

ONLINE FANTASY SPORTS LITIGATION AND THE NEED FOR A FEDERAL RIGHT OF PUBLICITY STATUTE

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ABSTRACT

The right of publicity is currently a jumble of state common law and state statutes, but the online fantasy sports industry crosses state lines with ease. Having witnessed the great revenue potential of online fantasy sports, professional sports leagues are trying to strong-arm independent fantasy sports providers out of the business by using the right of publicity to assert property interests in the statistics generated by professional players, and used by fantasy sports providers to run their online games. The first such attempt—by Major League Baseball—failed. However, the state law nature of the right of publicity prevents any single court opinion from binding the industry or other jurisdictions. The National Football League is attempting to achieve a more favorable result in a different jurisdiction. If successful, other professional sports leagues will be encouraged to litigate the issue, and Major League Baseball might even attempt to re-litigate its position in other states. This free-for-all could result in different rules for different sports in different states, which would not only be untenable for the online fantasy sports providers, but a violation of the Constitution as well. A cohesive federal right of publicity statute would (1) bring uniformity to the doctrine, (2) give federal courts (where these actions are being brought) a federal law to apply instead of allowing them to continue muddying the application of state laws, (3) directly address First Amendment concerns, and (4) solve the dormant commerce clause violation alluded to above.

INTRODUCTION

¶1 Fantasy sports as we know them today have their roots in Rotisserie League Baseball, which was founded in 1980 by Daniel Okrent.² What

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² Gary P. Quiming, Comment, *Playing by the Rules of Intellectual Property: Fantasy Baseball's Fight to Use Major League Baseball Players' Names and*

began as a handful of friends meeting over burgers³ has transformed into a cultural juggernaut played by an estimated 19.4 million people in the United States and Canada alone.⁴ This phenomenal growth can be explained in two words: the internet.⁵ Online fantasy sports providers have been able both to grow their audience and to branch out far beyond the original Rotisserie baseball, offering fantasy games in hockey, football, basketball and other sports.⁶

¶2 Participants in a fantasy sports game act as managers of their “fantasy” (i.e. imaginary) teams. Each fantasy league holds a draft at the beginning of the season whereby participants choose players for their team. Unlike the professional leagues’ drafts, in which players from college or high school are chosen, participants in a fantasy league choose from, and are limited to, players currently employed by the professional leagues. As the corresponding “real” season unfolds, the statistics of each professional player are compiled to determine which player/manager in the fantasy league is “winning.” The same achievements that make a real player in the professional leagues a valuable asset also make him a desirable member of a fantasy team. For example, a hockey player who scores a lot of goals, or a baseball player with a high batting percentage, would be highly sought-after both in the real-life professional league and in the various fantasy leagues.⁷

¶3 Because the fantasy leagues correspond with the professional leagues, the information that makes the fantasy games possible is the factual record of what takes place in live games: the statistics generated by each

Statistics, 29 U. HAW. L. REV. 301, 304 (2006) (citing Chris Colston, *Revisiting Roto’s Roots*, USA TODAY BASEBALL WEEKLY, Dec. 8, 1999, <http://www.usatoday.com/sports/bbw/2001-04-04/2001-04-04-archive-roto.htm>).

³ Colston, *supra* note 2.

⁴ Press Release, Fantasy Sports Trade Ass’n, Fantasy Sports Conference Demographic Survey Shows Continued Growth (Aug. 2, 2007), available at <http://www.fsta.org/news/pressreleases/PRWeb-FantasySportsConference0807.pdf>.

⁵ See Quiming, *supra* note 2, at 307 (“The rise of the Internet and digital technology has revolutionized fantasy sports.”).

⁶ Complaint at ¶ 4, CBS Interactive Inc. v. Nat’l Football League Players Ass’n, No. 08-05097-CIV (D. Minn. filed Sept. 3, 2008).

⁷ One important difference is that in real life, an athlete can play for only one team at a time. In the fantasy world, only one participant in a given league can “own” that player, but the same player may be on hundreds of different fantasy teams in different leagues. Also, fantasy participants can play in more than one fantasy league at a time, even within the same sport. The make-up of each of that participant’s fantasy teams will change, depending on which players he is able to draft in each league’s game.

individual player.⁸ Online fantasy sports providers are battling against the professional sports leagues and their players' associations over whether the fantasy providers should pay licensing fees to use the players' names and the statistics they generate. This question turns on whether the players have an enforceable right of publicity interest in their names and playing records.⁹

¶4 Part I of this note briefly summarizes the history and development of the right of publicity. Part II describes recent and current litigation between fantasy providers and affiliates of Major League Baseball (MLB) and the National Football League (NFL), respectively. Part III examines the various federal legal theories that are often implicated in right of publicity suits, including the fantasy sports lawsuits. Finally, Part IV uses the fantasy sports cases to illustrate the ways in which a federal statute could alleviate problems that arise from the disparate treatment states give to the right of publicity.¹⁰

⁸ See Adam L. Sheps, Note, *Swinging for the Fences: The Fallacy in Assigning Ownership to Sports Statistics and its Effect on Fantasy Sports*, 38 CONN. L. REV. 1113, 1114 (2006) ("The lifeblood of the competition is the actual performance statistics of Major League Baseball players." (quoting Jack F. Williams, Symposium, *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 *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007) (declaratory judgment action by a fantasy sports provider against Major League Baseball); see also Complaint, *CBS Interactive Inc. v. Nat'l Football League Players Ass'n*, No. 08-05097-CIV (D. Minn. filed Sept. 3, 2008) (declaratory judgment action by a fantasy sports provider against National Football League).

¹⁰ Implicit in my argument is a concession that the right of publicity as a doctrine is necessary at all. One commentator has pointed out that the justification for the right is circular:

It is sometimes said that the right of publicity rests on the commercial value of the interest itself, but that explanation is nonsense without something more. A claim of this sort will have commercial value only if it also has the protection of the law. In a sense, the value of this property stems from the fact that the law recognizes it and protects it.

David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147, 160 (1981) (footnotes omitted). For a non-fantasy sports-related analysis of the need for a federal right of publicity statute, see Eric J. Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DEPAUL-LCA J. ART & ENT. L. & POL'Y 227 (1999).

I. THE RIGHT OF PUBLICITY

¶5 The right of publicity originally derived from the right to privacy.¹¹ An 1890 law review article by Louis Brandeis and Samuel Warren is generally credited with inventing the concept of the right to privacy,¹² which is often described as the “right ‘to be let alone.’”¹³ In typical fashion, once the legal concept was introduced, the states began to adopt it either through common law or by passing state statutes.¹⁴

¶6 In 1953 the United States Court of Appeals for the Second Circuit coined the term “right of publicity” to explain why famous people, such as baseball players, “far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements.”¹⁵ The following year Melville Nimmer wrote his seminal law review article on the right of publicity, explaining that “it may seriously be doubted that the application of [the right to privacy] satisfactorily meets the needs of Broadway and Hollywood in 1954.”¹⁶ But as Nimmer also pointed out, “by the very nature of our judicial process, a new principle of law can never be completely embodied in any one decision.”¹⁷ And so, the right of publicity continued to evolve from Nimmer’s (and the Second Circuit’s) original articulation.

