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# THE COPYRIGHTABILITY OF SPORTS CELEBRATION MOVES: DANCE FEVER OR JUST PLAIN SICK?

## INTRODUCTION

United States copyright law seeks to protect original works of authorship in order to promote learning and knowledge. Creating a body of law with such an objective, however, was not a novel idea when the Framers incorporated the Copyright Clause (hereinafter, the “Clause”) into the United States Constitution.<sup>1</sup>

The origins of United States copyright law can be traced to England.<sup>2</sup> Originally, the English government used copyright law as a means for “censorship and press control.”<sup>3</sup> It was not until the introduction of the printing press, in 1476, that the modern form of copyright law began to take shape.<sup>4</sup>

Following many informal attempts to protect authors’ works,<sup>5</sup> the first officially recognized copyright act was instituted in 1710, when Parliament enacted the Statute of Anne.<sup>6</sup> Resembling current copyright law, the Statute “granted an assignable right to authors to control the publication of their writings. . . . Instead of a tool of censorship, the Statute of Anne was expressly meant to be . . . ‘[a]n act for the encouragement of learning.’”<sup>7</sup>

The Framers of the United States Constitution followed the precedent established by Parliament when they created Article I, § 8, cl.8 of the Constitution,<sup>8</sup> the Copyright Clause.<sup>9</sup> The Clause requires that copyright serve

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1. See JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 27-28 (2002); *Copyright History*, IUP INFO, at <http://reference.allrefer.com/encyclopedia/C/copyright-history.html> (last visited Mar. 15, 2004).

2. COHEN ET AL., *supra* note 1, at 25.

3. *Id.*

4. See *id.* at 25-26; Wm. Tucker Griffith, Note: *Beyond the Perfect Score: Protecting Routine-Oriented Athletic Performance With Copyright Law*, 30 CONN. L. REV. 675, 683-84 (1998).

5. See COHEN ET AL., *supra* note 1, at 26; Griffith, *supra* note 4, at 684.

6. COHEN ET AL., *supra* note 1, at 27; Griffith, *supra* note 4, at 684.

7. COHEN ET AL., *supra* note 1, at 27. See generally Griffith, *supra* note 4, at 684.

8. COHEN ET AL., *supra* note 1, at 27-28; see *Copyright History*, *supra* note 1.

9. U.S. CONST. art. I, § 8, cl. 8.

a public purpose, namely “[t]o promote the Progress of Science and useful Arts.”<sup>10</sup>

The reach of copyright protection today, as detailed in section 102(a) of the Copyright Act (hereinafter, the “Act”), extends to authors’ “literary works . . . musical works . . . [, and] choreographic works.”<sup>11</sup> However, despite sport’s exponential growth and its significant influence on modern culture, the Act does not expressly afford protection for an author’s original and creative sports celebration moves.<sup>12</sup>

This comment asserts that sports celebration moves are copyrightable. When contrasted with more traditional choreographic works, which are regularly afforded copyright protection, sports celebration moves possess a quantum of “originality” tantamount to that of those more typical works. Moreover, sports celebration moves can be “fixed” just as easily as more conventional choreographic works. Thus, sports celebration moves satisfy the conditions required of copyrighted works just as effectively as the more traditional, and oft protected choreographed works.

Part I of this comment discusses the continual growth and cultural importance of sport throughout history. Further, Part I offers several reasons why sports celebration moves should be protected by copyright law.

In Part II, this comment explores the origins of copyright law. Though the foundation of copyright law existed well before the United States Copyright Clause, the purpose of copyright law remains the same - to protect original works of authorship that promote societal progress. Part II also discusses the furtherance of copyright’s purpose through the requirements put forth by Congress in the Copyright Act.

Part III examines the copyrightability of sports celebration moves by applying the stringent requirements set forth in the Copyright Act to these moves. In addition, this section addresses the policy considerations concerning the copyrightability of sports celebration moves.

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10. COHEN ET AL., *supra* note 1, at 28 (emphasis omitted); see *Copyright History*, *supra* note 1.

11. 17 U.S.C. § 102(a) (2002).

12. *Id.*; see *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 846 (2d Cir. 1997). Sports celebration moves are original, choreographed moves designed by an athlete for the purpose of celebrating his or her athletic feats. Sports celebration moves, though generally related to sports moves, should, nevertheless, be considered an entirely different species of sports move for purposes of copyright protection analysis. They are creative, original, and unique moves that serve only as a tangential part of any game. Whereas, ordinary sports moves are standardized, commonly performed moves that serve a functional role in an athletic competition.

## I. THE CONTINUAL GROWTH AND IMPORTANCE OF SPORT: PRESENTING A NEED FOR COPYRIGHT PROTECTION

Sport's cultural impact was felt in even the earliest civilizations. Its continual influence has led to exponential growth in media coverage and has had vast economic implications in modern society. This section will address sport's influence on society and why its continued growth is presenting a need for copyright protection of athletes' sports celebration moves.

### *A. Sport's Cultural Impact Throughout History*

Sport's cultural influence helped shape many of the world's earliest societies.<sup>13</sup> Its meaningful role in ancient societies was perhaps best exemplified in ancient Greece. From the first Olympic Games in 776 B.C., until their demise in 393 A.D.,<sup>14</sup> Grecian citizens, including many who were from cities located at the farthest reaches of the Greek world, regularly trekked to Olympia to celebrate and watch the Olympic Games.<sup>15</sup> The Games were so greatly revered that "[e]ven in times of war, an Olympic truce would usually allow participants safe travel to and from the games."<sup>16</sup>

To the Grecian people, the Olympics signified more than mere contests determining physical superiority.<sup>17</sup> These "[s]ports festivals were created as religious rituals to honor the gods."<sup>18</sup> Further, the Olympics had a momentous impact on societal growth and learning.<sup>19</sup> At these Games, "diverse segments of the populace [would gather], permitting exchanges in philosophy, art, politics, and economics."<sup>20</sup>

Though much has changed since ancient times, sport's significant cultural influence remains. Like the ancient Grecians, today's societies place sports on a pedestal. However, unlike sport in ancient civilization, sport in the U.S. is

13. See generally Griffith, *supra* note 4, at 676.

14. JOHN R. GERDY, SPORTS: THE ALL-AMERICAN ADDICTION xix (2002).

15. *Id.*

16. *Id.*; see *The Importance & Demise of the Olympic Games*, AROUND GREECE GUIDES, at <http://www.aroundgreece.com/olympics-importance-demise.html> (last visited Mar. 15, 2004).

17. See GERDY, *supra* note 14, at xix; Griffith, *supra* note 4, at 676. See generally *The Importance of the Olympic Games*, *supra* note 16.

18. GERDY, *supra* note 14, at xix; see Paul Cartledge, *Olympic Self-Sacrifice*, HISTORY TODAY, at [http://www.findarticles.com/cf\\_0/m1373/10\\_50/66157027/pl/article.jhtml?term=truce+Olympics](http://www.findarticles.com/cf_0/m1373/10_50/66157027/pl/article.jhtml?term=truce+Olympics) (last visited Mar. 15, 2004).

19. GERDY, *supra* note 14, at xix; see *The Importance of the Olympic Games*, *supra* note 16.

20. GERDY, *supra* note 14, at xix.

no longer respected because of an affiliated religious significance.<sup>21</sup> Rather, the games and athletes of today are revered because fans are continually awed by the grace and skill with which the most progressive, exciting athletic moves are performed by athletes who demonstrate an ever-greater ability to jump higher, run faster, and throw farther.<sup>22</sup>

Further, the explosion of media coverage of athletic events has impacted modern culture ubiquitously. Due to the around-the-clock coverage by twenty-four hour sports television networks like ESPN, fans have unprecedented access to games involving a cornucopia of teams competing in numerous professional and amateur sport leagues, continuously updated sports news, and talk shows offering discussion about the most exciting players and the “big games.”<sup>23</sup> The programming offered by these “all-sport” channels, as well as new media like the Internet,<sup>24</sup> allows fans to witness daily, if not hourly, all of the superior plays performed by the most accomplished athletes, from the convenience of their homes.

### B. *The Economic Impact*

“Sport is not just a game it is big business.”<sup>25</sup>

The sports industry is a multibillion-dollar industry.<sup>26</sup> Whether it be through purchasing shoes similar to those of a basketball star<sup>27</sup> or through buying tickets to the “game of the week,”<sup>28</sup> fans spend large sums of money in an attempt to witness, as well as to identify themselves with the seemingly magical moves of their favorite athletes.<sup>29</sup>

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21. See generally Griffith, *supra* note 4, at 676; Loren J. Weber, *Something in the Way She Moves: The Case for Applying Copyright Protection to Sports Moves*, 23 COLUM.-VLA J.L. & ARTS 317, 318 (2000).

22. See Griffith, *supra* note 4, at 677.

23. See Weber, *supra* note 21, at 325; see also GERDY, *supra* note 14, at 21.

24. See *Massive Revenue Growth Forecasted for Internet Sports Sites*, SCREEN DIGEST, at [http://www.screendigest.com/press\\_sportonthei.htm](http://www.screendigest.com/press_sportonthei.htm) (last visited Mar. 29, 2003).

25. *Id.* (quoting Rachael Church, the author of the *Report, Sport on the Internet*); see William S. Kern, *Introduction*, in THE ECONOMICS OF SPORTS 1 (William S. Kern ed., 2000).

