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## THE LEGAL GAME BEHIND FANTASY SPORTS: COPYRIGHT PROTECTION AND THE RIGHT OF PUBLICITY IN PROFESSIONAL PERFORMANCE STATISTICS

### I. INTRODUCTION

In 1866, Charles A. Peeverly wrote, “The game of baseball has now become beyond question the leading feature of the outdoor sports of the United States...It is a game which is peculiarly suited to the American temperament and disposition...in short, the pastime suits the people, and the people suit the pastime.”<sup>1</sup>

Attracting nearly seventy-five million fans in attendance alone in 2005, Peeverly’s observation remains as true today as it did in 1866.<sup>2</sup> With baseball being labeled “America’s national pastime” and “as American as apple pie,” it is far from surprising to see a dramatic increase in online games, such as fantasy baseball, considering the American public’s fascination with the sport. Accordingly, Major League Baseball (“MLB”) has increasingly sought to capitalize on the fans’ fascination with the game and channel it into a source of revenue. From game day internet broadcasts to online baseball arcades, the modern day baseball fan can experience the thrill of baseball in ways the fans of the Stan Musial, Babe Ruth or Bob Gibson eras could never imagine. This interactive and modern day experience, however, has not come without its headaches.

Nearly four million Americans currently play the cyber version of baseball, and an estimated twelve million more fans play other online fantasy sports games.<sup>3</sup> Originating from a grassroots hobby nearly a quarter century ago, fantasy baseballers now spend an average of \$175 million annually which makes fantasy baseball a highly-competitive, \$1 billion industry.<sup>4</sup> Fantasy baseball literally allows fans to become general managers of their own virtual

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1. Baseball Almanac, Home Page, *available at* <http://www.baseball-almanac.com/> (last visited Jan. 20, 2007).

2. Baseball Almanac, National League Attendance in 2005, *available at* <http://www.baseball-almanac.com/charts/attendance-nl/attendance-nl2005.shtml> (last visited Jan. 20, 2007).

3. Greg Auman, *Baseball Looking to Recapture Imaginations*, ST. PETERSBURG TIMES, Feb. 17, 2005, at C2.

4. Greg Johnson, *Suing Over Statistics*, LOS ANGELES TIMES, Jan. 2, 2006, at D1; Tresa Baldas, *Taking Statistics: Does Major League Baseball Own Player Statistics? Some Say It's a Fantasy*, IP. L. & Bus., Apr. 2005, at 10.

baseball teams. Fans can draft existing Major League Baseball players onto their virtual teams, and then conduct trades, pick up free agent players from the free agent pool and even decide who to play. This entire fantasy world is centered on the ballplayers' real life performance statistics which fantasy providers gather and input into online databases. It is ownership of these statistics that has lead one online fantasy sports provider to challenge whether anyone can own professional performance statistics.

Part II of this article explores the history behind copyright protection for historical facts and factual compilations. Part III of this article will discuss the historical origins for the right of publicity and focus on two main elements of the right of publicity: identity and exploiting that identity through a commercial use. Part III also focuses on the public interest exception to using one's identity for a commercial use. Part IV of this article concludes that baseball statistics, as used in the fantasy sports world, are not copyrightable as factual compilations because the originality in selection and arrangement in fantasy sports databases does not satisfy the minimum level of creativity to afford copyright protection. Part IV also concludes a professional performance statistic is not a part of one's identity because the nature of the baseball statistic is raw, statistical data within the public domain constituting mere bits of baseball history. Even further, Part IV concludes that a third party can commercially exploit baseball statistics because the history of baseball demands a substantial public interest.

#### A. *MLB/MLBPA Licensing Agreement*

On January 19, 2005, the Major League Baseball Players Association ("MLBPA") and Major League Baseball Advanced Media ("MLBAM") entered into a five year, \$50 million exclusive agreement that allows MLB to exploit and market the personal attributes of the players' through interactive media.<sup>5</sup> This agreement also provides the MLBAM with the exclusive rights to use and to sublicense to others the rights of MLB players for the development and creation of online games, as well as all wireless applications including cell-phone enabled games.<sup>6</sup>

By entering into this agreement, MLB is seeking to begin a dramatic reworking of its own online fantasy games to narrow the gap between the steadily increasing fantasy baseball market and the surging interest in fantasy football.<sup>7</sup> This renovation includes adding video highlights, wireless

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5. Auman, *supra* note 3; *see also* Complaint at 4, C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, 443 F. Supp. 1077 (E.D. Mo. 2005).

6. *See* Complaint, *supra* note 5, at 4.

7. *See* Auman, *supra* note 3. It should be noted that fantasy baseball is far from struggling. As mentioned earlier, it is estimated that between two and four million Americans alone play fantasy baseball compared to an estimated twelve million fantasy footballers. *Id.*

applications and modified gaming to attract more casual fantasy fans.<sup>8</sup> However, if this agreement is upheld, it is speculated that MLB will concentrate the fantasy baseball market from about thirteen officially licensed MLB websites to four or five major websites offering official MLB fantasy gaming.<sup>9</sup> Bob Bowman, who oversees MLB Advanced Media, suggests that a reduction is likely stating, “[i]t appears that licensors think they can create a bigger business by concentrating licensees.”<sup>10</sup> But not all fantasy faithfuls believe Major League Baseball’s reduction in consumer choices will stimulate baseball’s fantasy gaming. Gary Ambrosius, president of the Fantasy Sports Trade Commission, advocates the opposite approach stating, “[i]t would be tough to take all the fantasy choices now available and put them under just a few umbrellas.”<sup>11</sup>

*B. C.B.C. Distribution and Marketing, Incorporated v. Major League Baseball Advanced Media*

Not all major fantasy sports providers have complied with MLB’s attempt to control the fantasy baseball market. In February of 2005, one fantasy provider, C.B.C. Distribution and Marketing, (operating under the surname C.D.M. Fantasy Sports) challenged the MLB licensing deal by filing suit in the United States District Court of Eastern Missouri.<sup>12</sup> While many of the MLB’s previous licensees have complied with the agreement, C.D.M., who provides fantasy gaming services for USA Today, Sports Weekly, The Hockey News, The Golf Channel, The Sporting News, MSNBC and Snap, is the only previous official MLB licensee that has refused to comply with MLB’s request.<sup>13</sup> By filing suit, C.D.M. sought for the court to declare that C.D.M.’s fantasy gaming operation has not violated any intellectual property, copyright or publicity rights allegedly owned or controlled by MLB.<sup>14</sup> Although C.D.M. had formerly entered into a licensing agreement with the MLBPA covering the rights to names, nicknames, numbers, likenesses, signatures, pictures, playing records and biographical data, the agreement expired on December 31, 2004.<sup>15</sup>

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8. Michael Hiestand, *Fantasy Choices May Narrow*, USA TODAY, Feb. 9, 2005, at 12C.

9. *Id.*

10. *Id.*

11. *Id.*

12. *See* Complaint, *supra* note 5, at 1.

13. *See* Auman, *supra* note 3; *see also* Complaint, *supra* note 5, at 1.

14. *See* Complaint, *supra* note 5, at 1. In addition to the claims mentioned above, C.D.M. also claims that their actions have not constituted trademark, false or deceptive advertising, or trade practices under state and federal law. *Id.* However, those issues are not relevant to the discussion at hand.

15. *Id.* at 4.

