

2020

Raising the Stakes: The Battle Between the First Amendment and Athlete's Publicity Rights in the Wake of *Murphy v. NCAA*

Alexis Nicole Lilly

American University Washington College of Law

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/aubl>



Part of the [Constitutional Law Commons](#), [Entertainment, Arts, and Sports Law Commons](#), [First Amendment Commons](#), and the [Torts Commons](#)

Recommended Citation

Lilly, Alexis Nicole "Raising the Stakes: The Battle Between the First Amendment and Athlete's Publicity Rights in the Wake of *Murphy v. NCAA*," *American University Business Law Review*, Vol. 9, No. 1 (2020) . Available at: <https://digitalcommons.wcl.american.edu/aubl/vol9/iss1/4>

This Note is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *American University Business Law Review* by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

RAISING THE STAKES: THE BATTLE BETWEEN THE FIRST AMENDMENT AND ATHLETES' PUBLICITY RIGHTS IN THE WAKE OF *MURPHY V. NCAA*

ALEXIS NICOLE LILLY*

I. Introduction	103
II. Torts Illustrated.....	104
a. The Obsession with Fantasy Sports	105
b. The Right of Publicity Enters the Arena.....	106
c. The Different Tests	110
III. No Penalty for Sports Platforms	111
a. Inconsistent Tests Produce Inconsistent Results.....	112
b. Which Test Is Best?	114
c. The Right of Publicity Is an Economic One	117
d. Indiana Takes the Lead.....	118
IV. Play-by-Play Data Is the Solution	119
V. Conclusion	121

I. INTRODUCTION

Fantasy sports began in the 1960s, with the industry expanding each year since its inception.¹ Amongst those capitalizing on fantasy sports betting are FanDuel and DraftKings, two of the largest daily fantasy sports companies.²

* Technical Editor, *American University Business Law Review*, Vol. 9; J.D. Candidate, 2020, American University Washington College of Law. This piece would not have been possible without the invaluable editorial guidance of the *American University Business Law Review* staff. I would also like to thank my friends and family, especially my parents, for their love and support. Thank you for always encouraging me to follow my dreams, no matter how unrealistic they seemed.

1. FANTASY SPORTS TRADE ASS'N, *History of FSTA*, <https://thefsga.org/history/> (last visited Feb. 18, 2020).

2. Eric Ramsey, *The Week in Sports Betting: FanDuel and DraftKings Making All the Moves*, LEGAL SPORTS REP. (July 20, 2018, 2:15 PM), <https://www.legalsportsreport.com/22178/the-week-in-sports-betting-news-july-20/> (highlighting partnerships

Players and sports unions have long asserted that athletes have a publicity right and need to be fairly compensated for the use of their image and likeness in fantasy sports.³ Fantasy sports leagues argue that game statistics and player names are public information, and therefore the athletes have no right to compensation.⁴ Although courts have different tests to determine whether athletes have an overriding publicity right, their conclusions are largely the same — the First Amendment allows these platforms to use player information free of charge because the information is in the public sphere.⁵

The conflict heightened with the 2018 Supreme Court ruling in *Murphy v. National Collegiate Athletic Ass’n*,⁶ which legalized sports betting for states that enact appropriate legislation.⁷ While the battle between publicity rights and the First Amendment has been seemingly settled, the national legalization of sports betting presents a new challenge for athletes.⁸ Athletes and leagues can potentially capitalize on integrity fees, sponsorship deals, and in-game betting.⁹

II. TORTS ILLUSTRATED

Fantasy sports allow consumers to pick from a roster of professional athletes and create the ultimate team, typically picking players from different teams to combine the best players in each position.¹⁰ Each player earns points based on real-life performance, and the fantasy team with the most

between DraftKings and FanDuel and casinos).

3. Andrew Beaton, *Players Unions Join Battle Over Publicity Rights in Potential Sports-Betting Preview*, WALL ST. J. (May 18, 2018, 1:22 PM), <https://www.wsj.com/articles/players-unions-join-battle-over-publicity-rights-in-potential-sports-betting-preview-1526664138>.

4. *Id.*

5. *See, e.g., Daniels v. FanDuel, Inc.*, 109 N.E.3d 390, 394 (Ind. 2018) (specifying that players’ names, pictures, and statistics fall into a “newsworthy value” exception to Indiana’s laws or rights of publicity).

6. 138 S. Ct. 1461 (2018).

7. *Id.* at 1484–85.

8. Irwin Rajj et al., *Legalized Sports Gambling: Revenue Opportunities Following Murphy*, ALERTS & PUBLICATIONS: O’MELVENY & MYERS (Aug. 13, 2018), <https://www.omm.com/resources/alerts-and-publications/alerts/client-alert-legalized-sports-gambling-revenue-opportunities-following-murphy/#>.

9. *Id.*

10. Harold Stark, *What Is Daily Fantasy Sports and Why Is Everyone So Obsessed With It?*, FORBES (Dec. 9, 2017, 9:41 AM), <https://www.forbes.com/sites/haroldstark/2017/12/09/what-is-daily-fantasy-sports-and-why-is-everyone-so-obsessed-with-it/#458782e1be3a> (explaining that points are awarded based upon the performance of the players, and the consumers with the most points win in their league).

overall points at the end of the season wins.¹¹ These leagues often have a cash prize for the winner.¹²

DraftKings and FanDuel are the nation's leading fantasy sports platforms.¹³ Both platforms operate similarly — by allowing users to select a team and pick from a range of contests.¹⁴ In 2017, over fifty-nine million people in the United States and Canada participated in fantasy sports using just these two platforms.¹⁵

a. The Obsession with Fantasy Sports

These platforms recently contracted with major sports leagues like the National Hockey League (“NHL”) and the National Basketball Association (“NBA”) to use game data, team names, and logos on their sites.¹⁶ In fact, the NHL contracted with FanDuel after the Supreme Court's decision to legalize sports betting.¹⁷ These partnerships are estimated to be worth between six or seven million dollars.¹⁸ With the ease and accessibility of sports betting and fantasy sports, consumers now have the ability to place a range of bets, including single-play betting and daily fantasy sports.¹⁹

FanDuel and DraftKings run sportsbooks in states that have legalized sports gambling, widening the market for fantasy sports, especially to the

11. *Id.* (noting that fantasy sports are typically played between friends and co-workers).

