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# Texas Entertainment and Sports Law Journal

State Bar of Texas  
Entertainment & Sports Law Section

Vol. 15 No. 2, Fall 2006

## 16th Annual Entertainment Law Institute

# Legal and Business Aspects of Film, Music, and Digital Entertainment

Live • Austin • October 20-21, 2006 • Omni Downtown Hotel



Original poster art to promote a 1979 appearance by Talking Heads at the Armadillo World Headquarters in Austin, Texas. © 1979 Guy Juke.

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## CHAIR'S REPORT

Thank you for being a member of the State Bar of Texas Entertainment & Sports Law Section, also known as TESLAW! The 2006-2007 State Bar year is in full swing and the new TESLAW leadership plans to build on the successes of the past and work hard to increase the benefits you receive in exchange for your membership dues. As a member of TESLAW, you are currently entitled to 1) receive the acclaimed Texas Entertainment and Sports Law Journal; 2) join the TESLAW listserve; 3) earn free CLE credits; 4) receive a discount on the cost of the Annual Entertainment Law Institute; and 5) become part of the growing Texas-based entertainment and sports lawyer community. In the year ahead, the TESLAW leadership will strive to make the [www.teslaw.org](http://www.teslaw.org) website the first place for TESLAW members and out of state attorneys to visit to retrieve Texas, national, and international entertainment and sports lawyer resources. In addition, an official TESLAW MySpace presence could become the social e-hangout for Texas entertainment and sports lawyers (<http://www.myspace.com/teslaw>). Please look to the listserve as the primary source of communication among the TESLAW members and between the members and the TESLAW leadership ([eandslawsection@yahoo.com](mailto:eandslawsection@yahoo.com))

So, you ask, what has occurred since the last Chairman's Report? TESLAW held its Annual Meeting and CLE in Austin on June 16, 2006. We were fortunate to secure top speakers and present two interesting and informative CLE sessions covering music and sports. In the first half, Charlie Jones and Lawrence Temple presented "Legalpalooza: Legal Aspects of Producing the Austin City Limits and other Music Festivals." Charlie is a Principal and Executive Producer for Capital Sports and Entertainment (CSE) and Lawrence is its General Counsel. Charlie and Lawrence gave valuable business and legal insight into arguably the most successful music festivals in the world. In the second half, Jeff Nalley, Chief Operating Officer and General Counsel of Select Sports Group, LLC of Houston followed with a sports topic titled "Sideline Strategy: A Sports Agent Tackles the Legal, Financial, and Exploitation Issues of Representing Professional Athletes." Jeff broke down the difficult issues agents face and provided an excellent handout for those interested in becoming a sports agent. The TESLAW Council then held the Annual Section Meeting and elected the new officers to serve during the 2006-2007 fiscal year. The current Council members and officers are identified on the front cover of this journal.

We located more "Rock Star -Attorney" shirts! So if you are a Rock Star Attorney, or if you just slept in a Holiday Inn Express last night, then you need a shirt. Contact Craig Barker, Chair-Elect, if you want buy one.

What's next? The 16th Annual Entertainment Law Institute (ELI) will be held on October 20-21, 2006 at the Omni Downtown Hotel in Austin. Mike Tolleson, the ELI's Director, has once again created a premier event for Texas entertainment lawyers. Although detailed information is found in this journal, highlights include: protection and distribution of digital recordings; copyright and estate issues; copyright infringement claims; sampling; TV and stadium sponsorships; film distribution; and, insight on the career path of Los Lonely Boys. In addition, TESLAW will present Jay Cooper with the Entertainment and Sports Law Section 2006 Texas Star Award. Jay is truly one of the handful of entertainment lawyers who helped blaze the trail for all of us to follow. You simply cannot miss this ELI!

The next Council meeting will likely be held at the Omni hotel after the first day of the ELI. Please look for a listserve notice for the official date, time, and location. We hope you will attend.

In the meantime, we want to hear from you. Initially, we want to identify what you want or expect from the Section that it is currently not giving you. Please post a message to the listserve or contact a section officer to express your opinion on member benefits. We also want you to know that we need your help by being involved. The easiest way to get involved is to join a committee. TESLAW currently has the following committees: Legislative: Federal and State; Membership; Website; MySpace; Listserve; ByLaws; Journal; Entertainment Law Institute; Sports Law CLE; and, the Annual Meeting CLE. If interested in contributing your time, talents, or insight to any of these committees, please contact a Council member.

"Some people see things that are and ask, Why? Some people dream of things that never were and ask, Why not? Some people have to go to work and don't have time for all that ..."

-- George Carlin

Here's to a very good year!  
Kenneth W. Pajak"

## Student Writing Contest

The editors of the *Texas Entertainment and Sports Law Journal* ("Journal") are soliciting articles for the best article on a sports or entertainment law topic for the Fifth Annual Writing Contest for students currently enrolled in Texas law schools.

The winning student's article will be published in the *Journal*. In addition, the student may attend either the annual Texas entertainment law or sports law seminar without paying the registration fee.

This contest is designed to stimulate student interest in the rapidly developing field of sports and entertainment law and to enable law students to contribute to the published legal literature in these areas. All student articles will be considered for publication in the *Journal*. Although only one student article will be selected as the contest winner, we may choose to publish more than one student article to fulfill our mission of providing current practical and scholarly literature to Texas lawyers practicing sports or entertainment law.

All student articles should be submitted to the editor and conform to the following general guidelines. Student articles submitted for the writing contest must be received no later than January 1, 2007.

Length: no more than twenty-five typewritten, double-spaced pages, including any endnotes. Space limitations usually prevent us from publishing articles longer in length.

Endnotes: must be concise, placed at the end of the article, and in Harvard "Blue Book" or Texas Law Review "Green Book" form.

Form: typewritten, double-spaced on 8½" x 11" paper and submitted in triplicate with a diskette indicating its format.

We look forward to receiving articles from students. If you have any questions concerning the contest or any other matter concerning the *Journal*, please email Andrew T. Solomon, Professor of Law and Articles Editor, Texas Entertainment & Sports Law Journal, at [asolomon@stcl.edu](mailto:asolomon@stcl.edu).

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## FOR THE LEGAL RECORD ...

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### *The fabric of sports law ...*

Launch a probe and get results, or was the timing just right? In 2005, the New York State Attorney General started an investigation of the U. S. Tennis Association's assignment of umpires at U. S. Open matches. For the period 2003 to 2005, the investigation found that 5 women were assigned to 567 men's matches but no female umpires were assigned to late round men's matches. Male umpires were assigned to approximately 20% of late round women's matches. Women chaired almost half of the women's matches during the period. In August 2006 the U. S. Tennis Association reached an agreement with the New York attorney general requiring the USTA to assign more women as chair umpires to men's matches and adopt antidiscrimination policies to assure opportunities for female and minority umpires. Juanita Scarlett, from Attorney General Eliot Spitzer's office, was quoted as saying "[The decision] should dispel any notion that women are incapable of competently umpiring or officiating men's events, which is so pervasion throughout professional sport ..." At the most recent U. S. Open, Carlos Bernardes Jr. was the first black umpire to chair a finals since the '70s ...

A Uniontown, Pa., jury convicted Mark R. Downs Jr. of corruption of minors and criminal solicitation to commit simple assault. Downs was accused of offering to pay one of his players \$25 to hit a nine year old autistic teammate with a ball while warming up. Purportedly Downs' motivation was to have his eight year old player bean the teammate to prevent the autistic player from playing in the June 2005 playoff game. Downs was acquitted of criminal solicitation to commit aggravated assault, and jurors were deadlocked on a charge of reckless endangerment ...

A backup punter for Northern Colorado, sophomore Mitch Cozad, allegedly stabbed the starting punter in his kicking leg on the Monday prior to the university's Saturday game. The two teammates were competing for the starting punting spot for the university team located 50 miles north of Denver. Rafael Mendoza, the starting punter had averaged 37.6 yards per punt on 9 punts in 2 games. Cozad alleged attached Mendoza from behind and stabbed in him the right leg. Mendoza apparently was outside his apartment at approximately 9:30 p.m. Cozad fled, but a witness identified the fleeing car, which was traced to Cozad, who was arrested the next morning. "Rafael is a competitor and wants to get back as soon as he can," said coach Scott Downing. "When that occurs, I don't know." Mendoza was scheduled to miss the Saturday game against Texas State. Cozad was free on a \$30,000.00 bond but was suspended from the university and the team and evicted from his dorm room ...

Sheikh Mohammed bin Rashid al Maktoum, the crown prince of Dubai, and Sheikh Hamdan bin Rashid al Maktoum, the deputy ruler, were accused in a lawsuit in Miami, Florida of enslaving tens of thousand of boy over 3 decades. The boys were allegedly forced to work as jockeys in the sport of camel racing. The lawsuit, seeks unspecified damages, was filed by parents who accuse the United Arab Emirates' rulers of abducting, selling and enslaving their children in a case, which may involve more than 30,000 boys. The parents are seeking class-action status. The members of the royal family raise horses in Ocala, Florida ...

Cheating at the world's largest chess tournament was suspected, but no one was caught. However, one player was expelled and the other was permitted to finish the tournament. The World Open, held in Philadelphia, Pa., was the venue for accusations that shook the chess world. The suspected cheating involved 2 players, who were suspected of receiving assistance from computers and or from accomplices using computers. Although Steve Rosenberg was asked to leave, Eugene Varshavsky was allowed to continue to play but was searched before each round ...

### *Sports Rules, Regulations and Due Process:*

Texas Christian University tennis coach Joey Rive, was relieved of his duties, after the school found that he made excessive telephone calls to international recruits. Athletic director Danny Morrison said the NCAA violations were self-reported to the Mountain West Conference and the NCAA ...

Sprinter Justin Gatlin negotiated an eight year ban to avoid a lifetime penalty. Gatlin cooperated with World Anti-Doping authorities after testing

positive for testosterone or other steroids. The World Anti-Doping Agency code provides for a lifetime ban for a second violation but Gatlin agreed to an eight year compromise to avoid the lifetime ban. Although Gatlin still can appeal to the U. S. Anti-Doping Agency, which imposes penalties in America, he cannot argue the earlier test was faulty. "To his credit, it's recognition that the science is reliable." Said USADA general counsel Travis Tygart. "Instead of wasting a bunch of resources attempting to create smoke where there's not any, [Gatlin]'s acknowledging the accuracy of the positive test." In May of 2006, Gatlin tied the world 100-meter record at 9.77. Gatlin's second positive test purportedly resulted from a vindictive massage therapist who used testosterone cream on Gatlin without his knowledge. Gatlin's first positive test occurred nearly 5 years earlier from his taking medicine, which he claimed was used to control attention-deficit disorder

School District Officials determined that 3 former state of Washington Chief Sealth High School girls basketball coaches "lured 5 players to the team with promises of starting spots and college scholarships" in violation of Washington Interscholastic Activities Association rules. The WIAA oversees high school sports in the state of Washington. The high school coaches were accused of recruiting girls for the high school team for more than 3 years. Following the school district's investigation, the coaches were dismissed from their jobs and the school district declined to renew the coaches' contracts. Relying on state law, the employees appealed their dismissal to the superior court filing a lawsuit claiming a lack of due process, while continuing to deny the recruiting allegations. The lawsuit claims racial discrimination and an inadequate investigation played a role in the dismissals. In addition to the coaches losing their jobs, Chief Sealth High School was forced to give up its 2005 and 2006 district team titles and was banned from tournament play for the next year. "The information is false ... and they need to put these coaches back to work." Stated Mary Ruth Mann, attorney for head coach Ray Willis. Brenda Little, attorney for assistant coaches Laura Fuller and Amos Walters, said the Washington Education Association, a statewide teachers' union, investigated and found the Seattle School District investigated and the allegations were unsupported. Peter Daniels, spokesman for the school district, rejected claims that the district actions were racially motivated. All 3 coaches are African American ...

Northwestern University suspended its women's soccer team for alleged hazing. A web site displayed pictures of the team's soccer players in T-shirts and underwear, with blindfolds and hand tied behind their backs, prompting the suspension ...

And finally, special thanks to Malesha Farmer for her assistance in proofing and reviewing articles under consideration for publication in this issue of the Journal. Ms. Farmer is an Assistant City Attorney with the City of Fort Worth, where she has worked for the last 5 years. Her focus is in the Transactional section where her practice focuses on Intellectual Property, Software Licensing agreements, Facility Use agreements, and Artist Engagement agreements. Ms. Farmer is a member of the Texas State Bar College, and the Texas Entertainment and Sports Law and Computer and Technology Sections.

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Sylvester R. Jaime--Editor

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The Section's Website is at <http://stcl.edu/txeslj/index.htm>.

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Comments or suggestions may be submitted to Yocel Alonso at [Yocelaw@aol.com](mailto:Yocelaw@aol.com) or your editor at [srjaime@pdq.net](mailto:srjaime@pdq.net) ...

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## SAVE THE DATE

### October 20 & 21, 2006

## The 16<sup>th</sup> annual Entertainment Law Institute Conference in Austin, Texas



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## WHEN FANTASY MEETS REALITY: THE CLASH BETWEEN ON-LINE FANTASY SPORTS PROVIDERS AND INTELLECTUAL PROPERTY RIGHTS

by Matthew G. Massari

Mr. Massari is a May 2007 Juris Doctorate candidate at the University of Oregon School of Law in Eugene. Prior to his candidacy at Oregon, Mr. Massari attended St. Thomas University School of Law in Miami, Florida and is a graduate of the University of California Davis, where he graduated with a Bachelor of Arts in Political Science. Mr. Massari was a Division II football All-American and has been on the Sport/Entertainment Law Forum Board while at Oregon.

*"PLAYER STATISTICS ARE IN THE PUBLIC DOMAIN . . . BUT IF YOU'RE GOING TO USE STATISTICS IN A GAME FOR PROFIT, YOU NEED A LICENSE FROM US TO DO THAT. WE OWN THOSE STATISTICS WHEN THEY'RE USED FOR COMMERCIAL GAIN." – JIM GALLAGHER, SENIOR VICE PRESIDENT, CORPORATE COMMUNICATIONS FOR MLB ADVANCE MEDIA.<sup>1</sup>*

### I. INTRODUCTION

The clash should have been foreseen, given modern popularity and commercial appeal surrounding the game. But for a company who had been providing the service for 13 years, it was a legal blindside; a strategically timed ambush executed with the requisite degrees of precision and surprise. On January 19, 2005, a senior vice president for Major League Baseball sent an e-mail letter to the vice president of C.B.C. Distribution and Marketing, Inc., a fantasy sports provider, stating the following:

This morning, MLB Advanced Media ("Major League Baseball" or "MLB.com") and the Major League Baseball Players Association ("MLBPA") announced that they have agreed to a relationship whereby Major League Baseball will be the exclusive licensee and sublicensor of the MLB player's [sic] rights with respect to interactive media Fantasy Baseball Games...Please be advised that if your Company is using the above-described rights without a license, all such uses must cease immediately.<sup>1</sup>

What the notice letter meant to fantasy sports providers, is that baseball was attempting to monopolize the use of its sports statistics. Further employing the strategies of precision and surprise, the notice letter referenced a link to MLB.com's press release announcing the exclusive agreement to the public. The press release and notice letter were dated the same day.

Apprehensive that Major League Baseball would subsequently sue if it continued to operate its fantasy games, C.B.C. filed suit seeking a declaratory judgment.<sup>2</sup> Among the issues for determination by the court are whether fantasy sports providers infringe any copyright allegedly owned or controlled by Major League Baseball, whether fantasy sports providers violate sections of the Lanham Act for deceptive and unfair business practices and whether fantasy sports providers violate rights of publicity owned or controlled by MLB. While the action is pending litigation in the United States District Court for the Eastern District of Missouri as of the date of this article, an analysis of the competing interests and rights of the parties will be the subject of this article. The scope of this article will cover issues primarily related to intellectual property only.

