Be a Good Sport and Refrain from Using my Patented Putt: Intellectual Property Protection for Sports Related Movements

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I. INTRODUCTION

In an age where the average athlete in Major League Baseball annually receives a salary in excess of $1.3 million,[1] the protection of sports moves and related actions have increasingly been sought through existing intellectual property laws. While the average sports fan finds such a notion ridiculous, there are some strong arguments in its favor. The Constitution authorized Congress to pass laws to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[2] The Supreme Court and other courts have read this to include a wide variety of subject matter which could not have been foreseen by the Founding Fathers. Sports methods and other processes involving movement of the human body have received protection by the Patent Office and sports formations have been registered with the Copyright Office. This article will explore the various mechanisms under the guise of intellectual property law which may be able to protect athletic movements in the future.

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1 See CNN MONEYLINE WITH LOU DOBBS, Transcript # 98031900V19 Mar. 19, 1998; Michael Jordan has been the highest paid athlete since 1990 by having received over $300 million in salary and endorsements (approximately $78 million was received in 1997 alone). Mike Tyson is a distant second at $182 million. Peter Spiegel, Sports Top 40, p. 180, FORBES, December 15, 1997; Sergei Federov is on course to receive $28 million dollar this season from the Detroit Red Wings after holding out for more than half of the regular season. Off the Wire, THE ARKANSAS DEMOCRAT-GAZETTE, Feb. 27, 1998 at C2.

2 U.S. Const. art. 1 § 8.

II. ALTERNATIVES TO PATENT PROTECTION

A. *Copyright Protection*

Copyright, like other areas of intellectual property law is based on a fundamental principle that limited protection of human expression is an incentive to creativity.[3] The Copyright Act of 1976 extends copyright protection to original works of authorship fixed in any tangible medium of expression.[4] This protection grants the owner of a valid copyright a cause of action not only against literal word for word copying, but also against substantial non-literal copying.[5] Copyrights are arguably the narrowest area of intellectual property law, but it is possible that they may be used to protect various types of sports moves.

In a case involving the copyrightability of a circus poster, Justice Oliver Wendell Holmes stated: "[If certain 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."[6] Should Justice Holmes' turn of the century viewpoint be interpreted to include sports moves? Unquestionably, sports events and athletes are of great interest to the public as evidenced by professional athletes' salaries, so the focus then shifts to whether sports moves contain aesthetic and educational value. One need only watch a couple of Nike commercials featuring Michael Jordan to recognize that there is a high level of aesthetics involved in the way he leaps into the air to dunk a basketball.

The Copyright Act specifically enumerates choreographic works as included in the subject matter of copyright.[7] Choreography protection has typically been utilized to protect dance movements such as those which would be included in a ballet.[8] While basic steps are not protected, elaborate combinations of movements can warrant protection.

3 See generally Mark A. Lemley, The Economics of Improvement in Intellectual Property Law, 75 TEX. L. REV. 989, 994 (1997); Factors besides economic motives, such as moral rights have also had a significant impact on the creation of intellectual property laws.

4 17 U.S.C. § 102

5 See Ansehl v. Puritan Pharmaceutical Co., 61 F.2d 131, 137 (8th Cir. 1932).

6 Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 252 (1903); See also Robert M. Kunstadt, F. Scott Kief and Robert G. Kramer, Are Sports Moves Next in IP Law? THE NATIONAL LAW JOURNAL, May 20, 1996 at C1.

7 Robert Kunstadt, Are Sports Moves Next in IP Law? THE NATIONAL LAW JOURNAL, May 20, 1996 at C1.

8 Photographs of the choreography accompanying the Nutcracker ballet infringed copyright. Horgan v. MacMillan, 789 F.2d 157 (2nd Cir. 1986).

Most sports moves are more than a single step or gesture which would suggest that an analogy to choreography would be appropriate.[9]

Routine-oriented sports such as free-style gymnastics and synchronized swimming are much closer in nature to ballet than would be a sport such as hockey. Gymnasts and skaters with their coaches devise complex sets of moves which are intended to be performed with a high level of accuracy during competitions. These types of athletes are judged in large part on the aesthetic portions of their performances and often incorporate elaborate costumes, props, music and special lighting into their routines.[10] Athletes in routine-oriented sports do not face direct competition as do hockey players or other athletes which participate simultaneously and head to head. Wayne Gretzky may have a special backhanded shot which enables him to score more often, but his performance is always contingent on the movements of the players on the opposing team. Routine-oriented athletes do not face the obstacle of an opposing team and are able to repeatedly practice their routines to help assure the accuracy of their desired end product as compared to their predetermined choreographed moves. It is in this respect that sports such as figure skating are similar to traditional dance which often is completely choreographed with little opportunity for improvisation offered to the individual dancers.[11]

An interesting example of a football play formation protected under the guise of choreography occurred in the late 1980s. In 1985, a Texan registered the I-Bone football formation with the Copyright Office.[12] This federally protected team position is a cross between the power I formation and the wishbone formation and the creator co-authored an article in Texas Coach magazine encouraging its use.[13] The "creator" of the I-bone saw the University of Colorado football team use the formation in late 1988 and and as a result sent several letters to the team which rather than threaten suit, stated that he would like to show the team how to properly use the formation.[14] If the I-bone registrants had opted to pursue the so-called infringement in court, they

9 Robert Kunstadt, Are Sports Moves Next in IP Law? THE NATIONAL LAW JOURNAL, May 20, 1996 at C1.

10 Wm. Tucker Griffith, Beyond the Perfect Score: Protecting Routine-Oriented Athletic Performance with Copyright Law, 30 CONN. L. REV. 675, 678 (1998).

11 Still photographs of a ballet were found to infringe the registered choreography of a ballet. Horgan v. MacMillan, 789 F.2d 157 (2d. Cir. 1986).

12 Craig Neff, Whose Bone Is It, Anyway?, SPORTS ILLUSTRATED, January 23, 1989, at 7; Registration Number: TXu215357, Date Registered: October 15, 1985 (West 1998).

