

Spring 2009

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Repository Citation

Christopher Bidlack, *The Prohibition of Prosthetic Limbs in American Sports: The Issues and the Role of the Americans with Disabilities Act*, 19 Marq. Sports L. Rev. 613 (2009)

Available at: <https://scholarship.law.marquette.edu/sportslaw/vol19/iss2/7>

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THE PROHIBITION OF PROSTHETIC LIMBS IN AMERICAN SPORTS: THE ISSUES AND THE ROLE OF THE AMERICANS WITH DISABILITIES ACT

INTRODUCTION

The sound he makes while running has been described as the “snick, snick, snick” sound of giant scissors,¹ and to watch him run leaves no doubt that he is a phenomenal athlete. However, the story of Oscar Pistorius centers more around the fiberglass that lets him run than his unquestioned ability. Before the 2008 Summer Olympics there was a media stir over Pistorius, a runner from South Africa who attempted to make his country’s Olympic team as a sprinter in the 400-meter race.² The situation was remarkable because Pistorius is a double amputee, with partial amputations of both legs, and runs on prosthetic legs.³ Before the Olympics, the International Association of Athletics Federations (IAAF) announced that it would not allow Pistorius to compete.⁴ He then appealed this decision to the Court of Arbitration for Sport (CAS), which held that he could run.⁵ Ultimately, this decision did not affect the Beijing Games, because Pistorius failed to qualify for the South African team.⁶ However, this situation presents many questions, including the role of athletes using prosthetics in sports in the United States, and the potential legal ramifications of a ban on prosthetic use in sports.

As prosthetics have become increasingly technologically advanced over the past decades, disabled athletes have approached world-class times and

1. Josh McHugh, *Blade Runner*, WIRED.COM, (2008), http://www.wired.com/wired/archive/15.03/blade_pr.html.

2. *Id.* (giving a thorough look at the Pistorius story and the athlete as a person).

3. *Id.*

4. Press Release, Int’l Ass’n of Athletics Fed’ns, Oscar Pistorius – Independent Scientific Study Concludes that Cheetah Prosthetics Offer Clear Mechanical Advantages, IAAF.ORG, <http://www.iaaf.org/news/printer,newsid=42896.htm> (last visited Sept. 11, 2008) [hereinafter Oscar Pistorius].

5. Pistorius v. Int’l Ass’n of Athletics Fed’ns, CAS 2008/A/1480, award of May 16, 2008, available at [http://www.tas-cas.org/d2wfiles/document/1085/5048/0/Pistorius%20award%20\(scanned%20published%20on%20CAS%20website\).pdf](http://www.tas-cas.org/d2wfiles/document/1085/5048/0/Pistorius%20award%20(scanned%20published%20on%20CAS%20website).pdf).

6. *Pistorius Fails to Make South African Olympic Team*, CBSSPORTS.COM, July 18, 2008, <http://www.cbssports.com/worldsports/story/10901549>.

standards.⁷ This reality will force American sports entities to determine whether athletes using prosthetic limbs⁸ will be eligible to compete. The motivations for such a ban are discussed within,⁹ but the legal issues raised directly involve the Americans with Disabilities Act (ADA).¹⁰ When the issue of banning an athlete using prosthetics comes before an American court, the court is likely to hold the prohibition legal under the ADA because mandating participation would fundamentally alter the nature of many sports. The sport examined in this Comment is American track. The focus on track is to allow for comparison with the Pistorius case, and because track is the sport in which prosthetics use is most likely to arise. The nature of track allows for prosthetics when sports with greater contact or physicality would likely make prosthetics impractical with current technology.

To explore the interactions of the ADA with an American sports ban on prosthetics, this Comment is broken into two large parts, each with several sub-parts. Part I provides background information on the relevant issues by exploring the Oscar Pistorius story to set the proper context for a ban of prosthetics in sports. Part I also describes the evolution of prosthetics to demonstrate how they can be viewed as providing an unfair advantage, discusses the potential American prosthetics bans and their rationales, and provides an analysis of the ADA and relevant prior case law. Part II provides analysis of an American sports prosthetics ban in the context of the ADA by reviewing the statutory language¹¹ of the ADA and the key burden of proof issues. This Comment concludes that bans on the use of prosthetics in sports will likely be upheld by U.S. courts.

I. BACKGROUND

Determining whether an athlete using prosthetic limbs can be prevented from participating in American sports requires extensive background information because it is necessary to create an understanding of prosthetics in addition to the legal issues that accompany their use. This Part is broken into several sections. Section A looks at the story of Oscar Pistorius and reveals

7. European Patent Office, *The Story Behind: Prosthetic Limbs*, EPO.ORG, <http://www.epo.org/topics/innovation-and-economy/european-inventor/inventions/2008/prosthetic-limbs.html> (last visited Sept. 11, 2008).

8. While the issue applies to all prosthetics, the type of prosthetics most likely to be used in sports and raise the issues discussed in this Comment are legs. This is because prosthetic legs are the type of prosthetic most likely to impact the sports world.

9. See discussion *infra* Part I.C.

10. The Americans with Disabilities Act, 42 U.S.C. § 12101-12213 (2008).

11. Under the ADA, an entity does not have to make accommodations for disabled persons if such alterations would “fundamentally alter” the nature of the entity. § 12182(b)(2)(A) (2008).

the real-life experiences of an amputee athlete. Section B provides an overview of prosthetics to create an understanding of the technology. Section C briefly describes the possible bans of athletes using prosthetics that could be imposed in the United States. Lastly, Section D analyzes the ADA and its relation to sport, specifically to track.

A. Oscar Pistorius: The Desire of an Amputee Athlete to Compete

Today, Oscar Pistorius is an athlete known around the world for his remarkable sprinting speed, in spite of the fact that he was born without a fibula in either leg.¹² When he was just one year old, Pistorius had both of his legs amputated between his knees and feet.¹³ Pistorius quickly adapted to walking on fiberglass legs and showed his innate athletic ability from a young age.¹⁴ Ironically, Pistorius only came to sprinting after suffering a knee injury while playing rugby. He used sprinting to aid in his rehabilitation.¹⁵ Despite his late start in track, Pistorius quickly became the best paralympic sprinter in the world.¹⁶ At the 2004 Athens Paralympics, Pistorius won the gold in the 200-meter T44 event, the most difficult category of disabled sprinting.¹⁷ Since then, Pistorius has set the disabled world record in the 100, 200, and 400-meter races.¹⁸ To put his achievements in perspective, while his best times have not qualified him for the Olympics, all three of his record times would have won gold in the able-bodied women's races at the 2004 Athens Olympics.¹⁹ Because of his great athletic ability, Pistorius dreams of competing in the Olympics against able-bodied runners. This desire led to a great deal of litigation and contention before the 2008 Olympics.²⁰

12. McHugh, *supra* note 1.

13. *Id.* (discussing the difficult decision Pistorius's parents were forced to make with their infant son: have him confined to a wheelchair or allow him to learn to walk on prosthetic legs).

14. *Id.*

15. Jeré Longman, *An Amputee Sprinter: Is He Disabled or Too-Abled?*, N.Y. TIMES, May 15, 2007, available at http://www.nytimes.com/2007/05/15/sports/other/sports/15runner.html?_r=1&oref=slogin (discussing Pistorius's innate athletic ability and how it can be seen through his success in multiple sports including sports that are more physically demanding than sprinting).

