

Sports Celebrity Photographs and Copyright Law in the United States

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Sports memorabilia collecting is a \$3bn per year industry in the United States. One popular and easily obtained memento is the sports celebrity photograph. Protected by the Copyright Act 1976, owners of sports celebrity photographs are entitled to several exclusive rights that restrict other's use of their photographs. This article discusses the key exceptions of United States law that enable sports memorabilia collectors to market, trade, buy, and sell photographs, as well as outlining the potential legal pitfalls collectors should avoid, such as the duplication of photographs and the display of photographs over the internet.

Introduction

The sports industry is the market in which the products offered to its buyers are sport, fitness, recreation or leisure-related.¹ Common products within the sports industry include sporting events, goods, collectables and memorabilia. Of the US\$213bn spent annually on the sports industry in the United States,² the sports memorabilia market accounts for US\$3bn.³

Defined broadly, sports memorabilia consists of any sports-related memento or souvenir that has emotional or monetary value.⁴ Sports memorabilia's popularity and commercial value have attracted an eclectic group of collectors who seek a wide range of items featuring their favourite college and professional athletes and teams. Collectors acquire their collectables from a variety of sources, such as dealers and promoters, or trade items with other collectors.⁵ The least expensive and most convenient method of obtaining a memorabilia item, however, is to request a photograph directly from a sports celebrity.⁶

To demonstrate the ease of direct correspondence and how to obtain valuable sports memorabilia at little or no cost, the authors wrote to 120 professional golfers and requested a personal photograph.⁷ Of the 120

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requests, 101 (84 per cent) of the golfers returned a photograph. Ninety-eight (97 per cent) of the photographs also included the athlete's personal signature, further increasing the commercial value of the photograph.⁸ For example, an authentically signed photograph of Tiger Woods recently sold for US\$2199.99 through The Upper Deck Sport Memorabilia Company.⁹ While Woods is an extreme example, other professional golfers' photographs, such as Fred Couples (US\$399.00), Gary Player (US\$399.00) and Davis Love III (US\$319.00), equally command considerable amounts of money through ProTour Memorabilia, the official memorabilia source of the PGA Tour.

In the United States, copyright law, specifically the Copyright Act 1976, protects sports celebrity photographs. The owner of a sports photograph is entitled to several exclusive rights that limit others' use of the picture. This article discusses American-based law and the key exceptions of the Copyright Act 1976 that enable sports memorabilia collectors to market, trade, buy and sell photographs, as well as outlining the potential legal pitfalls collectors should avoid.¹⁰

Fundamental Copyright Law Concepts

The importance of copyright law has long been established in the United States, dating back to 1787, when the framers of the Constitution granted Congress power 'to promote the Progress of Science and useful Arts and the means by which it may accomplish it, securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries'.¹¹ Over time, Congress used its Constitutional authority to codify common law into the Copyright Act 1976.¹²

While primarily grounded in federal law,¹³ copyright law has evolved over time. A lengthy body of federal case law that has defined ownership and the public's right to use copyrighted works, for example, supplements the Copyright Act 1976. 'It should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas'.¹⁴ The primary objective of copyright, therefore, is not to reward the labour of authors, but 'to promote the Progress of Science and useful Arts'. To this end, copyright assures authors the right in their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.¹⁵ In other words, copyright affords 'greater encouragement to the production of literary works of lasting benefit to the world'.¹⁶ It accomplishes this purpose by rewarding the owner for 'the products of his creative genius'.¹⁷ Thus, the 'immediate effect' of the copyright law is that authors receive a 'fair return for [their] creative labor'; but yields to its ultimate aim, that is, 'to stimulate

artistic creativity for the general public good'.¹⁸

Although copyright law 'ultimately serves the purpose of enriching the general public through access to creative works',¹⁹ copyright law imposes no obligation upon copyright owners to make their works available.²⁰ 'While it is hoped that the potential economic benefits to doing so will induce them, copyright owners are not obligated to provide access to their works – either during the term of protection or after. Hence, unpublished works never distributed to the public are granted as much (if not more) protection as published works.'²¹

The Copyright Process

Copyright protection extends to eight statutorily enumerated works: literary; musical; dramatic; pantomimes and choreographic; pictorial, graphic and sculptural; motion pictures and other audiovisual; sound recordings; and architectural.²² Courts have generally viewed these categories broadly. Computer programs, for example, can be registered as literary works or maps, and architectural plans can be registered as pictorial, graphic or sculptural works.²³

