



The NFLPO: The NFL's Private Patent Office

Paul Fina

DePaul University College of Law

Follow this and additional works at: <https://via.library.depaul.edu/jatip>



Part of the [Computer Law Commons](#), [Cultural Heritage Law Commons](#), [Entertainment, Arts, and Sports Law Commons](#), [Intellectual Property Law Commons](#), [Internet Law Commons](#), and the [Science and Technology Law Commons](#)

Recommended Citation

Paul Fina, *The NFLPO: The NFL's Private Patent Office*, 31 DePaul J. Art, Tech. & Intell. Prop. L. 118 (2021)
Available at: <https://via.library.depaul.edu/jatip/vol31/iss1/4>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Art, Technology & Intellectual Property Law by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

THE NFLPO: THE NFL'S PRIVATE PATENT OFFICE

*Paul Fina**

Table of Contents

I.	INTRODUCTION	119
II.	WHY A PRIVATE PATENT SYSTEM IS WELL SUITED FOR THE NFL	124
III.	BASICS OF THE NFLPO	125
	A. The Pre-Draft Process	126
	i. Submission Process Examples	128
	B. The Drafting Process	131
	C. Post-Draft Considerations	131
	i. Improper Use Determination Examples	132
	ii. Penalty Implementation Examples	136
IV.	WHY THE NFLPO WOULD IMPROVE FAN INTEREST	136

* J.D. Candidate, May 2021, DePaul University College of Law; Patent Agent (Reg. No. 79,133). Thank you to all of the friends and family who helped me to develop and refine this paper. Also, a special thanks to Professor Joshua Sarnoff for his guidance and support. I welcome any comments or discussion at paulgina@gmail.com.

2021] *THE NFLPO: THE NFL'S PRIVATE PATENT OFFICE* 119

I. INTRODUCTION

The players walk off the field, and head to the locker room after another long and unsuccessful season. Fans make their way up the aisles to the exits, wondering why they had to grow up in a city with such a terrible team. This is a scene to which many National Football League (NFL) fans can relate. A quick glance at the NFL win and loss statistics for each team in the past decade will confirm as much.¹ The regular season record for each NFL team shows that the NFL is not as competitive as it should be. In turn, this lack of competitive nature of the NFL, along with other factors, is leading to a reduction in fan interest. Therefore, there is the need to improve both the competitive nature of, and fan interest in, the NFL.

To that end, this paper will argue for the creation of a private patent system, implemented, and run by the NFL. This private patent system would receive submitted plays from private individuals, receive playbooks from every NFL team to place into a catalogue, remove submitted plays which are the same as or simply in a different formation from a play in the catalogue of NFL playbook plays, and supply the remaining plays in a repository from which NFL teams would be able to draft. A drafted play would give the drafting team an exclusive right to the use the play for a single NFL season. Teams which improperly use another team's drafted play would be subject to penalty, namely the loss of draft picks in the NFL players draft. In the event that a submitted play is drafted by an NFL team, the member of the public who submitted the play would receive a licensing fee for the use of the play. This private patent system, called the NFL Patent Office (NFLPO), would increase the competitive nature of the NFL, and would significantly improve fan interest in the NFL. Specifically, young individuals who otherwise would not watch the NFL would be enticed to do so if there was the possibility that their submitted play would potentially be run by an NFL team. Also, the prospect of a significant licensing fee from the NFL would encourage the

¹ *NFL: Regular season wins in the 2010's* (Feb. 2, 2020), <http://mcubed.net/nfl/fw2010.shtml>.

120 DEPAUL J. ART, TECH. & IP LAW [Vol. XXXI:

younger generations to participate, thereby improving fan interest in the NFL.

A common concern among those who analyze the NFL is the continuing decline in the NFL's fanbase. A stark reality exists; fan interest in the NFL is decreasing, especially among younger generations.² The NFL has consistently high viewership among the older portion of the United States population. However, it is members of the younger generations that are growing less interested. As Mr. Pielke aptly states, "it is clear from the data that parents are increasingly keeping their young children out of football and high school boys are choosing to play other sports."³ To that end, "[t]he decline of football has accelerated in recent years."⁴ Therefore, in order to revive interest among members of the younger generations, it is essential to allow the youth of this country to become more interconnected with the NFL. Generally, young athletes want to watch the professional sports league for the sport that they are playing. Therefore, it is paramount to create a means for young athletes, and young people in general, to become connected to the NFL.

