

Reprinting Vintage Trading Cards: It's Better Than Counterfeiting Currency (and It's Legal)

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[Mickey Mantle] was our guy. When he was hot we felt great. When he slumped or got hurt, we sagged a bit too. We tried to crease our caps like him; kneel in an imaginary on-deck circle like him; run like him, heads-down, elbows-up.—Bob Costas¹

Sports and trading cards have sparked the emotions of generations of children around the world.² The “emotional truths of childhood have a power to transcend objective fact”³ and often last well into adulthood. “We can still recall the immediate tingle in the instant of recognition when a Mickey Mantle popped up in a pack of Topps bubble gum cards—a treasure lodged between an Eli Grba and a Pumpsie Green.”⁴ The trading card industry has a place in the market that serves these emotional truths of children and adults alike.

In an attempt to carve out a new niche in the market, this article examines the legal framework of reprinting pre-World War II trading cards. After examining a history of the trading card industry, the article reviews potential copyright problems and examines the tort of misappropriation of likeness from the perspectives of both statute and common law. It also suggests possible defenses to these causes of action. It concludes with an observation that reprinting vintage trading cards appears to be legally viable, at least in California.

A discussion on trademarks is intentionally omitted because no significant trademark issues are apparent. A trademark is “[a] word, phrase, logo or other graphic symbol used by a manufacturer or seller to distinguish its product or products from those of others. The main purpose of a trademark is to guarantee a product’s genuineness.”⁵ First, most vintage trading cards were not licensed by the sports leagues, and logos are not shown on jerseys worn by individual players. Second, most of the tobacco trademarks on vintage sport cards are from companies that are now defunct. Even the card backs that have trademarks from existing companies can be changed to include data about the player and any trademarks can be easily removed.⁶ Furthermore, the card should bear the logo of the new publisher, and disclaimers should be included on all boxes, packages, and advertisements, stating that the original producers, sports leagues, and players do not endorse these cards.

Trading Cards in a Nutshell⁷

Trading cards are a hot commodity and big business.⁸ The importance of trading card revenue was highlighted when Alex Rodriguez refused to play on the 1992 U.S.A. Olympic team because he was not allowed to negotiate an individual trading card contract.⁹ Rodriguez capitalized on his athletic prowess and business acumen and went on to sign a \$252-million-dollar contract with the Texas Rangers.¹⁰

Many dealers entered the business during the late 1980s and early 1990s and some made handsome profits.¹¹ By the late 1980s, there were nearly 100,000 full-time card shops and tens of thousand of so-called weekend warriors,¹² people who displayed their wares at card shows.¹³ Some shows, such as the Frank and Son Card Show in southern California, became semi-weekly events.

There were a few high-profile dealers, such as Alan Rosen (known as Mr. Mint), who spent hundreds of thousands of dollars on merchandise and advertising. He received considerable publicity on the *Today Show* and elsewhere as a dealer of sports cards and memorabilia. Although he was portrayed in the media as a typical dealer, the reality was far different.

Many dealers have a difficult time turning a profit.¹⁴ There are an estimated 40,000 card shops currently in business, and the number of the uncountable¹⁵ weekend warriors is down considerably, as evidenced by the decreasing number of shows and fewer tables at the remaining ones.¹⁶ The revenue generated by the new trading card market has also shrunk. The exact amount is unknown because the Topps Company is the only major manufacturer that is publicly traded, but some estimates suggest that the market is only \$500 million dollars a year—down from more than \$1 billion per year in the early 1990s.¹⁷

Moreover, the tastes of collectors have changed dramatically over the years. In the beginning, cards in tobacco packages allowed the gentleman smoker to share something other than second-hand smoke with his family. People who collected these cards did so for the sheer enjoyment of collecting their favorite baseball player, actress, or boxer. In the 1930s, manufacturers of chewing gum began to insert gum into packages of baseball cards to promote sales, a practice that

is now almost defunct.¹⁸ The modern era was rushed in when Bowman inserted trading cards in their packages of gum in 1948. The company's primary competitor, Topps,¹⁹ inserted a game that featured cards of baseball players in 1951. Fans during the post-World War II era collected cards based primarily on their love (or intense dislike) for particular players or teams.