26. See *Massive Revenue Growth Forecasted for Internet Sports Sites*, *supra* note 24; *Sports Industries to USA*, AUSTRALIAN TRADE COMMISSION, at [http://www.austrade.gov.au/ci\\_display/0,1257,ContentGroup%253Dcountryindust%2526ContentType%253Dcountryindust%2526ContentSection%253Dmajorproduct%](http://www.austrade.gov.au/ci_display/0,1257,ContentGroup%253Dcountryindust%2526ContentType%253Dcountryindust%2526ContentSection%253Dmajorproduct%253D) (last visited Mar. 29, 2003).

27. GERDY, *supra* note 14, at 33.

28. See Kern, *supra* note 25.

29. See GERDY, *supra* note 14, at 33; Kern, *supra* note 25. See generally *Sports Industries to USA*, *supra* note 26.

The demand for these products results in immense profits from lucrative endorsement contracts for the most celebrated athletes like Tiger Woods and, recently retired, Michael Jordan.<sup>30</sup> Michael Jordan, who served as the measuring stick for all other endorsed athletes, earned an estimated \$40 million a year from endorsement contracts.<sup>31</sup> Tiger Woods, who finished first among all athletes based on their 2002 earnings and marketability,<sup>32</sup> will earn \$100 million over five years from his endorsement contract with Nike, alone.<sup>33</sup> In addition, marketers are now aiming their attention at non-traditional athletes such as charismatic X-gamers<sup>34</sup> and female competitors.<sup>35</sup> For example, “snowboarder Terje Haakonsen reportedly earn[s more than] \$600,000.00 per year for endors[ing] . . . snowboards, footwear, and eyewear. . . .”<sup>36</sup> Additionally, tennis star Venus Williams signed a \$40 million endorsement contract with Reebok.<sup>37</sup>

As examples like these become more common, a trend grows increasingly more evident; the market power of the sports industry in combination with rapidly expanding media coverage of athletic events, has created a target audience in the broad public for the purposes of marketing products<sup>38</sup> associated with an athlete’s on-the-field success and charisma. In turn, the members of this audience have become mass consumers of these products, resulting in a unique opportunity for athletes to attain both fame and financial security during their short-lived playing careers.<sup>39</sup>

### C. Athletes’ Need for Protection

Because an athlete’s career longevity is often cut short due to injury or a

30. Weber, *supra* note 21, at 326.

31. Ralph Frammolino, *Serena Completes Glam Slam*, L.A. TIMES, Jan. 29, 2003, at A1; see Weber, *supra* note 21, at 326.

32. Bob Young, *He’s Money in the Bank; Stoudemire Future Big Off Court*, THE ARIZ. REPUBLIC, Jan. 14, 2003, at 1C (citing Forbes top ten athletes based on their earnings and marketability).

33. Frammolino, *supra* note 31.

34. See e.g., Weber, *supra* note 21, at 326-27; Frammolino, *supra* note 31.

35. See Frammolino, *supra* note 31.

36. Weber, *supra* note 21, at 326.

37. Frammolino, *supra* note 31.

38. Griffith, *supra* note 4, at 720.

39. See generally Weber, *supra* note 21, at 326; Melissa Gillespie, *After the Lights Go Out – Looking Beyond the Game*, Sports Media Group, (Aug. 10, 2003), at <http://www.buzzle.com/editorials/8-10-2003-44070.asp?viewPage=3>; Int’l Ass’n of Drilling Contractors Health, Safety & Env’t Committee, *Minutes of Meeting*, (Oct. 7, 1999) at <http://www.iadc.org/committees/hse/minutes/1999/MIN100799.htm> (last visited March 15, 2004).

decline in talent,<sup>40</sup> it is crucial that each athlete maximize his<sup>41</sup> earning potential while he is still playing; thus, enabling himself to remain financially secure even after he has retired.<sup>42</sup> Since there is much at stake, it is in the athlete's best interest to capitalize on consumers' wide demand for goods associated with the most entertaining and talented athletes by marketing himself and his abilities while on the field. Thus, many athletes have sought to take advantage of this special opportunity by performing celebratory moves or dances following their execution of a superior play.<sup>43</sup>

As worldwide access to sporting events continues to expand, thereby creating an ever-growing market for goods associated with the most entertaining and athletic players,<sup>44</sup> protection of athletes' creative, sports celebration moves becomes increasingly necessary.<sup>45</sup>

Protection of athletes' sports celebration moves is necessary because a sports celebration move can be a key component of an athlete's market power and of his earnings derived from that market power.<sup>46</sup> This is perhaps most

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40. Mich. Intercollegiate Athletic Ass'n, *Special Concerns Unique to Performers*, at <http://www.miaawellness.net/unique.html> (last visited Mar. 15, 2004).

41. The use of "his" in this comment is employed merely because it is the author's writing style. The reference to the male form of the pronoun is not to imply that only male athletes' sports celebration moves are eligible for copyright protection.

42. Frank R. Veltri, Ed.D. & Steve A. Long, *A New Image: Female Athlete-Endorser*, *Cyber-Journal of Sport Marketing*, at <http://www.nswis.nsw.gov.au/fulltext/1998/cjsm/v2n4/veltrilong24.htm> (last visited Nov. 2, 2003). ("[A]thletes have a short career compared to other professions. Consequently [they] will use every possible means to increase their earnings during and after their careers, including negotiation of endorsement contracts to supplement earnings."); Gillespie, *supra* note 39.

43. See generally Seth Stevenson, *Signs and Wonders: A Brief History of Celebratory Sports Gestures*, MICROSOFT NETWORK, (Nov. 27, 1997), at <http://slate.msn.com/?id=3461>. See also Sean Jensen, *Let's Dance: End Zone Celebrations Go Way Back*, MILWAUKEE J. SENTINEL ONLINE, (Dec. 9, 1998), at <http://www.jsonline.com/packer/sbxxxiii/news/dance120998.asp>.

44. Weber, *supra* note 21, at 325-26; see also *Massive Revenue Growth Forecasted for Internet Sports Sites*, *supra* note 24.

45. Weber, *supra* note 21, at 325-26.

46. See Allyn Turner, *Then & Now: Ickey Woods*, CBS SPORTSLINE, at <http://www.cbs.sportslines.com/u/thennow/woods.htm> (last visited Mar. 29, 2003). (Turner writes, "[t]he Ickey Shuffle took on a life of its own with fans everywhere imitating his end zone dance. There were Ickey shirts, songs, commercials and a milk shake."). Veltri & Long, *supra* note 42. (Quoting Schaaf "The marketability of an athlete depends on tangible factors, such as level of skill and success in the sport. Marketability also depends on many intangible factors . . . [s]uch [as] image, charisma, physical appearance, and personality. . . ."); Calvey, a Business Times Staff writer, notes that athletes have several sources of income, including income from endorsements and advertisements. Calvey states, "The big bucks [are] earned during [an athlete's] short career on the field plus related income from endorsements, advertising and other deals." Mark Calvey, *Sports stars need help playing the numbers game*, at <http://sanfrancisco.bizjournals.com/sanfrancisco/stories/1998/09/07/focus2.html> (last visited October 31, 2003).

true for athletes who, unlike Michael Jordan or Tiger Woods, are not consistently the best performers in their respective leagues. Athletes who are not consistently the best performers on the playing field must rely more on the attention they gain from their charisma, personality, and physical appearance than on the attention they gain from their superior talent.<sup>47</sup>

Because sports celebration moves serve as a reflection of an athlete's personality and charisma, these moves become even more valuable to lesser-talented athletes who can use their move as an attention-grabbing medium through which they can exhibit their charisma and personality while on the playing field. Thus, because each move serves as an identifier of a particular player's charisma, personality, and excitement for the game, and can thereby add significantly to an athlete's market power, it is crucial that each athlete has a way to prohibit other competitors from exploiting, claiming rights to, or diluting the novelty of his sports celebration move.

Copyright law, almost certainly, offers the most effective protection for an

47. While an athlete's success on the playing field may be a leading factor of the athlete's marketability, other, more intangible factors such as personality, charisma, and appearance are just as important. Veltri & Long, *supra* note 42. Weber, *supra* note 21, at 327. (Quoting Weber "[I]t stands to reason that in . . . sports . . . endorsement contracts are available not only to athletes who consistently win competitions, but also to those who develop a unique and instantly-recognizable style that fires audiences' imaginations"). Therefore, while an athlete may be highly marketable primarily because of her superior talent, another athlete may be just as marketable chiefly because of her charisma and personality. This theory is exemplified by athletes like Anna Kournikova, who ranked No. 71 on the WTA tour but still placed second in the list of the most marketable female athletes. *News Munchies: Mia Hamm Beats the Daylights Out of Mike Tyson*, (Jan. 28, 2002), <http://www.cornerbarpr.com/articles/munchies.cfm?article=19>. Kournikova is more sought after for endorsement contracts than either Venus or Serena Williams who are both top players on the WTA tour. *Id.* While Kournikova may not have superior skills relative to the other players on the WTA tour, her personality and appearance are able to compensate for her lack of on-the-court success and allow her to nevertheless be highly marketable. This was also the case for Ickey Woods. Though Ickey Woods had a brief professional career in the National Football League, his charisma, revealed by the Ickey Shuffle, made him highly marketable even into his retirement. *See e.g.*, Turner, *supra* note 46; Geoff Hobson, *Ickey In Step With 'Dirty Bird': Falcons Dance Like the Shuffle*, (Jan. 20, 1999), *The Cincinnati Enquirer* at [http://bengals.enquirer.com/1999/01/20/ben\\_ickey\\_in\\_step\\_with.html](http://bengals.enquirer.com/1999/01/20/ben_ickey_in_step_with.html). Ten years after Ickey created the shuffle, he was still asked to perform the move publicly at events like the groundbreaking of Paul Brown Stadium. *Id.* Likewise, simply because an athlete has superior skills, it does not indicate that he will be the most highly sought after player. This is why a player with an "edge," like Allen Iverson will "sell[] in a way that Tim Duncan [one of the league's most talented but bland players] could never dream." Tim Keown, *Iverson Is Money In the Bank*, *ESPN The Magazine*, available at [http://www.espn.go.com/magazine/keown\\_20010601.html](http://www.espn.go.com/magazine/keown_20010601.html) (last visited Nov. 2, 2003).

