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## Are Intellectual Property Rights in Fantasy Sports a Reality?

Christian Hambleton

Brush your teeth. Take a shower. Eat breakfast. Check your fantasy football team. The rapid growth of fantasy sports over the last decade has made keeping track of one's fantasy sport team part of a daily routine. Participation in online fantasy sports has grown by an average of 11.5 % a year over the last five years.<sup>1</sup> It is estimated that that over 33 million Americans participate in fantasy sports while fantasy platforms such as ESPN and Yahoo! will generate close to \$1.3 billion in revenue through ad sponsorship and player fees in 2013.<sup>2</sup> With the surge in fantasy sports has come many questions such as: what protection is major league industries and player associations afforded under the federal copyright law? What is the right of publicity and what is its tension with the First Amendment? Should major league industries and player associations seek shelter under copyright law or the right of publicity cause of action? What does the future hold for fantasy sports in its battle with intellectual property law? Outdated court

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<sup>1</sup> <http://www.theatlantic.com/business/archive/2013/09/the-insane-growth-of-fantasy-sports-in-1-graph/279532/>

<sup>2</sup> Id.

rulings from a time when current technology only appeared in science fiction novels have created an unclear precedent.

### Introduction to Fantasy Sports

Online fantasy sports are games where participants (managers of the teams) draft current professional players to create their team. Each player accumulates points based on his actual performance throughout the course of the season. Different accomplishments in a game will result in a set amount of points that are determined by each league. For example in a fantasy football league, every 10 rushing yards by a player is worth one point. The first fantasy leagues were developed in the 1970's and leagues used sports periodicals and newspapers to collect their game content.<sup>3</sup> Each players' statistics were then calculated longhand, before releasing the updated fantasy league standings on a weekly basis<sup>4</sup>. The creation of the Internet transformed fantasy sports leagues from a hobby done amongst local friends to a commercial enterprise, connecting people from across the world. No longer are newspapers used to compute player statistics in a tedious weekly exercise. Instead, the Internet has provided fantasy sports participants with up-to-the minute updates of all player statistics.<sup>5</sup>

Leagues are organized through websites like ESPN, Yahoo!, and CBS Sports. Some sites offer free participation in order to attract as many people as possible to increase advertising revenue, while other charge participants a nominal fee.<sup>6</sup> The economic impact of fantasy sports has expanded to other platforms as well. Smartphone users are able to access their fantasy leagues and manage their teams on their mobile devices through fantasy sports "apps." The

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<sup>3</sup> Jeff Passan, The Reality of Fantasy, Yahoo! Sports, April 20, 2006, available at <http://sports.yahoo.com/mlb/news?slug=jp-fantasy042006&prov=yhoo&type=lgn>.

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Jeremy Herron, NBCSports.com Redesigns Web Site, Buys Fantasy Sports Site, Buffalo News, Sept. 18, 2006, at C2, available at 2006 WLNR 16308044.

success of a fantasy team during the course of a season is totally dependent upon the participant's chosen players performance on their respective teams.<sup>7</sup> As a result, drafting and managing one's team is crucial to winning a league. Sport information outlets have taken advantage of fantasy sports' popularity and the glut of sports information that exists by offering "expert" advice on drafting players and how to organize one's team roster as part of the outlet's premium membership package. With cash prizes often being awarded to participants who win their league (whether paid out through the site or on the side amongst the participants), participants look for any edge they can gain over their competitors.

### The Right of Publicity and the First Amendment

The right of publicity protects an individual's proprietary interest and is derived from state law.<sup>8</sup> Violations of the right of publicity have two elements: use of a protected individual's identity; and the identity must be appropriated to further an impermissible purpose (i.e. seek a commercial advantage).<sup>9</sup> The Third Restatement of Unfair Competition identifies five reasons for the right of publicity law: (1) "protecting an individual's interest in personal dignity and autonomy"; (2) securing for plaintiff(s) the commercial value of their fame"; (3) preventing the unjust enrichment of others seeking to appropriate the commercial value of plaintiff's fame for themselves"; (4) "preventing harmful or excessive commercial use that may dilute the value of a person's identity" and (5) "affording protection against false suggestions of endorsement or sponsorship."<sup>10</sup>

The integration of the idea of the right to control commercial exploitation of aspects of one's identity and the right of privacy was first discussed in Roberson v. Rochester Folding Box

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<sup>7</sup> C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp.2d 1077, 1080 (E.D. Mo. 2006).

<sup>8</sup> Lugosi v. Universal Pictures, 603 P.2d 425, 440 (Cal. 1979).

<sup>9</sup> Id.

<sup>10</sup> 114 Cal. Rptr. 2d 307, 316 (Ct. App. 2001).

Co.<sup>11</sup> The New York Court of Appeals refused to acknowledge that any right existed to protect a woman from the unauthorized use of her portrait to promote the sale of flour.<sup>12</sup> The public outrage in response to the court's decision was so strong that the following year the New York Legislature enacted a statute making it both a misdemeanor and a tort to use a name or picture without consent for the purposes of trade.<sup>13</sup> In the years since Roberson, the right of privacy has expanded into the subject of state statutory law, federal statutory law, and common-law causes of action.<sup>14</sup>

The right of publicity was commonly viewed as a right of privacy by the courts, however, it was first recognized as a type of property right by the Second Circuit Court of Appeals in Haelan Laboratories Inc. v. Topps Chewing Gum, Inc when the right of publicity was first discussed in the context of sports.<sup>15</sup> The plaintiff in Haelan Laboratories Inc. had entered into a contract with a professional baseball player for the exclusive right to use his photograph on trading cards that were sold with chewing gum.<sup>16</sup> The defendant refused to recognize the contract and was able to persuade the same ballplayer to authorize the distribution of his photograph with its sale of chewing gum.<sup>17</sup> Haelan thought Topps induced the player to breach his contract and brought a claim against Topps, who argued that the contract between plaintiff and the player was only a release of liability contract, because celebrities lacked the ability to assign their privacy interest in their photograph to another under privacy law.<sup>18</sup> The court opinioned that the baseball player could grant an exclusive and enforceable right in his image to

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<sup>11</sup> Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1992).

