



**TOURO UNIVERSITY**  
JACOB D. FUCHSBERG LAW CENTER  
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**Touro Law Review**

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Volume 30 | Number 3

Article 14

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October 2014

## **Fantasy Sports and the Right of Publicity Are under Further Review**

Christopher Miner

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### **Recommended Citation**

Miner, Christopher (2014) "Fantasy Sports and the Right of Publicity Are under Further Review," *Touro Law Review*. Vol. 30: No. 3, Article 14.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol30/iss3/14>

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## Fantasy Sports and the Right of Publicity Are under Further Review

Cover Page Footnote

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## FANTASY SPORTS AND THE RIGHT OF PUBLICITY ARE UNDER FURTHER REVIEW

*Christopher Miner\**

### I. INTRODUCTION

Gloria woke up at 6:00 Sunday morning to a loud alarm clock buzzing obnoxiously. She turned over to wake up Steve, but he was nowhere to be found. Steve could not sleep all night; he had so much on his mind that he forgot to turn off the alarm before he left for the big game. Steve picked up Rick, and they made their way to the stadium. The Pioneers were on the cusp of earning a playoff spot for the first time in twelve years. Today marked the last game of the season, and the Pioneers faced their rivals—the Renegades—in a must-win scenario.

The first half provided the home fans with much to be happy about, as the Pioneers were leading by four touchdowns at halftime. With such a sizeable lead for the home team, Rick looked as if he was on top of the world. Steve, however, did not share Rick's halftime high. Steve's favorite Pioneers player, whose name was on the back of Steve's jersey, had already scored twice, yet Steve sat expressionless, studying something on his phone.

As the second half progressed, Renegades' quarterback T.J. Finley finally woke up after a dismal first half. With the Pioneers leading by only four points and less than three minutes remaining, the Pioneers were forced to punt. Rick noticed that Steve had finally started to take interest in the game. As Finley was ripping apart the Pioneers' defense at the seam, Steve rose to his feet. With five seconds left in the game, the Renegades were left with one play. Finley

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\* J.D. Candidate 2015, Touro College Jacob D. Fuchsberg Law Center; B.A. 2011 in Personal & Professional Communication, State University of New York at Geneseo. I would like to thank my Mom for always stressing the importance of education. I would also like to thank Professor Rena Seplowitz for making the publication of this Comment a possibility. Lastly, a special thank you to Alexa Gordon for her support and advice throughout.

launched the ball high and long into the end zone, where it was tipped and eventually caught by a Renegades' receiver. Steve immediately jumped in the air and screamed—in jubilation. Steve's favorite team had just lost, their season was over, and yet he was excited? How could this be? As it turns out, the Pioneers were not Steve's favorite team after all—that honor went to Steve's Savvy Surplus, which had just won the Fools Fantasy Football League and \$800 as a result of Finley's last second Hail Mary.<sup>1</sup>

Steve is a quintessential example of how fantasy sports have monumentally impacted the sports world. Long gone are the days when fans were only interested in their favorite teams. Professional sports teams have noticed such a shift and, as a result, are making adjustments to their stadiums to address the rampant expansion of fantasy sports.<sup>2</sup> Fantasy sports' substantial success is due, in large part, to the unique intimacy that fans feel with “their” players.<sup>3</sup>

Fantasy sports leagues allow people to become virtual owners of professional athletes.<sup>4</sup> Traditionally, leagues commence when the participants conduct drafts, which typically take place before professional leagues start their seasons.<sup>5</sup> During the draft, fantasy league

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<sup>1</sup> *Hail Mary Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/hail%20mary> (last visited May 2, 2014) (defining a Hail Mary as “a long forward pass thrown into or close to the end zone as playing time runs out”).

<sup>2</sup> See Ken Belson, *Going to the Game, to Watch Them All on TV*, N.Y. TIMES (Sept. 14, 2013), <http://www.nytimes.com/2013/09/15/sports/football/jaguars-use-fantasy-football-lounge-to-lure-fans.html?> (describing how various professional football teams have built fantasy lounges in their stadiums, enhanced wireless signals in their stadiums, and built fantasy features into their scoreboards in response to fans' desire to follow fantasy sports even when they attend a live game).

<sup>3</sup> See Tom Rock, *Giants' Brandon Jacobs Received Death Threats via Twitter*, NEWSDAY (Oct. 22, 2013, 2:49 PM), <http://www.newsday.com/sports/football/giants/giants-brandon-jacobs-received-death-threats-via-twitter-1.6301267> (discussing how a fantasy football participant sent death threats to a professional football player and his family regarding the participant's ownership of the player in a fantasy league and the player's performance in an upcoming game).

<sup>4</sup> See David L. Pratt II, *Fantasy Sports and the Right of Publicity: A Case for Viewing Dissemination of Player Statistics as Fair Use of the News*, 13 TEX. WESLEYAN L. REV. 215, 216 (2006) (addressing the impact that fantasy sports leagues have on an “everyday fan”).

<sup>5</sup> Compare Risa J. Weaver, *Online Fantasy Sports Litigation and the Need for a Federal Right of Publicity Statute*, 2 DUKE L. & TECH. REV. 1, 2 (2010) (explaining how a traditional fantasy league operates), with Tony Manfred, *People are Making \$100,000 a Year Playing a More Intense Version of Fantasy Football*, BUSINESSINSIDER.COM (Nov. 8, 2013, 12:37 PM), <http://www.businessinsider.com/people-making-100000-a-year-on-daily-fantasy-sports-2013-11> (describing how a non-traditional daily league operates—“[y]ou choose your league, pay your entry fee, pick your team, and collect your winnings if your team gets better stats than the other teams in your league. And then you do it all again the next day.”).

members pick real-life professional players. Following the draft, participants are left with a team composed of various players from different actual teams.<sup>6</sup> Throughout the season, fantasy players have the ability to alter their team by adding, dropping, benching, and trading players—much like the duties of a professional team's general manager.<sup>7</sup> Ultimately, professional players are the driving force of fantasy sports because fantasy teams' wins and losses depend upon the success of their players' real-life achievements, which are represented by statistics.<sup>8</sup>

Fantasy sports have changed since they were created by a group of New Yorkers in 1980.<sup>9</sup> Today, over 33 million Americans participate in fantasy sports, fueling a \$3.6 billion industry.<sup>10</sup> The majority of that amount comes from league entry fees.<sup>11</sup> Most fantasy leagues compete for money from members who pay dues in the hope of winning the pool at the end of the season.<sup>12</sup> Although league fees are typically collected and safeguarded by a player within the league, fantasy leagues can, alternatively, allow an online site to handle their finances.<sup>13</sup> The expansion of fantasy sports has created an influx of new Internet-based businesses that provide fantasy sports services, which comprise 273 businesses in total.<sup>14</sup> Most of these sites provide players with advice on drafting and managing their

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<sup>6</sup> Weaver, *supra* note 5, at 3.

<sup>7</sup> See Anthony N. Cabot & Louis V. Csoka, *Fantasy Sports: One Form of Mainstream Wagering in the United States*, 40 J. MARSHALL L. REV. 1195, 1209-10 (2007) (discussing the legality of fantasy sports and participants' strategy when playing).

<sup>8</sup> Weaver, *supra* note 5, at 3.

<sup>9</sup> See Chris Colston, *Revisiting Roto's Roots*, USA TODAY (Dec. 8, 1999), <http://usatoday30.usatoday.com/sports/bbw/2001-04-04/2001-04-04-archive-roto.htm> (describing how fantasy sports originated when a group of friends created Rotisserie League Baseball).

<sup>10</sup> *Industry Demographics*, FANTASY SPORTS TRADE ASSOCIATION, <http://www.fsta.org/?page=Demographics> (last visited May 2, 2014).

<sup>11</sup> See *id.* (estimating that each fantasy player spends about \$52 a year on league fees, which totals \$1.71 billion a year).

<sup>12</sup> See Jeff Cade, *The Real Money of Fantasy Sports*, MONEY.MSN.COM (Apr. 3, 2012), <http://money.msn.com/personal-finance/the-real-money-of-fantasy-sports-jeff-cade> (discussing fantasy sports' significant economic impact).

<sup>13</sup> See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates Its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 22-23 (2012) (noting that fantasy host sites collect and distribute leagues' funds as well as "third-party treasury sites," which charge a fee for depositing the league fees "into an interest-generating, FDIC-insured bank account" until the end of the season).

<sup>14</sup> *Fantasy Sports Services in the US: Market Research Report*, IBISWORLD INDUSTRY (June 2013), <http://www.ibisworld.com/industry/fantasy-sports-services.html>.

teams.<sup>15</sup> The popularity of fantasy sports has led to the creation of unique businesses which offer services such as fantasy sports insurance<sup>16</sup> and fantasy sports dispute resolution.<sup>17</sup>

The rapid growth of fantasy sports can be attributed to the rise of the Internet.<sup>18</sup> The most notable type of Internet-based businesses which exist are host sites (which will be used interchangeably with “fantasy sites” throughout this Comment) that afford easy access to players to run and participate in leagues.<sup>19</sup> These websites appeal to fantasy players because they deliver up-to-the-minute statistics, freeing participants from having to compile and calculate statistics on their own.<sup>20</sup> Many websites offer to host leagues for free; however, a portion of sites still make a combined \$290 million a year in website hosting fees.<sup>21</sup> The majority of host sites’ revenue comes from the web traffic generated from hosting fantasy leagues.<sup>22</sup> Consequently, the sites are able to attract advertisers, which provide sizeable revenue for the sites.<sup>23</sup>

This Comment examines the impact that recent case law, which decided that former college athletes’ right of publicity was violated when their likenesses were used in video games, could have on professional<sup>24</sup> fantasy sports.<sup>25</sup> In 2007, the Eighth Circuit Court of

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<sup>15</sup> See Edelman, *supra* note 13, at 24 (discussing “strategic advisors, who make their living by providing advice to other fantasy sports participants.”).

