

## ARTICLES

# Commercial "Branding": The Final Frontier or False Start for Athletes' Use of Temporary Tattoos as Body Billboards

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## I. INTRODUCTION

In the ever-growing quest to generate new revenues, sport organizations and individual athletes continue to push the boundaries of tradition and, in the opinion of some, taste.<sup>1</sup> In auto racing and to a lesser extent individual-oriented sports such as tennis and golf, athletes adorned with commercial logos on their clothing and accessories have become commonplace.<sup>2</sup> However, the major professional team-oriented leagues have historically restricted "on-field" commercialization of its players, due not only to tradition but also to the desire to protect their own league-wide business interests.

The major professional sports leagues have, however, had players push the endorsement envelope through unauthorized on-field commercial endeavors. In 1986, Chicago Bears quarterback Jim McMahon, a noted free spirit, created a firestorm of media attention by wearing a headband while on the sidelines that bore the word "adidas" during a nationally-televised National Football

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1. During the 2002 Major League Baseball season, for instance, the Red Sox began selling advertising signage on the nets above Fenway Park's famed Green Monster. Scott Van Voorhis, *Monster brings green to Sox; Local Volvo dealerships, The Sports Authority Ink Deals For Ads*, BOSTON HERALD, July 11, 2002, at 31. New ground was also broken by MLB all-star Rafael Palmeiro, who became a spokesman for sexual-disfunction drug Viagra. Terry Lefton, *Little Blue Pill And A Big Decision: Palmeiro Goes To Bat For Viagra After 4-Month Search By Pfizer*, SPORTSBUSINESS J., Apr. 29-May 5, 2002, at 1.

2. Jeff MacGregor, *Nascar Nation*, SPORTS ILLUSTRATED, July 1, 2002, at 60.

League (NFL) playoff game.<sup>3</sup> McMahon's actions, designed to promote his endorsement deal with adidas, drew the ire of NFL Commissioner Pete Rozelle because McMahon's activity violated the league's strict uniform and game appearance rules.<sup>4</sup> While McMahon's actions did not violate any specific NFL rule, his team was fined and he was warned by Rozelle that such advertising "will not be tolerated" in the future.<sup>5</sup> Since then, sport leagues and sanctioning bodies have occasionally faced the need to deal with players' attempts to extend the limitations of league rules regarding on-field commercial activities. This past season, the NFL's new \$250 million apparel and licensing agreement with Reebok did not deter NFL players under contract with Nike from surreptitiously seeking ways to secure Nike presence on the field of play and on the sidelines – much to the consternation of NFL officials.<sup>6</sup> To combat a recent attempt by Major League Baseball (MLB) players to wear turtleneck shirts bearing logos such as Nike and adidas, MLB posted a notice restricting such commercial activity in all team locker-rooms.<sup>7</sup>

With teams and individual athletes pushing the envelope ever further in search of new advertising revenue streams and endorsement opportunities, it was perhaps inevitable that a new commercial medium – "the final frontier," as deemed by Sports Illustrated<sup>8</sup> —should emerge in the form of body billboards: tattoos that can be temporarily affixed to an athlete's skin to feature

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3. Tom Cushman, *Rozelle Has Been Upstaged by McMahon*, SAN DIEGO UNION-TRIB., Jan. 25, 1986, at 35.

4. Joe Mooshil, *McMahon's Headband is Rozelle's Headache*, ASSOCIATED PRESS, Feb. 2, 1986. In March, 1986, the NFL owners voted to adopt new on-field equipment rules that stated that a player could be ejected from the game if caught by an official, or suspended for a game if caught by a television camera on the sidelines wearing unauthorized equipment including headbands bearing logos. Will McDonough, *No Compromise: USFL Trial Suits NFL Just Fine*, BOSTON GLOBE, March 12, 1986, at 39.

5. *Id.* Rozelle stated that he did not "want our players to look like racing drivers." *Id.* McMahon, whose team was fined \$5,000, protested Rozelle's edict in a subsequent game by wearing an assortment of headbands with various words handwritten on them, including "Rozelle," while citing his First Amendment rights. In further defiance, McMahon wore his headband around his neck during the Super Bowl. *Id.*

6. Mike Dodd, *NFL Demands Sunday Best*, USA TODAY, Nov. 22, 2002, at 1C. As a further example of on-field commercialism, the article also referenced San Francisco 49'ers wide receiver Terrell Owens' nationally-televised incident in which, immediately after scoring a touchdown, he pulled a Sharpie pen from his sock, signed the ball and delivered it to a friend in the stands. Owens' actions resulted in an advertising deal with Sharpie. "Given free rein, some players might look like rock stars in a NASCAR vehicle." *Id.*

7. Paul Hoynes, *Game Reset*, CLEV. PLAIN DEALER, Apr. 11, 2000, at 3D.

8. Albert Chen, *Tattoo You*, SPORTS ILLUSTRATED, March 18, 2002, at 26. "Clearly, the final frontier for sports marketers – the human body – is now open for business." *Id.*

a commercial logo or message.<sup>9</sup> This new advertising vehicle, which may be traced to the proliferation and popularity of tattoos in society generally as well as specifically within sports,<sup>10</sup> has generated debate over legal issues, business considerations and practical concerns including matters of taste and cultural preferences.

In March of 2001, the National Basketball Association (NBA) became the first professional sport league publicly faced with the issue of body billboards. Portland Trail Blazers' forward Rasheed Wallace was reported to have considered an offer from an advertising agency to appear in televised NBA games wearing the logo of a candy company temporarily emblazoned on his biceps.<sup>11</sup> Wallace's intentions drew a quick and negative response from league officials, including Commissioner David Stern.<sup>12</sup> Although NBA rules did not specifically prohibit body billboards, the league suggested its rules and restrictions with respect to both player endorsements and commercial logos on uniforms would enable the league to prevent Wallace from wearing a temporary tattoo featuring a corporate logo.

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9. The author uses the term "body billboards" throughout to describe temporary tattoos that feature the logos and/or messages of commercial entities. Technology now allows for tattoos to be temporarily affixed for a period of days and sometimes even weeks using a henna-based ink. Throughout this article, the author also uses the term "permanent tattoos" as distinguished from body billboards, although acknowledging that even permanent tattoos could be ordered removed from the skin by a sport organization if it were deemed in violation of the organization's rules regarding players' on-field appearance and/or commercial activity.

10. Mary Jo Monnin, *Painting the Student Body; High School Athletes Score One for Self Expression By Joining Tattoo Trend*, BUFFALO NEWS, Sept. 25, 2001, at E4 (noting current estimates that one in seven people (40 million plus Americans) have at least one tattoo, whereas 30 years ago it was one in 100); see also John Jeansome, *Tattoos Far from Taboo in NBA*, N.Y. NEWSDAY, Feb. 28, 1999, at C12 (noting that a survey of all 29 NBA teams found that 35% of NBA players had tattoos, compared to an estimated 4% of all Americans).

11. Matthew Futterman, *Sports Tattoos Could Lead to Dollar Signs*, NEWHOUSE NEWS SERVICE, March 19, 2001.

12. Adam Rubin, *Tattoos Used as Ads Have Drawn NBA's Ire*, N. Y. DAILY NEWS, March 22, 2001, at 80. The fact that the company seeking to use Wallace to feature its logo was in direct conflict with the NBA's existing official corporate sponsor within the candy category created further concerns by the NBA over the potential for ambush marketing. Ambush marketing, also known as guerrilla marketing, is defined as a non-sponsor company's effort to affiliate or associate itself with a sport league or event without securing "official" rights typically granted through the payment of rights fees. For articles addressing the legal parameters of ambush marketing in sport, see, Stephen McKelvey, *Atlanta '96: Olympic Countdown to Ambush Armageddon?*, 4 SETON HALL J. SPORT L. 397 (1994); Stephen McKelvey, *NHL v. Pepsi-Cola Canada, Uh-Huh! Legal Parameters of Sports Ambush Marketing*, 10 ENT. & SPORTS LAW. 5 (Fall 1992). See also Hillary Cassidy, *Roll (Dice) With The Punches*, BRANDWEEK, Dec. 9, 2002, at 22 (recognizing GoldenPalace.com as one of Brandweek's "Guerrilla Marketers of the year" for its use of body billboards on boxers).

Although Wallace ultimately rejected the offer, stating that the temporary tattoo would conflict with the "integrity of his existing body art,"<sup>13</sup> the incident generated national publicity. Six months later, in September of 2001, boxer Bernard Hopkins officially broke new ground in sports advertising, becoming the first known athlete to enter the field of competition wearing a body billboard on behalf of a commercial entity.<sup>14</sup> Hopkins' body billboard featured the logo of internet gambling casino GoldenPalace.com across his back.<sup>15</sup>

The examples cited above illustrate a growing tension between the desire and need of sport organizations to regulate their business and their players, versus the individual freedoms of players, particularly with respect to their pursuit of commercial endorsements. The emergence of body billboards has created the opportunity for individual and team-oriented athletes, their agents, and sport organizations to consider, among other things, the extent to which body billboards may constitute commercial speech protected by the First Amendment.<sup>16</sup> The emergence of body billboards is also causing team-oriented professional and amateur sport organizations, many traditionally not subject to constitutional claims because of their status as private entities, to weigh the extent to which they can prohibit their players from appearing in games wearing body billboards. For individual-oriented sport organizations, such as pro tennis and golf, which operate without traditional management-labor pacts, the issue of body billboards may be even more problematic as shall be discussed herein.

The nature and commercial intent of the body billboards themselves also raise intriguing issues. For instance, consider a WNBA player who has her own record label or apparel company and desires to advertise her company through a tattoo, permanent or temporary, on her shoulder. Another scenario

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13. Rubin, *supra* note 12, at 4.

