FULL-COURT PRESS: FANTASY SPORTS, THE RIGHT OF PUBLICITY, AND PROFESSIONAL ATHLETES' INTEREST IN THE LIVE TRANSMISSION OF THEIR STATISTICAL PERFORMANCES

Michael B. Greenberg[*]

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* B.A. 2012, Tulane University; J.D. 2015, University of Florida Levin College of Law. I first want to thank my mother and father for everything they have done for me. I must also thank my siblings, Jeff, David, and Erica, for always challenging me. Thank you Professors Elizabeth A. Rowe, D. Daniel Sokol, and Richard Vermut for your guidance and knowledge. Thank you Robert Bray, Doug Horn, Joshua Margolesky, Harrison Smith, and Gregory Weissman for your unwavering encouragement and support. A special thanks and acknowledgment is owed to Jeff Hagen and Eric Pakowitz for their general counsel throughout law school. Finally, I would be remiss if I did not thank the Friends of Fantasy, est. 2007, for inspiring this endeavor.

Many scholarly articles have focused on whether professional sports leagues and their athletes have a right of publicity when it comes to the unlicensed use of daily statistical performances by fantasy sports websites.[1] The unambiguous trend in recent court decisions is that such statistics are not protectable because they are "news" within the public domain.[2] I submit, however, that the live transmission of such statistics without the licensed consent of athletes or leagues violates the professional athlete's right of publicity. Accordingly, to be allowed to transmit these statistics as the game is being played, fantasy sports website operators should have to obtain licenses from professional sports leagues or their respective player unions.

This Note will begin by overviewing the history and basics of fantasy sports. Next, we will examine the intellectual property laws implicated in fantasy sports. Throughout that examination, the overarching argument of this Note will be advanced, which is how live, up-to-the-minute statistical updates amount to unjust economic exploitation of athletic performances. Contextualizing this conception with relevant legal precedents will serve to explain why fantasy sports operators should be required to obtain licenses for such live updates. A comparison between video games and fantasy sports will also be discussed, as recent legal developments concerning the right of publicity and video games may have applicability in the realm of fantasy sports. Finally, this Note will advocate for legal reforms to reflect the reality that professional athletes are entitled to a right of publicity for their live performances.

I. FANTASY SPORTS: AN OVERVIEW

A. *Origins*

Psychology professor Bill Gamson created one of the first known iterations of fantasy games.[3] Called "The Baseball Seminar," participants

1. Matthew G. Massari, *When Fantasy Meets Reality: The Clash Between On-Line Fantasy Sports Providers and Intellectual Property Rights*, 19 HARV. J.L. & TECH. 443, 455 (2006); Christopher Miner, *Fantasy Sports and the Right of Publicity Are Under Further Review*, 30 TOURO L. REV. 789, 792–93 (2014); Erika T. Olander, *Stop the Presses! First Amendment Limitations of Professional Athletes' Publicity Rights*, 12 MARQ. SPORTS L. REV. 885, 902 (2002); Risa J. Weaver, *Online Fantasy Sports Litigation and the Need for a Federal Right of Publicity Statute*, 2010 DUKE L. & TECH. REV. 2, ¶ 50 (2010).

2. *See* Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 843 (2d Cir. 1997).

3. Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America*

would pay $10 to "draft" professional baseball players based on their projected performances for that season in a number of predetermined statistical categories.[4] At the end of the actual season, the participant whose drafted team had earned the highest number of total points won the game, receiving the other participants' entry fees as a prize.[5]

One participant of Gamson's game, Robert Sklar, was a retired *Los Angeles Times* news reporter who taught journalism and film studies at the University of Michigan.[6] Sklar told one of his mentees, Daniel Okrent, about "The Baseball Seminar" in 1965.[7] Nearly fifteen years later, Okrent was working as a journalist for the Texas Monthly and decided to bring back "The Baseball Seminar" as a competitive game that he could enjoy with his colleagues.[8] In November 1979, Okrent, with the help of Sklar, created the first modern-day fantasy league.[9]

B. *Basics*

Prior to the start of a professional league's season, a fantasy league participant ("owner") drafts players based on how well the owner predicts the player will perform statistically. In a "snake" draft, a set draft order is determined so that the owner who has the first pick of the first round will have the last pick of the second round and the first pick of the third round, while the owner who has the last pick of the first round will have the first pick of the second round and the last pick of the third round. In an "auction" draft, there is no set draft order. Instead, owners are allotted a set amount of money (usually pretend money, but not always) to bid on players and fill out their rosters.

Each week owners either compete with the entirety of the fantasy league to see whose players performed best overall (a "rotisserie" league) or match up one team against another (a "head-to-head" league). The winner of the week is determined by a combination of point allocations derived from the actual statistical performances of each fantasy team's players. For instance in baseball, a fantasy team may earn points based on a professional player's weekly statistics in categories such as home runs, hits, stolen bases, batting average, and runs batted in.[10] In football, the categories may include passing yards, rushing yards, receiving yards,

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Regulates Its New National Pastime, 3 HARV. J. SPORTS & ENT. L. 1, 5 (2012).

4. *Id.*
5. *Id.*
6. *Id.* at 6.
7. *Id.*
8. *Id.*
9. *Id.*
10. Zachary C. Bolitho, *When Fantasy Meets the Courtroom: An Examination of the Intellectual Property Issues Surrounding the Burgeoning Fantasy Sports Industry*, 67 OHIO ST. L.J. 911, 918 (2006).

touchdowns, interceptions made or thrown, and fumbles forced or lost.[11] By using real-time statistical tracking programs offered on the websites of fantasy sports operators, a fantasy sports participant can view how each team in their fantasy league is fairing with live, up-to-the-minute updates of athletes' performances.[12]

C. *Business*

The growth in popularity of fantasy sports is astounding, as the estimated number of fantasy sports participants in the United States and Canada has skyrocketed from 500,000 in 1988 to 56.8 million as of 2015, according to the Fantasy Sports Trade Association.[13] In 2015 the average fantasy sports participant spent $465 on league-related costs, materials, and single-player challenge games over a twelve-month period.[14] In 2014, among fantasy sports participants who had a mobile device, 67% used their mobile device or an application thereon to access real-time player statistics.[15] To say the least, today's fantasy sports industry generates a significant amount of economic activity and opportunity.

Why, then, are professional athletes not entitled to compensation for the utilization of their statistical performances? One could argue that athletes do in fact indirectly benefit financially from the increased broadcast viewership resulting from fantasy sports, which in turn increases the values of the leagues in which they play. But this argument fails to account for the fact that the live statistical updates are a market substitute for the actual broadcasts. Unless fantasy participants pay for a premium league package (such as NBA League Pass or NFL Sunday Ticket) allowing them viewing access to any game on television or the internet,[16] the only medium through which fantasy participants can

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11. *Id.*

12. Fantasy sports operators have different names for their real-time statistical tracking programs. Yahoo! Fantasy Sports offers "StatTracker," *About StatTracker*, YAHOO.COM, https://help.yahoo.com/kb/stattracker-sln6121.html (last visited Nov. 10, 2015), while CBS Fantasy Sports offers "GameTracker," *GameTracker*, CBSSPORTS.COM, http://www.cstv.com/gametracker/universe/ (last visited Nov. 10, 2015). Some operators charge extra for these programs.