¶7 In a 1960 law review article, William Prosser divided the right to privacy into four prongs, the violation of any one of which would be an actionable tort.¹⁸ The fourth prong essentially described the right of publicity and was phrased as “[a]ppropriation, for the defendant’s

¹¹ See Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 202, 203 (1954) (“The[] concern is rather with publicity, which may be regarded as the reverse side of the coin of privacy.”)

¹² *Id.* at 202 (“Louis Brandeis and Samuel Warren in their essay ‘The Right to Privacy’ produced what is perhaps the most famous and certainly the most influential law review article ever written.”).

¹³ Dana Howells, Note, *Log Me in to the Old Ballgame: C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, LP*, 22 BERKELEY TECH. L.J. 477, 478 (2007) (quoting *Pasevich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 71–72 (Ga. 1905)).

¹⁴ Nimmer, *supra* note 11, at 202.

¹⁵ *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953); see also *id.* (“We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture . . .”).

¹⁶ Nimmer, *supra* note 11, at 202.

¹⁷ *Id.* at 221.

¹⁸ See William Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960) (“The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff . . .”).

advantage, of the plaintiff's name or likeness."¹⁹ The Restatement (Second) of Torts²⁰ and the Restatement (Third) of Unfair Competition²¹ each includes something akin to the right of publicity. These Restatements have been relied on by "states that have yet to codify"²² the right of publicity and have instead developed the right through case law. Today, "[t]he right of publicity is properly viewed as a species within the genus of 'unfair competition' law,"²³ and infringement of the right may properly be termed a "misappropriation."²⁴ A person's right of publicity is considered to be a form of intellectual property,²⁵ and, as will be illustrated in Part III *infra*, other branches of intellectual property—specifically copyright and trademark—are frequently implicated in right of publicity infringement actions.

¶8 The right of publicity is exclusively the province of state law, whether common or statutory.²⁶ Because there is no federal right of publicity, when deciding right of publicity cases, federal courts are obliged to apply state law. Because of the number of celebrities residing in California, its state and federal courts have contributed considerably to right of publicity law.²⁷ Several of the most often-cited right of publicity cases—*Midler v. Ford Motor Co.*,²⁸ *Waits v. Frito-Lay, Inc.*²⁹ and *White v. Samsung Electronics America, Inc.*³⁰—were decided by the United States

¹⁹ *Id.*

²⁰ RESTATEMENT (SECOND) OF TORTS § 652C (1977) ("One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.").

²¹ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995) ("One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate under the rules stated in §§ 48 and 49.").

²² Goodman, *supra* note 10, at 235.

²³ J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:7 (2d ed. 2000).

²⁴ *Id.* § 1:8 ("In fact, some have claimed that misappropriation is the legal theory that is the closest neighbor to the modern right of publicity.").

²⁵ *Id.* § 1:3 ("The right of publicity is a state-law created intellectual property right whose infringement is a commercial tort of unfair competition.").

²⁶ JULIUS C.S. PINCKAERS, FROM PRIVACY TOWARD A NEW INTELLECTUAL PROPERTY RIGHT IN PERSONA 21 (1996).

²⁷ See *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1521 (9th Cir. 1993) (Kozinski, J., dissenting from denial of petition for rehearing en banc) ("For better or worse, we are the Court of Appeals for the Hollywood Circuit.").

²⁸ *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

²⁹ *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992).

³⁰ *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992).

Court of Appeals for the Ninth Circuit, which was (ostensibly) applying California state law.³¹

¶9 The *White* case produced two separate Ninth Circuit opinions, each with its own dissenting opinion, and involved a Samsung advertisement that depicted a robot posed on the Wheel of Fortune set and dressed to resemble Vanna White, the hostess of that game show.³² White sued Samsung for appropriating her identity, among other claims.³³ In the first *White* decision, a three-judge Ninth Circuit panel reversed the district court's grant of summary judgment to Samsung because, even though Samsung had not used "White's 'likeness' within the meaning of [the California statute],"³⁴ White had "alleged facts showing that Samsung . . . appropriated her identity."³⁵ Judge Alarcon dissented in part, observing, "the courts of California have never found an infringement on the right to publicity without the use of the plaintiff's name or likeness."³⁶

¶10 The second *White* opinion was a denial of the petition for a rehearing en banc,³⁷ which produced a blistering dissent authored by Judge Kozinski and joined by two other Circuit Judges.³⁸ Judge Kozinski warned that by allowing this extension of the right of publicity, the court was on "dangerous" ground and was jeopardizing creativity by depleting the public domain.³⁹ He also referred to the panel's decision as "a classic case of overprotection."⁴⁰

³¹ Bette Midler and Tom Waits sued Ford Motor Company and Frito-Lay, respectively, for using "sound-alike" singers in advertisements that led the consuming public to believe that Midler and Waits were actually performing the songs in the ads. In *Midler*, a Ninth Circuit panel held "that when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California." *Midler*, 849 F.2d at 463. In *Waits*, a different Ninth Circuit panel declined to reconsider or overrule *Midler*'s precedent. See *Waits*, 978 F.2d at 1100 ("[W]e are not at liberty to reconsider this conclusion, and even if we were, we would decline to disturb it.").

³² *White*, 971 F.2d at 1396.

³³ *Id.* at 1397.

³⁴ *Id.*

³⁵ *Id.* at 1399.

³⁶ *Id.* at 1403 (Alarcon, J., concurring in part and dissenting in part). Indeed, the California legislature previously had the opportunity to amend the state right of publicity statute to protect something other than name, likeness, voice, and signature, and had not done so. *Id.*

³⁷ *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512 (9th Cir. 1993).

³⁸ *Id.* (Kozinski, J., dissenting from denial of petition for rehearing en banc).

³⁹ *Id.* at 1513.