13 Id.

14 Id.

would have faced a serious hurdle. Unlike patent law, the Copyright Act does not consider independent unknowing derivation of a work completely identical to a previously registered work infringement.[15]

The I-Bone formation brings about an important distinction in copyright law. Only the formation is protected, and not the actual play which results from the team lining up in a certain manner. The idea/expression dichotomy has been justified because the Copyright Act does not extend coverage to an idea, procedure, process, system or method of operation.[16] The choreography of a marching band half-time show is copyrightable largely because it does not have the random element that sports events include and are adequately fixed to be reproduced. Like other improvisational performers, athletes will almost always rely on a core library of moves and strategies. An athlete's individual moves can be analogized to ideas in which by themselves are uncopyrightable, but, when combined, may constitute a sufficient copyrightable expression.[17] The "fact/expression dichotomy" is a bedrock principle of copyright law that "limits severely the scope of protection in fact-based works."[18] "'No 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.'"[19] John Coltrane could not garner protection for an unrecorded free jazz solo, nor can an athlete gain protection for a simple move under copyright.[20]

15 Alfred Bell & Co. v. Catalda Fine Arts, 191 F. 2d 99 (2nd. Cir. 1951); See also Feist Publications Inc. v. Rural Telephone Services, 499 U.S. 340, 346 (1991).

16 17 U.S.C. § 102(b).

17 In terms of figure skating, the various moves involved in a skating performance constitute unprotectible 'ideas.' However, one may compose a combination of those ideas to form a routine. An expressive form of those ideas is created once the entire expression is reduced to a tangible form—i.e., a skater performs the routine with simultaneous recording thereof, or the routine is notated into written form. Thus, while the individual camel spin may not be protected due to its form as an 'idea,' an entire skating routine comprising multiple 'ideas' is an expression of a protectible work of authorship. Wm. Tucker Griffith, Beyond the Perfect Score: Protecting Routine-Oriented Athletic Performance with Copyright Law, 30 CONN. L. REV. 675, 698 (1998).

18 Feist Publications, Inc. v. Rural Tel. Service Co., 499 U.S. 340, 350, 113 L. Ed. 2d 358, 111 S. Ct. 1282 (1991).

19 Id. (quoting Harper & Row, Inc. v. Nation Enter., 471 U.S. 539, 547–48, 85 L. Ed. 2d 588, 105 S. Ct. 2218 (1985)).

20 The Copyright Act's anti-bootlegging provision, 17 U.S.C. §1101 only prohibits the recording or transmission of the musical performance itself. It does not prohibit an audience member from recreating improvisational works from memory and using them in other works. Gregory S. Donat, Fixing Fixation: A Copyright With Teeth for Improvisational Performers, 97 COLUM. L. REV. 1363, 1366, 1367 n. 15 (1997).

So what value could one place on a team lining up in a certain formation? What kind of remedies would have been realistically available to the creator of the I-Bone formation if he had decided to judicially pursue the University of Colorado?[21] The author could have requested an injunction to permanently restrain the Buffaloes from using the protected formation.[22] Statutory damages would have likely been the only monetary remedy available since the formation was registered before its subsequent use and the creator, a veterinary dermatologist, probably did not suffer any actual damages.[23]

1. Does Taping Fix the Problem?

When a football game is covered by four television cameras, with a director and crew switching from various shots and positions on the field, the activities of the director and camera persons constitutes authorship under the Copyright Act.[24] The production behind a sports event contains sufficient creativity, originality and if simultaneously recorded can result in a copyrightable audiovisual work. The more difficult question is whether the movements of the players on the field is a copyrightable work of authorship.[25] The court in Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n.,[26] found that baseball players' right to publicity claims for their performances in the athletic events is secondary and thus preempted by the team owners' copyright in the broadcast of the games. The court did conclude in a footnote that "the Players' performances possess the modest creativity required for copyrightability"[27] but decided the case on other factors. Professor Nimmer argues that four factors weigh against the Baltimore Orioles Court granting protection to athletic events: 1. The conclusion in the footnote is unsupported by any authority; 2. the legislative history of the Copyright Act of 1976 does not include athletic performances

21 Colorado was defeated by Oklahoma 17-14. The coach of Colorado suggested a possible remedy by naming the formation after the creators. Craig Neff, Whose Bone Is It, Anyway?, SPORTS ILLUSTRATED, January 23, 1989, at 7.

22 17 U.S.C. § 502(a).

23 17 U.S.C. § 504; Craig Neff, Whose Bone Is It, Anyway?, SPORTS ILLUSTRATED, January 23, 1989, at 7; It is possible that the playmaker/veterinarian could have received costs and attorneys fees under 17 U.S.C. § 505.

24 1 NIMMER ON COPYRIGHT § 2.09 (1997); H.R. No. 94-1476 at 52, reprinted in 1976 U.S.C.C.A.N. at 5665.

25 Id.

26 805 F.2d 663 (7th Cir. 1986).

27 Id. at 669 n.7.

within the enumerated illustrations of copyrightable subject matter;[28] 3. the court is inconsistent regarding its analysis as to the sufficiency of creativity of sporting events; and 4. the court overemphasized the importance of commercial value,[29] stating that commercially valuable activities such as heart surgery and the oversight of a nuclear power plant are not remotely capable of copyright protection.[30] Similar to a sports event, one court has held that a Christmas parade is not a work of authorship entitled to copyright protection.[31]

Commentator Donat has pointed out an apparent loophole in the Copyright Act in his call for increased protection of improvisational works.[32] By recording an improvisational performance, two potentially copyrightable works are created. First, there is the intangible musical composition, dramatic work, choreographic work and perhaps even an athletic event (the 'underlying work'). Second, the recording itself may be protected. In the case of improvisational works, the underlying and secondary works are created simultaneously and embodied in a single fixation.[33] If Cher were to release an aerobics video which materially reproduced the moves contained in a Jane Fonda tape, then she would be liable for copyright infringement.[34]

Since an underlying work gains federal copyright protection at the moment of its fixation, simultaneous recordings by third parties may be outside of the exclusive rights granted to the copyright holder. Both parties are simultaneously fixing their version of the performance and the lack of a senior right does not prevent the bootlegger from making copies of the performance.[35] The Act's legislative history suggests that the statute prohibits third parties from simultaneously recording events when the copyright holder, in addition to recording the event, transmits

28 We believe that the lack of case law [regarding copyrightability of athletic events] is attributable to a general understanding that athletic events were, and are, uncopyrightable. Indeed, prior to 1976, there was even doubt that broadcasts describing or depicting such events, which have a far stronger case for copyrightability than the events themselves, were entitled to copyright protection. Indeed. . . .Congress found it necessary to extend such protection to recorded broadcasts of live events. NBA Properties v. Motorola, Inc., 105 F.3d 841, 847 (2nd. Cir. 1997).

29 Illustrative of the importance that courts have placed on commercial value since Justice Holmes' opinion in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 252 (1903).

30 1 NIMMER ON COPYRIGHT § 2.09 (1997).

31 Prod. Contractors, Inc. v. WGN Continental Broad. Co., 622 F. Supp. 1500 (N.D. Ill. 1985).

32 Gregory S. Donat, Fixing Fixation: A Copyright With Teeth for Improvisational Performers, 97 Colum. L. Rev. 1363, 1384–89 (1997).

