

# CONTEMPORARY COPYRIGHT AND PATENT LAW AND SPORT

by

**Annie Clement, Ph.D., J.D.**

**Associate Professor, Florida State University**

**Phone: 850-627-2158**

**Ans/Fax: 850-627-2138**

**E-mail: clement@coe.fsu.edu**

**Address: 563 Gould Road**

**Quincy, Florida 32351**

## **Abstract**

*Recent changes in copyright and patent law suggest that in addition to the traditional intellectual property opportunities provided to sport and physical activity professionals and participants, rights can be extended to athletes' performance, unique skill execution, and image and to coaches' plays, strategies, and instructional manuals. Legislation defining these potential new rights are the Sonny Bono and Digital Millennium Acts. Case law involving these rights include Tasini, Ryan, O P Solutions, NBA, NFL, Curtis, Minster Communications, Nike, Antonious, State Street Bank and Trust, Zurko, Pfaff and others. The writings of Kunststadt and Smith, also reviewed, provide insight into the application of the legislation and case law.*

## **Introduction**

Sport is one of our nation's major industries. One has only to observe television, magazines, roadside billboards, and the internet to learn of the extent to which sport and physical activity have captured the public's attention. In an effort to be competitive, successful sport managers are using state of the art business information. Copyright and patent laws and court decisions are among the state of the art business information essential to success in the sport industry.

Copyright and patent laws are intellectual

property rights granted to those engaging in market- place competition. The products protected under these laws are treated as personal property; thus, they can be sold, licensed, or given away. Today, patent portfolios are considered business assets and are listed as such on the balance sheets of many corporations.

## **Copyright Law**

For many of us, our first encounter with copyright law was the notice above the photocopy machine telling us what could and could not be copied. Then we became aware of statements in books and in the credits of television programs about copyright policy. These statements warned us about knowingly or unknowingly taking the copyright of another and the problems associated with such actions. Copyright law was recently described by Biederman (1999) as, "a relatively laconic statute which, at times, seems to have been put together by Lewis Carroll with an assist from Stephen King" (p. 3). Nevertheless, our effort is to understand and use the law effectively in making business decisions.

Sport professionals have been forced to move to the other side of the copyright table. And the question is, how can one obtain protection for intellectual property products produced by our business? Title 17 of the Copyright Act, Section 102,

(a) states, "Copyright protection subsists.....in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

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

(b) In no case does copyright protection for an original work of authorship extend to any ideas, procedures, 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." (17 USC 102 [a] and [b])

A copyright protects works; it does not protect ideas. Two requirements are essential for a work to be protected under copyright law: originality and fixation. The work must be original (or a first) and it must be fixed (or in print). A product, not protected by copyright, or an idea that is not fixed, is in the public domain and is available for anyone to use without permission.

Section 196 of the Copyright Act enables the owner of the copyright to make copies, authorize others to make copies; create derivative works; and perform or display works. Assignment or licensing of a copyright to a party for royalty is a privilege of the copyright owner. In addition to the specifics of the copyright law, these agreements are to satisfy basic contract law requirements. A copyright owner who wants to sue

under infringement (someone has unlawfully copied the owner's materials) must have a registered copyright as the statute notes that the, "certificate of registration is prima facie evidence that the copyright is valid" (17 USCA 410[c], 1992). Registration for a copyright is accomplished by completing an application form, paying a fee, and depositing two copies of the work to the Copyright Office of the Library of Congress (17 USCA 408, 409, 1992). (For more detail on copyright law see Battle, 1997, Clement, 1998, 209-211, Moiseichik, 1994.)

The consumer of copyright products, under the Fair Use Doctrine, may reproduce materials for the purpose of criticism, comment, news reporting, teaching, scholarship, or research without liability for infringement (17 USC 107). The Fair Use Doctrine is highly specific and should be carefully reviewed before one engages in the above practices. Remedies for court-determined infringements include injunctive relief (the stopping of the activity of the infringer) and statutory and/or compensatory (monetary) damages.