16. To sprint, Pistorius uses a prosthetic leg known as a Cheetah Blade. See discussion *infra* Part I.B.

17. Int'l Paralympic Comm., *Classification*, http://www.paralympic.org/release/Summer_Sports/Athletics/Classification/ (last visited Oct. 22, 2008). T44 is the category where the minimum disability requirement is one leg amputation below the knee. This level is generally considered to be the toughest level of competition. Pistorius's success at this level shows his true athletic ability.

18. Longman, *supra* note 155.

19. *Id.*

20. *Amputee Runner Wins Right to Try for Olympic Spot*, L.A. TIMES, May 16, 2008, available at <http://articles.latimes.com/2008/may/16/sports/sp-pistorius17>. Following the IAAF decision that prohibited Pistorius from competing, he immediately filed suit with the Court of Arbitration for Sport.

The right to compete in international track events is governed by the IAAF.²¹ The IAAF started as a means to regulate both amateur athletics and has expanded to regulate amateur and professional international events.²² Following Pistorius's declaration of his desire to compete in the Beijing Olympics, the IAAF undertook proceedings to determine if it would allow him the opportunity to compete.²³ Under IAAF rules, an athlete may not participate if he or she receives a technical advantage.²⁴ Rule 144.2(e) states that an athlete receives a mechanical advantage if the athlete uses "any technical device that incorporates springs, wheels or any other element that provides the user with an advantage over another athlete not using such a device."²⁵ In order to determine if the prosthetic legs used by Pistorius, the Cheetah blade, provide a mechanical advantage to a runner and thus violates Rule 144.2(e), the IAAF conducted a series of tests with Pistorius and able-bodied runners of similar skill.²⁶ Following the tests, the IAAF announced that Pistorius would not be allowed to run in able-bodied competitions because his prosthetic legs allowed him to run at the same speed as able-bodied athletes while using twenty-five percent less energy.²⁷ The IAAF concluded that because the prosthetics required less energy to perform, they qualified as a prohibited technical device.²⁸ Following the ban, Pistorius was left with a

21. Int'l Ass'n of Athletics Fed'ns, *IAAF History*, <http://www.iaaf.org/aboutiaaf/history/index.html> (last visited Sept. 11, 2008). The IAAF has the power to regulate the vast majority of international track and field events, including the Olympics and World Championships. *Id.*

22. *Id.*

23. 'Blade Runner' Handed Olympic Ban, BBC SPORT, Jan. 14, 2008, <http://news.bbc.co.uk/sport2/hi/olympics/athletics/7141302.stm>.

24. IAAF Rule 144.2(e), is available in the IAAF rulebook. IAAF COMPETITION RULES 2008 rule 144.2(e), available at http://grfx.cstv.com/photos/schools/ustca/genrel/auto_pdf/IAAF_Rule_Book_08.pdf.

25. *Id.*

26. Oscar Pistorius, *supra* note 4 (the tests involved measuring the amount of energy used to reach speeds and times so that scientists could compare the energy used by Pistorius to able-bodied runners).

27. *Id.*

It is evident that an athlete using the Cheetah prosthetic is able to run at the same speed as able bodied athletes with lower energy consumption. Running with prosthetic blades leads to less vertical motion combined with less mechanical work for lifting the body. As well as this, the energy loss in the blade is significantly lower than in the human ankle joints in sprinting at maximum speed. An athlete using this prosthetic blade has a demonstrable mechanical advantage (more than 30%) when compared to someone not using the blade.

Id.

28. *Id.* (arguing that because the Cheetah Blades require the runner to expend less energy than an able-bodied runner, this constitutes a mechanical device that provides assistance to the runner, which is against IAAF rules).

single means of recourse: an appeal to the CAS.²⁹

Soon after the IAAF prohibited Pistorius from competing, he filed an appeal with the CAS in an attempt to preserve his dreams of running in the Beijing Olympics.³⁰ While the CAS looked at all aspects of the case, the ultimate issue was whether or not the IAAF met its burden of proof in showing that Pistorius's prosthetic legs gave him a mechanical or unfair advantage.³¹ The IAAF presented its findings from the previously mentioned tests that found Pistorius used twenty-five percent less energy than an able-bodied runner.³² In opposition, Pistorius offered evidence that the testing done by the IAAF was not scientifically reliable, noting that the test did not account for all aspects of the race and that the scientist offered by Pistorius to participate in the testing was "frozen out" of the testing process.³³ The CAS held that the conflicting scientific evidence and testing showed that the IAAF had failed to meet its burden of proof to satisfy its own rule by showing there was an advantage received through the prosthetics.³⁴ As a result, the CAS held that Pistorius could not be prohibited from running based on his prosthetics.³⁵ However, the CAS did not prohibit the future banning of prosthetics; it specifically limited its decision to Pistorius on the given facts because of the possibility that additional testing or a change in technology could allow the IAAF to meet its burden.³⁶

Following the favorable CAS ruling, Pistorius tried out for the South African Olympic team because he was still required to qualify, as was every other runner. In a somewhat unglamorous conclusion to the story, Pistorius failed to qualify for the Beijing Olympics, but remains dedicated to competing

29. 'Blade Runner' Handed Olympic Ban, *supra* note 23.

30. *Amputee Runner Wins Right to Try for Olympic Spot*, *supra* note 20.

31. Pistorius v. Int'l Ass'n of Athletics Fed'ns, CAS 2008/A/1480, award of May 16, 2008, 15-16, available at [http://www.tas-cas.org/d2wfiles/document/1085/5048/0/Pistorius%20award%20\(scanned%20published%20on%20CAS%20website\).pdf](http://www.tas-cas.org/d2wfiles/document/1085/5048/0/Pistorius%20award%20(scanned%20published%20on%20CAS%20website).pdf). The CAS placed the burden of proof on the IAAF to show that there was a clear advantage gained by Pistorius in order to satisfy the use of the IAAF's own rules. *See id.*

32. *Id.* at 9.

33. *Id.* at 10-11 (arguing that the testing process did not properly account for the start and acceleration phase of a race, a portion that negatively affects Pistorius, and that Dr. Gailey was not allowed to participate in the testing).

34. *Id.* at 15.

35. *Id.* at 15-16. The CAS held that the IAAF did not meet its burden because (1) the testing measured only for a mechanical advantage and not for "an overall net advantage," (2) the testing did not adequately explore whether or not there was any metabolic advantage, (3) the IAAF did not satisfy the burden in showing that Pistorius received a biomechanical advantage over able-bodied runners, and (4) the testing did not address whether the energy lost through the prosthetics was compensated for elsewhere in the body. *Id.* (emphasis in original).

36. *Id.* at 16.

for a spot to run in the London Games in 2012.³⁷ Pistorius did compete in the Beijing Paralympics where he won the 100, 200, and 400-meter races in the T44 division.³⁸

B. Prosthetic Legs: A Brief History and Overview

Twenty-five years ago, the topic of this Comment would have appeared bizarre because it would not have been conceivable that a person using prosthetic legs could compete with able-bodied athletes in elite track competitions. The reason this topic is relevant today is because the technology behind prosthetic limbs has evolved greatly, both in terms of design and materials.³⁹ Because of this great jump in the quality of prosthetics, American sports entities will soon have to determine whether disabled athletes will be eligible to compete on prosthetic limbs.

Historically, prosthetic limbs have been awkward, uncomfortable, and merely a means of alleviating some of the problems that came with the loss of an arm or a leg.⁴⁰ The history of prosthetic legs shows a path of homemade devices with varying levels of comfort, practicality, and design.⁴¹ Much of the history of advancement within prosthetic limbs has been tied to the military⁴² because of the unfortunate reality that wars create amputees who are otherwise healthy and want to return to an active lifestyle.⁴³ The current war in Iraq has similarly created a number of amputees, many of whom are used to active participation in sports.⁴⁴ It is certainly possible that many of the amputee athletes who could face a ban from participating in sports will be Iraqi War veterans.⁴⁵

Today, the technology of prosthetic legs has matured to a very high

37. *Pistorius Fails to Make South African Olympic Team*, *supra* note 6.