Building upon the limited success of the 1951 product, Topps changed its format to a large-size card (closer to the style used today) and ushered in the modern era. It was not, however, until 1957 that Topps introduced the now standard-size baseball card (2-1/2 x 3-1/2). The smaller size and somewhat unattractive card was actually a step backward that resulted from Topps's monopoly of the trading card market after 1955. There were few incentives for the company to create more attractive cards that collectors prized.²⁰ Many card collectors find Topps sets produced between 1952 and 1956 to be among the most attractive cards, despite the absence of modern printing techniques. Many collectors regard the 1957 set as dull and boring, second only to Topps sets issued between 1966 and 1969, which featured the same photographs year after year.

By the 1970s, trading clubs started to surface and people recognized that a secondary market existed for their baseball cards. Prices were highly regional and individually variable until James Beckett,²¹ who holds a doctorate in statistics, wrote an annual book and price guide in the mid-1970s. Although Topps had produced basketball, football, hockey, and nonsports cards since the 1950s, their popularity did not take off until the late 1980s when Beckett started a monthly price guide for these cards.

The trading card market exploded in 1981 when the Fleer Corporation received a license to produce a second competing set of baseball cards.²² Potential profits in the trading card market whetted the appetites of collectors and others to buy cards as an investment.²³ Many investors bought thousands of cheap cards of rookies, gambling that their on-field performance would translate into higher value and generate a handsome return.²⁴ Even the true collectors started to buy cards for investment purposes. Before the late 1980s, most collectors prized vintage cards; cards from the 1950s and 1960s offered the most volume and profit for dealers. To get into the new card market, smaller dealers had to place orders that met the card manufacturers' steep requirements for minimum amounts and pay cash up front. The long delays between payment and shipment (usually two to three months) also created a strong barrier to entry.

The public's unquenchable thirst created such a demand for trading cards that the card manufacturers

by the 1980s were forced to institute maximum orders. Most dealers made enough money in the hot market of the late 1980s to invest in larger amounts of inventory. Thus the two major obstacles for entering the new card market disappeared, and returns of between 100 percent to 1,000 percent were not uncommon.

Consumers' tastes also changed. In 1990, Upper Deck,²⁵ inspired by Willie Wonka and the Chocolate Factory's gold ticket, randomly inserted 2,500 cards signed by Reggie Jackson into its packs. This started the "insert card"²⁶ or "chase card"²⁷ phenomenon. While consumers chased insert cards between 1991 and 1996, the market for vintage cards²⁸ faltered. But the chase phenomenon lost its luster as early as 1993,²⁹ and collectors, by 1997 tired of the manufactured scarcity and growing number of different "insert cards," renewed their interest in vintage cards. Because of the true scarcity of vintage cards, the demand for reprints skyrocketed. Reprint sets are featured almost exclusively in full-page ads placed by a New York card company³⁰ in major periodicals, such as *Sports Collectors Digest*³¹ and *Tuff Stuff*.³² The market for reprints, which appear to be exact replicas of the originals, must be considerable to justify advertising expenditures for full-page ads costing between \$500 and \$1,500 per issue.

Legal Issues of Reprinting Vintage Cards

The potential market for reprints inspired the author to examine the legal issues involved in reprinting and selling pre-World War II (WWII) trading cards. Most of the companies that originally produced the cards have long since gone out of business, and many of the sports and other celebrities featured on vintage cards died years ago. Seemingly, there would be little opposition for the intellectual property rights of these cards—unlike the problems that would be encountered by reprinting the more recent Topps cards. In addition, Topps has reproduced some of their own sets.³³

Therefore, this article focuses on pre-WWII trading cards. The discussion has been limited to the California law for three reasons: (1) because the author lives in California, the state would be the most convenient place for any business venture (2) California courts would have jurisdiction because of the author's residence and (3) space limitations preclude a discussion of laws in other states, many of which would not be able to assert jurisdiction in the first place.

