1998

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WHAT'S THE SCORE?: DOES THE RIGHT OF PUBLICITY PROTECT PROFESSIONAL SPORTS LEAGUES?

Pamela Edwards*

INTRODUCTION

For nearly forty-five years, courts have protected the marketable identity of professional athletes and other celebrities in a number of factual settings, under the rubric of "the right of publicity."\(^1\) During that time, changes in technology have altered the concept of what constitutes a protectible, marketable identity. This Article discusses: (1) the breadth of this protection as applied to athletes, groups of athletes; and (2) whether it applies to sports leagues.

In doing so, this Article examines: (1) what constitutes the right of publicity; (2) whether the right applies to sports leagues; and (3) whether sports leagues can use the right of publicity to, inter alia, restrict the dissemination of scores and statistics while games are in progress. To provide a paradigm for how sports leagues could use the right to protect its interests, this Article uses the National Basketball Association ("NBA" or "League") as a prototype. Recently, the NBA brought suit against a company that provides "real-time," that is, virtually contemporaneous, updates of sporting events.\(^2\) The NBA brought several federal causes of action, includ-

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* Assistant Professor of Law, CUNY School of Law at Queens College. I thank everyone who read and commented on this Article, including those individuals who attended the writing workshop at the Third Annual Northeast People of Color Conference, held at Touro Law Center on March 27-29, 1998, at which I presented a draft of this Article. I especially thank Leonard M. Baynes, Western New England College School of Law, who acted as commentator on the Article. Although this Article improved as a result of the comments of all these individuals, any potentially controversial positions that remain are my own. I also thank Silvia Montaíban, Hofstra University School of Law, Class of 1998, for her invaluable research assistance.

1 See infra notes 17-22 and accompanying text (discussing Haelan Lab. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953)). The Haelan court coined the term "the right of publicity." See, e.g., Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129, 133 (Wis. 1979) (discussing the intrinsic nature of the tort of appropriation).

2 NBA v. Motorola, Inc., 105 F.3d 841, 843 & n.1 (2d Cir. 1997) (defining the specific type of service that was the basis for the dispute).
ing Lanham Act\(^3\) claims, copyright infringement claims, as well as state common law causes of action.\(^4\) Although the NBA brought a New York State common law “hot-news” misappropriation cause of action, it did not bring a right of publicity cause of action, probably because of New York state courts’ position that there is no separate common law right of publicity outside of the New York Civil Rights sections 50 and 51.\(^5\) Part I of this Article discusses how the NBA would have fared had it brought a right of publicity cause of action in other jurisdictions assuming that the League has a marketable identity.\(^6\) Part II examines whether leagues have a protectible marketable identity independent of the marketable identities of their constituent athletes and, if such a protectible marketable interest does exist, whether game statistics and scores evoke this identity.\(^7\) The Article concludes that, in those states that recognize the right of publicity, that right would protect a marketable identity of sports leagues independent of the marketable identity of individual athletes.\(^8\)

\(^3\) 15 U.S.C. § 1125(a) (1994). The Lanham Act provides a civil cause of action for, inter alia, unauthorized uses of a symbol, which uses constitute “false designation of origin” or false descriptions. See Resource Developers, Inc. v. Statue of Liberty-Ellis Island Found., Inc., 926 F.2d 134, 139 (2d Cir. 1991) (detailing the two principal causes of action under section 1125); see also infra notes 241-42 and accompanying text (discussing claims brought under the Lanham Act).

\(^4\) See Motorola, 105 F.3d at 844 (indicating that the state law causes of action included unfair competition by misappropriation, false advertising, and false designation of origin).


\(^6\) See infra notes 9-74 and accompanying text (discussing the right of publicity).

\(^7\) See infra notes 75-132 and accompanying text (outlining the scope of the right of publicity).

\(^8\) See infra notes 133-282 and accompanying text (discussing the applicability of the right of publicity to professional sports leagues).
I. BACKGROUND

A. The Right of Publicity Defined

The right of publicity protects athletes’ and celebrities’ marketable identities from commercial misappropriation by recognizing their right to control and profit from the use of their names and nicknames, likenesses, portraits, performances (under certain circumstances), biographical facts, symbolic representations, or anything else that evokes this marketable identity. Thus, any trait that uniquely identifies celebrities or athletes implicates their marketable identities. "[T]he reaction of the public to name and likeness, which may be fortuitous or which may be managed and

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9 See Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129 (Wis. 1979) (chronicling the dispute between a former professional football player and a shaving gel manufacturer concerning the use of the "Crazy Legs" nickname).


11 See, e.g., Haelen Lab., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953) (discussing the unauthorized use of baseball players’ pictures on baseball cards to market chewing gum); Shamsky v. Garan, Inc., 632 N.Y.S.2d 930, 933-34 (Sup. Ct. 1995) (dealing with the unauthorized use of a photograph emblazoned on articles of clothing, though the photograph did not clearly identify individual players).

12 See Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977) (resolving that the broadcast of a performer’s entire act in a news program violated the performer’s right of publicity); see also Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n, 805 F.2d 663, 681 (7th Cir. 1986) (acknowledging that Major League Baseball players’ “rights of publicity might be violated wherever their performances are broadcast without their consent”).


14 See Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 827 (9th Cir. 1974) (determining that the use of a car’s distinctive markings evoked that driver’s marketable identity and violated his right of publicity).

15 See Abdul-Jabbar, 85 F.3d at 416 (ruling that the use of an athlete’s statistical record violates the right of publicity); Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988) (resolving that an imitation of a singer’s voice in a commercial advertisement violated the California common law right of publicity). But see Tin Pan Apple, Inc. v. Miller Brewing Co., 737 F. Supp. 826, 837 (S.D.N.Y. 1990) (deeming that a New York statute did not protect performers against vocal imitations). However, section 51 of the New York Civil Rights Law has been amended and now includes “voice” as a protected characteristic. See N.Y. CIV. RIGHTS § 51 (McKinney Supp. 1998).
planned, endows the name and likeness of the person involved with commercially exploitable opportunities."

One of the seminal right of publicity cases is *Haelan Laboratories v. Topps Chewing Gum, Inc.*\(^\text{17}\) In *Haelan*, the Second Circuit coined the term "right of publicity" which, in contrast to the right of privacy (the right of natural persons to live their lives in peace), protects the right of "prominent persons (especially . . . ball-players)" to receive compensation "for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways."\(^\text{18}\) *Haelan* involved a suit brought by one chewing gum manufacturer against a rival manufacturer; the plaintiff alleged that the defendant induced athletes to breach their contracts for the use of those athletes' pictures in the marketing of chewing gum.\(^\text{19}\) The athletes signed contracts with both manufacturers, allowing them to use the athletes' pictures on baseball trading cards.\(^\text{20}\) The court rejected the defendant's argument that there is no assignable right or "interest in the publication of [a prominent person's] picture other than his right of privacy."\(^\text{21}\) In doing so, the court held that

in addition to and independent of [the] right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph . . . . This right of publicity would usually yield . . . no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.\(^\text{22}\)

State courts have also adopted this line of reasoning. For example, in reaching its decision in *Hirsch v. S.C. Johnson*, the Supreme Court of Wisconsin distinguished the right of publicity from the right of privacy.\(^\text{23}\) The court clarified the right of publicity as pro-

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\(^{16}\) *Abdul-Jabbar*, 85 F.3d at 413 (quoting Lugosi v. Universal Pictures, 603 F.2d 425, 431 (Cal. 1979)).

\(^{17}\) 202 F.2d 866 (2d Cir. 1953).

\(^{18}\) *Id.* at 868; *see* Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129, 134 (Wis. 1979) (distinguishing the right of publicity from the right of privacy).

\(^{19}\) *See* Haelan, 202 F.2d at 867.

\(^{20}\) *See id.*

\(^{21}\) *Id.* at 868.

\(^{22}\) *Id.*

\(^{23}\) *See Hirsch*, 280 N.W.2d at 130, 132. The court repeatedly stressed that the focus of the right of publicity was on the athlete's marketable identity:

A cause of action for the appropriation of a person's name for trade purposes is different in nature from other privacy torts . . . . The appropriation cause of action protects not merely the right to be let alone, but, rather, protects primarily the property rights in the publicity value of aspects of a person's identity.
tecting the property right in the publicity value of a person's identity.

As the U.S. Supreme Court stated in Zacchini v. Scripps-Howard Broadcasting Co.,

“The rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.”

B. Historic Development of the Right of Publicity

Although the right of publicity and the right of privacy protect different interests, courts and legal scholars have discussed the two in tandem. In fact, some scholars have stated that the right of publicity has developed from the right of privacy. For example, in an oft-cited law review article, William L. Prosser divided the right of privacy into four separate torts, one of which protects against the “[a]ppropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.” There has been some disagreement concerning whether the right of publicity is purely a tort right or whether it...

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Id. at 130. The court went on to state that

We conclude that the right of a person to be compensated for the use of his name for advertising purposes or purposes of trade is distinct from other privacy torts which protect primarily the mental interest in being let alone. The appropriation tort is different because it protects primarily the property interest in the publicity value of one’s name.

Id. at 132.


25 Id. at 576 (quoting Harry Kalven, Jr., Privacy in Tort Law—Were Warren and Brandeis Wrong?, 31 LAW & CONTEMP. PROBS. 326, 331 (1966)) (alteration in original).

26 See, e.g., Hirsch, 280 N.W.2d at 132-35 (discussing the development of both rights); Cristina Fernandez, The Right of Publicity on the Internet, 8 MARQ. SPORTS L.J. 289 (1998) (documenting the history of the right of publicity); Ira J. Kaplan, They Can't Take that Away from Me: Protecting Free Trade in Public Images from Right of Publicity Claims, 18 LOY. L.A. ENT. L.J. 37 (1997) (distinguishing the right of publicity from other intellectual property rights).

27 See 1 J. THOMAS MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY, §§ 1.1-1.11 & fig.1-1 (1997) (discussing the areas of the law that contributed to the development to the right of publicity).

protects a property right. However, most courts appear to have adopted the position that the right of publicity, unlike the general invasion of privacy tort, “protects pecuniary and proprietary interests [rather than] emotional interests.”

