

The Right of Publicity and Fantasy Sports: Should Professional Athletes Wield Control Over Their Identities or Yield to the First Amendment?

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I. INTRODUCTION

When the typical fantasy sports player (“fantasy player”) prepares to select his team for an upcoming fantasy season, he researches several areas such as: professional athletes’ (“athlete”) statistics from the previous season, strength of team schedules and reports on athletes’ health. As he assembles a winning fantasy team, the intersection of publicity and constitutional rights could not be farther from his mind. However, for representatives of the fantasy and professional sports industries, that intersection has become a real federal issue.

In the last three years, the heated litigation over fantasy sports providers’ alleged violation of professional athletes’ right of publicity and the availability of First Amendment protection has surged to the forefront of entertainment law. In addition to the potential legal implications, the continued increase in popularity and profitability of the fantasy sports industry has made this debate socially and economically relevant.¹ The debate revolves around three legal issues: (1) whether professional athletes have a right of publicity in their name, likenesses, performance statistics and biographical information; (2) whether fantasy providers’ use of player’s names and statistics violates their right of publicity; and (3) if a right of publicity violation exists, whether fantasy providers’ First Amendment privilege to use publicly available players’ name, statistics and other information prevails over any right of publicity. While federal and state courts have become closely acquainted with the contentious intersection of publicity rights and the First Amendment, fantasy sports providers are newcomers to this litigious matter.

¹ 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 (2007).

This paper provides a brief background on the history and evolution of the fantasy sports industry from an unknown hobby to a major social phenomenon and financial juggernaut. Next, it outlines the common-law of right of publicity and its intersection with the First Amendment. Then it proceeds to frame the legal issue of whether fantasy sports providers' use of professional athletes' names, likenesses and statistics violates their right of publicity. To analyze this issue, the paper focuses on three recent cases that addressed this issue and discusses the legal community's response to those decisions. The next section agrees with the recent precedent and contends that although fantasy providers' conduct violates athletes' right of publicity, the First Amendment protects such activity. Finally, the paper discusses the future of this dispute and proffers potential solutions that may settle the debate.

II. THE FANTASY SPORTS INDUSTRY

A. A Tale of Two Players: Professional and Fantasy Athletes

1. The Professional Athlete

With the first pick of the 2016 draft, the National Football League ("NFL") expansion team, the Los Angeles Knights, selected Jermaine Perez ("Perez"), the 2015 Heisman Trophy winner and highly touted running back from the University of Southern California. Perez signed a multi-million dollar contract with the Knights and immediately received a lucrative sponsorship deal from Nike. Perez had an outstanding 2016 season and led the Knights to a Super Bowl L victory. He also led the league in rushing yards and garnered Rookie of the Year honors from numerous sports news outlets. Despite his athletic accolades, off the field Perez has gained notoriety for his proclivity to party late into the night at Hollywood's most exclusive clubs and to run into trouble with the Los Angeles police. In fact, Perez's excessive partying and

several arrests were widely publicized while he was a college student. Recently, Nike threatened to remove its sponsorship if Perez did not start acting like a “role model” for young children. Fortunately, for Perez, his “bad-boy” image has boosted his popularity with the 18 – 24 year old demographic.

Prior to the start of the 2017 NFL season, fantasy football provider Punt, Pass and Click, Inc., (“PPC”)² realized the magnetism of Perez’s image and placed a large action shot of Jermaine Perez on its website. PPC is a relatively new fantasy provider, but its popularity, especially amongst college-aged fantasy players, has soared in the last few years. Since making Perez the poster boy of PPC fantasy football, PPC’s league participation has increased by 40% from last season. Unlike other popular fantasy providers such as Yahoo! and CBS Sports, PPC incorporates players’ personality traits, habits and personal lives into the fantasy game. PPC, in a joint venture with TMZ.com, distributes “Home Reports” to PPC players to apprise them of any significant updates in each athlete’s personal life. For example, a report on a player’s marital problems may negatively affect his performance in a given game; therefore, PPC projects in the report that marital stress will reduce that particular athlete’s fantasy score. These reports are exclusively available to PPC fantasy players on the PPC website. PPC players may also access the reports through a link on TMZ.com. An image of a clearly intoxicated Perez leaving a Las Vegas nightclub adorns the front page of the weekly “Home Reports.”

PPC’s website is the center of PPC’s fantasy world. On average, it nets 40,000 hits an hour, making its web pages highly attractive to advertisers. Since participants may join the PPC

² PPC is incorporated in the state of Florida, which falls under the jurisdiction of the Eleventh Circuit.

league for free, PPC realizes a substantial profit by selling its highly valuable online advertisement space. PPC's top advertisers hail from the alcohol and tobacco industry. PPC also gains revenue from the beer pong³ tournaments it sponsors in bars and clubs throughout major U.S. cities and college towns. Participants pay a \$5 admission fee to participate in the tournament. Currently, PPC's front page juxtaposes an action shot of Perez next to an ad for Bacardi rum, which features a scantily clad woman in a swanky nightclub. Additionally, directly above Perez's picture an advertisement for a PPC beer pong tournament reads "Punt, Pass and Click: The Authority on Beer Pong." Perez's image also appears on other pages throughout PPC's website, each of which features an ad for alcohol or cigarettes.

Perez is concerned that the parents of young fans and more importantly, Nike, will mistakenly associate him with these advertisements, thus further damaging his reputation. The embarrassing photo of Perez on the "Home Reports" page also troubles him. Perez and his agent have both demanded PPC remove his picture from PPC's website, but PPC refused, claiming they had a First Amendment privilege to use his picture. Perez realizes the value of his image and, if PPC refuses to take the picture down, then, at the very least, Perez wants PPC to pay him to use it. After all, Nike pays Perez millions of dollars each year to use his name and image in its commercials and on merchandise. Perez and his agent have decided to visit general counsel for the NFL Players' Association ("NFLPA") to discuss Perez's legal options. The general counsel advises Perez that, in light of landmark rulings from the Eighth Circuit, PPC does not have to

³ "Beer Pong" is a game where teams of two arrange cups one quarter full of beer into a pyramid on opposite ends of a table and attempt to throw a ping pong ball into the opposing team's cups. If a player makes a ball into a cup the cup must be removed from the table and its contents consumed. The first team to have all opponent's cups removed from the table wins. See, Wikipedia, *Beer Pong*, http://en.wikipedia.org/wiki/Beer_pong

pay the NFLPA licensing fees to use professional athletes' names, likenesses and statistics.

Perez is furious and declares PPC should not get "something for nothing."

2. The Fantasy "Athlete"

Brad Meyer is an avid Green Bay Packers fan and PPC fantasy football player. Last year, Brad moved to England to work in his company's London office. Although Brad managed to find a neighborhood pub that broadcasts some NFL games each Sunday, he decries the lack of coverage American football receives from the British media. Consequently, Brad depends on the PPC website to stay apprised of the current NFL season and his beloved Packers. He visits the PPC website on a daily basis to monitor league standings, schedules and athlete statistics, especially for the most valuable athlete on his fantasy roster, Jermaine Perez. Brad owns a Perez jersey, Perez's "Get Abs like Jermaine!" DVD and follows the L.A. Knights just as closely as the Packers. Prior to the start of the 2017 NFL season, several of his English co-workers became quite curious about Perez and the "fantasy team" Brad frequently lauded. Intrigued by Brad's enthusiasm for the NFL and his "fantasy team," the Londoners joined Brad's PPC league and formed their own teams. Several weeks into the season, Brad's co-workers were hooked on American football and purchased an expensive cable TV package to keep track of their athletes' performances. Brad enticed his friends to join the PPC league, partially because it is free and, because it afforded them an opportunity to learn about professional American football in a fun and competitive manner. Brad believes his friends' overnight infatuation with the NFL demonstrates fantasy sports' popularity and utility as a means to acquaint even the most unfamiliar people with professional American sports.