13. *Industry Demographics: Actionable Insights and Insightful Data*, FANTASY SPORTS TRADE ASSOCIATION, http://fsta.org/research/industry-demographics (last visited Mar. 5, 2015) [hereinafter *Industry Demographics*].

14. *Id.* A single-player challenge game is a type of fantasy sports game wherein an individual puts together a fantasy team for a single night only, as opposed to an entire season.

15. *Spotlight on Fantasy Sports*, MECGLOBAL.COM 9 (May 2015), http://www.mecglobal.com/assets/publications/2015-06/SpotlightOn-FantasySports-May2015FINAL1.pdf (last visited Mar. 5, 2015).

16. *NBA League Pass*, NBA.COM, *available at* http://www.nba.com/leaguepass/index.html (last visited Nov. 9, 2015); *NFL Sunday Ticket*, NFL.COM, http://www.nfl.com/nflsundayticket (last visited Nov. 9, 2015).

experience the excitement of their chosen players' performances is a real-time statistical tracking system.

II. COPYRIGHT, TRADEMARK, AND THE RIGHT OF PUBLICITY

Before delving into the precedential cases implicating the ability of professional athletes to claim compensation for their statistical performances utilized by fantasy sports websites, it is important to first briefly outline the basic areas of law that are in play so as to establish the intellectual property issues that arise from fantasy sports. A point of confusion with regard to fantasy sports and the utilization of athletes' statistical performances is that the use of these performances, along with their often necessary linkage with the identity of the source of their initial creation (the athlete), is not easily categorized as one definitive type of intellectual property.

A. *Copyright Law*

Copyright is an intellectual property right explicitly protected by the U.S. Constitution.[17] Copyright protects "original works of authorship fixed in a tangible medium of expression," whether published or unpublished.[18] Specifically, a copyright may protect original "literary, dramatic, musical, and artistic works, such as poetry, novels, movies, songs, computer software, and architecture," but may not protect "facts, ideas, systems, or methods of operation, although it may protect the way these things are expressed."[19]

At the moment, fantasy sports operators need not concern themselves with copyright issues in relation to the utilization and dissemination of statistical performances of professional athletes, as such statistics are by nature "facts" that once published are considered to be in the public domain.[20] While this Note unequivocally recognizes that such statistics are and should be considered to be non-copyrightable as facts within the public domain, the *live conveyance* of these statistical performances should require a licensing agreement with the professional leagues or players' unions, as there is tangible economic value in disseminating the statistics as they are produced in real time (as opposed to mere publication

17. *Copyright in General*, COPYRIGHT.GOV, http://copyright.gov/help/faq/faq-general.html #what (last visited Nov. 9, 2015).

18. *Id.*

19. *Id.*

20. *See* C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, 505 F.3d 818, 823 (8th Cir. 2007) ("[t]he information used in CBC's fantasy baseball games is all readily available in the public domain").

after the game already occurred).

In *National Basketball Association v. Motorola, Inc.*, the U.S. Court of Appeals for the Second Circuit ruled that Motorola's sale of subscriptions for its SportsTrax device (a small pager-like object) that allowed users access to up-to-date NBA scores and statistics was legal because the underlying games were not entitled to copyright protection.[21] The Second Circuit reasoned that although there was much work that went into the preparation of the games, "[s]ports events are not 'authored' in any common sense of the word" since the outcomes of athletic performances are unpredictable and unscripted, and thus fail to meet the originality requirement for copyright protection.[22] This understanding of the creativity involved in the performance of sports implicitly considered the athletes' actions during a game to somehow be entirely instinctive, reactive, and completely devoid of any planning or forethought. True, the actual outcomes of the games (and the statistical performances therein) are not literally scripted, but in a sense they are because the rules of the game dictate what players can and cannot do, and that there will be a winner and a loser.

Interactive fiction, or "choose your own adventure" novels, allow the reader to determine the outcome of the story,[23] yet they are rightly entitled to copyright protection even though the author of such a work merely sets the parameters of what the possible outcomes could be. In the same vein, professional sports, which are likewise meant to entertain, should be afforded the same or similar protection.

In ruling as it did, the Second Circuit rejected the district court's contention that Motorola was able to "reap . . . profits from [the] NBA's most valued asset—real-time NBA game information."[24] The Second Circuit ignored the district court's factual finding that:

> SportsTrax and STATS' AOL site erode [the] NBA's ability to approach other commercial entities . . . and offer them the degree of exclusivity in real-time depictions of NBA games that it could offer in the absence of these products. Thus, defendants' products have affected adversely the value of [the] NBA's real-time game

21. *See* Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 853 (2d Cir. 1997).

22. Bolitho, *supra* note 10, at 926 (citing *Nat'l Basketball Ass'n,* 105 F.3d at 846).

23. *See, e.g.*, Sally Lodge, *Chooseco Embarks on Its Own Adventure*, CHILDREN'S BOOKSHELF (Jan. 18, 2007), *available at* http://web.archive.org/web/20071009094529/http://www.publishersweekly.com/article/CA6408126.html (last visited Nov. 9, 2015).

24. Nat'l Basketball Ass'n v. Sports Team Analysis & Tracking Sys., Inc., 939 F. Supp. 1071, 1105 (S.D.N.Y. 1996) (citing Nat'l Exhibition Co. v. Fass, 143 N.Y.S.2d 767, 768-70 (N.Y. Sup. Ct. 1955), wherein a news gatherer was found to have misappropriated the commercial value of information produced by N.Y. Giants football games by listening to play-by-play broadcasts of the games while simultaneously sending out typed reports of what he heard to radio stations for rebroadcasting purposes).

information.[25]

Despite the soundness of the lower court's factual assessment, unfortunately the U.S. Court of Appeals for the Eighth Circuit in a later case directly involving fantasy sports[26] (which will be discussed later in this Note) was seemingly influenced by the Second Circuit's view that athletic performances do not exhibit the requisite modicum of creativity necessary to afford them copyright protection.

B. *Trademark Law*

Trademark protection is another type of intellectual property that ensures consumer confidence in the source of a particular product, thereby allowing trademark holders to "develop and control the goodwill associated with a given product."[27] As Marc Edelman explained:

> A federal cause of action for trademark infringement typically accrues under Section 32(1) of the Lanham Act where "a person uses (1) any reproduction . . . of a mark; (2) without the registrant's consent; (3) in commerce; (4) in connection with the sale, offering for sale, distribution or advertising of any goods; (5) where such use is likely to cause confusion, or to cause mistake or to deceive."[28]

An important exception to trademark infringement is known as "fair use," which is the use of a mark for non-commercial speech.[29] Defining the difference between fair use and commercial speech has not been the easiest of tasks, as different federal courts employ varying standards.[30] In the context of fantasy sports, fantasy sports operators are best advised to use the actual logos of professional sports teams only after obtaining a

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25. Neal H. Kaplan, NBA v. Motorola*: A Legislative Proposal Favoring the Nature of Property, the Survival of Sports Leagues, and the Public Interest*, 23 HASTINGS COMM. & ENT L.J. 29, 37-38 (2000) (citing *Sports Team Analysis & Tracking Sys., Inc*., 939 F. Supp. at 1106).