C. National Basketball Association v. Motorola, Incorporated.

In NBA v. Motorola, the NBA brought suit seeking relief from Motorola’s SportsTrax service which, inter alia, provides subscribers with information on scores and statistics of games in progress via electronic pagers.

1. The NBA v. Motorola Facts

In district court, the NBA argued that Motorola violated both the League’s copyright in the games and in the game broadcasts by disseminating the scores of games in progress. As discussed below, Motorola received information concerning games in progress from licensed NBA broadcasts. The district court, using the test set out in Feist Publications, Inc. v. Rural Telephone Service Co., stated that “[t]o establish copyright infringement, “two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” Using this test, the court found that the NBA failed to meet the first element of the test, ownership of a valid copyright, as to the games themselves,

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29 Compare Hirsch, 280 N.W.2d at 134 (observing that the right of publicity “protects a property right”), with Haelan Lab. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) (stating that whether the right of publicity is “labelled a ‘property’ right is immaterial . . . the tag ‘property’ simply symbolizes the fact that courts enforce a claim which has pecuniary worth”).
32 See Motorola, 105 F.3d at 843-44 (indicating that the NBA’s complaint asserted six claims for relief).
33 See Sports Team Analysis, 939 F. Supp. at 1088 (discussing the two elements of a copyright infringement claim).
34 See infra notes 54-55 and accompanying text (discussing Motorola facts as presented in the appellate opinion).
35 See Sports Team Analysis, 939 F. Supp. at 1081 (noting that the defendant paid reporters to watch and listen to games on television and radio to obtain the information).
and failed to meet the second element of the test, a copying, as to the broadcasts of the games. Following the line of cases that have addressed the issue of the copyrightability of sporting events, the district court held that NBA games are not protected under the Copyright Act. The court stated that "NBA games do not constitute 'original works of authorship' and thus do not fall within the subject matter of copyright protection under 17 U.S.C. §§ 102, 103.

As to the League's claim that Motorola violated the copyrights in the broadcasts of the games, the court held that Motorola did not copy any of the protected features of the broadcasts, stating:

In the instant case, although direct evidence exists that defendants actually copied certain aspects of the broadcasts of the NBA games, this evidence also reveals that defendants copied, at most, the idea of an NBA game and facts from specific NBA games, both of which are beyond the realm of protectibility.

Next, the district court addressed the NBA's commercial misappropriation claim. The League alleged that Motorola's dissemination of the scores of games in progress violated the NBA's property rights in the games and in the broadcasts of the games, rights that were recognized under New York State common law. Motorola asserted the defense that section 301 of the Copyright Act preempted common-law misappropriation claims. The court rejected this defense in part and accepted it in part, holding that the rights in the broadcasts were preempted because the broadcasts were copyrightable, but that the rights in the games themselves were not preempted because the games were not copyrightable, and thus not governed by the Copyright Act. The Second Circuit reversed the

39 See id.; see also infra notes 229-40 and accompanying text (discussing preemption by the Federal Copyright Act).
41 Id. at 1093-94 (citing Feist, 499 U.S. at 350).
42 See id. at 1094-98 (focusing on the issue of federal preemption of state law).
43 See id. at 1094, 1098-1107 (addressing the New York common law claim of misappropriation).
44 See id. at 1094 (citing 17 U.S.C. § 301 (1994)).
45 See id. at 1094-98 (explaining the general scope and subject matter requirements for preemption).
district court's holding as to the preemption of New York State's common law misappropriation.⁴⁶

In addition to the federal copyright claims, the NBA brought other federal claims. The League alleged that Motorola violated section 43(a) of the Lanham Act; the NBA contended that Motorola's advertising contained false designations of origin and constituted false advertising.⁴⁷ The district court rejected these claims.⁴⁸ The League also alleged that by taking information from cable telecasts to transmit over the SportsTrax service, Motorola violated the Communications Act, prohibiting unauthorized transmissions of interstate and foreign communications.⁴⁹

The district court held that, because the NBA did not adduce any evidence that Motorola "intercepted" cable transmissions, and because Motorola did not play a legitimate role in cable transmissions, this claim failed.⁵⁰ Thus, the district court judge dismissed all of the NBA's claims except the New York state law misappropriation claim.⁵¹ On appeal, Judge Winter dismissed this claim as well.⁵²

The Second Circuit framed the issue before it as centering on the state law "hot-news" misappropriation cause of action.⁵³

Motorola marketed a paging device, SportsTrax, which supplied data on sporting events, including NBA games; the information was taken from radio and television broadcasts by SportsTrax-affiliated reporters, who then keyed this information into a computer that transmitted the information to the pagers.⁵⁴ SportsTrax provided data on sporting events while they were in progress.⁵⁵

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⁴⁶ See NBA v. Motorola, Inc., 105 F.3d 841, 848-49 (2d Cir. 1997) (holding that where the challenged misappropriation relates in part to the broadcasts of the games, the subject matter requirement is met as to both the broadcasts and the games).
⁴⁸ See id. at 1108.
⁴⁹ See id. at 1112 (citing 47 U.S.C. § 605(a) (1994)).
⁵⁰ See id. at 1113-14.
⁵¹ See id. at 1085-115 (concluding that the NBA's misappropriation claim was the only meritorious claim).
⁵² See NBA v. Motorola, Inc., 105 F.3d at 841, 848-52 (2d Cir. 1997) (holding "that only a narrow 'hot news' misappropriation claim survives preemption for actions concerning material within the realm of copyright").
⁵³ Id. at 843 ("The crux of the dispute concerns the extent to which a state law 'hot-news' misappropriation claim based on International News Service v. Associated Press ("INS") survives preemption by the federal Copyright Act and whether the NBA's claim fits within the surviving INS-type claims." (citation omitted)).
⁵⁴ See id. at 843-44 (explaining the pager's capabilities).
⁵⁵ See id. (finding that the information included the names of the teams, score changes, and the time remaining in the game).
2. “Hot-News” Misappropriation Cause of Action

In *International News Service v. Associated Press*, the U.S. Supreme Court sought to protect transmission of factual information. The Court held that the International News Service’s (INS) use of the Associated Press’ wire service bulletins to transmit information to the former’s subscribers constituted a misappropriation of Associated Press property. In rejecting the NBA’s misappropriation claim in *Motorola*, the Second Circuit ruled that although legitimate “hot-news” misappropriation claims survive preemption under federal copyright law, “much of New York misappropriation law after INS goes well beyond ‘hot news’ claims and is preempted.” The court found that

the surviving “hot-news” INS-like claim is limited to cases where: (i) a plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant’s use of the information constitutes free riding on the plaintiff’s efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened. We conclude that SportsTrax does not meet that test.

Since the NBA and Motorola were not yet in direct competition, the NBA did not satisfy this requirement and consequently, the sports league could not use the “hot-news” misappropriation claim to control the dissemination of information concerning games in progress. Had the NBA been offering a similar service, the Second Circuit would have likely sustained the “hot news” misappropriation claim. This is in accord with the legislative history of the

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56 248 U.S. 215 (1918).
57 See *International News Serv.*, 248 U.S. at 239 (recognizing that news gathering services invest time, money, and effort in acquiring information to be commercially disseminated).
58 See id. at 242 (discerning that International News Service was “sell[ing] complainant’s goods as its own”).
59 *Motorola*, 105 F.3d at 845.
60 Id.
61 See id. at 853-54 (indicating that although the NBA had intentions of marketing a service similar to SportsTrax, it had yet to do so).
62 Id. at 854 (“To be sure, if [Motorola] in the future were to collect facts from an enhanced Gamestat pager to retransmit them to SportsTrax pagers, that would constitute free-riding and might well cause Gamestats to be unprofitable because it had to bear costs to collect
Copyright Law, which expressly carves out an exception for "hot news" misappropriation causes of action. 63

In reaching its decision, the Second Circuit held that "where the challenged copying or misappropriation relates in part to the copyright broadcasts of the games, the subject matter requirement [for preemption] is met as to both the broadcasts and the games." 64

The Motorola holding ignores one of the strongest rationales underlying the misappropriation cases. As stated in a seminal case:

[The parties] are using baseball news as material for profit. The Athletic Company has, at great expense, acquired and maintains a baseball park, pays the players who participate in the game, and have, as we view it, a legitimate right to capitalize on the news value of their games by selling exclusive broadcasting rights to companies which value them as affording advertising mediums for their merchandise. 65

In Pittsburgh Athletic Co. v. KQV Broadcasting Co., 66 the defendant radio station broadcasted "play-by-play descriptions" of home games played by the Pittsburgh Pirates major league baseball team, in violation of the team's broadcast licenses with other radio broadcasters. 67 The defendant used reporters positioned outside of the ballpark, at locations where they could observe the game. 68 The court held that the defendant's actions violated the plaintiffs property interest in the news value of the games.69

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[State law should have the flexibility to afford a remedy (under traditional principles of equity) against a consistent pattern of unauthorized appropriation by a competitor of the facts (i.e., not the literary expression) constituting "hot" news, whether in the traditional mold of International News Service v. Associated Press, 248 U.S. 215 (1918), or in the newer form of data updates from scientific, business, or financial data bases. Id. (footnote omitted).]

64 Motorola, 105 F.3d at 848; see infra notes 231-39 and accompanying text (discussing the Federal Copyright Act and examining whether it preempts the right of publicity).


66 Id.

67 See id. at 491-92.

68 See id. at 492 (noting that the reporters were positioned outside the arena, but were capable of observing the activity on the playing field).

69 See id. at 494 (finding that defendants' actions constituted unfair competition and violated the Communications Act of 1934). The court concluded that
Although Motorola did not broadcast entire games, the service, similar to the broadcasts in *Pittsburgh Athletic*, did compete with the League’s “right to capitalize on the news value of [the] games.”

