
Instagram Issues: Why Professional Sports Leagues Need to Reconsider How Photography and Copyrights are Governed

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I. INTRODUCTION

Most top professional athletes have lucrative contracts with their teams. Additionally, many athletes generate income from marketing and endorsement deals. In recent years, athletes have taken a deliberate approach towards building their personal brands. The more known, liked, and marketable an athlete is, the greater their potential income from marketing opportunities. One way to measure this potential is using social media.

Athletes can increase their marketability through eliciting and creating positive interactions with fans on social media. For example, LeBron James is one of the most famous athletes in the world. James has over 76 million followers on Instagram and 23 million likes on his official Facebook page. James' posts on these channels receive an extraordinary number of views. According to Opendorse, in January 2021, James ranked first among athletes on social media.¹ His Twitter and Instagram accounts have 29.9 million engagements. Ultimately, the number of views a post has is what drives monetary value.

When James decides to take to Instagram and post a photograph, can he post whatever image of himself he wants? Consider an image of him towering over a defender slamming a basketball with dynamic authority during a rim-bending slam-dunk. In the background, there are 20,000 fans. The dunk comes in the midst of leading his team during a hard-fought road game, of which they come out victorious. Such posts generate interactions, driving fan engagement. Posting such a photo can be great for James and his individual likeness, help grow his persona, and potentially lead to an increase in his worth. However, are such posts legal? Are such posts permitted under existing collective bargaining agreements?

These questions implicate issues unique to copyright law. Consider an example from December 2019, when James posted a photo depicting the previously mentioned dunk. The photo was taken by photographer Steve Mitchell. As discussed herein, James likely could not legally post the photo without committing copyright infringement. Moreover, the National Basketball Association's ("NBA") Collective Bargain Agreement ("CBA") currently does not protect James. Indeed, the CBA should be updated to reflect the realities of the digital age and current social media trends.

Because many CBAs are outdated, professional athletes have become targets for photojournalists to sue for copyright infringement. Accordingly, the agreements governing professional sports leagues are best suited to address how photography and any accompanying copyright rights are handled. Implementing the recommended changes will reduce disputes while supporting the creation of new works that can be consumed and enjoyed by the public.

This note discusses the application of copyright law to this context including how copyright law impacts collective bargaining agreements. Part III discusses prior, analogous cases where similar

¹ @opendorse, TWITTER (Feb. 12, 2021, 1:58pm) <https://twitter.com/opendorse/status/1360332564620333067?s=21>.

issues have arisen, Part VI walks through a detailed analysis of the Mitchell v. James lawsuits, and finally, Part V provides recommendations to better protect athletes from liability.

II. PHOTOGRAPHS ARE COPYRIGHTABLE AND, BY DEFAULT, OWNED BY THE PHOTOGRAPHER

A. Creation and Ownership of Copyrightable Works

Congress derives its authority to create copyright law from Article I, Section 8, Clause 8, of the U.S. Constitution, commonly referred to as the “IP Clause.” Copyrights exist to provide rights to creators for original expressions. Indeed, copyright grants authors five exclusive rights including the right to reproduce, prepare derivative works, distribute copies of the work, perform the work publicly, and display the work publicly.² The rationale for copyright law is that it exists to promote expression which encourages public learning and knowledge.

Copyrightable expressions must be the appropriate subject matter, original, and include at least a minimal degree of creativity fixed in a tangible medium. Copyright protection arises automatically once these requirements are satisfied, although additional benefits are obtained by formally registering the work with the U.S. Copyright Office.

Common eligible subject matters include literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures and audiovisual works, sound recordings, and architectural works.³ This list is non-exhaustive, thus even works outside this list may be copyright protected. Originality is met when an author independently creates a work without copying from another provided that the work exhibits a minimal degree of creativity.⁴ Fixation is met when a work is embodied in a tangible medium, such as a memory card, that permits it to be perceived for more than transitory duration.⁵

Registering a copyright with the U.S. Copyright Office provides official notice of ownership in the public record. It prevents an infringer from claiming innocent infringement. While this choice is voluntary, it is beneficial because it is required to file suit and makes additional remedies available.⁶

Infringement of a copyright can be direct or indirect. To prove direct infringement, there must be an element of volition or causation.⁷ Direct infringement is strict liability, which means intent is irrelevant. Indirect infringement may arise under a pair of legal doctrines. These doctrines include

² 17 U.S.C. § 106.

³ 17 U.S.C. § 102(a).

⁴ *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

⁵ 17 U.S.C. § 101.

⁶ 17 U.S.C. § 412.

⁷ See *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F.Supp. 1361, 1370 (N.D. Cal. 1995).

vicarious infringement, which requires control and financial benefit being present⁸, or contributory infringement, which requires knowledge and material contribution, or inducement to be present.⁹

Copyright ownership includes three distinct categories. These three categories are (1) sole and joint authorship¹⁰; (2) works made for hire¹¹; and (3) transfers¹² which are commonly referred to as assignments or licenses.

For joint ownership of a copyright to exist, there must be at least two authors who have an intent that their contributions be merged.¹³ Further, this merger must result in inseparable or interdependent parts of a whole.¹⁴

Section 101 of the Copyright Act outlines the two situations in which a work made for hire may arise. A work made for hire arises when: (1) a work is prepared by an employee within the scope of their employment; or (2) a work is specifically commissioned for use as a contribution to a collective work, as part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties agree, signed in writing, that the work shall be considered a work made for hire.¹⁵ In analyzing if a work was created within the scope of employment, there are three factors. These factors include if (1) the work was in the realm of the work in which the employee was hired to perform; (2) the employee's creation of the program occurred substantially within the authorized time and space limits of their job; and (3) the work was actuated by a purpose to serve the employer's interests.¹⁶ To determine whether the creator was an "employee" at the time the work was created, courts use common law principles of agency and employment law rather than relying merely on a written statement designating someone an employee.¹⁷

The final ownership category of assignments and licenses covers contractual transfers of a copyright and is outlined in 17 U.S.C. § 201(d). Licenses and assignments can be exclusive, meaning the author does not retain the copyright, or non-exclusive, meaning the author does retain for themselves or someone else the copyright. In transferring a copyright, a license refers to anything less than the entire copyright, whereas an assignment refers to a transfer of all of the rights. If a transfer is exclusive, copyright owners must sign a writing that manifests their intent to transfer the rights.¹⁸

⁸ See *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304 (2d Cir. 1963).