### II. BACKGROUND

#### A. The Argument for Exclusivity

Fantasy sports is a game whereby players (i.e. public individuals) manage imaginary sports teams based on the real-life performance of professional players, and compete against one another using those players' statistics to score points.<sup>3</sup> The fantasy sports game has been credited as the creation of a small group of individuals interested in simulating the real game and predicting future performances using the publicly available sports statistics. As Professor Jack F. Williams explained, "the lifeblood of the competition is the

actual performance statistics of Major League Baseball players."<sup>4</sup> Statistics used for points in early leagues were often chosen because they were easy to compile from media *box scores* and from weekly information published in *USA Today*.<sup>5</sup> Before the aid of technology, players manually tallied their scores from the most immediate source to disseminate the information. Today, the advent of powerful computers and the internet has revolutionized the fantasy game, reaching scores of new players, allowing scoring to be done entirely by computer and allowing leagues to develop their own scoring systems and game play options. Players need no longer wait until the next day news service to compile and distribute stats, real-time statistics are now recorded and distributed to the public in a matter of minutes via the internet.

The timing of Major League Baseball's notice letter to fantasy game providers is simply the natural gestation of an industry that has reached an apex in public popularity and commercial revenue—by way of information generated by the professional sports leagues. Participation in fantasy games is a multimillion dollar industry in the United States.<sup>6</sup> According to the Fantasy Sports Trade Association, more than ten million people play fantasy football in the United States, another six million play fantasy baseball, spending an average of \$175 a year on the game and making fantasy baseball a \$1 billion annual business.<sup>7</sup> Major League Baseball valued its own five-year exclusive agreement to provide fantasy games in excess of \$50 million.<sup>8</sup> From a financial perspective, Major League Baseball could ill afford not to assert rights in the matter any longer. Because fantasy games operate off the information from the real game, the inference can be made that Major League Baseball believes it is entitled to the revenues that would not exist but for stats generated by their forums and employees.

#### B. The Clash

One possible explanation of fantasy sports providers' lack of foreseeability may be found in the nature of the service they provide. Fantasy operators provide sports statistical information to subscribers, similar to newspapers and on-line news sites, only in a highly detailed and comprehensive fashion. Also similar to news-of-the-day services, internet fantasy providers generate significant revenue through the sale of corporate advertising.

Commercial venture fantasy sports providers generally agree that using players' names, likenesses and/or biographical information to *promote* or *advertise* their products require a license from the respective players unions<sup>9</sup> so as not to violate the players' rights of publicity.<sup>10</sup> Fantasy providers must also obtain licensing from the professional team organizations for any use of protected marks, such as team names and logos or risk infringement claims. With respect to

*Continued on Page 5*

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existing trademarks and copyrights, fantasy providers do not dispute the rights of the leagues and of the players when using protected marks and identities in advertisement and/or promotion, and based upon the absence of litigation, have substantially complied. Because these facts are undisputed by both fantasy providers and professional leagues, the real cause of the clash seems to derive from uses of player statistics and names as components of game play. Specifically who, if anyone, owns or controls these rights?

### III. FEDERAL COPYRIGHT PROTECTION

#### A. Are Sports Statistics Copyrightable?

What does it mean that a professional player had two hits in four batting attempts with one homerun and one single? For fantasy sports owners, it is game play information that may signify points for their team. For the general public it is a past factual event. For news services who report the information, the statistic is a mere discovery and communication of fact. Before professional sports leagues claim ownership of statistics, it must first be examined whether sports statistics are within the scope of federal copyright protection. A clearer view can be accomplished by examining the Federal Copyright Act and a few significant judicial decisions involving related matters.

Copyright protection is a constitutionally granted power, intended by the Framers of the U.S. Constitution "to promote the progress of science and useful arts, by securing for limited times to authors... exclusive right to their respective writings and discoveries."<sup>11</sup> The Copyright Act of 1976 establishes two fundamental prerequisites for copyright protection for works of authorship: originality and fixation.<sup>12</sup> Originality means that the work was independently created by the author (as opposed to copied from other works) and that it possesses at least some modicum of creativity.<sup>13</sup> Since *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*,<sup>14</sup> the Supreme Court has held that as a matter of constitutional law, originality is necessary for copyright protection.<sup>15</sup> In this landmark copyright case, the Plaintiff was seeking infringement for the copying of the factual data from its phone book. The Supreme Court however rejected any notion of copyright protection for factual information.<sup>16</sup> Borrowing from its late 19th century decision in *Burrow-Giles Lithographic Co. v. Sarony*,<sup>17</sup> the Court held:

"No one may claim originality as to facts." *Id.*, § 2.11[A], p. 2-157. This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence. To borrow from *Burrow-Giles*, one who discovers a fact is not its "maker" or "originator." *III U.S.*, at 58. "The discoverer merely finds and records."<sup>18</sup>

Sports statistics seem to clearly fall within the courts explanation of unoriginal and thus uncopyrightable fact. Sports statistics are merely related factual events. These events can then be characterized as "discovered" by observers or spectators and may then be communicated or recorded. Since the specifics themselves—two hits in four batting attempts with one homerun and one single—are simply recordings of related events, they exist as facts that are "discovered" by observers and/or communicated to others. Similar to any of yesterday's news stories - the poll results of an election, the outcome of a court decision or recorded weather figures - statistics fail to satisfy the necessary prerequisites of originality and creativity for copyright protection. The information plainly resides in the public domain available to every person<sup>19</sup> as free information that may not be privately owned for purposes of copyright. The decision in *Feist* represents an extension of federal copyright policy that has sought to strike a balance between protecting an author's right to protection of an *originally created intellectual work* against

the interests of the public's rights to obtain and use information.<sup>20</sup> Moreover, a sports statistic by itself before fixation has no author.<sup>21</sup> The player who caused the event to occur through the action(s) of hitting a baseball in a real game has not fixated the fact and can no more claim ownership of that event than a driver could claim ownership over a report of her automobile accident. The two events exist as past factual information, lacking an author.

As the *Feist* Court turned next to the question of whether a compilation of facts could satisfy the requirements sufficient to invoke copyright protection, so too it is necessary to examine whether sports statistics are copyrightable as compilations. The *Feist* Court confirmed that certain factual works - i.e. works whose subject matter consists of facts that are themselves not copyrightable - may possess the requisite modicum of creativity to warrant copyright protection.<sup>22</sup> The key to satisfying the prerequisites of originality and fixation to warrant copyright protection for compilations is in the *selection* and *arrangement* of the underlying facts. As the *Feist* court explained, "these choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws."<sup>23</sup> Based upon this standard, the copyright protection for factual compilations is thin, but nevertheless exists. As an illustration of elements, the facts themselves used in compilations are not copyrightable, but the 1) independent 2) selection and arrangement of the uncopyrightable facts, 3) so long as they satisfy a modicum of creativity, are copyrightable. The *Feist* Court failed to establish a bright line to determine when compilations may achieve copyright protection, preferring instead to consider the context and subject matter of each work seeking protection. Suffice to say, the more originality and creativity in the *selection* and *arrangement* of the facts, the higher the probability of achieving copyright protection.<sup>24</sup> In applying this standard to the use of sports statistics it is clear that copyright protection, although not available for the statistics themselves, may be available for an original and creative selection and arrangement of the statistics. Further, statistical compilations necessarily contain an author, as an individual is needed to record and input the data into fixed form. Under the Copyright Act, a compilation is copyrightable and is defined as a "collection and assembling of preexisting materials or of data that are selected in such a way that the resulting work as a whole constitutes an original work of authorship."<sup>25</sup> Given that compilations are copyrightable in general, it must now be examined whether and under what circumstances sports statistical compilations may achieve copyright protection.

The facts in *Kregos v. Associated Press*<sup>26</sup> are most comparable to the circumstances of fantasy sports providers and further support the entitlement of copyright protection for compilations established in *Feist* and codified by the Copyright Act. In *Kregos* the Plaintiff created a baseball pitching form that displays information concerning the past performances of baseball pitchers as a predictor of future performance. Kregos registered his form with the Copyright Office and successfully obtained a valid copyright. Kregos' form compiled information for each day's games including information about each pitcher's past performances, broken down into nine statistical categories such as won/lost record, earned run average, innings pitched, and men on base average, among others, and distributed it to subscribing newspapers. Though the form included statistics, the controversy in the case concerned only Kregos' rights to the form without each day's data. In other words, at issue were his exclusive rights to the particular *selection* of categories of statistics

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appearing in the form, not the underlying statistics used. The court upheld Kregos' copyright protection, reasoning that "there are at least scores of available statistics about pitching performance available to be calculated from the underlying data and therefore thousands of combinations of data that a selector can choose to include in a pitching form."<sup>27</sup> Therefore, by selecting a *particular selection* of statistical data out of a significant multitude of possible *combinations* of available statistics, Kregos' compilation did not fail to satisfy originality and creativity in selection and arrangement in the opinion of the court.<sup>28</sup> Thus, Kregos authored a compilation that passed federal copyright requirements where sports statistics were the "raw materials." It may be significant that the Court never even considered the possibility of whether MLB had a proprietary interest as owner, author or producer of the statistics used in the form. Kregos owned exclusive rights in his pitching form and federal protection from infringement of his authorship in the statistical arrangement.

### B. Limits of Sports Stat Protection

The limited protection available to sports stat compilations as established in *Kregos* and compilations in general established in *Feist*, impact sports statistical compilations in two significant ways. First, while *Feist* established that the expression of ideas may be protected by copyright, the Court also held that because the facts themselves are not original, deference will not be given to the labor expended when deciding the merit of copyright protection. As a result the Court rejected "sweat of the brow" as a basis of copyright protection, an argument that begs entitlement for the fruits of an author's labor.<sup>29</sup> The Court declared that "notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement."<sup>30</sup> Thus, the court favored a narrow scope of protection for compilations over granting exclusive rights that would have the effect of displacing facts from the public domain.<sup>31</sup> Applied to sports statistics, the significance of the holding means that statistical information may be copied from another's work without regard to copyright protection, so long as the author's original and creative selection and arrangement in the compilation is not copied. To illustrate the impact using a fictitious example, assume Major League Baseball expends substantial labor and resources to collect, compile and distribute its game statistics via the internet to fans in a sufficiently original and creative selection and arrangement that has been afforded copyright protection. A fantasy provider may then copy and distribute those same statistical facts on their own sites, inserting them in their own copyrighted compilation (that has satisfied the minimal requirements of originality and creativity) and be well within its rights for purposes of copyright.<sup>32</sup> Copyright infringement will turn on similarity in selection and arrangement only, without regard to the reproduction of the factual statistical information or labor expended to gather such information.<sup>33</sup>

*Kregos* outlined the second significant limitation of copyright protection given sports statistical compilations. Also concerned that granting exclusive rights to compilations would have the effect of insulating and limiting public access to the underlying facts in the compilation, the Court explained that the "fundamental copyright principle that only the expression of an idea and not the idea itself is protectable, has produced a corollary maxim that even expression is not protected in those instances where there is only one or so few ways of expressing an idea."<sup>34</sup> Simply, while expressions of facts are protectable, where there is only one or few ways of expressing factual matter by compilation, then that expression is *not* protectable. This doctrine is known as Idea/Expression Merger.<sup>35</sup> Cautious of the

tension between applying the doctrine too sparingly or too readily, *Kregos* also did little to establish a bright line rule to determine when the idea and its expression have merged to preclude the compilation from copyright protection. As discussed *supra*, the Court found Kregos' use of pitching forms that used past statistics within the scope of copyright protection because Kregos' original use of the factual information was one of "thousands of combinations of data that a selector can choose to include in a pitching form" to predict future performance. The Court highlighted the fact that Kregos' compilation was neither exhaustive nor precise given the multitude of other possible *combinations* of statistics available. Moreover, the court reasoned, Kregos' "idea," for purposes of the merger doctrine remained the general idea that statistics can be used to assess pitching performance rather than the precise idea that his selection yields a determinable probability of outcome."<sup>36</sup> Thus, had Kregos' compilation been one of only a few predictive methods or a precise gauge of future pitching performance, his forms likely would have failed copyright affirmation. Kregos' protection turned on the fact that his uses of the statistics were preferable to him personally and that there were many other stats he omitted from using, which could also be combined in an effort to predict similar outcomes. Accordingly, Kregos' rights in the intellectual property can aptly be characterized as *in gross* because his forms were highly subjective and based on his personal opinion of which combinations of statistics were a valuable predictive measure, rather than a precise method to determine a particular result.<sup>37</sup>

While determining the ripeness of Idea/Expression Merger to sports statistical compilations seems a bit slippery out of context, the inference can be made that the more the compilation is used as functional recording or precise predictive gauge, the less likely copyright protection will be available. Returning to the original statistic, there are only a few ways to selectively arrange the events - two hits in four batting attempts with one homerun and one single. The classic expression of this stat is fixated as 2/4, 1hr, 1b. It is easy to see that the expression of the stat is largely functional and used to communicate quickly and efficiently. Any alternative variation would likely be trivial. There are a limited number of ways to express the statistical information because there are a limited number of recordable events. Therefore such an expression likely fails copyright protection because the use is functional expression rather than original and creative. However, when the stat 2/4 is used with other statistical facts in a subjective manner to gauge a player's outcome over an entire season, such an expression moves along the copyright continuum closer toward satisfying originality and creativity requirements.

To briefly summarize the legal theories applicable to the sports statistical dispute, copyright protection is a constitutionally granted power, intended by the Framers "to promote the progress of science and useful arts, by securing for limited times to authors... exclusive right to their respective writings and discoveries."<sup>38</sup> The Copyright Act of 1976 defines a "compilation" 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."<sup>39</sup> The fundamental prerequisites for copyright protection are originality and fixation. *Feist* established that the facts used in compilations are not copyrightable, but the 1) independent 2) selection and arrangement of the facts, 3) so long as they satisfy a modicum of creativity are copyrightable. *Kregos* upheld copyright protection for a pitching form that utilized performance statistics, where personal taste and opinion in the selected facts used to predict performance was dispositive. *Feist* outlined the limits of copyright protection

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for compilations as only the elements that owe their origin to the compiler—the selection, coordination, and arrangement of facts - and established that deference will not be given to labor in determining copyright infringement. *Kregos* expanded the Doctrine of Idea/Expression Merger to preclude copyright protection in those instances where there is only one or so few ways of expressing a statistical compilation.

#### IV. CURRENT SPORTS STATISTICS DISPUTE: BASEBALL IN THE WRONG BALLPARK?

On its face, it appears that fantasy sports providers are the benefited party of *Feist* and *Kregos*. Borrowing from the model in *Kregos*, if compilations are seen as a spanning continuum where pure taste and subjectivity exist at one end and precise analysis at the other, the closer along the continuum that sports statistical compilations engage matters of pure taste and opinion, the more attainable copyright protection.<sup>40</sup> This standard seems likely to work against professional sports leagues asserting ownership over statistics for several reasons. First, as it has been established that statistics alone are facts and thus not protectable, the deduction can be made that Major League Baseball's potential claim of copyright is *how* its stats are recorded and organized. That is, the selection and arrangement of their own recorded game stats. This argument will be difficult to assert because MLB will have the burden of proving originality. As illustrated *supra*, the recording of actual game statistics is largely functional and designed to record the factual events of the game efficiently and comprehensively rather than subjectively and creatively. Further, the recording methods for the actual game has become largely uniform where leagues, media analysts and the general public all utilize similar categories and selections to record the significant events in game play.<sup>41</sup> If MLB plans to invoke a claim in the box score data from their games,<sup>42</sup> they will have a hefty burden of proving originality, as the selection and arrangement of recording the events of actual professional games today is a not only functional but also widely used. It is not a necessary endeavor to determine who originated the first box score and current game keeping methods because novelty does not make copyright.<sup>43</sup> Moreover, even if the respective sports leagues proved first use, originality is surely diluted by the functional and uniform methods of current data compilation in the public domain. The Copyright Act further precludes protection for functional works, adding, "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."<sup>44</sup>

Today, an average of 23,250,000 links to fantasy league sports cites exists.<sup>45</sup> The use of statistics in fantasy games to tally points, predict outcomes of team performance, individual player performance and every other predictive feature of professional sports in between is both widespread and commonplace of recent (inside and outside of the fantasy game). As a result, the Doctrine of Idea/Expression Merger may act as the principal precluding factor for copyright protection of sports statistical compilations.<sup>46</sup> The actual sports games can only produce statistics based on the recordable events of game play. A batter can only attempt so many at bats; a quarterback can only attempt so many passes in a given game or season; there are only so many offensive and defensive series in a given performance. Therefore, because the actual game consists of a measurable quantity of recordable events, so must statistical combinations. In this respect, the *Kregos* court failed to foresee the public statistical craze that would ensue with the advent of technology and sports statistical games.