<sup>12</sup> Id at 442, 447-448.

<sup>13</sup> William L. Prosser, Privacy, 48 Cal. L. Rev. 383, 385 (1960).

<sup>14</sup> Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129, 133 (Wis. 1979).

<sup>15</sup> Haelan Labs, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953).

<sup>16</sup> Id at 867.

<sup>17</sup> Id.

<sup>18</sup> Id at 868.

a third party such as Haelan, thus distinguishing the right of publicity from the right of privacy.<sup>19</sup> In explaining its decision the court said, “ a man has a right in the publicity in the value of his photograph... famous persons would be sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses trains, and subways.”<sup>20</sup>

The ruling in Haelan allowed public figures to protect against the commercialization of their figure without proper compensation. The court, however, left unanswered the question of whether the right of publicity should be a right exclusively for celebrities.<sup>21</sup> Professor Melvin Nimmer concluded that the right of publicity was not limited to only celebrities in his 1954 article, “The Right to Publicity.”<sup>22</sup> Using Nimmer’s theories and analysis, courts have spent decades quarreling over a unified formulation of, and the limits upon which the right of publicity may be extended.<sup>23</sup>

### Right of Publicity Applied to Fantasy Sports

#### **Do Stats and Names Constitute an “Identity?”**

There is no denying that fantasy sport leagues’ existence is based on the use of player statistics and identities. The courts have consistently held that only the identity or persona of a person is protected under publicity law, not “a mere use of a name.”<sup>24</sup> A person’s identity can be expressed in likeness, images, or personality.<sup>25</sup> Using a player’s name is not dispositive in a right

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<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> Melville B. Nimmer, The Right of Publicity, 19 Law & Contemp. Probs. 203, 203 (1954).

<sup>22</sup> J. Thomas McCarthy, The Rights of Publicity and Privacy § 1:3, at 3 (2d ed. 2004).

<sup>23</sup> See Sarah M. Konsky, Publicity Dilution: A Proposal for Protecting Publicity Rights, 21 Santa Clara Computer & High Tech. L.J. 347, 352 (2005)

<sup>24</sup> Doe v. TCI Cablevision, 110 S.W.3d 363, 369 (Mo. 2003).

<sup>25</sup> Id.

of publicity claim; rather it is how the player's name is use that matters. Professional leagues and player associations would meet the threshold for "identity" if it could prove that fantasy leagues use the personality, expression, or persona of a player through a means other than the player's name. In Doe v. TCI Cablevision, the court found a comic book character, Tony Twist, was a misappropriation of the athlete Tony Twist's identity.<sup>26</sup> The comic book character had similar personality and physical characteristics as the athlete, and there was intent to profit off the athlete's fame.<sup>27</sup>

In Uhlaender v. Henricksen, Major League Baseball Players Association (MLBPA) brought a suit alleging a violation of state misappropriation law against a creator of a board game.<sup>28</sup> The production of the board game involved using the statistics and names of over 500 professional baseball players without compensation or the permission of the MLBPA. The court, relying partly on the precedent set in Palmer, explained, "a celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status. That identity, embodied in his name, likeness, statistics and other personal characteristics, is the fruit of his labors and is a type of property."<sup>29</sup> The players in Uhlaender had a right to their statistics and names, and the defendant had infringed on their rights to publicity by using this information without the players' permission or compensation.<sup>30</sup>

Taking a player's name aside, professional leagues are left to argue that a player's statistics create a player's identity. This argument falls short of what the court in Doe recognized as qualifying as one's "identity." However, under Uhlaender, the players' statistics would qualify

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<sup>26</sup> Id at 363.

<sup>27</sup> Id at 370.

<sup>28</sup> Uhlaender v. Henricksen, 316 F. Supp. 1277, 1278 (D. Minn. 1970).

<sup>29</sup> Id at 1282-1283.

<sup>30</sup> Id at 1279-1280.

as their identity. Fantasy leagues would argue that numbers generated from a player's performance do not reveal anything about his physical characteristics, his personality, image, or his persona. Professional sport leagues would counter this by arguing a player's statistics are equitable to one's personality and physical features when it comes to marketability. Thus, statistics should be considered part of a player's identity.

### **What is the Impermissible Purpose?**

The second prong professional leagues and player associations would have to satisfy in their right of publicity cause of action is that fantasy leagues use players' names and statistics for an impermissible purpose. While various mitigating factors have been used in determining what this "impermissibility" encompasses, there are three major approaches that have been adopted by courts.

The "commercial use" test places its emphasis on the danger of "the exploitation of celebrity to sell products and attempt to take a free ride on a celebrity's celebrity value" that may be realized within the context of advertising.<sup>31</sup> Palmer v. Schonhorn Enterprises, Inc. was the first case that dealt with the unauthorized integration of names and statistics of professional athletes.<sup>32</sup> In Palmer, the defendant used the image and statistics of golf legend Arnold Palmer and other professional golfers in its video game *Pro-Am Golf* by listing the player's information in "profile and playing charts" in hopes of improving the sale of the game.<sup>33</sup> The court rejected the defendant's argument that "since the information contained in the profiles is readily obtainable public data and available to all, it should be denied the privilege of reproducing that is

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<sup>31</sup> White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1401 & n.3 (9th Cir. 1992).

<sup>32</sup> Palmer v. Schonhorn Enter., Inc., 232 A.2d 458, 458 (N.J. Super. Ct. 1967).

<sup>33</sup> Id. at 462.

set forth in newspapers, magazine articles, and other periodicals.”<sup>34</sup> Rather, the court distinguished between the “act of capitalizing upon the name by using it in connection with a commercial project” and pure reporting of an individual’s statistics.<sup>35</sup> The former was deemed unjust because it allowed the defendant to freely exploit and to profit from successes of another based on the owner’s highly publicized accomplishments.<sup>36</sup>

Fantasy sports do not satisfy this test because players’ names and statistics are not included based on the players’ celebrity status, nor are the statistics used as an advertisement to associate the player with the fantasy league. The statistics of every player are used in fantasy sports, from the superstars to the benchwarmers.