<sup>16</sup> See Nando Di Fino, *A New Kind of Pocket Protection*, WALL ST. J. (Sept. 1, 2009, 10:19 AM), <http://online.wsj.com/news/articles/SB10001424052970203550604574360691019757738> (describing fantasy sports insurance—which allows fantasy sports participants to “protect themselves against the injuries of real players with actual insurance policies.”).

<sup>17</sup> See Elliot C. McLaughlin, *Lawyers, Insurance Firms Cash in on Fantasy Football*, CNN.COM (Sept. 10, 2009), <http://www.cnn.com/2009/LIVING/wayoflife/09/10/bizarre.fantasy.football.companies/> (discussing businesses that resolve disputes that occur in fantasy leagues).

<sup>18</sup> See Edelman, *supra* note 13, at 10-11 (describing how the Internet caused a substantial increase in fantasy sports participation).

<sup>19</sup> See *id.* at 19 (defining host sites as “websites that store league data and serve as the place where participants make changes to their roster”).

<sup>20</sup> See Pratt II, *supra* note 4, at 221 (describing how the Internet provided fantasy players “a quick and easy way to compile and disseminate league statistics.”).

<sup>21</sup> See *supra* note 10.

<sup>22</sup> See Cade, *supra* note 12 (stating that “sites tend not to discuss how they make their money, but industry analysts say ad revenue is based on a rate of anywhere from \$2 to \$10 per 1,000 page views.”).

<sup>23</sup> *Id.*

<sup>24</sup> Please note that although fantasy leagues exist for college sports, this comment addresses only professional leagues. Currently, college athletes must sign an agreement with the NCAA that restricts the players’ ability to use “his or her athletics skill (directly or indi-

Appeals addressed professional baseball players' right of publicity in fantasy sports and, ultimately, held that such right was outweighed by a fantasy site's First Amendment rights.<sup>26</sup> This Comment seeks to establish that the Eighth Circuit was incorrect in its ruling and that the courts should instead follow the reasoning provided by the video game cases to find that professional athletes' right of publicity is unjustifiably infringed by fantasy sites.

Section II provides two hypotheticals—a former college football player in a video game and a professional athlete in a fantasy sports setting. This section allows readers to recognize the similarities that exist between both contexts. Section III addresses the history of the right of publicity and discusses past cases that dealt with the use of athletes' names, statistics, and likenesses.<sup>27</sup> Section IV examines the faulty reasoning provided by the court in *C.B.C. Distribution & Marketing v. Major League Baseball Advanced Media, L.P.*<sup>28</sup>—the precedential case regarding professional athletes' right of publicity in fantasy sports games. Next, Section V analyzes *Hart v. Electronic Arts, Inc.*<sup>29</sup> and *Keller v. Electronic Arts, Inc.*<sup>30</sup> (“Video Game Cases”). Lastly, Section VI highlights the effect that the Video Game Cases could have on the future of professional athletes' rights of publicity in fantasy sports games.

## II. WHAT'S THE DIFFERENCE?—A HYPOTHETICAL LOOK

In a discussion of the legal aspects of the right of publicity, two fact patterns are instructive—one involves a former college football player situated in a video game, and the other involves a professional football player placed in a fantasy sports setting. Following

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rectly) for pay in any form in that sport.” NCAA DIVISION I MANUAL § 12.1.2 (2013-2014), available at [http://grfx.cstv.com/photos/schools/usc/genrel/auto\\_pdf/2013-14/misc\\_non\\_event/ncaa-manual.pdf](http://grfx.cstv.com/photos/schools/usc/genrel/auto_pdf/2013-14/misc_non_event/ncaa-manual.pdf). College athletes' rights in the NCAA are currently in a state of flux, another reason why this Comment only addresses professional fantasy sports.

<sup>25</sup> *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013); *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013) [hereinafter *Keller*].

<sup>26</sup> *C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 824 (8th Cir. 2007) [hereinafter *C.B.C. I*].

<sup>27</sup> *Likeness Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/likeness> (last visited May 2, 2014) (defining likeness as “the quality or state of being alike or similar especially in appearance”).

<sup>28</sup> 505 F.3d 818 (8th Cir. 2007).

<sup>29</sup> 717 F.3d 141 (3d Cir. 2013).

<sup>30</sup> 724 F.3d 1268 (9th Cir. 2013).

the hypotheticals, this Comment explores the similarities between both scenarios. The similarities serve as a basis for the argument that, in both contexts, an athlete's right of publicity supersedes video game manufacturers' and fantasy sports providers' First Amendment interests.

### A. Small Town Player with Big Time Rights

John Saucey grew up in Wyoming, where there was little to do besides play sports. Heading into his senior year of high school, he was set on one goal—playing college soccer. After failing to receive interest from college programs, he sent film to colleges in order to get the ball moving, but he quickly learned recruiters were not going to call. He understood that his desolate hometown prevented him from playing at the next level. Turning to plan B, he attended the University of Wyoming to focus on academics.

The first few weeks were tough for Saucey because Wyoming lacked a soccer program. Faced with boredom, Saucey attended his school's first football game where he became intrigued by the kicking part of the sport. During the game, Wyoming's punter sustained an injury. The next day, Saucey ran to the stadium to find a football. After only a handful of kicks, he was destroying the ball and ready for a tryout. After just one season, the former soccer player was rewarded with a partial scholarship. Following his senior year, he was named the conference's best punter; however, Saucey received little interest from professional teams, thereby ending his football career.

In an effort to relive his college days, Saucey purchased a college football video game, which included every Division I program and allowed users to make changes to rosters as well as individual players. After scrolling through the nearly endless list of schools, he was thrilled when he finally found his alma mater. During the game, it took him just two minutes to be faced with 4th-down-and-20-yards-to-go.<sup>31</sup> As he lined up for a punt, he noticed that Wyoming's punter's jersey bore the number 2, the same number that Saucey sported during his playing days. He hit pause and navigated to the roster sec-

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<sup>31</sup> See *NFL Beginner's Guide to Football*, NFL.COM, <http://www.nfl.com/rulebook/beginnersguidetofootball> (last visited May 2, 2014) (explaining what a fourth down is: "[e]ach time the offense gets the ball, it has four downs, or chances, in which to gain 10 yards . . . [i]f the offense reaches fourth down, it usually punts the ball (kicks it away). This forces the other team to begin its drive further down the field.").



tion of the main menu, where he could find more information for individual players. When he reached the page for Wyoming's punter, he was very surprised; the video game avatar<sup>32</sup> not only shared his number, but also his height, weight, and home state. The character also listed statistics that nearly mirrored Saucey's. Although the video game character was nameless, Saucey was convinced it was an avatar of him.

### **B. Hard Work Pays Off—Right?**

Tom Jones was the first Pop Warner football player<sup>33</sup> in Florida to score ten touchdowns in a game, and this was only the beginning of his football career. Although he valued education, his real interest was football. For years, he visited the weight room during the day and studied films of legendary running backs in order to learn technique at night. To go the extra mile, he traveled across the country to attend camps. Jones finally reached his goal during his junior year of high school, when he received offers from major programs throughout the country.

Jones attended the University of Alabama, where his motivation and hard work continued. While other freshman teammates found time to occasionally attend parties, Jones studied his opponents' defensive schemes in his dorm room. No one expected him to start as a freshman because Alabama had an impressive running back returning for his senior year; however, the senior took a back seat to Jones. Jones's sophomore season was electrifying; he won the Heisman Trophy<sup>34</sup> in a landslide and led Alabama to a national championship. Believing that he had accomplished everything that he could at the college level, Jones entered the NFL draft and was selected second overall.

Jones returned to his hometown before the start of his first season, which gave him a chance to hang out with his friend Tim.

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<sup>32</sup> *Avatar Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/avatar> (last visited May 2, 2014) (defining an avatar as "an electronic image that represents and is manipulated by a computer user").

<sup>33</sup> *See About Us*, POPWARNER.COM, [http://www.popwarner.com/About\\_Us.htm](http://www.popwarner.com/About_Us.htm) (last visited May 2, 2014) (describing Pop Warner as "a non-profit organization that provides youth football . . . for participants in 42 states and several countries around the world.").

<sup>34</sup> *See* Steven Goldberg, *Federal Judges and the Heisman Trophy*, 32 FLA. ST. U. L. REV. 1237, 1243 (2005) (describing the Heisman Trophy as "a highly respected award for the best college football player each year.").

Ironically, Tim had a fantasy football draft that day. During the draft, as Tim was sifting through the players, Jones noticed his own name on the list. There was an “R” next to his name to signify rookie and the numbers 955, 7, 2, 150, and 1 were displayed horizontally. Tim informed him that they were projected stats for his upcoming season: 955 rushing yards, 7 touchdowns, 2 fumbles, 150 receiving yards, and 1 receiving touchdown. Jones also noticed the iconic Chevrolet symbol next to his name, which puzzled him.

Towards the end of the draft, Jones was still available. Feeling obligated, Tim selected his friend. As Tim made his pick, a popup window appeared on his computer screen stating, “You selected Chevy’s Sleeper of the Draft—Click here to enter a sweepstakes for a new truck.” At that point, Jones started to wonder, “Am I getting paid for the use of my name like this?”

Jones’s rookie season was not what he had grown accustomed to throughout his football career, as he served as his team’s backup. His best game came in week six, when he evaded the defense for a 67-yard run but was tackled just shy of the goal line.<sup>35</sup> However, Jones’s boost of confidence was short lived. Following the game, he received numerous tweets<sup>36</sup> about his performance. Rather than receiving praise for notching the longest run of his career, he was ridiculed for failing to score on the play and received messages such as “Thanks for losing my fantasy week, you bum,” and “You may have won the Heisman, but you don’t belong in the NFL—Sincerely, Your spiteful owner.”

### C. Certainly Similar

Saucey and Jones represent players whose football careers followed much different paths. Saucey only started playing football in college, while Jones played his entire life. While Saucey was a small-town high school soccer star, Jones was heralded as one of the nation’s top high school football players in a state known for football.<sup>37</sup> Saucey attended a college not known for football; Jones went

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<sup>35</sup> *Goal Line Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/goal%20line> (last visited May 2, 2014) (defining goal line as “a line that must be crossed to score . . . in football”).

