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WHEN FANTASY MEETS REALITY: THE CLASH BETWEEN ON-LINE FANTASY SPORTS PROVIDERS AND INTELLECTUAL PROPERTY RIGHTS

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> "PLAYER STATISTICS ARE IN THE PUBLIC DOMAIN . . . . BUT IF YOU'RE GOING TO USE STATISTICS IN A GAME FOR PROFIT, YOU NEED A LICENSE FROM US TO DO THAT. WE OWN THOSE STATISTICS WHEN THEY'RE USED FOR COMMERCIAL GAIN." – JIM GALLAGHER, SENIOR VICE PRESIDENT, CORPORATE COMMUNICATIONS FOR MLB ADVANCE MEDIA.[1]

I. INTRODUCTION

The clash should have been foreseen, given the modern popularity and commercial appeal of "fantasy" sports games. But for a company that had been providing the service for thirteen years and had spent considerable time and resources developing the software central to playing fantasy sports on-line, it was a legal blindside — a strategically timed ambush executed with precision and surprise. On January 19, 2005, a senior vice president for Major League Baseball ("MLB")

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1. Tresa Baldas, *Pro Sports: Technology Changes Rules of the Game*, NAT'L L.J. (2005), *available at* http://www.law.com/jsp/article.jsp?id=1109128216973.

sent an e-mail to the Vice President of C.B.C. Distribution and Marketing, Inc., a fantasy sports provider,[2] stating that MLB had entered an agreement whereby it would be the exclusive licensee of the baseball players' "rights with respect to interactive media Fantasy Baseball Games,"[3] and further urged C.B.C. to "be advised that if your Company is using the above-described rights without a license, all such uses much cease immediately."[4]

For fantasy sports providers, this meant that the league was attempting to force them to discontinue the use of baseball statistics in their games, or negotiate with MLB for the right. The notice letter referenced a link to MLB.com's press release announcing the exclusive agreement to the public. The press release and notice letter were dated the same day.

Apprehensive that MLB would subsequently sue if it continued to operate its fantasy games, C.B.C. filed suit seeking a declaratory judgment.[5] The action is pending litigation in the United States District Court for the Eastern District of Missouri as of the date of publication. Among the issues before the court are whether fantasy sports providers infringe any copyrights allegedly owned or controlled by MLB, whether fantasy sports providers violate sections of the Lanham Act for deceptive and unfair business practices, and whether fantasy sports providers violate rights of publicity now owned or controlled by MLB through its exclusive agreement with the MLB Players Association.[6] This Article will primarily cover issues related to intellectual property.

II. BACKGROUND

A. The League's Argument for Exclusivity

A fantasy sport is a game in which players (i.e., public individuals) compete against one another by maintaining rosters of actual professional athletes and using the real game statistics of those athletes to

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2. C.B.C. has operated sports fantasy games since 1992 under its own brand name, CDM Fantasy Sports, and has also provided services for various other sports media. The company currently offers several fantasy sports games via the Internet. Complaint for Declaratory Judgment at ¶ 4, C.B.C. Distribution & Mktg. v. MLB Advanced Media, No. 4:05CV252MLM, 2005 WL 453742 (E.D. Mo. 2005) [hereinafter C.B.C. Complaint].

3. C.B.C. Distribution & Mktg. v. MLB Advanced Media, No. 4:05CV252MLM, 2005 WL 3299137 at *1 (E.D. Mo. 2005).

4. *C.B.C. Distribution & Mktg.*, 2005 WL 3299137 at *1.

5. *Id.*

6. C.B.C. had formerly entered into a licensing agreement with the MLB Players Association covering, *inter alia*, rights to names, nicknames, numbers, likenesses, signatures, pictures, playing records, and biographical data. This agreement was executed in late 2002 and expired on December 31, 2004. C.B.C. Complaint, *supra* note 2 at ¶15.

score points.[7] As Professor Jack F. Williams explained, "[T]he life-blood of the competition is the actual performance statistics of MLB players."[8] Before the aid of technology, early fantasy leagues were manually operated and used statistics from media box scores and from weekly information published in *USA Today* because they were easy to tabulate.[9] The advent of powerful computers and the Internet has revolutionized fantasy games, reaching many new players, allowing scoring to be done entirely by computer, and allowing leagues to develop their own scoring systems and game play options. Real-time statistics are now recorded and distributed to the public almost instantly via the Internet.

MLB's claims and notice letter to fantasy game providers come at a time when the industry is reaching new heights in public popularity and commercial revenue. Participation in fantasy games is a multimillion dollar industry in the United States.[10] According to the Fantasy Sports Trade Association, more than ten million people play fantasy football in the United States. Another six million play fantasy baseball, spending an average of $175 a year and making fantasy baseball a $1 billion annual business.[11] MLB valued its own five-year exclusive agreement to provide fantasy baseball games in excess of $50 million.[12] Because fantasy games rely upon information from real games, MLB believes it is entitled to revenues that would not exist but for statistics generated by its forums and employees.

B. The Clash

One possible explanation for fantasy sports providers' failure to foresee this conflict may be found in the nature of the service they provide. Fantasy operators provide statistical sports information to subscribers, similar to newspapers and online news sites, only in a more detailed and comprehensive fashion. Much like news services, Internet fantasy providers generate significant revenue through the sale of corporate advertising.

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7. Fantasy games currently offered by C.B.C. include fantasy football, basketball, hockey, golf, and auto racing. See C.B.C. Complaint, *supra* note 2, at ¶ 14.

8. Jack F. Williams, *Who Owns the Back of a Baseball Card?: A Baseball Player's Rights In His Performance Statistics*, 23 CARDOZO L. REV. 1705, 1708 (2002).

9. *See* Wikipedia, *Fantasy Baseball*, http://en.wikipedia.org/wiki/Fantasy_baseball (as of Apr.l 9, 2006, 02:28 GMT).

10. *See* Baldas, *supra* note 1.