⁴⁰ *Id.* at 1514. Judge Kozinski continues: "This Orwellian notion withdraws far more from the public domain than prudence and common sense allow. It

¶11 While the Ninth Circuit has expanded the reach of the right of publicity, other courts have limited it. Several courts have addressed the inherent First Amendment issue in allowing a person to have total control over how his or her name and likeness are used, thereby restricting the free expression of others wishing to use that name or likeness.⁴¹ Although the First Amendment's prohibition against restraining speech applies only to government, courts have allowed First Amendment suits between two private entities if a state statute or common law is involved.⁴² In *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, a company selling trading cards depicting parodic caricatures of well-known MLB players sued the players' association for a declaration that its cards did not violate the players' rights of publicity.⁴³ The United States Court of Appeals for the Tenth Circuit considered whether the lack of overt state action was a bar to Cardtoons' use of the First Amendment as a defense and decided that "[a]lthough this is a civil action between private parties, it involves application of a state statute that Cardtoons claims imposes restrictions on its right of free expression. Application of that statute thus satisfies the state action requirement of Cardtoons' First Amendment claim."⁴⁴

¶12 Later courts seem to have accepted the Tenth Circuit's reasoning in allowing the First Amendment to be used as a defense to right of publicity actions, and do not independently analyze such claims. In *Gionfriddo v. Major League Baseball*, the plaintiff, who was a retired MLB player, sued MLB to prevent it from using his name and likeness in a media guide to be distributed "at All-Star and World Series games."⁴⁵ Taking for granted that a First Amendment analysis was appropriate, the California Court of Appeal proceeded with a discussion of why and how the First Amendment protected MLB.⁴⁶ Similarly, the United States Court of Appeals for the Sixth Circuit did not explicitly state why it was applying a First

conflicts with the Copyright Act and the Copyright Clause. It raises serious First Amendment problems. It's bad law, and it deserves a long, hard second look." *Id.*

⁴¹ *E.g.*, *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915 (6th Cir. 2003); *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003); *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989); *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307 (Ct. App. 2001).

⁴² The First Amendment applies explicitly to Congress; it applies implicitly to the states through the application of the Fourteenth Amendment.

⁴³ *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 962 (10th Cir. 1996).

⁴⁴ *Id.* at 968.

⁴⁵ *Gionfriddo*, 114 Cal. Rptr. 2d at 310.

⁴⁶ *Id.* at 313 ("The 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 . . .'" (citations omitted)).

Amendment defense when Tiger Woods unsuccessfully sued an artist for violating his right of publicity by painting a work depicting Woods and several other famous golfers.⁴⁷

¶13 Most recently, the United States Court of Appeals for the Eighth Circuit upheld a First Amendment defense, in *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, again without explicitly explaining why it was applicable in the first place.⁴⁸ This decision prompted a wave of law review articles debating whether the district court and the Eighth Circuit correctly allowed C.B.C.'s First Amendment rights to trump the MLB players' rights of publicity.⁴⁹

II. THE RIGHT OF PUBLICITY AND FANTASY SPORTS

¶14 Right of publicity issues are not new to sports—indeed, the 1953 Second Circuit decision that introduced the term “right of publicity” involved two rival baseball card companies.⁵⁰ But *C.B.C.* was the first reported opinion⁵¹ to address the right of publicity vis-à-vis fantasy sports.⁵² The case was decided in 2006 by a federal court in Missouri in favor of *C.B.C.*, the fantasy sports provider⁵³ and affirmed by the Eighth Circuit in

⁴⁷ *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 925 (6th Cir. 2003) (“Rush’s prints are not commercial speech. They do not propose a commercial transaction. Accordingly, they are entitled to the full protection of the First Amendment.”).

⁴⁸ *C.B.C. Dist. & Mktg., Inc. v. Major League Baseball Adv. Media, L.P.*, 505 F.3d 818, 824 (8th Cir. 2007) (“[W]e hold that CBC’s first amendment rights in offering its fantasy baseball products supersede the players’ rights of publicity . . .”).

⁴⁹ *E.g.*, Gabriel Grossman, Comment, *Switch Hitting: How C.B.C. v. MLB Advanced Media Redefined the Right of Publicity*, 14 UCLA ENT. L. REV. 285 (2007); Timothy W. Havlir, Note, *Is Fantasy Baseball Free Speech? Refining the Balance Between the Right of Publicity and the First Amendment*, 4 DEPAUL J. SPORTS L. CONTEMP. PROBS. 229 (2008); David G. Roberts, Jr., Note, *The Right of Publicity and Fantasy Sports: Why the C.B.C. Distribution Court Got It Wrong*, 58 CASE W. RES. L. REV. 223 (2007).

⁵⁰ *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

⁵¹ See Havlir, *supra* note 49, at 245 (“The recent *CBC* case was the first court ruling on this issue.”).

⁵² There is an earlier case that touched on fantasy sports and the right of publicity, but it revolved around a contract issue. The fantasy sports provider in that case had signed contracts with NFL players in order for them to appear on, and endorse, the website. This violated the agreement the players had signed with their players’ union, assigning group licensing rights to the union. See *Gridiron.com, Inc. v. Nat’l Football League, Player’s Ass’n, Inc.*, 106 F. Supp. 2d 1309 (S.D. Fl. 2000).

⁵³ *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077 (E.D. Mo. 2006).

late 2007.⁵⁴ This case was likely the opening salvo in a war on the professional leagues and their players' associations.

¶15 The second volley was fired in September 2008, when CBS Interactive, another online fantasy sports provider, filed suit against the National Football League Players Association (NFLPA) in federal court in Minnesota,⁵⁵ which is also in the Eighth Circuit. National Football League Players, Inc. (NFL Players) promptly filed a countersuit claiming that CBS filed its suit in the wrong venue and against the wrong party.⁵⁶ A brief summary of each case will highlight the issues raised.

A. C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.

¶16 The Major League Baseball Players Association (MLBPA) is the collective bargaining unit that includes all MLB players.⁵⁷ Players assign their rights to conduct group licensing (any licensing agreement involving three or more players at a time) to the MLBPA.⁵⁸ From 1995 until December 31, 2004, C.B.C. used MLB statistics, along with the names of the players, in its fantasy games under the terms of two license agreements.⁵⁹

¶17 In 2005 the MLBPA entered into an interactive media contract with MLB Advanced Media,⁶⁰ which had been formed by MLB owners in 2000 "to serve as the interactive media and internet arm of Major League Baseball."⁶¹ MLB Advanced Media notified C.B.C. that it was only willing to grant C.B.C. a license to promote Advanced Media's fantasy baseball game, "in exchange for a percentage share of all related revenue."⁶² Advanced Media would not grant C.B.C. a license to allow C.B.C. "to promote its own MLB fantasy game."⁶³ C.B.C. filed a declaratory

⁵⁴ C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818 (8th Cir. 2007).

⁵⁵ Complaint, CBS Interactive Inc. v. Nat'l Football League Players Ass'n, No. 08-05097-CIV (D. Minn. filed Sept. 3, 2008).

⁵⁶ Complaint, Nat'l Football League Players Inc. v. CBS Interactive, Inc., No. 08-22504-CIV (S.D. Fla. filed Sept. 9, 2008).

⁵⁷ Major League Baseball Players Ass'n 2007–2011 Basic Agreement, art. II, available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf.

⁵⁸ Major League Baseball Players Ass'n: Licensing, <http://mlbplayers.mlb.com/pa/info/licensing.jsp> (last visited Jan. 30, 2010).

⁵⁹ C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1080 (E.D. Mo. 2006).

⁶⁰ *Id.* at 1081.

⁶¹ *Id.* at 1080.

⁶² *Id.* at 1081.