To be copyrightable, a work must also be original and fixed in any tangible medium of expression.²⁴ Neither of these requirements is stringent. 'Even a slight amount [of originality] will suffice',²⁵ and a work becomes fixed the instant it is written onto a page or typed onto a computer screen.²⁶ If a work falls within one of the eight copyrightable categories and is original and fixed, copyright protection automatically attaches. No additional publication, registration or other action in the Federal Copyright Office is required.²⁷ Both publication and registration, however, are beneficial. A copyright notice²⁸ is important because: it informs the public that the work is protected by copyright; it identifies the copyright owner; it shows the year of first publication; in the event that a work is infringed, no weight will be given to a defendant's claim of innocent infringement; and if the work is registered, the owner can receive statutory damages.²⁹

Copyright Ownership

Copyright ownership initially vests in the 'author or authors' of the work.³⁰ As a general rule, the author is the party who created the work, that is, the person who translated an idea into an original, fixed and tangible expression.³¹ The Copyright Act 1976, however, specifies an exception to this general rule. If the copyrighted work is made for hire, 'the employer or other person [for] whom the work was prepared is considered the author' and owns the copyright, unless there is a written agreement to the contrary.³² In other words, the creator of a work may not be its legal owner.³³

Exclusive Ownership Rights

Once a work is copyrighted, the owner has five exclusive rights: to make copies; to prepare derivative works or create spin-offs from the original work; to distribute copies to the public; to perform the copyright in other audiovisual works; and to display the work publicly.³⁴ These exclusive rights not only entitle the author to any monetary gains derived from the work, but also essentially allow the owner to control how and when the work may be used. Nonetheless, the public and owner of a copyright equally benefit.

By granting authors these exclusive rights, the authors receive the benefit of economic rewards and control and the public receives the benefit of literature, music and other creative works that might not otherwise be created or disseminated. The public also benefits from the limited scope and duration of the rights granted.³⁵

The granting of exclusive rights to the author, however, does not always preclude others from using the works.³⁶ Many of these exclusive rights are limited by several statutory exceptions discussed herein.

Transfer

An essential component of copyright law is that copyright owners may transfer all or part of their rights to another person.³⁷ An exclusive transfer relinquishes all rights in the copyright to another person, whereas a non-exclusive transfer does not. Transfers of exclusive rights are valid only if they are in writing and signed by the copyright owner of the rights conveyed or the owner's duly authorised agent.³⁸ Non-exclusive transfers do not require a written agreement.³⁹ An oral agreement is acceptable.⁴⁰

Copyright may also be conveyed by operation of law, bequeathed by will, or passed as personal property by the applicable laws of intestate succession.⁴¹ Because copyright is a personal property right, it is subject to the various state laws and regulations that govern the ownership, inheritance or transfer of personal property, as well as terms of contracts.⁴²

Copyright Duration

The duration of copyright (that is, the owner's exclusive rights) varies and depends upon when the work was created. For works created in or after 1978, the work is protected for the life of the author plus 70 years.⁴³ The copyright term for works made for hire is 95 years from the date of first publication (that is, distribution of the copies to the general public) or 120 years from the date of creation, whichever expires first.⁴⁴ The duration of copyright for works prepared by two or more authors (that is, joint authors), excluding works for hire, is 70 years after the last surviving author's death.⁴⁵

Copyright Infringement

Any person who violates the exclusive rights of a copyright owner commits copyright infringement.⁴⁶ Although most infringements occur because a work is unlawfully copied, not every work that is copied without the owner's permission constitutes copyright infringement. Section 107 of Copyright Act 1976, for example, details several exceptions to an owner's exclusive rights in order to maintain the public's interest and freely build upon existing works (see *Statutory Exemptions*).

Copyright Law and Sports Celebrity Photographs

Establishing copyright of sports celebrity photographs is relatively straightforward. For more than a century, photographs have been held to be copyrightable.⁴⁷

Specifically, photographs are considered 'pictorials'. They fall within one of the eight copyrightable categories of works established by section 102 of the Copyright Act 1976,⁴⁸ and become fixed the instant an image is photographed.⁴⁹ As long as the picture is 'original', copyright automatically attaches.⁵⁰ Original 'means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity'.⁵¹ A work may be original, for example, even though it closely resembles other works, so long as the similarity is not the result of copying.⁵² 'To illustrate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable.'⁵³

Ownership of an original photograph initially vests in the photographer,⁵⁴ unless the photograph is a work made for hire. For example, when a sports celebrity hires a professional photographer to produce a photograph for commercial or promotional purposes, the photograph consequently belongs to the sports celebrity under the doctrine of works made for hire.⁵⁵ The remaining portions of this article focus on those sports celebrity photographs that would qualify as works made for hire, and addresses the sports celebrity's and sports memorabilia collector's rights under copyright law.