B. Background of Fantasy Sports

Brad's and his British friends' immersion into the NFL via fantasy sports is not unique. In fact, it resembles the experiences of millions of other American sports fans. Few subjects capture the attention and intrigue of so many people as professional sports. Americans spend billions of dollars each year to buy game tickets, merchandise and memorabilia. They support their favorite teams with an intense zeal that rivals and, oftentimes, surpasses the passion the athletes themselves exhibit for their respective sports. However, for many people, *merely* being a fan is not enough. Fantasy sports allow the average fan to raise his passion for sports to a new plateau and simulate ownership of a real sports team.

Generally, at the start of a real sports season, fantasy players draft actual athletes onto their fantasy roster. As the season progresses, fantasy players act like real sports team owners as they trade athletes and manage their fantasy team, which earns points based upon the athletes' actual performances over the course of the season.⁴ Fantasy players join leagues with friends, family and coworkers, and depending on the league and sport, the team owner with the highest point total at the end of the season or most victories after head-to-head matchups wins the league.⁵ For example, in Brad Meyer's PPC league he competes against a different person in his league. each week. Suppose, in a given week during the season, Perez scored two touchdowns and rushed for 100 yards. Because Brad "owns" Perez on his fantasy team, Perez's performance added 22 points to Brad's team score for that week – six points for each touchdown and one

⁴ Yahoo! Help Page, <http://help.yahoo.com/l/us/yahoo/sports/>.

⁵ Yahoo! Help Page, <http://help.yahoo.com/l/us/yahoo/sports/>.

point for every ten rushing yards Perez accumulated. The scoring system functions similarly for other fantasy sports leagues such as basketball and baseball. Fantasy players, however, oftentimes create their own, customized scoring systems for their respective leagues.

Sports journalists and fantasy industry representatives debate the precise origins of fantasy sports, but most agree that sports writers Glen Waggoner and Daniel Okrent are the industry's founding fathers.⁶ In 1979, Waggoner and Okrent recruited several friends to organize and play a fantasy baseball league, which they dubbed "Rotisserie Baseball."⁷ These fantasy sports pioneers used newspapers and sports magazines to track their players' weekly statistics in order to calculate their own scores.⁸ The innovative game caught on and over the next decade, fantasy baseball leagues and fantasy leagues for other professional sports such as football emerged across the country. In the mid 1990s, the fantasy sports industry capitalized on advent of the Internet and quickly evolved from small groups of sports buffs armed with pen and paper, to an immensely popular and profitable e-commerce enterprise.

Recognizing a commercial opportunity with the burgeoning fantasy industry, players' unions from the major professional sports leagues negotiated lucrative licensing agreements with fantasy providers that granted them exclusive use of professional athletes' names, likenesses,

⁶ See Allan M. Johnson, *The Right of Publicity Gets Left out in CBC Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, 14 Sports L.J. 71, 72 (2007) (claiming Okrent drafted the initial rules of fantasy baseball on a flight to Austin in 1979); See also, Daniel Mead, *CBC Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.: Why Major League Baseball Struck out and Won't Have Better Luck in Its Next Trip to the Plate*, 8 Minn. J. L. Sci. & Tech. 715, 719 (2007) (alleging Okrent obtained the idea for fantasy baseball from a former Harvard professor).

⁷ Johnson, *supra* note 4, at 72.

⁸ *Id.*

pictures, photographs, voices, facsimile signatures, and/or biographical information (collectively “athlete information”).⁹ In the past, the licensing agreements permitted fantasy providers to use the athlete information for a specific term.¹⁰ Thus, instead of fantasy players doing their own leg work, fantasy sports providers used the licenses to offer various services such as tracking, compiling and posting the athletes’ statistics and other information to their website to aid fantasy players to manage their teams accordingly. To cover the costs of operating such services, pay the expensive licensing fees, and still turn a profit, fantasy sports providers identified the potential for major revenue by selling advertisement space on their websites.¹¹

C) Fantasy Sports Today

Spurred by explosive growth on the internet, the fantasy sports industry has expanded into nearly every professional sport league (American and international) and annually draws million players.¹² Fantasy sports have become so popular, in fact, that this past October FX premiered a new television show, “The League,” based on four thirty-something male friends and their fantasy football league. Collectively, the industry generates upwards of \$2 billion for fantasy league providers. It also affects the professional sports industry’s bottom line by more than \$3 billion by increasing revenue from various sources, such as merchandise, video games,

⁹ “New Case: Yahoo! Inc. v. NFLPA” (June 7, 2009), www.patentarcade.com/2009/06/new-case-yahoo-inc-v-nflpa.

¹⁰ *Id.*

¹¹ “Pro-Fantasy Rulings Hurt NFLPA’s Bottom Line” (June 8, 2009) www.fantasybusinesssports.com/wordpress/tag/yahoo-v-nflpa (*Sports Business Journal* reported that for the 2007 fiscal year, the NFLPA recorded revenue of \$4.7 million from fantasy licensing fees).

¹² Ben Klayman, *Technology Spurs Growth of Fantasy Sports in U.S.* Reuters, (Sept. 25, 2008), available at <http://www.reuters.com/article/sportsNews/idUSTRE48002L20080925>.

tickets and television packages.¹³ One can attribute the fantasy industry's growth in popularity and financial opportunity to the licensing fees fantasy providers paid for the right to use players' names and statistics. For nearly twenty years, fantasy sports providers such as CBS Sports and Yahoo have paid players' unions from each professional sports league millions of dollars for the right to use players' names, likenesses, pictures, and statistics.¹⁴ Fantasy providers pay the unions as opposed to the players, because most professional athletes assign their licensing rights to the players' association. For example, in 2006 alone, Yahoo! paid the MLB Players' Association a \$ 3 million licensing fee.¹⁵ A portion of the licensing revenue from fantasy providers is then paid directly to the professional athletes.¹⁶ In the past, players' associations threatened to sue fantasy providers if they proceeded to use athlete information without the association's consent. The associations argued that use of athlete information would violate athletes' right of publicity. Recently, though, two decisions permitting fantasy sports providers' unlicensed use of athlete information have threatened the future existence of these licensing agreements.

¹³ Johnson, *supra* note 1, at 72.

¹⁴ Karcher, *supra* note 1, at 563.

¹⁵ *Id.*

¹⁶ *Id.*

III. THE RIGHT OF PUBLICITY

The right of publicity is a “creature of state and common law”¹⁷ and is entirely distinct from federal copyright law.¹⁸ In fact, it is an offshoot of the common law right of privacy.¹⁹ What began as an aspect of the right of privacy transformed into its own right that protects the use of an individual’s name and likeness for commercial gain.²⁰ The right of publicity, however, is entirely distinct from traditional privacy rights.²¹ While the right of privacy protects an individual’s right “to be left alone,” the right of publicity focuses on an individual’s celebrity and recognizes a property right and commercial value in the celebrity.²² In other words, it affords a famous individual, such as Jermaine Perez, the exclusive right to control the unauthorized, commercial use of his or her identity.²³ Although this nascent right is relatively new to the common law, one may trace its roots to the Lockian principle that individuals are entitled to the

¹⁷ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 566 (1977); *C.B.C. Distribution & Mktg., Inc. v. MLB Advanced Media, L.P.*, 443 F. Supp. 2d 1077 (E.D. Mo. 2006) *aff’d* 505 F.3d 818 (8th Cir. 2007).

¹⁸ See generally, *Nat’l Basketball Assn’ v. Motorola, Inc.*, 105 F.3d 841, 846-47 (2d Cir. 1997) (recognizing that even though player names and statistics appear in various media, the athletes themselves do not have a valid claim for copyright protection, because their “identities” are not original works of authorship fixed in a tangible medium).

¹⁹ See, *Zacchini*, 433 U.S. at 576 (quoting William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 389 (1960) (The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff); See also, Restatement (Second) of Torts § 652 (1977) which spelled out the four different torts as: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of the other’s name or likeness; (3) unreasonable publicity given to the other’s private life; and (4) publicity that unreasonably places the other in a false light before the public.

²⁰ *ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915, 928 (6th Cir. 2003).

²¹ *Haelen Labs. Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

²² *Id.*

²³ J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 28:4 (2d ed. 2007).

