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"'You never think those [plays] are going to work, but you can't draw it up any better.'"[1]

INTRODUCTION

America is a nation of leaders. She prides herself as the torchbearer of modern ingenuity. Striving to stay a step ahead has become as much a part of her livelihood as the ideals and principles upon which the country was originally founded. Among these ideals, freedom stands at the forefront.[2] Complementary to this ideal is America's love affair with competition.[3] From Wall Street capitalists to the Electoral College, competition has rooted itself as the core of American society. Perhaps this helps to explain the significant impact that the fields of law and sport have had in shaping American culture. After all, these two institutions are arguably the most competitive, prevalent, and visible fixtures society has to offer. When they overlap it can be assured that the event will capture center stage.

The law has been used as an effective vehicle for change. In their own right, sports have been successful in orchestrating progression in society as well. For example, the law provided legal grounds for eliminating racial discrimination through such legislation as the Civil Rights Act of 1964.[4] Yet it was almost ten years earlier that sports laid the groundwork for this legislation when baseball brought down its barriers and introduced the world to a youngster named Jackie Robinson.[5] The rest,

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1. Robbi Pickeral, *Valparasio Stuns Mississippi Series*, ST. PETERSBERG TIMES, Mar. 14, 1998, at 6C, *available in* 1998 WL 4251171 (quoting former Valparaiso University basketball star Bryce Drew, commenting on his coach's play that resulted in a game-winning basket over Mississippi in the 1998 NCAA tournament).

2. *See generally* Eric Foner, *Bondage, Freedom & the Constitution*, 17 CARDOZO L. REV. 2113 (1996) (discussing Americans' concept of freedom).

3. *See generally* Spencer Weber Waller, *Market Talk: Competition Policy in America*, 22 L. & SOC. INQUIRY 435 (1997) (reviewing RUDOLPH J.R. PERITZ, COMPETITION POLICY IN AMERICA 1888-1992 (1996)).

4. 42 U.S.C. §§ 2000e-1 to -17 (1994).

5. *See* J. Gordon Hylton, *American Civil Rights Laws and the Legacy of Jackie Robinson*,

as they say, is history and further illustrates that when the two fields overlap there can be little doubt of their impact on society. From Major League strikes to NBA lockouts, America's fascination with the intermingling of sports and law is undeniable.[6] Names from the sporting world, such as Pete Rose, Tonya Harding, and Curt Flood have become famous as much for their on-field performances as their legal woes and controversies.[7] The commissioners from the major sports leagues are all lawyers.[8] The sports metaphor has been frequently used to describe the competition of the courtroom, and vice versa. The impact and intermingling of these two institutions have helped to define America's social culture.

One of the trendier topics in law today is intellectual property. Intellectual property is essentially an umbrella term for the more specific subjects of patents, copyrights, trademark, and unfair competition.[9] Though the recent application of the subject has thrust it into the modern spotlight, intellectual property has long been a part of the American legal process.[10] Its roots are found in Article I of the United States Constitution, which grants Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[11] Thus, while the concept of protecting products of human ingenuity has been a staple in American jurisprudence, each application continues to expand and challenge the boundaries of intellectual property law.

From a legal standpoint, an individual is certainly entitled to protection of his intellectual property. From an economic standpoint, this appears to create a conflict. On the one hand, intellectual property protection provides an incentive to create new ideas that will enhance the social good. On the other, granting an individual a property right over an idea excludes others from its use and hence factors into a tremendous social cost. In essence, a monopoly has been created which imposes a further social cost by its very nature. The question of how to foster the most efficient outcome in intellectual property law may be explained through its three main specialized subjects—patents, copyrights, and trademarks. The regulatory and impressive themes of each relevant category promote the general notion of social efficiency.

Given its popularity, it should be no wonder that the application of intellectual property law to the world of sports sparks great interest. It seems as though it has become impossible to maintain one's sports savvy without a grounding in intellectual property law. Sports fans have witnessed the growth of intellectual property law and its pervasive reach from front row seats. They have seen the Los Angeles Dodgers club fail in its attempt to preserve its Brooklyn antecedents.[12] They learned of the

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8 MARQ. SPORTS L.J. 387, 388 (1998).

6. *See* David J. Stern, *Law and Sports*, N.Y. ST. B.J., May-June 1994, at 44, 44.

7. *See id.*

8. *See id.* at 45.

9. *See* Darryl C. Wilson, *The Legal Ramifications of Saving Face: An Integrated Analysis of Intellectual Property and Sport*, 4 VILL. SPORTS & ENT. L.J. 227, 229 (1997).

10. *See id.*

11. U.S. CONST. art. I, § 8, cl. 8.

12. *See* Major League Baseball Properties, Inc. v. Sed Non Olet Denarius, Ltd., 817 F. Supp. 1103, 1131-34 (S.D.N.Y. 1993) (denying Los Angeles Dodgers club's claim that

International Olympic Committee's successful bid to prevent others from using the term "Olympics" or the Olympic rings logo.[13] Baseball games have been granted copyrights.[14] Basketball games have been denied copyright protection.[15] Teams have argued over who is entitled to be represented by which mascots for purposes of trademark law.[16] Companies have sued sports franchises over trademark and intellectual property protection.[17] There has even been a movement by some in the legal community to protect sports moves as intellectual property.[18] Indeed, one could teach a course on intellectual property law utilizing sports cases. Through such intellectual property subjects as patents, copyrights, and trademarks, the world of sports has seen an alteration in its structure that is difficult to ignore.

As is often the case with cutting edge subject matter, the boundaries of intellectual property have yet to be concretely defined. Thus, the reach of such laws into the sporting world is riddled with competing arguments in helping to shape its limits. This Note provides insight into the potential application of intellectual property law to scripted sports plays. Part I presents the case for applying intellectual property protection to scripted sports plays. Part II identifies potential problems with such an application from a legal and practical standpoint. Finally, Part III argues for a compromised standard that utilizes institutional rules and on-site lawyers to help resolve the conflicts presented by such an application of intellectual property law. While an analysis of such an application will probably not completely define the reach of intellectual property law, it foreshadows exciting issues that await the

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restaurant's use of "The Brooklyn Dodgers" mark was an infringement).

13. *See* San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 540-41 (1987) (affirming lower court's holding that USOC had exclusive right to use of the word "Olympics").

14. *See* Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 668 (7th Cir. 1986) (granting baseball club's copyright over telecasts of games).

15. *See* NBA v. Motorola, Inc., 105 F.3d 841, 843-45 (2d Cir. 1997) (holding that professional basketball games were not copyrightable); *see also* Hoopla Sports & Entertainment, Inc. v. Nike, Inc., 947 F. Supp. 347 (N.D. Ill. 1996) (finding that idea of a United States versus the world all-star game was not copyrightable); NBA v. Sports Team Analysis & Tracking Sys., Inc., 939 F. Supp. 1071 (S.D.N.Y. 1996) (holding that professional basketball games were not entitled to copyright protection).

16. *See* Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd., 34 F.3d 410, 411 (7th Cir. 1994) (holding that use of name "Baltimore CFL Colts" infringed on rights of Indianapolis Colts and National Football League); *see also* Harlem Wizards Entertainment Basketball, Inc. v. NBA Properties, Inc., 952 F. Supp. 1084, 1086-89 (D.N.J. 1997) (holding that two teams' concurrent use of the name "Wizards" did not create a likelihood of confusion).

17. *See* Jaguar Cars, Ltd. v. NFL, 886 F. Supp. 335 (S.D.N.Y. 1995) (dealing with suit brought by Jaguar Cars, Ltd. against the NFL when the NFL franchise in Jacksonville decided to use the name "Jaguars" and the image of a sleek jaguar that resembled the emblem serving as hood ornaments on Jaguar automobiles).

18. *See* Richard Kunstadt, *Are Sports Moves Next in IP Law?*, NAT'L L.J., May 20, 1996, at C1; Jack McCallum & Richard O'Brien, *Scorecard: Yo! He Owns That Move*, SPORTS ILLUSTRATED, May 27, 1996, at 16. For an excellent analysis on the possibility of protecting sports moves, see Carl A. Kukkonen III, *Be a Good Sport and Refrain from Using My Patented Putt: Intellectual Property Protection for Sports Related Movements*, 80 J. PAT. [& TRADEMARK] OFF. SOC'Y 808 (1998).

continued intermingling of two of America's most fashionable institutions.

I. TAKING A PAGE OUT OF THE IP PLAYBOOK: THE CASE FOR PROTECTION

The assertion that a playbook may be characterized as intellectual property is both logical and ludicrous. On the one hand, scripted plays are creative ideas, no different than other protected works such as theatrical plays,[19] musical songs,[20] or architectural blueprints.[21] The coach serves as the author, composer, and designer of the play as an act of original ingenuity. He then directs his team to perform or essentially demonstrate his play under his direction. It would seem perfectly rational that he be afforded the same rights that writers, composers, and architects enjoy in protecting their works.

On the other hand, the concept of restricting the competitive elements of the playing field through the use of societal law offends the notions of fair play and competition that sports enthusiasts cherish. Also, there are greater issues regarding enforcement and damages. After all, a coach is not producing a product or availing himself of the standards of the marketplace. He operates within a confined league against a fixed number of competitors battling for wins and losses, not profits and sales. Thus, the necessity and indeed the ethics of applying similar protection to a coach's work must be questioned.

The issue is more complicated than it appears at first blush. It is necessary to first identify whether or not scripted sports plays may indeed be characterized as intellectual property. If they cannot, then the analysis is over, since there is no subject matter to be afforded protection under the intellectual property laws. In order to make the determination of whether such plays fall under the definition of intellectual property, the analysis must be divided into subparts. The first inquiry focuses on the extent to which patents may be used to secure protection of these works. The second identifies a similar analysis under copyright law as a means for attaining protection. It is necessary to apply the issue to each of these subcategories before evaluating the counterarguments to the initial proposal. If it can be shown that the legal climate is fertile enough to sustain a claim for protecting scripted sports plays, then the counterarguments as to the desirability and practicality of such a proposal must be considered.

