First and a Virtual Ten Yards: Fantasy Football's Contest Over Publicly Available Sports Statistics, Forum Selection, and the Dash to the Courthouse

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I. INTRODUCTION

It is hard to imagine that when Walter Camp[1] founded American Football, he could have foreseen the statistics created through participation in his sport being fought over in court, let alone on the basis of a game played through a network of computers accessible worldwide. Similarly, Alexander Cartwright[2] could not have possibly contemplated arguments before American courts regarding the right of publicity or the commercial gain associated with the representation of Major League Baseball players' statistics and names. These are all very contemporary issues, as are most that deal with the internet and internet gaming. However, the foundational concepts of these arguments are rooted in prior decisions throughout American judicial history.

On September 3, 2008, CBS Interactive, Inc. ("CBS Interactive"), a subsidiary of CBS Corporation, filed a preemptive lawsuit against the National Football League Players Association ("NFLPA") in the District Court of Minnesota.[3] CBS Interactive claims the NFLPA "has threatened and continues to threaten CBS Interactive with litigation if CBS Interactive does not pay the Players Association nationwide license fees for the use of publicly available statistics" in association with CBS Interactive's fantasy football game.[4] CBS Interactive states that it had formerly entered into licensing agreements with the NFLPA through its "licensing entity, National Football Player Incorporated [sic]."[5] The last agreement expired on February 29, 2008, and CBS Interactive contends that, between February and August 2008, the NFLPA approached CBS Interactive. The NFLPA claimed intellectual property rights related to the professional football players in their league and demanded licensing fees for their use. CBS Interactive argues that, even though the Eighth Circuit Court of Appeals ruled on this issue in *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*[6]—which will be discussed in detail below—the NFLPA threatened CBS Interactive with litigation if it failed to pay the licensing fees. According to CBS Interactive, the NFLPA "further asserted that any party that elects to challenge the Players Association's alleged rights in the names and statistics of professional football players would be *excluded* from the fantasy football market."[7]

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[1] Hartford Powel, *Walter Camp, The Father of American Football: An Authorized Biography*, 12 AMERICAN HERITAGE 50 (2007).

[2] JIM REISLER, A GREAT DAY IN COOPERSTOWN: THE MIRACULOUS AND UNLIKELY BEGINNING OF THE BASEBALL HALL OF FAME 157–58 (Carroll & Graf 2006). Alexander Cartwright wrote the first rules (called the "Knickerbocker Rules") in 1845. The founding of baseball by Abner Doubleday is myth.

[3] The District Court of Minnesota decided the case after this paper was completed. CBS Interactive, Inc. v. Nat'l Football League Players Ass'n, 259 F.R.D. 398 (D. Minn. 2009).

[4] CBS Complaint at 1, CBS Interactive, Inc. v. Nat'l Football League Players Ass'n, 259 F.R.D. 398 (D. Minn. 2009) (No. 08 CV 05097).

[5] *Id.* at 10.

[6] C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818 (8th Cir. 2007).

[7] CBS Complaint, *supra* note 4, at 12 (emphasis in original).

CBS Interactive seeks three declaratory judgments: (1) a right of publicity interpreted broadly enough to encompass CBS Interactive's actions is superseded by the First Amendment to the U.S. Constitution, (2) a right to publicity interpreted broadly enough to encompass CBS Interactive's actions is preempted by federal copyright law, and (3) CBS Interactive does not violate any right of publicity owned or controlled by the Players Association.[8] CBS Interactive also seeks the Court to enter a judgment against the NFLPA for violating § 2 of the Sherman Act.[9] CBS Interactive claims the NFLPA is monopolizing, or attempting to monopolize, the relevant fantasy football markets through "improper conduct [that] threatens to reduce the availability of fantasy football games, to raise prices for fantasy football customers, to restrain the dissemination of information related to professional football, and to exclude CBS Interactive from the relevant markets."[10] Finally, CBS Interactive asks the Court to enjoin the NFLPA and their agents "from interfering with Plaintiff CBS Interactive's business related to sports fantasy teams."[11]

Acting in response, NFL PLAYERS, Inc. ("NFL PLAYERS") filed suit on September 9, 2008, in the Southern District Court of Florida. NFL PLAYERS claims CBS Interactive's use of National Football League player's "names, images, likenesses, photographs, statistics and biographical information . . . [is] in violation of the exclusive NFL player group licensing rights held by [NFL PLAYERS]."[12] NFL PLAYERS states in its complaint that it is a Virginia corporation with its principal place of business in Washington, D.C. It is a "for-profit, partially owned subsidiary of the National Football League Players Association, Inc."[13] NFL PLAYERS claims the Southern District of Florida is the proper jurisdiction for this matter because CBS Interactive transacts business in the Southern District of Florida, negotiated business with the NFL in this jurisdiction, and "operates the www.cbssports.com website at issue through CBSSports.com's business headquarters in Fort Lauderdale, Florida."[14] NFL PLAYERS stated that CBS Interactive filed its September 3, 2008 action in Minnesota "in order to seek an advisory opinion from a favorable forum, even though that forum has no jurisdiction over the dispute."[15] NFL PLAYERS asks for the Minnesota action to be transferred or dismissed.[16]