“fruits of their labor.”²⁴ The typical right of publicity violation involves the unauthorized use of a celebrity’s image to promote a product.²⁵ In addition to controlling one’s identity, the essence of this tort is that celebrities, including professional athletes, have a legal right to receive compensation for the use of their identities; specifically, when another person profits from such use.²⁶ Twenty-eight states recognize the right of publicity via the common law or statute.²⁷ At common law, to establish a prima facie violation of the right of publicity, a plaintiff like Jermaine Perez must show: (1) use of his name as a symbol of his identity; (2) appropriation of his identity to the defendant’s commercial advantage; (3) lack of his consent; and (4) a resulting injury.²⁸ Over time, however, the evolution and increasing acceptance of the right of publicity muddied the parameters and scope of the right.²⁹ To achieve clarity and uniformity in their

²⁴ Melville B. Nimmer, *The Right of Publicity*, 19 *Law & Contemp. Probs* 203 (1954).

²⁵ See, e.g., *Sirico v. Best Buy, Inc.*, 03-cv-1691 (C.D. Ca. 2003) (cast members of HBO series “The Sopranos” settled lawsuit with Best Buy for violating their right of publicity by putting their pictures in ads without their permission); *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 691-94 (9th Cir. 1998) (holding unauthorized use of MLB player’s image in beer advertisement violated his right of publicity).

²⁶ *Id.* at 578 (“Petitioner does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it”).

²⁷ John Grady, Steve McKelvey and Annie Clement, A New “Twist” for “*The Home Run Guys*”? : *An Analysis of the Right of Publicity Versus Parody*, 15 *J. Legal Aspects of Sport* 267, 271 (2005).

²⁸ *Cardtoons v. Major League Baseball Players Ass’n.*, 95 F.3d 959, 968 (10th Cir. 1996); *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (9th Cir. 1992); *Gionfriddo v. Major League Baseball*, 94 Ca. App. 4th 400, 408 (Cal. Ct. App. 2001).

²⁹ IND. CODE ANN. § 32-36-1-7 (“While most states only recognize and protect an individual’s name and likeness, Indiana’s right of publicity extends to protect an individual’s “gestures, distinctive appearances, and mannerisms”).

definition and application of the right of publicity, courts have looked to the Restatement (Third) of Unfair Competition for guidance.³⁰

The Restatement defines a violation as an “appropriation [of] 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.”³¹ Under the Restatement, the elements of a right of publicity violation are: (1) use of the plaintiff’s identity; (2) without consent from the plaintiff; and (3) for the purposes of trade.³² While the common law’s “for commercial advantage” element is quite clear, the Restatement’s “for purposes of trade” element is less clear and problematic for deciding right of publicity violations by fantasy sport providers.³³ The grey area exists, because, while fantasy providers offer their sports leagues to obtain a commercial advantage (from advertising revenue), they also aggregate and organize publicly available information (athlete’s statistics), which is protected by the First Amendment. Despite this grey area, the Restatement’s definition further aids courts in analyzing right of publicity violations by providing policy reasons in support of recognizing publicity rights. The policy rationales include: (1) protection “an individual’s interest in personal dignity and autonomy”; (2) secur[ing] for plaintiffs the commercial value of their fame”; (3) prevent[ing] the unjust enrichment of others seeking to

³⁰ Karcher, *supra* note 1, at 558.

³¹ RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46-47 (1995).

³² RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d-f (1995)

³³ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (1995) (“for purposes of trade” defined as when the identity is used “in advertising the user’s goods or services, or are placed on merchandise marketed by the user, or are used in connection with services rendered by the user. It does not include the use of a person’s identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses.”)

appropriate the commercial value of plaintiffs' fame for themselves; (4) preventing "harmful or excessive commercial use that may dilute the value of [a person's] identity"; and (5) afford[ing] "protection against false suggestions of endorsement or sponsorship."³⁴ Federal and state courts consistently uphold the right based upon these rationales.³⁵

Regardless of whether a jurisdiction follows the common law or Restatement's definition, generally, a plaintiff alleging a right of publicity violation must prove the infringer used his identity for an impermissible purpose (i.e. to obtain a commercial advantage or for the purposes of trade.³⁶ Thus, to satisfy the identity requirement, a plaintiff must show the infringing party used expressions of his personality or persona that are greater than, or at least distinct from, his or her name to him.³⁷ Next, a plaintiff needs to show the appropriator used the identity for a commercial purpose, which subsequently conferred a commercial benefit on him. The resulting damages must be commercial in nature, because the appropriator's unauthorized use of the athlete's identity is unjust enrichment.³⁸ According to the Missouri Supreme Court, "it is

³⁴ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c. (1995).

³⁵ Manav K. Bhatnagar, Note, *Fantasy Liability: Publicity Law, the First Amendment, and Fantasy Sports*, 119 Yale L.J. 131 (2009).

³⁶ *ETW*, 332 F.3d at 928.

³⁷ *Doe (Tony Twist) v. TCI Cablevision*, 110 S.W. 3d 363, 369 (Mo. 2003) (following the Restatement's definition held plaintiff must establish that his name as a symbol of his identity is being used...not just a mere name); See also, *Carson v. Here's Johnny Portable Toilets, Inc.* 698 F.2d 831,835 (6th Cir. 1983) (following common law principles held Johnny Carson's identity may be exploited for purposes of a right of publicity action even if his name or picture is not used).

³⁸ *Cardtoons*, 95 F.3d at 968.

irrelevant whether [a] defendant intended to injure the plaintiff." ³⁹ Instead, plaintiff only need prove that the appropriator intended to obtain a commercial advantage.⁴⁰ The Missouri court's reference to common law's element of "commercial advantage" element demonstrates that, despite the to the Restatement's "for purposes of trade"

Of the twenty-eight states that recognize the right of publicity, it varies which look to the Restatement of Unfair Competition or the common law for guidance. While states' right of publicity laws varies creating a "crazy quilt of different responses at different times to different demands on the legislature,"⁴¹ the commonalties permit a singular analysis of how courts across the country will analyze athletes' right of publicity claims.

A. Cases Recognizing an Athlete's Right of Publicity

Courts that have recognized a professional athlete's right of publicity have heavily relied on the United States Supreme Court's seminal decision in *Zacchini v. Scripps-Howard Broad. Co.*⁴² Although several state courts had previously analyzed and affirmed athletes' right of publicity, *Zacchini* clarified the elements of a prima facie case as well as the scope of such publicity rights.⁴³ In *Zacchini*, the Supreme Court held that when a television news station

³⁹*Doe*, 110 S.W.3d at 371.

⁴⁰ *Id.*

⁴¹ *McCARTHY*, supra note 23, at 8:25

⁴² *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 566 (1977).

⁴³ See, *Palmer v. Schonhorn Enterprises, Inc.*, 232 A.2d 458, 462 (N.J. 1967) (holding that a board game's unauthorized use of the names, biographies, and profiles of professional golfers violated the golfers' right of publicity); See also, *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1283 (D. Minn. 1970) (concluding that a baseball strategy table game that contained player cards featuring MLB player's name and statistics, without consent, constituted the players' identities and therefore violated players' right of publicity).

broadcast the “human cannonball’s” routine without his consent, the TV station violated his right of publicity.⁴⁴ In reaching its decision, the Court determined the broadcast of the performance posed a “substantial threat to the economic value of that performance.”⁴⁵

Additionally, the Zacchini court reasoned that protection of the right of publicity affords individuals is akin to the unjust enrichment protected in copyright and patent law.⁴⁶ The Court explained that “the protection provides an economic incentive for [the plaintiff] to make the investment required to produce a performance of interest to the public.”⁴⁷

Drawing upon the Supreme Court’s analysis of a right of publicity action, in *Doe v. TCI Cablevision*, the Missouri Supreme Court held that the sale of a comic book featuring a character named after a professional hockey player and modeled after his tough-guy persona violated the hockey player’s right of publicity.⁴⁸ The *Doe* court emphasized the importance of establishing the identity element of the claim by considering whether the alleged appropriator used certain identifying characteristics as a symbol of the plaintiff’s identity.⁴⁹ In the comic book, *Spawn*, even the writer admitted he based one of his characters, Antonio Twistelli, on the intimidating

⁴⁴ *Id.* at 578-79.

