

A LICENSE TO PLAY BALL? AN ANALYSIS OF WHY WEBSITE PROVIDERS SHOULD NOT BE SUBJECT TO PROFESSIONAL ATHLETES PLAYERS' ASSOCIATIONS LICENSING CONTRACTS.

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INTRODUCTION

On January 19, 2005, the Major League Baseball Player's Association (hereinafter "MLBPA") agreed to a five year deal, worth over \$50 million with Major League Baseball Advanced Media, the league-owned entity that controls MLB.com. In the deal, MLB Advanced Media received exclusive rights to the league's fantasy baseball games and the online fantasy related rights of all the professional baseball players who signed the Players Union licensing agreement.¹ By obtaining the exclusive online fantasy rights to the MLB players, MLB Advanced Media is permitted to use the players' identities on the internet as the company chooses. However, the biggest impact of the deal is that MLB Advanced Media now controls if, when, and to whom sub-licensee contracts will be granted, thus giving the company substantial power to regulate fantasy baseball leagues across the nation.

For over more than 40 years, virtually every major professional sports player's associations (hereinafter "Associations") have signed licensing agreements with players from their respective leagues.² Once the professional players sign the licensing deal with the Associations, which almost all players do, the Associations may sub-license the players' rights to

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¹ Darren Rovell, *Names, League Marks will be Sublicensed*, ESPN.COM, January 19, 2005, <http://sports.espn.go.com/espn/sportsbusiness/news/story?id=1970454> (last visited November 19, 2005) (may also be accessed by typing the title of the article in at www.google.com).

² *Id.*

others to be used in connection with products, such as cars, cereal, trading cards and video games.³ The players get a percentage of the income generated from the sale of their identities, while the Associations keep the rest of the royalties earned. In return, the Associations are responsible for ensuring that the players receive compensation when identities are used or appropriated by other parties who profit from their personas.

For the players, the source of income they generate from the sub-licensing agreements is negligible compared to their multi-million dollar salaries because they only see a small fraction of the royalty payments collected by the Associations. However, those sub-licensing agreements significantly impact fantasy participants. According to Fantasy Sports Trade Association (“FSTA”), the average fantasy player in 2003 spent \$179 to participate in fantasy baseball, \$161 to participate in fantasy football, and \$118 to participate in fantasy basketball.⁴ The sub-licensing agreements between an online fantasy sports website provider (“Provider”) and the Associations require the Provider to pay a guaranteed annual amount and also a percentage of its “revenue attributable to use by the Licensee of the rights licensed * * * including without limitation subscription, advertising and sponsorship.”⁵ Therefore, fantasy participants are required to pay substantial fees to the Provider because the Provider must generate enough income to meet the Associations’ guaranteed payments, which can be as much as \$100,000 a year,⁶ in addition to their other business operating costs. Besides being required to pay the Associations the guaranteed licensing fee, the Providers must also pay the Associations a

³ *Id.*; see also Darren Rovell, *Bonds will be Individually Licensed*, ESPN.com, November 17, 2003, available at <http://sports.espn.go.com/mlb/news/story?id=1661883> (explaining that in 2003, Barry Bonds became the first union member in the 30-year history of the licensing program not to sign the agreement. He has chosen to sell his licensing rights individually).

⁴ Rovell, *supra* note 1.

⁵ License Agreement between CDM Fantasy Sports, Inc. and National Football League Players Inc., February 5, 2003 (actual license agreement between two parties in current litigation) (on file with the author).

⁶ *Id.* (license agreement stated that CDM was required to make guaranteed royalty payments of \$75,000 for 2003).

percentage of the gross revenue that is attributed to any fantasy services. Those additional royalty fees range from \$150,000 to \$350,000 annually.⁷

The Associations have the responsibility to collect that money from each Provider and to distribute a percentage to the players. When a Provider fails to pay the agreed amount or uses the players' likenesses without permission, the Associations will initiate legal action against the Provider. In the past, the Associations have filed federal copyright claims against the Providers for the non-consensual use of statistics. Due to un-favorable judgments,⁸ the Associations that sue on behalf of the players now bring right of publicity claims – a claim that protects the players from the unlawful use of the players' personas or likenesses.

Right of publicity claims are very effective when individuals use a player's likeness to market products without the player's consent. However, the use of players' names and likenesses by Providers represents considerably different conduct because the Providers are simply publishing the statistical performance of the professional athletes, not using their likenesses. Unlike video games or car advertisements, Providers are not using the players to endorse a product; rather, they are reporting newsworthy facts. "Newsworthy" information is defined in liberal and far-reaching terms, and specifically includes "all types of factual, educational and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general."⁹ Significantly, the First Amendment of the U.S. Constitution protects newsworthy information, and acts as an affirmative defense to a right of

⁷ *Id.* (license agreement required CDM to pay 7.5% of all revenue attributable to fantasy sports activity. Financial numbers show that from September 1, 1999 through November 30, 2003 CDM had total fantasy sales of \$3,649,719 and had income of \$8,611,603 in transactions and other fees. Therefore, CDM was required to pay \$919,598 in subsequent royalties over the four-year period).

⁸ *See Nat'l Basketball Ass'n and NBA Properties, Inc. v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997); *International News Service v. Associated Press*, 248 U.S. 215 (1918); *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663 (7th Cir. 1986).