There are a number of factors that make it difficult for certain teams to compete in the NFL. Namely the limited number of NFL caliber athletes, as well as other restrictions, mean that teams have to find other ways to be competitive. NFL teams have limited resources to improve their roster. One potential method for teams to improve would be to obtain patent protection over specific plays, thereby preventing other teams from using those plays. This would allow the team that files a patent to design and protect a unique and innovative play that would allow the filing team to be more successful. The monopoly provided by patent protection would allow teams to use plays specifically tailored for their roster without fear of other teams also running the same play. However, current patent law effectively prevents a team from receiving patent

² Roger Pielke, *The Decline Of Football Is Real And It's Accelerating* (Jan. 28, 2020), <https://www.forbes.com/sites/rogerpielke/2020/01/28/the-decline-of-football-is-real-and-its-accelerating/#138bb07b2f37>

³ *Id.*

⁴ *Id.*

2021] *THE NFLPO: THE NFL'S PRIVATE PATENT OFFICE* 121

protection over sports plays, including those used in football. Therefore, the current patent law system does not presently provide a viable option for teams to improve.

Additionally, relying on trade secrecy does not provide a viable option for teams to protect innovative new plays. Specifically, after a play is run once, it is no longer protected as a trade secret. Therefore, a system based on providing an exclusory right, such as a patent right is the ideal system. However, as discussed above, the use of the United States patent system is not viable. Additionally, others have tried to implement systems where fans are allowed to call plays during live games, thereby increasing fan interaction.⁵ However, these systems are not practical. It would be difficult from a logistical standpoint to implement a system where fans were calling plays. Importantly, only a single fan would be able to call a given play due to time constraints.⁶ Moreover, if multiple fans were allowed to call plays at various points in the game, it would be a detriment to the teams, as there would likely be discontinuity between the play calling style of the different fans. That said, the sentiment is appropriate. The NFL should be determining ways for increasing fan interaction. There simply needs to be a more effective means for doing so.

One way to increase fan interaction is to increase the social media presence of the NFL, a step which the NFL has taken.⁷ While this is an important step, it is not enough. Fans need a more concrete connection to NFL teams, a real investment in the NFL. However,

⁵ Emily Matchar, *In This Interactive Football League, Fans Pick the Plays* (Sep. 19, 2019),

SMITHSONIANMAG.COM,

<https://www.smithsonianmag.com/innovation/interactive-football-league-fans-pick-plays-180973154/>; Patrick Hruby, *Are You Ready for Some (Fan-Controlled) Football?* (Oct. 16, 2019), Washington Post,

<https://www.washingtonpost.com/news/magazine/wp/2019/10/16/feature/are-you-ready-for-some-fan-controlled-football/>

⁶ After the end of a given play, an offense is only allowed a very short period of time (40 seconds) before which they must start the next play.

⁷ Malik Zafar, *How the NFL is Using Twitter to Increase Fan Engagement*, <https://www.r2integrated.com/r2insights/how-the-nfl-is-using-twitter-to-increase-fan-engagement>; *How NFL Teams Use Social Media to Engage Fans*, The Bradley Business Group, <https://thebbg.com/how-nfl-teams-use-social-media-to-engage-their-fans/>.

the proper system has not, to this point, been presented. It is clear that if the right system were to be implemented, NFL fans would partake in it. Fantasy football is a clear representation of NFL fans' desire to become interactive with the NFL.⁸ According to Mr. Goff, "[t]he FSTA estimates that the average fantasy gamer spends 3 hours per week managing a team(s) [sic], translating to 1.2 billion hours for 23 million players over a 17 week season."⁹ Therefore, if given the opportunity to become more interactive with the NFL, fans would participate.

As such, the NFLPO is the best way to increasing NFL interaction without causing a drastic impact on the NFL. Also, the NFLPO would improve the competitive nature of the NFL. The NFLPO, would allow NFL teams to receive protection for plays, and the plays would be submitted by members of the public. Moreover, the NFL could dictate the terms of the NFLPO.

There are several reasons why the NFL should implement the NFLPO. First, the NFL has the infrastructure already in place to effectively run the NFLPO. The NFL has an extensive corporate structure, meaning adding a separate department would not be difficult. The NFL could hire individuals to handle the administration of the system and would be able to effectively delegate the responsibilities of the NFLPO. Second, the NFL is attempting to become more interactive with fans. As discussed above, the NFL wants to increase fan interaction. However, the NFL cannot implement a system that would drastically change the game. Therefore, the NFLPO would be ideal, as it increases fan interaction without causing a drastic change in the game. Third, the NFLPO would increase the competitive nature of the NFL. Specifically, particular plays can be extremely useful for given teams. Using effective play calling, including unique and innovative plays in key moments in a game, would allow teams with inferior talent to be

⁸ Brian Goff, *The \$70 Billion Fantasy Football Market* (Aug. 20, 2013), Forbes, <https://www.forbes.com/sites/briangoff/2013/08/20/the-70-billion-fantasy-football-market/#2c38f249755c>.