A. Patent Law

Patent protection is governed by the Patent Act.[22] It allows for an individual to acquire a patent for an invention or discovery of "any new useful process, machine,

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19. *See* Horgan v. MacMillan, Inc., 789 F.2d 157, 162-63 (2d Cir. 1986) (involving a copyright in choreography).

20. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 574 (1994) (involving a copyright over a song).

21. *See* Harris Custom Builders, Inc. v. Hoffmeyer, 92 F.3d 517, 520-21 (7th Cir. 1996) (involving a copyright over architectural drawings).

22. 35 U.S.C. §§ 101-376 (1994 & Supp. III 1997).

manufacture, or composition of matter, or any new and useful improvement thereof."[23] There is a further specification that the invention or discovery be nonobvious.[24] The Supreme Court has adopted the view that such patent protection is applicable to "'anything under the sun that is made by man.'"[25] However, laws of nature, natural phenomena, and abstract ideas are exempt from such protection in and of themselves.[26] Where the legislative history behind the Patent Act is silent, inferring limitations into the subject matter described in the Act is improper.[27] Thus, it appears that as long as something is not a law of nature, a natural phenomena, an abstract idea, old, useless, or obvious, it is patent eligible.

The analysis of whether a scripted sports play deserves patent protection must begin here. In order to qualify, a play cannot be seen as a law of nature or a natural phenomenon.[28] Since a play is the product of human ingenuity, a creative work attributed to an original author or inventor, it eludes classification under these two areas. The issues of idea and utility factors are equally applicable to copyright law. The play cannot be a mere idea. This test is met the moment a play is put on paper or run on the field. The concept or idea has manifested itself into a visible work that quantifies what may have previously been considered an abstract idea. The utility of a play serves the function of entertainment and is thus justified. Finally, the question of obviousness should not be limiting though it is necessary to explore on a case-by-case basis.[29] The legal test for obviousness was set forth by the Supreme Court in *Graham v. John Deere*.[30]

Patents have been granted for a variety of subject matter, particularly in the field of science. Charles Goodyear was granted the right to patent the process for vulcanization of rubber.[31] A "[m]ethod for dilating plastics using volatile swelling

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23. *Id.* § 101.

24. *See id.* § 103.

25. Diamond v. Chakrabatry, 447 U.S. 303, 309 (1980) (quoting S. REP. NO. 82-1979, at 5 (1952); H.R. REP. NO. 82-1923, at 6 (1952)).

26. *See* Diamond v. Diehr, 450 U.S. 175, 185 (1981).

27. *See In re* Alappat, 33 F.3d 1526, 1542 (Fed. Cir. 1994).

28. *See Diamond*, 450 U.S. at 185.

29. *See* Graham v. John Deere, 383 U.S. 1 (1956).

> This is not to say, however, that there will not be difficulties in applying the nonobviousness test. What is obvious is not a question upon which there is likely to be uniformity of thought in every given factual context. The difficulties, however, are comparable to those encountered daily by the courts in such frames of reference as negligence and scienter, and should be amenable to a case-by-case development.

Id. at 18.

30. *Id.* at 17-18.

> Under s[ection] 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented.

31. *See, e.g.*, Tilghman v. Proctor, 102 U.S. 707, 722 (1880).

agents" is protected by patent law.[32] Yet the controversy surrounding patents in the field is just as strong as the one presented by the field of sports. Industrial procedures have been afforded patent protection.[33] Genetic creations have found patent numbers.[34] Even medical procedures, arguably at the height of patent controversy, have been considered for patent protection.[35]

Patents in sports are not uncommon. After all, patents are generally readily provided to tangible inventions. The ornamental design of athletic shoes has received protection.[36] Sporting goods such as a new type of hockey stick[37] or an improved putter[38] have been afforded protection as well. However, the trend in patent law

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32. U.S. Patent & Trademark Office, *United States Patent: 4,419,322* (visited Feb. 18, 2000) <http://www.uspto.gov/patft>. Claim 1 of Patent 4,419,322 states as follows:

> 1. A method for dilating a cold shrink plastic article which comprises the steps of:
> immersing said article into the lower phase of a bath having distinct upper and lower phases with said upper and lower phases being substantially immiscible, said lower phase being a volatile swelling agent for said cold shrink plastic article and having a specific gravity greater than that of said upper phase; said upper phase acting as a blanket to substantially prevent vaporization of said lower phase;
> allowing said article to remain in said lower phase of said bath until it has dilated; and, removing said article from said bath for use.

Id.

33. *See Tilghman*, 102 U.S. at 722.

> That a patent can be granted for a process, there can be no doubt. The patent law is not confined to new machines and new compositions of matter, but extends to any new and useful art or manufacture. A manufacturing process is clearly an art, within the meaning of the law.

Id.

34. *See* U.S. Patent & Trademark Office, *United States Patent: 4,736,866* (visited Feb. 18, 2000) <http://www.uspto.gov/patft>. Claim 1 describes "[a] transgenic non-human mammal of whose germ cells and somatic cells contain a recombinant activated oncogene sequence introduced into said mammal, or an ancestor of said mammal, at an embryonic stage."

35. *See* Beata Gocyk-Farber, Note, *Patenting Medical Procedures: A Search for a Compromise Between Ethics and Economics*, 18 CARDOZO L. REV. 1527, 1528 (1997). There have been thousands of patents issued for medical processes. *See id.* at 1528 n.10.

36. *See* U.S. Patent & Trademark Office, *United States Patent: 6,041,524* (visited Feb. 18, 2000) <http://www.uspto.gov/patft> (patent for footwear with recessed heel cup); *see also* U.S. Patent & Trademark Office, *United States Patent: 6,018,893* (visited Feb. 18, 2000) <http://www.uspto.gov/patft> (patent for athletic shoe with notched cleats).

37. *See* U.S. Patent & Trademark Office, *United States Patent: 5,728,016* (visited Feb. 18, 2000) <http://www.uspto.gov/patft>. The patent describes

> 1. A hockey stick having a reinforced blade attached to a handle, the reinforced blade comprising:
> a) a blade having a v-shaped bottom edge;
> b) a plastic bumper adhesively bonded to the v-shaped bottom edge of the blade; and
> c) glass fiber material coating the whole outer surface of the blade except the v-shaped bottom edge to which is attached the plastic bumper.

Id.

38. *See* U.S. Patent & Trademark Office, *United States Patent: 5,728,009* (visited Feb. 18,

appears to be to allow patentees to claim human movements that are connected with their inventions. As such, a patent has been issued for a "golf putter and method of putting."[39] A "[m]ethod for lining up a golf putt" is a patented work on file with the Patent and Trademark Office ("PTO").[40] Another patent is labeled as an "exercising method."[41] Each of these expands on the protection of an invention by incorporating

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2000) <http://www.uspto.gov/patft>. The patent describes

> 1. A golf putter comprising:
> a head having an anterior putting face for striking a golf ball, and a connection point provided by the head, and
> a shaft secured to the head at the connection point and extending upwardly for being gripped by a golfer,
> wherein the head has a midline extending through the putting face forwardly in an anterior direction along which the golf ball is propelled after being struck and extending in a posterior direction through the head,
> wherein the connection point where the shaft is secured to the head is located distal to the midline relative to the golfer so that the shaft as it extends upwardly is directed from the distal side of the midline towards the proximal side thereof, and
> wherein the head has a center of gravity which is located substantially on the midline so that it is located forwardly in the anterior direction from the connection point and is located towards the proximal side of the head from the connection point.

Id.

39. U.S. Patent & Trademark Office, *United States Patent: 5,127,650* (visited Feb. 18, 2000) <http://www.uspto.gov/patft>; *see also* U.S. Patent & Trademark Office, *United States Patent: 5,377,987* (visited Feb. 18, 2000) <http://www.uspto.gov/patft>.

40. U.S. Patent & Trademark Office, *United States Patent: 5,437,446* (visited Feb. 18, 2000) <http://www.uspto.gov/patft>.

> 1. A method of aligning a putting stroke for putting a golf ball into a golf green hole wherein the golf ball has dimples and a line of indicia separately discernible from the dimples, said method comprising the steps of:
> aligning a ball position marker having a directional indicating marking on its surface so that said directional indicating marking is aligned with a line of chosen putt to define a desired putting path between said aligner and a hole in a golf green;
> placing said golf ball at a position adjacent to said ball position marker so that the line of indicia on said golf ball has the same alignment as said directional indicating marking on said ball position marker; and,
> aligning a putter face perpendicular with said line of indicia on said golf ball so that said putter face is perpendicular to said line of chosen putt.

Id.

41. U.S. Patent & Trademark Office, *United States Patent: 4,323,232* (visited Feb. 18, 2000) <http://www.uspto.gov/patft>.

> 1. A method of increasing the strength of a participant's grip involved in such activities as tennis or golf, by the application of localized pressure to the flexor capri ulnaris muscle at such participant's wrist just above the hand, comprising the steps of positioning a flexible, non-stretch strap about said wrist, which strap is provided with a protrusion mounted upon the inside of said strap for applying said localized pressure, applying pressure on said muscle by securing said strap

a method that involves some human action in conjunction with use of the inclusively protected object.

The PTO has gone even further. It has issued a patent for a sports method which only references an object rather than seeking to protect it in accordance with its use as the aforementioned patents. The patent, entitled "Method of Putting," simply demonstrates a particular grip and manner in which to putt that the inventor discovered after breaking his wrist.[42] The patent has been greeted with harsh criticism by some in the media.[43] However, it is evidence of the direction that intellectual property law and particular patents are heading.