Veltri & Long, *supra* note 42. (Quoting Fink "[M]any endorsement contracts were awarded to athletes based on the athlete's popularity, talent, and charisma. Celebrities with high profiles were believed to be more persuasive and influential on consumer behavior. . . . '[C]orporations are looking for that one player who goes above and beyond, and the team's success is at least partly responsible because of them. . . .") (Quoting Gotthelf "[C]ompanies often measure value in terms of 'highlight time,' the frequency with which a player appears on ESPN's 'SportsCenter' program.").



athlete's celebratory move. While the idea of protecting an athlete's sports celebration move with copyright may seem overripe, competitors from past decades had little need for it.<sup>48</sup> They had "few profitable avenues to exploit [a] copyright [protected move]. . . . [Further, e]xhibitions of athletic events were far more limited than today and - - athletes' performances were . . . available for the most part only to attending fans and on [a few] television broadcasts."<sup>49</sup>

Today, however, the increased commercialization of sports<sup>50</sup> as well as the growing focus on the "individual athlete's" performance and persona<sup>51</sup> has made copyright protection for athletes' individual efforts, which contribute to the excitement and originality of each performance, imperative.<sup>52</sup>

## II. THE COPYRIGHT LAW POWERS

Part II of this comment will explore the copyright powers given to Congress and copyright's purpose. In addition, this section will detail the analysis used to determine the copyrightability of a work.

### *A. The Constitution's Copyright Clause*

Article I, § 8, cl. 8 of the United States Constitution, also known as the "Copyright Clause," expressly grants the copyright powers to Congress.<sup>53</sup> The

48. Weber, *supra* note 21, at 320-21.

49. *Id.* at 320.

50. Trevor Slack, *Studying the Commercialization of Sport: The Need for Critical Analysis*, Sociology of Sport Online, at <http://physed.otago.ac.nz/sosol/v1i1/v1i1a6.htm> (last visited Oct. 31, 2003). ("[I]n no previous time period have we seen the type of growth in the commercialization of sport, that we have seen in the last two decades. Today, sport is big business and big businesses are heavily involved in sport. Athletes in the major spectator sports are marketable commodities, sports teams are traded on the stock market, sponsorship rights at major events can cost millions of dollars. . .").

51. "Companies are more interested in equating their images with individuals than they are with team winners." DALE HOFFMAN & MARTIN J. GREENBERG, *SPORTSBIZ* 89 (Leisure Press, 1989) (quoting Robert Dowling, the editor of Sports Marketing News.); *The Marketing Edge*, EDGE SPORTS INTERNATIONAL, INC., at <http://www.edgesportsintl.com/cedge.htm> (last visited Nov. 2, 2003). ("In the age of multi-million dollar contracts, billion dollar television network deals and trend-setting advertising campaigns the athlete has become the center of it all. It is the athlete who can make an inner city youth spend his money on \$150.00 shoes or motivate an impressionable 12-year-old to stay in school. . . . The most marketable athletes are those who understand the importance of maintaining a positive public image in order to capitalize on their athletic achievements."). See generally Darren Rovell, 'King' James Proves A Ratings Bonanza for ESPN2, (*Dec. 13, 2002*), at <http://www.espn.go.com/sportsbusiness/s/2002/1213/1476503.html>.

52. Weber, *supra* note 21, at 326.

53. See U.S. CONST. art. I, § 8, cl. 8; 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 1.02 (2002).

Clause states:

The Congress shall have Power . . . [t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.<sup>54</sup>

While extracting the Framers' intent from the Clause may seem difficult, the courts have nevertheless succeeded in construing a reasonable interpretation of copyright's purpose from the Clause.

### i. Copyright's Purpose

The true purpose of copyright, as the Framers intended it, is not clear from the language in the Clause.<sup>55</sup> Further, there is relatively little legislative history available to expound upon the Framers' intent.<sup>56</sup> At best, "[i]ts effect . . . is to suggest certain minimal elements to be contained in copyright legislation."<sup>57</sup>

The courts have contributed little to resolve this ambiguity.<sup>58</sup> Because they have "rarely felt called upon to construe the Copyright Clause [,] . . . there is no vast body of case law imparting a judicial gloss . . . comparable to that found in connection with other provisions of the Constitution."<sup>59</sup> There are, however, enough decisions, which allow legislators, as well as the courts, to construe a reasonable and consistent interpretation of copyright's purpose.<sup>60</sup>

The majority of these decisions hold that the essence of copyright law is to encourage authors' individual efforts that advance the public welfare, with the incentive to profit.<sup>61</sup> Though Justice Stevens, in *Eldred v. Ashcroft*, characterized the idea of rewarding authors for their works as "a secondary consideration" of copyright law,<sup>62</sup> the majority would challenge Justice Stevens's position.<sup>63</sup> Later in that opinion, the Court notes:

"[T]he economic philosophy behind the [Copyright] [C]lause . . . is

54. U.S. CONST. art. I, § 8, cl. 8.

55. NIMMER, *supra* note 53, at § 1.02.

56. *Id.*

57. *Id.* at § 1.03.

58. *Id.* at § 1.02.

59. *Id.*

60. See generally *Eldred v. Ashcroft*, 537 U.S. 186, 212-13 (2003); *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991).

61. See *Eldred*, 537 U.S. at 212-13; *Mazer*, 347 U.S. at 219.

62. *Eldred*, 537 U.S. at 227 (quoting *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158, n. 4 (1948)).

63. See generally *id.* at 212, n.18.

the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors.”<sup>64</sup> . . . Accordingly, “copyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge. . . . The profit motive is the engine that ensures the progress of science.”<sup>65</sup>

*Eldred* makes it clear that the purpose of copyright is to use a profit motive to encourage authors to create works that will advance the public welfare.<sup>66</sup>

## ii. The Application of Copyright’s Purpose

Though case law has helped to more clearly define the purpose of copyright, the Copyright Clause does not require that each “writing” protected by copyright actually promote this purpose.<sup>67</sup>

Rather, the current majority view, set forth in *Mitchell Bros. Film Group v. Cinema Adult Theater*, found that the Clause merely requires that Congress shall promote copyright’s purpose through its creation of copyright legislation.<sup>68</sup> Therefore, while “Congress could require that each copyrighted work be shown to protect the useful arts (as it has with patents), . . . [it could just as] reasonably conclude that the best way to promote creativity is not to impose any governmental restrictions on the subject matter of copyrightable works.”<sup>69</sup>

### B. The Copyright Act of 1976

The Copyright Clause powers, expressly vested in Congress, allow Congress to enact copyright legislation.<sup>70</sup> The Copyright Act of 1976, housing Congress’s copyright legislation, is the most current edition of the Act.<sup>71</sup> “[I]t provides the basic structure for U.S. copyright law today.”<sup>72</sup>

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64. *Id.* (quoting *Mazer*, 347 U.S. at 219).

65. *Id.* (quoting *Am. Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 27 (S.D.N.Y. 1992), *aff’d*, 60 F.3d 913 (2d Cir. 1994)).

66. *Id.*

67. NIMMER, *supra* note 53, at § 1.03[B].

68. *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 860 (5th Cir. 1979) *cert. denied*, 445 U.S. 917 (1980); *see also* NIMMER, *supra* note 53, at § 1.03[B].

69. *Mitchell Bros.*, 604 F.2d at 860.

70. *See* NIMMER, *supra* note 53, at § 1.02.

71. *See* Weber, *supra* note 21, at 320. *See generally* Griffith, *supra* note 4, at 685.

Generally, the 1976 Act, in contrast to the preceding Act of 1909, broadens the scope of copyright protection; “broaden[s] the rights granted to copyright owners, and lengthen[s] the term of protection for all copyrighted works.”<sup>73</sup>

Additionally, the 1976 Act discards the 1909 Act’s requirement of publication in order for authors to receive federal copyright protection.<sup>74</sup> Now, the Act immediately “grants a limited statutory monopoly in original works of authorship [the moment they are] fixed in a tangible medium of expression.”<sup>75</sup>

Moreover, the current version of the Act offers copyright owners five exclusive rights, including “the traditional rights of reproduction and distribution [as well as the] broadened rights of public performance[, public] display[,] and a newly defined right to create derivative works based on the copyrighted work.”<sup>76</sup>

#### i. Copyrightable Subject Matter

Section 102 of the Act states:

(a) Copyright protection subsists, in accordance with this title, in [(1)] original works of authorship [(2)] fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device.<sup>77</sup>

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.<sup>78</sup>

Section 102(a) sets forth two requirements that a work must satisfy before becoming eligible for copyright protection.<sup>79</sup> First, the work must be an “original work of authorship.”<sup>80</sup> Second, the “original work of authorship”

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72. COHEN ET AL., *supra* note 1, at 34.