While each party's argument consists of such issues as the right of publicity versus First Amendment rights, copyright infringement, and antitrust violations, the crux of this case is whether CBS Interactive will be able to keep its lawsuit within the District Court of Minnesota. The reason the choice of forum is so critical in this case could read like a MasterCard commercial: "Having a great case: $1 million; selecting a favorable jury: $1 million; taking probability out of the case: priceless." For a lawyer to be able to take the probability out of a case is invaluable. If this case were to be heard in the District Court of Minnesota, CBS Interactive would almost be guaranteed summary judgment in their favor, based on the Eighth Circuit Court of Appeals decision in *C.B.C. Distribution*.[17] Even though CBS Interactive's case seems to have merit, the Southern District of Florida has no precedent from the Eleventh Circuit which it must follow. In fact, in *Gridiron.com, Inc. v. National Football League Player's Association, Inc.*, an internet website operator sought a declaratory judgment that its use of NFL players for his site, dedicated to professional football, did not violate the exclusive licensing agreement between the NFLPA

[8] *Id.* at 17–25.
[9] Sherman Antitrust Act § 2, 15 U.S.C. § 2 (2006). CBS Complaint, *supra* note 4, at 26–40.
[10] CBS Complaint, *supra* note 4, at 38.
[11] *Id.* at F.
[12] NFL PLAYERS Complaint at 1. Nat'l Football League Players, Inc. v. CBS Interactive, Inc., No. 1:08-CV-22504 (S.D. Fla. Sept. 9, 2008).
[13] *Id.* at 2.
[14] *Id.* at 6.
[15] *Id.* at 32.
[16] *Id.* at 34.
[17] C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818 (8th Cir. 2007).

and NFL PLAYERS.[18] The Southern District of Florida held that the website operator's conduct violated the agreement and was not free speech protected by the First Amendment.[19] In addition to this holding, Florida is also one of only a handful of states that has statutory law protecting images and pictures under the right to publicity.[20] NFL PLAYERS, in its complaint, specifically claims CBS Interactive "uses images, pictures, [and] likenesses . . . of the Players to directly promote, advertise and solicit players for its Fantasy Football Games" in accord with Florida's right to publicity statutes regarding pictures.[21] Nevertheless, according to *Van Dusen v. Barrack*,[22] even if CBS Interactive fails to overcome a 28 U.S.C. § 1404 transfer motion, the Southern District of Florida will be required to apply Minnesota state law. The *Van Dusen* Court held that when venue is proper in the original forum, and a transfer is made pursuant to 28 U.S.C. § 1404(a), the transferee court must apply the law of the transferor court.[23] Therefore, the laws of the Southern District of Florida will only apply if CBS Interactive's lawsuit in Minnesota is dismissed. Regardless, it is obviously in CBS Interactive's best interest to have the case remain in Minnesota and have the district court be held to the precedent set forth in *C.B.C. Distribution*.

II. FROM THE SIDELINES TO CYBERSPACE

As a devotee to the dogmatic theory that baseball is America's pastime, it causes me to wince slightly when I admit that football may have overtaken that title. While both leagues, Major League Baseball ("MLB") and the National Football League ("NFL"), enjoy immense success, the NFL has now become king—at least in terms of television ratings. In 2008, the NFL was averaging 13 million viewers per airing for Monday Night Football broadcasts, while in 2007, the MLB on FOX averaged just over 2.5 million viewers per broadcast, or a 2.3 Nielsen rating.[24] Along with increased viewer ratings, the NFL has expanded its market, continuing to attempt to gain exposure outside of the United States with past regular season football games being played in Mexico City and an annual regular season game in London. The average salary for an NFL player is $1.4 million,[25] while the average NFL team is worth nearly $957 million.[26]

Why the introduction to the economics of the National Football League? In addition to the increased popularity and profitability of the NFL, fantasy football has also blossomed with immense participation into a very successful industry. NFL fantasy football is a game in which participants are arranged into "leagues." The creator of these leagues is the "commissioner," and he or she invites other "owners" to join the league. Once the league is assembled, the owners participate in a draft where they select NFL players to fill their roster. Normally a starting roster consists of one quarterback, two running backs, three wide receivers, a tight end, a kicker, a team defense, and seven bench players, although formats vary. Teams gain points based on their players' statistical on-the-field performances. Most leagues are set up in a head-to-head format where each "owner's" team faces a new team each week in a round-robin schedule until the playoffs, which are usually reserved for the last weeks of the NFL season.

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[18] Gridiron.com, Inc. v. Nat'l Football League Player's Ass'n, 106 F.Supp. 2d 1309 (S.D. Fla. 2000).
[19] *Id.* at 1315.
[20] Fla. Stat. § 540.08 (2007).
[21] NFL PLAYERS Complaint, *supra* note 12, at 24.
[22] Van Dusen v. Barrack, 376 U.S. 612 (1964).
[23] *Id.* at 639–42.
[24] Sports Media Watch, *2007 MLB on FOX average lowest since at least '87*, Oct. 5, 2007, http://sportsmediawatch.blogspot.com/2007/10/mlb-on-fox-sets-record-low.html.
[25] Even Weiner, *NFL Players Association Finds Itself at a Crossroads*, Sept. 4, 2008, http://www.nysun.com/sports/nfl-players-association-finds-itself-at/85175.
[26] Forbes.com, *The Business of Football*, http://www.forbes.com/2007/09/13/nfl-team-valuations-biz-07nfl_cz_kb_mo_cs_0913nfl_land.html.

