EVERY TIME I CALL IT A GAME, YOU SAY IT’S A BUSINESS.
EVERY TIME I SAY IT’S A BUSINESS, YOU CALL IT A GAME.*

Jay R. Wampler**

I. INTRODUCTION

The symbolic nature and importance of sports within American culture is unequivocal.1 With several centuries of American history in the rearview mirror, a litany of issues and controversies surround sport, similar to current issues within American society, such as racism,2 gambling,3 and sexual orientation.4 However, one particular issue, the separation between professional and amateur sports, has seen “[f]orests of trees and lakes of ink” perish in an effort to establish clear boundaries.5

The distinction between a professional athlete and amateur athlete is somewhat tenuous. Amateurism and what it means to be an amateur athlete, like sports, mirror social and cultural constructions.6 The idea of amateurism relates

---

** J.D. candidate 2015 at the Salmon P. Chase College of Law at Northern Kentucky University. This article is dedicated to my wife, children, and parents whose support and encouragement made law school possible. Special thanks to Professor John M. Bickers, and the editors, members, and staff of the Northern Kentucky Law Review.

1. HARRY EDWARDS, SOCIOLOGY OF SPORT 90 (1973) (summarizing the entwinement between sport and American history, and explaining how sport is a quasi-religious institution).
2. See, e.g., John Branch, N.B.A. Bars Clippers Owner Donald Sterling for Life, N.Y. TIMES (Apr. 29, 2014), http://www.nytimes.com/2014/04/30/sports/basketball/nba-donald-sterling-los-angeles-clippers.html (explaining that Mr. Sterling was banned because of racial statements); Michael Crittenden, Senators Urge NFL to Change Redskins’ Name, WALL ST. J. (May 22, 2014, 11:52 AM), http://blogs.wsj.com/washwire/2014/05/22/senators-urge-nfl-to-change-redskins-name (explaining that the name of the team is a racial slur and thus, needs replacing).
back to the Greeks, and definitions indicate “that an amateur is one who engages
in sport as pastime . . . or for the glory of sport alone, and not for financial gain.”

In contrast to amateur athletes, a professional athlete is involved in sports as a
vocation or full-time job, and therefore, receives payment for his or her
employment. However, the fact that college student-athletes, who are classified
as amateurs, receive scholarships and other financial incentives in return for the
privilege to participate in intercollegiate sports only blurs the lines between
professionals and amateurs. Today, as the lines become hazy, the two most
recognizable organizations that champion the idea of amateur sport and promote
amateur athletes are the United States Olympic Committee and the National
Collegiate Athletic Association (NCAA).

The NCAA began in 1906, after Teddy Roosevelt called a White House
meeting to investigate the rules of football and offered direction toward
promoting amateurism. Since adopting the name “NCAA” in 1910, the
NCAA’s purpose has been to promote amateur athletics and intercollegiate
sports, even though its “most important aspect is its authority to make and
enforce rules.” Today, the NCAA has over 1,000 voluntary member schools
and is an unincorporated association of colleges, universities, athletic
conferences, and sports organizations. The NCAA’s mission has evolved to
safeguard the development and interests of student-athletes.

In the last two decades, the NCAA has received negative publicity for the
seemingly arbitrary nature of its BCS football bowls, inconsistent rulings on

7. Id.
individual who is employed as an athlete”); see also Benjamin A. Menzel, Comment, Heading
Down the Wrong Road? Why Deregulating Amateurism May Cause Future Legal Problems for the
9. See generally Erin Abbey-Pinegar, Note, The Need for a Global Amateurism Standard:
International Student-Athlete Issues and Controversies, 17 IND. J. GLOBAL LEGAL STUD. 341
(2010).
10. Discussion of the United States Olympic Committee’s promotion of amateurism is outside
the scope of this note.
11. Koller, supra note 6, at ii.
12. Rodney K. Smith, A Brief History of the National Collegiate Athletic Association’s Role in
14. Id.
15. Id.
16. NCAA, http://www.ncaa.org/about/who-we-are/offic e-president/offic e-president-mark
(last visited July 22, 2014) (emphasis added).
17. Kathryn Young, Note, Deconstructing the Façade of Amateurism: Antitrust and
Intellectual Property Arguments in Favor of Compensating Athletes, 12 VA. SPORTS & ENT. L.J.
Thomas, BCS Bowl Games: 2012 National Championship Will Spell the End of the BCS Era,
BLEACHER REPORT (Dec. 10, 2011), http://bleacherreport.com/articles/976823-201-1-national-
championship-will-spell-the-end-of-the-bcs-era; Why does BCS Suck?, RIPBCS,
infractions and subsequent punishments, \(^{18}\) and the questioning of amateurism. The negative publicity is not just from the media or press, but also from a Pulitzer-Prize winning author, lawyers, and Congress. \(^{19}\) Like many for-profit businesses, the NCAA has felt the ire of how it makes money. \(^{20}\) The NCAA receives criticism for being a hypocritical entity because a portion of its profit and revenue stem from licensing “[the] use [of] student-athletes’ names and identifying characteristics in the promotion of various products” \(^{21}\) to third-party entities, such as fantasy sports providers. Thus, the NCAA states it safeguards the development and interest of student-athletes even though it profits by “condoning the exploitation of student-athletes, [who are] the same people it was formed to protect.” \(^{22}\)