73. *Id.* at 35.

74. *Id.*

75. *Id.*; 17 U.S.C. § 102(a).

76. § 106; COHEN ET AL., *supra* note 1, at 35.

77. § 102(a).

78. § 102(b).

79. § 102(a).

80. *Id.*

must be fixed in a “tangible medium of expression.”<sup>81</sup> Further, § 102(b) makes it clear that not every work, even if it satisfies the two requirements set forth in § 102(a), will be eligible for copyright protection.<sup>82</sup> Instead, the Act’s final requirement, detailed in § 102(b), directs that in addition to § 102(a) requirements, the work must fall within the subject matter of copyright.<sup>83</sup>

(a) Originality

“The sine qua non of copyright is originality”<sup>84</sup>

In *Feist Publications v. Rural Telephone Service Co.*, the Supreme Court set forth the required elements of an “original” work.<sup>85</sup> The Court stated, “[o]riginal, as the term is used in copyright, means only that: (1) the work [is] independently created by the author[;]. . . and [(2)] that it possesses at least some minimal degree of creativity.”<sup>86</sup>

i. Independent Creation

An “original” work must be independently created, not merely copied from another’s work.<sup>87</sup> However, an “original” work is not required to be novel.<sup>88</sup> Even if a work is identical to another’s work, provided that it is a product of its author’s independent efforts, it will nevertheless satisfy this prerequisite.<sup>89</sup> In the words of Judge Learned Hand, “[i]f by some magic a man who had never known [Keats’ Ode on a Grecian Urn] were to compose anew Keats’ Ode on a Grecian Urn, he would [nevertheless] be an “author. . . .”<sup>90</sup>

ii. Creativity

Assuming that the work satisfies the first prong of the “originality”

81. *Id.*

82. § 102(b).

83. *Id.*

84. *Feist*, 499 U.S. at 345 (emphasis added).

85. *Id.*

86. *Id.* (citing 1 M. NIMMER & D. NIMMER, Copyright §§ 2.01[A], [B] (1990)).

87. “Originality in this context ‘means little more than a prohibition of actual copying.’” *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951) (quoting *Hoague-Sprague Corp. v. Frank C. Meyer, Inc.*, 31 F.2d 583, 586 (D.C.N.Y. 1929)).

88. *See Lee v. Runge*, 404 U.S. 887, 891-92 (1971); *see also COHEN ET AL.*, *supra* note 1, at 76.

89. NIMMER, *supra* note 53, at § 2.01[A].

90. *Id.*

requirement, it must still exhibit “some minimal degree of creativity.”<sup>91</sup> In *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, the Second Circuit states that,

All that is needed to satisfy both the Constitution and the statute is that the “author” contribute[s] something more than a “merely trivial” variation, something recognizably “his own.” Originality in this context “means little more than a prohibition of actual copying.” No matter how poor artistically the ‘author’s’ addition, it is enough if it be his own.<sup>92</sup>

With this statement, the court in *Alfred Bell* makes it clear that “the modern definition of ‘originality’ requires more than mere independent creation, but not much more.”<sup>93</sup>

If it is determined that the work is sufficiently “original,” the work must then satisfy the requirement of fixation.

### (b) Fixation

According to section 101 of the Copyright Act:

A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.<sup>94</sup>

Because the Copyright Act of 1976 offers protection to both published and unpublished works—unlike the 1909 Act, which required works to be published before receiving copyright protection—the moment the work meets the “fixation” standard the work itself is considered to exist for purposes of federal copyright law.<sup>95</sup> For example, for purposes of federal copyright protection, a musical composition exists from the instant that the author causes the musical notation to be written on paper.<sup>96</sup> Congress revised the 1909 Act’s definition of “fixed” in anticipation of new technological developments:<sup>97</sup>

[The] broad language is intended to avoid the artificial and largely unjustifiable distinctions, derived from such cases as *White-Smith* . . .

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91. *Feist*, 499 U.S. at 345; see also *Weber*, *supra* note 21, at 348.

92. *Alfred Bell*, 191 F.2d at 102-03 (citing *Bleistein*, 188 U.S. at 250).

93. COHEN ET AL., *supra* note 1, at 76. See generally *Alfred Bell*, 191 F.2d at 102-03.

94. § 101.

95. COHEN ET AL., *supra* note 1, at 66.

96. *Id.*

97. *Id.*

under which statutory copyrightability . . . has been made to depend upon the form or medium in which the work is fixed. Under the bill it makes no difference what the form, manner, or medium of fixation may be—whether it is in words, numbers, . . . pictures, . . . whether embodied in a physical object in written, printed, . . . magnetic, or any other stable form, and whether it is capable of perception directly or by means of any machine or device “now known or later developed.”<sup>98</sup>

Furthermore, in accord with the Copyright Act, a work is not “fixed” if its embodiment in tangible form is not “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”<sup>99</sup> Though the required quantum of permanency or stability seems unclear from this statement, case law suggests that it is a reasonably low standard to meet.<sup>100</sup>

In *Williams Electronics, Inc. v. Artic International, Inc.*, the Third Circuit found that a video game’s display stored in Random Only Memory (ROM) constituted a “fixed” work for the purposes of copyright.<sup>101</sup> The court stated, “[t]he (video game’s) display satisfies the statutory definition of an original ‘audiovisual work,’ and the memory devices [ROM] of the game satisfy the statutory requirement of a ‘copy’ in which the work is fixed.”<sup>102</sup>

This finding was taken one step farther in *MAI Systems Corp. v. Peak Computer, Inc.*<sup>103</sup> In that case, the Ninth Circuit found that Random Access Memory (RAM) - in RAM, the stored information is lost when the computer is turned off, unlike the permanently stored information in ROM,<sup>104</sup> - qualifies as a sufficient medium for the purposes of fixation.<sup>105</sup> The court in that case commented, “the copy made in RAM is ‘fixed’” because it can be “perceived, reproduced, or otherwise communicated.”<sup>106</sup>

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98. *Id.*; H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 52 (1976), available at <http://www.title17.com/contentLegMat/houseReport/chpt01/sec102.html> (last visited Mar. 29, 2003).

99. *Id.*

100. See generally *Williams Elecs., Inc. v. Artic Int’l, Inc.*, 685 F.2d 870 (3d Cir. 1982); *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), cert. dismissed, 510 U.S. 1033 (1994).

101. *Williams Elecs.*, 685 F.2d at 876-77.

102. *Id.* at 874.

103. See generally *MAI Systems*, 991 F.2d 511.

104. *Id.* at 519.

105. *Id.*

106. *Id.* (quoting § 101).

(c) *Works of Authorship*

If the work is both sufficiently “original” and “fixed,” for purposes of copyright protection, the work must then survive the third and last hurdle; namely, it must fall within the subject matter of copyright.<sup>107</sup>

The Copyright Act delineates the types of works, in eight broad categories, which are eligible for copyright protection in section 102(a).<sup>108</sup>

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.<sup>109</sup>

While these categories detail the types of works that expressly fall within the scope of copyrightable subject matter, “these categories are [meant to be] illustrative[,] not limitative, and . . . do not necessarily exhaust the scope of ‘original works of authorship’ that the bill is intended to protect.”<sup>110</sup>

Congress intended to leave the phrase “works of authorship” undefined.<sup>111</sup> Congress did not further define the phrase because it intended a “flexible definition . . . that would neither ‘freeze the scope of copyrightable subject matter at the present stage of communications technology nor . . . allow unlimited expansion into areas completely outside the present congressional intent.’”<sup>112</sup>

Though section 102 (a) does not include every type of work that is considered copyrightable subject matter,<sup>113</sup> section 102 (b) *does* include those works that are “categorically excluded from receiving copyright

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107. See § 102.

108. *Id.*

109. *Id.*

110. NIMMER, *supra* note 53, at § 2.03[A]; see e.g., Weber, *supra* note 21, at 350; Griffith, *supra* note 4, at 714.

111. NIMMER, *supra* note 53, at § 2.03[A]; Weber, *supra* note 21, at 350.

112. Weber, *supra* note 21, at 350.

113. See § 102(a); NIMMER, *supra* note 53, at § 2.03[A].



protection.”<sup>114</sup> Works that fall under section 102 (b) are precluded from copyright protection because they are regarded as ideas under the idea/expression dichotomy.

### i. The Idea/Expression Dichotomy

The idea/expression dichotomy is perhaps, “the most fundamental axiom of copyright law.”<sup>115</sup> The language giving rise to this copyright conundrum is found in section 102 (b) where it states, “[i]n no case does copyright protection for an original work of authorship extend to any idea, . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work.”<sup>116</sup>

The purpose behind “copyright’s idea/expression dichotomy [is to strike] ‘a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts [and ideas] while still protecting an author’s expression.’”<sup>117</sup> Ideas and facts are the “basic building blocks of copyrightable expression.”<sup>118</sup> Copyright encourages authors to combine these basic forms, like words or musical notes, in a sufficiently creative way to construct an “original work of authorship.” Therefore, to grant a monopoly in the building blocks of copyrightable expression would be to stifle future creativity and, hence, be counterproductive.<sup>119</sup>

While one cannot receive copyright protection of an idea or a fact, an original and creative expression of that idea or fact is certainly eligible for copyright protection.<sup>120</sup> However, attempting to separate the idea from an expression of that idea is much more difficult than it seems. “The distinction between nonprotectible ‘ideas’ and their protectible ‘expression’ is one of the most pervasive, as well as one of the most elusive, threads in copyright law.”<sup>121</sup>

*Baker v. Selden* reveals the complexity of this dichotomy.<sup>122</sup> In that case,

114. § 102(b) (emphasis added). See generally COHEN ET AL., *supra* note 1, at 90.