Contrary to the common belief that fantasy football was invented by online gaming companies during the "computer age," the game was actually first developed in 1962 by three men on a rainy October night in New York City.[27] Wilfred "Bill" Winkenbach, a limited partner in the Oakland Raiders, headed the group. The group's aim was "[t]o bring together some of Oakland's finest Saturday morning gridiron forecasters to pit their respective brains (and cash) against each other."[28] The system Winkenbach created was called the "Greater Oakland Professional Pigskin Prognosticators League" or GOPPPL.[29]

Today, millions of Americans participate in fantasy football leagues, some playing for mere recreation, while others compete for cash prizes. A study released in 2006 by a top American consulting firm found that businesses lost as much as $1.1 billion a [week] in productivity during the NFL season due to many of the nearly thirty-seven million fantasy owners spending an average of fifty minutes a week managing their teams during their working hours.[30] The study also found that these owners will spend an average of nearly $500 a year on fantasy sports and use thirty-four minutes a day "just thinking about their teams."[31] If these statistics were not enough to prove the staple of fantasy football in American life, the study went on to find that "[t]he potential damage to morale and loyalty resulting from a fantasy football ban could be far worse than the loss of productivity caused by 10 minutes of online team management."[32] Even capitalism is asked to wait in the proverbial line to get its turn at grabbing the attention of the everyday American fantasy football owner. However, throughout this four-month period of trades, waiver moves, and accumulation of statistical points, who retains ownership of these statistics? The fantasy football developers and owners say the statistics are public information, while the NFL Players Association and its subsidiary, NFL PLAYERS, claim ownership rights. The debate is one which will be settled in federal court. The crucial question is, which court?

As stated, the keystone of fantasy football is obviously statistics. Fantasy football is ruled by the accumulation of points for basic statistics players earn during games throughout the NFL season. No matter what variety of fantasy football game is played, statistics generally include touchdowns, rushing yards, receiving yards, passing yards, receptions, interceptions, fumbles, and sacks. The appeal of this game, especially to the everyday "recliner quarterback," is the ability to set lineups with their favorite football stars and feel the power of "ownership" during free agency, when their favorite players swap teams almost as much as Adam "Pacman" Jones has a "run-in" with the law.[33] However, the use of these statistics has created issues within the fantasy sports gaming world and the courts. Major league sports players' associations and their subsidiary companies have raised arguments about the legality of online gaming companies using the names and statistics of their players to conduct their online fantasy sports business. These circumstances led to CBS Interactive's preemptive suit against the NFLPA in the District Court of Minnesota.

[27] Bob Harris & Emil Kadlec, *A Nod (and a Wink) to the Founders of Fantasy Football*, http://www.fspnet.com/wink.pdf.
[28] *Id.* at 10.
[29] *Id.*
[30] FoxNews.com, *Study: Fantasy Football Costs Businesses $1.1 Billion a Year*, Aug. 16, 2006, http://www.foxnews.com/story/0,2933,208719,00.html.
[31] *Id.*
[32] *Id.*
[33] ESPN.com, *Georgia Won't Revoke Jones' Probation After Latest Incident*, Oct. 16, 2008, http://sports.espn.go.com/nfl/news/story?id=3645419. Adam "Pacman" Jones has been in 13 incidents involving police since he was drafted into the National Football League in 2005.

III. *C.B.C. DISTRIBUTION AND MARKETING, INC. V. MAJOR LEAGUE BASEBALL ADVANCED MEDIA, L.P.*

While the courts are being called upon to examine issues such as copyright infringement and the right to publicity versus First Amendment rights, a decisive procedural strategy may aid in the determination of this case even before opening arguments are heard. *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, found the Eighth Circuit Court of Appeals dealing with these same issues, as well as delving into the history of these disputes.[34] In that case, C.B.C. Distribution and Marketing, Inc. ("CBC"), a St. Louis, Missouri, based company that provides fantasy sports services to its customers, brought a declaratory judgment action against Major League Baseball Advanced Media, L.P. ("MLBAM"). Just as CBS Interactive alleges that the NFLPA threatened to "put CBSSports.com out of the fantasy football business,"[35] CBC alleged their suit arose from "Major League Baseball's declared intentions to force CBC to discontinue using the sports statistics in its fantasy sports games."[36] As with CBS Interactive's claim, CBC's action came after a prior licensing agreement had expired. CBC argued that it had the right to use the unlicensed statistics and names of Major League Baseball players, and that its use of such was not in violation of the players' rights to publicity.[37] MLBAM and the Major League Baseball Player's Association ("MLBPA") counterclaimed against CBC for a violation of players' rights to publicity and breach of contract.[38] The Eastern District Court of Missouri granted summary judgment for CBC.[39] MLBAM and the MLBPA appealed the decision to the Eighth Circuit Court of Appeals. The Eighth Circuit found in favor of CBC, holding that "CBC's first amendment rights in offering its fantasy baseball products supersede the players' rights of publicity."[40] The court also held that "recitation and discussion of factual data concerning the athletic performance of [players on Major League Baseball's website] command a substantial public interest, and, therefore, is a form of expression due substantial constitutional protection."[41] Finally, the Eighth Circuit stated that the use of professional athletes in fantasy games, just as in CBS Interactive's fantasy football game, does not present "any danger here that consumers will be misled, because the fantasy baseball games depend on the inclusion of all players and thus cannot create a false impression that some particular player with 'star power' is endorsing CBC's products."[42]