12. *Id.*

13. Dustin Gouker, *FanDuel Vs. DraftKings — Who's No. 1 In Daily Fantasy and Sports Betting?*, LEGAL SPORTS REP. (Feb. 27, 2019, 3:00 PM), <https://www.legalsportsreport.com/3832/fanduel-or-draftkings/>.

14. FANDUEL, *This is How You FanDuel*, <https://www.fanduel.com/how-it-works> (last visited Feb. 18, 2020) (listing a number of available contests in a variety of sports); DRAFTKINGS, *It's Easy to Get Started*, <https://www.draftkings.com> (last visited Feb. 18, 2020) (displaying a number of different sports leagues in which a user can bet on).

15. FANTASY SPORTS & GAMING ASS'N, *Industry Demographics*, <https://thefsga.org/industry-demographics/> (last visited Aug. 19, 2019).

16. Zachary Zagger, *NBA Makes FanDuel New Sports-Betting Partner*, LAW360 (Dec. 18, 2018, 9:38 PM), <https://www.law360.com/articles/1112686/nba-makes-fanduel-new-sports-betting-partner>; Mike Esposito, *NBA and FanDuel Expand Partnership to Include Sports Betting*, FANDUEL (Dec. 20, 2018), <https://www.fanduel.com/theduel/posts/6251735-nba-and-fanduel-expand-partnership-to-include-sports-betting>.

17. Zachary Zagger, *NHL and FanDuel Reach Deal for Betting Partnership*, LAW360 (Nov. 5, 2018, 7:57 PM), <https://www.law360.com/articles/1099014/nhl-and-fanduel-reach-deal-for-betting-partnership>.

18. Kristi Dosh, *NFL Players Association Inks Licensing Deal with DraftKings*, FORBES (Sept. 29, 2015, 9:01 AM), <https://www.forbes.com/sites/kristidosh/2015/09/29/nfl-players-association-inks-licensing-deal-with-draftkings/#7ca4654f374c>.

19. See, e.g., Stark, *supra* note 10 (discussing the ingenuity of the daily fantasy sports industry).

younger generations.²⁰ This increased ability to bet creates a new market for both players and teams.²¹ For example, New Jersey saw close to \$100 million in total wagers during August 2018 alone.²² Currently, thirty-seven states have either enacted or proposed legislation to legalize sports betting.²³

b. The Right of Publicity Enters the Arena

The Supreme Court recognized the right to publicity in *Zacchini v. Scripps-Howard Broadcasting Co.*²⁴ Hugo Zacchini brought suit alleging that a television broadcasting station violated his publicity rights by filming his entire “human cannonball” performance.²⁵ The station then aired his fifteen-second performance on the nightly news.²⁶ The issue was whether Zacchini had to be compensated for the taping of his performance, or whether the broadcasting company had a First Amendment right to use the information.²⁷

The Court held that while Zacchini’s performance was newsworthy, he was entitled to compensation because the broadcast posed “a substantial threat to the economic value of that performance.”²⁸ The violation only occurred because the broadcasting company filmed and aired the *entire* performance, rather than just a few seconds.²⁹ The Court also noted that publicity right claims are based on state law and come from a property right, “one that focus[es] on the right of the individual to reap the reward of his

20. *Id.*

21. See Dave Simpson, *Daily Fantasy Sports are Gambling, NY Judge Says*, LAW 360 (Oct. 29, 2018, 11:20 PM), <https://www.law360.com/articles/1097160/ny-daily-fantasy-sports-in-jeopardy-after-gambling-ruling> (suggesting team owners and players both share in these potential revenue gains); see also Rick Maese, *Games Within Games*, WASH. POST (Oct. 1, 2018), https://www.washingtonpost.com/graphics/2018/sports/gambling-fan-experience/?noredirect=on&utm_term=.d857fa14b73f (predicting in-game sports betting could become a \$16 billion industry).

22. Eric Ramsey, *New Jersey Sports Betting Generates Nearly \$100 Million in August Wagers*, LEGAL SPORTS REP. (Sept. 12, 2018, 11:43 AM), <https://www.legal-sportsreport.com/24005/new-jersey-sports-betting-august-revenue/> (highlighting online and mobile betting contributed more than a third of the total revenue for sportsbooks).

23. Darren Rovell, *Where is Sports Betting Legal? Projections for all 50 States*, ACTION NETWORK (last updated Jan. 10, 2020), <https://www.actionnetwork.com/news/legal-sports-betting-united-states-projections> (analyzing sports betting legislation in all fifty states).

24. 433 U.S. 562, 565–66 (1977).

25. *Id.* at 563–64 (explaining that the human cannonball performance consisted of Zacchini being shot from a cannon into a net about 200 feet away).

26. *Id.* at 564.

27. *Id.* at 565–66.

28. *Id.* at 575.

29. *Id.*

endeavors”³⁰ Publicity rights are meant to protect individuals from the erosion of their brand, and in the case of professional athletes, their name and likeness being used for profit.³¹ The Supreme Court noted that publicity rights serve the purpose of “preventing unjust enrichment by the theft of goodwill.”³² The Court further clarified that “[n]o social purpose is served by [appropriating] some aspect of [Zacchini] that would have market value and for which [defendant] would normally pay.”³³

Publicity rights present an innovative opportunity for professional athletes to earn more money.³⁴ *Cardtoons, L.C. v. Major League Baseball Players Ass’n*,³⁵ one of the first major adjudications of professional athletes’ publicity rights, found in favor of the First Amendment in a dispute regarding parody baseball cards.³⁶ These cards used a player’s likeness on the front with comedic commentary regarding his career on the back, without authorization from the Major League Baseball Players Association (“MLBPA”) or the player.³⁷ The court used an ad-hoc balancing test to adjudicate the claim, weighing the First Amendment against the right of publicity.³⁸ The court ruled that a producer’s First Amendment right to use players’ likenesses and names for parody trading cards outweighed the players’ publicity rights.³⁹ Affording more protection to the MLBPA would hurt *Cardtoons*’ incentive to create because the players would not likely give

30. *Id.* at 573 (discussing the State’s interest in enacting a publicity right); *see also* *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 967 (10th Cir. 1996) (“[T]he right of publicity involves a cognizable property interest.”).

31. Lynne M.J. Boisineau, *Intellectual Property Law: The Right of Publicity and the Social Media Revolution*, A.B.A. (May 1, 2013), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2013/may_june/intellectual_property_law_right_publicity_and_social_media_revolution/.

