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Who Owns a Home Run - The Battle of the Use of Player Performance Statistics by Fantasy Sports Websites

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Who Owns A Home Run? The Battle of the Use of Player Performance Statistics by Fantasy Sports Websites

by
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> I don't think the average guy playing a fantasy baseball or football game knows that maybe in the next year or two the way he's played the game in the past, and this whole industry has the opportunity to change.
>
> - Charlie Wiegert[1]

I. Introduction

Fantasy sports leagues have grown rapidly since the founding of the first such league, the Rotisserie Baseball League in New York City, in 1980.[2] In 2005, almost 10 million Americans participated in

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1. Charlie Wiegert is the Founder and Executive Vice President of CDM Fantasy Sports. *Outside the Lines Nightly: Fantasy League Use of Statistics* (ESPN television broadcast Aug. 16, 2005).

2. Greg Johnson, *Suing Over Statistics: Fantasy leagues challenge Major League Baseball's right to demand licenses*, L.A. TIMES, Jan. 2, 2006, at D1.

fantasy football and 6 million participated in fantasy baseball.[3] Fantasy baseball alone generated $200 million in revenues from league registration fees during 2005, and some leagues now offer a $100,000 grand prize.[4]

At the heart of fantasy sports leagues are "player performance statistics," which are the statistics that players produce through their actual play on the field, such as batting average and home runs in baseball or touchdowns in football. Fantasy websites allow participants, or "owners," to draft teams of individual players, and then compete against their friends, co-workers, or complete strangers, on the basis of the player performance statistics, which are compiled in real time. "The success of one's fantasy team over the course of the . . . season is dependent on one's chosen players' actual performances on their respective actual teams."[5]

The inevitable result of the fantasy sports phenomenon is that professional sports leagues (e.g., Major League Baseball, the National Football League, the National Basketball Association, and the National Hockey League) and their athletes (or, more specifically, the players' unions representing those athletes) have claimed property rights to the player performance statistics and charge fantasy website proprietors licensing fees for the use of these numbers, as well as for the use of player names and images and team names and logos. Many fantasy leagues, like those offered by CDM Fantasy Sports and FantasySports.com, charge participants money to join leagues in order to cover the cost of these licensing fees, and to create the pot of prize money. The 6 million Americans who play fantasy baseball spend an average of $175 a year on the game, with fees per league ranging from $25 to $40.[6] Other fantasy website proprietors, such as Yahoo! and ESPN.com, offer free fantasy sports leagues, paying licensing fees for the participants, but still reap the benefits of advertisers clamoring to acquire space on their websites.[7] For years,

3. Tresa Baldas, *Pro Sports: Technology Changes Rules of the Game*, THE NAT'L L.J. (Mar. 4, 2005), at http://www.law.com/jsp/article.jsp?id=1109128216973 (last visited Nov. 10, 2005).

4. Johnson, *supra* note 2, at D1.

5. C.B.C. Distrib. and Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1080 (E.D. Mo. 2006).

6. Baldas, *supra* note 3; *Outside the Lines Nightly: Fantasy League Use of Statistics*, *supra* note 1.

7. *Outside the Lines Nightly: Fantasy League Use of Statistics*, *supra* note 1 (describing the potential change in the number of fantasy participants should fantasy proprietors be forced to pay larger licensing fees). *See also* Yahoo! Fantasy Sports, http://fantasysports.yahoo.com/; ESPN Fantasy Sports, http://games.espn.go.com/frontpage).

fantasy website proprietors paid the licensing fees without incident.[8] In 2004, the professional baseball players' union, the Major League Baseball Players Association ("MLBPA"), sold the right to use players' names and likenesses to Major League Baseball ("MLB"), which subsequently denied certain fantasy website proprietors a license renewal.[9]

On August 8, 2006, the United States District Court for the Eastern District of Missouri decided the issue of whether or not Major League Baseball Advanced Media ("MLBAM"), MLB's interactive division, has the right to demand that fantasy league operators be licensed in order to use player performance statistics.[10] Fantasy website proprietor C.B.C. Distribution & Marketing ("CBC"), which operates sports fantasy games under its brand name CDM Fantasy Sports, had filed suit against MLBAM, seeking a declaration of its right to produce and promote fantasy baseball games without having to get a license from MLB.[11]