115. *Feist*, 499 U.S. at 344-45.

116. § 102(b).

117. *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 556 (1985) (quoting *Consumers Union of the United States, Inc. v. General Signal Corp.*, 723 F.2d 195, 203 (1983)).

118. COHEN ET AL., *supra* note 1, at 90.

119. See *id.*

120. *Id.* See generally *Baker v. Selden*, 101 U.S. 99 (1879); *Feist*, 499 U.S. 340.

121. Griffith, *supra* note 4, at 694 (quoting WILLIAM F. PATRY, *LATMAN’S THE COPYRIGHT LAW* 30 (6<sup>th</sup> ed. 1986)).

122. See generally *Baker*, 101 U.S. 99.

Selden authored a book explaining a unique system of bookkeeping.<sup>123</sup> Baker authored subsequent books, which discussed an almost identical system.<sup>124</sup> However, Baker expressed the system in a new, creative, and original way.<sup>125</sup> The Court found that Baker did not infringe on Selden's copyright<sup>126</sup> because,

[Baker] use[d] a similar plan so far as the results are concerned; but [he] ma[de] a different arrangement of the columns, and use[d] different headings. . . . Where the truths of a science or the methods of an art are the common property of the whole world, any author has the right to express the one, or explain and use the other, in his own way.<sup>127</sup>

Although Baker used Selden's ideas, he expressed those ideas in a new and creative way. Here, Baker used Selden's ideas as building blocks to create a new, copyrightable expression. This case serves as a prime example of how the idea/expression dichotomy furthers copyright's goal, "to promote the progress of science and useful arts."<sup>128</sup>

## ii. Useful Articles: Functional v. Non-Functional

Separating protectible form from unprotectible function presents a similar and an equally perplexing task for the courts.<sup>129</sup> The solely "utilitarian aspects of 'useful articles'<sup>130</sup> are not subject to copyright protection."<sup>131</sup> Additionally, "if an article has *any* intrinsic utilitarian function, it can be denied copyright protection except to the extent that its artistic features can be identified separately and are capable of existing independently as a work of art."<sup>132</sup>

The Supreme Court addressed the issue of separating protectible form from unprotectible function in *Mazer v. Stein*.<sup>133</sup> In that case, the Court found that, "[a] subsequent utilization of a work of art in an article of manufacture in

123. *Id.* at 99-100.

124. *Id.* at 100.

125. *Id.*

126. *Baker*, 101 U.S. at 107.

127. *Id.* at 100-01.

128. NIMMER, *supra* note 53, at § 1.03 [B] (quoting *Chambalin v. Uris Sales Corp.*, 150 F.2d 512 (2<sup>nd</sup> Cir. 1945)).

129. COHEN ET AL., *supra* note 1, at 219.

130. "A 'useful article' is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." § 101.

131. Griffith, *supra* note 4, at 696; *see Fabrica Inc. v. El Dorado Corp.*, 697 F.2d 890, 893-94 (9<sup>th</sup> Cir. 1983)

132. *Fabrica*, 697 F.2d at 893 (emphasis added); *see* § 101.

133. 347 U.S. 201 (1954).

no way affects the right of the copyright owner to be protected against infringement of the work of art itself."<sup>134</sup>

However, even after *Mazer*, the line between form and function is still quite blurry. This complicates the courts' task of determining, on a case-by-case basis, whether the creative, artistic features of a work can be separated from, and exist independently of a work's utilitarian features.<sup>135</sup>

In an effort to simplify the issue, Congress released a House Report in 1976. In the report, Congress "added language to the definition of 'pictorial, graphic, and sculptural works' [to clarify] the distinction between works of applied art[, which are] protectible under the bill[,] and industrial designs [, which are] not subject to copyright protection."<sup>136</sup> The House Report attempts to further define this vague line, stating:

The test of separability and independence from "the utilitarian aspects of the article" does not depend upon the nature of the design – that is, even if the appearance of an article is determined by esthetic (as opposed to functional) considerations, only elements, if any, which can be identified separately from the useful article as such are copyrightable.<sup>137</sup>

Despite this additional language, courts continue to experience difficulty in resolving this issue.

After carefully reviewing the copyright analysis detailed in this section, the question still remains: how does this analysis apply to sports celebration moves, if at all? The next section of this paper, Part III, seeks to answer this question.

### III. THE COPYRIGHTABILITY OF SPORTS CELEBRATION MOVES

Part III of this paper will apply the copyright analysis detailed in Part II, to sports celebration moves to determine whether these moves are copyrightable.

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134. *Id.* at 204.

135. See generally *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980) (discussing the separability of form from function of a belt buckle); *Carol Barnhart Inc. v. Econ. Cover Corp.*, 773 F.2d 411 (2d Cir. 1985) (contemplating the functionality of a four poly-styrene human torso forms); *Brandir Int'l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987) (contrasting the utilitarian and artistic features of a bike rack); *Fabrica*, 697 F.2d 890. See also COHEN ET AL., *supra* note 1, at 219.

136. COHEN ET AL., *supra* note 1, at 219. See generally H.R. REP. NO. 94-1476, *supra* note 97, at 54-55.

137. H.R. REP. NO. 94-1476, *supra* note 97; see also COHEN ET AL., *supra* note 1, at 220.

### A. Introduction

As discussed in Part I of this comment, many factors including the rapid expansion in media coverage of athletic events, the growing focus by fans and the media on an “individual athlete’s” on-the-field success and charisma, and the fans’ willingness to spend large amounts of money on products associated with their favorite teams and athletes, have resulted in a unique opportunity for athletes to attain both fame and financial security during their generally short-lived playing careers.<sup>138</sup>

Athletes have the opportunity to capitalize on this phenomenon by drawing the attention of both the media and the fans to themselves, through performing sport celebration moves after they complete a successful play. While performing these moves, athletes are able to market themselves and build their brand on the playing field.

Perhaps the best known examples of these sports celebration moves include the “Ickey Shuffle,”<sup>139</sup> the “Dirty Bird,”<sup>140</sup> and the dances of Billy “White Shoes” Johnson.<sup>141</sup> However, not all sports celebration moves are performed by athletes who participate in one of the “Big Four” sports.<sup>142</sup> Athletes like professional bowler, Pete Weber, have also benefited from the attention drawn to themselves and their superior athletic abilities through sports celebration moves.<sup>143</sup> Pete Weber has brought unprecedented attention to both his skills and the Pro Bowling Association events with his wild, sports celebration moves.<sup>144</sup>

It is this same explosion of media attention and economic opportunity driving these athletes’ creative celebrations that is also necessitating the protection of their sports celebration moves. Because an athlete’s sports

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138. See Mich. Intercollegiate Athletic Ass’n, *supra* note 40; Int’l Ass’n of Drilling Contractors Health, Safety & Env’t Committee, *supra* note 39.

139. See Sean Jensen, *Where To Draw the Line In the NFL*, SOUTHCOAST TODAY, Dec. 10, 2001, at C12, available at <http://www.s-t.com/daily/12-01/12-10-01/c12sp113.htm> (last visited Mar. 29, 2003); see also Turner, *supra* note 46.

140. See Jensen, *supra* note 139; Curt Sylvester, *Dirty Bird Flying High In Atlanta*, DETROIT FREE PRESS, Dec. 18, 1998, at <http://www.freep.com/sports/football/qnflcol18.htm> (last visited Mar. 29, 2003).

141. See Jensen, *supra* note 139; see also Jensen, *supra* note 43.

142. The “Big Four” sports refers to baseball, basketball, football, and hockey. These are generally accepted as the four most popular sports in American culture. See generally Weber, *supra* note 21, at 320.

143. Tom Clark, *Brash, Raunchy Weber Is Just What Bowling Needs*, USA TODAY, Feb. 12, 2002, available at <http://www.usatoday.com/sports/bowling/clark/2002-02-12-clark.htm> (last visited Mar. 29, 2003).

144. *Id.*

celebration move can become such a valuable component of his marketing package, athletes need a means through which they can protect their sports celebration moves to prevent others from exploiting, claiming rights to, or diluting the novelty of their particular moves. Copyright would be the most appropriate and effective means of protecting these works. However, because this is essentially a matter of first impression, the question remains whether sports celebration moves are copyrightable.

### *B. Application of the Principles of Copyright to Sports Celebration Moves*

This section will apply the principles of copyright to determine whether sports celebration moves are copyrightable.