In light of the *C.B.C. Distribution* decision and its similarities to this case, it is obvious that CBS Interactive's forum choice in its anticipatory filing was no coincidence. Anticipatory filing is defined as "[t]he bringing of a lawsuit or regulatory action against another with the expectation that the other party is preparing an action of its own. If properly brought, an anticipatory filing may determine procedural matters such as jurisdiction and venue."[43] CBS Interactive, fearing "that it will be sued by the Players Association or that the Players Association will publicly contend that CBS Interactive is violating its rights,"[44] strategically used an anticipatory filing in what appears to be an attempt to force the case under the jurisdiction of the Eighth Circuit Court of Appeals, armed with its fresh *C.B.C. Distribution* decision.

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[34] C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818 (8th Cir. 2007).
[35] CBS Complaint, *supra* note 4, at 1.
[36] CBC Complaint at 2, C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media. L.P., 505 F.3d 818 (8th Cir. 2007) (No. 05 CV 00252).
[37] *Id.*
[38] C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, Inc., 443 F.Supp. 2d 1077, 1082 (E.D. Mo. 2006).
[39] *Id.* at 1107.
[40] C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818, 824 (8th Cir. 2007).
[41] *Id.* at 823–24 (quoting Gionfriddo v. Major League Baseball. 94 Cal.App. 4th 400, 411 (Cal. Ct. App. 2001)).
[42] *Id.* at 824.
[43] BLACK'S LAW DICTIONARY 102 (8th ed. 2004).
[44] CBS Complaint, *supra* note 4, at 13.

However, the court must decide if the anticipatory filing is proper by examining whether CBS Interactive "forum shopped" against judicial policy, or whether transfer of venue is appropriate.

IV. THE "FORUM SHOPPING" DEBATE

The vital question still remains whether the District Court of Minnesota or the Southern District of Florida will hear this case. NFL PLAYERS argues that CBS Interactive has forum shopped by preemptively filing its anticipatory suit in a venue—Minnesota—that lacks jurisdiction in order to take advantage of the *C.B.C. Distribution* decision. CBS Interactive claims that it not only has the minimum business contacts in Minnesota required for it to be the proper jurisdiction to hear this case, but that "the Players Association is an unincorporated association with members who reside in Minnesota and is subject to personal jurisdiction in this judicial district."[45] However, NFL PLAYERS contends that CBS Interactive's complaint names the wrong party, and that it is NFL PLAYERS—not the NFLPA—that negotiates player licensing agreements.

As a matter of filing, CBS Interactive's complaint must be examined to assure it has brought suit against a viable party. As NFL PLAYERS argues, "CBS Interactive filed the Minnesota Action against an improper party, the NFLPA, in order to seek an advisory opinion from a favorable forum, even though that forum has no jurisdiction over the dispute."[46] While this paragraph of the NFL PLAYERS complaint alleges forum shopping, it also alerts the court to CBS Interactive's naming of an improper party. The Eighth Circuit Court of Appeals commented on such an issue in *Roberts v. Michaels* in 2000.[47] In *Roberts*, plaintiff brought a Title VII action against her former employer but used an incorrect corporate name when bringing the lawsuit. Although the statute of limitations had expired, plaintiff was allowed to amend her complaint to correct defendant's name. While *Roberts* dealt with a simple misnomer mistake, the court explained:

> [even i]f a plaintiff has named and served the wrong defendant . . . the decision whether to dismiss the complaint without prejudice under Rule 4(m), or to grant the plaintiff leave to amend, is critical . . . . To proceed in the initial suit, she needs to amend her complaint to name the proper defendant, and the amended complaint must relate back to the original complaint to avoid the statute of limitation bar.[48]

Federal Rule of Civil Procedure 15(c) describes, in its relevant portions:

> [a]n amendment of a pleading relates back to the date of the original pleading when . . . (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.[49]

[45] *Id.* at 15.
[46] NFL PLAYERS Complaint, *supra* note 12, at 1.
[47] Roberts v. Michaels, 219 F.3d 775 (8th Cir. 2000).
[48] *Id.* at 778.
[49] *Id.* (citing Fed. R. Civ. P. 15(c)).

While the NFL PLAYERS complaint claims that the NFLPA is a "separate entity"[50] and corporation from NFL PLAYERS, it is apparent that NFL PLAYERS is a subsidiary of NFLPA. It is still on record that the NFLPA and NFL PLAYERS share the same executive director/chairman, the late Gene Upshaw.[51] NFLPA's website also displays that it shares the same Legal Department with NFL PLAYERS.[52] Thus, even if NFL PLAYERS is correct in its claim that CBS Interactive brought suit against the wrong party, NFL PLAYERS "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought" against them.[53] Also, CBS Interactive's claims against NFL PLAYERS arose out of the "conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading" and NFL PLAYERS "knew or should have known" about the suit. Therefore, assuming NFL PLAYERS is the proper party, CBS Interactive should be entitled to amend its complaint to avoid dismissal of its suit.[54]

