Football Play Scripts: A Potential Pitfall for Federal Copyright Law?

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FOOTBALL PLAY SCRIPTS: A POTENTIAL PITFALL FOR FEDERAL COPYRIGHT LAW?

I. INTRODUCTION

Since its inception, the sport of American football has developed with increasing complexity and intricacy in its strategy and play calling. The variety of offensive and defensive plays, formations, and strategies have enhanced the game and intrigued the passionate fan and follower while creating what is considered to be the modern game. However, in the midst of these numerous innovations, certain advancements have created issues reaching beyond the game itself to potentially encounter the regulation of federal copyright law, raising substantial questions for the future of the sport.

This comment will consider the evolution and use of the play script, a dramatic modern advancement in the sport. Accordingly, it will address the applicability of copyright law to these scripts, the impact that this application could have on the future of football, and the insight that it provides into copyright law as it currently exists.

II. THE EVOLUTION AND USE OF THE PLAY SCRIPT IN FOOTBALL

The use of scripts originated with the National Football League (NFL) Hall of Fame coach Bill Walsh, later dubbed a genius by sportswriters. His innovation was not viewed as a drastic breakthrough at its outset, but instead met significant skepticism from the establishment when initiated by Walsh in 1970 as an assistant coach with the Cincinnati Bengals. However, with his successful stint as the head coach and architect of the San Francisco 49ers


Super Bowl dynasty of the 1980s, utilizing a play script in his “West Coast Offense,” the value of his innovation could no longer be disputed.4

As originally utilized by Walsh, the script was a plastic sheet of twenty-five offensive plays.5 In his description, “what we did was liberally use the forward pass on early downs – first down in particular – and have a comprehensive base of offensive football, from the run to the pass, to depend equally on both, but not be predictable.”6 In Walsh’s view, scripting allowed the coach to evaluate defensive adjustments to specific offensive formations, to monitor and maintain a run-pass balance, to call particular running plays specifically setting up certain play-action passes, to run trick plays, and to develop plays that could move the ball consistently in small chunks while setting up a later, deep play.7 The other extremely important advantage to the script was the ability to complete all game planning in the office during the week leading up to the game and the opportunity to limit the number of specific plays to be studied and perfected by the offense in a particular week to a manageable handful, instead of an entire playbook, including a number of plays that would not actually be called during the game.8

Despite its present prominence, many misconceptions abound over the actual use of the script by coaches in games. Although Walsh’s script contained twenty-five plays, these plays were not necessarily called in order from one to twenty-five.9 Rather, the plays were grouped for situational purposes. For instance, if the team was facing third-and-long or short-yardage situations, Walsh would select from the plays scripted for those situations instead of those listed for normal down-and-distance situations.10 This divergence from a strictly regimented, ordered list was highlighted by Walsh, “[w]ould you run 25 in order? No.... Let’s say, of the 25, you’d run 18 or 19 sort of in order. If something really worked or you saw something in the defense, you’d go back to (a play).”11

As another example, Chan Gailey employed a variation of the script while

4. Barber, supra note 1.
5. Id. See also Miller, supra note 1.
7. Miller, supra note 1.
8. Id.
9. Id. See also, DICK VERMEIL ET AL., 1986 PRO FOOTBALL SCOUTING REPORT 361 (Jack Clary & Norm Miller eds., 1986). Describing Notre Dame legend and NFL Hall of Fame quarterback Joe Montana: “he is the ideal man to execute coach Bill Walsh’s sophisticated offense. Walsh programs in advance his first 20 to 25 plays, varying of course, according to how the defense reacts.” Id.
10. Miller, supra note 1.
11. Id.
head coach of the Dallas Cowboys. For Gailey, the script allowed him to effectively predetermine strategy during the week while seeing how the defense would react in various situations during the game. Gailey’s script consisted of two sheets of paper, divided into columns. The first sheet had three columns, the first column listing offensive plays for specific down-and-distance situations, the second column listing formations and personnel groups for a particular play, and the third column listing additional down-and-distance situations. "The second page [was] divided into two columns labeled with different headers, such as two-minute, screens/draws and specials [or] trick plays." In the first quarter, Gailey called the first play listed under the first-and-ten heading. If the team gained five yards on the play, he then called the first play listed under second-and five. If the team eventually entered the red zone (inside the opponent’s 20-yard line), Gailey called the first play listed under red zone on his second page. This script differs from, and is more flexible than, many others because play selection is determined by the location on the field and down-and-distance situations, not leaving a coach tied to a particular play in an ordered list. Although many variations of the script exist, from the scripting of a certain number of the first plays to the scripting of plays for specific situations, it is clear that the script has become a common feature of the game of football.

At least half of NFL teams, or by some accounts nearly every NFL team, utilizes some form of scripting. Most teams script roughly fifteen plays. The Arizona Cardinals script the game’s first twelve offensive plays, while the Baltimore Ravens and Pittsburgh Steelers script the game’s first ten plays. Additionally, Mike Shanahan of the Denver Broncos and Butch Davis of the

13. Id.
14. Id.
15. Id.
16. Id.
17. See Taylor, supra note 1.
18. Id.
19. Id.
20. Id.
21. See Barber, supra note 1.
23. See Prisco, supra note 22.
24. See Miller, supra note 1.
Cleveland Browns each script the first six to eight plays beginning the second half.\textsuperscript{25} College football has also witnessed an influx of the play script. Coaches at the University of Tennessee,\textsuperscript{26} the University of Washington,\textsuperscript{27} the University of Hawaii,\textsuperscript{28} Penn State University,\textsuperscript{29} and Washington State University\textsuperscript{30} have all utilized scripts in various forms, scripting plays from as few as only the first series of plays\textsuperscript{31} to as many as the first twenty offensive plays.\textsuperscript{32} This practice has continued to trickle down to the game’s lower levels, as high school coaches have also begun using play scripts.\textsuperscript{33}

With the proliferation of the play script at all levels of football, it is fitting to consider the possible application of federal copyright law to this type of work. This potential application of the law is not entirely outlandish given many similarities between the play script and other works currently protected by copyright. However, application of the law to the play script could have severe ramifications for the game of football and may also highlight important flaws in copyright law, as it currently exists. However, before directly considering the applicability of copyright law to the play script, the fundamental principles of federal copyright law will be addressed.

