

## ARTICLE

# Post No Bills: Can the NBA Prohibit its Players from Wearing Tattoo Advertisements?

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INTRODUCTION .....	508
I. THIS SKIN FOR RENT: THE HISTORY OF TATTOO ADVERTISING ON ATHLETES .....	511
<i>A. Tattoo Advertising and the NBA</i> .....	513
<i>B. Current NBA Rules Potentially Applicable to Tattoo     Advertising</i> .....	515
II. PROHIBITING TATTOO ADVERTISING .....	517
<i>A. False Advertising and Unfair Competition</i> .....	518
1. Section 43(a) of the Lanham Act .....	519
a) Likelihood of Confusion .....	521
b) Other Elements of a § 43(a) Cause of Action .....	524
2. The Tattoo Advertiser's Defense .....	526
3. Distinguishing <i>National Hockey League v.         Pepsi-Cola Canada Ltd.</i> from Tattoo Advertising .....	529
<i>B. Is a Tattoo Advertising Prohibition     Unconstitutional?</i> .....	531
1. Private Actors versus State Actors .....	532

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508	<i>FORDHAM INTELL. PROP. MEDIA &amp; ENT. L.J.</i> [Vol. 15:507]	
	2. Tattooing as Protected Speech .....	536
	3. Tattoo Advertising as Protected Speech.....	540
III.	MUST THE NBA NEGOTIATE ITS PROHIBITION OF TATTOO ADVERTISING THROUGH COLLECTIVE BARGAINING? .....	541
	A. <i>Tattoo Advertising Income as “Wages”</i> .....	542
	B. <i>Tattoo Advertising as “Other Terms or Conditions of Employment”</i> .....	543
	CONCLUSION.....	546

## INTRODUCTION

Consider the following hypothetical: professional basketball player Yao Ming (“Yao”) of the Houston Rockets gets the “Twizzlers” candy logo temporarily tattooed on his right bicep. Hershey Foods Corporation (“Hershey”), owner of the Twizzlers candy and logo, is paying Yao \$250,000 to wear the temporary tattoo, which will naturally wear off in two weeks—after Yao has played in several televised games, appeared on countless sports highlight shows all over the country, and likely graced the back cover of various newspapers.

Hershey is a direct competitor of Nestlé, an official corporate sponsor of the National Basketball Association (“NBA”).<sup>1</sup> Nevertheless, through its creative arrangement with Yao, Hershey has effectively circumvented Nestlé’s exclusive contract with the NBA, and has advertised its product in a variety of media for a fraction of what it would likely cost to purchase one minute of advertising during a national broadcast of an NBA game.

This type of marketing ploy, called tattoo advertising, has already made a controversial appearance in the sporting world. Beach volleyball players and skateboarders have worn tattoo advertisements and skin patches.<sup>2</sup> Boxers have been using tattoo

<sup>1</sup> See generally Michael Futterman, *Sports Tattoos Could Lead to Dollar Signs*, NEWHOUSE NEWS SERVICE, Mar. 19, 2001, at C1 (stating that Nestlé has paid several million dollars to be the exclusive candy sponsor of the NBA).

<sup>2</sup> Marathon runners, bodybuilders, and tennis players have expressed interest in offering skin-space for sponsorship as well. Sam Walker, *On Sports: This Skin for Rent*, WALL ST. J., Nov. 9, 2001, at W10. In addition, an Australian soccer club recently

advertising to make extra money for several years.<sup>3</sup> A certain online gambling site has temporarily tattooed its internet address across boxers' backs for televised fights, despite resistance from boxing regulators and television broadcasters.<sup>4</sup> While no NBA player has yet worn a tattoo advertisement, several players considered it, and the NBA asserted that it will prohibit the practice.<sup>5</sup> In response, the NBA Players Association has stated it believes tattoo advertising is permissible, and would likely file a grievance with the National Labor Relations Board ("NLRB") if the NBA thwarts a tattoo advertising campaign.<sup>6</sup>

Before the NBA formally issues a blanket prohibition of tattoo advertising to protect league and corporate sponsorships and marketing agreements, does the league have an obligation to consider the rights of the players? A ban on tattoo advertising arguably restricts the player's freedom of expression or other personal liberty or privacy rights. As discussed above, some boxers wear tattoo advertisements. NBA players wear all kinds of visible tattoos on their arms and shoulders. And one player, Shaquille O'Neal, even has a self-promoting "Superman" logo permanently tattooed on his arm.<sup>7</sup> The NBA apparently has not expressed any concerns about these tattoos<sup>8</sup>—making a ban on

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announced it was considering a sponsorship agreement under which players would have a mobile telephone company's logo temporarily tattooed on their arms. While the club indicated that it intends to pursue the deal, the Australian Football League reportedly "was not amused and said it had knocked the concept back when approached in the past." Rosanne Michie, *Tattoo Idea is Crazy, Says AFL*, SUNDAY HERALD SUN (Austl.), Dec. 19, 2004, at 9.

<sup>3</sup> See Hilary Cassidy, *Roll (Dice) with the Punches: When an Online Casino Sends a Fighter into the Ring with its Ad Tattooed on His Back, He Upsets His Opponents, the Boxing Community and ESPN*, BRANDWEEK, Dec. 9, 2002, at 22.

<sup>4</sup> *Id.*

<sup>5</sup> Matthew Futterman, *NBA Paints its Own Picture on Tattoo Ads—Corporate Logos on Players Not Acceptable*, STAR-LEDGER (Newark, N.J.), Mar. 21, 2001, at 067; Matthew Futterman, *NBA: Union Takes Wait-and-See on Tattoos*, STAR-LEDGER (Newark, N.J.), Mar. 22, 2001, at <http://www.fiftyrubies.com/New%20Jersey%20Online-%20Star-Ledger%20Sports.htm>.

<sup>6</sup> See Charlene E.M. Wilson, *Corporate Tattoos Present Problem for NBA*, Mar. 23, 2001, at <http://www.sportslawnews.com/archive/Articles%202001/NBATattoos.htm> (last visited Mar. 14, 2005).

<sup>7</sup> Eric Immerman, *Jenny Jumping into Lake Show*, at <http://sports.espn.go.com/-espn/print?id=1477699&type=page2Story> (last modified Dec. 18, 2002).

<sup>8</sup> See generally Futterman, *supra* note 1.

tattoo advertising without a sound legal premise smack of hypocrisy and paternalism. In addition, the NBA Players Association believes the league cannot unilaterally ban tattoo advertisement, but rather must resolve the issue through collective bargaining.<sup>9</sup>

Here, applying First Amendment protection to a purely commercial form of expression like tattoo advertising would be a dubious extension of the law<sup>10</sup> and the First Amendment may have little relevance to the NBA because the league is not a state actor.<sup>11</sup> The NBA also has lucrative sponsorship agreements with numerous corporations, allowing the sponsors to advertise in basketball arenas, at NBA events and during television broadcasts of NBA games.<sup>12</sup> Various other companies pay television networks millions of dollars for exclusive rights to advertise during NBA game broadcasts.<sup>13</sup> The NBA ostensibly selects sponsors in an effort to protect the league's image. Renegade tattoo advertisers peddling any variety of goods or services could take advantage of the goodwill the NBA enjoys in the marketplace and harm its image by giving the appearance that the advertisers or their products are affiliated with the NBA.

This Article will explore the issue of tattoo advertising on NBA players. Part I provides background information on tattoo advertisers campaigns to date. Part II discusses ways in which

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<sup>9</sup> Walker, *supra* note 2.

<sup>10</sup> See *S.F. Arts & Ath., Inc. v. United States Olympic Comm.*, 483 U.S. 522, 535 (1987) (stating that “[c]ommercial speech ‘receives a limited form of First Amendment protection’” (quoting *Posadas de P.R. Assoc. v. Tourism Co. of P.R.*, 478 U.S. 328, 340 (1986))).

<sup>11</sup> See *generally id.* at 543–44 (holding that Congressional grant of charter to United States Olympic Committee (“USOC”) does not make the USOC a state actor); *Goldberg v. 400 E. Ohio Condo. Ass’n*, 12 F. Supp. 2d 820, 823 (N.D. Ill. 1998) (arguing in dicta that it is unlikely that the NBA is a government entity for First Amendment purposes); *Piazza v. Major League Baseball*, 831 F. Supp. 420, 425–26 (E.D. Pa. 1993) (holding that Congress’s grant of a federal antitrust exemption to Major League Baseball does not make the league a state actor).

<sup>12</sup> Stefan Fatsis & Suzanne Vranica, *NBA’s Rapid Action Following Brawl Earns Kudos from Major Advertisers*, NAT’L POST (Can.), Nov. 24, 2004, at FP10; see Debbie Arrington, *Ad Nauseam: Sponsors Rethink Their Support of NBA, Players*, DESERET MORNING NEWS, Dec. 12, 2004, at D08; Futterman, *supra* note 1 (reporting that Nestlé has paid millions to be the exclusive candy sponsor).

<sup>13</sup> Fatsis & Vranica, *supra* note 12.

tattoo advertisers could unfairly capitalize on the goodwill of the NBA, and concludes that tattoo advertising is likely to confuse viewers into believing that the tattoo advertiser has a sponsorship agreement with, or is authorized by, the NBA. Part II also analyzes the First Amendment implications of restricting players from wearing tattoo advertisements. It argues that the NBA should not be considered a state actor, and that tattoo advertising is not protected speech. Finally, Part III considers whether the NBA can unilaterally prohibit tattoo advertising, or whether such a restriction must be collectively bargained with the players' union. The Article concludes that, under the National Labor Relations Act, the NBA is not required to negotiate its stance on tattoo advertising through collective bargaining. Tattoo advertising may prove to be an interesting battle for the players and their lawyers, but ultimately it would be a losing one.

#### I. THIS SKIN FOR RENT: THE HISTORY OF TATTOO ADVERTISING ON ATHLETES

The furor over tattoo advertising began in September 2001 when boxer Bernard "The Executioner" Hopkins wore a temporary tattoo on his back while defeating the favored Felix Trinidad.<sup>14</sup> GoldenPalace.com, an online casino, paid Hopkins about \$100,000 to have its internet address temporarily tattooed on his back in large block letters.<sup>15</sup> The Nevada Athletic Commission (NAC) then stepped in and voted 5-0 to prohibit a second fighter, Clarence "Bones" Adams, from wearing a temporary GoldenPalace.com tattoo on his back during a fight against Paulie Ayala.<sup>16</sup> The NAC's decision was based on three factors: (1) that the tattoos could distract judges; (2) that the ink might get into the opponent's

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<sup>14</sup> See Cassidy, *supra* note 3, at 22 ("The body art . . . generated a swirl of controversy over the rights of boxers to control their images and a network's ability to protect its interests—while generating a roundhouse punch of publicity for the company."); Walker, *supra* note 2 (The henna tattoo in this first fight started coming off after Hopkins began sweating during the fight. Nevertheless, GoldenPalace.com signed a long-term deal to apply henna tattoos for subsequent fights).

<sup>15</sup> Walker, *supra* note 2.