The issue seems simple. Who owns professional performance statistics? But, this simple question is an issue of first impression for the courts.<sup>16</sup> C.D.M. attorney Rudy Telscher concedes that trademarked material, such as logos, need a MLB license, but claims that essentially no one owns performance statistics because they are in the public domain, much like telephone books.<sup>17</sup> Telscher and other supporters for an open fantasy market also claim that performance statistics are not copyrightable because statistics involve mere raw data where creativity is not involved.<sup>18</sup>

Jim Gallagher, a spokesperson for, MLBAM argues that C.D.M. and other fantasy sports providers should be paying for the right to use such statistics in a game for profit and that ownership of baseball statistics lies with MLB when used for commercial gain.<sup>19</sup> More specifically, MLB and the MLBAM contend that the methods for compiling, organizing and keeping player statistics are copyrightable. However, much of the recent litigation surrounding performance statistics boils down to a fairly young and developing doctrine called the right of publicity.<sup>20</sup>

Professor McCarthy claims that the right of publicity can be stated with clarity; it is the inherent right of every human being to control the commercial use of his or her identity.<sup>21</sup> Even though stating this right may be simple, determining what constitutes a commercial use of one's identity has become increasingly difficult to determine due to the uncertainty and variation among scholars and courts.

## II. COPYRIGHT PROTECTION – ORIGINALITY IN THE SELECTION AND ARRANGEMENT OF FACTUAL COMPILATIONS

Fantasy sports providers, like C.D.M., conduct their online gaming by gathering raw statistical information and inputting these statistics into an online database which can then be accessed by online fantasy subscribers.<sup>22</sup> Essentially, the existence of fantasy sports relies on the ability of the user to access the database(s) which harness the ballplayers' statistics.<sup>23</sup> Whether copyright protection extends to baseball statistics contained in a fantasy baseball factual compilation is a central question in the current lawsuit.

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16. See Hiestand, *supra* note 8.

17. See Baldas, *supra* note 4.

18. See Hiestand, *supra* note 8.

19. See Baldas, *supra* note 4.

20. Alan Schartz, *Claiming It Owns the Rights to Players' Names, Baseball Tells Fantasy Leagues to Pay up. The Leagues Tell Baseball to Dream on*, LEGAL AFF., Nov./Dec. 2005, at 22.

21. J. THOMAS MCCARTHY ET AL., MCCARTHY'S DESK ENCYCLOPEDIA OF INTELLECTUAL PROPERTY 528 (3d ed. 2004).

22. See Baldas, *supra* note 4.

23. *Id.*

“A compilation is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes as an original work of authorship.”<sup>24</sup> However, under U.S. Federal copyright law, the protection for a database as a factual compilation is limited.<sup>25</sup> A copyright for a factual compilation does not extend to preexisting works, such as the individual pieces of information stored in the database.<sup>26</sup> The only information that is protected is the material that is contributed by the author, not any preexisting material.<sup>27</sup>

Compilations that are purely factual and involve no creativity in selection, arrangement or organization are not entitled to copyright protection since there is a presumption at law that raw facts can be copied at will.<sup>28</sup> For example, in *ProCD, Inc. v. Zeidenburg*,<sup>29</sup> the plaintiff spent millions of dollars in developing a nationwide business and home phone directory entitled ProCD.<sup>30</sup> The directory, which consisted of over ninety-five million names, nine digit zip codes and census industrial codes, was packaged and sold at several retail outlets.<sup>31</sup> Zeidenburg purchased ProCD’s directory program at a retailer and merged it with other business and home phone directories.<sup>32</sup> Zeidenburg then made his hybrid database available on the internet.<sup>33</sup> The Court of Appeals for the Seventh Circuit held that an online database which has been made from the white pages in a phone book was not entitled to copyright protection because the compilation lacked originality in the selection and arrangement of the names and zipcodes.<sup>34</sup>

In *National Basketball Association v. Motorola, Inc.*,<sup>35</sup> the NBA brought action against Motorola, a manufacturer and marketer of the SportsTrax paging device, for supplying player and team statistics and game information to Motorola subscribers with such pagers.<sup>36</sup> The operation of the SportsTrax pager relied on data supplied by reporters who watched the games on

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24. 17. U.S.C. § 101 (2004) (defining “compilation”).

25. Ian C. Ballon, *Copyright Protection for Databases*, in 1 E-COMMERCE & INTERNET LAW ¶ 9.02[1] (2006).

26. *Id.*

27. *Id.*

28. *Id.*

29. 908 F. Supp. 640 (W.D. Wis. 1996).

30. *Id.* at 644.

31. *Id.* at 644-45.

32. *Id.* at 645.

33. *Id.*

34. *ProCD, Inc. v. Zeidenburg*, 86 F.3d 1447, 1449 (7th Cir. 1996).

35. 105 F.3d 841 (2d Cir. 1997).

36. *Id.* at 843-44. The type of information conveyed to Motorola’s subscribers included: the teams playing; score changes, the team in possession of the ball, whether the team is in the free-throw bonus, the quarter of the game, time remaining in the quarter, field goal shooting percentages by player and team and top scorers. *Id.*

television or listened to the games on the radio.<sup>37</sup> The information was then transmitted to Motorola by phone, and then transmitted to the SportsTrax pagers.<sup>38</sup> The plaintiff's complaint alleged federal copyright protection in the statistical information that Motorola conveyed to its customers.<sup>39</sup> The Court of Appeals for the Second Circuit held that no copyright infringement existed because Motorola only reproduced factual information from the broadcasts and underlying basketball games, and this did not infringe on the actual copyright of the broadcasts.<sup>40</sup>

When analyzing the copyright protection for the underlying basketball game, the court concluded that the actual basketball game did not fall within the subject matter of federal copyright protection because the games did not constitute original works of authorship.<sup>41</sup> The court reasoned that sports events are not authored in any common sense of the word and what "authorship" there is in a sports event must be open to copying by competitors if fans are to be attracted to the sport.<sup>42</sup> However, the court noted that "recorded broadcasts of NBA games – as opposed to the games themselves...are...entitled to copyright protection."<sup>43</sup> Despite the fact that broadcasts are protected under copyright law, the court further held that Motorola did not infringe on the NBA's copyright because they did not reproduce the expression of the game broadcasts, but only facts from the broadcast, which "any patron of an NBA game could acquire from the arena without any involvement from the director, cameramen, or others who contribute to the originality of a broadcast."<sup>44</sup> Thus, factual information

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37. *Id.* at 844.

38. *Id.* Note that the actual electronic process of communicating the statistics to the pager is unimportant. For those interested, Judges Altamari and Winters in the *Motorola* case do a nice job of breaking down the actual process used to transmit the statistics. *Id.*

39. *Id.*

40. *Id.* at 847.

41. *Motorola*, 105 F.3d at 846-47. Although many supporters of the MLB's copyright protection in players' performances will rely on *Baltimore Orioles Inc. v. Major League Baseball*, one should take note that the Court in *Motorola*, expressly negates the NBA's reliance on this case. The Court in *Motorola* states:

In claiming a copyright in the underlying games, the NBA relied in part on a footnote in *Baltimore Orioles, Inc. v. Major League Baseball Players Assn.* which states that the 'players performances' contain the 'modest creativity' required for copyright ability.' However the court went on to state, 'Moreover, even if the [p]layers' performances were not sufficiently creative, the [p]layers agree that the cameramen and director contribute labor to the telecasts.' This last sentence indicates that the court was considering the copyright ability of telecasts – not underlying games, which obviously can be played without cameras.

*Id.* (citations omitted).

42. *Id.* at 846.

43. *Id.* at 847.

44. *Id.*

pertaining to the underlying sports event is not copyrightable even though the broadcast of the game retains copyright protection.