### **Changes in Copyright Law**

Among recent changes in the Copyright law are the Sonny Bono Copyright Term Extension Fairness in Music Licensing Act of 1998; the Digital Millennium Copyright Act of 1998; and Treaties under the General Agreement on Tariffs and Trade (GATT) and the World Intellectual Property Organization (WIPO). Many of the changes have been made in response to issues about the ownership of databases and on-line commerce. Other questions address the rights of individuals to their image and/or status and the value placed on an athlete's unique performance. Persons violating the copyright of the property of others are held to a standard of "absolute liability." "Such liability is described as 'absolute' because the copyright owner can receive both injunctive relief and monetary damages, whether or not the person violating such rights did so intentionally or accidentally" (Radcliffe, 1999, C16).

The Sonny Bono Copyright Term Extension Fairness in Music Licensing Act of 1998, signed by President Clinton on October 27, 1998, adds twenty years to the existing terms of a copyright. Since 1978, copyrights have been for the life of the author plus 50 years. This has now been extended to 70 years beyond the life of the author. Works made for hire or commissioned by an employer are now protected for 95 years following publication or 120 years after they were created. An amendment to this Act, called the Sensenbrenner Amendment, provides an exemption permitting protected music to be played, without royalty, in restaurants and malls. This amendment could apply to background music in health spas; however, it will not excuse royalty payments for exercise music.

*Eldred v. Reno* is a complaint that has been filed in the United States District Court for the District of Columbia challenging the constitutionality of the Sonny Bono Act or the Copyright Term Extension Act of 1998 (CTEA) using the free speech and press clause of the First Amendment. Eric Eldred, a computer programmer, owns a company that puts literary works in the public domain on the internet. He was preparing to post works created in 1923 on the internet when the Copyright Term Extension Act and the No Electric Theft Acts were created. The latter Act makes it a criminal offense to copy materials valued over \$1,000. Eldred's suit is on the changes in the copyright law and his constitutional right to freedom of expression (Article 1, section 8). Action on this case is pending. Persons producing books and other items possessing historical value in sport should be cognizant of these changes.

The Digital Millennium Copyright Act of 1998 provides a structure or legal framework for the distribution and control of internet content. This is a water-marking process based on cryptography that will encode data about the author on each product produced. Liability of internet users has not been tested in the courts because the technology is new; however, it appears that

the technology presents many concerns, including third-party liabilities, created through linkage among internet parties. For example, an article that has not received proper copyright permission, appearing on a website and accessed by a person on a second website will cause the owners of both websites to be held for copyright violations. This Act provides safeguards to both copyright and website owners. Another feature of the Digital Millennium Act is that it puts United States copyright law in better conformity with international copyright law.

On the international scene the treaties of the General Agreement on Tariffs and Trade (GATT) and World Intellectual Property Organization (WIPO) have had an impact on domestic copyright law. GATT is an agreement among member countries to adhere to minimum standards while the treaty of WIPO, made in Geneva, concentrates on the topic of online communication.

## Court Decisions

In *Tasini v. New York Times Co.* (1997), six freelance writers for the *New York Times*, *Newsday*, and *Sports Illustrated* sued stating that their articles, sold for publication within the respective magazines, did not include permission for copy into the Mead Corporation NEXIS database. The plaintiffs saw their rights in the following from 17 U. S. C. 201 (c):

“Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution, as part of that particular collective work, any revision of that collective work, and any later collective work in the same series” (p. 809).

The question before the court was whether a legal transfer of copyright from author to magazine publisher included electronic production. The United States District Court, Southern

District of New York, held that the publisher could transfer the freelance writers' materials to an electronic media without each writer's permission.

The four plaintiffs in *Ryan* (*Ryan, et al. v. Carl Corp., et al.*, 1998) found the court's interpretation of 201 (c) to be the reverse of the decision in *Tasini*. The plaintiffs in *Ryan* are authors of works published in magazines and professional journals. UnCover, a document retrieval and delivery company, owned by Carl Corporation, copied and delivered the articles to third parties. UnCover paid copyright fees to the publishers of the magazines and journals; no fees were paid to the authors. The plaintiffs claimed, "that their copyrights in the individual articles were thereby violated" (p. 1147).