III. THE FOUNDATIONS AND PRINCIPLES OF COPYRIGHT LAW

Prior to the invention of the printing press, not unexpectedly, little need existed for copyright protection for original works. However, Gutenberg’s
landmark invention sparked a movement for protection in England, culminating in Parliament’s enacting of the Statute of Anne in 1710. Influenced by the Statute of Anne, the framers of the Constitution realized the importance of providing protection for original works, giving Congress the license to enact copyright legislation, a permissive power utilized by legislators at various times throughout history. The modern statute includes a general list of categories entitled to copyright protection. Although some items are excluded from protection in the statute, the eight categories of

34. Statute of Anne, 1710, 8 Ann. c. 19 (Eng.), reprinted in 8 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7-5 (2001). The Statute provided protection of limited duration, specifically two 14-year terms, for the copyright owner against unauthorized use. Id. This limit on protection allowed for a body of works that entered the public domain following the expiration of these terms for which copyright protection could no longer be sought. See id. The preamble plainly stated the reason for the statute’s enactment:

WHEREAS printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting and publishing, or causing to be printed, reprinted and published, books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families: for preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books; may it please your Majesty, that it may be enacted .

35. U.S. CONST. art. I, § 8, cl. 8. The Constitution provides that Congress may elect to protect original works through copyright: “Congress shall have Power... [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” Id.


Copyright protection subsists, in accordance with this title, in original works of authorship 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. Works of authorship include the following categories:

(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.

38. The statute lists categories that do not rise to the level of protection, including “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 . . . .” Id. § 102(b).
protectible works nevertheless remain sufficiently broad and capable of adapting to changing society and technology while providing protection for a multitude of original works of authorship, provided that they have been sufficiently fixed in a tangible medium.

A. Original Work of Authorship

Originality is the threshold question of any copyright analysis. The standard for originality in copyright law has emerged from various decisions of the Supreme Court and the federal circuit courts. In *Burrow-Giles Lithographic Co. v. Sarony*, the Court illustrated the flexibility of copyright law. Holding that federal copyright law could cover even a photograph, the Court stated that “the Constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representatives of original intellectual conceptions of the author.” Furthermore, the Court described an author as “he to whom anything owes its origin.”

In *Bleistein v. Donaldson Lithographing Co.*, the Court noted that the original or unique work is “something irreducible, which is one man’s alone.” In coming to this holding, Justice Holmes did not define originality on a basis of artistic or aesthetic merit, hoping to avoid a situation in which courts have the power to decide if one work possesses enough artistic value to be protected while another work does not. Accordingly, the standard of originality is not based on any sort of subjective artistic, aesthetic, or commercial merit, but rather on a more objective standard of whether the work is truly “one man’s alone.”

In *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, the Second Circuit held that “[a]ll that is needed to satisfy both the Constitution and the statute is that the ‘author’ contributed something more than a ‘merely trivial’ variation, something recognizably ‘his own.’ Originality in this context ‘means little

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40. Burrow-Giles, 111 U.S. at 58.
41. Id.
42. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903) (concerning photographs used in a commercial advertisement).
43. Id. at 250.
44. Id. at 251-52.
45. Id. at 250.
more than a prohibition of actual copying."  

The Supreme Court highlighted the foundational necessity of originality in *Feist Publications, Inc. v. Rural Telephone Service Co.* The opinion noted that "[t]he sine qua non of copyright is originality." However, despite its fundamental importance, the threshold of originality is quite low. "Original . . . means only that the work was independently created by the author . . . and that it possesses at least some minimal degree of creativity." Therefore, "the requisite level of creativity is extremely low; even a slight amount will suffice."

Based on these decisions, a work possesses sufficient originality if it is an "original intellectual conception," "irreducible, . . . [and] one man's alone," "something more than a 'merely trivial' variation," and possesses "at least some minimal degree of creativity."

**B. Fixed in a Tangible Medium**

According to the statute:

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. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

The key to this language is not the particular means used to fix the work, but rather, the focus is on the effect produced. Therefore, the question is how the effect of fixation for more than a transitory period is actually achieved. This relatively low bar of fixation has been illustrated by holdings that even storage in a computer's memory is sufficient to fix a work for more than a

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47. Id. at 102-03.  
49. Id. at 345.  
50. Id. at 345.  
51. Id.  
52. *Burrow-Giles*, 111 U.S. at 58.  
54. *Alfred Bell & Co.*, 191 F.2d at 102-03.  
55. *Feist*, 499 U.S. at 345.  
transitory period in a tangible medium of expression. Accordingly, based on these court decisions, the statute provides a relatively low bar that is sufficiently broad enough to cover a wide variety of works fixed in a multitude of ways, including storage into a computer's RAM, as long as the fixation is more than simply transitory, or more obvious examples of fixation including physical writings or videotaped expressions.

C. Idea/Expression Dichotomy

Section 102(b) of the statute specifically excludes certain categories of works from copyright protection. No protection is available for facts, ideas, concepts, or principles, regardless of how they are described, explained, or embodied within a work. However, although an idea or fact itself may not be protected by copyright, an original work of authorship utilizing or compiling these unprotectable facts or ideas may itself be copyrighted. It has been left to the courts to attempt to create a concrete standard for handling this idea/expression question. In doing so, courts have attempted to draw a line between what is eligible for protection and what instead belongs to the public domain.