⁶³ *Id.*

judgment action seeking an injunction to prevent Advanced Media “from interfering with CBC’s business related to sports fantasy teams.”⁶⁴

¶18 The original complaint was filed in federal court because it included claims under statutory federal trademark law (the Lanham Act)⁶⁵ in addition to a state right of publicity claim.⁶⁶ The parties eventually agreed to dismiss all the federal claims, leaving only the state right of publicity claim to be adjudicated.⁶⁷ After deciding that it would exercise supplemental jurisdiction,⁶⁸ the district court held that (1) C.B.C.’s use did not constitute “the persona or identity of any player” under Missouri common law,⁶⁹ and (2) even if it had, “CBC’s First Amendment right to freedom of expression prevails over the players’ claimed right of publicity.”⁷⁰ The court granted C.B.C.’s motion for summary judgment and entered an injunction to prevent Advanced Media from “interfer[ing] with CBC’s using players’ names and playing records on its website and in its fantasy baseball games.”⁷¹

¶19 The Eighth Circuit disagreed with the district court on the first issue, stating that “it is clear that CBC uses baseball players’ identities in its fantasy baseball products” and that the players had “offered sufficient evidence to make out a cause of action for violation of their rights of publicity under Missouri law.”⁷² But the Eighth Circuit agreed that C.B.C.’s rights under the First Amendment “supersede the players’ rights of publicity”⁷³ and affirmed the grant of summary judgment.⁷⁴ Advanced Media petitioned the United States Supreme Court for *certiorari*, but the Court declined to hear the case.⁷⁵ C.B.C.’s victory was hailed as “a

⁶⁴ *Id.* at 1082.

⁶⁵ 15 U.S.C. §§ 1051–1129 (2006).

⁶⁶ *See* 28 U.S.C. § 1331 (2006) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

⁶⁷ *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1082 n.5 (E.D. Mo. 2006).

⁶⁸ 28 U.S.C. § 1367(c)(3) (2006) (stating a district court has the discretion to hear or decline to hear any claims remaining after the dismissal of “all claims over which it has original jurisdiction”).

⁶⁹ *C.B.C.*, 443 F. Supp. 2d at 1089.

⁷⁰ *Id.* at 1099.

⁷¹ *Id.* at 1107.

⁷² *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 823 (8th Cir. 2007).

⁷³ *Id.* at 824.

⁷⁴ *Id.* at 825.

⁷⁵ *Major League Baseball Advanced Media, L.P. v. C.B.C. Distrib. & Mktg., Inc.*, 128 S.Ct. 2872 (mem.) (2008) *denying cert. to* 505 F.3d 818 (8th Cir. 2007).

landmark win for the fantasy sports industry” in a press release issued by the Fantasy Sports Trade Association.⁷⁶ Within a year of C.B.C.’s victory over MLB, professional football was faced with its own fantasy sports lawsuit.

B. CBS Interactive Inc. v. National Football League Players Association

¶20 CBS Interactive (CBS), another online fantasy sports provider, filed a declaratory judgment action against the NFLPA in Minnesota federal court on September 3, 2008.⁷⁷ CBS concluded that Minnesota was an appropriate venue because CBS had customers within that state and the NFL had a team, and therefore players (who are members of the NFLPA), within that state.⁷⁸ According to the complaint, “CBS Interactive had formerly entered into multiple licensing agreements with the Players Association, through its licensing entity, National Football League Player [sic] Incorporated.”⁷⁹ After the expiration of the most recent licensing agreement, “[t]he Players Association demanded licensing fees for continued use of names and statistics related to professional football players.”⁸⁰

¶21 Encouraged by the Eighth Circuit’s decision in *C.B.C.*, CBS took the position that it did not need to pay licensing fees to continue using the players’ names and statistics and filed a declaratory judgment action seeking a number of declarations: (1) that its use of player statistics does “not infringe any right of publicity allegedly owned or controlled by the Players Association,”⁸¹ (2) that if CBS is violating the players’ rights of publicity, “the First Amendment to the U.S. Constitution supersedes the right of publicity,”⁸² (3) that if CBS is violating the players’ rights, “federal Copyright Law, which dedicates information used in a fantasy sports games business to the public, preempts the right of publicity,”⁸³ and (4) that “[t]he Players Association seeks to monopolize . . . the market for creation and

⁷⁶ Press Release, Fantasy Sports Trade Ass’n, CDM Legal Victory in Appeals Court Ensures Continued Fantasy Sports Growth (Oct. 17, 2007), available at <http://www.fsta.org/news/pressreleases/CBCvsMLBAM.doc>.

⁷⁷ Complaint, CBS Interactive Inc. v. Nat’l Football League Players Ass’n, No. 08-05097-CIV (D. Minn. filed Sept. 3, 2008).

⁷⁸ *Id.* ¶¶ 3, 5.

⁷⁹ *Id.* ¶ 10.

⁸⁰ *Id.* ¶ 11.

⁸¹ *Id.* ¶ 25.

⁸² *Id.* ¶ 19.

⁸³ Complaint ¶ 22, CBS Interactive Inc. v. Nat’l Football League Players Ass’n, No. 08-05097-CIV (D. Minn. filed Sept. 3, 2008).

maintenance of fantasy football games and the provision of related information services”⁸⁴ in violation of § 2 of the Sherman Act.⁸⁵

¶22 Six days after CBS filed suit, NFL Players filed a countersuit in a federal district court in Florida.⁸⁶ NFL Players’ complaint alleged that it, not the NFLPA, is the sole entity responsible for group licensing of NFL players’ identities.⁸⁷ The complaint further alleged that CBS’s choice of Minnesota for its suit was simply an attempt “to seek an advisory opinion from a favorable forum, even though that forum has no jurisdiction over the dispute.”⁸⁸ Lastly, NFL Players alleged that the Southern District of Florida was the appropriate venue because the business unit of CBS Interactive that operates the fantasy football website, CBSSports.com, is headquartered in Ft. Lauderdale, Florida.⁸⁹

¶23 NFL Players’ complaint sought the dismissal or transfer of the allegedly improperly-filed CBS action,⁹⁰ as well as (1) a declaration that CBS is violating the rights of publicity of players in the NFL,⁹¹ (2) an injunction preventing CBS’s further use of NFL Players’ “Property Rights” without permission,⁹² and (3) a declaration that NFL Players is not violating § 2 of the Sherman Act.⁹³

¶24 On September 30, 2008, CBS filed an amended complaint in Minnesota district court to include NFL Players as a defendant in addition to the NFLPA.⁹⁴ In its amended complaint, CBS reiterated that the Federal District of Minnesota was an appropriate venue for their suit.⁹⁵ On the same day, NFL Players filed a motion to transfer venue from Minnesota to

⁸⁴ *Id.* ¶ 30.

⁸⁵ 15 U.S.C. § 2 (2006) (making it a felony to “monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States”).

⁸⁶ Complaint, Nat’l Football League Players Inc. v. CBS Interactive, Inc., No. 08-22504-CIV (S.D. Fla. filed Sept. 9, 2008).

⁸⁷ *Id.* ¶¶ 7–8, 14 (considering group licensing to be “a total of six (6) or more NFL player images on or in conjunction with products”).