3. The Right of Publicity and “Hot-News” Misappropriation Theory Distinguished

As mentioned earlier, Prosser dubbed the right of publicity as the “appropriation” prong of the right of privacy. In some jurisdictions, therefore, the right of publicity is denominated “commercial misappropriation.” The cause of action these terms designate should be distinguished from the “hot-news” misappropriation cause of action. “Hot-news” misappropriation claims focus on a person’s information gathering activities as opposed to that person’s efforts to create a marketable identity.

II. PARAMETERS OF THE RIGHT OF PUBLICITY

States generally have taken two approaches in recognizing the right of publicity—either by enacting a statute to codify the right, or allowing it to remain the subject of common law protection. This Part looks at these approaches, beginning with two states that have substantial right of publicity jurisprudence. Given the degree of media concentration in New York and California, we will look first to the approaches taken by these two states.

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The defendant wrongfully deprive[d] the plaintiffs and each of them of the just benefits of their labors and expenditures in respect of the baseball games and the public dissemination of news thereof as alleged in the complaint; and the action, threatened action, and practice of the defendant constitute a fraud on the public.

*Id.*

70 *Id.* at 492; see *NBA v. Motorola*, Inc., 105 F.3d 841, 843-44 (explaining the pager's information capabilities).

71 See Prosser, *supra* note 28, at 389 (characterizing the tort as “[a]ppropriation, for the defendant’s advantage, of the plaintiff’s name or likeness”).


73 See *infra* notes 232-40 and accompanying text (discussing the Federal Copyright Act and the right of publicity).

74 See, e.g., *Motorola*, 105 F.3d at 852 (2d Cir. 1997) (discussing the five requirements under the *International News Service* “hot-news” standard).
A. New York's Protection of the Right of Publicity

New York courts have held that no common law cause of action is available to vindicate the right of publicity in New York, aside from sections 50 and 51 of the New York Civil Rights Law. As New York jurisprudence does not recognize a common law right of publicity, we now turn to the question of why the NBA did not bring a cause of action under New York Civil Rights Law sections 50 and 51. These sections forbid the unauthorized use of the name or picture of a person for commercial purposes and corporations. New York law provides for equitable relief, damages, and, where appropriate, punitive damages.

Although Motorola's use of the NBA's name (or the name of the individual teams) in providing scores and statistics and in marketing the product seems violative of sections 50 (which imposes criminal penalties for the violation of the right of privacy) and 51 (which provides civil remedies), these statutes explicitly address the marketable identity of "living persons." Furthermore, the statutes were created "to protect an individual against "selfish, commercial exploitation." Thus, corporations are not protected by sections 50 and 51 of the New York Civil Rights Law.

However, there is a separate section of the New York statutory code which provides protection for certain categories of not-for-profit organizations, indicating the New York legislature's willingness to protect some organizations' right of publicity. One question that arises under section 397 is how to treat a cause of action brought by a not-for-profit organization such as the National Foot-

75 See Allen v. National Video, Inc., 610 F. Supp. 612, 621 (S.D.N.Y. 1985) (noting that protection against the use of a person's picture or portrait for advertising purposes, is encompassed under existing statutory provisions, rendering an independent common law right of publicity unnecessary).
78 See infra notes 152-70 and accompanying text (discussing the NBA's efforts at making a marketable identity).
ball League to recover for an infringement of its right of publicity. In its list of protected organizations, section 397 neither explicitly enumerates not-for-profit organizations formed to promote the advancement of a particular sport, or sports in general, nor explicitly precludes this type of not-for-profit organization. In fact, section 397 was amended in 1986 to add the words “or to inform or educate the consumer by publishing and disseminating the results of tests and evaluations of goods and services,” as a result of the Consumers Union cases, in which both state and federal courts held that the code section did not cover that organization.

B. California Right of Publicity Protection

Currently, California state law offers the broadest protection for the right of publicity, both statutorily and at common law.

1. California Statutory Protection

The relevant California Civil Code provision, section 3344, provides:

Use of another's name, voice, signature, photograph, or likeness for advertising or selling or soliciting purposes

(a) Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof.

...
(d) For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a).

(e) The use of a name, voice, signature, photograph, or likeness in a commercial medium shall not constitute a use for which consent is required under subdivision (a) solely because the material containing such use is commercially sponsored or contains paid advertising. Rather it shall be a question of fact whether or not the use of the person's name, voice, signature, photograph, or likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required under subdivision (a).

(f) Nothing in this section shall apply to the owners or employees of any medium used for advertising, including, but not limited to, newspapers, magazines, radio and television networks and stations, cable television systems, billboards, and transit ads, by whom any advertisement or solicitation in violation of this section is published or disseminated, unless it is established that such owners or employees had knowledge of the unauthorized use of the person's name, voice, signature, photograph, or likeness as prohibited by this section.85

It appears that, on its face, this code section would apply to sports leagues, such as the NBA. Unlike some other state statutes, section 3344 does not explicitly limit its protections to people.86 Nor did the California legislators define the term "person" in the code section. Looking at section 14 of the California Civil Code may prove useful in interpreting the language of section 3344.87 When

section 14 was originally enacted in 1872, it provided a definition of persons which included certain organizations:

Where the term "person" is used to designate the party whose property may be the subject of any offense, action, or proceeding, it includes this State, any other State, Government, or country which may lawfully own any property within this State, and all public and private corporations, or joint associations, as well as individuals. The word "person," except when used by way of contrast, includes not only human beings, but bodies politic or corporate.\footnote{CAL. CIV. CODE § 14 note (West 1982) (Historical Note).}

Although this section was amended in 1874, the California Code continues to define the word "person" to include associations and corporations.\footnote{See id. (indicating that section 14 experienced only one other amendment in 1903).}

2. California Common Law

In addition to statutory protection, California courts recognize a common law right of publicity which provides protection broader than that of section 3344.\footnote{See, e.g., Abdul-Jabbar v. General Motors Corp., 85 F.3d 407, 414 (9th Cir. 1996) (describing a broader construction under common law).} These courts have held that "[t]he statutory cause of action complements rather than codifies [the] common law" right of publicity.\footnote{Montana v. San Jose Mercury News, Inc., 40 Cal. Rptr. 2d 639, 640 (Ct. App. 1995); see Abdul-Jabbar, 85 F.3d at 414 (explaining that "the statute is best understood as 'complementing,' rather than enacting, the common law cause of action, because the two are not identical").} Furthermore, courts "have construed the statute's protection of name, voice, signature, photograph, or likeness more narrowly than the common law's protection of identity."\footnote{Abdul-Jabbar, 85 F.3d at 414 (citations omitted) (emphasis added).}

Kareem Abdul-Jabbar, a former NBA basketball player, brought claims under the Lanham Act, the California common law right of publicity, as well as California Civil Code section 3344, alleging that the defendant "violated his trademark and publicity rights by using his former name, Lew Alcindor, [in a commercial for its product] without his consent."\footnote{Id. at 409; see infra notes 257-63 and accompanying text (describing the commercial and the context in which "Lew Alcindor" was used).} In deciding this case,
the Ninth Circuit acknowledged that the right of publicity is firmly entrenched in California common law.94

Although language in the opinion refers to "name and likeness," the Ninth Circuit has held that "California's common law 'right of publicity is not limited to the appropriation of name or likeness.' The key issue is appropriation of the plaintiff's identity."95 Thus, any attribute that evokes this identity arguably is covered by California common law.

To establish a prima facie case of common law right of publicity, the plaintiff must allege: "(1) the defendant's use of plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury."96

However, to establish a prima facie case under section 3344(a), plaintiff must allege two other elements: "(1) knowing use; and (2) a 'direct connection . . . between the use and the commercial purpose.'"97 In White v. Samsung Electronics America, Inc.,98 a game show celebrity brought suit alleging defendants breached both her common law right of publicity and her rights under section 3344 by marketing a robot that she claimed evoked her marketable identity.99 The Ninth Circuit upheld the dismissal of the section 3344 claim, but reversed the trial court's dismissal of the plaintiff's common law claim.100 In discussing the common law right of publicity, the Ninth Circuit held that the right protects "means of appropriation other than name or likeness," as well as actual name and likeness.101 The Abdul-Jabbar court found that while section 3344 is "limited to commercial appropriations," state common law may apply in non-commercial contexts as well.102

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94 See Abdul-Jabbar, 85 F.3d at 413 (explaining "that the reaction of the public to name and likeness . . . endows the name and likeness of the person involved with commercially exploitable opportunities").

95 Id. at 414 (quoting White v. Samsung Elec. Am., Inc., 971 F.2d 1395, 1398 (9th Cir. 1992)).

96 Id. at 413-14; see Montana, 40 Cal. Rptr. 2d at 640.

97 Abdul-Jabbar, 85 F.3d at 414 (quoting Eastwood v. Superior Court, 198 Cal. Rptr. 342, 347 (Ct. App. 1983)).

98 971 F.2d 1395 (9th Cir. 1992).

99 See id. at 1396 (stating that the advertisement in dispute displayed a robot whose appearance resembled that of the plaintiff, posing on a game show set resembling the set on which the plaintiff became famous).

100 See id. at 1399 (resolving that the district court had erred in rejecting the plaintiff's claim on summary judgment).