In *Baker v. Selden*, the Court contrasted the protectable original writing of the author with the practical knowledge explained by the work, which was not protectable. Highlighting the importance of distinguishing between types of protectable subject matter and facts or ideas left to the public domain, the Court stated that ""[t]he description of the art in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself. The object of the one is explanation; the object of the other is use. The former may be secured by copyright." Accordingly then, the original explanation and expression of facts or ideas contained in a book or other work

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57. *Williams Elec., Inc. v. Artic Int'l, Inc.*, 685 F.2d 870, 874 (3d Cir. 1982) (involving a claim of infringement based on a knock-off video game); *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993) (holding that copies of computer programs loaded into RAM memory were sufficiently permanent to be perceived, therefore satisfying the statutory requirement for fixation), *cert. denied*, 510 U.S. 1033 (1994).

58. 17 U.S.C. § 102(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." *Id.*

59. *Id.*


61. *Id.*

62. *Id.* at 105.
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can provide the author with ownership of a copyright in that explanation or expression, while no copyright is extended to the author over the particular ideas or facts found in the work, which instead remain part of the public domain.

The primary question in analyzing these copyright issues involves determining what exactly constitutes the atomistic unit of copyrightability in a work, the smallest fundamental building block of a work that is eligible for protection. This fundamental unit can vary in its size or complexity, but it can never be as simple as facts, such as the knowledge serving as the foundation for the book in Baker v. Selden. Instead, an entire book may, in fact, represent the protectable original expression of the knowledge.63

The key case representing the current standards for copyrightability is Feist.64 Feist clarifies important facets of the idea/expression dichotomy, stating: "The most fundamental axiom of copyright law is that 'no author may copyright his ideas or the facts he narrates.'"65 This important distinction is rooted in the originality requirement. The line is drawn between creation and discovery.66 Facts utilized in a work have not been an original creation of the author by any stretch of the imagination and are simply organized in a specific way. It is possible for the original expression of the author in arranging or organizing those facts into a work as a whole to rise to the level of protection, but still, "[n]o author may copyright facts or ideas. The copyright is limited to those aspects of the work—termed 'expression'—that display the stamp of the author's originality."67

D. Derivative Works and Compilations

The statute specifically provides protection for derivative works and compilations.68 A compilation is defined as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."69 A derivative work is defined as "a work based upon one or more preexisting works, such as a translation, . . .

64. 499 U.S. 340 (1991) (holding that copying of information from one company's telephone directory in order to create a separate regional telephone book did not constitute infringement).
65. Id. at 344-45 (quoting Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 556 (1985)).
66. Id. at 347.
67. Id. at 350 (quoting Harper & Row, 471 U.S. at 599 (citations omitted)).
69. § 101.
abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted.70 As discussed above in light of the idea/expression dichotomy,

[t]he copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.71

Again, Feist is the key case addressing the copyright protection available to compilations.72 According to Feist, it is possible for various compilations of facts, including compilations in telephone directories, to possess the necessary level of originality for protection. "A factual compilation [displays the requisite originality and] is eligible for copyright if it features . . . [a truly unique] selection or arrangement of facts. . . ."73 The author of a compilation has the power to decide which facts will be included in the final work, the order in which the facts will be presented, and the arrangement that will provide the most useful work. This minimal amount of creativity and originality in decision-making is sufficient for the requirements of the statute.74 It is possible, therefore, for a compilation containing no "protectible written expression, only facts,"75 to rise to the level of protection.

In these cases, though, the compilation copyright can be considered to be a thin copyright, limited only to the particular selection or arrangement of the work.76 Nonetheless, as long as the compiler’s selection and arrangement of the facts is achieved completely independently of an earlier work and does not amount to a simple copy of the work, protection will be available.77 Despite this thin copyright protection, however, the facts found in the compilation can be freely used in the preparation of another publication, as long as they are not arranged in the same manner by virtue of a simple copy.78

70. Id.
71. § 103(b).
72. 499 U.S. at 348.
73. Id. at 350.
74. Id. at 345.
75. Id. at 370.
76. Id. at 350-51.
77. Feist, 499 U.S. at 358.
78. Id. at 349.
E. Choreographic Works

Section 102(a)(4) of the Act provides full copyright protection to choreographic works without providing a definition of such works.\footnote{79} Accordingly, "ambiguity [remains] as to whether a choreographic work by definition requires 'dramatic' content."\footnote{80} However, since the earlier statute protected choreography only when part of a dramatic performance, "the legislative expectation that 'the coverage of the present [1909] statute... would be broadened further by the explicit recognition of all forms of choreography'\footnote{81} plainly indicates that choreography may be eligible for copyright regardless of dramatic content or performance.\footnote{82} This conclusion is further justified by the Register's Report of 1961, predating the modern statute. The report stated:

Treating choreographic works as a species of 'dramatic compositions' [under the 1909 Act], has one serious shortcoming. Many choreographic works present 'abstract' dance movements in which, aside from their esthetic appeal, no story or specific theme is readily apparent. Whether such 'abstract' dances qualify as 'dramatic compositions' is uncertain. We see no reason why an 'abstract' dance, as an original creation of a choreographer's authorship, should not be protected as fully as a traditional ballet presenting a story or theme.\footnote{83}

Additionally, language providing protection for choreographic works "prepared for presentation to an audience" was later removed from the report for being "unnecessarily restrictive."\footnote{84} Furthermore, the more restrictive fixation standards of the 1909 Act, requiring "deposit of qualifying choreographic works in the form of a verbal description, dance notation, pictorial or graphic diagrams, or a combination of these,"\footnote{85} have been relaxed to allow for fixation "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 a device."\footnote{86} Accordingly, the category of protected choreographic works appears to be

\footnotesize{\footnote{79} Legislators believed the meaning of choreographic work to be "fairly settled." \cite{MelvilleB.Nimmer DavidNimmer NimmerCopyright § 2.07 (2002)}.}
quite broad and sufficiently capable of encompassing a wide range of original works, regardless of dramatic content.