26. *See generally* C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, 505 F.3d 818, 820 (8th Cir. 2007).

27. *See* Mark A. Kahn, *May the Best Merchandise Win: The Law of Non-Trademark Uses of Sports Logos*, 14 MARQ. SPORTS L. REV. 283, 284 (2004).

28. Edelman, *supra* note 3, at 40 (citing Boston Prof'l Hockey Ass'n v. Dallas Cap & Emblem Mfg., Inc., 510 F.2d 1004, 1009-10 (5th Cir. 1975)).

29. *Id.* at 41.

30. The U.S. Court of Appeals for the Second Circuit employs a balancing test that weighs the public interest of free expression against the public interest of avoiding consumer confusion, while the U.S. Court of Appeals for the Third Circuit tends to favor the position of the trademark holder and the public's interest to avoid confusion over the right of free expression of the non-trademark holder. *Id.* at 41-42.

license to do so.[31] Moreover, in the absence of a license, fantasy sports operators should minimize the appearance of professional teams' names as much as possible by displaying those names with text that is less pronounced than the text of the operators' own names and marks.[32]

C. *Right of Publicity Laws*

In a way, it is fair to conceive of the right of publicity as being grounded in a sort of overlap between the rationales for copyright and trademark law, which are, respectively, to encourage and protect the original creation of works of art, and to ensure that source identifiers are trustworthy for the benefit of consumers. Right of publicity laws concern "the use of names and identifying characteristics of famous individuals."[33] Unlike copyright and trademark laws, there is no federal statute governing the right of publicity.[34] Instead, right of publicity laws are established independently by the states and are based on the common law right to privacy, which itself is grounded in both tort and property law.[35]

Notwithstanding its apparent overlap with and derivation from other categories of law, the right of publicity is a separate category unto itself; as J. Thomas McCarthy elucidated, "[t]he right of publicity is a state-law created intellectual property right whose infringement is a commercial tort of unfair competition. It is a distinct legal category, not just a 'kind of' trademark, copyright, false advertising or right of privacy."[36] According to *Black's Law Dictionary*, the right of publicity is defined as "The right to control the use of one's own name, picture, or likeness and to prevent another from using it for commercial benefit without one's consent."[37]

In the sole case regarding the right of publicity that reached the Supreme Court of the United States (*Zacchini v. Scripps-Howard Broad Co.*, which will be explored in greater detail later in this Note), the Court

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31. *Id.* at 42.

32. *Id.*

33. *Id.* (citing WILLIAM SLOAN COATS & KENNETH MAIKISH, *The Right of Publicity: Proper Licensing of Celebrity Endorsements*, *in* 1025 PLI/PAT 269, 279 (2010) (noting that "[c]urrently, nineteen states, including California and New York, protect the right of publicity via statute . . . an additional twenty-eight states recognize the right via common law."); C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818, 822 (8th Cir. 2007) ("An action based on the right of publicity is a state-law claim.")).

34. *Id.*

35. *Id.* (citing Keller v. Elec. Arts, Inc., No. C 09-1967 CW., 2010 WL 530108, at *3 (N.D. Cal. Feb. 8, 2010) ("The statutory right of publicity complements the common law right of publicity, which arises from the misappropriation tort derived from the law of privacy.")).

36. 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2000).

37. BLACK'S LAW DICTIONARY 1521 (10th ed. 2014).

declared that the right of publicity functions as "an economic incentive for [one] to make the investment required to produce a performance of interest to the public."[38]

III. LEGAL PRECEDENTS PRIOR TO THE FANTASY SPORTS INDUSTRY

The issue of whether products capitalizing on the actual statistical performances of professional athletes unjustly violate copyright or the right of publicity arose in a number of cases prior to the proliferation of the fantasy sports industry (one of which, *National Basketball Association v. Motorola, Inc.*, was previously discussed).[39] A general overview of the facts and outcomes of some of these key cases is necessary, as they provided the comparative paradigms on which a precedential federal court of appeal decision directly concerning fantasy sports relied.[40]

Online fantasy sports as we know it today is not the first iteration of using real statistics of professional athletes competitively in a game setting.[41] In the 1920s, the company Ethan Allen introduced All-Star Baseball, a "table game" allowing participants to imitate managing a baseball team by choosing from a collection of player cards to compose a lineup.[42] Actual past performances of the players determined the probabilities of their performances in the table game, which in conjunction with a rotating spinner, determined the outcome.[43] Strat-O-Matic, devised in 1961, was a similar concept that used dice as the random determinant.[44] The 1980s saw the advent of computer simulations based on past player performances with games like Micro League Baseball and Avalon Hill.[45] While all these types of games used actual player performances as a factor to determine the outcome, they differ from modern fantasy sports in that outcomes were *in part* based on *past* statistical performances, whereas fantasy sports depend *entirely* on *future* predicted statistical performances.

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38. Zacchini v. Scripps-Howard Broad., Co., 433 U.S. 562, 576 (1977).

39. *See generally id.* at 562; *Nat'l Basketball Ass'n,* 105 F.3d at 842; Uhlaender v. Henricksen, 316 F. Supp. 1277 (Minn. 1970); Palmer v. Schonhorn Enters., Inc., 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967).

40. C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, 443 F. Supp. 2d 1087 n.12 (citing generally Zacchini, 433 U.S. at 562; *Uhlaender*, 316 F. Supp. at 1277; *Palmer*, 232 A.2d at 458).

41. Edelman, *supra* note 3, at 4-5.

42. *Id.* at 4.

43. *Id.*

44. *Id.* at 4-5.

45. *Id.* at 5.

A. Palmer v. Schonhorn Enterprises

The first notable legal case involving such a simulation table game was *Palmer v. Schonhorn Enterprises*.[46] At issue was "Pro-Am Golf," a game that used player's names, profiles, and statistics.[47] The manufacturer of the game claimed that because the golfers were popular athletes they "deliberately invite publicity in furtherance of their careers" so that the manufacturer "should not be denied the privilege of reproducing that which is set forth in newspapers, magazine articles and other periodicals."[48] The court did not outright disagree with the manufacturer's general premise, but rejected the defense in the context of the board game.[49] The court held that to publish biographical data of a famous person is not itself an invasion of privacy, but to do so to capitalize on a famous person's name "with a commercial project other than the dissemination of news or articles or biographies" violates a famous person's privacy and is thus disallowed.[50] As clear as the *Palmer* court's decision was, its precedential value was limited because the court's jurisdiction only covered the State of New Jersey.[51]

B. Uhlaender v. Henricksen

A similar factual situation to *Palmer* involving a table game and professional athletes' right of publicity arose in Minnesota in the case of *Uhlaender v. Henricksen*.[52] At issue were two games that a game manufacturer created and sold, "Big League Manager Baseball" and "Negamco's Major League Baseball."[53] Both games employed the names and statistics of a significant number of baseball players in the major leagues.[54] The Major League Baseball Players Association (MLBPA) tried on multiple occasions to cajole the manufacturer to pay for a licensing agreement, but to no avail.[55] Finally, the MLBPA sued the manufacturer for the unauthorized use of the players' names and

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46. *See generally* Palmer v. Schonhorn Enters., Inc., 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967).