<sup>16</sup> George Kimball, *Boxing Notes; Tattoo Needle; Fighters Left Flat on Backs*, BOSTON HERALD, May 19, 2002, at B23.

eyes; and (3) that tattoo advertisements are demeaning to the sport of boxing.<sup>17</sup> Adams sought a temporary restraining order against the NAC, which a Clark County District Court granted.<sup>18</sup> In March 2002, the Clark County District Court granted a preliminary injunction against the NAC, stating that while the Government does have an interest in preventing the distraction of boxing judges during a fight, distraction has not been shown and a banning of the temporary markings does not materially advance the Commission's interest.<sup>19</sup> The judge further held that "the ban was a violation of the boxers' First Amendment rights and therefore could not be enforced."<sup>20</sup> Subsequently, "Bones" Adams and other boxers have fought with temporary GoldenPalace.com tattoos on their backs.<sup>21</sup> Cash-strapped former celebrities Todd Bridges, Danny Bonaduce, and Tonya Harding<sup>22</sup> also jumped into the tattoo advertising fray, each sporting GoldenPalace.com tattoos on their backs during Fox Television's "Celebrity Boxing" show.<sup>23</sup> According to GoldenPalace.com, the celebrities were each paid in the "low five figures."<sup>24</sup> Over fifteen million viewers in the United States saw the program on Fox, and visitors to the

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<sup>17</sup> *Id.*

<sup>18</sup> Press Release, GoldenPalace.com, GoldenPalace.com to Help Fund Retired Boxers Foundation (July 10, 2002), at <http://goldenpalaceevents.com/sports/retired01.php> (hereinafter Golden Palace Press Release). According to GoldenPalace.com's attorney, "the judge found that the ban was an improper 'ad hoc' regulation, and that it was an 'overbroad' infringement of free speech in violation of the First Amendment." *Id.*

<sup>19</sup> *Adams v. Nev. Athletic Comm'n*, No. 02-A-446674-C, 2002 WL 1967500 (Nev. Dist. Ct. Mar. 6, 2002).

<sup>20</sup> See Golden Palace Press Release, *supra* note 18; W.H. Stickney Jr., *Body Language All the Rage*, HOUS. CHRON., June 2, 2002, at 4.

<sup>21</sup> See Golden Palace Press Release, *supra* note 18. GoldenPalace.com tattooed over thirty fighters between September 19, 2001 and July 10, 2002. *Id.* According to one sports commentator, "Happily, for true boxing fans, Paulie Ayala tattooed Bones' face and belly with his gloves [during their boxing match]." Mike O'Callaghan, *Smile, Don't Fight*, LAS VEGAS SUN, Mar. 15, 2002, at 19.

<sup>22</sup> Of "Diff'rent Strokes," "The Partridge Family," and figure-skater-who-hired-a-hitman-to-smash-Nancy-Kerrigan's-kneecap fame, respectively. James Poniewozik, *Celebrity Boxing is a Stiff*, TIME MAG., May 14, 2002, available at <http://www.time.com/time/columnist/poniewozik/article/0,9565,217249,00.html>.

<sup>23</sup> Michael McCarthy, *Ad Tattoos Get under Some People's Skin*, USA TODAY, Apr. 4, 2002, at B03.

<sup>24</sup> *Id.*

2005] *CAN THE NBA PROHIBIT TATTOO ADVERTISEMENTS?* 513

GoldenPalace.com web site reportedly rose 200% in the twenty-four hour period following the show.<sup>25</sup>

While the boxers pocketed the money, ESPN fumed.<sup>26</sup> In the spring of 2002, the sports network announced that it would prohibit fighters from wearing temporary tattoos in fights shown on its ESPN or ESPN2 channels.<sup>27</sup> It received an assurance from junior middleweight Kassim Ouma, as well as his manager, that the boxer would not wear a tattoo during his May 10, 2002 fight against Jason Papillion.<sup>28</sup> However, come fight time, Ouma and Papillion both revealed GoldenPalace.com tattoos on their backs.<sup>29</sup> ESPN responded by fining the fight promoter \$10,000 and threatening never to broadcast an Ouma fight on its network again.<sup>30</sup> Fox Sports also reportedly told promoters it would not allow tattoo advertising on its boxing programs.<sup>31</sup>

#### A. *Tattoo Advertising and the NBA*

Rumors that NBA players planned to wear tattoo advertisements circulated even before boxers began sporting them. A New York City marketing executive, Dakkan Abbe, contacted several NBA players in March 2001 to propose that they wear

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<sup>25</sup> *Id.* GoldenPalace.com has paid “streakers” at sports events to tattoo their backs as well. Most famously, a man wearing nothing but a temporary tattoo on his chest ran onto the field at the Super Bowl—the National Football League’s championship game—in February 2004. *Super Ads?*, FIN. TIMES, Feb. 6, 2004, at 14. The web site reportedly saw an immediate 380% jump in web traffic. *Id.* More recently, GoldenPalace.com paid \$28,000 in an eBay.com online auction for a partially eaten, ten-year-old grilled cheese sandwich with what the seller claimed was a likeness of the Virgin Mary visible on the toasted bread. *Sandwich with Image of Mary Draws \$28,000; Grilled Cheese Sold on eBay Sparks Other Lookalike Items*, CHI. SUN-TIMES, Nov. 24, 2004, at 4.

<sup>26</sup> Liz Mullen, *Boxer’s Tattoo Gets Underneath ESPN’s Skin*, STREET & SMITH’S SPORTS BUS. J., Aug. 5, 2002, available at <http://goldenpalaceevents.com/sports-tattoo01.php>.

<sup>27</sup> *See id.*

<sup>28</sup> Bernard Fernandez, *Cease Fire, But Watch Your Back*, PHILA. DAILY NEWS, Aug. 27, 2002, available at <http://www.mercurynews.com/mld/dailynews/2002/08/27/sports-3945726.htm?1c>; see also Bob Raissman, *TV’s Fight Foe: Tattoos, Inc.*, N.Y. DAILY NEWS, May 14, 2002, at 53.

<sup>29</sup> Fernandez, *supra* note 28.

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

<sup>31</sup> Raissman, *supra* note 28.

tattoo advertisements.<sup>32</sup> Abbe reportedly planned a sneak attack for Sunday, April 1, 2001, when players were to wear tattoo ads in games between the Orlando Magic and the Detroit Pistons, the Indiana Pacers and the Philadelphia 76ers, and the New York Knicks and the Los Angeles Lakers.<sup>33</sup> When the NBA heard about the plan, it prohibited tattoo ads on the grounds that players are not allowed to advertise products on the playing court.<sup>34</sup> Abbe initially had Rasheed Wallace, then a forward for the Portland Trailblazers, interested, but Wallace later rejected the idea.<sup>35</sup> According to Wallace's agent, "His decision had nothing to do with the league's position. He decided not to do it because he didn't want to detract from his current tattoos. He didn't want to become a billboard."<sup>36</sup> Abbe claimed the NBA scared players off.<sup>37</sup>

The Players Association decided to bide its time to see if a player wearing a tattoo would be fined or suspended by the league.<sup>38</sup> No player has taken this risk, so the issue remains hypothetical and the NBA's stated position remains untested.<sup>39</sup>

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<sup>32</sup> Roscoe Nance, *Marketer Hopes NBA Players Will Agree to Temporary Ad Tattoos*, USA TODAY, Mar. 29, 2001, at C06.

<sup>33</sup> Fred Robinson, *Tattoos Used as Advertisement Not Welcome*, TIMES-PICAYUNE (New Orleans), Apr. 1, 2001, at Sports p.2.

<sup>34</sup> *Id.*

<sup>35</sup> Nance, *supra* note 32.

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

<sup>37</sup> Adam Rubin, *Tattoos Used as Ads Have Drawn NBA's Ire*, N.Y. DAILY NEWS, Mar. 22, 2001, at 80.

<sup>38</sup> *See* Futterman, *supra* note 5.

<sup>39</sup> *Id.* Richard "Rip" Hamilton of the Detroit Pistons came closest to challenging the rule when he had his hair braided to match the tread pattern of a Goodyear tire. He debuted the hairdo on January 31, 2005 in a game against the New York Knicks. Goodyear paid Hamilton an undisclosed amount of money—and gave him a new set of tires—to wear his hair in the tire tread pattern for a week. *Goodyear Endorsement Deal Goes Straight to Piston Player's Head*, PHILA. INQUIRER, Feb. 3, 2005, at E02; Scott Soshnick, *Pistons' Hamilton Heads Up Tire Ad: Goodyear Pays Detroit Star to Wear His Hairstyle Like Its Automobile Tread*, DETROIT NEWS, Feb. 1, 2005, available at <http://www.detnews.com/2005/autosinsider/0502/01/C01-76155.htm>. A Goodyear spokesman announced that the company chose Hamilton because "the way he plays fits nicely with the product—confident maneuvering, handles well in all conditions." *Overtime*, FT. WAYNE J. GAZETTE (Ind.), Feb. 8, 2005, at 4B. Hamilton's tread-head (and Goodyear's puns) received mixed reviews from the public. Dwain Price, *Rudy T Exits Amid Reminders that He's Truly One of the Good Guys*, FT. WORTH STAR-TELEGRAM, Feb. 6, 2005, at C6. The NBA did not comment publicly.



*B. Current NBA Rules Potentially Applicable to Tattoo Advertising*

NBA players face a wholly different set of issues than do boxers with respect to tattoo advertising: boxers compete individually, have no “boss,” are not part of a league,<sup>40</sup> and for the most part negotiate their contracts on a fight-by-fight basis.<sup>41</sup> The sport is governed by individual state boxing commissions.<sup>42</sup> On the other hand, NBA players compete in teams under the leadership of coaches, a general manager, and a team owner.<sup>43</sup> Players are members of a league, receive regular salaries, and often have performance-based incentive clauses included in multi-year contracts.<sup>44</sup> All NBA players are members of a players’ union and are subject to a Collective Bargaining Agreement (“CBA”) and NBA Rules.<sup>45</sup>

Neither the NBA’s CBA nor the Uniform Player Contract (“UPC”) directly addresses tattoo advertising.<sup>46</sup> The NBA primarily bases its tattoo ad ban on provisions that grant the NBA Commissioner the authority to enforce the “best interests” of the league.<sup>47</sup> For example, a UPC provision on player conduct states: “The Player agrees . . . not to do anything that is materially detrimental or materially prejudicial to the best interests of the Team or the League.”<sup>48</sup> Similarly, a UPC clause governing player

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<sup>40</sup> See Jioni Palmer, *Ready for a House Fight*, NEWSDAY, Jan. 9, 2005, at A08.

<sup>41</sup> Jack Newfield, *Teamsters Ring Bell*, N.Y. SUN, May 7, 2003, at 1, available at [http://www.boxersunion.org/news/bn\\_030507\\_1.htm](http://www.boxersunion.org/news/bn_030507_1.htm).

<sup>42</sup> Palmer, *supra* note 40; see also Tim Lueckenhoff, *Understanding the Association of Boxing Commissions*, at <http://www.secondsout.com/Ringside/business.cfm?ccs=356-&cs=9836> (discussing the business of boxing) (last viewed Mar. 14, 2005).

<sup>43</sup> Nat’l Basketball Players Ass’n, *Frequently Asked Questions*, at <http://www.nbpa.com/aboutus/nbpfaq.html> (last visited Mar. 14, 2005); see Official Rules of the NBA, *Rule No. 3-Players, Substitutes and Coaches*, available at [http://www.nba.com/analysis/rules\\_index.html](http://www.nba.com/analysis/rules_index.html) (last visited Mar. 14, 2005).

<sup>44</sup> NBA Collective Bargaining Agreement, art. VII, § 3, <http://www.nbpa.com/cba/cba.html> (last visited Mar. 14, 2005).