What About Copyright?

The subject matter of copyright laws is covered in 17 U.S.C § 102. Copyrightable works must include two elements: the work must be original, and fixed in a tangible medium.³⁴ Original issue trading cards seem

to fall under the categories listed in § 102(a)(5): pictorial, graphic, and sculptural works. A trading card seems much like a circus poster, which the Supreme Court held to be copyrightable in *Bleinstein v. Donaldson Lithographing Co.*³⁵

In *Bleinstein*, the poster featured a combination of words and realistic drawings of circus performers. There was no question that the artist engaged in an exercise of intellect in carefully choosing and coordinating his words, images, design, and color. This was original expression. The Court rejected the argument that the poster's commercial purpose should keep it from being protected under copyright laws. The Court held that original expression constitutes copyrightable subject matter, regardless of its good or bad artistic value and its commercial or noncommercial purpose.

Trading Cards and Copyrights

Trading cards do not seem to fall within the excluded categories set forth in § 102(b). These include an "idea, procedure, process, system, method of operation, concept, principle or discovery."³⁶ Trading cards that were produced and printed before 1976, which obviously includes all pre-WWII cards, fall under the Copyright Act of 1909.³⁷ The 1909 Act differentiated between federal and state law.³⁸ Protection from copyright infringement flowed from both state common (widely, although inaccurately, called "common law copyright") and statutory law.³⁹ The common law protection began with creation of the work and continued until its publication.⁴⁰ Statutory protection was the only protection available once the work was published.⁴¹

The Copyright Act of 1976⁴² eliminated this common law protection and replaced it with statutory protection. Under the 1909 Act, proper notice was essential to securing copyright protection,⁴³ which lasted initially for twenty-eight years with the possibility of one twenty-eight year extension.⁴⁴ Renewal was made automatic under the Copyright Renewal Act of 1992.⁴⁵ Under the 1909 Act, any copyright that expired without renewal, or if renewed after expiration of the renewal period, entered the public domain. Works published without the required copyright notice also entered the public domain.⁴⁶ Any trading card published more than fifty-six years ago is in the public domain. This would include virtually all pre-WWII trading cards because the statistics and other generic terms like city names are not copyrightable.

Action for Invasion of Privacy

The first form of invasion of privacy to be recognized by the courts was the appropriation of one's likeness or name for another's commercial advantage.⁴⁷ The most frequently cited case recognizing this distinct cause of action is *Haelan Laboratories v.*

*Topps Chewing Gum, Inc.*⁴⁸ In *Haelan*, there was a dispute over whether Haelan⁴⁹ interfered with Topps's contract for exclusive rights to produce its baseball cards. Of more importance for this article's discussion, the court recognized that "a man has a right in the publicity value of his photograph."⁵⁰ This use of the player's photograph is the major concern with respect to appropriation of one's likeness in baseball cards.

The common law cause of action for invasion of privacy by misappropriation requires establishment of (1) a knowing use (2) appropriation of the name or likeness to defendant's advantage, commercially or otherwise (3) lack of consent and (4) resulting injury.⁵¹ The first and third elements are nearly identical to the statutory cause of action discussed above. The use element of the statutory element is harder to prove. Therefore, if the higher "knowing" standard is met, the common law cause of action is proven as well.

The underlying idea is to determine if it is economically viable to reprint trading cards without the consent of the celebrity. We will assume that the consent element is absent for analytical purposes. The injury element seems relatively easy to prove: if all the previous elements are met and there is no defense, the statutory cause of action will show an injury that arises from using images without compensating the celebrity. Compensation has been common practice since the inception of trading cards.⁵²

The most difficult issue to litigate is whether use of the player's image is to the advantage of the reprinter. It seems rather farfetched to believe that republishers would be reprinting cards without the promise of some gain. This element allows for recovery even when the use is not for a commercial reason.⁵³

The common law cause of action expires upon death.⁵⁴ The sole remedy for dead persons under California law for misappropriation lies in the statutory cause of action. Given that most of these sets are more than fifty-six years old, and most ball players were between the ages of twenty to forty in their heyday, it is likely that most are deceased. Therefore, the statutory cause of action would be the sole remedy available to the heirs of celebrities.