38. Stephen Wade, *Pistorius Wins 3rd Gold in Beijing Paralympics*, WASH. POST, Sept. 16, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/16/AR2008091601573.html>.

39. European Patent Office, *supra* note 7 (noting that engineers have worked hard to better prosthetics and that the evolution of lightweight but strong materials has created the ability to make stronger, lighter limbs).

40. See generally ARTIFICIAL PARTS, PRACTICAL LIVES: MODERN HISTORY OF PROSTHETICS (Katherine Ott et al. eds., 2002) [hereinafter ARTIFICIAL PARTS]. (an in-depth history of prosthetic limbs)

41. See generally *id.* at 1-33.

42. European Patent Office, *supra* note 7.

43. ARTIFICIAL PARTS, *supra* note 40, at 45-75, 119-36.

44. See generally Kari Huus, *Disabled Vets Redeploy — To Beijing Paralympics*, MSNBC.COM, Sept. 11, 2008, <http://www.msnbc.msn.com/id/26547412/>.

45. See *id.*

level.⁴⁶ The world of prosthetic legs changed forever in 1976 when an amputee who wanted to return to his pre-amputation life of waterskiing began using carbon fiber materials in prosthetics.⁴⁷ That homemade prosthetic was the earliest incarnation of the Cheetah blade, the model of leg that Pistorius uses to run today.⁴⁸ It is clear that modern prosthetic legs are providing athletes with the ability to compete at a very high level; however, whether the prosthetic legs merely bring an amputee athlete to the same status as an able-bodied athlete or whether, instead, they provide a mechanical advantage is still debated and is examined throughout this Comment.

The Cheetah blade, or the “Cheetah Flex-Foot” as it is officially known, is the prosthetic leg of choice for amputee athletes. Ironically, they look very little like a human leg. The Cheetah blade is a flat piece of carbon fiber that is shaped into a “J” shape resembling the hindquarters of a cheetah.⁴⁹ While the Cheetah blade is unsuitable for walking and everyday use, it is exceptional when it comes to running.⁵⁰ In the words of the manufacturer, Ossur:

The Cheetah Flex-Foot is a passive prosthetic foot that uses patented carbon technology to efficiently store and release energy produced by the user while running. The shape, which somewhat resembles the hind quarter of a Cheetah—hence the name—acts like a spring and shock absorber. The “J” curve is compressed at impact, storing energy as well as absorbing high levels of stress that would otherwise be absorbed by the user’s knee, hip, and lower back. At toe-off, the “J” returns back to its original shape, releasing a percentage of the stored energy and propelling the user forward.⁵¹

Regardless of whether the Cheetah blade is allowed in American sports, it has clearly provided a valuable resource to amputee athletes who wish to maintain an active, athletic lifestyle.

There is strong disagreement over how much assistance the Cheetah blade provides to a runner. This is a key issue because it will likely be one of the deciding factors of whether sports entities will be allowed to prohibit their use

46. Ossur, *The Cheetah Flex-Foot*, OSSUR.COM, <http://www.ossur.com/?PageID=6741> (last visited Sept. 11, 2008).

47. European Patent Office, *supra* note 7.

48. *Id.*

49. Ossur, *The Cheetah Flex Foot*, *supra* note 46.

50. *See id.*

51. *Id.*

on the grounds of unfair mechanical advantage, much as it was in the CAS decision.⁵² In the testing that has been done up until this point, there has been a great disparity of results⁵³ and the only conclusion that can be drawn is that even more testing will come. One of the greatest difficulties in testing is that, for most amputee athletes, it is impossible to compare their ability before amputation and after. The most obvious example of this is Pistorius, who lost his legs at the age of one. Even for people who lose their legs in adulthood, there are problems of variables that make any direct comparison difficult.⁵⁴ Ossur, the manufacturer, argues that prosthetic legs are passive and return far less energy than the human leg.⁵⁵ This perspective is echoed by Robert Gailey, a professor of physical therapy.⁵⁶ In contrast, IAAF scientists found that the Cheetah blade requires twenty-five percent less energy input and requires less vertical motion than able-bodied runners must exert.⁵⁷ This discrepancy foreshadows the heart of future controversies in the banning of prosthetics in American sports.

C. Potential Bans of Prosthetic Legs in American Sports

Until now, no American sports entity has attempted to ban the use of prosthetics. USA Track and Field has a rule similar to the rule prohibiting mechanical advantages used by the IAAF to prohibit prosthetics, but has not faced the issue of banning prosthetics.⁵⁸ This presents a difficulty because

52. See generally *Pistorius v. Int'l Ass'n of Athletics Fed'ns*, CAS 2008/A/1480, award of May 16, 2008, available at [http://www.tas-cas.org/d2wfiles/document/1085/5048/0/Pistorius%20award%20\(scanned%20published%20on%20CAS%20website\).pdf](http://www.tas-cas.org/d2wfiles/document/1085/5048/0/Pistorius%20award%20(scanned%20published%20on%20CAS%20website).pdf).

53. See discussion *supra* Part I.A.

54. These variables can include different lifestyles, training regimes, etc.

55. Ossur, *The Cheetah Flex Foot*, *supra* note 46.

The Cheetah is a passive foot, which means it is limited to returning a portion of the energy stored during the loading phase of running. Studies have shown the Cheetah can return around 90% of the load applied to it. In contrast, a normal able-bodied foot/ankle/gastroc system can return 249%.

Id.

56. Longman, *supra* note 15, Simon Turnbull, *Running into Trouble: Cheetah or Cheater? The "Blade Runner" Hits Back*, INDEPENDENT (LONDON), July 8, 2007, available at <http://www.independent.co.uk/sport/general/running-into-trouble-cheetah-or-cheater-the-blade-runner-hits-back-456385.html> (noting Gailey's contention that the Cheetah blades return 80% of the energy of each stride while a natural leg returns 240%).

57. Oscar Pistorius, *supra* note 4.

58. USA Track and Field (USATF) has a rule governing technical advantages similar to the IAAF rule. According to USATF Rule 144(1), athletes may not have assistance. Rule 144(3)(g) lists the following as assistance: "any technical devise that incorporates springs, wheels, or any other element that provides the user with an advantage over an athlete not using such a device." USA

without the context of a ban it is difficult to apply the law. Thus, it is useful to look at what an American sports entity's, specifically track's, ban on prosthetics could look like. Pistorius was the first athlete to run times that approached world class; however, it seems likely that others will follow him. While it may provide good publicity to allow amputee athletes to compete, it is likely that American sports entities, and particularly USA Track and Field,⁵⁹ will prohibit prosthetics. There are two reasons that sports entities are likely to prohibit the use of prosthetics: unfair mechanical advantage and safety concerns.

The first cause for concern, and the most expected, is the belief that prosthetics will give amputee athletes an unfair advantage. This was the concern of the IAAF and the motivation for its ban.⁶⁰ This appears to be the most rational concern of sports entities. Prosthetics have the potential to provide assistance in two ways. The first way is through direct mechanical advantage. The reality is that the Cheetah blade is a spring, and as the technology advances the mechanical advantages are likely to increase. The mechanical advantage of a Cheetah blade is in storing energy.⁶¹ With each step a person takes, his foot, ankle, and leg store energy that is then used to push the body as the next step is taken. The IAAF study found that the Cheetah Blade is significantly more efficient at storing and returning this energy than the human ankle.⁶² The IAAF argues that this efficiency is what creates a significant mechanical advantage.⁶³ As a result, sports entities are likely to ban the prosthetics to keep the playing field level for all athletes.