33 Id. at 1385.

34 Andrew Ford, Whose Move is This?, THE TIMES July 30, 1996, at Features.

35 Id. at 1387. State anti-bootlegging laws do give some protection to unauthorized third party recordings, typically with musical performances.

it.[36] The requirement of transmittal is only helpful to large scale professional athletics and of little value to recreational athletes.

2. What Function does that Play?

Copyright does not extend protection to the functional aspects of an article.[37] When the utilitarian aspects of the subject matter in question are not capable of independent existence, then those aspects are denied coverage.[38] Shooting a three point basket functions so as to increase the score of one team in a basketball game, but this is not the intent behind the functionality exclusion. The exclusion of functional aspects in the Copyright Act is meant solely to prevent overreaching protection of a useful article which would in effect prevent others from making similar matter. Sports are merely entertainment and moves which meet the originality and subject matter requirements of the Copyright Act should not be excluded on the basis of functionality.[39]

B. *The Right of Publicity*

The state law right of publicity grants entertainers or public figures exclusive control over the commercial exploitation of their names, likenesses, or other aspects of their personae.[40] Rather than claiming some sort of misappropriation of a sports move in which he or she created, an athlete would have to show that their likeness is being used to endorse a product of some sort.[41] Showing misappropriation may not be very difficult since it is becoming common for major athletes to be highly visible to the public due to endorsement contracts which greatly exceed their annual salaries. The increasing exposure of the public at large to superstar athletes via their commercials has heightened their celebrity status and their association with various moves and or phrases.

36 Id. at 1388 referencing H.R. Rep. No. 94-1476, at 52, reprinted in U.S.C.C.A.N. 5659, 5665.

37 See 37 C.F.R. § 202.10(c).

38 See Esquire, Inc. v. Ringer, 591 F.2d 796 (D.C. Cir. 1978) (the design elements of outdoor lighting fixtures were to be incapable of independent existence as a copyrightable sculptural work apart from the utilitarian aspect); Cf. Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (2d Cir. 1980) (the sculptured design aspects of a belt buckle were found to be copyrightable).

39 Robert Kunstadt, Are Sports Moves Next in IP Law? THE NATIONAL LAW JOURNAL, May 20, 1996 at C1 (". . .games and sports are diversions and entertainment. . .the opposite of the performance of useful, functional work.").

40 Gregory S. Donat, Fixing Fixation: A Copyright With Teeth for Improvisational Performers, 97 COLUM. L. REV. 1363, 1371 (1997) referencing Melville B. Nimmer, The Right of Publicity, 19 LAW & CONTEMP. PROBS. 203 (1954).

41 "If a live broadcast is not based upon a work of authorship, as in the case of a sporting event, a parade, etc., then no statutory copyright could result from its reproduction." Production Contractors, Inc. v. WGN Continental Broad., 622 F. Supp. 1500, 1503 (N.D. Ill. 1985).

In Zacchini v. Scripps-Howard Broad. Co.,[42] the Supreme Court found that a human cannonball performer could recover for the unauthorized broadcast by a local television station of his entire act. The Zacchini decision is a narrow case which probably could not extend to a certain move by a sports team or individual since most sports events include a multitude of participants competing individually or as a team. The Court in Zacchini was undoubtedly influenced by the fact that Mr. Zacchini's entire act consisted of being shot out of the cannon and as such, the broadcats of his act was a "substantial threat to the economic value of that performance."[43] Televising a football formation or a certain style of putting or shooting a free throw basket would unlikely constitute a substantial threat to the economic value of a sports event. On the other hand, if the entire routine of a professional ice dancer was televised, it is possible that the broadcast could meet the Zacchini test.

Assuming that Julius Irving was the creator of the foul line slam dunk in the early 1970s, Michael Jordan's emulation of Dr. J's famous move in early Air Jordan commercials[44] and the NBA Slam Dunk contest[45] possibly constituted a substantial threat to the economic value of Dr. J's game films. The Slam Dunk Contest is arguably a significant turning point in the career of Michael Jordan since it resulted in boosting sales of Nike and Jordan's leverage with his shoe contract.[46] The game of basketball would have been severely hampered if players such as Jordan were restricted from performing certain moves. The question is then reduced to whether equating a certain athletic move with one's identity is sufficient to constitute a violation of an athlete's right of privacy (i.e. Kareem's Sky Hook, The Iron Sheik's Camel Clutch submission hold, The Icky Shuffle, the Fosbury Flop[47]).[48]

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42 433 U.S. 562, 97 S.Ct. 2849 (1977).

43 Id. at 575.

44 Randy Harvey, Clear the Dunkway, Michael Jordan is. . .Taking to Air; NBA Star Leaps into Profitable Shoe Market, LOS ANGELES TIMES, April 26, 1985, at C1.

45 Bob Sakamoto, Jordan's Dunk Shows Grand Time for Bulls, CHICAGO TRIBUNE, February 8, 1987, at C5.

46 Worldwide sales of Nike's Air Jordan XIII are estimated to surpass $300 million in the first year after their release. Jemele Hill, Jordan's latest deal is line of shoes with Nike, THE DALLAS MORNING NEWS, September 12, 1997, at 17B.

47 Patented Putt Sees Many Chipping Divots, WISCONSIN STATE JOURNAL, Aug. 24, 1997, at 3B.

48 Perhaps if the first Air Jordan commercial featuring a free throw line dunk was done with a robot rather than Michael Jordan then Dr. J may have had a cause of action under right of publicity at least in California. See White v. Samsung Electronics America, Inc., 971 F.2d (9th Cir. 1992).

C. *Trademark Protection*

Generally speaking, a trademark is a phrase or symbol adopted and used by a merchant to identify his goods and distinguish them from articles produced by others.[49] The Lanham Act defines a trademark as "any word, name, symbol, or device or any combination thereof (1) used by a person, or (2) which a person has a bona fide intent to use in commerce. . .to identify and distinguish his or her goods. . ."[50] Ownership of a trademark accrues when products bearing the mark are placed on the market.[51] The first to use a particular trademark in connection with specific goods gains its exclusive use.[52] Such use need not have gained wide public recognition and a single use may suffice for trademark rights if followed by continuous utilization.[53] Although federal registration is not required to assert a mark against other parties, registration allows for increased damages and advantageous evidentiary standards for the registrant.[54]

Trademark protection in the sports industry has typically been utilized to protect team logos and other related merchandising.[55] Revenues from licensing fan merchandise generates in excess of $10 billion annually to sports organizations in the United States.[56] The image of a wheel with a wing has long been the logo for the Detroit Red Wings[57] and as such, is sold on everything from hats, shirts and cumberbuns to fans across North America as is the logo of the National Basketball

49 15 U.S.C. § 1127; Clairol, Inc. v. Gillette Co., 270 F. Supp. 371 (E.D.N.Y. 1967).