It is becoming more and more common for human movement to be subject to patent protection. The PTO has granted a patent for a "[m]ethod of preventing repetitive stress injuries during computer keyboard usage" which is simply a method of typing.[44] A "[p]ill swallowing device and method"[45] and a "[m]ethod for

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in tension, and maintaining said tension by securing the free ends of said strap about said wrist during participation in said activities.

Id.

42. U.S. Patent & Trademark Office, *United States Patent: 5,616,089* (visited Feb. 18, 2000) <http://www.uspto.gov/patft>. The patent covers:

1. A method of gripping a putter comprising the steps:
gripping a putter with a dominant hand;
placing a non-dominant hand over an interior wrist portion of the dominant hand behind a thumb of the dominant hand;
resting a middle finger of the non-dominant hand on the styloid process of the dominant hand;
pressing a ring finger and a little finger of the non-dominant hand against the back of the dominant hand;
pressing the palm of the non-dominant hand against a forward surface of the putter grip as the non-dominant hand squeezes the dominant hand.

Id.

43. *See Patented Putt Sees Many Chipping Divots*, WIS. ST. J., Aug. 24, 1997, at 3B.

44. U.S. Patent & Trademark Office, *United States Patent: 5,638,831* (visited Feb. 18, 2000) <http://www.uspto.gov/patft>. The patent describes:

1. A method for providing a natural line between the hand, wrist and forearm, comprising the steps of: moving the hand and wrist in a straight line with the forearm thereby forming a natural line position; reaching for an object with the hand and allowing the elbow to follow the hand naturally; angling the hand and wrist sideways relative to the forearm, thereby forming an angled wrist position; returning the hand, wrist and forearm to said natural line position; and placing the hand on a keyboard while maintaining said natural line position.

Id.

45. U.S. Patent & Trademark Office, *United States Patent: 5,643,204* (visited Feb. 18, 2000) <http://www.uspto.gov/patft>. The patent covers:

1. A method for facilitating the swallowing of pills, the method comprising the steps of:
placing inside a user's mouth a flexible shield sized and configured as a flat pattern that is formable to reside within the interior of said mouth to cover a substantial portion of the roof of the mouth for shielding said roof from a pill within the mouth and facilitating substantially complete closures of the mouth for swallowing;

demonstrating a lifting technique"[46] are also patented methods focusing on human movement that have been recognized by the PTO.

If such individual acts can be patented, then how about a game? Well, the PTO has provided patents for games regarding their rules of play and dimensional requirements.[47] Game fields and arenas have received patent protection.[48] The new

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forming the shield to generally conform to the shape of the roof portion of user's mouth; positioning the shield to substantially cover the roof of the user's mouth; placing one or more pills inside the user's mouth between the user's tongue and the shield; and

swallowing the pills without the pills substantially contacting the roof of the user's mouth.

Id.

46. U.S. Patent & Trademark Office, *United States Patent: 5,498,162* (visited Feb. 18, 2000) <http://www.uspto.gov/patft>.

1. A process for demonstrating a lifting technique to a person, the process comprising the steps of:

providing a substantially rectangular box in a first stationary position on a ground surface, the box having an internal storage area means for receiving a plurality of weights therein, the internal storage area means formed by a top wall, a bottom wall, a front wall, a back wall, and first and second opposed side walls, the first and second side walls each having handles thereon adjacent [to] the top wall, the bottom wall contacting the ground surface in the first stationary position, the bottom wall being movable to provide access to the internal storage area means; inserting at least one weight into the internal storage area means receives said plurality of weights therein to selectively change the weight of the box and the resistance one's body perceives when raising and lower[ing] the box from the first stationary position and to the first stationary position, the bottom wall having a securing means such that the . . . least weight is contained within the box when the box is lifted;

approaching two perpendicular sides of the box, wherein one of the perpendicular sides is one of the front or back walls, in the first stationary position at approximately a 45 [degree] angle such that one's feet are wider than shoulder distance apart when one is adjacent [to] the box;

bending one's knees such that one's body is close to the box;

lifting the box from the first stationary position using the handles; and

returning the box to the first stationary position . . . .

Id.

47. *See* U.S. Patent & Trademark Office, *United States Patent: 5,419,561* (visited Feb. 18, 2000) <http://www.uspto.gov/patft>. The patent, which covers a "[m]ethod of playing golf game on reduced size course," describes:

1. A method of playing traditional, championship golf using only a putter and a single golf ball, comprising the steps of:

a) providing a reduced size golf course including a series of eighteen holes each including a playing surface simulating grass and defining a teeing area and a putting green at opposite ends of a fairway, means for limiting the number of strokes to play said eighteen holes, using only a putter and a single golf ball, to a par 72, the said eighteen holes including four par-3 holes, four par-5 holes, and ten par-4 holes.

b) Providing representations of natural hazards along said holes as bunkers and

trend appears to be to construe patents as liberally as possible. Arena football, the newest of the major sports, boasts that it is living up to its trendy image by being the only major sport to receive patent protection.[49] Indeed, if an entire game such as arena

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water hazards by selectively colored areas wherein a selected color is employed to represent a particular hazard and any penalty associated therewith, and,
c) providing and indicating maximum distance boundaries across the fairways of said holes in selective manner past which the player must not stroke a ball with the putter without incurring a penalty, and,
d) said colored areas and boundaries being so arranged that the player may play the reduced area course with only a putter as if it were a full size championship golf course by virtue of the selective stroke distance boundaries and hazard indications and the player is prevented from reaching each of said greens in less strokes than it takes to reach the greens in said full size course using select clubs from a set of clubs.

Id.

48. *See* U.S. Patent & Trademark Office, *United States Patent: 5,682,711* (visited Feb. 18, 2000) <http://www.uspto.gov/patft>. The patent describes:

1. A game field comprising,
a fixed domed structure forming and including a central enclosed building having a surrounding wall and a covering dome defining an interior space,
the building having a continuous main floor throughout its extent,
the building also having a continuous course extending therethrough with opposite end portions extending beyond the building to the exterior, the course having an upper surface continuous with and forming extensions of the main floor,
a fixed amphitheater in the building having a lower edge spaced from an opposed wall and spaced above the floor, defining a void,
a self-contained, fixed construction, completely unitary, mobile unit supported on said course and movable thereon into and out of said void and also into the building, and out of the building onto the corresponding end portion of the course,
the mobile unit having a flat top surface forming a playing field with an arena and bleacher seats surrounding the arena, and the mobile unit when out of the building being capable of accommodating a sports game and spectators, and when in the void in the building, the bleacher seats forming a continuation of the amphitheater.

Id.

49. *See* U.S. Patent & Trademark Office, *United States Patent: 4,911,443* (visited Feb. 18, 2000) <http://www.uspto.gov/patft>. Claim 1 reads as follows:

1. A method of playing a game comprising the steps of:
(a) providing a playing field having a first end line and second, opposing end line;
(b) providing a ball having the general shape of an oblong spheroid similar to that of an American football;
(c) providing a goal in association with each of said end lines such that said goal defines a scoring area elevated above said playing field;
(d) providing a first team of players having as an objective to move said ball across said first end line wherein movement of said ball is accomplished by a player optionally 1) running with said ball, 2) passing said ball to another player, or 3) kicking said ball through said scoring area;

football can be patented, and if the individual actions such as a method of putting can be patented, then it would be illogical to conclude that a team method or action would not be eligible for similar protection.

B. Copyright Law

Historically, authors, artists, and performers have used copyright law to protect their interests in competing for the adoration of society. It can be argued that sports are in direct combat with these other forms of entertainment for the public eye. Indeed, this was actually the case at localized festivals in the Grecian Olympics where athletes competed with poets, orators, and musicians.[50] Thus, it can be argued that application of intellectual property protection to scripted sports plays does nothing more than put the work product of athletics at par with its traditional competitor fields.

Copyrights are generally not granted, but rather, like the original work that they seek to protect, they are created. Once an original work of authorship is fixed in a tangible medium of expression, it is copyrighted.[51] There is no need for any additional filing, application, or registration. It has been often said that once a "poet puts pen to paper," a copyright arises in his work.[52]

The current law governing copyrights is the Copyright Act of 1976.[53] As with other forms of intellectual property protection, the Constitution empowers Congress to pass such a law. Again, it states that "Congress shall have the Power . . . [t]o promote the progress of Science and useful Arts, by securing for limited Times to Authors and

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(e) providing a second team of players having as an objective to defend said first end line by stopping the movement of said ball by said first team toward said first end line, whereby said movement may be stopped by players of said second team by either optionally 1) tackling a player of said first team who is carrying said ball, 2) disrupting a pass from one player of said first team to another, or 3) disrupting an attempt by said first team to kick said ball through said scoring area;

(f) providing said first team with a predetermined number of successive plays to move said ball a predetermined distance wherein each play may be ended when said second team either 1) tackles a player of said first team who is carrying said ball, 2) disrupts a pass from one player of said first team to another, or 3) disrupts an attempt by said first team to kick said ball through said scoring area; and

(g) providing surface means adjacent [to] said goal and above said playing field for deflecting at least one of errant kicks and passes aimed toward said scoring area back toward said playing field where players from said second team are free to catch said ball off said deflecting surface means and before it touches the playing field without interference by players of said first team.

Id.; *see also Success of Arena Football Quiets Skeptics*, J. REC. (Okla. City), Apr. 30, 1994, *available in* 1994 WL 4771021.

50. *See* John A. Scanlan, Jr. & Granville E. Cleveland, Sr., *The Past As Prelude: The Early Origins of Modern American Sports Law*, 8 OHIO N.U. L. REV. 433, 434 (1981).