IV. THE INTERSECTION OF FEDERAL COPYRIGHT LAW WITH SPORTS AND SPORTING EVENTS

Due to the flexibility of the statutory categories of protectible works, federal copyright law has affected the sports world in various ways. Two important cases illustrate the intersection of sports and copyright, but as long as the fundamental principles of copyright discussed above are satisfied, it can be expected that many future copyright cases will address issues affecting the sports world.

A. Baltimore Orioles v. MLBPA and NBA v. Motorola

Federal courts have addressed questions of copyright application in two important sports settings. In Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n,87 the Seventh Circuit considered the possibility of copyrighting entire baseball games and the issue of whether the publicity rights of players were preempted by the teams’ copyright in the telecast of games.88 In coming to its decision, the court noted, “Since the telecasts of the games are videotaped at the same time they are broadcast, the telecasts are fixed in [a] tangible form.”89 In considering the originality of the telecasts, the court stated that “the work must possess an independent origin and a minimal amount of creativity.”90 This minimal amount of creativity is present in the complex pattern of producing a baseball telecast. For instance,

[t]he many decisions that must be made during the broadcast of a baseball game concerning camera angles, types of shots, the use of instant replays and split screens, and shot selection... supply the creativity required for the copyrightability of the telecasts.... “When a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent to the public and in which order, there is little doubt that what the cameramen and the

88. Id. at 682.
90. Balt. Orioles, 805 F.2d at 668.
director are doing constitutes ‘authorship.’”

The Players Association argued that player performances could not rise to the level of copyright protection because they lacked “artistic merit.” However, the court rejected this argument on the basis of the fact that the creative combination of the work conducted by the cameramen and the director is sufficient for the telecasts to be copyrightable. Additionally, the court upheld the earlier reasoning of Justice Holmes in Bleistein, rejecting the notion that a judicial determination of artistic merit is an essential element of copyright analysis.

In 1997, the Second Circuit’s opinion in National Basketball Ass’n v. Motorola, Inc. clarified the decision in Baltimore Orioles. This case involved a suit brought by the National Basketball Association (NBA) against Motorola, alleging copyright infringement in Motorola’s relay of scores and statistics from NBA games currently in progress with its SportsTrax paging device. In its decision, the Second Circuit held that basketball games themselves are not copyrightable. The court interpreted the Seventh Circuit’s holding in Baltimore Orioles to indicate only that copyright protection was available only for the telecasts of the games, not for the underlying games themselves, “which obviously can be played without cameras.” Therefore, the Second Circuit believed that a “lack of caselaw [in the area] is attributable to a general understanding that athletic events were, and are, uncopyrightable.” This decision was based, in part, on Nimmer’s statement that the “‘reasonable’ position is that athletic events are not copyrightable . . . [because] the number of joint copyright owners would arguably include the league, the teams, the athletes, [the] umpires, [the] stadium workers and even [the] fans, who all contribute to the ‘work.’” Accordingly, the district court rejected the NBA’s claim by noting that athletic events were “noticeably absent from the illustrative list of works of

91. Id. at 668-69 (citations omitted).
92. Id. at 669.
93. Id.
94. 188 U.S. at 251-52.
95. 105 F.3d 841 (2d Cir. 1997).
96. Id. at 843.
97. Id. at 846-47.
98. Id.
99. Id. at 847.
100. 105 F.3d at 846 (citing 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.09[F] at 2-170.1 (1996)).
authorship" listed in the Copyright Act. The Second Circuit affirmed this holding, noting that although the list of works in the Copyright Act is not necessarily exclusive, athletic events are in no way similar to, nor mirror, any of the accepted categories. Although the court is clear in holding that no copyright protection is available for underlying games, it nonetheless leaves open the possibility of protection for particular aspects of athletic contests.

B. Copyright of Individual Sports Moves and Plays

In addition to assertions of the copyrightability of underlying athletic events, a variety of arguments have emerged claiming that individual sports moves and routines should rise to the level of copyright protection. These arguments tend to focus on the distinction between routine-oriented athletics such as figure skating, gymnastics, ice dancing, skateboarding, and other extreme sports, and adversarial and reactive sports such as tennis, baseball, basketball, football, hockey, and soccer.

The key to the argument in favor of protecting routine-oriented athletic performances such as a figure skating or gymnastics routine is the regimented choreography involved. Specifically:

Routine-oriented athletic performance... is most similar to 'pantomimes and choreographic works.' Both tend to exhibit a planned and prepared routine, the result of which entertains the audience, displays the performer's athletic abilities, and gives the performer herself [or himself] a great deal of self-gratification. Additionally, both rely greatly upon creativity and artistic expression.

The parallel between the artistic nature of a figure skating routine and dance routine is often drawn in an attempt to more easily present the sport as a choreographic work. However, the fact that sport is not always perceived as

102. Motorola, 105 F.3d at 846.
104. Id.
105. See Griffith, supra note 103, at 677-78.
106. Griffith, supra note 103, at 698 (internal citations omitted).
art is not sufficient to defeat all claims for copyright protection.\textsuperscript{107} Rather, the fundamental nature of copyright law is to provide protection for creative expression in order to avoid discouragement of new expression because of rampant unauthorized copying and use.\textsuperscript{108}