As aforementioned, NFL PLAYERS next accuses CBS Interactive of forum shopping "in order to seek an advisory opinion from a favorable forum, even though that forum has no jurisdiction over the dispute."[55] Forum shopping is defined as "the practice of choosing the most favorable jurisdiction or court in which a claim might be heard."[56] The term "forum shopping" is not only ambiguous, but also brings negative connotations to an important part of the legal process. Forum selection is an integral part of a lawyer's duty to his or her client. "In reality, every litigant who files a lawsuit engages in forum shopping when he chooses a place to file suit."[57] The Model Rules of Professional Conduct explain that a lawyer "has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure . . . . However, the law is not always clear and never is static."[58] It is also an attorney's duty to represent his or her client zealously within the bounds of the law.[59] While some object to the practice of forum shopping, forum selection is actually a strategy not only accepted by the legal system, but encouraged and expected in order to fulfill a lawyer's duty to his client and select a favorable jurisdiction that will yield the greatest chance of success. According to the late Judge Skelly Wright, forum shopping has become "a national legal pastime."[60] Under Canon 9 of the Model Code of Professional Responsibility, Ethical Consideration 9-1 states in part, "A lawyer should promote public confidence in our system and in the legal profession."[61] However, the negative connotations that accompany forum shopping may just be attributed to the general public's skepticism and lack of knowledge regarding legal jurisdiction, not the practice itself. As with various legal conundrums, "[o]n occasion, ethical conduct of a lawyer may appear to laymen to be unethical."[62] Nevertheless, there must be a threshold that determines where forum shopping ceases to be a legitimate practice of zealous advocacy and instead becomes an improper attempt to manipulate the judicial system.

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[50] NFL PLAYERS Complaint, *supra* note 12, at 33.
[51] *See* NFL Players Association Member Services—Department Contacts, http://www.nflplayers.com/user/template.aspx?fmid=181&lmid=238&pid=0&type=l#a3 (last visited Dec. 9, 2009).
[52] *Id.*
[53] *Roberts*, 219 F.3d at 778. (quoting Fed. R. Civ. P. 15(c)(3)).
[54] *Id.*
[55] NFL PLAYERS Complaint, *supra* note 12, at 32.
[56] BLACK'S LAW DICTIONARY 681 (8th ed. 2004).
[57] Tex. Instruments, Inc. v. Micron Semiconductors, Inc., 815 F. Supp. 994, 996 (E.D. Tex. 1993).
[58] MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 1 (1983).
[59] MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1980).
[60] Harvard Law Review Association, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1679 (1990) (citation omitted).
[61] MODEL CODE OF PROF'L RESPONSIBILITY Canon 9-1 (1980).
[62] MODEL CODE OF PROF'L RESPONSIBILITY Canon 9-2 (1980).

The modern views on forum shopping trace back to two Supreme Court decisions: *Erie Railroad v. Tompkins*[63] and *Hanna v. Plumer*.[64] The *Erie* Court held that in diversity actions, federal courts are required to apply the substantive law of the state in which they are located, abolishing the prior rule of *Swift v. Tyson*.[65] The *Hanna* Court declared that the Federal Rules of Civil Procedure preempt any conflicting state rules, even in diversity actions where *Erie* would allow state rules to apply.[66] The *Hanna* Court stated "the twin aims of the *Erie* rule [are] discouragement of forum-shopping and avoidance of inequitable administration of the laws."[67] After these two decisions, the Court has taken various opportunities to be critical of forum shopping. In one example, Justice Marshall chastised a plaintiff by remarking that "the clear absence of venue in the District Court further strengthens the odor of impermissible forum shopping which pervades this case."[68]

Nevertheless, there are also examples where the Supreme Court allowed blatant interstate forum shopping to occur. In *Keeton v. Hustler Magazine, Inc.*,[69] the Court allowed plaintiff to bring a libel action in New Hampshire, a forum in which she had no connection and defendant had minimal contacts. In fact, plaintiff's blatant use of forum shopping was apparent as New Hampshire was the only jurisdiction whose statute of limitations had not run, yet the Court still allowed the suit. The Court held:

> The fact that petitioner has very limited contacts with New Hampshire does not defeat jurisdiction, since a plaintiff is not required to have "'minimum contacts" with the forum State before that State is permitted to assert personal jurisdiction over a nonresident defendant. A plaintiff's residence in the forum State is not a separate jurisdictional requirement, and lack of residence will not defeat jurisdiction established on the basis of the defendant's contacts . . . the defendant [only needs] certain minimum contacts . . . such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[70]

In *Ferens v. John Deere Co.*, plaintiff, a Pennsylvania farmer, sustained a personal injury from defendant's product.[71] Plaintiff failed to bring his negligence claim before Pennsylvania's two-year statute of limitations expired.[72] Subsequently, plaintiff filed two simultaneous actions: a related breach of warranty action that was not time-barred, brought in District Court for the Western District of Pennsylvania, and a negligence action in District Court for the South District of Mississippi, whose statute of limitations for such a claim is six years.[73] Plaintiff then submitted a motion to the court to have his Mississippi action transferred to Pennsylvania on *forum non conveniens*.[74] The Supreme Court allowed both actions to be heard in Pennsylvania, but with a caveat. The Court held that while the Mississippi action was being transferred to Pennsylvania, the state law of Mississippi, the transferor court,

