

A NEW STANDARD FOR RIGHT OF PUBLICITY
PROTECTION FOR STATISTICS IN THE ERA OF
DAILY FANTASY SPORTS AND LEGALIZED
SPORTS BETTING – A CRITIQUE OF *DANIELS V.*
FANDUEL AND A REVIVAL OF AN ECONOMIC-
BASED RATIONALE TO PROTECT ATHLETES’
PROPERTY RIGHTS ♦

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ABSTRACT

The Indiana Supreme Court’s unanimous decision in Daniels v. FanDuel, addressing whether the use of an athlete’s name and statistical information is subject to a right of publicity, has the potential to serve as a persuasive precedent—and formidable obstacle—in future sports-related legal matters. Specifically, in rejecting the plaintiff’s claim, the court ruled that publicly available statistical information used in a daily fantasy sports game is protected speech under a statutory “newsworthy value” exemption found in the state’s right of publicity law. The panel also determined that the use of athletes’ names and images are protected as well. On the surface, this decision may seem to be the logical application of a broad exception; however, in actuality it is problematic because it failed to consider the economic underpinnings of the use of that information. It also left some key doctrinal questions unanswered. For example, was the use of the publicly available material a commercial use that goes beyond the “newsworthy value” of the material? Should the court have addressed the use of players’ images as a separate and distinct component from the use of the statistics? Was the use of the names and statistics commercial enough to override First Amendment issues? While Daniels is a state court case decided under Indiana law, its implications for the future of monetizing information in sports can be significant. It also marks a continued retreat from earlier case law that was supportive of

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athletes’ publicity rights in their statistics. This Article outlines the background of right of publicity protection for the use of statistical information, discusses the Daniels case in detail, and argues why the statutory newsworthy value exception should not apply to athletes’ names, images, or statistical information in profit-making daily fantasy sports games. Finally, this Article reiterates the author’s earlier call for an appropriate balancing test to weigh the First Amendment rights of daily fantasy sports and gambling firms against the publicity rights of the athletes, and demonstrates how a commercial speech-based rationale results in a more effective approach than the helter-skelter system presently in place.

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INTRODUCTION

The definition and scope of the right of publicity brings to mind Winston Churchill’s famous description of Russia: “a riddle, wrapped in

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a mystery, inside an enigma.”¹ This multi-headed hydra of legal doctrine—which began as a privacy tort to prevent the unauthorized advertisement of one’s name for commercial purposes—has since morphed into a common law property right based on a multiplicity of state laws and court rulings that vary in scope, application, and length of time. Not surprisingly, right of publicity controversies have produced a treasure trove of cases brought by the famous and not-so-famous, including celebrities, athletes, actors, and personalities (active, retired, or the estates of those deceased). This has resulted in a series of rulings that include statutory interpretation of state right of publicity laws,² attempts to impose constitutional “standards” on an area of expression,³ and the crafting or alteration of common law rules.⁴ Although right of publicity involves speech, the application of First Amendment principles has also been haphazard, as courts have sometimes eschewed the strong presumption of constitutional protection in favor of finding protection for those aggrieved by the use of avatars, lookalikes, and soundalikes.⁵

¹ See *The Russian Enigma* (BBC radio broadcast Oct. 1, 1939), *microformed on The Russian Enigma*, CHURCHILL SOC’Y LONDON, www.churchill-society-london.org.uk/RusnEnig.html [https://perma.cc/K4XX-FNYJ].

² See, e.g., *Loft v. Fuller*, 408 So. 2d 619 (Fla. Dist. Ct. App. 1981) (holding that, because Fla. Stat. § 540.08 “is designed to prevent the unauthorized use of a [person’s] name [or likeness] to directly promote the product or service of the publisher,” it does not give victim’s relatives a cause of action under the privacy claims); see also *Alberghetti v. Corbis Corp.*, 263 F.R.D. 571, 576 (C.D. Cal. 2010) (“California rights of publicity clearly extend equally to celebrities and non-celebrities alike.”), *aff’d*, 476 Fed. App’x 154 (9th Cir. 2012); see generally 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 6:4 (2D ED. 2019) [HEREINAFTER *RIGHTS OF PUBLICITY & PRIVACY VOL. 1*].

³ See 2 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, *THE RIGHTS OF PUBLICITY AND PRIVACY* §§ 8:23, 8:27 (2d ed. 2019) [hereinafter *RIGHTS OF PUBLICITY & PRIVACY VOL. 2*]; see also *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 569 (1977); see also *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 802 (Cal. 2001) (holding that, under the transformative use test for determining whether the First Amendment protects the artistic use of a celebrity’s image adopted therein, the artist’s portraits were entitled to First Amendment protection because they were “expressive works and not . . . advertisement[s] or endorsement[s] of a product”), *cert. denied*, 534 U.S. 1078 (2002); see also *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1284 (9th Cir. 2013) (“Under California’s transformative use defense, [defendant] EA’s use of the likenesses of college athletes like Samuel Keller in its video games is not, as a matter of law, protected by the First Amendment.”).

⁴ See *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905); see also *Frigon v. Universal Pictures, Inc.*, 255 So. 3d 591, 598-99 (La. Ct. App. 2018) (“[F]or us to hold jurisprudentially that a right of publicity exists would constitute an unwarranted intrusion into an area in which the legislature has not seen fit to act Thus, in the absence of legislative action, we decline to supply a cause of action through jurisprudence that the law does not.” (internal citations omitted)).

⁵ See *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 170 (3d Cir. 2013) (holding that, because the use of a college athlete’s number and image on an electronic game is not “transformative,” the First Amendment does not insulate his “avatar” from a right of publicity claim), *cert. dismissed*, 573 U.S. 989 (2014); see also *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d at 1273 (holding that depiction neither raises a transformative defense nor involves exemptions under California common law); see also *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992); see also *Midler v. Ford Motor Co.*, 849 F.2d 460, 463-64 (9th Cir. 1988).

While right of publicity cases, as noted earlier, have been brought by a host of litigants, sports athletes, whether individually or as a class, have made up a prominent portion of these challengers. Examples include Tiger Woods,⁶ Kareem Abdul-Jabbar,⁷ Michael Jordan,⁸ Arnold Palmer,⁹ and a number of other former and present college athletes who have claimed that the use of their names, images, and playing numbers constituted a violation of their publicity rights.¹⁰

The recent birth and proliferation of daily fantasy sports, coupled with the United States Supreme Court's invalidation of the federal prohibition on state authorization of sports gambling in *Murphy v. National Collegiate Athletic Association*,¹¹ has led to many states permitting fantasy sports and legalizing sports betting. Significantly, it has also brought forth a potentially important but as yet unresolved issue regarding the right to use the names and statistical information of players for betting purposes. In particular, with gaming legalized in at least a dozen states (and likely more to come),¹² and with large firms like FanDuel,

⁶ See *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003) (“[A]pplying the transformative effects test adopted by the Supreme Court of California in *Comedy III*, [the court concluded] that [the artist’s] work d[id] contain significant transformative elements which made it especially worthy of First Amendment protection and also less likely to interfere with the economic interest protected by Woods’ right of publicity Because [the artist’s painting of Tiger Woods winning a major golf tournament] ha[d] substantial transformative elements, it [wa]s entitled to the full protection of the First Amendment.”).

⁷ See *Abdul-Jabbar v. Gen. Motors Corp.*, 75 F.3d 1391 (9th Cir. 1996) (holding that the former basketball star sufficiently alleged facts to state a claim, under both California common law and statute, that the advertisement’s use of his birth name to attract television viewers’ attention and thereby gain a commercial advantage, constituted a violation of right of publicity laws).

⁸ See *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 514, 519 (7th Cir. 2014) (holding that because the grocery store operator’s advertisement, congratulating the former professional basketball player on his induction into the Naismith Memorial Basketball Hall of Fame, prominently featured in the middle of the page the store’s trademarked logo and marketing slogan, it constituted commercial speech—that was entitled to reduced protection, i.e., stripped of its blanket immunity from suit, under the First Amendment—and was thus subject to the laws the athlete invoked in his claims for violations of right of publicity and false endorsement).

⁹ See *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967) (holding that, absent consent, the defendant’s use of well-known professional golfers’ names and biographies in conjunction with a golf game constituted a violation of the golfers’ right to privacy).

¹⁰ See, e.g., *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016).

¹¹ *Murphy v. Nat’l Collegiate Athletic Assoc.*, 138 S. Ct. 1461 (2018).

¹² At the time of writing, there are fourteen U.S. states that have legalized sports betting: Arkansas, Delaware, Indiana, Iowa, Mississippi, Montana, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, West Virginia; there are four U.S. states that have legalized sports betting, pending launch: Illinois, New Hampshire, North Carolina, Tennessee; there are twenty-four U.S. states that have introduced, but not yet passed, legislation to legalize sports betting: Alabama, Arizona, California, Colorado, Connecticut, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Vermont, Virginia, Washington; there are eight states where no action has been taken to legalize sports betting: Alaska, Florida, Idaho, Nebraska, North Dakota, Utah, Wisconsin, Wyoming. See David Fucillo & Frank Bi, *The State of Sports Betting*, SB NATION, <https://www.sbnation.com/a/sports-betting-gambling-state-legislation->

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William Hill, MGM, and others seeking inroads into what could be a lucrative market, the use of athletes' statistical information is crucial for the viability of the industry. Not surprisingly, with the potential for large amounts of revenue, there are many stakeholders who wish to lay claim to some of the money. They include states (seeking tax revenues from betting), leagues (desiring a system of "integrity fees" to be paid as part of a licensing deal), and the athletes themselves (wishing to receive licensing fees for the use of their names and likenesses). However, at least for the athletes, there is an important legal issue that has to be resolved before they can lay their claim: While their names and identities are protected from commercial use under right of publicity doctrine, are their names, images, and statistical information also protected when they are used by fantasy sports and gambling businesses for information and background purposes? In short, does the state-based concept known as right of publicity protect this information from unauthorized use?

Despite the hundreds of right of publicity rulings over the last half century, very few have addressed the intellectual property value of statistical information, and fewer still have addressed the question of the use of names and images in connection with these ventures. The few existing cases that have addressed the issue are not conclusive. In short, when it comes to the use of statistical information, there is some precedent—both for and against—by prior courts; but for images linked to the use of those statistics, the well is pretty dry. Without a clear answer as to the appropriate standard of protection for statistics and related images, uncertainty exists over whether athletes can share in some of the daily fantasy and gambling profits earned with the use of their names, images, and statistics, or whether this information is protected speech and therefore exempt from a right of publicity claim. As of the date of the publication of this Article, there are no cases involving gambling sites due to the recent vintage of the state laws that permit sports betting. However, the Indiana Supreme Court recently answered this question in the context of daily fantasy sports, concluding that the names, images, and statistical information of players for the purposes of daily fantasy sports are not subject to claims under the state's broad right of publicity law.¹³

In *Daniels v. FanDuel*, the Indiana Supreme Court unanimously concluded that such information is protected by the "newsworthy value" exception to Indiana's right of publicity law.¹⁴ The ramifications of the

tracker [<https://perma.cc/3RSC-XMNK>]; see also Ryan Rodenberg, *United States of sports betting: An updated map of where every state stands*, ESPN (Aug. 2, 2019), http://www.espn.com/chalk/story/_/id/19740480/gambling-sports-betting-bill-tracker-all-50-states [<https://perma.cc/JP2D-UNL4>].

¹³ *Daniels v. FanDuel, Inc.*, 109 N.E.3d 390 (Ind. 2018), *aff'd*, 909 F.3d 876 (7th Cir. 2018).

¹⁴ *Id.* at 398.

court's determination are significant, not only because such a ruling prevents athletes from seeking compensation for any property interest in their names, images, *and* statistical information—at least while within the boundaries of the state—but also for the underlying First Amendment question it raises. Although *Daniels* specifically dealt with a daily fantasy sports game, it is clearly applicable to the potentially lucrative area of sports betting. Suffice it to say, it would be ideal for gaming firms and sports leagues, players associations, or, in some cases, individual athletes to consummate licensing agreements covering the use of athletes' names, likenesses, and statistical information because, as it stands now, there is no obligation to license such information.

This Article thus examines the legal ramifications of the applicability of the right of publicity to the use of athletes' names, images and, most importantly, statistical information by commercial daily fantasy sports and sports betting websites in the absence of such licensing agreements. It then discusses why the Indiana Supreme Court's ruling in *Daniels* failed to properly consider the central commercial and economic reasons that such statistical information is used. Finally, given the current state of Indiana's law, and how *Daniels* could apply in other states that have newsworthy exceptions to their right of publicity laws, this Article will explore the rapidly declining incentive for gaming firms to enter agreements with athletes that would compensate them for the use of their name, image, and statistical information in the aftermath of the *Daniels* ruling.

Accordingly, this Article outlines: (I) early cases where statistical information was subject to the right of publicity; (II) a discussion of the ruling in *C.B.C. Distribution v. Major League Baseball Advanced Media*,¹⁵ which marked a deviation from past cases considering the issue; (III) the rise of daily fantasy sports, sports gambling, and the greater monetization of images and statistics; (IV) the history of and ruling in the *Daniels* case; (V) a critique of *Daniels* and *C.B.C.*; and (VI) the need for a harmonized standard to consistently and adequately balance the protection for image and statistical rights with the First Amendment right to disseminate public information.

I. EARLY RIGHT OF PUBLICITY CASES INVOLVING THE USE OF STATISTICS

Right of publicity laws have, for some time, been the subject of voluminous amounts of legal scholarship.¹⁶ There is therefore little need to discuss its genesis and early progress in great detail. While right of publicity

¹⁵ See generally *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818 (8th Cir. 2007), *cert. denied*, 553 U.S. 1090 (2008).

¹⁶ See RIGHTS OF PUBLICITY & PRIVACY VOL. 1, *supra* note 2, § 1:7.

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law historically began as an extension of the privacy tort,¹⁷ in the last half-century it has evolved into a property right.¹⁸ Accordingly, given its initial origins in tort, it has been a creature of state, rather than federal, law. Thus, unlike copyright and trademark laws, which are harmonized under federal statutes,¹⁹ the regulation of right of publicity law rests entirely on state jurisprudence, whether by statutory or common law.²⁰ Notably, as of the publication of this Article, over thirty states have enacted statutory laws, while the remainder continue to rely on regulation by state common law.²¹

The frequently cited definition of the publicity right, which is found in the Restatement of Unfair Competition, prohibits others from appropriating “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.”²² More recently, however, both the enactment of new state laws and subsequent court decisions have expanded that definition to include characterizations that have similarities to real-life persons, even where such characterizations do not constitute literal depictions.²³ Particularly complex issues have thus arisen from divergent understandings of “purposes of trade” or how linked the use is to such activities. Moreover, because each state can define “right of publicity” as it sees fit, definitions vary from state to state and protect sometimes widely divergent sets of characteristics.²⁴

¹⁷ See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 211 (1890), <https://www.cs.cornell.edu/~shmat/courses/cs5436/warren-brandeis.pdf> [<https://perma.cc/5LPZ-YNWE>] (“The right of property in its widest sense, including all possession, including all rights and privileges, and hence embracing the right to an inviolate personality, affords alone that broad basis upon which the protection which the individual demands can be rested.”); see also William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960), <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=3157&context=californialawreview> [<https://perma.cc/J8TT-LYEQ>] (“The law of privacy comprise four distinct kinds of invasion of four different interests of the plaintiff . . . [One such] tort[] may be described as follows: . . . Appropriation, for the defendant’s advantage, of the plaintiff’s name and likeness.”).

¹⁸ See *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

¹⁹ See Copyright Act of 1976, 17 U.S.C. §§ 101–1401 (2012); see Lanham Act, 15 U.S.C. §§ 1051–1141 (2012).

²⁰ California has both a statutory and common law right of publicity. See, e.g., CAL. CIV. CODE § 3344 (West 2019); see also *Eastwood v. Superior Court*, 198 Cal. Rptr. 342 (Ct. App. 1983) (explaining the standard for a common law right of privacy action in California).

²¹ See Mark Conrad, *A New First Amendment Goal Line Defense – Stopping the Right of Publicity Offense*, 40 OHIO N.U. L. REV. 743, 748 nn.26–27 (2014), <https://law.onu.edu/sites/default/files/743%20-%20Conrad.pdf> [<https://perma.cc/JTE8-QMYK>].

²² See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. LAW INST. 1995).

²³ See cases cited *supra* note 5.

²⁴ For example, under the New York Civil Rights Law, the right of privacy—which has been interpreted to include right of publicity—is defined as the unauthorized use of the “name, portrait or picture of any living person” for “advertising purposes, or for the purposes of trade.” N.Y. CIV. RIGHTS LAW § 50 (McKinney 2019). Alternatively, pursuant to section 3344 of the California Civil Code, right of publicity is defined as the unauthorized use of “another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services.” CAL.

Although the development of online games is a relatively recent phenomenon, the idea of simulated games dates back decades. While baseball has had simulated games dating back to the Civil War era, the direct predecessor of daily fantasy sports was the advent of certain baseball card games in the 1920s, as well as games such as Strat-O-Matic baseball in the 1960s.²⁵ The Major League Baseball (MLB) Players' Association, in response to the marketing of these games, demanded that it be compensated through a licensing fee for the manufacturers' use of its members' names and statistical information. While the majority of manufacturers accepted the association's request for a non-exclusive license agreement, one refused to comply with its demands, because doing so would have wiped out the small profits it had from the sale of its games.²⁶

Although at the time of filing the modern iteration of the right of publicity was still in its infancy, a New Jersey court had concluded that, in the context of a golf board game, the state's right of publicity law extended to the protection of professional golf players' names and statistics.²⁷ In *Palmer v. Schonhorn Enterprises, Inc.*, the court upheld the right of publicity claims brought by a group of professional golf players—including Arnold Palmer, Gary Player, and Jack Nicklaus²⁸—who did not

CIV. CODE § 3344 (West 2019). Unlike New York law, California statutory law also recognizes a post-mortem right of publicity, while the state's common law recognizes right of publicity based on the misappropriation tort. See Jennifer E. Rothman, *California, ROTHMAN'S ROADMAP TO RIGHT PUBLICITY*, <https://www.rightofpublicityroadmap.com/law/california> [https://perma.cc/6TN6-W5XV] (last updated Aug. 16, 2019). Specifically, California common law right of publicity distinguishes between different types of torts on the basis of whether the claimed injury is dignitary or economic in nature. *Id.* Perhaps most important for the purpose of this Article is the statutory definition of right of publicity under Indiana law. According to the Indiana statute, "[R]ight of publicity means a personality's property interest in the personality's: (1) name; (2) voice; (3) signature; (4) photograph; (5) image; (6) likeness; (7) distinctive appearance; (8) gestures; or (9) mannerisms." IND. CODE § 32-36-1-7 (2019). Additionally, Indiana statutory law provides that "[t]he rights recognized under this [statute] are property rights, freely transferable and descendible, in whole or in part . . ." *Id.* § 32-36-1-16.