⁹ *Paulsen v. Personality Posters, Inc.*, 59 Misc.2d 444, 448 (1968).

publicity claim.¹⁰ Because the reporting and publishing of newsworthy material is protected, it seems inequitable, unjust and unnecessary for the Providers to be subject to the Associations' licensing agreements due to the threat of right of publicity claims. The position taken below is that Providers are not legally required to sign the Associations' licensing agreements because the service they report and disseminate newsworthy information; therefore, the Providers should be permitted to freely disseminate professional players' names and statistics.

This article is arranged as follows: Part I discusses the basic premise and historical background for fantasy sports leagues ("Leagues"). Part II will show how Providers administer the Leagues, as understanding the nature and structure of Leagues is critical for why and how the information provided on the websites should not be subject to licensing agreements. Part III discusses a right of publicity claim, the primary legal theory protecting the players' names and likenesses from misappropriation. Finally, Part IV introduces the First Amendment affirmative defense to a right of publicity claim.

FANTASY SPORTS IN AMERICA: 25 YEARS IN THE MAKING

January 2005 marked the 25th anniversary of fantasy baseball, considered by many to be the origin of the growing phenomena known around the world as "fantasy sports." Ten soon-to-be media moguls met inside a Manhattan restaurant named *La Rotisserie Francaise*, where they conducted the first ever fantasy draft.¹¹ That notable group was led by *Sports Illustrated* writer Dan Okrent, Jim Cramer of *MSNBC*, Glen Waggoner and Steve Wulf, the current executive editor of *ESPN, The Magazine*.¹² In preparing for the inaugural event, the men came equipped with their personal knowledge of the game of baseball and their own theories on how to be a

¹⁰ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 571 (1977); *Nat'l Basketball Ass'n and NBA Properties, Inc.*, 105 F.3d at 841; *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 930 (6th Cir. 2003); *Paulsen*, 59 Misc.2d at 448; *Cardtoons v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996).

¹¹ Rovell, *supra* note 1.

¹² MICHAEL LEWIS, *MONEYBALL* 86 (2004); *see also* Rovell, *supra* note 1.

major league general manager. In 1980, computers were just beginning to be modernized and the Internet was still unknown to many outside of academia. Therefore, in conducting the first fantasy season, the “Rotisserie Group” used now primitive means to obtain information – the box-scores from the sports section of the newspaper.

A British-born journalist named Henry Chadwick invented the baseball box-score in 1845 and improved it in 1859.¹³ Chadwick, and other analysts “saw that baseball * * * gave you meaningful things to count, and that by counting them you could determine the value of the people who played the game.”¹⁴ The precise goal of the members of the Rotisserie Group, and all fantasy sports players today, was to master the numbers to determine a player’s worth. The box-score was the essential resource in running the nascent fantasy leagues because it was the only news source to report on the critical facts needed to evaluate players’ performances.

Through the development of computers and the internet, fantasy sports has become a tremendously popular activity for sports fans across the country. Three separate search engines produce more than 30,000 links devoted to Leagues, and according to the FTSA, fantasy baseball alone has become a \$1 billion annual business.¹⁵ Today, many fantasy team managers select a Provider to help them conduct their respective leagues. Corporate powerhouses such as Disney, Yahoo, Viacom, and Time Warner, in conjunction with Sports Illustrated, provide the public with fantasy related features on their respective sports’ websites.

FANTASY SPORTS 101: THE BASICS

To understand the legal arguments, it is essential to understand the nature of Leagues and the services that Providers offer fantasy players. Professor Jack F. Williams described how a typical baseball League runs:

¹³ *Id.* at 69.

¹⁴ *Id.*

¹⁵ Rovell, *supra* note 1.

Friends (who act as team owners) meet (either in person or virtually) to draft existing Major League Baseball players onto their teams. These team owners then act as general managers and manage their virtual team: they make trades, they assign players to the “minors,” and call up players to their active rosters. The lifeblood of the competition is the actual performance statistics of the Major League Baseball players. Each league may employ whatever statistical categories it so chooses, although several services provide ‘off the rack’ protocols as well.¹⁶

Leagues use two basic organizational formats – Rotisserie and head-to-head. Evaluating the players’ statistical performance was the premise that led to the creation of the Rotisserie league. Despite all of the technological developments, current Leagues still follow that same basic model. The Rotisserie concept depends upon certain statistical categories that determine the success or failure of fantasy teams. In professional sports, the ultimate purpose is to win games; whereas, in fantasy sports success is based solely on the numerical performance of the players. The fantasy teams do well when the player’s perform well statistically. At the end of the season, each team looks to see how all of the players performed in each statistical category over the course of the year. The teams then add up the respective performance numbers and the team that finishes with the best total score for the particular category receives ten points. Second place in the category receives nine, with each remaining team receiving their respective number depending on how the team finished in that category. Each team adds up their total category points, and is ranked against the other teams in the league. The team with the highest total is the winner.

The head-to-head format allows two teams from a league to compete against each other directly. Leagues that use the head-to-head format create a schedule at the beginning of the season, randomly matching up the league’s teams with one another. Typically, stats are compiled for a designated period of time – usually a week. The team that totals the most points in the selected categories earns the victory for that week. The following week each team gets

¹⁶ Jack F. Williams, *Who Owns the Back of a Baseball Card? A Baseball Player’s Rights in his Performance Statistics*, 23:5 1705, CARDOZO L. REV. 1705, 1707-1708 (2002).

matched-up against a different opponent. At the end of the regular season, the teams with the best records advance to the playoffs, and that same basic formula continues.