Sports Memorabilia Collection Practices

Sports memorabilia collectors must not only be aware of possible fraudulent trade practices,⁵⁶ but they must also be familiar with those practices that result in copyright infringement. One fundamental principle of sports memorabilia collecting is that mere possession of a photograph does not necessarily confer copyright ownership.⁵⁷ In most instances, when a

collector receives a sports celebrity photograph, whether through direct correspondence or some other means, the collector receives a print of the original photograph.⁵⁸ Under section 109(c) of the Copyright Act 1976, the sports memorabilia collector has a limited right to display this photograph publicly, but does not receive ownership or any exclusive rights in the photograph.⁵⁹ If sports memorabilia collectors desire the actual copyright of a sports celebrity photograph, they must do so in accordance with section 204(a) of the Copyright Act 1976.⁶⁰ 'A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.'⁶¹

The legal term used to describe the transfer of a copyright interest is commonly referred to as a licence.⁶² Essentially, a licence allows a specified third party, such as a sports memorabilia collector, to use a copyrighted work in a way that otherwise would be considered copyright infringement.⁶³ A sports celebrity, for example, could issue a one-time licence to a specific organisation to promote a charitable event. In this instance, no special licence is required; an oral agreement will suffice since no exclusive rights are involved.⁶⁴ If, however, the sports celebrity transfers permanent ownership of one of his or her five exclusive rights to another party, the transfer must comply with the requirements of section 204(a).⁶⁵

When a copyright or exclusive right is transferred, no particular 'form' of transfer is required.⁶⁶ Generally, a 'one-line pro forma statement will do'.⁶⁷ Section 204(a) is not met, however, if a sports celebrity merely signs (that is, autographs) a printed copy of his or her original photograph. Copies of photographs cannot be copyrighted.⁶⁸ Only the original photograph receives copyright protection.⁶⁹ Nonetheless, while the copy of a photograph is technically not protected, the rights attached to the original photograph still apply. Sports memorabilia collectors, therefore, cannot use the copied photograph in any manner that would violate the remaining exclusive rights attached to the original photograph (that is, make or distribute additional copies; prepare derivative works; or perform the copyright).⁷⁰

Statutory Exemptions

Several statutory exemptions limit a sports celebrity's exclusive rights in his or her photograph and thereby exempt many common sports memorabilia collecting practices from copyright infringement.⁷¹ For example, section 107 of the Copyright Act 1976, the fair use doctrine, allows limited uses of a sports celebrity's photograph.⁷² These uses include: criticism, comment, news reporting, teaching, scholarship or research.⁷³ The more widely relied-upon statutory exemptions in sports memorabilia collecting, however, are

sections 109(a), the first-sale doctrine, and 109(c), a limited exception of the sports celebrity's public display rights.

Under the first-sale doctrine, sports memorabilia collectors are free to resell a lawfully obtained copy of a photograph. 'The owner of a particular copy ... lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.'⁷⁴ Concerned over the potential abuse of the first-sale doctrine, some celebrities have attempted to limit the doctrine by stamping on the back of their personalised sports pictures a phrase similar to: 'Intended for use only by the recipient. Resale or other commercial exploitation is prohibited by law and unauthorized.'⁷⁵ Despite the fact that sports celebrities have a common law or statutory right to market their image for commercial purposes,⁷⁶ courts have held that the owner of a copyright cannot limit the first-sale doctrine.⁷⁷ In *Allison v. Vintage Sports Plaques*, Allison entered into a licensing agreement with Maxx Race Cards ('Maxx') whereby Maxx manufactured and marketed trading cards bearing Allison's likeness in exchange for a royalty in the sales receipts.⁷⁸ The defendant, Vintage Sports Plaques ('Vintage') purchased Maxx trading cards and subsequently framed and mounted Allison's cards on a wood plaque. Vintage also labelled each plaque with an identification plate bearing Allison's name and marked it as a 'Limited Edition' and an 'Authentic Collectable'. Vintage, however, was not a party to any licensing agreement and never paid a royalty or commission to use Allison's name or likeness for commercial purposes.⁷⁹

The issue before the *Allison* court was whether Vintage used Allison's name and likenesses to promote a new product in violation of the right of publicity doctrine, or whether Vintage merely repackaged and resold a lawfully purchased product under the first-sale doctrine.⁸⁰ The *Allison* court held:

[While] the first-sale doctrine does limit the right of publicity, on the other hand, [it] would not eliminate completely a celebrity's control over the use of her name or image; the right of publicity protects against unauthorized use of an image, and a celebrity would continue to enjoy the right to license the use of her image in the first instance – and thus enjoy the power to determine when, or if, her image will be distributed.