<sup>45</sup> Nat’l Basketball Players Ass’n, *supra* note 43; see also Official Rules of the NBA, *supra* note 43.

<sup>46</sup> See generally NBA Collective Bargaining Agreement, Exhibit A, NBA Uniform Player Contract [hereinafter NBA UPC], <http://www.nbpa.com/cba/exhibits/exhibitA.html> (last visited Mar. 14, 2005).

<sup>47</sup> *Id.* § 5(b).

<sup>48</sup> *Id.*

promotional activities provides: “The Player agrees that . . . he will not . . . sponsor commercial products without the written consent of the Team, which shall not be withheld except in the reasonable interests of the Team or the NBA.”<sup>49</sup> Further, the CBA provision on player uniforms is arguably broad enough to apply to tattoo advertisements, stating:

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, 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.<sup>50</sup>

Finally, the NBA Constitution, which is incorporated into the Collective Bargaining Agreement, authorizes the league Commissioner to fine “[a]ny Player who gives, makes, issues, authorizes or endorses any statement having, or designed to have, an effect prejudicial or detrimental to the best interests of basketball or of the Association or of a Member or its Team . . . .”<sup>51</sup>

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<sup>49</sup> *Id.* § 13(b).

<sup>50</sup> NBA Collective Bargaining Agreement, *supra* note 44, art. XXXVII (“Group Licensing Rights”), § 3.

<sup>51</sup> NBA Collective Bargaining Agreement, Exhibits, *Excerpt from NBA Constitution*, § 35(c), <http://www.nbpa.com/cba/exhibits/exhibitA-excerpt.html> (last visited Mar. 14, 2005). Two successive provisions of the NBA Constitution also give the Commissioner broad power to fine or suspend players for misconduct. Section 35(d) states:

If in the opinion of the Commissioner any other act or conduct of a Player at or during an Exhibition, Regular Season, or Playoff game has been prejudicial to or against the best interests of the Association or the game of basketball, the Commissioner shall impose upon such Player a fine . . . or may order for a time the suspension of any such Player . . . or he may order both such fine and suspension.

Section 35(e) states: “The Commissioner shall have the power to suspend for a definite or indefinite period, or to impose a fine . . . or inflict both such suspension and fine upon any Player who, in his opinion, shall have been guilty of conduct . . . that is prejudicial or detrimental to the Association.”

Presumably, the NBA Commissioner could decide that tattoo advertising is detrimental to the best interests of the league if such advertisements conflict with league sponsors or anger networks televising NBA games. Nevertheless, for Dakkan Abbe, the marketing executive, the controversy boils down to free speech.<sup>52</sup> For athletes like boxer Kassim Ouma, wearing a tattoo ad means added income.<sup>53</sup> But for ESPN and the NBA, tattoo ads represent lost revenue and strained relations with league sponsors and loyal advertisers.<sup>54</sup>

## II. PROHIBITING TATTOO ADVERTISING

The NBA has used the “best interests” language in the CBA to impose fines and suspensions on players, coaches, and even team owners who criticize the league or the officials during media interviews.<sup>55</sup> Those restrictions, however, are arguably more justifiable than a ban on tattoo advertising. Criticizing game

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<sup>52</sup> According to Abbe, “How can the NBA mandate what goes on your skin? . . . To me, it’s no different than a sneaker contract.” Elliot Harris, *Almost Famous; NBA Wants to Can this Marketing Plan*, CHI. SUN-TIMES, Mar. 26, 2001, at 93. Further, Abbe believes there is a cultural divide between NBA executives and NBA players, such that “[t]he league has freaked out over the issue of tattoos. If they’re uncomfortable with tattoos, they have to come to terms with it. . . . [The NBA] would like everyone to be like Michael Jordan, no tattoos, never say anything controversial, sell the right products.” Robinson, *supra* note 33 (alterations in original).

<sup>53</sup> According to Ouma, “If I can make a little extra money by putting an ad on my back, . . . it’s nobody’s business except for mine.” Raissman, *supra* note 28. NBA player Kendall Gill agreed in 2002: “I’d do it for the right price. . . . This is a business. You’ve got to take advantage of your opportunities.” Tom Verducci, *The Rites of Spring: The Only Ones Who Need Preseason Training are the Fans*, SPORTS ILLUSTRATED, Mar. 18, 2002, at 25.

<sup>54</sup> According to an ESPN spokesman:

What’s to stop a fighter from coming in the ring with Budweiser on his back? . . . You’re Miller and you’re sponsoring the entire show and someone is in the ring for thirty minutes with “Budweiser” on his back. Is Miller going to continue to pay ESPN to support the show with this stuff going on?

Kimball, *supra* note 16.

<sup>55</sup> Geoffrey C. Arnold, *Raw’sheed Rasheed Wallace Cares, Just Not About Fans’ Feelings or the NBA*, THE OREGONIAN, Dec. 11, 2003, at D01. The NBA also has a mandatory suspension policy for players who leave the team bench area during a fight between players, regardless of whether or not the player leaving the bench contributes to the fight. The league may also fine the player up to \$20,000 for the infraction. Rod Beaton, *New Wave of Brawls Concerns Baseball*, USA TODAY, June 23, 2003, at C8.

officials in the media casts doubt on the integrity of the game, personally insults officials, and unduly antagonizes or intimidates officials in future games, thereby harming the integrity of the league. However, tattoo advertising would not typically harm anyone directly involved in the game of basketball.

A much more viable claim by the NBA would be rooted in the financial harm to the league and its business partners, resulting from infringement on intellectual property rights.

#### A. *False Advertising and Unfair Competition*

Tattoo advertising can best be compared to what is known as “ambush marketing”—a practice whereby companies attempt to make the consumer think their product or service is somehow affiliated with a popular sporting event or league.<sup>56</sup> The “ambush marketer’s” goal is to capitalize on the goodwill of the sport, league, or event without receiving authorization from the event organizer.<sup>57</sup> Common examples include giving away free tickets to an event through sweepstakes or contests, sponsoring individual teams or athletes, buying commercial time prior to or during event broadcasts, or flying a banner over an outdoor stadium.<sup>58</sup>

Similarly, the company employing an athlete to wear a tattoo advertisement avoids paying advertising and sponsorship fees to

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<sup>56</sup> See Lori L. Bean, Note, *Ambush Marketing: Sports Sponsorship Confusion and the Lanham Act*, 75 B.U. L. REV. 1099, 1100 (1995).

<sup>57</sup> *Id.*; J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:66 (4th ed. 2003).

<sup>58</sup> See Bean, *supra* note 56, at 1100, 1103, 1105. One example includes the 1992 Winter Olympic Games, during which Visa paid the International Olympic Committee (“IOC”) \$20 million for the right to serve as the official credit card of the Olympic Games. However, American Express bought substantial advertising time on the major television networks. While American Express did not use the Olympic logo or name, it made generic references to “winter fun and games.” *Id.* at 1103. Another example is from the 1984 Summer Olympic Games in Los Angeles. Converse was an official sponsor of the Games, but Nike ran a concurrent ad campaign with an “I Love L.A.” theme. *Id.* at 1104. Yet another example is a contest Pepsi promoted in 1990 called the “Diet Pepsi \$4,000,000 Pro Hockey Playoff Pool.” *Id.* at 1108. Pepsi ran an extensive advertising campaign for the contest during the National Hockey League (“NHL”) Stanley Cup Playoffs, but never used the name or logo of the NHL. Coca-Cola was the NHL’s official sponsor. *Id.* at 1108.

the league or to the television broadcaster.<sup>59</sup> Yet that company benefits by reaching large audiences watching NBA games on television. While such a practice may seem unethical or underhanded, it is—in its pure form—entirely legal.<sup>60</sup> Problems could arise, however, where consumers are deceived or confused into thinking that the event organizer endorses the ambush marketer, or that the two entities have some sort of relationship.<sup>61</sup> This is where the “victim,” such as the NBA, might be able to turn to the Lanham Act to assert a false advertising claim.<sup>62</sup>

### 1. Section 43(a) of the Lanham Act

In drafting the federal trademark statute, and § 43(a) of the Lanham Act in particular, Congress had a dual intent: (1) to protect trademark owners from having their marks misappropriated by others,<sup>63</sup> and (2) to protect consumers, so that they “may be confident that, in purchasing a product bearing a particular trademark which it favorably knows, it will get the product which it asks for and wants to get.”<sup>64</sup> Thus, § 43(a) of the Lanham Act holds liable:

- (1) Any person who . . . uses in commerce any word, term, name, symbol, or device . . . or any false designation of

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<sup>59</sup> See Stephen M. McKelvey, *Commercial “Branding”: The Final Frontier of False Start for Athletes’ Use of Temporary Tattoos as Body Billboards*, 13 J. LEGAL ASPECTS OF SPORT 1, 18 (2003).

<sup>60</sup> According to one commentator:

The difficulty with ambush marketing is that the law is on the side of the ambushers. Purely defined, ambush marketing does not involve counterfeiting or the illegal use of trademarks, tradenames or symbols. Companies simply develop a creative advertising campaign around the event, never use the event logo, trademark or tradename and capitalize by association with the event without paying for official sponsor status.

Robert N. Davis, *Ambushing the Olympic Games*, 3 VILL. SPORTS & ENT. L.J. 423, 430 (1996).

<sup>61</sup> See 15 U.S.C. § 1125(a) (2002).

<sup>62</sup> See generally *id.* § 1125.

<sup>63</sup> Bean, *supra* note 56, at 1111 (citing Senate Comm. on the Judiciary Rep. on S. 1883, S. Rep. No. 100-515, 100th Cong., 2d Sess. 4 (1988), reprinted in 1988 U.S.C.C.A.N. 5577, 5580).

<sup>64</sup> *Id.* (quoting S. Rep. No. 1333, 79th Cong., 2d Sess. 3 (1946), reprinted in 1946 U.S.C.C.A.N. 1274, 1274).

origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . . .

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities . . . .<sup>65</sup>

Notably, the Act does not require that the confusing or misleading “word, term, name, symbol, or device” be trademarked.<sup>66</sup> The Act can be used to target a wide range of false or misleading advertising, and not just misrepresentation of an existing mark.<sup>67</sup>

Therefore, were Twizzlers to launch a tattoo advertising campaign on the biceps of NBA players, the NBA or its sponsor, Nestlé, could bring a claim under § 43(a) against Twizzlers and its parent company, Hershey Foods.<sup>68</sup> The NBA or Nestlé could claim likelihood of confusion—not between the Twizzlers and NBA/Nestlé marks, but rather “confusion [or deception] as to the affiliation . . . or sponsorship, or approval”<sup>69</sup> of Twizzlers’ product by the NBA or Nestlé.<sup>70</sup> The cause of action would require proving the following six elements:

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<sup>65</sup> See 15 U.S.C. § 1125(a)(1).

<sup>66</sup> See Bean, *supra* note 56, at 1111 (quoting 15 U.S.C. § 1125(a)(1)).

<sup>67</sup> *Id.*

<sup>68</sup> See 15 U.S.C. § 1125(a)(1).