Statutory Cause of Action

California Civil Code section 3344 codifies a person's right to recover based upon the use of a "name, photograph, or likeness" for a commercial purpose without prior consent.⁵⁵ The plaintiff must establish (1) a knowing use, (2) for purposes of advertising, and (3) a direct connection between the use and the commercial purpose.⁵⁶ The statute provides for recovery of the greater of \$750 or actual damages, and any prof-

it attributable to the unauthorized use and not accounted for in computing damages. The injured party can also recover punitive damages and attorneys' fees and costs.⁵⁷

The "knowing use" element can be easily met. It is hard to imagine any good argument that reprinting a pre-World War II baseball card unknowingly captured the player's image. Courts have long recognized the use of a person's photograph without consent for commercial purposes as a basis for liability.⁵⁸ Almost all sports cards have a picture of the sport celebrity on the front,⁵⁹ and there is no dispute as to the identity of the celebrity.⁶⁰ There is an interesting side note: because members of a definable group cannot recover based upon this section,⁶¹ any team pictures would not be actionable under this statutory provision.⁶²

The second and more difficult element to prove requires the misappropriation for the purposes of advertising. On the surface it seems as though these cards would not be for the purposes of advertising. The plaintiffs in such cases could argue that the reprints can be regarded as advertising because the original cards were packaged in tobacco and gum products as advertising pieces.⁶³ Courts are not likely to accept this argument. These cards are not being reproduced to further the tobacco companies' image, but rather to sell a piece of nostalgia. Further, they would be reproduced by someone who has no vested interest in promoting the tobacco companies. The sole production motive would be to sell them at a profit. Many of these tobacco brands no longer exist, so there would be little benefit in promoting their products, names, or brands. On a practical note, although there may be no misappropriation cause of action available to the players, it might be wise to use players whose right of publicity has expired in any advertisements⁶⁴ and to use actual reprints of the cards instead of other photographs of the players.⁶⁵

Finally, the use is not actionable merely because the material contained paid advertising. The use must be "so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required."⁶⁶ This element should be relatively easy for the plaintiff to prove. The fact that it is necessary to get a celebrity's consent to place his or her image on trading cards is a strong argument that treats the card as a type of commercial sponsorship for which consent is normally required. Further, many players were originally paid for use of their images, thus giving credence to the idea that consent is required.

California Civil Code section 990 may be more applicable to the right of publicity. Some sets were produced as early as the 1880s, so many, if not all, players and managers from these pre-WWII sets are

dead. Section 990 protects "deceased personality's name, voice, signature, photograph, or likeness" in much the same way as section 3344 does for living personalities. The damages and remedies are identical. It further recognizes the rights expressed under this statute as "property rights." These rights under section 990 are freely transferable and vest after death as specified in the statute.⁶⁷ This section allows for action based on a limited duration of no more than fifty years after the death of the deceased personality. It defines a "deceased personality" as "any natural person whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death, whether or not during the lifetime of that natural person" he or she exploited the commercial value of celebrity status. Any person claiming to be a successor-in-interest to the rights of a deceased personality under this section or a licensee must register

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with the California secretary of state and pay a nominal fee. By making it possible to find out if someone's personality is protected, this section provides a good method to reduce the possibility of unintentional infringement.

Possible Defenses

Several possible defenses are available, including public interest and copyright preemption.

The defendant in the statutory and common law cause of action may claim that reprinting a vintage trading card is a matter of public interest. In *Montana v. San Jose Mercury News*,⁶⁸ the court allowed the newspaper defendant to reprint old news articles, together with an artist's new rendition of football star Joe Montana, in a souvenir edition. The newspaper and a poster were sold for \$5 each. The court recognized that these matters are not restricted to current events but reproductions of past events as well.⁶⁹ Thus, it could be argued that the reprinted trading cards are much like the poster: they involve the public actions of sports celebrities and are therefore of public interest. Admittedly, this argument will likely lose because of the *Montana* case's countervailing interest, i.e., freedom of the press. There are no First

Amendment issues involved with the reprinting of pre-WWII baseball cards.