In other words, section 106(3) of the Copyright Act 1976 and the right to publicity grants sports celebrities the exclusive right to distribute copies of their photographs to the public.⁸¹ This right, however, is not absolute. Once the celebrity 'first consents to the sale or other distribution of copies

... of his work', the first-sale doctrine cannot be circumvented by the right to publicity.⁸² Hence, if sports memorabilia collectors legally obtain a copy of a photograph, collectors are 'entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy'.⁸³ 'A sale of a "lawfully made" copy terminates the copyright holder's authority to interfere with subsequent sales or distribution of that particular copy.'⁸⁴ Nonetheless, the first-sale doctrine does not permit collectors to reproduce or sell additional copies, since those rights rest exclusively with the sports celebrity, the owner of the original photograph.⁸⁵

In addition, if sports memorabilia collectors lawfully possess a copy of a photograph, section 109(c) of the Copyright Act 1976 provides a limited exemption to the sports celebrity's public display rights. 'The owner of a particular copy lawfully made under this title ... is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located'.⁸⁶

The concept of 'display' is broad.⁸⁷ It covers 'the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube, or similar viewing apparatus connected with any sort of information storage and retrieval system'.⁸⁸ Furthermore, a 'public display' is a display 'at a place open to the public or ... where a substantial number of persons outside of a normal circle of family and its social acquaintances is gathered'.⁸⁹ A place is 'open to the public' in this sense even if access is limited to paying customers.⁹⁰ Courts have held that public display occurs even if photographs are limited to subscribers⁹¹ or occurs at a trade show even if the display is limited to trade show members.⁹²

Sections 106(5) and its exemption 109(c), therefore, allow sports memorabilia collectors to display their collections privately and, under limited circumstances, to display and market their collection of photographs publicly. The modern trend of internet sports auctions, a popular and growing outlet among collectors, however, poses problems for collectors who display or market their sports celebrity photographs.⁹³ Although no court has specifically addressed whether sports memorabilia collectors can lawfully use the internet to display a photograph of a sports celebrity, either to sell or for promotional purposes, the court in *Brown v. McCormick* held that the defendant's display of copyrighted quilt patterns on a national cable television broadcast did not fall within section 109(c) because the work was not displayed 'at the place where the copy is located'.⁹⁴ In addition, at least one legal commentator believes internet displays fall outside the scope of section 109(c).⁹⁵ In other words, to qualify for a 109(c) exemption, sports memorabilia collectors must limit their public displays of a copied photograph to 'the place where the copy is located'; anything beyond this,

such as an auction website which can be viewed from anywhere in the world, 'is clearly beyond the limits of section 109(c)'. Copyright law, therefore, forbids collectors who use the internet to display their collected photographs because these images can be viewed by the public from anywhere in the world.⁹⁶ Section 109(c) merely allows the display of 'no more than one' sports celebrity photograph 'at a time, to viewers present at the place where the copy is located'.⁹⁷

Copyright Infringement

Any sports memorabilia collector who violates the exclusive rights of a sports celebrity's photograph commits copyright infringement.⁹⁸ The sports celebrity's remedy for copyright infringement largely depends on whether the photograph is registered with the United States Copyright Office.⁹⁹ If it is not registered, the sports celebrity can only recover actual damages.¹⁰⁰ The primary measure of recovery is the market value of the photograph at the time of the infringement.¹⁰¹ On the other hand, if a photograph is registered, the celebrities can also seek attorney's fees, court costs and statutory damages, up to \$100,000 per infringement.¹⁰²

Other potential remedies for infringement include injunctions, impoundment or destruction of the infringing materials.¹⁰³ If a sports memorabilia collector willfully infringes on a copyright, he or she could face criminal prosecution and be imprisoned for up to ten years under the Copyright Act 1976.¹⁰⁴ Outside of the Act's own civil and criminal penalties, there are additional criminal offences that safeguard the sports memorabilia market, such as forgery and counterfeiting of items. For example, in *Arnold Palmer et al. v. Gotta Have It Golf Collectibles, Inc.*, Arnold Palmer, Jack Nicklaus and Tiger Woods ('Palmer et al.') sued Gotta Have It Golf Collectibles, Inc. ('Gotta Have It'), alleging the fraudulent and unauthorised sale of licensed golf photographs and autographs.¹⁰⁵ According to Palmer et al., Gotta Have It obtained photographs and autographs of the three golf celebrities from various sources, forged the Plaintiffs' signatures and then sold the items at the 1997 Masters golf tournament. In all, 60 items priced from \$350 to \$1,500 were seized. Because the photographs were licensed, the defendants were charged with felony forgery and counterfeiting of registered designs under Georgia State Statute.¹⁰⁶