⁹ See *Gershwin Publ'g Corp. v. Columbia Artists Mgmt.*, 443 F.2d 1159 (2d Cir. 1971).

¹⁰ 17 U.S.C. § 201(a).

¹¹ 17 U.S.C. § 201(b).

¹² 17 U.S.C. § 201(d).

¹³ 17 U.S.C. § 101.

¹⁴ *Id.*

¹⁵ 17 U.S.C. § 101.

¹⁶ *Cramer v. Crestar Fin. Corp.*, 67 F.3d 294 (4th Cir.) (unpublished opinion).

¹⁷ For further analysis in determining whether an employment relationship exists, see *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).

¹⁸ 17 U.S.C. § 204(a).

B. Copyright Protection for Social Media Content

Today, copyright protection for photographs taken by known authors begins on the date of creation and ends 70 years after the death of the author.¹⁹ Copyright protection for works made by unknown authors or works made for hire is the shorter of 95 years from the year of publication, or 120 years from the year of creation.²⁰ As noted above, there are benefits to formally registering the copyrighted work with the Copyright Office. However, copyright protection arises automatically when the work is created without any formal registration required.

Generally, the copyright of a photograph belongs to the photographer, not the subject of a photograph. This is true except in limited specific situations, such as joint authorship or works made for hire. However, typically, photographers own the copyright to their photographs because photographs represent the photographers' creative work. 17 U.S.C. § 201 states that copyright ownership vests in the author or authors of a work.²¹ While 17 U.S.C. § 201 does not define an author, the Supreme Court has defined the term to mean the person "to whom anything owes its origin, originator, maker, one who completes a work of science or literature ... the person who puts the ideas of the mind into a visible expression."²² Regarding photographs, a photographer is the party who arranges the scene, decides on the lighting, angles, colors, and other features of a photograph.²³ Therefore, a photographer is analogous to a painter crafting a painting or a writer writing an original work.²⁴

To transfer ownership of a copyright, a contract must exist between the photographer and the interested party. Any party who is interested can contract to own a copyright, whether it be the subject of the photograph, or some other individual or entity. Since photographers own their creative works, they also control the right of reproduction.²⁵ In other words, the photographer owns the right to republish it on social media and has discretion regarding how to license this right.

C. Rights of a Person Photographed

A person who is photographed typically does not own the copyright to the photo absent a contractual agreement. However, an individual may have other rights regarding the image. A person who is a subject of a photograph may own their personal right of publicity or have rights under state or federal privacy laws.

Rights of publicity exist to protect against the misappropriation of an individual's name, image, likeness, or other indicia of one's persona for commercial benefit.²⁶ While this right of publicity

¹⁹ 17 U.S.C. § 302 which applies to works created on or after January 1, 1978.

²⁰ *Id.*

²¹ 17 U.S.C. § 201.

²² *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

²³ *Id.* at 60.

²⁴ *Id.* at 61.

²⁵ 17 U.S.C. § 106(1).

²⁶ See Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, AMERICAN BAR (Aug.

does not exist in federal statute,²⁷ a majority of states recognize the right of publicity by state statute²⁸ or case law. Therefore, there is some inconsistency as to the extent to which these rights cover, as it varies on a state-by-state basis.

Some states recognize publicity rights as part of an individual's right of privacy.²⁹ While the Restatement Second of Torts recognizes four different types of invasion of privacy, appropriation of name or likeness is the most similar to an invasion of the right of publicity.³⁰

Other states protect an individual's right of publicity through the law of unfair competition.³¹ Unfair competition is primarily comprised of the torts that cause an economic injury to an individual. Examples of unfair competition include not only trademark infringement but also misappropriation. In misappropriation issues, the right of publicity is often invoked. Misappropriation encompasses the unauthorized or illegal use of property for purposes other than for which it was intended.³² The misappropriation doctrine seeks to protect things of value not otherwise covered by patent law, copyright law, breach of confidential duty, and extends to include some other forms of unfair competition.³³

D. Defenses to Copyright Infringement

Copyright law recognizes several defenses. These defenses include innocent infringement,³⁴ abandonment,³⁵ laches,³⁶ statute of limitations,³⁷ and fair use.³⁸ Asserting that the work is an independent creation, or that a license was granted is also possible. Of these, fair use is the most commonly used defense in copyright cases. An argument of fair use may be successful in relation to photography when it is argued that the photo is intended for news reporting, criticism, comment, or one of several other limited purposes.³⁹

2011) https://www.americanbar.org/content/dam/aba/publications/communications_lawyer/august2011/why_federal_right_publicity_statute_is_necessary_comm_law_28_2.authcheckdam.pdf.

²⁷ *But see* 15 U.S.C. §1125, governing false designations of origin, false descriptions, and dilution forbidden offering protection for a person whose identity is used to falsely advertise a product or any false designation of its origin.

²⁸ States that have statutory provisions related to a right of privacy include Alaska, art. I, § 22; Ariz., art. II, § 8; Cal., art. I, § 1; Fla., art. I, § 23; art. I, § 12; Haw., art. I, §§ 6 and 7; Ill., art. I, § 6; La., art. I, § 5; Mont., art. II, § 10; N.H., art. 2-b; S.C., art. I, § 10; Wash., art. I, § 7.

²⁹ *See* Cornell Law School, *Publicity* <https://www.law.cornell.edu/wex/publicity> (last visited: March 25, 2021).

³⁰ *See* Restatement (Second) of Torts § 652C, comments a & b, illustrations 1 & 2 (Am. L. Inst. 1977).

³¹ *See generally* Cornell Law School, *Publicity* <https://www.law.cornell.edu/wex/publicity> (last visited: March 25, 2021); Restatement (Third) of Unfair Competition, s.46-49 (Am. L. Inst. 1995).

³² *Doherty vs. Ret. Bd. of Medford*, 425 Mass.130, 143 (Mass. 1997).