⁴⁵ *Id.* at 575.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Doe*, 110 S.W. 3d at 374 (identity requires more than mere use of a name); See also, *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 728 (S.D.N.Y. 1978) (holding identity requires appropriation of a celebrity’s “public reputation or persona”).

⁴⁹ *Doe*, 110 S.W.3d at 370.

personality and aggressive playing style of former NHL player, Tony Twist.⁵⁰ Consequently, the court concluded the defendant's main rationale to reference Twist was commercial in nature.⁵¹ Not every use of athlete information, however, even when used as a symbol of an athlete's identity for the purpose of commercial gain, necessarily violates his or her right of publicity.⁵²

B. Jermaine Perez's Right of Publicity Claim

If Perez convinces the NFLPA to file a right of publicity action against PPC⁵³, it appears that the NFLPA could establish a prima facie violation of the right, regardless if the jurisdiction follows the Restatement or common law definition. First, PPC clearly appropriates Perez's identity by using his name, picture, performance statistics and his personality traits on and off the field. Next, Perez must prove that PPC appropriates his identity to gain a commercial advantage. PPC receives millions of dollars revenue by selling its advertising space and tickets to participate in its beer pong tournaments. Perez can show that PPC's unauthorized use of his identity has unjustly enriched PPC, because its fantasy player participation and revenue has increased since it started to use Perez's identity in connection with its services. Perez does not need to show PPC intended to injure him economically. Rather, Perez must simply illustrate that PPC intended to

⁵⁰ *Id.*

⁵¹ *Id.* at 366.

⁵² See, e.g., *Gionfriddo*, 94 Cal. App. 4th at 409 (rejecting former professional baseball players' contention that defendants violated their publicity rights, because defendants were merely disseminating historic facts to the public through standard media outlets. The First Amendment protected such use and "far outweighed" the players' right of publicity); See also, *Cardtoons*, 95 F.3d at 968 (holding that because the defendant's parody baseball cards disseminated information the trading cards were entitled to Full First Amendment protection).

⁵³ Remember, most professional athletes assign their licensing rights to their respective players' union.

gain a commercial advantage by using his identity.⁵⁴ However, Perez must clear another hurdle before he wins the unyielding right to control PPC's use of his identity. Before it renders a judgment for the NFLPA and Perez, the court will balance Perez's publicity rights against PPC's First Amendment rights.

IV. THE FIRST AMENDMENT

An inherent tension exists between celebrities' right of publicity and freedom of expression under the First Amendment.⁵⁵ The Supreme Court has explained that while freedom of speech lies at the crux of American society, it does not give one the privilege to infringe on another's intellectual property rights.⁵⁶ Rather, the court must implement a balancing test when a state law right interferes or conflicts with another's constitutional right.⁵⁷ Accordingly, in *Zacchini*, the Supreme Court mandated that state law rights of publicity must be balanced against First Amendment considerations.⁵⁸ Depending on the type of speech at issue, the First Amendment may serve as a defense to a right of publicity action. Before analyzing the First Amendment's place in the context of publicity rights, a brief understanding of the scope of First Amendment protection is appropriate.

⁵⁴ See C.B.C.

⁵⁵ *ETW*, 332 F.3d at 931

⁵⁶ *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

⁵⁷ *Id.*

⁵⁸ *Zacchini*, 433 U.S. at 526.

A. The Nature and Breadth of First Amendment Protection

The First Amendment protects a wide range of speech, ranging from written and spoken word to artistic expression.⁵⁹ On one end of spectrum lies purely communicative speech, such as political discourse, news reporting, and historical records, which receive the highest level of protection.⁶⁰ Communicative speech aims, primarily, to educate and inform the public. On the other end of the spectrum lies commercial speech that is subject to time/place/manner restrictions and thus does not enjoy absolute constitutional protection.⁶¹ Commercial speech is “expression related solely to the economic interests of the speaker and its audience” and “speech that merely advertises a product or service for business purposes.”⁶² For example, placing Derek Jeter’s image on a box of Gillette razors or Dean Martin’s image on a box of cigars constitutes pure commercial speech, which the First Amendment does not protect. Other forms of expression that generate a profit, however, do not automatically become pure commercial speech and therefore lose First Amendment protection.⁶³ Accordingly, not every publication of an individual’s image

⁵⁹ Grady, *supra* note 22, at 272.

⁶⁰ Karcher, *supra* note 1, at 527.

⁶¹ *Cardtoons*, 95 F.3d at 968; See also Karcher, *supra* note 1, at 580

⁶² *Cardtoons*, 95 F.3d at 970 (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561 (1980))

⁶³ *Time, Inc. v. Hill*, 385 U.S. 374, 396-97 (1967) (holding that just because books, newspapers and magazines are published and sold for profit does not them from being a form of expression safeguarded by the First Amendment; *ETW Corp.*, 332 F.3d at 924 (concluding that speech and other forms of expression that are sold for profit does not prohibit First Amendment protection).

violates the right of publicity; courts, therefore, afford First Amendment protection to appropriators of publicity rights on a “sliding scale.”⁶⁴

B. Intersection of the Right of Publicity with the First Amendment

The line between communicative and commercial speech is blurred. Consequently, a clear, uniform method to resolve the conflict between publicity rights and the public’s interests in free speech has escaped the courts for years.⁶⁵ Over the years, courts have employed various balancing tests to draw a fine line as to what the First Amendment protects, especially with speech that contains both expressive and commercial elements.⁶⁶ According to the Restatement, using an individual’s identity for purposes of “news reporting, commentary, entertainment, or works of fiction or not fiction” does not necessarily violate a right of publicity.⁶⁷ In *Zacchini*, the Supreme Court left no doubt that using a person’s identity for entertainment purposes enjoys the same First Amendment protection as factual news reports, because of the expressive nature of entertainment.⁶⁸ The Supreme Court, however, limited its decision to the case before it and

⁶⁴ *Id.*

⁶⁵ See MCCARTHY, *supra* note 20, § 8:23 (“It is important to remember that even if the accused communication is classified, not as ‘commercial speech,’ but as full-fledged ‘communicative speech,’ the First Amendment does not automatically and of its own weight crush any and all assertions of the right of publicity”).

⁶⁶ *Id.*

⁶⁷ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c. (1995).

⁶⁸ *Id.* at 578 (holding speech that does not utilize a “traditional medium of expression” does not automatically preclude application of the First Amendment. However, notwithstanding the court’s conclusion that entertainment fell within the sweep of the First amendment, the court held that by broadcasting the human cannonball’s entire act without his consent, the defendants conduct went beyond mere reporting facts and events, which injured the commercial value of the human cannonball’s performance); See also, *Cardtoons*, 95 F.3d at 969 (quoting *Winters v. New York*, 333 U.S. 507, 510 (1948) (“[s]peech that entertains, like speech that informs, is protected by the First Amendment because ‘the line between the informing and the entertaining is too elusive for the protection of that basic right...What is one man’s amusement, teaches another’s doctrine.’”))

did not provide guidance on other instances where the First Amendment would be a defense to alleged violations of the right of publicity.⁶⁹ As a result, courts have struggled to weigh an individual's right to control publication of his or her image against the society's interest in the constitutional guarantees of freedom of speech and freedom of the press.⁷⁰ To resolve this dilemma, courts have posited three tests to aid in the balancing act: the "related use," "transformative" and "predominant purpose" tests.⁷¹ However, these tests apply the First Amendment as a defense to artistic expression. Thus, they do not aid the courts in determining whether fantasy providers' First Amendment privilege outweighs athletes' right of publicity. The product fantasy providers put into the marketplace is distinct from a comic book in *Doe* and the lithograph in *ETW* that appropriated an athlete's identity. In addition, the fantasy providers' use of the athletes' identity is not readily distinguishable as either communicative or commercial speech. Fantasy sports fall into a gray area where the use is both expressive and commercial.⁷² The Eighth Circuit recently grappled with this issue and concluded only a "case-by-case

⁶⁹ *Id.* at 574.

