

Trademark Rights for Signature Touchdown Dances

Abstract

Famous athletes are increasingly cultivating signature dances and celebratory moves, such as touchdown dances, as valuable and commercially viable elements of their personal brands. As these personal branding devices have become immediately recognizable and have begun being commercially exploited, athletes need to legally protect their signature dances.

This paper argues that trademark law should protect the signature dances and moves of famous athletes, particularly the signature touchdown dances of NFL players. Because touchdown dances are devices capable of distinguishing one player from another, are non-functional, and are commercially used in NFL games, the dances should be registrable with the USPTO as trademarks for football services.

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Joshua A. Crawford

Table of Contents

I. Introduction	1
A. Aaron Rodgers and the “Discount Double Check”	1
B. Signature Dances and Moves in Sports	4
C. Trademark Protection for Signature Sports Dances	8
II. Trademark Eligibility and Registration for Signature Touchdown Dances	10
A. Background Principles of American Trademark Law	11
B. Subject-Matter Eligibility	12
C. Distinctiveness	15
1. Distinctiveness Background	15
2. Acquired Distinctiveness for Dances with Secondary Meaning	18
3. The Possibility of Proving Inherent Distinctiveness under <i>Seabrook</i>	19
4. The Possibility of <i>Wal-Mart</i> Barring Inherent Distinctiveness	20
D. Functionality	21
E. Use in Commerce	24
1. Interstate Commerce	24
2. Bona Fide Commercial Use	25
a. Manner of Use	26
b. Publicity of Use	28
c. Frequency of Use	31
III. Infringement	33
A. Real-World Unauthorized Copying of Dances among Players—Permissible Parody	34
B. Infringement for Intentional Copying of another Player’s Dance	36
C. Infringement for Use of a Touchdown Dance by a More Famous Player	39
D. Infringement for Use of a Touchdown Dance in Advertising	41
IV. Conclusion	43

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I. Introduction

A. Aaron Rodgers and the “Discount Double Check”

In October 2011, State Farm insurance company launched a commercial for an insurance service called the “Discount Double Check”¹ that featured Green Bay Packers quarterback Aaron Rodgers.² In the ad, Rodgers is surprised and bewildered when a State Farm agent and several customers perform his signature touchdown celebration—a gesture imitating the donning of a championship belt³—every time they mention the Discount Double Check.⁴ It has been said that to analyze humor is to destroy it,⁵ but the interest of this paper demands a critical examination of the humor in the Discount Double Check ad.

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¹ The “Discount Double Check” is a service offered by State Farm to double check whether insurance customers are eligible for discounts on their policies. See *State Farm—Discount Double Check*, STATE FARM, <https://www.statefarm.com/discount-double-check/> (last visited April 6, 2014).

² See Ted Marzilli, *Aaron Rodgers Ad Lifts Up State Farm Among Football Fans, Wisconsinites*, FORBES (Dec. 16, 2011, 11:53 AM), <http://www.forbes.com/sites/brandindex/2011/11/16/aaron-rodgers-ad-lifts-up-state-farm-among-football-fans-wisconsinites/>.

³ See Ryan Saylor, *The Evolution of Rodgers’ Weird “Belt Dance”*, YARDBARKER (Jan. 10, 2011, 4:36 PM), http://network.yardbarker.com/nfl/article_external/the_evolution_of_aaron_rodgers_weird_belt_dance/3942479.

⁴ See Marzilli, *supra* note 2. The ad proved to be a hit and spawned several spin-off commercials. See Kevin Seifert, *B.J. Raji crashes ‘Discount Double Check’*, ESPN (Jan. 8, 2012, 12:00 PM), http://espn.go.com/blog/nfcnorth/post/_id/37147/b-j-raji-crashes-discount-double-check (one follow-up ad featured Rodgers alongside his teammate, B.J. Raji); Kevin Seifert, *‘Discount Double Check’ Trilogy Complete*, ESPN (Jan. 14, 2012, 12:00 PM), http://espn.go.com/blog/nfcnorth/post/_id/37532/discount-double-check-trilogy-complete (another ad featured Rodgers alongside another teammate, Clay Matthews); Mike Krumboltz, *‘Da Bears’ Boys of ‘SNL’ Return to Taunt Aaron Rodgers*, YAHOO TV (Sept. 9, 2013, 1:04 PM), <http://tv.yahoo.com/blogs/tv-news/--da-bears--boys-of--snl--return-to-taunt-aaron-rodgers--200409095.html> (additional ads featured Aaron Rodgers alongside *Saturday Night Live*’s famous fictional Bears fans).

⁵ See Joel Warner, *One Professor’s Attempt to Explain Every Joke Ever*, WIRED (April 26, 2011, 12:00 PM) http://www.wired.com/2011/04/ff_humorcode/ (reciting E.B. White’s famous observation that “[a]nalyzing humor is like dissecting a frog. Few people are interested and the frog dies of it”).

The punch line of the commercial develops when Rodgers directly confronts the insurance agents and customers about their appropriation of his touchdown dance:

“You guys are doing my move . . .that’s my touchdown dance,” Rodgers explains while miming the action.

“So you’re a dancer?” a customer asks with a doubtful smile.

“No, I’m a quarterback,” a clearly bewildered Rodgers tries to explain.

“Oh, a quarterback,” says another disbelieving customer, “I’m a robot!”⁶

Thus, the ad depicts an absurd “brandjacking,” in which—in some strange fictional universe—State Farm executives have, either unintentionally or maliciously, decided to use a championship belt gesture as a brand identifier for their insurance service. The humor comes from the fact that viewers of the commercial, along with Aaron Rodgers, seem to be the only ones who realize that the dance, being enthusiastically used as State Farm’s brand identifier, is actually Aaron Rodgers’ brand identifier.

The humor further operates on a second, more subtle level when one customer responds to Rodgers’ attempt to claim his touchdown dance, asking Rodgers if he is “a dancer.” Here, the rabbit-hole deepens. At one moment, this customer is enthusiastically participating in State Farm’s bizarre fictional effort to brand its insurance services with a dance. At the next moment, however, the customer is apparently unable to understand that Rodgers could himself use dance to brand his own football services.

With apologies for having potentially destroyed the humor of the ad,⁷ it is submitted that this ad poignantly demonstrates interesting developments in the area of branding for professional athletes. First, the ad’s literary effect (the humor explained above) plays directly at the tension

⁶ See *State Farm TV Spot, ‘Touchdown Dance’ Featuring Aaron Rodgers*, iSPOT.TV <http://www.ispot.tv/ad/7YI4/state-farm-touchdown-dance-featuring-aaron-rodgers> (last visited April 10, 2014).

⁷ See Warner, *supra* note 5.

between bodily motion *not usually* being a branding element, and the obvious reality that, for many famous athletes, it is a branding element. The initial humor of the ad is built upon the absurdity that an insurance company—which consumers expect to engage in traditional branding through a name, a logo, and a slogan—would adopt a signature dance as a brand identifier. When the fictional customer assumes that Rodgers is “a dancer” after he asserts that the move is his “touchdown dance,” her assumption channels the broad commercial norm that dance is *usually not* a brand identifier, and that very few commercial entities (besides professional athletes) engage in branding via the medium of dance.

The ad highlights the tension between this norm and the reality for professional athletes, whose personal brands do in fact include signature source-identifying dances. The fictional Rodgers would, of course, have nothing to be confused or offended about (and viewers would have nothing to be amused by) if the dance was not actually associated with Rodgers’ personal brand. The customer’s confusion about Rodgers being a dancer would not be funny if viewers did not know that the customer is wrong: Rodgers is not a dancer, but is a football player, and the dance is a brand-identifying element associated with his football services.

Second, the ad’s literal, real-world existence represents an important proof-of-concept, showing that professional athletes’ signature dances and celebratory moves can be commercially exploited *unto themselves* as an independently valuable part of an athlete’s personal brand.⁸ As will be explained below, many modern athletes are incorporating signature dances and moves into their personal brands, helping to distinguish themselves from teammates and competitors in

⁸ In contrast to traditional endorsements in which an athlete sells his image and approval, Rodgers was also able to sell his signature move. Two iconic traditional examples of an athlete endorsing a product include Mean Joe Greene’s 1979 endorsement of Coca Cola and Larry Bird’s and Michael Jordan’s 1993 endorsement of McDonald’s. See Alyson Shontell, *The 10 Best Award-Winning TV Ads Everyone Must See*, Business Insider (Jan. 18, 2011, 10:51 AM), <http://www.businessinsider.com/the-10-best-award-winning-tv-ads-everyone-must-see-2011-1?op=1>.

the eyes of fans, sports media, and potential employers.⁹ The potential economic value of building such a brand through a signature dance is not only evident in conventional branding goals such as cultivating goodwill with consumers,¹⁰ but is particularly demonstrated by recent advertising campaigns (including the Discount Double Check ads) and memorabilia products focusing specifically on several such signature dances.¹¹ Below, Part B briefly surveys the history of signature dances and moves in American sports.

B. Celebratory and Signature Dances and Moves in Sports

Throughout the history of modern sport, famous athletes have been remembered for iconic styles and iconic plays. Dick Fosbury stamped his name on his innovative “Fosbury Flop,” now the universal high jump technique;¹² Willie Mays became forever associated with the over-the-shoulder centerfield basket catch following his famous catch in the 1954 World Series;¹³ and Kareem Abdul-Jabbar made his “skyhook” famous by employing the effective hook shot throughout his NBA career in the 1970s and 80s.¹⁴ Other athletes have been remembered for famous flourishes and celebrations, like Babe Ruth famously pointing toward center field before homering in the 1932 World Series,¹⁵ Carlton Fisk dramatically waving his home run fair

⁹ See *infra* Part I.

¹⁰ *C.f.* *Qualitex Co. v. Jacobson Prods. Co., Inc.*, 514 U.S. 159, 163-64 (1995) (explaining that trademark law seeks to ensure that competitors do not unfairly reap the goodwill cultivated by mark owners).

¹¹ See, e.g., *supra* Introduction (Aaron Rodgers and Clay Matthews State Farm ads); *Clay Matthews Sack Celebration*, FATHEAD.COM, <http://www.fathead.com/nfl/green-bay-packers/clay-matthews-sack-celebration/> (last visited April 6, 2014) (Clay Matthews’ signature sack dance shown in an adhesive wall-decoration); *Pre-order the Cam Newton “Superman” Bobblehead*, WARBLOGLE.COM (Jan. 8, 2014), <http://www.warblogle.com/2014/01/08/tiles/pre-order-cam-newton-superman-bobblehead/> (Cam Newton’s signature Superman dance depicted in a bobble-head doll).

¹² See Joseph Durso, *Fearless Fosbury Flops to Glory*, N.Y. TIMES, Oct. 20, 1968, available at http://www.nytimes.com/packages/html/sports/year_in_sports/10.20.html.

¹³ See Joe Morgan, *Mays was Mr. Everything*, ESPN (May 5, 2001), <http://m.espn.go.com/wireless/story?storyId=1191373&wjb>.

¹⁴ See Andrew Kamenetzky, *Talking with Kareem Abdul-Jabbar, Part II*, L.A. TIMES (Jan. 27, 2006, 11:17 AM), http://lakersblog.latimes.com/lakersblog/2006/01/talking_with_ka_2.html.

¹⁵ See Jim Rednour, *Ruth’s Called Shot Among Greatest World Series Homers*, 500 HOME RUN CLUB (April 1, 2014), <http://www.500hrc.com/500-hrc-articles/ruths-called-shot-among-greatest-world-series-homers.html>.

in the 1975 World Series,¹⁶ or Kirk Gibson exuberantly pumping his fist as he rounded second base after homering in the 1988 World Series.¹⁷

Slightly different from those examples are signature moves, dances, and gestures that have been cultivated by famous athletes through intentional repetition. These gestures might be repeated in-game flourishes, like Sammy Sosa's signature "bunny hop" out of the batter's box;¹⁸ they might be preparatory pre-game rituals, like LeBron James' famous chalk toss¹⁹ or Ray Lewis' elaborate tunnel dance;²⁰ or they might be celebratory rituals performed after the completion of a successful play—namely, touchdown dances.²¹

While touchdown celebrations may trace their modern origins to now ubiquitous rituals like spiking the ball,²² kneeling in prayer,²³ or leaping into the stands,²⁴ the modern tradition has shifted toward originality, creativity, and personal branding. Since Elmo Wright became the first

¹⁶ See *Relive the Moment: Carlton Fisk Waves Walk-Off Home Run Fair to Keep Red Sox Alive in 1975 World Series*, NESN (Aug. 20, 2011), <http://nesn.com/2011/08/relive-the-moment-carlton-fisk-waves-walk-off-home-run-fair/>.