<sup>69</sup> See *id.*

<sup>70</sup> Tattoo advertising can also be compared to virtual advertising—whereby advertisers superimpose computer-generated advertisements into the scenery in sports broadcasts so that the advertisement is visible to television viewers, but not to those attending the game. According to one commentator:

[I]t is arguable that sports venues which do not grant athletic teams or television broadcasters approval to place virtual ads in the venue may have standing to bring § 43(a) claims because the ads: 1) falsely suggest that the

2005] *CAN THE NBA PROHIBIT TATTOO ADVERTISEMENTS?* 521

- (1) defendant has made a statement about a product which is false, misleading, or is likely to cause confusion;
- (2) the statement was made in a commercial or promotional context (in connection with goods or services);
- (3) the advertised goods travel in or affect interstate commerce;
- (4) a possibility of deception of a substantial segment of the target audience exists;
- (5) the deception is likely to affect purchasing decisions (materiality); and
- (6) there is a likelihood that plaintiff will be injured as a result of the ad.<sup>71</sup>

While the first element would be most difficult to prove, it is important to note that the Lanham Act does not target only literally false representations.<sup>72</sup> Rather, the Act is designed to protect consumers as to source, origin, or sponsorship of a product or service.<sup>73</sup>

#### a) Likelihood of Confusion

In order to show that a defendant tattoo advertiser's use of a word or symbol "is likely to cause confusion," the NBA would

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venues endorse or are affiliated with the advertised products; and 2) the virtual ads negatively affect the venues' business of selling ad space on venue property. In addition, a sponsor forced to compete with virtual advertisements may have standing to assert § 43(a) claims where: 1) a virtual ad is misleading because the public perceives that the virtual ad is physically in place at the sports venue and is associated with the venue; and 2) the virtual ad causes commercial injury to the sponsor by reducing the value of the sponsor's ad at the park.

Theresa A. McEvilly, Comment, *Virtual Advertising in Sports Venues & The Federal Lanham Act § 43(a): Revolutionary Technology Creates Controversial Advertising Medium*, 8 SETON HALL J. SPORT L. 603, 619 (1998).

<sup>71</sup> *Id.* at 619–20 (citing MCCARTHY, *supra* note 57, § 27:13); *see also* Johnson & Johnson-Merck Consumer Pharms. Co. v. Rhone-Poulenc Rorer Pharms., Inc., 19 F.3d 125, 129 (3d Cir. 1994) (rejecting likelihood of confusion claim where consumer surveys did not prove that a substantial number of consumers were misled).

<sup>72</sup> *See* Am. Home Prods. Corp. v. Johnson & Johnson, 577 F.2d 160, 165 (2d Cir. 1978).

<sup>73</sup> *See generally* 15 U.S.C. § 1125.

need to conduct a traditional likelihood of confusion analysis.<sup>74</sup> Courts have articulated a multi-factor test for likelihood of confusion:

- (1) the degree of similarity between the owner's mark and the alleged infringing mark;
- (2) the strength of the owner's mark;
- (3) the price of the goods and other factors indicative of the care and attention expected of consumers when making a purchase;
- (4) the length of time the defendant has used the mark without evidence of actual confusion arising;
- (5) the intent of the defendant in adopting the mark;
- (6) the evidence of actual confusion;
- (7) whether the goods, though not competing, are marketed through the same channels of trade and advertised through the same media;
- (8) the extent to which the targets of the parties' sales efforts are the same;
- (9) the relationship of the goods in the minds of consumers because of the similarity of function . . . .<sup>75</sup>

For purposes of an ambush marketing case, factors four through nine are the most relevant. With respect to factors four and six, the NBA could present evidence of actual confusion among viewers that defendant's mark was actually endorsed or sponsored by the NBA. For example, this evidence could take the form of consumer surveys showing that consumers thought Twizzlers was an officially endorsed snack of the NBA, and not endorsed merely by the player wearing the tattoo advertisement. A

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<sup>74</sup> MCCARTHY, *supra* note 57, § 27:18.

[U]nder the Lanham Act [§ 43(a)] the ultimate test is whether the public is likely to be deceived or confused by the similarity of the marks. . . . Whether we call the violation infringement, unfair competition or false designation of origin, the test is identical—is there a “likelihood of confusion”?

*Id.* (quoting *New West Corp. v. NYM Co. of Cal., Inc.*, 595 F.2d 1194, 1201 (9th Cir. 1979)).

<sup>75</sup> *Interpace Corp. v. Lapp, Inc.*, 721 F.2d 460, 463 (3d Cir. 1983).



showing that consumers believe the NBA approves of the player's on-court endorsement of the product, or that the tattoo advertisement harms the league's reputation, could be enough to show confusion.<sup>76</sup> While evidence of actual confusion could be highly persuasive in the NBA's favor, courts recognize that showing actual confusion is difficult, especially where a plaintiff is trying to enjoin a defendant from a marketing practice.<sup>77</sup> If the NBA acts quickly enough, there may not be time for actual harm or confusion to take hold.<sup>78</sup>

The fifth factor—the intent of the defendant in adopting the mark—would likely weigh in favor of the NBA. The tattoo advertiser clearly undertakes the campaign in order to expose its mark to a large audience via NBA telecasts. Evidence that the defendant intended to make consumers think that its product is an official sponsor of the NBA could be especially helpful for the NBA. The league would want to show to the greatest extent possible that the defendant tattoo advertiser was trying to capitalize on the goodwill surrounding the NBA name and logo, and the goodwill of those names and marks associated with the NBA as official sponsors.<sup>79</sup>

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<sup>76</sup> See *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 205 (2d Cir. 1979).

<sup>77</sup> *1-800 Contacts, Inc. v. WhenU.com*, 309 F. Supp. 2d 467, 498 (S.D.N.Y. 2003) (“[I]t is black letter law that actual confusion need not be shown to prevail under the Lanham Act, since actual confusion is very difficult to prove and the Act requires only a likelihood of confusion as to source.”) (quoting *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 875 (2d Cir. 1986)).

<sup>78</sup> The example of a Twizzlers tattoo advertising campaign especially lends itself to confusion among consumers. The average basketball fan probably does not know which company manufactures Twizzlers. One might assume, when seeing a Twizzlers logo tattooed on a player's arm, that Twizzlers is produced by Nestlé, the NBA's official sponsor.

<sup>79</sup> Goodwill is a business value that reflects the basic human propensity to continue doing business with a seller who has offered goods and services that the customer likes and has found adequate to fulfill his needs. *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1122 (8th Cir. 1999). According to one commentator: “Goodwill is not to be simply equated with reputation. It includes, but connotes more than, good credit, honesty, fair name and reliability. . . . Because goodwill is merely a concept, it requires perceptible symbols, e.g., trademarks and trade names, for its survival.” LOUIS ALTMAN, *CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES* § 1:11 (4th ed. 2001) (citations omitted).

Factors seven, eight, and nine of the likelihood of confusion analysis could also weigh in the NBA's favor. The signage and logos of the NBA's official sponsors, as well as those of tattoo advertisers, would be seen through the same medium—during basketball telecasts potentially viewed by a national audience.<sup>80</sup> As such, the targets of the advertising are the same. Finally, if the consumer is aware that the NBA has numerous endorsement contracts with goods and services providers, the consumer could reasonably assume that a mark displayed during a basketball game is an official sponsor of the NBA or has some endorsement from the league or a specific team.

b) Other Elements of a § 43(a) Cause of Action

After showing likelihood of confusion, the NBA still must show that: (a) the defendant's misleading or confusing use of its tattoo advertisement was made in a commercial or promotional context; (b) the advertised goods travel in or affect interstate commerce; (c) a possibility of deception of a substantial segment of the target audience exists; (d) the deception is likely to affect purchasing decisions; and (e) there is a likelihood that plaintiff will be injured as a result of the tattoo advertisement.<sup>81</sup>

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<sup>80</sup> See *MasterCard Int'l, Inc. v. Sprint Commun. Co.*, No. 94 CIV. 1051, 1994 WL 97097 (S.D.N.Y. Mar. 23, 1994). In this case, MasterCard sought to enjoin Sprint from distributing calling cards bearing the 1994 World Cup Soccer Tournament logo. MasterCard had signed an exclusive agreement with the World Cup as a provider of "card-based payment and account access device[s]" bearing the World Cup mark. *Id.* at \*1. Even though Sprint had rights to use the World Cup logo as a result of signing on as the official long-distance telephone carrier of the World Cup, and even though the calling card did not have a magnetic stripe, the court enjoined Sprint from distributing calling cards with the World Cup logo because of the likelihood of confusion between the Sprint calling card and the MasterCard credit card. See *generally id.* Where a league sponsor and the tattoo advertiser are competitors, the NBA or an official sponsor could use the *MasterCard* case to argue that because the sponsor has exclusive game time advertising rights for a particular product, any other advertising in an NBA arena, or shown during an NBA telecast, is likely to confuse viewers by making them think there is an association between the tattoo advertiser and the NBA or television network. The analogy is limited, however, by the fact that unlike a tattoo advertising case, MasterCard and Sprint both incorporated the World Cup mark into their products, thereby increasing the likelihood of confusion.

<sup>81</sup> See *supra* notes 70–71 and accompanying text.

The commercial nature of tattoo advertising is obvious. The “interstate commerce” requirement is also easy to satisfy.<sup>82</sup> Even if a local company that did business in only one state paid a player to wear a tattoo advertisement, its goods or services would be advertised in multiple television markets in two or more states, and thus the tattoo would be found likely to “affect” interstate commerce.<sup>83</sup>

The possibility of deception would have been addressed, in part, through the likelihood of confusion analysis. This element would require a showing by the NBA that the average NBA viewer, when seeing a tattoo advertisement on a player’s arm, would assume that there was a relationship between the advertiser and the NBA.<sup>84</sup> Presumably, an association with the NBA is meant to affect purchasing decisions, such that NBA fans will buy a product endorsed by the league.

Finally, the NBA could show two forms of injury: (1) breach of exclusive rights sponsorship contracts with legitimate sponsors, or (2) harm to the NBA’s reputation by association with the tattoo advertiser.<sup>85</sup> Under the first form of injury, the NBA could suffer monetary losses as a result of legitimate sponsors who, angered by the tattoo advertising campaign, might abandon their agreements

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<sup>82</sup> Wickard v. Filburn, 317 U.S. 111, 124 (1942).

<sup>83</sup> See, e.g., *id.* at 125 (stating that even local activity of growing wheat on a private farm falls under the Commerce Clause as substantially affecting interstate commerce because such activity influences price of wheat in the overall wheat market); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964) (holding that travel, regardless of the nature of the trip, affects interstate commerce, and thus racial discrimination by a motel, which deters travelers, can be regulated under the Commerce Clause); *Radovich v. Nat’l Football League*, 352 U.S. 445, 451–52 (1957) (explaining that the business of professional football affects interstate commerce).

<sup>84</sup> See, e.g., *Zelinsky v. Columbia 300 Inc.*, 335 F.3d 633, 639 (7th Cir. 2003) (holding that competitor’s use of trademarked bowling balls caused actual confusion); *Mattel Inc. v. Robarb’s Inc.*, 139 F. Supp. 2d 487, 493 (S.D.N.Y. 2001) (holding that defendant’s collectible car display caused “substantial confusion” with plaintiff’s Hot Wheels cars).