32. *Zacchini*, 433 U.S. at 576.

33. *Id.*

34. *See* Pamela Edwards, *What’s The Score?: Does the Rights of Publicity Protect Professional Sports Leagues?*, 62 ALB. L. REV. 579, 581 (1998) (“The right of publicity protects athletes’ and celebrities marketable identities . . . by recognizing their right to control and profit from the use of their names and nicknames, likenesses, portraits, performances . . . symbolic representations, or anything else that evokes this marketable identity.”). *But see* *Cardtoons, L.C.*, 95 F.3d at 976 (concluding that the First Amendment protections of parody outweigh the athlete’s right to publicity).

35. *Cardtoons, L.C.*, 95 F.3d at 962.

36. *Id.* at 976 (using a balancing test to weigh the Major League Baseball Players Association’s publicity rights and *Cardtoon*’s First Amendment right to free speech).

37. *Id.* at 962 (explaining that a reasonable person could easily identify the professional player based on the caricature on the front of the card).

38. *Id.* at 976.

39. *Id.* (stating that these parodies add to society in the form of entertainment).

consent to make parodies of themselves.⁴⁰ These cards are valuable to the public because the game statistics provide context to the millions of viewers.⁴¹

Creation of fantasy sports increased professional athletes' interest in their right of publicity.⁴² The court in *CBC Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*⁴³ adopted a balancing test between publicity rights under state law and the First Amendment.⁴⁴ This test weighed the value of public information with the athletes' ability to capitalize on their names.⁴⁵ The court concluded that the First Amendment prevailed in this test over Missouri law because the information used by CBC was readily available and "it would be strange law that a person would not have a [F]irst [A]mendment right to use information that is available to everyone."⁴⁶ The court highlighted that, even though the information used was meant for entertainment, the use of players' names and statistics for fantasy sports was still protected under the First Amendment.⁴⁷ The court rejected the argument that non-monetary claims outweigh the First Amendment because publicity rights are meant to protect financial interests, not "mental anguish."⁴⁸ Players are paid extremely high salaries, which achieves the same objectives as codifying a law to protect their name and likeness.⁴⁹ Therefore, the purpose of the right to publicity is already satisfied by their salary.⁵⁰

The tension intensified in *Murphy* when the Supreme Court ruled that the

40. *Id.*

41. *See, e.g.,* Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307, 315 (2001) ("[B]aseball fans have an abiding interest in the history of the game . . . the records set by former players and in memorable games . . . [and these records become] the standards by which the public measures the performance of today's players.").

42. *See* *CBC Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 820–21 (8th Cir. 2007) (showing the argument supporting the players' right to publicity).

43. 505 F.3d 818 (8th Cir. 2007).

44. *Id.* at 823 (interpreting *Zacchini v. Scripps-Howard Broad.*, 433 U.S. 562 (1977) to direct states to adopt a balancing test between the First Amendment and publicity claims).

45. *Id.*

46. *Id.*

47. *Id.* at 823 (concluding the use of the player's name and information is speech and entitled to the same basic First Amendment protection).

48. *Id.* (remarking that non-economic justifications are unpersuasive when balanced against the First Amendment).

49. *See id.* at 824 (stating that publicity laws are enacted to "provide incentives to encourage a person's productive activities").

50. *See id.* (comparing economic interests of a player's right to make a living off his endeavors with protecting the public from false advertising).

Professional and Amateur Sports Protection Act (“PASPA”) was unconstitutional.⁵¹ States now have the option to legalize sports betting by passing legislation.⁵² Doing so allows each state to regulate its own sports betting industry.⁵³ At least six states have already legalized, or are making efforts to legalize, sports betting.⁵⁴ Sports platforms like FanDuel and DraftKings run sportsbooks in these states, using players’ names and images in fantasy sports.⁵⁵

While the issue was seemingly settled, the legalization of sports betting piqued professional athletes’ interest in re-litigating the problem.⁵⁶ *Daniels v. FanDuel, Inc.*,⁵⁷ the first case since the Supreme Court’s ruling in *Murphy*, was litigated fiercely by player’s associations and FanDuel.⁵⁸ The Indiana Supreme Court ruled that a platform’s use of game statistics and college players’ names did not violate Indiana’s publicity statute because the information fell within the newsworthy exception.⁵⁹ Therefore, the sports platforms had a First Amendment right to use the information without compensating the players.⁶⁰ Any use of players in advertisements was minimal and did not implicate an athlete’s publicity right.⁶¹

51. *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1484–85 (2018) (noting that supporters of legalization argue that it will deter illegal betting operations and produce revenue for the state).

52. *Id.*

53. *Id.*

54. See Charles H. Baker et al., *Supreme Court Overturns Third Circuit, Holds Federal Prohibition on Legalization of Sports Gambling is Unconstitutional*, O’MELVENY & MYERS (May 15, 2018), <https://www.omm.com/resources/alerts-and-publications/alerts/supreme-court-overturns-third-circuit-holds-federal-prohibition-on-legalization-sports-gambling/> (listing Connecticut, New Jersey, Mississippi, New York, West Virginia, and Pennsylvania as states who are working to legalize sports betting).

55. See Simpson, *supra* note 21 (emphasizing that daily fantasy sports betting is unconstitutional as it relates to New York’s state constitution because there is little difference between gambling like poker and daily fantasy sports).

56. See Rajj et al., *supra* note 8 (“With the potential revenue boon from sports gambling, players’ unions may have an added incentive to pursue these publicity rights or the rights to protect players’ names and likeness.”).

57. 109 N.E.3d 390 (Ind. 2018).

58. Beaton, *supra* note 3.

59. *Daniels*, 109 N.E.3d at 396, 398 (likening use of player’s names and statistics in fantasy sports to publishing that information in newspapers or online).

60. *Id.* at 396–97 (“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.’”).