"Under plaintiffs' reading of the statute, moreover, the only thing made clear is that the publishers of a collected work do not have the right to reproduce individual contributions. But who does? The natural conclusion is that the right of reproduction must belong to the authors. Such a decision, although perhaps more in line with the purposes of section 201 (c), is not much more equitable. In many other cases, the value added by the publisher to a reproduced article is significant. Where the collected work is a peer-reviewed academic journal, the article gains intellectual credibility from having been selected and approved by the publisher. To be useful to future researchers, the article must be cited according to its location in the publisher's journal. In some magazines, the publisher's addition of illustrations adds substantially to the value of the article" (p. 1150).

A major difference between the two cases was that *Tasini* challenged the data base used in selling the authors' products to others while *Ryan* challenged the company's system of sending people to libraries to photocopy materials for sale.

Statutory damages, as automatic recovery

under copyright law, was the issue in *Feltner v. Columbia Pictures Television, Inc.* (1998). Under the Copyright Act 504(c) a court can award between \$500 and \$20,000 for each copyright infringement. Mr. Feltner's company acquired three television stations in the United States and obtained licenses from Columbia Pictures Television, Inc. for several series for these stations. Feltner became delinquent in royalty payments but he continued to use the programs.

Columbia sued Feltner in federal court alleging copyright infringement for the unauthorized broadcasting of the programs. A number of claims were made; eventually only the copyright claim remained. Columbia asked for statutory damages. Feltner requested a jury trial. The District Court denied the request. They found that Feltner had 440 acts of infringement, that the acts were wilful and therefore should be assessed at \$20,000 each for a total of \$8,800,000. The Ninth Circuit affirmed the District Court's decision, holding that neither the Copyright Act or the Seventh Amendment to the United States Constitution provided a right to a jury trial for statutory damages. The United States Supreme Court ruled that the Copyright Act did not provide for a jury trial on damages but that the Seventh Amendment to the Constitution did provide for a jury trial.

*O P Solutions v. Intellectual Property Network LED* (1999), another software case, is instructive to professionals in sport and physical activity contemplating the copyrighting of coaching strategies and systems of play. O P Solutions alleged that Intellectual Property Network LED was copying their protected legal software. Over one hundred and sixty similarities were found between the two processes. At issue was screen displays and user interfaces. Under copyright standards, O P Solutions had to have a valid copyright and the copied elements of the work had to be original. O P Solutions had a valid copyright for the computer program. The one hundred and sixty commonalities satisfied the

standard that the material was copied. Intellectual Property Network LED said the program was not original or creative. The court held for O P Solutions finding that it's software was original.

Copyright was the subject of sport court cases and law review articles involving television rights (*National Football League v. PrimeTime 24 Joint Venture* [1999], *National Football League v. SJS of WNY, Inc., et al.* [1998]); unauthorized use of plaintiff's copyrighted work (*Curtis v. Benson* [1997], *Monster Communications, Inc. v. Turner Broadcasting System, Inc., et al.* [1996]); and the performance of athletes (*National Basketball Association, et al. v. Motorola and Sports Team Analysis and Tracking Systems, Inc.* [1997, 1996], *Baltimore Orioles v. Major League Baseball Players Association* [1986]) Griffith [1998], Kunstadt [1995], and Smith [1997]).

### **Television Rights**

Television rights or specifically the right to broadcast a professional football game, was the topic of *National Football League v. PrimeTime 24 Joint Venture* (1999) and *National Football League v. SJS of WNY, Inc.* (1998). In *PrimeTime*, the NFL alleged that the defendant captured air broadcast signals in the United States and transmitted them to Canadian networks. *PrimeTime* admitted to the process used but argued that it's use of satellites in the transmission did not violate the copyright law. The court found for the NFL saying that the United States copyright law was appropriate to the facts and that *PrimeTime* was in violation of the Copyright Act.

The National Football League sued SJS of WNY, Inc., doing business as Boulevard Entertainment Sports Complex, for illegal intercepting and playing for paid customers a telecast of a November, 1996 game between the Buffalo Bills and the Cincinnati Bengals. SJS was in violation of the Copyright and the Federal Communications Act of 1934 because the game was "blacked-out" in the Boulevard area. SJS

was ordered by the court to pay \$10,000 in statutory damages.