[63] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
[64] Hanna v. Plumer, 380 U.S. 460 (1965).
[65] Swift v. Tyson, 41 U.S. 1 (1842), *overruled by* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). Under *Swift*, federal courts in diversity cases followed state law on some local issues but were free to create and follow a federal common law in others.
[66] Harvard Law Review Association, *supra* note 60, at 1681.
[67] *Erie*, 304 U.S. at 68.
[68] Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 24 (1987).
[69] Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984).
[70] *Id.* at 771 (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).
[71] Ferens v. John Deere Co., 494 U.S. 516 (1990).
[72] *Id.* at 519.
[73] *Id.*
[74] *Id.* at 520.

would be the substantive law to be followed in the transferee court of Pennsylvania.[75] The Court reasoned:

> First, § 1404(a) should not deprive parties of state-law advantages that exist absent diversity jurisdiction. Second, § 1404(a) should not create or multiply opportunities for forum shopping. Third, the decision to transfer venue under § 1404(a) should turn on considerations of convenience and the interest of justice rather than on the possible prejudice resulting from a change of law.[76]

Still, *Erie* and *Hanna* address the Court's attempt to avoid different results from occurring between state and federal courts within the same state and not interstate federal courts.[77] Interestingly enough, "[t]he Supreme Court has never prohibited choices involving different substantive laws beyond the narrow *Erie* context, and therefore differences in the substantive law remain one of the considerations in forum selection."[78] With regards to forum shopping, the Court's policies against it are not principal distinctions between legitimate and illegitimate actions, but discretionary tools by which a court may constrain actions or motives it finds distasteful.[79] Consequently, with the idea that the differences in substantive law is still a practical element in a party's forum selection decision, it does not seem there is much resistance in the federal courts against the practice of interstate forum shopping. The issues then become: (1) whether CBS Interactive will be able to demonstrate the necessary minimum contacts between Minnesota and the NFLPA and/or between Minnesota and NFL PLAYERS to maintain subject matter jurisdiction in Minnesota, and (2) whether CBS Interactive's Minnesota action will survive a 28 U.S.C. § 1404 transfer motion by NFL PLAYERS.

CBS Interactive's suit claims the District Court of Minnesota has subject matter jurisdiction over its case pursuant to 28 U.S.C. § 1331 (federal question)[80] and 28 U.S.C. § 2201(a).[81] 28 U.S.C. § 2201 is the Declaratory Judgment Act and "enables a potential defendant to file suit against the potential plaintiff to have his rights and liabilities as to the potential plaintiff declared by the court."[82] 28 U.S.C. § 1331 states "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[83] In its touchstone decision in *International Shoe Co. v. Washington*, where the defendant purposefully availed itself of the privilege of conducting activities within the forum state, the Supreme Court held that a defendant is subject to suit in a given forum when he has "minimum contacts" with that forum.[84] Furthermore, the Court found the contacts must be sufficient enough that the suit does not offend "traditional notions of fair play and substantial justice."[85]

As the federal venue statutes aged, the requirements necessary to bring a lawsuit in a certain venue expanded. In 1990, Congress amended 28 U.S.C. §1391(a) to state that venue is proper in:

> (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving

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[75] *Id.* at 516.
[76] *Id.* at 523.
[77] 28 U.S.C. § 1391 (2006).
[78] Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 349 (2006).
[79] Richard Maloy, *Forum Shopping? What's Wrong With That?* 24 QUINNIPIAC L. REV. 25, 27 (2005).
[80] 28 U.S.C. § 1331 (2006).
[81] 28 U.S.C. § 2201(a) (2006).
[82] Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79, 102 (1999).
[83] 28 U.S.C. § 1331.
[84] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
[85] *Id.*

> rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced.[86]

This amendment replaced the older language which provided venue was proper where "the claim arose."[87] Therefore, federal courts apply a more lenient standard to decide if venue is proper, allowing flexibility in the courts and relaxing the standards by which jurisdiction is held to be appropriate. This relaxed standard increases the probability that CBS Interactive will succeed in having the District Court of Minnesota assert jurisdiction over the NFLPA.

Still, some scenarios do exist whereby the District Court of Minnesota could declare it did not have jurisdiction over this matter. In such an instance, the court would first have to find that NFL PLAYERS was actually a free-standing entity and that it sought licensing business independent from the NFLPA. If such were true, the District Court of Minnesota would probably not maintain jurisdiction over this case. Other scenarios also include if NFL PLAYERS has no place of business in Minnesota, no office in Minnesota, and no board members residing in Minnesota.[88]