61. *Id.* at 397 (“[I]t would be difficult to draw the conclusion that the athletes are endorsing any particular product such that there has been a violation of the right of publicity.”).

c. The Different Tests

Lower courts have developed several different tests for adjudicating First Amendment and publicity right claims.⁶² These tests — the relatedness test, the predominant purpose test, the transformative use test, and the ad-hoc balancing test — take different approaches and, as a result, reach different conclusions.⁶³

The court in *Rogers v. Grimaldi*⁶⁴ used the relatedness test when an actress sued for a permanent injunction to stop a film that allegedly imitated her early career.⁶⁵ This test simply asks whether the use of the celebrity's likeness is related to the work as a whole.⁶⁶ The court ruled that the name of the movie, which was meant to invoke the actress's likeness, related to the film as a whole and not to the actress, and therefore she was not entitled to relief.⁶⁷

The predominant purpose test, as the name suggests, asks whether the use of the celebrity's likeness is predominately commercial.⁶⁸ The court in *Doe v. TCI Cablevision*⁶⁹ used the predominant purpose test to find that a comic book violated Tony Twist's publicity rights.⁷⁰ Tony Twist, a former NHL player, had a reputation for being a "tough-guy enforcer."⁷¹ However, Todd McFarlane Productions, Inc. created a comic book that included a character named "Anthony 'Tony Twist' Twistelli," a criminal that bears no physical resemblance to the professional athlete but took on the persona of an "enforcer."⁷² The court found that because the predominant use of Twist's likeness was to sell comic books, McFarlane violated Twist's publicity

62. See Dora Georgescu, *Two Tests Unite to Resolve the Tension Between the First Amendment and the Right of Publicity*, 83 *FORDHAM L. REV.* 907, 927–42 (2014) (discussing the four major tests adopted by jurisdictions).

63. See *id.* (debating the advantages and disadvantages of each test); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 972 (10th Cir. 1996) (using an ad-hoc balancing test to adjudicate claim).

64. 875 F.2d 994 (2d. Cir. 1989).

65. *Id.* at 1004 (interpreting the state of Oregon's right of publicity).

66. *Id.*

67. *Id.* at 1005 (noting that the movie title was not a disguised endorsement from the actress).

68. See *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003) (en banc) (ruling that use of an NHL player's likeness in a comic book violated his right of publicity because the use was "predominately a ploy to sell comic books and related products than an artistic or literary expression.").

69. 110 S.W.3d 363 (Mo. 2003).

70. *Id.* at 374, 376.

71. *Id.* at 366.

72. *Id.*

rights.⁷³

The last test, the transformative use test, asks “whether the product containing a celebrity’s likeness is so transformed that it has become primarily the defendant’s own expression rather than the celebrity’s likeness.”⁷⁴ Gary Saderup, Inc. produced t-shirts with the Three Stooges printed on the front.⁷⁵ While the court specifically emphasized that the quality of the transformation was not controlling, the court still ruled that the reproduction did not have a creative element.⁷⁶ Rather than using the image of the comedic trio in a creative manner, Gary Saderup, Inc. failed to add any creative element, instead producing a literal depiction of the Three Stooges.⁷⁷ Recognizing the difficulty of interpreting this test, the court added a second inquiry for cases that are a closer call.⁷⁸ The subsidiary inquiry questions whether the value of the work stems from the use of the celebrity in the product.⁷⁹ If it does, the work is less likely to enjoy First Amendment protection.⁸⁰ If it does not, the court will presume that the work is protected under the First Amendment.⁸¹ However, the ad-hoc balancing test is used by a majority of lower courts.⁸²

III. NO PENALTY FOR SPORTS PLATFORMS

The Supreme Court’s decision in *Murphy* has increased athletes’ interests in protecting their name, likeness, and game statistics because platforms have more opportunities to use their image to promote the platforms.⁸³ Because at least six states have enacted legislation legalizing sports betting, the effects of player appropriation are more widespread than ever before.⁸⁴ Players

73. *Id.* at 374.

74. *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 809 (Cal. 2001).

75. *Id.* at 800–01.

76. *Id.* at 809.

77. *Id.* at 811.

78. *Id.* at 810.

79. *Id.*

80. *Id.*

81. *Id.*

82. *See Doe v. TCI Cablevision*, 110 S.W.3d 363, 372 (Mo. 2003) (en banc) (“[C]ourts often will weigh the state’s interest in protecting a plaintiff’s property right to the commercial value of his or her name and identity against the defendant’s right to free speech.”); *see also* Kyle D. Slimcox, *Selling Your Soul at the Crossroads: The Need for a Harmonized Standard Limiting the Publicity Rights of Professional Athletes*, 63 DEPAUL L. REV. 87, 101 (2014) (highlighting the popularity of the ad-hoc balancing test).

83. *See* Raji et al., *supra* note 8 (explaining athletes’ rising interest in publicity rights).

84. David Purdum, *Inside How Sports Betting Went Mainstream*, ESPN (Aug. 9,

now, more than ever, have an interest in protecting the misappropriation of their name and likeness.⁸⁵

a. Inconsistent Tests Produce Inconsistent Results

Using the ad-hoc balancing test, the aforementioned cases would come out in favor of the First Amendment.⁸⁶ If the court in *Rogers* had applied the ad-hoc balancing test, it would have ruled in favor of the First Amendment because the actress's name was in the public domain.⁸⁷ Had the court applied the transformative test, again, it would not have found a publicity right violation because the movie title and the content substantially transformed the actress's likeness into a creative form.⁸⁸ The value of the work did not derive wholly from Rogers's fame, but the story that it told was about her life and how she became famous.⁸⁹ However, using the predominant purpose test, the court would have found that the predominant use of the actress's likeness was commercial, and therefore would have violated her right of publicity.⁹⁰

If the court in *Cardtoons* had used the other tests, the results would again show inconsistency.⁹¹ Under the predominant use test, the court would have ruled that *Cardtoons* had violated the baseball players' publicity rights because the predominant purpose of the parody cards was commercial.⁹² Application of the transformative use test would not have resulted in a publicity right violation because *Cardtoons* took the players' likeness and turned it into a creative form by using catchy phrases and puns to represent

2018), http://www.espn.com/chalk/story/_/id/24310393/gambling-how-media-daily-fantasy-new-thinking-us-pro-sports-commissioners-helped-sports-betting-become-accepted.

85. See Rajj et al., *supra* note 8.

86. *E.g.*, *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 976 (10th Cir. 1996) (accepting the First Amendment argument over the publicity rights argument).

87. See *Daniels v. FanDuel*, 109 N.E.3d 390, 396 (Ind. 2018) (recognizing the First Amendment allows use of information available to everyone).

88. See *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 810 (Cal. 2001) ("When the value of the work comes principally from some source other than the fame of the celebrity . . . it may be presumed that sufficient transformative elements are presented to warrant First Amendment protection.").