As can be seen by the nature and makeup of Leagues, the main service that Providers offer their subscribers is the efficient and timely reporting and publishing of the players' statistical performances. Fantasy team performances directly correlate with the players' statistical data, which is undoubtedly newsworthy, and in no way does the Provider or the participant alter, modify or distort the real-life public events that took place.

THE RIGHT OF PUBLICITY: AN INDIVIDUAL'S PROPRIETARY INTEREST IN THEIR PERSONALITY

“The right of publicity is the inherent right of every human being to control the commercial use of his or her identity.”¹⁷ Every person possess the right of publicity, but the right is more valuable to celebrities “as it is illegal under the right of publicity to use without a license the identity of a real person to attract attention to an advertisement or product,”¹⁸ and it is unlikely that the average person will attract attention to a product. As one scholar explains, “the right of publicity protects athletes' and celebrities' marketable identities from commercial misappropriation by recognizing their right to control and profit from the use of their names and nicknames, likeness, portraits, performances (under certain circumstances), biographical facts, symbolic representations.”¹⁹

To fully understand the Associations' valid prima facie claim and the subsequent First Amendment affirmative defense analysis, it is important to review the history and the evolution of the right of publicity. In 1953, Judge Jerome Frank first coined the term “right of publicity.”²⁰

¹⁷ J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 28:3, at 28-4 (1996).

¹⁸ J. Thomas McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 130 (1995).

¹⁹ Pamela Edwards, *What's the Score? Does the Right of Publicity Protect Professional Sports Leagues?*, 62 ALB. L. REV. 579, 581 (1998).

²⁰ *Haelan Labs. v. Topps Chewing Gum*, 202 F.2d 866, 868 (2d Cir. 1953).

In *Haelan*, two chewing gum manufacturers used a photograph of a baseball player in connection with the sale of bubble-gum. The plaintiff had a contract with the baseball player guaranteeing that his chewing gum company had the exclusive right to use the player's photograph in association with the product. The defendant knew of the player's exclusive contract with the plaintiff, yet successfully convinced the player to permit continued use of his photograph to sell the defendant's gum. The defendant argued that even though the baseball player had a contract with the plaintiff, there was in fact no legal claim against the defendant, as the privacy right involved was personal, belonging to the baseball player, and could not be assigned to the plaintiff.²¹ The court ruled against the defendant, and was the first court to promulgate a right of publicity claim, carving it out as a property right rather than a privacy right.²² The court stated that,

In addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross,' i.e., without an accompanying transfer of a business or of anything else. . . . This right might be called a 'right of publicity.' For it is common knowledge that many prominent persons (especially actors and ball-players) . . . would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains, and subways.²³

Even after the prominent *Haelan* holding, most courts across the country failed to view right of publicity as a property right. Rather, most courts adopted the view promulgated by Dean William Prosser, in *Handbook of the Law of Torts*, which considered the right of publicity to be a privacy tort.²⁴ Prosser included the right of publicity in his four categories for invasion of privacy, often cited as "Four Torts of Privacy:"²⁵

1. Intrusion upon the plaintiff's physical solitude;

²¹ *Haelan Labs*, 202 F.2d at 867.

²² *Id.* at 868.

²³ *Id.*

²⁴ MCCARTHY, *supra* note 17, at 28-7.

²⁵ *Id.*

2. Public disclosure of embarrassing private facts;
3. Placing the plaintiff in a false light in the public eye; and
4. Appropriation for commercial benefit of the plaintiff's name or likeness.²⁶

The distinctions between privacy rights and property rights are crucial. Where privacy rights are considered personal rights or liberty interests, publicity rights are considered property rights or property interests. In right of privacy claims, injury occurs when there is an invasion of privacy, which is determined by “mental distress.”²⁷ In comparison, Professor McCarthy explained that damage in right of publicity claims is commercial injury to the business value of one's personal identity.²⁸ That distinction is significant when dealing with fantasy sports, as the use of a player's name and likeness without his permission does not create mental distress to the athlete, and thus there would be no damages if he tried to assert a right of privacy claim.²⁹ However, because the right of publicity is now widely considered a property right, the athlete is able to contend that when someone uses his image or likeness for a commercial benefit without his permission or compensation then he has suffered a pecuniary loss.

It was not until 1977, when the United States Supreme Court explicitly held that right of publicity was an entirely different cause of action than a right of privacy claim.³⁰ In *Zacchini v. Scripps-Howard Broad. Co.*, the Court held that “the State's interest in permitting a ‘right of publicity’ is in protecting the proprietary interest of the individual in his act, in part to encourage such entertainment. As we later note, the state's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his

²⁶ *Id.*

²⁷ McCarthy, *supra* note 18, at 134.

²⁸ *Id.*

²⁹ MCCARTHY, *supra* note 17, at 28-7.

³⁰ *Zacchini*, 433 U.S. at 571.

endeavors and having little to do with protecting feelings or reputation.”³¹ After *Zacchini* no question remained regarding the interest at issue in a right of publicity claim.