101 Id. at 1398.

102 Abdul-Jabbar, 85 F.3d at 414.
Thus, if the NBA could establish that it has a marketable identity, the League could then prove a prima facie cause of action under the California common law right of publicity. This identity includes, but is not limited to, the NBA’s name.103

However, both the common law right of publicity jurisprudence and section 3344 recognize a privilege for reporting newsworthy events.104 The question here is whether the Motorola SportsTrax service constitutes reports of newsworthy events or, to use the language of section 3344, “a sports broadcast or account.”105 This Article concludes that it does not.106

C. Current Status of the Right of Publicity—Other States

1. Common Law States

Several states provide common law right of publicity protection, including states which were the fora for several of the leading cases addressing the right of publicity for sports figures.107 These states include New Jersey,108 Pennsylvania,109 and Minnesota.110 Recently, a federal court in Illinois addressed the issue of state com-

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103 See supra notes 31-55 and accompanying text (discussing the suit brought by the NBA against Motorola).
105 See infra notes 206-27 and accompanying text (concluding that the Motorola-type use goes beyond merely providing final game scores).
107 In his leading treatise on the right of publicity and the right of privacy, J. Thomas McCarthy lists 16 states which he identifies as having recognized the right of publicity at common law. See 1 McCarthy, supra note 27, § 6.1[B]. However, some of the states he lists have enacted statutes as well. See id. § 6.3[C]. The states he lists that have not enacted statutes are: Connecticut, Georgia, Hawaii, Illinois, Michigan, Minnesota, Missouri, New Jersey, Ohio, Pennsylvania. Cf. id. (supplying a chart of states which currently provide a statutory right of publicity). Though the preceding list does not include Alabama, a recent Eleventh Circuit case indicates it also recognizes the right of publicity, although not under that rubric. See Allison v. Vintage Sports Plaques, 136 F.3d 1443, 1446 (11th Cir. 1998).
110 See, e.g., Hillerich & Bradsby Co. v. Christian Bros., Inc., 943 F. Supp. 1136, 1141 (D. Minn. 1996) (discussing Minnesota’s common law right of publicity in the context of the licensing of athletes’ names and images); Uhlaender v. Henrickson, 316 F. Supp. 1277, 1282 (D. Minn. 1970) (noting that the celebrity’s identity is “the fruit of his labors and is a type of property”).
mon law protection of athletes’ right of publicity. In *MJ & Partners Restaurant Limited Partnership v. Zadikoff*, the court held that Illinois common law does recognize the tort of misappropriation, although Illinois state courts have not explicitly “addressed the relationship between the tort of misappropriation and the ‘right of publicity.’”

In another recent case, *Allison v. Vintage Sports Plaques*, the Eleventh Circuit distinguished the right of publicity from the common law tort of commercial appropriation and held that Alabama’s common law commercial appropriation right of privacy, “represent[ed] the same interests and address[ed] the same harms as does the right of publicity as customarily defined.” Indeed, the elements of Alabama’s commercial appropriation invasion of privacy tort, which bases liability on commercial, rather than psychological, interests, do not differ significantly from [the elements] of the tort of violation of the right of publicity.”


In addition to New York and California, other states have enacted statutes to codify the right of privacy.

a. State Statutes That Explicitly Limit Protections to Natural Persons

In 1977, the Wisconsin legislature enacted section 895.50 under the general caption of “right of privacy.” One definition of “invasion of privacy” is included in the provisions of section 895.50(2)(b): “The use, for advertising purposes or for purposes of

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112 Id.
113 Zadikoff, 10 F. Supp. 2d at 930 (rejecting the argument that the right to publicity does not exist in Illinois).
114 136 F.3d 1443 (11th Cir. 1998).
115 Id. at 1447 (“Although it does not appear that Alabama courts ever have recognized a right denominated as ‘publicity,’ we conclude that the Alabama right of privacy contains an analogous right.”).
116 Id. at 1447 (citation omitted).
117 These states include: Florida, Indiana, Kentucky, Massachusetts, Nebraska, Nevada, Oklahoma, Rhode Island, Tennessee, Texas, Utah, Virginia, and Wisconsin. See infra notes 118-32 and accompanying text.
118 WIS. STAT. ANN. § 895.50 (West 1997).
trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person . . . .”

Section 540.08 of Florida’s statutes also limits the scope of its protection to “natural person[s],” as does Nebraska, Nevada, and Utah. The Texas statute, which creates a property right strictly to allow the descendability of the right of privacy, limits protections to individuals.

Although the Kentucky code section does not define “person” as natural persons, the language of the section which acknowledges that “the right of publicity . . . does not terminate upon death” is a strong indication that the section is limited to natural persons. The Tennessee code provision restricts its protections to individuals, defined as “human being[s], living or dead.” Although the Virginia statute does not explicitly restrict its scope to natural persons, the code section’s language indicates that the protection is restricted to natural persons.

b. State Statutes that Do Not Explicitly Limit Protections to Natural Persons.

In addition to California, there are other states that do not explicitly restrict right of publicity protection to natural persons. These states include Indiana, Massachusetts, and Rhode Island. Furthermore, the Oklahoma code section specifically ex-
tends its protections to baseball teams. Section 1449 of the Oklahoma code reads in pertinent part: “A definable group [eligible for protection] includes, but is not limited to, the following examples: A crowd at any sporting event, . . . a baseball team.”

III. PROPOSED APPLICATION OF THE RIGHT OF PUBLICITY TO PROFESSIONAL SPORTS LEAGUES

A. Why Should the Right of Publicity Protect Sports Leagues?

1. Use of NBA's Name

One of the traits that the right of publicity indisputably protects, both at common law and statutorily, is one's name. In Motorola, the district court found that Motorola used the NBA's name in marketing SportsTrax, including the term “NBA SportsTrax,” as well as the name of the individual teams, although there was no evidence that Motorola “ever advertised that NBA manufactured, licensed, sponsored, or approved of SportsTrax.”

2. Use of Marketable Identity

In Motorola, the district court recognized the commercial value of NBA games and the efforts the League takes to protect and increase this commercial value. As to the value of the games, the court found that NBA games have “vast commercial value and appeal” much of which “is attributable to years of NBA's promotional investments” and activities. The commercial value of NBA games

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132 OKLA. STAT. ANN. tit. 12, § 1449 (West 1993).
133 See, e.g., Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129, 138 (Wis. 1979) (A right of publicity "cause of action for appropriation of a person's name . . . exist[ed] at common law in Wisconsin").
135 See id. at 1077 (describing the NBA's licensing and advertising agreements).
136 Id. The court's findings include, in pertinent part:
... The National Broadcasting Company (“NBC”), for example, pays NBA approximately $3 million per game for the national network television broadcast rights to NBA games.
... Turner Broadcasting (“Turner”) pays NBA approximately $1 million per game for the rights to televise nationally 115 regular season and playoff games.
... ESPN Radio pays NBA approximately $50,000 to $100,000 per game for the national radio distribution rights for NBA games.
in progress accounts for approximately eighty percent of the League's income, including broadcast license agreements and ticket sales. Thus, the NBA has an interest in restricting dissemination of games in progress; as to the League's attempts to restrict the dissemination of information about games in progress, the court found that "[a]lthough [the] NBA relies on . . . public dissemination of real-time NBA game data to enhance public interest in NBA games, it must, in order to preserve the value of its proprietary interest in this information, impose limitations on its dissemination." Thus,

... In addition to these national broadcast agreements, NBA has a series of local and regional license agreements. In the New York Metroplex, NBA has agreements with MSG Network and Sports Channel, which carry New York Knicks and New Jersey Nets games respectively.

Id. (citations omitted).

137 See id. (describing in substantial detail, the efforts taken by the League to protect its assets).

138 Id. at 1078 (emphasis added). The district court's decision reads, in pertinent part:

... Although NBA relies on this public dissemination of real-time NBA game data to enhance public interest in NBA games, it must, in order to preserve the value of its proprietary interest in this information, impose limitations on its dissemination.

... NBA's license agreements represent one limitation.

... Another limitation is NBA's media credentials. These media credentials ensure that entities, despite the legitimacy of their news gathering and dissemination functions, are not able to disseminate real-time information which is comparable to that provided by NBA's paying licensees without compensating NBA.

... In this manner, NBA balances the goals of informing the public about, and attracting interest in, NBA games, on the one hand, and preserving its ability to derive revenue from the sale of real-time NBA game information, on the other hand.

... Credentialed media entities are admitted to the arenas and are permitted to provide post-game reports and, to a more limited extent, reports of NBA games while they are in progress.

... According to NBA's 1995-96 Media Pass: Television and radio stations may use excerpts of NBA games only in the manner and on the terms and conditions set forth in the NBA's Video and Audio Highlights Licenses, receipt of which is acknowledged. Any other use requires prior specific written approval from the NBA. The use of any photograph, film, tape or drawing of the game, player interviews or other arena activities taken or made by the accredited organization or the individual for whom this credential has been issued shall be limited to news coverage of the game by the organization to which this credential is issued unless expressly authorized in writing by the NBA. Permission to film or tape NBA games may be revoked at any time by the NBA. All ownership, copyright and property rights in the NBA games, telecast thereof and in the events and activities conducted in the arena shall remain the sole property of the NBA and no such rights are conferred or intended to be conferred or created on behalf of any other person or entity by the issuance of this credential.

... NBA's Media Guidelines provide further specifications for photographers, cameramen, and the electronic media, and they limit the nature of the media's use of video highlights of NBA games.

... The electronic media restrictions state:

No electronic media personnel shall transmit scores and/or other game information out of an NBA arena (by telephone or by any other means) more than three times during each quarter and once during each of the two quarter breaks without the prior specific written approval of the NBA; provided, however, that in the event that such game in-
major professional sports leagues have invested, and continue to invest, great sums of money and time in marketing their games and in trying to control the nature and timing of the scores and statistics of these games.\textsuperscript{139} As the U.S. Supreme Court stated in *Zaccchini v. Scripps-Howard Broadcasting, Co.*:

The broadcast of a film of [a performer's] entire act poses a substantial threat to the economic value of that performance. . . . [T]his act is the product of [the performer's] own talents and energy, the end result of much time, effort, and expense. *Much of its economic value lies in the "right of exclusive control over the publicity given to his performance"; if the public can see the act free on television, it will be less willing to pay to see it . . . The effect of a public broadcast . . .