Previous commentators on this topic have pointed to federal copyright protection of statistical compilations as protecting the league's property interests in the statistics, as well as the players' right of publicity, which allows them to determine who can use their image, likeness, etc., for profit.[12] Copyright law regarding statistical compilations—the professional sports leagues' main claim in defense of their imposed licensing fees—declares that originality in selection, coordination, or arrangement is necessary for copyright protection of these factual databases.[13] Professional athletes separately claim protection from unlicensed fantasy sports proprietors using their images and information under the right of publicity, "the inherent right of every human being to control the commercial use of his or her identity."[14] Contrary to these two asserted rights is a 2001 California Court of Appeal ruling in *Albert F. Gionfriddo v. Major League Baseball* that MLB had the right to use the names, images, and statistics of former ballplayers because the information, which was being used in game programs, were historical facts, part of

8. Johnson, *supra* note 2, at D1.

9. *Id.*

10. C.B.C. Distrib. & Mktg., 443 F. Supp. 2d at 1081.

11. *Id.*

12. *See generally* 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 (2002).

13. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 346 (1991).

14. 2 J. THOMAS MCCARTHY, TRADEMARKS & UNFAIR COMPETITION 28:1, at 28-3 (4th ed. 2006).

baseball history.[15] The ruling in *Gionfriddo* provides the most convincing counterargument to MLB's copyright and right of publicity claims against fantasy website proprietors such as CBC.

In *CBC Distribution & Marketing*, the district court held that the players do not have a right of publicity in their names and playing records as used by fantasy website proprietors, and therefore, CBC could not have violated any such right to publicity.[16] Even if the players had any right to publicity, the First Amendment would take precedence over that right.[17] Also, the court found that the names and playing records of Major League baseball players "as used in CBC's fantasy games are not copyrightable and, therefore, federal copyright law does not preempt the players' claimed right of publicity."[18] This final element of the holding was a qualification of the holding in *Baltimore Orioles v. Major League Baseball Players Ass'n*, where the Seventh Circuit ruled that federal copyright law preempts the individual players' state rights of publicity in game performances—more specifically, television broadcasts of games—but did not explicitly extend its holding to cover player performance statistics.[19] MLBAM has since filed a notice of appeal.

This note will show that, on appeal, the district court's holding should be upheld, despite the court's erroneous holding that the players do not have a right to publicity. The right of publicity of professional athletes is trumped by the First Amendment, because the statistics are historical facts, as the use of those statistics within the realm of fantasy sports is in the public interest. Finally, the court was correct in holding that the player performance statistics are not copyrightable, and that therefore federal copyright law does not preempt any claimed right of publicity.

II. Background

A. Sports and Technology

As professional sports move into the 21st century, their relationship with technology is an issue at the forefront of the

15. 114 Cal. Rptr. 2d 307, 319 (Cal. Ct. App. 2001) In this case, plaintiffs, four professional baseball players who played in MLB between 1932 and 1948, sued MLB and its agents over the use of their photographs and statistics, as well as accounts of their play.

16. *C.B.C. Distrib. & Mktg.*, 433 F. Supp. 2d at 1107.

17. *Id.*

18. *Id.*

19. 805 F. 2d 663, 679 (7th Cir. 1986).

industry's growth.[20] The question of the ownership of player performance statistics is a relatively new one, arising in recent years because of MLB's apparent intention to reel in the proliferation of fantasy sports websites not directly tied to its offered web services. This controversy over the ownership rights to these statistics is seen by fantasy website proprietors as one involving greedy professional sports leagues attempting to make money on every aspect of the industry, even going so far as restricting the use of information in the public domain.[21] On the opposite end of the spectrum, professional sports leagues and professional athletes view the controversy as a simple reclamation of their rights to the profits arising out of new technologies emerging from their own creations, the statistics and personas of the individual players.

The sports industry's move from sport to entertainment and business is well-documented.[22] Over the last 40 years, the sports industry has moved from traditional to nontraditional sources of income, becoming a big business and an entertainment source for hundreds of millions of fans and viewers around the globe.[23] Initially, the sports industry relied primarily on ticket sales, parking, and concessions as its main sources of income.[24] Eventually, income streams developed in the areas of advertising, radio and television, and continue to expand in the form of luxury boxes, apparel, and cable programming.[25] The starkest examples of the transformation from pure sport to business and entertainment is evidenced by the new emphasis within the industry on branding, network ownership, and sports as programming.[26] At new baseball parks around the country, such as the Baltimore Orioles' Camden Yards or the San Francisco Giants' AT&T Park, the game itself has nearly taken a

20. Williams, supra note 12, at 1706; Neville Firdaus Dastoor, The Reality of Fantasy: Addressing the Viability of a Substantive Due Process Attack on Florida's Purported Stance against Participation in Fantasy Sports Leagues That Involve the Exchange of Money, 6 VAND. J. ENT. L. & PRAC. 355 (2004).