An outbreak of academic research and sports commentary continues regarding the legal implications, such as publicity rights, intellectual property rights, and First Amendment rights, associated with the use of collegiate player likenesses. \(^{23}\) Central to this debate is whether fantasy sports providers and the NCAA must pay a licensing fee and monetary damages to the student-athletes for use of their names, statistics, and records without their consent and authorization, in conjunction with a fantasy sports game. \(^{24}\) This note focuses upon the probability that both the NCAA and fantasy sports providers must compensate student-athletes for violating multiple legal rights.

---


22. Id.


24. Id.
II. FANTASY SPORTS

In 1979, Dan Okrent, a publishing consultant for Texas Monthly, and ten friends created Rotisserie Baseball, which was the forerunner to modern day fantasy sports. From the humble beginnings of backroom conversations among friends, today, “[m]ore than 33 million Americans play fantasy sports, which has mushroomed into a $3.3 billion industry.” Fantasy sports has multiple variations; traditionally, however, a participant drafts a team of athletes, either professional or collegiate depending upon the sport, whose success is determined by the statistics generated by those athletes. Because of the size of the ever growing fantasy marketplace, fantasy sports are categorized based upon multiple attributes, such as (1) sport, (2) allocation of players, (3) season length, and (4) cost. However, critical to one’s understanding of fantasy sports is “[that] fantasy sports isn’t really about sports. It’s about [the] data.” The ascension of fantasy sports intersects with the rise of sports analytics, “a once-obscure, nerd-populated corner of the sports world” that has come to the forefront in recent years. This mainstream exposure was brought to light in the Michael Lewis book turned movie “Moneyball,” which demonstrated the Oakland Athletics baseball team’s use of statistics to measure and acquire players.

At present, the popularity and growth of fantasy sports are without end. Participants, or “fantasy addicts,” cannot resist the need to get their “fix” by updating their teams or reviewing statistics for trade ideas. Modern sports fans spend as much time predicting the outcomes of fantasy sports as business investors and stock traders spend analyzing the stock market. The primary demographic of fantasy sports participants is males ages 18 – 49. One fantasy sports enthusiast, Cory Albertson, using statistical tactics similar to a hedge-fund

30. Id.
31. Id.
manager, took home over $100,000 in one day.\textsuperscript{35} Another enthusiast, Drew Dinkmeyer, quit a seven-year stint as a senior investment analyst to become a professional fantasy sports participant and indicated his earnings were relatively equivalent to his previous salary.\textsuperscript{36} In 2013, the fantasy sports provider, FanDuel, offered $150 million in prizes to participants, thus adding to the allure of this burgeoning industry.\textsuperscript{37}

Fantasy sports are not just games played online, but also big business. Fantasy sports providers, via Internet websites, generate revenue from advertising, subscriptions, and fees.\textsuperscript{38} Within the past two years alone, corporations have infused the industry with more investments than in the history of fantasy sports.\textsuperscript{39} The Fantasy Sports Trade Association (FSTA), founded in the late 1990s, serves as a forum between corporate America and the fantasy sports industry.\textsuperscript{40} For prospective investors, knowing that revenues continue to rise for fantasy sports providers, such as DraftKings, FanDuel, U-Sports, Yahoo!, and CBS Sports, adds to continued industry support.\textsuperscript{41} While a vast majority of fantasy sports participants partake in free fantasy leagues, about 65% of participants join leagues or tournaments that require fees.\textsuperscript{42} The majority of fantasy leagues focus on professional sports, such as the NFL, NBA, and MLB; however, there has been an influx of collegiate fantasy games in recent years.\textsuperscript{43} The collegiate sports games are essentially identical in structure and format to professional offerings.\textsuperscript{44} According to FSTA, “in 2012, fantasy sports participants spent over $3.38 billion on products, services, and entry fees.”\textsuperscript{45} As an example of this expansive and lucrative industry, “CDM Fantasy Sports (CDM) has less than a five percent market share and has annual gross revenues of approximately $8.5 million.”\textsuperscript{46}

A cursory examination of the fantasy sports industry shows that there are four dominant fantasy sports provider websites: Yahoo!, ESPN, Fox Sports, and CBS Sports.\textsuperscript{47} The remainder of the industry is divided among a myriad of

\begin{footnotesize}
\begin{enumerate}
\item See Reagan, supra note 26.
\item See Matuszewski, supra note 27.
\item Id.
\item Id. (interview of past FSTA President Paul Charchian, explaining the growth of fantasy sports).
\item Id.; accord Fantasy Sports Trade Association, supra note 34.
\item See Reagan, supra note 26; accord Matuszewski, supra note 27; Edelman, supra note 28.
\item Fantasy Sports Trade Association, supra note 34.
\item See Cade, supra note 38 (detailing the number of players playing the different games).
\item Gerton, supra note 34, at 157.
\item See Matuszewski, supra note 27.
\end{enumerate}
\end{footnotesize}
smaller organizations and entrepreneurial entities, of which FanDuel and U-Sports are the most popular.\textsuperscript{48} Even the video game giant, Electronic Arts, entered the fray of fantasy sports through providing an “analyzer tool,” which allows fantasy sports participants to optimize their teams.\textsuperscript{49}