50 15 U.S.C. § 1127.

51 See Blue Bell, Inc. v. Farah Manufacturing Co., Inc., 508 F.2d 1260 (5th Cir. 1975).

52 McClean v. Fleming, 96 U.S. 245, 24 L.Ed. 828 (1877).

53 Blue Bell,Inc. v. Farah Manufacturing Co., Inc., 508 F.2d 1260 (5th Cir. 1975) referencing Kathreiner's Malzkaffee Fabriken v. Pastor Kneipp Medicine Co., 82 F. 321 (7th Cir. 1897); Waldes v. International Manufacturers' Agency, 237 F. 502 (S.D.N.Y. 1916); Ritz Cycle Car Co. v. Driggs-Seabury Ordnance Corp., 237 F. 125 (S.D.N.Y. 1916).

54 Registration provides constructive notice to those who might later adopt the mark; such registration is prima facie evidence of the registrant's exclusive right to use the mark in commerce; the owner of a registered mark has the right to ex parte seizure of goods bearing a counterfeit mark and can limit exports of goods bearing the mark; the registrant has the right to treble damages and attorney fees for some cases of willful infringement; there are criminal penalties associated with infringement of a federally registered mark; and the mark becomes incontestable after five years on the Principal Register. Glen Weston, Peter Maggs, Roger Schecter, UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION, p. 37 (1992).

55 See generally Boston Professional Hockey Association, Inc. v. Dallas Cap & Emblem Manufacturing, Inc., 510 F.2d 1004 (5th Cir. 1975).

56 Anne M. Wall, Sports Marketing and the Law: Protecting Proprietary Interests in Sports Entertainment Events, 7 MARQ. SPORTS L.J. 77, 91 (1996).

57 See URL: http://www.detroitredwings.com.

Association, which has a silhouette of a player dribbling a basketball.[58] Pat Riley had some foresight when he sought trademark protection for the word THREE-PEAT after winning the NBA championship back to back to back with the Los Angeles Lakers.[59] Merchandise with THREE-PEAT has earned money from royalties for Riley from both the Lakers' and Bulls' three consecutive championship victories.[60] These are all examples of trademarks relating to an organization rather than an individual.

Kareem Abdul-Jabbar has sought several trademarks for the words "Sky Hook" and the image of the NBA point leader performing his famous shot.[61] The trademark is based on a silhouette of the player making his over the shoulder shot. This mark would protect the image of Kareem from being used on goods or in connection with services, but it would not grant Kareem a cause of action if someone physically used his "trademark" shot for financial gain.

In recent years, courts have recognized the influence of the information age on the public's increased visual identification of products and services.[62] As the World Wide Web continues to proliferate, it is likely that multiple image trademarks will be granted protection by the Trademark Office. Increasingly sophisticated web browsers combined with faster computers have permitted web sites to quickly display images on computer screens. If these multiple image logos collectively gain protection, rather than each image individually, it would be reasonable that sports moves could also gain protection. A series of six pictures of Kareem shooting his sky hook could be used in combination as in indication of the source of goods and thus should deserve protection.

Even if Kareem is unable to register his trademark, he might have protection under Section 43 of the Lanham Act. Section 43 of the Lanham Act specifically protects non-registered subject matter against:

(a)(1) Any person, who, on or in connection with any goods or services. . .uses in commerce any word, term, name, symbol, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which-

58 Robert Kunstadt, Are Sports Moves Next in IP Law? THE NATIONAL LAW JOURNAL, May 20, 1996, at C1; See URL:http://www.nba.com.

59 THREE-PEAT, Registration Number: 1977620 (Lexis 1998).

60 ABC WORLD NEWS TONIGHT, Transcript # 6093-7, May 9, 1996.

61 Craig Marine, All the copyrighted moves; It's not whether you win or lose, but if you can patent how you play the game, lawyers say, THE SAN FRANCISCO EXAMINER, June 23, 1996, at D1; See SKY HOOK, Serial Numbers: 74-593488 and 74-593669 (both were abandoned for lack of a statement of use LEXIS 1998).

62 See Edmund W. Kitch, Intellectual Property and the Common Law, 78 VA. L. REV. 293, 294 (1992).

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her commercial activities by another person, or shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.[63]

Protection under this section may be available for moves that are capable of indicating the source of a particular good or service.[64] This section of the Lanham Act arguably provides protection similar to the state law created right of publicity.

An example of such Lanham Act protection, imagine that after many months in the gym with a personal trainer, I shoot a commercial for my beef jerky company where in my ridiculous garb I jump off the third rope of a wrestling ring and drop a flying elbow on my opponent's head. While this reference may seem obscure to some, many would quickly associate my commercial with the series of Slim Jim commercials where wrestler Randy Macho Man Savage performs a similar elbow drop. The company that produces Slim Jim jerky sticks would have a strong case under Section 43(a) of the Lanham Act recited above. The similarity in my elbow drop to the Macho Man's may be seen to some as an endorsement of my beef jerky by Mr. Savage. If on the other hand, my commercial was for a lawn mower, then a likelihood of confusion as to the actual endorsement of my lawnmower would probably not exist. In addition, if I were in a wrestling match and used Mr. Savage's elbow drop, he probably would not have a cause of action against me since, although my activities are commercial in nature, my actions are not endorsing or otherwise associated with a product. This example of sports and pop culture is illustrative of the outer boundary where Lanham Act protection of a specific move would cease to exist.

D. *The Limitations of Copyright, Right of Publicity and Trademark Protection*

Copyright, trademark, and right of publicity protection only offer moderate to minimal protection for sports related movements. Copyright could only be utilized to prevent possible appropriators from copying movements which can be analogized to choreography. Further, the fundamental requirement that material protected under the Copyright Act be fixed in a tangible medium requires at minimum that the athletic performance is taped or scored. The right of publicity will only prevent

63 15 U.S.C. § 1125(a)(1).