The *Kregos* court reasoned in 1991 that, "there are at least scores of available statistics about pitching performance available to be calculated from the underlying data and therefore thousands of combinations of data that a selector can choose to include in a pitching form,"<sup>47</sup> given the widespread use of statistical information today, the sufficient degrees of creativity and originality required must surely be higher to establish copyright protection than in 1991. For example, while there are "thousands of combinations" and the use of sports statistical compilations provides a vast universe of available data, combinations are limited at some point by the parameters of actual game play. As a result, while Idea/Expression may merge in the use of sports statistical compilations at a near inestimable level, at some point maximization *can* be accomplished because the statistical variables available from the real games are not infinite. Nevertheless the issue will inevitably turn on the originality in the selection of variables used to determine a particular outcome. Therefore, like *Kregos*' copyrighted pitching forms, in order to seek copyright protection authors of sports statistical compilations should cite stat selections that are highly subjective and largely chosen on the basis of taste and personal opinion as to value.<sup>48</sup> Recording events in a functional manner will likely fail to satisfy the requisite degrees of creativity and originality but will nevertheless be a question of fact for the Copyright Office or court to determine.

In March, 2005 Jim Gallagher, senior vice president, corporate communications for MLB Advance Media, stated in an interview that baseball officials are not claiming exclusive rights to player statistics unless a company is trying to use those statistics as a means of financial gain. "Player statistics are in the public domain. We've never disputed that," Gallagher said. "But if you're going to use statistics in a game for profit, you need a license from us to do that. We own those statistics when they're used for commercial gain."<sup>49</sup>

These statements seem quite contradictory alone and particularly when viewed in the context of the prior legal theories authorizing copyright protection. There exists no statutory copyright or case law to support conditional copyright ownership. Given that professional sports leagues have not disputed collection and dissemination of their stats to the public in the past when the stats had little economic value, it seems Major League Baseball is now seeking to charge fans for information they have always had a right to use. Most sports fans have in the past, and surely all have the ability to compile and use sports statistics by reading the box scores from a newspaper or by attending a game and recording the events they witness. While the uses and economic value of the statistical facts have increased rapidly with advances in technology, it has been judicially determined that the intellectual property right is not dependent upon its commercial value.<sup>50</sup> One of the fundamental principles of copyright law has always been to give "exclusive rights of limited duration, granted in order to serve the public interest in promoting the creation and dissemination of new works."<sup>51</sup> It has traditionally been viewed as an incentive to encourage new works by authors knowing they will reap the benefits of their intellectual labor. It is difficult to imagine any of the major sports leagues discontinuing or failing to produce their games absent copyright protection of statistics. As one attorney close to the current fantasy dispute explained, "The public is fascinated with sports, and in particular baseball. Essentially, they can't get enough of stats."<sup>52</sup> With such an insatiable public appetite for sports statistics MLB's undertaking seems much akin to that of attempting to reclaim discarded meat from a pack of hungry wolves once its nutritional value has been realized. A daunting task indeed.

#### A. Unfair Competition; Misappropriation

Major League Baseball has also asserted claims of unfair

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business competition. Unfair competition law will only hold one who causes harm to the commercial relations of another liable for such harm if it relates to, among other principles,

“Appropriation of intangible trade values including trade secrets and the right of publicity...or from other acts or practices of the actor determined to be actionable as an unfair method of competition, taking into account the nature of the conduct and its likely effect on both the person seeking relief and the public...”<sup>53</sup>

MLB’s public claim of ownership over commercial use of statistics is likely based on upon the “quasi-property” right established in *International News Service v. Associated Press*.<sup>54</sup> At issue in the case were news reports, published by AP on the East Coast, where they were copied by competitor INS and relayed to INS’ Midwest and West Coast papers, simultaneously or even ahead of their receipt by AP’s local counterparts.<sup>55</sup> The court held that because complainant’s interest in the “hot news” it gathered was worthy of protection from interference by defendant, its competitor in business, defendant was enjoined from taking or gainfully using any of complainant’s news until its commercial value as “hot news” had passed.<sup>56</sup> In other words, AP was granted protection against its competitor during the period of initial dissemination of the information to its members because that is when the news had high commercial value. The novelty in this case is that traditionally unfair competition claims were based on competitors passing off goods or services of another as their own. “As a result of the Court’s willingness to find unfair competition beyond the traditional context of “passing off,” *INS* has now come to stand for a general common law property right against “misappropriation” of commercial value.”<sup>57</sup> According to the Supreme Court majority, the right might be effective against competitors, but not against the public at large.<sup>58</sup> This case may be distinguished by the fantasy game/professional league circumstances in two significant ways. First, the court relied heavily on the fact that “the parties are in the keenest competition between themselves in the distribution of news throughout the United States.”<sup>59</sup> In contrast, fantasy providers are barely in competition with professional sports leagues. True, Major League Baseball provides its own fantasy game via its official website to which it competes with other fantasy providers for consumers. However, this is merely one, fairly new service that MLB provides consumers and is neither the central business service nor goods provided. Consequently, direct competition in the *International News Service/Associated Press* sense where both parties provided matching services and competed for the same market is lacking. For C.B.C., the fantasy provider involved in the current dispute, fantasy sports is the central service provided and has been since 1992.

Given this distinction, however, an argument can be made for professional sports leagues that emphasizes the unique nature of their revenue streams. Unlike industrial or financial business, which is generally valued on cash flow and assets, sport franchises are valued by the sum of all their revenue streams<sup>60</sup> and therefore each is critical to the overall economy, particularly the intellectual property. Revenue streams from the leagues include gate receipts, broadcasting right fees, luxury boxes, club seats, concessions, advertising and membership fees.<sup>61</sup> Viewed in this context, competition in any facet that contributes to net revenue is in direct competition, including fantasy and internet games which contribute to advertising and media revenues and where intellectual property rights plays a critical role. The argument is not completely flawless however, and the professional sports leagues will still need to overcome the lack of direct competition in the “keenest” sense because fantasy sports providers stand to suffer greater harm, possibly termination of business. Professional sports leagues have traditional revenue

streams and are not dependent on fantasy games as vital revenue since the service is fairly new and still developing as an income source.

Secondly, the case can be distinguished by lack of free-riding. The equities were strongly in favor of AP because INS was essentially free-riding AP’s costs and labor in generating the “hot news” that both businesses were in competition. In contrast, fantasy sports providers do not free ride from information provided at the cost of the leagues; fantasy sports providers collect their own data independently or outsource from companies who do. The Second Circuit affirmed this latter distinction in *NBA v. Motorola*,<sup>62</sup> by rejecting the NBA’s claims of misappropriation of their game statistics. Plaintiff NBA attempted to prevent Motorola and STATS<sup>63</sup> from divulging the scores and statistics of ongoing basketball games to users of Motorola’s SportsTrax paging device. Defendants did not divert broadcast or computer feeds from the NBA or its licensees; instead STATS employees compiled the data manually while watching the game in person, on television or listening on the radio.<sup>64</sup> Defendants did not free ride, the court determined, because defendants do their own fact gathering, and have their own network and assemble and transmit data themselves with their own costs, resources and labor.<sup>65</sup> There might have been free-riding if Defendants had simply collected the information from the league and retransmitted rather than engaging in their own information collection and dissemination.<sup>66</sup> In light of the foregoing, professional leagues must prove that fantasy sports providers are causing harm by diverting information that the leagues gather at substantial costs and labor. Under the precedents of *International News Service* and *NBA v. Motorola*, a misappropriation claim under the doctrine of unfair competition is unlikely to succeed absent direct competition and free-riding. A claim of unfair competition will give deference only to the harm, if any, caused from the business practices of another in direct competition for goods or services.

## B. Lanham Act; Rights of Publicity

Given the limits in asserting copyright infringement and unfair competition claims for misappropriation of statistics, the fantasy game providers’ futures may ride on Major League Baseball’s agreement to control players’ rights of publicity. The right of publicity prevents the unauthorized commercial use of an individual’s name, likeness, or other recognizable aspects of one’s persona. It gives an individual the exclusive right to license the use of their identity for commercial promotion. “For almost fifty years, the courts have protected an athlete’s right to control and profit from the use of their name and nicknames, likenesses, portraits...or anything else that evokes a marketable identity.”<sup>67</sup> Rights of publicity claims under the Lanham Act, however, must be distinguished from state law rights.

Under the Lanham Act, celebrities have the legal right to prevent false designation of origin or attribution with regard to their names, likeness or other attributes of their public identity, thereby ensuring their ability to exploit the commercial value of their identity. The pertinent language in the Act, under Section 43(a) prohibits unauthorized use of information that “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 goods, services, or commercial activities by another person.”<sup>68</sup> The coverage that the Lanham Act affords against unlicensed exploitations, however, does not fully correspond to the interests the players seek to protect, because the underlying policies of the Act seek to ensure accuracy of source identification, rather than to secure rights solely in the uses of identity.<sup>69</sup>

A claim under the Lanham Act must demonstrate that the uses of the players’ identities by fantasy providers suggests that the

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service is endorsed, sponsored, authorized or associated with the players whose names are used for game play. To be more concise, the issue is whether the use of the players' names creates a likelihood of consumer confusion over whether the players' endorsed or were otherwise involved with the service. If it can be determined that a consumer would likely be confused, then protection will be afforded under the Lanham Act enjoining the particular use. The determination will turn on issues of fact regarding use. It seems clear, however, that if players' names or images are used in commercial *advertisement* or *promotion* of the services without authorization, such uses will be prohibited under the Act because consumer confusion and deception as to the affiliation, connection, or association of such person seems definite given the widespread use of athlete endorsements today. Where, however, the use of the players' identity is deemed to perform an informational function of identification, without misleading consumers as to the sponsorship or approval of the use, violation under the Lanham Act will be difficult to prove.<sup>70</sup> In *Bi-Rite Enterprises v. Button Master*<sup>71</sup> the Court held, [M]arks that are exploited only for their functional value and not to confuse the public receive no protection under unfair competition laws. Functionality in this context means that consumers desire the mark for its intrinsic value and not as a designation of origin. [Citations omitted]. When a mark...is exploited [by third parties] for its intrinsic functional value, Congress has implicitly determined that society's interest in free competition overrides the owner's interest in reaping monopoly rewards.<sup>72</sup>

Fantasy games require two critical components to function: players' names and their statistics. A strong argument can be made that the use of the players' names for game play is functional and thus a fair use under the Lanham Act. That is to say, rather than using the players' names to sell, promote or endorse products and services, the names are used to provide information identifying the players' and their historical performance records much like next day newspaper box scores. Surely newspapers provide names and statistics of players not only for informational but also for commercial gain as well? The manner in which players' names are used on the fantasy sites will be critical in determining fair use. Prohibitions will include uses of names and statistics in an *advertisement* and speech where the primary message is to buy.<sup>73</sup> This distinction may preclude fantasy operators from enhancing their game play options, such as links to player bios, photographs, images, etc., but ordinary use of name and statistical information may be more permissible.

While the right of publicity has been codified in the *Restatement (Third) of Unfair Competition*,<sup>74</sup> the right is generally a matter of state law, California's being one of the most robust and protective. Baseball may have to overcome its own successful Ninth Circuit ruling in asserting rights of publicity under state law, as the cleat is now on the other foot. In 2001, Major League Baseball was sued by former players who claimed their rights to publicity were violated by MLB's use of the players' names and statistics in programs and web sites without authorization.<sup>75</sup> The Ninth Circuit illustrated the elements of the tort claim as: "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury."<sup>76</sup> Even if each of these elements is established, however, the right does not provide relief for every publication of a person's name or likeness.<sup>77</sup> The First Amendment requires that the right to be protected from unauthorized publicity "be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of

the press."<sup>78</sup> The court's analysis provides valuable insight into a successful argument advocating the public's interest in the rights to sports statistical information. The court determined that the balancing process begins by identifying and considering the precise information conveyed and the context of the communication to determine the public interest in the expression. The public interest must then be weighed against the plaintiff's economic interests.<sup>79</sup> Consequently, the court determined that

It is manifest that as news occurs, or as a baseball season unfolds, the First Amendment will protect mere recitations of the players' accomplishments. "The freedom of the press is constitutionally guaranteed, and the publication of daily news is an acceptable and necessary function in the life of the community...Major league baseball is followed by millions of people across this country on a daily basis...The public has an enduring fascination in the records set by former players... Those statistics and records set throughout baseball's history are the standards by which the public measures the performance of today's players. The records and statistics remain of interest to the public because they provide context that allows fans to better appreciate (or depreciate) today's performances... Baseball is simply making historical facts available to the public through game programs, web sites...The recitation and discussion of factual data concerning the athletic performance of these plaintiffs command a substantial public interest, and, therefore, is a form of expression due substantial constitutional protection."<sup>80</sup>

The court responded to Plaintiffs' claims that the challenged uses are presented in a commercial context, and thereby constitute "commercial speech," holding that "Profit, alone, does not render expression "commercial,"" and that "An expressive activity does not lose its constitutional protection because it is undertaken for profit."<sup>81</sup> The court determined that the key distinction is in the nature of the expression. "The core notion of commercial speech is that it does no more than propose a commercial transaction," which the court interpreted as akin to "advertisements selling a product that *do no more than propose a commercial transaction*."<sup>82</sup> [emphasis in original]

Upholding Baseball's uses of the players' information and defining the critical distinction of commercial and noncommercial use, the holding seems favorable to fantasy sports providers so long as their uses are not used to promote or sell services. The issue should turn on not *if* the players' identities are used in a commercial endeavor, but *how* the identities are used. Again, it is an issue of fair use. Baseball on the other hand, will need to rely heavily on demonstrating a substantial competing interest and economic impairment of such interest. As discussed *supra*, Baseball should establish the unique nature of its revenue structure now adding the importance of the players' interests to control their names and images from commercial exploitation. Based upon the lengthy analysis of the competing interests in *Gionfriddo v. Major League Baseball* it is fair to conclude that competing policy considerations will play an important role in the court's decision.<sup>83</sup>

In stark contrast to *Gionfriddo* stands *Uhlaender v. Henricksen*<sup>84</sup> a 1970 case decided in the U.S. District Court of Minnesota in favor of Major League Baseball players suing for commercial uses of their names and statistics. Defendants manufactured and sold games that employed the names and professional statistical information such as batting, fielding, earned run and other averages of some 500 to 700 major league baseball players, identified by team, uniform number, playing position and otherwise. The issue before the court was whether the plaintiffs' names and published statistics can be considered property subject to legal protection from unauthorized

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use. The court found that “major league baseball players have a proprietary or property interest in their names, sporting activities and accomplishments so as to enable them to enjoin the use thereof for commercial purposes by private entrepreneurs engaged in the manufacture of parlor or table games which employ and use their names and sports accomplishments.”<sup>85</sup> This case has been the major foundation for which lucrative licensing agreements of professional athletes’ likenesses in video games, board games and other commercial uses are based.<sup>86</sup> This court’s lack of distinction for commercial and noncommercial uses of a players’ identity will be Major League Baseball’s biggest crutch and Fantasy Leagues biggest hurdle. It stands for the right to license one’s name, face, and likeness *in conjunction with* performance statistics for *any* commercial use, with the exception of news media. Nevertheless “commercial activity” is an exceptionally ambiguous term as demonstrated by the previous conflicting court decisions and a definite interpretation will be critical in determining whether fantasy sports use is fair use.<sup>87</sup>

## V. CONCLUSION

### Balancing Competing Interests

Given the limitations of the prior legal claims, determining whether providing and running fantasy sports games violate rights of publicity controlled by MLB may be the central issue for determination by the Court. The significance of this issue, however, is that its outcome will likely be a result of policy considerations that will consider and have ramifications on all the claims. Thus, consideration of the totality of the situation is necessary to determine whether rights of publicity are violated. At the core of the issue are the interests of the public balanced against the interests of the league and players.