#### i. The Purpose of Copyright

The purpose of copyright, as discussed in Part II, is to encourage authors' individual efforts with a profit incentive.<sup>145</sup>

As noted above, athletes have a momentous opportunity to profit by creating celebratory moves and dances, which ultimately draw fan and media attention to their individual successes on the playing field.<sup>146</sup> It follows that, as the attention to their respective success on the playing field increases, an athletes' opportunity to earn money from more lucrative endorsement contracts and additional financial incentives also escalates.<sup>147</sup>

An example of this phenomenon occurred following Jamal Anderson's creation and performance of the "Dirty Bird."<sup>148</sup> Sales of products associated with Anderson's name skyrocketed.<sup>149</sup> One store owner commented, "[w]e can't keep jerseys in . . . . We've sold out of the Jamal Anderson jerseys. At one time, we had almost 30. Then we had another shipment of 24. All of them are sold out."<sup>150</sup>

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145. See *Eldred*, 537 U.S. at 212, n.18; *Mazer*, 347 U.S. at 219.

146. See Turner, *supra* note 46. (Turner writes, "[t]he Ickey Shuffle took on a life of its own with fans everywhere imitating his end zone dance. There were Ickey shirts, songs, commercials and a milk shake.").

147. See Weber, *supra* note 21, at 326.

148. See *Forget the Funky Chicken, the Dirty Bird is the Word*, CNN SPORTS ILL., (Jan. 29, 1999), at [http://sportsillustrated.cnn.com/football/nfl/1998/playoffs/news/1999/playoffs/news/1999/01/28/dirty\\_bird/](http://sportsillustrated.cnn.com/football/nfl/1998/playoffs/news/1999/playoffs/news/1999/01/28/dirty_bird/).

149. See Jim Thomas, *Retailers Do the 'Dirty Bird' Over Falcons Merchandise*, SAVANNAH MORNING NEWS, (Jan. 17, 1999), at <http://www.savannahnow.com/stories/011799/SPTfalconsmer.html>.

150. *Id.*; While it is impossible to claim that the increase in merchandise sales was due solely to Anderson's sports celebration move, there can be little doubt that the move served a pivotal role in drawing fans' attention to his on-the-field success. Not only is success on the playing field a key

While the incentive to profit is certainly a motivating factor for athletes to put forth the individual effort in creating these moves, it is not the lone reason why athletes create celebratory dances.<sup>151</sup> Athletes, like Jamal Anderson, create the moves to ignite the fans' enthusiasm, and contribute creatively to the game they love.<sup>152</sup> In other words, they seek to advance the public welfare.<sup>153</sup> Anderson explained the reasoning behind his dance saying, "[w]e [had] to do something to kind of give the people a symbol of the Dirty Birds. I just made up the dance."<sup>154</sup>

Affording athletes copyright protection encourages them to put forth their efforts in creating original, celebratory dances, with the incentive to profit. In turn, these victory dances will advance the public welfare by furthering the fans' enthusiasm and the thrill of sport. Therefore, the rationale for protecting these moves is fully consistent with the purpose of copyright.

## ii. Copyrightable Subject Matter

Athletes' performances, perhaps because they are so skilled and graceful, have long been analogized with the execution of complex choreographies performed by the most renowned dancers and artisans.<sup>155</sup> In particular, athletes' sports celebration moves are often referred to as choreographies or dances.<sup>156</sup>

Additionally, unlike ordinary sports moves that are regularly performed in accord with a standard form or method and can often be considered a functional and necessary feature of a particular game,<sup>157</sup> sports celebration

element of one's marketability, but an athlete's personality, charisma, and physical appearance can also contribute significantly to her marketability. See *supra* text accompanying note 47.

151. See Sylvester, *supra* note 140.

152. Jensen, *supra* note 43. (Quoting Johnson "You get the fans all dressed up and into the game, and someone scores a big touchdown; that little gesture becomes your 12<sup>th</sup> man, it gets things going.").

153. Sports celebration moves seek to advance the public welfare by providing the public with more exciting entertainment and by contributing to the continuance of the cultural influence of sport. See generally Jensen, *supra* note 43. (Quoting Johnson "There [are] a lot of pluses to keeping fans happy. When you think about it, we're all entertainers.").

154. Sylvester, *supra* note 140.

155. In reaction to a graceful catch made by Rocky Blier in Superbowl XIII, Pittsburgh Steelers announcer, Myron Cope, exclaimed, "what a heck of a catch that was by Rocky Blier, huh? Would you have expected Rocky Blier to turn into Nijinsky?" BATTLE OF CHAMPIONS SUPERBOWL XIII-HIGHLIGHTS (NFL Films Mar. 6, 1984).

156. See e.g., Sean Keeler, *Ickey Wishes O'Donnell Would Shuffle Away*, THE CINCINNATI POST, (Sept. 2, 1998), at <http://www.cincypost.com/sports/1998/keeler090298.html>; Jensen, *supra* note 138; Jensen, *supra* note 43.

157. See Weber, *supra* note 21, at 359-60.

moves are often creatively and uniquely choreographed<sup>158</sup> and serve only as a tangential element of any game.<sup>159</sup> With this reasoning in mind, athlete celebrations will be thought of as choreographic works for purposes of the following analysis.

As explained in Part II, the Copyright Act sets forth three requirements that must be satisfied before a work can become eligible for copyright protection. Works must: (1) be original; (2) be fixed in a tangible form; and (3) fall within the subject matter of copyright, in order to be copyrightable.<sup>160</sup> An analysis of the copyrightability of sports celebration moves or dances, with respect to these requirements, follows.

### (a) Originality

To satisfy the requirement of "originality," a work must be: "[ (1) independently created by the author[;] . . . and . . . [ (2) possess[ ] at least some minimal degree of creativity."<sup>161</sup>

#### i. Independent Creation

"The copyrighted work need not be novel, merely independently originated in the author."<sup>162</sup> This prerequisite does not create a high barrier to the copyrightability of sports celebration moves.

Most often, an athlete choreographs a celebratory move as a matter of self-expression.<sup>163</sup> His aim is not only to create a novel work, but also to choreograph a work that directly expresses his feelings when he scores a touchdown or slugs a towering blast over the outfield fence.<sup>164</sup> Therefore, these works are almost always inherently "independently originated in the author."<sup>165</sup>

#### ii. Creativity

To satisfy the creativity requirement, the Second Circuit noted, "[a]ll that is needed to satisfy both the Constitution and the statute is that the author

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158. Turner, *supra* note 46.

159. Weber, *supra* note 21, at 358.

160. § 102.

161. *Feist*, 499 U.S. at 345 (citing 1 NIMMER, Copyright §§ 2.01[A], [B] (1990)).

162. Weber, *supra* note 21, at 348; *see e.g.*, *Lee*, 404 U.S. at 891-892; *see also* COHEN ET AL., *supra* note 1, at 76.

163. *See* Turner, *supra* note 46; *see also* Weber, *supra* note 21, at 358.

164. Weber, *supra* note 21, at 358.

165. *Id.* at 348.

contributed something more than a ‘merely trivial’ variation, something recognizably ‘his own.’”<sup>166</sup>

In one of the few cases to discuss the copyrightability of ordinary sports moves, the Seventh Circuit in *Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n*, stated that, “[o]nly a modicum of creativity is required for a work to be copyrightable. . . . [T]he Players’ performances [therefore] possess the modest creativity required for copyrightability.”<sup>167</sup>

In accord with the Seventh Circuit’s analysis in *Baltimore Orioles*, if ordinary sports moves satisfy copyright’s creativity condition, sports celebration moves are sure to possess the minimal creativity required for an original work.<sup>168</sup> Often, ordinary sports moves such as a golf putt or a pitcher’s motion are literally going to exhibit a merely trivial variation over a previous golf putt or another pitcher’s motion. However, a choreographed dance, specifically designed by an athlete to be as creative, and attention grabbing as possible, is certain to possess the required “modicum of creativity.”<sup>169</sup>

Moreover, policy suggests that the fans, not the courts, be the ultimate trier of fact in determining whether a move exhibits a sufficient quantum of creativity.<sup>170</sup> Justice Holmes asserted this principle in *Bleistein v. Donaldson Lithographing Co.*:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. . . . [I]f [authors’ works] command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt.<sup>171</sup>

In applying Justice Holmes’s assertion to the current analysis, it appears that the low standard of “the interest of any public” has been met when one observes the explosion of public interest in sports and the fans’, at least

166. *Alfred Bell*, 191 F.2d at 102-03.

167. *Balt. Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663, 669, n.7 (7th Cir. 1986) *cert. denied*, 480 U.S. 941 (1987).

168. *Id.*; Weber, *supra* note 21, at 348-49.

169. *Balt. Orioles*, 805 F.2d at 669, n.7.

170. Weber, *supra* note 21, at 349; *see, e.g.*, *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903) (holding that a circus poster is a piece of purely commercial art and is therefore copyrightable); *Baltimore Orioles*, 805 F.2d at 669.

171. *Bleistein*, 188 U.S. at 251-52; *see also Balt. Orioles*, 805 F.2d at 669.



minimal, acceptance of athletes' sports celebration moves.<sup>172</sup> This seemingly indicates that fans have found in favor of athletes' sports celebration moves.<sup>173</sup> Whether judged by the courts or by the public, sports celebration moves should most certainly survive this obstacle.