14. Chen, *supra* note 8, at 26.

15. The online casino reportedly paid Hopkins \$100,000 for the ad, which according to casino sources more than paid off in increased website traffic. Hopkins remarked afterward, "I'd put tattoos on my forehead if they paid me." *Id.* The temporary tattoo dissolved early in the bout due to excessive perspiration. *Id.*

16. The author acknowledges, as several of his interview sources and newspaper articles have posited, that another potential on-body advertising opportunity exists in the form of commercial logos or messages shaved into players' hair. For instance, NBA player Dennis Rodman generated a firestorm of national publicity by displaying the numbers "666" carved into his hair for an NBA playoff game. See David Whitely, *NBA Hurts Like A Tattoo*, ORLANDO SENTINEL, Apr. 1, 2001, at C16. The author has chosen not to further address the issue of "scalp advertising" in this article, other than to suggest that the legal arguments made herein regarding body billboards would apply as well to commercial messages shaved into athletes' hair.

that may arise in the future involves high-profile athletes who, in order to support their long-time charity affiliations (or their own charities), wish to don a tattoo displaying the logo of their chosen charity. These scenarios – such as a world-renowned player like Michael Jordan wearing a permanent or temporary tattoo showing the Ronald McDonald house logo – pose interesting questions that sport organizations have yet to directly address. Further exposing the issue, Shaquille O'Neal's upper arm bears a permanent tattoo featuring the Superman logo.<sup>17</sup> Considering that Superman is a commercial product of DC Comics, a major publishing and entertainment corporation, one might rightly ask if this is not "essentially an ad for DC Comics, even if Shaq wasn't paid for it[?]."<sup>18</sup>

The legal debate over athletes' donning of body billboards applies not only to in-game competition, but could also extend to off-the-court situations closely aligned with the league's activities and image. One possible scenario involves the right of a player who, although not actually playing in the All-Star Game, attends the league's festivities wearing a visible body billboard that, through an aggressive public relations effort, successfully attracts media attention for the company that the player is endorsing. Another possible scenario involves a player posing for a photo shoot wearing a temporary tattoo promoting a corporation.<sup>19</sup>

The emergence of body billboards may become increasingly thorny since the lifeblood of most sport organizations – television – has also recently entered the fray. Television networks ESPN and Fox have both notified boxers and their promoters that they do not want boxers to appear wearing body billboards within their telecasts.<sup>20</sup> In May of 2002, ESPN fined a promoter after one of his boxers appeared with "GoldenPalace.com" tattooed across his

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17. Adam Rubin, *Bizman Shoots for Tattoo Ads*, DAILY NEWS (N.Y.), March 23, 2001, at 4. See also, Jeansome, *supra* note 10, at C12 (noting that NBA player Loy Vaught also sports a permanent Superman tattoo and that NBA player Damon Stoudamire has a permanent tattoo of Mighty Mouse, a commercial character owned by Disney).

18. Whitley, *supra* note 16, at C16. See also Rubin, *supra* note 17, at 4 ("What if they [the NBA] found out Shaq had been paid \$10 million by DC Comics to put Superman on his arm? . . . What are they going to do. Is that illegal?" (quoting Dakkan Abbe, president of New York-based Fifty Rubles Marketing, the firm that approached Wallace and several other NBA players about wearing temporary tattoos)).

19. Tom Fitzgerald, *NBA Found Guilty Of A Coverup*, SAN FRANCISCO CHRON., May 22, 2000, at C6. The NBA came under harsh criticism when it was learned that the league was responsible for airbrushing permanent tattoos (albeit non-commercial in nature) off of Allen Iverson's body in photos that appeared on the cover and inside NBA HOOP magazine, one of the league's official publications. *Id.*

20. Bob Raissman, *TV's Fight Foe: Tattoos, Inc.*, N.Y. DAILY NEWS, May 14, 2002, at 53.

back in defiance of ESPN's stated ban on body billboards worn by boxers during its televised bouts.<sup>21</sup> Although such future incidents may ultimately be dealt with through pre-fight contracts between boxers and telecasters, how professional sport organizations choose to confront the issue of body billboards with their respective players could have potential ramifications and repercussions for their respective broadcast partners.

This article explores the legal issues and ramifications of body billboards for sport organizations. Part II begins with a brief overview of the freedom of speech protections afforded by the First Amendment, distinguishing between both core and commercial speech as well as verbal and non-verbal (or symbolic) speech. Part III provides an overview of the only judicial decision to date that specifically addresses the issue of body billboards in sports, *Clarence "Bones" Adams et. al. v. Nevada Athletic Comm.*<sup>22</sup> which resulted in the granting of a preliminary injunction in favor of boxer Adams.<sup>23</sup> Part IV of this article then provides an analysis of the application of the First Amendment argument to the *Adams* case, particularly with respect to commercial speech protections. Part V discusses the issues related to the wearing of body billboards by athletes participating in sport leagues and organizations, the applicability and enforceability of sport organizations' respective rules and regulations, the parties' respective rights under labor law, and the viability of First Amendment claims. The section will discuss the important distinctions between individual-oriented sports such as boxing, that are often regulated by governmentally-sanctioned athletic commissions; individual-oriented sports such as tennis and boxing that operate without "league-wide" labor agreements; and finally team-oriented sports such as the NBA and NFL whose operations are governed Collective Bargaining Agreements (CBA's) and Uniform Player Contracts (UPC's). Of particular concern, given these

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21. *Id.* The boxer's promoter, Russell Peltz, was fined \$10,000 by ESPN. The concern of television sports broadcasters over temporary tattoos was summed up by Bob Yalen, ESPN's Director of Boxing, who stated, ". . . [W]hat's to stop a fighter from coming in the ring with Budweiser on his back. You're Miller (beer) and you're sponsoring the entire show and someone is in the ring for 30 minutes with Budweiser on their back. Is Miller going to continue to pay ESPN to support the show with this stuff going on?" *Id.*

22. Preliminary Injunction, *Adams, et al. v. Nev. Athletic Comm'n*, No. A446674 (D.C. Nev. March 13, 2002). No request for trial setting had been filed at time of this publication. Although the plaintiff's case involved a constitutional law issue, plaintiffs elected to file their suit in state court given the timeliness of the issue. The plaintiffs were fearful that the federal court would require the plaintiffs to exhaust their administrative remedies before the Nevada Athletic Commission (NAC). Telephone interview with Paul Larson, Attorney for Plaintiffs (Nov. 10, 2002).

23. Although *Adams* did not reach a full trial on the merits, the parties' constitutional law arguments and the judge's decision shed light on the legal debate that a court will likely confront in any such future cases.

distinctions, is the extent to which a First Amendment challenge may or may not apply to these various sport organizations.

## PART II: OVERVIEW OF FREE SPEECH PROTECTIONS UNDER THE FIRST AMENDMENT

### 1. Application to Core, Commercial and Non-verbal Speech

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."<sup>24</sup> However, freedom of speech is not an unfettered right. Some speech, such as obscene speech, is unprotected.<sup>25</sup>

Courts have extended First Amendment speech protection to commercial speech.<sup>26</sup> In *Bigelow v. Virginia*,<sup>27</sup> the Supreme Court held that it was an error to assume that commercial speech was entitled to no First Amendment protection.<sup>28</sup> A year later, in *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*,<sup>29</sup> the Court expanded its holding in *Bigelow* and held that the state's blanket ban on advertising the price of prescription drugs violated the First Amendment, stating:

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.<sup>30</sup>

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24. U.S. CONST. amend I.

25. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (right of free speech does not include the use of lewd and obscene, profane, libelous and other words which by their very utterance inflict injury or tend to incite an immediate breach of the peace)

26. *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 633 n.7, (1980). Courts continue to debate the extent to which commercial speech should be protected. See Maureen Tkacik, *Just How Far Does First Amendment Protection Go?: High Court May Decide to Hear Whether Nike's PR Statements To Media, Others Are Protected*, WALL ST. J., Jan. 10, 2003, at B1.

27. 421 U.S. 809 (1975).

28. *Id.* at 825-826.

29. 425 U.S. 748 (1976)

30. *Id.* at 765 n.7.

Thus, advertising, even speech that does no more than propose a commercial transaction, has been held entitled to protection under the First Amendment.<sup>31</sup> The Constitution, however, accords less protection to commercial speech than to other constitutionally safeguarded forms of expression.<sup>32</sup> For instance, the Supreme Court held in *Central Hudson Gas & Electric Corp.* that to enjoy First Amendment protection, commercial speech must concern lawful activity and not be misleading.<sup>33</sup> The Court in *Central Gas* further held that in order to be valid, a government regulation or restriction on commercial speech must (1) serve a substantial governmental interest; (2) directly and materially advance the interest; and (3) reach no further than necessary to accomplish this objective.<sup>34</sup> Courts have also held that even if such speech concerns a lawful activity, "[I]n a commercial context, it is clear that government may control speech that is deceptive or misleading."<sup>35</sup> Finally, as set forth in *S.O.C., Inc.*<sup>36</sup> a government may impose a "time, place, and manner restriction" on speech as long as it is 1) content neutral, 2) narrowly tailored to serve a significant government interest, and 3) leaves open ample alternative channels of communication.<sup>37</sup> Although the A speech the second and third factors are self-explanatory, a restriction is judged to be content-neutral if it is "justified without reference to the content of the regulated speech."<sup>38</sup>

The Supreme Court has also extended the notion of free speech to include non-verbal but expressive conduct that qualifies as "symbolic speech," such as wearing black armbands to protest the Vietnam War<sup>39</sup> and defacing the

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31. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (finding City's ban on commercial newsracks unconstitutional); *S.O.C. Inc. v. County of Clark*, 152 F.3d 1136 (9<sup>th</sup> Cir. 1998)(finding ban on commercial speech unconstitutional).

32. *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980). *See also*, *Assoc. & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133 (1971) (holding that a movie advertisement was "subject to less protection than other types of speech.") *Id.* at 136.

33. 447 U.S. 557 (1980).

34. *Id.* at 566.

35. *Zarate v. Younglove*, 86 F.R.D. 80, 102 (C.D. Cal. 1980).

36. 152 F.3d 1136 (9<sup>th</sup> Cir. 1988).

37. *Id.* at 1145. *See also*, *One World One Family Now v. City and County of Honolulu*, 76 F. 3d 1009, 1012 (9<sup>th</sup> Cir. 1996).