89. See *id.* (allowing for a First Amendment exception when the work is "sufficiently transformative").

90. See *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003) (en banc) (critiquing both the transformative test and the relatedness test due to the lack of balancing).

91. See *Cardtoons, L.C.*, 95 F.3d at 959.

92. See *id.*; see also *Doe*, 110 S.W.3d at 375 (defining the predominant use test).

certain players.⁹³ Adjudication under the relatedness test would not have violated publicity rights because the use of the players' likeness in the cards was related to their sport.⁹⁴ Additionally, no one would think that the players were endorsing a parody of themselves, and therefore false advertising would not have been a concern.⁹⁵

Applying the different tests to the facts in *C.B.C.* again highlights the confusion among the courts on how to decide these claims.⁹⁶ Had the court used the predominant purpose test, it would have found a violation for the same reason as above: the use of player names in fantasy sports is for a commercial purpose.⁹⁷ Adjudication under the transformative test would have protected the platform because it transformed the player's information into a creative form, presenting a new concept with which the public can interact.⁹⁸ Use of the relatedness test would not have resulted in a victory for the players because fantasy sports, and sports in general, clearly relate to professional athletes.⁹⁹

Applying the ad-hoc balancing test to the facts in *Doe* would not have resulted in a publicity rights violation because Twist was in the public domain.¹⁰⁰ TCI Cablevision would have a First Amendment right to use the information that was available to everyone.¹⁰¹ If the court had used the transformative test, it would have not found a publicity rights violation because the creator significantly transformed Tony Twist's name into a creative element by making him into a comic book character with a different likeness.¹⁰² The relatedness test again would not result in a publicity rights violation because the use of Twist's name was related to the theme of the

93. See *Comedy III Prods., Inc.*, 21 P.3d at 811 (using Andy Warhol portraits as an example of celebrity portraits that pass the transformative use test).

94. See *Rogers v. Grimaldi*, 875 F.2d 994, 1005 (2d Cir. 1989) (“[T]he Lanham Act does not bar a minimally relevant use of a celebrity’s name in the title of an artistic work where the title does not explicitly denote authorship, sponsorship, or endorsement by the celebrity or explicitly mislead as to content.”).

95. See *id.*

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

97. See *Doe*, 110 S.W.3d at 374 (“If a product is being sold that predominantly exploits the commercial value of an individual’s identity, that product should be held to violate the right of publicity and not be protected by the First Amendment[.]”).

98. See *Comedy III Prods., Inc.*, 21 P.3d at 811.

99. See *Rogers*, 875 F.2d at 1005.

100. See *Daniels v. FanDuel, Inc.*, 109 N.E.3d 390, 394 (Ind. 2018) (showing that information readily available to the public is not protected under publicity rights).

101. See *id.*

102. See *Comedy III Prods., Inc.*, 21 P.3d at 811.

comic book.¹⁰³

The ad-hoc test would not have resulted in a publicity rights violation in *Comedy Productions III, Inc.* because the Three Stooges were public figures, and therefore Saderup had a First Amendment right to use their image.¹⁰⁴ Under the predominant use test, the court would have found a publicity rights violation because the t-shirts were produced for a commercial purpose.¹⁰⁵ If the court had used the relatedness test, it would have found a publicity rights violation because the use of the Three Stooges' faces on a shirt is wholly related to the work as a whole; in fact, it *is* the work as a whole.¹⁰⁶ However, the relatedness test is not directly applicable to these facts because the work, in this case the production of t-shirts, is not masking its use of celebrities — but rather a literal recreation.¹⁰⁷ This highlights another problem with the relatedness test because it cannot be used in every situation.¹⁰⁸

b. Which Test Is Best?

The ad-hoc balancing test presents the fairest and most accurate way to balance each party's interest because the Supreme Court stated that “when faced with conflicting rights, the ‘duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented.’”¹⁰⁹ The goals of a balancing test best serve the public because it is the simplest test that can be applied to a variety of fact patterns.¹¹⁰ This test will result in the most even application, something much needed in an already state-specific inquiry.¹¹¹ The test is best suited for fantasy sports because it only requires balancing a few specific interests — a platform's First Amendment right against a player's right of publicity.¹¹² As evidenced above, the ad-hoc balancing test produces the

103. See *Rogers*, 875 F.2d at 1005.

104. See *Daniels*, 109 N.E.3d at 394.

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

106. See *Rogers*, 875 F.2d at 1005.

107. See *id.*

108. See *id.* at 1006–07 (Griesa, J., concurring) (“[T]his unique case would seem to be an inappropriate vehicle for fashioning a general rule of the kind announced by the majority.”).

109. Georgescu, *supra* note 62, at 940–41.

110. *Id.* But see David G. Roberts, *The Right of Publicity and Fantasy Sports: Why the C.B.C. Distribution Court Got It Wrong*, 58 CASE W. RESERVE L. REV. 223, 229 (2007) (criticizing the balancing test).

111. See Patrick M. McFadden, *The Balancing Test*, 29 B.C.L. Rev. 585, 622–23 (1988) (“If the balancing test is simpler than traditional legal reasoning, it might for that reason be preferred.”).

112. See *id.* at 623 (specifying the balancing test is most effective when it “requires the balance of only a few interests”).

most consistent results.

Lower courts that do not use a balancing test are misinterpreting *Zacchini*.¹¹³ The Supreme Court refused to draw an exact line when sports media is protected by the First Amendment.¹¹⁴ However, the Court recognized that the two competing interests — the First Amendment and publicity rights — must be weighed according to the social purpose behind them.¹¹⁵

However, a bright-line test is not necessary in the fantasy sports context.¹¹⁶ Fantasy sports do not broadcast plays or players' actions like touchdown or homerun celebrations.¹¹⁷ Fantasy sports differ significantly from the act in *Zacchini* because they do not pose a threat to the players' economic value of their *performance*, meaning that the use of a player's name for sports betting does not affect an athlete's ability to play his or her professional sport.¹¹⁸ Unlike *Zacchini*, the use of athletes' names does not go to "the heart of [their] ability to earn a living as an entertainer," but is more like the "unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press."¹¹⁹ In *Zacchini*, the value of the act was derived from the unique performance to a new audience.¹²⁰ In professional sports, the value of the performance is not linked to a new audience, but rather to an entire new performance, often to the same audience.¹²¹ Professional athletes, by the very nature of their occupation, place themselves into the public domain.¹²² Therefore, they are unable to seek compensation for the use of their name while simultaneously holding themselves out to be public

113. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578 (1977).