The second advantage that can occur, and is a bit more abstract, is the ability of amputee athletes to avoid wear and tear on their leg joints. While able-bodied athletes are subject to wear and injuries, amputee athletes can simply replace old or broken parts. This means that because an amputee athlete does not have ankles, he does not have to worry about ankle injuries, and can replace any broken parts instantly.⁶⁴ The ability to mend injuries so quickly has the potential to be a distinct advantage for amputee athletes. This advantage can also be extended to game activity in the prevention of cramping

TRACK AND FIELD, 2008 USATF COMPETITION RULES (2008), available at <http://www.usatf.org/about/rules/2008/2008USTAFRulesArticle4.pdf>.

59. USA Track & Field, *About USATF*, USATF.ORG, <http://www.usatf.org/about/> (last visited Oct. 22, 2008). USA Track and Field is the governing body of the sport in the United States.

60. See discussion *supra* Part I.A.

61. Oscar Pistorius, *supra* note 4.

62. *Id.*

63. *Id.*

64. While the issue of easy replacement has not been addressed by courts, it is a clear way in which there is the potential for a distinct advantage for amputee athletes.

and muscle fatigue for amputee athletes.

The second reason for a sports entity to ban the use of prosthetics is a fear for the safety of participants. When prosthetic legs are worn, foreign objects are necessarily brought to the field of play. In the track setting, this means that carbon fiber legs are in tight quarters with athletes moving at their highest level and as fast as they can. If an amputee athlete were to fall, his or her legs could seriously injure another runner. While it is hard to predict exactly what the safety risks are, it would not be surprising for sports entities to lean toward precaution. It is also unclear how much the non-traditional gait of amputee athletes will impact a race within the close quarters of track.⁶⁵ A final rationale for sports entities to ban prosthetics is to protect the status quo of able-bodied athletes, or to ban athletes using prosthetics in order to protect the employment of the able-bodied athletes currently playing sports. This prospect seems less likely than the others.

D. The ADA: The Statute and Subsequent Case Law

The ADA⁶⁶ is a comprehensive statute designed to ease the burden on the government of the costs imposed by the disabled by reducing the financial burden of disabled people on the government and by creating a system in which disabled people are placed at the same starting point as able-bodied people, thereby giving them an equal chance at success in American society.⁶⁷ Since its implementation in 1990, the ADA has become a very important law, and one that affects many people on a regular basis.⁶⁸ Because of the scope of the ADA, only a portion of it applies to the issue of banning the use of prosthetics in sports. This Section is broken into a discussion of the statute itself and case law addressing the statute.

65. The motion of a runner on prosthetics differs from the gait of an able-bodied runner because the majority of the motion comes from the amputee runner's hips. Pistorius's running has been described as follows:

[The] hip-generated stride, combined with the odd shape of the Cheetah itself, means that Pistorius has to waddle slightly, his feet flailing out to the side a bit on each rearward kick. The blades make that scissoring noise as they grip the track, compress, and return to their original shape.

McHugh, *supra* note 1.

66. 42 U.S.C. § 12101-12213 (2008).

67. WILLIAM D. GOREN, UNDERSTANDING THE AMERICANS WITH DISABILITIES ACT 1 (2nd ed. 2006) ("The ADA is not an affirmative action statute. Instead, its purpose is to enable people with disabilities to be placed at the same 'starting line' as those who are nondisabled.").

68. *See generally id.*

1. The ADA: The Statute Itself

The ADA has three titles that have the potential to be relevant to sports: Titles I, II, and III. While all three have the potential to impact sports, Title III is the title most likely to have a direct impact on the banning of prosthetic limbs in sports. Title I deals with discrimination in employment⁶⁹ and provides a great deal of protection for disabled people in that context.⁷⁰ Title I has the potential to be relevant in the context of professional team sports because of the employment relationships created in those situations; however, it will not be the first issue to be brought because much of sport is unrelated to employment. Title II prohibits discrimination against disabled people by public entities⁷¹ and has the potential to be relevant to high school and collegiate sports because schools are generally public entities; but again, this will not be the first issue addressed in looking at sports and the ADA. The key title is Title III, which prohibits discrimination in public facilities.⁷² The reach of Title III to public facilities creates coverage over the vast majority of sporting situations, and thus makes it the most applicable and the most useful for creating a body of law that is consistent across sports. This is confirmed by the use of Title III as the section of the ADA that has been most consistently used by courts across the country in analyzing sports.⁷³

i. Title III: Prohibition on Discrimination in Public Facilities

As the ADA has developed, Title III has become the most relevant title in the context of sports and disabilities.⁷⁴ The goal of Title III is to prohibit discrimination against disabled people in places of public accommodation.⁷⁵ Thus far, courts have taken a broad interpretation of what constitutes places of public accommodation and public facilities.⁷⁶ Additionally, this requirement

69. 42 U.S.C. § 12112 (2008).

70. GOREN, *supra* note 67, at 14.

71. *See* 42 U.S.C. § 12132 (2008).

72. § 12182.

73. *See* discussion *infra* Part I.D.2 for a discussion of cases that have applied Title III as a means to analyzing sports issues and the ADA.

74. *See* GOREN, *supra* note 677, at 1.

75. 42 U.S.C. § 12182(a) (2008) (“General Rule. No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”).

76. Courts have taken the statutory language broadly and incorporated similar facilities. Under 42 U.S.C. § 12182(a)(L) (2008) a public facility includes a gymnasium, health spa, bowling alley, golf course, or other place of recreation. This has been taken to include baseball fields, racquetball courts, and ice arenas. *See* discussion *infra* Part I.D.2. This indicates that facilities designed for

applies not only to observers in the context of public accommodations, but to participants as well.⁷⁷ The prohibition on discrimination requires owners and operators of facilities of public accommodation to “make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities.”⁷⁸ The ADA itself does not define reasonable modification, but the *Americans with Disabilities: Practice and Compliance Manual* provides some guidance.⁷⁹ The *Practice and Compliance Manual* recognizes that the evaluation of what constitutes a reasonable modification is a fact intensive inquiry and provides several factors that are useful in making the evaluation: “(1) the effectiveness of the modification in light of the nature of the disability in question; (2) the cost to the organization that would implement the modification; and (3) whether the modification would do violence to the purposes underlying the rule.”⁸⁰

Despite this requirement, entities do have a means of opting out of the modification requirement. An entity is excused from making reasonable modifications if “the entity can demonstrate that making such modifications would *fundamentally alter* the nature of such goods, services, facilities, privileges, advantages, or accommodations.”⁸¹ The ADA’s supplemental materials define a fundamental alteration as “a modification that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages, or accommodations offered.”⁸² This shows it is difficult to create a concrete definition of what constitutes a fundamental alteration because a fact intensive inquiry is needed in each case. The difficulty of this determination is seen in Justice Scalia’s dissent in *PGA Tour, Inc. v. Martin*, in which he argued that “not even the Supreme Court of the United States” can determine which rules of a competitive sport are fundamental when the governing body of the sport contends that they are.⁸³ Despite this difficulty, the *Martin* case did provide a useful starting point in determining what constitutes a fundamental alteration by providing two types

holding athletic competitions fall within the standard of public accommodation under the ADA.