²⁵ For a detailed summary of the history of baseball board games, see J. Gordon Hylton, *The Major League Baseball Players Association and the Ownership of Sports Statistics: The Untold Story of Round One*, 17 MARQ. SPORTS L. REV. 87, 93-94 (2006), <https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1380&context=sportslaw> [https://perma.cc/S33X-LF3K] ("These more sophisticated games allowed players to trade baseball players from one team to another, pick all-star teams and, if they were sufficiently dedicated, players could simulate entire seasons, either by playing alone or with others. Much of the games' appeal lay in the opportunity to calculate statistics generated in the simulated games. A devoted game player could easily devote hundreds of hours to the game." (internal footnote omitted)).

²⁶ See *id.* at 95.

²⁷ See *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458, 462 (N.J. Super. Ct. Ch. Div. 1967).

²⁸ These players challenged the use of their names and statistical information in a board game that could be analogized to a pre-computer, pre-internet version of a fantasy sports game. *Id.* at 459. This game, called "Pro-Am Golf Game," utilized short biographies or profiles of twenty-three international golf players. *Id.* More precisely, featured on each of twenty-three individual sheets of paper, cumulatively called the "Profile and Playing Chart," was a short profile of an internationally

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consent to the use of their names and statistical information in the board game manufactured by the defendant. Rather than look to the proprietary rights central to the right of publicity, the court relied on the general law tort right of privacy. Therefore, while the court concluded that the defendant's use of this information—for the effective monetization of its product—did indeed violate the plaintiffs' privacy rights,²⁹ it also acknowledged that this right could be limited by statutory law. The court explained that while there existed among the majority of states with limited statutory protections a general conclusion that background information about celebrities falls outside the ambit of protection afforded by the right of publicity,³⁰ the scope of the common law right could be defined more broadly, essentially embracing Dean Prosser's idea that the "misappropriation of one's name or likeness" fell under the right of privacy umbrella.³¹ Relying on this broad interpretation of the common law privacy right, the *Palmer* court then utilized a balancing approach that weighed the right of the public to access general newsworthy information about famous athletes or celebrities against the individual's inherent right to protect their image from exploitation for commercial purposes. It concluded that, despite the professional status of the famous plaintiffs, their names and statistics were nevertheless entitled to protection.³²

Shortly thereafter, the MLB Players' Association instituted an action against the sole manufacturer of a baseball simulation game that refused to pay the licensing fee. In *Uhlaender v. Henricksen*, a Minnesota district court re-affirmed the approach established in *Palmer*. In *Uhlaender*, the court had to determine whether Major League Baseball players had a proprietary or property interest in their names and statistical information, which would enable them to enjoin a manufacturer of a baseball board game from using such information for commercial

known professional golfer that contained "accurate facts concerning their respective professional careers." *Id.*

²⁹ *Id.* at 461 ("There is little doubt that a person is entitled to relief when his name has been used without his consent, either to advertise the defendant's product or to enhance the sale of an article.").

³⁰ *Id.* at 460; see *Gautier v. Pro-Football, Inc.*, 107 N.E.2d 485, 488 (N.Y. 1952) ("[T]he use of name or picture in a newspaper, magazine, or newsreel, in connection with an item of news or one that is newsworthy, is not a use for purposes of trade within the meaning of the [statute]." (internal citation omitted)).

³¹ *Palmer*, 232 A.2d at 461.

³² *Id.* at 460 ("Undoubtedly there are limits to the right of privacy . . . [A] man in public life may not claim the same immunity from publicity as a private citizen may. A public figure has been defined as a person who, by his accomplishments, fame or mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs and his character, has become a public personage. He is, in other words, a celebrity.").

purposes absent a license or permission.³³ The court, citing *Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc.*,³⁴ concluded that the manufacturer's use of the professional baseball players' names and statistics violated the athletes' proprietary rights due to its commercial nature.³⁵ Importantly, when making this determination, the court examined the growing split between the traditional basis for misappropriation in the tort of privacy and the "more recent" approach of right of publicity based on property rights, i.e., trespass.³⁶ Despite the court's conclusion, the dispute did not end there. Following the manufacturer's refusal to pay the astoundingly small licensing fee, the court issued a delayed injunction that would allow it to sell off its remaining inventory and honor existing contracts.³⁷ However, once in effect, the manufacturer figured out a way to cleverly evade the injunction—namely, by creating a new version of the game that replaced each letter of the players' names with a blank line and asking contestants to use the card's statistical information to determine the identity of the player³⁸—and continue to manufacture the game.

The dawn of the internet brought about the creation of online games and increased dependence on statistics, which became salient information

³³ See *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1278 (D. Minn. 1970). Principally, the *Uhlaender* defendants manufactured and sold games that employed the names and professional statistical information—such as batting, fielding, earned run, and other averages—of approximately five hundred to seven hundred major league baseball players, identified by team, uniform number, playing position, and otherwise. *Id.* Significantly, defendants' 1967 advertisement for the product contained the following statement: "SCIENTIFICALLY COMPUTED[:] Players are rated in every phase of baseball play. Each pitcher is different and each batter is different. You manage 520 big time players. Your strategy affects the outcome of every game. This game is Big, Colorful, and True. 220 pitchers and 300 fielders are included." *Id.*

³⁴ *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953) (discussing, for the first time, the possible expansion of the right of misappropriation beyond a classic right of privacy tort).

³⁵ *Uhlaender*, 316 F. Supp. at 1282 ("It is unfair that one should be permitted to commercialize or exploit or capitalize upon another's name, reputation or accomplishments merely because the owner's accomplishments have been highly publicized.").

³⁶ *Id.* at 1279-80 ("Although misappropriation of one's name, likeness or personality for commercial use has been considered as one species of the general tort of invasion of privacy, many authorities suggest that misappropriation is a distinctly independent tort." (internal footnote omitted)).

³⁷ See *Hylton*, *supra* note 25, at 105-06 ("To allow the Henricksens to sell off their existing inventory and honor existing contracts, Judge Neville delayed the effective date of his injunction to January 1, 1971, a date more than four months after the court's August 25, 1970 decision. This delay not only allowed the Henricksens the opportunity to sell off any remaining 1970 games they had in stock, but it also allowed them to prepare a 1971 version of the game based on the 1970 regular season, which ended at the beginning of October." (internal footnotes omitted)).

³⁸ *Id.* at 106 ("[I]n lieu of the individual player names on the game cards, the game now included the name of the player's team, his statistics from the previous year, and a series of blank lines, one for each letter of the player's first and last names . . ." (internal footnote omitted)). Evidently, the technique utilized by the Henricksens established a precursor to future cases—specifically, video manufacturers would use a player's jersey number, rather than their name, to identify the player's character in video games. See, e.g., *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013), *cert. dismissed*, 573 U.S. 989 (2014).

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for gameplay and thus integral to the value of the product. Throughout the 1980s and 1990s, the scope of right of publicity protection continued to increase, as more states began to adopt more detailed and tailored statutes, like those found in California and Indiana, rather than the older, more restrictive model of New York.³⁹ A series of judicial decisions that extended the types of protection available to non-literal depictions of names and likenesses also contributed to the increasing scope of protection.⁴⁰ Moreover, the Supreme Court expanded the scope of protection by creating a misappropriation right for a “human cannonball” performer whose act was filmed and broadcast on a news report.⁴¹ However, while the right of publicity was safely ensconced in statutory interpretation and court precedent by the turn of the century, the application of this right to statistical information coupled with names and likenesses continued to be uncertain.

It would be logical to believe that, when the usage of names and statistical information shifted from board to screen, the courts would respond in kind and continue to rely on *Palmer* and *Uhlaender* as persuasive precedents. In fact, on its face, it seems entirely rational to think that, because the use of names and likeness has remained constant and only the medium has changed, there should be no variation in the outcomes of subsequent cases, regardless of the medium in which they arise. Perhaps even more so than in board games, the use of names and likenesses, coupled with statistical information, is the bloodline for commercial success in fantasy sports games—and, even more saliently, for online or on-site sports gambling. It follows that such usage, under the preceding case law, should be protected under the scope of right of publicity.

Professor Karcher, who has strongly supported the use of cases like *Palmer* and *Uhlaender* to determine modern legal issues arising in the online gaming context, focuses on two primary questions: (1) Is the individual's name or likeness being used for a purpose other than news reporting, entertainment (i.e., movie, film, etc.), or literature? (2) If so, is the individual's name or likeness the “essence” of the product or service being produced, such that the product or service is dependent upon such use for its existence?⁴² Despite this seemingly rational reasoning, modern

³⁹ See sources cited *supra* note 24 and accompanying text.

⁴⁰ See *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992) (finding a game show hostess' right of publicity claims, asserting that the defendant's use of a robot wearing a blond wig and posing in front of a “Wheel of Fortune” inspired setting in its commercial embodied a “likeness” of the hostess in a commercial context, was actionable); see also *Midler v. Ford Motor Co.*, 849 F.2d 460, 463-64 (9th Cir. 1988) (holding that the use of a voice-impersonator to replicate the voice of a professional singer constituted a violation under right of publicity laws).

⁴¹ See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 563-64 (1977).

⁴² See Richard T. Karcher, *The Use of Players' Identities in Fantasy Sports Leagues: Developing Workable Standards for Right of Publicity Claims*, 111 PENN ST. L. REV. 557, 573 (2007).

courts have nevertheless rejected this logic—and have even gone so far as to call into question the rationale behind *Uhlaender*.⁴³ For example, the court in *C.B.C. Distribution v. MLBAM*,⁴⁴ the leading case for matters dealing with statistical use in the online era, did not even address commercial “essence” in its ruling.

II. *C.B.C. v. MAJOR LEAGUE BASEBALL ADVANCED MEDIA: A TURNING POINT?*

Since its earliest days as a bona fide labor organization, the MLB Players’ Association has secured licensing agreements for the use of its players’ names and likenesses from game manufacturers.⁴⁵ By the turn of the century, however, the old simulation games morphed into what became season-long—and, eventually, daily—fantasy games. Thus, the right of publicity issues arising from the use of players’ names and statistics have become the central focus of today’s disputes between Major League Baseball’s media arm and creators and distributors of fantasy games. In fact, one such dispute gave rise to the Eighth Circuit’s ruling in *C.B.C. Distribution v. Major League Baseball Advanced Media*,⁴⁶ a case that bears factual similarities to *Daniels*.

C.B.C. was in the business of offering season-long fantasy sports games, and from 1995 through the end of 2004 it purchased licenses to use major league players’ names and information from the MLB Players’ Association.⁴⁷ After this arrangement ended, the Players’ Association transferred its merchandising rights to Major League Baseball Advanced Media⁴⁸ (MLBAM), at which time C.B.C. was no longer offered a license to continue to offer fantasy baseball products. Despite the revocation of C.B.C.’s license, it nevertheless continued to be a competitor to

⁴³ See *Dryer v. Nat’l Football League*, 55 F. Supp. 3d 1181, 1199 (D. Minn. 2014); compare *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282-83 (D. Minn. 1970) (concluding that irrelevant to courts evaluation of an appropriation claim is the public nature of information used) with *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818, 823 (8th Cir. 2007) (finding that, where the information used exists in the public domain, the use is protected under the First Amendment), *cert. denied*, 553 U.S. 1090 (2008).

⁴⁴ See *C.B.C. Distribution & Mktg., Inc.*, 505 F.3d 818.

⁴⁵ See Hylton, *supra* note 25, at 95.

⁴⁶ See *C.B.C. Distribution & Mktg., Inc.*, 505 F.3d 818.

⁴⁷ *Id.* at 821 (explaining that there were two licensing agreements—the first from 1995 and the second from 2002—and that, under the latter, C.B.C. was granted a license to use, in association with its fantasy baseball products, “the names, nicknames, likenesses, signatures, pictures, playing records, and/or biographical data of each player”).

⁴⁸ *Id.* (“In 2005, after the 2002 agreement expired, the Players Association licensed to Advanced Media, with some exceptions, the exclusive right to use baseball players’ names and performance information ‘for exploitation via all interactive media.’ Advanced Media began providing fantasy baseball games on its website, MLB.com, the official website of major league baseball. It offered C.B.C., in exchange for a commission, a license to promote the MLB.com fantasy baseball games on C.B.C.’s website but did not offer C.B.C. a license to continue to offer its own fantasy baseball products.”).

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MLBAM's product because it continued to offer a fantasy game. While the "new" C.B.C. fantasy game did not use player images, it did include players' names and statistics. MLBAM subsequently filed a lawsuit against C.B.C., claiming, in addition to copyright preemption and breach of contract, that the new fantasy game constituted a violation of MLBAM's right of publicity in the players' names and statistics.⁴⁹

The district court ruled in favor of C.B.C., concluding that under Missouri law C.B.C.'s right to First Amendment protection presumptively outweighed any right of publicity claims raised by MLBAM.⁵⁰ A divided Eighth Circuit took a more equivocal approach. It affirmed the lower court's conclusion and, in its short, almost curt opinion, accepted a potential basis for the application of right of publicity, opining that the use of their names and statistical information created a commercial right for the players.⁵¹ Like the district court, the Eighth Circuit concluded that the public's First Amendment interest in the information outweighed the property interests of the players. However, unlike the district court, the majority based its conclusion on the idea that this information was "readily available" in the public domain and therefore available to everyone.⁵² Moreover, in a departure from both *Palmer* and *Uhlaender*, the majority dismissed MLBAM's argument that the information was not a type of speech protected by the First Amendment because it was primarily used to "entertain" rather than inform as a meaningless distinction for First Amendment purposes.⁵³ The

⁴⁹ *Id.* at 820. Importantly, both the ruling of the district court and the court of appeals centered on right of publicity, rejecting both the copyright preemption claim and the breach of contract claim. *Id.* The district court found that while the material could be "arguably in the subject matter of copyright," the players' names and playing records, as used by C.B.C. in its fantasy games, were not copyrightable because such information was merely factual. See *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1101 (E.D. Mo. 2006), *aff'd*, 505 F.3d 818, 824 (8th Cir. 2007). Moreover, the court, in dismissing the breach of contract claim, reasoned that the "strong federal policy favoring the full and free use of ideas in the public domain" outweighed any breach of contract claim arising from the 2002 licensing agreement. *Id.* at 1104-07.

⁵⁰ *C.B.C. Distribution & Mktg., Inc.*, 443 F. Supp. 2d at 1084-85, 1099 (rejecting all right of publicity claims under Missouri law and instead focusing on the free speech protection of players' names and statistical information); see also *Doe v. TCI Cablevision*, 110 S.W.3d 363, 372 (Mo. 2003).

⁵¹ *C.B.C. Distribution & Mktg., Inc.*, 505 F.3d at 822-23 ("Because we think that it is clear that CBC uses baseball players' identities in its fantasy baseball products for purposes of profit, we believe that their identities are being used for commercial advantage and that the players therefore offered sufficient evidence to make out a cause of action for violation of their rights of publicity under Missouri law.")

⁵² *Id.* at 823 ("[I]t would be strange law that a person would not have a [F]irst [A]mendment right to use information that is available to everyone.")

⁵³ *Id.* ("It is true that CBC's use of the information is meant to provide entertainment, but '[s]peech that entertains, like speech that informs, is protected by the First Amendment because "[t]he line between the informing and the entertaining is too elusive for the protection of that basic right.'" (internal citation omitted)).

court similarly rejected the notion that the state has an interest in protecting baseball players from economic losses or that consumers would be misled into thinking that such an interest existed just because C.B.C. used MLBAM's information.⁵⁴ Finally, the majority rejected the breach of contract claim, holding that the First Amendment protected such information and thereby made any contract claim superfluous.⁵⁵

Accordingly, the *C.B.C.* majority introduced a First Amendment component into right of publicity analysis and thereby diminished the level of protection for names and statistical information. Consequently, the ruling served as a guideline for future cases, where two factors could come into play. First, *C.B.C.* could be distinguished from the Supreme Court's 1977 ruling in *Zacchini v. Scripps-Howard Broadcasting Co.* (the Court's only foray into the right of publicity), as that case dealt with a news broadcast of a public performance at a state fair,⁵⁶ while *C.B.C.* involved a purely commercial fantasy sports game. Another explanation for the court's shift is that, by that time, the right of publicity doctrine had been codified in a growing number of state statutes, and many of those statutes have more explicit definitions of the scope of the right and, significantly, exceptions for "newsworthy" materials.⁵⁷

However, it is not clear whether the precedential value of *C.B.C.* would be as persuasive today in the presence of further case law on the use of individual statistics in online games. For one, the opinion was

⁵⁴ *Id.* at 824 (explaining that baseball players command high salaries and can earn additional large sums of money from endorsements and sponsorship arrangements). Other courts have acknowledged the economic comfort of athletes in right of publicity cases. *See, e.g.,* *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003) ("In balancing these interests against Wood's right of publicity, we note that Woods, like most sports and entertainment celebrities with commercially valuable identities, engages in an activity, professional golf, that in itself generates a significant amount of income which is unrelated to his right of publicity. Even in the absence of his right of publicity, he would still be able to reap substantial financial rewards from authorized appearances and endorsements. It is not at all clear that the appearance of Woods's likeness in artwork prints which display one of his major achievements will reduce the commercial value of his likeness."). Thus, the earnings of an athlete are not a factor that the courts should generally rely on. *Id.* Put differently, if there is an unauthorized use of one's name and likeness for commercial purposes, it should not matter how much income the alleged victim earns or should earn. *Id.* However, because other elements of the case were not met, this point was moot in *C.B.C. Distribution and Marketing, Inc. See C.B.C. Distribution & Mktg., Inc.*, 505 F.3d at 824.

⁵⁵ *C.B.C. Distribution & Mktg., Inc.*, 505 F.3d at 824-25. Significantly, the 2002 contract between the Players Association and C.B.C. provided that ownership of the material remained with the Players Association and that, upon expiration, C.B.C. would "refrain from further use of the Rights and/or the Trademarks or any further reference to them, either directly or indirectly." *Id.* at 824. Consequently, the court, having found that this was not a warranty of title, held the claim to be meritless. *Id.* at 825. However, the dissent, arguing to the contrary, concluded that a viable breach of contract claim did, in fact, exist. *Id.* at 826.

⁵⁶ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 562 (1977) (determining whether the fifteen-second "human cannonball" performance of a man being shot from a cannon—that was recorded in its entirety by a reporter for a broadcasting company without consent and aired on the local nightly news without permission—was protected by state-law right of publicity).

⁵⁷ *See, e.g.,* CAL. CIV. CODE § 3344 (West 2019); *see also* IND. CODE § 32-36-1-7 (2019).