⁸⁸ *Id.* ¶ 32. The same could be said for NFL Players in trying to move the dispute to the Southern District of Florida, the jurisdiction that had enjoined gridiron.com in a previous fantasy sports/right of publicity suit, albeit one involving a contract dispute. *See supra* note 52.

⁸⁹ *Id.* ¶¶ 3, 5.

⁹⁰ *Id.* ¶ 34.

⁹¹ *Id.* at Prayer for Relief ¶ 1.

⁹² Complaint at Prayer for Relief ¶ 3, Nat’l Football League Players Inc. v. CBS Interactive, Inc., No. 08-22504-CIV (S.D. Fla. filed Sept. 9, 2008).

⁹³ *Id.* at Prayer for Relief ¶ 4.

⁹⁴ First Amended Complaint, CBS Interactive, Inc. v. Nat’l Football League Players Ass’n, No. 08-05097-CIV (D. Minn. filed Sept. 3, 2008).

⁹⁵ *Id.* ¶¶ 3–10.

Florida.⁹⁶ On October 28, 2008, the Florida district court stayed the Florida proceeding, “pending resolution of the Motion for Transfer of Venue in the District of Minnesota action.”⁹⁷ On January 28, 2009, the Minnesota district court judge held a hearing on the motion to transfer, along with several other motions filed by the two parties, and issued an order on April 28, 2009.⁹⁸

¶25 The Minnesota court’s order addressed not only the preliminary issue of proper venue, but also the substantive claims. The court first held that it could properly exercise jurisdiction over NFL Players because of the extent of its contacts within the state.⁹⁹ Next, the court denied NFL Players’ motion to transfer venue after conducting a thorough analysis of the various factors.¹⁰⁰ As to the substantive claims, the district court followed *C.B.C.* and granted summary judgment to CBS Interactive on the claim that its First Amendment rights trumped the players’ rights of publicity.¹⁰¹ NFL Players succeeded on only one issue – CBS Interactive’s antitrust claims. The court ruled that NFL Players’ actions (i.e., threatening litigation and filing the Florida action) were protected as “objectively reasonable efforts” to protect Players Inc.’s interest in the publicity rights” and were thus protected under the *Noerr-Pennington* doctrine from antitrust liability.¹⁰²

¶26 According to the docket report for the case filed and stayed in the Southern District of Florida, NFL Players intends to file an appeal with the Eighth Circuit.¹⁰³ Pending the outcome of that appeal, the case will either

⁹⁶ Motion to Transfer Venue Pursuant to 28 U.S.C. § 1404(a), *CBS Interactive Inc. v. Nat’l Football League Players Ass’n*, No. 08-05097-CIV (D. Minn. filed Sept. 3, 2008).

⁹⁷ Order Granting in Part and Denying in Part Defendant’s Motion to Dismiss or Stay at 3, *Nat’l Football Players Inc. v. CBS Interactive, Inc.*, No. 08-22504-CIV (S.D. Fla. filed Sept. 9, 2008).

⁹⁸ Memorandum Opinion and Order, *CBS Interactive Inc. v. Nat’l Football League Players Ass’n*, No. 08-05097-CIV (D. Minn. filed Sept. 3, 2008).

⁹⁹ *Id.* at 7–14.

¹⁰⁰ *Id.* at 15–23.

¹⁰¹ *Id.* at 39–40.

¹⁰² *Id.* at 24.

The *Noerr-Pennington* doctrine, which is premised on the First Amendment right to petition the government for redress of grievances is derived from two antitrust cases decided by the Supreme Court. Under the doctrine, the act of filing a lawsuit is viewed as a form of petitioning activity and is therefore immune from antitrust or tort liability.

Id. (citations omitted).

¹⁰³ Paperless Order Denying Defendant’s Motion to Dismiss, *Nat’l Football Players Inc. v. CBS Interactive, Inc.*, No. 08-22504-CIV (S.D. Fla. filed Sept. 9, 2008).

be re-litigated in Florida (if the Eighth Circuit reverses the Minnesota district court on the question of proper venue), or the Florida action will be dismissed. Although it remains to be seen how this case will be resolved, one thing seems certain – federal courts will be the forum of choice for litigating fantasy sports-related state law right of publicity issues.

III. FEDERAL LAWS IMPLICATED IN RIGHT OF PUBLICITY SUITS

¶27 Despite the fact that right of publicity law is exclusively state law, suits claiming violations of rights of publicity are often brought in federal court.¹⁰⁴ Sometimes federal jurisdiction is obtained simply because the parties have diversity of citizenship.¹⁰⁵ In many cases, the plaintiff claims violations of a federal law,¹⁰⁶ often § 43 of the Lanham Act,¹⁰⁷ in order to be properly within federal jurisdiction.¹⁰⁸ The First Amendment¹⁰⁹ and preemption by the federal Copyright Act¹¹⁰ are often asserted as affirmative defenses to claimed violations of the right of publicity.¹¹¹

A. *The Trademark Act of 1946 (The Lanham Act)*

¶28 Federal trademark law is governed by the Trademark Act of 1946 (the Lanham Act).¹¹² Section 43(a) of the Lanham Act provides that “any person who believes that he or she is or is likely to be damaged by” the use

¹⁰⁴ *E.g.*, *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915 (6th Cir. 2003); *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959 (10th Cir. 1996); *Groucho Marx Prods., Inc. v. Day & Night Co.*, 689 F.2d 317 (2d Cir. 1982); *Complaint, CBS Interactive, Inc. v. Nat’l Football League Players Ass’n*, No. 08-05097-CIV (D. Minn. filed Sept. 3, 2008); *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077 (E.D. Mo. 2006).

¹⁰⁵ *See* 28 U.S.C. § 1332(a)(1) (2006) (providing that federal district courts have jurisdiction over civil actions between “Citizens of different States” as long as the amount “in controversy exceeds the sum or value of \$75,000”).

¹⁰⁶ *E.g.*, *ETW*, 332 F.3d 915; *Cardtoons*, 95 F.3d 959; *Groucho Marx*, 689 F.2d 317.

¹⁰⁷ 15 U.S.C. § 1125 (2006).

¹⁰⁸ *See* 28 U.S.C. § 1331 (2006) (providing that federal district courts have jurisdiction over civil actions “arising under the Constitution, laws or treaties of the United States”).

¹⁰⁹ U.S. CONST. amend. I.

¹¹⁰ Copyright Act of 1976, 17 U.S.C. §§ 101-810, 1101 (2006).

¹¹¹ However, the fact that these federal laws are asserted as *defenses* does not bring a claim properly within federal jurisdiction because of “the ‘well-pleaded complaint’ rule, which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff’s properly pleaded complaint.” *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987).