114. *Id.* at 574–75 (declining to draw a bright-line because it was clear the First Amendment does not allow for the broadcasting of an entire event without authorization).

115. *See id.* at 576. (citing Kalven, *Privacy in Tort Law — Were Warren and Brandeis Wrong?*, 31 L. & CONTEMP. PROB. 326, 331 (1966)).

116. *See generally id.* (declining to construct a bright-line test); *Daniels v. FanDuel, Inc.*, 109 N.E.3d 390 (Ind. 2018) (same).

117. Stark, *supra* note 10.

118. *See Zacchini*, 433 U.S. at 575–76; *see also Daniels*, 109 N.E.3d at 394 (holding that players' names and data do not lose "newsworthy value simply because [they are] . . . used in the context of a fantasy sports game").

119. *Zacchini*, 433 U.S. at 575–76.

120. *See id.*

121. *See Shirley Wang, Sports Complex: The Science Behind Fanatic Behavior*, ASS'N FOR PSYCHOL. SCI. (May 1, 2006), <https://www.psychologicalscience.org/observer/sports-complex-the-science-behind-fanatic-behavior> (noting that fans often identify with their sports team).

122. *See Zacchini*, 433 U.S. at 582 (Powell, J., dissenting) (emphasizing that the individual placed themselves in the public domain).

figures.¹²³ Lost profits and economic opportunity do not outweigh the First Amendment because freedom of speech is a core value of the United States, while the right of publicity is a predominately economic one.¹²⁴

The different publicity rights tests each have advantages and disadvantages, but the ad-hoc balancing test presents the least number of flaws.¹²⁵ The predominant purpose test seeks to determine the subjective intent of the creator — a very confusing and arbitrary method of adjudicating these claims.¹²⁶ This test is inappropriate for publicity claims in the fantasy sports context because it could lead to inconsistent application in an already muddled inquiry due to “[t]he sufficiency of artistic transformative-ness [being] a qualitative valuation.”¹²⁷

Similarly, the transformative use test is unsuitable for the fantasy sports analysis.¹²⁸ This test also tries to look at the subjective intent of the creator because it only requires that significant transformation happen.¹²⁹ This approach will lead to inconsistent application and will not solve the uniformity problem of publicity rights adjudication.¹³⁰ The relatedness test’s shortcomings do not solve the problems of publicity rights because the holding of each adjudication is often limited to its facts and therefore unfit for broad application.¹³¹ Like the others, this test does not solve the problem of inconsistent application.¹³²

Even if courts do not use the ad-hoc balancing test, players’ claims may not survive using the other publicity rights tests.¹³³ A publicity right would

123. *See id.* (reasoning a public act broadcasted on a news channel did not entitle the individual to receive compensation).

124. *See Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 818 (1996) (highlighting the government will only restrict free speech when “address[ing] extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech”).

125. *See Georgescu, supra* note 62 (examining the four tests that emerged).

126. *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003) (en banc).

127. *See* Geoffrey F. Palachuk, Note, *Transformative Use Test Cannot Keep Pace with Evolving Arts*, 16 DENV. SPORTS & ENT. L.J. 233, 269 (2014) (arguing the test could lead to “conflicting and unpredictable results”).

128. *See id.* at 275 (arguing the transformative test does not aid courts in determining publicity rights violations).

129. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 811 (Cal. 2001).

130. *See* Palachuk, *supra* note 127, at 263–64 (criticizing the test because it will show favoritism for individual rights over freedom of expression).

131. *See Hart v. Elect. Arts, Inc.*, 717 F.3d 141, 157 (3d Cir. 2013) (“We are concerned that this test is a blunt instrument, unfit for widespread application in cases that require a carefully calibrated balancing of two fundamental protections: the right of free expression and the right to control, manage, and profit from one’s own identity.”).

132. *Id.*

133. *See generally* Georgescu, *supra* note 62 (discussing the inconsistent application

not grant athletes the right to be compensated under the relatedness test because fantasy sports do not advertise using players' names and the use of their names is closely related to fantasy sports.¹³⁴ Adjudication under the transformative use test results in sports betting platforms being able to use player name and game statistics without compensation because they transform the data into a new and uncommon form.¹³⁵ The predominant use test is the only possible test that could provide an avenue for athletes because fantasy sports are predominately used for economic purpose.¹³⁶ However, a court may find that fantasy sports are predominantly using the data in an expressive and creative way by assigning points to different accomplishments during performances, allowing users to interact with the data in a new way.¹³⁷

c. The Right of Publicity Is an Economic One

Originally a privacy right, the right of publicity has evolved into a predominantly economic right.¹³⁸ Courts have analyzed this right through a property lens as opposed to a privacy one.¹³⁹ Courts have also looked to other factors to satisfy the same goals as the right of publicity.¹⁴⁰ Players' high compensation satisfies the goal of a publicity right, meaning their economic interests are protected without implicating intellectual property rights.¹⁴¹

due to the varying publicity rights tests).

134. *See* *Rogers v. Grimaldi*, 875 F.2d 994, 1005 (2d Cir. 1989) (barring use of a celebrity's name unless wholly unrelated to the work or as an advertisement).

135. *Id.*; Georgescu, *supra* note 62, at 931.

136. *Daniels v. FanDuel*, 109 N.E.3d 390, 396 (Ind. 2018).

137. *Id.*

138. *E.g.*, Laura Lee Stapleton & Matt McMurphy, *The Professional Athlete's Right of Publicity*, 10 MARQ. SPORTS L. REV. 23, 26 (1999) ("The right of publicity was born out of the right of privacy, and later developed into a property right of sorts."). *But see* *Zacchini v. Scripps-Howard Broad. Co.*, 351 N.E.2d 455, 455 (Ohio 1976) ("One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy, and the use or benefit need not necessarily be commercial.").

139. *See, e.g.*, *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 807 (Cal. 2001) ("What the right of publicity holder possesses is not a right of censorship, but a right to prevent others from misappropriating the economic value generated by the celebrity's fame[.]").

140. *Id.*; *see also* *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) ("[P]rotection provides an economic incentive for him to make the investment required to produce a performance of interest to the public.").