11. *Id.*

12. *See* Press Release, MLB.com, MLB Advanced Media and Major League Baseball Players Association Reach Exclusive Agreement (Jan. 19, 2005), http://mlb.mlb.com/NASApp/mlb/mlb/news/mlb_com_press_release.jsp?ymd=20050119&content_id=932415&vkey=pr_mlbcom&fext=.jsp.

Commercial venture fantasy sports providers generally agree that using players' names, likenesses, or biographical information to *promote* or *advertise* their products requires a license from the respective players unions or individual players.[13] Fantasy providers must also obtain licensing from the professional team organizations for any use of protected marks, such as team names and logos. Fantasy providers do not dispute the rights of the leagues and of the players to license protected marks and identities for advertisement and promotion. Because these facts are undisputed by both fantasy providers and professional leagues, the real cause of their recent clash seems to derive from the use of player statistics and names as components of game play. Who, if anyone, owns or controls these statistics?

III. FEDERAL COPYRIGHT PROTECTION

A. Are Sports Statistics Copyrightable?

What does it mean that a professional player had two hits in four batting attempts with one homerun and one single? For fantasy sports owners, it is game play information that may signify points for their teams. For the general public it is a past factual event. For news services who report the information, the statistic is a mere discovery and communication of a fact. Before professional sports leagues claim ownership of statistics, it must first be determined whether sports statistics are within the scope of federal copyright protection. An examination of the Copyright Act of 1976 and a few significant judicial decisions helps to clarify this issue.

Copyright protection is a constitutionally granted power, intended by the Framers "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings."[14] The Copyright Act establishes two fundamental prerequisites for copyright protection for works of authorship: originality and fixation.[15] Originality means that the work was independently created by the author (as opposed to copied from other works) and that it possesses at least some modicum of creativity.[16] Since *Feist Publications, Inc. v. Rural Telephone Service Co.,* the Supreme Court has held, as a matter of constitutional law, that originality is

13. The NFL, NBA, MLB, and NHL players unions have authority to license their players' names when used for group marketing or endorsement purposes. Players are compensated through their respective unions for such usage. Individual athletes can also give authorization for individual uses.

14. U.S. CONST. art. I, § 8, cl. 8.

15. 17 U.S.C. § 102(a) (2000).

16. Williams, *supra* note 8, at 1710.

necessary for copyright protection.[17] In this landmark copyright case, the plaintiff was alleging infringement for the copying of the factual data from its phone book.[18] The Supreme Court rejected any notion of copyright protection for factual information.[19] Borrowing from its late 19th century decision in *Burrow-Giles Lithographic Co. v. Sarony,*[20] the Court held:

> 'No one may claim originality as to facts.' . . . This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence. To borrow from *Burrow-Giles*, one who discovers a fact is not its 'maker' or 'originator.' 111 U.S., at 58. 'The discoverer merely finds and records.'[21]

Sports statistics seem to fall comfortably within the Court's definition of unoriginal, and thus uncopyrightable, fact. Sports statistics are merely related factual events. Since the statistics are simply recordings of related events, they exist as facts that are "discovered" by observers and communicated to others. Similar to any of yesterday's news stories, such as the poll results of an election, the outcome of a court decision, or recorded weather figures, statistics fail to satisfy the necessary prerequisites of originality and creativity for copyright protection. The information plainly resides in the public domain, available to every person as free information that may not be privately owned for the purposes of copyright.[22] The decision in *Feist* represents an extension of federal copyright policy that has sought to strike a balance between protecting an author's right to control an originally created intellectual work and public's interest in obtaining and using information.[23] Moreover, a sports statistic by itself has no author.[24] The player who caused the event to occur through the action of hitting

17. 499 U.S. 340 (1991); *see also* James E. Schatz et al., *What's Mine Is Yours? The Dilemma of a Factual Compilation*, 17 U. DAYTON L. REV. 423 (1991).

18. *Feist*, 499 U.S. at 342–45.

19. There may be a valid dispute as to whether *Feist* benefits sports leagues, in that the holding supports copyright protection for "unauthored" facts via arrangement and selection in compilations. *Id.* at 348.

20. 111 U.S. 53 (1884).

21. *Feist*, 499 U.S. at 347 (citing 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §§ 2.11[A], 2.03[E] (1990)); *accord* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985) (holding that no author may copyright his ideas or the facts he narrates).

22. *See Feist*, 499 U.S. at 354.

23. CRAIG JOYCE ET AL., COPYRIGHT LAW 67 (6th ed. 2003).

24. *Cf.* NBA v. Motorola Inc., 105 F.3d 841, 846 n.3 (2d Cir. 1997).

a baseball can no more claim ownership over that event than a driver could claim ownership over a report of her automobile accident. The two events exist as merely past factual information.

The *Feist* Court also addressed whether a compilation of facts could satisfy the requirements for copyright protection. The Court affirmed that certain works with subject matter consisting of uncopyrightable facts may nonetheless possess the requisite modicum of creativity to warrant copyright protection.[25] The key to satisfying the originality and fixation requirements for copyrighting compilations lies in the *selection* and *arrangement* of the underlying facts. As the Court explained, "these choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws."[26] Under this standard, copyright protection for factual compilations is thin, but nevertheless exists through the independent selection and arrangement of uncopyrightable facts, so long as they possess a modicum of creativity.

The *Feist* Court failed to establish a bright line to determine when compilations may achieve copyright protection, preferring instead to consider the context and subject matter of each work seeking protection. The more originality and creativity that is evidenced in the selection and arrangement of the facts, the higher the probability of qualifying for copyright protection.[27] In applying this standard to the use of sports statistics, it is clear that copyright protection, although not available for the statistics themselves, may be available for an original and creative selection and arrangement of the statistics. Further, statistical compilations are necessarily authored, as an individual is needed to record and input the data into fixed form. Under the Copyright Act, a compilation is copyrightable and is defined as a "collection and assembling of preexisting materials or of data that are selected in such a way that the resulting work as a whole constitutes an original work of authorship."[28] Given that compilations are generally copyrightable, it must now be examined whether and under what circumstances compilations of sports statistics may be protected under copyright law.