³³ *U.S. Golf Ass'n v. Arroyo Software Corp.*, 81 Cal.Rptr.2d 708, 714 (Cal. Ct. App. 1999).

³⁴ 17 U.S.C. § 495(b).

³⁵ *E.g.*, *Bell v. Combined Registry Co.*, 536 F2d 164 (7th Cir. 1976).

³⁶ *E.g.*, *Lotte Joplin Thomas Tr. v. Crown Publishers, Inc.*, 592 F2d 651 (2d Cir. 1978).

³⁷ 17 U.S.C. § 507(b).

³⁸ 17 U.S.C. § 107.

³⁹ *Id.*

Section 107 of the Copyright Act requires courts to consider four factors in assessing whether a use of a copyright is fair. These include: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; (4) the effect of the use upon the potential market for, or value of, the copyrighted work.⁴⁰

The first factor analyzes whether the use transforms the original work. For example, courts have analyzed this to determine if it gives a new meaning or message to the original work.⁴¹ Some courts consider this factor the most important factor.⁴² In the context of sharing photos on social media, a court may analyze the reasoning behind why a photograph was posted and what purpose it is striving to serve. However, whether a copyrighted work is used for commercial or non-commercial purposes is also part of the first factor analysis and may often weigh against the infringer in the social media context.

The second factor relates to the characteristics of the infringed-upon work.⁴³ More factual or functional works can more readily be used as compared to more fictional and fanciful works. Further, courts may consider whether the creator's work has previously been published or remains unpublished.⁴⁴ In the context of social media, a court would observe that the work was published for broad consumption, and further, that the photograph represents the unique talents of the photographer in terms of composition, color, and timing.

The third factor considers how much of the protected work was taken from both a quantitative and qualitative perspective.⁴⁵ In the social media contexts, copyrighted works are often reposted or otherwise used in their entirety. In such cases, there is both a high degree of quantity and quality taken from the original work.

The fourth factor analyzes the market impact of the infringing work.⁴⁶ For example, a movie critic may quote or show clips while criticizing a movie. Indeed, that criticism may even diminish the movie's financial success. However, that kind of market impact is outside the scope of the fourth factor because people do not substitute the review for the movie itself. Courts generally give this factor the second most weight⁴⁷ and consider the extent of harm caused by the particular actions of the alleged infringer.⁴⁸ One could argue in the social media context that freely taking and reposting images is detrimental to the original photographers licensing revenue for her work.

⁴⁰ *Id.*

⁴¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994).

⁴² *Id.* at 585.

⁴³ *Authors Guild v. Google, Inc.*, 804 F.3d 202, 220 (2d Cir. 2015).

⁴⁴ *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 564 (1985).

⁴⁵ *See Campbell*, 510 U.S. at 586 (1994).

⁴⁶ *See Campbell*, 510 U.S. at 590 (1994).

⁴⁷ Prior to *Campbell vs. Acuff-Rose Music, Inc.*, courts indicated the fourth factor weighed the heaviest *See Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539 (1985). Subsequently, courts have accorded the first factor the most weight.

⁴⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

The fair use factors are considered together in light of the purpose of the copyright.⁴⁹ The evaluation of the fair-use factors has evolved over time. This analysis began as a question of fact for a jury⁵⁰ but has evolved to being interpreted as legal issues suited for a judge.⁵¹ However, historical facts of what occurred remain as factual issues in this analysis.⁵²

E. Remedies for Copyright Infringement

Injunctive and monetary relief are both available as remedies in Copyright litigation. Regarding damages, actual damages like profits generated may be available.⁵³ Alternatively, statutory damages may be available if the copyright owner registered the work prior to the infringement occurring. Statutory damages range from \$750 to \$30,000 per act of infringement and can be increased to \$150,000 for willful infringement.⁵⁴

Further remedies exist in Copyright litigation including injunctive relief⁵⁵ and seizure or destruction of the infringing materials.⁵⁶ Lastly, costs including attorney fees may also be awarded.⁵⁷

F. Professional Sports Collective Bargaining Agreements Addressing Copyrights

The NBA CBA is the governing contract in professional basketball. It is negotiated between the NBA and the NBA Players Association. The current NBA CBA took effect on July 1, 2017 and runs through the end of the 2023-24 season. According to current CBA and NBA media policies, photojournalists are permitted to take photos during games so long as the photos' intended use is for news coverage of the game.⁵⁸ This concept is consistent with general copyright law, as well as the majority of professional sports leagues in the United States.

The publicity rights of an individual player during an NBA basketball game are therefore restricted under the CBA. The CBA grants the NBA authority over essentially all of the league's media rights.⁵⁹ This extends to still images taken of players during games.⁶⁰ The NBA has the authority to use, exhibit, distribute, or license any performance of the players in any form of media.⁶¹ These

⁴⁹ *Id.* at 586.

⁵⁰ *See, MCA Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1931).

⁵¹ *See, e.g., Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986); *But see Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 560 (1985) stating fair use is a mixed question of law and fact.

⁵² *See, e.g., Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986).

⁵³ 17 U.S.C. § 504(b).

⁵⁴ 17 U.S.C. § 504(c).

⁵⁵ 17 U.S.C. § 502.

⁵⁶ 17 U.S.C. § 503.

⁵⁷ 17 U.S.C. § 505.

⁵⁸ NATIONAL BASKETBALL ASSOCIATION, *Collective Bargaining Agreement*, art. XXVIII Media Rights 378-80 (Jan. 19, 2017) <https://cosmic-s3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf>.

⁵⁹ *Id.* at 378.

⁶⁰ *Id.* at 380.

⁶¹ *Id.* at 378.

in-game and out-of-game licensing policies in the CBA include a right for photojournalists to take professional photos of players while playing games.⁶² The fact that players are performing their professional obligation, playing in the game, is indicative that the CBA governs this space.

The rights of an NBA player regarding photos used for promotional purposes, which likely extends to social media, are as follows. If a telecaster or other distributor of NBA content uses or authorizes another to use player attributes in creative elements within promotions in a manner that are not consistent with Section 3(e)(iii)...