State statutes are subject to preemption under the Supremacy Clause of the U.S. Constitution when they conflict with a valid federal statute or prevent the full purposes and objectives of Congress from being fulfilled.⁷⁰ The Copyright Act preempts a claim when it is: fixed in a tangible medium and falls within the subject matter or scope of copyright protection. There are only a few cases that analyze whether the federal copyright protection preemption trumps the California misappropriation remedies.

The most recent one is *Wendt v. Host International, Inc.*⁷¹ in which the Ninth Circuit held that robots based on actors' likenesses violated the statutory right to publicity and was not preempted by federal copyright law. The most on-point case seems to be *Fleet v. CBS, Inc.*⁷² In *Fleet*, the court held that because the disputed performance rights claimed under the state right of privacy were equivalent to the copyright protection, the rights were preempted. The issue before the court was a very narrow one: whether an actor may bring an action for misappropriation of his or her name, image, likeness or identity under California Civil Code section 3344 when the alleged exploitation only occurred through the distribution of a movie that included the actor's performance. In *Fleet*, CBS was the holder of the copyright. Although production of an exact reprint of a vintage baseball card would likely create the same type of copyright action, the reprinter would not be the copyright holder. Thus, the reprinting would involve a case of first impression: whether use of material that is in the public domain would preempt the misappropriation cause of action. Such an interpretation appears to be at cross-purposes with Congress's intent to allow copyrighted materials to go into the public domain, even if it was necessary to pay for a celebrity's image. Therefore, it follows that the celebrity's right to profit would expire because the use of the photo is merely "works for hire,"⁷³ as the actors in *Fleet*. It seems contrary to allow something to enter the public domain yet frustrate the purpose of the copyright law by allowing a misappropriation cause of action.⁷⁴

Conclusion

The reprinting of vintage trading cards appears to be legally viable. Most of the companies that originally produced the cards are either out of business or have been taken over by larger companies, and the intellectual property rights of the trading cards have been lost. Most of the players no longer have legal protection for their celebrity status or do not enforce it. Given the unlikely chance of enforcement, the small number of enforceable rights and the even smaller likelihood of

recovery, this idea appears very economically viable. This answer makes sense. The purpose of copyright laws is to encourage creativity while maintaining an adequate balance in the public's interest in free flow of information and ideas. The creators of these trading cards are no longer using the images to their benefit. Thus, encouraging creativity and marketing of these cards in a new way coincides with the underlying policy of copyright law and benefits the American legal, business, and economic landscape. ■

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Endnotes

1. Bob Costas, *Eulogy for Mickey Mantle*, at <http://members.aol.com/mindycpa/eulogy.htm>.
2. See *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139, 141 (3d Cir. 1981) (recognizing the importance of baseball cards on childhood).
3. *Fleer Corp.*, 658 F.2d at 141.
4. *Id.*
5. BLACK'S LAW DICTIONARY 1500 (7th ed. 1999).
6. On the pre-WWII cards, most of the reverse sides contain only advertising for cigarette companies. The fronts contain the player's name and his team's city, e.g., Honus Wagner—Pittsburgh. These words are not subject to trademark or copyright laws.
7. Uncited material in this section is based on the author's personal knowledge. He learned the industry operating as a sports card and memorabilia dealer for over eleven years and collecting for nearly twenty years. The author was one of the early supporters of unbiased third-party grading services for authorized dealers, such as Professional Sports Authenticator (PSA). See <http://www.psacard.com>.
8. See Ralph Barrier Jr., *Players' Cards*, ROANOKE TIMES & WORLD NEWS, Apr. 14, 2001, at 1, available at WL 5363051 (quoting a lawyer and collector as saying that cards are "big business" and that children "are not in it anymore"); see also Gregory Lewis & Dwight Chapin, *The Collectors: Topps Has Expanded, and Also Become PR Conscious*, S.F. EXAM., May 14, 1994, available at WL 4273725 (asserting that Topps printing presses are running around the clock); Alan Breznick, *The Topps Gum in Baseball Cards, Profits*, CRAINS N.Y. BUS., Apr. 3, 1989, at 3, available at WL 2600218 (claiming that baseball cards were the biggest fad since Pac-Man).
9. Paul Dottino, *Top Pick a Symbol of the Greedy 90s*, RECORD, NORTHERN NEW JERSEY, June 26, 1993, at B02, available at WL 7914832.
10. Dale Hofman, *Fans Alone Feel Pinch of A-Rod's New Deal*, MILWAUKEE J. & SENTINEL, Dec. 14, 2000, at C1, available at WL 26101410.
11. For instance, new trading card sales reached \$800 million by 1990, which has shrunk today to \$450 million. *Id.*
12. A somewhat derogatory term likely coined by full-time card store proprietors based upon the price slashing tactics