47. *Id.* at 459.

48. *Id.* at 460.

49. Timothy J. Bucher, *Game on: Sports-Related Games and the Contentious Interplay Between the Right of Publicity and the First Amendment*, 14 TEX. REV. ENT. & SPORTS L. 1, 6 (2012).

50. *Palmer*, 232 A.2d at 461.

51. *See generally id.* at 458.

52. *See generally* Uhlaender v. Henricksen, 316 F. Supp. 1277 (Minn. 1970); *Palmer*, 232 A.2d at 458.

53. *Uhlaender*, 316 F. Supp. at 1278.

54. *Id.*

55. *Id*. at 1278-79.

statistical information.[56] The manufacturer defended itself by averring, in relevant part, "that the names and statistics concerning sports achievements used in the game are readily available to anyone . . . [and] are published with some regularity in the newspapers and the news media and are thus in the public domain."[57]

In light of previous cases, including *Palmer*, the court decided that the wide availability of the players' names and statistics in the public domain outlets did not preclude said players' right of publicity.[58] Rather, the court reasoned that the widespread visibility of the players and availability of their statistical performances was in fact the very reason why the players had the right of publicity in the first place, as the public's recognition of the players conferred a valuable interest in their celebrity association with commercial endeavors.[59]

C. Zacchini v. Scripps-Howard Broadcasting Co.

As *Palmer* and *Uhlaender* were state Supreme Court decisions, their value as precedents were influential, but not binding on other jurisdictions.[60] In 1977, the Supreme Court of the United States heard its first and only case involving the right of publicity to date.[61] In the early 1970s, Hugo Zacchini performed a "human cannonball" act, which took about fifteen seconds, at various venues.[62] At issue in *Zacchini v. Scripps-Howard Broadcasting Co.* was a recording of Zacchini's entire performance that was broadcasted in Cleveland on a local newscast.[63] In August 1972, Zacchini was performing his act every day at the Geauga County Fair in Burton, Ohio.[64] Zacchini did not charge a separate fee to see his performance, yet the fair grounds were enclosed so that the performance could not be seen without paying an initial admission to the fair.[65] One day at the fair he noticed a freelance reporter with a camera.[66] The reporter agreed not to film the act that day after Zacchini asked him not to do so, but he came back the next day and filmed it without Zacchini's consent.[67]

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56. *Id.* at 1279.
57. *Id.*
58. Bucher, *supra* note 49, at 6-7.
59. *Id.* at 7.
60. *See generally Uhlaender*, 316 F. Supp. at 1277; Palmer v. Schonhorn Enters., Inc., 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967).
61. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 562 (1977).
62. *Id.*
63. *Id.*
64. *Id.* at 563.
65. *Id.*
66. *Id.*
67. *Id.* at 564.

After the Ohio Supreme Court ruled in the news station's favor and denied Zacchini damages, the case eventually reached the Supreme Court of the United States.[68] The Supreme Court reversed the Ohio Supreme Court's decision, rejecting the station's argument that it was immune from a right of publicity claim under the First Amendment's guarantee of freedom of the press.[69] In so ruling, the Court determined that the First Amendment did not allow the station to air Zacchini's performance in its entirety without providing him just compensation, stating:

> [T]he First and Fourteenth Amendments do not immunize the media [from right of publicity claims] when they broadcast a performer's entire act without his consent. The Constitution no more prevents a State from requiring [the station] to compensate [Zacchini] for broadcasting his act on television than it would privilege [the station] to film and broadcast a copyrighted dramatic work without liability to the copyright owner.[70]

Moreover, the Court further elaborated that broadcasts, or acts of the like in which the news station engaged, amounted to "unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay."[71] While not creating a definitive, all-encompassing federal test for right of publicity cases, the Court extolled the state-law right of publicity as creating "an economic incentive for [performers] to make the investment required to produce a performance of interest to the public."[72]

It is the contention of this Note that live statistical updates provided by online fantasy sports operators amount to exploitation of the market value of professional athletes' performances that the public could only otherwise consume by watching the games in-person or via broadcast. From a purely economic perspective, the major benefit professional sports leagues enjoy due to the popularity of fantasy sports is that hundreds of thousands, if not millions of people watch their games who would not have otherwise, which increases the ratings and commercial value of the broadcasted product. Although fantasy sports operators are not broadcasting feeds of the actual games, the sheer size of the fantasy

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68. The initial causes of action appear to have been misappropriation, common law copyright infringement, conversion, and publicity infringement, yet only the claim regarding publicity came before the U.S. Supreme Court. *See id*. at 564-65.

69. *Id*. at 565-66.

70. *Id.* at 575.

71. *Id.* at 576.

72. *Id*.

sports industry[73] suggests that fantasy sports participants (consumers) find live statistical updates to be adequate substitutes for watching actual games. That online live statistical updates adequately substitute for watching the actual games is a significant limitation to the benefit of increased viewership the leagues may enjoy, and thus mitigates the hypothetically-increased financial value of such deals due to the proliferation of fantasy sports. Professional athletes in the four major American sports leagues (MLB, NFL, NBA, and NHL) are entitled to a percentage of the profits of their respective leagues' broadcast deals,[74] so the loss in potential value of such deals due to the live, unlicensed transmission of their in-game statistical performances has a tangible and negative economic effect on these athletes.

Given that the Supreme Court ruled in favor of a performer's right of publicity claim in the only case of its kind heard before the Court,[75] as well as the considerable similarity the two aforementioned table game cases have to fantasy sports today (in terms of the utilization of professional athletes' names, likenesses, and statistical performances),[76] it is reasonable to conclude that litigation between fantasy sports operators and professional athletes might tend to favor the latter's right of publicity *vis-à-vis* said operators. As reasonable as such an assumption intuitively appears to be, the most consequential fantasy sports case which followed *Zacchini*[77] proved this assumption to be incorrect.

IV. FANTASY SPORTS PRECEDENTS AND THE RIGHT OF PUBLICITY

Since *Zacchini*, there has been only one major case decided relating to professional athletes, fantasy sports, and the right of publicity.[78] In ruling against professional baseball players' right of publicity in the fantasy sports context, the U.S. Eighth Circuit Court of Appeals wrongly differentiated the facts of *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media* from similar factual situations in legal

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73. *Industry Demographics*, *supra* note 13.

74. Joel Maxcy, *Antitrust Laws & Live Streaming of Games Over the Internet*, SPORTS LABOR RELATIONS . . . AND OTHER SPORTS INDUSTRY ISSUES (Sept. 12, 2013, 7:13 PM), http://sportslaborrelations.blogspot. com/2013/09/live-streaming-games-over-internet.html.