141. *The World's Highest-Paid Athletes*, FORBES, <https://www.forbes.com/athletes/list/#tab:overall> (last visited Feb. 18, 2020) (showing that LeBron James earned \$89 million in 2019).

While daily fantasy sports provide more opportunity for betting platforms to gain revenue without paying players, this additional income is not enough to offset the players' large salaries.¹⁴² Consumers will not be misled by advertisements because all players are included in fantasy sports, and therefore no one would believe that any one player was endorsing any specific brand or platform.¹⁴³ It is hard to believe that professional athletes will stop playing sports simply because they are not compensated for the use of their name in fantasy sports.

d. Indiana Takes the Lead

Regardless of the test used, courts in the future are likely to follow the Indiana Supreme Court's decision because Indiana has one of the broadest publicity right statutes.¹⁴⁴ This makes Indiana an optimal forum for those seeking to vindicate their publicity rights.¹⁴⁵ Indiana has one of the broadest publicity right statutes because, unlike the states of Ohio and New York, it protects a person's signature, gestures, and mannerisms.¹⁴⁶ Additionally, Indiana allows the right to be enforced for a longer period of time.¹⁴⁷ Other states with narrower publicity right statutes will likely hold that the First Amendment prevails in the dispute.¹⁴⁸ Because a state with a broader

142. See Michael B. Greenberg, *Full-Court Press: Fantasy Sports, the Right of Publicity, and Professional Athletes' Interest in the Live Transmission of Their Statistical Performances*, 20 J. TECH. L. & POL'Y 129, 153 (2015) (suggesting that fantasy sports are similar to video games and the real-time data unfairly infringes on the proprietary rights of professional athletes because it "unjustly limits their ability to fully reap the benefits of their labors").

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

144. See Raji et al., *supra* note 8 (explaining that Indiana has one of the broadest publicity rights statutes).

145. See Jeremy A. Wale, Note, *Adequate Protection of Professional Athletes' Publicity Rights: A Federal Statute Is the Only Answer*, 11 T.M. COOLEY J. PRAC. & CLINICAL L. 245, 251–52, 255–56 (2009) (cautioning that plaintiffs might forum shop to gain favorable publicity statutes).

146. Compare Ind. Code Ann. § 32-36-1-7 (2019), with Ohio Rev. Code Ann. § 2741.02 (2019) (protecting "individual persona"), and N.Y. Civ. Rights Law § 51 (McKinney 2019) (providing protection for name, portrait, picture, and voice).

147. Compare Ind. Code Ann. § 32-36-1-8 (granting a person a publicity right for a commercial purpose during his or her lifetime or one hundred years following the person's death, prohibiting the unauthorized use of such), and Ohio Rev. Code Ann. § 2741.02 (allowing a person to enforce the right during their lifetime plus sixty years), with N.Y. Civ. Rights Law § 51 (refusing to recognize a posthumous right of publicity).

148. See Daniel Gervais & Martin L. Holmes, *Fame, Property & Identity: The Purpose and Scope of the Right of Publicity*, 25 FORDHAM INTELL. PROP., MEDIA, & ENT. L.J. 181, 182 (2014) (citing J. Thomas McCarthy, RIGHTS OF PUBLICITY AND PRIVACY § 1:25 (2d ed. 2014)) ("[T]en states have statutes which, while some are labeled 'privacy'

publicity rights statute has defeated player's publicity claims, one of the main arguments advocating for a federal publicity right — prevention of forum shopping — must also fail because if the most lenient state does not allow success on these claims, then athletes in stricter states will also not prevail.¹⁴⁹ While not binding on other courts, the *Daniels* decision will likely guide other courts that need to resolve similar claims because other publicity statutes have newsworthy exceptions.¹⁵⁰ While the First Amendment may not prevail on every occasion involving publicity rights, in the context of fantasy sports and professional athletes, it will allow betting platforms to use player names and statistics without compensation.¹⁵¹

IV. PLAY-BY-PLAY DATA IS THE SOLUTION

The right to publicity has been ambiguous since its inception, partly due to its state-specific inquiry and because of the courts' inconsistent application of different tests.¹⁵² The Supreme Court has yet to weigh in on publicity rights in fantasy sports, but the states are not left without guidance.¹⁵³ The best way to provide a uniform framework is for courts to adopt the ad-hoc balancing test.¹⁵⁴ This test provides the simplest analysis, therefore making it the optimal choice to ensure consistency.¹⁵⁵ The ad-hoc

statutes, are worded in such a way that most aspects of the right of publicity are embodied in those statutes.”).

149. See *Daniels v. FanDuel, Inc.*, 109 N.E.3d 390, 397–98 (Ind. 2018) (interpreting Indiana's publicity statute's newsworthy exemption broadly); see also Zachary Zagger, *7th Circuit Avoids DFS Legality, Ends Publicity Rights Suit*, LAW360 (Nov. 29, 2018, 9:13 PM), <https://www.law360.com/articles/1106460/7th-circ-avoids-dfs-legality-ends-publicity-rights-suit> (“[P]utting an end to a proposed class action . . . to stop DraftKings and FanDuel from using their names, likenesses and statistics without permission.”).

150. Christina Costa & Jonathan Polak, *Indiana Supreme Court: No Right to Publicity in Fantasy Sports*, TAFT (Oct. 26, 2018), <https://www.taftlaw.com/news-events/law-bulletins/indiana-supreme-court-no-right-to-publicity-in-fantasy-sports> (speculating this decision may not be limited to Indiana and “is likely to be instructive, guiding and potentially dispositive.”).

151. See *Daniels*, 109 N.E. at 398 (allowing an exception to publicity rights for fantasy sports using athletes' “names, pictures and statistics”). But see Ryan Martin, *Indiana DFS Ruling Sets Stage for Sports Betting Right of Publicity Disputes*, SPORTTECHIE (Jan. 16, 2019), <https://www.sporttechie.com/indiana-fantasy-sports-ruling-publicity-rights-betting/> (conjecturing the *Daniels* decision was narrow).

152. See McFadden, *supra* note 111, at 586 (highlighting the balancing tests simplicity).

153. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 570 (1977) (finding a right of publicity violation using a balancing test when a news station broadcasted an entire performance).

154. But see, e.g., Georgescu, *supra* note 62, at 946 (suggesting a blend of the ad-hoc balancing test and the transformative use tests).