21. *See, e.g.*, Baldas, *supra* note 3 (summarizing CCM's attorney Rudy Telscher's statement that "[MLB] is trying to monopolize the fantasy market . . . and that MLB just wants a bigger piece of the pie."); *see also Outside the Lines Nightly: Fantasy League Use of Statistics*, *supra* note 1 (in a panel discussion on the topic, Fantasy Planet CEO, and President and Founder of the Fantasy Sports Writers Association, Ryan Houston states, "I think where it all became a big factor was Major League Baseball realized this is a huge money-making opportunity for them.").

22. Williams, *supra* note 12, at 1706.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

back seat to restaurants, corporate guest entertainment in luxury boxes, and playgrounds for children. The newest types of income sources for sports leagues, owners, and players include web radio, websites, e-commerce, video streaming, fantasy league sports, and virtual sports leagues.[27]

Historically, sports leagues were not concerned with ownership of player performance statistics because those statistics were not used as the centerpiece of a major money-making scheme. The news media reported the statistics solely for informational purposes, and the leagues appeared unconcerned with the use of these statistics once they were reported. But a major money-making scheme based on statistics finally arose with the proliferation of fantasy sports leagues.

B. The Rise of Fantasy Sports Leagues

Baseball historians and analysts trace the beginnings of fantasy sports leagues as far back as 1960 at Harvard University, and to the University of Michigan in the late 1960s.[28] But most believe that fantasy sports leagues as presently known were born with the founding of the Rotisserie Baseball League by a group of friends in New York City in 1980.[29] At the time, the League presented the idea to MLB as a business venture, and "baseball laughed at us . . . and slammed the door in our faces," according to Daniel Okrent, one of the co-founders of the Rotisserie League.[30]

Throughout the 1990s and into the 2000s, the fantasy sports industry experienced previously unforeseen growth in the number of websites, number of participants, and revenue.[31] After ignoring the fantasy baseball movement for more than two decades, MLB finally entered the market in 2001.[32]

Player performance statistics are of central importance to these fantasy sports leagues, as the fantasy participants act as team owner, general manager, and coach, assembling team rosters based on statistics in categories that will be used to measure one team against another on a weekly or daily basis.

27. Williams, *supra* note 12, at 1706-07.

28. *Outside the Lines Nightly: Fantasy League Use of Statistics*, *supra* note 1 (commentary by Alan Schwarz, Senior Writer for *Baseball America*).

29. Johnson, *supra* note 2, at D1.

30. *Id.*

31. Baldas, *supra* note 4.

32. Johnson, *supra* note 2, at D1.

For years, fantasy sports sites have paid the MLBPA for a license to use the statistics.[33] In 2005, the players sold the right to use their names and likenesses to MLB, which then denied several of the fantasy sports companies' license renewals.[34] This has led to at least one lawsuit by a fantasy sports website proprietor against MLB and/or its media division.[35]

C. Fantasy Sports Proprietors Take the Fight to Court

On its website, CDM Sports (which is operated by CBC, the plaintiff in the above suit) claims to be one of the leading providers of fantasy sports products and services in North America.[36] CDM has operated fantasy games since 1992 for a multitude of players in the national sports media, including USA TODAY, Sports Weekly, The Hockey News, The Golf Channel and The Sporting News, for major Internet entities such as MSNBC, Snap and The Lottery Channel, as well as under the CDM brand.[37] The company currently offers baseball, football, basketball, hockey, golf and auto racing fantasy games which can be played over the phone, by mail, email, fax, or the Internet.[38]

CDM Sports was one of the fantasy sports providers that was denied a license renewal after the MLBPA transferred the right to use the players' names and likenesses to MLBAM.[39] The company has filed suit in the Eastern District of Missouri,[40] alleging that the player performance statistics are historical data in the public domain, which the public ought to be able to use without having to compensate the players or the league.[41] The District Court eventually held, as stated above, that the players had no right of publicity in the statistics, and that even if they did have such a property interest, it would be preempted by the First Amendment.