¹⁷ See Arash Markazi, *Gibson in '88: 'It's a good story.'*, ESPN (Oct. 18, 2012, 12:48 AM), http://espn.go.com/los-angeles/mlb/story/_/id/9821079/25th-anniversary-los-angeles-dodger-kirk-gibson-world-series-home-run.

¹⁸ See Paul Sullivan, *No one gets hopping mad over Sosa antics*, CHICAGO TRIBUNE (April 4, 2003), http://articles.chicagotribune.com/2003-04-04/sports/0304040217_1_hot-corner-hop-dance.

¹⁹ See Brian Windhorst, *LeBron James returns to chalk toss*, ESPN (Oct. 2, 2013, 2:23 PM), http://espn.go.com/nba/truehoop/miamiheat/story/_/id/9759180/lebron-james-miami-heat-says-pregame-chalk-toss-coming-back.

²⁰ See Simon Samano, *Ray Lewis shares the origins of his 'squirrel' dance*, USA TODAY (Jan. 6, 2013, 7:46 PM), <http://www.usatoday.com/story/gameon/2013/01/06/ravens-ray-lewis-squirrel-dance/1812555/>.

²¹ Football provides a unique opportunity for signature celebratory dances that is not matched by other major professional American sports. In baseball and basketball, the play continues after a basket is made or a home run is hit. As for hockey, players might have trouble dancing in any elaborate manner while wearing skates. Soccer, admittedly, provides significant opportunity for post-goal celebrations, but the landscape of the sport and the laws of the countries in which it is most popular are both beyond the ken of the author.

²² See Bill Pennington, *PRO FOOTBALL; Giants' Wide Receivers May End Long Drought*, N.Y. TIMES (Sept. 30, 2001), <http://www.nytimes.com/2001/09/30/sports/pro-football-giants-wide-receivers-may-end-long-drought.html> (explaining that Homer Jones is credited with inventing the after-touchdown football spike in the 1960s).

²³ See Alan Goldenbach, *After NFL's First Prayer, Religion Touched Down*, WASHINGTON POST (Sept. 28, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/27/AR2007092702077.html> (explaining that Herb Lusk, in 1977, was the first NFL player to drop to a knee after scoring a touchdown).

²⁴ See Tom Weir, *The first Lambeau Leap was hardly noticed*, USA TODAY (Feb. 3, 2011, 2:28 PM), <http://content.usatoday.com/communities/gameon/post/2011/02/lambeau-leap-leroy-butler-green-bay-packers/1#.UxQHKfldWZw> (exploring the history of the Lambeau Leap, the signature touchdown celebration of the Green Bay Packers).

player to do a celebratory dance in the end zone in 1969,²⁵ the evolution of end zone dances has showcased scores of variations. Group celebrations were popular in the 80's and 90's.²⁶ In the 2000's, with group celebrations banned by the NFL, touchdown celebrations evolved into a sort of elaborate pantomime that could be used to incite opponents and fans,²⁷ to mock other players,²⁸ to challenge authority,²⁹ or perhaps merely to engage in arbitrary pantomime, imitating a recognizable every-day act for seemingly no reason whatsoever.³⁰

But all the while, some players were able to carve out their own *signature* dances. Certain dances would be named after the player who did them, like Ickey Woods' "Ickey Shuffle."³¹ Other players would eventually be named after their dance, like Deion Sanders,

²⁵ See Bill Finley, *Father of End-Zone Dance Explains His Happy Feet*, N.Y. TIMES (Nov. 13, 2005), <http://www.nytimes.com/2005/11/13/sports/ncaafootball/13wright.ready.html>.

²⁶ See, e.g., *Top 10 End Zone Celebrations: The Fun Bunch*, NFL.COM (Sept. 8, 2008, 2:25 PM), <http://www.nfl.com/videos/nfl-videos/09000d5d8220c095/Top-10-End-Zone-Celebrations-The-Fun-Bunch> (discussing the Redskins' signature "Fun Bunch" celebration); Ariel Sandler, *NO FUN LEAGUE: The most Controversial NFL Touchdown Celebrations Ever*, BUSINESS INSIDER (Nov. 29, 2011, 6:39 PM), <http://www.businessinsider.com/you-cant-dance-if-you-want-to--2011-11?op=1> (discussing the Rams' signature "Bob and Weave" celebration).

²⁷ Wide receiver Terrell Owens, then of the 49ers, incited the wrath of Dallas Cowboys fans on September 24, 2000, by running to midfield to celebrate a touchdown on the midfield Cowboys' star logo. Later in the game, the Cowboys' Emmitt Smith followed suit, after a score of his own, to reclaim the star. When Owens then scored again, and ran back to midfield a second time himself, he was chased down by a Cowboys defender and knocked to the ground at midfield; a brawl nearly ensued. See Ken Dorset, *We Remember Terrell Owens Celebrating on the Dallas Cowboys Star*, L.A. TIMES (Sept. 24, 2013), <http://bleacherreport.com/articles/1786193-we-remember-terrell-owens-celebrating-on-the-dallas-cowboys-star>. In another instance of fan incitement, Randy Moss gestured at Packers fans as if he was mooning them. See Jay Busbee, *Randy Moss, Joe Buck clear the air over 2005 'disgusting' mooning incident*, YAHOO SPORTS (Aug. 19, 2013, 9:28 AM), <http://sports.yahoo.com/blogs/nfl-shutdown-corner/randy-moss-joe-buck-clear-air-over-2005-132852266.html>.

²⁸ See, e.g., Mike Mazzeo & Jane McManus, *Stevie Johnson mocks Plaxico Burrell*, ESPN (Nov. 27, 2011, 11:41 PM), http://espn.go.com/nfl/story/_id/7287212/stevie-johnson-buffalo-bills-mocks-plaxico-burrell-self-inflicted-gun-shot (recounting Stevie Johnson pretending to shoot himself in the leg, just as Jets' player Plaxico Burrell had actually accidentally done, after scoring against the Jets).

²⁹ See, e.g., *Top 10 Touchdown Celebrations: #7—The Sign | Chad Johnson*, SIKIDS.COM, http://www.sikids.com/multimedia/photo_gallery/0808/top.td.celebrations/content.4.html (recounting Chad Johnson's touchdown celebration in which he displayed a written sign reading, "Dear NFL, PLEASE don't fine me AGAIN!!!!!!").

³⁰ Joe Horn, for example, once celebrated a touchdown by pretending to talk on a cell phone. See Sandler, *supra* note 26. Steve Smith once celebrated a touchdown by pretending the ball was a baby, and Lamont Jordan once celebrated by pretending the ball was a chainsaw. See Alex Juel, *23 of the Funniest NFL Touchdown Celebrations Ever*, AIMLESSDIRECTION.COM, <http://www.aimlessdirection.com/2012/23-funniest-nfl-touchdown-celebrations/>

³¹ The "Ickey Shuffle" may be the first touchdown dance to be specifically associated with a certain player. See *Top 10 Touchdown Celebrations: #2—The Ickey Shuffle | Ickey Woods*, SIKIDS.COM, http://www.sikids.com/multimedia/photo_gallery/0808/top.td.celebrations/content.9.html.

whose signature dance and entire on-field persona would both come to be known as “Primetime.”³²

The phenomenon of personally branded touchdown celebrations reached new heights during the 2011 NFL season, when Tim Tebow captivated fans with a miraculous streak of improbable victories, punctuated by his signature prayerful pose: kneeling on one knee, head bowed and rested on a clenched fist.³³ As fans took to the internet by the thousands to share photographs of themselves replicating Tebow’s signature pose all over the world,³⁴ the pose became known as “Tebowing.”³⁵ Not to be out-branded, Colin Kaepernick would soon follow in the footsteps of Tebow to turn his own surname into an awkward gerund: when Kaepernick’s bicep tattoos came under some criticism, he began kissing his biceps as a touchdown celebration, an act he branded as “Kaepernicking.”³⁶

Additionally, there are dozens of other signature touchdown dances that don’t bear the name of the player associated with them. To name just a few examples of many, Ladainian Tomlinson was known for his finger roll celebration,³⁷ Victor Cruz is known for his Salsa dance,³⁸ Rob Gronkowski is known for his extremely exaggerated spiking celebration,³⁹ Cam

³² See Matt Branham, *The 25 Greatest Signature Moves of Star Athletes*, MANDATORY.COM (Feb. 11, 2013), <http://www.mandatory.com/2013/02/11/the-25-greatest-signature-moves-of-star-athletes/17>.

³³ See, e.g., Frank Bruni, *Tim Tebow’s Gospel of Optimism*, N.Y. TIMES (Dec. 10, 2011), <http://www.nytimes.com/2011/12/11/opinion/sunday/bruni-tim-tebows-gospel-of-optimism.html>.

³⁴ See TEBOWING, <http://tebowing.com> (last updated March 2014) (a blog dedicated to sharing pictures of fans imitating Tebow’s pose).

³⁵ See Lindsay Jones, *The story behind the “Tebowing” craze*, DENVER POST (Oct. 27, 2011, 3:56 PM), <http://blogs.denverpost.com/broncos/2011/10/27/the-story-behind-the-tebowing-crazy/>; see also Dan Barry, *He’s a Quarterback, He’s a Winner, He’s a TV Draw, He’s a Verb*, N.Y. TIMES (Jan. 13, 2012), <http://www.nytimes.com/2012/01/14/sports/football/fascinated-by-tim-tebow-on-more-than-sundays.html>.

³⁶ See Darren Rovell, *QB seeks ‘Kaepernicking’ trademark*, ESPN (Jan. 24, 2013, 12:53 PM), http://espn.go.com/nfl/playoffs/2012/story/_id/8874764/2013-nfl-playoffs-colin-kaepernick-san-francisco-49ers-wants-trademark-kaepernicking.

³⁷ See Jarret Bell, *Tomlinson leaves end-zone dances for the brash*, USA TODAY (Dec. 14, 2006, 7:20 PM), http://usatoday30.usatoday.com/sports/football/nfl/chargers/2006-12-14-tomlinson-endzone_x.htm?csp=34.

³⁸ See Ohm Youngmisuk, *Victor Cruz considers dance sacred*, ESPN (Oct. 10, 2012, 9:11 PM), http://espn.go.com/new-york/nfl/story/_id/8487589/victor-cruz-new-york-giants-says-salsa-dance-imitation-insult.

³⁹ See Alan Siegel, *A Brief History Of The Gronkowski Spike*, BOSTON MAGAZINE (Nov. 5, 2012, 10:29 AM), <http://www.bostonmagazine.com/news/blog/2012/11/05/history-gronkowski-gronk-spike/>.

Newton is known for his Superman pose,⁴⁰ and Aaron Rodgers is known for his championship belt celebration (otherwise known as the Discount Double Check).⁴¹ The list goes on,⁴² and there is no reason to believe that the trend of players cultivating signature dances and celebrations will stop. Accordingly, signature touchdown dances are becoming not only more important to players' personal brands, but more common in the landscape of professional American sports, particularly football. Thus, the question of what legal mechanisms will protect these valuable brand-identifying dances must be addressed.

C. Trademark Protection for Signature Sports Dances

As modern athletes have striven to build valuable personal brands,⁴³ they have naturally sought legal protection for those brands. These efforts are demonstrated, for example, by the recent rush by athletes to register trademarks for signature words or phrases that are associated with their brands.⁴⁴ As more and more athletes attempt to cultivate signature dances⁴⁵ as a

⁴⁰ See Steve Kubitzka, *The Top 3 'New Era' Touchdown Celebrations*, MIDWESTSPORTSFANS.COM (Jan. 4, 2012), <http://www.midwestsportsfans.com/2012/01/the-top-3-new-era-touchdown-celebrations-cam-newtons-superman-victor-cruzs-salsa-and-aaron-rodgers-championship-belt/>.