\textsuperscript{139} See *id.* at 1076-77 (explaining that the National Football League, the Office of the Commissioner of Baseball, and the National Hockey League all submitted amicus curiae briefs).
. is similar to preventing [the performer] from charging an admission fee.\textsuperscript{140}

As much of the return on the NBA’s investment in promotional activities takes the form of revenues, such as broadcast licenses that are a direct result of the League’s restrictions on the dissemination of information on games in progress, allowing Motorola to provide real-time updates of basketball games in progress provides an analogous “threat to the economic value” of those games similar to the threat that concerned the Zacchini court.\textsuperscript{141} Here, the threat comes not from television broadcasts, but from services such as SportsTrax. Although the public has a choice between paying to see the games in person and watching “free” games on television, the League receives fees from media entities for these broadcasts.\textsuperscript{142} Thus, the NBA is compensated for any loss of ticket revenues due to the decline in attendance at League games, caused by people choosing to watch the games on television, with broadcast licensing fees. But the League receives no fees from SportsTrax similar to the broadcast licensing fees.\textsuperscript{143} The question is whether these efforts have created a marketable identity outside that of the individual athlete. This Article contends that they have.

a. What Is a Marketable Identity?

The concept of marketable identity reflects the efforts of athletes in creating a public image with which consumers desire to associate.\textsuperscript{144} This desire is apparent from the interest in using athletes’ identities to market games,\textsuperscript{145} restaurants,\textsuperscript{146} and other consumer


\textsuperscript{141} See id. (describing how the performer is harmed).

\textsuperscript{142} See supra notes 138-40 and accompanying text (discussing broadcast licensing agreements).

\textsuperscript{143} See Sports Team Analysis, 939 F. Supp. at 1084-85 (noting that SportsTrax was concerned that it might have to pay a royalty or face a lawsuit).

\textsuperscript{144} See, e.g., Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129, 134 (Wis. 1979) (“An advertiser who appropriates an individual’s personality . . . uses the audience appeal of [that] personality . . . to sell goods. Audience appeal is a principal stock-in-trade of a celebrity.”).


\textsuperscript{146} See, e.g., MJ & Partners Restaurant Ltd. Partnership v. Zadikoff, 10 F. Supp. 2d 922 (N.D. Ill. 1998) (concerning the unauthorized use of a basketball player’s name by a restaurant).
products.\textsuperscript{147} \textit{Zadikoff} illustrates the desire of the public, and derivatively, that of corporate marketers, to associate with an athlete’s identity. Not only was the use of Michael Jordan’s name and likeness at issue, but the plaintiff also claimed that the defendants, including Jordan himself, attempted to trade on other elements of Jordan’s identity in opening a competing restaurant by undertaking such activities as: attempting to “strategically” locate a restaurant “to benefit from its proximity to the United Center, home of the Chicago Bulls” to make it more readily accessible to “the large number of sports fans that use [the] thoroughfare” to the sporting arena;\textsuperscript{148} attempting to locate this new restaurant near another Michael Jordan project;\textsuperscript{149} “serving ‘Carolina Style Food’ to take advantage of the fact that Jordan is from North Carolina”;\textsuperscript{150} and displaying “Jordan’s vehicles, many of which bear vanity license plates . . . outside the [new] restaurant when Jordan [was] visiting.”\textsuperscript{151}

\textit{b. How Do the NBA’s Efforts Compare to the General Construct of Marketable Identity?}

Sports leagues’ efforts to create demand for their sport and related paraphernalia are analogous to the efforts that individual athletes expend in creating their marketable identities.\textsuperscript{152} As mentioned in the earlier discussion of the \textit{Motorola} case, the time, money and other resources leagues have expended to create this demand has been successful.\textsuperscript{153} Some of this effort has gone into promoting the leagues as entities as opposed to focusing on particular players or teams.\textsuperscript{154} The fact that the leagues have created this interest as opposed to allowing it to happen “naturally” is irrelevant. To paraphrase the already quoted language of the Ninth

\textsuperscript{147} See, e.g., Abdul-Jabbar v. General Motors Corp., 85 F.3d 407 (9th Cir. 1996) (automobiles); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974) (cigarettes).

\textsuperscript{148} \textit{Zadikoff}, 10 F. Supp. 2d at 926.

\textsuperscript{149} \textit{Id}.

\textsuperscript{150} \textit{Id}.

\textsuperscript{151} \textit{Id}.

\textsuperscript{152} See Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129, 138 (Wis. 1979) (stating that “the publicity value of a celebrity’s name is built up by the investment of work, time, and money by the celebrity”).

\textsuperscript{153} See supra notes 134-43 and accompanying text (discussing the NBA’s marketable identity).

Circuit in *Abdul-Jabbar*, whether the public's fascination with a celebrity or athlete's persona is "fortuitous or . . . managed and planned," the focus should be on the opportunities created by this fascination.\(^{155}\) The question is whether others should be able to profit from the exploitable opportunities created by the leagues’ efforts at the expense of the leagues. As one federal district court stated: "a person has the right to enjoy the fruits of his own industry free from unjustified interference."\(^{156}\)

In his treatise on publicity and privacy law, one legal scholar discusses both sides of this type of "unjust enrichment" argument.\(^{157}\) On one hand, sports leagues' successful efforts to create public demand for their sports should arguably come at a cost of having to provide information to the public by making this information "freely available for use" as part of the public domain.\(^{158}\) On the other hand, the question is not whether this information should be made available to the public, but who should profit from the public's interest: the creator of the interest or a third party.\(^{159}\) After all, "the real policy choice is not between rich celebrities and the needy public, but between celebrities and corporate advertisers who want to use the aura of celebrity to help sell products."\(^{160}\) Although this language focuses on the use of the right of publicity in advertising, the Supreme Court in *Zacchini* conducted a similar analysis in the context of news reporting.\(^{161}\)

c. **How Does the Presence of Broadcast Licenses Affect the NBA’s Marketable Identity?**

Sports leagues enter into broadcast distribution licensing agreements to publicize their sports and to disseminate information about games in progress.\(^{162}\) For example, the district court in *Mo-
torola set forth a list of findings of fact. As previously mentioned, the court found that eighty percent of the NBA's revenues came from such agreements. If these leagues were unable to restrict the dissemination of game statistics while the games were in progress, the value of these agreements would effectively disappear. As the district court stated: "Although NBA relies on... public dissemination of real-time NBA game data to enhance public interest in NBA games, it must, in order to preserve the value of its proprietary interest in this information, impose limitations on its dissemination."

The presence of broadcast licenses does not affect the NBA's interest in controlling the dissemination of League game scores and statistical information. Courts have rejected the argument that the widespread publication of athletes' performance statistics by news media, or the availability of this data to the public at-large, destroys the right of publicity. As one court has stated: "It is unfair that one should be permitted to commercialize or exploit or capitalize upon another's name, reputation or accomplishments merely because the owner's accomplishments have been highly publicized.”

In Palmer v. Schonhorn Enterprises, the court rejected the argument that the use of athletes' biographical data is not privileged in all circumstances merely because the information had been previously published.

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163 See id. at 1076; see also supra note 138 (reproducing relevant portions of the court's findings).
164 See id. at 1077 (indicating that broadcast licenses and admission fees were among the sources of the NBA's revenue).
165 Id. at 1078; see supra note 138 (discussing the court's findings of fact).
166 See Sports Team Analysis, 939 F. Supp. at 1078 (stating that broadcast licenses are one way the NBA limits score dissemination).
168 Id. at 1282.
170 See id. at 460-62 (explaining that an individual should be able to enjoy his hard work without it being capitalized on by others).
3. Courts Have Applied the Right of Publicity to Professional Athletes

One of the first cases to discuss an athlete's right of publicity was *Haelan Laboratories v. Topps Chewing Gum, Inc.* Since then, courts have decided several cases involving this particular topic, as illustrated by the cases cited in this Article. The Seventh Circuit, in *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n,* recognized that athletes have the right, in some instances, to control the commercial use of their identities. However, the court held that teams, as copyright owners of game telecasts, controlled the players' rights of publicity as to televised game performances, and not the players themselves. In *Baltimore Orioles,* the Major League Players Association sought a declaratory judgment to determine whether the players or the teams for which they played owned "the broadcast rights to the Players' performances during major league baseball games."

4. Courts Have Applied the Right of Publicity to Teams

In *Shamsky v. Garan, Inc.*, the New York Supreme Court held that t-shirts bearing a team picture of the 1969 World Champion New York Mets violated the right of publicity of the individuals portrayed in the picture. Although the defendant manufacturer did not get plaintiffs' approval for the shirt, it used the photograph "under authority from the National Baseball Hall of Fame." While acknowledging that "[u]nder New York law, [individual] players have the right to commercial exploitation of their individual identities," the *Shamsky* court rejected the defendant's argument.

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171 202 F.2d 866 (2d Cir. 1953); see supra notes 26-30 (discussing the development of right of publicity case law).
172 805 F.2d 663 (7th Cir. 1986).
173 See id. at 679 (stating that the Players may bargain "with the Clubs for a contractual declaration that the Players own a joint or an exclusive interest in the copyright of the telecasts"); infra note 231 and accompanying text (discussing players' rights of publicity other than in game broadcasts).
174 See id. at 673-74 (noting that an agreement altering the "statutory presumption that the employer owns the copyright in a work made for hire" must be express).
175 Id. at 665.
177 See id. at 931 (describing the subject photograph as it appeared on the front of the shirt with random drawings and statistics, including statistics from the 1969 baseball season, displayed on various areas of the shirt).
178 Id. at 932.
that the players relinquished certain publicity rights by entering into an agreement with the Mets ballclub, and ruled that “each player retains the right to the commercial exploitation of his identity,” with respect to the photograph in question.\textsuperscript{179} The court distinguished the right of publicity with respect to game performance, such as represented in the subject photograph, with the right of publicity in general.\textsuperscript{180} In doing so, the court acknowledged that individual players retained their general right of publicity.\textsuperscript{181} Under paragraph 3(c) of the player’s agreement, the players only assigned the right to use pictures from games for publicity purposes.\textsuperscript{182} Thus, the agreement did not grant the team the right to use these pictures for other (advertising) purposes.