(b) *Fixation*

The Copyright Act requires that "original works of authorship" [be] fixed in any tangible medium of expression, now known or later developed."<sup>174</sup> This precondition may provide a slightly higher barrier for choreographic works "because unlike other works, [they are] created in a spatial environment."<sup>175</sup> Therefore, while other works, such as novels, exist for the purposes of copyright the moment the words are laid out on paper,<sup>176</sup> authors of choreographic works must complete an additional step in an effort to "fix" their works.<sup>177</sup>

There are a number of ways in which an author of a choreographic work can record his work in order to satisfy this condition.<sup>178</sup> Under the 1909 Act, the Copyright Office accepted recordings of "choreographic works in the form of a verbal description, dance notation, pictorial or graphic diagrams, or a combination of these."<sup>179</sup> Perhaps the most effective of these forms, accepted under the 1909 Act, is dance notation.<sup>180</sup> "Notation is more scientific, recorded in symbols to represent almost every movement."<sup>181</sup>

The current Act accepts these methods of fixation as well as any other methods "in any tangible medium of expression, now [known] or later

172. See generally Clark, *supra* note 142; Sylvester, *supra* note 140; Thomas, *supra* note 149; Jensen, *supra* note 43.

173. Weber, *supra* note 21, at 349.

174. § 102.

175. *How Can Choreography Be Recorded In 'Fixed' Form*, COPYRONG, at <http://edic.cprost.sfu.ca/~jacsen71/janedancerecord.html> (last visited Mar. 29, 2003); see generally Adaline J. Hilgard, *Can Choreography and Copyright Waltz Together In the Wake of Horgan v. Macmillan, Inc.*?, 27 U.C. DAVIS L. REV. 757, 765 (1994).

176. COHEN ET AL., *supra* note 1, at 66.

177. See § 102; *How Can Choreography Be Recorded In 'Fixed' Form*, *supra* note 175; Hilgard, *supra* note 175, at 765-66. This situation is similar to the fixation problem that exists with live radio and television broadcasts. The sounds of which are ephemeral. Nimmer, *supra* note 51, at § 2.03[B][2]. To protect live broadcasts, the broadcaster must separately record the sounds and images simultaneously with the broadcast. *Id.*

178. Hilgard, *supra* note 175, at 766; Griffith, *supra* note 4, at 710-11; *How Can Choreography Be Recorded in 'Fixed' Form*, *supra* note 175.

179. NIMMER, *supra* note 53, at § 2.07[C].

180. *Id.*; *How Can Choreography Be Recorded In 'Fixed' Form*, *supra* note 175.

181. *How Can Choreography Be Recorded In 'Fixed' Form*, *supra* note 175.

developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>182</sup> The current Act broadens the scope of this requirement, making it significantly easier for authors of choreographic works to satisfy the condition.<sup>183</sup>

With the ubiquity of modern technology in the form of digital still cameras, sophisticated video cameras, cell phones that are able to record sounds and images, voice recording devices, and computers, it would not be difficult for an athlete to “fix” his choreographed, sports celebration move.<sup>184</sup> However, this requisite can be easily satisfied even without using these rapidly improving technologies. Dance notation or recording the moves on paper would be equally as effective.<sup>185</sup>

*(c) Works of Authorship*

After the first two conditions set forth in § 102 of the Act are satisfied, the third requirement—that the sports celebration move fall within the subject matter of copyright—must be addressed.<sup>186</sup> This requirement provides, perhaps, the most formidable barrier that a work must survive to receive copyright protection.

Athletic events are not included as one of the eight categories of subject matter detailed in section 102 (a) of the current Act.<sup>187</sup> This observation was made in *National Basketball Ass’n v. Motorola, Inc.*<sup>188</sup> In that case, the Second Circuit noted that “the list [of copyrightable subject matter] does not include athletic events, and, although the list is concededly non-exclusive, such events are neither similar nor analogous to any of the listed

182. NIMMER, *supra* note 53, at § 2.07[C] (quoting 17 U.S.C. § 102(a)); *see also* § 102(a). The Chicago Bears Shufflin’ Crew have one of the only examples of a copyrighted, sports celebration move. Though their dance, which was performed in a studio, is only quasi-related to the sports celebration moves discussed in this comment, it provides an example of how an athlete might use various forms of technology to “fix” his move. *See* Superbowl Shuffle, No. Pau-793-097, Dec. 9, 1985, available at <http://www.loc.gov/cgi-bin/formprocessor/copyright/locis.pl> (last visited Mar. 29, 2003).

183. § 102(a). The Act allows for future methods of fixation that may not yet be developed. *Id.*; NIMMER, *supra* note 53, at § 2.07[C].

184. An athlete could simply have a friend, relative, or business partner record his sports celebration move using one of the mentioned technologies in order to “fix” her move.

185. Griffith, *supra* note 4, at 710-11 (noting that while notation is sufficient, it would be even better to also have the dance simultaneously recorded on video). A written form of a choreographed, celebratory move might look like the description in *Forget the Funky Chicken, the Dirty Bird Is the Word*. *See Forget the Funky Chicken, the Dirty Bird Is the Word*, *supra* note 148.

186. § 102.

187. *NBA*, 105 F.3d at 846; § 102(a); *see also* Weber, *supra* note 21, at 350.

188. *NBA*, 105 F.3d at 846.

categories.”<sup>189</sup>

However, it must be noted that the court in that case was dealing with a very different issue, that of the copyrightability of an “athletic event.”<sup>190</sup> Additionally, in addressing the concern that sports celebration moves are not expressly listed as copyrightable subject matter, it should be noted that “there is no [clear] indication that the [current] Act should not, and for that matter could not, be expanded to incorporate new media of expression and creativity [like athletes’ sports celebration moves].”<sup>191</sup>

When Congress broadened the scope of copyright law in 1976, it established two general categories in which copyrightable subject matter might fall.<sup>192</sup> Congress created the first classification for works that were already in existence but that “had only recently been recognized as ‘creative,’ and therefore worthy of protection.”<sup>193</sup> The second category was opened to new works “that had never previously existed but became possible due to scientific discoveries and technological developments.”<sup>194</sup> Composers, artists, and choreographers have served as the beneficiaries of the Act’s broadened scope.<sup>195</sup> These authors have benefited because the Act’s broad language allows Congress to expand copyright protection when it so elects.<sup>196</sup>

One of the principal reasons Congress revamped the Copyright Act was due to the fact that the 1909 Act was rendered obsolete because its narrow scope failed to allow for technological and societal advances.<sup>197</sup> Hence, Congress created broader language in anticipation for those “areas of existing subject matter that [the 1976 Act did] not [yet] propose to protect, but that future Congresses may want to.”<sup>198</sup>

Thus, though Congress may not have had the foresight to recognize the great societal and economic impact that sports celebration moves and athletic events would have, sport’s popularity and recognized influence is now certainly appreciated; and the Act’s legislative history indicates that Congress has the ability to expressly include sports moves as copyrightable subject

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189. *Id.*

190. *Id.*

191. Griffith, *supra* note 4, at 693.

192. *Id.* at 685.

193. *Id.*

194. *Id.*

195. *Id.*

196. Griffith, *supra* note 4, at 685; H.R. REP. NO. 94-1476, *supra* note 97, at 53.

197. Griffith, *supra* note 4, at 689.

198. H.R. REP. NO. 94-1476, *supra* note 97, at 51; *see also* NIMMER, *supra* note 53, at § 2.03[A].

matter.<sup>199</sup>

However, even if athletes' sports celebration moves are not expressly included in the subject matter of copyright, these choreographed moves may nevertheless be considered eligible for copyright protection as choreographic works. Choreography is defined in *Horgan v. Macmillan* as:

the composition and arrangement of dance movements and patterns, and is usually intended to be accompanied by music. Dance is static and kinetic successions of bodily movement in certain rhythmic and spatial relationships. Choreographic works need not tell a story in order to be protected by copyright.<sup>200</sup>

“The Act [, however,] does not define choreography.”<sup>201</sup> Additionally, the legislative history indicates only that choreography, as it is used in § 102(a) of the Act, does not include “social dance steps and simple routines.”<sup>202</sup> “Thus, for example, the basic waltz step, the hustle step, and the second position of classical ballet are not copyrightable.”<sup>203</sup> These basic steps are regarded as ideas under the idea/expression dichotomy. Ideas are expressly prohibited under section 102(b) of the Act.<sup>204</sup>

#### i. The Idea/Expression Dichotomy

Section 102(b) of the Act implies that “social dance steps and simple routines” are not copyrightable. It states, “[a]n idea can never be copyrightable, but its expression may be.”<sup>205</sup>

In this case, simple dance steps are considered basic ideas for the purpose of copyrighting choreographic works, just like individual words are considered basic ideas for the purpose of copyrighting a literary work. Ideas, or in this case simple dance steps, are the “basic building blocks of [any] copyrightable expression.”<sup>206</sup> Thus, to grant a monopoly in the building blocks of copyrightable expression would be to curtail future creativity, and hence, be counterproductive.<sup>207</sup>

199. Griffith, *supra* note 4, at 693.

200. *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 161 (2d Cir. 1986) (quoting Compendium of Copyright Office Practices, Compendium II § 450.01 (1984)).

201. *Id.*

202. *Id.*; see also NIMMER, *supra* note 53, at § 2.07[B]

203. Weber, *supra* note 21, at 356.

204. § 102(b).

205. COHEN ET AL., *supra* note 1, at 90; see also § 102(b).

206. COHEN ET AL., *supra* note 1, at 90. The term “social dance steps” is used here as a term of art, relating to each movement of a more complex routine or choreography.