<sup>36</sup> *Tweet Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/tweet> (last visited May 2, 2014) (defining a tweet as “a post made on the Twitter online message service”).

<sup>37</sup> See Staff Report, *Texas Tops the List of the Best High School Football States in the*

to one of the best programs in the country.<sup>38</sup> Saucey became an accountant after college; Jones became an NFL player.

However, the context of the misappropriation between both hypotheticals is similar because both players were performing the same activity for which they were famous for—playing football. Video games and fantasy sports are also similar. First, both are considered games. A game is defined as “[a] contest, for amusement or for a prize, whose outcome depends on the skill, strength, or luck of the players.”<sup>39</sup> Video games and fantasy sports can certainly be considered a contest. Next, video games are generally used for amusement; however, there are many video game competitions across the nation that offer prizes.<sup>40</sup> Similarly, fantasy sports are used for amusement or prizes as well.<sup>41</sup> The outcomes of both games are usually dependent on the skill of the players. A gamer<sup>42</sup> acquires skill from playing frequently and, likewise, fantasy sports participants are more likely to excel if they have played before and consistently spend time researching players.

The features that Saucey and Jones believe violated their right of publicity are similar as well. Both video games and fantasy sports involve statistics and player information. Although Saucey’s name was not depicted, his biographical information implied that the video game character was, in fact, Saucey. As a result, both games are using the players as a foundation. While Saucey’s physical characteristics afford the realism that video games attempt to deliver, Jones’s statistics make fantasy sports possible. Both games have the same purpose as well—for the creators to earn money by providing enter-

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County, MAXPREPS.COM (Oct. 3, 2013), <http://www.maxpreps.com/news/6trP5t2zy0WYPX1S2zE7EQ/texas-tops-the-list-of-the-best-high-school-football-states-in-the-country.htm> (ranking the state of Florida third as the best high school football state in the country).

<sup>38</sup> See Chris Fallica, Nick Loucks & Harold Shelton, *Counting Down College Football’s Most Prestigious Programs*, ESPN.COM (Jan. 22, 2009), <http://sports.espn.go.com/ncf/news/story?id=3849028> (ranking the University of Alabama the sixth most prestigious college football program in the nation and the University of Wyoming fifty-first).

<sup>39</sup> BLACK’S LAW DICTIONARY 712 (9th ed. 2009).

<sup>40</sup> See Richard Nieva, *Video Gaming on the Pro Tour, for Glory but Little Gold*, N.Y. TIMES (Nov. 28, 2012), [http://www.nytimes.com/2012/11/29/technology/personaltech/video-gaming-on-the-pro-tour-for-glory-but-little-gold.html?\\_r=0](http://www.nytimes.com/2012/11/29/technology/personaltech/video-gaming-on-the-pro-tour-for-glory-but-little-gold.html?_r=0) (discussing video game competitions and how the average salary for competitive gamers ranges from \$12,000 to \$30,000).

<sup>41</sup> Cade, *supra* note 12.

<sup>42</sup> *Gamer Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/gamer> (last visited May 2, 2014) (defining a gamer as “a person who regularly plays computer or video games”).

tainment to their users.

Jones's likeness may be infringed even more than Saucey's. Right of publicity allows an "individual to reap the reward of his endeavors."<sup>43</sup> Jones dedicated fifteen years of his life to football and deserves to procure benefits derived from that hard work. Saucey's endeavors, on the other hand, are seemingly trivial. Although he displayed dedication during high school, such commitment elevated his likeness as a soccer player, not as a football player. As a result, Saucey's four years of playing football cannot compare to Jones's lengthy history on the gridiron.

There are significant qualitative differences between the two athletes as well. Jones spent his youth attempting to build his image as a football player. He relentlessly developed his body and traveled across the country to make a name for himself. Jones attended a premier college program in which he continued to build his name by winning a national championship and a Heisman Trophy. However, the greatest difference is that Jones is a professional athlete. Throughout their lives, football players aspire to make it to the NFL. To some, playing football for a living is enough, but to others, the desire to make money is what really fuels them. That being said, a strong argument can be made that professional athletes should receive greater protection for their right of publicity whether their identities were used in video games or fantasy sports.

### III. THE HISTORY OF RIGHT OF PUBLICITY

#### A. A General Look

The right of publicity is "the inherent right of every human being to control the commercial use of his or her identity."<sup>44</sup> In 1890, Louis Brandeis and Samuel Warren indirectly fostered the right of publicity when they wrote a law review article addressing the right of privacy.<sup>45</sup> The authors believed that the law lacked an essential individualistic protection—an individual's "right 'to be let alone.'"<sup>46</sup>

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<sup>43</sup> *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977).

<sup>44</sup> 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. 2013).

<sup>45</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>46</sup> *Id.* at 195 (quoting THOMAS M. COOLEY, *A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT* 29 (2d ed. 1888)).

*The Right to Privacy* has been heralded as “perhaps the most famous and certainly the most influential law review article ever written.”<sup>47</sup> The article’s influence was demonstrated when a group of states adopted privacy statutes or started to recognize a common law right of privacy following its publication.<sup>48</sup> Eventually, celebrities surfaced with claims regarding the use of their persona in advertisements without their permission.<sup>49</sup> Celebrities were not looking for privacy because they readily sought attention in order to enhance their image; rather, they needed protection from the commercial use of their images without their consent.<sup>50</sup>

In 1953, *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*<sup>51</sup> was the first case to address the celebrities’ concerns. The Second Circuit held that a professional baseball player, in addition to his right of privacy, had a right of publicity for the value of his photographs used by a gum manufacturer.<sup>52</sup> The court reasoned that “prominent persons (especially actors and ball-players), far from having their feelings bruised through exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements.”<sup>53</sup>

Soon after, two law review articles expanded on the new legal right. First, Melville Nimmer addressed the substance of, and limitations on, the right of publicity in his article, noting that a person achieves publicity protection after expending a great deal of time, effort, skill, and even money.<sup>54</sup> Nimmer suggested that “the use of a name may in itself carry considerable publicity value, and there would seem to be no reason to exclude such appropriation from the

<sup>47</sup> Melville B. Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROBS. 203, 203 (1954).

<sup>48</sup> Compare *id.* (finding that in 1954, eighteen states adhered to a common law right of privacy or enacted privacy statutes), with MCCARTHY, *supra* note 44, at § 6:3 (stating that in 2010, “under either statute or common law, the right of publicity is recognized as the law of 31 states.”).

<sup>49</sup> MCCARTHY, *supra* note 44, at § 1:7.

<sup>50</sup> See Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 229-31 (2005) (justifying the right of publicity on John Locke’s labor theory); MCCARTHY, *supra* note 44, at § 1:7 (summarizing that celebrities’ “real complaint was damage to their ‘pocketbook,’ not their ‘psyche.’ ”); Nimmer, *supra* note 47, at 204 (privacy is the “one thing [celebrities] [do] ‘not want, or need.’ ”) (quoting *Gautier v. Pro-Football*, 107 N.E.2d 485, 489 (N.Y. 1952) (Desmond, J., dissenting)).

<sup>51</sup> 202 F.2d 866 (2d Cir. 1953).

<sup>52</sup> *Id.* at 868.

<sup>53</sup> *Id.*

<sup>54</sup> Nimmer, *supra* note 47, at 216 (explaining that “every person is entitled to the fruits of his labors unless there are important countervailing public policy considerations.”).

protection of the right of publicity.”<sup>55</sup> In 1960, William Prosser delineated the invasion of privacy into four distinct torts, which finally made it easier for courts to separate the right of publicity from the right of privacy.<sup>56</sup> Prosser classified the right of publicity as the fourth type of invasion of privacy, referring to it as an “[a]ppropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.”<sup>57</sup> Prosser further defined appropriation as when a defendant “makes use of the name to pirate the plaintiff’s identity for some advantage of his own.”<sup>58</sup>

In 1977, the Supreme Court decided *Zacchini v. Scripps-Howard Broadcasting Co.*—the first and only time the Court has addressed the right of publicity.<sup>59</sup> In *Zacchini*, the defendant, a reporter, recorded the plaintiff’s fifteen-second human cannonball act, despite the plaintiff’s opposition.<sup>60</sup> Thereafter, the defendant aired the entire act on a television news program.<sup>61</sup> Consequently, the plaintiff brought an action against the defendant, alleging that his publicity rights, under Ohio state law, had been violated.<sup>62</sup> The Court rejected the defendant’s First Amendment defense<sup>63</sup> because the First Amendment did not allow the station to air the plaintiff’s entire per-

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<sup>55</sup> *Id.* at 217-18.

<sup>56</sup> William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

<sup>57</sup> *Id.* at 389; *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995) (expanding on Prosser’s definition for the right of publicity—“[o]ne who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade . . .”).

<sup>58</sup> Prosser, *supra* note 56, at 403.

<sup>59</sup> 433 U.S. 562 (1977).

<sup>60</sup> *Id.* at 563-64.

<sup>61</sup> *Id.*

<sup>62</sup> *See* MCCARTHY, *supra* note 44, at § 6:3 (pointing out that although many states recognize the right of publicity, no federal right of publicity exists).

<sup>63</sup> *See* 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, 3 (2012) (addressing the First Amendment defense against right of publicity claims);

Simply put, the right of publicity is a creature of . . . state courts. Because a plaintiff could not otherwise bring a right of publicity claim without those state entities creating and enforcing this right, state action allows a defendant to assert constitutional protections as a defense. In particular, because the right of publicity prohibits a person from using aspects of another’s identity without consent, defendants will assert that the right of publicity violates the First Amendment by limiting expressive acts. This was the defense at issue when . . . the U.S. Supreme Court heard its first and only right of publicity case to date.

*Id.*

formance without compensation.<sup>64</sup>

Although *Zacchini* involved facts that are inapplicable to the issue addressed in this Comment,<sup>65</sup> the Court did provide its rationale for the right of publicity, which is relevant here.<sup>66</sup> Furthermore, *Zacchini* propelled the right of publicity onto the national stage, which conferred recognition and legitimacy on a legal right that was fairly unknown beforehand.<sup>67</sup> As a result, the number of right of publicity cases increased dramatically.