Although courts have remained silent on the issue, despite so easily accepting the possibility of providing copyright protection for routine-oriented athletics, many authors bristle at the suggestion of copyrightability in other athletic performances. Notably though, this attempt at drawing a distinction between these two broad genres of sport does not fully survive upon close inspection. Quite often, the dismissal of copyright protection for sports other than routine-oriented sports fails to properly consider the law as it exists or the nature of the specific sport in question. As one author comments, "Individual sports often involve great periods of rehearsal and preparation, much like a dramatic or choreographed performance. These sports, including figure skating, gymnastics, diving, synchronized swimming, and other ‘routine-oriented’ athletics, exhibit expressive characteristics and occasionally incorporate bodily movement coordinated to musical accompaniment."\textsuperscript{109} In contrast, "[t]eam sports, such as basketball, baseball, hockey, football, and soccer do not possess the essential artistic and innovative processes that are readily apparent in literature, music, dance, or drama."\textsuperscript{110}

The first error to be highlighted in this contrast is the lack of a requirement in the Act for an artistic nature of a choreographic work. Although explicitly undefined by the statute, as Nimmer has illustrated, based on a legislative intent of broadening the scope of copyright coverage available to choreographic works, protection for these works may exist regardless of dramatic content or performance.\textsuperscript{111} This conclusion is not surprising given Justice Holmes's attempt to avoid creating a standard of judicial determination of artistic content.\textsuperscript{112} Accordingly, since dramatic content or performance is not a statutory necessity for protection of a choreographic work, the fact that many figure skating routines are expressively coordinated to music does not provide protection for the figure skating routine while excluding protection for the football play simply because it does not exhibit dramatic content and is not set to music.

\textsuperscript{107} See \textit{id.} at 716. See also \textit{NIMMER, supra} note 79 (dramatic or artistic content is not a requirement for copyrightability of a choreographic work).

\textsuperscript{108} Griffith, \textit{supra} note 103, at 716.

\textsuperscript{109} \textit{Id.} at 716-17.

\textsuperscript{110} \textit{Id.} at 716.

\textsuperscript{111} \textit{NIMMER, supra} note 79, § 2.07 [B].

\textsuperscript{112} \textit{Bleistein}, 188 U.S. at 251-52.
Furthermore, it is a gross misstatement to suggest that football does not possess innovative processes akin to literature, music, dance, or drama that are learned through countless hours of rehearsal, practice, and preparation. On the contrary, football is rampant with innovation, from individual plays and formations to ground breaking offensive systems like Bill Walsh's "West Coast Offense." Furthermore, these plays, formations, and systems are mastered through numerous practices mimicking the rehearsal of a stage play with lines of dialogue replaced by coordinated physical positioning or mimicking the preparation of a gymnastics routine with individual physical movements and positioning replaced by coordinated team actions.

Although individual football plays would seem to be protectible as seemingly no different than the protected dance movements of Balanchine's "The Nutcracker," able to be diagrammed in manners similar to dance steps, many would argue otherwise. In 1984, two Texans, James R. Smith and Joey Lozano, registered the I-Bone formation, a cross between the Power-I and Wishbone formations, with the U.S. Copyright Office. After attempting to persuade various coaches to utilize the formation and its plays, and after publishing an article describing the I-Bone formation in Texas Coach magazine in November 1984, Smith and Lozano considered a suit against the University of Colorado for allegedly infringing on the registered copyright. As the suit never proceeded for a judicial opinion, there is no clear precedent illustrating the strength of this copyright. However, it has been argued that the scope of the copyright would protect only the "I-Bone" name and possibly the printed copies of the plays that the two men designed.

As Julia Huff, an examiner in the U.S. Copyright Office, remarked when interviewed in 1989, "game plays themselves are not copyrightable. They're considered ideas." However, dismissal of game plays as mere ideas fails to consider the possibility of protection for original football formations and plays as

113. Griffith, supra note 103, at 716.
115. Football plays can be described on paper in ways analogous to dance steps. "Under the 1909 Act the Copyright Office accepted deposit of qualifying choreographic works in the form of a verbal description, dance notation, pictorial or graphic diagrams, or a combination of these." Nimmer, supra note 79, § 2.07 [C].
117. Id.
118. Kukkomen, supra note 103, at 811.
120. Id.
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choreographic works similar to dance steps.\textsuperscript{121} Although no official determination was made on this question or the status of plays and formations as protectible ideas, the I-Bone situation remains particularly important in regards to scripted plays, as it may highlight one potential flaw in the application of copyright law to the game of football.

Finally, the suggestion that team sports cannot be subject to protection due to a nature of improvisational performance and reaction to other players cannot be supported. It cannot be denied that often in football, despite exhaustive preparation, things do not always go as planned. The seemingly perfect running play may be stuffed for a four-yard loss, while a "busted play" may suddenly and shockingly evolve into an eighty-yard touchdown run. However, this basic scenario is not unique to adversarial team sports. Even the most extensively rehearsed dramatic play may often become reactive. When one actor misses a line, the others on stage must immediately react to the unexpected occurrence and carry on with the dialogue or fill gaps with improvisation. Similarly, the carefully crafted skating routine often involves the unexpected occurrence of a fall, requiring the skater to adjust to the circumstance and continue with the routine. It would be ridiculous to argue that the stage play or skating routine was no longer copyrightable because of an unexpected occurrence requiring improvisation. Therefore, the football play should be treated no differently.

V. WHY GAME SCRIPTS CAN BE COPYRIGHTED

Even if the individual football play is deemed merely an uncopyrightable idea or fact, despite the seemingly clear justification for its protection as a choreographic work, a strong argument still exists for the copyrightability of the play script. Based on the manner in which the play script is typically created, copyright protection as a derivative work or compilation is available.