### **Unauthorized Use of Copyrighted Works**

Curtis brought an action against Benson and the New Orleans Saints Limited Partnership alleging that Benson and associates illegally used his architectural drawings to renovate the New Orleans Superdome. Curtis was the original architect for the Superdome. The copyright infringement claim was, "that since March, 1992, and continuing monthly during 1995 and 1996, and particularly in July 1995, defendants reproduced, distributed, promoted and used Curtis's work product for substantial additions and capital improvements to the Louisiana Superdome without his permission to do so and that defendants continue to pass off the design of the capital improvements of the Superdome as their own, in violation of federal copyright law" (p. 5). Parts of the case were settled and other parts, including the copyright infringement, were active for the future. This case and the confusion around ownership of architectural drawings is one of interest to risk managers involved in the construction and upgrading of sport facilities.

Monster Communications, Inc. had achieved success and envisioned further commercial opportunities with a film of Mohammed Ali's (Cassius Clay) 1974 heavy weight title fight with

George Foreman in Zaire. Monster became concerned when they learned of a documentary on Ali containing film footage from the Monster film that was about to be premiered on Turner Network Television. (*Monster Communications, Inc. v. Turner Broadcasting Systems, Inc., et al.*, 1996). Monster claimed copyright infringement and asked the United States District Court for the Southern District of New York for, "a temporary restraining order and preliminary injunction restraining Turner from exhibiting or distributing any of the Zaire footage allegedly owned by plaintiff, relief which would preclude the broadcast of Story in it's present form" (p. 491). The

motion was denied. At issue was Monster's claim to copyright protection for the contents of its film as well as the underline footage or film acquired but not used. Turner quickly edited out film that was obviously protected and part of the original film. However, they refused to accept a violation of copyright infringement for any of the film that had not been a part of Monster's presentation. The court agreed with Turner in this matter stating that this portion of the film was under the "fair use" component of the copyright law.

### **Performance of Athletes**

The National Basketball Association and NBA Properties, Inc. brought an action against Motorola, Inc. alleging copyright infringement, misappropriation, false advertising and false designation of origin under the Lanham Act. The NBA became aware of a handheld pager, "Sport Trax" sold by Motorola. The pager, "has an inch-and-a-half by inch-and-a-half screen and operates in four basic modes: current, statistics, final scores and demonstration" (p. 843). In the current mode the pager provides the following information on NBA games in progress: "(i) the teams playing; (ii) score changes; (iii) the team in possession of the ball; (iv) whether the team is in the free-throw bonus; (v) the quarter of the game; and (vi) time remaining in the quarter" (p. 843).

Six claims were stated in the NBA complaint: "(i) state law unfair competition by misappropriation; (ii) false advertising under Section 43(a) of the Lanham Act, 15 USC s1125(a); (iii) false representation of origin under Section 43(a) of the Lanham Act; (iv) state and common law unfair competition by false advertising and false designation of origin; (v) federal copyright infringement and (vi) unlawful interception of communications under the Communications Act of 1934, 47 USC Section 605. Motorola's counterclaim was that the NBA unlawfully interfered with Motorola's contractual relations with four individual NBA teams that had agreed to sponsor and advertise Sport Trax" (p. 844). A permanent injunction was awarded the NBA and NBA

Properties, Inc. Motorola appealed. The issue on appeal was whether state law misappropriation claims were preempted by the Copyright Act.

Congress passed legislation in 1976 that provided copyright protection to recorded broadcasts of live performances, including sporting events. The court noted the following: "(i) a plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant's use of the information constitutes free-riding on the plaintiff's efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened" (p. 845). Sport Trax did not meet the test. The court decided that the, "underlying basketball games did not fall within the subject matter of federal copyright protection because they did not constitute original works of authorship" (p. 845). They stated that, "athletic events are competitive and have no underlying script" (p. 845). It would appear that this court used a very narrow analysis of sport including only "open sport" and concluded that only the tape of a game could have copyright privileges.

The United States Court of Appeals, Second Circuit, argued that the handheld pager provided factual information that could not be protected by copyright. They stated, "we vacate the injunction entered by the district court and order the NBA's claim for misappropriation be dismissed. We affirm the district court's dismissal of the NBA claim for false advertising under Section 43(a) of the Lanham Act" (p. 855).

While the rights of athletes, coaches, universities, and professional teams to the films, tapes, and broadcasts of sporting events is widely litigated, there are many references and a fairly wide range of agreement on such topics. The property rights of athletes, coaches, universities, and professional teams to drills, strategies, and specific skill patterns of individual and group

participants is unclear. Could original strategies used to win football and other games by a university be placed under copyright or patent and licensed to consumers by a university as an innovation of the chemistry department could be marketed to the drug industry?