⁹ *Id.*

2021] *THE NFLPO: THE NFL'S PRIVATE PATENT OFFICE* 123

more competitive. Accordingly, coaches could use unique plays to maximize the talent that is on their roster.

At the beginning of each league year, the NFLPO would request each team's playbook and would place these plays in a repository. Then, individual members of the public (inventors) would submit plays to the NFLPO. Those plays would be reviewed by examiners to determine whether the submitted plays are an exact copy of a play from the repository, the same play as a play in the repository with a different formation, or a different play. If the submitted play is the exact same as a play in the repository, or the only change is the formation, the submitted play would be removed from consideration. Otherwise, if the submitted play is not the same as a play from the repository, it would be added to a catalogue of plays for NFL teams to draft. Each team would receive draft picks for the plays draft in the same way that they receive draft picks for the NFL players draft.

Once a team drafts a play, they are the only team that is allowed to use that play. In the event that another team uses a play drafted by a different team, the non-drafting team would be subject to sanctions from the NFLPO, which would include loss of NFL player draft picks from the NFL players draft. If a submitted play is drafted by a team, the inventor would be entitled to a one-time payment for the rights to the play. Additionally, each inventor would have to pay a fee to submit a play to the NFLPO.

Another benefit of the NFLPO is the potential revenue that it could generate. The licensing fees paid to inventors represents a significant cost to the NFL. Also, the examiners would need to be hired to implement this system. However, the filing fees paid by inventors would cover much, if not all, of the expense of the licensing fees and examiners. Additionally, the draft process would be a television event that would generate revenue. Finally, the increased fan interest that results from implementing this system would result in additional revenue.

This article will consist of three main parts. Part II will outline why a private patent system is well suited for the NFL. Part III will describe the basics behind the NFLPO, including logistics of inventors submitting plays and the enforcement of the plays

among teams. Finally, part IV will illustrate why the NFLPO would improve fan interest in the NFL.

II. WHY A PRIVATE PATENT SYSTEM IS WELL SUITED FOR THE NFL

A football play, called at the right time, can drastically impact the nature of a given game. Therefore, strategic use of plays is critically important for any team in the NFL. For example, the use of the Philly Special in Superbowl 52 allowed the Eagles to score a much-needed touchdown going into halftime.¹⁰ This play arguably changed the momentum of the game, helping the Eagles win.¹¹ The Philly Special is a prime example of a play which, when called at the right time, completely changed the outcome of the most important game of the season.

Additionally, effective play calling can allow a team to exploit weaknesses in the opposing team. For example, if team X does not have a quarterback who can effectively throw from the pocket, the opponent, team Y, will call plays on defense which force the quarterback to stay in the pocket.¹² Likewise, if the defense for team X has defensive backs that are slower than team Y's receivers, team Y will call plays on offense which exploit the slow defensive backs on team X. This strategic use of plays can allow teams which have inferior roster talent to compete with teams which are more talented.

Moreover, football plays and formations can be tailored to fit a given roster. A prime example is when Buddy Ryan developed the 46 defense for the Chicago Bears in the 1980s. Specifically, the 46 defense was designed to use the talent on the Bear's defense to

¹⁰ Kyle Newport, *Eagles Super Bowl 52 Rings Include Tribute to 'Philly Special' Trick Play* (June 14, 2018), BLEACHER REPORT, <https://bleacherreport.com/articles/2781214-eagles-super-bowl-52-rings-include-tribute-to-philly-special-trick-play>.

¹¹ *Id.*

¹² The pocket is the area of protection in the backfield provided by the offensive linemen for the quarterback when he drops back to pass the ball. This area is also referred to as the tackle box.

2021] *THE NFLPO: THE NFL'S PRIVATE PATENT OFFICE* 125

its maximum.¹³ In turn, the 1985 Bears defense is often considered one of the greatest defenses of all time. While part of the success of the 1985 Bears defense related to its large number of Hall of Fame players on that defense, a significant part of its success was the 46 defense which Buddy Ryan designed.

Another example of strategy as a key asset, is the continued success of the New England Patriots. In particular, Bill Belichick and Tom Brady have been able to lead the Patriots to the Superbowl nine times in the last twenty years. This is so because Bill Belichick is an expert in tailoring his play calling to fit the roster he has, especially on defense.¹⁴ In turn, the Patriots have been extremely successful over the past two decades. These examples illustrate the significance of plays in the NFL. A successful play or scheme of plays can allow teams with inferior talent to compete with more talented teams. Therefore, football plays are extremely valuable to NFL teams. As such, a private system for the patenting of plays would be an effective means of improving the competitive nature of the NFL.