The facts in *Kregos v. Associated Press*[29] are comparable to the circumstances of fantasy sports providers. In *Kregos*, the plaintiff created a baseball pitching form that displayed information concerning

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25. *See* Williams, *supra* note 8, at 1712.
26. *Feist*, 499 U.S. at 348.
27. For an excellent illustration of originality sufficiency as a vector relationship, see Williams, *supra* note 8, at 1710.
28. 17 U.S.C. § 101 (2000).
29. 937 F.2d 700 (2d Cir. 1991).

the past performances of baseball pitchers as a predictor of future performance. Kregos registered his form with the Copyright Office and successfully obtained a copyright. Kregos's form compiled information for each day's games, including nine statistical pitching categories such as win/loss record, earned run average, innings pitched, and men on base average, among others, and distributed it to subscribing newspapers. Though the form included statistics, the controversy in the case concerned only Kregos's rights to the form without each day's data.

In other words, at issue were his exclusive rights to the particular selection of categories of statistics appearing in the form, not the underlying statistics used. The court upheld Kregos's copyright protection, reasoning that "there are 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."[30] Selection of a particular set of statistical data out of a multitude of possible combinations made Kregos's compilation an original and creative arrangement of facts.[31] Thus, Kregos authored a compilation, using sports statistics as "raw materials," that satisfied federal copyright requirements. It may be significant that the court never considered the possibility of whether MLB had a proprietary interest as owner, author, or producer of the statistics used in the form. Kregos owned exclusive rights in his pitching form and enjoyed federal protection from infringement of his statistical arrangement.

B. Limits of Protection for Sports Statistics

The limited protection available to sports statistics compilations as established in *Kregos* and compilations in general as established in *Feist* impact sports statistics compilations in two significant ways. First, while *Feist* established that the expression of ideas may be protected by copyright, the Court also held that because the facts themselves were not original, deference would not be given to the labor expended when deciding the merit of copyright protection. The Court thus rejected "sweat of the brow" as a basis of copyright protection – a position that justifies copyright as a reward for an author's labor.[32] The Court declared that "notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, so long as the com-

30. *Id.* at 704.
31 *Id.*
32. Feist Publ'ns Inc. v. Rural Tel. Serv. Co., 499 U.S. at 349.

peting work does not feature the same selection and arrangement."[33] Thus, the Court favored a narrow scope of protection for compilations over granting exclusive rights that would have the effect of removing facts from the public domain.[34] Applied to sports statistics, the significance of the holding is that statistical information may be copied from another's work without regard to copyright protection, so long as the author's original and creative selection and arrangement in the compilation is not copied. To illustrate the impact using a fictitious example, suppose MLB has expended substantial labor and resources to collect, compile, and distribute its game statistics via the Internet to fans in a sufficiently original and creative selection and arrangement that has been afforded copyright protection. A fantasy provider may then insert those same statistical facts into its own copyrighted compilation (that has satisfied the minimal requirements of originality and creativity) and be well within its rights for purposes of copyright.[35] Copyright infringement would turn on similarity in selection and arrangement only, without regard to the reproduction of the factual statistical information or labor expended in gathering such information.[36]

Kregos outlined the second significant limitation of copyright protection given sports statistical compilations. Concerned that granting exclusive rights to compilations would have the effect of insulating and limiting public access to the underlying facts in the compilation, the court explained that the "fundamental copyright principle that only the expression of an idea and not the idea itself is protectable, has produced a corollary maxim that even expression is not protected in those instances where there is only one or [a] few ways of expressing an idea."[37] While expressions of facts are generally protectable, the expression is not protectable where there is a limited number of ways of expressing factual matter by compilation. This is known as the idea/expression merger doctrine.[38] Cautious of applying the doctrine too sparingly or too readily, *Kregos* also did little to establish a bright line rule to determine when the idea and its expression have merged to preclude the compilation from copyright protection.

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33. *Id.*

34. *Id.*; s*ee also* Baker v. Selden, 101 U.S. 99 (1879) (holding that granting the exclusive rights to a book on accounting did not also grant exclusive rights to the accounting forms within the book).

35. A more appropriate claim to consider would be misappropriation, discussed *infra* at Part IV.A.

36. *See Feist*, 499 U.S. at 340 (finding that listings in a phone book arranged alphabetically did not satisfy the element of originality in selection and arrangement); *see also* Key Publ'ns, Inc. v. Chinatown Today Publ'g Enters., Inc., 945 F.2d 509 (1991) (upholding an assertion of copyright in the yellow pages but finding no infringement from the defendant's copying of the white pages information).

37. Kregos v. Associated Press, 937 F.2d 700, 705 (2d Cir. 1991).

38. *Id.*

The Court highlighted the fact that Kregos's compilation was neither exhaustive nor precise given the multitude of other possible combinations of statistics available. Moreover, the Court reasoned, Kregos's "'idea,' for purposes of the merger doctrine remained the general idea that statistics can be used to assess pitching performance rather than the precise idea that his selection yields a determinable probability of outcome."[39] Thus, had Kregos's compilation been one of only a few predictive methods or a precise gauge of future pitching performance, his forms likely would not have been protected. Accordingly, Kregos's intellectual property rights were grounded in his subjective opinion of which combinations of statistics were valuable to him personally, rather than an objective and precise method to determine a particular result.

The inference can be made that the more the compilation is used as a functional recording or precise predictive gauge, the less likely copyright protection will attach. Returning to the original statistic, one homerun and one single in four at-bats, there are only a few ways to selectively arrange the events. The classic expression of this statistic is fixated as 2/4, 1hr, 1b. It is easy to see that the expression of the statistic is largely functional and used to communicate facts quickly and efficiently. Any alternative variation would likely be trivial and *de minimis*. The number of ways to express the statistical information is limited because there are only a limited number of recordable events. Such an expression likely fails copyright protection because the use is functional rather than original or creative. However, when the statistic 2/4 is used with other statistical facts in a subjective manner to gauge a player's outcome over an entire season, such an expression moves closer toward satisfying copyright's requirements of originality and creativity.