The keystone to the fantasy league concept is the player performance statistics.[42] If denied access to these statistics and the

33. *Id.*

34. *Id.*

35. *C.B.C. Distrib. & Mktg.*, 433 F. Supp. 2d at 1077.

36. CDM Fantasy Sports, About CDM, at http://www.cdmsports.com/aboutcdm.php (last visited Feb. 21, 2007).

37. *Id.*

38. *Id.*

39. Baldas, *supra* note 3.

40. *CBC Distrib. & Mktg*, 443 F. Supp. 2d at 1077.

41. Baldas, *supra* note 3.

42. Johnson, *supra* note 2, at D1.

names of players, the games will lose their authenticity. Therefore, the issues of whether player performance statistics are a form of protected intellectual property, and if so, who owns this intellectual property, are crucial to the fantasy sports sites' very existence. The issue of ownership rights in player performance statistics hinges on questions of the players' right of publicity and its limits on the free dissemination of the statistics, as well as federal copyright protection for the leagues and owners.

III. Analysis

A. The Right of Publicity and Player Performance Statistics

The right of publicity is the "inherent right of every human being to control the commercial use of his or her identity."[43] The right of publicity is infringed "by unpermitted use which will likely damage the commercial value of this inherent right of human identity and which is not immunized by principles of free speech and free press."[44] The right of publicity "protects athletes' and celebrities' marketable identities from commercial misappropriation by recognizing their right to control and profit from the use of their names and nicknames, likenesses, portraits, performances (under certain circumstances), biographical facts, symbolic representations, or anything else that evokes this marketable identity."[45]

The right of publicity was originally identified by Dean Prosser as a subset of the right of privacy, but "the right of privacy proved a poor proxy where the harm complained of had more to do with uncompensated use as opposed to unwelcome use."[46] Courts recognized that the right of privacy "provided a poor vehicle by which to vindicate uncompensated use of a celebrity's name or likeness."[47] This displeasure with the right of privacy as the basis for the right of publicity led to the case of *Haelan Labs. v. Topps Chewing Gum, Inc.*, where the Second Circuit recognized the right of publicity as separate from the right of privacy.[48] The court found that this right existed

43. 4 J. THOMAS MCCARTHY, TRADEMARKS & UNFAIR COMPETITION § 28:1 (4th ed. 2006).

44. *Id.*, § 28:1.

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

46. Williams, *supra* note 12, at 1713.

47. *Id.*, at 1714

48. 202 F.2d 866 (2d Cir. 1953).

under New York common law as a subset to the statutory right of privacy, observing:

> [I]n 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.[49]

In *Zacchini v. Scripps-Howard Broadcasting Co.*, the United States Supreme Court recognized the right of publicity by name and concluded that it was distinct from the right to privacy.[50] Eventually the right of publicity was codified in the Restatement (Third) of Unfair Competition, which states that "one who appropriates the commercial value of a person's identity by using without consent the person's name, likeness or other indicia of identity for purposes of trade is subject to liability . . . ."[51] The right of publicity "protects a person's pecuniary interest in the commercial exploitation of his 'self' and common manifestations of self such as a person's name, nickname, aliases, signature, likeness, voice, tag line . . . and distinct personality characteristics."[52]

The policy behind the right of publicity is threefold. First, it defends the economic interests of celebrities.[53] Second, it promotes intellectual and creative works by giving a financial incentive for people to spend time and resources necessary to produce such works.[54] Third, it prevents wrongful conduct such as unfair trade and unjust enrichment.[55]

The right of publicity is a matter of state law. California recognizes both a statutory and common law right of publicity. The elements of the common law action in California, which are representative of the majority of American jurisdictions, including Missouri, are: (1) the defendant's use of the plaintiff's identity; (2) the appropriation of the plaintiff's likeness or name to the defendant's

49. *Id.* at 868.
50. 433 U.S. 562 (1977).
51. RESTATEMENT (THIRD) UNFAIR COMPETITION § 46 (1995).
52. Williams, *supra* note 12, at 1715.
53. *Id.*
54. *Id.*
55. *Id.*

advantage (whether commercial or not); (3) lack of consent; and (4) a resulting injury to the plaintiff.[56]