III. BASICS OF THE NFLPO

The basics of the NFLPO are broken down into the following main components: the pre-draft process, which includes how members of the public submits plays, the NFLPO's repository of NFL team playbooks, and examples of the submission process; the drafting process; and post-draft considerations which include a

¹³ Hardy Evans, *X's and O's: The 46 Defense, What it Was and Where it Went*, BLEACHER REPORT (Aug. 10, 2010), <https://bleacherreport.com/articles/433093-xs-and-os-the-46-defense-what-it-was-and-where-it-went>. The 46 defense was an innovation of Buddy Ryan, the former defensive coordinator for the Chicago Bears. This defense allowed the Bears to be arguably one of the best defensive units ever assembled. Buddy Ryan, "designed the 46 to essentially be an ultra-aggressive version of the 4-3 defense. ...By 1985, Ryan had finished tweaking and perfecting his brainchild, and by then it was nearly unstoppable."

¹⁴ Reid Forgrave, *Defense the most underrated aspect of Patriots' run as all-time greatest dynasty* (Feb. 2, 2018), CBS SPORTS, <https://www.cbssports.com/nfl/news/defense-the-most-underrated-aspect-of-patriots-run-as-all-time-greatest-dynasty/>.

determination of improper use and enforcement of penalties based on a finding of improper use.

A. *The Pre-Draft Process*

At the beginning of each league year, NFL teams would submit their entire playbook to the NFLPO in digital form. This playbook would only be seen by members of the NFLPO, alleviating concerns about other teams obtaining their playbook. Once the playbook for every NFL team has been delivered to the NFLPO, the digital plays would be organized and placed in a repository of plays. Each league year, NFL teams would be allowed to either resubmit their playbook or use the playbook from the previous year. Additionally, members of the public (inventors) would submit plays to the NFLPO. Only offensive plays would be submitted. Specifically, the proposed system would only include offensive plays in order to reduce any initial complications in establishing the NFLPO. After the NFLPO has been established, defensive plays may be added as well.

To submit a play, the inventor would have to pay a filing fee of \$300. This is approximately the average cost for two tickets to an NFL game.¹⁵ Therefore, a member of the public could submit a play for the cost of attending two football games. A filing fee of \$300 provides enough incentive to not submit frivolous plays, while not being so expensive to prevent members of the public from being able to participate. Additionally, the filing fees would cover the expense of having the play examined to determine whether it should be rejected. Inventors would be required to submit their plays in digital form.

Again, if a submitted play is the same as a play in the repository, then it would be rejected automatically. A play is deemed to be the same regardless of the formation that the play uses. Therefore, if the only difference between a submitted play and a play from the repository is the formation, the play is rejected. This

¹⁵ NFL Football Tickets, SEATGEEK, <https://seatgeek.com/nfl-tickets>. “The average ticket price for an NFL game is \$151, according to SeatGeek data.”

2021] *THE NFLPO: THE NFL'S PRIVATE PATENT OFFICE* 127

is a simple novelty standard, namely because any difference between a submitted play and a play from the repository other than a change in formation, would be enough to prevent a rejection.

If a submitted play is not rejected, it would be added to a catalogue of plays from which NFL teams may draft. The inventor who submits a play which is later drafted would receive a \$50,000 licensing fee from the NFLPO. Based on statistics from the United States department of labor, the median weekly wage in the fourth quarter of 2019 was \$936.¹⁶ Extrapolating that number for a full year provides a median wage of just under \$47,000. Therefore, a licensing fee of \$50,000 is just above the median annual salary for a United States citizen. The NFLPO, by approving a play submitted by an inventor, is basically rewarding that individual with one year's wages.

By submitting a play, the inventor would agree to transfer the rights in the play to the NFLPO, regardless of whether the play is approved. Any undrafted plays in the repository would be free to use by any NFL team. Accordingly, inventors who submitted undrafted plays would not be entitled to the licensing fee. Also, the NFLPO would handle the payment of the licensing fees to inventors so that NFL teams would not have the responsibility. Therefore, the NFLPO would be the entity that deals directly with the inventors, not the NFL teams. Additionally, NFL teams would provide annual payments for funding the NFLPO. These payments would help cover administrative costs and the payment of licensing fees.