The dollars make solid business sense. In 2013, Yahoo! accrued between $60 - $120 million in profits just from its fantasy sports offerings.\textsuperscript{50} In 2013, CBS Sports offered its first paying leagues for college football, with an introductory price of $14.99 for a participant’s first team.\textsuperscript{51} The fees for additional services only add to that price point.\textsuperscript{52} From 2007 – 2012, fantasy sports grew 12% annually and brought an estimated $397 million - $1.1 billion in revenue for providers.\textsuperscript{53} The economic impact of this simplistic business or game has fantasy sports in the rarefied air of major Fortune 500 organizations, such as Burger King, Bose, and Mary Kay.\textsuperscript{54}

Fantasy sports’ meteoric rise has not occurred without its share of legal challenges. The first confrontation for the industry was overcoming the perception that fantasy sports is just a version or form of Internet gambling. Within most states, sports gambling is illegal\textsuperscript{55} and the penalties are harsh.\textsuperscript{56} However, fantasy sports avoided the “Scarlet Letter-like” stigma of gambling in 2006, with Congress’ passing of the Uniform Internet Gambling Enforcement Act (UIEGA).\textsuperscript{57} The UIGEA carves out a specific provision excluding fantasy sports from illegal gambling.\textsuperscript{58}

After the fantasy sports industry overcame the gambling issue, the next legal attack challenged the use of another’s intellectual property rights and publicity rights for using a player’s likeness without permission.\textsuperscript{59} Yet again, the fantasy sports industry came out on top, in the seminal case of \textit{C.B.C Distribution v. Major League Baseball Advanced Media}, where the court held that use of
professional athletes’ likenesses without consent or authorization was appropriate because that information is public. However, the fantasy sports industry, like the NCAA, is not completely in the clear on the issue of publicity rights, because C.B.C. Distribution dealt with only professional athletes rather than collegiate players. Thus, fantasy sports providers rely upon C.B.C. Distribution to stand for the proposition that because professional athletes could not prevent the use of their likenesses by fantasy sports providers, then the same rule should apply to amateur athletes.

III. PROSPECTIVE CAUSES OF ACTION AND SUBSEQUENT ARGUMENTS

“War is one way to solve disputes.” However, using the legal system is a more civilized manner to resolve conflicts. Nonetheless, the legal system draws many comparisons to combat, and thus, studying or learning from military strategists such as Sun Tzu, Carl Von Clausewitz, Thomas “Stonewall” Jackson, or Alexander the Great is not uncommon. Thus, when anticipating potential litigation, such as the question posed, an attorney like a warrior should be prepared for the enemy’s attack. Therefore, the NCAA and fantasy sports providers need to prepare and plan to litigate the following prospective causes of action brought by student-athletes.

A. Violation of Privacy Rights

In the late 1800’s, Samuel Warren and Louis Brandeis first discussed privacy rights in a Harvard Law Review article. The authors opined that “people have a right to privacy in its basic sense,” which is the right to protection from “publicly airing one’s dirty laundry.” However, the genesis of this right was not without the realization that a right to privacy is not absolute. Furthermore, the right to privacy was understood to be part of common law, not necessarily a property

60. Id. at 823-24 (holding that the use of professional athletes’ likeness is public, and therefore not infringed).
61. See Chamberlin, supra note 21; see also Gerton, supra note 34; see generally Karcher, supra note 46; Bill Cross, The NCAA as Publicity Enemy Number One, 58 U. KAN. L. REV. 1221, 1223 (2010) (explaining the position that the NCAA and fantasy sports might have legal problems with publicity rights of amateur athletes’ likenesses).
62. Chamberlin, supra note 21, at 556.
64. Id.
65. Id.
68. Id.; accord Chamberlin, supra note 21, at 561 (citation omitted).
right or a tort; however, as time advanced this distinction became uncertain. In 1928, after twelve years as a member of the Supreme Court of the United States, Justice Louis Brandeis wove the idea of privacy rights into the fabric of the Court by authoring a dissenting opinion about an individual’s right of privacy. However, not until three decades later, in Griswold v. Connecticut, did the majority of the Supreme Court of the United States recognize the right of privacy, albeit concluding that this right stemmed from other specifically stated rights. In general, cases defining the reaches of the right of privacy focus upon three areas: (1) autonomy to make decisions, (2) government surveillance, and (3) government collection of information.