The District Court in *C.B.C. Distribution & Marketing* erred in concluding that the players have no right to publicity, because the players' names and statistics clearly satisfy the four elements of such a claim. Despite the Court's claim that "CBC does not use in its fantasy baseball games Major League baseball players' names separately or in conjunction with their playing records as a symbol of their identity," the company's use of the statistics does in fact "involve the . . . reputation . . . of the players"[57] and therefore the first element of this tort is satisfied. The second element is also satisfied, despite the Court's claim that CBC and other fantasy proprietors are not using the statistics to obtain a commercial advantage. The Court itself states that this element is satisfied if the defendant has used "a plaintiff's name to 'attract attention to [a] product,'"[58] which is exactly what the fantasy proprietors are doing. Without these names, the proprietors would have no basis for a business at all, as the games would lose much of their appeal if the players and statistics were imaginary. The final two elements are satisfied as the fantasy providers are attempting to use the statistics and names without MLBAM's consent and to the detriment of MLBAM's own fantasy leagues.

Similarly, in *Uhlaender v. Hendricksen*, the federal district court in Minnesota recognized ballplayers' right of publicity in a case involving a game manufacturer's use of player names and player performance statistics in a board game.[59] The court held that "it seems clear to the court that a celebrity's property interest in his name and likeness is unique, and therefore . . . [d]efendants have violated plaintiffs' rights by unauthorized appropriation of their names and statistics for commercial use," satisfying all four elements of a right of publicity action.[60] *Uhlaender* would appear to be the ideal parallel for the present issue involving the use of player names and performance statistics in the production and operation of fantasy sports websites.

Even in regard to a conflict over ownership interest in player performance statistics between the players and the professional sports

56. Wendt v. Host Int'l, Inc., 125 F.3d 806, 810-12 (9th Cir. 1997) (applying California law); Eastwood v. Superior Court, 198 Cal. Rptr. 342, 346 (Cal. Ct. App. 1983); *see also* Williams, *supra* note 12, at 1716.

57. *C.B.C. Distrib. & Mktg.*, 443 F. Supp. 2d at 1089.

58. *Id.* at 1085.

59. 316 F. Supp. 1277 (D. Minn. 1970).

60. *Id.* at 1283.

leagues—which centers on the question of the preemption of the players' right of publicity by federal copyright law, a topic discussed below[61]—the leagues themselves appear to bow to the right of publicity. By denying certain fantasy website proprietors' applications for license renewals with regard to the use of players' names and statistics only after the MLBPA sold to it the right to use to use the players' names and likenesses, MLB demonstrates that it views the players' right of publicity as superior to all other contended rights in player performance statistics. It would appear, at first glance, that the courts and MLB agree that the players' monetary and nonmonetary interests resulting from the right of publicity prevail over MLB's copyright interest in the player performance statistics.

B. The First Amendment and the Right of Publicity

Despite errantly concluding that the unlicensed use of player performance statistics does not violate the players' right of publicity, the court in *C.B.C. Distribution & Marketing* was correct in holding that whether or not there is a potential right to publicity claim, it would be trumped by the First Amendment—a topic which the court in *Uhlaender* did not consider.[62] In *Gionfriddo v. Major League Baseball*, the California Court of Appeal held that "[t]he First Amendment requires that the right to be protected from unauthorized publicity '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.'"[63] Courts "are forced to conduct a very delicate balancing act in determining where 'newsworthy' ends and 'commercial' begins."[64]

With the balancing test between the right of publicity and the public's First Amendment interests, uses of a person's identity fall into two categories: communicative or commercial.[65] Communicative uses occur where "the policy of free speech predominates over the right of a person to his identity, and no infringement of the right of publicity takes place."[66] Commercial uses occur where "the right of

61. See III C, infra.

62. 316 F. Supp. at 1280.

63. 114 Cal. Rptr. 2d at 313 (quoting Gill v. Hearst Publ'g Co., 253 P.2d 441, 443 (Cal. 1953)).

64. Laura Lee Stapleton & Matt McMurphy, *The Professional Athlete's Right of Publicity*, 10 MARQ. SPORTS L.J. 23, 44 (1999).