Moreover, the submission process would work on a first to file basis. Therefore, the first inventor to submit a play would receive the right to a potential licensing fee. Accordingly, the second inventor to submit the same play is not eligible for a licensing fee. As mentioned above, a play is considered the same even if it is submitted in a different formation. A change in formation does not constitute a different play. Therefore, there is no need for a system of resolution between the NFLPO and the inventors. If a play is drafted by an NFL team, the inventor receives

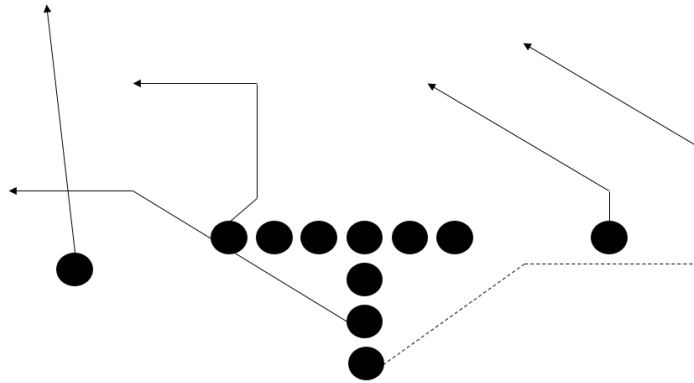
¹⁶ *Usual Weekly Earnings Summary* (Jan 17, 2020), <https://www.bls.gov/news.release/wkyeng.nr0.htm>.

the licensing fee, otherwise, the inventor would not receive the licensing fee.

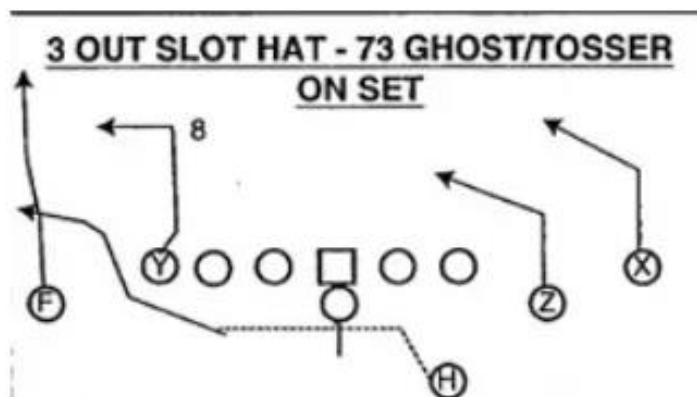
i. Submission Process Examples

There are three possible outcomes for a submitted play, each being demonstrated by way of example.

Submission Process Example One -- Inventor John Doe submits the following play:



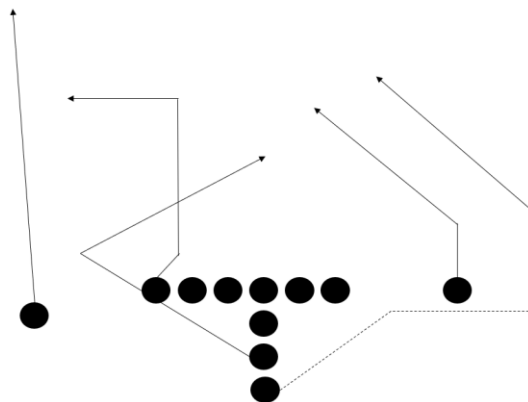
In response, the examiner searches the repository and finds the following play, which was part of an NFL team's submitted playbook:

2021] *THE NFLPO: THE NFL'S PRIVATE PATENT OFFICE* 129

17

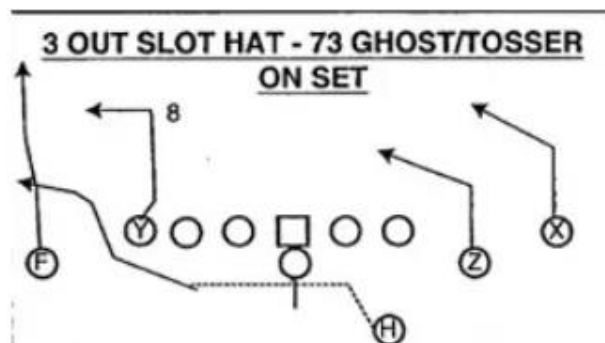
Therefore, the play is rejected. Even though the submitted play is in a different formation than the play in the repository, it is deemed to be the same. The rejection is proper.