#### *So what is at stake for the public?*

In addition to freedom of speech and freedom of information concerns, if the court determines that the inclusion of players’ names in fantasy games does not violate rights to publicity, then the effect will be more games provided which leads to higher competition encouraging providers to offer the best possible game to consumers at the lowest price. The policy furthered is the fundamental premise of the free enterprise system: freedom to compete in business for the patronage of prospective customers. Competition in the marketing of goods and services creates incentives to offer quality products at reasonable prices and fosters the general welfare by promoting the efficient allocation of economic resources.<sup>88</sup>

Secondly, the goal in capitalistic society is to promote economic efficiency by maximizing the value of goods in society. The use of statistics in fantasy games has created significant economic value where former uses of the “good” were minimal. Pre-fantasy, sports statistics were primarily used to provide the public with information in an effort to engage fans and had little economic value. Fantasy sports has not only instrumentally maximized the value of sports statistics, it has fueled a wholly new economy.

Far removed from using statistics for fun with friends, fantasy sports today have created a new market. Today fantasy sports companies have been created, solely dedicated to providing fantasy analysis, numbers, projections, injury reports, scouting and expert advice. Television shows have been created whereby leading experts in the real game dedicate time to discuss professional players’ fantasy performances and values and to offer playing advice to the public. More and more comments aimed at fantasy are referenced during analysis of real games on the most popular highlight television shows, while statistical “tickers” continually update viewers during

network television game coverage. There are fantasy conventions, trade conferences, and a Fantasy Sports Trade Association to help promote fantasy sports. Simply, what started out as a couch game among friends is now big business. But now that business involves selling things that used to be quaintly considered public knowledge, intellectual property is being tugged in opposite directions. If the uses of players’ names and identities in the game are found to violate rights of publicity, then MLB’s exclusive agreement with its players union will be enforceable against fantasy providers. The effect may be the same result the copyright doctrine of idea/expression merger sought to prevent; exclusivity in uncopyrightable facts. Since the statistics are ineffective if they are not conjoined to the player, then both may be plucked from the public domain. As goes the players’ names, so goes their statistical performances. They are inseparable components of the fantasy game. Further, the exclusive rights agreement between Major League Baseball and its players affords Major League Baseball a monopoly in fantasy baseball. Baseball has referenced its motive in exclusivity as one to increase quality of the game. Consequently, however, prices go up. Law disfavors monopolies unless such grants produce substantial benefits to society. Rather than substantial benefits, the public may be in jeopardy of experiencing higher prices, fewer choices, loss of autonomy in use, insulation of public information, and potentially irreparable harm to fantasy sports providers. And what about the significant popularity that fantasy sports has provided the real game? Clearly, it has revolutionized the way fans experience the real game.

On the other side of the issue is the vitality of the players’ rights of publicity, a legal right of no less significance. For the modern athlete, the right to market a name or image constitutes a substantial personal and economic interest. For professional athletes, endorsement contracts for the use of their persona can be lucrative and unauthorized exploitation of such persona can be costly.<sup>89</sup> Further, “[T]he right of publicity is the inherent right of every human being to control the commercial use of his or her identity.”<sup>90</sup> As such, “the right of publicity is not merely a legal right of the ‘celebrity,’ but is a right inherent to everyone to control the commercial use of [his] identity and persona and recover in court damages and the commercial value of an unpermitted taking.”<sup>91</sup> While fantasy providers are not using players’ names as commercial advertisement *per se*, the uses are generating significant commercial revenue. Surely such uses are not simply free speech used to communicate past historical facts.

[w]ith a balancing between the property right of the right of publicity and the policy of free speech, a given unauthorized use of a person’s identity will fall within one of two categories: the challenged use is either “communicative” or “commercial.” A “communicative” use is one in which the policy of free speech predominates over the right of a person to his identity, and no infringement of the right of publicity takes place. A “commercial” use is one in which the right of publicity is infringed because while there are overtones of ideas being communicated, the use is primarily commercial.<sup>92</sup>

Viewed in this light, fantasy use seems to suggest unjust enrichment. Consumers subscribe to on-line fantasy games, not for its useful information and news reporting, but for its one-stop service of combining players’ names and their statistics in highly comprehensive and sophisticated game play. News reports and analysis are added benefits. The free speech informational aspects of the game are merely aids to assist players in making informed choices of in their line-ups. If electronic game providers pay a premium for exclusive rights to use players’ names and identities in their video games, why

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should not fantasy providers as well? Certainly the electronic video game market provides fair and efficient competition, with unlicensed competitors providing similar games utilizing less infringing descriptions such as player numbers and team geographical locations. While Fantasy providers may put heavy emphasis on the fact that they are not using the players' identities for their commercial value and consumer appeal *per se*, unquestionably the use of the players' names is critical to the provider's commercial enterprise.<sup>93</sup> Lastly, unauthorized commercial use hinders the interests of the players in controlling and benefiting from the uses of their names and personas and diminishes returns on their own efforts in sport.

There are certain fair uses permitted of names and likeness without compensation.<sup>94</sup> To date however, "Courts have yet to offer truly concrete definitions of First Amendment protected speech which limit a professional athlete's rights of publicity in his own persona and achievements."<sup>95</sup> In light of the competing interests discussed above, which is the policy the court should protect?

<sup>1</sup> C.B.C. Distribution & Marketing v. MLB Advanced Media, No. 4:05CV 22MLM (E.D. Mo.)

<sup>2</sup> *Id.*

<sup>3</sup> Fantasy games currently provided include fantasy Football, Basketball, Hockey, Golf, and Auto Racing among others.

<sup>4</sup> Jack F. Williams, *Who Owns the Back of a Baseball Card?: A Baseball Player's Rights In His Performance Statistics*, 23:5 Cardozo L. Rev. 1705, 1708 (2002).

<sup>5</sup> See <http://www.answers.com/topic/fantasy-baseball>

<sup>6</sup> See CDM v. MLB at 3.

<sup>7</sup> See Tresa Baldas, *Pro Sports: Technology Changes Rules of the Game*, The National Law Journal (2005) (available at <http://www.law.com/jsp/article.jsp?id=1109128216973>) (citing Fantasy Sports Trade Association available at <http://www.fsta.org/index.shtml>)

<sup>8</sup> See MLB Press Release at [http://mlb.mlb.com/NASApp/mlb/mlb/news/mlb\\_press\\_release.jsp?ymd=20050119&content\\_id=932415&vkey=pr\\_mlb&text=js](http://mlb.mlb.com/NASApp/mlb/mlb/news/mlb_press_release.jsp?ymd=20050119&content_id=932415&vkey=pr_mlb&text=js)

<sup>9</sup> The NFL, NBA, MLB and NHL players unions have authority to license their players' names when used for group marketing or endorsement purposes. Players are compensated through their respective unions for such usage.

<sup>10</sup> The right of publicity currently varies from state to state but either common law or statutory law in almost every state protects certain individuals from the unauthorized exploitation of their identity. Uniform federal law does not currently protect the individual's right of publicity. The varying players' unions control the players' rights to publicity as a group.

<sup>11</sup> U.S. Const. art. I, § 8.

<sup>12</sup> 17 U.S.C. § 102(a) (2000); See also Craig Joyce et al., *Copyright Law* 67 (6th ed., LexisNexis 2003).

<sup>13</sup> Williams, *supra*, at 1710.

<sup>14</sup> 499 U.S. 340 (1991).

<sup>15</sup> See James E. Scahtz et al., *What's Mine Is Yours? The Dilemma of a Factual Compilation*, 17 U. Dayton L. Rev. 423 (1991).

<sup>16</sup> There may be valid dispute as to whether *Feist* may benefit sports leagues, in that the holding supports copyright protection for "unauthorized" facts.

<sup>17</sup> 111 U.S. 53 (1884).

<sup>18</sup> Accord *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 556 (1985) (holding that no author may copyright his ideas or the facts he narrates).

<sup>19</sup> See *Feist*, 499 U.S. at 354.

<sup>20</sup> Joyce, *supra*, at 55.

<sup>21</sup> See generally *NBA v. Motorola* 105 F.3d 841 (2d. Cir. 1997) (stating that [s]ports events are not 'authored' in any common sense of the word).

<sup>22</sup> See Williams, *supra* at 1712.

<sup>23</sup> *Feist*, 499 U.S. at 348.

<sup>24</sup> For an excellent illustration of originality sufficiency as a vector relationship, see Williams, *supra*, at 1710.

<sup>25</sup> 17 U.S.C. § 101 (2000) (defining "compilation").

<sup>26</sup> 937 F.2d 700 (2d Cir. 1991).

<sup>27</sup> *Id.* at 704.

<sup>28</sup> *Id.* at 3. The court reasoned that if the universe of available data included even 20 items and a selector was limited to 9 items, there would be 167,960 combinations of items available.

<sup>29</sup> 499 U.S. at 349.

<sup>30</sup> *Id.*

<sup>31</sup> See also *Baker v. Selden*, 101 U.S. 99 (holding that granting the exclusive rights to an book on accounting did not also grant exclusive rights to the accounting forms within the book, and was thus free to the use of the public).

<sup>32</sup> A more appropriate claim would be misappropriation, discussed *infra*.

<sup>33</sup> Accord, *Feist* (finding that listings in a phone book arranged alphabetically did not satisfy the element of originality in selection and arrangement); see also *Key Publications, Inc. v. Chinatown Today Publishing Enterprises, Inc.* 945 F.2d 509 (upholding an assertion of copyright in the yellow pages but finding no infringement from the defendant's copying of the white pages information).

<sup>34</sup> 937 F.2d 700 at 705.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 707.

<sup>37</sup> In the case of real property, an easement in gross is one that is not created for the benefit of any land owned by the owner of the easement but that attaches personally to the easement owner.

<sup>38</sup> U.S. Const., art. I, § 8.

<sup>39</sup> 17 U.S.C. § 101 (1996) (defining "compilation").

<sup>40</sup> Kregos further described different categories of ideas and distinguished between, on the one hand, those ideas that undertake to advance the understanding of phenomena or the solution of problems and those, like the pitching form at issue that do not undertake to explained phenomena or furnish solutions, but are infused with the author's taste or opinion. 937 F.2d 700 at 710

<sup>41</sup> See Statistics at mlb.com (last visited October 22, 2005).

<sup>42</sup> See re: Sports at [www.resports.net](http://www.resports.net) (defining Box Score as "The progression of the game as written is a series of boxes in hits, runs, errors, and player substitutions").

<sup>43</sup> Accord *Boisson v. Banian, Ltd.*, 273 F.3d 262, 270 (2d Cir. 2001) ("[A]n author is entitled to copyright protection for an independently created original work despite its identical nature to a prior work,

because it is independent creation, not novelty, that is required"); *Baltimore Orioles, Inc. v. Major League Baseball Players Assn.*, 805 F.2d 663 (7th Cir. 1986) (For a work to be copyrightable, it must be original and creative, but need not be novel. Thus, a work that is independently produced by two separate authors may be copyrighted by both).

<sup>44</sup> 17 U.S.C. § 102 (b)

<sup>45</sup> This idea was taken from Professor Jack F. Williams' 2002 Law Review Article, *Who Owns the Back of a Baseball Card?: A Baseball Player's Rights In His Performance Statistics*, 23:5 Cardozo L. Rev. 1705, 1708 (2002). His search on three Internet search engines uncovered over 30,000 links to fantasy league sports- 23, 220, 000 less than the average of three search engines last visited October 22, 2005.

<sup>46</sup> e.g. STATS, INC at [www.stats.com](http://www.stats.com); Elite Sports Analysis at <http://www.elitesportsanalysis.com/>; Swinburne Sports Statistics at <http://www.swin.edu.au/sport/>; Fantasy Sports Brainiac at [www.fantasysportsbrainiac.com](http://www.fantasysportsbrainiac.com);

Stats Shark at [www.statshark.com](http://www.statshark.com) (last visited October 22, 2005).

<sup>47</sup> 937 F.2d 700 at 704.

<sup>48</sup> See *CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc.* (rejecting CCC's argument seeking the benefit of the merger doctrine and finding infringement for copying Maclean's predictive valuations used to predict car values by emphasizing that Maclean's compilations to determine car value were approximate statements of opinion, rather than simply ideas); See also *Eckes v. Card Prices Update*, 736 F.2d 859 (2d Cir. 1984) (upholding the copyrightability of a selection of 5,000 premium baseball cards from over 18,000 cards, observing that the selection of data required a cognizable degree of creative thought and holding that even when the data itself is arranged in a common form, the selection of that data may be sufficiently original to warrant copyright protection).

<sup>49</sup> Tresa Baldas, *Pro Sports: Technology Changes Rules of the Game*, The National Law Journal (2005) (available at <http://www.law.com/jsp/article.jsp?id=1109128216973>)

<sup>50</sup> See *Int'l News Serv. v. AP*, 248 U.S. 215 (U.S. 1918).

<sup>51</sup> 33 U.S. 591

<sup>52</sup> See Baldas, *supra*.

<sup>53</sup> *Restatement (Third) of Unfair Competition*, Ch. 1, § 1.

<sup>54</sup> *Supra*, 248 U.S. 215

<sup>55</sup> Jane C. Ginsburg et al., *Trademark and Unfair Competition Law* at 32 (3d ed. Foundation Press 2001).

<sup>56</sup> 248 U.S. 215.

<sup>57</sup> Ginsburg, *supra*, at 33.

<sup>58</sup> *Id.* at 32.

<sup>59</sup> *Id.* at 230.

<sup>60</sup> *Ibid.*

<sup>61</sup> See Soonhwan Lee et al., *Economic Values of Professional Sport Franchises in the United States*, The Sports Journal (2002) (available at <http://www.thejournal.org/2002Journal/Vol5-No3/economic-values.asp>)

<sup>62</sup> 105 F.3d 841

<sup>63</sup> See STATS at [www.stats.com](http://www.stats.com) (Founded in 1981, STATS provides detailed sports services for both individual consumers and a wide array of commercial clients.

<sup>64</sup> STATS provides up-to-the-minute sports information to fans, professional teams, print and broadcast media, software developers and interactive service providers around the country).

<sup>65</sup> See generally *NBA v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997) (affirming that "[T]he district court correctly held that appellants [who were selling pages updated every two to three minutes with NBA game information during games] were not infringing a copyright in the NBA games").

<sup>66</sup> Ginsburg, *supra*, at 44

<sup>67</sup> *Ibid.*

<sup>68</sup> Williams, *supra*, at 1716.

<sup>69</sup> 15 U.S.C. 1125 (2000).

<sup>70</sup> Ginsburg, *supra*, at 642.

<sup>71</sup> *Ibid.* at 643.

<sup>72</sup> 555 F.Supp. 1188 (S.D.N.Y.1983).

<sup>73</sup> Ginsburg, *supra*, at 642 (quoting *Id.*).

<sup>74</sup> See *Abdul-Jabar v. General Motors corp.* (9th Cir. 1996) F.3d 407. Accord *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400 (Cal. Ct. App. 2001).

<sup>75</sup> See *Restatement (Third)*, Unfair Competition §§ 46-49 (1995).