⁷⁰ *Gionfriddo*, 94 Cal. App. 4th at 409 (quoting, *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001)).

⁷¹ See, e.g. *ETW*, 332 F.3d at 931 (applying the transformative test court held a lithograph print of Tiger Woods was not a literal depiction of Woods, because the print contained "substantial transformative elements," therefore the defendant could avail himself of First Amendment protection that preempted Woods' right of publicity claim); See also 110 S.W. 3d at 374 (applying the "predominant use" test court rejected both the related use and transformative use tests, finding that both "give too little consideration to the fact that many uses have both expressive and commercial components. It held that "if a product is being sold that predominantly exploits the commercial value of an individual's identity, that product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some 'expressive' content ... that might qualify as 'speech' in other circumstances." The court determined that the use and identity of plaintiff's name has become predominantly a ploy to sell comic books and related products rather than an artistic or literary expression, and under the circumstances, free speech must yield to the right of publicity).

⁷² MCCARTHY, *supra* note 8, at § 8:23

weighing of competing values” will determine whether fantasy providers’ use of athletes’ information deserves constitutional immunity from violation of state laws.”⁷³

C. Does the First Amendment Prohibit Perez’s Right of Publicity Claim?

Since Perez and the NFLPA can successfully establish a prima facie case of right of publicity infringement, PPC will likely argue the First Amendment protects its use of athletes’ information. Recent case law on the interplay between right of publicity and free speech is incredibly favorable to PPC. However, Perez can make a strong argument that the type of speech at issue here is distinguishable from Eighth Circuit precedent. Perez may argue that because PPC incorporates Perez’s, and other athletes’, personality, character and reputation into the fantasy game, the First Amendment does not protect their use. Accordingly, such use constitutes a much greater violation of the athletes’ right of publicity, which tilts the balance in favor of publicity rights over the First Amendment. Perez may contend that PPC is using his identity, particularly his photograph, for purely commercial purposes; therefore, PPC’s conduct is pure commercial speech, which the First Amendment does not protect. PPC can easily rebut Perez’s argument because it can argue that its product primarily aims to communicate information available in the public domain, much like a newspaper or magazine. Additionally, it contains a significant amount of expressive content (i.e. its unique organization of athlete information into various categories), other than Perez’s identity.

⁷³ *CBC*, 505 F.3d at 818.

V. THE LEGAL BATTLE

A. Round One: C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.

In 2005, the battle over whether fantasy providers needed a license to use athlete information reached a breaking point. C.B.C. Distribution and Marketing, Inc. (“CBC”) a fantasy baseball provider, refused to pay licensing fees to a subsidiary of the MLB, Major League Baseball Advanced Media (“MLBAD”), and subsequently sought a declaratory judgment to prevent MLBAD from demanding any fee.⁷⁴ In the lawsuit, CBC contended that its use of MLB players’ names and statistics did not violate their right of publicity.⁷⁵ Furthermore, CBC alleged that even if such use did violate the right of publicity, the First Amendment protected its use of the athletes’ names and statistics. **CITE.** The United States District Court for the Eastern District of Missouri granted summary judgment for CBC holding that MLBAD did not establish a prima facie case for violation of right of publicity and if it did, the First Amendment trumped their publicity right.⁷⁶ The district court explained that CBC’s use of athlete information “does not give them something free which it would otherwise be required to pay; players’ records are readily available in the public domain.”⁷⁷

⁷⁴ *CBC*, 443 F. Supp. 2d at 1080

⁷⁵ *Id.*

⁷⁶ *Id.* at 1081.

⁷⁷ *Id.* at 1091.

The Eighth Circuit affirmed, but by different reasoning.⁷⁸ The appellate court disagreed with the district court and found that, under Missouri state law, C.B.C's use of MLB athletes' information did infringe on their right of publicity. The court determined that fantasy providers' use of player's names, statistics, and likenesses satisfied the "identity" element. Second, the court held that CBC clearly used the baseball players' identities to gain a commercial advantage. **CITE.** Nevertheless, the Eighth Circuit agreed with the district court and held the First Amendment trumped MLB athletes' publicity rights because: (1) the information was already available in the public domain; (2) the public has a strong interest in access to baseball related info; and (3) the economic balance weighs in favor of CBC.⁷⁹ The economic interests the court discussed relate to the right of an individual to reap the rewards of his or her endeavors, which underlies the right of publicity.⁸⁰ In the context of this publicity right violation, the court concluded that professional baseball players are so handsomely rewarded that the elimination of revenue from fantasy league licensing fees would have virtually zero impact on the players ability to enjoy the fruits of their labor.⁸¹ The court asserted that it would be "strange law that a person would not have a First Amendment right to use information that is available to everyone."⁸² Despite the novel issues involved and multiple amicus briefs drafted and filed by

⁷⁸ *CBC*, 505 F.3d at 822.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 823

⁸² *Id.*

other professional sports leagues,⁸³ the Supreme Court of the United States denied MLB's request for *certiorari*.

B. Round Two: CBS Interactive v. National Football League Players' Association, Inc.

In *CBS Interactive, Inc. v. National Football League Players' Association, Inc.*, the plaintiff, a fantasy football provider, filed a lawsuit against the NFLPA seeking declaratory relief that it was no longer required to pay licensing fees to use professional football players' names and statistics in its fantasy sports league. Since the Eighth Circuit had squarely decided the issue as it relates to fantasy baseball, CBS Interactive requested the district court to extend the same rationale to fantasy football.⁸⁴ The lawsuit came at the heels of the Eighth Circuit's affirmation of the CBC decision and prior to filing suit, CBS Interactive stopped paying licensing fees to the NFLPA, which at one point topped \$ 1.4 million.⁸⁵ CBS Interactive argued the material facts and alleged right of publicity are the same as those in *CBC*, thus the Eight Circuit's decision in that case compels the same result. Following Eighth Circuit precedent, the CBS Interactive court granted summary judgment in favor of plaintiff.⁸⁶ In granting summary judgment, the court concluded that this case was indistinguishable from the *CBC* case, notwithstanding the differences between fantasy *football* and fantasy *baseball*. The court held that CBS Interactive's

⁸³ Other *amici* professional sports leagues supporting MLB included the NFL, NBA, NHL, PGA Tour, WNBA and Stock Car Auto Racing (NASCAR).

⁸⁴ *CBS Interactive, Inc. v. NFLPA, Inc.*, 2009 U.S. Dist. LEXIS 36800 (D. Minn. Apr. 28, 2009).

⁸⁵ "Report: Yahoo!, NFLPA Settle Fantasy Suit," July 7, 2009, <http://www.fantasysportsbusiness.com/wordpress/tag/yahoo-v-nflpa>.

⁸⁶ *CBS Interactive*, 2009 U.S. Dist. LEXIS 36800 at*70.

“First Amendment right to use the names and statistics of the individual players in connection with its fantasy football game supersedes [the NFLPA’s] right of publicity.”⁸⁷ The NFLPA has appealed the district court’s decision to the Eighth Circuit.⁸⁸

C. Round Three: Yahoo! Inc. v. NFLPA

One month after the Court issued its decision in *CBS Interactive*, Yahoo! Inc. (“Yahoo!”) filed a lawsuit nearly identical to CBS Interactive’s action. The action sought declaratory judgment that its actions in operating its fantasy football league did not violate any publicity rights owned or controlled by NFL players and even if its actions did violate those rights, the First Amendment supersedes that right of publicity.⁸⁹ Prior to the 2009-10 NFL season, Yahoo! had an ongoing licensing agreement with the NFLPA to pay for using the statistics as well as “names, likenesses, pictures, photographs, voices, facsimile signatures and/or biographical information of NFL players.”⁹⁰ In March 2009, the licensing agreement between Yahoo! and the NFLPA expired and two months later, in light of the *CBS Interactive* decision, Yahoo! notified

⁸⁷ *Id.* at *70.