⁴¹ See *supra* Part I.A.

⁴² For the sake of narrative succinctness, the sampling of signature celebrations here has been limited to signature touchdown dances. This leaves out a growing number of signature sack dances (*see, e.g., Clay Matthews Sack Celebration*, FATHEAD.COM, <http://www.fathead.com/nfl/green-bay-packers/clay-matthews-sack-celebration/> (last visited April 6, 2014) (Clay Matthews' signature sack dance shown in an adhesive wall-decoration); Edén Prarie, *NFL tells Jared Allen his sack celebration is against rules*, USA TODAY (Oct. 4, 2010, 7:47 PM) http://usatoday30.usatoday.com/sports/football/nfl/vikings/2010-10-04-jared-allen-sack_N.htm?csp=34sports (discussing Jared Allen's signature calf-roping sack dance), and a number of signature pre-game dances (*see, e.g., Samano, supra* note 20 (Ray Lewis' signature tunnel dance); Glenn Davis, *Brian Dawkins Might Have Single-Handedly Inspired The Eagles To Victory With His Pregame Routine*, SPORTSGRID.COM (Oct. 1, 2012, 9:52 AM), <http://www.sportsgrid.com/nfl/brian-dawkins-number-retired-pregame-dance/> (Brian Dawkins' signature gorilla-like tunnel routine)). As will be apparent, several of the legal principles discussed herein could substantially apply to these dances, just as they could substantially apply to similar dances and celebrations in other sports.

⁴³ Modern famous athletes are harnessing their increased public exposure (through twenty-four-hour media, social media, and high-definition TV broadcasts) to attempt to connect with fans and build valuable personal brands through the use of advertising, social media, reality television, clothing, and music. See Jeffrey Martin, *Colin Kaepernick defends move to protect personal brand*, USA TODAY (Feb. 1, 2013, 8:46 AM), <http://www.usatoday.com/story/sports/nfl/super/2013/01/31/colin-kaepernick-san-francisco-49ers-super-bowl/1881873/>; Darren Heitner, *How NFL Draft Prospects Build Their Personal Brands*, FORBES (Jan. 23, 2013, 9:06 AM), <http://www.forbes.com/sites/darrenheitner/2013/01/23/how-nfl-draft-prospects-build-their-personal-brands/>.

⁴⁴ See Darren Rovell, *Johnny Manziel bids for new phrase*, ESPN (April 4, 2014, 12:17 PM), http://espn.go.com/nfl/draft2014/story/_/id/10722746/johnny-manziel-file-new-trademark (Johnny Manziel has filed

valuable part of their personal brands,⁴⁶ it follows that athletes will seek legal protection for that aspect of their brand. Below, this paper explores the possibility that the law of trademarks could protect athletes' signature dances and moves.

In past scholarship, the possibility of trademark protection for any form of bodily motion has not been widely entertained. One notable treatment of the subject is a paper by F. Scott Kieff, published in redacted form in 1996 and in full form in 2009, in which a brief discussion of trademark suggests that “fanciful or suggestive dimensions of . . . sporting behavior,” including touchdown celebrations, should be theoretically eligible for trademark protection.⁴⁷ Despite some scholarly exploration of the theoretical viability of trademarks in bodily motion, however, intellectual property commentators have still given short shrift to the possibility.⁴⁸ In light of the discussion above demonstrating how recognizable and valuable many athletes' signature brand-identifying dances have become, there is increasing need for further exploration of the reality that bodily motion may serve brand-identification purposes, and the possibility that it should therefore be eligible for trademark protection.

for trademarks for “JOHNNY FOOTBALL” and “THE HOUSE THAT JOHNNY BUILT”); U.S. Trademark Application Serial No. 85,499,414 (filed Dec. 20, 2011) (Tebow filed for a trademark for “TEBOWING”); Rovell, *supra* note 36 (Kaepernick filed for a trademark for “KAEPERNICKING”).

⁴⁵ See *supra* Part I.B.

⁴⁶ See *supra* Part I. A.

⁴⁷ F. Scott Kieff, Robert G. Kramer & Robert M. Kunstadt, *It's Your Turn, But It's My Move: Intellectual Property Protection For Sports "Moves"*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 765, 781-84 (2009).

⁴⁸ This short shrift was evidenced in 2012 when Tim Tebow applied for a trademark for the word “TEBOWING.” See U.S. Trademark Application Serial No. 85,499,414 (filed Dec. 20, 2011). When an Associated Press story inaccurately reported that Tebow had applied for a trademark for the physical motion, known as Tebowing, of dropping to a knee like Tebow (*see, e.g., Tim Tebow trademarking 'Tebowing'*, ESPN (Oct. 20, 2012, 12:13 AM), http://espn.go.com/new-york/nfl/story/_id/8525097/tim-tebow-new-york-jets-trademarking-tebowing), one intellectual property commentator attempted to set the record straight. In a thoughtful and well-reasoned blog post, Evan Anderson of Brand Ventures IP Law explained the inaccuracy of the AP story and the potential harm to public perception of trademark law. Evan Anderson, *The TEBOWING TM: Press Fumbles With Trademark Law*, BRAND CENTRAL IP (Oct. 24, 2012), <http://brandventures.blogspot.com/2012/10/the-tebowing-trademark-national-news.html>. However, Anderson gave little weight to the even theoretical possibility that Tebow could attempt to register the kneeling pose, postulating that the pose might be entitled to pantomime copyright protection or trademark protection *as a stylized design logo* instead. *Id.* Thus, while Anderson stopped short of declaring that bodily motion could *never* be entitled to trademark protection, he failed to explore the possibility when presented a golden opportunity to do so.

Accordingly, this paper builds on the premise that some touchdown dances may be eligible for trademark protection. The scope of this paper will be limited to a discussion of signature dances in the sport of American football, with a particular focus on touchdown dances in the NFL.⁴⁹

This paper concludes that many well-known signature dances and moves should be registrable with the United States Patent & Trademark Office as service marks⁵⁰ for football services. Because many touchdown dances identify and distinguish certain players from their teammates and competitors in the eyes of fans, media, and employers, those dances serve a source-identification function, may be registrable as service marks, and may create enforceable rights against certain kinds of confusing unauthorized use. Below, Part II will explore how certain signature touchdown dances could be registered as service marks for football services. Then, Part III will explore what situations would constitute infringement of trademarks for signature sports dances.

II. Trademark Eligibility and Registration for Signature Touchdown Dances

As they exist today, many signature sports dances such as touchdown dances satisfy all the eligibility and registrability requirements to be federally registered as service marks for football services. The important considerations for eligibility and registration include the subject-matter of a signature dance, the distinctiveness of the signature dance, whether the dance is functional, and the manner in which the dance is used in commerce.

⁴⁹ See *supra* note 21.

⁵⁰ Service marks are marks that identify the source of a service. Under U.S. law, treatment of service marks is largely analogous to trademarks for goods. See 15 U.S.C. § 1051 (2006).

A. Background Principles of American Trademark Law

Trademarks allow consumers to easily identify the source and affiliation of goods or services, reducing the “costs of shopping” by allowing consumers to use the source-identifying marks to locate the products of a source with which they intend to do business.⁵¹ The common law has long used trademark principles to reduce customers’ shopping costs and to protect mark owners from unfair competition, with the earliest cases dating back at least to 1584 and perhaps to 1558.⁵²

American law has embraced this tradition, creating a regime of trademark law, the “basic objectives” of which the Supreme Court has characterized as twofold: (1) quickly and easily assuring customers that items they are purchasing are made by the same producer as similarly marked items they have liked or disliked in the past; and (2) assuring that producers, and not imitators, reap the benefits of having produced a desirable product in the past.⁵³ While trademark rights took root in the United States by the common law,⁵⁴ a modern federal scheme of trademark registration and enforcement is statutorily established by the Lanham Act.⁵⁵ The basic idea of the Lanham Act is that trademark owners may federally register their trademarks with the United States Patent and Trademark Office.⁵⁶ Once a mark is registered, the owner may hold liable any unauthorized parties who use the mark in commerce in such a way that is “likely

⁵¹ See *Qualitex Co. v. Jacobson Prods. Co., Inc.*, 514 U.S. 159, 163-64 (1995) (citing J. McCarthy, McCarthy on Trademarks and Unfair Competition § 2.01[2], p. 2–3 (3d ed. 1994)).

⁵² See Keith M. Stole, *How Early Did Anglo-American Trademark Law Begin? An Answer to Schechter’s Conundrum*, 8 FORDHAM INTELLECTUAL PROP., MEDIA AND ENT. L. J. 505, 506-09 (2006) (discussing the recent discovery of *Sandforth’s Case*, a 1584 case, the existence of which was long suspected based on an uncited reference in a later case known for four centuries before the discovery of *Sandforth’s Case*; *Sandforth’s Case* itself makes an uncited reference to a 1558 counterfeiting case).

⁵³ See *Qualitex*, 514 U.S. at 163-64.

⁵⁴ See, e.g., *In re Trade-Mark Cases*, 100 U.S. 82, 92 (1879).

⁵⁵ 15 U.S.C. § 1051 (2006).

⁵⁶ *Id.* § 1051.

to cause confusion” among consumers.⁵⁷ With this extremely broad conceptual overview in mind, this paper will now apply several issues of U.S. trademark law to signature touchdown dances.

B. Subject-Matter Eligibility

Despite the fact that dance comprises non-traditional trademark subject-matter, there is no theoretical bar under the Lanham Act to the registrability of a dance as a trademark. The Lanham Act provides for registration and ownership of “any word, name, symbol, or device, or any combination thereof,”⁵⁸ provided that the matter functions as a trademark. Traditional and still prevalent conceptions of trademark subject matter have focused on words, phrases, and images, but modern courts have interpreted the Lanham Act’s recitation of “any . . . device” as providing for very broad subject-matter eligibility.

The seminal case defining the wide breadth of subject-matter eligibility is *Qualitex v. Jacobson*, a case involving a trademark for the color of a brand of dry cleaning pads.⁵⁹ The Supreme Court was asked to consider whether colors alone could constitute eligible trademark subject matter.⁶⁰ The Court rejected arguments that unique considerations of color depletion (scarcity of colors) and shade confusion (difficulty establishing distinctness of different colors) should justify a unique analysis for eligibility of colors.⁶¹ But the court did conclude “[S]ometimes, a color will meet ordinary legal trademark requirements. And, when it does so, no special legal rule prevents color alone from serving as a trademark.”⁶² Speaking in general terms, the Court explained that “[i]t is the source-distinguishing ability of a mark—not its

⁵⁷ *Id.* § 1114(1)(a).

⁵⁸ *Id.* § 1127.

⁵⁹ *Qualitex Co. v. Jacobson Prods. Co., Inc.*, 514 U.S. 159, 159 (1995).

⁶⁰ *Id.* at 159.

⁶¹ *Id.* at 167-70.

⁶² *Id.* at 161.

ontological status as color, shape, fragrance, word, or sign—that permits it to serve these basic purposes.”⁶³ One leading treatise on trademark law has explained that the Lanham Act, in light of *Qualitex*, should be understood to mean that “anything that can be detected by one of the human senses should be eligible for protection as a trademark if it is used to identify and distinguish a source of goods or services.”⁶⁴ This broad understanding comports with many modern examples of non-traditional trademark subject-matter eligibility, such as trademarks for packaging and product design,⁶⁵ building design,⁶⁶ sounds,⁶⁷ smells,⁶⁸ and even textures.⁶⁹

Following these examples and the broad modern understanding of trademark subject-matter eligibility, there ought to be no theoretical bar to registration for bodily motion,⁷⁰ such as a dance, so long as that bodily motion “meet[s] ordinary legal trademark requirements.”⁷¹ As referenced in the Introduction, at least one scholarly commentator has agreed with this

⁶³ *Id.* at 164.

⁶⁴ J.T. MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 7:105 (4th ed. 2014).