IV. Current Sports Statistics Dispute: Baseball in the Wrong Ballpark?

On its face, it appears that fantasy sports providers benefit from *Feist* and *Kregos*. Borrowing from the model in *Kregos*, if compilations are seen as spanning a continuum with pure taste and subjectivity at one end and precise analysis at the other, the closer along the continuum that sports statistical compilations engage matters of pure taste and opinion, the more likely they are to be protected by copyright law.[40] This standard will likely work against professional sports leagues asserting ownership over statistics for several reasons.

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39. *Id.* at 707.

40. *Kregos* further described different categories of ideas and distinguished between those ideas that undertake to advance the understanding of phenomena or the solution of

First, since statistics alone are facts and thus not protectable, the deduction can be made that MLB's potential claim of copyright is *how* its statistics are recorded and organized. This argument will be difficult to assert because MLB will have the burden of proving originality. The recording of actual game statistics is largely functional and designed to record the factual events of the game efficiently and comprehensively rather than subjectively and creatively.

Further, the recording methods for the actual game have become largely uniform, as leagues, media analysts, and the general public all utilize similar categories and selections to record the significant events in game play.[41] If MLB plans to invoke a claim in the box score data — hits, runs, errors, and substitutions — from its games, it will have a hefty burden of proving originality, as the selection and arrangement in recording the events of professional games today is both functional and widely used. It is not necessary to determine who originated the first box score because novelty does not trigger copyright rights.[42]

Moreover, even if sports leagues proved first use, originality is surely diluted by the functional and uniform methods of current data compilation in the public domain. The Copyright Act further precludes protection for functional works, adding, "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."[43]

Today, approximately 23,325,000 links to fantasy league sports sites exist.[44] The use of statistics in fantasy games to tally points, predict outcomes of team performance, and track individual player performance is widespread. As a result, the idea/expression merger doctrine may preclude the copyright protection of sports statistical compilations.[45] The actual sports games can only produce statistics

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problems and those, like the pitching form at issue, that do not undertake to explain phenomena or furnish solutions, but are infused with the author's taste or opinion. *Id*. at 710.

41. *See* MLB.com, Stats, http://www.mlb.com (follow "Stats" link in upper navigation bar) (last visited Apr. 29, 2006).

42. *See* Boisson v. Banian, Ltd., 273 F.3d 262, 270 (2d Cir. 2001) ("[A]n author is entitled to copyright protection for an independently created original work despite its identical nature to a prior work, because it is independent creation, not novelty, that is required."); Balt. Orioles, Inc. v. MLB Players Ass'n, 805 F.2d 663 (7th Cir. 1986) ("For a work to be copyrightable, it must be original and creative, but need not be novel.").

43. 17 U.S.C. § 102(b) (2000).

44. *Cf.* Williams, *supra* note 8. Professor Williams's search on three Internet search engines uncovered over 30,000 links to fantasy league sports — 23,295,000 fewer than the number of links on the same three search engines as of April 4, 2006.

45. *See, e.g.*, Fantasy Sports Brainiac, http://www.fantasysportsbrainiac.com (last visited Apr. 29, 2006); STATS, Inc., http://www.stats.com (last visited Apr. 29, 2006); Swinburne

based on the recordable events of game play. Because the actual game consists of a measurable quantity of recordable events, so must corresponding statistical combinations. In this respect, the *Kregos* court failed to foresee the public craze over statistics that would follow the advent of technology and sports statistical games.

The *Kregos* court reasoned, "There are 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."[46] Given the widespread use of statistical information in increasingly complex and sophisticated combinations,[47] one could argue that there remains little of value that has not been explored by sports statisticians and the public, and that therefore the idea/expression merger doctrine should be applied more strictly in light of such developments. Moreover, while the use of sports statistical compilations provides a vast universe of available data, combinations are practically limited by the parameters of actual game play. As a result, while idea and expression might merge in the use of sports statistical compilations at a near inestimable level, maximization could occur because the statistical variables available in real games are not infinite. Nevertheless, the issue will inevitably turn on the originality in the selection of variables used to determine a particular outcome. Therefore, like Kregos in his pitching forms, authors of sports statistical compilations should cite statistic selections that are highly subjective and largely chosen on the basis of taste and personal opinion as to value in order to gain copyright protection.[48] Recording events in a factual and functional manner will likely fail to satisfy the requisite degrees of creativity and originality but will still present a question of fact for the Copyright Office or court to determine.

In March 2005, Jim Gallagher, senior vice president of corporate communications for MLB Advanced Media, stated in an interview that baseball officials are not claiming exclusive rights to player sta-

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Sports Statistics, http://www.swin.edu.au/sport/ (last visited Apr. 29, 2006); Stats Shark, http://www.statshark.com (last visited Apr. 29, 2006).

46. *Kregos*, 937 F.2d at 704.

47. *See, e.g.*, Society for American Baseball Research, http://www.sabr.org (last visited Apr. 29, 2006).