Submission Process Example Two -- Inventor Jerry Footballfan submits the following play:



In response, the examiner searches the repository and find the following play, which was part of an NFL team's submitted playbook:

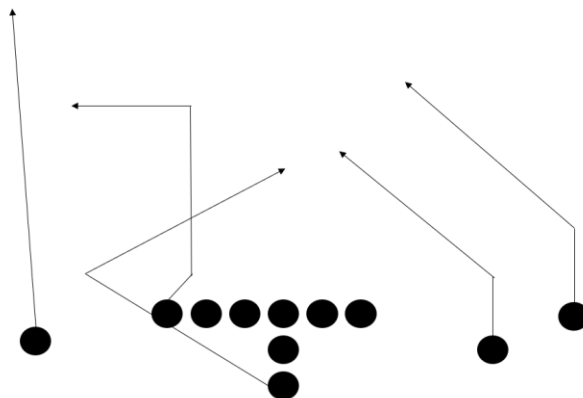
¹⁷Alex Sinclair, *Summer School: The simple marvels of the Erhardt-Perkins Offense* (Jul. 15, 2016), SB NATION, <https://www.bigblueview.com/2016/7/15/12188564/summer-school-erhardt-perkins-offense-belichick-weis-parcells-brady-patriots>.



18

The examiner determines that the cited play (directly above) is the closest play to the submitted play. Therefore, the play is not rejected, and is added to the catalogue of plays from which NFL teams will be able to draft. This is the case because one of the receiver's routes is different, which means that the play is different from the cited play.

Submission Process Example Three -- Arthur Williams submits the following play, *after* Jerry Footballfan submits his play:



In response, the examiner searches the catalogue of submitted plays and finds Jerry Q Footballfan's submitted play. Therefore, the examiner rejects the play, as it has already been submitted. Even though Arthur's submitted play is in a different formation than Jerry's submitted play, the play is deemed to be the

¹⁸ *Id.*

2021] *THE NFLPO: THE NFL'S PRIVATE PATENT OFFICE* 131

same. A change in formation is not enough to change a play into a new play. Therefore, the rejection is proper.

B. The Drafting Process

Submitted plays, which are not rejected, are provided in a catalogue that each team would be able to view and study before the NFL plays draft. The NFL plays draft would be 5 rounds, where each team would receive draft picks in the same manner as draft picks are provided in the NFL players draft. As mention above, any undrafted plays would be eligible for use by any team. Accordingly, if a play is not drafted, the inventor does not receive the licensing fee. Draft picks in the NFL plays draft could also be traded, just like picks in the players draft. These trades could be prospective trades, meaning that the trading of NFL plays draft picks could be done before the NFL plays draft takes place.

Each NFL team would be able to evaluate all of the available plays and determine which plays they would like to draft. Then, when a team's position in the draft arrives, the team may select whichever available play it wishes. As such, each of the plays will be made available to every team, and every team will know which plays have been drafted by various teams. However, this will not render the play, and thus the entire system useless. Rather, because the drafted plays can be run in any formation, it would be extremely difficult for other teams to predict when a team is running a drafted play.

While teams are able to trade picks in the NFL plays draft, a team would not be allowed to draft more than eight plays in the NFL plays draft, which would be enforced by the NFLPO. This ensures that opposing teams would not have to account for more than eight plays when preparing for opponents. However, having even a few unique plays that only the drafting team can run provides a significant advantage. Also, because the system resets at the beginning of each league year, the protection provided by drafting a play only lasts for one year.

C. Post-Draft Considerations

While draft picks in the NFL plays draft can be traded, once a play is drafted, the team is not able to trade the play. This is intended to ensure that once the NFL plays draft is over, teams are able to know which team owns the drafted plays. Accordingly, it is easier for teams to make sure that they do not improperly use other teams drafted plays. A drafted play gives the drafting team the exclusive right to run the drafted play for the course of the season. Once the league year ends, the right associated with the previous year's draft ends.

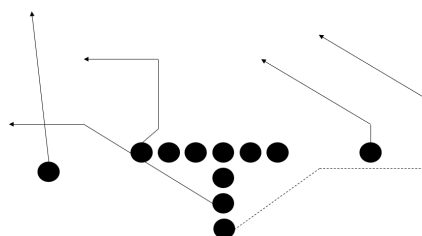
The NFLPO would handle enforcement of the drafted plays. This would include determining whether a play has been improperly used and administering penalties to teams which improperly use another team's drafted play. The standard for determining improper use would be similar to the standard for whether a play is rejected in the application process. Specifically, if an NFL team uses a play that is the same as, or only modifies the formation of a play drafted by another team, that team has improperly used another team's drafted play. As before, it is a simple novelty standard, in that direct copying, or copying with only a modification of the formation, constitutes improper use.

i. Improper Use Determination Examples

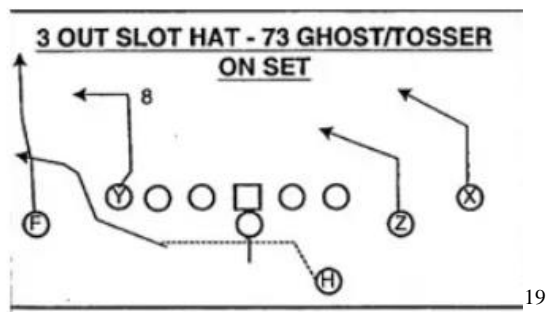
The following examples illustrate the process for determining improper use.