⁶⁵ See J.T. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 8.01[2] at 8-8 to -9 (3rd ed. 1996) (“Book and magazine covers; the appearance of a teddy bear toy; a Rubik’s cube puzzle, the appearance of a lamp; the overall design of a sports shoe; the appearance of a video game console; a combination of features of a folding table, the appearance of a water meter; the decor, menu and style of a restaurant, and the distinctive performance style of a rock music group are among the things courts have held to constitute protectable trade dress.”).

⁶⁶ See, e.g., Registration No. 764,837 (McDonald’s building design registrations for drive-in restaurant services).

⁶⁷ See, e.g., Registration No. 0,916,522, available at <http://www.uspto.gov/trademarks/soundmarks/72349496.mp3> (NBC chimes).

⁶⁸ See Jennifer Adams Draffen & Julia Anne Matheson, *The Sweet Smell of a Successful Registration*, FINNEGAN.COM (May 2003), <http://www.finnegan.com/resources/articles/articlesdetail.aspx?news=d28c44ca-6b7a-440b-a97d-ee09588e9c02> (explaining that five registrations have been issued by the USPTO for olfactory trademarks, but none have made it off of the Supplemental Register).

⁶⁹ See Brian Wassom, *A Distinctive Touch: Augmented Textures and Haptic Trademarks*, WASSOM.COM (July 21, 2011), <http://www.wassom.com/a-distinctive-touch-augmented-textures-and-haptic-trademarks.html> (last visited April 6, 2014) (discussing American Wholesale’s registration of a velvet texture for use on wine bottles).

⁷⁰ Indeed, it is easy to imagine organizations that might seek a registration for a trademark in bodily motion: the Boy Scouts of America might seek a trademark registration for their three-fingered “Scout sign” (see *The World Organization of the Scouting Movement*, BOY SCOUTS OF AMERICA, http://www.scouting.org/About/FactSheets/World_Org.aspx (noting the “Three-finger Scout sign” as a universal Scout practice)), or the owners of the *Star Trek* franchise might seek registration for the iconic Vulcan salute (see Natalie Jennings, *Obama gives ‘Vulcan salute’ in photo with Nichelle Nichols of ‘Star Trek’*, Washington Post (April 4, 2012, 4:30 PM) http://www.washingtonpost.com/blogs/44/post/obama-gives-vulcan-salute-in-photo-with-nichelle-nichols-of-star-trek/2012/04/04/gIQAzYInvS_blog.html (showing President Obama making the Vulcan Salute during a photo-op with a former *Star Trek* actress)).

⁷¹ *Qualitex Co. v. Jacobson Prods. Co., Inc.*, 514 U.S. 159, 161 (1995).

interpretation, and with its potential applicability to touchdown dances.⁷² Indeed, it seems undeniable that bodily motion is something “that can be detected by one of the human senses,”⁷³ and thus is squarely within the realm of eligibility.

A second way to understand that bodily motion may constitute eligible trademark subject matter is to understand bodily motion simply as a *medium* by which to convey the well-established trademark subject matter of moving images. First, it is well established that the human body may be used to evoke and communicate the subject matter of a trademark. For example, despite radio station call-signs or call-letters being primarily conveyed to consumers via oral communication by radio personalities, the call-signs are registrable as word marks.⁷⁴ Second, it is well established that federal registration may be obtained for motion marks, which are marks that consist of an image changing in time. For example, Columbia Pictures has had a registration since 1994 on a moving image title card that shows a woman holding a torch. The mark is described in the federal registration as follows:

The mark consists of a moving image of a flash of light from which rays of light are emitted against a background of sky and clouds. The scene then pans downward to a torch being held by a lady on a pedestal. The word ‘COLUMBIA’ appears across the top running through the torch and then a circular rainbow appears in the sky encircling the lady.⁷⁵

⁷² Kieff, *supra* note 47 at 781-84.

⁷³ J.T. MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 7:105 (4th ed. 2014).

⁷⁴ See Kevin M. Goldberg, *Trademark Registration: A Cheap and Easy Safeguard Against Commercial Identity Theft*, FHHLAW.COM (Jan. 2007),

<http://www.fhhlaw.com/resources/Memo/2007/january/TrademarkRegistration.pdf> (discussing radio call sign registrations); see also, e.g., WMZQ, Registration No. 1,370,574.

⁷⁵ See, e.g., Registration No. 1,975,999 (“The mark consists of a moving image of a flash of light from which rays of light are emitted against a background of sky and clouds. The scene then pans downward to a torch being held by a lady on a pedestal. The word ‘COLUMBIA’ appears across the top running through the torch and then a circular rainbow appears in the sky encircling the lady.”).

Therefore, the eligibility of bodily motion and dance for trademark protection may be understood by analogy to radio call-signs. Just as the human voice may be used to orally intone a registration-eligible word mark, the human body might be used to physically pantomime a registration-eligible motion mark, or dance.

Thus, because dancing falls within the modern broad understanding of Lanham Act trademark-eligible subject matter, and because use of the human body to create and communicate trademark subject matter is not unique in the law, there should be no bar to trademark eligibility for touchdown dances as service marks. Accordingly, we are directed by the *Qualitex* Court to look to other “ordinary legal trademark requirements” to continue the analysis.⁷⁶

C. Distinctiveness

One of the most fundamental requirements for establishing trademark rights is that a mark must be distinctive—it must distinguish the products of one manufacturer from the products of another.⁷⁷ In attempting to register a signature touchdown dance, many NFL players could likely establish distinctiveness through a showing of secondary meaning. For those who could not show secondary meaning, inherent distinctiveness would have to be proven; the availability of that option, however, would depend on whether touchdown dances are characterized as product design or product packaging.

1. Distinctiveness Background

To analyze whether potential trademarks are adequately distinctive, the Second Circuit in *Abercrombie v. Hunting World* established the now-standard classification framework, ranking marks from least to most easily registrable, depending on whether the mark is “(1) generic, (2)

⁷⁶ *Qualitex*, 514 U.S. at 161.

⁷⁷ 15 U.S.C. § 1052(f).

descriptive, (3) suggestive, [or] (4) arbitrary or fanciful.”⁷⁸ Subject matter that is a “generic” reference to a genus of products or services is completely unregistrable because it can never serve to distinguish one source from another.⁷⁹ On the opposite end of the spectrum are arbitrary, fanciful, and suggestive marks, which bear little or no relation to the underlying product. These types of marks are thus the most easily registrable because they are inherently distinctive by their nature.⁸⁰ As an illustration, the word “film” could never be registered for camera film, because it is generic. Conversely, the word “Kodak,”⁸¹ which is completely made-up and thus “fanciful,” is inherently distinctive and registrable. The most difficult cases are marks that are determined to be “descriptive” of the product, in that they describe a feature or characteristic of the product. These marks are disfavored, and may only be registered upon a showing that the mark has “become distinctive.”⁸² A descriptive mark becomes distinctive, and therefore registrable, only when it can be demonstrated that the mark has attained “secondary meaning” in the eyes of the public, such that “the primary significance of [the mark] is to identify the source of the product rather than the product itself.”⁸³

The *Abercrombie* framework was conceived, however, in a case about a word mark—the mark “SAFARI”⁸⁴—and it can be somewhat clumsy in cases involving other types of marks. Even the simplest of embellishments will virtually assure, for example, that a logo consisting of a stylized word is not generically referential to an entire genus of products, and it is difficult to conceive of any graphical mark (other than a picture of words) that could fairly be described as descriptive rather than suggestive.

⁷⁸ See *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976) (considering the mark “SAFARI” for use on tan-colored clothing and hats).

⁷⁹ See *id.* at 9-11.

⁸⁰ See *id.*

⁸¹ KODAK, Registration No. 0,389,813.

⁸² 15 U.S.C. § 1052(e) (2006).

⁸³ *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 851 n.11 (1982).

⁸⁴ See *Abercrombie*, 537 F.2d at 4.

The application of *Abercrombie* to cases of trade dress—the source-identifying characteristics embodied in a product’s overall design, packaging, or presentation⁸⁵—is even more difficult. In trade dress cases, the Supreme Court has relied more heavily on a simple dichotomy between “inherently distinctive” and not inherently distinctive than on the *Abercrombie* factors.⁸⁶ In *Two Pesos v. Taco Cabana*, a case about the trade dress of the décor of a Mexican restaurant, the Court found that some trade dresses could be inherently distinctive, thus *not* requiring any showing of secondary meaning for registrability.⁸⁷ The *Two Pesos* Court failed, however, to provide any definition or test for inherently distinctive trade dress.⁸⁸ In *Wal-Mart v. Samara Brothers*, the Court distinguished *Two Pesos* by holding that product design (as opposed to packaging) is not perceived by customers as indicative of source, and thus can never be inherently distinctive.⁸⁹ The *Wal-Mart* opinion further contemplated that some difficult cases will defy classification as either packaging or product design, and that courts should classify ambiguous trade dress as product design, and thus require a showing of secondary meaning.⁹⁰ To rectify this presumption with *Two Pesos*, the Court concluded that the décor of the restaurant in that case must have been product packaging.⁹¹

To assess inherent distinctiveness for product packaging trade dress, the leading test is the *Seabrook* test, which looks to whether the design (1) is a common basic shape or design, (2) is unique or unusual in a particular field, (3) is a mere refinement of a commonly adopted and

⁸⁵ See *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 765 (1992) (Explaining that trade dress involves “the total image of a product and may include features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques”) (quoting *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 980 (11th Cir. 1983)).

⁸⁶ See *id.* at 769-70.

⁸⁷ *Id.* at 775-76.

⁸⁸ The *Two Pesos* court did not reexamine the jury’s finding that the restaurant’s trade dress was inherently distinctive. *Id.* at 767.

⁸⁹ *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 205 (2000).

⁹⁰ *Id.* at 214-15.

⁹¹ *Id.* (“or else some *tertium quid* that . . . has no bearing on the present case”).

well-known form of ornamentation for a particular class of goods, and (4) is capable of creating a commercial impression distinct from the accompanying words.⁹² Although the Supreme Court expressed reservations about the usefulness of the *Seabrook* test in *Wal-Mart*,⁹³ the test continues to be applied.⁹⁴ Thus, a trademark may be proven distinctive by a showing of (1) secondary meaning, or (2) inherent distinctiveness, whether under the *Abercrombie* test or the *Seabrook* test.

2. Acquired Distinctiveness for Dances with Secondary Meaning

In analyzing the distinctiveness of a novel trademark subject matter, such as touchdown dances, the simplest cases would be those that could be disposed of with a showing of secondary meaning. In modern professional football, the group of players who could establish distinctiveness at least on those grounds would likely be substantial. Indeed, most of the players mentioned in Part I of this paper could make a compelling case that their signature dances have attained secondary meaning. The very fact that many of those dances are presumptively associated with their respective players by the sports media, the fans, other players,⁹⁵ and even the general public,⁹⁶ speaks to the existence of secondary meaning for many signature touchdown dances.

⁹² *Seabrook Foods, Inc. v. Bar-Well Foods Ltd.*, 568 F.2d 1342, 1344 (C.C.P.A. 1977).

⁹³ *Wal-Mart*, 529 U.S. at 213-14.

⁹⁴ *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 1351 (Fed. Cir. 2010). *But see* *Publications Int'l, Ltd. v. Landoll, Inc.*, 164 F.3d 337 (7th Cir. 1998) (Judge Posner argues that no articulated test is needed for inherent distinctiveness, and that it should be an intuitively understood and subjectively assessed concept).

⁹⁵ Players often intentionally imitate the dances of other players. *See infra* Part III.A.

⁹⁶ Cruz' signature Salsa dance is so well-known that it has been imitated by model Kate Upton during a photo-shoot in the Giants' (Cruz' team's) end zone (*see* Chris Chase, *Kate Upton did Victor Cruz's Salsa Dance in Super Bowl Endzone*, USA TODAY (Jan. 27, 2014, 3:14 PM), <http://ftw.usatoday.com/2014/01/kate-upton-super-bowl-victor-cruz-dance/>), and by Madonna at a pre-Super Bowl press conference (*see* Nekesa Mumbi Moody, *Super Bowl 2012: Madonna Channels Victor Cruz with Salsa Dance at Press Conference*, HUFFINGTON POST (Feb. 3, 2012, 5:35 PM), http://www.huffingtonpost.com/2012/02/02/madonna-salsa-victor-cruz-giants-super-bowl_n_1251121.html).