38. *S.O.C., Inc.*, 152 F.3d at 1145, citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

39. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (black armbands worn by students to express their opposition to the Vietnam War was a symbolic speech protected by the First Amendment). *See also*, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, (1978) (financial contributions to political campaigns can qualify as protected speech); *Spence v. Washington*, 418



American flag.<sup>40</sup> The First Amendment protections afforded "symbolic speech" have, however, been limited by the Supreme Court. *United States v. O'Brien*<sup>41</sup> involved one's right to burn one's draft card in protest of war. The Court stated that when "speech" and "non-speech" elements are combined in the same course of conduct a sufficiently important governmental interest in regulating the non-speech elements can justify incidental limitations on First Amendment freedoms.<sup>42</sup>

## 2. Application of First Amendment to Tattoos

There have been several cases in which courts have considered the application of First Amendment freedom of speech protections to non-verbal speech in the form of tattoos. To defend an individual's right to publicly display a tattoo by invoking the Constitutional right to free speech, it must first be determined whether a tattoo rises to the level of "speech" as set forth in *Texas v. Johnson*.<sup>43</sup> In that case, the court stated that, whether "an intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it."<sup>44</sup> Based on this threshold question, several lower courts have refused to afford blanket free speech protection for tattoos, particularly for tattoos deemed by the court to be merely a form of self-expression. Courts have also given broad deference to the policies of governmental agencies, including schools and police forces, with respect to tattoos and appearance.

In one such case, a lower court upheld the right of a police department to prevent officers from the public display of tattoos in the interest of preserving

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U.S. 405 (1974) (display of American flag with a peace symbol attached can qualify as protected speech).

40. *Texas v. Johnson*, 491 U.S. 397 (1989) (the Court held that a state law prohibiting the burning of the American flag as part of a peaceful protest was "symbolic speech" and thus violated the First Amendment's protection of freedom of speech).

41. 391 U.S. 367 (1968). In upholding a state statute prohibiting the burning of one's selective service (draft) card, the Court stated that when speech and "non-speech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech elements can justify incidental limitations on First Amendment freedoms. The Court further stated that there is not a "limitless variety of conduct [that] can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Id.* at 376.

42. *Id.* at 376-77.

43. *Johnson*, 491 U.S. 397.

44. *Id.* at 404.

the department's professionalism and positive public perception.<sup>45</sup> In *Stephenson v. Davenport Community School District*, the Eighth Circuit upheld the right of a school district to enforce a ban on tattoos that were deemed to be gang-related.<sup>46</sup> The *Stephenson* case involved an eighth-grade student who had a small cross tattooed between her thumb and index finger. She sued the school district for damages after having the tattoo removed in compliance with a newly-enacted school regulation prohibiting ". . . symbols, signals, signs, etc."<sup>47</sup> determined by the school administration to be gang-related. Relying in part on the plaintiff's testimony that her tattoo was not intended to communicate a political or religious statement, the court held that the tattoo was admittedly "nothing more than 'self-expression,' unlike other forms of expression or conduct which receive first amendment (sic) protections."<sup>48</sup>

The *In re Antonio C.* case involved a probation condition barring tattoos due to gang-related activity, and held that, although tattoos can rise to the level of protected speech, the restriction was nevertheless found valid because of the existence of a compelling state interest.<sup>49</sup>

Although neither the *Stephenson* court nor the *In re Antonio C.* court granted First Amendment protection to the tattoos in question both decisions did reaffirm the premise set forth in *O'Brien* that forms of expression other than verbal speech can be protected under the First Amendment, provided they extend beyond simple forms of self-expression.<sup>50</sup>

The increasing popularity of tattoos among high school student-athletes, coupled with a growing number of high school athletic associations setting

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45. *Riggs v. City of Fort Worth, et al.*, 229 F. Supp. 2d 572, 581 (2002) ("Because tattoos are not protected expressions under the fundamental First Amendment right of free speech, strict scrutiny, though invoked by [plaintiff] Riggs, is inappropriate.") *Id.* at 580-581.

46. 110 F. 3d 1303 (8th Cir. 1997).

47. *Id.* at 1305.

48. *Id.* at 1307, citing *Tinker*, 393 U.S. 503, 508.

49. 83 Cal. App. 4th 1029 (Ct. App. CA 2000). The court also reasoned that the prohibition of the tattoo was directed at the manner in which the message was conveyed, as tattoos were closely related to gang activity.

50. In October 2002, the U.S. Supreme Court declined to review a South Carolina Supreme Court decision that upheld a state ban on giving tattoos on the basis that the First Amendment does not protect the right to give tattoos. For a critical article challenging both the U.S. Supreme Court's denial of certiorari and South Carolina's ban, see, Scott Martin, *Does the First Amendment Protect the Right to Give Tattoos?*, available at, [http://writ.news.findlaw.com/student/20021009\\_martin.html](http://writ.news.findlaw.com/student/20021009_martin.html) (October 9, 2002). The author argues that the South Carolina statute is unconstitutional and that the U.S. Supreme Court refused to hear the case because, based on its prior decisions finding non-verbal speech to be protected, "the Court may believe it has already made the law on 'expressive conduct' sufficiently clear." *Id.*

regulations banning visible tattoos, may provide fertile ground for future free speech challenges by high school athletes, particularly given the state actor status of high schools athletic associations.<sup>51</sup> It is the intersection between the constitutional protections to be afforded tattoos as a form of non-verbal speech and the constitutional protection to be afforded commercial speech that lay at the heart of Adams decision.

### III. THE FIRST LEGAL PUNCH: *CLARENCE "BONES" ADAMS ET. AL. V. NEVADA ATHLETIC COMMISSION*

#### 1. "Introducing Tonight's Contestants"

On the heels of the September 2001 boxing match involving Hopkins' display of the "GoldenPalace.com" body billboard, as well as similar body billboard incidents in other jurisdictions,<sup>52</sup> the Nevada Athletic Commission (NAC) sought to ban such activity within its state. It held a hearing in January, 2002, at which it considered evidence in support of body billboards (which it referred to as "body markings"), and at a meeting on February 13, 2002, unanimously passed a policy stating that "temporary henna body messages were absolutely prohibited – regardless of the message displayed on the boxer."<sup>53</sup> At the time, due to the relatively recent emergence of temporary tattoos within the sport, the NAC had no policy against temporary or permanent tattoos.<sup>54</sup>

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51. *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001); *Indiana High Sch. Athletic Ass'n v. Carlsberg*, 694 N.E. 2d 222 (Ind. Ct. App. 1997); *Barnhorst v. Missouri State High Sch. Athletic Ass'n*, 504 F. Supp. 449 (W.D. Mo. 1980).

The issue of whether a high school infringed on First Amendment rights of a basketball player by enacting a basketball-player only rule banning tattoos, body graffiti and unnatural hair coloring was left undecided by the 7<sup>th</sup> Circuit due to mootness caused by the plaintiff player's graduation from high school. The U.S. District Court had earlier dismissed the player's petition for injunctive relief reinstating him to the team, ruling that he failed to demonstrate a likelihood of success on the merits. *Stotts v. Comty. Unit Sch. Dist., No. 1*, 230 F.3d 989 (7th Cir. 2000).

52. Plaintiffs' Motion for Preliminary Injunction on Order Shortening Time, No. A44674, at 4 (D.C. Nev. filed February 19, 2002) (noting that boxers have been allowed to fight bearing temporary tattoos in Quebec, Canada, Texas and Florida, as well as New York).

53. Plaintiffs' Complaint for Declaratory and Injunctive Relief, No. A44674 (D.C. Nev. filed February 15, 2002). The NAC's policy banning temporary tattoos "was not set forth in any written form, not adopted as a formal regulation and not communicated to boxers other than by verbal threats and warnings of disciplinary action or sanctions against boxers who bore the markings in the ring." *Id.* at 2-3.

54. *Id.* At the time of this article's publication, the NAC still had no such policy.

Universal Spheres, an Antigua Corporation representing GoldenPalace.com, joined Adams seeking a declaratory judgment by the NAC having already contracted with Adams for a fight to take place on February 23, 2002.<sup>55</sup> The NAC declined the plaintiffs' request and issued its order concluding "the use of temporary upper body markings during a contest of unarmed combat is forbidden under Nevada law."<sup>56</sup>

The plaintiffs responded by seeking a preliminary and permanent injunction allowing Adams to compete while wearing the temporary tattoo. The plaintiffs raised two legal arguments. The first charged the NAC with an unconstitutional infringement of Adams' free speech rights as protected under the First Amendment of the United States Constitution. The second charged the NAC with violating constitutional or statutory provisions through an improper ad hoc regulation, arguing that the ban constituted a standard or policy of general applicability without the NAC's adherence to the rulemaking procedures required by the Nevada Administrative Procedure Act, NRS Chapter 233B.<sup>57</sup> After several court hearings, the court granted a preliminary injunction in favor of the plaintiffs.<sup>58</sup>

## 2. The Jab: Defendant's Claims for Ban on Temporary Tattoos

The parties' arguments with respect to the constitutional claims are instructive.<sup>59</sup> In arguing against the Plaintiffs' claim of unconstitutional

55. *Id.*

56. Defendant's Opposition to Plaintiffs' Motion for Preliminary Injunction On Order Shortening Time, No. A44674 (D.C. Nev. 2002), at 7. In arguing that it had issued a Declaratory Order, not an Ad hoc regulation, the NAC relied, in part, on its rules regarding boxer's appearance. The rule, NAC 467.592, states: "[e]ach unarmed combatant must provide himself with a costume, which is subject to the approval of the commission or its representative; Each unarmed combatant must appear in proper attire. . . ." *Id.* at 6. The NAC also cited rule NAC 467.598(1), which provides that "each unarmed combatant must be clean and present a tidy appearance." *Id.* at 6. Finally, the NAC referred to rule NAC 467.885, which provides, in pertinent part:

The commission may suspend or revoke the license of, otherwise suspend or take any combination of such actions against a licensee who has, in the judgment of the commission:

2. *Violated any provision of this chapter . . .*

6(f) *Is engaged in any activity or practice that is detrimental to the best interests of unarmed combat.*

*Id.* at 7.