⁸⁸ Defendant’s Notice of Appeal to Eighth Circuit, *CBS Interactive*, 2009 U.S. Dist. LEXIS 36800 (D. Minn. May 28, 2009) (No. 08-cv-5097).

⁸⁹ Complaint at 12, *Yahoo! Inc. v. NFLPA, Inc.*, No. 09-cv-01272 (D. Minn. June 1, 2009)

⁹⁰ “New Case: Yahoo! Inc v. National Football League” www.patentarcade.com/2009/06/new-case-yahoo-inc-v-nflpa

the NFLPA it would no longer pay licensing fees.⁹¹ Several weeks into litigation, the parties reached a confidential settlement.⁹²

Sports journalists speculate that, recognizing the low chances for success in the chosen forum, NFLPA approached Yahoo! for a figure much lower than its previous licensing fee demand.⁹³ For Yahoo! the decision to settle, even with favorable law on its side, appears to be a smart business move. If the NFLPA substantially dropped its licensing fee demand, settling for some monetary amount may have cost less than trekking forward through expensive and time-consuming litigation.⁹⁴ Ultimately, Yahoo!’s settlement indicates that even though fantasy providers have won the first part of this legal battle, it may not be in their best interests to win the war. After all, the largest fantasy providers, such as Yahoo!, CBS Sports and others routinely conduct business, outside of the fantasy sports context, with representatives from the professional sports industry.

VI. IMPACT OF *CBC* and *CBS INTERACTIVE*

Regardless of whether one believes the *CBC* and *CBS Interactive* correctly decided these cases, their decisions will significantly affect the fantasy and sports industries, in addition to third parties associated with them. First, *CBC*’s and *CBS Interactive*’s victories will afford fantasy providers a wider latitude to operate their sites and invent new ways to develop, promote

⁹¹ “Pro Fantasy Rulings Hurt NFLPA’s Bottom Line” (according to *Sports Business Journal*, in 2008 Yahoo! paid more than \$800,000 in licensing fees to the NFLPA).

⁹² “Report: Yahoo!, NFLPA Settle Fantasy Suit,” *supra* at note 11

⁹³ “Report: Yahoo!, NFLPA Settle Fantasy Suit”, *supra* at note 11

⁹⁴ “Report: Yahoo!, NFLPA Settle Fantasy Suit”, *supra* at note 11

and sell a better fantasy product. Fantasy sport players also benefit from the decisions, as they will enjoy the luxury of choosing which free league it wants to join. In addition, professional sports industries and athletes stand to benefit from the continued proliferation and success of the fantasy sports industry. The royalties athletes and the leagues earn from other sources (e.g. merchandise, television broadcast rights, etc.) far outweighs whatever minimal amount a player could expect to receive from fantasy licensing fees.

In amicus briefs to the Eighth Circuit, representatives of various professional sports leagues directly contested this point and expressed concern that the current case law precludes professional sports industry from exercising control over publicity rights in which they have so heavily invested.⁹⁵ Furthermore, echoing John Locke’s “fruits of labor” theory, the amici decried that this precedent jeopardizes the publicity rights athletes have created and earned through their years of rigorous training and exceptional performance.⁹⁶ But do these holdings really jeopardize athletes’ publicity rights? In light of *CBC* and *CBS Interactive*, are merchandise vendors suddenly going to stop paying licensing fees? Will video game creators eschew licensing agreements, yet continue to use real athletes’ names and likenesses? No. The professional sports industry evidently fears some kind of domino effect that will likely never happen. The courts have very narrowly applied the balancing test to allow fantasy providers to continue its unlicensed use of athlete information – not any other industry that also uses athletes’ information. Denying players’ associations (and consequently the athletes) licensing revenue

⁹⁵ See, Defendant’s Memorandum in Opposition to Summary Judgment at 23, *CBS Interactive*, 2009 U.S. Dist. LEXIS 36800 (D. Minn. May 28, 2009) (No. 08-cv-5097).

⁹⁶ *Id.*

will not create a significant economic hardship. Instead, fantasy leagues expose athletes to people and markets who otherwise would not have followed, much less noticed, the performance of certain athletes. For example, but for the PPC league, Brad Meyer would likely not have purchased Perez's jersey and DVD and his British coworkers would not have paid for an expensive NFL cable package.

Critically, the *CBC* and *CBS Interactive* holdings allow fantasy providers to retain a desperately needed element of reality in their fantasy games. If the Eighth Circuit ruled for the athletes' unions, in order to avoid paying the fees, fantasy providers would likely exclude athletes' names and list them by number and team, much like early, unlicensed video games did.⁹⁷ Using fictitious athletes, however, defeats a primary purpose and appeal of fantasy sports – the simulation of *real* ownership of *real* athletes. For instance, following Tom Brady's and Devin Hester's weekly performances excites fantasy players much more than tracking the faceless achievements of "#12 – New England," or "# 23 – Chicago." Moreover, as discussed in the next section, such a system would prevent athletes and their respective leagues from reaping the benefit of fantasy sports' popularity. Thus, a pure "fantasy" league using fictitious players would substantially undermine the commercial viability of the fantasy sports product and negate the positive financial impact it has on the leagues and their players.

Despite the great potential for positive exposure and substantial economic gain, these recent decisions put athletes' reputation and public image at risk. Too much exposure can harm the athletes just as much as it can benefit them. For example, dilution is the converse of

⁹⁷ See, "Pro-Fantasy Rulings Hurt NFLPA's Bottom Line", *supra* note 10.

enhanced marketability when excessive use or exposure of their identity devaluates or dilutes the identity's commercial value.⁹⁸ After *CBC* and *CBS Interactive* decisions, dilution has arisen because athletes have lost control over the types of products and services they are associated with. Though the *CBC* and *CBS Interactive* courts noted that concern over false endorsements is relatively small, but it nonetheless is an issue and could become a bigger problem as digital media grows and the manner in which fantasy providers use athletes' images does imply a connection between players and the advertisement. For instance, the saturation of Perez's image next to ads promoting alcohol and tobacco use and beer pong could seriously damage his reputation and subsequently his financial status if Nike decides to remove its sponsorship. In addition, the professional sports leagues will suffer a pecuniary loss. The revenue licensing agreements previously generated will eventually dry up and leagues will have to think of new ways and look to other resources to replace it. Finally, while the fantasy industry may continue to grow, the number of successful providers will shrink as larger operators like Yahoo! and CBS Sports, who can survive without charging a fee to play, monopolize the industry.⁹⁹ Smaller fantasy providers formerly created competition in the fantasy industry, because most leagues were not free. Monopolization of the industry could lead to a slew other lawsuits.¹⁰⁰

⁹⁸ Maureen C. Weston, *Publicity Rights in Sports: The Fantasy of Player Statistics Ownership: The Fantasy of Athlete Publicity Rights: Public Fascination and Fantasy Sports' Assertion of Free Use Place Athlete Publicity Rights on an Uncertain Playing Field*, 11 Chap. L. Rev. 581 (2008).

⁹⁹ Weston, *supra* note 97, at 588 (smaller fantasy providers do not get large advertising revenue still charge a fee to cover the costs of league commissioners to compile and organize the statistics and other relevant information. The Yahoo!s and CBS Sports of the fantasy industry cover these costs from the significant advertising revenue they obtain).

¹⁰⁰ Weston, *supra* note 97, at 589.

VII. LEGAL AND SPORTS COMMUNITIES' RESPONSES TO *CBC* and *CBS INTERACTIVE*

The *CBC* and *CBS Interactive* decisions have triggered a host of varying responses from legal scholars and sports journalists. Some agree that the *CBC* and *CBS Interactive* courts established sound precedent, while others criticize them for making the wrong decision and perpetuating a judicially unworkable balancing test to arrive at its decision.