...[A]nd (y) unduly promotes the products or services of a sponsor, and (ii) the promotion of the sponsor's products or services within such promotional opportunity is more prominent than the NBA content, to which it relates, taken as a whole, then the Players Association shall notify the NBA in writing, and (B) the NBA shall have a period of fifteen (15) days to cause the telecaster or distributor to cease or modify such creative elements.⁶³

After the players association notifies the NBA in writing, NBA players can seek a remedy for any resulting damages. Players can do this by suing the NBA if the NBA fails to cure the issues, even if the NBA did not authorize the promotional opportunity.⁶⁴

The National Football League ("NFL") CBA contains similar language. The NFL CBA was agreed to on March 15, 2020. The current agreement runs for 10 years. Within the NFL CBA, Section 4(b) of Appendix A discusses the publicity and NFL Players' Association group licensing program.⁶⁵ In this provision, players grant the clubs and leagues the authority to not only use but also authorize others to use, pictures and photographs (among other things) for promotional purposes. However, there is a limitation in this provision that relates to a player's right of publicity. The provision states that nothing in the agreement is to confer any right or authority to use a player's publicity rights in a manner that constitutes any endorsement by a player of a third-party brand, product, or service.⁶⁶

III. Copyright Infringement Involving High-Profile Individuals

Several recent copyright disputes have involved athletes posting photographs. Athletes and celebrities have used social media to post images of themselves taken by photojournalists without permission or a license from the photojournalists.

⁶² *Id.* at 380.

⁶³ *Id.*

⁶⁴ *Id.* at 381.

⁶⁵ NATIONAL FOOTBALL LEAGUE, *Collective Bargaining Agreement*, Appendix A 334 (Mar. 15, 2020)

<https://nflpaweb.blob.core.windows.net/website/PDFs/CBA/March-15-2020-NFL-NFLPA-Collective-Bargaining-Agreement-Final-Executed-Copy.pdf>.

⁶⁶ *Id.* at 335.

For example, LeBron James, Deshaun Watson, and Khloe Kardashian have been sued for copyright infringement due to their social media posts, as discussed below. These kinds of suits are not uncommon.⁶⁷

In 2017, Khloe Kardashian was accused by Xposure Photos of removing copyright information attached to an image of herself.⁶⁸ Kardashian then allegedly shared it to her millions of followers on her Instagram account without Xposure's approval.⁶⁹ According to the lawsuit, photographer Manuel Muñoz took the photograph which was then licensed by Xposure to The Daily Mail.⁷⁰ The Daily Mail posted the images after obtaining the license from Xposure which included notice of copyright ownership for xposurephotos.com on the bottom left corner of the image.⁷¹

Xposure claimed that Kardashian removed the copyright notice from the photo, then proceeded to post it to her account which had nearly 67 million followers at the time.⁷² Xposure sought an injunction to prevent Kardashian from using the photograph any further.⁷³ Further, Xposure sought statutory damages of \$25,000 and any profits that may have been generated from the misuse of the photograph.⁷⁴ Before reaching a verdict, this case reached a settlement out of court.⁷⁵

In 2020, Houston Texans Quarterback and rising National Football League star Deshaun Watson was sued by freelance photographer Aaron M. Sprecher.⁷⁶ The lawsuit came shortly after Watson signed a \$156 million contract extension with the Houston Texans.⁷⁷ As a freelance photographer, Sprecher earns income by licensing his photographs to news sources such as the Associated Press.⁷⁸

Sprecher sued Watson alleging that three photographs he took in 2017, 2018, and 2020, that were formally registered with the U.S. Copyright Office, were published by Watson without his permission.⁷⁹ The allegation stated that Watson, who had 1.4 million followers on Instagram at the time, was not believed to have sought a license from The Associated Press before posting the

⁶⁷ Various other celebrities that have been named in copyright lawsuits include Emily Ratajkowski, Complaint at 1, *O'Neil v. Ratajkowski et al.*, Docket No. 1:19-cv-09769 (S.D. N.Y. 2019); Kim Kardashian, Complaint at 1, *Xposure Photos UK Ltd. v. Khloe Kardashian et al.*, Docket No. 2:17-cv-03088 (C.D. Cal. 2017); Gigi Hadid, Complaint at 3, *Cepeda v. Hadid et al.*, Docket No. 1:17-cv-00989 (E.D. Va. 2017).

⁶⁸ Complaint at 4, *Xposure Photos UK Ltd. v. Khloe Kardashian et al.*, Docket No. 2:17-cv-03088 (C.D. Cal. 2017).

⁶⁹ *Id.*

⁷⁰ *Id.* at 3.

⁷¹ *Id.*

⁷² *Id.* at 4.

⁷³ *Id.* at 7, 8.

⁷⁴ *Id.*

⁷⁵ Mediation Report, (Mar. 12, 2018), *Xposure Photos UK Ltd. v. Khloe Kardashian et al.*, Docket No. 2:17-cv-03088 (C.D. Cal. 2017).

⁷⁶ Complaint at 1, *Sprecher v. Watson*, Docket No. 4:20-cv-03196 (S.D. Tex. 2020).

⁷⁷ See Joel Corry, *Agent's Take: Why Deshaun Watson's Four-Year Extension Compares Favorably To Patrick Mahomes' 10-Year Megadeal*, CBS SPORTS (Sept. 9, 2020), <https://www.cbssports.com/nfl/news/agents-take-why-deshaun-watsons-four-year-extension-compares-favorably-to-patrick-mahomes-10-year-megadeal/>.

⁷⁸ Complaint at 2, *Sprecher v. Watson*, Docket No. 4:20-cv-03196 (S.D. Tex. 2020).