65. *Id.*

66. *Id.*

publicity is infringed because, while there are overtones of ideas being communicated, the use is primarily commercial."[67]

Using this First Amendment test to balance the public's interest in the dissemination of news and information against the individual's right of publicity, the *Gionfriddo* court held that a group of MLB players who all played between 1932 and 1948 were not protected under statutory or common law right of publicity from MLB's use of "factual data concerning the players, their performance statistics, and verbal descriptions and video depictions of their play" in the production of certain media promoting the game of baseball and its history.[68] More specifically, MLB was permitted to use this information, including player performance statistics, in the production of its websites, documentaries and game day programs.[69] The court held that this use of information was not protected under the statutory or common-law right of publicity because even if the use satisfied all of the elements of a right of publicity action, the plaintiff ballplayers were barred from exercising this right, as the public's interest in the dissemination of this information outweighed the plaintiffs' economic and noneconomic interests in the protection of the same.[70]

The holding in *Gionfriddo* requires a court attempting to balance the public's First Amendment rights against the players' right of publicity to "first consider the nature of the precise information conveyed and the context of the communication to determine the public interest in the expression."[71] In regard to fantasy sports websites, the precise information conveyed is factual data regarding players, those players' performance statistics, and verbal descriptions of their play, which is exactly the same as the information at issue in *Gionfriddo*.[72] "This information may be fairly characterized as mere bits of baseball history."[73] Thus, it follows that the court's analysis in *Gionfriddo* of the public's interest in former players' information, statistics, and visual depictions would parallel an analysis of the information at issue with fantasy sports websites, player performance statistics and the accompanying factual data about the players.

67. *Id.* at 45.
68. *Gionfriddo*, 114 Cal. Rptr. 2d at 314.
69. *Id.*
70. *Id.* at 318.
71. *Id.* at 314.
72. *Gionfriddo*, 114 Cal. Rptr. 2d at 314.
73. *Id.*

As professional baseball games are played, and as the season unfolds, the First Amendment "will protect mere recitations of the players' accomplishments."[74] Freedom of the press being constitutionally guaranteed, "'the publication of daily news is an acceptable and necessary function in the life of the community.'"[75] The accomplishments of celebrities and athletes, who have achieved notoriety by appearing before the public, "'may legitimately be mentioned and discussed in print or on radio and television.'"[76] Items of entertainment, such as fantasy websites, "receive the same constitutional protection as factual news reports,"[77] and the public interest is not limited to current events, as the "public is also entitled to be informed and entertained about our history."[78]

Professional baseball is America's national pastime and is followed by millions of fans in the United States and abroad on a daily basis.[79] Consequently, baseball fans have a strong interest in the history of the game and in the statistics and records from those games, as those numbers "set throughout baseball's history are the standards by which the public measures the performance of today's players."[80] Therefore, the history of professional baseball, as it unfolds, "is integral to the full understanding and enjoyment of the current game and its players."[81] Thus "the recitation and discussion of factual data concerning the athletic performance of [professional athletes] commands a substantial public interest, and, therefore, is a form of expression due substantial constitutional protection" since this use is communicative.[82]

MLB could counter this explanation of the constitutional protection of the public's interest in the dissemination of player performance statistics by contending that the uses of the statistics at issue constitute "commercial speech," which is entitled to a reduced level of constitutional protection.[83] Commercial speech is speech that helps the speaker make a profit, and any such speech in the context of

74. *Id.*

75. *Id.* (quoting *Carlisle v. Fawcett Publ'ns, Inc.*, 20 Cal. Rptr. 405, 414 (Cal. Ct. App. 1962)).

76. *Id.*

77. *Id.* (citing *Zacchini*, 433 U.S. at 578).

78. *Id.* (citing *Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d. 790, 792 (Cal. Ct. App. 1993)).

79. *Id.* at 315.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Gionfriddo*,. 114 Cal. Rptr. 2d at 315.

baseball history and statistics exploits the achievements of the players.[84] But the *Gionfriddo* court notes that "profit, alone, does not render expression 'commercial.'"[85] The First Amendment does not apply only to those who publish information without charging for the same, and a contested use "does not lose its constitutional protection because it is undertaken for profit."[86]

The uses at issue in *CBC Distribution & Marketing* are not commercial speech, as commercial speech has a special meaning in the context of the First Amendment.[87] Commercial speech, at its most basic, proposes a commercial transaction.[88] The use of player performance statistics by fantasy website proprietors is not an advertisement selling a product, but is instead "distinct from uses that *do no more than propose a commercial transaction.*"[89] Fantasy website proprietors such as CBC are not exploiting the public's interest by using player performance statistics in an advertisement. While the fantasy website proprietors admittedly use the player performance statistics in the construction of their products, they are not using the statistics to propose a commercial transaction, and this use is therefore a communicative use and protected under the First Amendment.