Palmer et al. may not be an isolated case. Court transcripts indicated that the plaintiffs made a concerted, nationwide effort to stop the unauthorised sale of their images and alleged signatures in the memorabilia market.¹⁰⁷

Conclusion

The popularity and marketability of sports celebrities has encouraged sports memorabilia collecting, a growing trade and hobby among millions of sports enthusiasts. An increasingly popular memento is the sports celebrity photograph. Although sports celebrities often times grant others permission to use their photographs for publicity and fan souvenirs,¹⁰⁸ collectors should be careful to use the photographs according to their intended licensed purpose. Failure to do so may result in copyright infringement.

To establish copyright infringement, a sports celebrity must merely show ownership of the copyright and a violation of the owner's five exclusive rights.¹⁰⁹ Exclusive rights were originally designed to benefit both the owner and public. The owner, for example, receives the economic rewards and the public receives the benefit of a work that might not otherwise be created or disseminated. In the instance of sports memorabilia collecting, the joint purposes of copyright law appear to be well served. Sports celebrities retain control, boost their public image, and may even profit from the use of their photograph. Alternatively, collectors receive a valuable collectable portraying their favourite player.

In recent years, however, abuses of sports celebrities' commercial rights have escalated with advances in technology. Of particular noteworthiness is the modern trend to use the internet and its ability to market individual photograph collections on private or public auction websites without the celebrity's permission. Neither form of display is permitted under the Copyright Act. While some sports celebrities have made a concerted effort to minimise the unlawful distribution of their photographs, by either an express notification of all commercial rights or the retention of independent agencies that police their images and products, only a few have resorted to litigation.

Sports memorabilia is big business. The recent commercial implications for signed sports celebrity photographs have increased the likelihood that more athletes will zealously protect their rights in the near future. Sports memorabilia collectors should not be alarmed, however, if they take the time to understand and follow the exemptions outlined by the Copyright Act. Copyright law was designed so both the sports celebrity and collector can harmoniously coexist.

NOTES

1. B. Pitts and D. Stotlar, *Fundamentals of Sport Marketing* (Morgantown: Fitness Information Technology, 1996), 3.
2. P. Steinbach, 'Dream Jobs', *Athletic Business* (July 2001), 65.