48. *See* CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc., 44 F.3d 61 (2d Cir. 1961) (rejecting CCC's argument under the merger doctrine and finding infringement for copying Maclean's predictive valuations used to predict car values by emphasizing that Maclean's compilations to determine car value were approximate statements of opinion, rather than simply ideas); *see also* Eckes v. Card Prices Update, 736 F.2d 859 (2d Cir. 1984) (upholding the copyrightability of a selection of five thousand premium baseball cards from over eighteen thousand cards, observing that the selection of data required a cognizable degree of creative thought and holding that even when the data itself is arranged in a common form, the selection of that data may be sufficiently original to warrant copyright protection).

tistics unless a company is trying to use those statistics as a means of financial gain. "Player statistics are in the public domain. We've never disputed that," Gallagher said. "But if you're going to use statistics in a game for profit, you need a license from us to do that. We own those statistics when they're used for commercial gain."[49]

These statements seem quite contradictory standing alone and particularly when viewed in the context of the prior legal theories authorizing copyright protection. No statutory copyright or case law exists to support conditional copyright ownership. Given that professional sports leagues have not disputed collection and dissemination of their statistics to the public in the past when the statistics had little economic value, it seems MLB is now seeking to charge fans for information to which they have always had unfettered access. While the economic value of the statistical facts has increased rapidly with advances in technology and use, it has been judicially determined that the intellectual property right is not dependent upon its commercial value.[50] One of the fundamental principles of copyright law has always been to give "exclusive rights of limited duration, granted in order to serve the public interest in promoting the creation and dissemination of new works."[51] The copyright grant has traditionally been viewed as an incentive to encourage new works by assuring authors that they will reap the benefits of their intellectual labor. But it is difficult to imagine any of the major sports leagues discontinuing or failing to produce future games for lack of copyright protection over statistics. As one attorney close to the current fantasy dispute explained: "The public is fascinated with sports, and in particular baseball. Essentially, they can't get enough of stats."[52] With such an insatiable public appetite for sports statistics, MLB's undertaking is no small task.

A. Unfair Competition and Misappropriation

MLB has also asserted claims of unfair business competition.[53] Unfair competition law will only hold one who causes harm to the commercial relations of another liable for such harm if it relates to, among other principles:

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49. Baldas, *supra* note 1.

50. *See* Int'l News Serv. v. Associated Press, 248 U.S. 215 (1918).

51. Brief of Tyler T. Ochoa et al. as Amici Curiae Supporting Petitioners, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618) (discussing Wheaton v. Peters, 33 U.S. 591 (1834)).

52. *See* Baldas, *supra* note 1.

53. *See* C.B.C. Complaint, *supra* note 2.

> Appropriation of intangible trade values including trade secrets and the right of publicity . . . or from other acts or practices of the actor determined to be actionable as an unfair method of competition, taking into account the nature of the conduct and its likely effect on both the person seeking relief and the public . . . .[54]

MLB's public claim of ownership over commercial use of statistics is likely based upon the "quasi-property" right established in *International News Service v. Associated Press*.[55] In this case, news reports, published by Associated Press ("AP") on the East Coast, were copied by competitor International News Service ("INS") and relayed to INS' Midwest and West Coast papers simultaneous to or even ahead of their receipt by AP's counterparts.[56] The Court held that because AP's interest in the "hot news" it gathered was worthy of protection from interference by its competitors, INS was enjoined from taking or gainfully using any of AP's news until its commercial value as "hot news" had passed.[57] In other words, AP was granted protection against its competitor during the period of initial dissemination of the information to its members because that was when the news had high commercial value. Traditionally, unfair competition claims were based on competitors passing off the goods or services of another as their own. "As a result of the Court's willingness to find unfair competition beyond the traditional context of 'passing off,' *INS* has now come to stand for a general common law property right against 'misappropriation' of commercial value."[58] According to the Supreme Court majority, the right might be effective against competitors, but not against the public at large.[59] This case may be distinguished from the fantasy game/professional league circumstances in two significant ways.

First, the Court relied heavily on the fact that "the parties are in the keenest competition between themselves in the distribution of news throughout the United States."[60] In contrast, fantasy providers are barely in competition with professional sports leagues. True, MLB provides its own fantasy game via its official website, which competes with other fantasy providers for consumers; however, this is merely one service that MLB provides to consumers and is neither the central

54. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 (1995).
55. *INS*, 248 U.S. 215 (1918).
56. *Id*. at 232–33.
57. *Id*. at 235.
58. JANE C. GINSBURG ET AL., TRADEMARK AND UNFAIR COMPETITION LAW 33 (3d ed. 2001).
59. *Id.* at 32.
60. *INS*, 248 U.S. at 230.

business service nor good provided. For C.B.C., the fantasy provider involved in the current dispute, fantasy sports leagues are the central service provided and have been since 1992. Consequently, the parties arguably do not provide matching services and thus do not compete for the same market.

MLB may argue that, unlike industrial or financial businesses, which are generally valued on cash flow and assets, sport franchises are valued by the sum of all their revenue streams.[61] Each stream is critical to the overall economy. Viewed in this context, competition that contributes to net revenue is direct competition, including the competition provided by fantasy and Internet games. The argument is not completely flawless, however, since professional sports leagues will still need to overcome the lack of direct competition in the more traditional sense because fantasy sports providers stand to suffer greater harm, including termination of business. Professional sports leagues, on the other hand, have many other revenue streams and are not dependent on fantasy games as traditional or vital revenue.

Second, the case can be distinguished by lack of free-riding. INS was essentially free-riding on AP's costs and labor in generating the "hot news" over which both businesses were in competition. In contrast, fantasy sports providers do not free-ride on information provided at the cost of the leagues; fantasy sports providers collect their own data independently or contract with companies who do. The Second Circuit affirmed this latter distinction in *NBA v. Motorola, Inc.*[62] by rejecting the National Basketball Association's ("NBA") claims of misappropriation of their game statistics. The NBA attempted to prevent Motorola and STATS Inc.[63] from divulging the scores and statistics of ongoing basketball games to users of Motorola's SportsTrax paging device. Motorola did not divert broadcast or computer feeds from the NBA or its licensees; instead, STATS employees compiled the data manually while watching the game in person, on television, or listening on the radio.[64]

Motorola did not free ride, the court determined, because defendants did their own fact gathering, had their own network, and assembled and transmitted data themselves at their own cost.[65] There would

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61. *See* Soonhwan Lee & Hyosung Chun, *Economic Values of Professional Sport Franchises in the United States*, 5 SPORT J. (2002), *available at* http://www.thesportjournal.org/2002Journal/Vol5-No3/econimic-values.asp.