practiced by many show dealers.

13. An event where dealers display merchandise in small booths for sale to the public.

14. See Lisa Sanders, *Topps Fights for Bottom Line: Trading Card Slide Gums Up Works; Sticking to the Old*, CRAIN'S N.Y. BUS., Jan. 19, 1998, at 4, available at WL 8016375 (quoting a dealer that has turned to Beanie Babies to keep his company profitable).

15. An accurate count is impossible because many dealers buy from distributors with unreported cash payments. Many also pay in cash for their show booths to avoid getting resale licenses or collecting sales tax.

16. See Nick Rousso, *Trading Cards: A Decade of Ups and Downs*, SEATTLE POST-INTELLIGENCER, Mar. 14, 2000, at B4 available at WL 5290711 (characterizing the 1990s as a decade of ups and downs for the trading card industry).

17. *Digital Collectibles: Topps Plan to Hawk New Sports Cards on the Net*, WALL ST. J., June 29, 2000, at B1, available at WL-WSJ 3034859; see also Tim Wilson, *Topps Put Web Spin on Baseball Cards*, INTERNET WK., Apr. 9, 2001, at 49, available at WL 8007498.

18. Only Topps maintains the right to market baseball cards along with bubble gum because of their exclusive license with players. See *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139 (3d Cir. 1981). Bazooka brand baseball cards still insert gum along with its cards. The manufacturers eliminated gum because the gum stained the last card of the pack.

19. Topps continues producing trading cards today. The company revived the Bowman brand name in 1989 and still produces a number of Bowman sets. See *Fleer*, 658 F.2d at 139.

20. See *id.*

21. Beckett Publications, still owned and operated by Dr. James Beckett, produce many monthly price guides that include prices for all sports cards. Beckett produces price guides for everything from autographed memorabilia to Beanie Babies and old *Sports Illustrated* books.

22. See generally *Fleer Corp.*, 658 F.2d at 139 (discussion of facts and legal analysis).

23. John Rippel, *Market Value: Collectors Enjoy Return on Investment*, ORANGE CTY. REG., July 2, 1989, at C12, available at WL 6214615 (quoting a *Wall Street Journal* article that called baseball cards "the best investment of the 1980s").

24. See *id.*

25. Based on gross sales, Topps is the world's largest trading card manufacturer. See PETE WILLIAMS, *CARD SHARKS: HOW UPPER DECK TURNED A CHILD'S HOBBY INTO A HIGH-STAKES, BILLION-DOLLAR BUSINESS* (1996). Cf. *Digital Collectibles*, supra note 17 (asserting that Topps had 37 percent of the trading card market compared to Upper Deck's 35 percent).

26. An insert card is a scarce, randomly inserted card that often is printed on premium stock with state-of-the-art printing techniques. It often has a very high secondary market value.

27. Another term for "insert card."

28. For the purposes of this article, the vintage card market includes everything produced before 1980.

29. See *Topps Co.: Third Quarter Net Fell 59% on Slump in Trading Cards*, WALL ST. J., Dec. 15, 1993, at B4, available at WL-WSJ 671527; see also Deidre A. Depke (ed.), *Top Cardmaker Topps Takes a Tumble*, BUS. WK., Feb. 8, 1993, at 34, available at WL 2154202 (discussing too many trading products aimed at a shrinking audience); Kevin Goldman, *Rapid Fire Topps TV Ad Breaks with Nostalgic Trading*

Card Past, WALL ST. J., Dec. 10, 1993, at B6, available at WL-WSJ 671961 (citing a sluggish trading card market as the reason Topps broke with tradition and created a television advertising campaign).

