STRATEGIST AND INVOKE ELEMENTS HE HAD LEARNED IN OTHER DISCIPLINES, SUCH AS MARKETING, TO KEEP THE TEAM Viable.**

Putting on his analyst’s hat, Brandt also offered his take on the collective bargaining negotiations that recently incepted between the NFL and the Players Association. Characterizing the pending labor discussions as “the most unique negotiation in the history of the league,” he points to league owners—often the most ardent proponents of a salary cap—embracing the currently uncapped, and unflored, year.

As Brandt and the NFP predicted, there has not been an uptick in team spending on free agents. Despite the initial megadeals that go hand in hand with the first few days of free agency, there has “simply not been a ballooning of salaries, and owners have shown restraint.” Brandt also offered his thoughts on the then-pending American Needle decision of the Supreme Court, predicting the Court would uphold the NFL’s limited antitrust exemption as it applied to apparel licensing and broadcast rights, but that it would not extend the league’s Sherman Act immunities beyond these concessions.

In 2008, Brandt left the Packers after nine years there and began pursuing other interests he had thought about for a long time, including writing and teaching. What seemed to be immediately thereafter, Brandt joined a team in creating the NFP and became a full-time lecturer at the Wharton School of Business at the University of Pennsylvania. Brandt notes that sports curricula need to place a premium on combining theoretical understanding with the practical aspects of sports law and business.

In establishing the NFP, Brandt says that his goal was not only to cater to football fanatics, but also to take the more casual fan behind the curtain with viewpoints on scouting, coaching, and the business of football in an interactive environment. Embracing elements of new digital media such as blogging, Twitter, Facebook, and YouTube, as well as regular radio appearances on ESPN, Brandt likened the experience of founding the Web site to “building an airplane while on the tarmac.” Despite eight winning seasons in nine years with the Packers, initial signs are foreshadowing that the NFP might eventually be recognized as Brandt’s greatest contribution to football, as it is the preeminent new media provider that teams actually look to on a daily basis as the pulse of the legal and business communities in their game.

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