3. The Possibility of Proving Inherent Distinctiveness under *Seabrook*

Touchdown dances for which secondary meaning could not be readily demonstrated would raise more difficult questions. The first determination to be made in assessing distinctiveness of such dances would be whether to apply the *Abercrombie* framework or the simplified trade dress framework from *Two Pesos* and *Wal-Mart*. In *Wal-Mart*, the Court explained that the breadth of the definition of registrable marks “has been held to embrace not just word marks . . . and symbol marks . . . *but also* ‘trade dress’” (emphasis added).⁹⁷ While the Court does not mention unusual trademark subject matters (such as moving images, sound, smell, or texture), the articulated dichotomy between word/symbol marks and trade dress likely indicates that bodily motion marks should be treated more like a trade dress than like a traditional word mark or symbol mark. This conclusion is also supported by the practical consideration that application of the *Abercrombie* categories to bodily motions such as dances frankly would make very little sense.⁹⁸

Presuming, then, that trade-dress distinctiveness analysis should be applied to dance trademarks, the next inquiry, under *Wal-Mart*, is whether touchdown dances constitute product packaging or product configuration. Upon first impression, if an NFL player’s product is the game of football, then a touchdown dance might not be fairly characterized as part of that product’s design. However, a wider view of the product provided by the NFL players might characterize players as entertainers who provides athletic spectacle, dramatic interaction with other players and coaches, and, in some instances, touchdown dances. Regarding the latter characterization, however, the non-game aspects of an NFL player’s product seem ultimately complimentary to the central product; in this way, the dances are perhaps very much like the

⁹⁷ *Wal-Mart*, 529 U.S. at 205.

⁹⁸ How can a dance be descriptive or generic within the meaning of *Abercrombie*?

décor of the restaurant in *Two Pesos*, which was ultimately complimentary to the food being sold. If this analogue can carry the day, then touchdown dances should be characterized as product packaging,^{99 100} and would be eligible for the application of the *Seabrook* test for inherent distinctiveness.

Under the four-factor *Seabrook* test, whether any given dance could be registered would depend on a factual analysis of the dance itself. Tim Tebow’s signature kneeling pose, for example,¹⁰¹ would likely fail the *Seabrook* test at least under the third prong, because it is a “mere refinement” of kneeling in prayer, which is a common end zone celebration. The same would likely go for Rob Gronkowski’s “super spike.” Conversely, a dance such as Colin Kaepernick’s “Kaepernicking” bicep kiss would likely be considered “unique or unusual” in the field of football celebrations, and might thus be deemed inherently distinctive under *Seabrook*.

4. The Possibility of *Wal-Mart* Barring Inherent Distinctiveness

The *Wal-Mart* case, however, may counsel against the application of the *Seabrook* test in the first place, merely because the question of whether touchdown dances are “packaging” or a “product” is a close question. If *Wal-Mart*’s presumption against inherent distinctiveness for

⁹⁹ Recall that if *Two Pesos* were reasoned following the *Wal-Mart* rule, a finding of inherent distinctiveness would likely require the conclusion that the décor of the restaurant was product packaging. *See Wal-Mart*, 529 U.S. at 214-15.

¹⁰⁰ Another potential argument that could be made for concluding that a touchdown dance is “product packaging” is to work backwards from the Court’s presumptions about consumer expectations. The *Wal-Mart* Court reasoned that consumers generally expect that product packaging is indicative of source, while they do not generally expect that product design is indicative of source. Thus, if NFL fans expect that players will perform signature touchdown dances *for the purpose of branding* and conveying a source, then perhaps the medium should be classified as “packaging” in order to acknowledge fans’ perceptions and expectation. This line of argument, however, remains open to the criticism that many players do not have signature touchdown dances, and perform random or varied end zone celebrations. Thus, perhaps fans do not expect that *every* touchdown dance is a signature dance that is indicative of source, but indeed rely on repeatedly observing certain dances to establish secondary meaning to shape their expectations.

¹⁰¹ These examples are used for illustrative purposes. As discussed above in Part II.C.2, most of the players specifically mentioned herein could likely make strong cases for having established secondary meaning, nullifying a need to prove inherent distinctiveness.

close cases carries the day, then the *Seabrook* test is rendered irrelevant, and a showing of secondary meaning would be required for the registration of any touchdown dance.¹⁰²

In summary, the issue of distinctiveness for signature touchdown dances is a complex one. Many players could likely make a strong showing of secondary meaning, establishing acquired distinctiveness. For players who could not show secondary meaning, however, the courts would likely apply a trade-dress distinctiveness analysis, according to which inherent distinctiveness could be relied upon if touchdown dances are considered product packaging, but could not be relied upon if touchdown dances are considered product design.

D. Functionality

An important limitation on the breadth of trademark protection is the functionality doctrine, which prohibits the registration of any functional or useful matter.¹⁰³ While the functionality doctrine would be a likely dispositive bar against trademark registration for sports *plays*, it weights much less strongly against the registrability of signature touchdown dances.

Under the Lanham Act, a mark may not be registered if it “comprises any matter that, as a whole, is functional.”¹⁰⁴ Essentially, trademark law may only be used to monopolize the commercial use of devices that signal a source to customers, not to monopolize subject matter (be it a word, phrase, image, design, or other device) that is inherently commercially desirable. For example, it is the functionality doctrine that would prohibit a trade dress registration for a particularly ergonomic handle. Even if the handle were distinctive looking and was associated by customers with a particular manufacturer, the fact that the shape of the handle has practical, non-source-identification utility—namely, it is comfortable and therefore desirable—means that

¹⁰² See *Wal-Mart*, 529 U.S. at 214-15.

¹⁰³ See *Qualitex Co. v. Jacobson Prods. Co., Inc.*, 514 U.S. 159, 164 (1995) (“The functionality doctrine prevents trademark law, which seeks to promote competition by protecting a firm’s reputation, from instead inhibiting legitimate competition by allowing a producer to control a useful product feature.”).

¹⁰⁴ See 15 U.S.C. § 1052(e)(5) (2006).

it cannot be monopolized indefinitely by the trademark system.¹⁰⁵ As the Supreme Court in *Qualitex* explained, “The functionality doctrine prevents trademark law, which seeks to promote competition by protecting a firm’s reputation, from instead inhibiting legitimate competition by allowing a producer to control a useful product feature.”¹⁰⁶ In weighing evidentiary considerations of functionality, the focus (in contrast to a distinctiveness inquiry) is not on customer perceptions, but on the legitimate needs of competitors.¹⁰⁷ Thus, a design may be functional if it “is one of a limited number of equally efficient options available to competitors and free competition would be unduly hindered by according the design trademark protection.”¹⁰⁸

To determine whether an element is functional, the courts have applied multi-factor tests and looked to various evidentiary considerations,¹⁰⁹ but the central inquiry is essentially whether an element embodies utilitarian design that it is superior in function or in economy of manufacture.¹¹⁰ The Restatement of Torts looks to whether a design “affects th[e] purpose, action or performance, or the facility or economy of processing, handling or using [goods].”¹¹¹

Luckily, despite the lack of a clearly articulated authoritative test for functionality, the issue of the functionality of signature touchdown dances presents a relatively straightforward case. First and foremost, the most serious problem of functionality in trademark sports moves is avoided by not considering any protection for “between-the-whistles” play. Obviously, sporting

¹⁰⁵ The functionality doctrine prevents trademark from being used to indefinitely monopolize subject matter that should be left to the limited-monopoly regime of the patent system. *See, e.g.,* *Traffix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23 (2001) (finding that an expired utility patent for a design element is essentially dispositive that the element is functional and therefore not eligible for trade dress protection).

¹⁰⁶ *See Qualitex*, 514 U.S. at 164.

¹⁰⁷ *See, e.g.,* *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332 (C.C.P.A. 1982); *Two Pesos v. Taco Cabana*, 505 U.S. 763 (1992).

¹⁰⁸ *See Two Pesos v. Taco Cabana*, 505 U.S. 763, 775 (1992) (citing the Fifth Circuit’s definition with approval).

¹⁰⁹ *See Morton-Norwich*, 671 F.2d at 1340-41.

¹¹⁰ *See id.* at 1339.

¹¹¹ RESTATEMENT OF TORTS, § 742.

efforts that are employed between the whistles—that is to say, during the time that the athletes are actively attempting to win the game—are of paramount competitive value, and would certainly sometimes need to be copied by competitors in order to succeed. Despite the fact that baseball fans might be reminded of Willie Mays every time a center-fielder makes an over-the-shoulder catch, or that basketball fans might think of Kareem Abdul-Jabbar when they see a fluid hook shot, allowing any one player to monopolize such techniques would obviously create an immediate competitive advantage for that player. Similarly, while at least one commentator has advocated trademark protection for Michael Jordan’s spread-legged “Air Jordan” slam dunk,¹¹² such protection for a sports play could create a competitive monopoly. In almost all cases, and especially in the case of football, a bright-line rule could likely be drawn to presumptively deem any between-the-whistle movement to be functional and thereby unregistrable.

Touchdown dances, however, are flourishes that are not employed between the whistles, or in any direct effort to score points or defeat the opponent. While arguments could be made that touchdown dances are functional in their ability to excite fans, inspire teammates, or intimidate opponents, these claims seem attenuated at best, and most likely would speak to the goodwill engendered by the source-identifying function of the dances, rather than any inherent *utilitarian* functionality of the particular movement itself. In any case, any such a claim would almost certainly fall short of meeting the high standard of proving that a dance is “one of a limited number”¹¹³ of superior designs. Indeed, the very fanciful¹¹⁴ and arbitrary¹¹⁵ nature of many celebratory football dances speaks to the fact that there is an effectively endless selection

¹¹² Giuliana R. Garcia, *He Shoots, He Scores...and Receives Copyright Protection? How the Current State of Intellectual Property Law Fumbles with Sports*, 2011 DEN. U. SPORTS & ENT. L.J. 81, 108 (2011).

¹¹³ *Two Pesos*, 505 U.S. at 775.

¹¹⁴ For example, Ladaian Tomlinson’s finger roll dance is merely a series of arbitrary poses. Clay Matthews’ sack dance is also completely arbitrary. *See supra* Part I.

¹¹⁵ Victor Cruz’ signature Salsa (*see supra* Part I) is but one of many well-known dances, and is completely arbitrary in its relation to football services. He could just as easily do the Rumba, the ChaCha, or the Tango.

of patterns of bodily motion that could serve as a touchdown dance, and that none are inherently more functional than any other. For these reasons, functionality would likely not be a bar to registrability for any touchdown dance performed after the completion of a play.

E. Use in Commerce

The final registration requirement that will be applied herein to the potential registration of signature touchdown dances is the requirement that a registered mark be used in commerce. As signature touchdown dances in professional football are performed in interstate commerce, in clear connection with the services rendered by football players, and in a manner that is calculated to create an association between the dance and the player, many such touchdown dances satisfy the “use in commerce” requirement for registrability.

Because trademark law is grounded in the Commerce Clause of the U.S. Constitution,¹¹⁶ commercial use is a necessary element for both registration¹¹⁷ and enforcement¹¹⁸ under the federal scheme. The Lanham Act provides for registration of trademarks that are already in use in commerce, and for marks that the applicant has a “bona fide intention to use” in commerce.¹¹⁹ The requirement of use in commerce includes two distinct prerequisites for registration: first, the use of the mark must be in *interstate* commerce; second, the use of the mark must be bona fide commercial use.

1. Interstate Commerce

The Lanham Act explicitly defines commerce as “all commerce which may lawfully be regulated by Congress.”¹²⁰ Accordingly, Courts have found that even a minimal connection with

¹¹⁶ See *In re Trade-Mark Cases*, 100 U.S. 82, 96 (1879) (striking an early federal trademark law for exceeding the scope of the Commerce Clause).

¹¹⁷ See 15 U.S.C. § 1051(a) (2006).

¹¹⁸ See *id.* § 1114(1)(a) (2006).