The “purpose” test analyzes the extent to which the use of the identity is for commercial purposes as opposed to noncommercial or expressive uses.<sup>37</sup> Courts have used this test to assess whether the defendant used the plaintiff’s identity to promote a product. In Abdul-Jabbar v. General Motors Corp., plaintiff was a well-known former basketball player who sued General Motors for the unauthorized use of his image and past accomplishments in its car advertisements.<sup>38</sup> The Ninth Circuit Court held that Abdul-Jabbar’s right of publicity had been violated because the advertisements would make it difficult for him to endorse other automobiles, therefore hurting his economic value.<sup>39</sup>

Fantasy sports do not use players’ names and statistics to promote their leagues. Participants join fantasy leagues because they enjoy playing the role of “general manager” and the camaraderie that the leagues involve. Also, every fantasy league uses the same players and

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<sup>34</sup> Palmer, 232 A.2d at 462.

<sup>35</sup> Id.

<sup>36</sup> Id. at 462.

<sup>37</sup> Doe, 110 S.W.3d at 373

<sup>38</sup> Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 416 (9th Cir. 1996).

<sup>39</sup> Id. at 409.

statistics, therefore player information is not used to promote one league over another. The statistics have no bearing on the marketing of fantasy leagues; rather they are used strictly as raw data that is computed to develop the league standings.

The last test that courts use in determining if an impermissible purpose exists is inquiring whether the identity of the plaintiff was transformed or if it was used “as is.”<sup>40</sup> Courts who rely on the “commercial value” test look favorably upon the use of identity that is expressive or adds a new element to the original identity. Fantasy sports use player statistics to create new data that is customized to its leagues. The performance of the players’ is transformed from hits, yards, touchdowns, and baskets, into fantasy points. The players’ statistics are not used to attract attention to the fantasy leagues; they are used to compute data.

### **Policy Rationale Applied to Fantasy Sports**

The five rationales for publicity law given by the Restatement (Third) of Unfair Competition (listed, supra) do not apply to fantasy sports, thus making it even more difficult for professional leagues and player associations to bring a right of publicity claim against fantasy leagues. Publicity laws were instituted to prevent defendants from receiving some free benefit as a result of using the plaintiff’s identity without having paid for it. Fantasy sports are not publicizing anything that is restricted by licensing agreements or needs to be purchased. Fantasy leagues do not have an adverse effect on the commercial value of athletes because the statistics are already in the public domain. If a player loses an endorsement deal because his statistics are down from previous years, he has only himself to blame, not fantasy leagues. In fact, empirical studies suggest that fantasy sports actually increases the commercial value of players because

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<sup>40</sup> Parks v. LaFace Records, 329 F.3d 437, 452 (6th Cir. 2003).

participants are more likely to watch games on TV to keep track of the players' on their team.<sup>41</sup> Also, players gain exposure to a larger audience who may not have known who the player was before the player was drafted onto the participant's fantasy team. In CBC, the trial court noted that, "fantasy sports games increases the commercial value of players' identities because the games encourage participants to attend live games, pay for television packages, or watch on television sporting events in which they would otherwise not be interested."<sup>42</sup>

Fantasy sports would be just as successful if the leagues did not use the players' name and only used their statistics. Players would still be drafted because, for the most part, participants draft players based on their statistical output, not on the players' name. The ability of fantasy sports to be successful without players' names refutes the argument that fantasy leagues appropriate player information for commercial gain or that the leagues would be unmarketable without it. The ability to succeed independent of players' names further proves that the policy rationale for publicity law does not apply to fantasy sports and its use of player statistics.

### Right of Publicity Defenses

Since the right of publicity was created by state legislature or state courts, state action allows defendants to assert constitutional protection as a defense. The most common defense used is that the right of publicity limits a defendant's expressive acts and thus directly violates his First Amendment rights. The extent that a right of publicity claim violates a defendant's constitutional rights was discussed in 1977 by the U.S. Supreme Court in Zacchini v. Scripps-Howard Broadcasting Co.<sup>43</sup> In that case an entertainer at a local fair sued a news station claiming

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<sup>41</sup> <http://quod.lib.umich.edu/j/jsas/6776111.0003.114/--relationship-of-fantasy-football-participation-with-nfl?rgn=main;view=fulltext>

<sup>42</sup> C.B.C., 443 F. Supp. 2d at 1091 n.20.

<sup>43</sup> Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 574-75 (1977).

a violation of his right of publicity for the reproduction of his live act after the news station had recorded and replayed the plaintiff's entire 15 second cannon ball routine.<sup>44</sup> The news station used the First Amendment to defend its actions and argued that the freedom of the press granted the station immunity from a right of publicity claim.<sup>45</sup> The Supreme Court rejected the defendant's claim and held that the First Amendment did not allow the news station to show plaintiff's performance in its entirety without some form of compensation.<sup>46</sup> In making its decision, the court affirmed Haelan's and Nimmer's argument that the right of publicity was an independent action apart from the right to privacy.<sup>47</sup> While Zacchini was an important case because it discussed the interplay between the right of publicity and the First Amendment, the case failed to develop adequate standards to analyze right of publicity cases. The limited precedential and analytical value is attributed to the fact that the use at issue was for a newscast rather than commercial, and the Court failed to establish a specific right of publicity standard or test because it ultimately decided the case under copyright law analysis.<sup>48</sup>

### **Right of Publicity vs. First Amendment**

The First Amendment, by its nature, implicates free speech and thus creates an inherent tension with the right of publicity.<sup>49</sup> Finding that the defendant's action warrants First Amendment protection is not dispositive to the courts' ruling.<sup>50</sup> Courts have developed their own

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<sup>44</sup> Id. at 563-564.

<sup>45</sup> Id.

<sup>46</sup> Id. at 575.

<sup>47</sup> Id. at 571.