⁷⁹ Complaint at 3-7, *Sprecher v. Watson*, Docket No. 4:20-cv-03196 (S.D. Tex. 2020).

photographs.⁸⁰ The complaint did not state a demand for a specific monetary figure. On February 25, 2021, the United States District Court for the Southern District of Texas announced that a settlement in this matter was reached.⁸¹

In a similar case, LeBron James and the relevant parties who operate his social media channels were sued by photographer Steve Mitchell on March 17, 2020.⁸² Mitchell, who has a career spanning 27-years as a photojournalist of professional sports, has had his work appear in *Sports Illustrated* and ESPN.⁸³ Mitchell, like the previous photographers mentioned in the other lawsuits, works on the basis of licensing his photographs for a fee. In December 2019, a picture Mitchell took of James mid-game during a slam-dunk was cropped and posted to James' social media.⁸⁴ As a part of his demand, Mitchell sought a jury trial to determine whether Section 501 of the Copyright Act was violated.⁸⁵ Mitchell sought damages based on the profits and revenue generated from the posts or alternatively \$150,000 per infringement.⁸⁶

James responded to Mitchell with a lawsuit of his own. James filed a countersuit alleging that Mitchell illegally used the photos on Mitchell's website to promote Mitchell's services.⁸⁷ James alleged that the website touted James' celebrity status as a connection. James' attorney, Howard Shire, claimed that James tried to settle the initial lawsuit for a reasonable amount.⁸⁸ However, when the two parties were unable to reach an agreement, the countersuit was filed.⁸⁹ Interestingly, Shire also stated that James continued to attempt to resolve the matter amicably after the filing of the countersuit and that James had no ultimate intention of obtaining any amount from Mitchell.⁹⁰ On December 21, 2020, Judge George Wu called on both sides to settle the dispute.⁹¹ On February 25, 2021, based upon the stipulation between the parties and their respective counsel, the action was dismissed by the District Court with prejudice in its entirety.⁹² Each party was ordered to bear its own attorneys' fees and expenses.⁹³

IV. Analysis of the LeBron James Copyright Lawsuits

⁸⁰ *Id.* at 3,6.

⁸¹ Order of Dismissal at 1, *Sprecher v. Watson*, Docket No. 4:20-cv-03196 (S.D. Tex. 2020).

⁸² Complaint at 1, *Mitchell v. James et al.*, Docket No. 2:20-cv-08188 (C.D. Cal. 2020).

⁸³ Phil Mistry, *LeBron James Slams Photog with \$1M Countersuit in Copyright Fight*, PETA PIXEL (Dec. 26, 2020), <https://petapixel.com/2020/12/26/lebron-james-slaps-photographer-with-1m-countersuit-in-copyright-fight/>.

⁸⁴ Complaint at 3, *Mitchell v. James et al.*, Docket No. 2:20-cv-08188 (C.D. Cal. 2020).

⁸⁵ *Id.* at 4,5.

⁸⁶ *Id.*

⁸⁷ Answer and Counterclaims at 8-10, *Mitchell v. James et al.*, Docket No. 2:20-cv-08188 (C.D. Cal. 2020).

⁸⁸ Mistry, *Supra* note 83.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Telephonic Hearing on Plaintiff's Motion to Dismiss and/or Strike Defendant's Counterclaims, *Mitchell v. James et al.*, Docket No. 2:20-cv-08188 (C.D. Cal. 2020).

⁹² Order to Dismiss with Prejudice at 1, *Mitchell v. James et al.*, Docket No. 2:20-cv-08188 (C.D. Cal. 2020).

⁹³ *Id.*

A. The Underlying Photographs are Copyrightable and Owned by the Photographer

The legal analysis for *James v. Mitchell* begins by first determining if there was a valid copyright in the photograph. To be copyrightable, a work must be original, include at least a minimal degree of creativity, and be fixed in a tangible medium. A pictorial work such as a photograph is expressly included in the non-exhaustive list of copyrightable works recited in 17 U.S.C. § 102(a). Originality is met because the author exercised at least a minimal degree of creativity. For example, the photographer chose when and how to press the shutter on his camera, configured settings in the camera to account for lighting and background blur, among other things. Lastly, the photo was saved on a digital media device such as a memory card, and, therefore, it became fixed in a tangible medium. Once the photo met all of these requirements, the copyright automatically began to exist.

B. Steven Mitchell is the Author and Owner of the Photograph and Copyright

The owner of the photograph is the author, Steven Mitchell. Mitchell was in attendance working as a photographer at the basketball game when he took the photo of James.⁹⁴ Mitchell's purpose in taking this photo was for news coverage. When Mitchell pressed the shutter on his camera to capture this photograph, this photograph became his creative work. In essence, he owned the copyright to this photograph, not James, per the copyright principles discussed previously. Mitchell owns the right of reproduction to this creative work, which he never licensed. Further, Mitchell's business model includes a licensing structure, indicating this was not a work made for hire.⁹⁵ Accordingly, he was the sole owner of the photo. Lastly, Mitchell additionally took the extra step to register the creative work with the U.S. Copyright office after James posted the photo.⁹⁶ This provided official notice of his copyright in the public record and prima facie evidence of ownership. Despite this, James continued to leave the photograph posted online after the formal registration.⁹⁷

C. Direct Infringement Occurred When James Posted the Photo

Assuming there is likely a rightful copyright held by Mitchell, determining infringement is the next step. Mitchell claims James reposted the photograph he took without being granted permission.⁹⁸ In essence, Mitchell claims James is liable for direct infringement. Direct infringement occurs when a defendant exercises one of the exclusive rights recited in 17 U.S.C. § 106 without permission from the copyright holder. Here, James created a copy of the photo as part of the process of posting it to his social media accounts. Additionally, James violated the right of public display by making the photo available to the public without permission of the copyright owner. James must have known about the original photo, by finding it online, in order to repost it onto his social media. The photo posted by James was virtually identical to the original.

⁹⁴ Complaint at 3, *Mitchell v. James et al.*, Docket No. 2:20-cv-08188 (C.D. Cal. 2020).

⁹⁵ *Id.* at 2.

⁹⁶ *Id.* at 3.

⁹⁷ *Id.* at 4.

⁹⁸ *Id.* at 3.

D. Right of Publicity and Claims of Fair Use are the Most Relevant Defenses for LeBron James

If there is a valid copyright for which there was infringement, there may be a number of reasonable defenses. These include the right of publicity and fair use.

The fact that James is undoubtedly one of the main focuses (or potentially the sole focus) of the photo, may lead a court of law to be compelled that this photograph intersects with his right of publicity. However, the reason this is unlikely to be a compelling argument in this specific case is due to the fact the NBA CBA governs the in-game and out-of-game licensing policies in situations like this. In short, the CBA hinders James's ability to bring this defense.