Improper Use Determination Example One

The Chicago Bears drafted the following play:



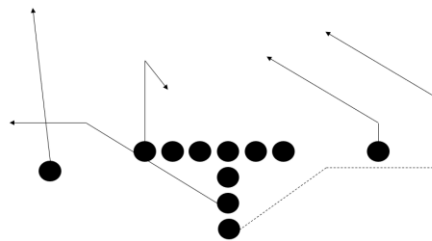
The Green Bay Packers use the following play in an NFL game:



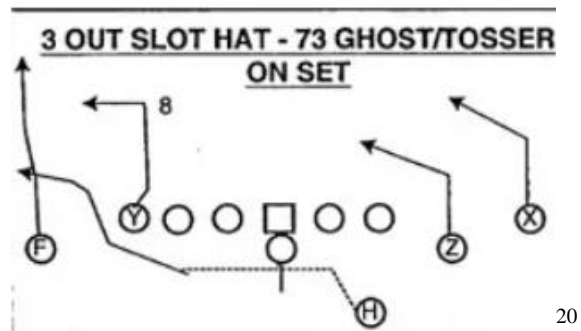
This would constitute improper use, as the Packers used a play that was only a change in formation from the drafted play owned by the Bears. Therefore, the Packers would be subject to penalty by the NFLPO.

Improper Use Determination Example Two

The Bears drafted the following play:



The Packers use the following play in an NFL game:



¹⁹ *Id.*

²⁰ *Id.*

This would not be improper use. Based on the simple novelty standard, any change other than a change in formation is enough to prevent a finding of improper use. In this example, the Packers changed the route run by one receiver, namely the player labeled Y in the Packers' play. Therefore, the play run by the Packers is not the same play as the play drafted by the Bears. As an additional note, the fact that the Packers changed the formation of the play is irrelevant. A change in formation is not considered a change for a determination of the simple novelty test. However, the change in route for one receiver is enough to pass the simple novelty test. Therefore, the Packers would not be subject to penalty by the NFLPO.

In sum, the test for improper use is a simple novelty test. In other words, a team that uses the exact copy of another team's drafted play, or only changes the formation of the drafted play, is improperly using another team's play. However, any other change other than a change in formation is enough to prevent a finding of improper use. For instance, if the non-drafting team changes any route run by any of the receivers in a drafted passing play, that is not improper use. Likewise, if the non-drafting team changes the blocking assignment of any player on a drafted running play, that is not improper use. This standard, which is a bright line rule, would be easy to implement and would provide protection for the drafted plays, without providing too extensive of a burden on non-drafting teams.

As discussed above, the NFLPO would be responsible for determining whether a team improperly used another team's drafted play. With a finding that a non-drafting team used a play improperly, the NFLPO would be responsible for enforcing this violation. Specifically, the NFLPO would determine the appropriate penalty for an unauthorized use of a play. The situation in which the improper use occurred, and the number of times the team has improperly used another team's play, would factor into the severity of the penalty. One important note is that the penalties will not include in-game penalties. Therefore, this system would not impede the course of a game. Rather, all of the penalties would be related to draft picks in the NFL players draft. This helps to ensure that games

2021] *THE NFLPO: THE NFL'S PRIVATE PATENT OFFICE* 135

are not interrupted, while still giving a significant incentive for teams to not improperly use another team's play. Also, teams that own the drafted play would receive the confiscated draft picks from the teams that improperly use their play.

In determining the penalty to hand down, the NFLPO would first consider the number of times that the violating team has improperly used another team's drafted plays. As mentioned above, higher penalties would be imposed on repeat offenders. For example, a team that is on its first offense may only lose a sixth or seventh round pick in the NFL players draft. This pick would in turn be given to the team that drafted the play. Likewise, teams which are multiple offenders would have to surrender either a higher pick or multiple lower picks. These penalties would discourage teams from improperly using another team's drafted plays.

Additionally, the situation in which the play is run will factor into the penalty. For instance, if a team runs another team's drafted play on the last play of regulation in the Superbowl, that team will receive a greater penalty than a team that uses another team's drafted play in a regular season game. Also, the NFLPO would consider the time of the game that the play was used, with use later in the game leading to greater penalties. While the penalties vary based on the number of offenses, and the time that the play is improperly used, the penalty would be limited only to draft picks in the NFL players draft. Therefore, there would be no in-game penalty for improper use of another team's play. Additionally, teams which have received a penalty for improper use of another team's drafted play would be able to appeal the decision to the commissioner's office. In turn, the commissioner would decide whether to reduce or reverse the penalty. This process would work in the same way as an appeal for any penalty issued by the NFL against either teams or individual players.