On the other hand, raw facts or data may be subject to protection where the selection, arrangement or organization of the data reflect some minimal level of creativity.<sup>45</sup> Thus, the Federal Copyright Act extends copyright protection to compilations that are “selected, coordinated, or arranged in such a way that the resulting whole constitutes an original work of authorship.”<sup>46</sup> In *Feist Publications, Inc. v. Rural Telephone Service Co.*,<sup>47</sup> the United States Supreme Court held that originality is essential for a work to be protected under copyright law.<sup>48</sup> The defendant, Rural, a public utility company, provided telephone services and published white pages with an alphabetical listing of subscribers’ names, towns and telephone numbers.<sup>49</sup> Feist, a publishing company that also distributed phone books, incorporated Rural’s white pages into its own phone book after Rural refused to issue a license to Feist.<sup>50</sup> Rural then sued for copyright infringement claiming that Feist, in compiling its own directory, could not use the directory compiled by Rural in its white pages.<sup>51</sup>

In reaching its holding, the Supreme Court reaffirmed several important principles of copyright law, as well as, establishing new ground rules for future infringements. First, the Court forcefully reminded the legal world of a “fundamental axiom of copyright law” that there is no valid copyright in facts.<sup>52</sup> Second, the Court expanded on this “fundamental axiom” by stating that facts must be original to the author to qualify for copyright protection.<sup>53</sup> Original, as used in copyright, means “that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.”<sup>54</sup> In addition to articulating a new standard for factual compilations, the Court observed that originality is a constitutionally mandated prerequisite for copyright protection.<sup>55</sup>

The Supreme Court went on to note that protection for factual compilations is thin.<sup>56</sup> A subsequent compiler is free to use facts contained in a copyrighted compilation to aid in preparing a competing work, as long as the competing

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45. See Ballon, *supra* note 25.

46. *Id.*; see also 17 U.S.C. § 101.

47. 499 U.S. 340 (1991).

48. *Id.* at 351.

49. *Id.* at 342.

50. *Id.* at 342-43.

51. *Id.* at 344.

52. *Id.* at 344-45.

53. *Feist*, 499 U.S. at 344-45.

54. *Id.* at 345.

55. *Id.* at 351. This principle was recognized by several commentators and courts before *Feist*, but this marked the first time that the Supreme Court held originality was constitutionally mandated for copyright protection.

56. *Id.* at 349.



work uses a slightly different arrangement and selection process.<sup>57</sup> The Supreme Court ultimately concluded that Rural's compilation did not satisfy the originality requirement because the selection and arrangement of the names and numbers were "garden-variety" and entirely typical of a phonebook (i.e. alphabetical order) and, thus did not represent the minimum level of creativity to afford copyright protection.<sup>58</sup>

Many supporters of MLB's position in the current lawsuit heavily rely on *Kregos v. Associated Press*,<sup>59</sup> where the Court held that certain baseball performance charts were entitled to copyright protection.<sup>60</sup> However, reliance on this case in the present lawsuit will not carry MLB far. In *Kregos*, the plaintiff compiled pitching charts for opposing pitchers to start each day's baseball games comprising of nine very specific pitching categories, such as earned run average, win/loss record and innings pitched for home and away games against specific teams, men on base average and innings pitched for the past three starts.<sup>61</sup> The Court stated that "the decision to express a pitcher's performance in terms of nine statistics from at least scores of available statistics about pitching performance available to be calculated from the underlying data and therefore thousands of combinations of data that a selector can choose to include in a pitching form" was not necessarily obvious or self-evident.<sup>62</sup> Additionally, the Court took note that prior publication of some of the statistics which Kregos used on his forms might indicate that his selection was not sufficiently different from those grouped in earlier publications to satisfy minimal creativity.<sup>63</sup>

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57. *Id.* In expanding on this concept the court notes that one commentator explains it as: "[N]o matter how much original authorship the work displays, the facts and ideas it exposes are free for the taking.... [T]he very same facts and ideas may be divorced from the context imposed by the author, and restated or reshuffled by second comers, even if the author was the first to discover the facts or to propose the ideas." *Id.* (quoting Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1868, n.12 (1990)).

58. *Id.* at 362.

59. 937 F.2d 700 (2d Cir. 1993).

60. *Id.* at 702.

61. *Id.* In more detail, the Court characterized the statistics like so:

The first category in Kregos 1983 form, performance during the entire season, comprises two items—won/lost record (1) and earned run average (2). The second category, performance during the entire season against the opposing team at the site of the game, comprises three items—won/lost record (3), innings pitched (4), and earned run average (5). The third category, performance in the last three starts, comprises four items—won/lost record (6), innings pitched (7), earned run average (8), and men on base average (9). *Id.*

This last item is the average total of hits and walks given up by a pitcher per nine innings of pitching. *Id.*

62. *Id.* at 704-705.

63. *Id.* at 705.

Fantasy baseball does not operate on complicated statistics such as wins against a particular team either on the road or at home. The fantasy baseball market thrives on general statistics, such as home runs, runs batted in, steals and wins by pitchers. Therefore, there are not “scores” of available statistics to play fantasy baseball. Fantasy baseball takes the general, “garden-variety” baseball statistics and uses them in their raw form without breaking down such numbers into road wins against a particular team or earned run average at home against a particular team in the past three starts. The numbers utilized by the fantasy baseball market are no more complicated or expected than box scores published in the newspaper. The logic expressed in Kregos simply doesn’t apply to the case at hand.

Further, as Ian Ballon notes, “for online databases, creativity in the selection of incorporated facts is substantially more important than their arrangement,” because online users have the ability to search and sort the data using multiple means.<sup>64</sup> Thus, the contention that online databases may require greater creativity in selection to offset the lack of arrangement has substantial bite, especially concerning the online fantasy sports market. The originality in the arrangement of facts is essentially a non-factor for online fantasy sports providers because fantasy sports databases allow their customers to search every statistic contained in the database in any order and fashion as that user pleases.

In summary, factual information from sports events are not subject to copyright protection because sports events are not authored in any sense of the word. However, factual compilations can obtain copyright protection if the compilation is an original work of authorship. Originality in the sense of factual compilations consists of selectivity or arrangement in the factual data. The selectivity or arrangement must possess a minimum level of creativity which must be more than what is entirely typical or expected of such a compilation. But, as the United States Supreme Court has noted, protection for such factual compilations is thin.

### III. THE RIGHT OF PUBLICITY – HISTORY AND ORIGIN

Many scholars have characterized the right of publicity as a descendant of the right of privacy.<sup>65</sup> Privacy, as a legal right, dates to Samuel Warren and Louis Brandeis and their 1890 article, *The Right of Privacy*, which focused on the harm posed by publishing a citizen’s private facts and photographs.<sup>66</sup> This

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64. See Ballon, *supra* note 25. For an overview of copyright law in the European Union, this chapter lays out this topic nicely. *Id.*

65. J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:7 (West 2d. ed. 2004).

66. Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition* 67 U. PITT. L. REV. 225, 227 (2005).

notion of privacy enumerated by Warren and Brandeis explicitly recognized an individual's "right to be let alone" which courts have interpreted to encompass the notion of "hurt feelings."<sup>67</sup> However, the right of privacy was a poor remedy for celebrities and athletes in protecting their image and likeness from the uncompensated efforts of exploiters because celebrities profit from publicity and being in the public spotlight.<sup>68</sup> Thus, courts took notice of the right of privacy's inefficiency to protect celebrities and in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,<sup>69</sup> the court recognized a similar common law and statutory right of privacy existed for celebrities.<sup>70</sup>

In *Haelan Laboratories*, the plaintiff, a manufacturer and seller of chewing gum, contracted with several baseball players to provide the plaintiff with the exclusive right to use the players' photographs in connection with the gum sales.<sup>71</sup> Although the ballplayers were not to grant any other gum manufacturer a similar right during the contract, the defendant, also a manufacturer and seller of chewing gum, induced the players to enter into contracts that authorized the defendant to use the players' photographs in connection with gum sales.<sup>72</sup> In characterizing the new right of privacy, the Court stated:

In addition to and independent of that right of privacy, 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. Whether it be labeled a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth...This right might be called a 'right of publicity.' For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, buses, trains and subways.<sup>73</sup>

Although courts were reluctant to build upon this newly developed right, Professor Melville Nimmer's groundbreaking article entitled, *The Right of*

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67. *Id.* at 227-228.