<sup>85</sup> See, e.g., *Hospitality Int’l Inc. v. Mahtani*, No. 2:97CV87, 1998 U.S. Dist. LEXIS 16445, at \*\*64–65 (M.D.N.C. Aug. 3, 1998) (holding that defendant’s use of exclusive mark of Plaintiff was a violation of 15 U.S.C. § 1114(1)(a) and plaintiff was entitled to the remedies provided in 15 U.S.C. § 1117(a)); *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200 (2d Cir. 1979) (holding that defendant damaged plaintiff’s reputation where actresses in defendant’s pornographic film were shown wearing uniforms similar to those normally associated with plaintiff).

with the NBA because of a breach of exclusivity rights. This form of injury would be most likely where the tattoo advertiser is a direct competitor of an official NBA sponsor. The second form of injury could apply whether or not the tattoo advertiser directly competes with an NBA sponsor. Courts have stated that harm to reputation is an actionable form of injury.<sup>86</sup> The NBA could claim that the tattoo advertiser, simply by associating itself with the league, is casting a negative shadow upon the league. However, this would not apply to an innocuous product like Twizzlers.

## 2. The Tattoo Advertiser's Defense

The tattoo advertiser could defend on the grounds that there is no likelihood of confusion between its mark and that of the NBA. There is no law against aggressive marketing, and no precedent exists for holding a marketer liable for this type of activity. As one commentator has stated, "The difficulty [for sporting event organizers] with ambush marketing is that the law is on the side of the ambushers. Purely defined, ambush marketing does not involve counterfeiting or the illegal use of trademarks, tradenames or symbols."<sup>87</sup> It could be argued that ambush marketing—in whatever form it is carried out—is in fact *good* for consumers. It informs them of more available products and services, and denies the granting of an advertising monopoly in a forum that should be open to more than one advertiser. Rather than confusing the consumer, it can expose the consumer to a greater number of products. The tattoo advertisement is not replacing or displacing an official sponsor's ad. Rather, it is merely adding to the swirl of marketing that already exists in professional sports.

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<sup>86</sup> See *Dallas Cowboys Cheerleaders, Inc.*, 604 F.2d at 205 ("The trademark laws are designed not only to prevent consumer confusion but also to protect 'the synonymous right of a trademark owner to control his product's reputation.'") (quoting *James Burrough Ltd. v. Sign of the Beefeater, Inc.*, 540 F.2d 266, 274 (7th Cir. 1976)).

<sup>87</sup> Davis, *supra* note 60, at 430. *But see* MCCARTHY, *supra* note 57, § 27:66 (stating that "[i]n the event a misleading impression is created, a violation of § 43(a) can be triggered" by an ambush marketing campaign).

The only case thus far directly addressing ambush advertising is *National Hockey League v. Pepsi-Cola Canada Ltd.*<sup>88</sup> As a decision of the Supreme Court of British Columbia (Canada), it carries no weight in the United States, but it could indicate how U.S. courts are likely to rule on a tattoo advertising case. The case involved a promotional contest Pepsi ran in Canada, called the “Diet Pepsi \$4,000,000 Pro Hockey Playoff Pool.”<sup>89</sup> The contest was heavily advertised during the 1990 National Hockey League (“NHL”) Stanley Cup Playoffs, and Pepsi obtained the “right to be the exclusive advertiser of soft drinks during the broadcast of all ‘Hockey Night in Canada’ games” televised by the Canadian Broadcasting Corporation.<sup>90</sup> Coca-Cola had entered into a \$2.6 million agreement with the NHL in the spring of 1989 to serve as an official league sponsor, but it did not obtain rights to advertise during NHL game broadcasts in Canada.<sup>91</sup> Pepsi avoided using the NHL logo or name, instead adopting a generic phrase, “Pro Hockey Playoff Pool.”<sup>92</sup>

The NHL claimed that “the Contest and particularly the television advertisements . . . [were] likely to convey to the public a false impression that the N.H.L. and its members approved, authorized, endorsed, or were in some manner associated with the Contest, and thereby, the defendant’s products.”<sup>93</sup> Further, the NHL asserted, “‘Pro Hockey Playoff’ could only have been intended to be a reference to the Stanley Cup playoff series . . . [and the contest] involved an infringement of [the NHL’s] registered trade marks or, alternatively, was an unlawful interference with their business relations with Coke.”<sup>94</sup>

Pepsi acknowledged that it purposely tried to gain “the greatest possible commercial advantage from the publicity the defendant’s

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<sup>88</sup> 92 D.L.R. 4th 349 (B.C. 1992); see also Davis, *supra* note 60, at 431–34 (discussing the British Columbia Supreme Court decision in *Nat’l Hockey League*); Bean, *supra* note 56, at 1108–09 (also discussing *Nat’l Hockey League*).

<sup>89</sup> *Nat’l Hockey League*, 92 D.L.R. 4th at 352–57.

<sup>90</sup> Davis, *supra* note 60, at 432–33 (quoting *Nat’l Hockey League*, 92 D.L.R. 4th at 354).

<sup>91</sup> *Id.* at 432.

<sup>92</sup> *Id.*

<sup>93</sup> See generally *Nat’l Hockey League*, 92 D.L.R. 4th at 356.

<sup>94</sup> *Id.* at 356–57.

products would receive during the Stanley Cup playoffs,” and that its contest “intended to refer to the N.H.L. teams.”<sup>95</sup> However, Pepsi claimed it was not attempting to indicate that its products were “in any way approved, authorized, or endorsed by or associated with the plaintiffs.”<sup>96</sup> Pepsi also denied infringement of the NHL’s marks and denied interference with the NHL’s business relationships. “The Contest was, they submitted, nothing more than an aggressive but legitimate marketing campaign.”<sup>97</sup>

The NHL provided survey evidence of consumer impressions that Pepsi was somehow affiliated with the NHL, but the court found the plaintiff’s evidence unconvincing.<sup>98</sup> Ultimately, the court held:

Certainly, the [NHL]-Coke agreement obligates [the NHL], so far as it is able, to protect the rights of Coke from ‘ambush marketing.’ Such an obligation cannot, however, impose on a third party a duty to refrain from engaging in advertising its products in a manner which, although aggressive, is not, by the law of Canada, unlawful.<sup>99</sup>

The Canadian court, therefore, refused to hold Pepsi liable.<sup>100</sup>

Tattoo advertisers may also benefit from the fact that players are already allowed to sign independent endorsement deals—perhaps making tattoo advertising merely a new, aggressive advertising technique in the existing scheme of player endorsement.<sup>101</sup> Further, certain Major League Baseball

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<sup>95</sup> *Id.* at 357.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 360–65.

<sup>99</sup> *Id.* at 369.

<sup>100</sup> *Id.* at 372.

<sup>101</sup> Despite the NBA’s exclusive sponsorship agreement with Coca-Cola, player Shaquille O’Neal has had an endorsement deal with Pepsi. According to one commentator:

Even though O’Neal did not wear a NBA uniform during his Pepsi commercial, one must ask whether the Pepsi-Cola advertising undermined Coca-Cola’s NBA sponsorship? David Schreff, NBA Properties Vice President of Media and Sponsor Programs, stated that “[t]hat’s close to an ambush, . . . [b]ut we respect the rights of our players to go out and secure endorsement.”

(“MLB”)<sup>102</sup> and National Football League (NFL)<sup>103</sup> teams have successfully signed their own sponsorship agreements, despite very vocal complaints from the respective leagues that the team sponsor was in direct competition with a league sponsor.

### 3. Distinguishing *National Hockey League v. Pepsi-Cola Canada Ltd.* from Tattoo Advertising

The facts of *National Hockey League*—and the practice of ambush marketing in general—are readily distinguishable from prospective tattoo advertising in the NBA. Ambush marketing, as seen in *National Hockey League*, may be in some ways exploitative, but the division between the sport and the marketing

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Davis, *supra* note 60, at 427–28 (citing Geoffrey Brewer, *Be Like Nike? Ambush Marketers Cash in on Major Events without Laying Out Enormous Sponsorship Fees; Should You Just Do It?*, SALES & MARKETING MGMT., Sept. 1, 1993, at 66, 70).

<sup>102</sup> The New York Yankees signed a sponsorship contract with Adidas in March 1997, despite the league’s exclusive sporting goods and apparel sponsorship agreement with Russell Athletic. Adidas agreed to pay the Yankees \$92 million over ten years for the right to advertise Adidas products in Yankee Stadium and to supply and include the Adidas logo on the team uniform. Within one year, Adidas’ new North American sales had increased by sixty-six percent. See Brandon L. Grud, *The Antitrust Implications of Professional Sports’ League-Wide Licensing and Merchandising Arrangements*, 1 VA. J. SPORTS & L. 1, 6 n.18 (1999) (citations omitted). MLB subsequently failed to sign Nike or Reebok to a sponsorship deal. MLB owners reportedly turned down a \$350 million deal offered by Nike, complaining that the sum was “paltry.” *Id.* at 15 (citations omitted).

<sup>103</sup> In 1995, the Dallas Cowboys football club signed stadium endorsement agreements with Nike, Pepsi, Dr. Pepper, and American Express. Through a series of agreements, the NFL’s licensing division, NFL Properties, had rights to all NFL club trademarks for commercial purposes, and all licensing revenue would be pooled and distributed equally to all clubs. NFL Properties filed suit against the Dallas Cowboys Football Club for circumventing the agreements that obligated the team to share revenue from licensing of club trademarks. Timothy D. Watson, *What’s “Love” Got to Do with It?: Potential Fiduciary Duties Among Professional Sports Team Owners*, 9 SPORTS LAW. J. 153, 155 (2002). At the time, Coca-Cola and Visa, competitors of Pepsi and American Express, were league sponsors of the NFL. Josh Dubow, *Not Always Coca Cola*, TIME, Sept. 6, 1996 (noting that Coca Cola was a sponsor for the NFL), at <http://www.time.com/time/nation/article/0,8599,7201,00.html>; David Breitkopf, *Visa Airst Olympics Teaser in Super Bowl Commercial*, May 6, 2004 (noting that Visa is a sponsor for the NFL), at <http://www.absolutebrand.com/newz/newz.asp?dismode=article&artid=154>). The Southern District of New York ruled that NFL Properties’ allegations were “sufficient to state a cause of action under the broad language of § 43(a) of the Lanham Act,” but the parties settled, allowing the Dallas Cowboys to keep its stadium sponsorships and to sign new ones. *Nat’l Football League Props., Inc. v. Dallas Cowboys Football Club*, 922 F. Supp. 849, 855 (S.D.N.Y. 1996).

scheme is clear. For instance, in *National Hockey League*, Pepsi never entered the playing arena and never used an NHL player to convey its message.<sup>104</sup> With respect to an ambush marketer flying a banner over an open stadium, it may be even more obvious to the viewer that the marketer could not enter the stadium and thus was forced to resort to flying an airplane overhead.<sup>105</sup>

However, tattoo advertising uses the actual instrumentalities of the game—the players—to carry and convey the advertisement. A viewer cannot watch the game on television without also seeing the tattoo advertisements—all in the same camera shot during live action. Consequently, there is little physical or visual separation between the game and the tattoo advertisement. Such close association between the tattoo advertisement and the league in the viewer's eye can create actionable harm to the league's reputation. For instance, in *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*,<sup>106</sup> actresses in defendant's pornographic film were shown wearing uniforms similar to those normally associated with plaintiff. Asserting a Lanham Act claim based on harm to reputation, plaintiff argued that film viewers would associate plaintiff cheerleaders with the pornographic scenes in defendant's film as a result of the similarity in costumes. There was no evidence showing that a substantial number of viewers thought plaintiff produced, directed, approved or funded the pornographic film. Nor was there any evidence that a substantial number of viewers were confused into believing that plaintiff cheerleaders performed in the film. Regardless, the court found a likelihood of confusion based on "a tendency to impugn (the plaintiff's services) and injure plaintiff's business reputation."<sup>107</sup>

Similarly, in the case of tattoo advertising, the NBA may not need to show that viewers believe the league formally participated in or approved the tattoo advertising campaign. The use of a particularly distasteful tattoo advertisement, or general viewer

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<sup>104</sup> See generally *Nat'l Hockey League*, 92 D.L.R. 4th 349.