One of the first issues is the rights among the various sports participants mentioned above. In *Baltimore Orioles, Inc., et al. v. Major League Baseball Players Association* (1986), the topic of the rights of the athlete to ownership of game films was litigated. The District Court granted the club the right to the films under copyright law, a work for hire. The United States Court of Appeals for the Seventh Circuit affirmed the lower court's decision. The Baltimore Orioles decision is important as it was the first time a court recognized a right of copyright in an athlete's performance.

Three law review articles (Griffith, 1998; Kunststadt et al., 1996; and Smith, 1999) suggest that athletes, coaches, club owners, and others may have both copyright and patent opportunities within the sport sequences, plays, and player performance. Griffith (1998) argues that routine-orientated athletic performance can be examined in the context of the Copyright Act's components of fixation, originality and creativity (p. 675).

Griffith (1998), ignoring the recognized sport specialist's method of analysis of human movement as open and closed environments, builds a case for copyright for closed sport environments. The open/closed system of classifying human movement, "was devised by Poulton (1957) and refined by Knapp (1963) and Robb (1972). It is based upon the performer's response to factors operating in the movement environment. Closed movements are planned sequences of movement repeated in the same manner every time. They are predetermined routines. Open movements are movements executed in response to the movement of others. They are used to react to the movement of others. Performers in open movement know many different movements and strategies; they do not, however, know the actual

movement that they will execute in any event until the opponents begin to make their plays. Gymnastics, figure skating, and archery represent closed movements; basketball, fencing, and tennis favor open movements" (Clement & Hartman, 1994, p. 21). Synchronized swimming, gymnastics, skating, and dance routines can and should receive copyright protection. Under recent patent court decisions discussed later, they may receive patent protection.

Griffith (1998) points out that, "Developments in technology have also made the sports industry a business in which economic incentives to excel conflict with personal motivations to be creative. The moral and personal motivation involved in sport may ensure continual involvement, even as the economic incentives increase the desire to copy the works of others. But the economics prevalent in the industry today have made protection of the athlete's creations essential. The competitive edge has always been a part of athletics, but modern technology has made copying easier. For example, young skaters with the available means may be able to examine a videotape of Oksana Baiul's gold medal performance from the 1994 Lillehammer Olympics—a program full of both artistic and technical merit. Frame by frame, one can break down the routine and eventually replicate the performance for one's own competitive success" (p. 681). His thesis is that most professionals in sport and physical activity are ignoring a call for copyright protection for much of what is done on a daily basis.

## Patent Law

Traditionally, patent law in sport was associated with athletic equipment. Recent litigation and changes in the law of patents prompted by new technology has opened the door to a range of sport interests. In the next twenty to thirty years, sport and physical activity specialists will witness the patenting of events, skills, techniques, and strategies.

A patent is a legal right, issued by the United States government, available through the Patent

Trademark Office only to the inventor, with limited exception, to exclude all others from making, using, or selling an invention. Under section 101 of the Patent Act the subject matter to be patented is, "any new and useful process, machine, article of manufacture, or composition of matter, or any new and useful improvement thereof" (35 U. S. C. 101). Battle (1997) states that, "the classes of subject matter include practically every thing made by man and the processes for making them" (p. 10). Patents are granted to the creator for a period of twenty years.

Infringement occurs when one, "without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the terms of the patent therefor, infringes the patent" (35 USC 271[a]). Infringement is found only when a prohibited act occurs; threatening such an act is not an infringement. In analyzing a patent infringement, information from the patent certificate describing the original product is compared with the alleged infringing product. Care needs to be taken in fully describing the product on the patent application. Creating an accurate patent application is far more difficult than merely appending the product in a copyright application.

## Court Decisions

Example of the application of patent law to sport are found in *Nike v. Wal-Mart Stores, Inc., et al.* (1996) and *Antonious v. Spalding & Evenflo Companies, et al.* (1999). Nike held a U. S. Patent for the sale of a number of shoes including "Tucson", the alleged infringing shoe. They brought suit against Wal-Mart and Hawe Yue, Inc. (HYI) for infringement of the Nike shoe design. The court found the patent to be valid and that it had been infringed. The shoe was copied. Significant to the awarding of damages was whether the patent infringement was wilful, the extent of the profit loss to the patent holder, and the extent of tax liability involved.