A. Does Fantasy Providers' Use of Athlete Information Violate the Right of Publicity?

In his note, Manav Bhatnagar assessed whether fantasy providers' use of players' names and statistics even violates their right of publicity.¹⁰¹ He argued that while the *CBC* and *CBS Interactive* courts ultimately reached the right decision, their approaches were not doctrinally sound.¹⁰² First, Bhatnagar argues that fantasy leagues do not use a player's identity.¹⁰³ Rather, he contends fantasy providers merely use athletes' names, and, therefore do not violate their right of publicity.¹⁰⁴ This position is wholly inconsistent with the nature of fantasy sports. When a fantasy player selects an athlete for his team, he picks more than just a name. Rather, he selects a real person whose physical, mental and emotional attributes certainly affect his performance on the field, and consequently, his fantasy performance. For instance, the emotional volatility of professional athletes like Carlos Zambrano and Terrell Owens has affected their real and fantasy

¹⁰¹ Bhatnagar, *supra* note 32, at 132.

¹⁰² Bhatnagar, *supra* note 32, at 133.

¹⁰³ Bhatnagar, *supra* note 32, at 132.

¹⁰⁴ *Id.*

performance on many occasions.¹⁰⁵ Their robust personalities directly correlate to their performances on the field, which is something fantasy players take into account when selecting players. This exemplifies the “other indicia of a person’s identity” listed in the Restatement.¹⁰⁶ The Eighth Circuit appropriately determined that CBC use of MLB players’ names and statistics constituted use of their “identity.” Based on the factual similarities between the two cases, it will likely reach the same conclusion in the pending appeal of the CBS Interactive case.

Bhatnagar further argues that fantasy providers fail to satisfy the “commercial advantage” element of a prima facie case for a right of publicity violation.¹⁰⁷ True, fantasy providers do not necessarily utilize professional athletes’ identities to “associate” a particular player with an advertised product. Common sense, however, says that advertisers would not promote their products on a website that does not draw traffic. As the Eighth Circuit’s rulings in C.B.C and CBS Interactive show, the marketability of fantasy sports leagues are wholly dependent on the celebrity of the athletes.¹⁰⁸ If fantasy providers did not intend to capitalize on the fame of the athletes, then why do the websites consistently portray the images of only the league’s most popular and prolific players? An action shot of Peyton Manning certainly draws more traffic than say, a picture of the Jacksonville Jaguars’ third string running back or a fictitious player. Likewise, a large image of the young and charismatic Jermaine Perez benefits PPC as advertisers

¹⁰⁵ Note their crazy antics led to suspensions and inability to perform consistently.

¹⁰⁶ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (1995).

¹⁰⁷ Bhatnagar, *supra* note 73, at 134

¹⁰⁸ See generally *CBC*, 443 F. Supp. 2d at 1088 (determining fantasy providers rely on the draw of celebrities to attract advertisers); See also, *CBS Interactive*, 2009 U.S. Dist. LEXIS 36800 at *26

looking to reach a younger demographic (e.g. alcohol and tobacco industry) have flooded the website with their ads. Bhatnagar's theory that fantasy providers could exclude player names and just use player's numbers and team names is inapposite with fantasy sports' business models.

Bhatnagar misses the point when he contends that dropping real athletes' identities would not affect the commercial success of fantasy sports. In fact, such a system would undoubtedly injure the fantasy and professional sports' industries bottom line. For example, if Brad Meyer drafted "# 24 – Los Angeles" as opposed to Perez, it is highly unlikely he would have purchased a Perez jersey or workout DVD. After all, the L.A. Knights are the Packers' rival, and seldom would a fan sport the gear of a rival's athlete. However, Brad owes the success of his fantasy team to Perez's outstanding performance, which led him develop a love for an athlete he otherwise would not have happened. Similarly, Brad's British friends would not have paid high prices for television packages to track the athletes on their team, if they were mere numbers on a jersey. Like the *CBC* court noted, the economic interests weigh in favor of the fantasy provider and professional athletes should not complain they are missing a "second turn at the trough."¹⁰⁹ Fantasy sports indirectly supplement athletes already prodigious income, thus, the violation of athletes' publicity rights should not grant the players' associations and other similar professional sports organizations an unyielding right to extract money from fantasy providers. The question still remains though: when will fantasy providers' privilege give way to professional athletes' and their respective unions' right to demand licensing fees?

¹⁰⁹ *CBC*, 443 F. Supp. 2d at 1081

B. Does the First Amendment Supersede the Right of Publicity?

Several articles agree that fantasy providers' use of players' identities violate their right of publicity, but do not believe the First Amendment protects such use.¹¹⁰ According to several articles, professional athletes' publicity rights should not yield to the public's right to free expression.¹¹¹ These articles distinguish fantasy providers' "speech" from newspapers and magazines that publish the same information without paying licensing fees, because their activity falls exclusively within the realm of protected, "communicative speech."¹¹² They assert, therefore, that the First Amendment should only defeat a right of publicity action where the appropriator solely uses the information for news reporting, entertainment or literary purposes.¹¹³ They contend that fantasy providers' use does not fit into any of those categories, therefore they should not avail themselves of the First Amendment's shield against right of publicity violations.¹¹⁴ Additionally, like the Missouri Supreme Court held in *Doe*, the articles state courts should similarly refuse to grant fantasy providers constitutional protection where the provider predominantly uses the athlete's identity to exploit its commercial value as opposed to disseminate publicly available information.¹¹⁵ The authors all stated that the *CBC* and *CBS*

¹¹⁰ Gustavo A. Otalvora, Note, *Alfonso Soriano is Getting Robbed: Why the Eighth Circuit Court of Appeals Made a Bad Call in CBC Distribution and Marketing v. Major League Baseball*, 2008 U. Ill. J.L. Tech. & Pol'y 383 (2008); Weston,, supra note 93, at588.

¹¹¹ Karcher, supra note 1, 559

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See, generally, Karcher, supra note 1 at 583.

¹¹⁵ See, Otalvora, supra note 109, at 390.

Interactive courts did not strictly scrutinize the providers' inappropriate use and too easily surrendered First Amendment protection to them.¹¹⁶ They argued that if clothing manufacturers must pay licensing fees to put the name of an professional athlete on the back of a jersey, then fantasy providers' should also pay to place the names of professional athletes on their products.¹¹⁷

To a certain extent, these arguments are rational and somewhat persuasive. Even though athlete information is readily available in the public domain, the law should not give the green light for all unauthorized, entrepreneurial uses of such information. On the other hand, simply because the user of the publicly available information happens to be a successful internet enterprise does necessarily render the First Amendment protection unavailable. Moreover, as fantasy leagues continue to grow, they appear increasingly like a news-reporting website that offers up to the minute updates on the performance, health and general outlook on athletes. Essentially, fantasy providers' websites have become a "one-stop shop" where fantasy players can follow track their fantasy scores and obtain the same information they would from a traditional sports news-reporting outlet such as *Sports Illustrated*. However, unlike newspapers, magazines and other traditional mediums of "communicative speech," fantasy providers' use of the public information violates athletes' publicity rights. Moreover, the content on each space may slide further towards the "pure commercial use" end of the spectrum, which would forbid application of the First Amendment. Moreover, as fantasy providers grow and innovate new

¹¹⁶ *Id.* (quoting Mark S. Lee, Agents of Cahos: *Judicial Confusion in Defining the Right of Publicity-Free Speech Interface*, 23 Loy L.A. Ent. L. Rev. 471, 500 (2003)).

¹¹⁷ Otaivora, *supra* note 109, at 391.

ways to use athletes' identities and market their product, First Amendment protection, which the Eighth Circuit correctly applied in *CBC* and *CBS Interactive*, may not equally apply in future cases. In other words, fantasy providers' unauthorized exploitation of an athlete's identity for commercial gain will inevitably tip the scales of justice in favor of publicity rights.

Accordingly, since these cases present fact intensive inquiries, it is imperative to have a workable framework to adjudicate these claims.