¹¹⁹ *Id.* § 1051(a) (2006).

¹²⁰ *Id.* § 1127 (2006).

interstate commerce may bring the use of a trademark under the broad scope of the Commerce Clause and, thus, of the Lanham Act. For example, in *Larry Harmon Pictures v. Williams Restaurant*, the Federal Circuit found that a restaurant's business constituted "commerce" for the purpose of trademark registration because it was located near an interstate metropolitan area and about 15% of its customers had traveled across state lines.¹²¹

Accordingly, professional football players' touchdown dances should easily meet the requirement of interstate use the first time the player uses the mark during a road game in another state. And even before that point, the NFL's interstate television broadcast contracts, interstate merchandise sales, interstate ticket sales, and places of business near interstate metropolitan areas like New York, Washington D.C., and St. Louis, would likely bring every use of such a mark during an NFL football game within the ambit of the Commerce Clause.

2. Bona fide Commercial Use

Beyond the use of a mark merely being interstate in nature, the Lanham Act requires that the use be bona fide commercial use. The Lanham Act defines "use in commerce" as "bona fide use of a mark in the ordinary course of trade."¹²² While the "ordinary course of trade" language prevents registration based on mere token use,¹²³ it implements a flexible standard for what may constitute legitimate commercial use. The House of Representatives foresaw that the ordinary course of trade "varies from industry to industry,"¹²⁴ and the Senate stated in its Report upon enacting the language that "the definition should be interpreted with flexibility so as to encompass genuine, but less traditional, trademark uses"¹²⁵ To determine whether a use is

¹²¹ *Larry Harmon Pictures Corp. v. Williams Restaurant Corp.*, 929 F.2d 662, 663, 663 n.1 (Fed. Cir. 1991).

¹²² 15 U.S.C. § 1127 (2006).

¹²³ Token use is "use made merely to reserve a right in a mark." See HOUSE JUDICIARY COMMITTEE REPORT ON H.R. 5372, H.R. REP. NO. 100-1028, p. 15 (1988).

¹²⁴ *Id.*

¹²⁵ SENATE JUDICIARY COMMITTEE REPORT ON S. 1833, S. REP. NO. 100-515, p. 44-45 (1988).

bona fide commercial use, the courts and the Trademark Office have looked to the manner, publicity, and frequency with which marks are used. Under all of these considerations, some modern signature touchdown dances would satisfy the requirement of commercial use.

a. Manner of Use

First, courts and the Trademark Office consider the manner in which a mark is displayed to determine whether that act constitutes an instance of bona fide commercial use in the first place. With specific regard to service marks, the Lanham Act recognizes that the mark will not ordinarily be affixed to goods. Accordingly, the Act defines a service mark as having been used in commerce when “it is used or displayed in the sale or advertising of services.”¹²⁶ The Federal Circuit has interpreted this language to mean that a service mark is used in commerce when it is used “in conjunction with the offering and providing.”¹²⁷ Thus, determining the registrability of signature touchdown dances requires considering what uses of such dances constitute sale or advertising of a player’s services, or use in conjunction with the offering and providing of such services.

The crucial issue for most foreseeable registration attempts,¹²⁸ then, is whether the ordinary use of a touchdown dance—performing it in the end zone of an NFL football game following a score—constitutes use in sale or advertising of a player’s services. The Restatement

¹²⁶ 15 U.S.C. § 1127 (2006).

¹²⁷ See *Lloyd’s Food Prods., Inc. v. Eli’s, Inc.*, 987 F.2d 766, 768 (Fed. Cir. 1993).

¹²⁸ One highly unusual case of commercial use is Aaron Rodgers’ State Farm ad, which unambiguously satisfies the commercial use standard. In the ad, Rodgers says, “That’s my touchdown dance,” as he demonstrates his signature move, and, as if to prevent any possible ambiguity, he then clarifies: “I’m a quarterback.” See *supra* Introduction. Obviously, these unambiguous literal statements in a nationally-broadcast advertisement constitute advertisement of Rodgers’ quarterbacking services. If Rodgers had been any more literal, he would have had to state, “I provide quarterbacking services, and my trademark is this move.” This satirical postmodern example is of limited analytical value, however, as most uses of touchdown dances will present more difficult cases. In fact, even other uses in television advertising are not absolutely certain to establish “use in commerce.” If a player merely lent his endorsement to an advertiser of another good or service, and performed his touchdown dance in an advertisement for that good or service, this use, though clearly an advertisement, would not be an advertisement *for the service for which registration of the mark is sought*, and registration on that basis *alone* would therefore fail. See *Blue Bell, Inc. v. Farah Mfg. Co.*, 508 F.2d 1260, 1267 (5th Cir. 1975) (marking *one line* of goods with a mark is insufficient to alone establish use in commerce for registration of the mark for use on *another line* of goods).

(Third) of Unfair Competition contemplates a functional standard for assessing “use” of trademarks:

Although physical affixation remains a common method of trademark use, the rule stated in this Section recognizes *any manner of use that is sufficient to create an association* between the designation and the user’s goods or services If the manner of use is not in itself sufficient to establish that the designation has been used as an identifying symbol, the requirement of use may be satisfied by proof that the designation is in fact perceived by prospective purchasers as an indication of source or other association with the user. *The proof of secondary meaning that is required under the rule stated in § 13(b) for designations that are not inherently distinctive thus also satisfies the use requirement imposed under this Section. . . . [U]se of . . . other advertising calculated to inform prospective purchasers of the association* between the designation and the user or the user’s goods and services [can also constitute use as a trademark] (emphasis added).¹²⁹

Thus, use as a trademark may be established by showing (1) that use in providing *or* advertising a service is of a manner calculated to create an association between the service and the provider, or (2) that the designation is in fact perceived by customers as indicating association with the user.

Under the Restatement’s functional standard, many players could prove the requisite use upon the theory that their end zone dancing is calculated to create an association between the dance and the player. A simple analogy to the use of traditional trademark subject matter is illustrative: just as a hypothetical electrician might recite his slogan while interacting with

¹²⁹ RESTATEMENT (THIRD) UNFAIR COMPETITION § 18 comment d.

potential customers¹³⁰ or rendering his services to paying customers,¹³¹ a professional football player performs his touchdown dance while rendering his services to paying customers. A professional athlete's "customers" are, of course, team owners who pay him to play the game, and his "services" are delivered by playing the game on the field. Further, even though a touchdown dance performed in the end zone is not a traditional paid advertisement, a player knows that he is being watched by potential employers when he plays the game, and his performance of a signature dance is certainly "calculated to inform prospective purchasers of the association"¹³² between himself and the dance. Thus, players furnish their dance marks upon at least the "providing"¹³³ of their services, and thus upon sale or advertising of those services within the meaning of the Lanham Act. Alternately, players could prove commercial use of a touchdown dance as a service mark by producing evidence, such as a survey, showing an *actual* association among customers between themselves and their dances.¹³⁴

b. Publicity of Use

The commercial use of a trademark may also be challenged if the use of a mark is entirely secret and internal to one corporate entity. For example, the Fifth Circuit held in *Blue Bell v. Farah* that a shipment from a manufacturer to twelve regional managers of one pair each of pants bearing a new trademark was inadequate to establish "use" of the mark.¹³⁵ The court explained that "[s]ecret, undisclosed internal shipments are generally inadequate to support the denomination 'use.'"¹³⁶ However, not all "internal" use is automatically deemed non-public

¹³⁰ Perhaps upon answering the phone.

¹³¹ Perhaps by handing out business cards, displaying his slogan on a hat, or displaying his slogan on the side of a van.

¹³² See RESTATEMENT (THIRD) UNFAIR COMPETITION § 18 comment d.

¹³³ See *Lloyd's Food Prods., Inc. v. Eli's, Inc.*, 987 F.2d 766, 768 (Fed. Cir. 1993).

¹³⁴ Equivalent proof would be necessary and sufficient to establish secondary meaning or acquired distinctiveness, as discussed above in Part II.C.

¹³⁵ *Blue Bell, Inc. v. Farah Mfg. Co., Inc.*, 508 F.2d 1260, 1265 (5th Cir. 1975).

¹³⁶ *Id.*

use.¹³⁷ The Eastern District of Virginia explains that “a segment of the relevant public may be found within the entity performing the service,”¹³⁸ and the Northern District of Georgia clarifies that intra-corporate parties may constitute “the very members of the public that comprise the target market for plaintiff’s services.”¹³⁹ Even the Federal Circuit has held that “being employed by the applicant d[oes] not strip . . . employees of their status as members of the public.”¹⁴⁰ Thus, the objection to secret internal shipments in *Blue Bell* can be best understood as being founded upon the shipments not being directed to the relevant portion of the consuming public, and the internal sales not being legitimate sales, but rather accounting devices.¹⁴¹

When a professional football player performs his signature touchdown dance on the field of play—at an NFL stadium, during an NFL game, while earning a game-check from an NFL team—he might seem to be acting, at least in some regards, internally to his employment by the team owners and the league. However, closer consideration reveals that he is displaying his marks to team owners, who are in fact the relevant audience for the current and future purchase of the player’s services.

Thus, according to the guidance of the Federal Circuit and multiple district courts, these team owners should still be considered members of the public for purposes of the Lanham Act. Returning again to the analogy to an electrician, the electrician may display his service mark (as a logo on a hat or uniform, or as a spoken slogan) to a homeowner *while* he is in the employ of that homeowner. The mere fact that the homeowner is currently employing the electrician does

¹³⁷ See *Sales Bd. v. Pfizer, Inc.*, 644 F. Supp. 2d 1127, 1132 (D. Minn. 2009) (“For purposes of the Lanham Act, however, internal use does not necessarily equate to non-public use.”).

¹³⁸ *Huthwaite, Inc. v. Sunrise Assisted Living, Inc.*, 261 F. Supp. 2d 502, 514 (E.D. Va. 2003).

¹³⁹ *SCQuARE Int’l, Ltd. v. BBDO Atlanta, Inc.*, 455 F. Supp. 2d 1347, 1367 (N.D. Ga. 2006).

¹⁴⁰ *In re Canadian Pac. Ltd.*, 754 F.2d 992, 995 (Fed. Cir. 1985).

¹⁴¹ See *SM Licensing Corp. v. U.S. Med. Care Holdings LLC*, 07-20293-CIV, 2007 WL 2051009, *11 n.23 (S.D. Fla. July 13, 2007) (“Each sales manager [in *Blue Bell*] purchased the pair of slacks, but only as an accounting device to charge them in the event of a loss. No sale was made to customers until a later date, and the transaction remained internal to Farah’s employees.”).

not make the electrician's display of his service mark secret, internal, or in any other way non-commercial. Similarly, the present existence of a contract for an NFL player's football services does not make the player's display of a service mark to current team owners non-public or non-commercial.

Furthermore, televised touchdown dances are by no means "secret" or "undisclosed," as the mark was in *Blue Bell*.¹⁴² The performances of such dances in NFL football are, of course, visible to dozens of owners of other NFL teams for whom players might work in the future. The dances are further visible to dozens *more* owners of professional football teams in other leagues, with whom NFL players might seek employment as an alternative to playing in the NFL. Finally, the dances are still further visible to at least hundreds of thousands of fans, who could be considered part of the relevant consuming public because of their role in ultimately consuming the product provided by professional sports leagues.¹⁴³ Thus, just as the electrician's display of his service mark on his van, parked on the street while he renders his services, would constitute commercial use in its display to passers-by, the display by an NFL player of his service marks to scores of potential future customers and hundreds of thousands of potential purchase influencers most certainly does not constitute secret internal use.

Thus, use of signature touchdown dances in professional football games should be considered adequately public use to constitute bona fide commercial use, either because the use is visible to team owners who are the relevant portion of the consuming public or because the use is visible to fans who ultimately consume the product provided by professional sports.

¹⁴² *Blue Bell, Inc. v. Farah Mfg. Co., Inc.*, 508 F.2d 1260, 1265 (5th Cir. 1975).