<sup>76</sup> 94 Cal. App. 4th 400.

<sup>77</sup> *Id.* at 410 (citing *Eastwood v. Superior Court* (1983) 149 Cal. App. 3d 409, 417 [198 Cal. Rptr. 342]); see also Cal. Civ. Code 3344(a).

<sup>78</sup> *Id.* (citing *Quelimate Co. v. Stewart Title Gauranty Co.* (1998) 19 Cal. 4th).

<sup>79</sup> *Id.* (citing *Gill v. Hearst Publishing Co.* (1953) 40 Cal. 2d 224, 228; and see *Codedy III*, 25 Cal. 4th at pp. 401-402; *Downing v. Abercrombie & Fitch* (9th Cir. 2001) 265 F.3d 994, 1001 (Downing); *Hoffman v. Capital Cities/ABC, Inc.* (9th Cir. 2001) 255 F.3d 1180, 1183-1184).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 410.

<sup>82</sup> *Id.* at 411.

<sup>83</sup> *Id.* at 412

<sup>84</sup> The Court eluded in dicta that Baseball may even use the information in an advertisement, stating that "a review of the cases finding that commercial speech violates the right of publicity strongly suggests that advertisements are actionable when the plaintiff's identity is used, without consent, to promote unrelated product.

<sup>85</sup> 316 F. Supp. 1277.

<sup>86</sup> *Id.* at 1281.

<sup>87</sup> See also *Haelan Laboratories, Inc. v. Topps Chewing Gum*, 202 F.2d 866 (2nd Cir. 1953) (holding a man has a right in the publicity value of his photograph); Accord *Arnold Palmer, et al. v. Schonhorn Enterprises, Inc.*, 96 N.J. Super. 72, 232 A.2d 458 (1967) (concluding that the fact that such information embodying the [\*813] public personalities of the plaintiff celebrities was voluntarily disclosed through various news media did not extinguish their proprietary interests in their names and statistics).

<sup>88</sup> See *Mattel, Inc. v. MCA Records*, 296 F.3d 894 (9th Cir. 2002) ("Although the boundary between commercial and noncommercial speech has yet to be clearly delineated, the core notion of commercial speech is that it does no more than propose a commercial transaction. If speech is not "purely commercial" — that is, if it does more than propose a commercial transaction — then it is entitled to full First Amendment protection").

<sup>89</sup> *Restatement (Third) of Unfair Competition*, Comment (a).

<sup>90</sup> Dannean J. Hetzel, Professional Athletes and Sports Teams: *The Nexus of Their Identity Protection* 11 Sports Law. J. 141, 155 (2004).

<sup>91</sup> Erika T. Olander, *Stop the Presses! First Amendment Limitations of Professional Athlete's Publicity Rights*, 12 Marq. Sports L.J. 885 (2002) (citing J. Thomas McCarthy, Trademarks & Unfair Competition § 28-1, at 28-3 (1996))

<sup>92</sup> *Ibid.* (also citing)

<sup>93</sup> *Ibid.* (citing J. Thomas McCarthy, The Rights of Publicity & Privacy, 6.1[B] at 6-6 to 6-8, 6.3[A] at 6-13 to 6-15 (Rev. 1999)).

<sup>94</sup> See *Pooley v. National Hole-In-One Ass'n* (finding rights to publicity infringement for a promotional video tape which included the implied a false connection between the golfer and the business since "the use of the golfer's name and video footage of his winning hole-in-one was crucial to Defendant's commercial purpose of selling its [\*898] fundraiser.")

<sup>95</sup> See generally *Cardoons, L.L.C. v. Major League Baseball Players Ass'n*; *Pooley v. National Hole-In-One Ass'n*; *Pamela Edwards, Inc. v. San Jose Mercury News, Inc.*; *Zacchini v. Scripps-Howard Broadcasting Co.*; *Abdul-Jabar v. General Motors Corp.*

<sup>96</sup> *What's the Score? Does the Right of Publicity Protect Professional Sports Leagues?*, 62 ALB. L. REV. 579, 581 (1998).

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**JAY L. COOPER**, recipient of the Entertainment & Sports Law Section 2006 Texas Star Award for Outstanding Contribution and Achievement in the Field of Entertainment Law, will speak at lunch on Friday.



Jay Cooper is a shareholder in the Greenberg Traurig LLP law firm and chair of the firm's West Coast Entertainment Practice. His practice focuses on the music industry, motion pictures, television, multimedia and intellectual property issues. He is a former President of the National Academy of Recording Arts and Sciences, former chairman of the American Bar Association Forum committee on Entertainment and Sports Industries, co-chair of the Alliance of Artists and Recording Companies, board member of SoundExchange®, member and former chairman of the California Copyright Conference, board member of Recording Artists' Coalition and a member of many other legal and entertainment industry organizations. In addition to authoring many published articles and speaking at law schools and conferences around the world, Mr. Cooper was named Entertainment Lawyer of the Year for 2006 by the Century City Bar Association, Entertainment Lawyer of the Year by Billboard Magazine, and listed in the "Southern California Super Lawyers" 2004, 2005, and 2006, among many awards and recognitions over the years. He received his law degree from DePaul University College of Law and is admitted to practice in California, Illinois, New York and before the U.S. Supreme Court.

# FACULTY

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Mike Tolleson, *Austin*  
Mike Tolleson & Associates

### **Review of the State of Texas Music Industry**

Caset Nibagab, *Austin*  
Texas Music Office

### **Recent Court Decisions and Legislation**

Stan Soocher, *Denver, CO*  
Professor, University of Colorado at Denver

### **Sound Recordings**

Chris Castle, *Sherman Oaks, CA*  
Attorney at Law

John Simson, *Washington, DC*  
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### **Luncheon Award Presentation Honoring Jay Cooper**

### **Trust Me...I'm a Lawyer**

Jay Cooper, *Santa Monica, CA*  
Greenberg Traurig

### **Entertainment Lawyers and Professional Responsibility: Avoiding Legal Malpractice Claims and Disciplinary Actions**

John P. "Jack" Sahl, *Akron, OH*  
Professor of Law, University of Akron School of Law

### **Intersection of Estate Issues and Copyright Law: A Long and Winding Road**

Tamera H. Bennett, *Lewisville*  
Bennett Law Firm

Kenneth W. Pajak, *Austin*  
The Bannerot Law Firm

Katherine A. Kinser, *Dallas*  
Pezzulli Kinser

### **Anatomy of a Copyright Infringement Case**

Buck McKinney, *Austin*  
Attorney at Law

Henry "Hank" J. Fasthoff, IV, *Houston*  
Stumpf Craddock Massey Farrimond

### **Getting the Sample; Negotiate or Litigate?**

Steve Winogradsky, *North Hollywood, CA*  
President, The Winogradsky Company

D'Lesli Davis, *Dallas*  
Fulbright & Jaworski

## SATURDAY

### **Announcements**

Mike Tolleson, *Austin*  
Mike Tolleson & Associates

### **Television, Stadiums, and Sponsors: Major League Soccer as a Case Study**

Alan W. Tompkins, *Dallas*  
Hunt Sports Partners

John Alper, *Los Angeles, CA*  
Premier Partnerships

Tracy Tague, *Dallas*  
Fox Sports Net Southwest

Gerald Johnson, *Plano*  
Cadbury-Schweppes Americas Beverages

### **Digital Distribution of Music**

Chris Castle, *Sherman Oaks, CA*  
Attorney at Law

Lucas Mann, *Los Angeles, CA*  
Mann Media Partners

### **Sorting Through The Confusion: Interpreting Standard Recording Agreements in the Digital Era**

Bobby Rosenblum, *Atlanta, GA*  
Greenberg Traurig

### **Texas' Film Industry: Keeping it Competitive**

Bob Hudgins, *Austin*  
Director, Texas Film Commission

Rebecca Campbell, *Austin*  
Austin Film Society

### **Film Distribution: Magnolia Pictures/Landmark Theatres as a Case Study**

Tom Hunter, *Beverly Hills, CA*  
Attorney at Law

Jason W. Janego, *New York, NY*  
Magnolia Pictures/Landmark Theatres

### **Los Lonely Boys - Evolution of a Band Career**

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# The Nonstatutory Exemption Sacks the Antitrust Act: *Clarett* Affirmed

by Darin Jones

Mr. Jones is a 2007 Juris Doctorate candidate of the University of Florida Levin College of Law, at the University of Florida in Gainesville. Mr. Jones has served as a Legal Intern with the U.S. Department of Justice, Civil Division, Commercial Litigation Branch, National Courts Section, in Washington, D.C. Mr. Jones is a 1995 graduate from the University of South Carolina, where he earned a BS in Civil Engineering. In 1995, he attended the U.S. Navy Officer Candidate School in Pensacola, Florida and was awarded the National Defense Service Medal.

## INTRODUCTION

With the recent criminal charges against Maurice Clarett, his story has been thrust back into the national spotlight.<sup>1</sup> However, almost two years have passed since the United States Court of Appeals for the Second Circuit decided *Clarett v. National Football League*<sup>2</sup> and the lingering questions<sup>3</sup> of whether the federal court system robbed Clarett of “his calling”<sup>4</sup> should finally be sacked. Since many of these questions are being advanced by members of the legal community<sup>5</sup>, it is no wonder the media<sup>6</sup> continues with its efforts in trying to pull whatever sensationalism they can out of a properly decided and closed case. This note evaluates what would have been the Supreme Court’s ruling on *Clarett* had certiorari been granted and takes an in-depth look into the major cases regarding eligibility in professional sports, particularly professional football, to illustrate how the Court would have affirmed the Second Circuit’s holding.

As a freshman, Clarett was a star running back at Ohio State University and led the team to an undefeated season and the national championship in the 2003 Fiesta Bowl.<sup>7</sup> After the season, Clarett was named the Big Ten Freshman of the Year and was considered the best running back in college football.<sup>8</sup> However, all his successes on the field were superseded by his problems off the field when OSU and the NCAA suspended him for his entire sophomore season.<sup>9</sup> Further, it appeared that the NCAA would not permit Clarett to participate in the following season as well.<sup>10</sup> Knowing that he would have to sit out at least one full college football season and possibly two, Clarett decided to try to enter the NFL draft early.<sup>11</sup> But, the NFL’s current draft eligibility rule requiring players to be three full football seasons removed from high school graduation precluded him from doing so.<sup>12</sup> Clarett sued the NFL claiming that the eligibility rule was an illegal restraint of trade in violation of the Sherman Act.<sup>13</sup> The district court held that the rule violated the Sherman Antitrust Act and ordered the NFL to allow Clarett to participate in the 2004 draft.<sup>14</sup> The Second Circuit reversed and vacated the district court’s order for Clarett to be eligible for the draft finding that the nonstatutory labor law exemption to antitrust liability immunized the NFL’s eligibility rule from antitrust scrutiny because the rule was part of the collective bargaining agreement between the NFL and the players’ union.<sup>15</sup>

The opinions of the district court and the Second Circuit have received considerable attention<sup>16</sup>; and of course the media has chimed in with their non-legal public policy assertions.<sup>17</sup> Much has been written about the apparent “bold”<sup>18</sup> decision by district court Judge Scheindlin where she misapplied the reasoning of prior professional sports eligibility cases in her circuit<sup>19</sup> and instead chose to use the reasoning of the Eighth Circuit in *Mackey v. NFL*.<sup>20</sup> The *Clarett* decisions have been cited as creating a split among the circuits, particularly the Second and Eighth Circuits, as to how courts apply the nonstatutory labor exemption.<sup>21</sup> Moreover, the Second Circuit was quick to point out that the Supreme Court has also been a pivotal contributor to the conflict of laws between federal labor law and federal antitrust law as it “has never delineated the precise boundaries

of the [nonstatutory] exemption.”<sup>22</sup> Following the Supreme Court’s ruling in *Brown v. Pro Football, Inc.*,<sup>23</sup> the Second Circuit held that the nonstatutory exemption protected alleged restraints on trade from antitrust liability developed through the collective bargaining process.<sup>24</sup>

The ongoing question posed after *Clarett* revolves around the scope and application of the nonstatutory labor exemption to alleged restraints of trade in the context of professional sports where collective bargaining is utilized. Part I provides brief background information on antitrust law, labor law [collective bargaining], and the development and subsequent application of the nonstatutory exemption through relevant case law. Part II outlines the district court and Second Circuit *Clarett* opinions. Part III analyzes the discrepancies in the *Clarett* opinions and describes how the Supreme Court would have affirmed the Second Circuit’s ruling if certiorari had been granted by arguing that the *Clarett* decision properly followed the narrow holding from *Brown*. The Note concludes by advocating that the goals of the National Labor Relations Act (NLRA) were successfully met in *Clarett*.

## I. BACKGROUND

### A. The Power of Antitrust Law and Professional Sports

Federal antitrust law is governed by the Sherman Antitrust Act<sup>25</sup> that makes every contract in restraint of trade illegal.<sup>26</sup> In one of the first cases alleging an antitrust violation, the Supreme Court found that the purpose of the Sherman Act was to prevent unreasonable restraints of trade.<sup>27</sup> And yet the antitrust laws were “clearly designed to promote competition.”<sup>28</sup> However, applying these laws in the professional sports context promotes competing interests between the players and the teams.<sup>29</sup> If the protections are afforded to the players, then competition among the teams is stifled; if on the other hand, the protections are afforded to teams and leagues, then competition among the players will be diminished as the players are less able to compete for the highest salaries among the various teams.<sup>30</sup>

Long before the antitrust challenges in *Clarett*<sup>31</sup>, the Supreme Court in the “pre-eminent”<sup>32</sup> sports antitrust case, *Flood v. Kuhn*,<sup>33</sup> granted Major League Baseball (MLB) a unique antitrust exemption over its labor market that no other professional sport enjoyed.<sup>34</sup> Although the Curt Flood Act of 1998<sup>35</sup> did curtail MLB’s control over labor agreements, professional baseball still benefits from a major antitrust exemption.<sup>36</sup> Later, the Supreme Court held that in order to determine if a restraint of trade was unreasonable, a “rule of reason” approach should be used to analyze such factors as the restraint’s “history, nature, and effect” were considered.<sup>37</sup> However, as this approach required a “detailed market analysis”<sup>38</sup> using extensive amounts of time and resources, the Court recognized that some restraints because of their extreme anticompetitive effect can be “deemed unlawful per se” without conducting the lengthy investigation into its alleged procompetitive benefits.<sup>39</sup> The short list of *per se* violations includes price fixing, market division, group

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boycotts, and tying arrangements.<sup>40</sup> But, the Court also held that the *per se* approach is not conducive for evaluating restraints in the sports industry because the restraints are required for the industry to survive.<sup>41</sup> Further, precedent shows the Court's intent to remove group boycotts from receiving automatic *per se* analysis.<sup>42</sup> Arguably, collective bargaining agreements developed by labor organizations in industries such as professional sports that establish horizontal constraints are analyzed under the rule of reason approach.<sup>43</sup>

### **B. The Power of Labor Law and Professional Sports**

Federal labor law is governed by the National Labor Relations Act (NLRA)<sup>44</sup> that was enacted by Congress in 1935 to "eliminate... obstructions to the free flow of commerce" by "encouraging the practice and procedure of collective bargaining".<sup>45</sup> The NLRA requires the "mutual obligation" of the parties to the collective bargaining relationship "to confer in good faith with respect to wages, hours and other terms and conditions of employment."<sup>46</sup> The Supreme Court first labeled these terms as mandatory subjects of collective bargaining with its decision in *Jewel Tea*,<sup>47</sup> and held that a refusal to bargain over a mandatory subject<sup>48</sup> was an unfair labor practice<sup>49</sup> as specified by the NLRA. Germane to the lawful operation of labor law and collective bargaining is the power of the National Labor Relations Board (NLRB)<sup>50</sup> authorized by the NLRA and recognized by the Court as the "rulemaking and interpretive authority"<sup>51</sup> for collective bargaining [labor law] disputes. Further, the Court held that it was the intent of Congress to prevent courts from using antitrust laws to resolve labor disputes<sup>52</sup> and that it would be inappropriate for the Court to decide when antitrust laws should be applied to unfair labor practices without the "specialized judgment" of the NLRB<sup>53</sup> because "the labor laws give the Board [NLRB], not the antitrust courts, primary responsibility for policing the collective bargaining process."<sup>54</sup> Also, in the context of professional sports that organize their respective labor markets around a collective bargaining relationship, employers [leagues] in conjunction with the players' associations, can establish conditions of employment as well as rules for the sport without violating antitrust laws.<sup>55</sup> And, simply because professional sports athletes negotiate their salaries with their employers does legally diminish the effectiveness of the collective bargaining process<sup>56</sup> to where professional sports should have its own antitrust exemption.<sup>57</sup>