51. *See* 17 U.S.C. § 102(a) (1994).

52. *E.g.*, EDMUND W. KITCH & HARVEY S. PERLMAN, INTELLECTUAL PROPERTY AND UNFAIR COMPETITION 536 (5th ed. 1998).

53. 17 U.S.C. §§ 101-801 (1994).

Inventors the exclusive right to their respective Writings and Discoveries."[54] The constitutional language set forth as the backbone of the subsidiary statute may be used to identify the congressional meanings and intent behind the statute itself.[55] The original objective of this clause was to facilitate the granting of rights to artistic creators in a uniform manner that could only be achieved at the national level.[56] This is consistent with James Madison's description of the intent of the Framers and the purpose of this clause in *The Federalist Papers 43*.[57] Thus, the statute should be construed in view of its constitutional roots.

The language used within the framework set forth must then be necessarily broad. Indeed, it has been stated that terms such as "authors" and "writings" should not be restricted to their literal sense but should instead be construed "with the reach necessary to reflect the broad scope of constitutional principles."[58] Generally speaking, the language within the constitutional clause has been interpreted in terms of copyrights and patents.[59] The term "author" has been defined as "he to whom anything owes its origin."[60] The Court has found the word "writings" to refer to creative and original "fruits of intellectual labor" placed in the proper tangible medium.[61] It has been established that such terms should be construed liberally.[62]

The subject matter covered by copyrights is explicit within the statute. As long as the work is an "original work of authorship" that has been "fixed in any tangible medium of expression" from which it can be "perceived, reproduced, or otherwise communicated" it will qualify as copyrightable.[63] The question that must then be considered in determining if scripted sports plays are copyright eligible is whether these plays come under the subject matter protected by the statute. This can be done by breaking down the terms of the statute and applying them to the issue at hand in a two-pronged analysis. First, is a scripted sports play an "original work[] of

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54. U.S. CONST. art I, § 8, cl. 8.

55. *See* Goldstein v. California, 412 U.S. 546, 555 (1973).

56. *See id.*

57. THE FEDERALIST NO. 43, at 288 (James Madison) (Jacob E. Cooke ed., 1961).

> The utility of this power will scarcely be questioned. The copy right of authors has been solemnly adjudged . . . to be a right at common law. The right to useful inventions, seems with equal reason to belong to the inventors. The public good fully coincides in both cases, with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.

Id.

58. *Goldstein*, 412 U.S. at 561.

59. *See, e.g.*, Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 56 (1884).

60. *Id.* at 58.

61. The Trade-Mark Cases, 100 U.S. 82, 94 (1879). The Court noted that

> while the word writings may be liberally construed, as it has been, to include original designs for engraving, prints, &c., it is only such as are original, and are founded in the creative powers of the mind. The writings, which are to be protected are the fruits of intellectual labor, embodied in the form of books, prints, engravings, and the like.

Id. (emphasis omitted).

62. *See* Bauer & Cie v. O'Donnell, 229 U.S. 1, 10 (1913).

63. 17 U.S.C. § 102(a) (1994).

authorship"?[64] Second, if so, to what extent is it "fixed in any tangible medium of expression . . . from which [it] can be perceived, reproduced, or otherwise communicated"?[65] The former of these questions is perhaps the more controversial.

The first "original work of authorship" question can be further broken down. "Original" is not as straightforward a term as it may appear. The Supreme Court clouded the meaning of the term in *Feist Publications, Inc. v. Rural Telephone Service Co.*[66] Prior to that case, the general rule had been that if a work originated with the author claiming the copyright, then the originality requirement had been satisfied.[67] However, in *Feist*, the Court stated that "originality" should entail some degree of creativity, regardless of how slight.[68] In doing so, the *Feist* Court looked at originality as a constitutional requirement.[69] This essentially provided a fourth necessary condition for a copyright to emerge. Thus, in order to receive copyright protection after *Feist*, a work must be original, creative, within the proper subject matter, and fixed in a tangible medium.[70]

Creativity is distinct from novelty.[71] The requirement of originality and creativity is not dependent on the uniqueness of a work, but rather on whether or not an author can be credited for creation of the work without the benefit or aid of copying a previous work of someone else.[72] In *Burrow-Giles Lithographic Co. v. Sarony*, the Court addressed the issue of whether a photograph produced by a camera can be said to be original.[73] The argument was that since the photo actually originated with the camera, and not the photographer himself, it could not be attributed to the photographer.[74] However, the Court held that the camera was nothing more than a tool of the photographer and as such the picture it produced was original and properly vested in the photographer, thus expanding the category of originality.[75] The focus of the initial inquiry then rests in whether the work is attributed to the creativeness of the author without regard to the use of instruments aiding in creation of such work.

Scripted sports plays appear to satisfy the originality and creativity requirement. They are original and they are creative. The coach comes up with the play by himself without the aid of anyone else. It is original. It is also creative in that there are numerous formations and plays that may be developed, and the only restriction on the

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64. *Id.*

65. *Id.*

66. 499 U.S. 340 (1991).

67. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547-49 (1985).

68. *Feist*, 499 U.S. at 345.

69. *Id.* at 346-47.

70. *See* D. NIMMER & M. NIMMER, NIMMER ON COPYRIGHT §§ 106(A), 1.08(C)(1), 2.01(A)-(B) (1995). Under the statute, there are three requirements with the second requirement subsuming two subparts. *See* 17 U.S.C. § 102 (1994). The statute requires that a work must (1) be fixed, (2) be an original work of authorship, and (3) be within the subject matter of the copyright. The second requirement actually includes two distinct concepts: originality and creativity.

71. *See Feist*, 499 U.S. at 345; NIMMER & NIMMER, *supra* note 70, §§ 2.01(A)-(B).

72. *See Feist*, 499 U.S. at 345.

73. 111 U.S. 53, 58-60 (1884).

74. *See id.* at 56, 59.

75. *See id.* at 59.

coach is his poetic license to structure each play differently. Of course, he must cater to the rules of the game, but the infinite combinations that such rules allow permeate the concept that such works should still be deemed creative.

The next issue is whether scripted sports plays meet the subject matter requirement of copyright law. Section 102 of the statute provides eight subject matter categories.[76] It defines "works of authorship" to include: literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.[77] It also specifically denies protection to any "idea, procedure, process, system, method of operation, concept, principle, or discovery."[78] Of the eight categories listed, five are explicitly defined.[79] The three left out of the definitions are "musical works," "dramatic works," and "pantomimes and choreographic works."[80] This allows for one to consider the vast range of possibilities for included works under copyright law. Indeed, the eight categories delineated serve merely to illustrate the range of works characterized by the term "original works of authorship."[81] This is further supported by the use of the term "include" which, as defined within the statute itself, expressly states that the listed subject matter categories are not exhaustive.[82] Thus, the inclusion of scripted sports plays under this subject matter would not be improper.

One argument for protection that may be advanced is that a scripted play is choreography. In *Horgan v. MacMillan*, the Second Circuit found that Balanchine's copyright of "The Nutcracker" was infringed by a book displaying photographs of the ballet.[83] Thus dance movements such as those found in ballet are protected in this category. Persuasive arguments exist for sports moves to fall under this category as well.[84] Certainly figure skating and gymnastics routines would be entitled to the same protection as dance and ballet given their similarities. If individual routines can be protected, then by the same logic group routines should be afforded protection. A scripted sports play is nothing more than a group routine with individuals performing a predetermined set act in cohesion with one another. It follows that a scripted sports play would carry the same intrinsically choreographed steps as a theatrical play or ballet. Logic dictates that, as such, it should be copyrightable.

The choreography subject matter category was added to copyright law in the 1976 revision.[85] There is no definition provided in the statute for what constitutes such a

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76. *See* 17 U.S.C. § 102(a) (1994).

77. *Id.*

78. *Id.* § 102(b).

79. *See* 17 U.S.C. § 101 (1994 & Supp. IV 1998).

80. *Id.*

81. H.R. REP. NO. 94-1476, at 53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665; *see also* KITCH & PERLMAN, *supra* note 52, at 546.

82. *See* 17 U.S.C. § 101 ("The terms 'including' and 'such as' are illustrative and not limitative.").

83. 789 F.2d 157, 164 (2d Cir. 1986).

84. *See* Kunstadt, *supra* note 18, at C2.

85. *See* H.R. REP. NO. 94-1476, at 53, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665. A number of law review articles have dealt with the need for copyright protection in choreography. *See, e.g.*, Jeffery I. Roth, *Common Law Protection of Choreographic Works*,

work. As has been discussed, the argument that a scripted sports play comes under this category is not farfetched. However, given the legislative history and stated intent of the Copyright Act, it would appear that restricting subject matter to the enumerated list would be erroneous.[86] Thus, the applicability of subject matter to copyright protection may be done in an abstract sense without necessarily categorizing each work into one of the eight illustrative categories referred to in the statute.

However, the categories listed may serve as a valuable guide in determining what types of works logically fall within the objective of the statute. The types of works that are granted protection follow logically from one another. For example, it is generally agreed that original theatrical works such as plays and movies are copyrightable.[87] The logical train here is difficult to ignore. If movies and theatrical plays are protected, then so should be wrestlers' performances. After all, wrestlers' performances are generally staged, choreographed events just as are plays and movies. If such protection is recognized, then the argument could also apply to an entire baseball game.[88]

The courts have actually addressed the copyrighting of entire games. In *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, the Seventh Circuit ruled that the athletic performance on the field constituted copyright protection.[89] In that case, the issue was whether the players' right to publicity was preempted by the clubs' copyright in the telecasts of games.[90] The players argued that their "performances" were not copyrightable because they lacked sufficient artistic merit.[91] The court stated that artistic merit is not the standard, but rather a modest level of creativity is.[92] It further held that the players' actions on the field met such a threshold and that since the telecasts of games were copyrightable works under federal law they trumped any claim to publicity under state law that the players may have.[93]

The issues of whether scripted sports plays amount to subject matter covered by the Copyright Act suggests that there are indeed legal grounds to provide such protection. In fact, a football play formation was successfully registered with the Copyright Office in 1985.[94] A Texas coach registered what he called "the I-Bone formation."[95]

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5 PERF. ARTS REV. 75 (1974); Barbara A. Singer, *In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives vs. the Custom of the Dance Community*, 38 U. MIAMI L. REV. 287 (1984); Joseph Taubman, *Choreography Under Copyright Revision: The Square Peg in the Round Hole Unpegged*, 10 PERF. ARTS REV. 219, 240 (1980); Martha M. Traylor, *Choreography, Pantomime and the Copyright Revision Act of 1976*, 16 NEW ENG. L. REV. 227 (1981).