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unusually short—especially in comparison to the lower court’s detailed First Amendment examination. Also problematic was the majority’s failure to clearly articulate a categorical test that balanced the First Amendment with right of privacy interests, as well as the fact that the *C.B.C.* case involved a more limited and less developed common law right of publicity than that of states such as California and Indiana, which have adopted comprehensive right of publicity statutes (and, in the case of California, an additional common law right).⁵⁸ Moreover, Missouri had a unique (and underrated) standard based on a “predominance of the commercial value of the use” for determining whether a right of publicity claim takes priority over a First Amendment claim.⁵⁹ Perhaps most significantly, however, is the fact that the majority did not address the potential issue involving the use of images in connection with such information—because *C.B.C.* made the (wise) decision to only list players’ names and statistics and dispense of any actual photos of players dressed in their uniforms.

Shortly after the Eighth Circuit’s ruling in *C.B.C.* had been rendered, a federal district court in Minnesota delivered a similar conclusion in *CBS Interactive v. National Football League Players’ Association*.⁶⁰ *CBS Interactive* involved a challenge by the National Football League Players’ Association to the continued use of football players’ names and statistical information in a fantasy sports game hosted by CBS Interactive. Although the parties had a licensing agreement, CBS, emboldened by the *C.B.C.* ruling, continued to use the information without renewing the license after that agreement expired.⁶¹

A two-decade old Second Circuit ruling also merits mention, despite the fact that it is grounded in copyright law. In *National Basketball Association v. Motorola*,⁶² the Second Circuit addressed the issue of whether the live transmission of National Basketball Association (NBA) game statistics tabulated by non-authorized individuals can be considered protected intellectual property. The court held that such game statistics could not be considered protected intellectual property and concluded that the information disseminated from Motorola-manufactured handheld

⁵⁸ See sources cited *supra* note 24 and accompanying text.

⁵⁹ Missouri adopted a “predominant use” test to determine whether a use is protected by the First Amendment. See Jennifer E. Rothman, *Missouri*, ROTHMAN’S ROADMAP TO RIGHT PUBLICITY, <https://www.rightofpublicityroadmap.com/law/missouri> [<https://perma.cc/5PYF-WK2D>] (last updated Sept. 24, 2015). Specifically, under the “predominant use” test, the courts must consider whether a use “predominantly exploits the commercial value” of the person’s identity or, in the alternative, if it predominantly makes an expressive comment about the person. *Id.*

⁶⁰ *CBS Interactive, Inc. v. Nat’l Football League Players Ass’n*, 259 F.R.D. 398, 403-04 (D. Minn. 2009).

⁶¹ *Id.* at 404.

⁶² *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 853 (2d Cir. 1997).

paggers⁶³ was neither protected under copyright law nor subject to state misappropriation law.⁶⁴ Unlike *Daniels* and *C.B.C.*, *Motorola* did not involve images or likenesses; instead, it involved the use of statistical information transmitted from an NBA game via a pager and subscription service. Because this information did not constitute an “original work of authorship,” it lacked the necessary elements for copyright protection.⁶⁵ Although this information was not quite up-to-the-minute, it was updated frequently.⁶⁶ Neither the NBA nor its teams or venues provided any form of consent that would indicate its permission for these transmissions. Notably, like fantasy sports and sports betting today, this type of transmission had a devoted following at that time.⁶⁷

After rejecting the copyright preemption claim, the court addressed the state law misappropriation argument, which centered on what was known as a “hot news” exception.⁶⁸ The “hot news” exception is a limited and infrequently cited doctrine that grants intellectual property protection to time-sensitive information.⁶⁹ The court, in applying the scope of copyright protection narrowly, declined to afford this protection to the NBA.⁷⁰ In so doing, the court limited the reach of early New York common law cases⁷¹ and instead interpreted the scope of “hot news” to

⁶³ Manufactured by Motorola, this device—the “SportsTrax pager”—transmitted game information supplied by STATS. *Id.* at 843. More specifically, the SportsTrax pager disseminated information relating to play action of live NBA games in real time. *Id.* For example, the SportsTrax pager notified users about: “(i) the teams playing; (ii) [any] score changes; (iii) the team [currently] in possession of the ball; (iv) whether [and when a] team is in the free-throw bonus; (v) the quarter of the game; and (vi) [the] time remaining in the quarter.” *Id.* at 844. This information was “updated every two to three minutes, with more frequent updates near [both] the end of the first half and the end of the game.” *Id.* However, “[t]here [wa]s a [small] lag of approximately two or three minutes between [the live] events [happening] in the game itself and when [that] information appear[ed] on the pager screen.” *Id.* This was partially because said information was supplied by “reporters” who watched the games on television or listened to them on the radio. *Id.* This process proceeded as follows: First, reporters were required to enter their information into their personal computers. *Id.* Second, once entered, that information was relayed, by modem, to STATS’s host computer. *Id.* Third, the data relayed to the STAT’s host computer was subsequently compiled for retransmission. *Id.* Following this process, the information was then sent “via satellite to various local FM radio networks that in turn emit[ted] the signal received by the individual SportsTrax pagers.” *Id.*

⁶⁴ *Id.* at 855.

⁶⁵ *Id.* at 846.

⁶⁶ *Id.* at 843-44.

⁶⁷ See Laura Keegan, *A Look Back at NBA v. Motorola*, COPYFUTURES (Sept. 29, 2004, 7:52 PM), https://solum.typepad.com/copyfutures/2004/09/several_of_my_r.html [<https://perma.cc/N457-6WKM>] (“When this technology first emerged, it was unparalleled and became immensely popular among sports fans and net users.”).

⁶⁸ *Motorola, Inc.*, 105 F.3d at 844.

⁶⁹ *Id.* at 851; see *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 229-30, 238 (1918).

⁷⁰ *Motorola, Inc.*, 105 F.3d at 852.

⁷¹ Despite its narrower interpretation of the “hot news” exception in *Motorola*, the court noted that other New York courts have construed the “hot news” exception more broadly. *Id.* at 851 (quoting *Metro. Opera Ass’n v. Wagner-Nichols Recorder Corp.*, 101 N.Y.S.2d 483, 492, 488-89 (Sup. Ct. 1950)) (“*Metropolitan Opera* described New York misappropriation law as standing for the ‘broader principle that property rights of commercial value are to be and will be protected from any

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require evidence of economic loss coupled with the time-sensitivity of the information used.⁷² Because the NBA neither competed with Motorola in this statistics-based service nor incurred any costs in collecting the information, the court concluded that the exception did not apply.⁷³ While the applicability of *Motorola* remains extremely limited, it may be possible for a “hot news”-type of standard to protect up-to-the-minute statistical information that may be found not only in daily fantasy sports but, even more likely, in the area of sports betting.

As stated earlier, when the court rendered its decision in *C.B.C.*, it noted that there was relatively little economic motivation in proceeds from the use of players' names and statistics in fantasy games.⁷⁴ The court indicated that the fact that Major League Baseball players are “rewarded, and handsomely, too, for their participation in games and can earn additional large sums from endorsements and sponsorship arrangements” demonstrated that First Amendment considerations overpowered their property rights.⁷⁵ This was a questionable premise, and it raises an interesting question: If the plaintiffs had been former National Collegiate Athletic Administration (NCAA) student-athletes (like those in *Daniels*) rather than professional athletes, would the court have been more sympathetic to their claims?

In the decade that has followed these rulings, the economics of fantasy sports has continued to change with the genre's evolution into “daily fantasy sports,” and, in that time, fantasy sports has become a

form of commercial immorality . . . ;['] that misappropriation law developed ‘to deal with business malpractices offensive to the ethics of . . . society . . . ;['] and that the doctrine is ‘broad and flexible.’” (internal citation omitted). Nonetheless, the *Motorola* court explicitly rejected these amorphous “commercial immorality” or “ethics” rationales as beyond the scope of *INS. Id.*

⁷² *Id.* at 852. The standard relied on by the *Motorola* court was: (i) the plaintiff must generate or gather information at some cost or expense; (ii) the value of the information must be highly time-sensitive; (iii) the defendant's use of the information must constitute free-riding on the plaintiff's efforts to generate or collect it; (iv) the defendant's use of the information must directly compete with a product or service that the plaintiff offers; and (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened. *Id.* For a detailed discussion of the “hot news” doctrine, see David L. Applegate & Ryan Schermerhorn, *Hot News: The “Hot-News” Doctrine Is Hot Again! Or Is It?*, FEDERALIST SOC'Y (Dec. 14, 2011), <https://fedsoc.org/commentary/publications/hot-news-the-hot-news-doctrine-is-hot-again-or-is-it> [<https://perma.cc/QW7P-87KD>].

⁷³ *Motorola, Inc.*, 105 F.3d at 854. Note, however, that not every circuit has adopted the application of the factors articulated above, and it is conceivable that a broader (or at least slightly broader) standard of “hot news” may be employed in other circuits. *See, e.g.*, *Agora Fin., LLC v. Samler*, 725 F. Supp. 2d 491, 499 (D. Md. 2010) (“Although the *NBA* test has been cited with approval and adopted outside the Second Circuit, the Fourth Circuit has never applied or discussed it.”).

⁷⁴ *See C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818, 823 (8th Cir. 2007), *cert. denied*, 553 U.S. 1090 (2008).

⁷⁵ *See Conrad, supra* note 21, at 793 (quoting *C.B.C. Distribution & Mktg., Inc.*, 505 F.3d at 824); *see also ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003).

significantly more lucrative business.⁷⁶ Importantly, the still-developing genre of daily fantasy sports has generated some serious legal controversy over the question of whether it constitutes a form of “gambling.” This continuing debate over the legality of daily fantasy sports is best evidenced by the divided attitudes of the states—some of which have formally legalized sports betting by either statute or legal opinion, while others still consider the activity to be illegal.⁷⁷ Nonetheless, the popularity and profitability of daily fantasy sports, coupled with the more recent legalization of sports gambling, has resulted in more significant efforts by athletes to seek compensation for the use of their names and statistics and to push courts to decide whether the commercial use of this information constitutes something more than a mere right of publicity violation.⁷⁸

III. THE RISE OF DAILY FANTASY SPORTS AND GAMBLING: THE GREATER MONETIZATION OF IMAGES AND STATISTICS

The use of names, images, and statistical information by FanDuel and other fantasy sports services is an integral part of their business model. In the last decade, fantasy sports has evolved from a casual

⁷⁶ Daniels v. FanDuel, Inc., No. 1:16-cv-01230-TWP-DKL, 2017 U.S. Dist. LEXIS 162563, at *3 (S.D. Ind. Sept. 29, 2017) (“In these daily fantasy sports games, a customer pays . . . an entry fee, and in exchange receives virtual currency [A fantasy sports firm] assemble[s] a group of select collegiate players to appear on a list of available athletes, and [the firm] assign[s] each player a fictitious ‘salary.’ Using his virtual currency, a customer can then purchase the services of individual athletes to complete his team roster for each fantasy contest, subject to a ‘salary cap’ assigned to each customer [A] certain number[] of points are awarded for selected statistically tracked athletic achievements. Based on the athletes’ real-life performances in sporting events, each athlete on the fantasy team scores a certain number of points in each contest.” (internal citations omitted)).

⁷⁷ Daily fantasy sports exists in most states; however, relatively few states have formally passed legislation to amend their gambling laws to formally permit such activity and thereby avoid any potential conflicts. See Dustin Gouker, *Legislative Tracker: Daily Fantasy Sports*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/dfs-bill-tracker/> [<https://perma.cc/25ML-FBYN>] (last updated May 9, 2018, 4:41 PM). As of the publication of this Article, twenty U.S. states have passed legislation legalizing and regulating daily fantasy sports: Arkansas, Colorado, Connecticut, Delaware, Indiana, Kansas, Louisiana, Maine, Massachusetts, Maryland, Mississippi, Missouri, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Tennessee, Virginia, and Vermont. *Id.*; see *States With Legal Daily Fantasy Sports*, LEGAL SPORTS BETTING, <https://www.legalsportsbetting.com/states-with-daily-fantasy-sports/> [<https://perma.cc/8593-GXNZ>] (last updated Apr. 23, 2019). Accordingly, in the year 2019, only eight U.S. states bar daily fantasy sports: Alabama, Arizona, Hawaii, Idaho, Iowa, Louisiana, Montana, Nevada, Washington. Gouker, *supra*; see Chris Grove, *What Are The States Where You Can Play Daily Fantasy Sports?*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/daily-fantasy-sports-blocked-allowed-states/> [<https://perma.cc/PB2C-T23V>] (last updated Sept. 4, 2019, 11:35 AM); see also *What States Allow Daily Fantasy Sports Betting?*, WSN, <https://www.wsn.com/betting-guide/dfs/> [<https://perma.cc/PDE9-XW9J>].

⁷⁸ Athletes have likewise raised copyright claims in such situations; however, such claims are beyond the scope of the matter addressed in this Article. See *Balt. Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663, 676 (7th Cir. 1986) (holding that federal copyright law preempts some right of publicity claims under Illinois law).

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pastime to a multibillion-dollar industry.⁷⁹ The activity allows online participants to construct virtual teams, in a wide range of contexts, that compete with other virtual teams using statistics generated by real-life athletes in individual and team-based sporting events.⁸⁰ Initially, these season-long contests were geared toward small groups of friends or fellow fans, with small entry fees and the possibility of a modest payout for the “winner.”⁸¹ However, this original “rotisserie” format was cumbersome—in part, because the statistical information was difficult to both compile and distribute to fantasy sports players.⁸²

The advent of the internet increased the interest in fantasy sports and the method of monetizing the activity substantially.⁸³ With access to the internet, ESPN, Yahoo, CBS, and other firms were able to create seasonal (or traditional) fantasy sports games, some of which paid prize money to winners.⁸⁴ These games utilized the names and statistics of players—a fact that served as the basis for the *C.B.C.* case discussed earlier.⁸⁵ The most significant leap, however, came with the development of daily fantasy sports. The concept of daily fantasy sports was intended to act as an “express” version of the traditional season-long game. Because it can be played daily, as opposed to seasonally, the game can attract a far larger audience willing to play (and pay) for more games. Over the last decade, the statistical information has become readily available online, enabling large groups of people to participate.⁸⁶

⁷⁹ See Darren Heitner, *The Hyper Growth Of Daily Fantasy Sports Is Going to Change Our Culture And Our Laws*, FORBES (Sept. 16, 2015, 4:01 PM), <https://www.forbes.com/sites/darrenheitner/2015/09/16/the-hyper-growth-of-daily-fantasy-sports-is-going-to-change-our-culture-and-our-laws/#4db4f7e05aca> [<https://perma.cc/KB7P-VN3R>] (“DraftKings is one of the new generation of hyper growth, well-funded gaming startups in daily fantasy sports rapidly changing American sporting culture.”).

⁸⁰ See Marc Edelman, *Regulating Fantasy Sports: A Practical Guide to State Gambling Laws, and a Proposed Framework for Future State Legislation*, 92 IND. L.J. 653, 656 (2017), <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=11245&context=ilj> [<https://perma.cc/XZ3D-WSZB>].

⁸¹ See *id.* at 657.

⁸² See Zachary C. Bolitho, *When Fantasy Meets the Courtroom: An Examination of the Intellectual Property Issues Surrounding the Burgeoning Fantasy Sports Industry*, 67 OHIO ST. L.J. 911, 917 (2006), https://scholarship.law.campbell.edu/cgi/viewcontent.cgi?article=1070&context=fac_sw [<https://perma.cc/2KKR-P5WK>] (“[T]he laborious effort required to calculate the statistics and league standings by hand and then submit them to the participants via U.S. mail limited the game to only the most diligent of fans.”).

⁸³ *Id.* at 912-13.

⁸⁴ See Marc Edelman, *Yahoo!, CBS, ESPN and the NFL Are Using Pay-To-Play Fantasy Football To Drive Website Traffic In Fall 2014*, FORBES (Aug. 13, 2014, 9:30 AM), <http://www.forbes.com/sites/marcedelman/2014/08/13/yahoo-cbs-espn-and-the-nfl-adopt-pay-to-play-fantasy-football-contests-in-2014-to-drive-user-traffic/> [<https://perma.cc/FXD2-PVGX>].

⁸⁵ See *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077 (E.D. Mo. 2006), *aff'd*, 505 F.3d 818 (8th Cir. 2007).

⁸⁶ See Will Leitch, *The Evolution of Fantasy Sports*, SPORTS ON EARTH (Aug. 31, 2015), <http://www.sportsonearth.com/article/146446906/evolution-fantasy-football-sports-draft> [<https://perma.cc/7QVF-ZYPV>] (“But then the Internet came, and it was wonderful. It calculated all your

Several states initially argued that daily fantasy sports was a form of gambling and should therefore be barred by state gambling laws.⁸⁷ However, even if it is not a form of gambling, there are many similarities between the business models employed for daily fantasy and for sports betting—particularly, both industries’ use of statistics, names, and images. Both can be lucrative, and certainly more profit-driven than the more traditional season-long fantasy sports. For example, daily fantasy offers options such as guaranteed prize pools, “50-50” games (where daily fantasy sports players can double their money if their lineup places in the top half of point-scoring lineups), or “head-to-head” games (where two players enter a lineup against each other, and the lineup with more points wins). In some cases, bettors can even wager five-figure amounts in head-to-head games.⁸⁸

There are also key distinctions between daily fantasy sports and sports gambling. For example, unlike in sports gambling, many daily fantasy sports participants play for free. Moreover, daily fantasy sports

stats for you. It organized the players by position. It formatted them into a draft board. It gave you a little box in the corner that let you talk to everybody in your league, like you used to, when they were just sitting next to you. The Internet, essentially, eliminated everything from fantasy sports, particularly fantasy football, that required any effort.”)

⁸⁷ See Complaint at 23-27, *People v. DraftKings, Inc.*, No. 453054/2015 (N.Y. Sup. Ct. Nov. 17, 2015), ECF No. 2 (contending that DraftKings, by offering daily fantasy sports, and thus continuing to accept wagers from its gambling operation, flagrantly violated New York’s state constitution, penal laws, and other statutes). Specifically, states like Texas, Illinois, Hawaii, Vermont, and Mississippi considered daily fantasy sports to constitute an illegal form of gambling. See Trent Gillies, *Fantasy sports: The lucrative market that may be legal*, CNBC (Feb. 7, 2016, 9:00 AM), <https://www.cnbc.com/2016/02/05/fantasy-sports-the-lucrative-market-that-may-be-legal.html> [<https://perma.cc/KYX4-CBUQ>]. Note, however, that the Unlawful Internet Gaming Enforcement Act of 2006 (“UIGEA”) explicitly exempted from the purview of its regulatory scope the category of fantasy sports, thereby precluding it from the statutory reach of federal law. Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. § 5362(1)(E)(ix) (2012), <https://www.govinfo.gov/content/pkg/USCODE-2012-title31/pdf/USCODE-2012-title31-subtitleIV-chap53-subchapIV-sec5362.pdf> [<https://perma.cc/84GZ-8SB7>] (“The term ‘bet or wager’ . . . does not include . . . participation in any fantasy or simulation sports game or educational game or contest in which (if the game or contest involves a team or teams) no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization . . . and that meets the following conditions: (I) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants. (II) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events. (III) No winning outcome is based—(aa) on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or (bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.”). For a comprehensive overview of the Unlawful Internet Gaming Enforcement Act of 2006, see John T. Holden, *The Unlawful Internet Gambling Enforcement Act and the Exemption for Fantasy Sports*, 28 J. LEGAL ASPECTS SPORT 97 (2018).