77. GOREN, *supra* note 67, at 54.

78. 42 U.S.C. § 12182(b)(2)(A)(ii).

79. AMERICANS WITH DISABILITIES: PRACTICE AND COMPLIANCE MANUAL, § 4:77 (2008).

80. *Id.*

81. 42 U.S.C. § 12182(b)(2)(A)(ii) (emphasis added).

82. AMERICANS WITH DISABILITIES ACT, ADA TITLE III TECHNICAL ASSISTANCE MANUAL (2008), available at <http://www.ada.gov/taman3.html>.

83. 532 U.S. 661, 700 (2001) (Scalia J., dissenting). For a further discussion, see Maureen A. Weston, *Health Law Symposium: The Intersection of Sports and Disability: Analyzing Reasonable Accommodations for Athletes with Disabilities*, 50 ST. LOUIS U. L.J. 137, 161-62 (2005).

of reasonable accommodations that could lead to a fundamental alteration.⁸⁴ According to the Supreme Court:

In theory, a modification . . . might constitute a fundamental alteration in two different ways. It might alter such an essential aspect of the game . . . that it would be unacceptable even if it affected all competitors[.] . . . Alternatively, a less significant change that has only a peripheral impact on the game itself might nevertheless give a disabled player, in addition to access to the competition as required by Title III, an advantage over others and, for that reason, fundamentally alter the character of the competition.⁸⁵

This explanation is useful, but again leaves much to be determined by the facts in each case. This topic is discussed at greater length later.⁸⁶

ii. The Burden of Proof Within Sports and the ADA

Because of the difficulty in demonstrating what is, and is not, a fundamental alteration in the context of sports, the placement of the burden of proof will be a key component of any case dealing with the prohibition of prosthetics in American sports. There has not been a clear articulation of the burden of proof requirements within the context of a case concerning the ADA and sports. There is, however, a strong description of the burden of proof in another Title III case that would almost certainly be applied to a sports case.

In *Johnson v. Gambrinus Co./Spoetzl Brewery*,⁸⁷ the Fifth Circuit analyzed the burden of proof within the context of access to a brewery by a disabled person who used a guide dog.⁸⁸ In that case, the court held that the burden of proof in Title III cases should be similar to Title I cases and follow a similar two-step process.⁸⁹ First, the court held that the plaintiff bore the burden of proof to show first, that reasonable accommodations were available.⁹⁰ Second, the court decided that the defendant was responsible to show that the reasonable accommodations fundamentally altered the

84. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 682-83 (2001).

85. *Id.*

86. See discussion *infra* Part I.D.2.i.

87. 116 F.3d 1052, 1059 (5th Cir. 1997).

88. *Id.* at 1059.

89. *Id.*

90. *Id.*

defendant's practice.⁹¹ Sports-related cases have followed this pattern without articulating it.⁹² Academic writing has also argued that this pattern will continue.⁹³

2. Case Law Concerning the ADA and Sports

While there has been a great deal of litigation dealing with the ADA as a legislative scheme, there have been a limited number of cases that deal with the relation of the ADA to competing in sporting events. Much of the litigation dealing with the ADA and sports has been in relation to access to watching sports.⁹⁴ Consequently, it is important to explore the cases that have been decided in depth so that the rules found in these cases can be applied to the situation of a prosthetics ban in American sports. This section looks at the two particularly relevant cases, *Martin* and *Kuketz*, and briefly touches on several cases that will be more relevant at the periphery.

i. Martin: The Supreme Court's Perspective on Competition in Sport and the ADA

The most influential case in the area of sports competition and the ADA is *PGA Tour, Inc. v. Martin*.⁹⁵ *Martin* was decided by the Supreme Court in a highly publicized decision in 2001.⁹⁶ In that case, Casey Martin, a golfer, was attempting to qualify for the PGA Tour.⁹⁷ The unusual aspect of the situation was that Martin is disabled⁹⁸ and desired to use a golf cart in qualifying for the

91. *Id.*

92. *See* *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001); *see also* *Kuketz v. Petronelli*, 821 N.E.2d 473 (Mass. 2005).

93. Kelly Collier Cleland, *Sports and the ADA After PGA Tour v. Martin*, 89 ILL. B.J. 480 (2001) (arguing that the test from *Johnson* will be applied to sports cases).

94. *See generally* GOREN, *supra* note 67.

95. *Martin*, 532 U.S. at 661.

96. *See* Cleland, *supra* note 93.

97. *Martin*, 532 U.S. at 667-68. The PGA is an acronym for the Professional Golf Association. *Id.*

98. *Id.* *Martin* is

afflicted with Klippel-Trenaunay-Weber Syndrome, a degenerative circulatory disorder that obstructs the flow of blood from his right leg back to his heart. . . . [The disease] causes severe pain and has atrophied his right leg. . . . Walking not only caused him pain, fatigue, and anxiety, but also created a significant risk of hemorrhaging, developing blood clots, and fracturing his tibia so badly that an amputation might be required.

Id.

PGA Tour.⁹⁹ The problem was that the PGA did not allow the use of carts during play.¹⁰⁰ In response, Martin brought suit under the ADA arguing that the golf cart prohibition violated Title III of the ADA by denying him a reasonable modification to accommodate his disability.¹⁰¹ In a 7-2 decision, Justice Stevens opined that the PGA Tour had violated the ADA by denying Casey Martin the opportunity to use a golf cart in his qualification attempts.¹⁰²

In *Martin*, the Court made several conclusions that have the potential to be influential in the decision on a ban of prosthetics in sports. First, the Court held that Title III of the ADA applies to athletic competitions.¹⁰³ The Court stated:

While Congress expressly exempted “private clubs or establishments” and “religious organizations or entities” from Title III’s coverage, 42 U.S.C. § 12187, Congress made no such exception for athletic competitions, [and] much less did it give sports organizations *carte blanche* authority to exempt themselves from the fundamental alteration inquiry by deeming any rule, no matter how peripheral to the competition, to be essential.¹⁰⁴

This implies that the Court will apply Title III to all sports competitions. Additionally, the Court stated that Title III of the ADA applies to elite athletes.¹⁰⁵

In finding that the PGA Tour did not show that a golf cart would fundamentally alter the game, the Court listed two ways a reasonable accommodation could change an activity: 1) changing an aspect of the game for all competitors that changes the nature of the game, or 2) making a modification for one competitor that gives that competitor an advantage.¹⁰⁶ Additionally, the Court stated that allowing Martin to use a cart would not fundamentally alter the game because Martin would not receive an advantage;¹⁰⁷ the walking requirement of golf is on the periphery of golf, and

99. *Id.* at 669.

100. *Id.* at 666-67.

101. *Id.* at 669-70.

102. *Id.* at 690.

103. *Id.* at 690-91.

104. *Id.* at 689 n.51 (emphasis included in original).

105. *Id.* at 689.

106. *Id.* at 682-83.