86. *See supra* text accompanying note 82.

87. *See* Twentieth Century-Fox Film Corp. v. MCA, Inc., 715 F.2d 1327 (9th Cir. 1983); Sheldon v. Metro-Goldwin Pictures Corp., 814 F.2d 49, 55 (2d Cir. 1936); NIMMER & NIMMER, *supra* note 70, § 2.13.

88. *See* Kunstadt, *supra* note 18, at C1.

89. 805 F.2d 663, 682 (7th Cir. 1986).

90. *See id.* at 667, 674.

91. *See id.* at 669 n.7.

92. *See id.* ("Only a modicum of creativity is required for a work to be copyrightable.").

93. *See id.* at 676.

94. *See* Craig Neff, *Whose Bone Is It, Anyway?*, SPORTS ILLUSTRATED, Jan. 23, 1989, at 7.

95. *Id.*

The formation is loosely described as a cross between two popular running formations—the power I formation and the wishbone formation.[96] The copyrighting of an entire formation lends serious credence to the notion that a mere play should be afforded similar protection.

The conclusion that the legal groundwork for protecting scripted sports plays has been laid seems inescapable. Indeed, such plays are original, creative, and fall under the subject matter of the statute, or so the existing law suggests. The fixation in a tangible medium prong of the analysis does not appear to be at issue with scripted sports plays that are diagramed within a coach's playbook. Generally, a writing on paper is considered fixed in a tangible medium and thus plays on paper should be afforded protection appropriately.[97] Further, the use of cameras in broadcasting games, and hence plays, produces a work that has been characterized as being fixed in a tangible medium. Thus, the law appears fertile to provide protection to scripted sports plays under the Copyright Act.

II. PATENTLY ABSURD: THE CASE AGAINST PROTECTION

Affording protection to a coach's playbook offends the very notion of fair play that sports aim to instill. The competitive mechanism of the game is severely hampered by the introduction of restrictions such as who may and may not use certain plays. Stifling the competition is not in accordance with the goals of either intellectual property law or the sporting world. Further, there is a solid argument that sports plays do not satisfy the definitional requirements necessary to win protection under the patent or copyright laws. Indeed, much of the case law on the issue suggests that such plays are not protectable.[98] Attempted consideration of enforcement of such protection makes the suggestion seem almost laughable. It is a futile effort to issue protection when such protection would ultimately serve little or no purpose. Thus, on grounds of legality, practicality, and social policy, it can be argued that the intellectual property laws do not support the protection of scripted sports plays.

A. Patent Law

There are three general types of patents made available under the Patent Act: patents on plants,[99] ornamental designs,[100] and utility patents.[101] Subject matter that is eligible under the heading "utility patents" includes "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof."[102] Patents have been issued for almost anything as discussed in this Note.[103]

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96. *See id.*

97. *See* KITCH & PERLMAN, *supra* note 52, at 536.

98. *See* NBA v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997); Hoopla Sports & Entertainment, Inc. v. Nike, Inc., 947 F. Supp. 347 (N.D. Ill. 1996).

99. *See* 35 U.S.C. § 161 (1994).

100. *See id.* § 171.

101. *See id.* § 101.

102. *Id.*

103. *See supra* text accompanying notes 19-21.

Even genetically engineered microorganisms have been found to be patentable.[104]

There are, however, a number of exceptions that have been created. Anything that occurs in nature which is substantially unaltered is not patentable. For example, a particularly processed shrimp that had its head and entrails removed was said to be unpatentable.[105] Abstract scientific principles and mathematical formulas or algorithms are generally not patentable.[106] Methods of doing business are also denied patent protection.[107] The Atomic Energy Act states that "[n]o patent shall hereafter be granted for any invention or discovery which is useful solely in the utilization of special nuclear material or atomic energy in an atomic weapon."[108] Other than these exceptions, the bedrock principle stands that "'anything under the sun that is made by man'" is patentable.[109]

Sports plays, it can be argued, fall under the category of a process or business method. The play is a directive plan for the production of maximum points. In this view, it would seem that a team could be likened to a business entity. Essentially, the offensive unit of a football team, for example, is the equivalent of a business department whose purpose is to produce points. The plays it uses to achieve these points are methods or processes by which production is attained. However, given the relation to a business end, the methods by which it attains this goal would be classified as a method of doing business. Since methods of doing business are not protected under the Patent Act, issuing a patent to a scripted play would be improper.[110]

B. Copyright Law

There are three central definitional arguments raised against applying copyright protection to scripted sports plays. They revolve around the same terms discussed in Part I. Recall that in order to be copyrightable, a work must be found to satisfy the

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104. *See* Diamond v. Chakrabarty, 447 U.S. 303 (1980); *see also* Carrie F. Walter, *Beyond the Harvard Mouse: Current Patent Practice and the Necessity of Clear Guidelines in Biotechnology Patent Law*, 73 IND. L.J. 1025, 1034-37 (1997) (discussing developing attitudes in the courts for patenting life forms).

105. *See Ex parte* Grayson, 51 U.S.P.Q. (BNA) 413 (Patent Office Bd. App. 1941).

106. *See* Parker v. Flook, 437 U.S. 584, 596 (1978) (holding a method of updating an alarm limit in a catalytic converter could not be patented where the only novel feature of the method was the formula used to calculate the alarm limit); *see also* Gottschalk v. Benson, 409 U.S. 63, 73 (1972) (holding that a method of converting binary-coded decimal numbers to purely binary numbers was not patentable because it involved only a series of mental steps or a programmed algorithm).

107. *See* Hotel Security Checking Co. v. Lorraine Co., 160 F. 467, 472 (2d Cir. 1908) (holding that a method of doing business is not patentable without some novel means of performing the method); *see also In re* Wait, 73 F.2d 982 (C.C.P.A. 1934) (holding that a method of offering to buy or sell commodities is not patentable).

108. 42 U.S.C. § 2181(a) (1994).

109. Diamond v. Diehr, 450 U.S. 175, 182 (1981) (quoting S. REP. NO. 82-1979 (1952); H.R. REP. NO. 82-1923 (1952)).

110. *See* MANUAL OF PATENT EXAMINING PROCEDURE § 706.03(a) (1993) ("Though seemingly within the category of a process or method, a method of doing business can be rejected.").

elements of originality, creativity, fixation, and subject matter. The claim is that scripted sports plays fail to satisfy each of these requirements. If only one of these elements is not satisfied, the work is not copyrightable. Thus, it may be helpful to evaluate each claim independently in assessing the applicability of the Copyright Act to scripted sports plays, similar to the analysis set forth in Part I.

Scripted sports plays do not fall within one of the enumerated subject matter categories. The argument for copyrighting sports plays places such plays in the subject matter category of choreographic works. A play, in diagram form, essentially tells a player how and when to move throughout the course of the play. For example, the wide receiver is told to run a post or an out on a certain count and at a certain pace, with his teammates each receiving similar instructions regarding their actions during the play. ("Posts" and "outs" are two of the more common patterns run by receivers as part of a football play.) As such, this constitutes protection for human movement through space. Copyright law should not extend its reach beyond the writings of the author as called for by the Constitution.

At least one court has relied on the enumerated subject matter in determining what qualifies for protection under the Copyright Act. In *NBA v. Motorola, Inc.*, the Second Circuit asserted that basketball games themselves were not copyrightable.[111] In doing so, the court resoundingly rejected the Seventh Circuit's prior reasoning in *Baltimore Orioles v. Major League Baseball Players Ass'n.*[112] In *Motorola*, the NBA attempted to prevent Motorola from disseminating game information through a process known as "real-time basketball SportsTrax."[113] The process updated game information with regard to the present score as it actually occurred on the court.[114] The NBA claimed protection under existing copyright law.[115] In its claim, the NBA relied heavily on the Seventh Circuit's decision in *Baltimore Orioles* alleging that the games themselves were copyrightable and thus were infringed by Motorola.[116] Essentially, the NBA attempted to claim that sporting events, such as baseball and basketball, were a ninth category of subject matter, based on the *Baltimore Orioles* case.[117] The district court rejected this claim by stating that such events were "noticeably absent from the illustrative list of works of authorship" contained in the Copyright Act.[118] The Second Circuit affirmed, declaring that NBA games did not fall into the subject matter of copyright since "although the list [in section 102(a)] is concededly non-exclusive, [athletic] events are neither similar nor analogous to any of the listed categories."[119] The Second Circuit also found that "[s]ports events are not 'authored' in any common sense of the word."[120] On another level, the court ruled

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111. 105 F.3d 841, 846-47 (2d Cir. 1997).

112. *See id.* at 849 (citing Baltimore Orioles v. Major League Baseball Players Ass'n, 805 F.2d 663, 682 (7th Cir. 1986)).

113. *Id.* at 843-44.

114. *See id.*

115. *See id.* at 845-46.