3. M. Larson, *Complete Guide to Baseball Memorabilia* (Iola: Krause Publications 2001), 8.
4. M. Shank, *Sport Marketing* (Upper Saddle River: Prentice Hall, 1999), 19.
5. M. Baker, *Baseball Autograph Handbook* (Iola: Krause Publications, 1991), 33.
6. *Ibid.*
7. Photographs of professional golfers are a commonly collected sport memorabilia item and can be obtained relatively easily and inexpensively.
8. Authentically signed photographs continually have higher values due to their scarcity and public demand, Shank (note 4).
9. See <http://www.upperdeck.com> and <http://www.protourmemorabilia.com>, accessed 9 October 2001.
10. For a comparative analysis of current European legal issues regarding the internet and sports marketing, see L. Edgar and D. McArdle, 'Selling Your Sole, eEurope, EU Law and Sports Marketing', in A. Caiger and S. Gardiner (eds.), *Sport and the Law of the European Union: Regulation and Re-regulation* (The Hague: Asser Press, 2001), 141–64.
11. US Constitution, Article I, s.8, cl.8.
12. Copyright Act 1976, Public Law No.94-553, 90 Stat.2541 codified as amended at 17 USC 1998 s.101–810, hereinafter cited to '17 USC' and referred to as 'the Copyright Act 1976'.
13. Individual state copyright laws exist, but it is limited to works that are not protected under the Copyright Act 1976.
14. *Harper & Row, Publishers, Inc. v. Nation Enterprises* [1985] 471 US 539, 558.
15. *Feist Publication, Inc. v. Rural Telephone Service Co.* [1991] 499 US 340.
16. *Washington Publishing Company v. Pearson* [1939] 306 US 151, 156.
17. *Ibid.*
18. *Twentieth Century Music Corp. v. Aiken* [1975] 422 US 151, 156.
19. *Fogerty v. Fantasy, Inc.* [1994] 510 US 517.
20. R. Alpert and M. Moy, Copyright, <http://www.ladas.com/NII/CopyrightPurpose.html>, accessed 12 October 2001.
21. *Ibid.*
22. 17 USC, s.102(a). The following types of works are ineligible for federal copyright protection: titles, names, short phrases, and slogans; familiar symbols or designs; variations of typographic ornamentation, lettering, or coloring; and mere listings of ingredients or contents. In some instances, however, these works can be protected under trademark law. United States Copyright Office, Copyright Basics, *Circular 1* (2000), 3.
23. 17 USC, s.102(a).
24. *Ibid.*
25. *Feist Publication, Inc.* (note 15). Elements of originality in a photograph may include the subjects, lighting, angle, selection of film and camera, and almost any other variant, *Burrow-Giles Lithographic Co. v. Sarony* [1884] 111 US 53, 58. A photograph of a photograph is not copyrightable, however, because it lacks sufficient originality, *Bleistein v. Donaldson Lithographing Co.* [1903] 188 US 239.
26. United States Copyright Office, Questions Frequently Asked in the Copyright Office Public Information Section, <http://www.loc.gov/copyright/faq.html>, accessed 22 September 2001. Copyright is secured when the original work is fixed for the first time. If a work is prepared over a period of time, the part of the work that is fixed on a particular date constitutes the copyrighted work, United States Copyright Office (note 22), 3.
27. 17 USC, s.408(a). See also United States Copyright Office (note 22), 7, noting that 'registration is not a condition of copyright protection'.
28. For example, © 2000 by John Smith, United States Copyright Office (note 22), 4.
29. *Ibid.*, 7. A prerequisite to establishing a *protectable* copyright is public notification that the work is copyrighted. This requirement is easily met by affixing a copyright symbol on a work that gives reasonable notice of a copyright claim, 17 USC, s.401. The use of a copyright notice is the responsibility of the copyright owner and does not require advance permission or registration with the United States Copyright Office (note 22), 4. For complete guidelines regarding the form of notice, see *ibid.*, 4–5. Formal copyright

- registration with the United States Copyright Office is also straightforward. For as little as \$30 per work, the owner can obtain a registration form directly from the United States Copyright Office. United States Copyright Office, Copyright Basics, *Circular 4* (2000), 5. Registration can be completed any time during the term of copyright protection, United States Copyright Office (note 22), 7.
30. 17 USC, s.201(a).
 31. United States Copyright Office (note 22), 2.
 32. 17 USC, s.201(b).
 33. 17 USC, s.201(b). For a discussion of employee works for hire, see *Marco v. Accent Publishing* [1992] 969 F 2d 1547. For a discussion of commissioned works, see *Schatt v. Curtis Management Group, Inc.* [1991] 764 F Supp. 902.
 34. 17 USC, s.106; *Altman v. New Haven Union Co.* [1918] 254 F 113.
 35. Alpert and Moy (note 20).
 36. Ibid.
 37. 17 USC, s.204(a).
 38. United States Copyright Office (note 22), 6.
 39. Ibid.
 40. 17 USC, s.201(b).
 41. Ibid.
 42. Ibid.
 43. Ibid, 5–6.
 44. Ibid.
 45. Ibid.
 46. 17 USC, s.501.
 47. *Burrow-Giles Lithographic Co.* (note 25).
 48. 17 USC, s.102(a), 5; *Burrow-Giles Lithographic Co.* (note 25). Not everything, however, can legally be photographed. Laws place various restrictions on currency, stamps, stocks and bonds, government information, buildings, judicial proceedings, medical operations, and people, 18 USC, s.504.
 49. *Altman* (note 34).
 50. *Burrow-Giles Lithographic Co.* (note 25).
 51. *Feist Publication, Inc.* (note 15), 345.
 52. Ibid.
 53. Ibid., 346. Elements of originality in a photograph may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved. *Burrow-Giles Lithographic Co.* (note 25), 60; M. Nimmer and D. Nimmer, *Nimmer on Copyright* (New York: Mathew Bender, 1994), s.2.08[E][1] (1991).
 54. *Time Inc. v. Bernard Geis Assoc.* [1968] 293 F Supp. 130; *Leibovitz v. Paramount Pictures Corp.* [2000] 2000 US Dist. LEXIS 10173.
 55. 17 USC, s.408(a). For example, see *Marco* (note 33); R. Miller, Jr., 'Photography and the Work-For-Hire Doctrine', *Texas Wesleyan Law Review* 1 (1994), 81. Even if a sports celebrity photograph falls outside of the doctrine of works made for hire, the right of publicity protects celebrities against commercial exploitation of their image, *Hoffman v. Capital City/ABC Inc.* [1999] F Supp. 2d 867. The right to publicity is a common law and statutory right that, in effect, allows sports celebrities the authority to determine when, or if, his or her photograph will be distributed for commercial purposes. See L. Stapleton and M. McMurphy, 'The Professional Athlete's Right of Publicity', *Marquette Sports Law Journal* 10/23 (1999), 64.
 56. See *Arnold Palmer et al. v. Gotta Have It Golf Collectibles, Inc.* [2000] 106 F Supp. 2d 1289. Plaintiffs Arnold Palmer, Jack Nicklaus and Tiger Woods ('Palmer *et al.*') sued Gotta Have It Golf Collectibles, Inc. ('Gotta Have It'), alleging the fraudulent and unauthorized sale of golf photographs and autographs.