### B. What's My Name Doing There?

Right of publicity claims typically involve celebrities.<sup>68</sup> As a result, athletes have historically appeared in court claiming a violation of such a right.<sup>69</sup> *Palmer v. Schonhorn Enterprises, Inc.*<sup>70</sup> involved a group of famous professional golfers who claimed “an invasion of their privacy and an unfair exploitation and commercialization of their names and reputations” in New Jersey state court.<sup>71</sup> The golfers alleged that a board game used their names and biographical information, including statistics, without their consent.<sup>72</sup> They argued that the free use of their names in the product reduced their ability to garner future licensing agreements.<sup>73</sup>

In response, the defendant argued that the golfers waived their

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<sup>64</sup> *Zacchini*, 433 U.S. at 578.

<sup>65</sup> *Zacchini* dealt with a person's entire performance as a basis for a right of publicity infringement rather than a person's name and likeness used in a commercial product.

<sup>66</sup> *Id.* at 576 (quoting Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 L. & CONTEMP. PROBS. 326, 331 (1966) (“The rationale for protecting the right of publicity is the straight-forward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get for free some aspect of the plaintiff that would have market value and for which he would normally pay.”)).

<sup>67</sup> See MCCARTHY, *supra* note 44, at § 1:33 (“The right of publicity had its day in the glare of public attention on the stage of the highest court in the land and had defeated the weighty First Amendment of the Constitution. After the *Zacchini* case, everyone took the right of publicity more seriously. Twenty-four years after the *Haelan* decision, the right of publicity had at last achieved prominence and respectability.”).

<sup>68</sup> *Id.* at § 4:2.

<sup>69</sup> See Michael Gerton, Note: *Kids' Play: Examining the Impact of the CBC Distribution Decision on College Fantasy Sports*, 11 TEX. REV. ENT. & SPORTS L. 153, 159 (2009) (stating that “a significant portion of case law applying the doctrine involves claims by professional athletes . . .”).

<sup>70</sup> 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967).

<sup>71</sup> *Id.* at 459.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

right of publicity because they purposely invited publicity to advance their careers.<sup>74</sup> Additionally, because the information was open to the public and regularly used by newspapers and magazines, the defendant believed that it too should be given the ability to reproduce the information.<sup>75</sup>

The court decided in favor of the golfers.<sup>76</sup> When addressing the defendant's first argument, the court reasoned that it would be unjust for people to capitalize on another's successes simply because they had been previously publicized.<sup>77</sup> More importantly, when rejecting the defendant's second argument, the court made a distinction between the defendant's use of the golfers' information in a board game and a newspaper's use of the same information.<sup>78</sup> The court acknowledged that publicizing celebrities' biographical information did not "per se" constitute a violation; however, a violation occurred when the name and information is used in a "commercial project other than the dissemination of news."<sup>79</sup>

Three years after *Palmer*, another case which involved a board game was decided.<sup>80</sup> In *Uhlaender v. Henricksen*,<sup>81</sup> the Major League Baseball Players Association<sup>82</sup> brought a misappropriation claim in the United States District Court of Minnesota regarding the unauthorized use of players' names, statistics, and jersey numbers in a board game.<sup>83</sup> The defendant contended that the names and statistics were readily available in the public domain and that its use of the players' information furthered the publicity that the players sought.<sup>84</sup>

The court in *Uhlaender* followed *Palmer's* rationale, and it found that the defendant violated the players' rights based on the "unauthorized appropriation of their names and statistics for commercial use."<sup>85</sup> The court dismissed the defendant's argument that its

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<sup>74</sup> *Id.* at 460.

<sup>75</sup> *Palmer*, 232 A.2d at 460.

<sup>76</sup> *Id.* at 462.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 461-62.

<sup>79</sup> *Id.* at 462.

<sup>80</sup> *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970).

<sup>81</sup> 316 F. Supp. 1277 (D. Minn. 1970).

<sup>82</sup> See *MLBPA Info – Frequently Asked Question*, MLBPLAYER.COM, <http://mlbplayers.mlb.com/pa/info/faq.jsp#mlbpa> (last visited May 2, 2014) (describing The Major League Baseball Players Association as "the group licensing agent on behalf of the players.").

<sup>83</sup> *Uhlaender*, 316 F. Supp. at 1278.

<sup>84</sup> *Id.* at 1279.

<sup>85</sup> *Id.* at 1283.



use was protected because the names and statistics are in the public domain and stated that the information is “valuable only because of past public disclosure, publicity and circulation.”<sup>86</sup> The defendant’s second argument was also rejected by the court when the court determined that the value in players’ names was attributed to the public’s recognition of them and to hold that such publicity waived a player’s right “would negate any and all causes of action.”<sup>87</sup>

In 1996, *Cardtoons*, a company which specialized in producing parody playing cards, sought a declaratory judgment in the Tenth Circuit that its cards did not infringe on Major League Baseball players’ right of publicity.<sup>88</sup> The court found that *Cardtoons* violated the players’ publicity rights because the company used the players’ names and likenesses without their consent.<sup>89</sup> However, the court ultimately concluded that *Cardtoons*’ infringement was fully protected by the First Amendment right to publish the cards.<sup>90</sup> In justifying its ruling, the court noted that parodies provide a “valuable communicative resource” to the public and that such commentary would be non-existent, absent First Amendment considerations, because the players would never grant a license for products that “poked fun at the players.”<sup>91</sup>

The court also articulated three economic and four noneconomic justifications for the right of publicity.<sup>92</sup> One economic justification, the additional inducement for achievement, was summarily dismissed by the court’s opining that celebrities “are already handsomely compensated.”<sup>93</sup> Celebrities, according to the court, generate “significant” income from their occupation and “the commercial val-

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 962 (10th Cir. 1996) (describing the parody cards as “caricatures of active major league baseball players on the front and humorous commentary about their careers on the back.”).

<sup>89</sup> *See id.* at 968 (stating the elements needed for a prima facie showing of publicity right infringement in Oklahoma: “(1) knowing use of player names or likenesses (2) on products, merchandise, or goods (3) without MLBPA’s prior consent.”).

<sup>90</sup> *Id.* at 976.

<sup>91</sup> *Id.* at 972.

<sup>92</sup> *Id.* at 973 (presenting the economic justifications as “further[ing] economic goals such as stimulating athletic and artistic achievement, promoting the efficient allocation of resources, and protecting consumers[,]” and the noneconomic reasons as “safeguarding natural rights, securing the fruits of celebrity labors, preventing unjust enrichment, and averting emotional harm.”).

<sup>93</sup> *Cardtoons*, 95 F.3d at 974.

ue of their identities is merely a by-product of their performance values.”<sup>94</sup>

In 2001, a California appellate court paid closer attention to the information that was allegedly misappropriated.<sup>95</sup> The case, *Gionfriddo v. Major League Baseball*,<sup>96</sup> involved former notable professional baseball players claiming infringement of their right of publicity by Major League Baseball.<sup>97</sup> The players alleged that the defendant violated their right of publicity by using the players’ names, statistics, and likenesses “in assorted All-Star game and World Series programs, or on its baseball Web sites.”<sup>98</sup>

Although the court held that the players’ right of publicity was violated, it stated that “the right to be protected from unauthorized publicity [must] ‘be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guarantees of freedom of speech and of the press.’ ”<sup>99</sup> The court referred to the players’ information as “mere bits of baseball’s history” and “fragments from baseball’s mosaic.”<sup>100</sup> The defendant, according to the court, was simply keeping the public informed by using the players’ information because “[t]he records and statistics remain of interest . . . because they provide context that allows fans to better appreciate (or deprecate) today’s performances.”<sup>101</sup>

Ultimately, the court decided that the public’s interest in the free flow of information about baseball’s history superseded the players’ right of publicity.<sup>102</sup> However, the court noted that the plaintiffs could have prevailed if they had presented a substantial competing interest, such as an impairment to their economic interests—which they failed to do.<sup>103</sup>

These cases show the multiple approaches that courts take

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<sup>94</sup> *Id.* at 973.

<sup>95</sup> *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 314 (Ct. App. 2001) (stating that “a court must first consider the nature of the precise information conveyed and the context of the communication to determine the public interest in the expression.”).

<sup>96</sup> 114 Cal. Rptr. 2d 307 (Ct. App. 2001).

<sup>97</sup> *Id.* at 309-10.

<sup>98</sup> *Id.* at 311.

<sup>99</sup> *Id.* at 313 (quoting *Gill v. Hearst Publ’g Co.*, 253 P.2d at 443 (Cal. 1953)).

<sup>100</sup> *Id.* at 314.

<sup>101</sup> *Gionfriddo*, 114 Cal. Rptr. 2d at 315.

<sup>102</sup> *Id.* at 318.

<sup>103</sup> *Id.* at 317-18.

when addressing right of publicity claims. *Palmer* and *Uhlaender* distinguished the information being used from the dissemination of news and held that such information was not protected by First Amendment considerations.<sup>104</sup> *Gionfriddo* involved similar facts, but the court concluded that the information was protected.<sup>105</sup> *Gionfriddo* is distinguishable from *Palmer* and *Uhlaender* because the information was used by a former employee to educate fans about the history of baseball,<sup>106</sup> rather than usage by a board game company as seen in *Palmer* and *Uhlaender*.<sup>107</sup> Lastly, *Cardtoons* dealt with an expressive work.<sup>108</sup> The court valued the artist's transformation of the athletes' image and also found importance in the communication that the parodies provided.<sup>109</sup>

#### IV. C.B.C.—FANTASY SPORTS' PROVIDERS FAVORITE THREE LETTERS

From 1995-2004, C.B.C. Distribution and Marketing, Inc. ("CBC") paid licensing fees to the Major League Baseball Players Association ("MLBPA") in order to use the baseball players' "names, nicknames, likenesses, signatures, pictures, playing records, and/or biographical data" in its fantasy sports products.<sup>110</sup> In 2005, the MLBPA exclusively licensed such player information to Major League Baseball Advanced Media, L.P. ("Advanced Media"), which ran its own fantasy games on MLB.com.<sup>111</sup> Soon after receiving the exclusive rights, Advanced Media offered CBC a license to promote Advanced Media's games on CBC's site in exchange for revenue sharing, but not a license to continue running its own fantasy games.<sup>112</sup> In response, CBC sought a declaratory judgment in the United States Eastern District of Missouri that its continued use of player information, without a license, did not violate the players'

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<sup>104</sup> *Palmer*, 232 A.2d at 461-62; *Uhlaender*, 316 F. Supp. at 1282-83.