¹¹² 15 U.S.C. §§ 1051–1129 (2006).

of “any word, term, name, symbol, or device . . . which—(A) is likely to cause confusion . . . or (B) . . . misrepresents the nature, characteristics, quality, or geographic origin of . . . goods, services, or commercial activities” has a civil cause of action.¹¹³

¶29 For example, Vanna White raised a § 43(a) claim in her suit against Samsung concerning Samsung’s use of a robot that resembled her in one of its print advertisements.¹¹⁴ The Ninth Circuit, in reversing the district court’s grant of summary judgment in favor of Samsung, pointed out that the standard for a § 43(a) claim is “a likelihood of confusion . . . over whether White was endorsing Samsung’s VCRs”¹¹⁵ and that such a determination “is a matter for the jury”¹¹⁶ (i.e., not proper for summary judgment).

¶30 C.B.C.’s original complaint sought a declaration that it was not violating § 43(a) of the Lanham Act by using MLB players’ names and statistics in its fantasy games.¹¹⁷ Advanced Media’s answer and countersuit alleged that C.B.C. was indeed violating the Lanham Act,¹¹⁸ but the parties dismissed these claims prior to the district court’s consideration of the issues.¹¹⁹ If the Lanham Act claims had not been dismissed, it is quite possible that the district court would have found that C.B.C. was not violating the Lanham Act because it was not representing that MLB or any of the individual players had endorsed its fantasy game, and C.B.C. quite possibly could have shown (probably through survey evidence) that it was not likely that anyone participating in C.B.C.’s fantasy games would be confused as to whether MLB or its players had endorsed C.B.C.’s game. Regardless, simply raising the issue had the effect of placing C.B.C. in federal court, because federal courts have exclusive jurisdiction over any action arising under federal trademark law.¹²⁰

¹¹³ *Id.* § 1125.

¹¹⁴ *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992).

¹¹⁵ *Id.* at 1399–1400.

¹¹⁶ *Id.* at 1401.

¹¹⁷ Complaint ¶ 22, *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077 (E.D. Mo. 2006) (No. 05-00252-CIV).

¹¹⁸ Answer & Counterclaim at 6, ¶ 7, *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077 (E.D. Mo. 2006) (No.05-00252-CIV).

¹¹⁹ *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1082 n.5 (E.D. Mo. 2006).

¹²⁰ 28 U.S.C. § 1338(a) (2006).

B. *The First Amendment Defense*

¶31 As described in Part I, *supra*, the First Amendment explicitly prevents the federal government from interfering with a person's freedom of expression, but courts have held that enforcement of a state right of publicity statute qualifies as state action for purposes of raising a First Amendment defense.¹²¹ In *Cardtoons*, trading cards depicting parodic caricatures of well-known baseball players were found to "infringe upon MLBPA's publicity right as defined in [the Oklahoma statute],"¹²² but the fact that "[t]he cards provide social commentary on public figures"¹²³ was found to be deserving of "full protection under the First Amendment."¹²⁴

¶32 In *C.B.C.*, even though the Eighth Circuit found that C.B.C. was violating the baseball players' rights of publicity, it affirmed the district court's holding that the freedom of expression guaranteed by the First Amendment superseded those rights.¹²⁵ The district court had itself conducted a thorough First Amendment analysis, first finding that the fantasy sports games qualified for First Amendment protection despite the fact that (1) fantasy sports games are "non-traditional expression,"¹²⁶ (2) C.B.C. was "deriving a profit from its use of the names and playing records,"¹²⁷ and (3) "interaction among . . . and between game participants"¹²⁸ was present. The court then found that the fantasy games were the sort of commercial speech protected by the First Amendment because "CBC does not use players' names and playing records for the purpose of advertising a product or services."¹²⁹ Finally, the court balanced C.B.C.'s First Amendment rights against the players' publicity rights and concluded that "none of the justifications for the right of publicity compel a finding that the First Amendment should not trump the right of publicity."¹³⁰

¹²¹ *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 968 (10th Cir. 1996).

¹²² *Id.*

¹²³ *Id.* at 969.

¹²⁴ *Id.*

¹²⁵ *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 824 (8th Cir. 2007).

¹²⁶ *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1092 (E.D. Mo. 2006).

¹²⁷ *Id.* at 1093.

¹²⁸ *Id.* at 1094.

¹²⁹ *Id.* at 1095.

¹³⁰ *Id.* at 1099.

C. Preemption By the Copyright Act of 1976

¶33 The U.S. Constitution grants to Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹³¹ Pursuant to the “Supremacy Clause,”¹³² federal law, as a matter of course, trumps state law, and the Copyright Act of 1976 includes specific language that any state law purporting to protect the same rights protected by the Copyright Act is preempted by the Copyright Act.¹³³

¶34 Copyright exists “in original works of authorship fixed in any tangible medium of expression.”¹³⁴ In *Feist Publications v. Rural Telephone Service Co.*,¹³⁵ the Supreme Court reiterated the “well-established proposition[] . . . that facts are not copyrightable”¹³⁶ and held that compilations of facts are only copyrightable if they have “at least some minimal degree of creativity”¹³⁷ as required by the word “original” in the Copyright Act.

¶35 In its lawsuit against MLB Advanced Media, C.B.C. asserted that federal copyright law preempted the players’ state rights of publicity. The district court found that the names and playing records of the players were “factual information which is otherwise available in the public domain,”¹³⁸ and held that “the players’ names and playing records as used by CBC in its fantasy games are not copyrightable . . . [thus] copyright preemption does not apply.”¹³⁹ The Eighth Circuit decided it did not need to “reach CBC’s alternative argument that federal copyright law preempts the players’ state law rights of publicity” because it had already decided that the First Amendment offered a sufficient defense to the infringement of the players’ rights of publicity.¹⁴⁰

¹³¹ U.S. CONST. art. I, § 8, cl. 8.

¹³² *Id.* art. VI, cl. 2 (“[T]he Laws of the United States . . . shall be the supreme Law of the Land”).

¹³³ 17 U.S.C. § 301(a) (2006) (“[A]ll legal or equitable rights that are equivalent to any of the exclusive rights [herein] . . . are governed exclusively by this title.”).

¹³⁴ *Id.* § 102(a).

¹³⁵ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

¹³⁶ *Id.* at 344.

¹³⁷ *Id.* at 345.

¹³⁸ *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1102 (E.D. Mo. 2006).

¹³⁹ *Id.* at 1103.

¹⁴⁰ *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 824 (8th Cir. 2007).