VIII. FUTURE OF THIS LEGAL BATTLE AND POTENTIAL SOLUTIONS

For now, though free to use player's information without paying licensing fees, the fantasy industry's Constitutionally protected use of athletes' information rests on a shaky foundation. As the fantasy industry continues to grow and create new products, the ways they use athletes' identities will undoubtedly change. The *CBS Interactive* court adhered to *CBC*, but mainly because the cases were "indistinguishable."¹¹⁸ What will happen when the court faces a similar legal dispute, but the facts are readily distinguishable from *CBC* and *CBS Interactive*? For example, in the case of *NFLPA v. PPC*, PPC's product adds a new element that the court did not address in *C.B.C* or *CBS Interactive* – the incorporation of athletes' personality traits, habits and personal lives. Additionally, PPC uses the website featuring athletes to promote its profitable beer pong tournaments. These facts add new ingredients to this legal stew, which could alter the legal analysis and the tip the balancing scale in favor of publicity rights. More and more fantasy providers will file complaints in federal court and the current lack of a

¹¹⁸ *CBS Interactive*, 2009 U.S. Dist. LEXIS 36800 at *23.

“principled and consistent” legal framework to resolve the conflict between the right of publicity and the First Amendment will likely lead to great confusion.

A. Legislation

Some legal scholars have posited that legislation may avoid judicial uncertainty and resolve this problem on two fronts. First, it would create a clear standard for courts to look to when adjudicating right of publicity claims. State legislatures, or even Congress, could look to the common law, Restatement and case law to create a clear, workable test to determine precisely when the First Amendment would protect a party from a right of publicity violation. Second, clear legislation would prevent a flood of litigation as well as forum shopping, which the procedural history in *CBS Interactive* shows is quite likely. Before granting CBS Interactive’s motion for summary judgment, the *CBS Interactive* court denied NFLPA’s motion to transfer venue to the Southern District of Florida.¹¹⁹ The NFLPA purposefully moved to transfer to that district to avail itself of favorable right of publicity law.¹²⁰ In *Gridiron v. NFLPA*, the court held that the First Amendment did not supersede athletes right of publicity.¹²¹ The court explained that a commercial website that used players’ images was not entitled to protection, because a First Amendment defense to a publicity rights claim is limited to the extent reasonably required to convey news to the public.¹²² However, the court’s decision was limited and held that the

¹¹⁹ Order Denying Motion to Transfer Venue, *CBS Interactive*, 2009 U.S. Dist. LEXIS at *27.

¹²⁰ *Gridiron.com, Inc. v. NFLPA, Inc.* 106 F. Supp. 2d 1309 (S.D. Fla. 2000).

¹²¹ *Id.*

¹²² *Id.* at 1315

fantasy provider could not use six or more player *photos* without paying fees to the NFLPA. The opinion did not mention player statistics or biographical information.¹²³ A legislative solution is not without its faults, though. Powerful interest groups would certainly influence any bill that came in front of a legislative body. Since the right of publicity is a creature of common law, perhaps the courts are best equipped to continue to confront the right they created and develop a clear, universally acceptable test to resolve this tension.

B. The Primary Motivation Test

While the courts have not failed to develop a test to decide these issues (this paper addresses only several that courts have applied), they have failed to create a test that will produce consistent and uniform results.¹²⁴ The primary motivation test provides the courts with a clear, judicially manageable standard to resolve the conflict between the right of publicity and the First Amendment. The test focuses on the defendant's primary influence or motive behind using a celebrity's identity and aims to balance the expressive and property interests at stake and the goals underlying each right.¹²⁵ Similar to predominant use test, this test is especially helpful where a product contains both expressive and commercial elements. However, instead of examining the appropriator's use of an athlete's identity, a court applying the primary motivation test would look at the motivating factors behind such use. Thus, if expressive interests primarily influence an appropriator's product, the product shall receive a strong presumption of full First

¹²³ *Id.*

¹²⁴ Gloria Franke, Note, *The Right of Publicity vs. The First Amendment: Will One Test Ever Capture the Starring Role?*, 79 S. Cal. Rev. 945, 980 (2006).

¹²⁵ Franke, *supra* note 117, at 980.

Amendment protection. However, if commercial interests chiefly motivate the defendant to appropriate an athlete's identity – the appropriator will not receive First Amendment protection.

One might refer to fantasy providers' activity as "fact-reporting plus". At its core, fantasy providers resemble traditional sports news agencies - they amass and organize publicly available information into various, accessible and understandable categories. In fact, many fantasy players visit their fantasy provider's website simply to read sports news. However, fantasy providers do something more than just report the news. They do more than just entertain too. Fantasy providers *engage* fantasy players in a fun, competitive and lucrative business. As this engagement becomes more profound, more reliant upon and more exploitative of athletes' identities, this "fact-reporting plus," may tip the scales in favor of publicity rights. With the proliferation of fantasy leagues and now mobile access to the league websites, the degree of exploitation is bound to increase. The increasingly extensive exploitation of athletes' identities may effectively close the door on First Amendment protection. For example, suppose the PPC website only features Perez next to the ads for various alcohol and tobacco companies. Further, assume that PPC fantasy players view the same images of Perez next to those same ads on their cell phones and even on other websites, such as PPC's joint venture partner, TMZ.com. In that scenario, one could reasonably assume the average fantasy player may incorrectly associate the athlete with the advertisement. Importantly, the *CBC* and *CBS Interactive* courts left door open for publicity rights to outweigh First Amendment where the athlete information is presented in a way that gives "false impression that some particular player . . . is endorsing [the fantasy sports

provider's] product.”¹²⁶ The primary motivation test would facilitate clear and consistent decisions from the courts on whether expressive, mainly expressive/communicative interests or commercial interests influenced the fantasy provider to use the athlete's identity in that manner.

The application of the primary motivation test necessitates a burden-shifting analysis similar to the *McDonnell-Douglas* burden shift courts apply in Title VII discrimination cases.¹²⁷ In other words, after a plaintiff establishes prima facie violation of right of publicity, the burden shifts to the appropriator bears to show that its primary motivation to use the athlete's identity was expressive and therefore falls under the ambit of First Amendment protection. Several factors that may aid the court in determining a fantasy provider's primary motivation in using athlete information include the: (1) expressive element to the fantasy provider's content; (2) prominence and pervasiveness of advertisements on the website; (3) presence of lesser known athletes on the site; and (4) presence of other non-fantasy sports related information on the site (excluding advertisements).

Although the balancing test the courts applied in *CBC* and *CBS Interactive* produced the correct result, the facts and rationale underlying application of the First Amendment in those cases may not exist in future litigation on this same issue. Fantasy providers' use of athlete information may evolve into a blatant abuse of the identities and the commercial advantage fantasy providers reap from such abuse may not invite application of the First Amendment. The

¹²⁶ *CBC*, 505 F.3d at 824.

¹²⁷ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (applying a burden shifting analysis where after plaintiff establishes a prima facie violation of Title VII, the burden shifts to the defendant to articulate a legitimate non discriminatory reason for the adverse employment action. The burden then reverts back to the plaintiff to prove that any such reason was mere pretext).

current balancing test will become convoluted, subjective and produce inconsistent decisions throughout the country. Thus, the primary motivation test affords the requisite degree of certainty and clarity that this legal dispute commands.

IX. CONCLUSION

Fame is a commodity. Over the last 60 years, celebrities, including professional athletes, have used that commodity in connection with the media and modern technology to become household names. As American society's obsession with and access to celebrities increase, this precious commodity will catapult celebrities from household names to brand names. Unlike entertainment celebrities who develop their brand from acting, singing, modeling, etc., in sports, the athlete's name *is* the brand. In fact, some athletes literally own their brand, like Michael Jordan. Consequently, the justification for an athlete to protect the value of his "brand name" from infringement, just like Coca Cola, Starbucks, or Microsoft, will be very high. Undoubtedly, fantasy sports providers use this valuable commodity to promote their own product and gain a commercial advantage. After all, the fantasy sports industry is a business and using athletes' brands to make money is one of the oldest business practices in the book. However, courts must clearly define the contours and scope of First Amendment protection to determine whether fantasy providers must pay the athletes to use their brand and receive the commercial advantage flowing therefrom. The primary motivation test will guide courts to apply the First Amendment defense where the fantasy providers' expressive motivation warrants such application. More importantly, it will clarify and simplify the complex legal analysis surrounding this conflict so that even Perez may understand why fantasy providers can "get something for nothing."