107. *Id.* at 671-72 (noting that Martin becomes physically tired through the use of the cart and that in circumstances where carts are allowed, many players choose not to use them, indicating that

the rule is not even an official rule.¹⁰⁸ Because of these findings, the Court held that Casey Martin could not be barred from using a golf cart in his attempts to qualify for the PGA Tour, and on the Tour if he succeeds.¹⁰⁹

ii. Kuketz: Exploring a Clear Example of a Fundamental Alteration

Since the *Martin* decision, *Kuketz v. Petronelli*¹¹⁰ has directly examined the role of a fundamental alteration of sports competition through an ADA-required modification. In *Kuketz*, a wheelchair racquetball player requested to participate in an able-bodied league and requested that he be allowed two bounces of the ball as opposed to the single bounce allowed to able-bodied players.¹¹¹ The Supreme Court of Massachusetts held that this alteration was a fundamental change to the nature of the game of racquetball.¹¹² The court found that allowing a second bounce created “a new game, with new strategies and new rules.”¹¹³ The court also noted that allowing a second bounce is directly contrary to the rules.¹¹⁴ Thus, the change fundamentally altered the sport of racquetball despite being a reasonable modification.¹¹⁵ Although not directly discussed by the court, it is valuable to point out that one reason the racquet club did not permit the rule change was a safety concern for able-bodied athletes who would not be accustomed to the movements and extra equipment of a wheelchair athlete.¹¹⁶

iii. Other Relevant Cases Dealing with Sports and the ADA

Martin and *Kuketz* are the two cases that are the most directly relevant to

they do not provide a strong advantage).

108. *Id.* at 667 (noting that the use of a cart is not directly in the game play of the sport and that it is not directly codified in the main rules of the PGA Tour).

109. *See id.* For discussion of the *Martin* case in greater detail see generally Darryl J. Liguori, Note, *Fore! The Supreme Court Tees Off a Standard to Apply the Americans with Disabilities Act to Professional Sports in PGA Tour, Inc. v. Martin*, 12 WIDENER L.J. 185 (2003); Cleland, *supra* note 93.

110. *Kuketz v. Petronelli*, 821 N.E.2d 473 (Mass. 2005).

111. *Id.* at 474. “The official rules of racquetball (rules), which govern league play, provide that the ‘objective’ of the game is ‘to win each rally’ and that a player loses a rally when he is ‘unable to hit the ball before it touches the floor twice.’” *Id.*

112. *Id.* at 479-80. “Unlike the use of carts in golf, the allowance for more than one bounce in racquetball is ‘inconsistent with the fundamental character of the game.’ . . . The essence of the game of racquetball, as expressly articulated in the rules, is the hitting of a moving ball with a racquet before the second bounce.” *Id.* at 479.

113. *Id.* at 480.

114. *Id.* at 479.

115. *Id.*

116. *Id.* at 475 n. 12.

the analysis of a ban on prosthetics in American sports, but there are several other cases that provide some useful background information. While these cases are not directly on point, they do aid in the analysis by showing how the issue of disability in American sports has been handled by courts up to this point in time. Additionally, these cases show several examples of analysis of the fundamental alteration question. In *Anderson v. Little League Baseball, Inc.*,¹¹⁷ an Arizona court held that a Little League rule that prohibited a coach in a wheelchair from coaching third base violated the ADA because the burden of proof was not met to show there was a safety hazard.¹¹⁸ The court in *Elitt. U.S.A. Hockey*¹¹⁹ held that a youth hockey league acted appropriately when it did not allow an older child with developmental problems to compete in a league for younger children.¹²⁰ That court held that the age of participants was a fundamental aspect of the competition, and thus a change in that age bracket would be a fundamental change.¹²¹ Similarly, an Illinois court held that National Collegiate Athletic Association grade point average requirements were a fundamental aspect of competition requirements because they established the privilege of competing in collegiate sports.¹²² Notably, that court made the decision under Title III of the ADA.¹²³ All of these cases show that there is useful case law dealing with sports and Title III of the ADA, but that analysis will be developed based on case-specific facts as a challenge to a prosthetics ban in American sports faces a court.

II. ANALYSIS OF A PROSTHETICS BAN IN AMERICAN SPORTS AND THE ADA

If an American sports entity, specifically USA Track and Field, bans the use of prosthetics in sports competition, an analysis of the ban under the ADA will necessarily be undertaken by a court once it is challenged by an amputee athlete.¹²⁴ While the statute and case law do not have a directly applicable rule to apply, there is enough law available to make strong predictions about how a court would view this type of situation. Title III of the ADA will be

117. 794 F. Supp. 342, 345-46 (D. Ariz. 1992).

118. *Id.* at 345-46.

119. 922 F. Supp. 217, 225 (E.D. Mo. 1996).

120. *Id.* at 225.

121. *Id.*

122. *Ganden v. Nat'l Collegiate Athletic Ass'n*, 1996 U.S. Dist. LEXIS 17368, *43-44 (N.D. Ill. 1996).

123. *Id.* at *47-50.

124. The entire decision will be made through the court system. While there may be decisions made by sports bodies, these decisions will not have any deferential value in the court system because sports bodies do not have any judicial authority and to give deference would allow a non-judicial body to make determinations about the application of the ADA.

applied to a ban on prosthetics based on the objective of the statute and on the Court's decision in *Martin* to apply Title III to sports cases.¹²⁵ Title III is used because it regulates the ADA in the scope of public accommodations, which include sports facilities. The rules covering public accommodations are applicable because track facilities are directly analogous to golf courses and sporting events, locations that have been found to be included under Title III, because they are all facilities created specifically for sports competitions and activities.¹²⁶ These findings will almost certainly be applied to a similar ban in any American sports competition.

This Part looks at how Title III will apply and what the likely outcome will be by providing analysis of the issue of burden of proof, the issue of a fundamental alteration, and the likely decision. Through this analysis, this Part concludes that a ban on the use of prosthetics in track competitions specifically, and likely most sports competitions, should be upheld by the courts. First, it provides an analysis of the issue of fundamental alteration and the workings of the ADA in relation to this ban. Second, this Part examines whether this finding is one that should be kept or one that calls for a change to the statute.

A. Establishing the Burden of Proof

As was discussed previously, applying the ADA to a prosthetics ban in American sports creates the issue of establishing the burden of proof.¹²⁷ A court analyzing Title III of the ADA in the context of sports will almost certainly apply the two-step burden of proof approach that was used in *Johnson*.¹²⁸ Thus, the initial burden of proof in a case evaluating a prosthetics ban will be on the plaintiff or athlete to show that reasonable accommodations can be made to facilitate his or her participation in the sport.¹²⁹ This standard should be relatively easy for the athlete to show. Allowing an athlete to use prosthetic legs does not require a sports entity to take any positive action or to undertake any additional costs, and it effectively compensates for the disability of the athlete. Both of these factors fit with the factors suggested by the ADA *Practice and Compliance Manual* previously discussed.¹³⁰ Consequently,

125. See *supra* Part I.D.2.a.

126. See generally *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001); *Kuketz v. Petronelli*, 821 N.E.2d 473 (Mass. 2005).

127. See *supra* Part I.D.1.b.

128. *Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1059 (5th Cir. 1997). See also discussion *supra* Part I.D.1.b.

129. *Johnson*, 116 F.3d 1059.

130. See discussion *supra* Part I.D.1.b.

such an accommodation is likely to be found reasonable much like the use of a golf cart was found reasonable in *Martin*¹³¹ and the use of a second bounce was found to be a reasonable modification in *Kuketz*.¹³² It should be noted that in *Kuketz* the second bounce was found to be a reasonable accommodation; the reason the ban was allowed was because the reasonable accommodation led to a fundamental alteration of the sport.

In all of these situations the sports entity can simply allow the athlete to make his own accommodations and no financial or feasibility burden is placed on the entity. The classification of this action as reasonable is solidified by the decision in *Badgett v. Alabama High School Athletics Ass'n*.¹³³ Although that case was decided under Title II of the ADA, the reasonableness evaluation is valuable. In *Badgett*, the court held that the Alabama High School Athletics Association could not reasonably accommodate a wheelchair athlete in track events when the accommodation requested was the creation of a separate class of events for her to participate in.¹³⁴ This was determined to be an unreasonable accommodation because of the infeasibility and impracticality of creating a class of a sport for a single individual to compete in.¹³⁵ In contrast, an amputee athlete in the current situation is attempting to compete in an established class of competition.