68. *Id.*; see also Jack F. Williams, *Who Owns the Back of a Baseball Card?: A Baseball Player's Right In His Performance Statistics*, 23 CARDOZO L. REV. 1705, 1714 (2002).

69. 202 F.2d 866 (2d Cir. 1953).

70. See Williams, *supra* note 68, at 1714. Note that Professor McKenna correctly points out that *Haelan Laboratories* was not the first case to recognize the right of publicity but, rather, the first case to recognize the right of publicity for celebrities. See McKenna, *supra* note 66, at 16-17.

71. *Haelan Laboratories*, 202 F.2d at 867.

72. *Id.*

73. *Id.* at 868.

*Publicity*, helped provide a framework for establishing a violation of the right of publicity.<sup>74</sup> Professor Nimmer argued that traditional privacy law was inadequate to protect an unauthorized commercial use of a person's identity because the right of privacy hinged on the concept of hurt feelings.<sup>75</sup> Nimmer's argument relied upon a 1941 case in which a celebrity sued under the New York privacy statute because the celebrity's name was used without his consent on an official program to a bicycle race.<sup>76</sup> In that case, the plaintiff admitted that he did not suffer humiliation from the unauthorized use of his persona and the court, finding only a technical violation of the privacy statute, awarded six cents to plaintiff as damages.<sup>77</sup> Nimmer argued that the true commercial value of the plaintiff's identity was worth more than six cents, and that the law of privacy simply was inadequate to deal with such claims.<sup>78</sup>

Until the 1970's, the right of publicity was met with reluctance and concern by many judges and practitioners.<sup>79</sup> However, most courts began to recognize a commercial property interest in human identity as being quite different from the traditional notions of privacy interests.<sup>80</sup> In 1977, the Supreme Court, in *Zacchini v. Scripps-Howard Broadcasting Co.*,<sup>81</sup> recognized that a commercial right in one's identity existed and observed the right of publicity's distinctness from privacy law.<sup>82</sup> In *Zacchini*, the plaintiff's fifteen second "human cannonball" act was, without his consent, videotaped in its entirety at a county fair by a reporter for the defendant broadcasting company and shown on a television news program later that day.<sup>83</sup> Plaintiff then brought an action for damages in state court against the broadcasting company alleging an "unlawful appropriation" of his "professional property."<sup>84</sup> In addition to recognizing the right of publicity as a cause of action distinct from privacy law, the Court recognized that the broadcast of the plaintiff's entire act posed a substantial threat to the economic value of that performance because: (1) if the public can see the act free on television, it would be less willing to pay to see it at the fair and (2) the broadcast goes to the heart of petitioner's ability to earn a living.<sup>85</sup> In the Court's discussion of the right of publicity, it stated that:

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74. See MCCARTHY, *supra* note 65, at § 1:27.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. See MCCARTHY, *supra* note 65, at § 1:27

80. *Id.* at § 1:31.

81. 433 U.S. 562 (1977).

82. See Williams, *supra* note 68, at 1712.

83. *Zacchini*, 433 U.S. at 563-564.

84. *Id.* at 564.

85. *Id.* at 575-576.

the rationale for protecting the right of publicity is the straight forward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.<sup>86</sup>

A. *Justifications for the Right of Publicity*

Supporters of the right of publicity have offered several rationales for upholding the right to prevent the uncompensated use of one's identity. For example, the natural rights of property theorists suggest that every human being should be given control over the commercial use of his or her identity and should be able to control such use of his or her identity as the holder sees fit.<sup>87</sup>

Another theory, more frequently relied upon, is a Lockean property based justification. Lockean theorists rely on Locke's explanation of private property which states:

Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say are properly his.<sup>88</sup>

The Lockean justification suggests that the right of publicity should be protected like a property right, and that a person's identity should legally be recognized as a person's property which can then be protected against commercial exploitation.<sup>89</sup> Where the right of privacy recognizes a legal injury due to unpermitted uses that cause "hurt feelings," the right of publicity recognizes a legal injury when the unpermitted use of one's identity causes financial damage flowing from the economic value of one's identity.<sup>90</sup>

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86. *Id.* at 576. For an attack on the unjust enrichment justification for the right of publicity, see *The Right of Publicity and Autonomous Self Definition* by Mark P. McKenna arguing that: a defendant is only 'free riding' if one assumes that the value of identity belongs to the plaintiff in the first instance. The assumption of initial ownership must itself be supported by some theory...Whether some object will have market value for which someone else would normally pay depends entirely on whether the law protects the object. Absent legal protection for identity, an advertiser normally would not pay to use it. Thus, we cannot conclude that there is no social purpose in allowing a defendant to make use of an identity freely without determining why we should allocate all of the value of that identity to the individual. If no compelling theory calls for such an initial allocation, then protecting identity would only allow celebrities to earn an undeserved profit by charging others to use their identity.

McKenna, *supra* note 66, at 248.

87. See MCCARTHY, *supra* note 65, at § 2:1.

88. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 305 (Peter Laslett ed., Cambridge Univ. Press 1960).

89. See MCCARTHY, *supra* note 65, at § 2:2.

90. *Id.*

The incentive rationale supports the theory that the right of publicity gives economic incentives for persons that enter the public eye to undertake socially useful or enriching activities.<sup>91</sup> Supporters of this justification argue that by granting such people an economic right in their identity, it encourages people to channel uses of their identity into socially beneficial activities.<sup>92</sup>

A final justification, which has its roots in unjust enrichment theory, is the economic theory. This theory recognizes that granting property rights in the commercial use of one's identity is an efficient way to allocate resources because the advertiser to whom that identity is most valuable will pay to use the identity.<sup>93</sup> It is the debate on the applicability of these theories that has led to much of the right of publicity's current state of confusion.

### B. *Elements of a Right of Publicity Claim*

The right of publicity is recognized under the common law of eighteen states, and of those eighteen, eight states have statutory counter-parts that are broad enough to encompass the common law right of publicity.<sup>94</sup> For example, California's common law right of publicity consists of four elements: (1) the defendant's use of the plaintiff's identity; (2) the appropriation of the

91. *Id.* at § 2:6.

92. *Id.*

93. *Id.* at § 2.7; see also WILLIAM LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 223 (Harvard Univ. Press 2003). Landes and Posner take a tragedy of the commons approach arguing:

The motive [to provide stronger publicity rights] is not to encourage greater investment in becoming a celebrity (the incremental encouragement would doubtless be minimal), but to prevent the premature exhaustion of the commercial value of the celebrity's name or likeness...Overgrazing causes crowding in the short run, with a resulting reduction in weight gain [by the animals' grazing], and depletion of the pasture in the long run with similar, though possibly more drastic results. Similarly, overexposure of a celebrity may turn people off in the short run and truncate the period in which his name or likeness retains commercial value.

*Id.*

In contrast, Professor McKenna offers several attacks on the economic justification of the right of publicity. Professor McKenna argues that there many dissimilarities between identities and physical commodities like pastures. McKenna, *supra* note 65, at 249. Professor McKenna proposes that pastures are rivalrous and exhaustible where identities are neither because:

whereas each pasture physically removes something and threatens to reduce the pastures utility in the long run, additional uses of identity neither prevent anyone else's use of that identity nor use up any of the resource in a physical sense.