### **C. The Nonstatutory Exemption: The Line of Scrimmage Between Antitrust and Labor Law**

Over 65 years ago, the Court held that in order to provide substance to the collective bargaining process that certain actions between employers and labor unions could not violate antitrust laws.<sup>58</sup> Later, this finding led to the development of the nonstatutory labor exemption<sup>59</sup> to antitrust laws as the Court inferred the exemption from the NLRA and its policy favoring collective bargaining.<sup>60</sup> The nonstatutory exemption seeks to balance the competing goals of labor laws, fostering "anticompetitive agreements conducive to industrial harmony", and antitrust laws, prohibiting "all agreements among competitors that unreasonably lessen competition".<sup>61</sup> Further, the nonstatutory exemption appears to immunize any union-management agreement that followed the NLRA good faith bargaining requirements from antitrust scrutiny.<sup>62</sup> The Court states that the nonstatutory exemption properly reflects history and logic as the labor statutes [NLRA] were adopted by Congress from Court precedent and that it would be counterproductive to require collective bargaining and yet forbid any agreements to stem from the process.<sup>63</sup> Nonetheless, since the Court has not specified the

scope of the nonstatutory exemption,<sup>64</sup> the courts have exercised considerable discretion in defining it.<sup>65</sup>

## **D. The Nonstatutory Exemption and the Courts**

### **1. Supreme Court Precedent**

Although the Court first dealt with the nonstatutory exemption in 1945,<sup>66</sup> it was not until twenty years later when the Court first applied the nonstatutory exemption to a dispute arising from a collective bargaining agreement in *Jewel Tea*.<sup>67</sup> The challenge centered on hours restrictions for meat sellers, one of which was *Jewel Tea*, and the case is significant because of Justice White's finding that a balancing test should be used determine when the nonstatutory exemption should be applied.<sup>68</sup> Justice White stated that the union's interests should be balanced against the restraint's effect on the market and held that the hours restriction was "so intimately related" with the goals of the "national labor policy" that it should be protected from the antitrust laws.<sup>69</sup> Later that same year in *Pennington*, Justice Goldberg stated that the requirements of the NLRA eliminated the need for the balancing test advocated by Justice White and advanced a very broad holding that "all collective bargaining activity concerning mandatory subjects of bargaining" are exempt from antitrust scrutiny.<sup>70</sup>

In 1996, the Court in *Brown* found that the nonstatutory labor exemption applied to the unilateral conduct of the employer when the conduct took place following collective bargaining negotiation.<sup>71</sup> Furthermore, the Court held that the conduct was protected from antitrust liability when it "grew out of, and was directly related to, the lawful operation of the bargaining process."<sup>72</sup> In an eight to one decision, the Court determined that the unilateral action of an employer was not beyond the scope of the nonstatutory exemption.<sup>73</sup> The dispute arose after the National Football League (NFL) unilaterally implemented the wage terms of the developmental squad football players after negotiations during collective bargaining reached an impasse.<sup>74</sup> The group of players brought an antitrust class action against the NFL claiming a violation of the Sherman Act as an illegal restraint of trade.<sup>75</sup>

The issue was whether the NFL's action was protected by the federal labor laws from antitrust scrutiny.<sup>76</sup> The Court addressed whether the Court of Appeals properly applied the nonstatutory exemption to the facts.<sup>77</sup> Regarding the unilateral implementation of a provision by an employer following good faith impasse in ongoing collective bargaining, the Court articulated that "implement[ing] their last offer" is a lawful option for the employer.<sup>78</sup> Finding that the exemption was applicable, the Court affirmed the Appeals Court ruling that the NFL was immunized from antitrust liability<sup>79</sup> meaning that the exemption continues both after the CBA expires and after impasse in collective bargaining.<sup>80</sup> Justice Stevens' lone dissent arguing for a narrow interpretation of the exemption was noticeably overshadowed by the Court's broader ruling.<sup>81</sup>

### **2. Eighth Circuit Precedent**

Thirty years ago, the Eighth Circuit in *Mackey v. NFL*<sup>82</sup> developed a three-part test for determining whether the nonstatutory labor exemption was available for a particular agreement where federal labor law trumped federal antitrust policy. The court held that the nonstatutory exemption from antitrust liability in collective bargaining applied only where the alleged restraint on trade 1) "primarily affects only parties to the collective bargaining relationship", 2) the "agreement sought to be exempted concerns the mandatory subject of collective bargaining", and 3) the "agreement

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is the product of *bona fide* arm's length bargaining."<sup>83</sup> The plaintiff's antitrust action alleged that the NFL's rule ("Rozelle Rule") that allowed the league commissioner to require a team acquiring a free agent to compensate the free agent's former team was an illegal restraint of trade in violation of the Sherman Act.<sup>84</sup> The court affirmed the holding of the district court finding that the Rozelle Rule did not satisfy the third-prong of the three-part test for determining if the nonstatutory labor exemption from antitrust laws applied and was set aside as an unreasonable restraint of trade.<sup>85</sup>

The court examined the three-part test in relation to the facts to determine whether the nonstatutory labor exemption applied.<sup>86</sup> Finding it "clear" that the Rozelle Rule satisfied part one of the test without an analysis, the court considered closely the remaining two factors<sup>87</sup> and stated that according to the NLRA, mandatory subjects of bargaining are those that pertain to "wages, hours, and other terms and condition of employment."<sup>88</sup> Also, the court found that it is the "practical effect" and not the "form" of the agreement as to whether that agreement involves a mandatory subject of bargaining.<sup>89</sup> The court held that the second prong was met because the Rozelle Rule restricted a player's ability to move among teams and it decreased player salaries.<sup>90</sup> With the last prong of the test, the court conducted an in-depth review of the record and bargaining history of the parties and found insufficient evidence to support a finding of "*bona fide* arm's-length bargaining over the Rozelle Rule."<sup>91</sup> As such, the court held that the nonstatutory exemption from antitrust liability did not apply to an agreement that primarily affected only the parties involved in collective bargaining, concerned a mandatory subject of bargaining, but was not the product of *bona fide* bargaining.<sup>92</sup>

The Eighth Circuit moved beyond its decision in *Mackey* with its examination of the nonstatutory labor exemption to antitrust liability in *Powell v. NFL*.<sup>93</sup> The court held that the nonstatutory exemption from antitrust scrutiny extends beyond impasse when an ongoing collective bargaining relationship exists.<sup>94</sup> The plaintiff's antitrust action against the NFL alleged that once impasse was reached in negotiations during collective bargaining that the nonstatutory labor exemption to antitrust laws expired and the challenged provisions were open for antitrust attack.<sup>95</sup> The court reversed the order of the lower court finding that impasse in collective bargaining negotiations did not terminate the application of the nonstatutory exemption to antitrust liability.<sup>96</sup>

The court reasoned that even though their prior decision in *Mackey* "is not controlling", the use of this method of analysis was required to evaluate the application of the nonstatutory exemption.<sup>97</sup> Applying the three-prong *Mackey* test – "(1) primarily affected only the parties in the collective bargaining relationship; (2) concerned a mandatory subject of collective bargaining; and (3) was the product of *bona fide*, arm's-length bargaining" – to the challenged provision, the court concluded that all three factors were met, hence, the nonstatutory exemption "precluded an antitrust challenge" while the collective bargaining agreement was in effect.<sup>98</sup> The issue for the court then was whether the nonstatutory exemption expired when the CBA expired or whether the impasse encountered by the parties during an ongoing collective bargaining relationship terminated the exemption.<sup>99</sup> The Eighth Circuit followed the Supreme Court's definition of impasse from *Charles D. Bonanno Linen Service, Inc. v. NLRB*<sup>100</sup> where impasse was: "a temporary deadlock or hiatus in negotiations which in almost all cases is eventually broken, through either a change of mind or the application of economic force. \*\*\* Furthermore, an impasse may be brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process."<sup>101</sup>

The court found that since the NFL did not bargain in bad faith that the nonstatutory exemption extended beyond impasse.<sup>102</sup> The

NLRA states that once parties in a collective bargaining relationship reach good faith impasse that the nonstatutory labor exemption from antitrust liability does not expire.<sup>103</sup> Also, the court held that agreements made in an ongoing collective bargaining relationship are immunized by the nonstatutory labor exemption from antitrust liability.<sup>104</sup> Moreover, the court maintained that the NLRB is the proper authority for federal labor law disputes and since the parties may present their complaints to the Board, the labor (collective bargaining) relationship continues and the nonstatutory labor exemption to antitrust laws applies.<sup>105</sup> Thus, the court held that the nonstatutory exemption from antitrust liability applied beyond impasse, to parties that are in an ongoing collective bargaining relationship, and where the NLRB has the potential to rule on merits of the antitrust claims.<sup>106</sup>

### 3. Second Circuit Precedent

In 1987, the Second Circuit in *Wood v. NBA*<sup>107</sup> held that the nonstatutory exemption applied to the NBA's salary cap, college draft, and other collective bargaining agreement provisions when the alleged antitrust claim is contrary to the federal labor laws governing collective bargaining and the plaintiff is a prospective employee.<sup>108</sup> The plaintiff claimed that the collective bargaining agreement between the NBA and players' association (NBPA) was "illegal because it prevents him from achieving his full market value".<sup>109</sup> The district court dismissed the antitrust action finding that the challenged provisions fell within the scope of the nonstatutory exemption because they affected "only parties to the collective bargaining agreement. . . involved mandatory subjects of bargaining as defined by federal labor laws, and are the result of bona fide arms-length negotiations."<sup>110</sup>

On appeal, the Second Circuit determined that federal labor laws governed disputes arising from the collective bargaining agreement and that the NLRA provided the authority of the union's bargaining representative.<sup>111</sup> Additionally, the court found that collective bargaining agreements that disadvantage new employees were not liable of antitrust violations.<sup>112</sup> Also, the court reasoned that a *quid pro quo*<sup>113</sup> in collective bargaining was not necessary to eliminate antitrust liability and that "any claim of unreasonable bargaining behavior must be pursued in an unfair labor practice proceeding charging a refusal to bargain in good faith, 29 U.S.C. § 158(a)(5), not in an action under the Sherman Act."<sup>114</sup> Therefore, the court affirmed the lower court's ruling that the nonstatutory labor exemption from antitrust liability applied to draft eligibility in professional sports.<sup>115</sup>

The Second Circuit again reviewed the application of the nonstatutory labor exemption from antitrust scrutiny in *NBA v. Williams*.<sup>116</sup> Following its reasoning in *Wood*, the court held that the nonstatutory exemption applied to the expired provisions of the expired collective bargaining agreement between the NBA and the NBPA when the NBA unilaterally implemented these provisions when negotiations with the NBPA reached impasse.<sup>117</sup> An antitrust class action was brought against the NBA by a group of current and prospective players alleging that the provision on the "College Draft", among others, was an illegal restraint of trade in violation of the Sherman Act.<sup>118</sup> The District Court found that the nonstatutory exemption applied and that "antitrust immunity exists as long as a collective bargaining relationship exists."<sup>119</sup> Consequently, the court held that the unilateral action by the NBA to maintain the College Draft while the collective bargaining relationship was still in existence protected the action from antitrust liability.<sup>120</sup>

The Second Circuit evaluated the NBPA's appeal as whether the employer's unilateral imposition of the status quo following impasse

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in negotiations in an on-going collective bargaining relationship violated antitrust laws.<sup>121</sup> The court found that “even after impasse, moreover, if the employer may impose new terms and conditions of employment, they are surely free to maintain the status quo.”<sup>122</sup> Also, the court followed its judgment in *Wood* that the College Draft was a mandatory subject of bargaining.<sup>123</sup> In accordance with the NLRA, good faith bargaining is required between the employer and union over mandatory subjects of bargaining.<sup>124</sup> Further, the Second Circuit articulated on two points of settled law from the Supreme Court.<sup>125</sup> First, that employers bargaining in good faith may insist upon the proposals offered to the union.<sup>126</sup> Second, that employers bargaining in good faith to an impasse “may implement terms and conditions of employment . . . in support of their demands.”<sup>127</sup> Thus, the court affirmed the lower court’s ruling that the nonstatutory labor exemption from antitrust liability applied to the NBA’s action to unilaterally implement the status quo College Draft after the expiration of the collective bargaining agreement since the collective bargaining relationship still existed.<sup>128</sup>

Later that same year after deciding *Williams*, the Second Circuit once again applied the nonstatutory labor exemption from antitrust liability to bar the plaintiff’s antitrust claims in *Caldwell v. ABA*.<sup>129</sup> The court held that the nonstatutory exemption immunized the employer from antitrust liability because any remedies sought by the plaintiff for his alleged intentional torts by the employer properly fell under labor law.<sup>130</sup> The plaintiff brought an antitrust action against the ABA claiming that ABA conspired against him to deprive him of his career as a professional basketball player in retaliation for his role in representing the player’s union in collective bargaining negotiations with the ABA.<sup>131</sup> The court affirmed, on different grounds, the lower court’s granting of summary judgment for the ABA holding that the nonstatutory labor exemption defeated the plaintiff’s claims.<sup>132</sup>

The court found that once the collective bargaining relationship was created between the ABA and the players union that the plaintiff “lost the right to seek the best bargain from individual ABA teams.”<sup>133</sup> In addition, antitrust laws that would have forced those teams to compete for players represented by the union no longer apply.<sup>134</sup> Furthermore, the Second Circuit fashioned a hypothetical to illustrate the scope of federal law by stating that even if the collective bargaining parties had agreed to pay the plaintiff a certain salary or terminate his employment, that any challenges to that agreement would lack antitrust standing.<sup>135</sup> Also, the court found that the plaintiff should have sought a remedy under the NLRA as Congress intended for federal labor policy disputes and not under the Sherman Act because NLRA offers “an array of rules and remedies . . . and . . . application of antitrust principles to a collective bargaining relationship would disrupt collective bargaining as we know it.”<sup>136</sup> Therefore, the court held that the nonstatutory exemption from antitrust liability applied because federal labor laws control in the existence of a collective bargaining relationship.<sup>137</sup>

## II. CLARETT RUSHES THE SECOND CIRCUIT

### A. The District Court Opinion

In the Southern District of New York, Judge Scheindlin held that Claret’s antitrust challenge to the NFL’s eligibility rule was subject to antitrust scrutiny because it was not a mandatory subject of collective bargaining, not the product of arm’s length negotiations, and only affected non-employees.<sup>138</sup> Claret was a star running back at OSU and led his team as a freshman to a victory in the national championship game at the 2003 Fiesta Bowl.<sup>139</sup> After the season, he was selected as Big Ten Freshman of the Year and voted the best

running back in college football by *The Sporting News*.<sup>140</sup> Following this exceptional season, Claret came under fire for violating NCAA regulations and was subsequently suspended from playing football for his entire sophomore season.<sup>141</sup> Rather than sitting out an entire football season, Claret brought an antitrust suit against the NFL for its eligibility rule that requires players to be three full college football seasons removed from high school graduation to be eligible for the NFL Draft.<sup>142</sup>