62. 105 F.3d 841 (2d Cir. 1997).

63. Founded in 1981, STATS provides detailed sports services for both individual consumers and a wide array of commercial clients. STATS provides up-to-the-minute sports information to fans, professional teams, print and broadcast media, software developers, and interactive service providers around the country. Stats Inc., About Us, http://biz.stats.com/history.asp (last visited Apr. 29, 2006).

64. *NBA*, 105 F.3d at 844.

65. GINSBURG, *supra* note 56, at 44.

arguably have been free-riding if Motorola had simply collected the information from the league and retransmitted it, rather than engaging in their own information collection and dissemination.[66] In light of the foregoing, professional leagues must prove that fantasy sports providers are causing harm by diverting information that the leagues gather at substantial cost. As mentioned above, fantasy sports providers collect their own data independently or contract with companies who do. Under the precedents of *INS v. AP* and *NBA v. Motorola*, a misappropriation claim is unlikely to succeed absent proof of direct competition and free-riding. Additionally, a claim of unfair competition will give deference only to the harm, if any, caused by the business practices of another in direct competition for goods or services.

B. Lanham Act and Rights of Publicity

Given the limits in asserting copyright infringement and unfair competition claims for misappropriation of statistics, fantasy game providers' futures may ride on MLB's exclusive agreement with the players union to control the players' rights of publicity. The right of publicity prevents the unauthorized commercial use of an individual's name, likeness, or other recognizable aspects of one's persona. It gives individuals exclusive rights to license the use of their identity for commercial promotion. "For almost fifty years, the courts have protected an athlete's right of publicity by recognizing an athlete's right to control and profit from the use of their name and nicknames, likenesses, portraits . . . or anything else that evokes a marketable identity."[67] Rights of publicity claims under the Lanham Act, however, must be distinguished from state law rights.

Under the Lanham Act, celebrities have the legal right to prevent false designation of origin or attribution with regard to their names, likenesses, or other attributes of their public identities, thereby ensuring their ability to exploit the commercial value of their identities. The pertinent language in the Act, under section 43(a), prohibits unauthorized use of information that "is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person."[68] The coverage that the Lanham Act affords against unlicensed exploitations, however, does not fully correspond to the interests the players seek to protect, because the underlying policies of

66. *Id.*
67. Williams, *supra* note 8, at 1716.
68. 15 U.S.C. § 1125 (2000).

the Act seek to ensure accuracy of source identification, rather than to secure exclusive rights in the uses of identity.[69]

A claim under the Lanham Act, therefore, must demonstrate that the uses of the players' identities by fantasy providers suggest that the service is endorsed, sponsored, authorized, or associated with the players whose names are used for game play. The issue is whether the use of the players' names creates a likelihood of consumer confusion over whether the players endorsed or were otherwise involved with the service. If it can be demonstrated that a consumer would likely be confused, then the Lanham Act enjoins the particular use. The determination will turn on issues of fact regarding use. It seems clear, however, that if players' names or images are used in commercial advertisement or promotion of the services without authorization, such uses will be prohibited under the Act because consumer confusion and deception seem certain given the widespread use of athlete endorsements today. Where, however, the use of the players' identity is deemed to perform an informational function of identification, without misleading consumers as to the sponsorship or approval of the use, violation under the Lanham Act is difficult to prove.[70] In *Bi-Rite Enterprises, Inc. v. Button Master*,[71] for example, the District Court for the Southern District of New York held:

> [M]arks that are exploited only for their functional value and not to confuse the public receive no protection under unfair competition laws. Functionality in this context means that consumers desire the mark for its intrinsic value and not as a designation of origin. When a mark . . . is exploited [by third parties] for its intrinsic functional value, Congress has implicitly determined that society's interest in free competition overrides the owner's interest in reaping monopoly rewards.[72]

Fantasy games require two critical components to function: players' names and their accompanying statistics. The manner in which fantasy sites use players' names or identities will be critical in determining fair use. A strong argument can be made that the use of players' names for game play is a functional use, thus constituting fair use under the Lanham Act.[73] Their names serve as an identification

69. GINSBURG, *supra* note 56, at 642.
70. *Id.* at 642–43.
71. 555 F. Supp. 1188 (S.D.N.Y. 1983).
72. GINSBURG, *supra* note 56, at 642 (quoting *Bi-Rite Enterprises*, 555 F.Supp. at 1195).
73. 15 U.S.C. § 1115 (2000).

mechanism to link players with their performance statistics, not unlike their function in newspaper box scores. Like newspapers, the fantasy games do not use the players' names to sell, promote, or endorse products or services. To steer clear of Lanham Act issues, fantasy sites should not use the names and statistics of players in advertisements or other content where the primary purpose is to sell or promote the game.[74] This may preclude fantasy operators from making certain enhancements to their game play options, such as links to player bios, photographs, images, and so on. Use of players' names and statistical information merely as identifying mechanisms, however, is more likely a fair use.

The right of publicity also is a matter of state law, with more than half of the states recognizing a right of publicity, either as a matter of statutory or common law.[75] MLB's own prior victory in this venue, however, clarifying rights of publicity under state law, might impede its current claim. In 2001, former MLB players sued the league, claiming that their rights of publicity were violated by MLB's unauthorized use of their names and statistics in programs and websites.[76] The California Court of Appeal listed the elements necessary to prove the players' claim as: "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury."[77]

Even if each of these elements is established, however, the First Amendment requires that the right to be protected from unauthorized publicity must "be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press."[78] The court determined that the public interest should be evaluated by identifying and considering the precise information conveyed and the context of the communication. The court then weighed this public interest against the plaintiff's economic interests.[79] Consequently, the court determined that:

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74. *See* Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 416 (9th Cir. 1996); Gionfriddo v. MLB, 114 Cal. Rptr. 2d 307, 316 (Cal. Ct. App. 2001) (noting that disputed uses were included as "minor historical references" rather than "in advertisements selling a product").