75. *See generally Zacchini*, 433 U.S. at 562 (holding that the performer's right of publicity outweighed the news media's First Amendment interest).

76. *See generally* Uhlaender v. Henricksen, 316 F. Supp. 1277 (Minn. 1970); *and* Palmer v. Schonhorn Enters., Inc., 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967) (both finding proprietary or property interests in the players' names).

77. *See generally* C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, 505 F.3d 818 (8th Cir. 2007), *aff'g* 443 F. Supp. 2d 1077 (E.D. Mo. 2006) (holding under Missouri law favored the producer's First Amendment right over the players' right of publicity).

78. *See id*.

precedents that generally supported professional athletes' right of publicity.[79] Still, hope springs eternal for future courts to justly protect athletes' right to publicity in fantasy sports, as the facts and dicta of another decision of a lower federal court in a different jurisdiction concerning a dispute between a fantasy sports operator and the NFL players' association may provide helpful precedential value as to the nature of the interests at stake.[80]

A. C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media

C.B.C. Distribution and Marketing, Inc. (CBC), a fantasy sports operator, agreed to two consecutive licensing agreements in 1995 and 2002 with the Major League Baseball Players Association (MLBPA), via MLB Advance Media (MLBAM), for the right to utilize MLB players' names, likenesses, and statistical performance information.[81] The language of the 2002 licensing agreement specified that CBC could use "the names, nicknames, likenesses, signatures, pictures, playing records, and/or biographical data of each player" to produce its fantasy baseball products.[82] Furthermore, the 2002 agreement provided that once the license expired or terminated, CBC would refrain from using, either directly or indirectly, players' names, likenesses, and other statistical and biographical information.[83] In 2005, MLBAM declined to extend the same licensing agreement to CBC, but instead offered a license for CBC to promote MLB's own fantasy baseball games in exchange for a percentage share of all revenue related to fantasy baseball.[84]

The U.S. District Court for the Eastern District of Missouri granted CBC's motion for summary judgment, declaring that the players' right of publicity was not violated and that CBC had the right to use the players' names, likenesses, and information for its fantasy baseball games without a license.[85] In granting the motion, the court simply disregarded *Palmer* and *Uhlaender* as being "decided early in the development of . . . [the] right of publicity and [thus as] inconsistent with more recent case

79. *See id.* at 824.

80. Gridiron.com, Inc. v. Nat'l Football League Player's Ass'n, 106 F. Supp. 2d 1309, 1316 (S.D. Fla. 2000).

81. Bucher, *supra* note 49, at 8 (citing *C.B.C. Distrib.*, 505 F.3d at 821).

82. David G. Roberts, Jr., *The Right of Publicity and Fantasy Sports: Why the* C.B.C. Distribution *Court Got It Wrong*, 58 CASE W. RES. L. REV. 223, 229 (2007) (citing *C.B.C. Distrib.*, 443 F. Supp. 2d at 1080-81, *aff'd*, 505 F.3d at 818).

83. Bucher, *supra* note 49, at 8 (citing *C.B.C. Distrib.*, 505 F.3d at 824).

84. Roberts, Jr., *supra* note 82, at 229 (citing *C.B.C. Distrib.*, 443 F. Supp. 2d at 1081, *aff'd*, 505 F.3d at 818).

85. *C.B.C. Distrib.*, 505 F.3d at 820.

authority including the Supreme Court's decision in *Zacchini*."[86]

On appeal, the Eighth Circuit actually disagreed in part with the district court by holding that CBC violated the players' right of publicity as defined by Missouri law when it used the players' names, likenesses, and statistical performances without permission.[87] The elements of Missouri law defining a violation of a right of publicity were "(1) that the defendant used plaintiff's names as a symbol of his identity (2) without consent (3) and with the intent to obtain a commercial advantage."[88] Ultimately, though, the Eighth Circuit sided with CBC, reasoning that First Amendment considerations outweighed the right of publicity violation.[89] Citing the explanation in *Zacchini* that a violation of a party's right of publicity must be balanced against the First Amendment,[90] the Eighth Circuit held that the players' information at issue was readily available to all fantasy sports operators, not just CBC, because it was in the public domain.[91] Furthermore, the court described CBC's utilization of the information to be expressive speech and "[s]peech that entertains"[92] that was protected by the First Amendment, rejecting MLBAM's contention that CBC's utilization was not speech under the First Amendment.[93]

MLBAM's argument against First Amendment protection for the statistical information was seriously undermined by MLB's previous argument in *Gionfriddo v. Major League Baseball*[94] that MLB's use of such information was in fact constitutionally protected speech, as the California Court of Appeals decreed that "recitation and discussion of factual data concerning the athletic performance of [players on Major League Baseball's website] command a substantial public interest, and, therefore, is a form of expression due substantial constitutional protection."[95] In determining that First Amendment considerations outweighed the players' right of publicity, the court ruled that CBC's use of the players' names, likenesses, and statistical performances did not violate the state's interests in enforcing the right of publicity to ensure

86. *C.B.C. Distrib.*, 443 F. Supp. 2d at 1087 n.12, *aff'd* 505 F.3d at 818.

87. *C.B.C. Distrib.*, 505 F.3d at 822-23.

88. *Id.* at 822 (citing Doe v. TCI Cablevision, 110 S.W.3d 363, 369 (Mo. 2003)).

89. *Id.* at 824.

90. Bucher, *supra* note 49, at 9 (citing *C.B.C. Distrib.*, 505 F.3d at 824).

91. *Id.* (citing *C.B.C. Distrib.*, 505 F.3d at 824 (citing Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977))).

92. *Cardtoons* involved parodying professional baseball players, implicating the notion of fair use. CBC and the use of player statistics in fantasy sports does not involve parody in any sense of the word, thus rendering the Eighth Circuit's misapplication of the case troublesome. *See id.* (citing Cardtoons v. Major League Baseball Player's Ass'n, 95 F.3d 959, 969 (10th Cir. 1996)).

93. *C.B.C. Distrib.*, 505 F.3d at 823.

94. Gionfriddo v. Major League Baseball, 94 Cal. App. 4th 400, 411 (2001).

95. *Id.*

that individuals may make a living as performers and that the consuming public is not misled due to false endorsement or advertising.[96] In addition to maintaining that consumers would not be misled into believing that certain MLB players endorsed CBC fantasy products because every MLB player's statistics were necessary for the fantasy game's functioning, the court bizarrely decided that the players' opportunities to make a living were not undercut because "players are rewarded, and handsomely, too, for their participation in games and can earn additional large sums from endorsements and sponsorship arrangements."[97]

Why should a professional athlete's ability to make a living through one avenue foreclose that athlete from making money through another? In essence, the court submitted that one of the major reasons professional athletes should not be entitled to reap the monetary benefits of their performances under the right of publicity is that they already make plenty of money.[98] But denying the publicity rights of professional athletes (or celebrities) because they earn income from salaries or individual projects defeats the very purpose of protecting the right of publicity, which is to allow such individuals to license their names, likenesses, and information for compensation.[99]

Preventing professional athletes from licensing their *live* statistical performances denies them the ability to fully capitalize on said performances, while simultaneously hampering potential enrichment due to lost viewership of broadcasted games. The ability to license such performances would both enhance the professional athletes' commercial value and provide the athlete with a direct monetary benefit. That professional athletes indirectly benefit from the uncompensated and unlicensed use of their live statistical performances does not lessen the fact that allowing the unions representing professional athletes to selectively license the live dissemination of those statistics to only some fantasy sports operators would further increase the value of these performances.