Even if the proprietors were using the information in an advertisement, courts such as that in *Gionfriddo* question whether this fact would be determinative, as commercial speech in advertisements are only actionable in the form of a right of publicity claim "when the plaintiff's identity is used, without consent, to promote an *unrelated* product."[90] In *Cardtoons v. Major League Baseball Players Ass'n*, the Tenth Circuit held that cartoon baseball trading cards, produced without the players' consent, are not commercial speech because they do not advertise another unrelated product.[91] Unauthorized cartoon trading cards are clearly more unrelated to the product of baseball than are player performance statistics as used by fantasy website proprietors.

The communicative use of player performance statistics on fantasy sports websites being demonstrated, it is necessary to evaluate

84. *Id.*
85. *Id.*
86. *Gionfriddo*,. 114 Cal. Rptr. 2d at 315 (citations omitted.)
87. *Id.* at 316.
88. *Id.*
89. *Id.*
90. *Id.* at 317 (italics in original).
91. 95 F.3d 959, 970 (10th Cir. 1996).

any substantial competing interest on the part of MLB in order to complete the balancing test described in *Gionfriddo*.[92] While MLB does have a substantial interest in providing its own fantasy sports services, it appears that professional sports leagues' marketability is enhanced by the fantasy website proprietors' conduct. The sports themselves can reach a larger audience because of the attraction of fantasy sports, and MLB and the other leagues can expect only greater profits from this increased interest in their product. Balancing the public's great interest in America's national pastime against MLB's minimal economic interests, it appears that "the public interest favoring the free dissemination of information regarding baseball's history far outweighs any proprietary interests at stake."[93] Therefore, even though all elements of the common law right of publicity are satisfied, public interest outweighs the players' right of publicity.

C. Federal Copyright Protection Versus the Right of Publicity

The court in *CBC Distribution & Marketing* was correct in holding that, even if a right of publicity existed, any subsequent question regarding the conflict between two ownership interests—that of the professional sports leagues and that of the professional athletes—is nonexistent because player performance statistics are not copyrightable.[94] The professional sports leagues trace their property interests in player performance statistics to federal copyright law regarding compilations and databases. The professional athletes trace their property interests in player performance statistics to the state right of publicity, as discussed above.

According to Congress, 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 an original work of authorship."[95] In *Feist Publications, Inc. v. Rural Telephone Service Co.*, the United States Supreme Court held that, as a matter of constitutional law, originality is a necessary predicate for copyright protection.[96] This requirement of originality has inspired much debate since this decision was handed

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

93. *Id.*

94. Williams, *supra* note 12, at 1718; *C.B.C. Distrib. & Mktg.*, 443 F. Supp. 2d at 1102-03.

95. 17 U.S.C. § 101 (2006).

96. 499 U.S. 340, 346 (1991).

down, especially in regard to its effect upon compilation copyright law.[97]

Pure facts are not copyrightable, but original works of authorship are.[98] Facts are not authored because they exist, regardless of the time and effort expended in discovering them.[99] Congress has denied copyright protection to any "discovery, regardless of the form in which it is described."[100] Copyright protection is rooted in originality, which means a level of creative, intellectual, or aesthetic labor, but not "sweat of the brow," i.e., actual effort.[101] Originality specifically means that "the work was independently created (not copied) and possessed at least some minimal level of creativity."[102]

The *Feist* court carved out an exception to the rule against the copyrighting of facts, where certain factual works may possess a base level of creativity—enough to warrant copyright protection.[103] Compilations of facts may warrant protection, because the "essence of that which is protected in a compilation is the author's judgment in selecting, arranging, or organizing the compilation."[104] The *Feist* court concluded that the plaintiff's alphabetical listing of phone numbers in the white pages did not satisfy the requirements for copyright protection of a compilation.[105]

Since the Supreme Court's holding in *Feist*, several lower courts have made rulings pursuant to that case's requirements for asserting a copyright in a factual compilation.[106] The Second Circuit upheld an assertion of copyright in the yellow pages, but found no violation of that right, where a defendant copied 1,500 of 9,000 entries in the plaintiff's directory, holding that the defendant used different selection criteria and arranged the materials differently than had the plaintiff.[107] The Eleventh Circuit conversely denied copyright protection to a yellow pages directory, holding that the compilation