30. Card Collector's Company.

31. A trade magazine, published by Krause Publications, printed every week during the 1980s and now published bi-weekly. It is the oldest hobby publication still being produced; its December 22, 1999, issue marked its 1000th issue.

32. Another long-time trade publication recently purchased by Krause Publications.

33. In the mid-1980s, Topps reproduced its 1952 set; during the 1990s, the company reproduced its 1953 and 1954 sets in a new series called "Archives." Because of a licensing disagreement with Upper Deck, Topps did not include Ted Williams in its reprint of the 1954 set. The missing Ted Williams card was issued by Upper Deck during the next season. See Paul Dottino, *Williams, Mantle Added to Card Set*, THE RECORD, NORTHERN NEW JERSEY, Aug. 13, 1994, at S02, available at WL 7765959.

34. 17 U.S.C. § 102(a).

35. *Bleinstein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

36. 17 U.S.C. § 102; *Baker v. Seldon*, 101 U.S. 99 (1879) (holding that there can be no copyright protection in ideas); *Morrissey v. Proctor & Gamble Co.*, 379 F. 2d 675 (1st Cir. 1967) (holding there can be no copyright protection when the subject matter of a work is so narrow and straightforward that only a few ways of expression exist).

37. 17 U.S.C. § 1 *et seq.* (repealed 1976).

38. *Maljack Prod., Inc. v. UAV Corp.*, 964 F. Supp. 1416 (C.D. Cal. 1997) (citing 1 M. NIMMER & D. NIMMER, *NIMMER ON COPYRIGHT* § 2.02 (1996)).

39. 17 U.S.C. § 2 (repealed 1976).

40. *Id.*

41. *Id.*

42. 17 U.S.C. § 101 *et seq.* (the 1976 Act).

43. *Maljack Prod.*, 964 F. Supp. at 1416 (citing 17 U.S.C. § 101 (repealed 1976)).

44. 17 U.S.C. § 10 (repealed 1976).

45. The 1976 Act extended the renewal term for works under the 1909 Act to a period of forty-seven years if their initial term expired in 1978 or later. This does not affect pre-WWII trading cards, all of which were either in their renewal period or in the public domain by 1978.

46. See *Stewart v. Abend*, 495 U.S. 207, 233 (1990).

47. See Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U. L. REV. 553 (1961); see also *International News Service v. Associated Press*, 248 U.S. 215 (1918) (recognizing the appropriation cause of action under federal common law).

48. 202 F.2d 866 (2d Cir. 1953).

49. Haelan produced Bowman trading cards, Topps's chief competitor at the time.

50. *Haelen*, 202 F.2d at 868.

51. *Montana v. San Jose Mercury News, Inc.*, 40 Cal. Rptr. 2d 639 (Cal Ct. App. 1995).

52. The famous 1919 T-206 card of Honus Wagner that sold for \$451,000 in 1991 and \$631,000 in 1996 is so rare because a contract dispute over either compensation or Wagner's distaste for cigarettes (depending on which story you believe) caused his card to be pulled from the production run. Less than one hundred cards exist today.

53. *Montana*, 40 Cal. Rptr. 2d at 790.

54. *Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal. Ct.

App. 1979); *see also* Guglielmi v. Spelling-Goldberg Prod., 603 P.2d 454 (1979).

55. CAL. CIV. CODE § 3344(a).

56. *Newcombe v. Adolf Coors Co.*, 157 F.2d 686 (9th Cir. 1998) (applying California law).

57. *Newcombe*, 157 F.2d at 686.

58. *Eastwood v. Superior Ct.*, 198 Cal. Rptr. 342, 347 (Cal. Ct. App. 1983); RESTATEMENT (SECOND) OF TORTS § 652C.