116. *See* NBA v. Sports Team Analysis & Tracking Systems, 939 F. Supp. 1071, 1090-91 (S.D.N.Y. 1996), *aff'd in part*, 105 F.3d at 844.

117. *See id.* at 1090-91.

118. *Id.* at 1090.

119. *Motorola*, 105 F.3d at 846.

120. *Id.*

that no copyright infringement existed because what was being copied, if anything at all, was the idea of an NBA game along with specific facts from that game which were "beyond the realm of protectability."[121]

It has been argued that the NBA's copyright claim could have been rejected on other grounds. At least one commentator has argued that the NBA scores were news and as such belong to the public domain.[122] However, the decision handed down by the court cannot be denied as an explicit ban on the application of copyright protection to sports events. At least one other court has followed the precedent. In *Hoopla Sports & Entertainment, Inc. v. Nike, Inc.*, an organizer of an international high school all-star game was denied copyright protection for the game because it was considered to be an unprotectable idea.[123] This is consistent with another court's finding that a Christmas parade did not amount to a work of authorship worthy of copyright protection.[124] Thus, it is clear that events in and of themselves are unlikely to be copyrighted. Scripted sports plays must therefore fall into one of the enumerated subject matter categories if they are to find any hope of receiving copyright protection.

The most compelling argument appears to be for inclusion in the choreography category. The Copyright Act does not define the category of "pantomime and choreographic works."[125] The House Report states that Congress deliberately left out such a meaning because the terms were said to have "fairly settled meanings."[126] The Copyright Office has defined choreography as "the composition and arrangement of dance movements and patterns . . . usually intended to be accompanied by music."[127] To call a sports play a dance set to music seems rather unusual. Indeed, the idea of a quarterback spinning in ballet slippers to the sound of Beethoven seems more ripe for a comedy than a football game. Yet, to fall within the choreography of subject matter, the definition offered by the Copyright Office demands such a characterization. The definitional guidance offered by the courts is scant, evidenced by the existence of but one case involving the subject matter category of choreography.[128] Individual building blocks of choreography are not included within

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121. *Id.* at 848-49.

122. *See NBA I, Free Speech 0*, SACRAMENTO BEE, Nov. 10, 1996, at F1, *available in* 1996 WL 14027367.

123. 947 F. Supp. 347, 353-54 (N.D. Ill. 1996). The court noted that

> [t]he difficulty with Hoopla's copyright claim alleging infringement of the FLG ["Father Liberty Game"] is that Hoopla cannot assert a copyright in the FLG itself. It is beyond question that copyright may not be used to protect ideas, only particular expressions of ideas. . . . Thus, the idea for the FLG is not protectible through copyright.

Id.

124. *See* Production Contractors, Inc. v. WGN Continental Broad. Co., 622 F. Supp. 1500, 1505 (N.D. Ill. 1985).

125. 17 U.S.C. § 102(a) (1994).

126. H.R. REP. NO. 94-1476, at 53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665.

127. COPYRIGHT OFFICE, LIBRARY OF CONGRESS, COMPENDIUM OF COPYRIGHT OFFICE PRACTICES II § 450.01 (1984), *quoted in* Horgan v. MacMillan, 789 F.2d 157, 161 (2d Cir. 1986).

128. *See Horgan*, 789 F.2d at 158.

the definition set forth by the Copyright Office.[129] However, the court's decision in *Horgan* affirms that certainly a combination of basic steps or moves rises to the level of choreography.[130]

The standard adopted by the Copyright Office calls for a minimum level of difficulty.[131] Under this level of difficulty requirement, it becomes a sketchy argument that a sports play can be labeled choreography. A play generally consists of rather simple movement. An individual is to run from point *A* to point *B*. He is asked to take a particular route to get there, but essentially his task is the same. Although the various routes of the different players on the field may prove effective at confusing the opposing defense, the individual players are not performing intricate steps. Thus, the claim does not meet the minimum level of difficulty called for by the Copyright Office in its characterization of choreography.

Even if scripted sports plays were to be classified as copyrightable subject matter, a coach would have difficulty proving that such plays amount to original works of authorship. The analysis is again two-pronged. First is the originality requirement, which also calls for a minimal level of creativity.[132] Then there is the question of authorship which dictates that the play visibly express the coach's idea.[133]

A play rarely originates entirely with a coach. His former mentors and present players are generally somewhat responsible for filling the pages of a coach's playbook. For example, legendary football coach Bill Walsh is credited with inventing the "West Coast Offense."[134] Presently, as many as five NFL and six major college programs use some variation of this offense.[135] However, it was Walsh's coaching experiences that led to the compilation of this offense. Much of the "West Coast Offense" is said to be based on the system used by former Oakland Raiders' coach Sid Gillman, for whom Walsh served as an assistant in his early days.[136] He had also studied under Marv Levy at Cal-Berkley, John Ralston at Stanford, and Paul Brown at Cincinnati.[137] From each experience he learned and developed what later amounted to the "West Coast Offense."[138] Yet this seems more like a creative compilation than a true work of originality. Of course, such compilations are not protected under copyright law, for which the logic of qualifying the first factor is clear.[139] It is difficult to then credit a coach with having exclusively created a play in

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129. *See* Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991).

130. *See Horgan*, 789 F.2d at 164.

131. *See* Singer, *supra* note 85, at 297-98.

132. *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884).

133. *See id.*

134. *See The Unofficial Website of the West Coast Offense* (visited Apr. 7, 2000) <http://www.westcoastoffense.com>.

135. *See id.* The professional teams are the San Francisco 49ers, Green Bay Packers, Denver Broncos, Philadelphia Eagles, and Minnesota Vikings. *See id.* The six college teams are Stanford University, Bringham Young University, University of California-Berkeley, University of Southern California, University of West Virginia, and University of Texas. *See id.*

136. *See id.*

137. *See id.*

138. *See id.*

139. *See* Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348-49 (1991).

compliance with the first factor. Without meeting this requirement for creativity and originality, a coach will not be afforded copyright protection. Certainly, if he were to "'slavishly or mechanically cop[y] from others'" he would be denied copyright protection.[140] To essentially deny the necessary influence of former experiences is naïve. Indeed, the state law remedy of trade secrets recognizes this fact in its inevitable disclosure doctrine.[141]

Many of the steps taken on the field do not owe their origin to the coach, but rather to the players themselves. The coach's diagrammed play may serve as a guide, but there is nothing to say that the player will necessarily duplicate the proposed action. Indeed, players need to be granted the poetic license to alter runs and patterns in response to the positioning of the opposing defense. This reactionary scheme takes away from the notion that the play may be entirely attributed to the coach. As such, the originality prong of the analysis is not met.

It is true that the routes and the desired runs do owe a significant part of their origin to the coach. In theory, the originality prong may be met. However, the second prong, the work of authorship factor, still must be met. Essentially, for a play to be a work of authorship, it must express the coach's idea. This requires a careful examination of the prescribed routes and the intricacies of the play itself to determine if they alone express an idea. In order to examine the play independent of the game itself, each element of the game that is not part of the play must be removed. A recent test utilized in *Computer Ass'n International v. Altai, Inc.* was dubbed the "abstraction, filtration, and comparison test."[142] First, the court dissected a computer program to break down the program into parts.[143] Second, the court applied the filtration step in order to determine if the element was an expression of the idea or if it was dictated by concerns of efficiency.[144] The elements that were not screened out, and thus protected, were used to determine if a copyright infringement had occurred.[145] The test has been used in at least two other cases. In *Lotus Development Corp. v. Borland International*, the First Circuit applied a similar test to a computer program infringement case.[146] The Tenth Circuit used the test in a case calling for a determination of whether one set of wooden dolls infringed upon another set.[147] It would appear that the test is appropriately applied here as well.

Stripping a football game includes discarding the fans, the stadium, the opposing team, the referees, and the field. Even the ball may be stripped since it does not owe its origin to the coach. Thus what remain are the players under the coach's control, running around in a space. There would be no cohesion or timing to anyone's runs as the line of scrimmage has disappeared leaving only random movement which could not be considered expression. What has essentially happened is that the coach's

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140. L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 490 (2d Cir. 1976) (alteration added) (quoting MELVILLE B. NIMMER, THE LAW OF COPYRIGHT §§ 6, 10.2 (1975)).

141. *See supra* text accompanying note 122.

142. 982 F.2d 693, 706-09 (2d Cir. 1992).

143. *See id.* at 706-07 (describing the abstraction phase of the test).

144. *See id.* at 707.

145. *See id.* at 710.

146. 49 F.3d 807, 814 (1st Cir. 1995).

147. *See* Country Kids 'N City Slicks, Inc. v. Sheen, 77 F.3d 1280, 1285-87 (10th Cir. 1996).

play has been screened out after the second step of the test, the filtration factor, and is therefore not protected.

It is a tough argument to make that sports plays can be separated from the game itself and still qualify as an expression. The play, by itself, does not express a coach's idea. The play can only express an idea within the context of a game. Copyright protection is not granted to a work that does not express an idea because such a work is not a work of authorship. Thus scripted sports plays fail the second prong of the analysis.

Such work is arguably denied protection for having been characterized as a derivative work. A derivative work is an original work of authorship that is "based upon one or more preexisting works."[148] As discussed, coaches' plays are generally derivative work based on preexisting work such as other coaches' plays. In all practicality, it is impossible for a coach not to allow his exposure to other coaching systems to influence his work. Thus, even if his particular plays are considered to be more than mere compilations of prior coaches' works, they certainly qualify as derivative from those works. Further, these plays are based on the rules of the game itself, for without the game the play is essentially worthless. If a game, such as baseball, has a copyright already afforded, then the ability of the coach to obtain a copyright for what amounts to a derivative work is logically troubled.