97. Williams, *supra* note 12, at 1709.
98. *Id.*
99. *Id.*
100. 17 U.S.C. § 102(b) (2006).
101. *Feist*, 499 U.S. at 352.
102. Williams, *supra* note 12, at 1710.
103. *Feist*, 499 U.S. at 350-51; Williams, *supra* note 12, at 1711.
104. Williams, *supra* note 12, at 1709.
105. *Feist*, 499 U.S. at 362-63.
106. *See* Williams, *supra* note 12, at 1711.
107. Key Publ'ns, Inc. v. Chinatown Today Publ'g Enter., Inc., 945 F.2d 509, 514 (2d Cir. 1991).

was not sufficiently original to warrant protection.[108] In *Eckes v. Card Prices Update*, the Second Circuit upheld the copyrightability of a selection of 5,000 baseball cards from over 18,000 cards, because the selection of data required a degree of creative thought.[109] In *Kregos v. Associated Press*, the Second Circuit held that a factual compilation which can only be expressed in a limited number of manners is only afforded limited protection.[110] Copyright laws protect the expression of an idea, not the idea itself.[111]

Compilations are afforded copyright protection so long as there is originality in selection or originality in arrangement.[112] The compilation must have some degree of originality, creative thought, or subjective creativity.[113] This degree of originality can be found in the selection, coordination, or arrangement of the facts that make up the compilation.[114] Applying this framework to the player performance statistics databases, it is apparent that professional sports leagues should not be afforded copyright protection. Player performance statistics are compiled by many agencies, not just the leagues. For example, groups such as Elias Bureau and the Associated Press compile baseball statistics outside the realm of MLB's official statistics. This selection and coordination of facts by the sports league is not enough to sustain the *Feist* analysis with regard to copyrights in compilations.

In *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, the Seventh Circuit held that federal copyright law preempts baseball players' state rights of publicity in game performances.[115] This holding does not specifically point to player performance statistics, only game performances, i.e., game telecasts and accounts thereof.[116] The court rejected the players' claim that a copyright in a game telecast was different from a copyright in actual game performance, indicating that player performance statistics, an element

108. Bellsouth Adver. & Publ'g Corp. v. Donnelley Info. Publ'g, Inc., 999 F.2d 1436, 1443-44 (11th Cir. 1993).

109. 736 F.2d 859, 863 (2d Cir. 1984).

110. 937 F.2d 700, 704 (2d Cir. 1991); Williams, *supra* note 12, at 1712.

111. *Kregos*, 937 F.2d at 705.

112. Williams, *supra* note 12, at 1712.

113. *Id.*

114. *Id.*

115. 805 F.2d 663, 674 (7th Cir. 1986).

116. Shelley Ross Saxer, *Baltimore Orioles, Inc. v. Major League Baseball Players Association: The Right of Publicity in Game Performances and Federal Copyright Preemption*, 36 UCLA L. REV. 861, 861 (1989).

of actual game performance, are to be included in its holding.[117] Nevertheless, because player performance statistics do not meet the *Feist* threshold to copyrighted materials, they are afforded no copyright protection here.

IV. Conclusion

The fantasy sports world has experienced rapid growth in the decades since the first rotisserie baseball league was founded.[118] Recently, disputes over the ownership rights to player performance statistics as used on fantasy sports websites have arisen, with some such disputes heading to court, most notably the case of *C.B.C. Distribution & Marketing* in the United States District Court for the Eastern District of Missouri.[119] The resolution of this and similar cases hinged on the courts' interpretation of the law surrounding First Amendment restrictions on commercial speech, the athletes' right of publicity claims, and the sports leagues' federal copyright claims.

Based on an analysis of the athletes' right of publicity, and the public interest exception thereto, neither professional athletes nor professional sports leagues should hold the rights to player performance statistics, because the statistics are historical facts whose use and dissemination is in the public interest. Even if the courts recognized a right unaffected by the First Amendment interests of the public, federal copyright law would not preempt this right of publicity, as it does not apply to player performance statistics. In conclusion, the holding of the District Court in *C.B.C. Distribution & Marketing* should be upheld, because whether or not the players have a valid claim of a violation of their right of publicity, this right would be preempted by the public's First Amendment interests in the dissemination of this information.

117. *Id.* at 862.
118. Williams, *supra* note 12, at 1706.
119. 443 F. Supp. 2d 1077 (E.D. Mo. 2006).