59. These photographs for most pre-World War II cards are either black and white or hand tinted.

60. To be actionable, the photograph must show the subject as "readily identifiable . . . [so] one who views the photograph with the naked eye can reasonably [identify] . . . the person." CAL. CIV. CODE § 3344(b)(1).

61. CAL. CIV. CODE § 3344(b)(3).

62. Section 3344(b)(2) specifically recognizes a baseball team as being "[a] definable group." CAL. CIV. CODE § 3344(b)(2).

63. The reverse side of many early cards feature tobacco ads and nothing else.

64. This would either eliminate litigation or allow for a quick dismissal.

65. Using the actual cards would give less credence to the idea that the players were representing the company, and that the cards were the focus of the advertisement.

66. CAL. CIV. CODE § 3344(e); *see also* *Newcombe v. Adolf Coors Co.*, 157 F.2d 686 (9th Cir. 1998).

67. CAL. CIV. CODE § 990(d)(1) sets forth the rather complicated transfer of these rights upon death.

68. *Montana v. San Jose Mercury News, Inc.*, 40 Cal. Rptr. 2d 639 (Cal. Ct. App. 1995).

69. *Montana*, 40 Cal. Rptr. 2d at 642 (citing *Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d 790, 792 (Cal. Ct. App.)); *Carlisle v. Fawcett Pub., Inc.*, 20 Cal. Rptr. 405, 414 (Cal. Ct. App. 1962); *Eastwood v. Superior Ct.*, 198 Cal. Rptr. 342, 347 (Cal. Ct. App. 1983).

70. U.S. CONST. art. 6, cl. 2.

71. *Wendt v. Host Int'l, Inc.*, 125 F.2d 806 (9th Cir. 1997).

72. 58 Cal. Rptr. 2d 645, 648 (Dist. 2 1996).

73. *Id.*

74. For a narrow reading of *Fleet*, *see* *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867 (C.D. Cal. 1998) (stating that "*Fleet* stands merely for the proposition that an actor cannot prevent the use of the actor's copyrightable performance by the holder of that copyright").

COACHING CONTRACTS

(continued from page 9)

Promoting Goodwill

Because your priority is to ensure your client's best interests, it is important to keep the negotiations cordial. As a litigator, I find that immediately taking an adversarial position often puts both parties on the defensive, making it harder to build consensus or gain concessions. Taking a nonadversarial tack when negotiating a sports contract is often the best way to be an advocate for your client. Working to identify creative solutions, rather than simply pushing back on every offer, will also promote goodwill between the coach and the university. Unlike many standard litigation settings in which the parties will settle a dispute and walk away, your client and the university are beginning a potentially long-term relationship. Setting the appropriate tone in negotiations will make your client's transition to her new position more successful.

Conclusion

Although some sports attorneys may favor working with better-known coaches of men's programs who can command multimillion dollar contracts, the potential for women's sports and coaches in women's programs has yet to be fully realized. Moreover, many coaches of women's programs are just starting to realize the power and clout they have when negotiating with universities. As such, sports attorneys may find themselves in the pleasant position of not only helping to shape a talented coach's career, but also enabling a particular university to deliver an award-winning season. ■

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Endnotes

1. 20 U.S.C. § 1681 (2001). Title IX reads as follows: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ."

2. The website of the Women's Sports Foundation at <www.womenssportfoundation.org/templates/action/take/results_views.html> was the source of the statistics cited in this article. Founded in 1974 by Billie Jean King, the Women's Sports Foundation is a charitable educational organization dedicated to increasing the participation of girls and women in sports and fitness and creating an educated public that supports gender equity in sport.

3. Two good sources are Martin J. Greenberg, *College Coaching Contracts: A Practical Perspective*, 1 MARQUETTE SPORTS L.J. 207 (1991), and Edward N. Stoner II & Arlie R. Norgay, *The Model University Coaching Contract ("MCC"): A Better Starting Point For Your Next Negotiation*, 16 J. COLLEGE & UNIVERSITY L. 43 (1989).

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