The merger doctrine offers another avenue of limitation. It essentially applies where there is a merger of an idea and an expression.[149] The doctrine generally applies in situations where there are a limited number of ways that an idea may be expressed.[150] For example, instructions for sweepstakes contests are prevented from being copyrighted by the merger doctrine because of the limited number of ways that these rules could be expressed.[151] Similarly, there are a limited number of routes that a wide receiver may run. Granted, there is a relatively large number of combinations that may be used regarding the individual movements of the players. However, there are only a fixed number of routes that a player may take to get to a specific point, the back right corner of the end zone, for example. Thus, if a coach were to obtain a copyright on each play that would allow a player to get to the back right corner of the end zone, then he essentially has a monopoly.[152] This monopoly over the expression of an idea is what the merger doctrine seeks to protect.

Therefore, if it is deemed that a scripted sports play falls within the statutory guidelines for copyright protection, then it must still overcome the hurdles of the derivative works rule and the doctrine of merger. The standards set forth make achieving copyright status for coaches' playbooks a daunting task.

There are other problems with advancing intellectual property protection to scripted sports plays. First, doing so is not in compliance with the goals and objectives set forth in the Constitution. Second, it would be inefficient and encumbering on the game itself. Third, enforcement issues make the issuance of copyrights in this sector

148. 17 U.S.C. § 101 (1994).

149. *See* Concrete Mach. Co. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 606-07 (1st Cir. 1988).

150. *See* Toro Co. v. R & R Prods., 787 F.2d 1208, 1212 (8th Cir. 1986).

151. *See* Morrissey v. Procter & Gamble Co., 379 F.2d 675, 678-79 (1st Cir. 1967).

152. *See id.*

almost senseless. Each of these issues lends some credence to the inapplicability of applying intellectual property protection to scripted sports plays.

III. THE RESOLUTION: SEASONAL PROTECTION AND ON-SITE ARBITRATION

Amidst the arguments a few concepts clearly emerge. There is an argument for protecting scripted sports plays. However, as the concerns articulated direct, the special nature of sports themselves calls for a more elaborate scheme of protection than simple reliance on the law. As such, these issues should be addressed from the standpoint that the possibility of protecting scripted sports plays is real. Society must be aware of the impact that protecting scripted sports plays will have. Leagues must take charge of the potential ill effects that this utilization of the law can bring to the essence of sports in general. It can do this by limiting the breadth and scope of the protection. It can further abate potential dangers with the use of on-site lawyers and arbitration. The difficulties caused when sports and societal law become entangled may be swiftly and efficiently resolved through the use of league structure and rules.

Despite the arguments to the contrary, sports plays may, from a legal standpoint, be considered intellectual property. The courts have suggested as much in determining the applicability of such status to other entities.[153] Though the concerns advanced in the preceding Part are legitimate they do not preempt the underlying theme: scripted sports plays can be classified as intellectual property. The statement stands true from both a theoretical and a practical standpoint.

Trade secret law serves as a prime example. Generally, trade secret cases revolve around situations in which a former employee has knowledge of a particular technology[154] or customer list[155] and can thus transfer to a competitor what would amount to an unfair advantage.[156] It is the use of the "inevitable disclosure" doctrine that best illustrates the purpose of sports plays. In *PepsiCo, Inc. v. Redmond*, the best known case using the doctrine, the plaintiff sought to prevent an employee from taking a similar managerial job with a rival company because of the possibility that he would disclose confidential information to his new employer.[157] The Seventh Circuit held that such disclosure was inevitable and granted the injunction.[158] In making this argument, the court analogized the situation to that of a player leaving a team with the coach's playbook.[159] In order to make this analogy, however, the logic needs to be set forth. If a player is not permitted to leave a team with a coach's playbook, then it is a solid claim that the playbook may be considered property.[160] But

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153. *See supra* text accompanying notes 31-51, 85, 88-98.

154. *See* Glenayre Elecs., Ltd. v. Sandahl, 830 F. Supp. 1149, 1151-52 (C.D. Ill. 1993).

155. *See* Stampede Tool Warehouse, Inc. v. May, 651 N.E.2d 209, 212 (Ill. App. Ct. 1995); *see also* Colson Co. v. Wittel, 569 N.E.2d 1082 (Ill. App. Ct. 1991) (holding that former employee could use former employer's customer list).

156. *See* PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1270 (7th Cir. 1995).

157. *Id.* at 1265.

158. *See id.* at 1272.

159. *See id.* at 1270 ("PepsiCo finds itself in the position of a coach, one of whose players has left, playbook in hand, to join the opposing team before the big game.").

160. *See* Williams v. Board of Educ., 367 N.E.2d 549, 553 (Ill. App. Ct. 1977) (addressing

the purpose of the illustration is to show the damaging effects of allowing an individual to travel from competitor to competitor even without any tangible books or files. Thus, the property protected is not just the playbook itself, but the ideas or information contained within the playbook. These, of course, amount to protection for individual scripted plays.

At the federal level, intellectual property law is, of course, protected by patents, copyrights, and trademarks.[161] The analysis set forth in this Note has focused on patents and copyrights. The arguments for patenting scripted sports plays are well supported by the precedent of prior patents. The various methods that have been identified provide ample room for a sports play to receive similar protection. As a method, sports plays are entitled to patent protection. The counterargument to this notion concerns the patenting of business methods. The merits of whether a sports play can be accurately described as a business method presents an aura of controversy. However, resolution of this particular controversy may be more a matter of frivolity than futility. A recent case suggests that business methods can indeed be patented as well. In *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*, the United States Court of Appeals for the Federal Circuit rejected what had been the widely held view that such methods were unpatentable.[162] Since the Federal Circuit is given exclusive jurisdiction over all patent appeals, the weight of the decision is undeniable.[163] It is unlikely that the Supreme Court will review the decision since it rarely reviews patent decisions and also because the decision was written by Judge Rich, who co-authored the Patent Act of 1952.[164] Thus, the elimination of the exception makes the argument for patenting scripted sports plays even more valid. As Judge Clevenger declared in the aftermath of *State Street Bank*, now "virtually anything is patentable."[165]

Copyright law also provides protection for scripted sports plays. Whether such plays fall into appropriate subject matter to be protected is at the crux of the issue. First, the copyrighting of baseball games lends credence to the notion that scripted plays deserve similar protection. Baseball games are much larger in scope and finding such an event copyrightable without extending a similar protection to a scripted play is the equivalent of granting a copyright for a building, but not for the blueprint. The court in *NBA v. Motorola, Inc.* came to a different conclusion than did the *Baltimore Orioles* court.[166] However, this does not change the conclusion. Just as with the

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the issue of damages in determining that a coach's coaching library, including playbook, was his personal property).

161. *See* Lanham Act, 15 U.S.C. §§ 1051-1127 (1994); Copyright Act of 1976, 17 U.S.C. §§ 101-801 (1994); Patent Act, 35 U.S.C. §§ 101-376 (1994 & Supp. III 1997).

162. 149 F.3d 1368, 1375 (Fed. Cir. 1998) ("We take this opportunity to lay this ill-conceived exception to rest. . . . Since the 1952 Patent Act, business methods have been, and should have been, subject to the same legal requirements for patentability as applied to any other process or method.").

163. *See* James B. Altman & James P. Tuite, *"Business Methods" Can Be Patented*, CORP. LEGAL TIMES, Oct. 1998, at 64.

164. *See id.*

165. Hughes Aircraft Co. v. United States, 148 F.3d 1384, 1385 (Fed. Cir. 1998) (Clevenger, J., dissenting).

166. *Compare* NBA v. Motorola, Inc., 105 F.3d 841, 855 (2d Cir. 1997) (rejecting claim that

building blueprint example, the copyrightability of the scripted play remains intact. The argument follows that simply because the copyrightability of the building is lifted, it does not necessarily eliminate the protection afforded to the smaller work.[167] In this case, the smaller work is the scripted play. So even if the *Motorola* court's view comes into favor over the *Baltimore Orioles* court's holding, the protectability of scripted sports plays remains intact.

The subject matter categories enumerated are not exhaustive. However, if scripted sports plays must be assigned within one to be afforded appropriate protection, then the choreography provision is the place where it belongs. A scripted sports play is the equivalent of a theatrical play, with each player the equivalent of an actor performing in compliance with the terms of the script or playbook. It is true that the definition of choreography offered by the Copyright Office seems unsupportive of this view.[168] However, it has allowed for a football formation to be registered,[169] and thus has directly stated that scripted sports plays are eligible for protection under the copyright laws within the scope of their interpretation.

In terms of original works of authorship, the analysis will need to be done on a case-by-case basis. However, it is entirely possible for a coach to individually create a play without its being labeled derivative. To make this argument is to carry the term "derivative" beyond its rational reach. Surely poets are influenced by their teachers as are writers and singers. To equate this influence to the misappropriation of a work is unjustified. So long as a play is individually and originally created, it should be afforded copyright protection.

Application of the merger doctrine to such cases is inappropriate. The theory behind the merger doctrine is to prevent monopolization. To claim that a coach would be able to copyright every single possible play that would result in the monopolization of a particular route or end position is farfetched. Given the infinite combinations available from just two patterns (run by two players), the inclusion of eleven separate patterns (run by eleven separate players) within each play provides a field of options that borders on unlimited. As such, the merger doctrine should not limit the copyrightability of scripted sports plays.

Sports plays may, then, be protected under both copyright and patent law. This does not present any apparent conflict. "Neither the Copyright Statute nor any other says that because a thing is patentable it may not be copyrighted."[170] Thus, the means chosen will depend on the level of protection that a coach seeks in his play.

There is a claim that providing protection to scripted sports plays is unsporting, similar to the arguments advanced by some commentators that patenting medical procedures is unethical.[171] This argument fails to recognize the scope of intellectual

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a basketball game is copyrightable), *with* Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 672 (7th Cir. 1986) (holding that owners' copyright over baseball game trumped players' right to publicity).