The court discussed the history of the NFL and the establishment of the collective bargaining relationship between the NFL Management Council (NFLMC) and the Players’ Association (NFLPA).<sup>143</sup> The court noted that the NFL is far and away the most financially successful professional sports league in terms of revenue and television ratings and offers “an unparalleled opportunity for an aspiring football player in terms of salary, publicity, endorsement opportunities, and level of competition.”<sup>144</sup> The first collective bargaining agreement between the NFL and NFLPA was executed in 1968 and the current CBA that began in 2003 expires in 2007.<sup>145</sup> While the text of the eligibility rule is not listed in the CBA, on the day CBA took effect, the NFLPA and the NFLMC executed a side letter acknowledging that the Constitution and Bylaws attached to the letter were referenced into the CBA.<sup>146</sup> Claret challenged this version of the eligibility rule.<sup>147</sup>

Judge Scheindlin granted Claret’s motion for summary judgment finding that the eligibility rule violated the antitrust laws and that the NFL could not preclude him from participating in the draft.<sup>148</sup> In making this decision, Judge Scheindlin summarily dismissed precedent – *Wood*, *Williams*, *Caldwell* – from [her own] the Second Circuit in favor of the three part test for determining the application of the nonstatutory exemption advanced by the Eighth Circuit in *Mackey*.<sup>149</sup> The Second Circuit cases were rejected because they involved mandatory subjects of collective bargaining and Judge Scheindlin found that the eligibility rule did not.<sup>150</sup> Specifically, she concluded that since the eligibility rule did not reference wages, hours, or other conditions of employment, that it was not a mandatory subject.<sup>151</sup> Further, Judge Scheindlin held that the nonstatutory exemption could not apply to individuals outside of the bargaining unit.<sup>152</sup> She did not dispute that the nonstatutory exemption applies to both current and prospective employees; however, she differentiated between Claret’s inability to be drafted and Wood’s post-draft status that made Wood covered by the CBA.<sup>153</sup> In addition, Judge Scheindlin found that the NFL failed to submit sufficient evidence that the eligibility rule was the product of arm’s length negotiations between the NFLMC and NFLPA.<sup>154</sup> Therefore, according to the *Mackey* test, Judge Scheindlin held that the nonstatutory exemption did not protect NFL’s eligibility rule from antitrust liability.<sup>155</sup>

Outside of the nonstatutory exemption, Judge Scheindlin held that the eligibility rule is an unreasonable restraint on trade because it constituted a group boycott and because the procompetitive justifications asserted by the NFL for the rule did not outweigh the rule’s anticompetitive effect.<sup>156</sup> Accordingly, after finding that the nonstatutory exemption did not apply and since Claret had antitrust standing, Judge Scheindlin ordered that Claret be eligible to participate in the draft.<sup>157</sup>

### B. The Second Circuit Opinion

On appeal, the Second Circuit reversed the holding of the district court and remanded in favor of the NFL.<sup>158</sup> As a result, the lower court’s order for allowing Claret to participate in the draft was vacated.<sup>159</sup>

The Second Circuit held that the NFL’s eligibility rule of being three football seasons removed from high school graduation

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was shielded by the nonstatutory labor exemption from antitrust liability.<sup>160</sup> Also, the court found that the lack of bargaining by the NFL and NFLPA did not eliminate the proper application of the nonstatutory exemption.<sup>161</sup> The court tracked its reasoning in *Wood*, *Williams*, and *Caldwell* as well as the Court's opinion in *Brown* to determine that the nonstatutory exemption defeated Claret's antitrust claim.<sup>162</sup> Similarly, Claret's allegation that the eligibility rule was not in the CBA was dismissed because the court found that the rule was noted in the NFL Constitution and Bylaws that were referenced in three separate provisions of the current collective bargaining agreement between the NFL, the multi-employer bargaining unit, and the NFLPA, the players union.<sup>163</sup>

The issue on appeal was whether the collective bargaining relationship and subsequent collective bargaining agreement process eliminated the eligibility rule from antitrust attack.<sup>164</sup> The Second Circuit articulated that the nonstatutory labor exemption to the antitrust laws was established by the Supreme Court because in regards to the collective bargaining process, "certain concerted activity among and between labor and employers must be held to be beyond the reach of the antitrust laws."<sup>165</sup> Further, the court explained that the Eighth Circuit's *Mackey* test was not the standard for delineating the scope of the nonstatutory exemption.<sup>166</sup> Also, the court concluded that the lack of bargaining over the eligibility rules "in no way diminished" the application of the nonstatutory exemption.<sup>167</sup> And the court maintained the judgment in *Brown* that a special antitrust exemption is not applicable to professional athletes.<sup>168</sup> Thus, the court held that the nonstatutory labor exemption to antitrust liability applied when the matter under dispute was not bargained for in the collective bargaining agreement.<sup>169</sup>

### III. CLARETT AFFIRMED

If the Supreme Court had granted Claret's request for *certiorari*, the Court would have affirmed the Second Circuit's ruling that the nonstatutory labor exemption to antitrust liability properly barred Claret's challenge to the NFL's eligibility rule. The Court would have used its reasoning in *Brown*, in conjunction with precedent from both the Second and Eighth Circuits, to determine that the nonstatutory exemption applied to the rule. As such, the scope of the nonstatutory exemption would be strategically defined in the professional sports context to further promote Congress' intent to encourage collective bargaining and the freedom to contract. The widely considered<sup>170</sup> broader ruling of the Second Circuit would be fettered by the modified *Mackey* approach used in *Brown*.

#### A. The Proper Application of Mackey, If Applied

The disagreement over *Claret* stems from, in large part, the opinion of Judge Scheindlin where she improperly dismissed precedent in her own Circuit as to the application of the nonstatutory exemption and instead applied a test from the Eighth Circuit to hold that the eligibility rule did not fall under the boundary of the exemption and that Claret had antitrust standing.<sup>171</sup> Further, not only did she misunderstand and wrongly apply the reasoning of *Wood*, *Williams*, and *Caldwell*,<sup>172</sup> but Judge Scheindlin also incorrectly applied the *Mackey* factors to the facts to find that the nonstatutory exemption did not immunize the NFL from antitrust scrutiny with its eligibility rule.

The Court would find that even if the *Mackey* test – (1) primarily affected only the parties in the collective bargaining relationship; (2) concerned a mandatory subject of collective bargaining; and (3) was the product of *bona fide*, arm's-length bargaining<sup>173</sup> – was applied to Claret's antitrust claim that the test would fail to show

antitrust liability because the nonstatutory exemption has been found to apply to alleged violations of the Sherman Act where the parties in a collective bargaining relationship conducted negotiations during the collective bargaining process.<sup>174</sup> Moreover, the Eighth Circuit in *Powell* expanded considerably upon its narrow ruling in *Mackey* by holding that the nonstatutory exemption to antitrust liability applied to unilateral actions of the employer beyond impasse in good faith bargaining with the union, to agreements created in ongoing collective bargaining relationships, and to agreements that may be challenged before the NLRB because the of the continuing collective bargaining relationship.<sup>175</sup> Applying this reasoning to *Claret*, the eligibility rule was the result of good faith bargaining between the NFLMC and the NFLPA, the CBA was created in an ongoing collective bargaining relationship, and the NLRB is the proper authority to review disputes regarding the CBA. According to *Mackey*, it is an all or nothing test as the nonstatutory exemption to antitrust liability applies only when a restraint satisfies each prong of the three-prong test.<sup>176</sup>

For the first prong, the court in *Caldwell* determined that the "governing legal regime" was changed "irrevocably" once the NFL and the players union established a collective bargaining relationship.<sup>177</sup> Also, the NLRA "explicitly defines 'employee' in a way that includes workers outside of the bargaining unit."<sup>178</sup> The *Mackey* court wasted little time in determining that it was "clear" that the restraint primarily affected only the parties to the collective relationship.<sup>179</sup> The Court would find that Claret is a prospective employee of the NFL whose possible future employment with the NFL is governed by the collective bargaining agreement.<sup>180</sup> Hence, the first prong is easily satisfied in favor of the nonstatutory exemption precluding Claret's antitrust claim. Similarly, the eligibility rule just as easily meets the second prong of the test because it is a mandatory subject of bargaining.<sup>181</sup> The rule certainly pertains to "wages, hours, and other terms and conditions of employment" as enumerated in the NLRA, and it unquestionably has the "practical effect" noted in *Mackey* on the CBA as the eligibility rule directly affects player salaries and team rosters, etc.<sup>182</sup> Accordingly, the second prong is easily satisfied in favor of the nonstatutory exemption. With the last prong, *bona fide* bargaining, the record states that the NFLMC and NFLPA discussed the rule via a letter signed by both parties incorporating the Constitution and Bylaws into the CBA,<sup>183</sup> but does this mean that the rule was not bargained for? The facts suggest otherwise as Mr. Ruocco, Senior Vice President of Labor Relations at the NFLMC, stated that the "eligibility rule itself was the subject of collective bargaining".<sup>184</sup> The record is silent as to whether these unresolved discussions on the rule, and the subsequent signing of the letter, meant that the parties were at impasse; however, either scenario (impasse or no impasse) does not change the determination that the third prong is met and the nonstatutory exemption applies to the eligibility rule, rather, only the reasoning for this conclusion does. If it is interpreted that the rule was bargained to impasse, then the holdings of *Brown* and *Powell* show that the nonstatutory exemption protects the NFL from antitrust liability because the exemption even goes beyond impasse as the NFLMC and the NFLPA are in an ongoing collective bargaining relationship.<sup>185</sup> If the interpretation is no impasse, then the Court would apply the Second Circuit's holding in *Claret* that the parties are not required to bargain over the rule for it to be within the scope of the nonstatutory exemption because the union knew of the rule and agreed not to challenge it.<sup>186</sup> As such, with the third prong successfully satisfied in favor of the nonstatutory exemption along with the first and second prongs, the *Mackey* test illustrates that Claret's claim lacks antitrust standing.

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### B. The Modified Mackey Approach in Brown

Even though the Court in *Brown* does not reference the *Mackey* opinion at all in its reasoning, the Court essentially adopted a modified *Mackey* approach to determine whether the nonstatutory exemption can be applied to the challenged restraint. The justifications for the apparent similarities are simple, as both the Court and the Eighth Circuit developed their analysis for applying the exemption upon notable Court precedent.<sup>187</sup> As such, the Court's four part test from *Brown* holds that the nonstatutory exemption should apply to the unilateral action by the employer when:

- (1) "the action took place during and immediately after collective bargaining negotiations," (2) "the action grew out of and was directly related to the lawful operation of the collective bargaining process," (3) "the action involved a matter that the parties were required to negotiate collectively," and (4) "the action concerned only the parties to the collective bargaining relationship."<sup>188</sup>

Removing the unilateral action by the employer context from the four factor test, the similarities between the *Mackey* test<sup>189</sup> are almost blatant. And just as the *Mackey* factors comprise an all or nothing test, if only one of the four prongs in *Brown* is not satisfied, then the nonstatutory exemption cannot be applied and the challenged restraint should be analyzed under antitrust scrutiny.

In relation to *Clarett*, although the case does not involve a challenge to unilateral action by the NFL, the Court would likely apply the same rationale to the remaining three factors as the Eighth Circuit did with its three part *Mackey* test. Concerned with the problems that could occur if the scope of the nonstatutory exemption was extended too broadly "to insulate from antitrust review"<sup>190</sup> all disputes arising from the collective bargaining process, the Court advocated a narrow application of the exemption and fashioned the four-part test for this reason.<sup>191</sup>

### C. The Supposed Second and Eighth Circuit Split

With the considerable amount of discussion<sup>192</sup> over the supposed split between the Second and Eighth Circuits in determining the limits of the nonstatutory exemption, how likely is it that the Court would concur with this reasoning? Although it is possible, it is more likely that the Court would praise both circuits for their proper interpretations of the scope of the nonstatutory exemption since both<sup>193</sup> use the Court's precedent from the *Jewel Tea* line of cases<sup>194</sup> to develop their respective reasoning just as the Court did in *Brown*.<sup>195</sup> Using the reasoning from the modified *Mackey* approach in *Brown* discussed above in Section III.B., the Court would clarify the Second Circuit's statements in *Clarett* that the Eighth Circuit's *Mackey* test has "never been regarded... as defining the appropriate limits of the non-statutory exemption" and that the "*Mackey* factors" do "not comport"<sup>196</sup> with *Brown* by explaining that the relatively narrow reasoning in *Brown* does not seek to protect from antitrust liability all agreements made in a collective bargaining relationship.<sup>197</sup>

Particularly important to understanding the Eighth Circuit's reasoning in *Mackey* and subsequent holding in *Powell* is the context of the NFLPA during the time of the CBA and the challenged Rozelle Rule that was at issue in *Mackey*. Indeed, the Rozelle Rule did not meet the requirement of being the product of *bona fide* arm's length negotiations because the rule was included in the CBA between the NFL and the players *before* the players were represented by a union (the NFLPA) as required by the NLRA in order for lawful collective bargaining to occur.<sup>198</sup> Further, Eighth Circuit agreed with the lower court's opinion in *Powell* that the *Mackey* test was not controlling as to defining the limits of the nonstatutory exemption.<sup>199</sup> Therefore, since both circuits follow the NLRA requirement of good faith

bargaining in an ongoing collective bargaining relationship,<sup>200</sup> the supposed split between them is negligible as the purpose of the NLRA promoting a national labor policy is advanced by both.

### D. Clarett and Public Policy

Where are the negative effects that opponents<sup>201</sup> have cried will occur following the Second Circuit's *Clarett* decision? Where is the supposed unequal bargaining power between the NFL and the NFLPA?<sup>202</sup> And where is the landslide of union decertification because of the overly broad holding in *Clarett*?<sup>203</sup> The answer to all of these questions, as well as the reasons why these problems have not surfaced, comes from careful reading of *Clarett*. Even though the holding appears to be overly broad on its face, the fact that the eligibility rule was not in the text of CBA but was incorporated by reference subsequent to bargaining on that very subject,<sup>204</sup> parallels the judgment both in *Brown* as the exemption does not apply "only to the understandings embodied in a CBA"<sup>205</sup> and in *Wood* "to ensure the successful operation of the collective bargaining process."<sup>206</sup> The two cases<sup>207</sup> of professional football players who decertified their membership with the NFLPA to pursue antitrust claims occurred almost fifteen years ago prior to the execution of the current CBA running from 1993 through 2007. More importantly, if the players were to seek employment from the NFL following their antitrust suits, they would have been required to recertify their membership with the NFLPA to take advantage of all the benefits and protections that the CBA provides; exactly the purpose of the NLRA and collective bargaining. Any such prediction of a reoccurrence of this type of decertification is unsupported by data. Similarly, the narrow scope of the nonstatutory exemption that *Brown* specifically calls for with its four-part test ensures that the exemption is not wrongfully extended beyond its capability to serve as a blanket exemption to antitrust liability.<sup>208</sup>

Proponents of the *Clarett* decision concur with the Court in *Brown* that subjecting a mandatory subject of collective bargaining, such as the NFL's eligibility rule, to antitrust scrutiny would "introduce instability and uncertainty into the collective bargaining process."<sup>209</sup> Also, a ruling for *Clarett* would be incompatible with the purpose and operation of the federal labor laws, and it would invite every disgruntled individual who was not hired in an industry with a collective bargaining relationship to file an antitrust cause of action.<sup>210</sup> Further, proponents would argue for maintaining the NLRB as the primary authoritative body for hearing and deciding collective bargaining disputes while preventing the judicial use of antitrust law to resolve them.<sup>211</sup> Moreover, a holding for *Clarett* would have had a backlash effect on the federal labor policy as the holding would have drastically impaired the ability of the parties to partake in meaning collective bargaining.<sup>212</sup> As such, sixty years of nurturing the Congressional policy favoring collective bargaining by the courts would have been sacked for a substantial loss of yardage.