<sup>48</sup> Mark Conrad, The Right of Publicity in the Digital Age - Doctrinal Tensions, Common Law Theories and Proposals for Solutions, 24 Computer Law & Security Report 407, 407 (2008).

<sup>49</sup> Sheldon W. Halpern, The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality, 46 Hastings L.J. 853, 853-54 (1995).

<sup>50</sup> Id.

balancing tests that weighs an individual's right to use his/her persona against the value of free expression in determining whether a right of publicity violation has occurred.<sup>51</sup>

The first step in the balancing test is categorizing the defendant's action as either communicative or commercial speech.<sup>52</sup> Communicative speech has proven difficult for courts to define, though it is most often thought of as the reporting of information and ideas in the public interest for the purposes of education, entertainment, and enlightenment.<sup>53</sup> Any form of speech "that advertises a product or service for profit or for business purposes," is categorized as commercial.<sup>54</sup> The First Amendment grants more protection to communicative speech, thus providing a defendant with a thinner veil of protection for commercial speech such as when a defendant uses the name or image of another in an advertisement.<sup>55</sup> With that said, communicative speech can still be found to violate one's right to publicity as was demonstrated in Zacchini. Even though the Court found defendant's action qualified as communicative speech, the Court believed that the plaintiff's right to publicity was violated because his time and effort expended on his performance outweighed the news stations First Amendment rights.<sup>56</sup> Courts, such as the one in Zacchini, are more likely to find that a violation has occurred when the defendant's action "substantially threatens" the economic value of a performance or one's commercial value.<sup>57</sup>

An example of how a First Amendment defense would apply to fantasy sport industries can be found in Gionfriddo v. Major League Baseball, in which MLB successfully asserted a

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<sup>51</sup> J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 28:41 (4th ed. 2005)

<sup>52</sup> Pamela Edwards, What's the Score?: Does the Right of Publicity Protect Professional Sports Leagues?, 62 Alb. L. Rev. 579, 610-12 (1998).

<sup>53</sup> Id.

<sup>54</sup> Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 972 (10th Cir. 1996)

<sup>55</sup> White v. Samsung Elec. Am., Inc., 971 F.2d 1395, 1401 n.3 (9th Cir. 1992).

<sup>56</sup> Zacchini 433 U.S. at 572.

<sup>57</sup> Id. at 575.

First Amendment defense against a right of publicity claim that was brought by a group of former baseball players.<sup>58</sup> The plaintiffs claimed MLB, without authorization, used the players' names, photographs, and statistics on television broadcasts, on its website, and in other presentations.<sup>59</sup> The most relevant part of the Court's holding for the fantasy industry was that since the videos and MLB website were not designed to make profits for the league, the communication (players' name, statistics, and photographs) did not present a commercial transaction.<sup>60</sup> The right to report statistics outweighed the interests of the players. "As a baseball season unfolds, the First Amendment will protect the mere recitations of the of the players' accomplishments."<sup>61</sup>

### **Modern Balancing Tests**

Since Zacchini, the courts have attempted to develop a systematized approach to resolve the inherent conflicts between the First Amendment and the right of publicity. The most common tests that have been implemented by the courts are: the trademark based Rogers test, the commercial-interest based predominant use test, and the copyright-based transformative use test.<sup>62</sup>

#### The Rogers Test

The Rogers test examines the relationship between the work as a whole and the celebrity, and was developed to protect consumers from risk of consumer confusion.<sup>63</sup> If the name or likeness of a person is used solely to attract attention to a work that is unrelated to the person,

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<sup>58</sup> Gionfriddo, 94 Cal. App. 4th at 404.

<sup>59</sup> Id at 406.

<sup>60</sup> Id at 411.

<sup>61</sup> Id at 410.

<sup>62</sup> Hart v. Electronic Arts, Inc., 717 F.3d 141 (3d Cir. 2013).

<sup>63</sup> Cairns v. Franklin Mint Co., 292 F.3d 1139, 1149 (9<sup>th</sup> Cir. 2002).

then the developer of the work is liable for the use of the person's identity in advertising.<sup>64</sup> Even though the test is a hallmark of the Lanham Act used in conjunction with trademark claims, courts have found it useful in right of publicity claims because both claims require the court to balance the interests in protecting the relevant property right against the interest in free expression.<sup>65</sup>

### Predominant Use Test

The predominant use test was first used in Doe v. TCI Cablevision as a result of the court rejecting both the transformative use and Rogers tests because they gave "too little consideration to the fact that many uses of a person's name and identity have both expressive and commercial components."<sup>66</sup> The court applied a different test that examined the predominant use of the person's identity at issue:

If a product is being sold that predominantly exploits the commercial value of an individual's identity, that product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some 'expressive' content in other circumstances. If...the predominant purpose of the product is to make an expressive comment on or about a celebrity, the expressive values could be given greater weight."<sup>67</sup>

### Transformative Use Test

The transformative use test was developed by the California Supreme Court in Comedy III Productions, Inc. v. Gary Saderup, Inc.<sup>68</sup> It requires a court to conduct a balancing test "between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere

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<sup>64</sup> Id.

<sup>65</sup> ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 924 (6<sup>th</sup> Cir. 2003).

<sup>66</sup> Doe v. TCI Cablevision, 110 S.W. 3d. 374 (Mo. 2003).

<sup>67</sup> Id. at 374.

<sup>68</sup> Comedy III Prods., Inc. v. Gary Saderup, Inc. 106 Cal.Rptr.2d 126, 21 P.3d 797 (2001).

celebrity likeness or imitation.”<sup>69</sup> Works that are deemed to possess significant transformative elements are less likely to interfere with the individual’s economic interest, and thus found not to violate one’s right of publicity.<sup>70</sup> An artist depicting a celebrity is required to contribute something more than a ‘merely trivial’ variation in order for the work to be transformative.<sup>71</sup> The court listed five factors that should be taken into account when analyzing a work of art under the transformative use test: “If the celebrity is one of the ‘raw materials’ from which an original work is synthesized”, it is more likely to be transformative than if “the depiction or imitation of the celebrity is the very sum and substance of the work in question,”<sup>72</sup>; examination of whether a likely purchaser’s primary motivation is to buy a reproduction of the celebrity or to buy the expressive work of the artist;<sup>73</sup> a quantitative analysis of whether the literal and imitative or the creative predominates the work;<sup>74</sup> whether the “marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted”;<sup>75</sup> and when “an artists’ skills and talent is manifestly subordinated to the overall goal of creating a conventional portrait of the celebrity so as to commercially exploit his or her fame, the work is not transformative.”<sup>76</sup>

### Recent Right of Publicity Cases Involving Sports

#### **CBC**

In 2006, the United States District Court for the Eastern District of Missouri ruled on a case that involved the use of players’ names and statistics on a fantasy sports website. CBC

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<sup>69</sup> Id. at 803.