⁸⁸ See *The Rise of Daily Fantasy Sports (DFS) and Sports Betting*, SBD, <https://www.sportsbettingdime.com/guides/betting-101/dfs-and-sports-betting/> [<https://perma.cc/J2AZ-YSPV>] (last updated Sept. 9, 2019).

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do not have fixed odds. Finally, many consider daily fantasy sports to be a skill-based, rather than a chance-based, activity.⁸⁹ Because of the potentially lucrative nature of daily fantasy sports, providers such as FanDuel and DraftKings exploded into the public's—and investors'—consciousness. Sports leagues invested or obtained equity interests in one of these two companies, which account for the majority of daily fantasy sports games in the United States.⁹⁰ The profitability of the daily fantasy sports model has been readily accepted—as indicated by both the investment capital generated and the nature of the service.⁹¹

As of 2018, there was evidence that the growth in revenues from daily fantasy sports had peaked, possibly due to the ascendancy of legalized sports betting. Moreover, the increasing legalization of sports betting has led to a new wave of industry consolidation, as sports gambling companies seek to both gain scale and partner with traditional U.S. sports media companies.⁹² The major fantasy sports firms, along with others, have seen gambling as their future profit base—and the use of the statistical information, coupled with names and images, would be a large part of it. As previously stated, this increased potential for profitability has not gone unnoticed by the former NCAA student-athletes who brought the *Daniels* case or by the professional league players associations that have brought right of publicity claims in the past. Now, with the legalization of sports betting, that economic interest has become even more compelling.

As of the publication of this Article, about a dozen states have legalized some form of sports betting,⁹³ while another six have passed

⁸⁹ See Aaron Gray, *Why Daily Fantasy Sports and Sports Betting Are Legally Distinct*, SBD, <https://www.sportsbettingdime.com/guides/legal/dfs-and-sports-betting-legal-distinctions/> [<https://perma.cc/7YFH-QCVM>] (last updated Jan. 25, 2019).

⁹⁰ In 2013, Major League Baseball secured an equity stake in DraftKings. See Darren Heitner, *DraftKings And Major League Baseball Extend Exclusive Partnership*, FORBES (Apr. 2, 2015, 12:55 PM), <https://www.forbes.com/sites/darrenheitner/2015/04/02/draftkings-and-major-league-baseball-extend-exclusive-partnership/#6d9e2f226ba7> [<https://perma.cc/6EHB-Y246>]. The following year, the NBA became an investor in FanDuel. See John Lombardo, *NBA Signs Four-Year Deal With FanDuel That Includes Equity Stake In Fantasy Company*, SPORTS BUS. DAILY (Nov. 12, 2014), <https://www.sportsbusinessdaily.com/Daily/Issues/2014/11/12/Marketing-and-Sponsorship/NBA-FanDuel.aspx> [<https://perma.cc/RH4R-A2CF>].

⁹¹ See Edelman, *supra* note 80, at 662; see also Curt Woodward, *DraftKings, FanDuel raking in millions as Yahoo jumps in the game*, BETA BOS. (July 14, 2015), <http://www.betaboston.com/news/2015/07/14/draftkings-fanduel-raking-in-millions-as-yahoo-jumps-in-the-game> [<https://perma.cc/2X6T-AZRB>] (discussing Adam Krejcik's proposition that one way private equity companies could profit from daily fantasy sports would be to involve an initial public offering of either FanDuel or DraftKings).

⁹² See Marc Edelman, *Flutter Entertainment's Acquisition of The Stars Group Could Place Gambling Markets On Path Toward More Consolidation*, SPORTS HANDLE (Oct. 9, 2019), <https://sportshandle.com/flutter-stars-fanduel-fox-antitrust-consolidation/> [<https://perma.cc/PJ54-XTGC>].

⁹³ These U.S. states include Nevada, Delaware, New Jersey, West Virginia, Mississippi, Pennsylvania, Rhode Island, New York, and Connecticut. See Dustin Gouker, *Legislative Tracker:*

legislation legalizing betting that will go into effect within the next year.⁹⁴ However, it is likely that even more states will soon follow. Notably, for those states that have already legalized sports betting and started these operations, sports betting has brought in considerable amounts of revenue for the firms that are licensed to conduct this activity (although tax revenues have fallen short in some of those states).⁹⁵ For example, in New Jersey, almost \$3 billion was wagered in the year since the state legalized sports betting, resulting in almost \$200 million in revenue and \$22.6 million in tax revenues.⁹⁶ While not every state has necessarily done this well, all have still drawn considerable amounts of betting money. For example, since Pennsylvania legalized sports betting, the comparable figures are about \$413 million in wagers, \$31.6 million in revenue, and \$11.29 million in taxes to the state.⁹⁷ Still, other states have taken in less.⁹⁸ A key informational component of making bets in these now-legalized regimes is the use of players' names and statistics. Coupled with that information, the use of their images clearly serves a commercial purpose. It was into this new and quickly evolving environment that the *Daniels v. FanDuel* case arose.

IV. *DANIELS V. FANDEUEL*

A. *Background*

In a claim that was initially brought in an Indiana federal district court, Akeem Daniels and two other former college football players alleged that the defendants had violated the state's right of publicity statute by featuring the plaintiffs on their fantasy sports sites, and that they were therefore entitled to damages under Indiana's right of publicity law.⁹⁹ Specifically, the plaintiffs asserted that FanDuel and its co-defendant DraftKings were permitting customers, for a fee, to access the

Sports Betting, LEGAL SPORTS REP., <https://www.legalsportsreport.com/sportsbetting-bill-tracker/> [<https://perma.cc/52GT-DQ4G>] (last updated Sept. 4, 2019, 10:02 A.M.).

⁹⁴ These U.S. states include Illinois, Indiana, Iowa, Montana, New Hampshire, and Tennessee. *Id.*

⁹⁵ See *US Sports Betting Revenue 2019: Sports Betting Handle, Revenue and Hold*, LINES, <https://www.thelines.com/betting/revenue> [<https://perma.cc/UA4R-TSBV>] (explaining the breakdown of revenues from sports gambling per state); see also Jennifer McDermott & Geoff Mulvihill, *AP: Most states' sports betting revenue misses estimates*, AP NEWS (Apr. 2, 2019), <https://www.apnews.com/21f9833e917948d6a36422bb286541b4> [<https://perma.cc/LV5Y-CP6E>].

⁹⁶ See *New Jersey Sports Betting Revenue*, PLAY NJ, <https://www.playnj.com/sports-betting/revenue/> [<https://perma.cc/UVJ2-G42V>] (last updated Sept. 12, 2019).

⁹⁷ See *Pennsylvania Sports Betting Revenue*, PLAY PA., <https://www.playpennsylvania.com/sports-betting/revenue/> [<https://perma.cc/P4BN-59S6>] (last updated Sept. 16, 2019).

⁹⁸ For example, since its initial launch in June 2019, West Virginia's sports betting handle was over \$122 million, while its revenue was approximately \$11 million, with roughly \$1.18 million in taxes going to the state. See *West Virginia Sports Betting Revenue*, PLAYWV.COM, <https://www.playwv.com/revenue/> [<https://perma.cc/JR2V-TE9M>] (last updated Sept. 30, 2019).

⁹⁹ See IND. CODE § 32-36-1-8(a) (2019).

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plaintiffs' information, such as their names, images, and statistics, so that a user's virtual team of real-life athletes could be assembled to compete against other users' teams on the defendants' daily fantasy sports websites. In response to the plaintiffs' claims, FanDuel sought dismissal on the grounds that one or more of the statute's exceptions applied and that, in any event, its use of the plaintiffs' names and statistics was protected under the First Amendment.¹⁰⁰

The Indiana right of publicity statute defines a person's right of publicity as "a personality's property interest in the personality's: (1) name; (2) voice; (3) signature; (4) photograph; (5) image; (6) likeness; (7) distinctive appearance; (8) gestures; or (9) mannerisms."¹⁰¹ However, the provision does not apply in four specific instances: when the aforementioned characteristics are (a) used in material that has political or newsworthy value, (b) broadcast as part of an event of general or public interest, (c) used in literary works, or (d) truthfully identify the person as the performer of a recorded performance, e.g., by the use of their name.¹⁰² The law protects these personality rights for up to one hundred years after the person's death.¹⁰³

In its ruling, the district court focused on the "newsworthy value" and "public interest" exceptions and whether they applied to what could be considered a commercial venture—the use of the players' names to facilitate a for-profit daily fantasy sports business. Citing common law rulings that had been made before the enactment of Indiana's right of publicity statute, the court concluded that a broad definition of "newsworthy" should govern its interpretation of the statute.¹⁰⁴ By

¹⁰⁰ See *Daniels v. FanDuel, Inc.*, No. 1:16-cv-01230-TWP-DKL, 2017 U.S. Dist. LEXIS 162563, at *2 (S.D. Ind. Sept. 29, 2017) ("Defendants argue[d] that Plaintiffs ha[d] not stated a claim upon which relief c[ould] be granted, because . . . federal copyright law shield[ed] Defendants from liability under Indiana's right-of-publicity statute.").

¹⁰¹ *Id.* at *7 (quoting IND. CODE § 32-36-1-7 (2019)).

¹⁰² See IND. CODE § 32-36-1-1(c)(1)(B) (2019) (explaining that this chapter does not apply to "[t]he use of a personality's name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms in any . . . [m]aterial that has political or newsworthy value"); see also *id.* § 32-36-1-1(c)(3) (explaining that this chapter does not apply to "[t]he use of a personality's: (A) name; (B) voice; (C) signature; (D) photograph; (E) image; (F) likeness; (G) distinctive appearance; (H) gestures; or (I) mannerisms; in connection with the broadcast or reporting of an event or a topic of general or public interest"); see also *id.* § 32-36-1-1(c)(1)(A) (explaining that this chapter does not apply to "[t]he use of a personality's name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms in any . . . [l]iterary works, theatrical works, musical compositions, film, radio, or television programs"); see also *id.* § 32-36-1-1(c)(2)(B) (explaining that this chapter does not apply to "[t]he use of a personality's name to truthfully identify the personality as . . . a performer of a recorded performance; under circumstances in which the written work or recorded performance is otherwise rightfully reproduced, exhibited, or broadcast").

¹⁰³ See *id.* § 32-36-1-8(a).

¹⁰⁴ See *Daniels*, 2017 U.S. Dist. LEXIS 162563, at *12-14 (determining "the breadth of the newsworthiness exception"); see also *Time Inc. v. Sand Creek Partners, L.P.*, 825 F. Supp. 210, 212 (S.D. Ind. 1993) (quoting *Rogers v. Grimaldi*, 695 F. Supp. 112, 117 (S.D.N.Y. 1988)) ("The

applying that definition to the facts of the case, it reasoned that the plaintiffs' athletic achievements and activities were "newsworthy" as contemplated by the statutory exception.¹⁰⁵ The court addressed the argument that the fictional salaries of the players featured in the daily fantasy sports game might also be included in the "personality" rights protected under the statute by pointing out that such an inclusion "would bring an almost limitless universe of materials within its reach, with obvious First Amendment implications."¹⁰⁶

The district court next focused on the question of whether the use of the players' names was within the "public interest" exception of the statute.¹⁰⁷ This exception conditions the public interest on the "broadcasting or reporting" of the event.¹⁰⁸ Because of this requirement, the court engaged in a more intricate analysis of this issue. It distinguished the facts in this case from those in cases involving the use of players/avatars for simulated video games, noting that the use for daily fantasy sports sites is "factual," as well as a "reference" either for purposes of playing the associated game or for "information about the collegiate sports and athletes represented on the websites."¹⁰⁹ The opinion also noted that the statistical information in question was available in the public domain.¹¹⁰ Despite these findings, the court nevertheless refused to dismiss other portions of the case on First Amendment grounds. The court ruled that further analysis of whether the speech is commercial or not would have to be determined at a later stage of the litigation.¹¹¹

scope of the subject matter which may be considered of 'public interest' or 'newsworthy' has been defined in most liberal and far reaching terms. The privilege of enlightening the public is by no means limited to dissemination of news in the sense of current events but extends far beyond to include all types of factual, educational and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general.").

¹⁰⁵ *Daniels*, 2017 U.S. Dist. LEXIS 162563, at *16 ("The Court concludes, as have a number of other courts that have considered the issue in the context of professional sports, that Plaintiffs' athletic achievements and activities are 'newsworthy' as contemplated by the statutory exception."); *see, e.g.*, *CBS Interactive, Inc. v. Nat'l Football League Players Ass'n*, 259 F.R.D. 398, 403-04 (D. Minn. 2009) (concluding that "there is no dispute that both professional baseball and professional football and the statistics generated by both sports are closely followed by a large segment of the public"); *see also* *Dryer v. Nat'l Football League*, 55 F. Supp. 3d 1181, 1198 (D. Minn. 2014).

¹⁰⁶ *Daniels*, 2017 U.S. Dist. LEXIS 162563, at *18.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at *20-22; *see also* IND. CODE § 32-36-1-1(c)(3).

¹⁰⁹ *Daniels*, 2017 U.S. Dist. LEXIS 162563, at *24.

¹¹⁰ *Id.* at *24; *cf. In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1271 (9th Cir. 2013) (concluding that "[a]n athlete's right of publicity simply does not encompass publicly available statistical data"); *see also* *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818, 824 (8th Cir. 2007) (concluding that "the information used in CBC's fantasy baseball games is all readily available in the public domain"), *cert. denied*, 553 U.S. 1090 (2008).

¹¹¹ *Daniels*, 2017 U.S. Dist. LEXIS 162563, at *31-33 ("For example, the first issue facing the Court in evaluating a First Amendment defense is to classify the speech at issue as either commercial or non-commercial, and the Court concludes that it cannot do so at this stage At

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Following the district court's ruling, the plaintiffs subsequently appealed to the U.S. Court of Appeals for the Seventh Circuit. The court did not wish to address the issue of the application of the statutory exemptions. Rather, it asked the state's highest court to render a ruling as to whether the plaintiffs' names and statistical information were subject to the "newsworthy value" or "broadcasting" exemptions of the state's right of publicity law because no Indiana state court had ever ruled on this point.¹¹² The Seventh Circuit refused to consider out-of-state decisions in determining an answer to this question.¹¹³ It therefore certified the question to the state's supreme court for resolution.

B. *The Indiana Supreme Court Ruling*

The Indiana Supreme Court answered the question in the affirmative. In a unanimous opinion, it rejected the plaintiffs' right of publicity claim, concluding that the use of their statistical information was protected under the Indiana statute's "newsworthy value" exception.¹¹⁴ The court thus focused on that exception and applied it broadly—a boon for free speech advocates and a disappointment for the former athletes.

First Amendment considerations were central to the court's application of the exception, particularly in the court's determination as to whether the speech was commercial or not. While some courts and scholars have argued that First Amendment considerations have to take a back seat in right of publicity cases—because such cases deal with commercial speech, which traditionally has not been granted the same

the motion to dismiss stage, the Court does not have the proper factual and evidentiary basis to conduct such an analysis, and therefore cannot make the threshold determination as to whether the speech at issue should be properly characterized as commercial or non-commercial. The Court therefore denies Defendants' Motion to Dismiss on the grounds of a First Amendment affirmative defense." Importantly, commercial speech is fundamentally afforded lesser First Amendment protection than other types of speech—i.e., non-commercial speech. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 573 (1980) (establishing a four-prong analysis whereby "a restraint on commercial communication [that] is neither misleading nor related to unlawful activity is subject to an intermediate level of scrutiny, and suppression is permitted whenever it directly advances a substantial governmental interest and is not more extensive than is necessary to serve that interest").

¹¹² *See Daniels v. FanDuel, Inc.*, 884 F.3d 672 (7th Cir. 2018).

¹¹³ *Compare id. with Davis v. Elec. Arts Inc.*, 775 F.3d 1172 (9th Cir. 2015) (applying the "transformative test" to determine whether a "video game developer's use of likenesses of former professional football players in its video games, which allowed users to control avatars representing the players," were subject to First Amendment protection, and, therefore, the players' right of publicity claims against the developer were barred) and *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (applying California's "transformative use" test to determine whether a "video game developer's use of the likenesses of college athletes in its video games" was protected under the First Amendment, and the former college football player's right of publicity claim against the developer was therefore barred).

¹¹⁴ *Daniels v. FanDuel, Inc.*, 109 N.E.3d 390, 393 (Ind. 2018), *aff'd*, 909 F.3d 876 (7th Cir. 2003).

level of First Amendment protection as its non-commercial counterpart¹¹⁵—the court appeared to reject this dichotomy when it stated that it was “not persuaded” that the newsworthy exception should not apply in cases of commercial use. After determining that the plain language of the statute did not prohibit the use of a person’s right of publicity “for a commercial purpose,”¹¹⁶ the court rejected the plaintiffs’ reading of the exception as limited only to news broadcasting. The court explained that, because another exemption explicitly dealt with that activity, it refused to limit the definition of “newsworthy” to media dissemination. Put differently, the court held that, even in a commercial context, this defense may be applied to information geared for a commercially-based daily fantasy sports firm.

The Indiana Supreme Court noted that, despite the lack of statutory definition for the term “newsworthy,” there were nevertheless compelling reasons why the exception should apply in this case. In making this determination, the court looked to common law precedent—both in-state and out-of-state—to bolster its view that the information can be used freely by daily fantasy providers. One of those reasons was constitutional: The panel cited the Supreme Court’s ruling in *Zacchini*.¹¹⁷ Although the *Zacchini* Court ruled in favor of the petitioner, the *Daniels* court noted that the majority opinion in *Zacchini* inferred protection for “reporting newsworthy facts” as opposed to expropriating the entire act.¹¹⁸ The court then delved into Indiana’s common law from the period before its right of publicity statute was enacted and concluded that the term “newsworthy” was understood to encompass a broad privilege that was “defined in the most liberal and far reaching terms.”¹¹⁹ In so concluding, the court found that the legislature had intended to include this broad immunity when drafting the exception into its right of publicity law.¹²⁰

¹¹⁵ See *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. 557.