Because it will likely be simple for an amputee athlete to meet his or her burden of proof in showing that reasonable accommodations can be made, the second component of burden of proof will be of utmost importance. The sports entity in question will have the burden of showing that the reasonable modification requested will fundamentally alter the sport.¹³⁶ This component will be the key issue in any case dealing with a prosthetics ban and is the focus of the next section.

B. Fundamental Alterations: The Key Analysis in Evaluating a Prosthetics Ban

The ultimate issue that a court will have to face in a case in which a sports entity has prohibited the use of prosthetics is whether the change to the sport will fundamentally alter the nature of the game. While the cases at the extremes of alteration will be easy for a court to determine, it is the gray,

131. See *Martin*, 532 U.S. at 661.

132. *Kuketz*, 821 N.E.2d at 473 (the second bounce was found to be reasonable, but it was found to be a fundamental alteration to the game of racquetball).

133. See *Badgett v. Ala. High Sch. Ath. Ass'n*, 2007 U.S. Dist. LEXIS 36014 (N.D. Ala. 2007).

134. *Id.* at *14-19.

135. *Id.*

136. See *Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1059 (5th Cir. 1997).

middle zone of alteration that will be difficult to determine. The reality is that the determinations will come down to a judgment call of judges or juries because there is no quantifiable measure of what constitutes the fundamental nature of a sport.

First, it is useful to explore what the definition of a fundamental alteration is and should be. In the sports cases dealing with the ADA, there has not been a declaration of a useful definition of a “fundamental alteration.” A good place to start is by looking at how the term “fundamental” is defined in common language. Two useful definitions describe “fundamental” as “serving as, or being an essential part of, a foundation or basis; basic; underlying,” and “of, pertaining to, or affecting the foundation or basis.”¹³⁷ While a plain language definition is useful, it highlights the fact that an evaluation of what is fundamental is a necessarily subjective analysis. Evaluating fundamental aspects of something inherently requires judgment. As a result, it is impossible to quantify what is a fundamental aspect of sports, and thus what a fundamental alteration would be. The fact that every sport is different and has a different set of rules and requirements means that every time a sport bans the use of prosthetic limbs a new analysis will have to be done. Despite the subjectivity of the analysis, a model definition can be useful. Within the context of sports, a useful definition of a fundamental alteration is: an alteration to a sport or game to facilitate the participation of a disabled person is a fundamental alteration if the requested change damages the underlying nature of the game or turns the game into an entirely new game. The consistent use of this definition will increase the consistency and predictability of this type of case.

With an initial definition of what constitutes a fundamental alteration in sports established, it is useful to compare prior cases to a ban on prosthetics in sports, and specifically track and field, to learn from those prior cases. The usefulness of this comparison is due to the inherently subjective nature of any evaluation of what constitutes a fundamental aspect of a sport. Consequently, it is key to analogize the facts of a prosthetics case to those prior cases. The two most apt cases for comparison are *Martin* and *Kuketz* because they both deal directly with disabled athletes seeking to alter the rules of established sports through reasonable accommodations. These cases establish the spectrum of fundamental change, with *Martin* being a strong example of no fundamental change,¹³⁸ while *Kuketz* is an example of a clear fundamental

137. *Fundamental*, DICTIONARY.COM, <http://dictionary.reference.com/browse/Fundamental> (last visited Oct. 8, 2008).

138. See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 690 (2001).

change.¹³⁹ Analysis of these cases in relation to a prosthetics ban shows that such a ban would likely be upheld.

As discussed previously, the *Martin* case is the key case in evaluating the relationship between sports and the ADA.¹⁴⁰ Comparing the facts in *Martin* to the likely facts of a prosthetics ban case is useful in evaluating whether allowing the use of prosthetics in sports is a fundamental alteration. The Court in *Martin* found that allowing Casey Martin to use a golf cart was not a fundamental alteration to the game of golf because it did not change the mechanics of the game or provide him with an advantage.¹⁴¹ The prohibition on using a golf cart was similar to a prosthetics ban because neither changes the rules of the game,¹⁴² and both introduce a mechanical piece of equipment to the game.¹⁴³ However, one important difference between the facts is that in *Martin* the use of the golf cart is not during the physical action of the sport, while in the context of prosthetics, the limbs are a key component during game play for the amputee athlete and may provide a mechanical advantage. Because of this difference, it is clear that the use of prosthetics constitutes more of a fundamental alteration than the use of a golf cart.

The *Kuketz* case represents the opposite end of the fundamental alteration spectrum from *Martin*. In *Kuketz*, the court held that allowing a second bounce for a wheelchair racquetball player fundamentally altered the sport because a key component of the game was allowing only a single bounce.¹⁴⁴ In this case, the reasonable accommodation went straight to the heart of the sport and was clearly a fundamental alteration. The *Kuketz* facts also have important dissimilarities and similarities in relation to a potential prosthetics ban. The key dissimilarity between the two fact patterns is that an additional bounce in racquetball does not include adding a mechanical component to the sport like the use of a prosthetic limb does. This difference has the ability to cut both ways. The presence of a mechanical component may be seen to increase the likelihood that the alteration will be seen as fundamental because it introduces something new to the game. On the contrary, the mechanical component may be viewed as independent from the game and thus not as fundamental as a rule change. The similarity between the two sets of facts is

139. See *Kuketz v. Petronelli*, 821 N.E.2d 473, 480 (Mass. 2005).

140. See *supra* Part I.D.2.a.

141. *Martin*, 532 U.S. at 690.

142. In both situations, the rules of the game remain constant. In golf the winner is the person who takes the fewest shots while in track the winner remains the person who runs the set distance in the shortest amount of time.

143. In *Martin*, the mechanical component was the golf cart while the mechanical component in the situation of an amputee athlete are the prosthetic limbs.

144. *Kuketz*, 821 N.E.2d at 479-80.

that both reasonable accommodations take place directly during the course of game play. Allowing a second bounce and allowing the use of prosthetic limbs are accommodations that must be made within the actual movements of and participation in the sport. Additionally, both arguably provide an unfair advantage to the disabled athlete. It is that similarity that will lead a court to find that allowing prosthetics is closer to allowing a second bounce in racquetball than to using a golf cart.

One additional piece of litigation that is worthy of analysis is the CAS decision that rejected the ban on prosthetics for Pistorius.¹⁴⁵ While the CAS found that prohibiting Pistorius from running was unacceptable, this should not be seen as determinative or even as strong dicta in an American case with similar facts. This is because the CAS case and a future American case will be evaluating the facts under different standards. The CAS found that Pistorius could run because the IAAF did not meet its burden of showing that his prosthetic legs gave him an advantage running.¹⁴⁶ In contrast, an American court will have to evaluate the case under the fundamental alteration standard created by the ADA. Thus, the CAS was evaluating the facts in relation to quantifiable mechanical advantage while an American court will evaluate similar facts under the subjective fundamental alteration standard. Because these standards are distinct, a direct comparison will not be particularly useful to an American court. Additionally, the fact that the CAS limited its holding on Pistorius to the narrow facts of the case¹⁴⁷ shows an unwillingness to prohibit bans on the use of prosthetics.