Evidence showed that Wal-Mart was not aware of Nike's patent on the shoe design.

Further, "no persuasive evidence that the defendants intentionally copied the Nike product was found" (p. 5). The court found that Wal-Mart had not wilfully infringed the Nike patent. Wal-Mart's profit on the shoe was calculated to be \$5,659,588. HYI profit was \$372,153. The court stated that, "The total profits allowed here will not be reduced by income tax paid on those profits" (p. 14). Thus, judgment for Nike was \$5,659,588. against Wal-Mart and \$372,153 against Hawe Yue, Inc. The plaintiff's injunction against further distribution or sale of the shoe was granted.

Anthony John Antonious held a patent for an iron-type golf club head; the, "club head design incorporated a cavity back bar weight mass configuration that is described as increasing golf club performance during a golf swing" (p. 2). Antonious sued Spalding alleging that Spalding's Top-Flite Tour and Tour Edition irons infringed his patents. The infringement analysis involved determining the scope of the patent claims that were believed to be infringed and comparing the device accused of infringement with the patented device. The district court found that Spalding had not infringed Antonious' patent and that Antonious' design patent was invalid. The United States Court of Appeals for the Federal Circuit affirmed the District Court's noninfringement decision in favor of Spalding. The higher court reversed the District Court's decision finding Antonious' design patent valid.

## Changes in the Law

Recent cases impacting patent law are *State Street Bank & Trust Co. v. Signature Financial Group, Inc.* (1998), *Dickinson v. Zurko, et al.* (1999) and *Pfaff v. Wells Electronic Inc.* (1998). State Street Bank & Trust Co. and Dickinson broadened the scope of potential patent protection; Pfaff influenced the concept of timing in appropriate filing.

Signature Financial Group, Inc. was the assignee of a patent called Data Processing System for Hub and Spoke Financial Services Configuration. The patent was a, "data process-



ing system (the system) for implementing an investment structure which was developed for use in Signature's business as an administrator and accounting agent for mutual funds.....the system.....facilitates a structure whereby mutual funds (Spokes) pooled their assets in an investment portfolio (Hub) organized as a partnership. The investment configuration provides the administrator of a mutual fund with the advantageous combination of economics of scale in administering investments couple with the tax advantages of a partnership" (p. 1370).

The system has six machine clauses and six methods clauses, most premised on arithmetic and logic. It is a method of doing business. Under Section 101 of the patent law an invention to be patentable must be a, "process, machine, manufacture, or composition of matter, or any.....improvement thereof" (35 U. S. C. 101). Under section 100(b) process includes an art or a method. State Street negotiated with Signature to obtain a license to use the Hub and Spoke database. When negotiations broke down State Street brought a judgment action against Signature alleging, "invalidity, unenforceability, and noninfringement in Massachusetts District Court and then filed a motion for partial summary judgment of patent invalidity for failing to claim statutory subject matter" (p. 1370). Motion was granted; Signature appealed.

Through the years the Supreme Court has identified three categories of inventions that are unpatentable: laws of nature, natural phenomena and abstract ideas. The question in State Street Bank & Trust was whether the Hub and Spoke Financial Process Configuration was patentable. The United States District Court for the District of Massachusetts said no; the process was an idea. The United States Court of Appeals, in reversing the District Court's decision held, "that the transformation of data, representing discrete dollar amounts, by a machine through a series of mathematical calculations into a final share price, constitutes a practical application of a mathematical algorithm, formula, or calculation,

because it produces 'a useful, concrete and tangible result' —a final share price momentarily fixed for recording and reporting purposes and even accepted and relied upon by regulatory authorities and in subsequent trades" (p. 1373). This decision is believed to make it easier to patent software (Aquino, 1999). It may, in fact, open the doors to patents in new and unique business processes.

Zurko, et al. applied for a patent for a method to increase computer security. The application was denied with the patent examiner concluding that Zurko's, "method was obvious in light of prior art" (p. 1818). The Supreme Court of the United States reversed the lower court's decision asking that the established guidelines be used in decision making; the court's finding was that the guidelines had not been used consistently. The case was reversed and remanded back to the earlier court for proceedings.