<sup>70</sup> Id.

<sup>71</sup> Winter v. DC Comics, 30 Cal.4<sup>th</sup> 881, 134 Cal.Rptr.2d 634, 69 P.3d 473, 476 (2003).

<sup>72</sup> Comedy III 106 Cal.Rptr.2d 126 at 809.

<sup>73</sup> J. Thomas McCarthy, The Rights of Publicity and Privacy § 8:72 (2d ed, 2013).

<sup>74</sup> Comedy III 106 Cal.Rptr.2d 126 at 809.

<sup>75</sup> Id.

<sup>76</sup> Id.

Distribution and Marketing, Inc. (CBC) owned a company called CDM, and it offered fantasy baseball leagues on its website.<sup>77</sup> Participants paid a fee to play in the league, drafted their team before the start of the MLB season, paid a small fee each time they made a trade, and the success of the team was determined by the participant's players' performance on their respective MLB teams.<sup>78</sup> CBC licensed from the MLBPA the non-exclusive right to use "the name, nicknames, likeness, signatures, pictures, playing records, and/or biographical data of each player" in its fantasy products from July 1995 through 2004.<sup>79</sup>

MLBPA ended this license with CBC when it entered into a license agreement with Major League Baseball Advanced Media, L.P. (MLBAM) in 2005 that granted MLBAM the right to use player likeness and statistics in connection with all interactive media, which included fantasy sport games.<sup>80</sup> MLBPA did not want to lose its business with CBC so it offered CBC an opportunity to promote MLBAM's fantasy games on CBC's website in exchange for a ten percent share of all related revenue.<sup>81</sup> CBC filed a complaint for declaratory judgment arguing that it had the right to use the players names and statistics on its fantasy sports website with a license.<sup>82</sup> MLBPA and MLBAM counterclaimed by contending that such action by CBC would result in a violation of the players' right of publicity.<sup>83</sup>

Under Missouri state law, one's right of publicity is violated when: The defendant used plaintiff's name as a symbol of his identity without consent and with the intent to obtain a

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<sup>77</sup> C.B.C. Distrib. & Mktg., Inc. 443 F. Supp.2d.

<sup>78</sup> Id.

<sup>79</sup> Id.

<sup>80</sup> Id.

<sup>81</sup> Id.

<sup>82</sup> Id. at 1081.

<sup>83</sup> Id. at 1082.

commercial advantage.<sup>84</sup> The court granted summary judgment in favor of CBC and held that the use of the players' performance records and names in conjunction with a fantasy sports league did not violate the players' right to publicity. It was conceded that the players' names and statistics were being used without the players' consent, however, the court felt that it was not used to a commercial advantage and the use of the players' name and statistics were not a symbol of the players' identity.

The players' names and statistics were not used by CBC with the intent to obtain a commercial advantage because in the court's view, "there is nothing about CBC's fantasy games which suggests that any Major League Baseball player is associated with CBC's games or that any player endorses or sponsors the game in any way."<sup>85</sup> In addition, the use of the players' names and statistics did not involve the personality, character, physical appearance, or reputation of the players.<sup>86</sup> Categorizing this information used by CBC as historical facts about baseball allowed the court to rationalize that the players' name and statistics did not equate to the players' persona and thus not a symbol of his identity. The court also considered the policy reasons behind the right of publicity and concluded that CBC's use of players' names and statistics did not harm the players' commercial value because: the players' ability to earn a living did not depend on the publication of their statistics and names; fantasy sports actually enhanced the marketability of players; and CBC was not unjustly enriched as the players' names and statistics were available in the public domain.<sup>87</sup>

The holding in CBC has been critiqued by many because it disregarded precedent established in earlier cases like Palmer and Uhlaender, with little more than an explanatory

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<sup>84</sup> Id. at 1084-1085.

<sup>85</sup> Id.

<sup>86</sup> Id. at 1089.

<sup>87</sup> Id. at 1091.

footnote stating that those cases were “decided early in the development of the recognition of the common law right of publicity and are inconsistent with more recent case authority including the Supreme Court’s decision in Zacchini.”<sup>88</sup> This logic by the court in CBC seems misplaced though because Palmer and Uhlaender, like Zacchini, sought to prevent unjust enrichment by a defendant using some aspect of the plaintiff that would have market value and for which he would have to normally pay.<sup>89</sup> With the exception of news reporting sources, CBC was attempting exploit an advantage that nobody else had: use players’ names and statistics for a commercial value. Furthermore, the Court in CBC appears to have reversed who has the burden in proving a violation of a right to publicity. There is a presumption in Palmer that the plaintiff’s right of publicity has been violated unless the defendant can prove that its use of the plaintiffs identity is all the way at the non-commercial end of the spectrum.<sup>90</sup> CBC sets forth a presumption that there is no violation unless the plaintiff can demonstrate that the defendant’s use is all the way at the commercial end of the spectrum.<sup>91</sup> Predictably, the case was appealed and went before the Eighth Circuit, where unlike the court in Missouri, a balancing test was applied.<sup>92</sup> The Court affirmed in the lower court’s decision, holding that “while there was a publicity right violation, the First Amendment interests still ‘superseded the players’ rights of publicity.”<sup>93</sup>

## **Hart and Keller**

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<sup>88</sup> Id at 1088.

<sup>89</sup> Zacchini, 433 U.S. 562.