167. *See* Raleigh W. Newsam, II, *Architecture and Copyright—Separating the Poetic from the Prosaic*, 71 TUL. L. REV. 1073, 1079 (1997).

168. *See supra* text accompanying note 127.

169. *See supra* text accompanying notes 94-96.

170. Mazer v. Stein, 347 U.S. 201, 217 (1954).

171. *See generally* American Medical Association, Council on Ethical and Judicial Affairs, *Ethical Issues in the Patenting of Medical Procedures*, 53 FOOD & DRUG L.J. 341 (1998)

property law. Patents do not take anything away from society. To the contrary, they actually add to society. The reason is that prior to the inventor's discovery of the patented work, it was nonexistent. This is because patents are only available to those things that are new and not obvious. Thus, patents neither are nor should be granted for those things that are already in the public domain.

Copyrights carry the requirement of having to be independently created, though the work need not be new. The Supreme Court set forth an interesting example in *Feist Publications, Inc. v. Rural Telephone Service, Co.*[172] It stated, "assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable."[173] Thus, the law only protects against copying someone else's plays. It does not take anything away from society. Certainly, the very essence of the copyright promotes fair play in that it discourages coaches from stealing the ideas of others.

The argument that limitations on the options available to coaches may be inefficient in view of the competitive nature of sports has some merit. However, this, along with enforcement problems, may be solved by league rules. Many of society's general laws are refined from within to suit the tenets of the game. For example, a person grabbing another person and throwing them to the ground would generally be guilty of an assault. However, the rules of football not only allow but actually encourage such action. Baseball has disallowed such things as corked bats and Vaseline-coated baseballs, neither of which is prohibited by societal law. Thus, leagues have the power to restrict the duration and breadth of patents and copyrights as they apply to other league members.

Indeed, leagues should adopt new rules. There is clearly an argument that scripted sports plays are entitled to some protection under the intellectual property laws. After all, this breeds creativity which offers society more plays for its aesthetic pleasure. However, sports is a unique discipline and such protection is probably not in the best interests of the game. So, the leagues should strike the happy medium. League rules should allow for a more limited copyright or patent in terms of duration. Limiting the reach of a scripted play for a season provides coaches with the necessary incentive to develop new creative plays, as envisioned behind the purpose of the laws, while ensuring the competitiveness of the game. Such an act would increase the competition and the ingenuity behind the game itself. Copyright protection essentially instills a desire to "encourage the origination of creative works by attaching enforceable property rights to them."[174] Thus, coaches would develop new plays with greater regularity, knowing that they would have an advantage in doing so. At the same time, the new plays are released within one year into the public domain of the league's member clubs, adding to the number of possible plays a team could then run.

Further, disclosure of plays is consistent with the economic principles of efficiency. In order to receive protection, a team will have to disclose the play it wishes to protect. In essence, this creates perfect information of all plays that can be used by a particular club. Perfect information breeds perfect competition. Each team may, in

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(arguing that patenting medical procedures limits availability to patients and fails to serve physicians' ethical role to advance medical science).

172. 499 U.S. 340 (1991).

173. *Id.* at 346.

174. Diamond v. Am-Law Publ'g Corp., 745 F.2d 142, 147 (2d Cir. 1984).

accordance with game theory, select the most effective plays when combating each other. This provides for a system that promotes efficiency. Economics dictates that the better team is now more likely to win, increasing the efficient aspect of the competitive game.

Enforcement is a definite consideration. One of the original problems commented on was the issue of damages. For example, return to the "Method of Putting" patent.[175] If one were to market a video demonstrating the method, he would certainly be infringing on the patent. The patent holder can show damages, especially if he were marketing a rival video with a similar demonstration. His financial loss is a direct result of competition in the marketplace. The question is whether such enforcement is ripe for on-field competition. The answer is yes. If the marketplace of competition is substituted for the field of competition, then the damages become possible. Of course, the teams need to be competing for an economic good. In the marketplace, they were competing for sales resulting in greater profits and, thus, economic value. On the field, they are similarly competing for economic value in two ways. First, wins translate into exposure, be it on television or in the newspapers. This is essentially advertisement that is valued at tremendous amounts. Second, events like the Bowl Championship Series and the Super Bowl carry with them financial rewards directly linked to wins and losses.[176] Kansas State's football program can attest to this after losing $11 million on one play.[177] Thus, when a play is used against a team, to its detriment, and that play is protected by the team harmed, it would only make sense that the team have an infringement claim.

Of course, this raises the practical consideration of how to solve such a claim. Indeed, the amount of time and energy that the court system requires probably would not prove to be the most effective way to resolve such a dispute. The answer to this problem again comes in the form of league rules. Leagues need to establish on-site legal counsel to resolve legal issues as they arise.[178] These lawyers can assist in the development of plays and ensure that they do not infringe on the rights of others within the adaptation of the league rules. Furthermore, leagues need to continue and expand on the use of arbitration. Arbitration and mediation are already used as a method for resolving disputes in the sports arena.[179] The concept may be expanded to

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175. U.S. Patent & Trademark Office, *United States Patent: 5,127,650* (visited Feb. 18, 2000) <http://www.uspto.gov/patft>.

176. *See Super Bowl XXXIII: Number Crunching*, ORLANDO SENTINEL, Jan. 31, 1999, *available in* 1999 WL 2783863 (indicating that each member of the winning team would be awarded $53,000 compared to the $32,500 given to losing squad members); Eddie Timanus, *Weekend Preview: Sports*, USA TODAY, Dec. 31, 1998, at 4C (listing projected per team payments for major bowl games in which teams were selected to play based on season wins and losses).

177. *See* Bob Ryan, *Deserving Kansas State Systematically Denied*, BOSTON GLOBE, Dec. 9, 1998, at F1 (describing how a double overtime, two-point loss to Texas A&M caused Kansas State to settle for a trip to the $1 million Alamo Bowl instead of an invitation to the $12 million Bowl Championship Series).

178. *See* Lisa A. Delpy & Kathleen B. Costello, *Lawyering on the Front Lines: On-Site Legal Counsel for Major Sporting Events*, 6 MARQ. SPORTS L.J. 29, 30 (1995).

179. *See generally* Peter B. Kupelian & Brian R. Salliotte, *The Use of Mediation for Resolving Salary Disputes in Sports*, 2 THOMAS COOLEY J. PRAC. & CLINICAL L. 383 (1999).

the point where disputes may be resolved on the field. The moment a team has a complaint against its opponent for infringement of a protected play, it can make its appeal to an on-site arbitrator. The notion is not as crazy as it may seem, given that a team of arbitrators was present at the Atlanta Olympics to resolve rules disputes on the spot.[180] The International Olympic Committee established the International Council of Arbitration for Sport ("ICAS") to help resolve international disputes and preserve fairness and consistency throughout the games.[181] As a prerequiste to competing, athletes, coaches, and officials agreed to use the ICAS to settle disputes and that such procedure was mandatory and binding.[182] Thus, lawyers and arbitrators can be used to decide intellectual property disputes.[183]

While it may be difficult to accept the placement of lawyers and arbitrators at athletic events as within the essence of the sport, it is consistent with the modern game. Referees and umpires are actively involved in each contest, interpreting and enforcing league rules. To ask lawyers and arbitrators to perform essentially the same task—the enforcement of league rules—does little to detract from the nature of the event. As with the placement of referees, lawyers and arbitrators are representatives of the league working in the best interest of the game to preserve the values of competition and fairness that are at the heart of the sporting world. While it is true that the introduction does not guarantee a solution to all of the potential obstacles protected sports plays may present, it is a step in the right direction. Just as referees are subject to human error, on-site counsel and arbitrators will be prone to make some mistakes. Technology has aided the modern day referee with developments such as instant replay to help defuse the potential for error. Perhaps such technology will some day aid on-site arbitrators by matching up each play as it is run on the field, and captured on television, with a computerized video database of those plays being protected. In any case, institutional rules and on-site arbitration provide the framework and enforcement necessary to preserve the continued contributions created from the intertwining of law and sports.

CONCLUSION

Playbooks are a coach's most prized possession. They are the product of analysis, hard work, and innovation. As such, scripted sports plays deserve to be protected along the same level as the works of other creators. However, sports is a unique discipline and application of society's rules in this sphere often frustrates more than it promotes. In order to strike the necessary level of equity and efficiency, leagues must first recognize that the legal climate provides for the protection of a coach's works. They must also seek to maintain the level of competitiveness that sports demand. By establishing rules and procedures for dealing with the potential protection of sports plays, leagues can essentially assure the best of both worlds. They must ensure that the goals of intellectual property laws are satisfied with the preservation

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180. *See* Richard C. Reuben, *And the Winner Is . . . : Arbitrators To Resolve Disputes As They Arise at Olympics*, A.B.A. J., Apr. 1996, at 20.

181. *See* Stephen A. Kaufman, Note, *Issues in International Sports Arbitration*, 13 B.U. INT'L L.J. 527, 532 (1995).

182. *See* Reuben, *supra* note 180, at 20.

183. *See* Kunstadt, *supra* note 18, at C1.

of incentives for creativity, while maintaining the integrity of the sport. They can do this by restricting the breadth and duration of intellectual property rights with respect to member clubs. Leagues can also begin providing on-site legal counsel and arbitration to help provide a sort of instant justice. Modern sports have come to dominate America's social culture. The law seems to regulate every aspect of that culture. These two institutions are on the verge of a titanic clash. With proper insight, the leagues can act to prevent the metaphorical sinking ship from destroying society's faith in either institution. The impact of sports on society is growing. The reach of law through society is keeping pace. It is up to the leagues to ensure that they continue to grow together.