This Comment focuses on the potential use of prosthetics in track because track is the sport in which Pistorius participated, and it is the sport that is the most logical for prosthetics use. However, the analysis will likely remain the same if the ban on prosthetics is used in other sports. A realistic hypothetical is a ban on the use of prosthetic legs in basketball. This is a logical extension from track because it is reasonable to think that the spring-like Cheetah blade used in track could be used or modified slightly to increase a disabled athlete's jumping ability. The ability to jump higher is clearly a useful tool in basketball. The analysis under the ADA for basketball would again depend on the determination of whether the prosthetics fundamentally altered the nature of the sport. Because of the huge benefit that could accompany the placement of spring-like prosthetics on the legs of an amputee basketball player, a court

145. See *Pistorius v. Int'l Ass'n of Athletics Fed'ns*, CAS 2008/A/1480, award of May 16, 2008, 18, available at [http://www.tas-cas.org/d2wfiles/document/1085/5048/0/Pistorius%20award%20\(scanned%20published%20on%20CAS%20website\).pdf](http://www.tas-cas.org/d2wfiles/document/1085/5048/0/Pistorius%20award%20(scanned%20published%20on%20CAS%20website).pdf).

146. *Id.* at 15-16.

147. *Id.* at 16.

would likely again find that the prosthetics fundamentally changed the game.¹⁴⁸ The use of such prosthetics would provide a mechanical advantage directly in game play, much like the track analysis given previously, and thus would be found to be a fundamental alteration to the game.

C. Mandating the Use of Prosthetic Limbs in Sports Constitutes a Fundamental Change

The conclusion to be drawn from the analysis of this Comment is that the key aspect of a case dealing with whether a prosthetics ban will be upheld under the ADA, is whether the reasonable accommodation of allowing prosthetics to be used in sports will fundamentally alter a sport. While there is some amount of uncertainty in the evaluation, there is enough case and statutory law to come to a sound belief that a ban on the use of prosthetics in sports, and particularly in track, will be upheld. The conclusion that a ban will be allowed is based on an evaluation that allowing prosthetics will be found to be a fundamental alteration to the sport of track, and would also be a fundamental alteration to other sports. A court will likely find there to be a fundamental alteration for two reasons: first, a change in the actual game play of the sport, and, second, the role of mechanical assistance.

As discussed above,¹⁴⁹ finding where to place the use of prosthetics in sports on the spectrum of a fundamental change requires comparing the facts to *Martin* and *Kuketz*. The use of prosthetics will be placed much closer to *Kuketz* on that spectrum because of the role of the accommodation directly in game play. Because the use of prosthetics during a race is directly in the act of the sport, small alterations to the nature of the game can be fundamental. It is for that reason that the use of the prosthetics will likely be a fundamental alteration.

A second reason that the use of prosthetics will be found to be a fundamental alteration, and an area that has not been greatly explored, is the mechanical advantage that can come from the use of prosthetics. While the court in *Kuketz* found that allowing a second bounce in racquetball was a clear advantage to a wheelchair player, the mechanical advantage that comes from the use of prosthetics is more complete. The varying test results from the Pistorius case show that whether Cheetah blades provide a mechanical

148. It is clear that increasing jumping ability constitutes a fundamental alteration to the game of basketball because a different sport, Slamball, does just that. Slamball places trampolines in the floor of a basketball court and the result is a game that is clearly a fundamental alteration from the traditional sport of basketball. For more information about the game of Slamball, see generally, Slamball, <http://www.slamball.net/> (last visited Apr. 4, 2009).

149. See discussion *supra* Part II.B.

advantage is questionable and that further testing is inevitable.¹⁵⁰ However, it is likely that the test results that show a mechanical advantage will have a strong pull with American courts. The *Martin* Court hinted that one reason a golf cart was not found to be an advantage was because it was clear that there was no advantage in regards to energy saved because of Martin's muscle condition.¹⁵¹ This can be interpreted to show that courts will be very hesitant to allow reasonable accommodations that give or could give the disabled athlete an advantage. This mechanical advantage is the type of advantage the *Martin* Court described when it listed a reasonable accommodation that gives the party requesting the advantage a fundamental alteration.¹⁵² This advantage will also be likely to grow as the prosthetics technology advances and thus expand the fundamental alteration.

The result of the placement of the prosthetics directly in the game play of the sport in question and the high potential for mechanical advantage for the disabled athletes is the conclusion that an American court will uphold the ban of the use of prosthetics in American sports under the ADA.¹⁵³ This conclusion is furthered by the reality that American courts have traditionally given sports highly favorable rulings.

D. The Legal Conclusion is the Only Conclusion that Can be Drawn From this Analysis

The analysis of a prosthetics ban in American sports has shown that such a ban will likely be upheld by the courts. That addresses the *legal* aspect of the situation. Despite the sound legal arguments for this finding, the question of whether this finding is the correct decision in terms of ethics or morals remains. The difficulty of evaluating the ethics of the decision is the dominant reason this Comment took only the legal approach, because while the legal

150. See *supra* Parts I.A and I.B (for discussion of the varying tests that have been done).

151. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001). The Court held that there was no energy saved because at the end of eighteen holes of golf, Martin was more tired using a golf cart than an able-bodied golfer who had walked the course would be. Consequently, the Court accepted Martin's argument that he did not receive an advantage by using a cart. *Id.*

152. *Id.* at 682-83.

153. While it should not play a direct role in the decision of the courts in these types of cases, the public perception of sports allowing the use of Cheetah blades is a motivation for sports to ban their use and suggests some justification in that perspective. Much like the steroids scandal has altered the public perception of professional baseball, it is possible that track athletes, being seen as strapping springs to their feet, could negatively impact the perception of the sport. It is possible that the public perception could be that races are not being run solely with the power and ability of the athletes. This has the potential to be very negative for sports, and track particularly, where the integrity and nature of the sport is the idea that the competition is pitting the raw athletic ability of one competitor against another.

approach can be derived through research and analysis, the ethical question is much harder. Both sides of a prosthetics ban have strong and valid perspectives. Sports entities that wish to ban the use of prosthetics want to make sure that technology does not redefine the game and create something entirely new. In contrast, disabled athletes simply want to be able to compete at the highest level of competition they can. Neither position is inherently wrong. Because of the validity of each argument, it does not seem possible to arrive at a singularly correct decision about the ethics of upholding a prosthetics ban. If it desired to do so, Congress could alter the ADA to expressly permit or prohibit the use of a ban on prosthetics in American sports, but in order to do so it would have to come to a conclusion about what the "correct" ethical decision is. As a result, it seems likely that the only conclusion that can be drawn is the legal conclusion, and that is under the law as it currently exists, American sports entities will be able to ban the use of prosthetics.

CONCLUSION

The issue of banning the use of prosthetic limbs in American sports will likely be an emotional and contentious issue as people viewing the situation empathize with the disabled athletes and understand the fears sports entities have in maintaining the integrity of their sports. As a result, the only way to determine what should happen is to look at the legal evaluation of the issue. That evaluation is done by analyzing the relationship between the ADA and a potential ban of the use of prosthetic limbs in American sports, and in this context track. That analysis shows that it is likely that a ban will be upheld under an analysis using the ADA and existing case law.

The decision that a prosthetics ban will be upheld comes from the determination that being forced to allow prosthetic limbs in sports will fundamentally alter the sports. This is because the use of prosthetics is similar to the *Kuketz* case. The fundamental alteration of prosthetics is changing the nature of the actual game play of the sport as well as providing the disabled athlete with a mechanical advantage. As a result, the ADA will likely be found to allow for the prohibition of prosthetic limbs in American sports.

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