Major league baseball players are not the only athletes in professional sports who have entered into contracts with teams or leagues that partially restrict their ability to control their rights of publicity. Paragraph 8 of the National Hockey League (NHL) Standard Player’s Contract provides, in pertinent part:

The Club recognizes that the Player owns exclusive rights to his individual personality, including his likeness. . . . The Player hereby irrevocably grants to the Club during the period of this Contract and during any period when he is obligated under this Contract to enter into a further contract with the Club the right to permit or authorize any firm, person or corporation to take and make use of any still photographs, motion pictures, or electronic (including television) images of himself in uniform and agrees that thereafter all rights in such photographs, pictures and images (including the right to identify him by name) shall belong to the Club exclusively for the purposes of telecasts, film or video documentaries or features, advertisements and promotions of the

\textsuperscript{179} Id. at 933-34. In Shamsky, the agreement between players and the Mets ballclub called the “Uniform Players Contract” contained the following provision:

The Player agrees that his picture may be taken for still photographs, motion pictures or television at such times as the Club may designate and agrees that all rights in such pictures shall belong to the Club and may be used by the Club for publicity purposes . . . .

\textsuperscript{180} See id. at 936-37 (explaining that it was upholding the right to “[p]rotection of a personality with ‘marketable status’”).

\textsuperscript{181} See id. at 933 (upholding this right despite the possibility of a decrease in commercial value).

\textsuperscript{182} See id. at 934 (distinguishing the use of a player’s photograph on clothing from a publicity purpose).
Club's games, use by the media for reportorial purposes, game programs, yearbooks, magazines and the like, and purposes in which the focus is on the Club or game and not the individual Player.\textsuperscript{183}

Paragraph 4 of the National Football League Player Contract provides, in pertinent part:

Player grants to Club and the League, separately and together, the authority to use his name and picture for publicity and promotion of NFL Football, the League or any of its member clubs in newspapers, magazines, motion pictures, game programs and roster manuals, broadcasts and telecasts, and all other publicity and advertising media, provided such publicity and promotion does not constitute an endorsement by Player of a commercial product.\textsuperscript{184}

Paragraph 18 of the National Basketball Association Uniform Player Contract provides in pertinent part:

(a) The Player agrees to allow the Club or the Association to take pictures of the Player, alone or together with others, for still photographs, motion pictures or television, at such times as the Club or the Association may designate, and... [these pictures] may be used in any manner desired by either of them for publicity or promotional purposes. The rights in any such pictures taken by the Club or by the Association shall belong to the Club or to the Association, as their interests may appear.\textsuperscript{185}

With the exception of the NHL players, as part of the above agreements, the athletes also agree to limit their personal appearances during the sports season and/or to seek the approval of their respective teams.\textsuperscript{186}

The Shamsky court, adopting the position advanced by the defendant clothing manufacturer that the clothing "commemorat[es] the 1969 World Champion New York Mets team as a separate and historically recognizable entity," held that, not only was the team being


\textsuperscript{186} See \textit{supra} notes 183-85 and accompanying text (quoting the language of the agreements).
“commemorated, [but also] that the whole is greater than the sum of its parts.” Thus, the value of a team’s marketable identity as a team, for example, may be greater than the value of the sum of the individual team members’ marketable identities.

B. Why Should the Right of Publicity Not Protect Sports Leagues?

1. Organization Protection Separate from the Players’ Rights

As stated earlier, professional sports teams control the individual athletes’ right of publicity in game performances. By agreement, sports leagues can enforce these rights, although the players otherwise retain their right of publicity. However, the question remains whether organizations have a marketable identity, separate from the rights of their constituents, that courts will protect. The right of publicity initially grew out of the right of privacy; that is, a natural person’s interest in keeping certain facts private. Protecting the interests of organizations represents an expansion on the original purpose of the right. Recently a court summarily concluded that corporations do not have a right of publicity.

2. Role of Players Associations in Protecting Individual Players’ Rights

Professional athletes, such as major league baseball players, have formed associations to represent the common interests of players. These associations not only act as labor unions, but also assist their members in using their rights of publicity. The Association of

187 Shamsky, 632 N.Y.S.2d at 933 (first alteration in original) (emphasis added).
188 See supra notes 174-82 (discussing Baltimore Orioles and Shamsky).
189 See supra notes 183-85 and accompanying text (discussing standard player contracts).
190 See Haelan Lab., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) (explaining that “in addition to and independent of [the] right of privacy . . . a man has a right in the publicity value of his photograph”); see also Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129, 132-37 (Wis. 1979) (discussing the development of the right of publicity in Wisconsin).
191 See 1 McCarthy, supra note 27, § 4.8[A]-[D] (explaining the idea of expanding the right of publicity and stating his reasons why this step should not be taken).
193 See Uhlaender v. Henricksen, 316 F. Supp. 1277, 1278 (D. Minn. 1970) (explaining that the role of the Major League Baseball Players Association is “to represent the major league baseball players’ common interest and . . . act for [member players] in marketing and licensing the use of group names or for group endorsement purposes”).
194 See 1 Wise & Meyer, supra note 183, at 89-98 (discussing the role of unions in the sports context).
Major League Baseball Players ("Association") is typical of such an organization. Not only does the Association act as the exclusive collective bargaining agent for all active major league baseball players, it also operates as a group licensing program in which it acts as the assignee of the individual publicity rights of all players. A relatively recent Tenth Circuit case briefly discussed the Association's responsibilities concerning licensing agreements:

Since 1966, [the Association] has entered into group licensing agreements for a variety of products, such as candy bars, cookies, cereals, and, most importantly, baseball trading cards, which generate over seventy percent of its licensing revenue. [The Association] receives royalties from these sales and distributes the money to individual players.

At the time of the Uhlaender case, "[t]he Association . . . represent[ed] over 850 major league baseball players and . . . ha[d] issued some 27 different licensing contracts" on behalf of these players. The Association joined the named individual plaintiff to sue a board game manufacturer who engaged in the unauthorized use of the players' marketable identities, including the players' names and statistics.

The Association has initiated and defended lawsuits to establish its members' rights. In Baltimore Orioles, the Association tried, albeit unsuccessfully, to protect Major League Player's rights in the broadcasts of their game performances.

3. Privatization of Public Facts

Courts and legal scholars have asserted that the right of publicity gives individuals the power to control the dissemination of public facts and ideas. The Tenth Circuit, in Cardtoons L.C. v. Major

195 See Uhlaender, 316 F. Supp. at 1279 (describing in detail the Association's role in licensing contracts).
196 Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 963 (10th Cir. 1996).
197 Uhlaender, 316 F. Supp. at 1279.
198 See id. at 1278 (recognizing that the use of players' names and statistical information helped attract consumers).
199 See supra notes 172-75 and accompanying text (discussing Baltimore Orioles).
200 See generally Cardtoons, 95 F.3d at 975 (stating that this power includes the "power to suppress criticism"); Michael Madow, Private Ownership of Public Image: Popular Culture and Publicity Rights, 81 Calif. L. Rev. 125, 136-38 (1993) (discussing the debate between "proponents of the right of publicity" and those who argue against it).
League Baseball Players Ass'n,\textsuperscript{201} addressed this concern when it weighed the athletes' right of publicity against the parodists first amendment rights and found the latter outweighed the former. The court reasoned that "[t]he potential for suppression [of free expression] is even greater in the context of publicity rights because the product involved is the celebrity's own persona."\textsuperscript{202}

The concerns of the right of publicity critics touch on not only the conflicts between the right and First Amendment freedoms,\textsuperscript{203} but also on who "owns" information that may be of interest to the public.\textsuperscript{204}

\textbf{C. Do Sports Leagues Have a Protectible Right of Publicity?}

Except in those states that limit the right of publicity to natural persons, sports leagues meet the requirements to establish a prima facie right of publicity. Not only do they have a name that has achieved some level of public knowledge (which sounds in and may be separately protected by trademark or Lanham Act provisions), but these leagues also have created a marketable identity outside of the combined identities of individual players.\textsuperscript{205} Campaigns such as the NBA's "I Love This Game," have created a commercial interest in League games in general.

1. Freedom of the Press Concerns

Courts have recognized that "newsworthy" events are privileged under the right of publicity. The California Court of Appeal has stated this privilege succinctly:

[N]o cause of action will lie for the "[p]ublication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it. . . ." Fur-

\textsuperscript{201} See Cardtoons, 95 F.3d at 970-71, 976 (explaining that in this case "[t]he justifications for the right of publicity are not nearly as compelling as those offered for other forms of intellectual property, and are particularly unpersuasive in the case of celebrity parodies"); Keith Aoki, Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain, 18 COLUM.-VLA J.L. \\& ARTS 1 (1993) (discussing the tension between intellectual property and the public dissemination of ideas).

\textsuperscript{202} Cardtoons, 95 F.3d at 972.

\textsuperscript{203} See generally 1 McCarthy, supra note 27, § 2.1(C) (discussing the speech criticism of the right of publicity).

\textsuperscript{204} See generally Cardtoons, 95 F.3d at 970-76 (weighing the right of publicity against First Amendment rights).

\textsuperscript{205} See supra notes 136-43, 162-64 and accompanying text (discussing the NBA's efforts at creating a marketable identity).
thermore, a matter in the public interest is not restricted to current events but may extend to the reproduction of past events.206

In Montana v. San Jose Mercury News, Inc.,207 the plaintiff, a National Football League quarterback, brought suit challenging a newspaper’s sale of posters reprinting the newspaper articles which contained Super Bowl coverage.208 The court held that the defendant newspaper did not use Montana’s “face and name solely to extract the commercial value from them.”209

Several states have codified this privilege.210 For example, section 3344(d) of the California Civil Code explicitly carves out this exception. The section provides that “a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a).”211

The Ninth Circuit, in Abdul-Jabbar, rejected the defendant’s argument that plaintiff’s college record constituted a newsworthy event and therefore its use was privileged. Instead, the Abdul-Jabbar court held that section 3344(d) did not apply because the defendant “used the information in the context of an automobile advertisement, not in a news or sports account.”212

However, this privilege does not provide blanket coverage. In Zacchini v. Scripps-Howard Broadcasting Co.,213 the Supreme Court upheld an entertainer’s right of publicity to prevent unauthorized broadcast of his act, even though the broadcaster asserted a First Amendment defense. The Court held that the right of publicity to compensate a performer for the time and effort invested in an act outweighed the broadcaster’s First Amendment rights.214 In Zacchini, a television reporter taped a circus performer’s 15-second

207 Id.
208 See id. at 641.
209 Id.; see Namath v. Sports Illustrated, 363 N.Y.S.2d 276 (Sup. Ct. 1975) (finding that the use of plaintiff’s picture to sell magazine subscriptions was privileged).
212 Abdul-Jabbar v. General Motors Corp., 85 F.3d 407, 416 (9th Cir. 1996).
214 See id. at 575 (explaining the holding of the case).
act without the performer’s consent. Later, this tape was broadcast in its entirety during a television station’s news program. Thus, viewers of the news program saw the performer’s entire act. The performer brought suit alleging that, in broadcasting his performance without his consent, the television station’s conduct constituted “an unlawful appropriation of [his] professional property.” The Court agreed.