¹⁴³ *C.f.*, e.g., Thomas R. Lee, Glenn L. Christensen, & Eric D. DeRosia, *Trademarks, Consumer Psychology, and the Sophisticated Consumer*, 57 EMORY L.J. 575, 633 (2008) (explaining that "courts have often considered children to be the relevant consuming public for purposes of the Lanham Act when children are the 'ultimate consumers' of a product").

c. Frequency of Use

Once it is established that a certain act of displaying the mark constitutes an instance of commercial use in the abstract, the Trademark Office and the courts will look to the frequency with which the mark is displayed in such a manner to determine whether the overall pattern of use constitutes bona fide commercial use. For example, forty-two bottles of hair product shipped to only two people before any mass marketing commenced,¹⁴⁴ a couple hundred sporadic sales (at a loss) of a connect-the-dots board game over fifteen years,¹⁴⁵ and eighty-nine sales of perfume over 20 years¹⁴⁶ were all found insufficient to establish bona fide commercial use. However, the House of Representatives predicted that, for industries trading in “expensive or seasonal products,” infrequent sales could be sufficient to establish commercial use.¹⁴⁷ Thus, the *consistency* of the use of the mark, rather than the bare *number* of uses, has been relied on by the Trademark Office to establish commercial use, as consistent use “reflect[s] a continual effort to create a viable business.”¹⁴⁸

For football players attempting to register a signature touchdown dance, casual or inconsistent performance of a dance could be insufficient to establish commercial use, even assuming, *arguendo*,¹⁴⁹ that such display of the dance is an instance of legitimate commercial use. However, consistent use of the same dance upon scoring would likely satisfy the standard of bona fide commercial use, as such use would reflect a “continual effort”¹⁵⁰ to use the mark in connection with a player’s football services. Even if a dance were only performed a dozen or so times per year, this small number of uses would not in and of itself defeat a showing of

¹⁴⁴ See *Zazu Designs v. L’Oreal, S.A.*, 979 F.2d 499, 502 (7th Cir. 1992).

¹⁴⁵ See *White v. Paramount Pictures Corp.*, 1997 WL 76957, *1 (Fed. Cir. 1997).

¹⁴⁶ See *id.* at *3 (Fed. Cir. 1997) (citing *La Societe Anonyme des Parfums le Galion v. Jean Patou, Inc.*, 495 F.2d 1265, 1272 (2d Cir. 1974)).

¹⁴⁷ See HOUSE JUDICIARY COMMITTEE REPORT ON H.R. 5372, H.R. REP. NO. 100-1028, p. 15 (1988).

¹⁴⁸ See *Lamaur, Inc. v. International Pharmaceutical Corp.*, 199 U.S.P.Q. 612, 617 (T.T.A.B. 1978).

¹⁴⁹ See, *supra*, Part II.E.2.a-b.

¹⁵⁰ See *Lamaur*, 199 U.S.P.Q. at 617.

commercial use, as the number of uses of the mark has to be understood in the context of industry norms. Professional football services are, of course, both seasonal and expensive. Players' contracts might net them several hundred thousand dollars per touchdown, or per sack, and those contracts are paid out to them in only about 20 game-check installments per year. Thus, it is completely reasonable to expect that their use of dance marks will occur on less than 20 days per year, since they render their services (in their final form) only about 20 times per year. Guided by the House of Representatives' predictions about industry norms for seasonal or expensive products,¹⁵¹ it can be understood that even relatively infrequent use is "in the ordinary course" of professional football as a trade. Thus, many signature touchdown dances are used with adequate frequency to constitute commercial use within the meaning of the Lanham Act.

For the reasons explained above, the registration requirements of "use in commerce" could likely be satisfied by a significant number of signature touchdown dances. Because professional athletes use their signature dances in an interstate manner that is capable of creating an association between the dance and the player in the eyes of the relevant consuming public, the dances are used in commerce within the meaning of the Lanham Act. Thus, the registration requirements of eligibility as a trademark, distinctiveness, non-functionality, and use in commerce all could be satisfied by a modern signature sports dance. The conclusion that trademark rights can be obtained for such dances, however, only answers half the question as to what those rights might entail. Accordingly, the analysis must also account for what actions might constitute infringement of such a dance mark.

¹⁵¹ See HOUSE JUDICIARY COMMITTEE REPORT ON H.R. 5372, H.R. REP. NO. 100-1028, p. 15 (1988).

III. Infringement

The scope of any trademark right that could be afforded to signature sports dances would be limited by the requirement to show likelihood of confusion to prove infringement of the trademark. Under the Lanham Act, infringement is defined as the “use in commerce [of any copy or] colorable imitation of a registered mark in connection with the sale . . . or advertising of any goods or services . . . [in a manner that] is *likely to cause confusion*”¹⁵² (emphasis added).

The recitation of commercial use in connection with goods or services is almost identical to the requirement recited for registration.¹⁵³ Thus, that standard can and will be met in the same ways that the registration requirement is met. Thus, if a mark is used in commerce in connection with football services when the registering player performs the dance in the end zone during a game, then it will similarly be used in commerce in connection with football services when an unlicensed third-party user performs the dance in an end zone during a game. Because the requirement of commercial use is the same for infringement as it is for registration, essentially any type of use that supports registration could also potentially constitute infringement.

The more important recitation in § 1114 of the Lanham Act is the requirement that an infringing use be “likely to cause confusion.”¹⁵⁴ As trademark law is grounded in policies of consumer protection,¹⁵⁵ the “likelihood of confusion” test—determining whether any consumers are actually confused by an unauthorized use of a trademark as to the source, sponsorship, affiliation, or connection of any goods or services—is the primary consideration in determining whether an action constitutes infringement.¹⁵⁶ In actually factually determining whether

¹⁵² 15 U.S.C. § 1114(1)(a) (2006).

¹⁵³ See *supra* Part II.E.

¹⁵⁴ 15 U.S.C. § 1114(1)(a) (2006).

¹⁵⁵ See, e.g., *Qualitex Co. v. Jacobson Prods. Co., Inc.*, 514 U.S. 159, 163-64 (1995) (trademark law reduces “costs of shopping” for consumers).

¹⁵⁶ See PETER B. MAGGS & ROGER E. SCHECHTER, *TRADEMARK AND UNFAIR COMPETITION LAW* 309-10 (7th ed. 2012).

consumers are confused, each Circuit (and the Restatement) has developed its own list of non-exclusive factors.¹⁵⁷ While at least nineteen different factors are considered by all of the different circuits, the most common and important considerations among the courts are (1) the similarity of the marks, (2) the similarity of the goods, (3) evidence of actual confusion, (4) the strength of the plaintiff's mark, (5) the defendant's intent, and (6) the sophistication of the consumers.¹⁵⁸

In assessing whether an unauthorized use of a touchdown dance could create a likelihood of confusion, any of the above factors could play an important role in different hypothetical situations. Most real-world examples of players copying each other's dances would be non-actionable parody, but plausible scenarios of bad-faith copying, usurping the dance of a little-known player, or unauthorized use in third-party advertisements could give rise to viable infringement actions.

A. Real-World Unauthorized Copying of Dances Among Players—Permissible Parody

While this paper will examine below several scenarios of possible infringement of a trademark sports dance, it should first be established that the majority of cases of real-world copying of touchdown dances would be excused as permissible parody. Trademark parody is an infringement defense that channels First Amendment norms and implicates the requirement of consumer confusion to bring an action under the Lanham Act.

In the last few years alone, there has been a veritable explosion of players copying the signature celebrations of one another. Sportswriters leapt at the story when 49ers Colin

¹⁵⁷ See J.T. MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 24:30-24:43 (4th ed. 2014); RESTATEMENT (THIRD) OF UNFAIR COMPETITION, §§ 20-23.

¹⁵⁸ See Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CAL. L. REV. 1581, 1590-91 (2006) (assembling a summary of the multifactor confusions tests used by each Circuit).

Kaepernick and Navarro Bowman copied opponent Cam Newton's Superman touchdown dance in a 2013 playoff matchup—Kaepernick upon scoring, and Bowman upon sacking Newton.¹⁵⁹ Similarly, Carlos Rogers' copied Victor Cruz' signature Salsa celebration when the cornerback intercepted a pass intended for Cruz in 2011.¹⁶⁰ Following veteran linebacker Ray Lewis' retirement, several opposing players imitated his signature pre-game dance while playing against his former team.¹⁶¹ These are only a few examples.

So, the phenomenon of intentionally imitating signature celebratory dances is indeed becoming common; however, the context of such imitation might make infringement difficult to establish for any such situation. The common denominator of all of the examples described above is that they were intended as a form of new-age smack talk. One need look no further than the situation in which the dances were performed—Rogers intercepts Cruz, does Cruz' dance; Bowman sacks Newton, does Newton's dance; Sanders scores on Lewis' former team, does Lewis' dance—to glean that the brandjacking is intended as a show of dominance or superiority. While this phenomenon might seem awkward if imagined in the context of traditional trademarks,¹⁶² a proper likelihood-of-confusion analysis requires cognizance of the context and public perception of intentional copying of NFL touchdown dances.

Accounting for contextual realities, the phenomenon of touchdown dance copying can properly be understood as a form of trademark parody, which does not constitute infringement

¹⁵⁹ See Chris Burke, *Colin Kaepernick and Navorro Bowman steal Cam Newton's 'Superman' Celebration*, SPORTS ILLUSTRATED (Jan. 12, 2014), <http://nfl.si.com/2014/01/12/colin-kaepernick-steals-cam-newton-superman-celebration/>.

¹⁶⁰ Youngmisuk, *supra* note 38.

¹⁶¹ See Rodger Sherman, *Emmanuel Sanders mocks Ray Lewis' dance after touchdown in Steelers-Ravens*, SB NATION (Nov. 28, 2013, 10:29 PM) <http://www.sbnation.com/nfl/2013/11/28/5156088/emmanuel-sanders-mocks-ray-lewis-dance-after-touchdown-in-steelers> (Emmanuel Sanders imitating the dance); James Dator, *LeGarrette Blount mocks Ray Lewis*, SB NATION (Dec. 22, 2013, 7:48 PM) <http://www.sbnation.com/nfl/2013/12/22/5236896/legarrette-blount-ray-lewis-dance-gif> (LeGarrette Blount imitating the dance).

¹⁶² One can hardly imagine Apple celebrating iPhone sales by displaying a Samsung logo.

because a successful parody (one that is understood to be a parody) does not create customer confusion. A popular definition of trademark parody was formulated in 1987 by the First Circuit, who defined it as “a simple form of entertainment conveyed by juxtaposing the irreverent representation of the trademark with the idealized image created by the mark's owner.”¹⁶³ Touchdown dance copying among NFL players largely follows this model. Taking the examples above, Cruz, Newton, and Lewis have cultivated idealized images of their signature celebrations that are imbued with ideas of their personal athletic talent and their teams' success. Unauthorized copiers like Rogers, Bowman, and Sanders juxtapose that idealized image against the irreverent representation of the dance being performed by an opponent of the dance's owner in a time at which the owner's team is being defeated. NFL fans and owners understand this irreverence and expect to see this increasingly popular form of smack talk; thus, they understand the intention of the parody. Therefore, most actual examples of NFL athletes imitating the dances of other players likely would not constitute actionable infringement, because no serious case could likely be made that the public is legitimately confused about the affiliation or sponsorship of a player whose well-known dance has been copied in an intentionally irreverent celebration of that player's defeat. Below, several scenarios are examined in which plausible arguments for likelihood of confusion could be made.

B. Infringement for Intentional Copying of Another Player's Dance

In considering what scenarios might amount to infringement of a trademark sports dance, the most logical starting point is the completely abstract scenario of one player copying the signature dance of another player, without the first player's authorization. If the situation is

¹⁶³ L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 34 (1st Cir. 1987).

contemplated outside the context of irreverent trademark parody when playing that player's team, the case for a potential likelihood of confusion can be made.