Plausibly, James' most likely and compelling defense is fair use. Section 107 of the Copyright Act recites four factors of fair use, including" (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; (4) the effect of the use upon the potential market for, or value of, the copyrighted work.

Regarding element (1) James could assert that the purpose of posting the photograph was to notify and educate his social media followers of the event that occurred. Further evidence of this may be demonstrated through the caption used on the photograph, which stated, "What. A. Time. To. Be. Alive and I'm LIVING with Pure Joy! Thank You."⁹⁹ James may be able to assert he was notifying the fans of the news of his pure joy of being alive or playing basketball.

Arguing element (2) may prove difficult for James. He would likely have to assert that Mitchell's work was not creative. James may attempt to demonstrate that the image merely demonstrates the scoring of a basketball as a part of his job function, which does not entail a creative or unique story. Mitchell could likely argue artistic elements that a photographer highlights, such as the crowd in the background, or nearby players as a response to prevail on this prong. After all, the image was prolific enough to warrant James to post it, it likely would be difficult to argue it was not unique.

James may have a favorable argument in regard to element (3). The photograph that James posted was clearly cropped and leaves out a portion of Mitchell's original creative work. The image that James posted crops out multiple other players and could be argued to amplify James as the true focal point of the image. The original work may arguably amplify different things, such as the surroundings during the moment of the slam dunk.

However, Mitchell may try to argue that doing this is irrelevant. He may assert that the purpose of the image was not to record fan or player responses but to capture James soaring through the air slam dunking. Further, the image was merely condensed by being cropped. The photo was not altered through coloring, creative graphics, or anything of this nature.

⁹⁹ Mistry, *supra* note 83.

Lastly, James may be able to argue that this image did not impact element (4) and alter the potential market. This could potentially shift the burden to Mitchell to prove that he lost financial opportunities because of James' post, and he did not have the ability to license his original work. Mitchell may argue that once James posted this to his social media channels and it circled through basketball fans free of cost, the original image no longer retained its value. Further, he may assert there was no specific attempt to minimize reproduction by James. While James may not have directly profited from the use of the cropped photo, it may be argued that the image helped to continue to grow James's personal brand. This growth will inevitably lead to future business opportunities for James. In other words, while James may not have profited from the specific post including the photo, it may have indirectly raised the value of his page and personal brand.¹⁰⁰

E. James Countersued Mitchell Alleging Mitchell Improperly Took Advantage of his Likeness

LeBron James countersued Steve Mitchell and alleged that Mitchell illegally used photos of James on Mitchell's website.¹⁰¹ This may have been used in an attempt to promote his own photography services business. In essence, the allegation that James is making is that Mitchell is attempting to profit off James' image and likeness by posting photos of James. As a result, posting these photos of James may be construed by viewers as a connection of status, or some other form of connection between Mitchell and James.

Siding with James may set a stern precedent for photojournalists. Mitchell's attorney Kevin McColluch claimed the countersuit was an attempt to "harass" Mitchell and was "threatening to bankrupt a courtside photographer." However, publicity law may debatably be on James' side.

Recall that rights of publicity exist to protect against the misappropriation of an individual's name, image, or likeness for commercial benefit. In this scenario, James may argue that Mitchell was misappropriating his images in order to enhance and appreciate his photography services business. Mitchell may be able to counterclaim that the images of James are merely examples of his creative work products. This exact scenario would likely require a deeper analysis in order to draw a conclusion determining whether Mitchell manipulated his website to appear that he had a connection with James. Perhaps if Mitchell's website included five photos and three of them were of James, one may reasonably draw this connection. Alternatively, if Mitchell's website included 115 photos and only three of them were of James, this conclusion seems less likely.

As mentioned previously, in December of 2020, the cases were ordered to settle.¹⁰² In February 2021, an order to dismiss with prejudice was filed, indicated an agreement was likely reached.¹⁰³ However, two things have become clear regardless of the financial outcomes of the Deshaun Watson and LeBron James lawsuits. First, professional athletes who sign lucrative contracts have

¹⁰⁰ For an additional analysis of the initial *James v. Mitchell* lawsuit, see sports journalist, attorney, and Professor Michael McCann's thoughts at <https://www.si.com/nba/2020/03/23/lebron-james-lakers-photo-copyright-lawsuit>.

¹⁰¹ Answer and Counterclaims at 8-10, *Mitchell v. James et al.*, Docket No. 2:20-cv-08188 (C.D. Cal. 2020).

¹⁰² Telephonic Hearing on Plaintiff's Motion to Dismiss and/or Strike Defendant's Counterclaims, *Mitchell v. James et al.*, Docket No. 2:20-cv-08188 (C.D. Cal. 2020).

¹⁰³ Order to Dismiss with Prejudice at 1, *Mitchell v. James et al.*, Docket No. 2:20-cv-08188 (C.D. Cal. 2020).

become apparent targets for copyright litigation. Second, professional sports leagues need to properly protect athletes from this sort of potential litigation.

V. Recommendations for Helping Athletes Avoid Copyright Disputes

I recommend three ways for professional athletes to avoid copyright disputes. The first and most effective would be having individual leagues' Collective Bargaining Agreements address these concerns. Alternatively, this could be included in player contracts with their respective teams. Lastly, federal legislation may be an effective way to reduce copyright disputes.

A. Professional Sports Leagues Collective Bargaining Agreements Can Protect Athletes

Darren Heitner, who previously spent time writing for Forbes and currently Above the Law, is an attorney and professor specializing in sports and intellectual property. Heitner stated, “[I]t should be on the leagues and/or players’ unions to ensure that the athletes have the tools at hand to quickly clear intellectual property issues so that they can celebrate their accomplishments with their fans and further their engagement without running the risk of inviting additional legal exposure.”¹⁰⁴

Heitner hits the nail on the head. CBAs can solve the problems surrounding athletes using images of themselves and sharing them on their social media channels. Additionally, these agreements are best situated to create clarity. Not only will this create clarity for photojournalists and players regarding policies, but it may also provide players with the necessary protection they need.

Throughout the NBA CBA, the terms “copyright,” intellectual property,” and “photo” never appear. In a growing digital age, the time has come to address this oversight.