Appropriately, in 1995 a right of publicity claim was included in the Restatement (Third) of the Law of Unfair Competition, thereby firmly establishing that it was separate from right of privacy.³² The current version of the Restatement defines right of publicity as follows:

One who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate under the rules stated in §§ 48 and 49.³³

Importantly, the Restatement authors suggest that courts may justifiably be reluctant to adopt a broad construction of the right.³⁴ Section 46, Comment c, provides that

The commercial value of a person’s identity often results from success endeavors such as entertainment or sports. . . . Any additional incentive attributable to the right of publicity may have only marginal significance. In other cases the commercial value acquired by a person’s identity is largely fortuitous or otherwise unrelated to any investment made by the individual, thus diminishing the weight of the property and unjust enrichment rationales for protections. . . . Thus, courts may be properly reluctant to adopt a broad construction of the publicity right.³⁵

The view taken by the Restatement commentators particularly supports the Providers in a defense against the Associations’ licensing agreements. The ability of the Providers to make a subsequent profit off the individualized reporting of the professional athletes’ real-world performances for fantasy purposes is analogous to the “additional incentive” and “fortuitous” benefit addressed by the Restatement commentators.³⁶

Implicit in the Restatement commentators’ comment is another significant result of the right of publicity evolving into a property right. The commentators felt that the right of publicity should be limited and given narrow construction because property interests are treated

³¹ *Id.* at 573.

³² RESTATEMENT (THIRD) OF THE LAW OF UNFAIR COMPETITION § 46 (1995).

³³ *Id.*

³⁴ *See id.* § 46 cmt. c. (1995); *see also* ETW Corp., 332 F.3d at 930.

³⁵ *See* RESTATEMENT, *supra* note 32, at § 46.

³⁶ *Id.*

considerably different than liberty interests.³⁷ In fact, the United States Supreme Court has held that the two interests receive different constitutional protection and that one's property interest can be trumped more easily by a legitimate public interest than one's liberty interest.³⁸ Those developments are particularly important when examining the First Amendment and how it provides a defendant with an affirmative defense against a right of publicity claim by a player.

The right of publicity is a state law claim and can be established by statute or common law. As of 2001, at least twenty-eight states recognize some form of a right of publicity claim.³⁹ Of those twenty-eight states, ten recognize the claim by common law and eighteen by statute.⁴⁰ Each state's cause of action varies slightly but the basic premise remains consistent. Professor J. Thomas McCarthy provides a clear and concise definition of the right of publicity, he states that in order to make out a prima facie case for a violation of the right of publicity, the moving party must prove the following elements:

1. **Validity.** Plaintiff owns an enforceable right in the identity or persona of a human being
2. **Infringement.**
 - a. Defendant without permission, has used some aspect of identity or persona [of the plaintiff] in such a way that plaintiff is identifiable from defendant's use.
 - b. Defendant's use [of plaintiff's identity or persona] is likely to cause damage to the commercial value of that [identify or] persona.⁴¹

McCarthy explains that "identifiability" is the key test to determine whether one's right to publicity has been infringed.⁴² His test only requires that a handful of "ordinary viewers

³⁷ See *U.S. v. Place*, 462 U.S. 696 (1983) (demonstrates how the Court allows authorities more flexibility when depriving an individual of their property rights, as compared to their privacy rights in a criminal procedure context); *Fla. v. Royer*, 460 U.S. 491 (holding that once the police action affected the defendant's liberty interest, the action was more intrusive, as compared to the temporary seizure of his property which was permitted).

³⁸ *Id.*

³⁹ J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 6:3 (2d ed. 2000).

⁴⁰ *Id.* at § 9:18.

⁴¹ MCCARTHY, *supra* note 39, at § 3:1; *cf.* *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1279 (D. Minn. 1970).

looking at, or listening to the defendant’s advertisement, [be able] to identify the plaintiff.”⁴³ If the plaintiff is identified or recognized by the ordinary person, the defendant violated the first prong of the infringement element. McCarthy’s “identifiability” test has been adopted by many jurisdictions across the country⁴⁴ and is crucial in proving a right of publicity cause of action.

Although this article contends that the Providers should not be subjected to licensing agreements, it is evident that the Associations have a prima facie right of publicity claim against Providers that do not sign the licensing agreements, but use the players’ statistics on their websites. As stated earlier, the first element only requires that the players’ own an enforceable right in their identity.⁴⁵ Therefore, because “everyone has an inherent right to control the commercial use of their identity,”⁴⁶ the mere use of the professional athletes’ names by the fantasy sports websites satisfies this element.

The first part of element two, which generally requires the most complex analysis, is whether the Providers’ use of the players’ names and statistics makes the players’ identifiable.⁴⁷ It is evident that the Providers’ use of the players’ name and statistics would lead a reasonable person to identify the name and statistics listed on the website with the professional athletes’ persona. Using someone’s name is the most simplistic way of having their persona linked to a product, as names are unique and explicitly create the connection between the player and the website. The fact that individualized statistics are listed in conjunction with the names only

⁴² McCarthy, *supra* note 18, at 135.

⁴³ *See id.*

⁴⁴ Hirsch v. S.C. Johnson & Sons, Inc., 280 N.W. 2d 129, 137 (1979) (holding that if the figure is recognizable, there will be a cause of action); *see also* Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978) (noted that recognition is of the individual will determine if there has been a right of publicity violation); Motschenbacher v. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974) (a level of recognition is necessary to violate a person’s right of publicity).

⁴⁵ MCCARTHY, *supra* note 17, at 28-4.