64 Robert Kunstadt, Are Sports Moves Next in IP Law? THE NATIONAL LAW JOURNAL, May 20, 1996 at C1.

another from acting so as to severely reduce the economic value of an athlete's performance or from suggesting a false endorsement by an athlete. Similarly, trademark protection currently does not protect series of images but will give a cause of action for an athlete against one who has suggested a false sponsorship or endorsement of a good or service. Patent protection is the ideal area of intellectual property law for innovative athletes and those in sports-related industries. A patent can offer broader protection than the aforesaid areas of intellectual property and the rigorous examination process required to receive a patent help increases the likelihood of a court ordered patent enforcement.

III. PATENT PROTECTION

A. *Patent Eligibility of Sports Movements*

Section 101 of the Patent Act reads: "Whoever invents or discovers any new useful process, machine, manufacture or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor. . ."[65] A process differs from the other classes of statutory subject matter in that it "is not a structural entity but rather an operation or series of steps leading to a useful result."[66] The Supreme Court has given an expansive view of patent eligibility to "include anything under the sun that is made by man."[67] The Federal Circuit has read this to mean that inferring limitations into § 101 is improper where the legislative history behind the Patent Act is silent.[68]

Despite the language of Chakrabarty, laws of nature, natural phenomena and abstract ideas are non-patentable subject matter when claimed alone.[69] A process, machine, manufacture or composition of matter which employs one of the aforementioned exclusions may be eligible for patent protection.[70] Human body movements such as a method of shooting a hockey puck cannot accurately be categorized as a natural phenomena since they involve actions which are of a greater complexity. Obviously, the movement of the human body in a certain way is a natural phenomena in the abstract, but refining the movement to meet a useful end brings an action into patent eligibility.

65 35 U.S.C. § 101.

66 Donald S. Chisum, 1 CHISUM ON PATENTS, § 1.03 (Matthew Bender ed., 1998).

67 Diamond v. Chakrabarty, 447 U.S. 303, 309, 65 L. Ed. 2d 144, 100 S. Ct. 2204 (1980).

68 In re Allapat, 33 F.3d 1526, 1542 (Fed. Cir. 1994); The Patent Act is silent regarding sports and games.

69 See Diamond v. Diehr, 450 U.S. 175, 185, 67 L. Ed. 2d 155, 101 S. Ct. 1048 (1981).

70 See Parker v. Flook, 437 U.S. 584, 590, 57 L.Ed. 2d 451, 98 S. Ct. 2522 (1978).

A process for moving the human body is eligible for protection as long as it is useful and novel. Thus, sports methods feasibly would be included in the subject matter of the Patent Act.[71] Although the evidentiary proof required to show that a human movement is novel may be difficult since a major portion of prior art is not recorded in any medium, utility is easier to prove.[72] In the age of sports being one of the biggest entertainment draws worldwide, the usefulness of a certain move giving an athlete a distinct advantage could allow for significant economic gain for the patentees and any licensees.[73]

B. *Traditional Sports Related Patents*

Shoe companies are one of the largest sectors utilizing design patents. They predominantly seek protection for the upper portion of shoes and their treads because of their ornamental, non-functional purpose.[74] The traditional sports related utility patent protects physical objects such as a new type of hockey stick,[75] an improved putter,[76] or a method for drilling the finger holes in a bowling ball.[77] Examiners have over the years allowed patentees to claim human movements which are connected with their inventions. There have been patents such as "Golf Putter and Method of Putting",[78] "Method for Aligning a Golf Putting Stroke",[79] and "Exercising Method"[80] which all combine human

71 The author was unable to locate any legislative history behind any of the patent acts which addressed the patentability of sports methods.

72 "Federal law requires that all ideas in general circulation be dedicated to the common good unless they are protected by a valid patent." Lear, Inc. v. Adkins, 395 U.S. 653, 668 (1969).

73 See Edmund W. Kitch, Intellectual Property and the Common Law, 78 VA. L. REV. 293, 300–301 (1992). Professor Kitch has suggested that under the common law, a system of intellectual property based on contracts rather than the current laws could allow for protection of obvious subject matter outside of the Patent Act, such as methods of doing business, principles of nature, and sports moves. Contracts granting the transfer of traditional intellectual property rights would limit the recipient's actions, and inducing a breach of contract would replace patent infringement suits.

74 Dan Gallagher. Thorny Patent Issues Raised in Qualcomm and Motorola Battle, SAN DIEGO DAILY TRANSCRIPT, April 14, 1997, at A1; Wal-Mart & Vendor Ordered to Pay NIKE $6 Million; Judgment Believed Highest Ever for Design Patent Infringement, PR NEWSWIRE, November 21, 1996; Two of NIKE's groundbreaking air sole patents expired last year having little effect on the footwear giant. Mark Hyman, Once-Sleepy Nike Accelerating as 'Air' Patent Expiration Nears, THE FORT WORTH STAR-TELEGRAM, September 3, 1996, at Business p. 1.

75 "Hockey Stick with Reinforced Blade", Patent No. 5,728,016.

76 "Golf Putter", Patent No. 5,728,009.

77 "Apparatus and Method for Forming Finger and Thumb Holes in Bowling Balls", Patent No. 5,173,016.

78 Patent No. 5,127,650; See also Patent No. 5,377,987.

79 Patent No. 5,437,446.

80 Patent No. 4,323,232.

movement with a claimed physical object. Methods of playing games have also been patented where physical boundaries have been claimed, equipment to accompany the game have been protected, but these patents typically are not claiming any human movements as part of the invention.[81]

C. *Method of Putting Patent*

A recently issued patent entitled "Method of Putting"[82] directed to one's golf game came to the attention of many lay people both domestically and abroad through articles criticizing its issuance.[83] The inventor of the controversial patent, Dale Miller, reportedly began using the claimed method after breaking his wrist.[84] Rather than give up golf, Miller started holding the putter in his right hand, clasping his left hand against his right wrist and found a grip that allowed him to lower his handicap from fifteen to eight.[85] Miller's patent is believed to be the first pure sports method patent issued by the Patent Office since the only reference to the putter (or any other article) in the claims of the patent is that the dominant hand grips the putter.[86]

D. *Patents Claiming Human Movements*

The "anything under the sun" passage from Diamond v. Chakrabarty case has apparently expanded the subject matter for which the Patent Office will grant protection.[87] Patents are increasingly being sought for methods which claim in part or in whole, movements of the

81 "Method of Playing Game on Reduced Size Golf Course", Patent No. 5,419,561.

82 Patent No. 5,616,089.

83 Dermot Gilleece, Method in Someone's Patent Madness, IRISH TIMES, Dec. 6. 1997, at p. 53; Patented Putt Sees Many Chipping Divots, WISCONSIN STATE JOURNAL, Aug. 24, 1997, at 3B.