<sup>105</sup> *Gionfriddo*, 114 Cal. Rptr. 2d at 318.

<sup>106</sup> *Id.* at 315.

<sup>107</sup> *Palmer*, 232 A.2d at 459; *Uhlaender*, 316 F. Supp. at 1278.

<sup>108</sup> *Cardtoons*, 95 F.3d at 969.

<sup>109</sup> *Id.* at 976.

<sup>110</sup> *C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1080-81 (E.D. Mo. 2006) [hereinafter *C.B.C. II*]; *C.B.C. I*, 505 F.3d at 821.

<sup>111</sup> *C.B.C. I*, 505 F.3d at 821.

<sup>112</sup> *Id.*

right of publicity.<sup>113</sup> Advanced Media, along with the MLBPA, intervened in the matter, asserting that CBC's use of players' names and statistics in conjunction with the fantasy games violated the players' right of publicity.<sup>114</sup> CBC claimed that the players' names and playing records were preempted by copyright law or, in the alternative, that the First Amendment outweighed any alleged right of publicity infringement.<sup>115</sup>

Magistrate Judge Mary Ann L. Medler ultimately found no right of publicity violation in CBC's use of the players' names and statistics and granted summary judgment in favor of CBC.<sup>116</sup> In reaching its decision, the court focused on two particular elements for a right of publicity claim in Missouri—commercial advantage and identity—and considered both elements to be lacking for a *prima facie* case.<sup>117</sup> Additionally, the court concluded that even if players' rights were infringed, "players' right of publicity must give way to CBC's First Amendment right to freedom of expression."<sup>118</sup> The court used language from *Gionfriddo*, referring to the names and playing records as "bits of baseball history" because they are used to educate society about baseball.<sup>119</sup> In its analysis, the court reasoned that the players' names and statistics in fantasy games "[do] not go to the heart of the players' ability to earn a living" because the players "do not earn a living by the publication of their playing records."<sup>120</sup> Furthermore, the court pointed out that the names and statistics were readily available in the public domain.<sup>121</sup>

On appeal, the Eighth Circuit determined that the players' right of publicity had, in fact, been violated, but it affirmed the lower

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<sup>113</sup> *C.B.C. II*, 443 F. Supp. 2d at 1081 n.5. The case was heard in federal court because, in addition to a state right of publicity claim, CBC claimed that Advanced Media violated federal trademark law, pursuant to the Lanham Act. *Id.* However, the parties entered into a stipulation that only the right of publicity claim would be decided. *Id.* With the option to dismiss the case, the court decided to hear it because of "judicial economy, convenience, and fairness to the litigants[.]" *Id.*

<sup>114</sup> *Id.* at 1082.

<sup>115</sup> *C.B.C. II*, 443 F. Supp. 2d at 1082.

<sup>116</sup> *Id.* at 1107.

<sup>117</sup> *Id.* at 1089. A right of publicity action in Missouri requires: "(1) [t]hat defendant used plaintiff's name as a symbol of his identity (2) without consent (3) and with the intent to obtain a commercial advantage." *Id.* at 1084-85. Both parties conceded that the use of the information was without consent. *Id.* at 1085.

<sup>118</sup> *C.B.C. II*, 443 F. Supp. 2d at 1100.

<sup>119</sup> *Id.* at 1092-93 (quoting *Gionfriddo*, 114 Cal. Rptr. 2d at 314).

<sup>120</sup> *Id.* at 1091.

<sup>121</sup> *Id.*

court's grant of summary judgment because CBC's First Amendment considerations countervailed such intrusion.<sup>122</sup> When addressing the right of publicity, the appellate court noted that "the district court did not understand" the identity element and failed to consider the Restatement's view on the commercial advantage element.<sup>123</sup> Because the court found enough evidence for a prima facie right of publicity claim, it continued to balance such violation against the First Amendment.<sup>124</sup>

In accordance with the district court, the Eighth Circuit held that players' names and statistics are already available in the public domain and went so far as to say that "it would be strange law" to bar a person from using information that is available to the public.<sup>125</sup> The court also spoke about the public value of baseball players' information, as illustrated in *Cardtoons* and *Gionfriddo*.<sup>126</sup> The court included a lengthy portion of the opinion from *Gionfriddo*, which also dealt with statistics.<sup>127</sup> However, the court failed to distinguish the obvious differences between the cases. The plaintiffs in *Gionfriddo* were former players suing their former employer over the use of their likenesses in various mediums.<sup>128</sup> Such facts are undeniably different from those in *C.B.C.* The information in *Gionfriddo* was used to inform and provide the public with a look into baseball's history because "the history of professional baseball is integral to the full understanding and enjoyment of the current game and its players."<sup>129</sup>

Unlike statistics for current players, statistics for former players are not as "readily available." Rather, Major League Baseball's dissemination of the information may have been the only way for the public to learn about it. The same cannot be said about the infor-

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<sup>122</sup> *C.B.C. I*, 505 F.3d at 824.

<sup>123</sup> *Id.* at 822-23.

<sup>124</sup> *Id.* at 823.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 823-24. The court referred to baseball as "the national pastime," which the court quoted from *Cardtoons*, 95 F.3d at 972.

<sup>127</sup> *C.B.C. I*, 505 F.3d at 823-24 (stating that "[t]he records and statistics remain of interest to the public because they provide context that allows fans to better appreciate (or deprecate) today's performances . . . [and] the 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." ) (quoting *Gionfriddo*, 114 Cal. Rptr. 2d at 315).

<sup>128</sup> *Gionfriddo*, 94 Cal. Rptr. 2d at 311, 314, (describing the information as "fragments from baseball's mosaic").

<sup>129</sup> *Id.* at 315.

mation used by CBC. If the public wants to stay informed about present-day baseball, then it may read a newspaper, watch a sports game, or visit websites such as MLB.com or ESPN.com. Fantasy sports participants visit fantasy sites in order to do one thing—manage their team. As a result, the statistics are being used as a commercial vehicle, not a historical reference. To compare the information provided by a fantasy provider to an actual news gathering source is simply wrong.

Next, the court considered, but dismissed, the economic interests of the players.<sup>130</sup> The court acknowledged that states typically provide protection in order for the “individual to reap the rewards of his or her endeavors” and to “provide incentives to encourage a person’s productive activities.”<sup>131</sup> However, the court seemed to think that because “major league baseball players are [already] rewarded,” then it is acceptable for another person to simultaneously cash in on the players’ hard work.<sup>132</sup> The court also pointed out that players make “additional large sums from endorsements and sponsorship arrangements.”<sup>133</sup> Here, the court assessed whether athletes were wealthy enough. The court, in essence, believed that the business owners profiting from the multimillion-dollar industry were not as financially comfortable as athletes. However, the court failed to mention that the average Major League Baseball player’s career lasts only 5.6 years.<sup>134</sup> Also, upon retirement, many athletes become unemployed, resulting in financial burdens. After only two years of retirement, 78% of former NFL players have filed for bankruptcy or are considered financial burdened, and within five years of retirement, “an estimated 60% of retired NBA players are broke.”<sup>135</sup> Furthermore, athletes suffer numerous injuries during their careers, resulting in life-long aches and pains.<sup>136</sup> Last, the court’s reasoning was circu-

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<sup>130</sup> *C.B.C. I*, 505 F.3d at 824.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Sam Roberts, *Just How Long Does the Average Baseball Career Last?*, N.Y. TIMES (July 17, 2007), [http://www.nytimes.com/2007/07/15/sports/baseball/15careers.html?\\_r=0](http://www.nytimes.com/2007/07/15/sports/baseball/15careers.html?_r=0).

<sup>135</sup> Pablo S. Torre, *How (and Why) Athletes Go Broke*, SPORTS ILLUSTRATED (Mar. 23, 2009), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1153364/1/index.htm>.

<sup>136</sup> See Scott Clement, *Do No Harm: Retired NFL Players Endure a Lifetime of Hurt*, WASH. POST, (May 16, 2013), <http://www.washingtonpost.com/sf/feature/wp/2013/05/16/do-no-harm-retired-nfl-players-endure-a-lifetime-of-hurt/> (stating “[a] Washington Post survey of retired NFL players found that nearly nine in 10 report suffering from aches and pains on a daily basis . . .”).

lar. Since its inception, the right of publicity has been used to protect celebrities. It seems illogical for a court to strip such a right for a wealthy individual when most celebrities are inherently wealthy.

Despite the court's questionable reasoning, the Supreme Court denied a writ of certiorari to review the case.<sup>137</sup> In response to *C.B.C.*, three of the most prominent fantasy host sites—CBS Sports, Yahoo!, and ESPN—contested their continued need for licensing agreements. In 2009, CBS sought a declaratory judgment in the same district court in which *C.B.C.* originated.<sup>138</sup> In *CBS Interactive, Inc. v. NFL Players Association*,<sup>139</sup> the NFL Players Association, the defendant representing the players' rights, among other arguments, claimed that CBS's use of the information was more comprehensive than CBS's use because CBS included not only statistics, but also images, biographical information, and information pertaining to the players' reputation and character.<sup>140</sup> Still, the court did not see the difference between statistics and more intimate information.<sup>141</sup> In the end, the court followed *C.B.C.*'s precedent and ruled in favor of CBS.<sup>142</sup> Yahoo! sought the same relief in 2009.<sup>143</sup> However, rather than continuing litigation, Yahoo! and the NFL Players Association settled the matter.<sup>144</sup> ESPN renegotiated its terms with the MLB Players Association as a result of *C.B.C.* and *CBS* as well.<sup>145</sup>

<sup>137</sup> *Major League Baseball Advanced Media v. C.B.C. Distrib. & Mktg., Inc.*, 553 U.S. 1090 (2008).