Even so, the District Court of Minnesota will most likely find it does maintain jurisdiction over the NFLPA and/or NFL PLAYERS. Within the lenient requirements for jurisdiction under § 1391(a), CBS Interactive would merely have to show either that a "substantial part of the events" occurred in Minnesota, NFLPA/NFL PLAYERS were residents of Minnesota, or NFLPA/NFL PLAYERS is subject to personal jurisdiction. One of CBS Interactive's best arguments is that NFL PLAYERS is the agent of the NFLPA, therefore allowing either to be a party to this suit. As it stands, all evidence points towards the NFLPA being a legitimate party to CBS Interactive's suit in the District Court of Minnesota. While NFL PLAYERS argues that the NFLPA never conducted negotiations with CBS Interactive regarding licensing rights for any National Football League players, the limited evidence available at this stage of the proceedings supports a conclusion that NFL PLAYERS is not a free-standing corporation independent of the NFLPA. As stated earlier, the two entities shared the same executive director/chairman, legal department, and, from what can be discerned from the limited information available, may even share the same principal place of business. Furthermore, there are numerous representations and advertisements for NFL PLAYERS located on the NFLPA website, as well as references to NFL PLAYERS as a subsidiary and affiliate. If NFL PLAYERS is not a separate entity, then, under *International Shoe*, not only will CBS Interactive's complaint suffice, but any NFLPA activity within the jurisdiction of Minnesota would also qualify as satisfying the "minimum contacts" and purposeful availment to the forum state through its conduct and activity in Minnesota. This contention would also allow the District Court of Minnesota to assert jurisdiction over the NFLPA, concurrent with NFL PLAYERS, through the lenient standards of personal jurisdiction under § 1391 if any of the representatives reside or conduct business in Minnesota.[89]

V. 28 U.S.C. § 1404(a)

The final obstacle CBS Interactive must overcome is the 28 U.S.C. §1404 motion for transfer. "28 U.S.C. § 1404(a) is designed to remedy the evils of forum shopping"[90] and states, "For the

[86] 28 U.S.C. § 1391(a) (1990).
[87] 28 U.S.C. § 1391(a)(2) (1988).
[88] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (holding that minimum contacts must exist between the forum, defendant, and claim before a state's court may exercise jurisdiction over a defendant).
[89] The Minnesota Vikings is a National Football League franchise. The team has representatives that are representatives to the National Football League Players' Association.
[90] 1A FED. PROC., L. ED. § 1:839 (2009).

convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."[91] The court which entertains a § 1404(a) motion for transfer must not only decide whether another forum is better suited to hear the case because of convenience and the interest of justice, but also must know the transferee court would have jurisdiction over the matter.[92] Courts have developed lists of factors, for convenience and the interest of justice, to consider when deciding whether to transfer a case. These factors may overlap, but consist of such issues as the court's familiarity with the applicable law, docket conditions, access to premises that might have to be viewed, possibility of unfair trial, order in which the district court obtained jurisdiction, plaintiff's choice of forum, location of relevant documents and relative ease of access to sources of proof, where the relevant agreements were negotiated and executed, respective parties' contacts with the forum, presence of a forum selection clause, relative means of a party, and contacts relating to the plaintiff's cause of action in the chosen forum.[93]

Although NFL PLAYERS might have minimum contacts with Minnesota, CBS Interactive may have selected this forum solely due to the *C.B.C. Distribution* decision. While CBS Interactive argues that the NFLPA "is an unincorporated association with members who reside in Minnesota and is subject to personal jurisdiction in this judicial district,"[94] this would constitute only 1/22 of the possible states which suit could have been brought against the NFLPA.[95] Unfortunately for CBS Interactive, "[i]f there is any indication that the plaintiff's choice of forum is the result of forum-shopping, the plaintiff's choice will be accorded little deference."[96] CBS Interactive may counter that "even where there is evidence of forum-shopping, a plaintiff's decision to sue in a particular district will not be considered forum-shopping where there are connections between the factors of the case and the chosen forum."[97] All the same, a party is guilty of forum shopping—and forum shopping must be considered as a factor in favor of transfer—if a party "brings an action in a particular district because the Court of Appeals in the circuit encompassing that district had decided a question of law involved in the suit which has not been decided in the transferee district."[98] Thus, forum shopping may weigh heavily against CBS Interactive. Furthermore, "Minnesota does not have an interest in encouraging forum shopping . . . because it frustrates the maintenance of interstate order."[99]

Even though more factors may be considered, CBS Interactive may argue that the NFLPA has contacts within the forum, relevant agreements were negotiated and executed in the state by and through the NFLPA, and CBS Interactive was the first to file. CBS Interactive may also contend that the Southern District of Florida is not a more convenient forum for parties or witnesses. While NFL PLAYERS argues CBS Interactive maintains a business office in the jurisdiction, CBS Interactive's inconvenience is not at issue. This case does not seem to include voluminous amounts of documents or witnesses. Furthermore, the distance to the District Court of Minnesota from NFL PLAYERS principal place of business is 1107 miles, while to the Southern District of Florida, it is 1050 miles—a travel difference of merely 57 miles. Nonetheless, if the court finds that CBS Interactive's forum shopping overwhelms the other considered factors, then 28 U.S.C. § 1406 would control.[100] According to § 1406(a), "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the

[91] 28 U.S.C. § 1404(a) (2006).
[92] 28 U.S.C. § 1404(a); 32A AM. JUR. 2D *Federal Courts* § 1272 (2009).
[93] 32A AM. JUR. 2D *Federal Courts*, *supra* note 92.
[94] CBS Complaint, *supra* note 4, at 15.
[95] Twenty-two states are home to the thirty-two National Football League teams.
[96] 32A AM. JUR. 2D *Federal Courts* § 1276 (2009).
[97] *Id.*
[98] 1A FED. PROC., L. ED. § 1:839 (2009).
[99] Ferris Baker Watts, Inc. v. Deutsche Bank Sec. Ltd., Nos. 02-3682 and 02-4845, 2004 WL 2501563, at *6 (D. Minn. 2004) (citation omitted).
[100] 28 U.S.C. § 1406 (2006).

interest of justice, transfer such case to any district or division in which it could have been brought."[101] If § 1406 controls, keeping in mind the Supreme Court's decisions in *Van Dusen* and *Ferens*, the court will only apply the substantive laws of CBS's choice if the lawsuit was transferred and not dismissed.