⁴⁶ *Id.*

⁴⁷ McCarthy, *supra* note 18, at 135; Laura Lee Stapleton & Matt McMurphy, *The Professional Athletes Right of Publicity*, 10 MARQ. SPORTS L.J. 23 (1999).

reconfirms the identity of the professional player. Furthermore, if the Providers do not sign the Associations' licensing agreements, nor have permission from the athletes who choose not to contract with the Association, then the Provider will use the players' identities without permission will violate the "permission" requirement.⁴⁸

The players' pecuniary damage resulting from unauthorized use of their personas constitutes the final element of a right of publicity claim.⁴⁹ The use of players' names and statistics clearly increases the commercial value of the service that the Providers sell. By offering subscribers both computer software and players' names and statistics, the Providers offer a commercially viable product. When combined, both services attract more users to the website, which in turn allows them to generate more advertising revenue – the Providers' main source of income. Therefore, the players' names and statistics clearly have an economic benefit to the Providers. And because the use of the players' names and statistics increases the attractiveness and the marketability of the website, those attributes undoubtedly have a monetary value to the players, thus satisfying the final element of a prima facie claim of right of publicity.

THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION: "OFFENSE WINS GAMES BUT DEFENSE WINS CHAMPIONSHIPS" (AND LAWSUITS)

Case law provides that a right of publicity claim is limited when the scope of the subject matter is considered of "public interest" or "newsworthy" information,⁵⁰ as the First Amendment protects a person's right to freedom of expression. To determine whether the unauthorized use of a person's identity is lawful, a court balances the individual's right of publicity claim with the policy of free speech that the public has an interest in having information disseminated freely.⁵¹

⁴⁸ *Haelan Labs*, 202 F.2d at 868; MCCARTHY, *supra* note 39, at § 3:1.

⁴⁹ MCCARTHY, *supra* note 39, at § 3:1.

⁵⁰ *Zacchini*, 433 U.S. at 571; *Nat'l Basketball Ass'n.*, 105 F.3d at 841; *ETW Corp.*, 332 F.3d at 930; *Paulsen*, 59 Misc.2d at 448; *Cardtoons*, 95 F.3d at 959.

⁵¹ *Paulsen*, 59 Misc.2d at 448.

Under that analysis, the right of publicity cannot prevent the use of someone’s name or picture from being used in news reporting.⁵² Therefore, freedom of speech and of the press, as protected by the First Amendment, acts as an affirmative defense and limits a right of publicity claim.⁵³

In *Zacchini*, the Supreme Court began to formulate the First Amendment defense available to a defendant charged with violating a person’s right of publicity.⁵⁴ The Court commented that if the TV station had “merely reported that the petitioner was performing at the fair and described or commented on his act, with or without showing his picture on television, we would have a different case.”⁵⁵ The plaintiff did not contend that his appearance at the fair and his performance could *not* be reported by the press as newsworthy items. Rather, the plaintiff argued that the television station filmed his *entire* act and displayed that film on television for the public to see – an appropriation of his professional property.⁵⁶ The Court agreed with plaintiff’s contention, but in the process laid the foundation for a First Amendment defense to a right of publicity claim. That holding clearly does not prohibit the TV station from reporting on the event, it only narrowly prohibited the TV station from showing the *entire* performance.

The Supreme Court has not reviewed a right of publicity case since *Zachinni*, but state and federal courts have expanded the First Amendment defense expressed in *Zacchini*. “Public interest” or “newsworthy” items are defined in liberal and far-reaching terms, and specifically include “all types of factual, educational and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general.”⁵⁷ One court has held

⁵² *Paulsen*, 59 Misc.2d at 448; MCCARTHY, *supra* note 39, at 8:46.

⁵³ *Zacchini*, 433 U.S. at 571; *Nat’l Basketball Ass’n.*, 105 F.3d at 841; *ETW Corp.*, 332 F.3d at 930; *Paulsen*, 59 Misc.2d at 448; *Cardtoons*, 95 F.3d at 959.

⁵⁴ *Zacchini*, 433 U.S. at 562.

⁵⁵ *Id.* at 569.

⁵⁶ *Id.*

⁵⁷ *Paulsen*, 59 Misc.2d at 448.

that “even where the ‘right of publicity is recognized, it does not invest a prominent person with the right to exploit financially every public use of his/her name or picture.”⁵⁸ Therefore, when such use of a prominent person’s name or image is constitutionally protected, the protected use will trump any private pecuniary interest, which might be protected by a property right of publicity.⁵⁹

In *ETW Corp. v. Jireh Pub., Inc.*, the court reviewed *Zacchini* and stated that a court would be “inclined to give substantial weight to the public interest in freedom of expression when balancing it against the personal and proprietary interests recognized by the right of publicity.”⁶⁰ The court found that there was “an inherent tension between the right of publicity and the right of freedom of expression under the First Amendment.”⁶¹ Ultimately the court concluded that an artist’s sale of his painting, which depicted Tiger Woods’ 1997 victory at the Masters Tournament in Augusta, Georgia, did not violate Tiger Woods’ right of publicity. The court held that Tiger Woods had an interest in his picture but the artist’s work was protected by the First Amendment because it depicted a newsworthy public event.⁶²

In ruling in favor of the artist in *ETW Corp.*, the court used a variation of McCarthy’s test for determining whether speech is protected by the First Amendment. In response to *Zachinni* and other prominent cases⁶³ that have held that the reporting of newsworthy events was not subject to a right of publicity claim, McCarthy developed a test for deciding whether the speech

⁵⁸ *Id.* at 450.