There are a few different ways professional leagues like the NBA can address this in their CBAs. Leagues may be able to do this through licensing agreements with photographers and other relevant companies. Alternatively, leagues may pursue the option of adding a specified credential requirement for photojournalists. Regardless, whether it is one of these options, or an option not explained in this note that each league chooses to pursue, the outcome is commensurate. The most appropriate place to confront these issues is within league CBAs.

Professional sports league CBAs could address this by creating a formalized licensing agreement. Such an agreement could contain a provision allowing players to redistribute images of themselves. From such a provision, players would then have the right to post to specific platforms. In such an agreement, the league could implement licensing arrangements with ESPN, Sports Illustrated, Getty Images, or any number of sports platforms that distribute images of athletes. Implementing this sort of agreement could permit players through a license to reshare images of themselves that are available on these platforms.

¹⁰⁴ Darren Heitner, *Deshaun Watson Will Need To Prove Fair Use To Avoid Being Sacked In Copyright Case*, ABOVE THE LAW (Sept. 22, 2020), <https://abovethelaw.com/2020/09/deshaun-watson-will-need-to-prove-fair-use-to-avoid-being-sacked-in-copyright-case/?rf=1>.

With this idea, leagues could decide to reach an agreement with a mere single, or any number of platforms. This is an enticing proposition because it is likely this would create a benefit that is twofold. First, this would initiate a highly sought-after partnership with each professional league. In turn, this would drive additional revenue. Photography companies and news providers would surely want to compete for this right. Second, this may finally lead to the implementation of comprehensible instructions for players. These instructions can provide clarity for players regarding what sources they have a license to repost images of themselves playing from. This would eliminate confusion for players and reduce disputes because they would know what images they have the right to repost.

To satisfy all parties of the proposed resharing licensing partnership, specific formalities would likely need to be implemented. One example may include in the bottom corner of each image a watermark is incorporated. This watermark could provide credit to the company, or individual photographer who captured the image. Therefore, companies and photographers would still retain recognition for their work. By formalizing this requirement, leagues would be taking the requisite extra measure to ensure their players are protected. Through this, players would be provided with the resources to strive to grow their individual brands. Leagues should be supportive of this measure, and of athletes growing their brands, as athletes' individual brands serve as an indispensable metric to increasing league exposure. This exposure not only helps leagues connect with younger demographics, but also drives revenue and value.

In this recommendation, there are winners all-around. The league gains exposure which leads to revenue. This is accomplished by the players driving fan interaction through sharing content. Players in turn have the ability to grow their personal brands without worrying about legal risks and subjecting themselves to additional disputes. Photojournalists and photography companies retain recognition for their creative works and avoid conflicts including potential litigation. Further, if implemented, this would result in generating valuable advertising and exposure for photographers when an athlete posts their image. In an agreement of this nature, all the relevant parties stand to benefit.

An alternative way this could be implemented through league CBAs could be through amending credential requirements and ticketing provisions. Professional sports leagues could create an additional credential requirement for journalists who intend to take photographs at professional sporting events. By obtaining this new credential, a photographer would essentially be agreeing to license the images to all players on the teams which are playing. To supplement this requirement, leagues could also add in ticket purchasing agreements a provision that grants players the express license to redistribute any photographs taken at the event. By adding these two requirements, players would no longer need to be concerned with the fact of where an image of them shooting a basketball, scoring a goal, or hitting a home run came from. Further, implementing both of these measures would additionally protect players in resharing images taken by fans.

While who bears the burden of cost for the credential requirement for photographers would be contentious upon implementation, it would likely need to be individual leagues. If the cost of this were to fall upon photojournalists, this would likely be subject to further legal challenges. However, if leagues were to offer some sort of privilege or incentive to photojournalists to ensure this did not cut into photojournalists' revenue exploration opportunities, like licensing images to

players directly, this proposal may be effective. Furthermore, the grim alternative may be individual leagues reaching agreements with only certain agencies and photojournalists, which ultimately would result in a loss of opportunity for the rest of the photographers taking photos. To avoid this, photojournalists may choose to comply with a new credential requirement.

However, for the reasons explained previously and potential legal challenges that may arise stemming from a credential requirement, the first CBA recommendation seems like a superior solution for leagues to consider. Ultimately, regardless of who bears the cost, and which option leagues pursue, one thing stays consistent. Navigating this requirement would not be solely on the players. The burden would be placed on professional sports leagues and players' unions to work this out to amply protect their athletes. This is logical as both sides will benefit. Players' unions fulfill their duty of protecting their players, and professional leagues benefit as their leagues continue to see growth through individual athlete marketing.

Players should not have to worry about copyright issues on a day-to-day basis. Further, professional athletes should not be required to comprehend the complexities entailed within copyright law. While many top-tier professional athletes have ascended to essentially becoming walking businesses, not all professional athletes have. The current system creates a disparate impact amongst athletes who do not have the requisite knowledge to understand these legal complexities or have hired professionals helping them in their business matters. Players' unions and representation bodies need to recognize this issue and advocate for a change to protect all athletes equally.

Professional athletes are not required to have attorneys on-call to help them navigate the complexities surrounding their professional obligations. Multiple professional sports leagues do not even require that professional athletes have an agent, let alone require that the agent have attended law school or have legal experience. Expecting athletes to understand or require that they have the resources to navigate copyright law individually is beyond unrealistic. This notion is ludicrous. Professional sports leagues, teams, and unions, who have attorneys available and on staff are more optimally suited to navigate these complexities and protect the best interests of their players. Further, these parties are incentivized to protect the athletes, because it ultimately entails the best interest of their sport. Leagues should continue to encourage their athletes to grow their individual brands, which in turn will inevitably grow their league. Contrarily, not implementing protective measures and subjecting athletes to continuously be parties in litigation will gain increasingly bad press. If professional athletes are not protected or provided ample guidance, it will be detrimental to the public perception of that league. Such a scenario does not benefit any party.

B. Player Contract Provision Extensions Can Be Implemented via Collective Bargaining Agreements

If leagues are unable to amply protect their athletes through one of the previous (or similar) recommendations, there is an effective alternative. Players may be protected, or at the bare minimum, they can be informed, of the risks associated with copyright infringement in their player contracts. It can be specified in a provision that if the players republish photographs without a license, they can be subject to punishment from the league, in addition to being liable to the

photographer. To serve as an example of how this could be implemented in a professional sports league contract, staying in sequence with the narrative of this note, it seems fitting to analyze the NBA.