The issue at bar does not fit squarely into any of these categories; however, an argument is plausible. Consider the Buckley Amendment to the Family Educational Rights and Privacy Act (FERPA) of 1974. In general, the Buckley Amendment prohibits release of a student’s educational records by any educational agency or institution receiving federal funds. However, do educational records include sports records while in pursuit of an education?

If a court considered this issue, review of the plain language of the statute might be necessary, using the rules of statutory construction. Here the pivotal phrase under scrutiny would be “education records.” FERPA defines education records as “those records, files, documents, and other materials which (i) contain information directly related to the student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.” FERPA’s inclusion of the phrase “other materials” makes the definition ambiguous. One might argue that “other materials” include driving records or high school academic records within a collegiate admissions application. However, another interpretation might include athletic or sports records, which directly identify the student-athlete by name, and both the

70. See Chamberlin, supra note 21, at 561-63 (explaining how eventually the right to privacy merged into Prosser’s version of invasion of privacy in the Restatement (Second) of Torts).
71. Id.
72. See Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis, J. dissenting) (“[E]very unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.”).
78. Id.; see also Paul J. Batista, Student Athletes and the Buckley Amendment: Right to Privacy Does Not Include Right to Sue, 14 MARQ. SPORTS L. REV. 319, 320 (2004).
This interpretation falls plainly under the umbrella of the definition.

However, as with many canons of statutory construction, an act’s definitions are more than just the plain meaning of the language itself, but also the combination of the context and legislative history. The “purpose of the [Buckley Amendment within FERPA] is . . . to assure parents of students . . . access to their education records and to protect such individuals’ rights to privacy by limiting the transferability of the records without their consent.”

Therefore, some parents of student-athletes who are not yet eighteen, but still playing in college athletics, might have a valid argument that fantasy providers are using the educational records, i.e., athletic records, without parental or student consent. However, this group of student-athletes, those under eighteen, would most likely be a small fraction of the overall student-athlete population.

Thus, even though the argument could be made it appears to be a losing argument for the student-athletes because enumerable collegiate athletic departments publish media guides and game day statistics, in addition to the broadcast and radio companies that report and publish information concerning student-athlete competitions. To date, no student-athlete has sued his or her own educational institution, the NCAA, or a third-party organization for publishing this information as a violation of his or her privacy rights. After all, publishing the statistics helps an athlete in the selection process towards post-season honors, such as All-American or Academic All-American. Therefore, this is a foolish argument, and as such, an imprudent course of action for student-athletes.

B. Violation of Intellectual Property Laws

The notion of privacy, as initially offered by Warren and Brandeis and later classified as “invasion of privacy” in Prosser’s Restatement (Second) of Torts, laid the foundation for the next expansive and similar right, the right of publicity.

The modern view is that the right of publicity exists under common

---


82. See generally Goodman, supra note 79.


85. Chamberlin, supra note 21, at 564.
law in every state. Today, the national nature of the right of publicity is well established, with highly publicized cases concerning the issue gaining countrywide media attention, and inclusion within significant legal treatises. The metamorphosis of this right has evolved from a simplistic notion of privacy to the legal complexities abounding within intellectual property.

Intellectual property laws include patent law, copyright law, trademark law, and right to publicity laws. Patent law has its origins dating to the Constitution and, in general, relates to technological innovations. A patent is a type of intellectual property protection granted by the federal government to an inventor “to exclude others from making, using, . . . or selling a particular invention.” Courts have already given fantasy sports victories by holding that certain aspects of fantasy sports games are patentable. Meanwhile, copyright law relates to content and has its roots in the Constitution. A copyright protects “original works of authorship fixed in a tangible medium of expression.” While a copyright covers both published and unpublished works, it does not protect “facts, ideas, systems, or methods of operation.” In general, fantasy sports providers do not need to worry about copyright problems because player statistics are factual and considered part of the public domain. However, bear in mind that when the court in C.B.C. Distribution reached this conclusion, that statistics are within the public domain, the defendants were professional athletes rather than student-athletes. Next, trademark law is a form of intellectual property protection that provides consumers with a sense of certainty about a particular product’s source, and allows holders to “develop and control the goodwill associated with a given product.” A trademark law claim is a federal

88. See generally RESTATEMENT (SECOND) OF TORTS § 652(c) (1977); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).
89. Chamberlin, supra note 21, at 564.
91. UNITED STATES PATENT AND TRADEMARK OFFICE, supra note 90.
claim, brought under the Lanham Act where “a person uses (1) any reproduction . . . of a mark; (2) without the registrant’s consent; (3) in commerce; (4) in connection with the sale, offering for sale, distribution or advertising of any goods; (5) where such use is likely to cause confusion, or to cause mistake or to deceive.” 98 To date, neither fantasy sports providers nor student-athletes have brought actions for trademark infringement via the Lanham Act, as there continues to be disagreement among the circuits about where depreciation of a trademark holder’s goodwill ends and fair use begins. 99