*Id.*

Further, Professor McKenna argues that celebrities' identities, unlike pastures, are not scarce resources which create a net social loss when the identities are dissipated. *Id.*

94. See MCCARTHY, *supra* note 66, at § 6:3. Those states that have recognized the right of publicity under the common law are: Arizona, Alabama, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Michigan, Minnesota, Missouri, New Jersey, Ohio, Pennsylvania, Texas, Utah, and Wisconsin. *Id.*

plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.<sup>95</sup> In contrast, to establish California's broader statutory right of publicity claim, a plaintiff must show that a person knowingly used another's "name, voice, signature, photograph, or likeness, in any manner on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of products, merchandise, goods or services, without such person's prior consent . . . ."<sup>96</sup>

An additional ten states have recognized the right of publicity as being intertwined in already existing state privacy statutes.<sup>97</sup> For example, New York's version of the right of publicity states:

[a] person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.<sup>98</sup>

Other states, such as Missouri, adopt the RESTATEMENT (THIRD) OF UNFAIR COMPETITION test which states that: "(1) the defendant used plaintiff's name as a symbol of his identity; (2) without consent; (3) and with the intent to obtain a commercial advantage."<sup>99</sup>

Although some scholars have lobbied for a federal enactment to help unify the law among the states, no such federal statute exists.<sup>100</sup> However, the right of publicity when boiled down to its component parts generally contains three central elements: plaintiff's identity, commercial exploitation and consent.<sup>101</sup>

### C. *Identifying One's Identity*

The right of publicity as construed by many state statutes and common law rights specifically created economic protection for uncompensated uses of one's "persona." In every state, these terms have been interpreted to include one's name and likeness.<sup>102</sup> The most common example of a violation of the right of publicity comes in the form of using one's name or photo in an

95. *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 310 (Cal. Ct. App. 2001).

96. CAL. CIV. CODE § 3344 (West 1997).

97. *See* MCCARTHY, *supra* note 66, at § 6:3. Twenty-eight states recognize either a common law or statutory right of publicity. *Id.*

98. N.Y. CIV. RIGHTS LAW § 50 (McKinney 1992). New York refers to the right of publicity as a right of privacy even though the same protections are afforded. *Id.*

99. *Doe v. TCI Cablevision*, 110 S.W.3d 363, 369 (Mo. 2003); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

100. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (discussing the differences in laws between the states).

101. Consent is not at issue in the present case and, therefore, will not be discussed in this paper.

102. *See* McCarthy, *supra* note 66, at § 4:45.

advertisement or on a product to gain a commercial advantage.<sup>103</sup> However, saying that the right of publicity only protects one's persona, which was defined by Judge Sofaer as "the public image that makes people want to identify with the object person, and thereby imbues his name or likeness with commercial value marketable to those that seek such identification," does not encompass the broad parameters the right of publicity has come to protect.<sup>104</sup> Aside from the protections of one's name and likeness mentioned above, some states have extended protection to characteristic phrases and even one's voice.<sup>105</sup>

It is important to note that the parameters of protection are highly jurisdictional. Only certain states such as California, Florida, Nevada, Oklahoma, Tennessee and Texas statutorily protect photographs, and only certain states such as California, Nevada, Oklahoma and Texas statutorily extend the right of publicity to protect a person's voice.<sup>106</sup> But the question still remains whether the raw statistic is considered a part of one's identity. The case law on this issue is limited, but provides important repercussions for the answer to this question.

In *Palmer v. Schonhorn Enterprises Inc.*,<sup>107</sup> the defendants created and sold a game called "Pro-Am Golf Game" in which short biographies and profiles of twenty-three golfers were included on sheets of paper as part of the contents to the game.<sup>108</sup> Each of the profiles contained accurate facts concerning the golfers' professional careers.<sup>109</sup> After the defendant refused to remove the names and profiles from the game, the plaintiff sued claiming that the use of the golfers' names reduced their ability to obtain satisfactory commercial affiliation through licensing agreements, and that such use was an unfair exploitation and commercialization of their names and reputations.<sup>110</sup> The defendant claimed that the information contained in the profiles was readily obtainable public data and available to all, and thus should not be

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103. See, e.g., *Hogan v. A. S. Barnes & Co., Inc.*, 114 U.S.P.Q. 314, 315, 320 (Pa.Com. Pl. 1957) (name and photo of golfer Ben Hogan); *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. American Heritage Prods., Inc.*, 296 S.E.2d 697, 698 (Ga. 1982) (name and bust of the late Martin Luther King, Jr.); *Abdul-Jabbar v. General Motors Corp.*, 75 F.3d 1391, 1393 (9th Cir. 1996) (name used in advertisement for Ford Trucks).

104. See McCarthy, *supra* note 66, at § 4:45.

105. PRACTISING LAW INSTITUTE, *Rights of Publicity and Entertainment Licensing* 845 PLI/Pat 283, 296 (October-December 2005) (lecture by Edward H. Rosenthal, Frankfurt Kurnit Klein & Selz, P.C.); see also *CARSON V. HERE'S JOHNNY PORTABLE TOILETS, INC.*, 810 F.2d 104, 105-106 (6th Cir. 1987) and *MIDLER V. FORD MOTOR CO.*, 849 F.2d 460, 461, 463 (9th Cir. 1988).

106. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46.

107. 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967).

108. *Palmer*, 232 A.2d at 459.

109. *Id.*

110. *Id.*



denied the privilege of what is set forth in newspapers, magazine articles and other periodicals.<sup>111</sup>

The court, without discussing a case that supports the conclusion that a statistic qualifies as being apart of one's likeness or identity, erroneously concluded that use of the data by the defendant's "for the purpose of capitalizing upon the name by using it in connection with a commercial project other than the dissemination of news or articles or biographies" constituted a violation of the celebrity's right of privacy.<sup>112</sup> The court stated that "the names of the plaintiff have become internationally famous, undoubtedly by reason of talent as well as hard work in perfecting it."<sup>113</sup> Further the court stated that:

[t]hey (plaintiffs') may not all desire to capitalize upon their names in the commercial field beyond or apart from that in which they have reached their known excellence...It is unfair that one should be permitted to commercialize or exploit or capitalize upon another's reputation or accomplishment merely because the owner's accomplishments have been highly publicized.<sup>114</sup>

Unfortunately, the court in *Palmer* did not make an independent analysis of identity to determine whether the exact nature of the information being used constituted part of the golfers' identity. Instead the court only focused on the fact that the defendants were commercially exploiting the statistical information and names of the golfers. The court should have first made a determination on whether the statistical and biographical information obtained in the profiles amounted to the likeness or persona of the golfers and if so, then made a determination on whether that information was being commercially exploited. However, the court glossed over the question of whether statistical information can be characterized as one's identity, and therefore, came to the wrong conclusion.

The Court in *Uhlaender v. Henriksen*<sup>115</sup> followed the faulty analysis as set forth in *Palmer*. In *Uhlaender*, the defendants manufactured and sold games called "Negamco's Major League Baseball" and "Big League Manager Baseball" which employed the names and professional statistical information such as batting, fielding, earned run and other averages of 500 to 700 major league baseball players, identified by team, uniform number and the player's position.<sup>116</sup> The MLBPA, on behalf of the plaintiff, wrote a letter to the defendant stating that defendant was exploiting a claimed property right and offered to enter into a restrictive licensing agreement with the defendants.<sup>117</sup>

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111. *Id.* at 460.

112. *Id.* at 462. Note that New Jersey recognizes the right of publicity through the common law right of privacy. *See id.* at 459-461.

113. *Id.* at 462.

114. *Palmer*, 232 A.2d at 462.

115. 316 F. Supp. 1277 (D. Minn. 1970).

116. *Uhlaender*, 316 F. Supp. at 1278.

117. *Id.* at 1278-1279.