207. *Id.*

Therefore, 102(b) may limit some very simple athlete celebrations like the “high-five,” the “monster bash,” or the “Mile-High Salute,” which all consist of one or two basic movements.<sup>208</sup> However, “a restriction against the incorporation of [several] social dance steps and simple routines” does not exist.”<sup>209</sup> “Social dance steps, folk dance steps, and individual ballet steps alike may be utilized as the choreographer’s basic material in much the same way that words are the writer’s basic material.”<sup>210</sup> While each word may be regarded as an uncopyrightable “idea,” an original, creative compilation of words will be treated as a newly created copyrightable expression of those ideas. Hence, in this case, while each simple step may be considered an uncopyrightable idea, more complex sports celebration moves that incorporate many steps, such as the “Ickey Shuffle” or the “Dirty Bird,” should be treated as a newly created copyrightable expression of those ideas and “[should thus] rise to the level of more complex choreography as contemplated by the statute.”<sup>211</sup>

Though a sufficiently complex sports celebration move should most certainly survive the rigors of the idea/expression dichotomy, it must still satisfy the “functionality test.”<sup>212</sup>

## ii. Useful Articles: Functional v. Non-Functional

The functionality of useful articles serves as, yet, another restriction on works seeking copyright protection.<sup>213</sup> According to the functionality doctrine applied in *Fabrica Inc. v. El Dorado Corp.*, “if an article has *any* intrinsic utilitarian function, it can be denied copyright protection except to the extent that its artistic features can be identified separately and are capable of existing independently as a work of art.”<sup>214</sup>

Ordinary sports moves, like the “method or process for throwing a pitch in baseball . . . or . . . performing more accurate putts,” may be categorized as purely functional<sup>215</sup> and may, therefore, be denied copyright protection.<sup>216</sup>

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208. Stevenson, *supra* note 43.

209. Weber, *supra* note 21, at 357 (citing Compendium II § 450.01 (1984)).

210. *Id.* (citing Compendium II § 450.01).

211. *Id.* (quoting Robert M. Kunststadt et al., *Recent Patent Copyright & Trademark Law Dev't could suggest Novel IP uses*, NAT'L L. J., May 20, 1996, at C2).

212. See *Fabrica*, 697 F.2d at 893; see § 101.

213. § 101 (defining “useful article”).

214. *Fabrica*, 697 F.2d at 893; see § 101.

215. Weber, *supra* note 21, at 360.

216. See *Fabrica*, 697 F.2d at 890 (affirming the lower court’s holding that copyright law did not protect folders because they were completely utilitarian).

However, sports celebration moves are more expressive, creative, and only tangentially related to the goals of a particular game. And would, therefore, most likely clear this hurdle to copyright.

To better understand this principle, one might contrast an athlete's movements in pursuit of scoring a touchdown in a football game with his movements in celebration of having scored (for example, while performing a [sports celebration move]). The former movements seem to be primarily functional in nature, since their chief purpose is the scoring of a touchdown and, ultimately, the winning of a game, whereas the [sports celebration move] seems purely expressive and irrelevant to the goal of winning.<sup>217</sup>

Further, it has been argued that "sports are inherently nonfunctional . . . [and thus] functionality should not be seen to exclude any sports moves from copyright protection."<sup>218</sup> Regardless of whether all sport moves should be copyrightable, purely expressive sports celebration moves should certainly not be hampered by the functionality doctrine, because they serve very little or no functional purpose to an athletic event.<sup>219</sup>

Although it seems as if the more complex sports celebration moves will survive the many hurdles provided by copyright law, public policy must still be considered. Because the purpose of copyright is focused intently on advancing the public welfare, public opinion provides a final, lofty hurdle that sports celebration moves must endure.

#### *(d) Public Policy Considerations*

There are three policy considerations that are often addressed when discussing the copyrightability of sports moves in general: (1) "Copyright for sports moves is superfluous, since powerful incentives for creative athleticism already exist[;]"<sup>220</sup> (2) "Copyright for sports moves will destroy competition by reducing the pool of available moves[;]"<sup>221</sup> and (3) "Copyright for sports move[s] will harm competition by preventing the general use of future-created moves[.]"<sup>222</sup> In addition to these three policy considerations, many also make a fourth argument; that sports celebration moves taint the purity of sport.<sup>223</sup>

217. Weber, *supra* note 21, at 358.

218. *Id.* at 359.

219. *See id.* at 358.

220. *Id.* at 333.

221. *Id.* at 336.

222. *Id.* at 338.

223. *See, e.g.,* David Sean Brennan, *Sanctity of Sport*, INST. FOR INT'L SPORT, at

These are all valid concerns when discussing the copyrightability of ordinary sports moves. However, as explained above, sports celebration moves, though generally related to sports moves, can be considered for purposes of copyright protection an entirely different species of sports moves. Sports celebration moves, unlike ordinary sports moves, are purely expressive acts, individualized by the influence of the respective competitor's persona. Nevertheless, this comment will address each policy argument.

The first policy consideration involves the issue of already existent incentives for athletes.<sup>224</sup> It is argued that, "a given move's potential value in the winning of a contest already provides a strong incentive for creativity completely independent from . . . that provided by the prospect of copyright."<sup>225</sup> However, sports celebration moves do not contribute directly to the outcome of a game.<sup>226</sup> Instead, they add to the creativity and excitement of an athletic contest, serving merely as expressions of each athlete's emotions while in the heat of battle. Therefore, the argument that there is already an incentive—an incentive to win—is not a compelling argument against copyright protection when applied to sports celebration moves.

Moreover, neither argument (2) nor (3) are convincing in this case. Both arguments address the concern that protecting sports moves with copyright will hamper current and future creativity. They further assert that copyrighting sports moves will create a virtual monopoly on present moves, greatly reducing the pool of moves in the future.<sup>227</sup>

While this may be a valid concern for ordinary sports moves, again, it is not so for sports celebration moves. There exist an infinite number of dance steps, gesticulations, gyrations, shimmies, sways, and other expressive moves that an athlete can combine to make a unique sports celebration move.<sup>228</sup>

Finally, many argue that these celebratory dances detract from the sportsmanship and purity of sport.<sup>229</sup> It is agreed that any move performed to intentionally and openly embarrass or mock a competitor detracts from the sanctity of sport and, therefore, has no place in sport. Sports celebration

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[http://www.sportparenting.org/nsd/nsd\\_articles.cfm](http://www.sportparenting.org/nsd/nsd_articles.cfm) (last visited Oct. 4, 2003); Beeb Salzer, *OUR HEROES: Today, It's the Bully, Not Strong Silent Type*, SAN DIEGO UNION-TRIB., (Aug. 14, 2003), at B-9:2,7, available at [http://www.sportparenting.org/nsd/nsd\\_articles.cfm#1](http://www.sportparenting.org/nsd/nsd_articles.cfm#1); Jensen, *supra* note 39.

224. Weber, *supra* note 21, at 333-34.

225. *Id.* at 334.

226. *See id.* at 358.

227. *See id.* at 339.

228. "Throughout the league now, players are dreaming up interesting ways to cap off a long drive or an amazing play, allowing an array of body parts to groove and gyrate to the delight of teammates and fans. The phenomenon isn't a new one, but [there has been] an influx of celebrations that exude a wide range of emotions." Jensen, *supra* note 43.

229. *See, e.g.*, Brennan, *supra* note 222; Salzer, *supra* note 222; Jensen, *supra* note 43.

moves should only be performed after the play, away from competitors. Further, they should be used simply to celebrate a great play, to draw attention to an athlete's superior skills, and to excite the crowd.<sup>230</sup> Performed respectfully, not at the competitors' expense, these moves can add great entertainment value and excitement to sport.<sup>231</sup> Moreover, excessive celebration rules are already in place to ensure that sports celebration moves do not detract from the sportsmanship of the game.<sup>232</sup> Though the battle between purists and non-traditionalists over this issue is sure to continue, resolution to this conflict will ultimately be decided by the market place.

#### IV. CONCLUSION

After thorough analysis, the question of whether a sports celebration move is copyrightable has been answered. It is asserted that sports celebration moves are copyrightable for the following reasons: (1) The purpose for protecting sports celebration moves is consistent with the purposes of copyright; (2) these moves almost certainly satisfy the Copyright Act's first two requirements of "originality" and "fixation;" (3) whether they are considered, for the purpose of copyright protection, as "sports moves" or as "choreographic works," many of the complex sports celebration moves would survive the obstacles of the idea/expression dichotomy and the doctrine of functionality. Thus, the more complex sports celebration moves would most likely satisfy the third and final requirement, namely, that they fall within the required subject matter of copyright; and lastly, (4) the policy considerations, which might have merit in weighing against ordinary sports moves, are mostly misdirected in regards to athlete celebration moves.

Most athletes have not pursued copyright protection for their sports celebration moves to date. However, this is perhaps only because athletes previously had far fewer opportunities to profit from the heightened media exposure that surrounds sport than athletes have today. Copyright protection of athletes' sports celebration moves is now crucial because it prospectively allows athletes to prohibit other competitors from exploiting, claiming rights to, or diluting the novelty of their sports celebration moves, which have the potential to enhance their marketability, their market power, and thus their earning potential.

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230. See Jensen, *supra* note 139.

231. See, e.g., Jensen, *supra* note 139; Jensen, *supra* note 43.

232. See, e.g., Jensen, *supra* note 139; Jensen, *supra* note 43.