¹¹⁶ *Daniels*, 109 N.E.3d at 394 (“The scope of the ‘newsworthy value’ exception becomes considerably less clear as we consider the parties’ competing interests in this case. The statute references ‘material that has political or newsworthy value,’ but provides no corresponding definitions or apparent clues as to the breadth of these ambiguously familiar terms. Ultimately, however, we think there are several compelling reasons why our Court should understand the term ‘newsworthy value’ to incorporate fantasy sports operators’ use of players’ names, pictures, and statistics.”).

¹¹⁷ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

¹¹⁸ *Daniels*, 109 N.E.3d at 395 (citing *Zacchini*, 433 U.S. at 574-75) (“It is evident . . . that petitioner’s state-law right of publicity would not serve to prevent respondent from reporting the newsworthy facts about petitioner’s act . . . [but] the First and Fourteenth Amendments do not immunize the media when they broadcast a performer’s entire act without his consent.”).

¹¹⁹ See *id.*

¹²⁰ *Id.* at 396 (“Considering the genesis and evolution of the right of publicity, and presuming the General Assembly was aware of the right of publicity, its origins, and the definitions available from caselaw in this area, we find that the term ‘newsworthy’ was meant to be construed broadly.”).

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Additionally, and more significantly, the court looked to a broad construction of the exception to avoid constitutional problems. This is not surprising, as the tension between right of publicity and the First Amendment is a longstanding one in right of publicity jurisprudence.¹²¹ The court tried to avoid what could have been a messier analysis by upholding its expansive reading of the newsworthy value exception.¹²² In so concluding, the court found that the defendants' use of players' names, images, and statistics in conducting fantasy sports competitions is similar to the publication of the same information in newspapers and websites across the country. It added: "[I]t would be strange law that a person would *not* have a first amendment right to use information that is available to everyone."¹²³ Further disregarding any division between commercial enterprises and general news media, the court stated that the information retained newsworthy value, despite being "placed behind a paywall or used in the context of a fantasy sports game."¹²⁴ Adding that the "fictional" aspects of daily fantasy sports do not render the information proprietary, the court concluded that it should not be placed outside the definition of "newsworthy."¹²⁵

The *Daniels* court also addressed whether the defendants' use of players' names, pictures, and statistics could constitute unauthorized advertising. Although the court did not expend much space on this argument, the panel admitted that a claim could be made and would be outside the scope of the newsworthy value exception of the state's right of publicity law.¹²⁶ Nevertheless, the court concluded that, in the realm of daily fantasy sports, the use of the statistics, names, and images could not be considered a form of advertising.¹²⁷ However, this was beyond the scope of the question certified but was instead a matter for the federal court to address.¹²⁸

¹²¹ See RIGHTS OF PUBLICITY & PRIVACY VOL. 1, *supra* note 2, § 8:23 (discussing the various balancing tests that the courts have adopted to weigh right of publicity interests against free speech interests).

¹²² *Daniels*, 109 N.E.3d at 396 ("These enumerated exceptions, including 'material with newsworthy value,' represent an obvious attempt to avoid constitutional issues with the statute. Against this backdrop, we find no indication within the text of the statute that the legislature intended to abrogate the expansive common law view of the term 'newsworthy.'").

¹²³ *Id.* (emphasis added) (quoting *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818, 823 (8th Cir. 2007)).

¹²⁴ *Id.*

¹²⁵ *Id.* at 396-97 ("Although fictional salary values are assigned to players, this does not change the function of the underlying data. It is difficult to find that the use of this otherwise publicly available information is somehow drastically different such that it should be placed outside the definition of 'newsworthy.'").

¹²⁶ *Id.* at 397.

¹²⁷ *Id.*

¹²⁸ *Id.*

Although the court admitted that the unpermitted use of an athlete's name in an advertisement would not be "newsworthy," citing as an example the Ninth Circuit's ruling in *Jabbar v. General Motors Corp.* (where basketball star Kareem Abdul-Jabbar was able to state a right of publicity claim under the California statute because General Motors gained a commercial benefit from using his former name in a television advertisement),¹²⁹ it did not apply this conclusion to the world of daily fantasy sports. In what certainly could have applicability in the area of sports gambling, the court did not equate the issue of an athlete's statistical information to a de facto endorsement of the company's services.¹³⁰ Although this could be considered a "false endorsement" claim under section 43(a) of the Lanham Act,¹³¹ the Seventh Circuit, after receiving the state supreme court ruling, dismissed the case and did not consider this argument because it was not presented with any evidence or arguments on this issue.¹³²

V. A CRITIQUE OF *DANIELS*: WHAT WAS MISSING, WHAT WAS AVOIDED

The reason this Article addresses a state court case involving the interpretation of a state-based law is that the case involved an issue that is likely to manifest itself not only in regard to fantasy sports, but to sports gambling as well. Due to the quick adoption of legalized sports betting schemes in the wake of the *Murphy* ruling and the resulting multitude of potentially lucrative business opportunities, the breadth of and limits on

¹²⁹ *Id.* (citing *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 416 (9th Cir. 1996)).

¹³⁰ *Id.*

¹³¹ 15 U.S.C. § 1125(a) (2012), <https://www.govinfo.gov/content/pkg/USCODE-2012-title15/pdf/USCODE-2012-title15-chap22-subchapIII-sec1125.pdf> [https://perma.cc/LG3C-JHWP] (illustrating the statutory foundation for an argument raised in some right of publicity cases); see J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:88 (5th ed. 2019) (quoting *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 925-26 (6th Cir. 2003)) ("False endorsement occurs when a celebrity's identity is connect[ed] with a product or service in such a way that consumers are likely to be misled about the celebrity's sponsorship or approval of the product or service."); see also RIGHTS OF PUBLICITY & PRIVACY VOL. 1, *supra* note 2, § 5:31 ("To trigger a false endorsement claim, the accused use must clearly identify the plaintiff . . . to an ordinary person when perceiving the defendant's accused use."). The applicability of section 43(a) of the Lanham Act to right of publicity claims has been subject to varied interpretations among the Federal circuits. For example, while the Ninth Circuit has inferred a de facto trademark in a celebrity's name, and thereby expanded its application of section 43(a) to their protection, see, e.g., MCCARTHY, *supra* § 28:15 (citing *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992)), the Second Circuit has been more limited in its application of section 43(a), extending it only to uses of names and sounds, see *id.* § 6:17.50 (citing *Oliveira v. Frito-Lay, Inc.*, 251 F.3d 56, 63 (2d Cir. 2001)).

¹³² See *Daniels v. Fanduel, Inc.*, 909 F.3d 876, 878 (7th Cir. 2018) ("Because plaintiffs have not tried to take advantage of the opening the state judiciary left them under the right-of-publicity statute, this civil suit is over.").

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the use of an athlete's statistics will be an increasingly important aspect of the scope of the right of publicity.

On the surface, the *Daniels* ruling can be seen as a relatively straightforward determination of a case involving the interpretation of an exception to a state statute. Because the exception involved free speech, the court read it broadly to protect speech interests. However, the court failed to consider the importance of the commercial and proprietary value of statistical information in an age where companies that sell certain products, such as daily fantasy sports and sports betting, require this information as the *raison d'être* of their business models. Additionally, the court failed to note the inherent difference between the statistical information itself and the use of names and images that may accompany that information. Even accepting the argument that the statistical information is newsworthy and not subject to right of publicity protection, does that mean that the use of the image is equally newsworthy? Although this is a secondary issue for this Article, it bears mentioning that the court should have discussed this question and could very well have concluded that even if the statistical information was within the newsworthy value exception, the use of the image was not.

The key issues are discussed in the five subsections that follow.

A. *Statistics Are an Economic Driver*

Statistics involve data and can be found in many sources. Sometimes the data is easy to find, but even when that is the case, it can take time and effort to glean, package, and disseminate the information. While the court in *Motorola* properly concluded that in-game statistics are not copyrightable and likely not subject to intellectual property restrictions per se, the question remains whether statistics can be protected if utilized as a primary economic driver. To put it another way: Is the need for statistics so crucial to the service provided that, if the customer cannot access them, the economic viability of the service will be threatened?

In the purest sense, the use of an athlete's statistics does not have any inherent commercial value. It is true that in many cases (and noted by the Indiana Supreme Court in *Daniels*), statistics merely constitute newsworthy information that is connected to and validates an athlete's performance.¹³³ Simply stated, player performances are news of the day and, as such, are the proper subject of exemption from the right of publicity. One could argue that the use of statistics for the season-long fantasy sports game in the *C.B.C.* case was less compelling than for a

¹³³ See David L. Pratt II, *Fantasy Sports and the Right of Publicity: A Case for Viewing Dissemination of Player Statistics as Fair Use of the News*, 13 TEX. WESLEYAN L. REV. 215 (2006).

more profit-driven daily fantasy sports game or a sports betting regime that might evolve over the next decade. For daily fantasy, players can choose games far more frequently. Monetary payments have increased. Moreover, for sports gambling, the early evidence suggests that the amounts players have been betting are significant. As noted earlier, in New Jersey, for example, \$3.2 billion dollars have been wagered in just over a year.¹³⁴ In order to place bets, bettors need to have access to statistics.

Furthermore, sports leagues already understand the inherent commercial value of statistics—recently, they sought to be paid for supplying such information, under the name of “integrity fees.” As of the publication of this Article, no states have adopted this system, but the leagues, in an attempt to find a way to monetize this information, have sought partnerships with some betting firms.¹³⁵ As two commentators noted: “[O]wnership of data is about to make owners and players wealthier and generate notable financial windfalls. However, as our capitalistic students point out, more money means more people wanting in on the action.”¹³⁶

Finally, it is important to consider what kind of statistical data would be included. As sports betting becomes increasingly prevalent, the scope of the information found in the statistics will grow and become more sophisticated and more proprietary. For example, would it include biometric data, which could involve personal statistics gleaned through wearables, optical tracking, and other technologies? In the case of the NFL, examples could include information and statistics comparing various players’ time to throw or time to sack, which could be used for both daily fantasy or betting.¹³⁷ Such information is found through radio-frequency identification chips in NFL players’ shoulder pads.¹³⁸ While gathering that kind of biometric data could present significant privacy concerns (the subject of a different article), the idea of such information compiled and organized for data users adds singular merit to the

¹³⁴ See *New Jersey Sports Betting Revenue*, *supra* note 96.

¹³⁵ See Ian Thomas, *MLS strikes deal with MGM*, SPORTS BUS. J. (Mar. 18, 2019), <https://www.sportsbusinessdaily.com/Journal/Issues/2019/03/18/Marketing-and-Sponsorship/MLS-MGM.aspx> [<https://perma.cc/R4BK-L3P3>] (explaining that the deal granted MGM Resorts access to enhanced MLS data for fans and sports betting customers); see also Bill King, *No. 1 – The American Sports Gambler*, SPORTS BUS. J. (Dec. 17, 2018), <https://www.sportsbusinessdaily.com/Journal/Issues/2018/12/17/Most-Influential/Intro1.aspx> [<https://perma.cc/9EWC-E7KJ>] (“The NBA, NHL and MLB landed eight-figure deals with MGM Resorts.”).

¹³⁶ See Rick Burton & Norm O’Reilly, *Sports Gambling: True aftershocks on horizon*, SPORTS BUS. J. (Apr. 15, 2019), <https://www.sportsbusinessdaily.com/Journal/Issues/2019/04/15/Opinion/BurtonOReilly.aspx> [<https://perma.cc/UVX3-2AQ9>].

¹³⁷ See Eric Fisher, *Data in motion*, SPORTS BUS. J. (Oct. 22, 2018), <https://www.sportsbusinessdaily.com/Journal/Issues/2018/10/22/In-Depth/Wearable-tech.aspx> [<https://perma.cc/LUD9-PMJW>].

¹³⁸ *Id.*

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increasingly proprietary nature of the content and exclusivity of those statistics.¹³⁹

Since sports betting has become legal in various states, leagues have negotiated licensing deals to use certain league-produced statistical data. The NBA and MGM hotels finalized the first such agreement in the summer of 2018. The leagues argue that this “official” data is safer for consumers and can be better standardized to avoid confusion.¹⁴⁰ If this agreement becomes the model for sports leagues (and it may, because the MLB, NHL, and MLS concluded similar deals shortly after the NBA),¹⁴¹ it poses an effective solution to the problems surrounding the *Daniels* case. Because revenues from these deals, which are still relatively small, will constitute a part of the pool of “basketball related income” or its equivalents in the NHL or MLS, a percentage of that sponsorship money will go to the players as part of salary cap calculations.¹⁴²

If more of these types of partnerships are consummated (or if more states mandate integrity fees to the respective leagues) then, in effect, the issues in *Daniels* will be rendered moot. Additionally, maybe in the not too distant future, college athletes may be able to partake in the benefits of similar agreements. Legally, however, the issue is very much alive. Say for example there is a C.B.C. redux (gambling version): A firm had a license agreement to use names, images, and statistical information for a particular sport. The agreement expires, and the company wishes to continue the use of that information (without the images, but with the statistics and names). Under the current law, it could—without paying the respective league or the athletes.

B. *Lumping Statistics and Images in One Pot*

The fantasy sports websites subject to challenge in *Daniels* utilized both statistical information and the names and images of the (then) student-athletes. Even assuming that the statistics are “public

¹³⁹ For example, NBA advanced statistics offer users an “extra edge when handicapping” by providing useful tools—such as True Shooting Percentage, Assist to Turnover Ratio, Pace Factor, Free-Throw Rate, and Rebound Rate—to maximize results. See *NBA Advanced Statistics*, SAFEST BETTING SITES, <https://www.safestbettingsites.com/nba-%20betting/advanced-hardwood-statistics> [https://perma.cc/TTE5-9A9F].

¹⁴⁰ See, e.g., Kevin Draper, *N.B.A. Makes MGM Resorts International Its First Gambling Partner*, N.Y. TIMES (July 31, 2018), <https://www.nytimes.com/2018/07/31/sports/nba-betting-mgm.html> (“While the final score of a game would not be in dispute, two different data providers could differ on things like who is credited with a rebound, which is crucial when consumers can place bets on specific player performances in a variety of statistical categories.”).

¹⁴¹ See Ed Scimia, *Major League Soccer Becomes Latest American Sports League to Partner with MGM Resorts*, ONLINEGAMBLING.COM (Mar. 19, 2019), <https://www.onlinegambling.com/news/2019/03/major-league-soccer-announces-partnership-with-mgm-resorts/>.

¹⁴² See Michael McCann, *What the NBA and Its Players Stand to Gain From Partnership With Vegas-Based MGM*, SPORTS ILLUSTRATED (July 31, 2018), <https://www.si.com/nba/2018/07/31/nba-mgm-resorts-partnership-vegas-sports-betting> [http://perma.cc/7KBY-3VZT].

information” or “newsworthy,” the purpose of the use of the images takes on a more commercial dimension in this context. The designers of the fantasy site in dispute in the *C.B.C.* case may have had this issue in mind. The season-long fantasy sports game marketed by the firm specifically did not utilize any names of players in connection with their images or in a direct commercial manner, which would have constituted a right of publicity violation in Missouri.¹⁴³ It merely listed the names of the baseball players next to their respective statistics. While the *C.B.C.* court admitted that the use “[did] not fit neatly into the more traditional categories of commercial advantage,”¹⁴⁴ it could have addressed the difference more definitively. However, at least the Eighth Circuit addressed it.

The *Daniels* court lumped the use of images together with the use of statistics and thereby concluded that the use was part of the newsworthy value exception of the Indiana statute.¹⁴⁵ By extension, the court inferred that its newsworthiness placed that information under the ambit of the First Amendment. But what about the use of the student-athletes’ photographs or images? They were not crucial to the nature of the fantasy sports games that were produced by the defendants. Additionally, the fact that, unlike the more traditional use in the fantasy sports game in *C.B.C.*, FanDuel’s continued use of images was not strictly necessary requires a more detailed explanation of whether that use would qualify for the “newsworthy value” exception under the Indiana statute. Although, as noted above, the argument could be made that the statistical information would be protected, at the very least, the court should have discussed the scope of newsworthiness concerning this particular use separately.

C. *The Continued Dependence on Zacchini: What is Newsworthy and What is Not?*

Although the Indiana Supreme Court relied on statutory interpretation as a basis for its conclusion, the panel also addressed potential constitutional claims and, in doing so, cited *Zacchini*¹⁴⁶ to justify its position. This seemed odd because the majority opinion in *Zacchini* came to the opposite conclusion: It protected the plaintiff’s

¹⁴³ See *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818, 822 (8th Cir. 2007) (holding that, while the use of the players’ names constituted a commercial advantage, the mere use of those names did not constitute a “symbol of [the players’] identit[ies]” under Missouri’s common law right of publicity standards), *cert. denied*, 553 U.S. 1090 (2008).

¹⁴⁴ *Id.*

¹⁴⁵ See *Daniels v. FanDuel, Inc.*, 109 N.E.3d 390, 396 (Ind. 2018) (“Considering the arguments presented in this case, Defendants’ use of players’ names, images, and statistics in conducting fantasy sports competitions bears resemblance to the publication of the same information in newspapers and websites across the nation.”), *aff’d*, 909 F.3d 876 (7th Cir. 2003).

¹⁴⁶ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

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entire human cannonball act, concluding that the defendant's broadcast of the entire act was not protected by general free speech concepts but instead fell within the scope of the misappropriation right.¹⁴⁷ To get around this ruling, the panel in *Daniels* cherry-picked a small portion of *Zacchini* that seemed to create a carve-out for reporting newsworthy facts about the event.¹⁴⁸

However, this dicta in *Zacchini* should not apply. The event—for which viewers were charged a fee—was reported and filmed as part of a local newscast. The broadcast of *Zacchini*'s act was not a part of an advertisement or otherwise a form of commercial speech, as it was not intended to sell a product. Nevertheless, the court considered it protectable. One of the defendants in *Daniels*, FanDuel—which also charges subscribers a fee—uses the names, images, and statistical information of former college athletes. If anything, this is far more “commercial” than the use in *Zacchini*. FanDuel is in business to make a profit off its fantasy sports services. It uses the names and identities of players to do so. It is a far more direct monetization of sources than the local television station that broadcast *Zacchini*'s act.

Until the Supreme Court revisits this doctrine, *Zacchini* remains the only ruling that directly addresses the merits of a misappropriation (now right of publicity) claim. While it is the first ruling to separate what is now known as right of publicity from the traditional privacy line of torts, it is an “old” case, doctrinally and practically. It fails to consider the statutory and common-law evolution of the right from tort to property, and predates the greater sophistication, statutory treatment, and complexity of issues that arise in a digital age. The court in *Zacchini*, whether intentionally or not, made an inference as to the commercial nature of the speech in question. Just two years earlier, the court recognized a limited constitutional right for commercial use of speech,¹⁴⁹ noting that the First and Fourteenth Amendments do not immunize speech that is entirely commercial.¹⁵⁰ *Zacchini*'s lack of doctrinal boundaries, as well as its relative age, make it a problematic precedent to apply in a digital and data-driven era.