<sup>138</sup> *CBS Interactive, Inc. v. NFL Players Ass'n*, 259 F.R.D. 398 (D. Minn. 2009).

<sup>139</sup> 259 F.R.D. 398 (D. Minn. 2009).

<sup>140</sup> *Id.* at 418, 419. The defendant also argued: (1) that CBS's use of the player information was a greater exploitation of publicity rights than the use in *C.B.C.*; (2) that consumers could mistakenly believe that athletes are endorsing CBS's website; and (3) public interest in football statistics is much lower than baseball statistics. *Id.* This Comment will not address these three arguments because they are the least persuasive of the four.

<sup>141</sup> *Id.* at 417-18.

<sup>142</sup> *Id.* at 419.

<sup>143</sup> Steven Musil, *Yahoo Sues NFL Players Group Over Fantasy Stats*, CNET.COM (June 3, 2009, 8:00 PM), [http://news.cnet.com/8301-1023\\_3-10256918-93.html](http://news.cnet.com/8301-1023_3-10256918-93.html).

<sup>144</sup> Gina Keating, *Yahoo, NFL Settle Lawsuit Over Fantasy League*, REUTERS (July 7, 2009, 3:49 PM), <http://www.reuters.com/article/2009/07/07/yahoo-sports-idUSN0733318120090707>.

<sup>145</sup> John Ourand & Eric Fisher, *ESPN Seeks Better MLBAM Terms*, ST. & SMITH'S SPORTS BUS. J. (Jan. 21, 2008), <http://www.sportsbusinessdaily.com/Journal/Issues/2008/01/20080121/This-Weeks-News/ESPN-Seeks-Better-MLBAM-Terms.aspx?hl=Sports%20Media%20Of%20The%20Year&sc=0>.

# **V. HART AND KELLER—TOUCHDOWN FOR RIGHT OF PUBLICITY**

In two separate cases, former college football players proved that athletes' right of publicity can trump First Amendment considerations.<sup>146</sup> Both cases originated soon after *C.B.C.* and *CBS* in different jurisdictions, yet both circuits concluded that the athletes' likenesses were unjustifiably infringed.<sup>147</sup>

In 2009, Sam Keller, and other similarly situated former college players, filed a suit in the United States Northern District of California against video-game giant Electronic Arts, Inc. ("EA"), asserting a violation of California statutory and common law rights of publicity.<sup>148</sup> EA produced *NCAA Football*, a video game that was released each year and depicted "real-life" college athletes who were playing that particular season.<sup>149</sup> The plaintiffs claimed that their right of publicity was violated because the virtual players wore the same number as the plaintiffs, looked like the plaintiffs, and shared similar biographical information.<sup>150</sup> EA conceded that they infringed on the plaintiffs' right of publicity; however, EA argued that such infringement was protected by the First Amendment.<sup>151</sup> The trial court disagreed.<sup>152</sup>

The court first considered EA's transformative use defense.<sup>153</sup> A work is transformative if the "product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness."<sup>154</sup> The court compared *Keller* to a previous California video game case that was analyzed under the Transformative Use Test<sup>155</sup>—*Kirby v. Sega of*

<sup>146</sup> *Hart I*, 717 F.3d at 170; *Keller*, 724 F.3d at 1284.

<sup>147</sup> *Id.*

<sup>148</sup> *Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108, at \*1-2 (N.D. Cal. Feb. 8, 2010). The plaintiffs also sued the NCAA in this case for alleged violation of Indiana's right of publicity statute, civil conspiracy, and breach of contract. *Id.* This Comment only addresses the charges against Electronic Arts, not those against the NCAA, which focuses on amateurism issues.

<sup>149</sup> *Id.* at \*1.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at \*3.

<sup>152</sup> *Keller*, 2010 WL 530108, at \*3.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at \*4 (quoting *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 809 (Ct. App. 2001)).

<sup>155</sup> *Id.*



*America, Inc.*<sup>156</sup> In *Kirby*, the plaintiff was a musician who was known for saying “ooh la la.” The court determined that the video game character was sufficiently transformed from the plaintiff because she was taller, dressed differently, and appeared in a different context.<sup>157</sup> The court in *Keller* distinguished EA’s video game characters from the character in *Kirby*.<sup>158</sup> The virtual players in *NCAA Football* were almost identical to the plaintiffs in terms of physical appearance, and the video game also depicted the plaintiffs as what they were known to be—football players.<sup>159</sup> EA also urged the court to consider the video game as a whole, rather than looking solely at the particular players.<sup>160</sup> The court rejected this assertion, because past right of publicity claims in California routinely focused on the portion that included individual plaintiffs, rather than the entire work.<sup>161</sup>

The public interest defense was also considered but rejected by the court. Essentially, this defense is grounded in the idea that the public has a right to know and stay informed about important public interests, which are protected by the First Amendment.<sup>162</sup> In this part of its decision, the court discussed *Gionfriddo* but distinguished it from *Keller*.<sup>163</sup> The court held that EA was not informing the public about athletes’ statistics, but rather allowing the public “to assume the identity of various student athletes and compete in simulated college football matches.”<sup>164</sup>

About a year and a half later, the United States District Court of New Jersey disagreed with *Keller*’s holding.<sup>165</sup> In that case, former Rutgers University quarterback Ryan Hart sued EA, claiming a

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<sup>156</sup> 50 Cal. Rptr. 3d 607 (Ct. App. 2006).

<sup>157</sup> *Keller*, 2010 WL 530108, at \*4.

<sup>158</sup> *Id.* at \*5.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> See, e.g., *Keller*, 2010 WL 530108, at \*5; *Montana v. San Jose Mercury News, Inc.*, 40 Cal. Rptr. 2d 639, 640-41 (Ct. App. 1995) (holding a poster that depicted former newspaper pages reporting on a past super bowl, which included a picture of former NFL quarterback Joe Montana, was afforded the same First Amendment protection as the original newspaper because of the strong public interest contained in the information); but see *Hilton v. Hallmark Cards*, 599 F.3d 894, 912 (9th Cir. 2009) (rejecting a greeting card company’s public interest defense because the birthday card at issue did “not publish or report information.”).

<sup>163</sup> *Keller*, 2010 WL 530108, at \*5.

<sup>164</sup> *Id.* at \*6.

<sup>165</sup> *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757, 786-87 (D.N.J. 2011) [hereinafter *Hart III*].

right of publicity violation under New Jersey law.<sup>166</sup> EA did not contest Hart's prima facie right of publicity claim, but again argued that the First Amendment trumps an infringement.<sup>167</sup> Because "neither New Jersey nor the Third Circuit ha[d] explicitly adopted a test . . . reconcil[ing] First Amendment interests with the state right of publicity," the court applied two tests—the Transformative Use Test and the *Rogers* Test.<sup>168</sup>

The court's application of the Transformative Use Test contrasted *Keller's* application.<sup>169</sup> *Keller*, according to the court, incorrectly focused on the challenged image rather than the complete product.<sup>170</sup> When taken as a whole, EA transformed Hart's likeness by providing users with a mechanism to alter many aspects of the game.<sup>171</sup> Part of the alterations included the ability to change players' physical characteristics, which was a major factor in the court's decision.<sup>172</sup> Although the game contained an actual photograph of Hart, the court held that the picture was a small part of an entire work, which is full of "transformative elements" in other portions of the game.<sup>173</sup>

The *Rogers* Test, which is grounded in trademark law, amounts to a two-prong test which questions: "(a) whether the challenged work is wholly unrelated to the underlying work; or (b) whether the use of the plaintiff's name is a disguised commercial advertisement."<sup>174</sup> The court determined that EA was entitled to First Amendment protection under the *Rogers* Test.<sup>175</sup> According to the court, Hart's likeness, although related to the game, was by no means an advertisement for the product but instead provided users with

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<sup>166</sup> *Id.* at 763-64.

<sup>167</sup> *Id.* at 768.

<sup>168</sup> *Id.* at 775, 776. Hart urged the court to use the Predominant Use Test, but the court found the test to be outdated and inapplicable in the video game context. *Id.* at 776.

<sup>169</sup> *Hart II*, 808 F. Supp. 2d at 786-87.

<sup>170</sup> *Id.* at 787.

<sup>171</sup> *Id.* at 785.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 786.

<sup>174</sup> *Hart II*, 808 F. Supp. 2d at 793.

<sup>175</sup> *Id.* at 794; *see also* *Brown v Elec. Arts, Inc.*, 724 F.3d 1235, 1248 (9th Cir. 2013) (rejecting a former NFL player's claim against EA for a Lanham Act violation over the use of Brown's likeness in EA's Madden NFL games because, although Brown's likeness was artistically relevant, no evidence supported "the claim that EA explicitly misled consumers as to Brown's involvement with the games.").

“public familiarity.”<sup>176</sup>

After Hart filed for appeal, the Third Circuit overturned the district court’s decision.<sup>177</sup> Initially, the Third Circuit contemplated which balancing test to utilize.<sup>178</sup> The court considered the Transformative Use Test, *Rogers* Test, and added a new test to the mix—the Predominant Use Test.<sup>179</sup>

The court ultimately adopted the Transformative Use Test because it found the test “uniformly applicable.”<sup>180</sup> The court also selected the test because it “effectively restricts right of publicity claims to a very narrow universe of expressive works” by first determining the extent to which the product “is the creator’s own expression.”<sup>181</sup> In its application, the court first considered Hart’s identity.<sup>182</sup> The digital avatar representing Hart matched his hair color, hairstyle, skin tone and also listed similar biographical information.<sup>183</sup> Next, the court looked at the context of the alleged appropriation.<sup>184</sup> The context, according to the court, strengthened Hart’s argument because the digital avatar was performing the same activity for which Hart was famous—playing football.<sup>185</sup>

The circuit court then addressed the district court’s main reason for finding a transformative element, the ability for a gamer to al-

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<sup>176</sup> *Hart II*, 808 F. Supp. 2d at 793.