84 Magazines, THE RECORD, Nov. 17, 1997.

85 Id.

86 Claim 1 reads.

A method of gripping a putter comprising the steps: gripping a putter with a dominant hand;

placing a non-dominant hand over an interior wrist portion of the dominant hand behind a thumb of the dominant hand;

resting a middle finger of the non-dominant hand on the styloid process of the dominant hand;

pressing a ring finger and a little finger of the non-dominant hand against the back of the dominant hand;

pressing the palm of the non-dominant hand against a forward surface of the putter grip as the non-dominant hand squeezes the dominant hand.

87 "Chakrabarty and [its] language has certainly pushed us into areas that thirty years ago we were not sure of. But now there's a tendency to look very carefully at these things when someone says it's not patentable subject matter." (quote from Deputy Solicitor Albin Drobst). Mark Walsh, Patently Ridiculous, Some Say; People Dunk Basketballs. People Lift Boxes. Should the Patent Office Protect Their 'Inventions'?, LEGAL TIMES, Aug. 19, 1996, at S32.

human body. Last year, the Patent Office granted a patent for a method of typing intended to reduce injuries such as carpal tunnel syndrome.[88] Similar to the "Method of Putting" patent, the only reference to a non-human movement is placing one's hand on a keyboard.[89] The Patent Office has also issued "Pill Swallowing Device and Method",[90] a patent claiming a shield and a method wherein the shield is placed in one's mouth while a pill is swallowed. Another patent recently granted which employs human movements is entitled "Method for Demonstrating a Lifting Technique"[91] and claims a method for lowering a box so as to reduce the likelihood of back injury.[92]

88 "Method of Preventing Repetitive Stress Injuries During Computer Keyboard Usage", Patent No. 5,638,831; Non-patent prior art cited in the patent include Rational Principles of Pianoforte Technique, The Art of Piano Playing, and The Vengerova System of Piano Playing. .

89 Claim 1 of Patent No. 5,638,831 reads.

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

90 Patent No. 5,643,204. Claim 11 reads

A method for facilitating the swallowing of pills, the method comprising the steps of:
placing inside a user's mouth a flexible shield sized and configured as a flat pattern that is formable to reside within the interior of said mouth to cover a substantial portion of the roof of the mouth for shielding said roof from a pill within the mouth and facilitating substantially complete closure of the mouth for swallowing;
forming the shield to generally conform to the shape of the roof portion of the user's mouth;
positioning the shield to substantially cover the roof of the users mouth;
placing one or more pills inside the user's mouth between the user's tongue and the shield; and swallowing the pills without the pills substantially contacting the roof of the user's mouth.

91 Patent No. 5,498,162. Claim 1 reads:

A process for demonstrating a lifting technique to a person, the process comprising the steps of: providing a substantially rectangular box in a first stationary position on a ground surface, the box having an internal storage area means for receiving a plurality of weights therein, the internal storage area means formed by a top wall, a bottom wall, a front wall, a back wall, and first and second opposed side walls, the first and second side walls each having handles thereon adjacent the top wall, the bottom wall contacting the ground surface in the first stationary position, the bottom wall being movable to provide access to the internal storage area means;
inserting at least one weight into the internal storage area means, wherein the internal storage area means receives said plurality of weights therein to selectively change the weight of the box and the resistance one's body perceives when raising and lower the box from the first stationary position and to the first stationary position, the bottom wall having a securing means such that the at least weight is contained within the box when the box is lifted;
approaching two perpendicular sides of the box, wherein one of the perpendicular sides is one of the front or back walls, in the first stationary position at approximately a 45° angle such that one's feet are wider than shoulder distance apart when one is adjacent the box;
bending one's knees such that one's body is close to the box;
lifting the box from the first stationary position using the handles; and
returning the box to the first stationary position,

92 Mark Walsh, Patently Ridiculous, Some Say; People Dunk Basketballs. People Lift Boxes. Should the Patent Office Protect Their 'Inventions'?, LEGAL TIMES, Aug. 19, 1996, at S32.

Prior to the judicial broadening of patentable subject matter, the Patent Office granted a patent for "A Method of Swallowing a Pill"[93] which excluded others from bowing their head forward before swallowing a pill and any throat lubricating liquid. Patents involving human movements are problematic because of the variance in human motion. The arm motion required in putting is much less repeatable and consistent than would be a patented process for heat treating metals. Repeatability is one of the touchstones of patent law, as is evidenced by requirement of the patentee to clearly define their invention.[94]

The granting of patents centered around the movement of the human body can in some cases stretch the rationale behind the patent act, namely, to help foster the creation of new technology. Granting a patent for a method of putting or typing or even swallowing a pill is limiting the natural motion of a person. Since patent law does not have mercy on the innocent infringer, it is possible that I am infringing a patent as I type this article. The movement of the human body is infinite and to believe that no one has ever typed using the claimed method is unreasonable and for that matter, it is quite possible that people have used Miller's putt in the past.

Despite the uncertainty and nonrepeatability of human motion, the U.S. has been one of the few regimes to grant protection for surgical methods.[95] While the ethics regarding patents and medicine have been controversial, such subject matter has a higher value to society than sport moves. The dissemination of a new surgical method through the patent process fosters more research in a very important area, namely personal health. A new sports move does little to benefit the welfare of society. Innovative methods of sports movements may increase the entertainment value of certain events, but this is not what the Constitution intended to protect. It is conceded that the Patent Office has granted many patents regarding subject matter for which the lay person may have trouble relating to the advancement of science, but pure sports

93 Patent No. 3,418,999; Claim 1 reads:

The method of swallowing a pill by a human subject which comprises the steps of taking a single swallowable amount of a liquid in the mouth together with a pill having a density in the range from about 0.4 to 0.95, and a volume in the range from about 0.2 cubic centimeters to about 1.7 cubic centimeters. . . .then bowing the head downwardly and forwardly while retaining said liquid and pill in the mouth, and then swallowing same while the head is held in said downwardly bowed position.

94 35 U.S.C. § 112 ¶ 2.

95 An early decision regarding the patentability of surgical methods dismissed their eligibility for patent protection because of "the uncertainty that any medical method will achieve the desired result." Donald S. Chisum, 1 CHISUM ON PATENTS 1.03[3] (1998); See also Joel Garris, The Case for Patenting Medical Procedures, 22 AM. J. L. AND MED. 85 n. 77 (1996).

method patents claiming bodily motion fall outside of a reasonable interpretation of protectable subject matter.