¹⁴⁷ *Id.* at 578.

¹⁴⁸ *Id.* at 574-75 (“It is evident . . . that petitioner’s state-law right of publicity would not serve to prevent respondent from reporting the newsworthy facts about petitioner’s act . . . [However,] the First and Fourteenth Amendments do not immunize the media when they broadcast a performer’s entire act without his consent.”).

¹⁴⁹ See *Va. State Bd. of Pharmacy v. Va. Citizens Consumers Council, Inc.*, 425 U.S. 748 (1976).

¹⁵⁰ See *Zacchini*, 433 U.S. at 574-75 (“The broadcast of a film of petitioner’s entire act poses a substantial threat to the economic value of that performance.”). For an analysis of the First Amendment limitation on publicity rights, see Martin H. Redish & Kelsey B. Shust, *The Right of Publicity and the First Amendment in the Modern Age of Commercial Speech*, 56 WM. & MARY L. REV. 1443 (2015), <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3589&context=wmlr> [https://perma.cc/7WHA-XZNA].

State legislatures, such as in Indiana and California, have attempted to resolve the vagaries of *Zacchini* by enacting right of publicity statutes with explicit newsworthy exemptions. Yet, as noted earlier,¹⁵¹ these exceptions often lack definition.¹⁵² Even where the statute is well-defined (Indiana's law, for example, includes "media that publishes, broadcasts, or disseminates advertising in the normal course of its business," including traditional print, broadcast and cable¹⁵³), it does not ensure consistent enforcement. Adding to this difficulty is the duality of sources for right of publicity laws in many states, which not only have a statutory code provision but a common law element as well. Such was the case in Indiana and a few other states. Indiana had a common law right of misappropriation under tort law (although it has since been subsumed by Indiana's statutory right of publicity, which was enacted in 1994).¹⁵⁴ California's right of publicity protection is more robust, as it goes beyond the statutory mandate to include "personality" rights, such as soundalikes or lookalikes.¹⁵⁵

The following hypothetical spells out the problem just introduced: Say that State A has had a common law right of publicity for many years and one or two rulings have concluded that the right is a broad one. More recently, the state enacted a comprehensive right of publicity law (in part because, like some other states, it wanted a post-mortem right of up to 100 years after death, as is the case in Indiana).¹⁵⁶ State A's statute also includes a newsworthy value exception, but no common law case ever ruled on the scope of that exception, nor did the statute or its legislative history indicate that the codification would supplant the common law

¹⁵¹ See *Daniels v. FanDuel, Inc.*, 109 N.E.3d 390, 394 (Ind. 2018), *aff'd*, 909 F.3d 876 (7th Cir. 2003).

¹⁵² California's newsworthy exception is equally vague. See CAL. CIV. CODE § 3344(d) (West 2019) ("[A] use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required . . .").

¹⁵³ See IND. CODE § 32-36-1-4 (2019).

¹⁵⁴ See, e.g., *Felsher v. Univ. of Evansville*, 755 N.E.2d 589 (Ind. 2001); see also Jennifer E. Rothman, *Indiana, ROTHMAN'S ROADMAP TO RIGHT PUBLICITY*, <https://www.rightofpublicityroadmap.com/law/indiana> [<https://perma.cc/67W6-WXFG>] (last updated July 19, 2019). In addition, both the district court and the Indiana Supreme Court utilized the common law definition of newsworthiness in their opinions.

¹⁵⁵ See Reshma Amin, *A Comparative Analysis of California's Right of Publicity and the United Kingdom's Approach to the Protection of Celebrities: Where are They Better Protected?*, 1 CASE W. RES. J.L., TECH & INTERNET 92, 103-07 (2010), <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1043&context=jolti> [<https://perma.cc/HXK6-MLCB>] ("In California, the common law right of publicity offers a broader scope of actionable claims than its statutory counterpart. Under statutory law, the type of appropriation, the intent of the infringer, damages, and a connection between the use and the commercial nature of the infringement are all relevant. But similar specificity is not found in the common law, which is comparatively broad in its protection [Therefore], celebrities have . . . assert[ed] . . . claims under the common law [against the use of soundalikes and lookalikes] . . .").

¹⁵⁶ IND. CODE § 32-36-1-8 (2019).

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rules. How does a court approach this question? And let's say that the statute limited some of the scope of the common law rights (but did not explicitly overrule any of its precedents). Does *Zacchini* stand for the proposition that newsworthy value is more limited than proponents may think (given that the broadcast of the human cannonball was during a newscast)? Alternatively, was the protective right based on the amount of the use rather than the medium involved or, as noted a few paragraphs back, was the type of use simply irrelevant? It is hard to say.

D. *A Doctrinal Contradiction: Real Life vs. Avatars—Why are Creations Protected and Real Identities Not?*

FanDuel's use of the names and images of the college players was literal. There was no mistaking their identity. Yet the Indiana Supreme Court's conclusion contradicts cases where courts found right of publicity violations for the use of fictionalized images of athletes ("avatars"). The images utilized were not named, although they were shown with the actual numbers of the players and some distinguishing features. In those cases, two federal circuit courts concluded that the use of such depictions in NCAA-licensed football games on Electronic Arts (EA) Sports was subject to right of publicity claims, rejecting arguments that the images were "transformative" and beyond the scope of the right of publicity as protected First Amendment expression.¹⁵⁷ Such distinctions—premised on an unclear and imprecise definition of what is "commercial" and what is not—prompted two prominent scholars to classify the courts' varying approaches to right of publicity standards as "absurd distinctions."¹⁵⁸

Because there were no alterations or creative depictions of the athletes used, in contrast to the portrayals in paintings,¹⁵⁹ parody trading cards,¹⁶⁰ or on T-shirts,¹⁶¹ the *Daniels* court did not have to address the issue of the relationship between the depiction of the athletes and their true identities. It therefore did not have to grapple with the nature of the depictions of the athletes and did not have to apply any one of the several

¹⁵⁷ See *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013), cert. dismissed, 573 U.S. 989 (2014); see also *Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 U.S. Dist. LEXIS 10719 (N.D. Cal. Feb. 8, 2010); see also *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013); see also *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015), cert. denied, 137 S. Ct. 277 (2016).

¹⁵⁸ See Redish & Shust, *supra* note 150, at 1449 ("When it comes to adjudicating publicity rights claims against free speech interests, courts are stupefied. They apply absurd distinctions, and they routinely discriminate against speech solely on the basis of speakers' profit motivation." (internal footnotes omitted)).

¹⁵⁹ See *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915 (6th Cir. 2003) (holding that the paintings of golfer Tiger Woods winning his first Master's tournament were transformative and not subject to right of publicity or false endorsement claims).

¹⁶⁰ See *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996).

¹⁶¹ See *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001), cert. denied, 534 U.S. 1078 (2002).

tests that courts have crafted to determine whether the depiction was a direct use of a plaintiff's name and image. Courts have developed a plethora of such tests—including the “transformative use” test (used in the cases addressed in this Article),¹⁶² the “predominant purpose” test,¹⁶³ and the “Rogers” test,¹⁶⁴ to name the most noteworthy—in an attempt to balance the nature of the depiction with the question of whether it is sufficiently commercial, literal, or at least identifiable.

But what if the court had to face this issue? Imagine that a gambling firm decided to create a game with fictionalized players, or players whose names are not identified. However, to make the game more “authentic,” it utilized actual statistical information from real players (without disclosing their identity). In this theoretical situation, there are fans and gamers who are so expert that they can determine who the “real” athlete is based exclusively on their statistics. That would pose an interesting problem for a court considering a right of publicity claim. Although the courts in prior avatar cases have applied the transformative use test, not every state or federal circuit has adopted that test. That means that, depending on the forum, a court may apply a different standard. How does one reconcile the cases where courts did find a right of publicity violation with the ruling in *Daniels*?

E. *Commercial Speech and Commercial Use*

What may be the most problematic aspect of *Daniels* (and many other rulings in the right of publicity area) is the court's failure to address whether an image, name, or general content is sufficiently “commercial” to warrant a right of publicity violation. This issue is intrinsically tied to the determination of the scope of the right and thus has resulted in a fair

¹⁶² First recognized by the California courts and later adopted by several federal circuits, this test focuses on the creativity of the depiction and, in effect, turns judges into art critics. *Id.* at 810. For a more detailed discussion of the transformative use test, see Redish & Shust, *supra* note 150, at 1473-75; see also *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d at 1274 (discussing the use of college football players' images in an electronic game).

¹⁶³ This concept fits most squarely into the idea of the use of the information. See *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003) (en banc) (holding that the use of a comic book character with a similar name to a hockey player is within the right of publicity).

¹⁶⁴ This standard is named after the case of *Rogers v. Grimaldi*, which considered whether a person's likeness is related to the work as a whole. See *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989). The case concerned the film “Ginger and Fred,” which portrayed two fictional Italian cabaret performers who had established their fame by imitating famous Hollywood duo Ginger Rogers and Fred Astaire. *Id.* Rogers subsequently filed an action claiming that the use of her first name in the film's title confused consumers and violated her common law right of publicity. *Id.* The Second Circuit concluded that because the movie title “Ginger and Fred” was related to the content of the movie and not “a disguised advertisement,” it constituted protected speech. *Id.*; see also Dora Georgescu, *Two Tests Unite to Resolve the Tension Between the First Amendment and the Right of Publicity*, 83 *FORDHAM L. REV.* 907, 927-29 (2014), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5047&context=fllr> [<https://perma.cc/QT7X-K3TX>].

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amount of scholarly debate.¹⁶⁵ Because of the doctrinal issues inherent to the question of what constitutes “commercial” speech and what does not, it has been difficult for courts to apply a bright-line test. Despite numerous opportunities to do so, many courts have refused to analyze right of publicity cases through a First Amendment prism, and for those who did, the analysis was often brief.¹⁶⁶ Courts often have imposed their own respective tests to determine whether the depiction was more “commercial” than “artistic,” or whether its primary purpose was commercial or pecuniary.¹⁶⁷

Looking at a sample webpage from FanDuel, one can see photos of players, along with their respective positions.¹⁶⁸ Players’ statistical information is also available. Considering that players’ photos and statistics are already publicly available, should they be considered so newsworthy that the commercial reasons for their use are to be disregarded? If so, such an approach not only underestimates the publicity rights of athletes but, more importantly, undermines the commercial speech doctrine. While this criticism has been addressed by other scholars,¹⁶⁹ there has not been adequate discussion of the commercial speech question of such uses of athletes’ statistics in tandem with their likeness. This is a result, in part, of the paucity of case law on the topic, the failure of statutory language to specifically address the issue and, most importantly, the lack of a unifying standard to distinguish between commercial and noncommercial speech. The utilization of names and likenesses in newer technologies, such as daily fantasy sports and sports gambling, makes it particularly problematic.

¹⁶⁵ See, e.g., Christina Smedley, *Commercial Speech and the Transformative Use Test: The Necessary Limits of a First Amendment Defense in Right of Publicity Cases*, 24 DEPAUL J. ART. TECH & INTELL. PROP. L. 451, 462 (2014), <http://via.library.depaul.edu/cgi/viewcontent.cgi?article=1036&context=jatip> [https://perma.cc/RQP5-5PYS]; see also W. Mack Webner & Leigh Ann Lindquist, *Transformation: The Bright Line Between Commercial Publicity Rights and the First Amendment*, 37 AKRON L. REV. 171 (2004), <https://ideaexchange.uakron.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1333&context=akronlawreview> [https://perma.cc/9W4E-9MGA]; see also Jennifer E. Rothman, *Commercial Speech, Commercial Use, and the Intellectual Property Quagmire*, 101 VA. L. REV. 1929 (2015), http://www.virginialawreview.org/sites/virginialawreview.org/files/Rothman_Online.pdf [https://perma.cc/8SAH-7YSQ].

¹⁶⁶ See Redish & Shust, *supra* note 150, at 1480; see also *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915 (2003) (6th Cir. 2003); see also *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992).

¹⁶⁷ See *Comedy III Prods., Inc.*, 21 P.3d 797; see also *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509 (7th Cir. 2014) (holding that the use of Michael Jordan’s number in an advertising insert by a food store celebrating his achievements constituted a valid cause of action).

¹⁶⁸ See Zachary Zaggar, *Player Images In Fantasy Sports Could Be Next IP Battle*, LAW360 (Apr. 24, 2019, 3:12 P.M.), <https://www.law360.com/articles/1141555/player-images-in-fantasy-sports-could-be-next-ip-battle>.

¹⁶⁹ See Redish & Shust, *supra* note 150.

1. The Commercial Speech Conundrum

Many scholars and courts have discussed the concept of commercial speech, with some praising the creation of a constitutional standard crafted by the courts and others criticizing it.¹⁷⁰ Despite all the discussion and the many court rulings regarding what speech is and is not considered commercial, there is no universally accepted definition for the term. Early cases defined it as speech that does “no more than propose a commercial transaction.”¹⁷¹ Later, the Supreme Court seemed to broaden the definition to cover “expression related solely to the economic interests of the speaker and its audience,”¹⁷² but subsequent courts, from the Supreme Court down, have alternated between these two definitions.¹⁷³

It seems odd that there is no overarching definition of a concept as important as what constitutes commercial speech, but that may stem from the fact that it is a constitutional right of fairly recent vintage. Until 1976, it was not formally recognized as subject to the free speech protections of the First Amendment.¹⁷⁴ It ultimately became part of the First Amendment family, but with a level of protection lower than for other

¹⁷⁰ See, e.g., C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981 (2009), <http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1134&context=ilj> [<https://perma.cc/UY3G-JTXV>]; see also Paul S. Zimmerman, *Hanging Up on Commercial Speech: Moser v. FCC*, 71 WASH. L. REV. 571, 573-76 (1996), <https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=4139&context=wlr> [<https://perma.cc/LQD9-93BW>]; compare Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903, 929-30 (2003), <http://www2.law.ucla.edu/volokh/publicity.pdf> [<https://perma.cc/KP48-G4BB>] (arguing that if right of publicity should exist, then its foundation should be based in commercial speech) with LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 896 (2d ed. 1988) (stating that the distinction between commercial speech and noncommercial speech “has not provided reliable guidance for resolution of individual cases”), and Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 648 (1990), https://law.yale.edu/sites/default/files/area/center/isp/documents/830am_kozinski_whos-afraid-of-commercial-speech.pdf [<https://perma.cc/YU2N-KCSU>] (“We have a distinction, then, with no basis in the Constitution, with no justification in the real world, and that must often be applied arbitrarily in any but the easiest cases.”), and Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1216 (1983), <https://pdfs.semanticscholar.org/7bb5/9952f819faad58fcd2d8fc3103bbd1f6ef1.pdf> [<https://perma.cc/7TDJ-JLSE>] (“[T]he Court’s doctrinal treatment of commercial speech has been inadequate . . .”).

¹⁷¹ See *Va. State Bd. of Pharmacy v. Va. Citizens Consumers Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973)).

¹⁷² See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561 (1980).

¹⁷³ See *Bd. of Trs. v. Fox*, 492 U.S. 469 (1989) (applying the earlier definition); see also *Taucher v. Born*, 53 F. Supp. 2d 464, 480 (D.D.C. 1999) (quoting *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm’n*, 149 F.3d 679 (7th Cir. 1998)) (identifying the “broader” definition in *Central Hudson*, while noting that “the Supreme Court has ‘not utilized the broader test [articulated in *Central Hudson*] in its recent commercial speech cases.’”); see also *IMS Health, Inc. v. Ayotte*, 550 F.3d 42 (1st Cir. 2008), *cert. denied*, 557 U.S. 936 (2009).

¹⁷⁴ See *Kozinski & Banner, supra* note 170, at 629 (“In *Virginia State Board of Pharmacy* . . . the Court held that commercial speech does, after all, fall within the scope of the first amendment.”).

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kinds of speech.¹⁷⁵ Courts have established an intricate variation of the “intermediate scrutiny” standard of review, which permits certain restrictions on speech that is directed toward economic interests. This so-called *Central Hudson* standard entails a four-part test that focuses on whether there exists a “substantial governmental interest” and requires that the restriction is “not more extensive than is necessary.”¹⁷⁶

The *Central Hudson* standard for commercial speech has been a malleable one. In the last quarter-century, there has been greater acceptance of commercial speech protection; some have argued that the standard has become a “heightened” intermediate scrutiny test.¹⁷⁷ The Supreme Court has ruled on several commercial speech cases in the last forty years but has not issued any decision regarding the application of this standard to right of publicity cases. As a result, the courts lack uniform guidance on how to deal with this dichotomy. The Restatement and some scholars take a literal approach: that right of publicity must be grounded in commercial speech to be protected.¹⁷⁸ Others have favored a more expansive approach, one that would also protect seemingly “noncommercial” speech that involves “financial gain.”¹⁷⁹ Under the latter approach, the depiction of athletes’ names, images, and possibly

¹⁷⁵ See *id.*; see also *Va. State Bd. of Pharmacy*, 425 U.S. at 771 n.24 (explaining that “commonsense differences” between commercial speech and noncommercial speech “suggest that a different degree of protection is necessary”).

¹⁷⁶ See *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 562-69 (defining commercial speech as “expression related solely to the economic interests of the speaker and its audience”). Significantly, in *Central Hudson Gas & Electric Corp.*, the Supreme Court developed a four-part test for determining whether a governmental regulation on commercial speech impermissibly infringes the speaker’s First Amendment right: “For commercial speech to come within [the First Amendment], it . . . must [(1)] concern lawful activity and not be misleading[;] . . . [(2)] the asserted governmental interest is substantial[;] . . . [(3)] the regulation directly advances the governmental interest asserted[;] and . . . [(4)] that regulation is . . . more extensive than necessary to serve that interest.” *Id.* at 566.

¹⁷⁷ See Oleg Shik, *The Central Hudson Zombie: For Better or Worse, Intermediate Tier Review Survives Sorrell v. IMS Health*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 561 (2015), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1593&context=iplj> [<https://perma.cc/Q44H-TKC3>] (“[S]ome have contended that the combination of *Sorrell*’s new ‘heightened judicial scrutiny’ standard, along with the increasingly business-friendly ideological makeup of the Court, has pushed the standard towards a de facto strict scrutiny standard.” (internal footnotes omitted)). The Court’s greater skepticism has been demonstrated in cases where the state has failed to meet its burden in restricting commercial speech. See *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 188-89 (1999); see also *44 Liquormart, Inc. v. R.I.*, 517 U.S. 484, 507 (1996) (plurality opinion); see also *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490-91 (1995).