<sup>90</sup> Palmer, 232 A.2d at 462.

<sup>91</sup> Id.

<sup>92</sup> C.B.C., 505 F.3d at 820-21.

<sup>93</sup> Id at 824.

It was a while after CBC was decided before another right of publicity case reached the Circuit of Appeals. One of the biggest issues facing the courts was deciding which of the three balancing tests was most appropriate in determining whether an individual's right of publicity had been violated. Courts had been divided on which test to apply until recently in May 2013 when the Third Circuit analyzed a right to publicity claim in Hart v. Electronic Arts Inc. under the transformative use test, and then in the July 2013 the Ninth Circuit Court followed the Third Circuits' lead shortly after in Keller v. Electronic Arts Inc.

In Hart, Electronic Arts (EA) produced the *NCAA Football* series of video games, which allows users to control avatars representing college football players as those avatars participate in simulated games.<sup>94</sup> In attempting to replicate each school's entire team as accurately as possible, EA gives an avatar a number corresponding to a players' actual jersey number and virtually identical weight, height, skin tone, and a hometown.<sup>95</sup> The avatars in the video game differ from the players in reality insofar as they do not have names on the back of their jersey and each avatar's hometown is different from the actual player's hometown.<sup>96</sup> Hart was a former college quarterback at Rutgers University who objected to the use of his likeness in *NCAA Football 2005* because there was an avatar that exhibited his physical attributes, jersey number, home state, and style of play.<sup>97</sup> Hart brought a right of publicity claim against EA before District Court for the District of New Jersey who granted summary judgment in favor of EA on the ground that the First Amendment protected the use of Hart's likeness.<sup>98</sup> Hart brought his appeal to the United States Court of Appeals, Third Circuit.

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<sup>94</sup> Hart 717 F.3d 141.

<sup>95</sup> Id.

<sup>96</sup> Id.

<sup>97</sup> Id.

<sup>98</sup> Id.

The issue facing the Third Circuit in Hart was balancing the right of publicity of a former college football player against the First Amendment right a video game developer to use the player’s likeness in its expressive work.<sup>99</sup> The Rogers test and predominant use test were both deemed insufficient to assess a right of publicity claim.<sup>100</sup> Unlike the predominant use test, the transformative use test “recognizes that if the First Amendment protections are to mean anything in the right of publicity claims, courts must *begin* by considering the extent to which a work is the creator’s own expression.”<sup>101</sup> Furthermore, unlike the Rogers Test, the transformative use test “maintains a singular focus on whether the work sufficiently transforms the celebrity’s identity or likeness, thereby allowing courts to account for the fact that misappropriation can occur in any market segment, including those related to the celebrity.”<sup>102</sup>

The Third Circuit used the transformative use test to determine whether Hart’s identity was sufficiently transformed by EA in *NCAA Football*. In ruling that *NCAA Football* did not sufficiently transform Hart’s identity to avoid the right of publicity claim, the court considered the ability to change the player’s avatar.<sup>103</sup> EA argued that the avatars were transformative because the gamer had the opportunity to alter the player’s physical characteristics.<sup>104</sup> The court found such depictions of the players was not sufficiently transformative because “the ability to modify the avatar counts little where the appeal of the game lies in the user’s ability to play as, or alongside, their preferred players or team.”<sup>105</sup> The Third Circuit were unable to qualify the work

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<sup>99</sup> Id.

<sup>100</sup> Id.

<sup>101</sup> Id. at 163.

<sup>102</sup> Id. at 163.

<sup>103</sup> Id.

<sup>104</sup> Id.

<sup>105</sup> Id. at 168.

as transformative and opined that the potential modifications to a player’s avatar were insignificant changes that equated to a “substitute” for the original.

The facts presented before the United States Court of Appeals, Ninth Circuit, in Keller were identical to the ones in Hart.<sup>106</sup> In response to Keller’s right of publicity claim, EA asserted four affirmative defenses all arising from the First Amendment: the transformative use test, the Rogers test, the public interest test, and the public affairs exemption.<sup>107</sup> The Ninth Circuit, having been provided just months earlier with the Third Circuit’s decision in Hart, determined that the transformative use test provided the best analysis for a right of publicity claim.<sup>108</sup> The court in Keller reached a similar decision as the one in Hart, holding that “*NCAA Football* realistically portrays college football players in the context of college football games...and cannot prevail as a matter of law based on the transformative use defense.”<sup>109</sup>

The court also dismissed EA’s argument that it had a right to incorporate player’s statistics, names, and other biographical information into its video game because the First Amendment’s public interest defense permitted the use of a person’s name in connection with matters of public interest.<sup>110</sup> In distinguishing Keller from cases where public interest defenses were found to exist, like Gionfriddo v. Major League Baseball and Montana v. San Jose Mercury News, Inc., the court said that *NCAA Football* was not publishing or reporting factual data.<sup>111</sup> Rather, *NCAA Football* was a video game enabling users to play their own virtual football

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<sup>106</sup> Keller v. Electronic Arts, Inc. was consolidated into In re NCAA Student-Athlete Name & Likeness Licensing Litigation, 724 F.3d 1268 (9<sup>th</sup> Cir. 2013). As part of this consolidation, the plaintiffs allege the NCAA and its business partners made agreements that unreasonably restrained trade in the violation of the Sherman Act. This paper does not explore the Sherman Act.

<sup>107</sup> Id.

<sup>108</sup> Id.

<sup>109</sup> Id. at 1279.

<sup>110</sup> Id.

<sup>111</sup> Id.

game.<sup>112</sup> Since it was an interactive game and not a reference source for statistical information, the First Amendment public interest defense did not apply.

### Fantasy Sports Issues Under Federal Copyright Law

In addition to a right of publicity claim, professional leagues and player associations may also seek a cause of action via federal copyright law against fantasy sport league websites for the commercial use of statistics generated by professional athletes. Professional leagues and player associations would only be successful against fantasy websites if the courts determined that player generated statistics warrant protection under the Copyright Act of 1976.