75. *See* Sarah M. Konsky, *Publicity Dilution: A Proposal for Protecting Publicity Rights*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 347, 350 (citing J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 6:3 (2d ed. 2000)).

76. *See Gionfriddo*, 114 Cal. Rptr. 2d at 310–12.

77. *Id.* at 313 (quoting Eastwood v. Superior Court, 198 Cal. Rptr. 342 (Cal. Ct. App. 1983)); *see also* CAL. CIV. CODE § 3344(a) (West 1987).

78. *Gionfriddo*, 114 Cal. Rptr. 2d at 313 (quoting Gill v. Hearst Publ'g Co., 253 P.2d 441 (Cal. 1953) (en banc)).

79. *See id.* at 314.

> The public has an enduring fascination in the records set by former players. . . . Those statistics and the records set throughout baseball's history are the standards by which the public measures the performance of today's players. The records and statistics remain of interest to the public because they provide context that allows fans to better appreciate (or deprecate) today's performances. . . .
>
> Baseball is simply making historical facts available to the public through game programs, Web sites and video clips. The recitation and discussion of factual data concerning the athletic performance of these plaintiffs commands a substantial public interest, and, therefore, is a form of expression due substantial constitutional protection.[80]

The court responded to the players' claims that the challenged uses were presented in a commercial context, thereby constituting "commercial speech,"[81] by holding that profit "does not render expression commercial" since an expressive activity "does not lose its constitutional protection because it is undertaken for profit."[82] The court found that the key distinction was in the nature of the expression: "The core notion of commercial speech is that it does no more than propose a commercial transaction."[83] Distinguishing the uses in *Gionfriddo v. Major League Baseball*[84] from "advertisements selling a product," the court defined infringing commercial speech as "uses that do no more than propose a commercial transaction."[85]

In upholding MLB's uses of the players' information as fair and defining the critical distinction between commercial and noncommercial uses, the case seems favorable to fantasy sports providers so long as they do not employ the athletes' names and statistics solely to promote or sell services. The issue should turn not on *whether* the players' identities are used in a commercial endeavor, but *how* those identities are used. Again, it is an issue of fair use. MLB, on the other hand, will need to rely heavily on demonstrating a substantial competing interest and the economic impairment of such interest. As dis-

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80. *Id.* at 315.

81. *Id.*

82. *Id.* (quoting Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797 (Cal. 2001) (internal quotation marks omitted)).

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

84. 114 Cal. Rptr. 2d 307 (Cal. Ct. App. 2001).

85. *Id.* (emphasis omitted).

cussed above, MLB needs to establish the unique nature of its revenue structure, emphasizing the importance of the players' interests to control their names and images from commercial exploitation and the substantial economic harm resulting from such unauthorized exploitation. Based upon the lengthy analysis of the competing interests in *Gionfriddo*, it is fair to conclude that competing policy considerations will play a significant role in the court's decision.[86]

In stark contrast to *Gionfriddo* stands *Uhlaender v. Henricksen*,[87] a 1970 case decided in the U.S. District Court of Minnesota. In that case, the defendants manufactured and sold games that made use of the names and statistics of five hundred to seven hundred MLB players, identified by team, uniform number, playing position, and so on. The issue before the court was whether the players' names and published statistics could be considered property subject to legal protection from unauthorized use. The court found 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.[88]

MLB's reliance on this case in asserting wrongdoing suggests that it has likely served as a foundation for lucrative licensing agreements of professional athletes' likenesses in video games, board games, and other commercial uses.[89] The *Uhlaender* court's failure to distinguish between the commercial and noncommercial uses of the players' iden-

86. The court noted in dicta that MLB might even be able to use the information in an advertisement, stating: "A review of the cases finding that commercial speech violates the right of publicity strongly suggests that advertisements are actionable when the plaintiff's identity is used, without consent, to promote an *unrelated* product." *Id.* at 317 (emphasis in original).

87. 316 F. Supp. 1277 (D. Minn. 1970).

88. *Id.* at 1282.

89. The primary cases upon which MLB relies are *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970), *Arnold Palmer v. Schonhorn Enterprises, Inc.*, 232 A.2d 458 (N.J. Super. 1967) (concluding that voluntary disclosure of information embodying the public personalities of the plaintiffs through various news media did not extinguish their proprietary interests in their names and statistics), and *Rosemont Enterprises, Inc. v. Random House, Inc.*, 58 Misc. 2d 1 (N.Y. Sup. 1968) (noting that the unauthorized use of a prominent person's name in connection with the sale of a commodity was recognized as an actionable wrong). Memorandum in Support of Major League Baseball Players Association's Motion for Summary Judgment, C.B.C. Distribution & Mktg. v. MLB Advanced Media, No. 4:05CV252MLM (E.D. Mo. Dec. 23, 2005).

tities, in contrast to *Gionfriddo*, will be MLB's biggest asset and fantasy providers' biggest liability. *Uhlaender* stands for the right to preclude others from using one's name, face, and likeness *in conjunction with* performance statistics for any commercial use, with the exception of news media. Nevertheless, "commercial activity" is an exceptionally ambiguous term when applied to fantasy uses and, as demonstrated by the previous conflicting court decisions, a definite interpretation will be critical in determining whether fantasy sports use is fair use.

V. CONCLUSION: BALANCING COMPETING INTERESTS

Given the limitations of the copyright and trademark claims, the court might take the opportunity to determine, as a central issue, whether fantasy sports games violate players' rights of publicity currently controlled by MLB. As *Gionfriddo* and *Uhlaender* indicate, any resolution would likely turn on policy considerations, balancing the interests of the public against the interests of the players and MLB. Thus, a court must consider the totality of the situation to determine whether fantasy uses violate rights of publicity.