57. 17 USC, s.201(a); 'Mere ownership of a book, manuscript, painting or any other copy or phonorecord does not give the possessor the copyright', United States Copyright Office (note 22), 2.
58. Shank (note 4).
59. *Olan Mills Inc. v. Linn Photo Co.*, [1994] 23 F.3d 1345. See also W. Patry, *Latman's The Copyright Law*, 6th edn. (Washington: Bureau of National Affairs, 1994), noting that if a license is non-exclusive, there is no transfer of ownership of the copyright.
60. 17 USC, s.201(d).
61. 17 USC, s.204(a).
62. *Gillespie v. AST Sportswear* [2001] 2001 US Dist. LEXIS 1997.
63. Licenses may be exclusive or nonexclusive, *ibid.* An exclusive license is considered a transfer of copyright ownership and is not valid unless it is in writing and signed by the copyright owner, United States Copyright Office (note 22), 6. On the other hand, a non-exclusive license allows another person to use the owner's copyright in a specified manner, but does not transfer any exclusive rights, including ownership, *ibid.*
64. *Graham v. James* [1998] 144 F 3d 229, 235. Under federal law, 'nonexclusive licenses may ... be granted orally, or may even be implied from conduct', Nimmer and Nimmer (note 53), s.10.03[A][7], 10-43. See also *I.A.E., Inc. v. Shaver* [1996] 74 F 3d 768, 775-6.
65. See generally United States Copyright Office (note 22), 6; *Gillespie* (note 62); 17 USC, s.204(a).
66. Patry (note 59).
67. *Ibid.*, citing *Effects Assocs. v. Cohen* [1990] 908 F 2d 555.
68. *Bleistein* (note 25). Moreover, regardless of the document's length, the statement 'should use critical words such as "copyright" or "exclusive rights" and it must be signed by the transferor, not just the transferee', W. Patry, *Copyright Laws and Practice*, vol.1 (Washington: Bureau of National Affairs, 1994). Note, however, that where a written assignment of rights has not been properly executed, some courts have instead implied non-exclusive licenses, *ibid.*
69. *Bleistein* (note 25).
70. These exclusive rights do not take into account the exclusions established by s.109(a) and 109(c) of the Copyright Act 1976.
71. See generally *Rogers v. Koons* [1992] 960 F 2d 301, 308, noting that fair use is an 'equitable rule of reason ... which permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity that law is designed to foster'; *Leibovitz* (note 54).
72. 17 USC, s.107.
73. *Rogers* (note 71); *Leibovitz* (note 54).
74. 17 USC, s.109(a). The first-sale doctrine, however, does not apply in those instances when a photograph has been obtained unlawfully: *Genesis Publications, Inc. v. Goss* [1983] 437 So 2d 169; *Brinkley v. Casablancas* [1981] 80 AD 2d 428.
75. Of the 101 photographs received in the present study, 48 contained identical or similar language.
76. The right of publicity protects against the commercial exploitation of one's image or likeness, *Hoffman v. Capital City/ABC Inc.* [1999] F Supp. 2d 867; L. Stapleton and M. McMurphy, 'The Professional Athlete's Right of Publicity', *Marquette Sports Law Journal* 10/23 (1999), 64.
77. *Allison v. Vintage Sports Plaques* [1998] 136 F 3d 1443; *Wendt v. Host Int'l, Inc.* [1999] F 3d 1284.
78. *Allison* (note 77).
79. Pursuant to Allison's licensing agreements, Allison only received royalties from Maxx for the initial sale of the cards to Vintage.
80. *Allison* (note 77).
81. Conversely, sports celebrities should be mindful that copyright law does not protect an idea, concept, location or the person depicted in a photograph, United States Copyright