Article I, Section 8, Clause 8 of the United States Constitution gives Congress the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>113</sup> Congress used this power to create federal copyright protection, first in 1790, which was then transformed into the Copyright Act of 1909, before it was revised yet again into the current law of today, the Copyright Act of 1976.<sup>114</sup> Federal Copyright law grants authors and artists the exclusive right to make and sell copies of their works, the right to create derivative works, and the right to perform or display their works publicly.<sup>115</sup> In order to gain copyright protection, the work must first qualify as an “original work of authorship.”<sup>116</sup> A work is deemed original if it is independently developed and possesses some minimal degree of creativity.<sup>117</sup> Courts have held that mere facts

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<sup>112</sup> Id.

<sup>113</sup> U.S. Const. art. I, § 8, cl. 8.

<sup>114</sup> Melville B. Nimmer & David Nimmer, Nimmer on Copyright OV-1 (2005) (citing to Act of May 31, 1790, ch. 15, 1 Stat. 124).

<sup>115</sup> Id.

<sup>116</sup> 17 U.S.C. § 102(a) (2000).

<sup>117</sup> Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

do not fit in the definition of “an original work of authorship”, and thus are not available for copyright protection.<sup>118</sup>

While the courts have deemed that facts do not receive copyright protection, a “thin veil” of protection has been extended to a compilation of factual information if there is an additional aspect of originality in the selection or organization of the facts.<sup>119</sup> Copyright protection in a compilation is only extended to a particular arrangement and selection that can be attributed to a compiler, not the underlying facts.<sup>120</sup> For example, if Company A organized the addresses of all the people who live in a town in alphabetical order, Company B would be able to list the same addresses in numerical order without being liable for copyright infringement. This is because Company A’s phonebook only receives copyright protection for the way the addresses are listed (alphabetically); the addresses themselves, which are the underlying facts compiled in the phonebook, do not receive copyright protection.<sup>121</sup> Time and energy spent on compiling and arranging facts do not factor into whether a compilation receives copyright protection. Courts must go through an intensive-fact specific inquiry in determining whether a factual compilation meets the originality requirement.<sup>122</sup>

In regards to fantasy sport leagues, sporting events and statistics generated at these events would warrant copyright protection if they were compilations that satisfied the requirements of originality and creativity. Events and players’ statistics would not receive copyright protection if they were deemed facts.

### Applying Copyright Law to Fantasy Sports

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<sup>118</sup> Id.

<sup>119</sup> Id.

<sup>120</sup> Id. at 348-349.

<sup>121</sup> Feist, 499 U.S.

<sup>122</sup> Bellsouth Adver. & Publ'g Corp. v. Donnelley Info. Publ'g, Inc., 999 F.2d 1436, 1441 (11th Cir. 1993)

The dispositive issue in the case between professional leagues and fantasy sport leagues is whether professional leagues can copyright their sporting events and statistics that are generated therefrom. The courts have been divided on the issue of whether sporting events and statistics generated at sporting events warrant copyright protection.

In National Basketball Association v. Motorola, the NBA filed suit against Motorola for its sale of subscriptions for a pager-type device known as SportsTrax, which displayed up-to-date scores and player statistics for NBA games in progress.<sup>123</sup> The NBA filed suit in federal court and in the copyright claim it alleged: SportsTrax infringed upon the NBA's copyright in the broadcast of basketball games by using information obtained from those broadcasts; and SportsTrax violated the NBA's copyright in the underlying game by transmitting the game statistics via the pager-device.<sup>124</sup> The case came before the United States Courts of Appeals for the Second Circuit, and in rejecting the NBA's claim that Motorola could not transmit the statistics while the game was in progress, the court ruled the Copyright Act of 1976 did not extend protection to the underlying basketball game scores or statistics transmitted by SportsTrax.<sup>125</sup> Although work and preparation goes into the games, the statistics were not copyrightable because "sporting events are not 'authored' in any common sense of the word."<sup>126</sup>

The Second Circuit's acknowledgement that athletic events were uncopyrightable was harmonious with the Supreme Court and its view of athletic events. In Zacchini, the court distinguished between copyrightable dramatic work and a baseball game, which was not afforded similar protection under the 1976 Act. The Seventh Circuit did not agree with the notion that athletic events could not receive copyrightable protection. To the ire of many legal scholars and

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<sup>123</sup> Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 842 (2d Cir. 1997).

<sup>124</sup> Id.

<sup>125</sup> Id. at 846.

<sup>126</sup> Id.

judge, the Seventh Circuit inserted a footnote in its Baltimore Orioles, Inc. v. Major League Baseball Players Association opinion that said: “the players’ performances possess great commercial value... [and thus] embody the modicum of creativity required for copyrightability.”<sup>127</sup>

### Copyrightability of Real-Time Statistics

The Eleventh Circuit decided Morris Communications Corp. v. PGA Tour, Inc. after Motorola, and it determined whether statistical information could be disseminated from golf tournaments without authorization.<sup>128</sup> Although this case was decided under the Sherman Act rather than copyright laws, the court provided a useful analysis in determining whether the use of statistical information by fantasy sport leagues violates copyright law. In Morris, the PGA Tour had a Real Time Scoring System (RTSS) that monitored players’ progress during tournaments and relayed the scores to its website.<sup>129</sup> Morris Communications was a competitor in the golf-scoring market and it began to publish real-time scores from Tour events.<sup>130</sup> The Tour responded by trying to implement agreements that required other media outlets to delay the dissemination of live scores by either 30 minutes or until the scores appeared on the Tour website.<sup>131</sup>

Morris brought a claim against the Tour alleging that the Tour’s practices violated both state unfair practice and federal anti-trust laws, but the court dismissed Morris’ claims because the Tour had property interest in the golf scores and could enter into a contract restricting the use of the scores.<sup>132</sup> Deciding the case under anti-trust law rather than a copyright law cause of action did not prevent the court from briefly touching on the possibility of a copyright violation

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<sup>127</sup> Baltimore Orioles v. Major League Baseball Players Ass’n, 805 F.2d 663, 669 n.7 (7th Cir. 1986), cert. denied, 480 U.S. 941 (1987).