57. Plaintiffs' Motion for Preliminary Injunction on Order Shortening Time, No. A44674, at 4.

58. Preliminary Injunction, Adams, et al. v. Nev. Athletic Comm'n, No. A446674. The court ruled that Plaintiffs had not shown a likelihood of success on the merits that Defendant engaged in *Ad hoc* rulemaking in violation of NRS 233B.0617, but held that Plaintiffs demonstrated a likelihood of success on the merits on the constitutional free speech issue.

59. The central theme of this article focuses on the constitutional issues raised, as opposed to the NAC's statutory rule-making authority.

infringement of free speech rights, the NAC presented a three-pronged attack: 1) that the proposed speech was not protected speech; 2) that the NAC's declaratory order was content-neutral; and 3) that the NAC's declaratory order was narrowly tailored to serve significant government interests.<sup>60</sup>

Given the fact that the Nevada legislature has made internet betting a crime,<sup>61</sup> and that GoldenPalace.com is an on-line betting concern, the NAC first argued that because the proposed "message" (the temporary tattoo ad) did not concern lawful activity, the plaintiffs' First Amendment claims should be denied on that basis alone.<sup>62</sup> The NAC further argued that, even if such speech did not concern an unlawful activity, it had the authority to control speech that, in this instance, was deceptive or misleading since it gave the impression to the public that on-line gambling is legal in Nevada.<sup>63</sup>

The NAC next opposed the plaintiffs' argument that the "ban" was not content neutral, an argument the plaintiffs based on the fact that while permanent tattoos were not banned, temporary tattoos were. A government may impose a "time, place, and manner restriction" on speech so long as it is content neutral, is narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication.<sup>64</sup> These are regulations established by the government that restrict the time, the location and/or the manner in which a organization or an individual can engage in activities that constitute speech. One such example, as seen in *S.O.C. Inc. v. County of Clark*,<sup>65</sup> was the city of Las Vegas' ban on the distribution of leaflets advertising erotic dance entertainment services in areas surrounding the Las Vegas "Strip" and Convention Center. Pointing out that the ban applied to all temporary markings regardless of content, the NAC relied on cases in which the courts have found such distinctions to be without

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60. Defendant's Opposition to Plaintiffs' Motion for Preliminary Injunction On Order Shortening Time, No. A44674.

61. NEV. REV. STAT. §465.091 (2002).

62. Defendant's Opposition to Plaintiffs' Motion for Preliminary Injunction on Order Shortening Time, No. A44674, at 2. "The government may regulate or ban entirely commercial speech related to an illegal activity. 'Illegal activity' is not confined to *malum in se* crimes, but extends to conduct the legislature declares to be illegal." Parrish v. Lamm, 758 P. 2d 1356, 1365 (Colo. 1988).

63. *Id.* at 3 (upholding a ban on the publication of any advertisement to promote the sale of objects designated or intended for use as drug paraphernalia). The defendant also referred the court to the state of Colorado's recent warning to radio stations to cease running advertisements for on-line casinos or risk prosecution for violating the state's consumer-protection statutes on similar grounds. *Id.*

64. *Id.* at 4.

65. 152 F.3d 1136 (9th Cir. 1998).

significance.<sup>66</sup> Given the content-neutral basis of the ban on temporary tattoos (the NAC's regulation did not, for instance, ban temporary tattoo advertising for on-line gambling but allow it for snack foods) and given that the ban left open ample alternative channels of communication routinely utilized by boxers (for instance, commercial logos on socks, trunks and robes), the remaining question addressed by the NAC was whether its ban on temporary tattoos was narrowly tailored to serve a significant government interest.

The NAC posited that "[t]here can be absolutely no doubt that the elimination of upper body markings that may distract boxing judges serves a significant government interest."<sup>67</sup> The NAC also claimed that the use of temporary upper body markings was "detrimental . . . to the best interests of the sport . . . because of the temporary markings' undignified nature."<sup>68</sup> The NAC argued that, given the alternatives, such as permanent tattoos, advertisements in the ring, and markings on boxers' trunks and shoes, the ban was narrowly tailored in that it addressed only temporary markings limited to the upper body, regardless of the message, and that the law required only the "intermediate scrutiny" test.<sup>69</sup> While in traditional public speech cases,

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66. *Id.* at 4, citing *Don's Porta Signs, Inc. v. City of Clearwater*, 829 F.2d 1051, 1053 (11th Cir. 1987) (although portable signs were a form of protected commercial speech, the restriction on that speech was valid because (1) the ban was a means of implementing the government's substantial interest in protecting the aesthetic values of its resort community, (2) the ban directly advanced the governmental interest, and (3) the ban reached no further than necessary to accomplish the goal. The court rejected an argument that the ban did not advance the government's interest because permanent signs were not banned, since the Constitution does not require the government to choose between curing all its ills or none of them). *Id.*

67. *Id.* at 4. The NAC noted that the Plaintiffs

may disagree with the Commission's conclusion, but in addition to being subjectively (and monetarily) involved in the matter, none of the Plaintiffs were appointed by the Governor and vested by the Legislature "with the *sole* discretion, management, control and jurisdiction over all contests or exhibitions of unarmed combat to be conducted, held or given within the State of Nevada." NRS 467.070(1). Moreover, the Nevada Supreme Court has repeatedly held that an agency's conclusions of law 'will necessarily be closely related to the *agency's view of the facts* [and] are entitled to *deference*.'" *Id.*

*Id.* at 5.

68. Defendant's Opposition to Plaintiffs' Motion for Preliminary Injunction on Order Shortening Time, No. A44674 (D.C. Nev. 2002), at 5, citing *Barber v. Municipality of Anchorage*, 776 P.2d 1035, 1037 (Alaska 1989) (court upheld a ban on off-premises advertising signs, portable signs and roof signs, stating: "It is established that the government's interest in aesthetics is substantial and should be accorded respect." *Id.*). The NAC's concern over the "dignity" and integrity of boxing was met with some amusement by critics of boxing. Matt O'Brien, *Nevada Athletic Commission Suddenly Gets A Conscience*, LAS VEGAS CITYLIFE, Feb. 19, 2002, at 1.

69. Defendant's Opposition to Plaintiffs' Motion for Preliminary Injunction on Order Shortening Time, No. A44674, at 5, citing *Globe Newspaper Co. v. Beacon Hill Architectural Comm'n*, 100 F.3d 175 (1st Cir. 1997) (upholding the ban of all "street furniture," including newspaper boxes, in a

content-based restrictions are presumptively invalid and subject to "strict" level of scrutiny, "time, place, and manner" regulations that are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication, are subject to "intermediate" scrutiny.<sup>70</sup> Thus, with respect to the constitutional free speech issue, the NAC held that the plaintiffs had not and could not establish the likelihood or probability of success on the merits.<sup>71</sup>

### 3. The Knockout: Plaintiffs Succeed on First Amendment Challenge

The plaintiffs, in asserting that Adams' body billboard amounted to protected commercial speech, employed a three-prong analysis of the constitutional protections.<sup>72</sup> They first argued that the ban on temporary markings was an all-inclusive restriction on such speech.<sup>73</sup> Relying primarily on *S.O.C. Inc. v. County of Clark*,<sup>74</sup> plaintiffs argued that the ban was unconstitutionally "overbroad" in that it prohibited all temporary markings on boxers' backs, including "any artistic, expressive, political or editorial messages."<sup>75</sup> Thus, plaintiffs alleged, the NAC's prohibition constituted a complete restraint on First Amendment-protected speech, unless the NAC could adequately demonstrate that their ban was a reasonable time, place and manner regulation.<sup>76</sup>

The plaintiffs next argued that the ban was not content neutral. They reasoned that the NAC had placed no ban on boxers' wearing of permanent markings or tattoos and, secondly, had placed no ban on commercial advertising on the boxer's clothing or around the boxing ring.<sup>77</sup> Relying on

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historic district on grounds that the regulation did not require heightened scrutiny because it was not content based, and thus required only intermediate scrutiny). *Id.* The NAC ridiculed the plaintiffs' argument that the ban was not narrowly tailored, while at the same time admitting that the ban is extremely limited because it did not apply to non-upper body temporary markings. *Id.*

70. *Globe Newspaper Co.*, 100 F.3d at 175, 182.

71. *Id.* at 6.

72. Plaintiffs' Motion for Preliminary Injunction on Order Shortening Time, No. A44674, at 6. In order to obtain a preliminary injunction in the Ninth Circuit, Plaintiffs must demonstrate "(1) a combination of probable success on the merits plus the possibility of irreparable injury; or (2) that serious questions are presented as a consequence of the adverse party's conduct, the balance of hardships strongly favors the movant and at least a fair chance of success on the merits." *Id.* at 6, citing *Miller v. California Pacific Medical Center*, 19 F. 3d 449, 456 (9th Cir. 1994).

73. Plaintiffs' Motion for Preliminary Injunction on Order Shortening Time, No. A44674, at 6.

74. 152 F.3d 1136.

75. Plaintiffs' Motion for Preliminary Injunction on Order Shortening Time, No. A44674, at 7.

76. *Id.*

77. *Id.* at 7-9.

*City of Cincinnati v. Discovery Network, Inc.*,<sup>78</sup> the plaintiffs reasoned that "advertising, even speech which does no more than propose a commercial transaction,"<sup>79</sup> is entitled to protection under the First Amendment. Plaintiffs noted that the NAC's regulation would ban both "GoldenPalace.com" and core speech such as "Hi Mom," and argued that the ban prohibited "both messages if displayed by means of temporary markings, but does not ban these messages if conveyed in permanent tattoos or markings on the boxer's trunks, shoes or the ringside."<sup>80</sup> The fact that in order to enforce the ban the referee would be required to review a boxer's body markings to determine whether the marking was permitted speech conveyed by a permanent tattoo or the banned speech conveyed by temporary markings in plaintiffs' view constituted a content-based restriction in violation of the Supreme Court decision as set forth in *City of Cincinnati*.<sup>81</sup>

In granting the preliminary injunction for the plaintiffs, the court held that the NAC's ban on temporary tattoos was not content-neutral.<sup>82</sup> This decision on content-neutrality should have foreclosed the next line of analysis regarding the time, place and manner restrictions, including whether or not the NAC's ban met a significant government interest. The court, however, chose to state that it was not persuaded by the NAC's concern over the distracting of referees or the dignity of the sport of boxing.<sup>83</sup>

#### IV. ANALYSIS OF PARTIES' CONSTITUTIONAL ARGUMENTS

The thrust of the *Adams* case was not whether the tattoo was symbolic speech worthy of protection under the First Amendment. Instead, the *Adams* court focused on the tattoo as commercial speech, and specifically an analysis of the permanent versus temporary nature of the plaintiff's tattoo. The plaintiffs' argument was based upon its coupling of temporary tattoos with the other forms of advertising and permanent non-commercial body markings allowable in boxing.