VI. FIRST-TO-FILE RULE

While NFL PLAYERS does not directly raise an argument against the District Court of Minnesota's possible application of the "first-to-file rule," it is worth commenting on this possible problem CBS Interactive may face. The "first-to-file" rule is:

> [t]he principle that, when two suits are brought by the same parties, regarding the same issues, in two courts of proper jurisdiction, the court that first acquires jurisdiction usually retains the suit, to the exclusion of the other court. The court with the second-filed suit ordinarily stays proceedings or abstains. But an exception exists if the first-filed suit is brought merely in anticipation of the true plaintiff's suit and amounts to an improper attempt at forum-shopping.[102]

Federal district courts have generally adhered to a first-to-file rule.[103] If a party challenges application of the first-to-file rule, they have the burden to show that special circumstances exist to justify departure from the rule.[104] Such a circumstance exists when the declaratory judgment action has been triggered by a notice letter.[105] This equitable consideration may be a factor in the decision to allow the later-filed action to proceed to judgment in the plaintiffs' chosen forum.[106] However, there is no evidence of a notice letter from NFL PLAYERS or the NFLPA directing CBS Interactive to cease and desist its use of statistics or players' names; there is only evidence that "[t]he Players Association has threatened and continues to threaten CBS Interactive with litigation."[107]

In the Second Circuit, priority is given to the anticipatory filing, as long as it was not "forum shopping alone [that] motivated the choice of the situs for the first suit."[108] Nonetheless, lower federal courts within the Second Circuit rarely find "forum shopping except when the recipient of a demand letter spurns the prospect of settlement and files an anticipatory suit in an effort to pre-empt the threatened action."[109] In *Koch Engineering Co., Inc. v. Monsato Co.*,[110] the Eastern District Court of Missouri dismissed a declaratory judgment suit which was filed in apparent anticipation of suit in another forum. The court, however, based this dismissal on the fact that the anticipatory defendant that filed the declaratory judgment suit "had participated in settlement negotiations for almost two years, and thus, was not dependent on declaratory judgment action for early adjudication."[111] So even if the District Court of

[101] 28 U.S.C. § 1406(a).
[102] BLACK'S LAW DICTIONARY 667 (8th ed. 2004).
[103] Antony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167, 186 (2000).
[104] Hanson PLC v. Metro-Goldwyn-Mayer Inc., 932 F.Supp. 104, 106 (S.D.N.Y. 1996) (citing 800-Flowers, Inc. v. Intercontinental Florist, Inc., 860 F.Supp. 128, 132 (S.D.N.Y.1994)).
[105] *See* Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 219 (2d Cir. 1978).
[106] *Id.*
[107] CBS Complaint, *supra* note 4, at 1.
[108] William Gluckin & Co. v. Int'l Playtex Corp., 407 F.2d 177, 178 (2d. Cir. 1969).
[109] Ryan, *supra* note 103, at 187 (2000).
[110] Koch Engineering Co. v. Monsato Co., 621 F. Supp. 1204 (E.D. Mo. 1985).
[111] *Id.* at 1204.

Minnesota looks to *Koch* or adopts the Second Circuit's examination of first-to-file lawsuits, it would give priority, absent the existence of a demand letter, to CBS Interactive's anticipatory suit.[112]

VII. CONCLUSION

While CBS Interactive's Minnesota lawsuit has various obstacles to overcome before adjudication will occur within the federal courts, it appears CBS Interactive will seemingly avoid a dismissal based on forum shopping. Although forum shopping is labeled by some as an underhanded procedure, it is a strategy of the law which all lawyers employ whenever they file a lawsuit. CBS Interactive is no different from any other plaintiff or anticipatory plaintiff that files suit; it found a forum which afforded it the greatest chance at victory and which arguably has jurisdiction over the case. NFL PLAYERS has the burden to prove otherwise. Both parties can be assured that it will be a hard-fought in-court battle, whichever forum receives this case.

When asked to describe the original fantasy football system, Scotty Stirling, co-creator of the GOPPPL, said, "Competition was fierce. Friendships were destroyed."[113] Stirling went on to explain that "Winkenbach had this trophy made with a wooden football face and a dunce cap on top for the guy who came in last each year. The last-place guy had to keep it on his mantle till the next season, and when you visited his house he damn well better have that trophy up on his mantle or there was trouble."[114]

The outcome of this case between CBS Interactive and NFL PLAYERS/NFLPA remains to be seen, but one thing is certain: competition will be fierce and friendships will be destroyed. While it is unreasonable to anticipate the court awarding Winkenbach's "dunce" trophy to the loser, it might just be an appropriate ending to this fantasy football feud.

[112] The Fifth Circuit Court of Appeals also has developed a six-part test for courts to use when deciding whether to dismiss or assert jurisdiction over a declaratory judgment action in its District Courts. "This test includes at least three factors that appear to be directed at curtailing forum shopping." Algero, *supra* note 82, at 103.
[113] Harris & Kadlec, *supra* note 27, at 10.
[114] *Id.*