## IV. CONCLUSION

If certiorari had been granted in *Clarett*, the Supreme Court would have affirmed the Second Circuit's decision where the nonstatutory labor exemption to antitrust liability was found to immunize the NFL's eligibility rule from antitrust attack. Following its narrow reasoning in *Brown* by properly limiting the scope of the nonstatutory exemption, the Court's four prong test recognized both the contributions made to furthering the purpose of the NLRA by the Second and Eighth Circuits as well as the similarities between the circuits and their respective interpretations of binding precedent. Affirming *Clarett* would solidify the national labor policy favoring collective bargaining as the precise boundaries of the exemption would be delineated. In the future, maybe *Clarett* should focus on challenging defenses instead of sixty years of sound federal labor policy.



*Continued from Page 20*

- <sup>1</sup> United Press International article of Maurice Claret charged with armed robbery at [http://webnews.instantalbert.com/wed/cg/Ufbc-clarett.RGHU\\_GFA.html](http://webnews.instantalbert.com/wed/cg/Ufbc-clarett.RGHU_GFA.html) (posted Feb. 10, 2006).
- <sup>2</sup> 369 F.3d 124 (2d Cir. 2004), cert. denied, No. 04-910, 2005 WL 742636 (Apr. 4, 2005).
- <sup>3</sup> See Jason Abeln, Chris Brown, Neil Desai, Comment and Casenote, *Lingering Questions after Claret v. NFL: A Hypothetical Consideration of Antitrust and Sports*, 73 U. Cin. L. Rev. 1767 (2005).
- <sup>4</sup> Gardella v. Chandler, 172 F.2d 402, 408 (2d Cir. 1949), quoted in Claret v. NFL, 306 F. Supp. 2d 379, 382 n.1 (S.D.N.Y.).
- <sup>5</sup> See Brown, supra note 3; Walter Champion, Article, Claret v. NFL and the Reincarnation of the Nonstatutory Labor Exemption in Professional Sports, 47 S. Tex. L. Rev. 587 (2006); Jocelyn Sum, Note, Claret v. National Football League, 20 Berkeley Tech. L.J. 807 (2005).
- <sup>6</sup> USA Today article on condo fire at Claret's residence at [http://www.usatoday.com/sports/college/football/2006-04-10-clarett-condo-fire\\_x.htm](http://www.usatoday.com/sports/college/football/2006-04-10-clarett-condo-fire_x.htm) (posted Apr. 10, 2006).
- <sup>7</sup> Claret, 369 F.3d at 126.
- <sup>8</sup> Claret, 306 F. Supp. 2d at 388.
- <sup>9</sup> Id.
- <sup>10</sup> Id.
- <sup>11</sup> See id.
- <sup>12</sup> Claret, 369 F.3d at 126.
- <sup>13</sup> Claret, 306 F. Supp. 2d at 379.
- <sup>14</sup> Id. at 410-11.
- <sup>15</sup> Claret, 369 F.3d at 142-143.
- <sup>16</sup> Champion, supra note 5; Sum, supra note 5.
- <sup>17</sup> See Claret, 306 F. Supp. 2d at 388 n.53-54.
- <sup>18</sup> Sum, supra note 5 at 807.
- <sup>19</sup> See Caldwell v. Am. Basketball Ass'n, 66 F.3d 523 (2d Cir. 1995); NBA v. Williams, 45 F.3d 684 (2d Cir. 1995); Wood v. NBA, 809 F.2d 954 (2d Cir. 1987).
- <sup>20</sup> 543 F.2d 606 (8th Cir. 1976).
- <sup>21</sup> See Darren Dummit, Note, Upon Further Review: Why the NFL May Not Be Free After Claret, And Why Professional Sports May Be Free From Antitrust Law, 8 Vand. J. Ent. & Tech. L. 149 (2005); Sum, supra note 5 at 807-08.
- <sup>22</sup> Claret, 369 F.3d at 131.
- <sup>23</sup> 518 U.S. 231 (1996).
- <sup>24</sup> Claret, 369 F.3d at 143.
- <sup>25</sup> 15 U.S.C. § 1 (2000).
- <sup>26</sup> Id.
- <sup>27</sup> Standard Oil Co. v. United States, 221 U.S. 1 (1911).
- <sup>28</sup> 18 A.L.R. Fed. 489.
- <sup>29</sup> Id.
- <sup>30</sup> Id.
- <sup>31</sup> Claret, 369 F.3d 124 (2d Cir. 2004).
- <sup>32</sup> Champion, supra note 5 at 590.
- <sup>33</sup> 407 U.S. 258 (1972).
- <sup>34</sup> See Dummit, supra note 21 at 149-50.
- <sup>35</sup> 15 U.S.C. § 26(b) (2000).
- <sup>36</sup> See Champion, supra note 5 at 590.
- <sup>37</sup> See Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 343 (1982).
- <sup>38</sup> See NCAA v. Bd. of Regents of University of Oklahoma, 468 U.S. 85, 104 (1984).
- <sup>39</sup> See Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).
- <sup>40</sup> Claret, 306 F. Supp. 2d at 405 (quoting Northern Pacific, 356 U.S. at 5).
- <sup>41</sup> See NCAA, 468 U.S. at 100-01.
- <sup>42</sup> See Claret, 306 F. Supp. 2d at 405 n.164.
- <sup>43</sup> See supra note 41.
- <sup>44</sup> 29 U.S.C. § 151 (2000).
- <sup>45</sup> Id. Collective bargaining meaning "Negotiations between an employer and the representatives of organized employees for the purpose of determining the conditions of the employment, such as wages, hours and fringe benefits." Black's Law Dictionary 109 (8th ed. 2004).
- <sup>46</sup> 29 U.S.C. § 158(d) (2000).
- <sup>47</sup> Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 685 (1965).
- <sup>48</sup> See NLRB v. Katz, 369 U.S. 736 (1962).
- <sup>49</sup> See 29 U.S.C. § 158 (2000).
- <sup>50</sup> 29 U.S.C. § 160 (2000).
- <sup>51</sup> See San Diego Building Trades Council v. Garmon, 359 U.S. 236, 242-245 (1959).
- <sup>52</sup> See Jewel Tea, 381 U.S. at 700-709.
- <sup>53</sup> Brown, 518 U.S. at 250 (quoting NLRB v. Truck Drivers, 353 U.S. 87, 96 (1957)).
- <sup>54</sup> Id. at 242.
- <sup>55</sup> See Claret, 369 F.3d at 130.
- <sup>56</sup> See Jacobs & Winter, Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage, 81 Yale L.J. 1 (1971).
- <sup>57</sup> Brown, 518 U.S. at 249.
- <sup>58</sup> See United States v. Hutcheson, 312 U.S. 219 (1941).
- <sup>59</sup> See Jewel Tea, 381 U.S. at 689; Connell Constr. Co. v. Plumbers, 421 U.S. 616, 622 (1975); Mine Workers v. Pennington, 381 U.S. 657, 665 (1965).
- <sup>60</sup> See Teamsters v. Oliver, 358 U.S. 283, 295 (1959).
- <sup>61</sup> Brown, 518 U.S. at 241 (citing Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930)).
- <sup>62</sup> See Champion, supra note 5 at 592.
- <sup>63</sup> Brown, 518 U.S. at 236-37.
- <sup>64</sup> Supra note 22.
- <sup>65</sup> Sum, supra note 5 at 811.
- <sup>66</sup> Allen Bradley Co. v. Local No. 3, International Brotherhood of Electrical Workers, 325 U.S. 797 (1945).
- <sup>67</sup> Jewel Tea, 381 U.S. 676 (1965).
- <sup>68</sup> Id. at 690 n5.
- <sup>69</sup> Id. at 689-90.
- <sup>70</sup> Pennington, 381 U.S. at 710.
- <sup>71</sup> Brown, 518 U.S. at 250.
- <sup>72</sup> Id.
- <sup>73</sup> Id.
- <sup>74</sup> Id. at 235.
- <sup>75</sup> Id.
- <sup>76</sup> Id. at 234.
- <sup>77</sup> Id.
- <sup>78</sup> Id. at 246.
- <sup>79</sup> Id. at 234-235.
- <sup>80</sup> See Champion, supra note 5 at 593.
- <sup>81</sup> Id.
- <sup>82</sup> Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976).
- <sup>83</sup> Id. at 614.
- <sup>84</sup> Id. at 609.
- <sup>85</sup> Id. at 623.
- <sup>86</sup> Id. at 615.
- <sup>87</sup> Id.
- <sup>88</sup> Id.; 29 U.S.C. § 158(d) (2000).
- <sup>89</sup> Id.
- <sup>90</sup> Id.
- <sup>91</sup> Id. at 616.
- <sup>92</sup> Id. at 616, 623.
- <sup>93</sup> 930 F.2d 1293 (1989).
- <sup>94</sup> Id. at 1303-04.
- <sup>95</sup> Id. at 1298.
- <sup>96</sup> Id. at 1304.
- <sup>97</sup> Id. at 1298.

- <sup>98</sup> Id. at 1299.
- <sup>99</sup> Id.
- <sup>100</sup> 454 U.S. 404 (1982).
- <sup>101</sup> Powell, 930 F.2d at 1299; Bonanno Linen, 454 U.S. at 412.
- <sup>102</sup> Powell, 930 F.2d at 1303.
- <sup>103</sup> 29 U.S.C. § 151 (2000); Brown, 518 U.S. at 244.
- <sup>104</sup> Supra note 102.
- <sup>105</sup> Id. at 1303-04.
- <sup>106</sup> Id.
- <sup>107</sup> 809 F.2d 954 (2d Cir. 1987).
- <sup>108</sup> Id. at 956-57, 963.
- <sup>109</sup> Id. at 959.
- <sup>110</sup> Id. at 958.
- <sup>111</sup> Id. at 959; 29 U.S.C. § 159(a) (2000).
- <sup>112</sup> Id. at 960.
- <sup>113</sup> Id. at 962 n.5.
- <sup>114</sup> Id.
- <sup>115</sup> Id. at 962-63.
- <sup>116</sup> 45 F.3d 684 (2d Cir. 1995).
- <sup>117</sup> Id. at 692-93.
- <sup>118</sup> Id. at 688.
- <sup>119</sup> Id. (internal quotations omitted).
- <sup>120</sup> Id. at 687.
- <sup>121</sup> Id. at 688.
- <sup>122</sup> Id. at 691.
- <sup>123</sup> Id.
- <sup>124</sup> Id.; 29 U.S.C. § 158(d) (2000).
- <sup>125</sup> Williams, 45 F.3d at 691.
- <sup>126</sup> Id. (citing Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 210 (1964)).
- <sup>127</sup> Id. (citing First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 675, (1981)).
- <sup>128</sup> Williams, 45 F.3d at 693.
- <sup>129</sup> 66 F.3d 523 (1995).
- <sup>130</sup> Id. at 530.
- <sup>131</sup> Id. at 526.
- <sup>132</sup> Id. at 526-28.
- <sup>133</sup> Id. at 530.
- <sup>134</sup> Id.
- <sup>135</sup> Id.
- <sup>136</sup> Id. at 530 (quoting Williams, 45 F.3d at 693).
- <sup>137</sup> Id. at 530.
- <sup>138</sup> Claret v. NFL, 306 F. Supp. 2d 379, 393-97 (S.D.N.Y. 2004).
- <sup>139</sup> Id. at 387.
- <sup>140</sup> Id. at 388.
- <sup>141</sup> Id.
- <sup>142</sup> Id. at 382.
- <sup>143</sup> Id. at 382-83.
- <sup>144</sup> Id. at 383-384.
- <sup>145</sup> Id. at 384.
- <sup>146</sup> Id. at 385.
- <sup>147</sup> Id. at 387.
- <sup>148</sup> Id. at 410-11.
- <sup>149</sup> Id. at 391-97.
- <sup>150</sup> Id. at 393.
- <sup>151</sup> Id.
- <sup>152</sup> Id. at 395 (citing Mackey, 543 F.2d at 614).
- <sup>153</sup> Id. at 395 (citing Wood, 809 F.2d at 960).
- <sup>154</sup> Id. at 396.
- <sup>155</sup> Id. at 393-97.
- <sup>156</sup> Id. at 397-410.
- <sup>157</sup> Id. at 411.
- <sup>158</sup> Claret, 369 F.3d at 143.
- <sup>159</sup> Id.
- <sup>160</sup> Id. at 143.
- <sup>161</sup> Id.
- <sup>162</sup> Id. at 134-43.
- <sup>163</sup> Id. at 127.
- <sup>164</sup> Id. at 130.
- <sup>165</sup> Id.
- <sup>166</sup> Id. at 133.
- <sup>167</sup> Id. at 142.
- <sup>168</sup> Id. at 143.
- <sup>169</sup> Id.
- <sup>170</sup> See Champion, supra note 5 at 604-05; Sum, supra note 5 at 822.
- <sup>171</sup> See id.
- <sup>172</sup> See Claret, 369 F.3d at 134-38.
- <sup>173</sup> Mackey, 543 F.2d at 614.
- <sup>174</sup> Brown, 518 U.S. at 250.
- <sup>175</sup> Powell, 930 F.2d at 1304.
- <sup>176</sup> See supra note 173.
- <sup>177</sup> Caldwell, 66 F.3d at 527.
- <sup>178</sup> Wood, 809 F.2d at 960; 29 U.S.C. § 152(3) (2000).
- <sup>179</sup> Mackey, 543 F.2d at 615.
- <sup>180</sup> See, e.g., Claret, 369 F.3d at 143; Wood, 809 F.2d at 961.
- <sup>181</sup> See, e.g., Brown, 518 U.S. at 250; Claret, 369 F.3d at 140-41.
- <sup>182</sup> Claret, 369 F.3d at 140.
- <sup>183</sup> Id. at 127-28.
- <sup>184</sup> Id. at 128.
- <sup>185</sup> Brown, 518 U.S. at 250; Powell, 930 F.2d at 1304.
- <sup>186</sup> Claret, 369 F.3d at 142.
- <sup>187</sup> See supra note 59.
- <sup>188</sup> See Brown, 518 U.S. at 250.
- <sup>189</sup> Mackey, 543 F.2d at 614.
- <sup>190</sup> Mackey, 518 U.S. at 250.
- <sup>191</sup> See id. at 235, 250.
- <sup>192</sup> See Champion, supra note 5; Sum, supra note 5; Desai, supra note 3; Dummit, supra note 21 at 156.
- <sup>193</sup> See Claret, 369 F.3d 124; Mackey, 543 F.2d 606.
- <sup>194</sup> See supra note 59.
- <sup>195</sup> See Brown, 518 U.S. at 235-37.
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- <sup>198</sup> See Powell, 930 F.2d at 1298 (emphasis added).
- <sup>199</sup> Id.
- <sup>200</sup> E.g., Claret, 369 F.3d 124; Mackey, 543 F.2d 606.
- <sup>201</sup> See Champion, supra note 5 at 614; Sum, supra note 5 at 824-25.
- <sup>202</sup> Sum, supra note 5 at 821, 824-25.
- <sup>203</sup> See id. at 821, 825-26; See generally Champion, supra note 5 at 614 (asserting that without bona fide, arms length negotiations, the nonstatutory exemption is contrary to the labor laws).
- <sup>204</sup> See supra note 184.
- <sup>205</sup> Brown, 518 U.S. at 243.
- <sup>206</sup> Claret, 369 F.3d at 143 (citing Wood, 809 F.2d at 961).
- <sup>207</sup> Sum, supra note 5 at 825-26 (citing Powell v. NFL, 764 F. Supp. 1351, 1354 (D. Minn. 1991); McNeil v. NFL, 790 F. Supp. 871 (D. Minn. 1992)).
- <sup>208</sup> See Brown, 518 U.S. at 250.
- <sup>209</sup> See id. at 231.
- <sup>210</sup> See Claret, 369 F.3d at 143.
- <sup>211</sup> See Brown, 518 U.S. at 236, 250.
- <sup>212</sup> See Claret, 369 F.3d at 143 (citing Wood, 809 F.2d at 962 n.5).

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