On its face, it would appear reasonable that, by banning all temporary tattoos regardless of their content, the NAC had a strong argument with

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78. *Id.* at 8.

79. Plaintiffs' Motion for Preliminary Injunction on Order Shortening Time, No. A44674, at 8.

80. *Id.*

81. *Id.*

82. Preliminary Injunction, *Adams, et al. v. Nev. Athletic Comm'n*, No. A446674.

83. *Id.*



respect to the content-neutral nature of the ban.<sup>84</sup> The NAC thus argued that the plaintiffs' reliance on *City of Cincinnati* was "misplaced."<sup>85</sup> In that case, the city banned commercial newsracks but allowed other newsracks, a ban that was clearly "content-based."<sup>86</sup> Conversely, the NAC's ban applied to all temporary tattoos, regardless of the commercial or non-commercial nature of the message. Likewise, the NAC's reliance on *S.O.C. Inc.* seemed, on its face, to strongly support the NAC's argument that its ban was indeed content-neutral in that it did not ban some messages on the upper-body of boxers (i.e., a GoldenPalace.com logo) and allow others ("Hi Mom!" message).

However, the plaintiffs' ability to convince the judge that temporary tattoos, permanent tattoos, and other logo advertisements on apparel should all be deemed as one in the same vehicle for the conveyance of commercial messages was critical to their ability to obtain an injunction.

Assuming, arguendo, that the court had sided with the NAC in finding the ban on temporary tattoos to be content-neutral, the NAC would then have to prevail on the three-prong analysis for time-place-manner restrictions as set forth in *S.O.C., Inc.*<sup>87</sup> The court was not persuaded by the NAC's argument that its ban was narrowly tailored to meet a significant governmental interest. The NAC's argument that the temporary tattoos would run, and thus present a danger to the boxers' eyes, was easily refuted by evidence that excessive sweating would not cause them to run.<sup>88</sup> The NAC's argument that the tattoos would distract the boxing judges was found to be inconsistent with why judges would not likewise be distracted by other advertisements on boxers' apparel and around the ring. Lastly, the judge took little stock in the NAC's stated desire to protect the "dignity" of the sport.<sup>89</sup>

As a result, the court held that the NAC's ban on temporary tattoos was not narrowly tailored to serve a significant governmental interest.<sup>90</sup> Thus, even had the court found the ban to be content-neutral, the NAC would still not have prevailed due to its failure to meet the significant governmental interest

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84. Defendant's Opposition to Plaintiffs' Motion for Preliminary Injunction on Order Shortening Time, No. A44674, at 3. In fact, what NAC argues is that plaintiffs want "medium-neutral" rule.

85. *Id.*

86. *Id.* citing *City of Cincinnati*, 507 U.S. 410.

87. *S.O.C., Inc.*, 152 F.3d 1136.

88. Although this issue was not squared with the fact that the temporary tattoo worn by Hopkins had in fact run due to excessive sweating, *see infra* note 15 and accompanying text, it appears that running had not been a problem in subsequent bouts due to a perfection of the application technique.

89. Preliminary Injunction, Adams, et al. v. Nev. Athletic Comm'n, No. A446674, at 2.

90. *Id.* at 2. The court likewise discounted the NAC's statutory authority in which it has the "vested and sole authority" to make decisions as to distraction or not. *Id.*

prong of the three-part analysis as set forth in *S.O.C., Inc.* The court's comingling of permanent, non-commercial tattoos and temporary tattoos conveying commercial messages also obviously foreclosed any discussion of the "alternative channels" analysis which the NAC would have easily prevailed upon had the court realized the distinction between a ban on all temporary tattoos and the right of boxers to engage in various other alternative means of commercial endorsements, including ironically permanent tattoos.

There are several ways the NAC might have strengthened its argument with respect to its ban meeting a significant governmental interest. One such defense would be to argue that temporary markings would negatively impact its television broadcast deals,<sup>91</sup> and sponsorship deals. Because revenues raised from the NAC's staging of these boxing events go to state coffers, there may be a significant governmental interest in protecting these revenue streams.

## V. IMPLICATIONS FOR PROFESSIONAL SPORT ORGANIZATIONS

### 1. Review of Applicable Sport Organization Rules and Policies

Given that courts have held tattoos to be entitled to First Amendment protection in the absence of a sufficient government interest, sport organizations face a difficult legal hurdle in attempting to restrict players from wearing permanent or temporary tattoos intended to convey constitutionally guaranteed expression, or core, non-commercial speech.<sup>92</sup> This is apparent in the proliferation of tattoos being worn today by athletes in virtually all sports.<sup>93</sup> Furthermore, sport organizations have not, to date, challenged the legal right of participants to don tattoos featuring league logos such as the official MLB or NBA logos.<sup>94</sup> Even a sport organization as vigilant about its commercial rights as the United States Olympic Committee ("USOC") has not sought to legally prevent its athletes from wearing visible permanent tattoos featuring the interlocking Olympic rings.<sup>95</sup> By legal extension, a sport

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91. This has now become a realistic possibility, given the concerns over body billboards raised by broadcasters such as ESPN. See Fitzgerald, *supra* note 19, at C6 & Raissman, *supra* note 20, at 53.

92. An interesting legal challenge might arise were a player to don a tattoo with the message "F—the Umps" or some otherwise inflammatory message.

93. Monnin, *supra* note 10, at E4.

94. Numerous athletes have had the official logo of their particular sport permanently tattooed on their bodies. Futterman, *supra* note 11.

95. David Valente, *Phil's Wearing The Rings Of Confidence*, ADVERTISER, May 10, 1996. The article notes that Australian swimmers Phil Rogers and Glenn Beringen wore the Olympic rings on their chests in the 1996 Olympic Games in Atlanta. United States swimming star Amy Van Dyken

organization would likely face a significant legal hurdle were it to attempt to prevent a player from wearing a tattoo, permanent or temporary, bearing the name or logo of his or her favorite charity since this would likely be deemed more closely analogous to core speech than commercial speech. However, a difficulty does arise in attempting to draw the legal line between tattoos that express non-commercial speech and tattoos that are worn expressly for commercial purposes.

It is likely that the controversy over body billboards will not be limited to the sport of boxing. Indeed, not only basketball players, but players in other sports including tennis have recently been approached to consider this endorsement opportunity.<sup>96</sup> Athletes' ability to compete wearing body billboards may hinge not only on potential First Amendment commercial speech issues, but also upon the authority that the respective sanctioning bodies and leagues have over their participants.

The professional tennis tours, for instance, have been mired in a struggle between the tour's sanctioning body and its players and their agents over the ability or right of the tours to not only utilize player likenesses but also to dictate what commercial advertising can appear on apparel worn during competition.<sup>97</sup> In March 2002, women's tennis star Jennifer Capriati blatantly disregarded the WTA Tour's uniform rules by wearing a shirt with a Ferrari logo on the front despite a ban on all corporate insignia other than the apparel manufacturer logo and the Tour logo.<sup>98</sup> This incident illustrates the ability of star players, especially in individual-oriented sports where their participation is critical to the success of the event, to violate the organization's rules in favor of their lucrative endorsement deals, even if it means being fined.<sup>99</sup> The structure of sport organizations such as the United States Tennis Association

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also has the Olympic rings tattooed on her ankle. Monnin, *supra* note 10, at E4. The U.S.O.C. did take action to prevent Van Dyken from appearing in a "Got Milk?" print advertising campaign that would have showed the Olympic rings on her ankle, causing the advertiser to "airbrush" off the Olympic rings out of the advertisement. Telephone interview with Jeff Benz, General Counsel, United States Olympic Committee (Oct. 4, 2002).

96. Sam Walker, *This Skin for Rent*, WALL ST. J., Nov. 9, 2001, at 10.

97. Daniel Kaplan, *Agency Heat Stalls ATP's Licensing Plan*, SPORTSBUSINESS J., July 8-14, 2002, at 1.

98. Daniel Kaplan, *Logo Has WTA Seeing Red*, STREET & SMITH'S SPORTSBUSINESS, Apr. 1-7, 2002, at 8. The WTA Tour is sponsored by Sanex, whose logo is included in the composite WTA Tour logo to be worn by all participants. Capriati violated a second WTA Tour rule by wearing the Sanex WTA logo at the bottom of her outfit. *Id.* "Dustups over logos are common on the tour. Nike . . . forbids its players from wearing the Sanex WTA logo on their apparel, leaving them to wear it on a hat or not at all. Those players must then perform a community service for the tour." *Id.*

99. The WTA Tour considered fining Capriati for her rules violations. *Id.*

("USTA") and the Professional Golfers Association ("PGA"), in which the individual athletes maintain far greater autonomy over matters of their appearance, apparel, and commercial endeavors than do their counterparts in team-oriented sports; coupled with the absence of a collective bargaining agreement, suggests that these organizations would have the most difficult legal challenge in combating body billboards.