<sup>177</sup> *Hart I*, 717 F.3d 141.

<sup>178</sup> *Id.* at 153.

<sup>179</sup> *See id.* at 153 (stating that under the predominant use test, a work does not have First Amendment protection “[i]f a product is being sold that predominately 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 it that might qualify as ‘speech’ in other circumstances.” *Id.* at 154) (quoting Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity—Free Speech Interface*, 23 LOY. L.A. ENT. L. REV. 471, 500 (2003)). The court rejected the Predominant Use Test because it considered it “subjective at best, arbitrary at worst[.]” *Hart I*, 717 F.3d at 154. Also, the *Rogers* Test was rejected by the court because the test considers the relationship between the image and the work as a whole, rather than looking at only the particular part of the work depicting the celebrity. *Id.* at 154-55.

<sup>180</sup> *See Hart I*, 717 F.3d at 163 (describing the Transformative Use Test’s singular focus as “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>181</sup> *Id.*

<sup>182</sup> *Id.* at 165.

<sup>183</sup> *Id.* at 166.

<sup>184</sup> *Id.*

<sup>185</sup> *Hart I*, 717 F.3d at 166.

ter the avatar.<sup>186</sup> The court considered the “default players” to be the “sum and substance” of the game.<sup>187</sup> In other words, people purchased the game, according to the court, in order to use avatars depicting the real-life athletes, not to alter the players. The court noted that regardless of such a feature, “the right of publicity can triumph even when an essential element for First Amendment protection is present.”<sup>188</sup> Furthermore, the court downplayed the feature by alluding to the slippery slope that could ensue if video game companies knew that adding such a feature would protect them from misappropriation claims.<sup>189</sup>

The court also rejected EA’s argument that other creative elements in the game transform the work as a whole.<sup>190</sup> The court noted that past decisions focus on “how the *celebrity’s identity* is used in or is altered by other aspects of a work.”<sup>191</sup> Again, the court was concerned that “[a]cts of blatant misappropriation would count for nothing so long as the larger work, on balance, contained highly creative elements in great abundance.”<sup>192</sup> As a result, the court ruled that EA did not sufficiently transform Hart’s identity and, therefore, reversed the district court’s decision.<sup>193</sup>

In a stimulating dissent, Judge Ambro declared that the majority had disregarded the work as a whole and punished EA for “financial success.”<sup>194</sup> According to Judge Ambro, the other creative features within the game could not be ignored.<sup>195</sup> Even if the gamer used the default avatar, the other alterations that the gamer could make would have a direct impact upon the game and ultimately affect the default avatar.<sup>196</sup> Accordingly, Judge Ambro recommended a Transformative Use Test that “prevent[s] commercial exploitation of an individual’s likeness where the work at issue lacks creative contri-

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<sup>186</sup> *Id.* at 166-68.

<sup>187</sup> *Id.* at 168.

<sup>188</sup> *Id.* at 167.

<sup>189</sup> *Id.* (“If the mere presence of the feature were enough, video game companies could commit the most blatant acts of misappropriation only to absolve themselves by including a feature that allows users to modify the digital likenesses.”).

<sup>190</sup> *Hart I*, 717 F.3d at 169.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 169.

<sup>193</sup> *Id.* at 170.

<sup>194</sup> *Id.* at 171 (Ambro, J., dissenting).

<sup>195</sup> *Hart I*, 717 F.3d at 174-75 (Ambro, J., dissenting).

<sup>196</sup> *Id.* at 175.

bution that transforms that likeness in a meaningful way.”<sup>197</sup>

A few months after *Hart* was overturned, the Ninth Circuit heard the appeal in *Keller* and affirmed the district court’s decision.<sup>198</sup> Applying the Transformative Use Test, the court compared *Keller*’s facts to *No Doubt v. Activision Publishing, Inc.*,<sup>199</sup> a California Supreme Court right of publicity case that dealt with a video game.<sup>200</sup> In *No Doubt*, the plaintiff was a band depicted in the game *Band Hero*. The court considered the context of *Keller* and *No Doubt* to be “similarly realistic” in that the gamers were acting as if they were football players and rock stars in virtual real-life venues.<sup>201</sup> Further, the avatars depicting the No Doubt band members were physical matches to the actual band members—much like *Keller*’s appearance was mimicked by his avatar.<sup>202</sup> As such, the court held that *Keller*’s likeness was not sufficiently transformed—the same outcome reached in *No Doubt*.<sup>203</sup>

Likely motivated by the dissent in *Hart*, EA once again argued that the Transformative Use Test should be applied to the game as a whole and not simply *Keller*’s avatar.<sup>204</sup> The court again turned to *No Doubt* for guidance.<sup>205</sup> Unlike the avatars in *NCAA Football*, the band members in *Band Hero* could not be altered.<sup>206</sup> However, similar to *NCAA Football*, *Band Hero* contained many other creative elements.<sup>207</sup> In *No Doubt*, the court declared that the creative elements did “not transform the avatars into anything other than exact depictions of No Doubt’s members doing exactly what they do as celebrities.”<sup>208</sup> The court also distinguished *NCAA Football*’s ability to alter the default avatars from other California right of publicity cases which dealt with default characters that were unique from the begin-

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<sup>197</sup> *Id.* at 175.

<sup>198</sup> *Keller*, 724 F.3d at 1271 (“Under the ‘transformative use’ test . . . EA’s use does not qualify for First Amendment protection as a matter of law because it literally recreates *Keller* in the very setting in which he has achieved renown. The other First Amendment defenses asserted by EA do not defeat *Keller*’s claims either.”).

<sup>199</sup> 122 Cal. Rptr. 3d 397 (Ct. App. 2011).

<sup>200</sup> *Keller*, 724 F.3d at 1276.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *See id.* at 1276, 1278.

<sup>205</sup> *Keller*, 724 F.3d at 1278-79.

<sup>206</sup> *Id.* at 1277.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* (quoting *No Doubt*, 122 Cal. Rptr. 3d at 411).

ning.<sup>209</sup> The court reinforced its reasoning by referring to the holding in *Hart*.<sup>210</sup> Like in *Hart*, the dissent in *Keller* asserted that the majority was applying the Transformative Use Test incorrectly by not looking at the game as a whole.<sup>211</sup>

The court also considered the *Rogers* Test and the Public Interest defense but ultimately dismissed them both.<sup>212</sup> The court noted that the *Rogers* Test “was designed to protect consumers from the risk of consumer confusion.”<sup>213</sup> As a result, because “Keller’s publicity claim [was] not founded on an allegation that consumers [were] being illegally misled,” the *Rogers* Test was simply inapplicable.<sup>214</sup> The court also reasoned that EA did not have a valid Public Interest defense because the game “[was] not publishing or reporting factual data” for “it [was] a game, not a reference source.”<sup>215</sup>

## VI. TURNOVER ON DOWNS? *HART & KELLER*’S POTENTIAL IMPACT ON FANTASY SPORTS

A court has not decided a right of publicity claim dealing with fantasy sports since 2009.<sup>216</sup> If a court were to address such a claim now, it would likely be guided by the recent holdings from the Video Game Cases.<sup>217</sup> Notably, the majority opinions in those cases followed the same reasoning, despite being in different jurisdictions. The Video Game Cases show that the current trend is for courts to use the Transformative Use Test for right of publicity claims. The court in *C.B.C.* ignored the Transformative Use Test because the court deemed that the information used in fantasy sports was already in the public domain and akin to a newspaper, therefore relying on a

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<sup>209</sup> *Id.*

<sup>210</sup> *Keller*, 724 F.3d at 1278 (“The Third Circuit came to the same conclusion in *Hart*.”).

<sup>211</sup> *Id.* at 1285 (Thomas, J., dissenting) (“The salient question is whether the entire work is transformative, and whether the transformative elements predominate, rather than whether an individual persona or image has been altered.”).

<sup>212</sup> *Id.* at 1281-83 (majority opinion).

<sup>213</sup> *Id.* at 1280 (citing *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1149 (9th Cir. 2002)).

<sup>214</sup> *Id.* at 1281.

<sup>215</sup> *Keller*, 724 F.3d at 1283.

<sup>216</sup> *CBS*, 259 F.R.D. 398.

<sup>217</sup> This Comment takes the position that a college athlete and a professional athlete are entitled to the same protection because both types of athletes have elevated their likenesses to a certain level that products, such as video games and fantasy sports, are inclined to include them within their products. However, professional athletes are entitled to a greater protection because their likenesses are more pronounced and recognizable than college athletes’ likenesses.

public interest justification.<sup>218</sup> Once an athlete can persuade a court that such reasoning is faulty, the question then becomes whether the player information used by fantasy sports companies would survive the Transformative Use Test—which is addressed at the end of this section.

Although the Eighth Circuit agreed that athletes' right of publicity was infringed by CBC, it nonetheless devalued such violation based upon erroneous and subjective reasoning.<sup>219</sup> The court merely looked at the information being appropriated, not how that information was used.<sup>220</sup> Player names and statistics, the court stated, were readily available in the public domain and, therefore, completely protected by the First Amendment.<sup>221</sup> The court equated a fantasy sports website to a news source. However, the court failed to distinguish the stark differences between the two.<sup>222</sup> Fantasy participants visit fantasy sites not to educate themselves about the game, as in *Gionfriddo*, but rather to use the information to participate in a game—as in *Palmer*, *Uhlaender*, *Hart*, and *Keller*.<sup>223</sup> The court, therefore, neglected to investigate the nature of the defendant's use of the players' names and statistics, and labeled the information as newsworthy purely because it could also be found in newspapers. However, a baseball card also contains information that could be used to educate the public, yet baseball card companies pay licensing fees<sup>224</sup> because collecting baseball cards, like playing fantasy sports, is a hobby. A person buys a baseball card in order to add it to his or her collection, not to learn about how the player performed the previous season. Certainly, baseball cards can educate someone about America's "national pastime," but this is far from their primary purpose. The same could be said about a video game—it is a hobby that allows users to become closer to the actual players and rarely used as

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<sup>218</sup> *C.B.C. I*, 505 F.3d at 823.