<sup>105</sup> See generally *Bean*, *supra* note 56, at 1099–1103.

<sup>106</sup> 604 F.2d 200 (2d Cir. 1979).

<sup>107</sup> *Id.* at 204–05 (quoting *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183, 1189 (E.D.N.Y. 1972)).



aversion to the practice of tattoo advertising,<sup>108</sup> could create a negative association with the NBA. Such harm to the league's reputation is actionable.

*B. Is a Tattoo Advertising Prohibition Unconstitutional?*

The next question is whether the NBA's concerns in protecting its image and goodwill can trump the free speech rights of the players. The players would argue that a ban on tattoo advertising violates the First Amendment,<sup>109</sup> just as a Nevada court reasoned when it enjoined the Nevada Athletic Commission from banning tattoo advertising during boxing matches.<sup>110</sup> However, individuals can assert a First Amendment right to free speech only if those restricting them—i.e., the NBA, an individual team or a state boxing commission—are considered public entities or state actors.<sup>111</sup> While a state boxing authority, such as the Nevada Athletic Commission, is likely a “public” entity,<sup>112</sup> the relationship between the state and the NBA and individual NBA franchises is not as clear.

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<sup>108</sup> Several commentators have criticized the practice of tattoo advertising in boxing. *See, e.g.,* Royce Four, *Temporary Tattoos Don't Belong in Fight Game*, LAS VEGAS REV.-J., Feb. 23, 2002, at 5C.

<sup>109</sup> U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”).

<sup>110</sup> *See supra* notes 10–17 and accompanying text.

<sup>111</sup> *Goldberg v. 400 E. Ohio Condo. Ass'n*, 12 F. Supp. 2d 820, 824 (N.D. Ill. 1998); *Piazza v. Major League Baseball*, 831 F. Supp. 420, 425–26 (E.D. Pa. 1993).

<sup>112</sup> The NAC is a division of Nevada's Department of Business and Industry. The Commission was established by act of the Nevada legislature, and it is responsible for “administer[ing] the State laws and regulations governing unarmed combat for the protection of the public and to ensure the health and safety of the contestants.” The NAC internet address (<http://boxing.nv.gov>) even has a governmental (“.gov”) internet domain extension. *But see S.F. Arts & Ath., Inc. v. United States Olympic Comm.*, 483 U.S. 522, 543–44 (1987):

The fact that Congress granted it a corporate charter does not render the [U.S. Olympic Committee] a Government agent. All corporations act under charters granted by a government, usually by a State. They do not thereby lose their essentially private character. Even extensive regulation by the government does not transform the actions of the regulated entity into those of the government.

### 1. Private Actors versus State Actors

The Supreme Court has developed three tests for determining whether an entity can be considered a state actor: (1) the public function test; (2) the close nexus test; and (3) the symbiotic relationship test.<sup>113</sup>

The *public function test* considers whether “the private entity has exercised powers that are ‘traditionally the exclusive prerogative of the State,’”<sup>114</sup> and whether it performed a function that traditionally was under municipal control.<sup>115</sup> However, merely performing a function which serves the public is not enough to make an entity a state actor.<sup>116</sup>

The *close nexus test* is concerned with whether the state may be deemed responsible for the specific actions.<sup>117</sup> The complaining party (i.e., the athlete) carries the burden of showing a sufficiently close nexus between the state and the challenged action (i.e., prohibition of tattoo ads) to establish that the state is responsible.<sup>118</sup> Such a nexus normally will be found only where the state has coerced the private entity or encouraged it to such an extent that the private entity’s action “must be deemed that of the state.”<sup>119</sup>

Finally, the *symbiotic relationship test* examines whether “the state has ‘so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity . . . .’”<sup>120</sup> A “combination of factors”—different in each case—can be used to show that the state and the private entity have an “interdependent and mutually beneficial relationship.”<sup>121</sup> One element that carries much weight

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<sup>113</sup> See Karen Martin Dean, Note, *Can the NBA Punish Dennis Rodman? An Analysis of First Amendment Rights in Professional Basketball*, 23 VT. L. REV. 157, 159–67 (1998).

<sup>114</sup> *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)).

<sup>115</sup> Dean, *supra* note 113, at 160 (citing *Evans v. Newton*, 382 U.S. 296, 301 (1966)).

<sup>116</sup> *Id.* (citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982)).

<sup>117</sup> *Long v. Nat’l Football League*, 870 F. Supp. 101, 105 (1994) (citing *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).

<sup>118</sup> *Id.* (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974)).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 104 (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)).

<sup>121</sup> *Id.* (discussing *Burton*, 365 U.S. 715).

in the test, though it is not dispositive, is a sharing of profits between the state and the private entity.<sup>122</sup>

The NBA should not be considered a state actor under the public function test. Organizing and operating a professional basketball league has never been considered a function of the state.<sup>123</sup> Certainly, the NBA performs a public function, and the state arguably benefits from the presence of the NBA—both in the overall national economy, and in the revenue each team brings to its host city. However, the operation of a professional basketball association is almost entirely a private function.<sup>124</sup> Similarly, the NBA and its member teams should fail the close nexus test. There is virtually no connection between the state and the NBA prohibition on tattoo advertising. Nor is there any evidence to show that the state has pressured or encouraged the NBA in the formulation of its policy.<sup>125</sup> Even the implementation of other NBA rules and initiatives which could be said to embody significant state interests—i.e., drug testing—are the result of league action in conjunction with the Players' Association, with little influence or interference from the government.<sup>126</sup>

One court addressed this very issue with respect to the NFL.<sup>127</sup> A former football player sued the NFL, the Pittsburgh Steelers, the City of Pittsburgh, and the mayor of the city following his suspension for anabolic steroid use.<sup>128</sup> Plaintiff claimed that the

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<sup>122</sup> Ponce v. Basketball Fed'n, 760 F.2d 375, 377 (1st Cir. 1985).

<sup>123</sup> Goldberg v. 400 E. Ohio Condo. Ass'n, 12 F. Supp. 2d 820, 823 (N.D. Ill. 1998) (arguing in dicta that it is unlikely that the NBA is a government entity for First Amendment purposes).

<sup>124</sup> *Id.*

<sup>125</sup> See Piazza v. Major League Baseball, 831 F. Supp. 420, 425–26 (E.D. Pa. 1993) (holding that the federal antitrust exemption, which Congress granted to Major League Baseball, is not the “‘significant,’ active encouragement required to adequately link [Major League Baseball’s] actions to the federal government” for First and Fifth Amendment purposes) (citing S.F. Arts & Ath., Inc. v. United States Olympic Comm., 483 U.S. 522, 547 (1987)).

<sup>126</sup> See, e.g., Mike Wise, *N.B.A. Finds Minimal Use of Marijuana in First Tests*, N.Y. TIMES, Feb. 7, 2000, at D1 (stating that 430 active players were randomly tested for marijuana, steroids, amphetamines, and LSD in the fall of 1999 pursuant to the league’s collective bargaining agreement, and that twelve out of the 430 players tested positive for marijuana).

<sup>127</sup> See generally Long v. Nat'l Football League, 870 F. Supp. 101 (1994).

<sup>128</sup> *Id.* at 103.

mayor and the City of Pittsburgh “acquiesced and/or consented to, supported and upheld the conduct of” the NFL and the Pittsburgh Steelers football team.<sup>129</sup> The court rejected plaintiff’s state action theory under the close nexus test, finding that neither the City nor the mayor “formulated the standards or controlled the decisions of the NFL or the Steelers.”<sup>130</sup> Rather, plaintiff’s drug suspension was “based on independent medical conclusions and policy objectives of the [NFL], neither of which were influenced by the state.”<sup>131</sup>

The argument for considering the NBA a state actor under the symbiotic relationship test is similarly weak. The relevant question is whether there is a high level of interdependence between the state and the private entity.<sup>132</sup> The interdependence in this case could be found primarily with respect to basketball arenas, many of which have received public financing.<sup>133</sup> Such interdependence between the teams and the state involves one of the most fundamental aspects of the sport—the arenas in which the teams can play. The very existence of some NBA teams might be in doubt without public financing. This was the spirit driving the *Stevens v. New York Racing Ass’n*<sup>134</sup> decision in which the court found a symbiotic relationship between the state and the New York Racing Association (“NYRA”), but rejected the existence of a close nexus between the two entities.<sup>135</sup> The lawsuit arose from the NYRA’s refusal to allow plaintiff, a publisher of a newspaper about horse-racing, to take or appear in photographs at New York racetracks.<sup>136</sup> The court considered several factors in holding that the NYRA and the state were interdependent, and thereby in a

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<sup>129</sup> *Id.* at 105.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* The court continued: “Plaintiff fails to allege that the state in any way influenced or implemented the substance abuse policies adopted by the NFL by which plaintiff was suspended.” *Id.*

<sup>132</sup> *Id.* at 104.

<sup>133</sup> Dean, *supra* note 113, at 166–67 (1998). It should be noted that Ms. Dean suggests the NBA would be found a state actor under the symbiotic relationship test, due to this interdependence.

<sup>134</sup> 665 F. Supp. 164 (E.D.N.Y. 1987).

<sup>135</sup> *Id.* at 171–72.

<sup>136</sup> *Id.* at 165.

symbiotic relationship.<sup>137</sup> First, the NYRA was formed by the New York legislature.<sup>138</sup> Second, state statute established what portion of race wagers go to the NYRA.<sup>139</sup> Finally, after the NYRA covered its expenses, the law required it to pay almost the entire adjusted net income to the state in the form of a “franchise fee.”<sup>140</sup>

Closer inspection, however, reveals major differences between the NBA and NYRA. “[NYRA] was created under a law whose purpose, in part, was to enable the State to ‘derive reasonable revenue for the support of government.’”<sup>141</sup> Further, “[NYRA] is merely a conduit through which money passes from the betting public to the state’s coffers.”<sup>142</sup> This level of interdependence is far beyond that which exists between cities and NBA teams. The only real similarity between NYRA and the NBA is that they both govern a sport. If *Stevens* is to serve as a model for establishing interdependence between a sports organization and the state, it would only support the view that the NBA is not a state actor.<sup>143</sup>

Another case addressing the issue is *National Collegiate Athletic Ass’n v. Tarkanian*.<sup>144</sup> In a 5-4 majority, the Supreme Court held that a state university application of National Collegiate Athletic Association (“NCAA”) rules does not make the NCAA’s

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<sup>137</sup> *Id.* at 172, 174–75.

<sup>138</sup> *Id.* at 168, 172.

<sup>139</sup> *Id.* at 169, 172.

<sup>140</sup> *Id.* at 172.

<sup>141</sup> *Id.* (quoting *Halpern v. Lomenzo*, 367 N.Y.S.2d 653, 660 (Sup. Ct. 1975) (quoting N.Y. CONST., art. I, § 9, ¶ 1)).