The men's and women's professional tennis circuit provides a good example of the manner in which the sanctioning bodies may address the body billboard issue.<sup>100</sup> Like other professional sport organizations, they have not specifically addressed the issue of body billboards within their rules or policies.<sup>101</sup> However, tennis' sanctioning bodies do maintain rules relating to participants' appearance during their sanctioned tournaments.<sup>102</sup> In registering to participate in sanctioned tournaments, tennis players also agree to adhere to strict rules regarding the number and size of commercial logos that can appear on their uniforms, towels and equipment bags.<sup>103</sup> The tennis organization's degree of concern, were a player to appear wearing a body billboard, would depend on several factors: 1) the level of tournament competition (i.e., a sanctioned major tournament versus a non-sanctioned circuit level tournament); 2) whether the event was televised or not; and 3) whether the company paying for the body billboard was an official sponsor of the tournament or was instead an ambush marketer.<sup>104</sup> These factors, coupled with the "fragmented nature" of professional tennis, suggest that professional tennis

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100. These sanctioning bodies include the United States Tennis Association ("USTA"), which oversees the U.S. Open and sponsors teams for the international competition including the Davis Cup and Federation Cup; the ATP Tour, which governs and manages the men's international professional circuit; and the WTA Tour, which governs and manages the Sanex women's international tour.

101. Telephone interview with Michelle DeFilippantonio, USTA Senior Vice President, Sales & Marketing (Oct. 7, 2002)

102. ATP TOUR, INC., ATP 2002 OFFICIAL RULEBOOK (2002). The rulebook includes the following provision: "Dress & Equipment – every player shall dress and present himself in a professional manner. Clean and customarily acceptable tennis attire as approved by the ATP shall be worn. A player who violates this section may be ordered by the Chair Umpire or Supervisor to change his attire or equipment immediately. Failure of a player to comply with such may result in an immediate default." *Id.* at 72.

103. *Id.* Exhibit M, at 233.

104. Telephone interview with counsel for a professional tennis organization (anonymity requested) (Oct. 14, 2002). This individual, speaking hypothetically, stated that, as long as the temporary tattoo did not violate size restrictions, did not put the player over the limit in terms of number of tattoos, and did not ambush the tournament's official sponsors, the organization might allow the temporary tattoo. This individual also noted that the real concern professional sport organizations have with respect to temporary tattoos is not maintaining the organization's image, but instead protecting its business relationships.

may be ripe for marketers and athletes seeking to profit from temporary tattoos.<sup>105</sup>

Because individual-sport oriented organizations, such as the WTA Tour, do not have the same level of control over players' commercial activities as do the team-oriented sport organizations, it is more likely that a tennis player seeking to wear body billboards would have a stronger First Amendment commercial speech argument assuming that the respective sport organization can be found to be a state actor.

The controversy surrounding body billboards presents a different set of legal issues with respect to the major professional sports leagues, primarily due to the fact that the relationship between management and players is governed by Collective Bargaining Agreements ("CBA's") and their attendant Uniform Player Contracts (UPC's"). The possibility of Rasheed Wallace donning a commercial tattoo during NBA games threatened to bring the issue to a head between management and labor.<sup>106</sup> Despite the aggressive posture taken by the NBA, the issue was ultimately left unresolved due to Wallace's decision to forgo body billboards. The Wallace incident did underscore the fact that the NBA had no rule specifically addressing players' tattoos, commercial or otherwise. A survey of the other major professional sports leagues has similarly found no specific rules relating to the appearance of advertising messages directly on the body itself.

However, each of the major professional leagues has rules specifically stated within their CBA or UPC that would be the likely basis for their prohibiting body billboards. For instance, NBA rules state that players may not "sponsor commercial products without the consent of the Team, which shall not be withheld except in the reasonable interests of the Team or the NBA."<sup>107</sup> Although NBA rules prohibit players from selling endorsements on their uniforms, and make no mention of their skin, the NBA has also argued that temporary commercial tattoos would violate the league's rules with respect to the players' uniforms as defined in the NBA's CBA.<sup>108</sup>

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105. *Id.*

106. Roscoe Nance, *Marketer Hopes NBA Players Will Agree To Temporary Ad Tattoos*, USA TODAY, March 29, 2001, at 6C.

107. National Basketball Association, Collective Bargaining Agreement: Exhibit A: Uniform Player Contract, ¶ 13(b), available at, <http://www.nbpa.com/cba/exhibits/exhibitA.html>.

108. *Id.*, Article XXXVII: Group Licensing Rights, § 3. Uniforms.

During any NBA game or practice, including warm-up periods and going to and from the locker room to the playing floor, a player shall wear only the Uniform as supplied by his Team. For purposes of the preceding sentence only, "Uniform" means all clothing and other items (such as kneepads,

Similar to the NBA, Major League Baseball ("MLB") has several rules that it would likely rely upon to prevent a player from wearing tattoos that endorse commercial products. Specifically, Paragraph 3(c) of the UPC prohibits players from sponsoring any commercial products without the Club's written consent, "which shall not be withheld except in the reasonable interests of the Club or professional baseball."<sup>109</sup> Further, MLB's Uniform Regulations, which govern what a player may wear during and immediately before and after games, prohibit players from wearing undershirts on which any corporate identification or other logo is visible under their jersey and specifically states that "[n]o part of the uniform shall include patches or designs relating to commercial advertisements."<sup>110</sup> Although these Uniform Regulations do not directly regulate what markings a player may have on his body, MLB would contend the prohibition against visible corporate logos, particularly when read in conjunction with Paragraph 3(c) of the UPC, provides MLB and its clubs the ability to prevent players from wearing temporary tattoos as commercial endorsements. Like MLB and the NBA, the NHL and NFL have similar rules regarding both athletes' rights to engage in commercial endorsements and game attire within their respective CBA's and UPC's.<sup>111</sup>

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wristbands and headbands, but not including Sneakers) worn by a player during an NBA game or practice. "Sneakers" means athletic shoes of the type worn by players while playing an NBA game.

109. Basic Agreement between the American League of Professional Baseball Clubs and the National League of Professional Baseball Clubs and Major League Baseball Players Association, effective January 1, 1997, Schedule A: Uniform Players Contract, ¶3(c) incorporated into the 2001 CBA.

110. *Id.*

111. Collective Bargaining Agreement Between the NFL Management Council and the NFL Players Association, as amended February 25, 1998., available at <http://www.nflpa.org/agents/main.asp?subPage=CBA+Complete>. Article LV, Section 1 states, in pertinent part: "Endorsements: No Club may unreasonably refuse to permit a player to endorse a product." *Id.* The NFL also maintains strict control over their players' on-field appearance and uniform, often fining players for inappropriate attire. The NFL's ability to control their players' on-field appearance was recently illustrated in the league's threat to fine star quarterback Peyton Manning \$25,000 if he wore black high-top cleats in tribute to Johnny Unitas who had recently died. Manning opted not to wear the cleats. Laura Vescey, *NFL Has Laces Tied Too Tight, Banning Colt's High-Top Tribute*, BALTIMORE SUN, Sept. 16, 2002, at 1D. From a practical standpoint, an incident of a player seeking to wear body billboards are likely remote given the league's history and precedent of maintaining strict control over player on-field appearances though fines.

The pertinent NHL provision is found in the Collective Bargaining Agreement by and between the National Hockey League and the National Hockey League Players' Association, effective June 26, 1997. Exhibit 1: Standard Player's Contract, Paragraph 8.b.:

The Players further agrees that during the period of this Contract and during any period when he is obligated under this Contract to enter into a further contract with the Club he will not make public appearances, participate in radio or television programs, or permit his picture to be taken, or write or

These various rules raise numerous issues for debate and interpretation by an arbitrator or judge. One is the issue of the absence of any specific rules prohibiting tattoos, permanent as well as temporary. A judge or arbitrator might interpret the fact that commercial tattoos are not addressed specifically within these rules as indication that they were not intended to be prohibited.

Another issue involves the interpretation of the common phrase in sport league UPC's stating that a team's approval of an athlete's commercial endorsement deal will "not be unreasonably withheld." An arbitrator or judge could find a team or league's decision to withhold approval to be "reasonable" if the commercial tattoo was for a company that was not an official sponsor of the team or the league.<sup>112</sup> Alternatively, he or she may find in interpreting this clause that the team or league's desire to protect its official sponsors is irrelevant when weighed against the rights of an athlete to engage in commercial endorsements. An arbitrator or judge might also extend the definition of "reasonable" to allow teams or leagues to prohibit commercial tattoos simply in order to protect the integrity and dignity of its sport (an argument that, the reader may recall, was not embraced by the judge in the *Adams* case).

The interpretation of what is "reasonable" versus "unreasonable" has arisen on several occasions within the pro team sports realm. In the mid-1980s, the Portland Trail Blazers cited a similar clause in the NBA's UPC in attempting to block two of its players from appearing in an advertisement; an arbitrator ultimately held in favor of the players.<sup>113</sup>

Most recently, in 1998, the Baltimore Orioles filed a grievance against the MLBPA when three of its players, without previously notifying the team, posed in generic uniforms in a commercial for Pepsi, a competitor of one of the Orioles' major sponsors Coca-Cola.<sup>114</sup> The team cited Paragraph 3(c) of the UPC giving teams the right to approve any player endorsement deals entered into during the season, with consent not to be withheld "except in the reasonable interests of the club or professional baseball."<sup>115</sup> The Orioles

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sponsor newspaper or magazine articles, or sponsor commercial products without the written consent of the Club which consent shall not be unreasonably withheld.

*Id.*

112. Futterman, *supra* note 11. "Officials at the National Basketball Players Association say withholding permission to wear any tattoo, even one that endorses a candy company, would be 'unreasonable.'" *Id.*

113. *Id.*

114. Jerry Crasnick, *Orioles, Players Clash Over Cash*, BLOOMBERG NEWS, May 10, 1998.

115. *Id.* MLBPA officials said the clause had never been used to prevent a player from doing an endorsement, indicating a possible laches defense. The Orioles and their players reached a

argued that it was reasonable for the team to withhold consent in order to protect the value of its sponsorship deal with Coca-Cola.<sup>116</sup> The team's grievance stated that the players were obligated to "protect the exclusive associational rights granted to Coca-Cola in the sponsorship agreement."<sup>117</sup> The Orioles and the Major League Baseball Players Association reached a settlement that allowed the three players to continue to endorse Pepsi products, with some unpublicized future restrictions, in exchange for the players' agreeing to participate in promotional events conducted at the Orioles stadium for Coca-Cola.<sup>118</sup>

Although there appears to be no definitive interpretation as to what may constitute "reasonable" or unreasonable withholding of consent with respect to endorsement deals, what has transpired leans in favor of players' rights to engage in such deals, even when they may conflict with official team sponsors.<sup>119</sup>

Similar to the individual-oriented sport organizations, the team-oriented professional sports leagues appear to also have a choice in confronting the issue of body billboards. They can argue that body billboards "fit" under their present rules and, if challenged, hope for success in arbitration, or they can proactively negotiate the issue with their respective players union. However, unlike the individual-oriented sport organizations, those team-oriented professional sport leagues that operate under Collective Bargaining Agreements have, unique to their industry, additional issues that must also be addressed.