In considering the abstract possibility of a player performing another player's touchdown dance on the field of play, previous authors have broadly concluded that this might constitute infringement. Kieff, in his 2009 analysis, writes:

This example can be brought closer to home if we imagine that Abel is a professional football player who has developed a particular endzone [*sic*] dance to celebrate the successful engagement and defeat of an opposing team, led (of course) by quarterback Cain. We might also assume that this endzone [*sic*] dance is so fanciful that TV fans remain glued to their sets through three minutes of commercials following Abel's victory, just to watch this dance (foregoing bathroom breaks and snack refills). Fan identification of Abel's move with the games of Abel's team makes the commercial time during these games more valuable. It is precisely this value that makes trademark protection necessary. If Abel notices that his 'Abel-ist' move is being used by brother Cain in an attempt to draw crowds, usurp goodwill, and benefit financially from Abel's creativity, then Abel should be able to sue Cain for trademark infringement.¹⁶⁴

Kieff's analysis, however, is somewhat muddled. To start, Kieff contemplates that a touchdown dance might be "so fanciful that TV fans remain glued to their sets through three minutes of commercials . . . just to watch this dance."¹⁶⁵ But the mere establishment of the economic or competitive value of a brand element certainly does not suffice to establish trademark infringement. Indeed, the idea that fans could have a strong interest in watching a player's

¹⁶⁴ Kieff, *supra* note 47 at 784.

¹⁶⁵ Kieff, *supra* note 47 at 784.

dance, independent of their interest in watching the player play the game, raises potential issues of functionality.¹⁶⁶ Kieff goes on to discuss how a dance could be usurped by a competing player to “draw crowds, usurp goodwill, and benefit financially,” and that this, in and of itself, could constitute infringement.¹⁶⁷ Here, even if Kieff’s conclusion of the possibility of infringement is correct, he completely skips the requisite likelihood of confusion analysis. Just proving that copying subject matter is economically desirable does not establish that the copying has created customer confusion, or that it amounts to trademark infringement.

To analyze whether likelihood of confusion could be proven in the abstract case of copying a touchdown dance, Kieff’s Cain and Abel can still be used. If Cain flagrantly copies Abel’s touchdown dance and begins using it every time he scores, both the marks (the dances) and the services (football services) would be very similar.¹⁶⁸ If Abel’s touchdown dance was well known, a case for confusion could be strengthened.¹⁶⁹ The most interesting consideration would likely be the sophistication of the consumers. As contemplated above in Part II.E, the customers for the services of football players are the owners of professional football franchises. These customers would likely be found to be very sophisticated, and to know the difference between one player and another, regardless of what dance they do. However, the case could be made that the viewing public and fans, as part of the market forces that could drive purchase (contract) decisions, should be considered as part of the consumer sophistication analysis.¹⁷⁰ In

¹⁶⁶ If *the dance itself* draws fans, and other players are able to draw fans merely by copying the design of the dance, then an argument can be made that the dance has utilitarian functionality, and that it cannot be entitled to protection. As discussed above in Part II.D, however, a successful showing that any touchdown dance is one of only a few superior designs seems unlikely. See *supra* Part II.D.

¹⁶⁷ Kieff, *supra* note 47 at 784.

¹⁶⁸ See Beebe, *supra* note 158 at 1590-91.

¹⁶⁹ See Beebe, *supra* note 158 at 1590-91.

¹⁷⁰ In considering likelihood of confusion under the Lanham Act, the sophistication of indirect consumers such as children may be considered when they are the “ultimate consumers” of a product. See, e.g., Lee, Christensen, & DeRosia, *supra* note 143 at 633 (2008). Similarly, courts might consider fans to be the “ultimate consumers” of football services.

that case, the sophistication of the customers could be found to be that of the average American football fan, in which case survey analysis could become very important. Finally, the intent of the defendant would be very important, and perhaps dispositive. If Cain admitted in interviews that he was trying to usurp Abel's dance to cause customers to associate it with him instead of his brother, a court would certainly find a likelihood of confusion, establishing infringement. Thus, a likelihood of confusion could potentially be established in the case of flagrant copying of a dance already claimed by another player, giving rise to potential infringement liability. However, this scenario has not occurred (and seems unlikely to occur¹⁷¹) in the real world. Below, two scenarios for possible infringement that might be more plausible are examined.

C. Infringement for Use of a Touchdown Dance by a More Famous Player

Abel's flagrant dance stealing is not the only hypothetical manner in which a viable case of likelihood of confusion could arise. Another, more plausible, scenario that might cause a likelihood of confusion would be the case of famous player imitating the dance of a young or less popular player. In this case, the little-known player, who might be a newly-drafted rookie or even a professional player in a minor football league, could assert an infringement claim based on a "reverse confusion" theory.

The Sixth Circuit explains the concept of reverse confusion thusly:

A third kind of infringement is reverse confusion of sponsorship. A reverse confusion claim differs from the stereotypical confusion of source or sponsorship claim. Rather than seeking to profit from the goodwill captured in the senior user's trademark, the junior user saturates the market with a similar

¹⁷¹ The most likely scenario in which this could actually occur might be a player claiming a trademark, registered or otherwise, in a somewhat common touchdown dance, like spiking the ball or dunking the ball over the uprights (*see, e.g., Siegel, supra* note 39 (explaining Rob Gronkowski's signature spiking celebration)). In this case, the issue of the strength of the plaintiff's mark (namely, its lack thereof) would make the case for infringement a more difficult one.

trademark and overwhelms the senior user. The public comes to assume the senior user's products are really the junior user's or that the former has become somehow connected to the latter. The result is that the senior user loses the value of the trademark—its product identity, corporate identity, control over its goodwill and reputation, and ability to move into new markets.¹⁷²

In cases where a reverse-confusion theory is pursued, the factors for analyzing the likelihood of confusion may be somewhat modified. Namely, (in precisely the opposite manner of a standard direct confusion claim,) a plaintiff whose trademark is commercially weaker is more likely to prevail.¹⁷³

In the case of a hypothetical little-known player (the “senior user”¹⁷⁴) who has performed his touchdown dance only a few times, imitation of the dance by a very famous or well-known player (the “junior user”¹⁷⁵) could be the basis for a strong case of reverse confusion. Unlike the typical case in which imitation of a well-known dance is understood by fans to be a parody, a veteran superstar performing the dance of a little-known player might cause legitimate confusion among fans, *even if the intent of the junior user was still to satirize*. Simply based on the reality that fans might not be aware of the existence of the little-known player's dance in the first place, fans might assume that the dance is intended to be legitimately associated with the superstar (fans might think the superstar is simply using a new dance), and the confusion would thus cause the rookie to “lose[] the value of the trademark [and] control over its goodwill and reputation.”¹⁷⁶ Accordingly, courts might be more likely to find infringement for the unauthorized on-field use

¹⁷² *Ameritech, Inc. v. Am. Info. Techs. Corp.*, 811 F.2d 960, 964 (6th Cir. 1987).

¹⁷³ *See A & H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198, 231 (3d Cir. 2000).

¹⁷⁴ This is the term used for the first user of a trademark, not necessarily the larger market-player. *See id.* at 227-28.

¹⁷⁵ This is the term used for the later user of a trademark, not necessarily the smaller market-player. *See id.*

¹⁷⁶ *See Ameritech*, 811 F.2d at 964.

of a trademark touchdown dance that is *not* well known than to find infringement for unauthorized on-field use of one that *is* well known.

D. Infringement for Use of a Touchdown Dance in Advertising

A final plausible infringement scenario is that a touchdown dance could be used without authorization in a traditional third-party advertisement, such as a television commercial.

Imagine, for example, that a rival insurance company to State Farm saw the success of the Discount Double Check ads,¹⁷⁷ and wanted to run their own series of ads associating their brand with a famous touchdown dance.

Advertising a third-party product via evocation of a signature sports move—without using the image or likeness of the associated player—is in fact not unprecedented. In 2005, *Wheaties* breakfast cereal, well known for endorsements by famous athletes, ran a television commercial that evoked Kirk Gibson’s famous 1988 World Series home run. The commercial played Vin Scully’s famous call of the play while showing an amateur softball game that recreated Gibson’s famous play. While the home run depicted was itself generic, the batter ran with a visible limp, and victoriously engaged in a double fist-pump as he rounded second base.¹⁷⁸ Though the commercial never showed Gibson’s face, the closing scene of the ad—a recreation of Gibson’s iconic fist pump—unmistakably implied Gibson’s association and endorsement.¹⁷⁹

Thus, if the hypothetical rival insurance company aired an ad in which insurance agents and customers performed a recognizable touchdown dance—say, Colin Kaepernick’s bicep

¹⁷⁷ See *supra* Introduction.

¹⁷⁸ See *New Wheaties TV Commercial Pays Tribute to Kirk Gibson’s famous 1988 World Series Winning Moment*, BUSINESS WIRE (June 7, 2005, 5:45 AM), <http://www.businesswire.com/news/home/20050707005044/en/Wheaties-TV-Commercial-Pays-Tribute-Kirk-Gibsons>.

¹⁷⁹ The ad ran concurrently with sales of a Wheaties box showing Gibson’s picture. The image selected of Gibson for the box depicted his iconic fist-pump. See *id.*

kiss—this could constitute infringement of a registered trademark for the gesture.¹⁸⁰ While the “similarity of the goods” consideration would normally weigh against infringement in the case of an insurance company using a similar trademark as a football player’s service mark,¹⁸¹ that consideration would be trumped here by the implication of endorsement, the expectations of viewers, and the intent of the defendant. Because the American viewing public knows that professional athletes often appear in advertisements for unrelated products, and particularly because American viewers are being increasingly primed to see commercials featuring players’ signature celebratory moves,¹⁸² the dissimilarity of the products would be negated by the manner of the advertising, and any demonstrable intent by the defendant to evoke the plaintiff’s trademark dance would weigh very heavily in favor of a finding of likelihood of confusion. In short, a court would likely find that an intentional unauthorized evocation of a professional athlete’s trademark touchdown dance in a third-party advertisement would create a likelihood of confusion, in that viewers would be likely to believe that the athlete had lent his endorsement to the advertiser, or was affiliated with the advertiser in some other way.

Thus, most modern cases of players copying the dances of other players would not constitute actionable infringement, as they are trademark parodies that are not confusing. Nevertheless, infringement could be found by courts in cases of flagrant attempts to steal a dance, performance of a little-known dance by a well-known player, or use of a dance in a third-party advertisement.

¹⁸⁰ Without trademark law, Kaepernick would likely have to pursue a state-law Right of Publicity claim. The Right-of-Publicity is a doctrine that was created in the 20th century. *See* Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) *cert. denied*, 346 U.S. 816 (1953); Melville B. Nimmer, *The Right of Publicity*, 19 Law & Contemp. Probs. 203, 203-04 (1954).

¹⁸¹ Identical marks may, in fact, be used on unrelated goods without infringement. *See* PETER B. MAGGS & ROGER E. SCHECHTER, TRADEMARK AND UNFAIR COMPETITION LAW 309-10 (7th ed. 2012) (pointing out, among other examples, “DELTA” airlines and “DELTA” faucets).

¹⁸² *See, e.g., supra* Introduction (Aaron Rodgers and Clay Matthews State Farm ads).

IV. Conclusion

This paper has sought to explore some practical issues regarding the potential for celebratory sports moves to serve as trademarks for athletics services. Namely, it has explored issues relating to the federal registration and enforcement of touchdown dances as service marks for football services. In general, there should be no theoretical bar to the eligibility of bodily motion as registrable trademark subject matter. As they are ordinarily utilized in modern American football, many well-known signature touchdown dances satisfy the distinctiveness, commercial use, and non-functionality requirements to be registered as trademarks. The scope of protection that would be provided by a registered trademark for a touchdown dance would be limited by the requirement to show a likelihood of confusion to prove infringement. Most cases of intentional copying of dances, used as a form of smack talk, would be permissible non-infringing trademark parody. However, viable trademark infringement claims could help ensure protection against flagrant copying of a signature touchdown dance, imitation of little-known dances by well-known players, and unauthorized use of a dance in a third-party advertisement.

Remaining important issues not explored by this paper include how private contracts and league regulations (such as professional collective bargaining agreements and NCAA amateurism guidelines) could affect the ownership of service marks for individuals' athletic services. Furthermore, this paper does not address how touchdown dance registrations would be affected by the doctrine of trademark dilution, whether NCAA football players' use of touchdown dances would be considered commercial use for trademark purposes, and how a trademark right in touchdown dances would interact with rights in other areas of intellectual property, such as copyright or the right of publicity.