The NBA CBA entails a provision which states that each player and the team by which they are employed shall enter into a uniform players' contract.¹⁰⁵ In theory, it seems like a feasible implementation to have this uniform contract add a provision that outlines the rules and requirements if a player wants to repost images they find on the internet. The requirement could be as simple as filing a waiver with the players' union. At this point, the players' union could then explore the opportunity of licensing the image from the photographer for the player. Alternatively, the players' union may inform the players of the necessary steps they must follow in an attempt to obtain a license to the photograph from a photographer.

Adding this section in each player's contract would ensure that agents, and their players are familiar with the risks associated with copyright infringement. Such a provision can educate these parties and serve as a resource as to how they can navigate this unfamiliar territory.

C. Federal Legislation May Provide a Solution to Issues Regarding an Individuals Publicity

Federal legislation regarding the right of publicity would also ultimately solve this issue. There are three main compelling reasons why federal legislation is practical. The right of publicity includes similarities to unfair competition law. Further, it contains similarities to trademark law. Lastly, creating federal standards would ensure uniformity.

While there is no federal statute that protects an individual's right of publicity, evidence including the fact that unfair competition law recognizes similar statutory rights may be compelling. These similar rights which are recognized in unfair competition law including protections against false endorsement and affiliations may serve as persuasive evidence that formally drafting a federal right of publicity is concurrent with past congressional intentions.

Further evidence that protecting an individual's right of publicity is in alignment with federal policies can be demonstrated through analyzing trademark law. In trademark law, a person has the ability to protect their name or likeness. A person can do this through proper trademark use, or through formal registration. The right of publicity is concurrent with this sort of protection, but depending on legislation, may add additional necessary layers of security. Additionally, the international trademark association supports the movement to create uniform rights of publicity, including the enactment of a federal right of publicity law in the United States.¹⁰⁶

Lastly, many states have a form of either statutory or case law that protects an individual's right of publicity. Creating uniform federal standards would help provide clarity. This level of clarity in our present world which includes a digital age is growingly imperative. Extensive amounts of individual information regarding celebrity's, and their publicity, is continuously published online.

¹⁰⁵ NATIONAL BASKETBALL ASSOCIATION, *Collective Bargaining Agreement*, *supra* note 58.

¹⁰⁶ *Right of Publicity*, INT'L TRADEMARK ASS'N, <https://www.inta.org/topics/right-of-publicity/> (last visited Mar. 25, 2021).

The internet knows minimal limitations and inevitably transcends state lines, magnifying the usefulness a uniform standard would provide.

D. A Deeper Thought: What Is Next If Changes In CBAs Are Implemented?

After analyzing these specific concerns and disputes, it seems addressing them in CBAs may be the most feasible. However, if the changes discussed in the first recommendation to CBAs are implemented, what would come next? Some may view this as protecting athletes, while others may view it as limiting professional photographers. Regardless, one may wonder if a change like this could lead to the opening of a new floodgate; could this change lead to fans being impacted?

To what extent can leagues and teams place contractual restrictions on fans' use of their own devices to generate and post content? Would leagues want to do this? Would leagues need to do this?

In conclusion, leagues may want to consider how new rules may impact the way fans interact with their games. The ultimate goal should be protecting athletes, while also trying to grow their sport. Limiting fans from having the ability to share and reshare content would hinder the objective of growing the sport. Leagues may want to carefully craft their rules to ensure they meet both of these objectives. It is essential that leagues achieve balance amongst what is in the best interest of their sport, while also protecting their athletes.

VI. Conclusion

The CBAs in professional sports were created to govern all athletes. Individuals like LeBron James and other athletes are subject to unclear and frustrating rules regarding their publicity. In the age of social media where athletes have the unique ability to drive their personal value through content and interactions online, additional scrutiny regarding their bargained-for rights in CBAs has grown necessary.

CBAs amongst professional sports leagues are best positioned to address this hazy and unsettled area for professional athletes. Implementing licensing agreements or providing clear policies for the respective parties to follow will avoid future conflicts including litigation between photojournalists and athletes. Federal legislation would also fulfill this void, amongst others, but compelling congressional action may prove costly, timely, and difficult. Further, legislation is not the only means to obtain the objective of this note, which is protecting athletes. Legislation may provide additional clarity for everyone else in the United States, but in the world of professional sports, CBAs govern and can provide sufficient protection.

Professional sports leagues in the United States have CBAs set to expire as follows: The National Football League in March 2021, Major League Baseball in December 2021, the United States Women's National Team in 2021¹⁰⁷, the National Basketball Association at end of 2023-2024 season (mutual opt-out after 2022-2023 season), Major League Soccer in January 2025, the

¹⁰⁷ As of April 2021, The National Women's Soccer League and NWSL Players Association began negotiations on the league's first Collective Bargaining Agreement.

National Hockey League following the 2025-2026 season, and the Women's National Basketball Association at the end of the 2027 season.

As some of these CBAs expire soon, and others over the coming years, professional leagues must seriously reconsider how to amply protect their athletes. Athletes are subjected to liability from potential copyright litigation arising from social media postings. These athletes should not be at legal risk by trying to grow their brands, engaging fans, and promoting themselves and their sport. If each league does not revisit its policies, we may see athletes refrain from posting to social media and engaging with fans out of fear of liability. If this happens, in turn, it will harm professional sports leagues. This will limit interactions with fans and be detrimental to league growth. Most importantly, this may limit the ability of athletes to connect with younger generations. As younger generations are increasingly online, it is vital to grow sports through the youth on this channel. Both players and leagues will benefit from focusing on finding a way to address these Instagram and other forms of social media issues. Professional athletes need this protection.

Appendix

Included is the photograph taken by Steven Mitchell that was posted by LeBron James and became subject to litigation as discussed in this note.¹⁰⁸



¹⁰⁸ Steven Mitchell, LeBron James (Photograph), subject of litigation *Mitchell v. James et al.*, Docket No. 2:20-cv-08188 (C.D. Cal. 2020).