So what's at stake for the public? Aside from concerns relating to the freedoms of speech and information, the public has a strong economic stake. If the court determines that the inclusion of players' names in fantasy games does not violate publicity rights, more games will be produced, leading to greater competition and better quality. The public benefits from the free enterprise system that promotes the efficient allocation of economic resources.[90]

The exclusive rights agreement between MLB and its players affords the league a monopoly in providing fantasy baseball to consumers. MLB seeks to justify this exclusivity by maintaining that it would improve the quality of fantasy play. Yet monopoly control will undoubtedly cause an increase in price. The law disfavors monopolies unless they produce substantial benefits to society. Rather than substantial benefits, however, in this case the public may be subjected to higher prices, fewer choices, less autonomy in use, and limited access to public information. Moreover, such a monopoly could irreparably harm independent fantasy sports providers who cannot obtain licenses from MLB. In addition, the goal of a capitalist economy is to promote efficiency by maximizing the value of goods in society. The use of statistics in fantasy games has created significant economic value, whereas former uses of the "good" were minimal. Before fantasy games became popular, sports statistics had less economic value.

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90. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 cmt. a (1995).

Fantasy sports have revolutionized the way fans experience — and pay for — the real game. Not only have they greatly increased the economic value of sports statistics, but they have also become a whole new economy. Today, entire companies are solely dedicated to providing fantasy analysis, including numbers, projections, injury reports, scouting reports, and expert advice. Leading experts of the real game appear on television shows, dedicating time to discussing professional players' fantasy performances and offering game-play advice to the public. Comments aimed at fantasy players appear more and more often during analysis of real games, while statistical "tickers" continually update viewers on fantasy information during network television game coverage. There are fantasy conventions, trade conferences, and even a Fantasy Sports Trade Association. What started as a simple game among friends is now big business.

Now that the fantasy sports business involves selling things that used to be quaintly considered public knowledge, intellectual property is being tugged in opposite directions. If using players' names and identities in fantasy gameplay violates rights of publicity, then MLB's exclusive agreement with its players union will be enforceable against fantasy providers, forcing them to discontinue their current uses of sports statistics in fantasy games. This may result in the very situation the idea/expression merger doctrine sought to prevent — exclusivity in uncopyrightable facts. Since a player's statistics are useless to the fantasy game when disconnected from the player's name, both may be plucked from the public domain. As go the players' names, so go their statistical performances.

The players' rights of publicity are no less significant. For modern athletes, the right to market their names or images constitutes a substantial personal and economic interest. Endorsement contracts for the use of their personas can be lucrative, and unauthorized exploitation of these personas can be costly.[91] Moreover, "the right of publicity is the inherent right of every human being to control the commercial use of his or her identity."[92] As such, "the right of publicity is not merely a legal right of the 'celebrity,' but is a right inherent to everyone to control the commercial use of his identity and persona and recover in court damages and the commercial value of an unper-

91. Dannean J. Hetzel, *Professional Athletes and Sports Teams: The Nexus of Their Identity Protection*, 11 SPORTS L.J. 141, 155 (2004).

92. Erika T. Olander, Comment, *Stop the Presses! First Amendment Limitations of Professional Athletes' Publicity Rights*, 12 MARQ. SPORTS L. REV. 885, 886 (2002) (quoting J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed., rev. vol. 2001) (internal quotation marks omitted)).

mitted taking."[93] Though fantasy providers are not using players' names as commercial advertisements per se, their use is generating significant commercial revenue. Such use has ramifications other than mere communication of past historical facts, though distinguishing between communication and commerce is not always easy,[94] and has been a source of inconsistency in the courts.

Consumers subscribe to online fantasy games not for their useful information and news reporting, but primarily for their sophisticated game play. News reports and analysis are merely added benefits. The free speech informational aspects of the games serve as aids to assist fantasy players in making informed choices in their fantasy lineups. If electronic video game providers pay a premium for exclusive rights to use players' names and identities in their video games, why shouldn't fantasy providers as well? The electronic video game market, for example, produces fair and efficient competition. In that market, unlicensed games typically utilize more circuitous descriptions, such as player numbers and teams' geographical locations. Although some fantasy providers emphasize that they are not using the players' identities for their commercial value and consumer appeal per se, such use is unquestionably critical to the providers' commercial enterprise.[95] Last, unauthorized commercial use hinders the athletes' interests in controlling and benefiting from the uses of their names and personas, diminishing the returns on their own efforts in sport.

Fair use of names and likenesses is permitted without compensation.[96] To date, however, "[c]ourts have yet to offer truly concrete definitions of First Amendment protected speech which limit a professional athlete's rights of publicity in his own persona and achievements."[97] It seems clear that when bare factual information of athletes' names and statistics are used to identify and make information available to the public, such recitation should be protected by the First Amendment and the public interest. On-line fantasy uses that utilize more than bare factual information may lose the protection when aspects of the athletes' personas are used excessively. Such excessive use should include signatures, nicknames and unique marketable traits. However, the court must reconcile the definition of

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93. *Id.* (quoting J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed., rev. vol. 2001) (internal quotation marks, alterations, and original emphasis omitted)).

94. *See id*. at 895.

95. *See, e.g.*, Olander, *supra* note 92, at 897–98 ("The use of Plaintiff's name and videotape footage was crucial to Defendant's commercial purpose." (quoting Pooley v. Nat'l Hole-In-One Ass'n, 89 F. Supp. 2d 1108, 1113 (D. Ariz. 2000))).

96. *See, e.g.*, Cardtoons, L.C. v. MLB Players Ass'n, 95 F.3d 959 (10th Cir. 1996) (parody); *Pooley*, 89 F. Supp. at 1112 (incidental use); Montana v. San Jose Mercury News, Inc., 40 Cal. Rptr. 2d 639 (Cal. Ct. App. 1995) (newsworthy event).

97. Olander, *supra* note 92, at 903.

"commercial use" in order to determine the line where the use of athletes' information becomes more than mere recitation and instead exploits the intrinsic market value of names and accomplishments.