One of the questions to be considered is what constitutes a newsworthy event. The Montana court likens a “newsworthy” event to one that is in the “public interest.” However, the parties in Montana did not dispute that the original news stories were in the public interest; the question was whether the posters reprinted from the articles were also considered newsworthy. The court found that the posters were in fact privileged.

The U.S. Supreme Court in Zacchini acknowledged that “[t]here is no doubt that entertainment, as well as news, enjoys First Amendment protection. It is also true that entertainment can itself be important news.” Even so, the Zacchini Court, in weighing the conflict between the right of publicity and the freedom of the press, further stated:

The Constitution no more prevents a State from requiring [a television station] to compensate [a performer] for broadcasting his act on television than it would privilege [the television station] to film and broadcast a copyrighted dramatic work without liability to the copyright owner, or to film and broadcast a prize fight; or a baseball game, where the promoters or the participants had other plans for publicizing the event.

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215 See id. at 564 (explaining the “film clip, approximately 15 seconds in length, was shown on the 11 o’clock news program that night, together with favorable commentary”).
216 See id.
217 See id.
218 Id. at 564.
219 See id. (noting that the court granted plaintiff’s motion for summary judgment).
220 Montana v. San Jose Mercury News, Inc., 40 Cal. Rptr. 2d 639, 641 (Ct. App. 1995) (“When Joe Montana led his team to four Super Bowl championships in a single decade, it was clearly a newsworthy event.... [a] ‘form of public interest presentation....’”).
221 See id. (noting that appellant’s argument was based on the First Amendment).
222 Id. (holding that the First Amendment protects the rights in the posters as well); see Namath v. Sports Illustrated, 363 N.Y.S.2d 276, 277 (Sup. Ct. 1975) (concerning the use of originally newsworthy photographs reprinted in advertisements).
223 Zacchini, 433 U.S. at 578.
224 Id. at 575 (citations omitted).
Although a Motorola-type use may not rise to the level of broadcasting an entire game, it clearly goes beyond merely providing final game scores. It still provides an alternative to (1) attending the game in person at an arena, and (2) watching a live broadcast of the game, both of which would provide the League with revenue. As stated earlier, the League receives no revenue from the pager update service. Even if courts find that pager services constitute valid sports accounts, in situations where the “newsworthy event” is referred to in a more clear-cut commercial or trade situation, such as in an advertisement, the privilege does not attach. For example, had Motorola more heavily advertised its ability to provide updates of NBA games in progress during commercials for the pager, the privilege would not protect Motorola. Furthermore, some courts have found the motive for profit irrelevant to whether the use of a publication is privileged.

“The First Amendment is not limited to those who publish without charge. Whether the activity involves newspaper publication or motion picture production, it does not lose its constitutional protection because it is undertaken for profit.”

However, courts tend to provide commercial speech with a less strict review than other forms of speech.

2. Preemption by Federal Copyright Act

The Second Circuit in NBA v. Motorola held that sporting events are not copyrightable. The court stated that

Although the broadcasts are protected under copyright law, the district court correctly held that Motorola and STATS did not infringe NBA’s copyright because they reproduced only facts from the broadcasts, not the expression or description of the game that constitutes the broadcast.

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225 See supra note 143 and accompanying text (discussing SportsTrax’s unwillingness to pay a fee).
226 See Davis v. High Soc’y Magazine, Inc., 457 N.Y.S.2d 308, 313 (App. Div. 1982) (asserting that the use of a name or picture by the media is protected by the First Amendment irrespective of the fact that such publications are carried on largely to make a profit).  
227 Montana, 40 Cal. Rptr. 2d at 643 n.2 (quoting Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454 (Cal. 1979)).
228 See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 498 (1996) (invalidating a state statute which purported to ban advertising of liquor prices which was deemed to be commercial speech and therefore required special review).
229 NBA v. Motorola, Inc., 105 F.3d 841, 846 (“In our view, the underlying basketball games do not fall within the subject matter of federal copyright protection because they do not constitute ‘original works of authorship’ under 17 U.S.C. § 102(a).”).
“fact/expression dichotomy” is a bedrock principle of copyright law that “limits severely the scope of protection in fact-based works.”

Even though the telecasts of sporting events are copyrightable, and therefore, the players’ rights of publicity with respect to telecasted game performances are preempted by federal copyright law, the holding of at least one court seems to indicate that this would not preempt the players’ rights of publicity in any other context. The Seventh Circuit in the Baltimore Orioles case stated:

The Players’ rights of publicity . . . are preempted only if they would be violated by the exercise of the Clubs’ copyright in the telecasts. A player’s right of publicity . . . would not be preempted if a company, without the consent of the player, used the player’s name to advertise its product, placed the player’s photograph on a baseball trading card, or marketed a game based on the player’s career statistics.

Since the right of publicity would rest either with the players or their teams, it is arguable that, under league agreements, leagues could pursue cases to protect their right. As with a hot-news misappropriation claim, the question is whether federal copyright law preempts such a right.

Federal copyright law preempts state law causes of action when the right sought to be protected by state law is “equivalent to copyright.” In other words:

[O]ne which is infringed by the mere act of reproduction, performance, distribution or display . . . . If under state law the act of reproduction, performance[,] distribution or display . . . will in itself infringe the state created right, then such right is preempted. But if other elements are required, in addition to or instead of, the acts of reproduction, performance, distribution or display, in order to constitute a state created cause of action, then the right does not lie

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231 Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n, 805 F.2d 663, 676 n.24 (7th Cir. 1986) (citations omitted).

“within the general scope of copyright,” and there is no preemption.233

The Shamsky court found the right of publicity constituted such an extra element.234 The court stated that, “a right to publicity—to the commercial exploitation of one’s identity—appears qualitatively different from copyright.”235 The legislative history of the Federal Copyright Act as it addressed preemption, in 17 U.S.C. § 301, supports the position that the framers did not intend for copyright law to necessarily preempt state rights of public. The relevant House Report provides in part: “[C]ommon law rights of ‘privacy’ [and] ‘publicity’... would remain unaffected as long as the causes of action contain elements, such as an invasion of personal rights... that are different in kind from copyright infringement.”236

The Shamsky court distinguished between the “right of publicity ‘in a [particular] performance’ [and] ... a right to commercial exploitation of one’s own identity.”237 In looking at the question of copyright protection and preemption in light of section 3(c) of the Major League Players Agreement,238 the Baltimore Orioles court found that “a player’s ‘right of publicity in his name or likeness would not be preempted’ if the club, without consent, commercially exploited the player’s identity.”239

With respect to the NBA’s lawsuit against Motorola, it appears that sports leagues cannot bring a “hot-news” misappropriation claim unless they provide services that directly disseminate game statistics and scores.240 Thus, this exception to federal preemption is not available to sports leagues.

3. Trademark Protection Under the Lanham Act

To the extent that these names are either registered or unregistered trademarks, the Lanham Act provides a federal cause of ac-

233 Id. (alteration in original).
234 See id.
235 Id.
237 Shamsky, 632 N.Y.S.2d at 936 (quoting Baltimore Orioles, 805 F.2d at 676 n.24) (first alteration in original).
238 See supra notes 173-74 and accompanying text (discussing the court’s finding that teams control the players’ right of publicity as to televised game performances).
239 Shamsky, 632 N.Y.S.2d at 936 (quoting Baltimore Orioles, 805 F.2d at 676 n.24).
240 See supra notes 59-65 and accompanying text (examining the New York treatment of the “hot news” misappropriation theory).
tion for false endorsement claims. However, in general, courts have not restricted plaintiffs to bringing either a right of publicity or a Lanham Act cause of action.

The Lanham Act proscribes the commercial use of "any word, term, name, symbol, or device" where such use would likely cause consumers to erroneously believe that the person who is identified by the word, term, name, symbol or device in question is affiliated with the user's product or service. As the Ninth Circuit stated in Abdul-Jabbar:

"[A]n express purpose of the Lanham Act is to protect commercial parties against unfair competition."... "Section 43(a) ... expressly prohibits, inter alia, the use of any symbol or device which is likely to deceive consumers as to the association, sponsorship, or approval of goods or services by another person." ... [Thus] "[a] false endorsement claim based on the unauthorized use of a celebrity's identity ... [which] alleges the misuse of a trademark, i.e., a symbol or device such as a visual likeness, vocal imitation, or other uniquely distinguishing characteristic, which is likely to confuse consumers as to the plaintiff's sponsorship or approval of the product."

However, in Motorola, the Second Circuit found that, although Motorola made inaccurate statements in a press release concerning how SportsTrax gathered game scores and statistics, these misstatements did not rise to the level of materiality required under the Lanham Act. Similar to its findings concerning the NBA's "hot-news" misappropriation claim, the court reached this conclusion due to the lack of direct competition between Motorola and the NBA in disseminating game statistics and scores.

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242 For example, it is commonplace for plaintiffs to assert both right of publicity and Lanham Act causes of action. See, e.g., NBA v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997); Abdul-Jabbar v. General Motors Corp., 85 F.3d 407 (9th Cir. 1996); White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992).
243 See 15 U.S.C. § 1125 (1994) (proscribing the use of symbols or words, misleading or confusing as to their origin or sponsorship, and misrepresentations in commercial advertising).
244 See Abdul-Jabbar, 85 F.3d at 410 (citations omitted).
245 See Motorola, 105 F.3d at 855.
246 Id. (noting that "if the NBA were in the future to market a rival pager with a direct datafeed from the arenas ... then Motorola's statements regarding source might well be materially misleading").
D. Even if Sports Leagues Have a Right of Publicity, Does it Protect Sports Scores or Statistics?