<sup>142</sup> *Id.*

<sup>143</sup> *But see* Jeffrey Paul Fuhrman, *Can Discrimination Law Affect the Imposition of a Minimum Age Requirement for Employment in the National Basketball Association?*, 3 U. PA. J. LAB. & EMP. L. 585, 607 (2001) (using *Stevens* to show that “if a player can demonstrate a significant level of government involvement with his NBA franchise, he may allege an equal protection violation”). However, the author does not detail the extent of the interdependence between NYRA and the state, and only notes that the association “received considerable funds” from the state. *Id.* While the author’s conclusion is true, it is unlikely an NBA player could meet that burden. The state essentially takes NYRA’s profits, and the only benefits the state takes from an NBA franchise, under normal circumstances, are indirect—i.e., via increased local employment opportunities to support the team and its facility, increased use of public transportation by fans, taxation, and increased tourism.

<sup>144</sup> 488 U.S. 179 (1988).

otherwise private conduct a state action.<sup>145</sup> The Court noted that the source of the NCAA rules is not the University of Nevada-Las Vegas (“UNLV”) or the state of Nevada, but rather the collective input of the member schools (many of which are state-owned and operated).<sup>146</sup> Ultimately, the Court found that the state did not “provide[] a mantle of authority that enhanced the power of the harm-causing individual actor.”<sup>147</sup> The dissent, however, pointed out that UNLV, a public university, is a state actor, and its suspension of Jerry Tarkanian, the men’s basketball coach and a public employee, constitutes state action.<sup>148</sup> Therefore, the dissent reasoned that, by acting jointly, the NCAA became a state actor.<sup>149</sup>

Even under the dissent’s rationale, neither the NBA nor its member franchises should be considered state actors. The decision to prohibit tattoo advertising is made solely by the NBA, not a governmental entity. The state might have some involvement in other aspects of the team, but none that have an immediate impact on players such that they would perceive the league or team to be a state actor.

## 2. Tattooing as Protected Speech

Assuming that the NBA is a state actor, which it likely is not, another relevant question is whether a tattoo constitutes “speech.” While it is well-established law that protected speech can include non-verbal communication, courts have been reluctant to extend First Amendment protection to tattoos.<sup>150</sup> However, as tattoos have become more mainstream in society, it is conceivable that they will be considered “speech” for First Amendment purposes under certain circumstances. Furthermore, up to now most cases have addressed whether the *process* of tattooing can be considered

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<sup>145</sup> *Id.* at 199.

<sup>146</sup> *Id.* at 193.

<sup>147</sup> *Id.* at 192.

<sup>148</sup> *Id.* at 199 (White, J., dissenting).

<sup>149</sup> *Id.*

<sup>150</sup> *See, e.g.,* *Yurkew v. Sinclair*, 495 F. Supp. 1248, 1253–54 (D. Minn. 1980) (declining to address whether tattoos are art, and therefore protected by the First Amendment, acknowledging “the courts are ill equipped to determine such illusory and imponderable questions . . .”).

protected speech, as opposed to whether the tattoo itself is protected speech.

The earliest case addressing tattooing under the First Amendment is *People v. O'Sullivan*,<sup>151</sup> in which a tattoo artist was convicted under a New York City law “prohibit[ing] all tattooing of human beings, except by licensed medical doctors for medical purposes.”<sup>152</sup> The defendant was not a licensed medical doctor and he was not applying tattoos for medical reasons.<sup>153</sup> The court rejected the defendant’s First Amendment claim, asserting that tattooing is not “speech or even symbolic speech, . . . and defendant’s right to engage in tattooing is not paramount to the public’s right to good health.”<sup>154</sup> Ultimately, the court held that some interference with an individual’s liberty or property is permissible if public health is at stake.<sup>155</sup> This left open the possibility that tattooing might be considered speech.

The District of Minnesota addressed a similar issue in *Yurkew v. Sinclair*,<sup>156</sup> in which the Minnesota State Fair Board of Managers refused to rent space at a state fair to the plaintiff, a tattoo artist.<sup>157</sup> Again, the state argued that tattooing is not protected by the First Amendment, and that it had an interest in regulating tattooing due to health concerns.<sup>158</sup> The court agreed, holding that “the actual process of tattooing is not sufficiently communicative in nature so as to rise to the plateau of important activity encompassed by the First Amendment.”<sup>159</sup> The court asserted that just because an individual intends to communicate something does not mean that activity merits First Amendment protection.<sup>160</sup> The Supreme Court of South Carolina recently

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<sup>151</sup> 409 N.Y.S.2d 332 (App. Term. 1978).

<sup>152</sup> *Id.* at 333.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> 495 F. Supp. 1248 (D. Minn. 1980).

<sup>157</sup> *Id.* at 1249.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 1253 (citing *People v. O'Sullivan*, 409 N.Y.S.2d 332, 333 (App. Term 1978)).

<sup>160</sup> *Id.* at 1254; *see also* Medical Licensing Bd. of Ind. v. Brady, 492 N.E.2d 34, 39 (Ind. App. 1986) (citing *O'Sullivan* and *Yurkew* to hold that the process of tattooing is neither speech nor symbolic speech, and thus is not protected by the First Amendment, and

reached the same conclusion in *State v. White*,<sup>161</sup> specifying that the plaintiff did not show that “the *process* of tattooing is communicative enough to automatically fall within First Amendment protection.”<sup>162</sup>

The Eighth Circuit Court of Appeals more directly addressed the issue of First Amendment protection for tattoos in *Stephenson v. Davenport Community School District*.<sup>163</sup> In this case, a high school student was told to remove a tattoo that school administrators mistakenly thought was a gang symbol.<sup>164</sup> In dicta, the court stated that Stephenson’s tattoo did not merit First Amendment protection because it “was simply ‘a form of self-expression.’”<sup>165</sup> Citing Supreme Court precedent, the court explained that the threshold question for First Amendment protection is “whether ‘[a]n 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>166</sup> Because Stephenson did not intend any meaning behind the symbol, the tattoo did not receive First Amendment protection.<sup>167</sup>

Finally, the court in *Riggs v. City of Fort Worth*<sup>168</sup> muddled the issue when considering a local police department’s requirement that an officer cover the tattoos on his arms and legs. Citing *Stephenson* and *O’Sullivan*, the court asserted: “a tattoo is not

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further holding that tattooing, whether done for medical or artistic/aesthetic purposes, must be performed by a licensed practitioner because tattooing is a medical procedure).

<sup>161</sup> 560 S.E.2d 420 (S.C. 2002).

<sup>162</sup> *Id.* at 423.

<sup>163</sup> 110 F.3d 1303 (8th Cir. 1997).

<sup>164</sup> *Id.* at 1304.

<sup>165</sup> *Id.* at 1307 n.4 (citing Jt. App. at 63).

<sup>166</sup> *Id.* (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (internal citation omitted)) (alterations in original).

<sup>167</sup> *Id.* The court seemed concerned that this case was not close enough to *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), in which the Supreme Court held that “black armbands worn by students intended to convey opposition to Vietnam War constituted ‘silent, passive expression of opinion.’” *Id.* n.4. Had the students in *Tinker* tattooed a black band around their arms, instead of wearing a cloth armband over their shirtsleeves, the communicative intent would not have been lessened. Perhaps the expression would have been even more powerful, given the permanency of tattoos and the financial cost of obtaining one.

<sup>168</sup> 229 F. Supp. 2d 572 (N.D. Tex. 2002).



protected speech under the First Amendment.”<sup>169</sup> However, the *Riggs* court misconstrued the *Stephenson* and *O’Sullivan* decisions. The dicta in *Stephenson* applied only to the tattoo in that case, because the tattoo in question was not sufficiently communicative.<sup>170</sup> It did not state that tattoos, by definition, are unprotected.<sup>171</sup> Likewise, the *O’Sullivan* court addressed whether the process or act of “tattooing” was protected speech, not whether a tattoo itself can be considered protected speech.<sup>172</sup> Thus, despite their generally adverse outcomes, the above cases do not contradict the possibility that tattoos could be considered protected speech under the First Amendment. Thus far, the cases on the subject simply do not resolve the issue.<sup>173</sup>

Further, as tattooing has become more mainstream—especially among athletes and entertainers—denying First Amendment protection to all tattoos would be unjustifiable. Tattooing is not just for gang members, men who ride Harley-Davidsons, or other assorted so-called “deviants.”<sup>174</sup> As NBA forward Jalen Rose stated in response to the idea of tattoo advertising, “You get a tattoo about something that’s real dear to you. That’s what makes

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<sup>169</sup> *Id.* at 580.

<sup>170</sup> *See Stephenson*, 110 F.3d at 1307 n.4.

<sup>171</sup> *Id.* at 1307.

<sup>172</sup> *See People v. O’Sullivan*, 409 N.Y.S.2d 332 (App. Term 1978).

<sup>173</sup> The case law reveals that courts may have been swayed by anachronistic perceptions of tattoos. Though it decided the case on other grounds, the *O’Sullivan* court cited a lower court decision referring to tattooing as a “barbaric survival, often associated with a morbid or abnormal personality.” *Id.* at 333 (quoting *Grossman v. Baumgartner*, 254 N.Y.S.2d 335, 338 (App. Div. 1964)). In addition, the *Stephenson* case never would have entered a courtroom—and the plaintiff never would have had surgery to remove her tattoo—had schoolteachers and police officers not reacted so extremely to an innocuous tattoo. Several teachers and an officer deemed the tattoo to be a gang symbol simply from looking at it. *See Stephenson*, 110 F.3d at 1305. Another officer also considered it a gang tattoo, without ever viewing it. *See id.* The plaintiff, Brianna Stephenson, was an eighth grade student, was doing well in her classes, and had no disciplinary problems. There was no evidence that she was ever affiliated with gangs. *Id.*

<sup>174</sup> *See, e.g.*, Major L.M. Campanella, *The Regulation of “Body Art” in the Military: Piercing the Veil of Service Members’ Constitutional Rights*, 161 MIL. L. REV. 56, 98 (1999) (“[People with tattoos] have, in the past, been labeled by American society as the deviants of society. This label was based primarily on the fact that tattoos were not traditionally a part of mainstream society. Today, however, tattoos have moved from being traditionally unacceptable to a more socially accepted form of ‘art.’”) (citations omitted).

you sit down and go through the process of putting something on you that will be there the rest of your life. . . .”<sup>175</sup> Thus, the issue of whether tattoos are protected “speech” is yet to be resolved. Most case law analyzing tattoos under the First Amendment scrutinize the tattooing process, not the tattoo itself.<sup>176</sup> Nevertheless, tattoos could earn First Amendment protection under some circumstances as they become more mainstream in society.

### 3. Tattoo Advertising as Protected Speech

Finally, again assuming that the NBA is a state actor, and assuming that tattoos can constitute speech under the First Amendment, athletes face yet more hurdles: (a) not all speech receives the same level of protection under the Constitution, and (b) even if the speech is generally protected, free speech protections are more limited in the workplace.

Tattoo advertising is commercial speech, which the Supreme Court has held merits limited First Amendment protection.<sup>177</sup> In addition, if the NBA is a state actor, it must comply with employment law free speech standards.<sup>178</sup> The most recent major

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<sup>175</sup> Nance, *supra* note 32. Rose also added that getting a temporary tattoo advertisement is “not something I would do.” *Id.*

<sup>176</sup> See *supra* notes 151–62 and accompanying text.