<sup>219</sup> *See id.* at 823-24.

<sup>220</sup> *Id.* at 823.

<sup>221</sup> *Id.*

<sup>222</sup> *See MCCARTHY*, *supra* note 44, at § 7:27 (stating "people who want to know statistical information about baseball players and games would not pay for admission to play fantasy baseball, they would just buy a newspaper, watch a TV sports show or log onto a sports info site on the Internet.").

<sup>223</sup> *See id.* ("In fantasy sports the participants are active, whereas in reading about sports statistics, the reader is passive.").

<sup>224</sup> Richard Sandomir, *Topps Gets Exclusive Deal With Baseball, Landing a Blow to Upper Deck*, N.Y. TIMES (Aug 5, 2009), [http://www.nytimes.com/2009/08/06/sports/baseball/06cards.html?\\_r=0](http://www.nytimes.com/2009/08/06/sports/baseball/06cards.html?_r=0).

a source of reference. This shows that a court cannot simply look at the information on its face; instead, a court must consider the context and actual purpose for the information.

The court in *C.B.C.* also justified a right of publicity violation by determining that the players were already justly compensated.<sup>225</sup> The court, in essence, stripped a legal right from athletes solely based on their income. However, the fact that the careers of professional athletes are often short-lived<sup>226</sup> bolsters the argument that athletes should be entitled to all compensation that they have a legal right to. Additionally, the court failed to consider the amount of money that the owners of fantasy sports companies receive.<sup>227</sup> As renowned right of publicity scholar, J. Thomas McCarthy, pointed out, “I cannot see how judges can or should make a moral or legal judgment as to which of those two groups is more entitled to the economic value of the fame and accomplishments of professional baseball players.”<sup>228</sup>

In the Video Game Cases, the college athletes’ right of publicity was violated primarily due to the inclusion of avatars resembling the players. The physical appearance of an athlete is important to his or her image. Players’ names and statistics are equally central to their identities.<sup>229</sup> Players receive lucrative contracts based, in large part, upon the statistics they compile. Fans are attracted to players who perform well—which is usually reflected by players’ statistics. In fact, an argument could be made that the appropriation of athletes’ statistics is even more detrimental to the players than a physical depiction. A fan is more likely to remember that Cal Ripken, Jr. holds the record for consecutive games played than that he has blue eyes.<sup>230</sup> Regardless, as *Palmer* and *Uhlaender* indicated, the

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<sup>225</sup> *C.B.C. I*, 505 F.3d at 824.

<sup>226</sup> Roberts, *supra* note 134.

<sup>227</sup> Richard T. Karcher, *The Use of Players’ Identities in Fantasy Sports Leagues: Developing Workable Standards for Right of Publicity Claims*, 111 PENN. ST. L. REV. 557, 579 (2007) (pointing out that fantasy companies are “getting for free the full commercial value of the players identities”).

<sup>228</sup> MCCARTHY, *supra* note 44, at § 7:27.

<sup>229</sup> See Robert T. Ferguson, Jr., Note, *Extreme Makeover: Redefining Athletes’ Identities in a Fantasy World*, 14 VILL. SPORTS & ENT. L.J. 287, 319-20 (2007) (stating “CBC profits directly from the quality of players uniquely identified as valuable fantasy goods by their characteristic performances in MLB games.”).

<sup>230</sup> See 2,632 Consecutive Games Played, REALCLEARSPORTS.COM (May 17, 2013), [http://www.realclearsports.com/lists/unbreakable\\_streaks/cal\\_ripken\\_jr\\_2632\\_consecutive\\_games.html?state=stop](http://www.realclearsports.com/lists/unbreakable_streaks/cal_ripken_jr_2632_consecutive_games.html?state=stop) (quoting Ripken Jr., “The [consecutive games played] streak has become my identity; it’s who I’ve become.”).



dissemination of an athlete's name and statistics is enough to violate his right of publicity and "past public disclosure, publicity and circulation" fail to relinquish an athlete's protected right.<sup>231</sup>

Once an athlete can prove to the court that the information being used is not for the purpose of educating the public and that athletes' compensation is an irrelevant factor for the court to consider, the decisions in the Video Game Cases become persuasive. To determine whether the infringements in the Video Game Cases counter-vailed First Amendment considerations, the courts used the Transformative Use Test. The test "shield[s] celebrities from literal depictions or imitations for commercial gain by works which do not add significant new expression."<sup>232</sup> When the courts have applied the Transformative Use Test, they made a significant distinction. In their interpretation of "works," the courts only considered the portion that included the particular player's likeness rather than focusing on the video game as a whole.<sup>233</sup> This interpretation narrows the scope of the work and ensures that an individual's likeness will be protected even if the remainder of the work is transformative in nature. As a result, the players' likenesses were not transformed because the physical appearance and biographical information of the avatars in the game closely resembled the real-life players.<sup>234</sup>

Fantasy sites are another context which lack a transformative element for the information that is used. The sites do not alter the names or statistics of the players in any manner. The athletes simply perform, and the sites simply compute such statistics into their system. Therefore, without the statistics, the sites would lose the data that drive their product. Under the Transformative Use Test, fantasy sites would have to alter the statistics or names of the athletes. However, such transformation would ruin a central component of fantasy sports—the personal connection that fantasy participants experience with the real-life players on their virtual rosters. Fantasy sports would become even more of a fantasy if the players used were not based on actual athletes. If fantasy sites were forced to make such changes, they would likely discontinue their games—much like EA

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<sup>231</sup> *Uhlaender*, 316 F. Supp. at 1282-83.

<sup>232</sup> *Kirby*, 50 Cal. Rptr. 3d at 615; *see also Comedy III*, 21 P.3d at 809 (stating that the test asks "whether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question.").

<sup>233</sup> *Hart I*, 717 F.3d at 169; *Keller*, 724 F.3d at 1278-79.

<sup>234</sup> *Hart I*, 717 F.3d at 166; *Keller*, 724 F.3d at 1276.

did with *NCAA Football* in the wake of the Video Game Cases.<sup>235</sup> However, EA's situation differs because of the complexity that exists between the NCAA and college athletes' right to compensation. Thus, fantasy sites have another option to pay licensing fees if a court were to overturn the precedent in *C.B.C.*

The dissenting judges in the Video Game Cases also presented another possible outcome for fantasy sports cases. As the Third Circuit pointed out, "few courts have applied the Transformative Use Test, and consequently there is not a significant body of case law related to its application."<sup>236</sup> The indefiniteness of the Transformative Use Test was reflected in the Video Game Cases' dissents. Rather than looking at the particular player information being used, the dissenters argued that the entire context must be measured.<sup>237</sup> If the majority interpreted the test to include the entire video game, the case would have likely been decided in EA's favor because of the creativity which is embodied within a video game. Fantasy sports have a degree of creativity as well. A game which enables people to act as if they are general managers of sports team is quite creative. Also, each fantasy site offers different features in order to appeal to users.<sup>238</sup> Therefore, although the sites are copying the names and statistics of the players, the product as a whole is certainly transformative. That being said, if the courts were to eventually follow the dissents' views, then *C.B.C.* may stand based on a different reason than the weak public interest considerations to which the court adhered.

## VII. CONCLUSION

The decisions reached in the Video Game Cases provide support to overturn *C.B.C.*'s precedent. The Transformative Use Test, as used in the Video Game Cases, affords courts with a "singular focus"

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<sup>235</sup> Steve Berkowitz, *EA Drops Football in '14, Settles Cases as NCAA Fights*, USA TODAY (Sep. 26, 2013, 10:37 PM), <http://www.usatoday.com/story/sports/college/2013/09/26/ea-sports-ncaa-13-video-game-keller-obannon/2878307/>.

<sup>236</sup> *Hart I*, 717 F.3d at 160.

<sup>237</sup> *Hart I*, 717 F.3d at 174-75 (Ambro, J., dissenting); *Keller*, 724 F.3d at 1285 (Thomas, J., dissenting).

<sup>238</sup> See Jeff Dunn, *Ranking the Best Sites for Fantasy Football Online*, TECHNOLOGYGUIDE.COM (Aug. 19, 2013), <http://www.technologyguide.com/feature/code-of-a-champion-ranking-the-best-sites-for-fantasy-football-online/> (describing how Yahoo! provides "a dedicated team of professional fantasy writers who pump out informative and entertaining articles every day" and ESPN has "a site that's attractive and feature[s] enough for the hardcore user, but not overwhelming to the ordinary player.").

as to whether an infringement exists.<sup>239</sup> The test provides a reliable framework that the ad hoc balancing test used in *C.B.C.* lacked. In *C.B.C.*, the Eighth Circuit, in failing to account for the users' purpose in utilizing the fantasy sites, incorrectly likened fantasy sites to newspapers.<sup>240</sup> Further, the court inappropriately used the athletes' salaries as a basis for its decision.<sup>241</sup> Although athletes have a reputation for being overpaid,<sup>242</sup> such a notion should not be considered by a court. After all, the Supreme Court declared that the main principle behind the right of publicity is "the right of the individual to reap the reward of his endeavors"<sup>243</sup> and did not include a limitation for such reward. As such, players should be entitled to compensation for the use of their name and statistics in fantasy sports. Based on the recent holdings in the Video Game Cases, such entitlement seems more realistic now.

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<sup>239</sup> See *Hart I*, 717 F.3d at 163 (describing the "singular focus" as "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>240</sup> See *C.B.C. I*, 505 F.3d at 823.

<sup>241</sup> See *id.* at 824.

<sup>242</sup> See Tulsi Patel, *Pro Athletes Are Way Overpaid*, DAILY HERALD (Apr. 27, 2013, 5:00 AM), <https://www.dailyherald.com/article/20130427/discuss/704279991/> (stating "[o]ur president earns a yearly salary of \$400,000, and he runs our country, while the athletes just provide amusement.").

<sup>243</sup> *Zacchini*, 433 U.S. at 573.