A. Originality of the Football Play Script

The first question to be considered in analyzing the football play script is whether it is an original work of authorship according to the Copyright Act.\textsuperscript{122} Based on relevant decisions, an original work of authorship is an "original intellectual conception,"\textsuperscript{123} "irreducible, ... [and] one man's alone,"\textsuperscript{124}

\begin{itemize}
\item \textsuperscript{121} Id. at 7-8.
\item \textsuperscript{122} 17 U.S.C. § 102(a).
\item \textsuperscript{123} Burrow-Giles, 111 U.S. at 58.
\item \textsuperscript{124} Bleistein, 188 U.S. at 250.
\end{itemize}
"something more than a 'merely trivial' variation," and possesses "at least some minimal degree of creativity." The Baltimore Orioles court noted that the minimal degree of creativity needed can be found in the complex decisions that broadcasters make in producing a sports telecast involving which camera angles to use, when to switch to a different shot, and the external information to include such as statistics, graphics, or diagrams. Considering the low bar of the originality requirement, it is not unreasonable to posit that aspects of sporting events can quite easily possess the minimal creativity required for copyright protection.

The football play script represents another example in the sports world capable of satisfying the originality requirement of copyright. Like the cameraman or television producer, the football coach must make many creative decisions in producing the script. In creating the script during the week leading up to the game, the coach must decide what plays should be included, the personnel packages that will be utilized for each play, and the order in which they will be organized into the script. Furthermore, during the game, the coach remains creative, making adaptations to the script and other improvisations in accordance with the course of the game. Accordingly, based on the creativity of the coach in the fashioning and implementation of the play script, the minimum requirements of originality are satisfied.

B. Fixation in a Tangible Medium

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. A work consisting of sounds, images, or both, that are being transmitted, is “fixed” for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

Football play scripts meet the bar for fixation in a number of ways. The actual script is fixed in a physical and tangible form in various ways, some in a single plastic sheet of twenty-five offensive plays, with others composed on two sheets of paper, divided into columns. These physical scripts,
translated on paper, are no different in the effect of fixation than any of the legendary dramatic scripts of such famous playwrights as William Shakespeare, Sophocles, Arthur Miller, Neil Simon, Samuel Beckett, or even Oscar Wilde, the focus of Burrow-Giles.  Just as with the scripts written by these authors, once on paper, football play scripts can be read and are sufficiently permanent and able to be perceived for greater than a transitory time when engaged by the competent reader. Additionally, due to the extensive use of videotaping of football practices and the telecasts of football games in the expansive sports broadcasting industry, the performance of these scripts may be quite easily "perceived, reproduced, or otherwise communicated for a period of more than transitory duration." Therefore, regardless of whether one considers the physical script on paper or video of the script in performance, it is clear that any argument against the ability of the play script to be properly fixed in a tangible medium should fail.

C. Idea/Expression Dichotomy

Section 102(b) of the statute specifically excludes facts, ideas, processes, or systems from copyright protection. As Feist noted, "The most fundamental axiom of copyright law is that '[n]o author may copyright his ideas or the facts he narrates.'" If dismissal of plays as unprotectible facts is the correct interpretation, this language poses a serious threat to potential claims such as those considered by Smith and Lozano regarding the I-Bone formation. No protection would likely be provided to them for the I-Bone formation or its associated plays if these truly represent ideas of the game of football that are unprotectible under the statute.

However, this possibility should not necessarily preclude protection for the play script. New plays or formations included in any coach's script might not be able to be protected under the statute if they are simply the coach's ideas. Similarly, existing formations such as the Pro Set, I, Wishbone, Flexbone, or Shotgun formations, or familiar offensive plays such as the Fullback Dive, Student Body Left, Triple Option, Counter Lead, or

131. See generally 111 U.S. 53 (1884).
132. See generally Balt. Orioles, 805 F.2d 663.
134. 17 U.S.C. § 102(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." Id.
136. See generally Neff, supra note 116; Kukkomen, supra note 103.
Quarterback Draw could not be eligible for protection by copyright as mere facts of the game of football existing within the public domain. If the critics are correct, the reasons for exclusion are simple. These facts of football represent no creativity on the part of the coach, fail the originality requirement, and also find exclusion in the language of the statute.

D. Derivative Works and Compilations

However, despite the possible inability to copyright football plays themselves, it is plausible to argue that game scripts could find copyright protection as derivative works or compilations. Either of these protectible categories appears to have applicability to the play script.

According to Feist, "A factual compilation [displays the requisite originality and] is eligible for copyright if it features a [truly unique] selection or arrangement of facts. . . ." It is even possible for two different authors to produce the exact same compilation without infringing on a copyright. As long as the compiler's selection and arrangement of the facts is achieved completely independently of an earlier work and does not amount to a simple copy of that work, protection will be available. Football play scripts are firmly entrenched within these boundaries.

The coaching staff typically creates the script after watching hours of game film of the opponent's previous games against this coach's team or other teams. Coaches then take account of what plays were successful against the various defenses run by the upcoming opponent and select similar plays and formations from their own playbook to be incorporated into that week's script. This creation of the script is akin to the compilation of facts by any

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137. A derivative work is defined as "a work based upon one or more preexisting works, such as a translation, . . . abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted." 17 U.S.C. § 101.

138. A compilation is "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." § 101.

139. Feist, 499 U.S. at 350.

140. Id. at 358.

141. Phil Fulmer, Scouting the Opposition, in American Football Coaches Association, The Football Coaching Bible 291 (2002). See Jon Gruden & Vic Carucci, Do You Love Football?!: Winning with Heart, Passion, and Not Much Sleep 66 (2003) (describing former University of Tennessee assistant coach and current University of Pittsburgh head coach Walt Harris "watch[ing] those reels over and over for hours upon hours upon hours.

other author, including the compiler of the telephone directory data in *Feist*. As in *Feist*, the coach then makes a number of creative choices regarding the specific selection of which facts, in this case specific plays, to include in the script and the particular order in which to arrange them. Like the producer of a sports television broadcast, the coach also makes a number of important decisions satisfying the minimal degree of creativity required for copyright protection. The same is true if the script is viewed as a derivative work. By watching films of other teams in their games against the upcoming opponent, the final draft of the script can be seen as a derivation, transformation, or adaptation from the script followed by that team in its game. As long as the coach has not specifically copied the script directly, injecting no specific creativity in its arrangement or the selection of its included plays, the script will satisfy the minimal creativity requirement for protection.