Perhaps the die has already been cast and it is too late to undo the damage done by *C.B.C. Distribution*. Yet, the U.S. District Court for the Southern District of Florida rendered a decision that provides the reasoning for why professional athletes should be able to plausibly assert a violation of their right of publicity when the statistics of their performances are transmitted in real time without a license.[100]

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96. *C.B.C. Distrib.*, 505 F.3d at 824.

97. *Id.*

98. *Id.*

99. Bucher, *supra* note 49, at 22.

100. *See generally* Gridiron.com, Inc. v. Nat'l Football League Players Ass'n, 106 F. Supp. 2d 1309, 1316 (S.D. Fla. 2000).

B. Gridiron.com, Inc. v. National Football League Players Association, Inc.

Although decided as a matter of contract law, the facts of *Gridiron.com* lend considerable credence to the notion that professional athletes have a legitimate right of publicity claim when it comes to the appropriation of their statistical performances in real time.[101] Gridiron.com was a website that covered professional football in addition to offering a fantasy football game.[102] At one point, Gridiron.com had licensing contracts with one hundred fifty NFL players that allowed the website to use the players' pictures in conjunction with links to other football websites as well as its own fantasy football offering.[103] The website was covered with advertisements from third parties seeking to capitalize on the association Gridiron.com had with the NFL players.[104] This was a problem for the NFL Players Association, which upon learning of such activity immediately issued a cease and desist letter to Gridiron.com, asserting that the activities violated the NFL Players Contract and Group Licensing Agreement.[105] That agreement essentially stipulated that the players' union maintained the exclusive licensing right to the names and likenesses of players when "a total of six (6) or more NFL player images [are used] in conjunction with or on products that are sold at retail or used as promotional or premium items."[106]

In response, Gridiron.com sought a declaratory judgment ensuring that its actions did not violate the licensing agreement.[107] Siding with the union, the court concluded that the website was a "product" covered by the agreement, as it "aggregate[d] information on football players and organize[d] the information for easy access."[108] Consequently, the court held that the First Amendment did not afford protection to the activities of Gridiron.com because its website, or "product," was purely commercial merchandise unlike "novels, movies, music, magazines and newspapers."[109]

The district court based its holding on the acknowledgment that fantasy sports are a product.[110] While consumers of fantasy sports indeed receive factual information that is widely available, the underlying business model of fantasy sports operators is not to merely disseminate

101. *Id.* at 1315.
102. *Id.* at 1313.
103. *Id.*
104. *Id.*
105. *Id*. at 1311.
106. *Id.*
107. *See generally id.*
108. *Id.* at 1314.
109. Bolitho, *supra* note 10, at 949 (citing *Gridiron.com*, 106 F. Supp. 2d at 1315).
110. *See generally Gridiron.com, Inc.*, 106 F. Supp. 2d at 1316.

or aggregate the news.[111] In reality, fantasy sports operators are using real-time statistical performances of professional athletes as an input to produce and market a consumable good.[112]

V. CASES INVOLVING THE RIGHT OF PUBLICITY AND VIDEO GAMES

Perhaps even more helpful to the cause of professional athletes' right of publicity than *Gridiron.com*[113] are two recent federal cases involving the right of publicity of collegiate student-athletes and the appropriation of their biographical information and likenesses in video games, wherein the courts ruled against the defenses' claims of fair use protection under the First Amendment.[114] Both cases illustrate how a great degree of the value in sports gaming products derives from the ability of users (consumers) to play with realistic representations of famous athletes who are recognizable on a national level. If a video game producer is held liable for violating the right of publicity of well-known athletes by allowing users to play with representations of said athletes (absent those athletes' real names) to simulate athletic performances which have not actually occurred, then fantasy sports operators similarly should be held liable for allowing fantasy participants to use the performances of athletes which actually have occurred (along with those athletes' real names).

A. Keller v. Electronic Arts, Inc.

In *Keller v. Electronic Arts, Inc.* (*In re NCAA Student-Athlete Name and Likeness Licensing Litigation*), a former college football player (Keller) sued video game developer Electronic Arts (EA) for violating his right of publicity by creating and allowing game players to use a representative character of Keller that had his jersey number, height, weight, skin tone, hair color, build, and even home state.[115] Except for his name, the character had all of Keller's relevant attributes that made him recognizable to college football fans.[116] EA submitted a motion to dismiss based on California's anti-SLAPP statute (strategic lawsuits against public participation) that allows special motions to dismiss if frivolous

111. Roberts, Jr., *supra* note 82, at 229.

112. *Id.*

113. *See generally Gridiron.com, Inc.*, 106 F. Supp. 2d at 1316.

114. *See, e.g.*, *In re* NCAA Student-Athlete Name & Likeness Licensing Litig. v. Elec. Arts, Inc., 724 F.3d 1268, 1271 (9th Cir. 2013) [hereinafter Keller v. Elec. Arts, Inc.]; Hart v. Elec. Arts, Inc., 717 F.3d 141, 170 (9th Cir. 2013).

115. *Keller*, 724 F.3d at 1271.

116. *Id.*

cases impede free speech rights,[117] but the district court denied it.[118] The Ninth Circuit Court of Appeals upheld the district court's finding that EA's defense invoking the First Amendment was insufficient to overcome Keller's claim that EA violated his right of publicity.[119] Specifically, the Ninth Circuit determined that EA did not change Keller's likeness enough to qualify as a transformative use.[120]

Given the Ninth Circuit's ruling in this case, it is logical to surmise that the court would rule favorably for professional athletes making right of publicity claims in a case with facts similar to those of *C.B.C. Distribution*. After all, EA did not even include Keller's actual name, and the outcomes of the games were not directly determined by Keller's or any other players' actual attributes or statistical performances.[121] Fantasy sports operators, on the other hand, use the actual names of the professional athletes whose likenesses they utilize, and the outcomes of the games are entirely determined by the athletes' actual statistical performances.

The value of the products created by sports video game developers and fantasy sports operators alike is that game users and fantasy sports participants are given the ability to play with and compete against famous athletes. These athletes are famous due to their performances at the highest level of their respective sports. Thus, it is safe to say that the value of sports video games and fantasy sports would be considerably lessened if either product used fictitious characters or athletes unknown to the public at large.