¹⁷⁸ See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c (AM. LAW INST. 1995); see also J. Thomas McCarthy, *The Spring 1995 Horace S. Manges Lecture - The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 131 (1995) (“[T]he only kind of speech impacted by the right of publicity is commercial speech—advertising. Not news, not stories, not entertainment and not entertainment satire and parody—only advertising and similar commercial uses.”).

¹⁷⁹ See Rothman, *supra* note 165 (suggesting that intellectual property protections are based on a broader notion of “commerciality,” rather than a literal commercial speech rubric).

even statistical information could be within the scope of the right of publicity.

The problem is exacerbated by the fact that states utilize different definitions of what constitutes right of publicity protection and, significantly, what does not.¹⁸⁰ As noted earlier, Tennessee limits claims only to names and likenesses,¹⁸¹ while Pennsylvania requires a “commercial purpose.”¹⁸² Indiana requires that a plaintiff have an inherent commercial value in their identity,¹⁸³ while other states do not.¹⁸⁴ Similarly, the type and scope of exceptions to a right of publicity claim run the gamut. As noted earlier, Indiana has crafted a specific “newsworthy value” exception; Illinois and California have done so as well.¹⁸⁵ In one sense, the inclusion of a specific “newsworthy value” exception may be one way to avoid the import of the *Zacchini* ruling, which dealt with a news broadcast of the “cannonball” event. “Newsworthy value” can be understood to include “non-commercial” speech that is used to disseminate information to the public, without requiring the sale of a particular good or service.

Finally, and possibly most troublesome, few courts have applied the *Central Hudson* test in evaluating commercial speech for right of publicity claims.¹⁸⁶ This lack of coherence becomes increasingly compelling in cases where the right of publicity is applied to the areas of fantasy sports and, more recently, legalized sports gambling.

One case that attempted to craft a balance between commercial use (subject to the right of publicity claim) and protected speech was

¹⁸⁰ For an overview of the myriad definitions of right of publicity adopted by the states, see Rothman, *supra* note 165.

¹⁸¹ TENN. CODE ANN. § 47-25-1103 (2019) (establishing a property right in the use of “[e]very individual[’s] . . . name, photograph, or likeness”).

¹⁸² 42 PA. CONS. STAT. § 8316(a) (2019) (“Any natural person whose name or likeness has commercial value and is used for any commercial or advertising purpose without the written consent of such natural person or the written consent of any of the parties authorized . . . may bring an action to enjoin such unauthorized use and to recover damages for any loss or injury sustained by such use.”); *see id.* § 8316(e) (defining “commercial or advertising purpose” and “commercial value”). Specifically, pursuant to the Pennsylvania statute, “commercial value” is established where there exists a “[v]aluable interest in a natural person’s name or likeness that is developed through the investment of time, effort and money.” *Id.*; *see* Rothman, *supra* note 165, at 1951, 1964-65.

¹⁸³ IND. CODE § 32-36-1-6 (2019).

¹⁸⁴ *See* Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 799–800, 807–09 (N.D. Cal. 2011) (“[T]he Court finds nothing requiring that a plaintiff commercially exploitable value be a result of his own talents or efforts in order to state a claim for damages under § 3344.”); *see also* Rothman, *supra* note 165, at 1951-52.

¹⁸⁵ *See* 765 ILL. COMP. STAT. 1075/35(b)(2) (2019) (“This Act does not apply to the . . . use of an individual’s identity for non-commercial purposes, including any news, public affairs, or sports broadcast or account, or any political campaign[.]”); *see also* CAL. CIV. CODE § 3344(b)(1) (West 2019).

¹⁸⁶ *See* Rothman, *supra* note 165, at 1956.

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Gionfriddo v. Major League Baseball,¹⁸⁷ a 2001 California appellate ruling. A group of veteran baseball players alleged that Major League Baseball had used their “names, voices, signatures, photographs and/or likenesses” in television programming without their consent and without compensating them.¹⁸⁸ The court rejected the claims (based on the broader protections of California common law, rather than its statutory counterpart), concluding that the dissemination of these materials was not commercial. Rather, the use was based on “significant public interest in the information conveyed,” rendering it protected speech even though the names and data were used in an advertisement.¹⁸⁹

In applying this rationale to the case at hand, the differences are considerable. In *Daniels*, the use was directly purposed to the pecuniary interest of the fantasy sports firm. As one scholar said: “[C]onsumers of fantasy league operators log in to the fantasy league website for the purpose of playing a game, drafting players, making trades and seeing how their team is performing in the context of the fantasy league game.”¹⁹⁰ Fantasy sports firms are exploiting such uses. Additionally, as noted earlier, the scale of the use is substantial. Thousands of users, if not tens of thousands, visit daily fantasy sites every day and use the information they find there. It is a far cry from the early days of rotisserie sports. With the expansion of sports betting, the number of users—and the amounts of money in question—are poised to increase.

Because the rationale for right of publicity is arguably directly tied to commercial speech, what would happen if the Supreme Court decided to overturn *Central Hudson* and treat commercial speech as a full-fledged First Amendment right subject to a strict scrutiny test? Suffice it to say that strict scrutiny is a more rigorous standard than the intermediate *Central Hudson* test because strict scrutiny makes it extremely difficult, if not nearly impossible, for a state to restrict speech.¹⁹¹ However, this would likely not present an insurmountable barrier because, when dealing with intellectual property law, courts utilize a de facto balancing

¹⁸⁷ *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307 (Cal. Ct. App. 2001). Notably, the complaint in *Gionfriddo* “was limited to persons who had played part of their major league careers prior to 1947, because that year the standard player contract was revised to add the following language: ‘The Player agrees that his picture may be taken for still photographs, motion pictures or television at such times as the Club may designate and agrees that all rights in such pictures shall belong to the Club and may be used by the Club for publicity purposes in any manner it desires.’” *Id.* at 311.

¹⁸⁸ *Id.* at 311.

¹⁸⁹ *Id.* at 316.

¹⁹⁰ See Karcher, *supra* note 42, at 582.

¹⁹¹ Strict scrutiny requires that, for the state to limit content-related speech, it must show that there is a compelling governmental interest for the restriction and that the restriction is as narrowly tailored as possible to accomplish that result. See, e.g., *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991).

approach to First Amendment issues. The problem is that the contours of that balancing are not well-defined.

In copyright law, courts have had to balance the protection of “original works of authorship fixed in any tangible medium of expression”¹⁹² with free speech issues that might arise. This is frequently done through the application of copyright’s most notable exception: the fair use doctrine.¹⁹³ While the standards of fair use have been some of the most vexing intellectual property issues for courts to apply,¹⁹⁴ judicial rulings have been clear that there must be a compromise between the free speech rights of the would-be infringer and the economic interests of the creator of the copyrighted work in a particular mode of expression (as opposed to an idea, which would clearly fall under the purview of free speech).¹⁹⁵ Some courts in right of publicity cases have taken a version of the “transformative use test” from this balancing approach found in copyright law—specifically, from the way the courts have interpreted the “purpose and character of the use,” the first of the four factors listed under the fair use provision of the Copyright Act.¹⁹⁶

Some courts, however, sensing that these elements may not be enough, inferred that a commercial requirement is necessary for infringement. For example, one Supreme Court ruling stated that “every

¹⁹² See 17 U.S.C. § 102 (2012), <https://www.govinfo.gov/content/pkg/USCODE-2017-title17/pdf/USCODE-2017-title17-chap1-sec102.pdf> [<https://perma.cc/5GML-RYB6>].

¹⁹³ See *id.* § 107, <https://www.govinfo.gov/content/pkg/USCODE-2017-title17/pdf/USCODE-2017-title17-chap1-sec107.pdf> [<https://perma.cc/UEL7-SWVD>] (“The fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”). Importantly, 17 U.S.C. § 107 prescribes four factors to be considered when “determining whether the use made of a work in any particular case is a fair use[.]” (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit education 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.” *Id.*

¹⁹⁴ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (explaining that fair use adjudication requires a case-by-case analysis and is not governed by “bright-line” rules). For a comprehensive review of the fair use doctrine, see Travis J. Denneson, *The Definitional Imbalance between Copyright and the First Amendment*, 30 WM. MITCHELL L. REV. 895 (2004), <https://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1200&context=wmlr> [<https://perma.cc/3YGV-22WF>].

¹⁹⁵ See Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1190 (1970) (“[I]deas per se fall on the free speech side of the line, while the statement of an idea in specific form, as well as the selection and arrangement of ideas fall on the copyright side of the line.”); see also Edmund T. Wang, *The Line Between Copyright and the First Amendment and Why Its Vagueness May Further Free Speech Interests*, 13 U. PA. J. CONST. L. 1471, 1477-78 (2011), <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1103&context=jcl> [<https://perma.cc/M9ST-6GCN>].

¹⁹⁶ See 17 U.S.C. § 107(1); see, e.g., *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001) (holding that, because the depiction of the Three Stooges on unlicensed lithographs and T-shirts was not sufficiently transformative to rise to a level of privileged expression under the First Amendment, the plaintiff’s right of publicity claim prevailed), *cert. denied*, 534 U.S. 1078 (2002).

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commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege,"¹⁹⁷ while another, barely a year later, generally affirmed this view.¹⁹⁸ While the transformative aspect of fair use is faulty in that it does not adequately center on the commercial characteristics of the use, the fundamental problem in the right of publicity area is that merely adopting copyright's transformative use test fails to establish a precise balancing between First Amendment rights and right of publicity property protection. Even if it did, transformative use ultimately would not be sufficiently applicable to the use of statistics in any case. As one court aptly stated, the core problem of the transformative use test is that a commercial work could receive First Amendment protection upon the slightest finding of personal expression—even if the work's sole purpose was commercial.¹⁹⁹

In the realm of trademark law, the Lanham Act allows trademark protection for items "use[d] in commerce," which is defined as the "ordinary course of trade."²⁰⁰ The Lanham Act does have a limited statutory fair use exception,²⁰¹ as well as additional judicially crafted exemptions.²⁰² An essential element in determining nominative fair use (the most applicable exception) is consumer confusion,²⁰³ which points to a commercial motive. But similar to copyright fair use, a precise test has not been established.

2. Incidental Use: How Incidental Does it Have to Be?

Although the Indiana Supreme Court (and by extension the Seventh Circuit) in *Daniels* focused on the newsworthy value exception, what if the court had concluded that the names, images, and statistics were not subject to this exception but instead were a direct commercial use of the information to help sell the game? An argument could be made that, while

¹⁹⁷ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984), *reh'g denied*, 465 U.S. 1112 (1984).

¹⁹⁸ *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985). For an argument that Supreme Court precedent on fair use is arbitrary and ad hoc, see Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 721-22 (2011), <https://law.lclark.edu/live/files/9132-lcb153netanelpdf> [<https://perma.cc/W4UW-N9CV>].

¹⁹⁹ *See Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003).

²⁰⁰ *See* 15 U.S.C. § 1127 (2012), <https://www.govinfo.gov/content/pkg/USCODE-2017-title15/pdf/USCODE-2017-title15-chap22-subchapIII-sec1127.pdf> [<https://perma.cc/D8GF-8QUE>].

²⁰¹ *See id.* § 1115(b)(4), <https://www.govinfo.gov/content/pkg/USCODE-2017-title15/pdf/USCODE-2017-title15-chap22-subchapIII-sec1115.pdf> [<https://perma.cc/4BTL-P74U>]

(preventing a trademark owner from monopolizing or appropriating the use of "a term or device which is descriptive of and used fairly and in good faith only to describe the goods or services").

²⁰² *See Exception to Trademark Protection*, INTELL. PROP. CTR. (Dec. 1, 2005), <https://theipcenter.com/2005/12/exception-to-trademark-protection/> [<https://perma.cc/H27Y-TP5A>]

("Although the Lanham Act contains the statutory fair use provision . . . , there are three additional judge-made categories where use of the trademark of another may be considered non-infringing[:]. . . (1) nominative fair use, (2) comparative advertising as fair use, and (3) parody as fair use.")

²⁰³ *Id.*

the use was sufficiently commercial, it was only “incidental” or “fleeting,” which might negate an otherwise viable right of publicity claim.²⁰⁴ However, cases that have found a use too incidental or fleeting to violate a plaintiff’s right of publicity have generally focused on a quick glance of a person in a crowd or a listing of one’s name that is too “remote and speculative” to establish a connection with the product.²⁰⁵ In contrast, sports fantasy or gambling sites would not focus on just a few athletes but on entire rosters of athletes in a given league. That easily numbers in the hundreds.

This presents a conflicting situation for both the use of names and statistical information. Regarding the latter, such statistical information of one athlete out of the hundreds of NCAA or professional athletes is a very small part of the overall fantasy sports or gambling ecosystem. On the other hand, each athlete’s statistical information is an essential part of the product. The omission of even one player’s information may limit the competitiveness of the game, hurting the quality of the product as a result. Therefore, there is a strong argument that any use of athletes’ statistical information would not be considered merely incidental.

With regard to names and images, the question necessarily follows as to how “incidental” the use of an athlete’s name and image is, given

²⁰⁴ There exists a robust line of New York case law that explicitly recognizes and defines this exemption. *See Marks v. Elephant Walk, Inc.*, 548 N.Y.S.2d 549, 551-52 (App. Div. 1989) (“It is well settled that where . . . a reference to an individual is ‘fleeting and incidental,’ it will not be actionable as a nonconsensual use of that person’s name for the purposes of advertising or trade.” (internal citations omitted)); *see also Dallesandro v. Henry Holt & Co. Inc.*, 166 N.Y.S.2d 805, 806-07 (App. Div. 1957) (holding that the plaintiff’s picture on the cover of the book with a priest who was the subject of the book was not actionable under New York state law); *see also Man v. Warner Bros. Inc.*, 317 F. Supp. 50, 53 (S.D.N.Y.1970) (“[T]he incidental use of plaintiff’s forty-five-second performance in defendants’ motion picture . . . is surely de minimus.”).

²⁰⁵ *Marks*, 548 N.Y.S.2d at 551-52; *see Leary v. Punzi*, 687 N.Y.S.2d 551, 553 (Sup. Ct. 1999) (quoting *Delan v. CBS, Inc.*, 458 N.Y.S.2d 608, 614 (App. Div. 1983)) (“Whether a particular use is incidental is determined through an assessment of the ‘relationship of the reference to a particular individual to the main purpose and subject of the [work in issue]. . . .’ [T]he plaintiff’s name was not used in a manner directly related to the product of service [A]ny potential rewards for using the plaintiff’s name were too remote and speculative to sustain her claim.” (internal citations omitted)). Like the New York courts, the courts of various other states have also utilized this exception. *See, e.g., Epic Metals Corp. v. CONDEC, Inc.*, 867 F. Supp. 1009 (M.D. Fla. 1994) (holding that no reasonable juror could find that the plaintiff’s use of the defendant’s photograph—which captured him “standing behind a stack of lumber with only his head and shoulders visible”—in a promotional brochure constituted commercial exploitation); *see also Comins v. Discovery Commc’ns, Inc.*, 200 F. Supp. 2d 512 (D. Md. 2002) (“Since the . . . Defendants’ use of [the plaintiff’s] name . . . [was] merely incidental, shorn of any attempt to capitalize upon whatever commercial value it may [of] h[ad], his claim of misappropriation [came] to naught.” (internal citations omitted)). However, afforded no weight under this exception is the quantity or importance of the use; therefore, so long as the use stands out from the rest of the publication, the insignificant or limited nature of that use does not invoke the exception and thereby is permitted protection. *See, e.g., Pooley v. Nat’l Hole-In-One Ass’n*, 89 F. Supp. 2d 1108 (D. Ariz. 2000) (holding that, although the hole-in-one only comprised six seconds of an eight-minute video, because “defendant’s use of plaintiff’s identity was integral to its advertisement and enhanced the marketability of its service,” the incidental use doctrine did not apply).

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that, at the very least, such use (which must be included as an identifier) would be of considerable importance. So even if an athlete is just one of the hundreds of members of a given league and one of two dozen on a team, their name stands out due to the nature of the use.²⁰⁶

Admittedly, the failure to include an athlete's image would not necessarily limit the effectiveness of the game. It could therefore be argued that use of the image was merely incidental.²⁰⁷ However, arguing incidental use in cases like *Daniels* is problematic. Not only is the use of the names and statistics not newsworthy, but it also is clearly not incidental. Consider traditional trading cards: A group of players have their images and statistics printed on a card that is purchased by consumers. That use is inherently commercial. Each individual unit (meaning a card featuring a player) is a part of a collective whole, which contributes to its substantial commercial value. The same can be said about such uses by fantasy sports sites and, potentially even more compellingly, about gambling sites.

VI. THE AFTERMATH: A CLEARER STANDARD IS NEEDED

The *Daniels* ruling is a strong reaffirmation of the right of fantasy sports and gambling firms to use the names, images, and statistical information of professional and college athletes in connection with their products without the need for a licensing agreement. It will be seen as a defeat not only for the former college athletes who brought the lawsuit, but for professional athletes as well. In essence, the court concluded that the plaintiffs lacked proprietary rights to their names, images, and statistical information.

With sports gambling likely becoming legal in more and more states, gambling firms will be able to use this information gratis—and those firms will almost certainly take advantage of that arrangement. Nevertheless, considering the property value of the statistical information, it is entirely possible, and even likely, that licensing agreements can be concluded between the gambling firms and sports teams, leagues, players' associations, and even collegiate athletes.²⁰⁸ For instance, as of

²⁰⁶ Thomas Phillip Boggess V, *Causes of Action for an Infringement of the Right of Publicity*, in 31 CAUSES OF ACTION 2D 121, § 23 (2006) (“[T]he short nature of the use does not protect it as insignificant.”).

²⁰⁷ Alternatively, it could be argued that the use was directly commercial because it was necessary to make the fantasy game or sports betting service profitable. Therefore, it could not be part of an incidental use exception.