Accordingly, independently derived game scripts can, at the very least, be protected by a thin copyright. Certainly then, these scripts should be protected from direct copying by opposing coaches. The plays and formations included in the script, though, are not shielded by the thin copyright. Rather, these plays and formations, public domain facts of the game of football, can be used by another coach in the preparation of his script, provided that they are not arranged in an identical manner by virtue of a simple copy.

VI. POTENTIAL RAMIFICATIONS OF COPYRIGHTING PLAY SCRIPTS

If play scripts can be protected as copyrightable compilations or derivative works, this protectability could highlight potential flaws in the law as it currently exists and have a destructive impact on the future of football in a variety of ways, potentially raising questions about the integrity of the game and fueling fears that courts could become overly intrusive in the outcomes of games.

The following example is illustrative. If the script can be protected as argued, one can imagine the Monday morning newspaper headline, “Bears Sue Packers for Alleged Copyright Infringement.” At first glance, this headline seems to present a ridiculous scenario, but this suggestion is not entirely without merit. If the script may in fact be protected, if even by a thin compilation copyright, it must be expected that the owner of the copyright will turn to the courts to uphold the sanctity of that right. The question then

143. *See generally Baltimore Orioles, Inc.*, 805 F.2d 663.
144. *See § 101 for the statutory definition of a derivative work.*
146. *Id.* at 350-51.
becomes, how will this copyright be upheld?

To establish infringement, the owner of the copyright, in this example the head coach of the Chicago Bears, has the burden of proving two important elements: "(1) ownership of a valid copyright; and (2) copying of constituent elements of the work that are original." The first element would be easier to prove. A coach could prove ownership of a valid copyright by demonstrating independent creation of the script with a minimal amount of creativity in the selection, arrangement, and compilation of the plays. The second element of infringement may be more difficult to prove. The compilation copyright does not prohibit protection of two identical works as long as the second was achieved through an independent creation and did not merely reflect the simple copying of the original script. If the head coach could demonstrate that the sequence of plays run by the opposing team mirrored exactly the sequence run by the coach's team in a previous game, this element might be proven with the demonstration of game film from which the opponent directly copied the coach's script. However, difficulty arises given the style of preparation utilized by teams at the highest levels of the game in the NFL and college football.

Coaches compile enormous amounts of game film of their opponents' games as well as their own team's games and practices. In the week leading up to a particular game, coaches will review this film, editing it and creating a new film to be studied by the entire team and its coaches as preparation for the upcoming week's game. The film may include bits and pieces of footage from opponents' games to particularly highlight the opponents' strengths and weaknesses. The coaching staff will then typically create the week's play script after reviewing this film, selecting those plays that it feels are most likely to be effective in the upcoming game, while

147. Id. at 361 (citing Harper & Row, 471 U.S. at 548).

148. See Fulmer, supra note 141, at 291. "Scouting an opponent ... by watching game films is standard at all levels of football." Tom Flores & Bob O'Connor, Coaching Football 183 (1993). Most high school and college teams, and all professional teams, take this scouting data and enter it into a computer for more efficient use. See generally id. at 173. Many major college football programs, such as the University of Tennessee, watch every practice, drill, or game from multiple camera angles. See Gruden & Carucci, supra note 141, at 65.

149. Bricknell & Tines, supra note 142, at 21. "Starting on Sunday and concluding Tuesday, we put together our offensive game plan ... [This procedure] requires a great deal of film work, an analysis of our upcoming opponents' personnel and what they are attempting to do defensively, and an evaluation of the problems that we can create versus their scheme." Id.

150. "By the use of competent scouting and film breakdowns, a coaching staff can determine a profile of the strengths and weaknesses of the opponent." Etheridge, supra note 142, at 28. See Gruden & Carucci, supra note 141, at 61 (describing the process of cutting and splicing together segments of game film from a variety of sources to serve a particular teaching purpose).
excluding those deemed less helpful for that week's game. Therefore, because scripts typically are derived and compiled from data taken from a variety of sources, it could be rather difficult for the Chicago coach, or any other coach, to prove that the opponent had not created an identical script completely independently from the Bears script by the creative and selective arrangement of plays into the opponent's own script.

However, although difficult to prove, this burden is not an impossible impediment. Consider, for instance, the following example. Assume an NFL game between two teams, the Chicago Bears and the Philadelphia Eagles. Further assume that both the Bears and Eagles run the same basic defense, a base 4-3 alignment with a Cover 2 scheme. In this hypothetical game, the Chicago Bear offense has particular success against the Eagle defense following a script originally and independently created by the Chicago head coach. It would not be entirely ridiculous to suggest that in watching film of the Bears-Eagles game in preparation for the upcoming week's game in Chicago against the Bears, the head coach of the Packers might simply decide to copy exactly the Bears' script to use with his offense in the upcoming game. If the Bears' script had been so successful against the base 4-3 alignment with a Cover 2 scheme of the Eagles, it would be reasonable for the Packers' coach to assume that the same script for his offense might be successful against the Bears' base 4-3 alignment with a Cover 2 scheme. Therefore, in this situation, the likelihood of a direct copy would be high and could be readily proven. Although it is a virtual certainty that the Packers' coach would not have access to the physical copy of the Bears' script, copying could potentially be shown based on film of the Bears-Packers game and a showing of access to the Bears' script in film format and substantial similarity between the Packers' and Bears' scripts. Accordingly, if the script can in fact be protected by a thin compilation copyright, the court would have a duty to uphold that right.