## 2. Impact of Collective Bargaining and Labor Law

Any attempt by team-oriented sport organizations, and specifically the major professional leagues, to prohibit body billboards could likely only be undertaken at the bargaining table. Under the rules of collective bargaining enforced by the National Labor Relations Board, professional sport leagues have the ability to refuse to bargain over topics that are deemed to be

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compromise agreement, avoiding grievance arbitration, enabling all three players to appear in the Pepsi commercial.

116. *Id.*

117. *Id.*

118. Curt Baltzley, Around the American League, HOUSTON CHRON., June 19, 1998, at C3.

119. Telephone interview with Greg Bouris, Director of Communications, Major League Baseball Players Association (Oct. 4, 2002). Major League Baseball and the MLBPA have a number of outstanding issues based on Paragraph 3(c). The parties are attempting to resolve these issues as part of the parties' broader negotiations of a new CBA.



permissive subjects, such as a policy allowing for the MLB logo to appear on all uniforms but denying a request by the MLBPA that its logo also appear on player uniforms.<sup>120</sup> There is no duty or obligation for management to collectively bargain over the implementation of rules deemed to involve permissive subjects.

However, terms relating to hours, wages, and conditions of employment are deemed to be mandatory subjects of collective bargaining.<sup>121</sup> Arbitrators and courts have broadened the scope of mandatory topics to include issues that may not be directly tied to hours, wages and conditions of employment, but that nonetheless are deemed to have impact on any these areas. For instance, in the sport setting, a court held that MLB Player Relations Committee, management's negotiating arm, could not unilaterally change its economic structure by implementing, among other changes, a hard salary cap because of the profound effect that such a change would have on players' wages, a mandatory subject of bargaining.<sup>122</sup>

Numerous decisions by the National Labor Relations Board ("NLRB"), which decides disputes relating to collective bargaining issues, strongly indicate that a league rule prohibiting the ability of a player to wear temporary tattoos would be viewed as a "condition of employment" and thus would need to be collectively bargained between management and the respective players union. For instance, with respect to a sport organization's effort to prohibit body billboards under its rules on uniforms, the NLRB has long held that work rules, including those regulating an employee's appearance (e.g., dress code) generally are considered mandatory subjects of bargaining.<sup>123</sup> For those leagues whose management-player relations are governed by CBA's, any unilateral decision to enact a rule barring body billboards would be immediately met with a grievance by the respective players association.

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120. GLENN WONG, *ESSENTIALS OF SPORTS LAW* 504 (3d ed. 2002).

121. *Id.* Murray Chass, *Dress Code Gets Sleek*, N.Y. TIMES, Sept. 20, 2002, at D3. In its most recently completed CBA negotiation, MLB and the MLBPA negotiated an agreement on guidelines that restrict players from wearing uniforms that are deemed so baggy that they interfere with play. *Id.*

122. *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054 (2nd Cir. 1995).

123. *Transportation Enterprises, Inc.*, 240 N.L.R.B. 551 (1979) (stating that the implementation of a new dress code is a mandatory subject of bargaining).

### 3. Avenues for Constitutional Law Challenges

#### A. State Action Requirement

The Constitution protects individual rights and liberties only as they apply to state action.<sup>124</sup> Neither the Constitution nor any of its Amendments provide protection against private conduct, no matter how unfair or egregious, unless that action can be traced back to some action by any federal, state or local government.<sup>125</sup> Thus, in order for an athlete to bring a constitutional law-based claim, whether in the individual-oriented sport or the team-oriented sport organization context, that athlete must first establish his or her sport organization as a "state actor."<sup>126</sup> Furthermore, state courts have consistently held that state action is required when freedom of speech is asserted.<sup>127</sup>

The Supreme Court has developed three tests to determine if a private entity may be considered a state actor: 1) the public function test; 2) the "entanglement" test, and 3) the symbiotic relationship test.<sup>128</sup>

The lynchpin of the public function test is whether the private actor's activity is one in which the government has traditionally been engaged.<sup>129</sup> The public function test will only be met "if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the state'."<sup>130</sup> Furthermore, the fact that the private entity performs a function that serves the public is not enough to make it a state actor.<sup>131</sup>

The entanglement, or nexus test, requires a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the

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124. WONG, *supra* note 120, at 196.

125. *Id.*

126. *Id.*

127. *Island Online, Inc. v. Network Solutions*, 119 F. Supp. 2d 289, 303 (2000), citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982).

128. See Wong, *supra* note 120, at 197-198. See also, Josiah Drew, *The Sixth Circuit Dropped the Ball: An Analysis of Brentwood Academy v. Tennessee Secondary School Athletic Ass'n in Light of the Supreme Court's Recent Trends in State Action Jurisprudence*, 2001 BYU L. Rev. 1313, at 1317 (2001) (noting that the entanglement test is also referred to as "the nexus test," and the symbiotic relationship test is also referred to as the "mutual contacts or 'catch-all' tests" that utilize a balancing approach theory).

129. *Jackson v. Metropolitan Edison*, 419 U.S. 345 (1974) (only those activities traditionally reserved to state authority, such as education, fire and police protection and tax collection fall within the ambit of public function).

130. *Id.* at 353.

131. *Rendell-Baker*, 457 U.S. 830.

action of the latter may be fairly treated as that of the State itself."<sup>132</sup> The test also measures the quantity and quality of a governmental entity's encouragement, coercion and direction aimed at the private entity.<sup>133</sup>

The symbiotic relationship test was first enunciated in *Burton v. Wilmington Parking Authority*.<sup>134</sup> Among the factors the courts weigh is whether there is a "symbiotic relationship involving the sharing of profits" between the entity and the state.<sup>135</sup> In cases applying this third test, the courts have, on a case-by-case basis, weighed items including: 1) state licensing and regulation of the private entity; 2) state subsidies or aid; 3) the amount of "symbiosis" or "entanglement" and 4) the amount of "joint action."<sup>136</sup>

### *B. Sport-related cases involving state action inquiry*

Although the U.S. Supreme Court has not addressed state action in professional sports, it did address state action in the seminal case of *NCAA v. Tarkanian*.<sup>137</sup> The case involved a determination of whether the University of Nevada-Las Vegas' (UNLV's) suspension of Coach Tarkanian, in compliance

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132. *Jackson*, 419 U.S. at 453.

133. *Shelley v. Kraemer*, 334 U.S. 1 (1948) (Court reversed state courts decision that upheld restrictive covenants preventing blacks from owning certain homes, reasoning that the state courts had, in effect, encouraged or directed racial discrimination in violation of the 14<sup>th</sup> Amendment's Equal Protection Clause). As noted in *Drew*, *supra* note 128, this test has also been termed the state compulsion/coercion test.

134. 365 U.S. 715 (1961). In a case involving a restaurant's refusal to serve an African-American man, the Court found state action on the basis that the restaurant was located in a building owned and operated by an agency of the state of Delaware. The Court concluded that when a "state has so far insinuated itself into a position of interdependence with [the private entity] . . . it must be recognized as a joint participant in the challenged activity." *Id.* at 725.

135. *Ponce v. Basketball Fed'n*, 760 F.2d 375 (1st Cir. 1985) (in an eligibility issue involving the right of a Puerto Rican citizen to participate in a league governed by the Basketball Federation of Puerto Rico, a private sports organization, the court found state action because the arrangement for the use of the sports facilities "confers on each an incidental variety of mutual benefits.") *Id.* at 381.

136. *Drew*, *supra* note 128, at 1317. The author cites as illustrative of the symbiotic relationship test the *Blum* Trilogy of cases, upon which the Sixth Circuit relied in *Brentwood*. The *Blum* Trilogy includes: *Blum v. Yaretsky*, 457 U.S. 991 (1982) (despite extensive regulatory overlap between decision-making physicians and New York state's bureaucratic implementation of Medicaid, as well as New York state's subsidizing ninety percent of the care, the Court held nursing homes not acting under influence of the state); *Rendell-Baker*, 457 U.S. 830 (in a case involving the discharge of private school employees, the Court held that significant subsidies and heavy regulation are not enough to confer state actor status); and *Lugar v. Edmondson Oil*, 457 U.S. 922 (1982) (the Court, in a narrowly-tailored decision, found state action due to the county court's involvement in authorizing prejudgment attachments).

137. 488 U.S. 179 (1988).

with NCAA rules, rendered the NCAA's actions that of the state.<sup>138</sup> In a narrow 5-4 decision, the Court held that the NCAA was not a state actor.<sup>139</sup> In subsequent cases, lower courts have consistently held that the NCAA is not a state actor.<sup>140</sup>

Conversely, with respect to high school athletics, until very recently there was a split of opinion as to whether the governing athletic associations were state actors. However, the Supreme Court resolved the issue in *Brentwood Academy v. Tennessee Secondary Schools Athletic Ass'n ("TSSAA")*,<sup>141</sup> when it held that TSSAA's "regulatory activity may and should be treated as state action owing to the pervasive entwinement of state school officials in the structure of the association . . . ."<sup>142</sup>

### C. Application to Professional Sport Organizations

Professional sport organizations have rarely come under constitutional scrutiny owing to their status as private entities, as well as, in the case of the major professional sport leagues, their protections under labor law. While constitutional issues have occasionally surfaced within the team-oriented sport context, they have been quickly extinguished. One such highly-publicized episode involved the NBA's Mahmoud Abdul-Rauf, a converted Muslim who during a series of NBA games in 1996 refused to stand and face the American flag during the playing of the national anthem.<sup>143</sup> The NBA chose to accommodate Rauf instead of strictly enforcing its rule stating: "Players, coaches and trainers are to stand and line up in a dignified posture along the

138. *Id.* It was uncontested that UNLV was clearly a state actor.