¶36 CBS also included a federal copyright preemption claim in its complaint against the NFLPA.¹⁴¹ Because the district court granted summary judgment to CBS Interactive on its First Amendment claims, it ruled that the copyright preemption claim was rendered moot and declined to address the question.¹⁴² It will be interesting to see if fantasy sports providers continue to raise copyright preemption as a defense in future lawsuits and whether any court decides to reach the issue.¹⁴³

IV. TOWARD THE CREATION OF A FEDERAL RIGHT OF PUBLICITY STATUTE

¶37 We live in an increasingly interconnected society. American citizens no longer live several days' journey away from their neighbors in the next state, as they did when our Constitution was drafted. And fantasy sports participants "'no longer ha[ve] to seek out like-minded fans'"¹⁴⁴ as they did in the Rotisserie League days; all they have to do is log on to their computer to instantly connect with millions of fellow fans. In 1953, when the right of publicity began its development, individual state laws probably made sense. But to paraphrase Melville Nimmer, it may seriously be doubted that this state law concept satisfactorily meets the needs of the Internet Age in the 21st century.¹⁴⁵

A. *The Dormant Commerce Clause Problem*

¶38 Fantasy sports providers are nationwide enterprises. Dormant commerce clause concerns arise whenever multiple state laws apply to a business that crosses state lines. The U.S. Constitution gives Congress the power "[t]o regulate Commerce . . . among the several States."¹⁴⁶ By negative implication, the states are not permitted to pass laws that pose a burden on interstate commerce.¹⁴⁷ Judge Kozinski raised a similar concern

¹⁴¹ Complaint ¶ 22, *CBS Interactive Inc. v. Nat'l Football League Players Ass'n*, No. 08-05097-CIV (E.D. Minn. filed Sept. 3, 2008).

¹⁴² Memorandum Opinion and Order at 43 n.19, *CBS Interactive Inc. v. Nat'l Football League Players Ass'n*, No. 08-05097-CIV (D. Minn. filed Sept. 3, 2008).

¹⁴³ For an interesting discussion of the conflicts between right of publicity doctrine and copyright preemption, see generally Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199 (2002).

¹⁴⁴ Quiming, *supra* note 2, at 307 (quoting Greg Johnson, *Suing Over Statistics*, L.A. TIMES, Jan. 2, 2006, at D1).

¹⁴⁵ See Nimmer, *supra* note 11, at 203.

¹⁴⁶ U.S. CONST., art. I, § 8, cl. 3.

¹⁴⁷ See *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) ("[W]e have long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal

in his dissent railing against the Ninth Circuit's expansion of California's common law right of publicity in *White v. Samsung*.¹⁴⁸ Judge Kozinski pointed out that

the right of publicity isn't geographically limited. A right of publicity created by one state applies to conduct everywhere, so long as it involves a celebrity domiciled in that state. . . . The broader and more ill-defined one state's right of publicity, the more it interferes with the legitimate interests of other states.¹⁴⁹

¶39 If the MLBPA were to bring suit in a California federal court against an internet fantasy sports provider for violating the players' rights of publicity, the MLBPA may very well prevail under the Ninth Circuit's interpretation of California law, which gives less weight to the First Amendment defense.¹⁵⁰ This could put the internet fantasy sports provider in the position of being required to pay a licensing fee for uses in California of names and statistics of players who are domiciled in California, but not for any uses in Missouri (under the *C.B.C.* decision). It would be very difficult—if not impossible—for a fantasy sports provider to calculate which fantasy sports participants in which states were using the statistics of all the California-domiciled professional athletes. The other option, which is equally unviable, would be to eliminate the California-domiciled professional athletes from the fantasy sports games. Faced with a choice between two impractical options, the providers would likely abide by the more stringent state law and pay the MLBPA its requested fee to cover the use of all players in the league. Thus, California law would be affecting interstate commerce at the expense of Missouri law, a result specifically prohibited by the dormant commerce clause.

statute.”). If a fantasy sports provider were to challenge a state right of publicity law on constitutional grounds as a violation of the dormant commerce clause, it likely would be evaluated using the *Pike* balancing test. *See Pike v. Bruce Church*, 397 U.S. 137, 142 (1970) (holding that when a state statute's “effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits”).

¹⁴⁸ *White v. Samsung Elecs. Am.*, 989 F.2d 1512, 1518 (9th Cir. 1993) (Kozinski, J., dissenting from denial of petition for rehearing en banc) (“Under the dormant Copyright Clause, state intellectual property laws can stand only so long as they don't ‘prejudice the interests of other States.’” (quoting *Goldstein v. California*, 412 U.S. 546, 558 (1973))).

¹⁴⁹ *Id.* at 1518–19.

¹⁵⁰ *See White v. Samsung Elecs. Am.*, 971 F.2d 1395, 1407–08 (9th Cir. 1992) (Alarcon, J., concurring in part and dissenting in part) (“The majority gives Samsung's First Amendment defense short shrift . . . we must prevent the creation of a monopoly that would inhibit the creative expressions of others.”).

¶40 Although the scenario illustrated above is largely hypothetical at this point, if NFL Players ultimately triumphs in its countersuit against CBS (which could happen if the Eighth Circuit reverses the district court on the venue question and the case is transferred to Florida), the litigation free-for-all envisioned at the outset of this note is not all that far-fetched. A federal right of publicity statute would alleviate the potential dormant commerce clause problem by preempting any conflicting state right of publicity laws that affect interstate commerce (as they do in the fantasy sports context) and could be justified under Congress's Commerce Clause power.¹⁵¹

B. The Messy Application of Current Right of Publicity Laws

¶41 Application of the current system of state right of publicity laws varies widely from state to state and has been referred to as a “patchwork”¹⁵² and “schizophrenic”¹⁵³ by various commentators. Eric Goodman notes that “[t]hese separate and independent efforts to define the scope and protection of the right of publicity have resulted in confusion among those faced with assessing the potential impact of a nationwide advertising campaign.”¹⁵⁴

¶42 With technology making our world smaller, it becomes increasingly easier to run a nationwide enterprise, but burdensome to keep abreast of—and comply with—the multitude of state right of publicity laws. A federal right of publicity statute would bring uniformity to this doctrine and would presumably be easier for federal courts to apply than the current variety of state laws appears to be.

¶43 Judge Alarcon's partial dissent in *White* revolved around his concern that the Ninth Circuit, a federal court, was expanding California's state law in a way that no California state court had previously done.¹⁵⁵ In *Groucho Marx Productions, Inc. v. Day & Night Co.*, the Second Circuit had to reverse the New York district court's ruling because the lower court had mistakenly applied New York right of publicity law instead of

¹⁵¹ Similarly, Congress used its Commerce Clause power to pass the first federal statute governing trademarks, which had previously been governed exclusively by state common law. DAVID LANGE ET AL., *INTELLECTUAL PROPERTY CASES & MATERIALS* 45 (3d ed. 2007).

¹⁵² Goodman, *supra* note 10, at 245.

¹⁵³ Jennifer Y. Choi, Comment, *No Room For Cheers: Schizophrenic Application in the Realm of Right of Publicity Protection*, 9 *VILL. SPORTS & ENT. L.J.* 121, 151 (2002).

¹⁵⁴ Goodman, *supra* note 10, at 245.

¹⁵⁵ *White*, 971 F.2d at 1402 (Alarcon, J., concurring in part and dissenting in part) (“The majority asserts that the use of a likeness is not required under California common law. . . . I cannot find any holding of a California court that supports this conclusion.”).

California law.¹⁵⁶ New York's law allowed the right of publicity to descend to a person's heirs, whereas California's did not.¹⁵⁷ A federal right of publicity law would avoid both the problem of federal courts expanding state law and the problem of federal courts applying the wrong state's laws.