<sup>177</sup> See *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975) (“[S]peech is not stripped of First Amendment protection merely because it appears in [the] form [of paid commercial advertisements].” (citations omitted). “The existence of ‘commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.” (quoting *Ginzburg v. United States*, 383 U.S. 463, 474 (1966)); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (“[S]peech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another.”). However, the state may regulate commercial speech that is false, deceptive, or misleading. See *id.* at 771 (“Untruthful speech, commercial or otherwise, has never been protected for its own sake.” (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); *Konigsberg v. State Bar*, 366 U.S. 36, 49 & n.10 (1961))). Further, the state may impose time, place, and manner restrictions on expressive activity, whether the location where the expression takes place is considered a public forum, a forum open to communication, or a forum not open to communication. See generally *Dean*, *supra* note 113, at 169–72 (discussing the differences between a public forum, a forum open to communication and a forum not open to communication, and discussing the limits on the state’s ability to regulate).

<sup>178</sup> See *Connick v. Myers*, 461 U.S. 138, 142 (1983).

Supreme Court case on this issue is *Connick v. Myers*,<sup>179</sup> in which the Court affirmed the principle that any restriction on speech by a public employee must “seek ‘a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.’”<sup>180</sup> The Court went on to say that it must consider the content, form, and context of the given statement when determining whether a matter is of public concern.<sup>181</sup> It further narrowed the contours of protected speech in the workplace by stating that government employers should be granted “wide latitude in managing their offices” in cases where “employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community.”<sup>182</sup>

*Connick* limits the free speech claim of an NBA player significantly. First, the NBA is not a state actor.<sup>183</sup> Second, courts have been slow to recognize tattoos as protected speech or expression.<sup>184</sup> Third, assuming the NBA is a state actor—a tenuous assumption at best—commercial tattoo advertising is of minimal “political, social, or other concern to the community.”<sup>185</sup> Accordingly, an NBA player challenging the league on tattoo advertising is unlikely to succeed on First Amendment grounds.

### III. MUST THE NBA NEGOTIATE ITS PROHIBITION OF TATTOO ADVERTISING THROUGH COLLECTIVE BARGAINING?

With the First Amendment analysis weighing against the players, their best hope for pursuing the right to wear tattoo advertisements is to try to force the issue into collective

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 142 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

<sup>181</sup> *Id.* at 147–48.

<sup>182</sup> *Id.* at 146; see also Thomas E. Fielder, *Keep Your Mouth Shut and Listen: The NFL Player’s Right of Free Expression*, 10 U. MIAMI BUS. L. REV. 547, 571 (2002) (“The overall effect of *Myers* was to deny government employees protection for anything other than political speech.”).

<sup>183</sup> See *supra* Part II.B.1.

<sup>184</sup> See *supra* Part II.B.2.

<sup>185</sup> *Connick*, 461 U.S. at 146; see *supra* notes 173–77 and accompanying text.

bargaining. The players' union would be in position to bargain on behalf of all players to gain concessions from the NBA on the issue. But, like the Lanham Act and First Amendment analyses, the law here weighs against the players as well. Decisions of the NLRB and judicial interpretations of what constitutes an "unfair labor practice" under the National Labor Relations Act ("NLRA")<sup>186</sup> indicate that the NBA may lawfully establish its tattoo advertising policy without submitting to collective bargaining.

Section 8(d) of the NLRA requires that the employer and representatives of employees meet "and confer in good faith with respect to wages, hours, and other terms and conditions of employment."<sup>187</sup> In other words, issues pertaining to employee "wages, hours, and other terms and conditions of employment"<sup>188</sup> are *mandatory subject matter* for collective bargaining—meaning the employer and a representative for the employees must bargain collectively in good faith.<sup>189</sup> Employers may refuse to bargain on all *permissive subject matter*, which is defined broadly as all subject matter that is not mandatory—i.e., not pertaining to "wages, hours, [or] other terms and conditions of employment."<sup>190</sup>

#### A. *Tattoo Advertising Income as "Wages"*

There is no clear answer to whether the right to wear temporary tattoo advertising would qualify as mandatory subject matter for collective bargaining purposes. The practice almost certainly is

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<sup>186</sup> 29 U.S.C. §§ 151–69 (1994).

<sup>187</sup> *Id.* § 158(d). The relevant portion of section 8(d) of the Act reads:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

<sup>188</sup> NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958).

<sup>189</sup> *Id.*

<sup>190</sup> 29 U.S.C. § 158(d); Silverman v. Major League Baseball Player Relations Comm., Inc., 880 F. Supp. 246, 253 (S.D.N.Y. 1981).

not considered part of the player's "wages." As one early ruling interpreting the NLRA states:

The word "wages," following the phrase "rates of pay" in the Act must have been intended to comprehend more than the amount of remuneration per unit of time worked or per unit of work produced. . . . This does not necessarily mean that the word "wages" as used in the Act covers all satisfactions, pleasures or gratifications arising from employment such as playing on a company baseball team, or attending a company picnic, or belonging to a company social club, although perhaps under some peculiar circumstances of employment in an isolated plant it might. Nor does our construction of the word "wages" necessarily mean that we construe it as covering "real wages" in all the breadth with which some economists use that phrase.<sup>191</sup>

Under the *W.W. Cross* court's rationale, any argument that the pursuit of tattoo advertising deals constitutes "wages" will fail. The fact that the players stand to earn money through tattoo advertising does not qualify it as a "wage." Tattoo advertising is, in essence, exploitation of one's employment to pursue another business interest. It is even more tangential to a player's "wages" than, for example, attending the company picnic.

*B. Tattoo Advertising as "Other Terms or Conditions of Employment"*

The Players' Association, in challenging the NBA prohibition, would need to show that tattoo advertising fits under the "other terms and conditions of employment" umbrella.<sup>192</sup> From early in the history of the NLRA, courts have been reluctant to expand "terms and conditions of employment."<sup>193</sup> Section 8(d) of the

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<sup>191</sup> *W.W. Cross & Co. v. NLRB*, 174 F.2d 875, 878 (1st Cir. 1949).

<sup>192</sup> 29 U.S.C. § 158(d).

<sup>193</sup> *See, e.g., Seattle First Nat'l Bank v. NLRB*, 444 F.2d 30, 32-33 (4th Cir. 1971) (citations omitted), in which the court stated:

Only as to those matters enumerated in Section 8(d) of the Act is there a mandatory obligation to bargain under Section 8(a)(5). And, as to those matters specified in Section 8(d), the phrase 'terms and conditions of employment' is to be interpreted in a limited sense which does not include

NLRA “does not say that the employer and employees are bound to confer upon any subject which interests either of them; the specification of wages, hours, and other terms and conditions of employment defines a limited category of issues subject to compulsory bargaining.”<sup>194</sup> There must be a strong connection to employee wages or hours for the employer action to be considered a mandatory bargaining subject.<sup>195</sup> The tattoo advertising scenario does not come close enough to wage, free agency, salary cap, revenue sharing,<sup>196</sup> or other employment issues<sup>197</sup> that have been found to be mandatory subjects of collective bargaining.<sup>198</sup> As one recent court held: “In general, ‘only issues that settle an aspect of the relationship between the employer and employees’ are mandatory subjects of bargaining. An issue arising from outside the bargaining unit may be a mandatory subject of bargaining if it

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every issue that might be of interest to unions or employers. A mere remote, indirect or incidental impact is not sufficient.

<sup>194</sup> *Westinghouse Elec. Corp. v. NLRB*, 387 F.2d 542, 546 (1967) (quoting Justice Stewart’s concurrence in *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 220–21, 223–24 (1964)).

<sup>195</sup> *Id.* at 547 (recognizing “a legal distinction between those subjects which have a material or significant impact upon wages, hours, or other conditions of employment, and those which are only indirectly, incidentally, or remotely related to those subjects”).

<sup>196</sup> *Wood v. Nat’l Basketball Ass’n*, 809 F.2d 954, 961 (2d Cir. 1987) (holding that “[m]inimum individual salaries [of NBA players,] fringe benefits, minimum aggregate team salaries, and guaranteed revenue sharing” are mandatory subject matters of collective bargaining under the NLRA).

<sup>197</sup> *Mackey v. Nat’l Football League*, 543 F.2d 606, 615 (8th Cir. 1976) (holding that the NFL’s “Rozelle Rule,” which required “inter-team compensation when a player’s contractual obligation to one team expires and he is signed by another . . . [and which] operates to restrict a player’s ability to move from one team to another and depresses player salaries,” is a mandatory subject matter for collective bargaining under the NLRA).

<sup>198</sup> *But see McKelvey*, *supra* note 59, at 25. The author argues that a prohibition on tattoo advertising would need to be collectively bargained. However, despite stating that “[n]umerous decisions of the [NLRB] . . . strongly indicate that a league rule prohibiting the ability of a player to wear temporary tattoos would be viewed as a ‘condition of employment,’” the author cites just one case. That case held that a change or revision in the dress code without collectively bargaining with the employees’ union is a violation of § 8(a)(5) of the NLRA. *Transp. Enters.*, 240 N.L.R.B. 551, 560 (1979); *see also Kaminski v. Chrysler Corp.*, 983 F. Supp. 1128, 1134 (N.D. Ohio 1997) (“[E]mployee work rules, especially those leading to disciplinary action, are subject to mandatory collective bargaining.”).

‘*vitaly affects*’ the terms and conditions of employment within the bargaining unit . . . .”<sup>199</sup>

Furthermore, as stated in Justice Stewart’s concurrence in *Fibreboard Products Corp. v. National Labor Relations Board*:

Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.<sup>200</sup>

Using Justice Stewart’s reasoning, the NBA would merely be seeking to preserve the contractual relationships it already has with numerous sponsors, and to protect the NBA brand and the league. These business interests, while perhaps not geared toward preventing the immediate downfall of the league, serve the long-term goal of preserving goodwill with sponsors. The fact that players are adversely affected by a tattoo advertising ban does not necessarily mandate collective bargaining.

It would be to the players’ benefit if the NBA based prohibition of tattoo advertising on the notion that tattoo advertisements are demeaning to the athlete or that they create an unsavory work environment for players. Such arguments would only draw attention to the issue as one concerning the well-being of athletes in the “workplace,” and thus, an issue that must be collectively bargained as a “term or condition of employment.”<sup>201</sup> By framing the issue in terms of the business interests of the league, the NBA would distance itself from players’ rights issues, and avoid the appearance of paternalism with respect to employees.

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<sup>199</sup> *Pall Corp. v. NLRB*, 275 F.3d 116, 119–20 (D.C. Cir. 2002) (citations omitted; emphasis added).

<sup>200</sup> 379 U.S. 203, 223 (1964) (Stewart, J., concurring); see also Mark M. Rabuano, *An Examination of Drug-Testing as Mandatory Subject of Collective Bargaining in Major League Baseball*, 4 U. PA. J. LAB. & EMP. L. 439, 446–57 (2002) (discussing mandatory and permissive subjects of bargaining, and arguing that drug testing must be a mandatory subject of collective bargaining).

<sup>201</sup> 29 U.S.C. § 158(d) (1994).

## CONCLUSION

In the opinion of the marketing executive who attempted to launch tattoo advertising in the NBA: “[Tattoo advertising] is going to happen. It’s really just a matter of when.”<sup>202</sup> He may be correct in saying that a player will attempt a tattoo advertising campaign. If your local baseball radio broadcasters have already agreed to mention an auto insurance company every time the home team completes a double play, can a “Dunkin’ Donuts” basketball bicep billboard be far behind? The league, however, is likely to prevail. The NBA has real economic incentives to oppose tattoo advertising, and, as a private actor, would be immune to a constitutional challenge.

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<sup>202</sup> Walker, *supra* note 2.