B. Hart v. Electronic Arts, Inc.

Keller was not some sort of outlier granting unusual deference to the right of publicity over the First Amendment.[122] In *Hart v. Electronic Arts, Inc*, the Third Circuit Court of Appeals also ruled against EA for a claim alleging a violation of a collegiate athlete's right of publicity.[123] Unlike *Heller*, however, the original decision of the federal district court in *Hart* found for the defendant, granting summary judgment to EA for its use of the college player's likeness as protected under the First Amendment.[124]

On appeal, the Third Circuit examined a number of different approaches for balancing the right of free expression with the right of

117. CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2012).
118. *Keller*, 724 F.3d at 1272.
119. *Id.* at 1284.
120. *Id.*
121. *Id.* at 1272.
122. *Id.*
123. Hart v. Elec. Arts, Inc., 717 F.3d 141, 170 (2013).
124. *See Keller*, 724 F.3d at 1272; *Hart*, 717 F.3d at 147.

publicity.[125] The three tests the court considered were the *Rogers* test used in trademark law, the transformative test used in copyright law, and the predominant use test.[126] The court ultimately settled on the transformative test as the most useful, opining that it gives courts "a flexible – yet uniformly applicable – analytical framework."[127]

Analyzing EA's use of Hart's physical and biographical attributes without directly identifying him by name, the court held that EA did not adequately transform Hart's likeness to a great enough degree to afford EA First Amendment protection, stating:

> based on the combination of both the digital avatar's appearance and the biographical and identifying information—the digital avatar does closely resemble the genuine article. Not only does the digital avatar match Appellant in terms of hair color, hair style and skin tone, but the avatar's accessories mimic those worn by Appellant during his time as a Rutgers player.[128]

The court further reasoned that the other creative elements of the video game (including some of the graphics, original sounds, and unique game scenarios) did not mitigate the close resemblance of the digital representation to Hart.[129] Perhaps this result was not altogether so surprising given the court's account of the facts:

> In no small part, the NCAA Football franchise's success owes to its focus on realism and detail—from realistic sounds, to game mechanics, to team mascots. This focus on realism also ensures that the "over 100 virtual teams" in the game are populated by digital avatars that resemble their real-life counterparts and share their vital and biographical information. Thus, for example, in NCAA Football 2006, Rutgers' quarterback, player number 13, is 6'2" tall, weighs 197 pounds and resembles Hart. Moreover, while users can change the digital avatar's appearance and most of the vital statistics (height, weight, throwing distance, etc.), certain details remain immutable: the player's home state, home town, team, and class year.[130]

The court's observations and holding are remarkable in the context of fantasy sports, since nothing about the famous professional athletes can

125. *Hart*, 717 F.3d at 153.
126. *Id.*
127. *Id.* at 163.
128. *Id.* at 166.
129. *Id.* at 169.
130. *Id.* at 146, 167, *cert. dismissed*, 135 S. Ct. 43 (2014).

be altered on the whim of the fantasy consumer. What's more, unlike video games that allow consumers to create fanciful or pretend matchups or situations that have never before occurred, the product that is fantasy sports can only work if the actual statistical performances of professional athletes are utilized in strict adherence to reality.

The court went on to observe that the close resemblance of the student-athletes' digital representations in the video game to the actual student-athletes was at the core of the game's appeal:

> Moreover, the realism of the games—including the depictions and recreations of the players—appeals not just to home-team fans, but to bitter rivals as well. Games such as NCAA Football permit users to recreate the setting of a bitter defeat and, in effect, achieve some cathartic readjustment of history; realistic depictions of the players are a necessary element to this. That Appellant's likeness is the default position only serves to support our conclusion that realistic depictions of the players are the "sum and substance" of these digital facsimiles.[131]

As the court found that a video game's necessary use of a "realistic" representation of an athlete's likeness and biography violated an athlete's right of publicity, it stands to reason that applying the transformative test to a fantasy product's necessary use of an athlete's actual performance would result in a similar right of publicity violation. In other words, the *Hart* court found that the digital representations of athletes—which *could* be altered by video game players—were not transformed enough to qualify as fair use. Accordingly, athletes' statistics as used in fantasy sports—which *cannot* be changed—lack the requisite transformation to qualify for fair use.

The Third Circuit relied on *Zacchini* to further explain how EA's defense, that the ability of video game players to change the features of the student-athletes' likenesses and attributes, did not diminish the right of publicity:

> As Zacchini demonstrated, the right of publicity can triumph even when an essential element for First Amendment protection is present. In that case, the human cannonball act was broadcast as part of the newscast. See Zacchini, 433 U.S. at 563, 97 S. Ct. 2849. To hold, therefore, that a video game should satisfy the Transformative Use Test simply because it includes a particular interactive feature would lead to improper results. Interactivity

131. *Hart*, 717 F.3d at 168.

cannot be an end onto itself.[132]

Once again, the court iterated how the EA video game lacked the necessary transformation under the transformative use test. The only interaction fantasy participants can have with the athletes is editing their starting lineups, adding or dropping athletes from their rosters, or trading athletes with their fellow participants. This level of interactivity is much less than what can be done in the video game setting, so it is significant that the Third Circuit found the level of interactivity in the EA video game to be insufficiently transformative.[133]

The court recognized that "the right of publicity can triumph even when an essential element for First Amendment protection is present."[134] From this we can extrapolate that even though the statistical performances used in fantasy sports are afforded First Amendment protection, not every use of statistics is permissible.

The performance in *Zacchini* was part of a newscast, and the First Amendment protects news because facts are not copyrightable.[135] Nevertheless, broadcasting the entire performance crossed the line from protectable free speech to violating Zacchini's right of publicity. The performance was the essence of his livelihood. The Third Circuit would likely draw the same conclusion with regard to the *real-time* conveyance of the statistical performances of professional athletes by fantasy sports operators.

As a result of these cases, EA announced that for the moment it would no longer produce college football games.[136] While this might temporarily deprive consumers of the college football video game, professional leagues and the athletes they represent should view this as a positive development in the context of fantasy sports. This could be a preview of things to come if the transformative use test is applied in a case involving fantasy sports and the right of publicity.

VI. PROPOSALS FOR REFORM

In the absence of the Eighth Circuit, a different federal appellate court, or the Supreme Court of the United States reconsidering *C.B.C. Distribution*,[137] Congress should pass legislation to enshrine the right of

132. *Id.* at 146, 167, *cert. dismissed*, 135 S. Ct. 43 (2014).

133. *Id.*

134. *Id.* (citing Zacchini V. Scripps-Howard Broad. Co., 433 U.S. 562, 563 (1977)).

135. *See Zacchini*, 433 U.S. at 578.

136. Nick Bromberg, *EA Sports will not Produce College Video Game for 2014*, YAHOO SPORTS (Sept. 26, 2013, 4:47 PM), http://sports.yahoo.com/blogs/ncaaf-dr-saturday/ea-sports-not-produce-college-football-game-2014-204712963--ncaaf.html (last visited Apr. 26, 2015).