The defendant claimed that the names and statistics concerning sports achievements used in the game were readily available to anyone at Major League Offices on inquiry and were published with some regularity in the newspapers and news media and were, thus, in the public domain.<sup>118</sup> The court, relying heavily on the *Palmer* decision, reasoned that:

...a celebrity has a legitimate proprietary interest in his public personality. A celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status. That identity, embodied in his name, likeness, *statistics and other personal characteristics*, is the fruit of his labors and is a type of property. Defendant's contention has no merit that by the publication in the news media and because of the ready availability to anyone of the names and statistical information concerning the players, such information is in the public domain and the players thus have waived their rights to relief in this case. Such argument may or may not have some weight against a right of privacy claim, but in an appropriation action such as in the case at bar the names and statistics are valuable only because of their past public disclosure, publicity and circulation.<sup>119</sup>

The court's holding and reasoning is wrong for the same reasons the court's analysis in *Palmer* is wrong. The court in *Uhlaender* did not focus on the underlying nature of the information being conveyed. Instead, it focused on how the information was being used which inevitably lead the court to skip the independent analysis of whether a statistic constitutes a part of one's identity. Additionally, the court expanded the right of publicity even further than in *Palmer* by stating that personal characteristics are protected because they are fruits of the celebrity's labor.<sup>120</sup> The court's analysis is mind boggling. Under the new test, if a third party even so much as uses the birth date of the celebrity, it would constitute a violation of the right of publicity under the rationale that the birth date is the fruit of the celebrity's labors.

#### D. *Gionfriddo v. Major League Baseball – The Nature of the Information*

Fortunately, the court in *Gionfriddo v. Major League Baseball*<sup>121</sup> departed from the *Palmer* and *Uhlaender* courts' faulty conclusions and properly dealt with the issues of identity and commercialization separately, and the result was dramatically different. In *Gionfriddo*, the California Court of Appeals for the First District was presented with the issue of whether MLB violated former ballplayers' right of publicity when the MLB used factual data concerning the players, their performance statistics, photographs, verbal descriptions and

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118. *Id.* at 1279.

119. *Id.* at 1282-1283.

120. *Id.*

121. 114 Cal. Rptr. 2d 307 (Cal. Ct. App. 2001).

video depictions without the players' permission or compensation.<sup>122</sup> The plaintiffs were four professional baseball players who played in the major leagues for different periods between 1932 and 1948 and alleged that MLB appropriated their names and likenesses.<sup>123</sup> Throughout the players' careers, numerous statistics and achievements were compiled, such as three players being honored with All-Star recognition and all four players appearing in a World Series.<sup>124</sup> Due to these accomplishments, MLB included the ballplayers' names and statistics, along with other former players, in assorted All-Star game programs, World Series programs and on its official websites.<sup>125</sup> The players' names also appeared in written accounts, video depictions and within lists of team members or award winners, such as the recipient of the "Most Valuable Player" award.<sup>126</sup> Some of the ballplayers had still photographs from their playing days and footage of their performances included within video histories distributed or produced by MLB or MLB affiliates.<sup>127</sup>

Before analyzing the issue of commercial use, the court in *Gionfriddo* stated, "We believe the balancing process begins by identifying and weighing the factors properly taken into account. *At a minimum, a court must first consider the nature of the precise information conveyed and the context of the communication to determine the public interest in the expression.*"<sup>128</sup> In looking at the nature of the precise information being used the court concluded that the information conveyed by MLB consisting of factual data, performance statistics, verbal descriptions and video depictions of the ballplayers were mere bits of baseball history carved from baseball's mosaic.<sup>129</sup>

The court ultimately concluded that MLB was simply making historical facts available to the public through game programs and that "mere recitations

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122. *Gionfriddo*, 114 Cal. Rptr. 2d at 310.

123. *Id.* at 310-311.

124. *Id.* at 310.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Gionfriddo*, 114 Cal. Rptr. 2d at 314 (emphasis added). The "balancing test" the Court is referring to is the test that requires the right to be protected from unauthorized publicity be balanced against the public interest in the dissemination of news and information which will be discussed below with the public interest section.

129. *Id.* The precise information used by the MLB in the *Gionfriddo* case is as follows:

[The] names of players included on All-Star and World Series rosters; descriptions of memorable performances from former games included within All-Star and World Series game programs created for the benefit of the media and the enjoyment of the fans; photographs and video clips taken of plaintiff's when they were playing the game themselves, and made available to the public through Web sites, home videos, and other programs presenting historic events from long ago.

*Id.*

of the players' accomplishments" and factual data concerning athletic performance commanded a substantial public interest.<sup>130</sup> The court reasoned that the records and statistics remain of interest to the public because they provide a context that allows fans to better appreciate the performances of today's players, and the history of professional baseball is integral to the full understanding and enjoyment of the current game.<sup>131</sup>

By looking at the underlying nature of the information, the court was able to conclude that the information being used was raw, factual and historical data which should not be included in one's identity. By avoiding the earlier decisions of *Palmer* and *Ulhaender* the court was able to focus on the nature of the information and make an independent ruling on identity.

#### E. What Constitutes a Commercial Use?

As Professor Jack Williams correctly points out, "the right of publicity has developed to protect the commercial interest of celebrities in their identities."<sup>132</sup> The theory underlying this concept is that a celebrity's identity can be valuable in the promotion of products and that the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity.<sup>133</sup> However, courts and commentators have been less than clear when determining what constitutes a commercial exploitation of one's identity.

When wrestling with this question, a majority of courts have made the distinction between exploitation for commercial purposes or trade and exploitation of one's identity for the purposes of public interest.<sup>134</sup> Traditionally, courts allow a third party to exploit one's identity for commercial purposes if the information being exploited is a matter of the public interest.<sup>135</sup> This distinction, usually brought up as a First Amendment defense at common law, has even crept its way into some state statutes.<sup>136</sup> For example, California's statutory version of the right of publicity specifically allows a third party to "use of name, voice, signature, photograph, or likeness in connection with any news, *public affairs*, or sports broadcast or account, or any political campaign . . . ."<sup>137</sup>

Courts typically recognize a commercial setting as one that denotes the use of a person's identity in the advertising, promotion or connection with the

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130. *Id.* at 314-315.

131. *Id.* at 315.

132. *See* Williams, *supra* note 68, at 1715.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. CAL. CIV. CODE § 3344 (West 1997) (emphasis added).

actual goods or services themselves.<sup>138</sup> The unpermitted use of one's identity in the advertising of commercial goods and services are the most common acts that trigger liability for an invasion of one's right of publicity.<sup>139</sup> Examples include the use of a sound-a-like Bette Midler singer in a Ford Truck television advertisement or printing pictures of "Spanky" the Little Rascals star on hats, shirts and other products to promote a bar.<sup>140</sup>

It is not always clear when the use of a person's name, picture or likeness constitutes a commercial use. For example, in *Titan Sports, Inc. v. Comics World Corporation*,<sup>141</sup> Titan, a promoter of professional wrestlers and wrestling events, sued the defendant for the commercialization of the wrestlers' personalities under the New York privacy statute when the defendant used several oversized photographs of Titan's wrestlers in publications produced by the defendant.<sup>142</sup> The trial court granted summary judgment for Comics World, and Titan appealed arguing that the wrestlers' photographs were used for "purposes of trade" which violated the statute.<sup>143</sup> Although Titan conceded the public interest of professional wrestling, the court stated that "it is appropriate for a court to consider whether the public interest aspect of publication is merely incidental to its commercial purpose."<sup>144</sup> The court further noted that, "a photograph accompanying an article concerning a matter of public interest may still be considered a use for the purpose of trade if it has no real relationship to the article."<sup>145</sup>

The court ultimately found a genuine issue of material fact that the defendant's use amounted to "trade" and suggested a multi-factored test for determining whether there has been a use for the purposes of trade, including factors such as "the nature of the item, the extent of its relationship to the traditional content of a magazine, the ease with which it may be detached from the magazine, whether it is suitable for use as a separate product once detached and how the publisher markets the item."<sup>146</sup> The multi-factored test set forth in *Titan* has proved difficult to apply, and thus gained little impetus as it only has

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138. See MCCARTHY, *supra* note 66, at § 7:2.

139. *Id.* at § 7:6. This site provides a laundry list of violations of one's commercial identity in the use of products and advertising. *Id.*

140. See MIDLER v. FORD MOTOR CO., 849 F.2d 460 (9th Cir. 1988); MCFARLAND v. MILLER, 14 F.3d 912, 913-914 (3d Cir. 1994).