Last, the legal phrase and subsequent right, the “right of publicity,” has its roots in sports. The Second Circuit in Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc. first coined the phrase “right of publicity”. 100 The Haelan court found that a baseball player has more than just the right to freedom from excessive public scrutiny, but also the right to the publicity value of his own personal identifying features, such as his photograph. 101 One court even extended the right of publicity to include protection of a professional athletes’ sports performance statistics. 102 In the decades since Haelan, celebrities and professional athletes have brought successful lawsuits for violations of their right of publicity. 103 In general, courts have found that public figures, such as actors and professional athletes, spent a substantial amount of time, talent, and money in order to build their fame, and therefore have a property right in that fame, which bars others from trespassing upon their names, likenesses, or any other unauthorized usage. 104

This intellectual property right “essentially provides an individual with the exclusive right to control the commercial value and exploitation of his or her own photograph, name, likeness, other personal characteristics . . . and sports performance statistics.” 105 In order to prevail on a right of publicity claim, commonly referred to as “appropriation,” one must prove the following four elements by a preponderance of the evidence: (1) use or appropriation of

100. Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).
101. Id.
104. Chamberlin, supra note 21, at 565.
plaintiff’s identity by defendant; (2) for the defendant’s benefit; (3) without consent of the plaintiff; and (4) resulting injury.\footnote{106}

In 1977, the Supreme Court of the United States had its only opportunity, thus far, to use its pen and power to address the concept of a protectable right of publicity in the case of Zacchini v. Scripps-Howard Broadcasting Co.\footnote{107} Hugo Zacchini, a human cannonball, sued the Scripps-Howard Broadcasting Co. for unlawfully appropriating his professional property.\footnote{108} Scripps-Howard had filmed Zacchini’s performance at an Ohio county fair and showed the footage on its evening news program.\footnote{109} In defense, Scripps-Howard claimed First Amendment privilege.\footnote{110} Ultimately, “in a 5-4 decision, the Court ruled for Zacchini, declaring that the First Amendment did not give Scripps-Howard the right to appropriate Zacchini’s ‘entire act.’”\footnote{111} Justice White, writing for the majority, reasoned that the goals of publicity are “closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation.”\footnote{112} However, even though Zacchini was a win for publicity rights, the holding appears to be restricted to cases involving news media defendants.\footnote{113}

In general, the right of publicity issue has two public policy rationalizations: (1) controlling the impact of misappropriation on a plaintiff’s reputation and (2) preventing unjust enrichment by the appropriators.\footnote{114} The first justification tends to disfavor non-celebrities, such as student-athletes, because if the plaintiff does not have a public reputation then it cannot be damaged by misuse. However, the second justification, preventing unjust enrichment, favors any plaintiff whose identity helps the defendant-appropriator make money, regardless of status. Thus, a question arises whether a plaintiff must attain a threshold level of celebrity or fame before stating a right of publicity claim.\footnote{115}

In considering the anticipated litigation, the parties would most likely bring to the attention of the court (1) a defense of privilege under the First Amendment and (2) case law: Brown v. Entertainment Merchs. Ass’n,\footnote{116} C.B.C

\footnote{106}{
}

\footnote{107}{
}

\footnote{108}{
Id.
}

\footnote{109}{
Id.
}

\footnote{110}{
Id. at 564.
}

\footnote{111}{
}

\footnote{112}{
Zacchini, supra note 107, at 573.
}

\footnote{113}{
Baird, supra note 111, at 1189 (explaining that “[t]he Court’s ultimate holding in Zacchini is sufficiently narrow that it does not strictly foreclose state courts from finding in their own law the proper accommodation of public access and performer incentive.”).
}

\footnote{114}{
}

\footnote{115}{
Cross, supra note 61, at 1228.
}

\footnote{116}{
}
C. Constitutional Defense

Even though the defense of privilege under the First Amendment was restricted in Zacchini, the argument was not foreclosed. Thus, fantasy providers might proffer two defense arguments under the First Amendment: (1) fantasy games are afforded protection because they are entitled to free expression in a similar context to video games; and (2) fantasy providers are protected because the right of publicity must give way to the public right to be informed on matters of public interest and concern.

First, fantasy sports providers might attempt to draw a comparison between fantasy sports games and video games. Generally, “a work that deviates from reality is likely to be considered expressive, and thus afforded First Amendment protection.” In Brown, the Supreme Court of the United States recognized that video games are entitled to First Amendment protections of free speech. To support this position, the Court analogized the protections that video games receive to those of books, plays, and movies, because video games communicate ideas and contain features distinctive to the medium, such as interaction within a virtual world. In general, proponents of fantasy games highlight the similarities to strategy and simulation video games, where the gamer arranges the pieces or interactive parts and then watches the outcome based on some computational model. In addition, fantasy game advocates denote the similarities with how video games and fantasy games permit gamers to have control and make decisions, which effect the outcome. However, one major distinction is that video game outcomes are often the result of computer programming whereas fantasy games use real-world statistics to determine the outcome. Furthermore, fantasy sports games lack a plot, dialogue, music, or even characters, which Justice Scalia offered as evidence of being familiar

---

117. C.B.C. Distrib., supra note 96 at 818.
119. Uhlaender, supra note 102, at 1277.
122. Zacchini, supra note 107 at 563.
123. Cross, supra note 116, at 1230.
125. Id.
127. Id.
128. Id.
literary devices, which communicate ideas. Instead, collegiate fantasy sports games communicate ideas, commonly which participant won that week’s game, via real-world statistical data. The athletic statistics are from real-world student-athlete performances, rather than fictional characters. Here, student-athletes could ask a court to take judicial notice of the legal idea of “transformation,” as seen in *Kirby v. Sega of America, Inc.*, where the court held that “the ‘transformative’ differences between a real-life pop star and a video game character were enough to validate Sega’s First Amendment defense.”