⁵⁹ *Id.*

⁶⁰ *ETW Corp.* 332 F.3d at 931.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Zacchini*, 433 U.S. at 571; *Nat’l Basketball Ass’n.*, 105 F.3d at 841; *ETW Corp.*, 332 F.3d at 930; *Paulsen*, 59 Misc.2d at 448; *Cardtoons* 95 F.3d at 971-972 (holding that the parody sports cards were not commercial speech and were protected by the First Amendment); *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407 (9th Cir. 1996) (holding that the newsworthy use of the basketball player’s name was only incidental to the conveyance of newsworthy information); *Shamsky v. Garan, Inc.*, 632 N.Y.S.2d 930 (1995) (holding that there was no dissemination of newsworthy information, thus a right of publicity violation).

would be protected by the First Amendment. He explained speech generally falls into one of two categories: commercial speech or communicative speech.⁶⁴ Communicative speech is a valid defense to a right of publicity claim, as First Amendment policy supports the free dissemination of this form of information and predominates over the right of the person to his identity.⁶⁵ On the other hand, commercial speech will not be protected by the First Amendment, and while there may be overtones of ideas being communicated, the desire for pecuniary gain is the primary purpose of the speech.⁶⁶

One of the earliest cases that recognized a right of publicity claim as a property right also provided a practical definition for commercial speech.⁶⁷ *Uhlaender v. Henricksen* is frequently used by Associations to allege a right of publicity violation because the activity alleged by the Players Association in that case was held to violate the Association's right of publicity. The court determined that the product was predominantly commercial as compared to communicative, and thus not subject to First Amendment protections.⁶⁸ That case involved a suit initiated by several professional baseball players and the MLBPA against a baseball board game manufacturer.⁶⁹ The plaintiffs argued that the manufacturer violated the group's right of publicity by creating the board game and using the professional baseball players' names and images in conjunction with the product. The court held that "a celebrity has a legitimate proprietary interest in his public personality * * * [t]hat identity, embodied in his name, likeness, statistics and other personal characteristics, is the fruit of his labors and is the type of property."⁷⁰ Finally, the court stated that "a name is commercially valuable as an endorsement of a product or

⁶⁴ MCCARTHY, *supra* note 17, at § 28-50.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Uhlaender*, 316 F. Supp. at 1277.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 1282.

for use for financial gain only because the public recognizes it and attributes good will and feats of skill or accomplishments of one sort or another to that personality.”⁷¹ The court’s holding shows that the use of the players’ names was undoubtedly commercial in nature, as the names were used to endorse the manufacturer’s product.

In a pending lawsuit involving CDM Fantasy Sports, Inc., a Provider, and National Football League Players Association, Inc., *Uhlaender* is prominently cited by the NFLPA in support of the claim that CDM’s use of the NFL players with its fantasy website is a right of publicity violation.⁷² The NFLPA claims that *Uhlaender* supports its right of publicity claim because in both situations the players’ statistics and names are used to determine performance and the forum provided by the Provider is synonymous to the board used in the board game manufactured by the defendant in *Uhlaender*.⁷³ Essentially, the NFLPA alleged that the fantasy website is a commercial activity that should not be protected by the First Amendment.

Even though the Provider’s website acts as a forum for users to receive information and interact with other participants, similar to a playing board, the website is easily distinguishable from the board game in *Gridiron.com v. NFLPA*. Where the activity in *Gridiron.com* was commercial, the behavior of the Providers in the NFLPA’s present challenge is communicative due to the way in which the players’ names and statistics are utilized by the Provider. In board games, the manufacturer has *created* a fictional playing field. The manufacturer created players and pre-determined how they will perform in the game scheme. All of the players in the game had an artificial value that is solely determined by the game creator who used the professional athletes’ past statistics and attributes in determining their game value. Essentially, the players in

⁷¹ *Id.* at 1283.

⁷² Memorandum of Law in Support of Plaintiffs’ Motion to Dismiss Defendant’s Counterclaims, Nat’l Football League Players Ass’n v. CDM Fantasy Sports, Inc., No. 04 Civ. 04536 (S.D.N.Y. June 16, 2004).

⁷³ *Id.*

the game are the playing pieces and most are similar to the images in video games, items that are subject to licensing agreements. The attributes and values of players in the game are the creator's "product" and by assigning the professional athletes' names to those players, the creator is using the players' likeness to endorse the product. Subsequently, that endorsement makes the creator's vision more commercially valuable in the marketplace. That endorsement benefit is no different than a car manufacturer using a celebrity to help sell a new car. Both manufacturers have created and designed a product, and attached the famous name or face to that product in order to increase interest. Furthermore, the statistics used in a board game are fixed and provide a minimal amount of newsworthy information, as the board-game is only able to provide the consumer with past player statistics. That information is similar to what is provided on trading-cards, another form of media that is subject to licensing agreements. The result in *Uhlaender* appeared correct, but should not be extended to fantasy sports.

In comparison, Providers do not sell their users a game *per se*, but rather an individualized news reporting service. A Provider's primary service offers users the most current updates on player performance. That feature creates a bright-line distinction between a website and a board game because the First Amendment protects the reporting of sporting events, just like all other public events, and should not be subject to licensing agreements. At no time do the Providers or the participants make an artificial rating determination of the professional athletes, as is done by the creator of a board or video game. Instead, the Provider merely reports player performance statistics, and the subscriber uses that objective and free information to evaluate his knowledge of the sport. At no time does the Provider manipulate the players' statistical performances in order to create a playing piece, as is done by the video game creators. Instead, whatever takes place on the playing field is reported onto the website. Clearly,

the fantasy participants make their own value judgments with regard to the professional athletes. However, that value is determined by the professional players themselves, rather than the creator of the League, as their performance dictates their value to the fantasy participants.