137. *See generally* C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced

publicity at the federal level. Because the right of publicity is currently protected only at the state level,[138] the country's jurisprudence regarding the right of publicity is fraught with confusion and inconsistencies. As Timothy J. Bucher details:

> on the state level, "Missouri state courts apply a 'predominant purpose' test"; California state courts apply a "transformative" test; Kentucky state courts apply the Rogers (a.k.a. "relatedness") test; and New York and Virginia state courts use a "purposes of trade" test--all varying standards for which courts interpret the interplay between the right of publicity and the First Amendment. Moreover, there are similar inconsistencies among the federal appellate courts. The Second Circuit and Sixth Circuit apply the Rogers test (the same as Kentucky); the Eighth Circuit, the Tenth Circuit, and the Sixth Circuit, (in addition to its use of the Rogers test) weigh the "societal interests in free use of famous persons' identities against the particular plaintiffs' interests in preventing exploitation."[139]

As the Ninth Circuit interprets California law to give less weight to First Amendment considerations, there could be a serious problem that is impracticable to resolve if a professional sports league successfully sues a fantasy sports operator in California for a violation of players' right of publicity.[140] The legal cacophony caused by the current state-by-state and circuit-by-circuit approach to the right of publicity may force fantasy sports operators to pay licensing fees in California for the use of statistical performances of players domiciled there, but not for such uses in Missouri.[141] Although hypothetical, the fact that the difficulty and prohibitive cost of a fantasy sports operator to figure out how much it owes in licensing fees renders such a task virtually unworkable. Besides hindering a consumer market, it would also amount to a violation of the dormant commerce clause because the California law would affect interstate commerce in Missouri.[142]

One option Risa J. Weaver proposes is for Congress to pass a federal right of publicity statute equivalent to the Copyright Act of 1976,[143] the

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Media, 505 F.3d 818 (8th Cir. 2007).

138. Edelman, *supra* note 3, at 42.

139. Bucher, *supra* note 49, at 21.

140. Weaver, *supra* note 1, ¶ 39 (citing White v. Samsung Elecs. Am., 971 F.2d 1395, 1407-08 (9th Cir. 1992)).

141. *Id.*

142. *Id.*

143. *Id.* ¶ 50 (citing 17 U.S.C. §§ 101-810, 1101 (2006)).

Trademark Act of 1946,[144] and the Patent Act.[145] A fair use exception could be carved out of the federal right of publicity statute by applying the first and fourth copyright fair use factors, which are "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes," and "(4) the effect of the use upon the potential market for or value of the copyrighted work."[146] Determining fair use is itself an imprecise exercise,[147] but at least case law based on a federal statute would eventually lead to a degree of uniformity and coherence that the current variance in state-based right of publicity laws sorely lacks.

Another route Congress could take, proposed by Neal H. Kaplan, would be to put a federal misappropriation statute within the Copyright Act specifically granting property-like protection for the duration of the performances of the sporting events.[148] This proposal attempts to balance the opposing interests of encouraging the creation of intellectual property with protecting free speech by further ingratiating the incentive to produce creative works while allowing the factual information about the work to be freely disseminated *after* the work has been performed.[149]

A necessary corollary to pass in conjunction with such a misappropriation statute would be a compulsory license allowing fantasy sports operators to utilize the live, in-progress statistical performances so that they can continue to provide real-time statistical updates through their offerings.[150] Such a corollary is necessary because "[a] statutory copyright that gives the copyright owner complete control of public access to the work following its publication has no constitutional basis."[151] Under a compulsory license, fantasy sports operators would have to reimburse the producer or owner of the performance after disseminating the live statistical updates, at a rate subject to negotiation.[152]

Any of the aforementioned proposals would equitably serve to defend professional athletes' right of publicity pertaining to their performances, while also ensuring First Amendment protections for firms to disseminate facts. As the incongruence of state right of publicity law demonstrates,[153]

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144. *Id.* (citing 15 U.S.C. §§ 1051-1129 (2006)).

145. *Id.* (citing 35 U.S.C. §§ 1-376 (2000)).

146. *Id.* ¶ 45 (citing 17 U.S.C. § 107 (2006)).

147. Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) ("[T]he issue of fair use . . . is the most troublesome in the whole law of copyright . . . .").

148. Kaplan, *supra* note 26, at 67.

149. *Id.*

150. *Id.* at 68.

151. *Id.* (citing L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 63 (1987)).

152. *See generally* 17 U.S.C.A. § 111 (West 2014).

153. Bucher, *supra* note 49, at 21.

federal legislation in some form is necessary to harmonize right of publicity jurisprudence uniformly across the United States, establish legal predictability, and rectify misjudgments like *C.B.C. Distribution*.[154]

VII. CONCLUSION

The overarching legal history of the right of publicity, including its original purpose[155] and relevant precedents,[156] reveals that the live, unlicensed transmissions of statistical performances should not be protected by the First Amendment because they infringe on the proprietary rights of professional athletes in a way that unjustly limits their ability to fully reap the benefits of their labors.[157]

Whether by amending the Copyright Act or passing an entirely new statute which explicitly protects the right of publicity in the context of transmitting the statistical performances of professional athletes as they occur in real time,[158] Congress should move to enact federal legislation that enshrines and clarifies the underlying interest professional athletes have in the live conveyance of their statistical performances. Yet in the absence of any such legislation, the federal judiciary should employ the transformative use test as applied in *Keller* and *Hart* (finding that video games using the approximate likenesses and biographical information of collegiate student-athletes violates said athletes' right of publicity and are not protected by the First Amendment) to determine that the live, unlicensed use of professional athletes' statistical performances amounts to an impermissible violation of said athletes' right of publicity.[159]

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154. *See generally* C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, 505 F.3d 818, 823-24 (8th Cir. 2007) (explaining that it would be strange for states to disallow people from using information that is available to everyone).

155. *See* J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 at 1-2 (2d ed. 2000) (stating that it is the right of every person to control the commercial use of his or her identity).

156. *See, e.g.*, Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977); C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, 505 F.3d 818 (8th Cir. 2007); Gridiron.com, Inc. v. Nat'l Football League Player's Ass'n, 106 F. Supp. 2d 1309, 1315 (S.D. Fla. 2000); Uhlaender v. Henricksen, 316 F. Supp. 1277 (Minn. 1970); Palmer v. Schonhorn Enters., 232 A.2d 458, 463 (N.J. Super. Ct. Ch. Div. 1967).

157. Roberts, Jr., *supra* note 82, at 245 (citing C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, 443 F. Supp. 2d 1077, 1080-81 (E.D. Mo. 2006)).

158. Neal H. Kaplan, NBA v. Motorola*: A Legislative Proposal Favoring the Nature of Property, the Survival of Sports Leagues, and the Public Interest*, 23 HASTINGS COMM. & ENT L.J. 29, 67 (2000) (citing Nat'l Basketball Ass'n v. Sports Team Analysis & Tracking Sys., Inc., 939 F. Supp. 1071, 1106 (S.D.N.Y. 1996)); Risa J. Weaver, *Online Fantasy Sports Litigation and the Need for A Federal Right of Publicity Statute*, DUKE L. & TECH. REV. 2, 39 (2010).

159. *See* Keller v. Elec. Arts, Inc., 724 F.3d 1268, 1272 (9th Cir. 2013); Hart v. Elec. Arts, Inc., 717 F.3d 141, 147 (2013).