155. See McFadden, *supra* note 111, at 587 (praising the ad-hoc balancing test for its

balancing test, however, does not help athletes in the fantasy sports context because athletes are in the public domain.¹⁵⁶ The First Amendment trumps any potential lost profits because of its constitutional roots. Freedom of speech and expression are core values of the United States, and when weighed against publicity rights, these principles override the intellectual property rights of athletes.¹⁵⁷

Athletes are not without any recourse, but to enforce their publicity rights, they need the support of their leagues because the leagues must collectively bargain for compensation for use of athletes' names. On the surface, the leagues seem to be behind their players.¹⁵⁸ However, not all leagues are in agreement and willing to negotiate on behalf of other leagues' players.¹⁵⁹ The leagues need to form a unified front if they wish to fight for this right for their players. To protect the athletes' interests, the leagues should try to negotiate with the sports platforms during the upcoming 2021 contract renegotiations.¹⁶⁰ Platforms like DraftKings and FanDuel have an incentive to contract with players' unions because these sites could then use a player's name and likeness for promotional purposes.¹⁶¹

While it may seem that the players are at a disadvantage, they may be able

simplicity).

156. See *Daniels v. FanDuel*, 109 N.E.3d 390, 392 (Ind. 2018).

157. See *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 810 (Cal. 2001) (describing when a First Amendment protection is warranted); see also *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 976 (10th Cir. 1996) (finding the balance between First Amendment protection of free expression and the intellectual property rights of the artist).

158. See Michael A. Rueda, *Players Associations File Amicus Curiae Brief with Indiana Supreme Court in FanDuel/DraftKings Litigation*, WITHERSWORLDWIDE, (May 18, 2018), <https://www.withersworldwide.com/en-gb/insight/players-associations-file-amicus-curiae-brief-with-indiana-supreme-court-in-fanduel-draftkings-litigation> (noting multiple leagues filed amicus curie briefs in the *Daniels v. FanDuel* case).

159. See John Brennan, *What Is the Pro Athlete's Place in This New Era of U.S. Sports Betting Expansion?*, USBETS (Nov. 30, 2018), <https://www.usbets.com/pro-athletes-place-sports-betting-expansion/> (recounting the poor communication between the various professional sports leagues).

160. See Thomas Dunn, *NFL Players Need to Gain Leverage in Contract Negotiations*, VILL. U. JEFFREY S. MOORAD CTR. STUDY SPORTS L., https://www1.villanova.edu/villanova/law/academics/sportslaw/commentary/sls_blog/2018/nfl-players-need-to-gain-leverage-in-contract-negotiations.html (last visited Feb. 18, 2020) (encouraging the NFL Players Association to negotiate a financially secure contract).

161. Gregory Pun & Michael A. Rueda, *Fantasy Sports and Publicity Rights: The Balancing Act as Athlete Unions Seek Compensation for Use of Name and Likeness*, WITHERSWORLDWIDE (June 7, 2018), <https://www.withersworldwide.com/en-gb/insight/fantasy-sports-and-publicity-rights-the-balancing-act-as-athlete-unions-seek-compensation-for-use-of-name-and-likeness>.

to gain leverage by tracking their data during games and practices and then selling it to the fantasy sports platforms.¹⁶² This practice data, unlike player names and game statistics, is not in the public domain, and therefore the First Amendment will not allow the sports betting platforms to use it without compensation. Some leagues, like the NHL, have already partnered with casinos to use player data in real time.¹⁶³ Other leagues could follow the NHL's example to incentivize sports betting platforms to contract with their players' association.¹⁶⁴ Sports platforms want this data because it will allow the platforms to update odds for more accurate in-game betting.¹⁶⁵ While some players may have privacy concerns about selling their data, athletes can negotiate for reassurance that this information will only be used to update odds, and will not become available for purchase by third parties or the general public.¹⁶⁶ Tracking this data can also be very beneficial to the professional athletes by helping to improve their own performances.¹⁶⁷ This information will allow coaches and trainers to tailor drills and practices to specific areas of the body and skills, while minimizing an athlete's chance of injury during both practices and games.¹⁶⁸ While selling practice data may not be the only solution to gaining bargaining power, some NFL players are already doing so.¹⁶⁹

V. CONCLUSION

The legalization of sports betting heightens an athlete's interest in protecting the unauthorized use of his name, likeness, image, and statistics.

162. Matt Rybaltowski, *NHL's Historic Deal with MGM Resorts Completes Gary Bettman's U-Turn on Sports Betting*, FORBES (Oct. 29, 2018, 5:53 PM), <https://www.forbes.com/sites/mattrybaltowski/2018/10/29/nhls-historic-deal-with-mgm-resorts-completes-gary-bettmans-u-turn-on-sports-betting/#25a8edb85aca>.

163. See, e.g., *id.* (highlighting the partnership between MGM and the NHL due to the NHL's "state-of-the-art tracking system").

164. See *id.*

165. But see *id.* (disclosing the NHL's technology was developed for broadcasting purposes, and not for in-game betting reasons).

166. See Dave Issac, *Flyers Don't Mind NHL's Sports Betting Partnership with One Possible Exception*, COURIER POST (Oct. 30, 2018, 4:54 PM), <https://www.courierpostonline.com/story/sports/nhl/flyers/2018/10/30/flyers-ok-sports-betting-partnership-one-possible-exception/1824114002/> (highlighting the NHL wants to use this technology to track data and sell it to MGM Resorts).

167. Paul Steinbach, *Tracking Technology Revolutionizes Athlete Training*, ATHLETIC BUS. (Sept. 2013), <https://www.athleticbusiness.com/equipment/tracking-technology-revolutionizes-athlete-training.html>.

168. See *id.*

169. Mark Van Duesen, *Empowering Players with Data Ownership*, WHOOP (Apr. 28, 2017), <https://www.whoop.com/the-locker/empowering-players-with-data-ownership/>.

With sports betting potentially legal in all states, there are unprecedented economic opportunities. The First Amendment overrides an athlete's publicity right, regardless of a player's lost economic opportunities because the information is in the public domain and professional athletes already earn high salaries. Therefore, sports betting platforms do not have to compensate professional athletes for use of their name and statistics.

Players can gain leverage by offering to track game and practice data of each athlete for later use by the sports platforms to update the odds for in-game betting. Without help from their leagues, professional athletes do not have much leverage in these negotiations.