- Office (note 22). 3. Further, if a sports memorabilia collector photographs his or her favourite celebrity, the collector owns the photograph since it would not be considered a work made for hire, 17 USC, s.201(a). This does not mean, however, that the collector may sell the photograph for commercial purposes; he or she merely owns the photograph, not the image or likeness of the sport celebrity depicted in the photograph. The right to publicity doctrine limits commercial exploitation of a sports celebrity's likeness or image, and celebrities enjoy the right to determine when, or if, their photograph will be distributed. *Haelan Lab., Inc., v. Topps Chew Gum, Inc.* [1953] 202 F 2d 866, 868 ('Many prominent persons, especially actors and ball players, far from having their feelings bruised through public exposure of their likeness, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, buses, trains, and subways.'). See also *Allison* (note 77); *Wendt* (note 77).
82. Nimmer and Nimmer (note 53), s.8.12[A].
 83. 17 USC, s.109(a). See for example *Summit Tech. v. High-Line Medical Instruments Co.* [1996] 922 F Supp. 299.
 84. *Parfums Givenchy, Inc. v. Drug Emporium, Inc.* [1994] 38 F 3d 477, 480.
 85. *Design Options v. Bellepointe, Inc.* [1996] 940 F Supp. 86.
 86. 17 USC, s.109(c).
 87. In order for there to be copyright infringement under section 106(5), a display must be public (that is, private displays are protected).
 88. HR Rep. No.1476, 94th Cong., 2d Sess.64 (3 Sept. 1976), reprinted in 1976 US Code Congressional and Administrative News 5659, 5677.
 89. Nimmer (note 53), s.8.14[C], 8-169 (1993).
 90. *Ibid.*, 8-169 n.36 (1993); See *Columbia Pictures Industries Inc. v. Redd Horne Inc.* [1984] 749 F 2d 154.
 91. *Playboy Enterprises, Inc. v. Frena* [1993] 839 F Supp. 1152.
 92. *Thomas v. Pansy Ellen Products* [1987] 672 F Supp. 237, 240. See also *Ackee Music, Inc. v. Williams* [1986] 650 F Supp. 653 (performance of copyrighted songs at defendant's private club constituted a public performance).
 93. T. Kessenich, 'Collecting Sports Memorabilia on the Web', *Sports Collectors Digest Guide to Collecting Sport Memorabilia on the Web* (March 2001), H29. See E-bay, <http://www.e-bay.com>, accessed 8 July 2001; Yahoo Auctions, <http://www.auctions.yahoo.com>, accessed 8 July 2001; Sports Auction.com, <http://www.sportsauction.com>, accessed 8 July 2001. See also P. Goldsmith, 'Got Game?', *Spirit* (December 2000), 61.
 94. [1998] 23 F Supp. 2d 594.
 95. D. Loundy, 'Revising the Copyright Law for Electronic Publishing', *John Marshall Journal of Computer & Information* 14/1 (1995), 27.
 96. *Ibid.*
 97. 17 USC, s.109(c).
 98. 17 USC, s.501(a). The creator of pictorial works has a protectable interest in the material he or she produces, 17 USC, s.106. As long as sports celebrities affix a copyright symbol, their name and the date on the back of a photograph, sports memorabilia collectors have provided reasonable notice of a copyright claim. See *Elbe v. Adkins* [1991] 812 F Supp. 107.
 99. Copyright registration is a mandatory condition of instituting an infringement suit, 17 USC, s.411(a). A copyright owner, however, can still register and file suit after infringement has occurred, *Olan Mills Inc.* (note 59), 1349.
 100. *Olan Mills, Inc.* (note 59).
 101. *Fitzgerald Publishing Company Inc. v. Baylor Publishing Company Inc.* [1986] 807 F 2d 1110.
 102. 17 USC, s.504-5. See *Rogers* (note 71).
 103. 17 USC, s.500-5.
 104. 18 USC, s.2319.



105. *Palmer et al.* (note 56).
106. *Ibid.*, 1293. *Palmer et al.* sought criminal charges rather than commercial remedies because 'ordinary consumers' were 'charged large sums of money' to purchase the items.
107. *Palmer et al.* (note 56). The defendant's actions were particularly troublesome to Palmer and Woods, who do not sign 'products to make money'. Court transcripts also noted that 'Tiger was ... upset that while he's trying to start his career on a positive note, here are people making money off him in the most dishonest way possible, and cheating Tiger's fans'.
108. Baker (note 5).
109. See *Feist Publications, Inc.* (note 15).