C. *The Possibility of a Fair Use Exception*

¶44 Fair use exceptions are built in to both the Copyright Act of 1976¹⁵⁸ and the Lanham Act.¹⁵⁹ If Congress were to pass a federal right of publicity statute, a similar fair use exception could be included.

¶45 The legislative history of section 107 of the Copyright Act shows that its purpose was to codify the long-standing, judicially-created doctrine of excusing copyright infringement when the use of the copyrighted material is "fair" as determined on a case-by-case basis.¹⁶⁰ Section 107 includes four factors that must be considered by a court when determining whether or not a use is fair:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.¹⁶¹

The second and third factors may not translate well to a right of publicity context, but the first and fourth factors are certainly appropriate and could be very useful in drafting a right of publicity fair use exception.¹⁶²

¶46 The most obvious problem with importing a copyright-style fair use exception into a federal right of publicity is the notorious difficulty of

¹⁵⁶ *Groucho Marx Prods., Inc. v. Day & Night Co.*, 689 F.2d 317, 318 (2d Cir. 1982).

¹⁵⁷ *Id.*

¹⁵⁸ 17 U.S.C. § 107 (2006).

¹⁵⁹ 15 U.S.C. § 1115(b)(4) (2006).

¹⁶⁰ See H.R. REP. NO. 94-1476, at 65 (1976) ("The judicial doctrine of fair use, one of the most important and well-established limitations on the exclusive right of copyright owners, would be given express statutory recognition for the first time in section 107. . . . [E]ach case raising the question must be decided on its own facts.").

¹⁶¹ 17 U.S.C. § 107 (2006).

¹⁶² For a more thorough discussion of this concept see Andrew Koo, *The Right of Publicity Fair Use Doctrine – Adopting a Better Standard*, 4 BUFF. INTELL. PROP. L.J. 1, 21–24 (2006).

applying fair use.¹⁶³ A different possibility would be the nominative fair use concept from trademark law. Section 33 of the Lanham Act outlines potential defenses to trademark infringement.¹⁶⁴ “[T]he use of a name . . . otherwise than as a mark . . . in good faith only to describe the goods or services of such party” is a defense to trademark infringement.¹⁶⁵ This traditionally is taken to mean that a defendant may fairly use “the plaintiff’s mark to describe the defendant’s *own* product.”¹⁶⁶ The Ninth Circuit has applied this to situations in which the defendant used the plaintiff’s mark to refer to the *plaintiff’s* product, as long as three conditions are met:

First, the product or service in question must be one not readily identifiable without the use of the trademark; second, only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and third, the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.¹⁶⁷

¶47 Although players do not hold trademarks in their own names, it can hardly be argued that there is a more efficient way to refer to a player than by using his name.¹⁶⁸ If a trademark-style nominative fair use provision were incorporated into a federal right of publicity, it would allow fantasy sports providers to easily reference the players by their names, as long as there was no suggestion that the players endorsed the game.¹⁶⁹

¶48 A built-in fair use exception could prevent many of the problems courts have had in trying to determine whether a fair use exception should apply to a right of publicity action,¹⁷⁰ and, if it does apply, how to best balance it against an individual’s right of publicity in order to preserve a

¹⁶³ See *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (“[T]he issue of fair use . . . is the most troublesome in the whole law of copyright . . .”).

¹⁶⁴ 15 U.S.C. § 1115 (2006).

¹⁶⁵ *Id.* § 1115(b)(4).

¹⁶⁶ *New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302, 308 (9th Cir. 1992).

¹⁶⁷ *Id.* (citation omitted).

¹⁶⁸ See *id.* at 306 (“For example, one might refer to ‘the two-time world champions’ or ‘the professional basketball team from Chicago,’ but it’s far simpler (and more likely to be understood) to refer to the Chicago Bulls.”).

¹⁶⁹ Obviously if a professional player wanted to endorse a particular game, he and his agent would be free to negotiate the appropriate fee with the fantasy sports provider.

¹⁷⁰ See *White v. Samsung Elecs. Am.*, 971 F.2d 1395, 1401 (“This case involves a true advertisement run for the purpose of selling Samsung VCRs. . . . Defendants’ [fair use] parody arguments are better addressed to non-commercial parodies.”).

defendant's First Amendment right to expression.¹⁷¹ According to Judge Kozinski,

[federal courts are] in a unique position . . . State courts are unlikely to be particularly sensitive to federal preemption, which, after all, is a matter of first concern to the federal courts. The Supreme Court is unlikely to consider the issue because the right of publicity seems so much a matter of state law. . . It's our responsibility to keep the right of publicity from taking away federally granted rights . . . from the public¹⁷²

¶49 The Missouri district court and the Eighth Circuit found that C.B.C.'s First Amendment rights outweighed the baseball players' state rights of publicity. If the Eighth Circuit affirms the Minnesota district court's ruling on venue, the CBS Interactive case will be another nail in the coffin for the professional sports leagues and their efforts to maintain control over their players' rights of publicity. However, if the case is ultimately decided in Florida, without the *C.B.C.* precedent, the issue could easily be decided the other way. A federal right of publicity statute with a built-in fair use exception would provide uniformity and better guidance to courts in protecting parties' constitutional rights.

CONCLUSION

¶50 The fantasy sports cases are a microcosm of the problems inherent in allowing disparate state laws to govern actions that take place on a national scale. The other major branches of intellectual property have federal statutes to govern them: the Copyright Act of 1976,¹⁷³ the Trademark Act of 1946,¹⁷⁴ and the Patent Act.¹⁷⁵ By placing the right of publicity on equal footing with its intellectual property brethren and passing a federal right of publicity statute, Congress would legitimize the fact that federal courts are already deciding these issues and alleviate the several

¹⁷¹ See *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 936 (6th Cir. 2003) ("In deciding where the line should be drawn between Woods's intellectual property rights and the First Amendment, we find ourselves in agreement with the dissenting judges in *White*. . .").

¹⁷² *White v. Samsung Elecs. Am.*, 989 F.2d 1512, 1518 (Kozinski, J., dissenting from denial of petition for rehearing en banc). The Supreme Court has only considered one right of publicity case, *Zacchini v. Scripps-Howard Broadcasting Corp.*, 433 U.S. 562 (1977), and that case "is a red herring . . . [because Zacchini] complained of the appropriation of the economic value of his *performance*, not the economic value of his *identity*." *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 973 (10th Cir. 1996).

¹⁷³ 17 U.S.C. §§ 101–810, 1101 (2006).

¹⁷⁴ 15 U.S.C. §§ 1051–1129 (2006).

¹⁷⁵ 35 U.S.C. §§ 1–376 (2000).

problems illustrated by the fantasy sports cases: (1) the potential dormant commerce clause violation, (2) the confusing application by federal courts of state laws, and (3) the question of whether and how much the First Amendment and a fair use exception should apply to the right of publicity.