E. *Enforcement Issues*

A major issue involved in the patenting of sports methods concern enforcement of one's exclusive rights. If I sell a video with Tiger Woods demonstrating Miller's "Method of Putting"[96] I would clearly be held liable for inducing infringement or for contributory infringement.[97] But what about the weekend golfer who by word of mouth learns this new technique? Proving infringement by recreational golfers would be quite difficult and Miller's patent may be worthless in practice. First, there is rarely an evidentiary record which one could use to help show infringement since only a fraction of golf tournaments and rounds of golf are recorded. Second, even if a golfer's putts were recorded, several camera angles zoomed in on his or her hand placement would be needed to show infringement of Miller's claims. The obstacles Miller will face if he chooses to assert his patent are significant and common to all sports related movements. There are possibly thousands of individuals infringing Miller's patent on golf course across the U.S., but the stakes involved make it economically unfeasible to pursue any alleged individual tortfeasor.[98] With attorneys fees in patent litigation often exceeding a million dollars in the discovery stage alone, pursuing individual infringers for small damages would be ludicrous.

Human movement patents such as Miller's putt run a higher risk of being deemed invalid. The Patent Office typically does not search for prior art references in the data banks or libraries where human movements would be recorded. Since an adequate prior art bank for human movements does not exist, the accused infringer could find an obscure video from a television broadcast or an instruction manual which would anticipate[99] the patent or show that it is obvious[100] in light of the new reference. In contrast, one could argue that golf games have been televised for decades and that the widespread exposure of golf strokes permitted Miller's "Method of Putting" to be examined in light

96 Patent No. 5,616,089.

97 35 U.S.C. § 271(b).

98 Similar problems are faced by owners of medical method patents since doctors perform procedures behind closed doors. As a result, many patentees have dedicated their patents to the medical profession. William B. Lafferty, Statutory and Ethical Barriers in the Patenting of Medical and Surgical Procedures, 29 J. MARSHALL L. REV. 891, 916–17 (1996).

99 35 U.S.C. § 102.

100 35 U.S.C. § 103.

of all available prior art. Such an argument poses problems since as stated, only a small portion of golf matches are televised, recorded, and archived. Prior art not found by the patent office or the applicant is a big risk for the potential litigant. A smart litigant preparing to assert a patent claiming human movements would engage in a greater level of pre-complaint filing research to make absolutely certain that they are asserting a rock solid patent.

While installing patent attorneys on golf courses may seem attractive to some, this is not a realistic enforcement mechanism. One alternative would have the patentee only reviewing televised golf tournaments for any infringing uses. As a result the use of the dominant hand putting stroke becomes widely used by recreational golfers. The patentee then runs the risk that his patent becomes unenforceable due to his or her failure to police infringers.[101] The questionable strength of such a patent is a major hurdle, because unlike the typical high technology patent, most people are able to practice the methods claimed in a sports method patent.

Another enforcement alternative would have the patentee license his method of putting to golf courses across the country. The greens fees paid by players would include a sub-license to use the patented putt. Such a system would require that the patentee only police those courses which have not licensed his money making stroke.

Assuming that the issues involving enforcement are adequately addressed, then damages need to be examined. After a finding of infringement, the Patent Act allows a remedy ranging anywhere from a reasonable royalty to triple one's lost profits or damages plus attorney fees.[102] Assume that the average golfer needs about 2.5 putts per hole to sink the ball. Over eighteen holes these putts amount to 45 strokes per game. A one cent royalty would amount to $0.45 per player per game. With the number of golf games played throughout the U.S. daily, damages could quickly add up. Inventor Miller's best route might be to license his putt to an organization such as the PGA so that all of its members could use the stroke and perhaps be permitted to teach it to others.

IV. Further Considerations Incentives Regarding Protection

A. *Patenting Sports Methods will Likely Not Increase Innovation*

Patent laws within the U.S. are seen as a tool to promote technological progress by offering the right of exclusion to the patentee for

101 American Optical Corp. v. Pittway Corp., 19 USPQ 2d 1789, 1791 (E.D.N.Y. 1991).
102 35 U.S.C. § 284, 285.

a limited period as an incentive to risk the great costs associated with research and development.[103] The resulting productive effort is believed to have a positive effect on society through the introduction of new products and processes of manufacture into the economy, and through a multiplier effect increases employment and betters the lives of citizens.[104] In exchange for disclosing one's invention to the public, he or she is given the exclusive right to make, use, sell, or offer to sell the protected material[105] for twenty years.[106] Under the incentive-to-invent theory, if competitors are free to copy an invention, competition will drive prices down to the level of the inventor's marginal cost, at which point the inventor recovers the manufacturing cost of each unit but receives no return on his original investment in research and development.[107]

Some commentators believe that even though patenting medical procedures has the effect of decreasing the availability of certain procedures and increasing the costs of some operations, patent protection has a positive effect on society as a whole because it assists potential doctors/inventors raise much needed venture capital.[108] Those in favor of patenting medical devices who are against the patentability of medical treatments argue that "[a] medical device requires significant in-

103 Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 480 (1974).

104 Id.; "The purpose [of the patent system] is much deeper and the effect much wider than individual gain. It is the promotion of science and the advancement of the arts looking to the general welfare of the Nation that the patent laws hope to accomplish. The individual reward is only the lure to bring about this much broader objective." 325 U.S. 327, 331 n.1 (1945); See Joel Garris, The Case for Patenting Medical Procedures, 22 AM. J. L. AND MED. 85 n. 77 (1996).

105 35 U.S.C. § 271(a).

106 The twenty year period begins from the date the patent is filed. 35 U.S.C. § 154(a)(2).

107 Wendy W. Yang, Patent Policy and Medical Procedure Patents: The Case for Statutory Exclusion From Patentability, 1 B.U. J. SCI. & TECH. L. 5, 14 (1995) citing Yusing Ko, An Economic Analysis of Biotechnology Patent Protection, 102 YALE L. J. 777, 791–92 (1992).

108 "For example, Surrogate Embryo Transfer technology involves a patented five-step procedure for transferring a donor embryo to the recipient. The research that developed this procedure was privately financed with $ 500,000 of venture capital because the National Institute of Health refused to fund the research." Joel Garris, The Case for Patenting Medical Procedures, 22 AM. J. L. AND MED. 85, 92–93 (1996) referencing George J. Annas, Surrogate Embryo Transfer: The Perils of Patenting, HASTINGS CENTER REP., June 1984, at 25;

Major hospitals such as Cedars-Sinai often reinvest royalties received from medical related inventions back into research and development and training of their doctors. Allan Bloomberg, et al., Patenting Medical Technology: "To Promote the Progress of Science and Useful Arts", 317 NEW. ENG. J. MED., 565, 566 (1987);

cf. "Assuming that the amount of funding available to medical researchers remains the same, the current volume of medical research should not diminish by any significant degree in the absence of the economic incentive provided by patent monopolies." Wendy W. Yang, Patent Policy and Medical Procedure Patents: The Case for Statutory Exclusion From Patentability, 1 B.U. J. SCI. & TECH. L. 5, 16 (1995).

vestment and FDA approval. . .whereas 'pure procedures' are discovered in the normal course of medical practice and cost nothing.''[109] Similarly, innovative sports equipment requires research and development monies whereas the typical sports move is created in the normal course of play as a result of competition and the physical advantages or limitations of the individual athletes.