141. 870 F.2d 85 (2d Cir. 1989).

142. *Titan Sports*, 870 F.2d at 86.

143. *Id.* Note it was undisputed that Titan was the owner of all the rights in the names and likeness of the wrestlers affiliated with Titan. *Id.* at 87.

144. *Id.* at 87-88 (quoting *Davis v. High Society Magazine, Inc.*, 457 N.Y.S.2d 308, 313 (N.Y. App. Div. 1982)). Note that some courts equate newsworthiness with public interest. *Id.* The court here uses these terms interchangeably. *Id.*

145. *Id.* at 88 (quoting *Stephano v. News Group Publ'ns Inc.*, 474 N.E.2d 580, 585 (N.Y. 1984)).

146. *Id.* at 89.

been followed by courts in that jurisdiction.<sup>147</sup> However, the court in *Titan* underlined an important principle for determining the application of the public interest exception to the right of publicity - a court should consider whether the public interest aspect of the information is merely incidental to its purpose.

*F. The Public Interest Exception*

Although the test in *Titan* has received little acceptance, most states that recognize the right of publicity either through state statute or common law also recognize a public interest exception as hinted to by the court in *Titan*. The public interest exception allows a third party to use one's identity in a commercial setting if the information being exploited is of public interest and outweighs the celebrity's proprietary interest. Focusing on this exception, the *Gionfriddo* case provides an excellent application of the public interest exception to the commercial use of one's identity.

After addressing the issue of identity, the court in *Gionfriddo* independently focused on the plaintiffs' contention that using the players' names and statistical information within game programs and Web sites constituted a commercial text, thereby entitling them to protection to under the First Amendment.<sup>148</sup> Further, the plaintiffs argued that the baseball owners were making a profit and the players' achievements were being exploited to promote the product of baseball with any historical value being a coincidence or incidental.<sup>149</sup>

Since the right of publicity is a statutory and common law right in California, the court addressed the issue of commercialization for both rights. The court framed the common law issue around the First Amendment, as referenced above, and concluded that MLB's uses of the plaintiffs' statistical information was not "commercial speech" within the meaning of the First Amendment because "[t]he core notion of the commercial speech does no more than propose a commercial transaction."<sup>150</sup> The Court reasoned that MLB's "uses were included as minor historical references to plaintiffs within game programs and Websites and in videos documenting baseball's past, rather than in an advertisement selling a product."<sup>151</sup> The court also distinguished MLB's uses from contexts where "the primary message is to buy," as in an advertisement, and concluded that the public's enduring fascination with

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147. The only two cases to follow are *Psihoyos v. Nat'l Examiner*, 49 U.S.P.Q.2d 1766, 1770-1771 (S.D.N.Y. 1998) and *Hoepker v. Kruger*, 200 F. Supp. 2d 340, 352 (S.D.N.Y. 2002).

148. *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 315 (Cal. Ct. App. 2001).

149. *Id.*

150. *Id.* at 316 (quoting *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1183-1184 (9th Cir. 2001)).

151. *Id.*

baseball and the free dissemination of information regarding baseball's history far outweighs any proprietary interest at stake.<sup>152</sup>

When analyzing the statutory claim which allowed the use of a "name, voice, signature, photograph or likeness in connection with any news, public affairs, or sports broadcast or account...", the court concluded that MLB's uses came within the "public affairs" exemption to the statutory right of publicity.<sup>153</sup> The court relied on *Dora v. Frontline Video, Inc.*,<sup>154</sup> where a famous surfer sued the producer of a surfing video documentary, claiming the use of his surfing footage and prior interviews in the documentary violated both common law and statutory appropriation of his name and likeness.<sup>155</sup> On the California statutory cause of action, the court in *Dora* broadly interpreted the term "public affairs" "to include things that would not necessarily be considered news" and also was "intended to mean something less important than news."<sup>156</sup> The court in *Dora* further reasoned that:

[w]e cannot limit the term public affairs to topics that might be concerned on public television or public radio. To do so would be to jeopardize society's right to know because publishers and broadcasters could be sued for use of name and likeness in documentaries on subjects that do not relate to politics or public policy, and may not even be important but are of interest.<sup>157</sup>

The court in *Dora* concluded that surfing has created a lifestyle that influences an entire culture which commands more than a passing interest to some and the use of the plaintiff's footage and past interviews were not an infringement of the plaintiff's right of publicity.<sup>158</sup>

In light of this case, the court in *Gionfriddo* concluded that MLB's Websites, documentaries and game day programs were entitled to the same protection afforded to the surfing documentary in *Dora*.<sup>159</sup> The court stated

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152. *Id.* at 316, 318. The court focused on the case of *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407 (9th Cir. 1996), where the plaintiff sued the defendant for using his former name, Lew Alcindor, in a commercial broadcast during the 1993 NCAA basketball tournament. *Id.* at 316. The commercial asked, "Who holds the record for being voted the most outstanding player of this tournament?" *Id.* Then the plaintiff's name and the three years he received the award were then printed on the screen. *Id.* The court concluded that the defendant used the information in the context of an automobile advertisement not in a news or sports account and, therefore, defendant made a valid case for violation of his right of publicity. *Id.* However, the court in *Abdul-Jabbar* fell victim to the same faulty analysis used by the Courts in *Palmer* and *Uhlaender*. The court focused only on how the information was being used and not the nature of the information. Under a *Gionfriddo* analysis, the *Abdul-Jabbar* case comes out differently.

153. *Gionfriddo*, 114 Cal. Rptr. 2d at 318.

154. 18 Cal.Rptr.2d 790 (Cal. Ct. App. 1993).

155. *Dora*, 18 Cal. Rptr. 2d at 791.

156. *Id.* at 794.

157. *Id.*

158. *Id.* 794-795.

159. *Gionfriddo*, 114 Cal. Rptr. 2d at 319.

that baseball, as America's "national pastime," has a pervasive influence on our culture, and MLB's uses are exempt from a statutory right of publicity action due to the "public affairs" exemption.<sup>160</sup>

Courts have drawn a line in applying the public interest exception, but the line is far from settled. On one extreme there lies *Padillo v. MRA Holding LLC*,<sup>161</sup> where the plaintiff was caught on tape removing her bikini top on a boat and subsequently placed in the well-known, girl flashing video entitled *Girls Gone Wild*.<sup>162</sup> In response to the plaintiff's right of publicity claim, the defendants argued that the actions of young people flashing their breasts have generated a great deal of public interest.<sup>163</sup> The court concluded that the videos did not represent issues of widespread public interest because the defendants were not participating in a public dialogue about the condition of American society in general, but rather are only intended to increase the sales for the defendants' benefit.<sup>164</sup>

In contrast, the court in *Creel v. Crown Publishers, Inc.*<sup>165</sup> found the use of plaintiff's picture as published in a "World Guide to Nude Beaches and Recreation" did not violate New York's right of privacy statute.<sup>166</sup> The court held that a guide to beaches where nude sun bathing is permitted is a matter of the public interest because the photograph was used to illustrate a guide book and not used for the purposes of "trade."<sup>167</sup>

Similarly, the court in *Montana v. San Jose Mercury News, Inc.*<sup>168</sup> allowed a newspaper to produce and sell posters to the general public of a previously published paper depicting the plaintiff in celebration of his Super Bowl victories.<sup>169</sup> The plaintiff sued for commercial misappropriation of his name, photograph and likeness.<sup>170</sup> The court concluded that the newspaper accounts of winning two Super Bowls and four championships in a single decade constituted publication of matters in the public interest which were protected under California's statutory right of publicity.<sup>171</sup>

In summary, the right of publicity protects against the use of one's identity for commercial use or exploitation. A commercial use is usually defined as one that denotes the use of person's identity in the advertising, promotion or

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160. *Id.*

161. 2004 WL 2988172 (Cal. Ct. App. Dec. 28, 2004).