TIE-BREAKER: WHAT MEDIUM IS USED TO REPORT THE NEWS?

As commercial speech will not generally invalidate a right of publicity claim, communicative speech remains a valid defense. The medium used has a significant impact on determining whether the speech is protected.⁷⁴ Newspapers or other news sources, which provide subscribers with the details of public events, provide the most likely candidates for First Amendment protection because those mediums are typically considered communicative rather than commercial.⁷⁵

The development of computers and the advent of the internet revolutionized how news gets reported and published. Similarly, these developments are invaluable to the growth of fantasy sports. Brad Morris, a leading writer and commentator in the field concurred with that conclusion when he exclaimed, “[f]antasy baseball and the [i]nternet – a marriage made in heaven.”⁷⁶ The impact of development led to two fundamental attributes which have materialized into an estimated fifteen million fantasy sports participants in the U.S.⁷⁷ Besides making fantasy sports an incredibly popular activity and a multi-billion dollar business, those attributes directly dispel the right of publicity claim made by the Associations. The medium being used by the Providers to report on the newsworthy events (the website) is legally no different than a traditional newspaper.

⁷⁴ MCCARTHY, *supra* note 17, at 28-50.

⁷⁵ Paulsen, 59 Misc.2d at 448.

⁷⁶ Telephone Interview with Brad Morris, Writer, Director and Producer (March 3, 2005).

⁷⁷ Rovell, *supra* note 1.

Courts have given newspapers considerable protections when dealing with right of publicity claims. In *Montana v. San Jose Mercury News, Inc.*, a newspaper reproduced the front page picture of the “Souvenir Section” of football legend Joe Montana into a poster, which it sold to the general public for \$5 a piece.⁷⁸ Montana filed a right of publicity claim against the newspaper, not for the original publication of Montana’s picture, but rather for the subsequent sale of the posters to the public. The court held that no right of publicity action existed for the “publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it,” and added that the freedom also covered the reproduction of past events.⁷⁹ Most significantly, the court addressed the subsequent sale of the posters to the general public and decided that the First Amendment protected such commercial activity because Montana’s name and likeness “appeared in the poster for precisely the same reason they appeared on the original newspaper front pages – Montana was a major player in a contemporaneous newsworthy sports event.”⁸⁰ Thus, even though the newspaper had a pecuniary interest in selling the posters of Joe Montana, the court ruled that because the original publication was primarily communicative, the additional act the same and deserved the same First Amendment protection.⁸¹

The internet is the major source of news-reporting in contemporary society and should receive the same degree of constitutional protection. The first and most significant news reporting advantage of the internet for Leagues is the speed at which information is provided to participants. Participants no longer have to wait to read the morning paper, or receive a weekly mailing of the League’s standings in order to see how their players performed the night before.

⁷⁸ *Montana v. San Jose Mercury News, Inc.*, 34 Cal.App. 4th 790 (1995).

⁷⁹ *Montana*, 34 Cal.App.4th at 793; *see also* *Dora v. Frontline Video, Inc.*, 18 Cal.Rptr.2d 790 (1993).

⁸⁰ *Montana*, 34 Cal.App.4th at 794.

⁸¹ *Id.*

The Providers can collect, report and post information seconds after it occurs onto websites that provide real-time statistical updates and instantaneous calculations for users to view. Professor Williams wrote that “the center of the fantasy league concept is access to real life/real time performance statistics. Without access to these actual performance statistics and the names of the players, [fantasy baseball] loses its real feel.”⁸²

The ability of Providers to provide this service to subscribers is crucial in the right of publicity analysis, as the Provider’s primary benefit to subscribers is the ability to report the most current news as it occurs in the sporting world. In essence, the Providers provide an instantaneous news source or news wire. The Providers’ capability to disseminate the statistics to subscribers is no different than what a newspaper does by providing daily box scores. The only difference is that the Providers are able to do it much quicker and more efficiently. All the Provider publishes on its website is statistical facts from professional games, analogous to the contents of a newspaper. Just as the newspaper, which publishes the box score, is not required to pay royalties to the Associations, neither should the Providers be required to do so. The fact that the internet’s capabilities are greater than that of a printed newspaper should not affect how this news medium is treated in the First Amendment analysis. The primary function of both mediums is to report the news, an activity which is undoubtedly communicative in nature. Therefore, the dissemination of this information should be protected equally.

The Providers’ ability to incorporate a computer software program, which organizes the pertinent information in an individualized manner, into the reporting function provides subscribers with individualized reports of pertinent facts. By implication, when subscribers sign up to use the Provider’s services, he is directly telling the Provider which news he wants and exactly how he wants to receive the information. The fact that a website is capable of providing

⁸² Williams, *supra* note 16, at 1708.

this newsworthy information to subscribers in a fast and personalized manner should not detract from the main nature of its service, which is to provide the public with communicative news-related information.

In *Gridiron.com*, the plaintiffs operated a website that provided its users with a number of football-related features.⁸³ The most significant feature of the website was a shopping link that allowed the public to purchase player endorsed items, such as memorabilia, apparel and novelty items. Also available on the website was a fantasy football option. The NFLPA argued that the entire website was a right of publicity violation, while the website operators argued that their conduct was protected expression. The court recognized that the First Amendment defense existed, but still rejected the operators' argument, stating that the website paid the professional players to endorse the services and products, which directly attracted third-party advertisements. This behavior was clearly outside the scope of First Amendment protection.⁸⁴ Most significantly, the court stated that “[Gridiron.com] seeks to utilize the players it contracts with to use their images and have them perform functions that go beyond merely conveying news.”⁸⁵ The contracts between Gridiron.com and the players to endorse the sales of merchandise on the website was an explicit violation of the players' licensing agreements. Therefore, the court never decided whether the fantasy football feature was permitted, as the merchandise store element was clearly commercial in nature and a contract violation.