Pfaff, an inventor, was invited by Texas Instruments to design a computer socket. Prior to April 1981 he designed the computer chip socket, sent a drawing of the invention to his manufacturer and to Texas Instruments who placed an order for the invention. The product was delivered in July of 1981. Pfaff applied for a patent on the product in April of 1982. He then became aware that Wells Electronics, Inc. was manufacturing and selling a product that contained six of his patent claims. After losing an infringement action against Wells Electronics he brought a suit against the Company.

The District Court of the Northern District of Texas, Dallas Division, found four of the six infringement claims to be valid and two to be invalid because they could be anticipated from the prior art. The Court of Appeals reversed the District Court's decision saying that Pfaff failed to file the patent application within one year of the invention. The question was whether the drawing or an actual product or a reduction to practice was the invention. The Court of Appeals ruled that the drawing was the invention and that the patent application was late. They concluded

that Section 102(b) of the Patent Law's, "1 - year period began to run when the invention was offered for sale commercially, not when it was reduced to practice" (p. 306). The Supreme Court affirmed the decision of the Court of Appeals, thus putting the world on notice that patent applications must be filed as soon as the inventor is ready to market and/or sell the product. This is true even if the product has not been field tested or reduced to practice.

### **Copyright/Patent and Sport/Physical Activity**

Robert Kunstadt, a partner in New York's Pennie & Edmonds, a firm that represents the National Basketball Association, United States Tennis Association, and the United States Olympic Committee on intellectual property matters suggested in a National Law Review article that slam - dunks, golf swings and other unique sport movements could be protected under copyright, trademark or patent law. Kunstadt recognizes that athletic equipment has received considerable patent protection; he argues that sports moves should receive the same level of protection (Kunstadt, 1996, C3). A sport patent would be required to not only meet the standard of a process, machine, manufacturer, or composite of matter it must be novel, non-obvious, and useful. Beyond existing sport and exercise equipment patents, protection for process, for example, for training baseball pitchers, enhancing energy metabolism for athletes and methods of preparing golfers could be acquired (Smith, 1999, p. 1068 ).

Copyrights are essential to the production of sport for television and the internet. Those protections have been strengthened by legislation extending copyright time periods and enabling products to carry the copyright imbedded in the product. Curtis' exercise of his copyright protection of the architectural drawings of the New Orleans Superdome is an example of the direction of copyright in sport. Athletes' rights to films, sport skill sequences, plays, and perform-

ance are valid under copyright law; some are expected to meet the tenants of patent protection.

Patents for sport apparel and equipment are routine business. The recent delineation of process, defined as method or (set of procedures), and congressional legislation addressing that area suggests that sport skill performance and game strategy could, in the near future, receive patent protection as business methods.

Buried within this discussion of copyright and patent law are some highly significant findings for the professional engaged in sport and physical activity. Will changes in the laws enable sport specialists to gain protection, either copyright or patent, for unique sport skills and strategies? Will unique and outstanding athletes place patent or copyrights on their running, kicking, and passing forms? Should coaches obtain protection for strategies and later license them to others for a fee.

Seldom in the history of our profession has such an opportunity been presented. The notion of obtaining copyright and patent protection needs to be shared with physiologists, biomechanists, trainers, coaches, and others. We may now be joining the biology and chemistry departments, where patents and licenses for substantial monetary rewards are possible.

### **REFERENCES**

- Aquino, J. T. (1999). Patently Permissive. *Journal of the American Bar Association*. 85(5), 30.
- Antonious v. Spalding & Evenflo Companies, Inc., et al., 44 F. Supp. 2d 732 (D. Md. 1998) and 98-1478, 1999 U. S. App. LEXIS 22984.
- Baltimore Orioles, Inc. et al. v. Major League Baseball Players Association, 805 F. 2d 663 (1986).
- Battle, C. (1997). *The patent guide*. New York: Allworth Press.
- Biederman, D. (1999). Copyright trends with friends like these. *Entertainment and Sports Lawyer*, 17(3), 3-9.
- Clement, A. (1998). *Law in sport and physical activity*. Tallahassee, FL: Sport and Law Press.
- Clement, A. and Hartman, B. G. (1994). *The teaching of physical skills*. Dubuque, IA: Wm C

Brown & Benchmark.