Unlike *Kirby*, student-athletes can argue that there is no transformative difference, as fantasy providers use the actual photographs, names, likenesses, and statistics of the players. Thus, there is no transformation and fantasy providers should not be entitled to protection under the First Amendment. In the end, this argument is a close call because there are solid arguments that fantasy games are similar to video games and counter arguments against; however, most likely courts will consider the use of real-world statistical data, lack of familiar literary devices, and lack of transformation too large a leap in logic to conclude that fantasy games are equivalent to video games. Therefore, courts would presumably deny First Amendment protection to fantasy sports providers.

The second argument for protection under the First Amendment is that the right to publicity must give way to the public’s right to be informed concerning matters of public interest. Fantasy providers and the NCAA might argue that sports statistics have long been reported, published, and circulated. “Newspapers and other media outlets have been publishing box scores from sporting events for over a century without having to pay any type of licensing fee to the league, teams, or athletes involved in the underlying games.” With today’s Internet and mobile digital age in full bloom, sports statistics are published and readily retrieved at virtually all hours of the day. However, lethal to the contentions of fantasy providers and the NCAA is that neither fall under the narrow lens of news media defendants, which was part of the *Zacchini* holding. *Zacchini* stands for the proposition that a person is entitled to reap the rewards of his endeavors. Therefore, while some courts might be willing to dismiss this defense altogether, most courts generally prefer to resolve matters at hand and thus might stay a decision on this second defense argument in order to address the true merits of the conflict.

133. *Id.*
134. *Zacchini, supra* note 107, at 563.
135. *Id.*
D. Examination of Case Law

When offering case law for the court’s consideration, fantasy providers would undoubtedly ask a court to begin with the holding in *C.B.C. Distribution*. To date, *C.B.C. Distribution* is the only case to address the right of publicity specifically in the context of fantasy sports. In *C.B.C. Distribution*, the Eighth Circuit addressed a claim brought by the Major League Baseball Players Association and Major League Baseball Advanced Media against C.B.C., a parent company to CDM, which was a fantasy sports provider. C.B.C. used players’ names, biographical information, and statistics in their fantasy products, in exchange for fees paid by its customers. Initially the case appeared to be a win for the players, as the Eighth Circuit found that C.B.C. did use the players’ identities for a commercial profit, thus, violating the players’ rights under the state publicity rights law.

In *C.B.C. Distribution* the court relied upon the *Gionfriddo* case, where retired professional baseball players sued Major League Baseball for including the players’ names, photographs, and performance statistics in World Series game programs, baseball video documentaries, and MLB website pages. The *Gionfriddo* court held that the First Amendment protected the use. However, the court in *C.B.C. Distribution* ultimately found that the First Amendment considerations must prevail over the state publicity right claims because the players’ names and statistics were available in the public domain, thus, giving fantasy sports providers a critical win.

*C.B.C. Distribution* gave fantasy sports providers unbridled control to use the names and statistical information of professional athletes for commercial gain. Thus, logic alone leads one to understand how fantasy sports providers would wish to use the holding in *C.B.C. Distribution* in prospective litigation brought by student-athletes.

In seeking to distinguish *C.B.C. Distribution* from this matter, student-athletes would indicate that they are not professionals and thus, do not get paid, pursuant to NCAA bylaws. Central to this distinction is how the Eighth Circuit examined how the right of publicity is intended to protect economic interests.
Student-athletes might point out that the Eighth Circuit found it significant that “major league baseball players are rewarded, and handsomely, too, for their participation in games and can earn additional sums from endorsements and sponsorship arrangements.”\(^{146}\) Thus, another court might be willing to stop this commercial exploitation if the victims are amateurs who are not “rewarded separately for their labors.”\(^{147}\) Furthermore, student-athletes could argue that collegiate athletics are not “professional baseball – America’s national pastime” and thus, a separate standard should apply in this situation.\(^{148}\) The major counter argument to this position is that student-athletes receive compensation in the form of athletic scholarships, which permit the athletes to reap the reward of a college degree in exchange for athletic performance.\(^{149}\) However, that argument seems more like a contract for the education and athletic performance, rather than the overall prohibition of receiving compensation for use of athletes’ likenesses.