139. *Id.* The Court held that the NCAA's policies were determined by several hundred public and private member institutions independent of any state, and the NCAA enjoyed no governmental powers to facilitate its investigation of UNLV and Tarkanian. "The NCAA's collective membership speaks through an organization that is independent of any particular state." *Id.* at 193. Justice White argued in his dissent that the NCAA was "jointly engaged with UNLV officials" and was thus a state actor. *Id.* at 203).

140. See, e.g., *Hall vs. NCAA*, 985 F.Supp 782 (N.D. Ill. 1997); *Arlosoroff v. NCAA*, 746 F.2d 1019 (4th Cir. 1984); *McDonald v. NCAA*, 370 F. Supp. 625 (C.D. Cal. 1974).

141. 531 U.S. 288. In a narrow 5-4 decision, the Court reversed the Sixth Circuit's controversial *Brentwood* decision that failed to find state action due to the fact that Brentwood Academy was a private school. See also, *Drew*, *supra* note 133 (providing a critical analysis of the Sixth Circuit Court's opinion that went against the prevailing trend of finding state high school athletic associations to be state actors. In criticizing the inconsistency of the application of the three state action tests, the author argues persuasively for the adoption of a single test that balances the value of the Constitutional right against the value of the private entity's challenged practice). *Id.*

142. *Brentwood Academy*, 531 U.S. at 295.

143. Rowland Nethaway, *Flag A Symbol of Freedom*, ATLANTA J. & CONST., March 18, 1996, at 9A.

sidelines or the foul line during the playing of the national anthem."<sup>144</sup> Thus, the issue went unchallenged.<sup>145</sup>

One way in which an athlete might be able to challenge a sport organization on a constitutional law claim, such as freedom of speech, is to invoke one of the three tests that may bring the organization under color of state action. The public function test is the most difficult to apply since the operation of professional sports leagues is not one in which the government has traditionally been engaged. The public function test was likewise held inapplicable in the amateur sports setting, in which the Supreme Court held that "neither the conduct nor the coordination of amateur sports has been a traditional government function."<sup>146</sup>

The nexus, or entanglement test is similarly difficult to apply to professional sport organizations, because "more than close ties are required. [professional sport organizations are] not a heavily regulated industry comparable to a public utility, nor can it be said that the actions of [professional sport organizations] can be held attributable to the State."<sup>147</sup>

However, courts have found state action in cases involving professional sport organizations under the symbiotic relationship test as formulated in *Burton*. Lower courts have, however, found entanglement in a case involving discriminatory practices.<sup>148</sup> One such case arose after a female newspaper reporter, was denied admission to the team's locker-room for the purposes of interviewing players. In *Ludtke v Kuhn*,<sup>149</sup> the district court found that the New York Yankees' lease arrangement with the city of New York resulted in the Yankees, a private entity, being "so entwined" with an agency of the state

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144. Futterman, *supra* note 11.

145. Nethaway, *supra* note 143, at 9A. ("The U.S. government can't order Abdul-Rauf to stand during the national anthem. But the NBA can. Perhaps. The NBA, which looks the other way when rules apply to superstars, could lose if a court decided that the national anthem rule violates Abdul-Rauf's religious and free speech rights under Title VII of the federal law. There's no telling where that decision would lead."). *Id.*

146. *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 545 (1987).

147. Karen Martin Dean, *Note: Can The NBA Punish Dennis Rodman? An Analysis Of First Amendment Rights In Professional Basketball*, 23 VT. L. REV. 157 (1998) (the author argues that the NBA can be found to be a state actor under the symbiotic relationship test, enabling Rodman to challenge his suspension for his derogatory remarks regarding Mormons. While the author makes a persuasive argument for finding state action, she fails to take in account the impact of the NBA's rights and protections under its CBA with its players, which allows for such disciplinary action).

148. *Id.* at 163.

149. 461 F. Supp. 86 (S.D. N.Y. 1978).

that that agency must be deemed responsible for the private entity's acts.<sup>150</sup> Furthermore, the New York State legislature had passed a statute that recognized the importance of Yankee Stadium to the city of New York.<sup>151</sup> The *Ludtke* court stated the right of a female reporter to pursue her profession is a fundamental "liberty" within the meaning of the Fourteenth Amendment's due process guarantee.<sup>152</sup> The court also stated that "[e]ven though the governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."<sup>153</sup>

In a more recent case, a lower court used the symbiotic relationship test to find state action in *Hertel et. al v. City of Pontiac, et.al.*<sup>154</sup> In *Hertel*, two Michigan residents challenged the constitutionality of defendant Detroit Lions and NFL's "home" blackout rule prohibiting television broadcasts of "home" football games in areas within 75 miles of the "home" stadium.<sup>155</sup> The court held that "[w]here the state merely leases land to a private actor, there may be a requirement of a sufficient nexus between the state action and the private discrimination."<sup>156</sup> The court found, in analyzing the terms of the lease agreement:

The relationship between the State and the private parties here is more interdependent than that which existed in *Burton*. Thus, the nature of the relationship shown here compels the conclusion that the conduct of the purported private actors should be treated as that of the State. Furthermore, since the 75-mile blackout rule has as its sole purpose and intent the increase of home game attendance, the Court would find state action here even if a nexus between the specific challenged conduct and the State were required to be shown. As Professor Tribe has stated, 'the more government gains (and the more it appears to gain) by the way in which a (private) choice is made, the clearer is the

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150. *Id.* at 92.

151. *Id.* at 95.

152. *Id.* at 98.

153. *Id.* The primary purpose of Commissioner Kuhn's policy was to protect players' privacy. The court held that this could be done by "much less sweeping means." *Ludtke*, 461 F. Supp. at 98.

154. 470 F. Supp. 603 (E.D. Mich. 1979).

155. *Id.* The plaintiffs argued that the rule violated their right to equal protection under the 14<sup>th</sup> Amendment. *Id.* at 2.

156. *Id.* at 3.

case for treating the choice as one for which government bears responsibility.<sup>157</sup>

The fact that a majority of professional sport organizations lease their facilities from the governments may provide fertile ground for constitutional law challenges, particularly using the symbiotic relationship test.<sup>158</sup>

The *Ludtke* case involved a reporter, however, and not a professional athlete participating under a CBA and UPC or other event participation contract, and different constitutional rights were at stake. *Hertel* addressed the constitutional rights of fans, not the professional athletes themselves. Thus, it is unclear as to the extent this theory could be applied to professional athletes.

The symbiotic relationship test may, based upon *Ludtke* and *Hertel*, provide a viable avenue through which an athlete might find the state action required to bring a First Amendment challenge. However, again, the CBA's and UPC's under which professional athletes participate may ultimately prove insurmountable. It is also unclear as to whether, in the case of body billboards, such commercial speech would be allowed only in facilities in which this symbiotic relationship with government exists (and banned in privately-owned facilities).

### CONCLUDING COMMENTS

The societal trend toward the popularity of permanent tattoos shows no signs of waning. Similarly, the quest for new revenue streams and advertising vehicles presents an opportunity for advocates of body billboards. It would be wise for sport organizations to proactively address the issue. Individual-based sport organizations, such as the Olympics, and professional tennis and golf tours, can achieve this by specifically stipulating the use or non-use of body billboards within their participation agreement. The major professional team sport leagues will likely need to address this issue at the bargaining table because this activity involves a mandatory subject of bargaining. Television networks such as ESPN, HBO and Showtime, as well as event owners/promoters such as IMG, need to also address their rules and policies with respect to whether or not, and when, they will allow body billboards.<sup>159</sup>

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157. *Id.* at 4 (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 18-7, at 1171-72 (1st ed. 1978)). The court went on to hold that, despite its finding of state action, plaintiff's constitutional rights had not been deprived under the "rational relationship" test. *Id.*

158. Martin, *supra* note 50, at 166, noting that 14 of the 29 NBA team lease their stadiums from the government.

159. Interview with Paul Larson, attorney for plaintiffs in *Adams* (Nov. 21, 2002). HBO and Showtime have already considered allowing boxers to wear body billboards on the condition that the

These telecasters could also enter agreements with participants to allow them to sell body billboards on the boxers' behalf to companies wishing to advertise within the broadcast. Finally ad agencies will be challenged to evaluate and consider the effectiveness of this new marketing medium.<sup>160</sup>

There is also the possibility of a negative public backlash against the intrusion of body billboards onto the sport scene.<sup>161</sup> Intertwined with this will be a continued debate over the rights of the individual athlete to control their own bodies, to engage in arguably constitutionally-protected speech and to freely contract with commercial entities, weighed against the ability of sport organizations, particularly non-governmental organizations, to set their own rules of etiquette and protect their own business interests.

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telecaster receives some portion of the advertising revenues paid by the sponsoring company to the boxer. Conversely, it is also viable that these telecasters can negotiate with individual boxers to be able to include body billboards on boxers into the advertising packages they present to potential advertisers. *Id.*

160. Michael McCarthy, *Ad Tattoos Get Under Some People's Skin*, USA TODAY, Apr. 4, 2002, at 3B ("Madison Avenue is wary, but 'looking at' ad tattoos as a new medium."). The article reports that after Fox's Celebrity Boxing Show, in which competitors Tonya Harding, Todd Bridges and Danny Bonaduce sported GoldenPalace.com tattoos seen by 15.5 million U.S. viewers, web visits to GoldenPalace.com rose 200% in the 24 hours after the March 13, 2002 show. *Id.*

161. *Id.* ("It's frightening that advertisers would literally brand people," says Gary Rusjin, director of consumer watchdog group Commercial Alert. "It's a perfect example of commercialism: that everything should be for sale, including the skin on a person's back.") *Id.*



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