Copyright Act. Title 17, USC 102—801. 90 Stat. 2541 - 2602.

Curtis v. Benson, The New Orleans Saints Limited Partnership, et al., 959 F. Supp. 348 (1997).

Diamond v. Chakrabarty, 447 U. S. 303; 100 S. Ct. 2204 (1980).

Dickinson v. Zurko et al., 119 S. Ct. 1816 (1999).

Digital Millennium Copyright Act of 1998. Pub. L. No. 105-304, 112 Stat. 2860 (1998).

Eldred v. Reno, <http://cyber.law.harvard.edu/commons>

Federal Communications Act of 1934, 47 U. S. C. Section 151 et seq..

Feltner v. Columbia Pictures Television, Inc., 106 F. 3d 284 and 118 S. Ct. 1279 (1998).

Griffith, W. T. (1998). Note & Comment: Beyond the perfect score: Protecting routine-oriented athletic performance with copyright law. 30 Conn. L. Rev. 675.

Knapp, B. (1963). *Skills in sport, the attainment of proficiency*. London: Routledge & Kagan.

Kunstadt, R. et al. (1996, MAY 20, C2). Are sport moves next in IP law? *National Law Journal*.

MCA Television Ltd v. Feltner, 89 F. 3d 766 (11th Cir. 1996), *cert denied*, 117 S. Ct. 1284 (1997).

Moiseichik, M. (1994). Copyright: An issue in sport and recreation. *Legal Aspects of Sport*, 4(1), 37-45.

Monster Communications, Inc. v. Turner Broadcasting System, Inc., et al., 935 F. Supp. 490 (1996).

National Basketball Association, et al. v. Motorola, Inc., and Sports Team Analysis and Tracking Systems, Inc., 939 Supp. 1071 (1996) and 105 F. 3d 841 (1997).

National Football League v. PrimeTime 24 Joint

Venture, 98 Civ. 3778 (LMM). 1999 U. S. District LEXIS 15261; 52 U.S.P.Q. 2d (BNA) 1615

National Football League v. SJS of WNY, Inc., et al., 97 - CV - 0077E (F). 1998 U. S. Dist. LEXIS 7611.

Nike, Inc. v. Wal-Mart Stores, Inc., et al., Civil Action No. 96-38-A, 1996 U. S. District LEXIS 20489; 41 U.S.P.Q. 2d (BNA) 1146.

No Electronic Theft Act of 1997, 17 U.S.C. Section 506 (a), Pub. L. No. 104-147, 111 Stat. 2678 (1997).

O P Solutions, Inc. v. Intellectual Property Network LED., 1999 U. S. District LEXIS 16639 (Oct, 1999) and 1999 U. S. District 979 (Feb. 1999).

Patent Law Act. 35 U. S. C. 1-376 (1999).

Pfaff v. Wells Electric, Inc., 119 S. Ct. 304 (1998), *pet denied*, 119 S. Ct. 854 (1999).

Poulton, E. C. (1957). On prediction of skilled movements. *Psychological Bulletin*, 54, 467-478.

Radcliffe, M. F. (1999, February 8) Congress helps resolve net copyright issues. *The National Law Journal*, C16-C18.

Robb, M. D. (1972). *The dynamics of motor-skill acquisition*. Englewood Cliffs, N. J.: Prentice Hall.

Ryan, et al. v. Carl Corporation, et al., 23 F. Supp. 2d 1146 (N. D. Cal. 1998).

Smith, Jeffrey A. (1999). Comment: It's your move — no it's not! The Application of Patent Law to Sports Moves. 70 U. Colo. L. Rev. 1052.

State Street Bank & Trust Co. v. Signature Financial Group, Inc., 149 F. 3d 1368 (1998), *cert denied*, 119 S. Ct. 851 (1999).

Sonny Bono Copyright Term Extension Fairness in Music Licensing Act of 1998, Pubic Law No. 105-298, 112 Stat. 2827 (1998).

Tasini v. New York Times Co., 972 F. Supp. 804 (S. D. N. Y. 1997).

*Share your Journal — Today  
with a Student*