Student-athletes might also have a strong argument to refute the holding in \textit{C.B.C. Distribution}, through the analogous case, \textit{Uhlaender}, which the Eighth Circuit explored.\(^{150}\) The \textit{Uhlaender} case did not involve fantasy sports; however, it dealt with a close cousin or precursor to fantasy sports – fantasy table games.\(^{151}\) In \textit{Uhlaender}, professional baseball players sued a table game manufacturer that, without consent, created a baseball strategy table game that contained 520 player cards that each featured an MLB player’s name, his team, his position, his uniform number, and his most recent performance statistics.\(^{152}\) Today’s fantasy sports games are remarkably similar to the table game in \textit{Uhlaender} because fantasy sports games use the same descriptive information on player profiles and often rank players based on the number of fantasy points the player has earned or is expected to earn.\(^{153}\)

The legal issue in \textit{Uhlaender} was whether the players’ names and performance statistics used in the table games constituted the players’ “public personalities” or “identities.”\(^{154}\) In \textit{Uhlaender}, the court enjoined the defending game manufacturer and held that, “a celebrity has a legitimate proprietary interest in his public personality . . . embodied in his name, likeness, statistics, and other

\(^{146}\) \textit{Id.}
\(^{147}\) \textit{Id.}
\(^{148}\) \textit{Id.} at 823 (citing Cardtoons, L.C. v. Major League Baseball Players Ass’n, 95 F.3d 959, 972 (10th Cir. 1996)).
\(^{150}\) \textit{Uhlaender}, supra note 102, at 1277 (noting that the Eighth Circuit found for the athlete in \textit{Uhlaender} and the fantasy provider in \textit{C.B.C. Distribution}, however, the court did not expressly overrule its finding in \textit{Uhlaender} when it ruled on \textit{C.B.C. Distribution}).
\(^{151}\) Roberts, Jr., supra note 23, at 231.
\(^{152}\) \textit{Uhlaender}, supra note 102, at 1278.
\(^{153}\) Roberts, Jr., supra note 23, at 231-32.
\(^{154}\) \textit{Uhlaender}, supra note 102, at 1277-78.
personal characteristics.” Thus, under Uhlaender, a MLB player’s “identity” includes his name used in conjunction with his performance statistics. This is the keystone argument of student-athletes. The Uhlaender court did not appear to focus upon whether the athlete in question earned compensation; however, it was the mere use of the athlete’s likeness or identity that mattered. Thus, if a court is willing to stop the exploitation of student athletes, using the analysis under Uhlaender would indicate that student-athletes’ likenesses include their performance statistics. This type of finding would overhaul collegiate athletics as we have known it for the past century, but would finally require the NCAA and fantasy sports providers to be accountable for what appears to be unbridled pirating and profiteering of student-athletes.

The next series of cases that fantasy sports providers and student-athletes might offer are rights of publicity cases against the video game manufacturer Electronic Arts, Inc. Fantasy sports providers would prefer an outcome similar to that found within the Hart case. In Hart, a former college football quarterback brought a class action lawsuit against Electronic Arts for the misappropriation of his likeness. After a thorough explanation of the various intellectual property tests that the New Jersey court could apply, which are beyond the scope of this note, the end result was that the First Amendment shielded Electronic Arts.

However, as with many unsettled areas of the law, such as rights of publicity, student-athletes would point the court to the recent Keller case. The Keller case, which was brought in California by another former college football quarterback, contains an identical claim against Electronic Arts, for the misappropriation of player likenesses, but also includes these same allegations against the NCAA. While there are many interesting nuances and facts within the Keller case, the pivotal event was that Electronic Arts settled for $40 million, which was a groundbreaking outcome as it became the first time student-athletes and former-student-athletes received remuneration for a claim challenging their likenesses.

155. Id. at 1282.
156. Roberts, Jr., supra note 23, at 232.
157. Uhlaender, supra note 102, at1282-83 (“It is this court’s view . . . [t]hat identity, embodied in . . . name, likeness, statistics and other personal characteristics . . . is a type of property . . . It seems clear to the court that a celebrity’s property interest in his name and likeness is unique, and therefore there is no serious question as to the propriety of injunctive relief.”).
159. Hart, supra note 118, at 141 (holding that even though the intellectual property transformative use test was appropriate that the players’ identities and likenesses were shielded by the First Amendment).
160. Id.
161. Id.
162. Keller, supra note 120, at *1-2.
Few will know the true reason for the settlement; however, it presupposes that Electronic Arts’ case was not as strong, and this includes a defense with a case of persuasive authority, Hart. The remaining claims against the NCAA, in Keller, were merged into the O’Bannon case, where a former college basketball player sued the NCAA and others for the misappropriation of student-athlete likenesses and violations of antitrust.164

C.B.C. Distribution, Uhlaender, Hart, Keller, and other similar cases illustrate the multifaceted problems with the right of publicity, and the difficulty that courts have in resolving those issues. Nonetheless, fantasy sports providers are now on notice, as Keller opened the door to providing athletes with some form of remuneration for the blatant use of their likenesses by third-parties.