It is not clear that the patenting of a sports method benefits the welfare of the Nation. While the patentee has potential for economic gain from the exclusive use of the covered invention, there is little if any benefit to society. In an age where the average salary for professional baseball players is sky rocketing, innovation is going to be a product of increasing one's potential salary rather than the possibility of exploitation through intellectual property laws.[110] In addition, new moves in a sport such as basketball are a function of the increasing athleticism of its players. Michael Jordan has introduced many new moves to the game, but he does not have to worry about them being appropriated by others. Michael is a unique position since others simply cannot consistently duplicate most of his moves. Restricting potential moves in a sports event might also have a negative effect on the flow of the games and the players' sportsmanship. Rather than using one's split second instincts, an athlete would be forced to consciously concentrate so as to avoid any patented moves. Such restrictions would have a negative impact on the game.[111]

Unlike doctors performing cutting edge medical procedures, top athletes perform in front of crowds in excess of 15,000 in addition to any audience viewing the game or highlights through television.[112] If there were no patent protection for medical procedures, doctors would be less likely to publish articles and to share their research regardless of the ethics involved.[113] Currently, there is more or less no patent protection available for sports moves and athletes are very willing to

109 Todd R. Miller, The International Suture: A Comparative Approach to Patenting Methods of Medical Treatment, 78 J. PAT. & TRADEMARK OFF. SOC'Y 443, 446 (1996) citing Legislation: PTO Assails Bills to Limit Patents on Medical Procedures, 50 PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 1250, at 737 (Mar. 9, 1995).

110 Id. at 448.

111 The increasing multinationality of sports leagues would further complicate the problem. Imagine NBA players being able to perform a patented three point shot only when they were playing in Canada (like the Raptors need anything more stacked against them!).

112 See Generally Lara L. Douglass, Medical Procedure Patents: Can We Live Without Them? Should We?, 3 J. INTELL. PROP. L. 161 (1995).

113 Joel Garris, The Case for Patenting Medical Procedures, 22 AM. J. L. AND MED. 85, 96 (1996).

perform their moves in public. Widespread patent protection for sports methods probably would not have a big effect on the innovation of athletes, because their performances[114] are what shape the levels of their future salaries.

B. *Sportsmanship and Patented Moves*

Patent protection of sports moves can be consistent with good sportsmanship. Commentators have argued that since patent rights only protect that which is new and nonobvious for a limited amount of time, they do not take something away from society. Athletic contributions to society are seen as entertainment and general language supporting the patent system as a whole are not applied very well to sports movements. If Dick Fosbury had been granted a patent on his revolutionary style of high jumping, he could have dominated the sport for years.[115]

Commentator Kunstadt has suggested that the exclusive powers of patents could be limited by the leagues controlling major sports through restrictive league rules since advantages such as corked bats and foreign substances on pitched balls have been outlawed.[116] The implementation of new rules is probably a realistic prediction of what organizations like Major League Baseball will have in response to patent protection of sports moves, but this goes against the idea of patent protection. If a professional athlete invents a new move and cannot use it for his team, then the motivation to seek patent protection is reduced. An alternative would be for the leagues to require a compulsory license for all of its players.[117] These licenses would permit the inventor to be compensated for their innovation, thus retaining the incentive to invent.

C. *Patent Harmonization*

In an era when harmonization among the major patent regimes is increasingly being implemented and discussed, preventing the patenting of sports methods is a low priority. Countries such as Taiwan that have recently overhauled their prior patent laws have explicitly removed

114 Showmanship is arguably a large part of an athlete's performances and marketability outside of sports events.

115 "Twelve years [after the Mexico City Olympics] 13 of the 16 finalists in the Olympic high jump were using the 'Fosbury flop.'" Olympic Moment—Mexico City, 1968, MILWAUKEE JOURNAL SENTINEL, March 4, 1996, at Sports p. 3; Gennady Fyodorov, Creator of Fosbury Flop Makes Stop in Moscow, THE MOSCOW TIMES, March 6, 1998.

116 Robert Kunstadt, Are Sports Moves Next in IP Law? THE NATIONAL LAW JOURNAL, May 20, 1996 at C1.

117 Id.

methods of games or sports from patent eligibility.[118] The European Patent Convention also explicitly removes games from patentability.[119] While the U.S. has never been one to allow itself to be pressured into changing its patent laws,[120] specifically abrogating protection for sports methods may help in the much talked about global patent scheme.[121] Currently, there have been no major effects seen from the patenting of sports methods and thus it is unlikely that they will be discussed in patent harmonization discussions except with their relation to surgical methods.

V. Conclusion

Sports related industries within the United States have been booming in recent years without the availability of enhanced legal protection for sports related movements. A higher salary and a competitive edge are the only factors that most athletes require to create movements which give them a personal edge. Nevertheless, there may be appropriate niches in sports which should be offered protection under the intellectual property laws. The similarities between routine-oriented sports and ballet and modern dance suggest that the choreographic protection under copyright law of sports such as ice skating is befitting. Trademark protection for sports moves, under both the federal Lanham Act and state common law is less attractive because of the single image protection granted in contrast with the fluid motion of a sports movement. Finally, patent protection for innovative sports methods such as Miller's "Method of Putting" may be found to be worthless in practice. The difficulty in showing that an athlete infringed the claims of a patent combined with the inadequate prior art databases for human movements make an infringement suit a risky path.

118 Republic of China Patent Law art. 21; Michael Skrehot, Taiwan's Changing Patent Law: The Cost of Doing Business with the World, 30 INT'L LAW 621 (unpaginated) (1996).

119 European Patent Conv. Art. 52(2)(c).

120 Witness the first to invent patent priority system.

121 "For patent harmonization to be truly effective, it must encompass a number of areas, including the following: a uniform definition of patentable subject matter; uniform application and filing procedures; uniform examination and grant procedures; and uniform interpretation, remedies, and enforcement." Anthony D. Sabatelli, J.C. Rasser, Impediments to Global Patent Harmonization, 22 N. KY. L. REV. 579, 585 (1995).