However, although copying could be proven, other problems might still abound. The second element of infringement requires proof of "copying of constituent elements of the work that are original." The question of originality having already been discussed previously in detail concerning compilations and derivative works and the real possibility of copying having just been illustrated, the question turns to exactly what determines "constituent

151. See generally JOHN D. MASSENGALE, COACHING THE PRO 4-3 DEFENSE (1976); AMERICAN FOOTBALL COACHES ASSOCIATION, THE FOOTBALL COACHING BIBLE (2002); AMERICAN FOOTBALL COACHES ASSOCIATION, DEFENSIVE FOOTBALL STRATEGIES (2000).

152. Three Boys Music Corp. v. Bolton, 212 F.3d 477 (9th Cir. 2000) (stating in a case of alleged infringement of a copyright in music that without direct evidence of copying, appellee had to prove appellants had access to appellee's work and that the two works were substantially similar).

153. Fiest, 499 U.S. at 361.
elements of the work.” 154 Constituent is defined either as “serving to compose or make up a thing,”155 or “(a component) that helps make up or complete a unit or a whole.”156 In the discussion of the script, these definitions can point to various things. Are the constituent elements the plays themselves, are they the specific arrangement of the plays in the script, or are they some basic portion of the script? Unfortunately, this is a question not definitively answered. The easiest answer, given the apparent uproar to the possibility of protection for individual plays, is that the constituent elements of the scripts are not the plays themselves; although in the meaning of the term, according to either definition, there is no script without the plays. However, as we have seen previously, it is possible that football plays cannot be protected by copyright and merely represent facts or ideas that belong only to the public domain.157 Another easy response is the suggestion that, like the book in Baker v. Selden,158 the complete specific arrangement of the plays in the script embodies the entire original compilation and would represent a constituent element of the compilation copyright. The trickier question involves a consideration of whether some smaller portion of the script could be considered a constituent element.

The sufficient originality of the script having been previously demonstrated, it is important to note that the entire script as crafted and compiled during the week of preparation may exceed the scope of what plays are actually called during the game. According to Bill Walsh, a coach may not choose to run all twenty-five plays in order, running only roughly fifteen of the twenty-five scripted plays.159 How long does the script have to be, fifteen plays, twenty plays, or twenty-five plays, in order to be copyrighted? Furthermore, how much of the script must actually be used in the game, three plays, five plays, ten plays, or more? Unfortunately, there appear to be no clear answers to these questions. The statute is silent, and no analogous caselaw appears applicable to answering this question. However, despite this ambiguity, based on the standards of copyright law, it seems clear that play scripts should be able to rise to the level of copyright protection. The answers to the lingering questions of infringement and enforcement may simply be left to the first court to decide a case involving infringement of these scripts.

154. Id.
156. BLACK’S LAW DICTIONARY 134 (2d ed. 2001).
158. 101 U.S. 99 (1879).
159. See Miller, supra note 1.
Just how damaging would protection of play scripts be to the integrity of
the game of football? In some respects, protection would be entirely
catastrophic, but in others, it would not be nearly as damaging as critics might
argue. The possible extent of judicial involvement can be illustrated by
returning to the statute. Section 502 of the Act discusses the most likely
remedy for infringement on the copyright of the script, that of
injunction.\footnote{160. 17 U.S.C. § 502.}

Under section 502(a), the court has the power to grant temporary and final
injunctions deemed "reasonable to prevent or restrain infringement of a
copyright."\footnote{161. § 502(a).}

Although an award of damages would be difficult to obtain in
this case, due to the difficulty of quantifying the actual damages suffered, an
award of additional profits would be possible. The plaintiff would only be
required to provide proof of the infringer's gross revenue.\footnote{162. § 504(b).}

It would be the
burden of the infringer to prove deductible expenses and that portion of profits
due to factors other than the infringed play script.\footnote{163. \textit{Id.}}
Similarly, the injunctive
relief, even if granted, may do little to remedy the problem. For instance, if
the opponent had beaten the plaintiff team and coach using an infringing
script, no redress will occur unless the court enters the business of overturning
finalized sports contests, an outlandish and unsettling suggestion.
Furthermore, any suggestion that the sport could be damaged by a coach's
claim that a specific play belongs only to him or his team and may not be used
by the rest of the league or sport, thereby impacting innovation and
competition, reveals a lack of knowledge of the idea/expression dichotomy so
crucial to this copyright question.

What remains then, is merely the question of what the possibility of
protecting football play scripts indicates about current federal copyright law.
Based on the detailed analysis of the football play script, it seems that
coverage of federal copyright law has exceeded its intended scope to become
overly broad. This is not to suggest that copyright law should be abolished as
having become entirely ineffective. On the contrary, copyright law has a
constitutional objective "to promote the Progress of Science and useful
Arts."\footnote{164. \textit{Feist}, 499 U.S. at 349 (quoting U.S. Const. art. I, § 8, cl. 8).}

This promotion and protection of original works has proven to be an
effective tool and essential component of our culture for decades. America
and the World would be vastly different places if every creative endeavor were
a free-for-all in which no protection was afforded to the original expressions
produced by various authors attempting to function in a type of commercial
anarchy. However, although copyright protection is clearly needed, the law as
it currently exists is exceedingly flexible in the protection that it is able to provide to such a huge range of original works. The play script is an excellent example. The argument for protecting the play script based on the standards of copyright law is a strong one. It therefore illustrates the possibility of the Copyright Act providing a means for increased judicial involvement in the world of sports. This particular potential avenue for increasing involvement threatens that which so many fans love about the sports arena. Contests, matches, tournaments, and games are meant to be decided on the field of play by competitors, not by external forces and the judiciary. Accordingly, sports and the courts must take care to not overstep the bounds of the Federal Copyright Act, damaging both the law and the game in the process.

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