E. Violation of Antitrust Laws & Breach of Contract

Antitrust law is perceived as a complex body of specialized laws; however, in general, antitrust is a collection of federal and state government laws, which regulate the conduct and organization of business corporations, in an effort to promote fair competition for the benefit of consumers.165 The primary target of this allegation is the NCAA, as seen in the O’Bannon case.166 The “O’Bannon case boils down to the question of whether the NCAA can legally prevent athletes from earning money on their names and identities, which are plastered on everything from video games to jerseys to ESPN Classic broadcasts.”167

The NCAA, as previously indicated, sets forth the guidelines and bylaws with which student-athletes must comply in order to be eligible for participation within intercollegiate athletics.168 However, while the NCAA is the recognizable name, the Collegiate Licensing Company (CLC) manages the administration of the NCAA licensing program.169 Any organization wishing to do business with the NCAA or one of its member institutions must obtain a licensing agreement from the CLC.170 Yet student-athletes do not have interaction with the CLC, but rather with the NCAA or their college or university. In addition, the NCAA received harsh criticism for how it treats student-athletes, such as Illinois congressman Bobby Rush’s comparison of the NCAA to the mafia, and historian Taylor Branch’s analogy that the NCAA functions as a drug cartel and

164. O’Bannon, supra note 121 (holding that the NCAA’s rules and bylaws operate as an unreasonable restraint of trade, in violation of antitrust law).
166. See O’Bannon, supra note 121.
167. See Fainaru & Farrey, supra note 158.
168. Gerton, supra note 34, at 164.
170. Id.
prostitution ring. There is truth in these allegations, mostly in that once student-athletes sign up within the NCAA, their lives belong to the NCAA. The question is whether student-athletes actually have a contract with this monopolistic organization. Of course, the NCAA states there is no contract with the student-athletes. At present, Michael Hausfield, the attorney who represented the plaintiffs in the O'Bannon case took the NCAA to task on the issues of antitrust with a simple idea “[that] the people who run our games ought to play by the rules that govern society and industry.”

After the C.B.C. Distribution case, the NCAA did not act to stop the practice of selling licensing rights to gain profits from student-athlete likenesses, but merely insisted that it was beholden to the Eighth Circuit’s ruling. The NCAA may argue this failure to act was in the way it interpreted the C.B.C. Distribution as applying only to professional athletes rather than student-athletes. Notwithstanding, this potential interpretation, overall the NCAA’s failure to take action after this case reinforces the NCAA’s position to permit the continued exploitation of student-athletes. Nonetheless, this position undermines the NCAA’s implied duty of good faith and fair dealing in its contractual relationship with student-athletes. This action or more so, lack of advocating for student-athletes shows that the NCAA is a passive advocate for student-athletes. However, student-athletes deserve an advocate who is willing to do battle for their rights, rather than some cheap imitation that hides behind excuses and pockets profits on the side.

Student-athletes could raise an unjust enrichment argument against the NCAA because it profits from player names and statistics without offering compensation of some form to student-athletes. The counter argument is that student-athletes receive scholarships as consideration for their acceptance to play a particular sport at a collegiate institution. The student-athletes could rely upon antitrust law principles, which assert that preventing unjust enrichment by the theft of goodwill without pay serves no social purpose.

171. See Branch, supra note 19.
172. Id.
173. See generally Mueller, supra note 136; see also Cross, supra note 61, at 1232-34.
174. Cross, supra note 61, at 1237.
175. See Fainaru & Farrey, supra note 158.
176. Gerton, supra note 34, at 170.
178. Hart, supra note 120, at 141; see also Blondy, supra note 149.
179. Gerton, supra note 34, at 171.
Overall, the outcome on this issue is uncertain; however, after the ruling by the O’Bannon court in favor of student-athletes, the NCAA is exposed for what it truly is – “an emperor with no clothes.”180

IV. CONCLUSION

For years, college student-athletes have had the same outlook as the Mudville Nine did on the day Casey entered the batter’s box.181 This outlook is a feeling of despair or that somehow student-athletes had sold their soul by signing their letter of intent to a collegiate program and signing their eligibility form with the NCAA.182 However, in light of the recent settlement in Keller and the recent victory for student-athletes in O’Bannon, hope has returned to restoring some semblance of fairness within today’s modern landscape of amateurism. The use of college student-athletes’ names and statistics in fantasy sports leagues should be prohibited, or at least require payment to the student-athletes, which would overturn the popular view that fantasy sports providers have clung to since the outcome of C.B.C. Distribution. Given that the NCAA lacks the backbone and temerity to represent the rights of student-athletes and prevent their exploitation, then student-athletes must stand up for the principles of fairness and demand payment from fantasy sports providers. Even though “Mighty Casey” struck out, today’s fantasy sports providers should pay up, or otherwise they are living in a fantasy world.

180. Fainaru & Farrey, supra note 158; O’Bannon supra note 121 (holding that the NCAA’s rules and bylaws operate as an unreasonable restraint of trade, in violation of antitrust law).
181. See Ernest Thayer, Casey at the Bat, SAN FRANCISCO EXAMINER, June 3, 1888.