<sup>128</sup> Morris Commc’n Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1288 (11th Cir. 2004).

<sup>129</sup> Id.

<sup>130</sup> Id.

<sup>131</sup> Id. at 1283.

<sup>132</sup> Id.

existing. The court surmised that, “although the arrangement or selection of the statistics used by the Tour’s RTSS program may have been protected by copyright law, the statistics themselves, as facts, could have been freely copied without a copyright violation, so long as the copying entity employed a different manner of arrangement and selection.”<sup>133</sup>

The Second Circuit shared the Eleventh Circuit’s view and granted copyright protection to a compilation of baseball statistics in Kregos v. The Associated Press.<sup>134</sup> The plaintiff brought a copyright claim after he had developed a chart of pitching statistics and the defendant later published its own version of a pitching chart that mirrored the plaintiff’s. On appeal the Second Circuit ruled in favor of Kregos and granted copyright protection to his pitching chart. According to the court, the fact that Kregos had organized his pitching form into nine distinct categories out of the multitude of categories that existed to measure a pitchers performance satisfied the originality requirement of copyright law.<sup>135</sup> The copyright protection that Kregos’ statistical compilation was limited however, and would not be violated by another compilation of pitching statistic categories that was organized differently.<sup>136</sup>

The courts decisions in Motorola, Morris, and Kregos offer professional leagues inconsistent precedent to rely on in bringing a copyright law violation against fantasy sports. Statistical compilations very rarely are afforded copyright protection because they are viewed to be similar to facts, and the protection that has been granted to these compilations has been very limited. The availability of players’ statistics in the public domain provide fantasy leagues with a strong argument that statistics are facts and they lack an element of originality which must exist in any work that is afforded copyright protection.

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<sup>133</sup> PGA Tour, 364 F.3d at 1297-98.

<sup>134</sup> Id.

<sup>135</sup> Kregos v. Assoc. Press, 937 F.2d 700 (2d Cir. 1991).

<sup>136</sup> Id. at 705.

## Conclusion

### **The Right of Publicity**

To succeed in their claim against fantasy leagues, professional leagues and player associations would have to establish a use of the players' identity and that the players' identity was appropriated for an impermissible manner such as a commercial advantage.

The biggest obstacle facing professional sport leagues and player associations in bringing a right of publicity claim against fantasy leagues is arguing that player statistics equate to the use of a player's identity. If professional leagues were successful in this argument it would satisfy the first prong in a right of publicity claim. Earlier court decisions dictate however, that the mere use of a player's statistics do not qualify as using a player's identity. The use of statistics by fantasy leagues do not reveal anything about the players' characteristics or persona that is required to satisfy the identity prong of a right of publicity claim.

Even if leagues on ESPN and Yahoo! were to use "thumbnail" images of the professional players in connection with the players' statistics, fantasy leagues would be able to assert an affirmative defense under the First Amendment. Fantasy leagues would argue that their use of the players' identity is a form of communicative speech rather than commercial speech, and therefore warrants protection under the First Amendment. The players' identity is not being used by fantasy league for an improper purpose such as unjust enrichment or profiting through false advertisement.

Player associations would refute the notion that player statistics are not used in a commercial on account that fantasy sports is a billion dollar industry. The use of the their statistics, the players would argue, is the driving force behind this money making enterprise. While it is true that fantasy sports is a growing industry, the players' statistics are not why fantasy sport leagues are so successful. People participate in fantasy sports not because of the

players' statistics or of any player's affiliation with the fantasy site, but because they enjoy competing against other people. Fantasy leagues function as a social mechanism to bring people together and provide them with something to discuss amongst their friends or co-workers. Furthermore, the flocking of people to join fantasy leagues is not directly tied to the performance of specific players like LeBron James or Tom Brady. In the example of fantasy football, people are still going to join fantasy leagues whether Tom Brady is healthy and having a successful year or he is hurt and not playing. Thus, fantasy leagues are not using player statistics for a commercial purpose. The statistics are reported for entertainment purposes because they are used to calculate how many fantasy points each player's performance is worth.

The conversion of a players' statistics into fantasy points would satisfy the transformative use test that was recently accepted in Hart and Keller as the best way to analyze a right of publicity claim. The fantasy leagues would be successful in arguing that awarding fantasy points based on a players' statistical output adds enough creative elements so as to transform the players' identity (statistics) into something other than a mere imitation of the identity (fantasy points). The fact that fantasy sport leagues have their own algorithm that awards a certain amount of points for each statistical category demonstrates that they are not merely copying the players' statistics. Rather, they are taking the statistics and adding additional creative elements to them that results in a final number that is totally different than a players' statistical product.

The right of publicity claim against fantasy sport leagues will also fail because it would be difficult for players to demonstrate that fantasy leagues adversely affects the players' commercial value. It is very easy to make the argument that a league and player's commercial value is enhanced by fantasy sports because of its popularity and accessibility worldwide. Fantasy football lends itself to this rationale the best. In a fantasy football league each team is

allowed to draft anywhere between 16-18 players in a draft. The superstars and most famous professional players are all drafted after the first few rounds, which forces participants to draft players who they might not be familiar with. Over the course of the season these unfamiliar players that are drafted can become household names if they are successful on the field. The more popular a player is, the more valuable his commercial value is. Fantasy football is more likely to have a positive influence on a player's commercial value rather than an adverse affect, thus the underlying policy rationale for right of publicity law is not satisfied in the players' claim against fantasy sport leagues.

### **Copyright Law**

Copyright law would not provide the players associations and professional leagues with a successful claim against fantasy leagues. In order to bring a successful copyright infringement claim the players would need to prove that their statistics qualify as an original work of authorship and that the fantasy league are violating their rights under the Federal Copyright Law by reproducing their statistics on the fantasy website. Court precedent dictates however, that statistics are considered facts that exist in the public domain, and as a result do not warrant protection under Copyright Law. If statistics are given the same protection as facts, which is none, then fantasy leagues are free to copy the players' statistics and display them on their websites.