The following examples will help to illustrate how the penalties would be implemented. For each, it is assumed that the Packers have improperly used a play that was drafted by the Bears. The only issue is the penalty that the NFLPO would give the Packers, which would translate to draft picks in the NFL players draft which the Packers would have to give to the Bears.

*ii. Penalty Implementation Examples***Penalty Implementation Example One**

In week two of the NFL season, when the Packers are losing by twenty points in the second quarter, the Packers run one of the Bears' drafted plays. This is their first offense. As such, the NFLPO would force the Packers to surrender a sixth-round pick in the NFL players draft to the Bears. Since this was the Packers first offense, and the play was run in the middle of a regular season game, the penalty is fairly small.

Penalty Implementation Example Two

In the divisional round of the NFL playoffs, when the Packers are losing by twenty points in the second quarter, the Packers run one of the Bears' drafted plays. This is their second offense. As such, the NFLPO would force the Packers to surrender a third-round pick in the NFL players draft to the Bears. Since this was the Packers second offense, and the play was run in the middle of the divisional round of the playoffs, the penalty is more severe.

Penalty Implementation Example Three

In the Superbowl, when the Packers are losing by four points in the fourth quarter with ten seconds left in the game, the Packers run one of the Bears' drafted plays. This is their third offense. As such, the NFLPO would force the Packers to surrender a first-round and a third-round pick in the NFL players draft to the Bears. Since this was the Packers third offense, and the play was run during a crucial period in the most important game of the NFL season, the penalty is severe.

In the event that a team does not have the picks that would be handed out as a penalty in the NFL draft that given year, the NFLPO may instead penalize the team with multiple lower draft picks or may choose to penalize the team with picks in later drafts.

IV. Why the NFLPO Would Improve Fan Interest

2021] *THE NFLPO: THE NFL'S PRIVATE PATENT OFFICE* 137

As discussed in the introduction, young people, and particularly young athletes tend to watch the sports in which they participate. Therefore, because young athletes are increasingly not playing football, there needs to be other reasons for young people to watch football. One such reason is connection with the NFL. For example, fantasy football has exploded in popularity over the past two decades.²¹ Fantasy football is a great example of interaction between the NFL and fans. The ability to draft players as part of fantasy football allows fans to act like a general manager of an NFL team. This allows the participant to feel involved with the NFL, thereby increasing fan interest.

Another example is the video game Madden, which allows members of the public to call plays and control players in a simulated football game.²² Many people who do not actually play football can feel engaged with the NFL through the playing of Madden and other related football video games. This increases fan interest in the NFL, as fans get to simulate the experience of being a player or coach in the NFL. However, both fantasy football and Madden are only simulations, and do not have any actual bearing on real NFL games. That is where the potential of the NFLPO could be realized.

The NFLPO would allow fans to have an actual impact on the NFL. When a submitted play gets drafted, the inventor who submits it actually contributes to the NFL team which drafts the play. Also, the licensing fee of \$50,000 will be a significant incentive to participate. The fan involvement in the NFLPO will inherently lead to increased fan interest in the NFL, especially among younger people. Young people will be enticed to participate due to the potential licensing fee and the ability to watch their play be run by an NFL team. These potential benefits would cause many young people, who increasingly desire to be interconnected, to be enticed due to the interactive nature of the NFLPO. By having

²¹ Brian Goff, *The \$70 Billion Fantasy Football Market* (Aug. 20, 2013), FORBES, <https://www.forbes.com/sites/briangoff/2013/08/20/the-70-billion-fantasy-football-market/#2c38f249755c>.

²² *MADDEN NFL 21 PLAYBOOKS AND AI GAMEPLAY UPDATES*, EA, <https://www.ea.com/games/madden-nfl/madden-nfl-21/news/gridiron-notes-madden-nfl-21-playbooks-and-ai-gameplay-updates-07-14>.

138 *DEPAUL J. ART, TECH. & IP LAW* [Vol. XXXI:

young people participate in large numbers in the NFLPO, fan interest in the NFL in general will increase. People could watch the NFL as a means of generating potential new plays that could be submitted. Fans could see existing plays and vary those existing plays in a new and innovative way. Therefore, the implementation of the NFLPO will not only improve the competitive nature of the NFL, it will also improve fan interest by providing an unprecedented level of interaction between the NFL and fans.