In comparison, the reporting in *Montana* and the artistic work in *ETW* were both deemed to be protected communicative speech. Those holdings, the underlying rationale used by the courts in *Gridiron.com* and *Uhlaender*, and Professor McCarthy's First Amendment test clearly

⁸³ *Gridiron.com, Inc. v. NFLPA*, 106 F. Supp. 2d 1309 (S.D. Fla. 2000). Notably, the website contracted with 150 NFL football players to *endorse* the website – contracts that violated the players' licensing agreements with the NFLPA.

⁸⁴ *Id.* at 1315.

⁸⁵ *Id.*

demonstrate that the Providers have a successful First Amendment defense to the Associations' claim of right of publicity. The primary purpose of the Providers' services to is to give subscribers the most instantaneous statistical updates. That conduct is unmistakably communicative in nature, as the information reported is precisely the type of material that is protected by the First Amendment. As was stated earlier, the use of the athletes' names and statistics makes a Provider's service more valuable, but such a pecuniary benefit is simply incidental. Just as a newspaper would sell fewer papers if it was not permitted to use the names or pictures of celebrities in its stories, the same would be true for the Providers' websites. Referring back to the Restatement commentators' comment, that incidental benefit derived from the athletes' celebrity status is fortuitous and is easily trumped by the newsworthy nature of the material being reported.

The Providers' incidental pecuniary benefit is significantly *less* commercial in nature than the behavior exhibited in *Montana* and *ETW*.⁸⁶ In *Montana*, the newspaper merely published local news stories; whereas, the Providers report on professional athletes' statistical performances. Furthermore, just as the court held that the subsequent commercial endeavor on the part of the newspaper to sell posters for a monetary gain was incidental and done for the "same purpose" as the original production of the article,⁸⁷ the same holds true when analyzing the Providers' actions. Providers report news, just like a newspaper, radio program, or television broadcast. They offer subscribers the ability to customize the way that news is received, thus providing subscribers with added features, all of which enhance the primary service: *to report on*

⁸⁶ *Montana*, 34 Cal.App.4th at 790; see *ETW Corp.* 332 F.3d at 915.

⁸⁷ *Id.* at 795.

newsworthy occurrences. Unlike the newspaper in *Montana*, which tried to capitalize on a single occurrence to increase its profits,⁸⁸ the Providers provide an ongoing service.

In arguing that the commercial benefit from the players is more than incidental, the Associations will undoubtedly try to focus on the *Gridiron.com* holding.⁸⁹ At first, *Gridiron.com* appears to provide overwhelming support for the Associations, as *one* of the services provided by *Gridiron.com* was the ability for its users to participate in fantasy football on the website.⁹⁰ However, the *Gridiron.com* holding does not strengthen the Associations' claim. In reality, that holding merely provides that contracts with professional athletes who are already under contract with their Association violates the Associations' rights as an exclusive licensee. Most importantly, *Gridiron.com* says nothing about whether the dissemination of statistics used in association with fantasy sports is a right of publicity violation. The fantasy football option on the website was incidental to the main purpose of the website, which was to sell NFL memorabilia, apparel and novelty items. Therefore, because *Gridiron.com* unlawfully contracted with the NFL players to endorse the *entire* website, which included a fantasy football option, the *entire* website violated the NFLPA's rights according to the licensing agreements with its players. The majority of Providers do not contract with professional athletes and do not impermissibly use players' images to endorse products, thus, the vast quantity of Providers are clearly distinguishable from *Gridiron.com*.

Gridiron.com recognized the validity of the First Amendment defense, as long a party conveys newsworthy information to the public. Objective statistics are undoubtedly newsworthy information, and the Providers do not use the players' likeness as an endorsement in a way that is any different than a newspaper would; thus, the court's rationale in *Gridiron.com* actually

⁸⁸ *See id.*

⁸⁹ *Gridiron.com, Inc.*, 106 F. Supp. 2d at 1309.

⁹⁰ *Id.*

supports the Providers' defense. Therefore, since the Providers' individualized and specialized reporting of the professional athletes' statistical performances is behavior that is protected under the First Amendment, the Providers should not be legally required to sign the Associations' sub-licensing contracts.

CONCLUSION

The preceding discussion has provided a thorough analysis of the current problem existing between online fantasy sports providers and professional player's associations; namely, whether the providers should be required to pay the Associations for disseminating players' statistics on their online fantasy websites. Almost invariably, the Associations will not have much trouble establishing a prima facie right of publicity claim. However, courts have become more comfortable applying a First Amendment affirmative defense against such right of publicity claims when the challenged conduct is newsworthy in nature. Because players' statistics arguably constitute newsworthy information, the First Amendment should trump the Association's right of publicity claim in the fantasy sports context. As a result, the courts and the Providers should take note that sub-licensing agreements and exorbitant royalty fees de facto are not legally required.

Based on the foregoing analysis, it is clear that the internet has had a drastic effect on how news gets reported. That technological development does not change the fact that the material being reported and published online, is the same as what is printed on the printing presses. Just as its printed material is deemed to be newsworthy under the First Amendment, so should the statistical information which is being reported online for fantasy sports purposes.