162. *PADILLA*, 2004 WL 2988172 at \*1.

163. *Id.*

164. *Id.* at \*6.

165. 496 N.Y.S.2d 219 (N.Y. App. Div. 1985).

166. *Creel*, 496 N.Y.S.2d at 220.

167. *Id.*

168. 40 Cal. Rptr. 2d 639 (Cal. Ct. App. 1995).

169. *Montana*, 40 Cal. Rptr. 2d at 640.

170. *Id.*

171. *Id.* at 641.



connection with the actual goods or services themselves. However, as the *Titan* case illustrates, determining if a use is purely commercial can be difficult if the use is not in the traditional form of an advertisement or connected with a consumer product.

The public interest exception, usually in the form of a First Amendment defense at common law or a statutory “public affairs” exception, allows a third party to commercially use one’s identity if the information is of public interest. Baseball statistics, surfing documentaries and travel guides to nude beaches have been construed as satisfying the public interest exception to the right of publicity.

#### IV. CONCLUSIONS

For MLB to successfully claim an infringement of copyright by C.B.C. Marketing and Distribution Inc., the MLB must convince the Court that statistics from the underlying sports event, which are released into the public domain, are in fact copyrightable and that the originality of the MLB’s fantasy databases meets the minimum level of creativity to afford copyright protection. In light of *National Basketball Association v. Motorola*, the performances of professional athletes are not copyrightable because sporting events do not constitute original works of authorship and reciting mere facts about the game does not constitute an infringement of the broadcast. Thus, the logic expressed by the Court in *Motorola* is equally applicable to professional baseball statistics because they are mere facts about the game and because the court in *Motorola* extended its protection to “sports events” which clearly embraces MLB.

Further, the compilation of professional performance statistics in a fantasy baseball format lacks the minimum level of creativity to afford copyright protection. In order to show originality in a factual compilation, a level of creativity must be shown in the selection and arrangement of the facts. However, fantasy baseball operates on the use of general or raw statistics. Unlike *Kregos*, where the Court saw “scores” of possibilities, fantasy baseball operates on categories of statistics that are no more complicated or unusual than those statistics that are posted in a typical newspaper box score. To put it another way, fantasy baseball providers use “garden-variety” baseball statistics, such as home runs, runs batted in and steals to compile a typical and expected statistical database. The creativity of simply compiling newspaper or “garden-variety” baseball statistics is too minimal to fulfill this standard which is already thin on protection.

Additionally, the arrangement of online fantasy baseball databases does not reach the level of creativity needed to afford copyright protection. Fantasy baseball subscribers can search and arrange the statistics in virtually any way the user pleases, thus, negating the organizer’s arrangement of the original factual compilation.

Also, the policy considerations set forth in *N.B.A. v. Motorola* support an open fantasy baseball market. The Court in *Motorola* reasoned that sports events are not authored in any common sense of the word and what “authorship” there is in a sports event must be open to copying by competitors if fans are to be attracted to the sport. Thus, if ownership of a professional baseball statistic lies with MLB, fans will be denied greater access to general information about the nation’s most beloved game. As Fred Villaruil, a computer consultant that spends much of his free time playing fantasy football states, “[w]e’re all watching these weird games that no one else wants to watch...Who else is going to watch the [Cleveland] Browns and [Baltimore] Ravens unless Jamal Lewis is on your fantasy team?”<sup>172</sup> Further, Brian Rolapp, the National Football League’s Vice President of Media Strategy, found that people who play fantasy football end up watching two to three hours more of NFL action on television.<sup>173</sup> Fans and spectators are attracted to professional sports to witness history breaking home runs or the possibility of a no hitter and denying fans the access to the raw numbers which these performances produce would detract fans from MLB.

When the court in *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball* is presented with the question of whether a statistic is a part of one’s identity, the court should first determine the nature of the information being used instead of only focusing on the commercialization of the information. In a fantasy sports game the nature of the information is raw, statistical and historical data which is released into the public domain. The information utilized by fantasy baseball providers is the same type of raw, historical information as used in *Gionfriddo* where MLB relentlessly and successfully argued that the data should remain accessible to the public regardless of the context the information was being used. These “mere bits of baseball history” which are carved from baseball’s mosaic provide the fan a context to better appreciate the performances of today’s ballplayers and the history of professional baseball is integral to the full understanding and enjoyment of the current game.

Additionally, the court in *Gionfriddo* concluded that MLB did not violate the ballplayers’ right of publicity by using their names in connection with the statistics. This is because using the players’ names simply gives the statistic a context so that it can be understood. What is being exploited is the statistic, not the players’ names. Without accompanying the name to the statistic, the

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172. See Johnson, *supra* note 5. This quote is not helpful unless it is put into context. In the 2005 football season, the Cleveland Browns and Baltimore Ravens had a identical records of six wins and ten losses and finished last and second to last in their division respectively. Unless you are a die hard Browns or Ravens fan or play fantasy football, you probably did not tune into many of these teams’ games.

173. *Id.*

statistic becomes meaningless. Therefore, the name associated with the statistic is essentially apart of the historical fact which allows the fan to appreciate the overall performance of the player.

Further, fantasy sports providers convey information in which the public has a substantial interest. The court in *Gionfriddo* recognized that baseball has a pervasive influence on our culture and that records and statistics remain of interest to the public because they provide a context that allows fans to better appreciate the game.<sup>174</sup> The court also recognized that the public has an enduring fascination in the records set by ballplayers and memorable moments from previous games.<sup>175</sup> As illustrated by *Gionfriddo*, the public interest in baseball statistics far outweighs any proprietary interest a player or organization has in retaining ownership of the statistic even against a significant revenue builder, such as selling baseball programs.<sup>176</sup> Even though the proprietary interest in fantasy baseball is high, courts have upheld the public interest exception against purely commercial settings, such as the sale of travel brochures and sports programs and even the production of a surfing film. Since the public interest in “America’s national pastime” far outweighs the interest in nude beaches or surfing, the protection for using baseball statistics should be given the utmost protection against any proprietary interest one has in retaining ownership of the numbers.

This article proposes that professional performance statistics, such as a home run or stolen base, as used in the fantasy baseball world are not subject to copyright protection or subject to claims under the right of publicity. As a scholar, fan and one of the four million Americans that enjoy the cyber version

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174. *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 315 (Cal. Ct. App. 2001).

175. *Id.* at 318.

176. For example, a 2006 World Series Program can be purchased for \$15.00 at MLB’s Website, <http://shop.mlb.com/product/index.jsp?productId=2537518> (last visited Feb. 25, 2007).

of baseball, this author urges courts and commentators to shape the law in this direction.<sup>177</sup>

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177. On August 8, 2006, United States Magistrate Judge Mary Ann Medler of the United States Eastern District of Missouri granted a summary judgment motion in favor of C.B.C. Distribution and Marketing stating that C.B.C.'s use of the players' records does not establish a violation of the players' right of publicity. *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1107 (E.D. Mo. 2006). Judge Medler stated, "C.B.C.'s use of the baseball players' names and playing records in the circumstances of this case, moreover, does not involve the character, personality, reputation or physical appearance of the players; it simply involves historical facts about the baseball players, such as their batting averages, home runs, doubles, triples, etc. . . ." *Id.* at 1089. Further, Judge Medler wrote that:

[c]learly, the names and playing records of Major League Baseball players as used by CBC in its fantasy baseball games are akin to the names, towns and telephone numbers in a phone book, to census data, and to news of the day . . . The court finds, therefore, that . . . the players' names and playing records as used by C.B.C. in its fantasy games are not copyrightable.

*Id.* at 1102-1103.

A proper case note would flesh out the reasoning behind the court's conclusions, but it is important to note that Judge Medler's decision stands to further the purpose provided by this paper.

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