²⁰⁸ It is important to note, however, that some courts have upheld a ban on student-athletes concluding endorsement agreements. *See, e.g., Bloom v. Nat'l Collegiate Athletic Ass'n*, 93 P.3d 621, 626 (Colo. App. 2004) (rejecting a challenge to NCAA rules barring athlete endorsements and concluding that “although student-athletes have the right to be professional athletes, they do not have the right to simultaneously engage in endorsement or paid media activity and maintain their eligibility to participate in amateur competition”). For an example of a more recent treatment of

the summer of 2019, the National Basketball Association (NBA) and MGM Resorts permit NBA and WNBA data and branding, on a non-exclusive basis, across MGM Resorts' land-based and digital sports betting offerings throughout the United States.²⁰⁹ This deal gives MGM the right to use "official" NBA data, known as "anonymized real-time data," which could be more precise than general statistical information. The players union, however, will not be a part of this agreement, as it took its commercial rights in-house after twenty years of partnering with the NBA.²¹⁰ Still, it may be possible for players and players associations to conclude similar deals in the future. A potentially more comprehensive deal was announced between the NFL and Sportradar, which supplements a 2015 agreement for the firm to provide statistics.²¹¹

Regardless of whether more licensing agreements follow, there remains the legal issue of the right to use the information. The problematic nature of *Daniels* suggests that there should be a precise national standard outlining a balancing test between plaintiffs' right of publicity and the protections of the First Amendment. Given the marked increase in right of publicity litigation since the Supreme Court rendered its ruling in *Zacchini*, a reappraisal and balancing test are needed to create a sense of proportionality between the rights of individuals to protect their personal information and the free dissemination of that information to the public. Some (including this author) have advocated for a new test²¹² and, with the increased importance of the information conveyed by daily

this issue, see *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058 (N.D. Cal. 2019) (upholding restrictions on income unrelated to education and implicitly rejecting endorsement income).

²⁰⁹ See *MGM Resorts International becomes official gaming partner of NBA*, NBA (July 31, 2018, 2:10 PM), <https://www.nba.com/article/2018/07/31/mgm-resorts-international-becomes-official-gaming-partner-nba-official-release> [<https://perma.cc/2NM4-XEKQ>]. It is reported that the three-year agreement is worth "north of \$25 million." See McCann, *supra* note 142.

²¹⁰ Notably, in 2018, the National Basketball Players Association (NBPA), having spent the previous twenty years effectively outsourcing its group licensing rights to the National Basketball Association and thereby securing licensees and sharing any revenues with the union, did just that. See Sam Carp, *Marketing destiny: How the NBA and NFL stars are taking back control*, SPORTSPRO (Oct. 1, 2018), <http://www.sportspromedia.com/from-the-magazine/nfl-nba-player-unions-interview> [<https://perma.cc/L4LP-MJT6>]. Specifically, the new arrangement dictates that, while players are still in charge of their endorsements, and the league continues to control the use of its teams' names and logos, the NBPA now controls the rights afforded to the players as a group whenever they are not in uniform. *Id.*

²¹¹ See Ben Fischer, *NFL Picks Sportradar To Distribute Data, Game Feeds To Sports Books*, SPORTS BUS. DAILY (Aug. 12, 2019), <https://www.sportsbusinessdaily.com/Daily/Issues/2019/08/12/Gambling/Sportradar.aspx> [<https://perma.cc/5RDQ-WZLQ>]. Under the deal, Sportradar will monitor betting across all NFL games for irregularities. *Id.* The NFL and Sportradar have worked together since 2015 when the companies began distributing stats to media outlets and created the Radar360 research platform, which teams use to analyze stats and outcomes. *Id.*

²¹² See also Karcher, *supra* note 42 (advocating for a more protective standard to prevent producers from reaping the commercial benefit of the use).

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fantasy and gambling websites, there is a more compelling need to harmonize these standards.

In a past article,²¹³ this author proposed a federalized standard with a constitutionalized free speech partial immunity. It would require that plaintiffs claiming right of publicity protection must show that the use of their name or image has a sole or direct commercial purpose.²¹⁴ However, if that commercial purpose is not direct, but tangential or incidental, there should be a First Amendment immunity unless some “malice” or “bad faith” conduct is shown.²¹⁵ This “bad faith” corollary is intended to resolve the issue of a defendant claiming a noncommercial purpose as a way to avoid the applicability of a right of publicity claim. Taken from the approach used in defamation cases after *New York Times v. Sullivan*,²¹⁶ the burden of proof for the “bad faith” allegation would be a showing of “clear and convincing” evidence.

In the half-decade since this standard was proposed, the complexity of the application of the right of publicity has increased, in large part due to the increasing use of information as data for supplying commercial ventures. In 2014, daily fantasy sports was just beginning, and sports gambling was effectively banned in all states except Nevada. In 2019, just five years later, daily fantasy sports is a thriving business in most states,²¹⁷ and sports gambling can rapidly become a considerable moneymaker for professional sports.²¹⁸ Therefore, the test must be revised in order to be applicable to the use of statistics and images used concurrently with data. The revised test would be as follows: Statistical information would be considered protected speech and beyond the scope of a right of publicity claim, unless the economic viability of the service using those statistics and images is “directly dependent” on the use of that information. If that is the case, then an athlete could successfully make a right of publicity claim against the seller of the statistical material. The fact that the information is “publicly available” or has “newsworthy

²¹³ See Conrad, *supra* note 21 (proposing a new test based on a presumption of First Amendment protection that creates a qualified privilege akin to the standard of defamation).

²¹⁴ *Id.* at 799-801.

²¹⁵ *Id.* at 806-09.

²¹⁶ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

²¹⁷ In 2018, daily fantasy sports generated an estimated \$3.2 billion in entry fees and approximately \$335 million in total revenue. See Dustin Gouker, *New Official Data: Daily Fantasy Sports Generated \$335 Million In Revenue In A Year*, LEGAL SPORTS REP. (June 18, 2018, 4:00 AM), <https://www.legalsportsreport.com/21627/ny-dfs/> [<https://perma.cc/RZF7-BW6G>].

²¹⁸ As of August 2019, the total handle for legal sports betting is over \$9.4 billion; revenues total \$588 million and tax receipts total over \$69 million. See *US Sports Betting Revenue And Handle*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/sports-betting/revenue/> [<https://perma.cc/TU9J-ZD2B>] (last updated Oct. 18, 2019, 1:51 PM); see also *How Much to Leagues Stand to Gain from Legal Sports Betting*, AM. GAMING ASS'N (2018), <https://www.americangaming.org/sites/default/files/Nielsen%20Research%20-%20All%204%20Leagues%20FINAL.pdf> [<https://perma.cc/BV6H-BZW6>].

value” becomes secondary. The use by a daily fantasy site or a gambling site is a form of monetizing the information for a business reason and therefore would be a prima facie example of bad faith by the crucial economic value of the use of the statistical information. Malice, as defined by the *New York Times* standard, would not be a necessary component as the intent would be shown by the nature of the use

How would this new test work? If it were applied to the facts in *Daniels*, the court would likely rule in favor of the former student-athletes, as it would be clear that the use of the statistics, coupled with their names and images, was clearly commercial and would override the “newsworthy value” or “incidental use” exceptions found in the state statute. This would be important in those states, like Indiana, that have broad right of publicity statutes. But it would equally apply to those states that have a more common law-based right of publicity. Not only would the use of the statistical information be within the scope of the commercial use, but it could induce large fantasy and gambling firms to conclude licensing agreements whereby the rights and duties of the parties would be clear. It may even lead to current student-athletes benefitting from the use of their names and statistics.²¹⁹ And it would likely increase the growing number of partnerships between the major sports leagues, amateur athletic organizations, and individual athletes with daily fantasy and gambling firms.²²⁰

This approach marks a return to the early right of publicity jurisprudence, particularly in regard to the use of statistics in sports games. The proposed standard may also extend the rationale of the Ninth

²¹⁹ While the NCAA currently bars student-athletes from receiving compensation from endorsements and sponsorships, that could change as a result of either ongoing or future antitrust litigation or state or federal laws. Recently, a federal district court upheld restrictions on such compensation. See *In re NCAA Grant-In-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058 (N.D. Cal. 2019). However, the California legislature passed, and the governor subsequently signed, a bill that will prohibit an athletic association, conference, or other group or organization from preventing a postsecondary educational institution (other than a community college) from participating in intercollegiate athletics as a result of its compensation of a student-athlete for the use of the student’s name, image, or likeness. See S.B. 206, 2019-2020 Leg., Reg. Sess. (Cal. 2019). Several other states are currently considering similar legislation. See Jabari Young, *Florida and NY push bills to compete with California’s NCAA ‘pay to play’ law*, CNBC (Oct. 24, 2019, 2:29 PM), <https://www.cnbc.com/2019/10/24/florida-and-ny-push-bills-to-compete-with-californias-ncaa-pay-to-play-law.html> [<https://perma.cc/6UFK-SZTH>]. Shortly after the passage of the California statute, the NCAA’s top governing board voted unanimously to allow college athletes to be compensated. At the time of publication, the NCAA’s three divisions have not crafted their own rules. See Jabari Young, *The NCAA will allow athletes to profit from their name, image and likeness in a major shift for the organization*, CNBC (Oct. 29, 2019, 1:50 PM), <https://www.cnbc.com/2019/10/29/ncaa-allows-athletes-to-be-compensated-for-names-images.html> [<https://perma.cc/Q5BZ-5DZK>].

²²⁰ See Thomas, *supra* note 135; see also King, *supra* note 135; see also *MGM Resorts International becomes official gaming partner of NBA*, *supra* note 209; see also McCann, *supra* note 142.

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Circuit in *Jabbar*,²²¹ as well as the approach found in the “hot news” copyright cases.²²²

A. *A Return to Palmer and Uhlaender?*

Although decided prior to *Zacchini* and the more “modern” era of right of publicity, the holdings in *Palmer*²²³ and *Uhlaender*²²⁴ constitute a stronger basis for a reasonable balance between the use of athletes’ names and statistics and First Amendment protection. Although they were decided before *Zacchini*, *Zacchini* failed to come up with a constitutional balance that would be practical in an era of game statistics and data. Using a commercially-based standard (one that must cross a constitutional immunity for noncommercially-based use) would be most effective in balancing the respective interests of the free expression and commercial rights of individuals.

B. *A Form of “Hot News”? : A Stretch for Sure, but Possible*

Although the idea of a protectable property right in general public information is a very limited one, it has been recognized in the past under what became known as the “hot news” doctrine. First addressed in the century-old *INS v. Associated Press* case,²²⁵ and well before modern broadcast and telecommunications media was created, it allows for the protection of factual, non-copyrightable information as a property right. The court in *NBA v. Motorola* crafted a limited, multi-part standard that requires: (1) the plaintiff generates or collects information at some cost or expense; (2) the value of the information is highly time-sensitive; (3) the defendant’s use of the information constitutes free-riding on the plaintiff’s costly efforts to generate or collect it; (4) the defendant’s use of the information is in direct competition with a product or service offered by the plaintiff; and (5) the other parties are able to free-ride on the efforts of the plaintiff.²²⁶ It could be argued that at least some elements of the *Motorola* standard may apply to commercially used athlete statistics for daily fantasy or up-to-the-minute gambling games.

Athletes could argue that “hot news” applies to fantasy sports and gambling sites. Applying the *Motorola* test to the facts of *Daniels*, there

²²¹ See *Abdul-Jabbar v. General Motors Corp.*, 75 F.3d 1391 (9th Cir. 1996).

²²² See *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997); see also *Metro. Opera Ass’n v. Wagner-Nichols Recorder Corp.*, 101 N.Y.S.2d 483 (Sup. Ct. 1950); see also *Agora Fin., LLC v. Samler*, 725 F. Supp. 2d 491 (D. Md. 2010); see also *Morris Commc’ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288 (11th Cir. 2004), *cert. denied*, 543 U.S. 919 (2004); see also *Applegate & Schermerhorn*, *supra* note 72.

²²³ See *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967).

²²⁴ *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970).

²²⁵ See *Int’l News Serv. v. Associated Press*, 248 U.S. 215 (1918).

²²⁶ See *Motorola, Inc.*, 105 F.3d at 852-53.

is a valid argument that, because the value of the statistical information can be time-sensitive, it falls within the ambit of “hot news” and would therefore be eligible for protection as a property interest. Admittedly, other components of the test would be harder to apply, and they would have to be tweaked or altered to apply to the use of statistical information. For example, under the *Motorola* test, the use of the information must constitute “free-riding” on the plaintiff’s efforts to generate or collect it. In the case of the use of athlete statistics, FanDuel was utilizing the particular statistics of athletes for free, in a way that suggests the free-riding in *Motorola*. Furthermore, if the statistics employ biometric activities and information, the free-riding argument could be even more compelling due not only to the proprietary interest, but to the privacy aspect of the information as well. Finally, the use of the statistics and images may not “directly compete” with a rival product or service, as laid out in *Motorola*. That element would be more challenging to prove, unless it could be claimed that the athlete sold or utilized their statistics in an exclusive manner to another firm.

C. “Predominant Purpose” in Constitutional Clothing?

When the Supreme Court decided the landmark *New York Times* case, it not only created a new constitutionalized standard for defamation but also redefined the presumptive elements needed to make a prima facie case. Under common law, defamation was presumed if the statement of fact, “of and concerning” the plaintiff, was false and damaged the plaintiff’s reputation.²²⁷ In certain circumstances, the damage to the plaintiff’s reputation was presumed, and it was up to the defendant to prove that the statement was true.²²⁸ After *New York Times*, though, there was presumptive immunity for false statements made about public figures unless “actual malice” could be shown.²²⁹ For non-public figures, a

²²⁷ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 262-64, 267 (1964).

²²⁸ *Id.* at 278 (“Once ‘libel *per se*’ has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars.”). Additionally, in libel *per se* cases, where the defamation is in written form, most states allow damages to be presumed. In the case of slander (oral defamation), damages had to be proven unless the slander was “*per se*”—one of four categories that falsely (1) alleged that a person has a loathsome disease; (2) impugned the chastity of a woman; (3) charged a person with a serious crime; or (4) injured a person’s reputation in their trade, business, or profession. See William L. Prosser, *Libel Per Quod*, 46 VA. L. REV. 839, 841-42 (1960). For an overview of the history of libel laws, see James Maxwell Koffler, *The Pre-Sullivan Common Law Web of Protection Against Political Defamation Suits*, 47 HOFSTRA L. REV. 153 (2018), <https://www.hofstralawreview.org/wp-content/uploads/2019/02/dd.1.koffler.pdf> [<https://perma.cc/5H5Y-HX2A>].

²²⁹ *N.Y. Times Co.*, 376 U.S. at 262-64, 267.

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baseline negligence requirement, rather than the traditional strict liability, was imposed by the Court in a subsequent case.²³⁰

This new approach for right of publicity challenges in cases involving the use of names, images, and, most importantly, statistical information about the plaintiff has three underlying components: the limited First Amendment immunity approach found in defamation, combined with the presumptive lower level of First Amendment protection found in commercial speech doctrine, and the application of the “predominant purpose” test. Although the “predominant purpose” test has been limited in its adoption, it works best in cases where statistics, names, and images are utilized because this standard focuses on the economic use of the materials. In other words, unless the purpose of the use is commercial, First Amendment immunity applies. Such uses do not have parody or otherwise artistic components and are therefore not transformative. They are not part of a news report; rather, they are part and parcel of the economic needs of the defendant (the fantasy sports or sports betting operation).

If the Indiana Supreme Court in *Daniels* had employed this approach, the result of the case would very likely have been different. The use of the former student-athletes' statistical information would (1) not be immunized by the First Amendment because (2) it was predominantly commercial (and subject to only an intermediate level of scrutiny under *Central Hudson*), and (3) its commercial use was its predominant purpose and was not incidental, but crucial to the operation of those websites. Therefore, any attempt to impose a statutory newsworthy value exemption would be inapplicable due to the commercial nature of the use. This last point is hardly novel as courts in different jurisdictions have stated that “the use of a person's identity for purely commercial purposes, like advertising goods or services or the use of a person's name or likeness on merchandise, is rarely protected [by the First Amendment].”²³¹

The Supreme Court of Missouri's ruling in *Doe v. TCI Cablevision* was the first and most significant ruling using the predominant purpose test. The court had to deal with the expressive speech issues implicated by a comic book and related merchandise that used the nickname of a professional hockey player as the name for its villain.²³² The court found

²³⁰ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (“We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”).

²³¹ See *Doe v. TCI Cablevision*, 110 S.W.3d 363, 373 (Mo. 2003); see also *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1397-99 (9th Cir. 1992); see also *Midler v. Ford Motor Co.*, 849 F.2d 460, 462-64 (9th Cir. 1988).

²³² *Doe*, 110 S.W.3d at 371-74.

that the publisher's main reason for using the athlete's name was to exploit the commercial value of his identity. For cases involving both expressive and commercial use, the court crafted the aforementioned balancing test to determine whether the use was "more commercial" or "more expressive."²³³ With the use of athletes' statistics and data (plus the use of names and images to personalize them), the predominant use test, together with a more overarching constitutional blueprint, is an easier and more effective way to protect the proprietary rights in players' statistics.

The flexibility of the test is also apparent in its application because the new standard would result in a different ruling in the case involving computer-generated avatars, as noted in an earlier article—and the results would not be inconsistent.²³⁴ In other words, the proposed standard is not a new limitation on First Amendment rights; rather, it is more realistic and use-specific way of measuring the economic rights of a person based on the commercial use of the indicia of that person's identity.

CONCLUSION

The use of statistical data is a crucial cog in the business model of daily fantasy sites and sports gambling. As these businesses expand, a uniform constitutionalized test will be the best method to determine the rights of athletes in their statistical information used in conjunction with their names and likenesses. Such a standard is the most effective way to resolve the problematic ruling in *Daniels* and, more fundamentally, to fill in the gaps found in *Zacchini*.

Because of the paucity of right of publicity rulings involving statistics and the growing evolution of statistics as the commercial backbone of certain sports business activities, applying the right of publicity to statistics is admittedly challenging. Statistical information does not involve an individual's image or likeness or sound; it does not constitute a type of commercial advertising for a daily fantasy or gambling product. Rather, it is information publicly available and used as a basis for picking a fantasy team or making a bet on a gambling site (whether brick and mortar or online). It often centers on public information that can be taken from newspapers, magazines, broadcast and cable outlets, and the internet.

²³³ *Id.*

²³⁴ See Conrad, *supra* 21. While the use of those images in the EA video games did show similarities to the "real" athletes, the fact that their names were not found and that the use was a relatively small part of the overall game could necessitate another result. See also Hart v. Elec. Arts, Inc., 717 F.3d 141, 170 (3d Cir. 2013), *cert. dismissed*, 573 U.S. 989 (2014); see also Keller v. Elec. Arts, Inc., No. C 09-1967 CW, 2010 U.S. Dist. LEXIS 10719 (N.D. Cal. Feb. 8, 2010); see also *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013).

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The court in *Daniels* did not address the central issue of the predominantly commercial use of the statistics; rather it found a broad statutory exemption for information of newsworthy value. It therefore concluded that the statistical information was a “publicly available” resource and, in effect, public domain. But that conclusion misses the point. The *Daniels* court failed to grasp the importance of the commercial reasons for the use of the information. The use did not have newsworthy value, nor was it incidental. Under application of the direct commercial standard, the use becomes paramount. A standard that combines the “predominant purpose” test used by courts in Missouri with a constitutional balancing that accounts for the lower standard of protection afforded to commercial speech would be the best method to resolve these disputes—and, significantly, far easier to apply than the present helter-skelter approach.