1. Do Game Statistics and Scores Evoke the NBA’s Marketable Identity?

The argument that Motorola does not violate the right of publicity in disseminating statistical data on sporting events, because the right protects the image and identity of celebrities, is open to disagreement in light of right of publicity jurisprudence. Courts have recognized that the unauthorized use of statistical information concerning athletes' careers violates their right of publicity, even though this information is available to the public from other sources. For example, under California law, anything that evokes the commercial persona of the celebrity may be protected under the right of publicity. In White, Vanna White won a judgment against Samsung for using a robot which merely evoked her commercial persona by having blond hair, a gown and jewelry, and by standing in front of a gameboard. In Motschenbacher v. R.J. Reynolds Tobacco Co., the Ninth Circuit held that a race car’s distinctive appearance invoked the marketable identity of its well-known driver. The defendant's advertisement used a photograph containing plaintiff’s race car. Although several of the car’s attributes were altered in the picture, the car’s most distinctive features remained unchanged. The changes were too subtle to prevent individuals from identifying the plaintiff as the owner of the car in the advertisement.

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247 See, e.g., Abdul-Jabbar, 85 F.3d at 407; White, 971 F.2d at 1395.
249 See Abdul-Jabbar, 85 F.3d at 414 (citing CAL. CIV. CODE § 3344(a) (West 1971)).
250 See White, 971 F.2d at 1399; see also supra notes 98-101 (discussing the case in greater detail).
251 498 F.2d 821 (9th Cir. 1974).
252 See id. at 822.
253 See id.
254 See id.
The Ninth Circuit in *Abdul-Jabbar v. General Motors Corp.* held that the unauthorized use of an athlete’s former name and statistics from his career infringed upon his common law right of publicity. In *Abdul-Jabbar*, the plaintiff alleged that a television commercial aired during the 1993 National Collegiate Athletic Association men’s basketball tournament violated his trademark and publicity rights. During this particular commercial, a disembodied voice asks, “Who holds the record for being voted the most outstanding player of the tournament?” In the screen appear the printed words, ‘Lew Alcindor, UCLA, ’67, ’68, ’69.’ The commercial then continues by giving information about the performance of the defendant’s product. The Ninth Circuit found that this commercial violated Kareem Abdul-Jabbar’s right of publicity, rejecting the defendant’s argument that Abdul-Jabbar’s record was newsworthy and thus its inclusion in the commercial was privileged. The court stated that, “[w]hile [Abdul-Jabbar’s] record may be said to be ‘newsworthy,’ its use is not automatically privileged.”

The court further stated that

“It is not important how the defendant has appropriated the plaintiff’s identity, but whether the defendant has done so . . . . A rule which says that the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth.”

In *Palmer*, several professional golfers, including Arnold Palmer, brought suit to enjoin the unauthorized use of their names and so-called “profiles.” These sheets contained information concerning the golfers professional careers and were used by defendant

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255 85 F.3d 407 (9th Cir. 1996); see supra notes 247-48 (discussing the violation of the right of publicity by use of statistical information on games even though such information was available to the public from other sources).
256 See *Abdul-Jabbar*, 85 F.3d at 415.
257 See id. at 409.
258 *Id.*
259 *Id.* (including the ratings and price of the product).
261 See *Abdul-Jabbar*, 85 F.3d at 416; see also supra notes 211-12 and accompanying text (discussing the privilege under CAL. CIV. CODE § 3344(d) (West 1971)).
262 *Abdul-Jabbar*, 85 F.3d at 416.
263 *Id.* at 414 (quoting White v. Samsung Elec. Am., Inc., 971 F.2d 1395, 1398 (9th Cir. 1992)).
as a component of its “Pro-Am Golf Game.”\textsuperscript{265} The New Jersey court determined that defendants’ use of the plaintiffs’ career statistics enhanced the marketability of their product.\textsuperscript{266} In holding that this use violated the golfers’ right of publicity, the court rejected defendant’s argument that “since the information contained in the profiles is readily obtainable public data and available to all, it should not be denied the privilege of reproducing that which is set forth in newspapers, magazine articles and other periodicals.”\textsuperscript{267} The court concluded that the fact that such information, which constituted the plaintiffs’ marketable identities, was voluntarily disclosed through various news media did not negate the golfers’ proprietary interests in their names and statistics and the commercial use of these features.\textsuperscript{268}

Citing the \textit{Palmer} case with approval, the court in \textit{Uhlaender v. Henricksen}\textsuperscript{269} found that a similar use of the names and statistics of professional major league baseball players violated these players’ right of publicity.\textsuperscript{270} In \textit{Uhlaender}, several hundred major league baseball players brought suit to enjoin game manufacturers from using the players’ identifying data in board games.\textsuperscript{271} The games used “the names and professional statistical information such as batting, fielding, earned run and other averages of some 500 to 700 major league baseball players, identified by team, uniform number, and playing position.”\textsuperscript{272} The court rejected all of the defendants’ arguments, including: (1) that the statistics were readily accessible to members of the public and were widely published by the news media; and (2) that the ballplayers sought publicity and the inclusion of the their names and statistics in the board games increased the publicity given to these players.\textsuperscript{273} The \textit{Uhlaender} court, after discussing the historic development of the right of publicity, and finding that the plaintiffs had such a right, framed the issue before it as “whether the plaintiffs’ names and published statistics can be considered property subject to legal protection from unauthorized

\begin{enumerate}
\item\textsuperscript{265} See id. (discussing the substance of defendants’ admissions).
\item\textsuperscript{266} Id. at 460.
\item\textsuperscript{267} See id. at 462 (noting that while the publication of biographical information “does not per se constitute an invasion of privacy,” the commercial use of such does).
\item\textsuperscript{268} 316 F. Supp. 1277 (D. Minn. 1970).
\item\textsuperscript{269} See id. at 1281 (observing that “a celebrity’s property interest in his name and likeness is unique”).
\item\textsuperscript{270} See id. at 1278.
\item\textsuperscript{271} Id.
\item\textsuperscript{272} See id. at 1279.
\end{enumerate}
use.\textsuperscript{274} The court found that the players’ statistics were part of their marketable identities and thus, their use in the subject board games violated the players’ right of publicity.\textsuperscript{275}

What sports leagues would be seeking to protect in evolving a right of publicity is the totality of the leagues games and schedules.\textsuperscript{276}

2. Does Motorola-Type Dissemination of Real-Time Scores Fall Under an Exception for News or Sports Accounts?

As previously discussed, courts and legislatures have created an exception to the right of publicity.\textsuperscript{277} This exception allows for the use of biographical information, including career statistics, in news and sports accounts, as well as incidental reprinting of such accounts to promote the media outlet.\textsuperscript{278} Both the district court and the Second Circuit in the Motorola case treat the pager service’s score dissemination as a news or sports account, without distinguishing this type of dissemination from a typical news or sports account.\textsuperscript{279} Even if one assumes that Motorola-type dissemination constitutes a news or sports account, a Zacchini analysis would seem to require that this type of dissemination should not be privileged in light of the negative impact it may have on sports leagues’ revenue derived from controlling access to games in progress.\textsuperscript{280} This position is also supported by the rationale set out in Pittsburgh Athletic Co. \textit{v.} KQV Broadcasting Co.,\textsuperscript{281} in preventing a radio station from play-by-play descriptions of games by reporters situated

\textsuperscript{274} \textit{Id.} at 1281 (emphasis added).
\textsuperscript{275} \textit{See id.} at 1283.
\textsuperscript{277} \textit{See supra} notes 211-27 and accompanying text (discussing the news reporting privilege in different states and specifically under \textit{Cal. CIV. Code} § 3344 (West 1971)).
\textsuperscript{278} \textit{See id.}
\textsuperscript{279} \textit{See Motorola}, 105 F.3d at 847 (determining that Motorola merely produced facts from the broadcast); \textit{Sports Team Analysis}, 939 F. Supp. at 1094 (explaining that the service “provide[s] purely factual information which any patron of an NBA game could acquire from the arena”).
\textsuperscript{280} \textit{See supra} notes 223-24 and accompanying text (discussing Zacchini restrictions on freedom of press privilege).
\textsuperscript{281} 24 F. Supp. 490 (W.D. Pa. 1938); \textit{see supra} notes 56-74 and accompanying text (discussing the hot-news misappropriation cause of action).
outside of the stadium, in positions from which they could observe the action.\footnote{282}

**CONCLUSION**

In the decades since courts first recognized the right of publicity, the right has been used to protect several aspects of one's marketable identity. It has expanded beyond protecting only name and likeness, and now protects voice, certain performances, biographical facts, and symbolic representations. The right has gone from protecting individual celebrities to groups of celebrities. At least one state legislature has expanded by statute the right of publicity to not-for-profit organizations. Therefore, finding that other organizations have a right of publicity, independent of the right of publicity of the organization's constituents, does not represent a significant expansion from the current state of the right of publicity. Granted, the right of publicity is vastly different that it was forty-five years ago, but so are the methods that can be used to invade the interests the right seeks to protect. Recognizing that sports leagues have a right of publicity would allow them to protect interests not otherwise protected by the Copyright Act, Lanham Act false advertising provisions, or other state and common law unfair competition protections. As mentioned in the preceding section, the district court in *Motorola* recognized that the NBA was trying to

protect [not just] a written book of NBA rules or coaches' plays or a tangible recording of an NBA game. Instead, it [sought] to protect the NBA games themselves—the culmination of interaction of these NBA rules and coaches' plays, the referees, the players, and perhaps even the announcers, members of the press, vendors, patrons, security guards, ticket takers, and the like who are present at the arena during an NBA game and whose interaction comprises an NBA game.\footnote{283}

If we accept that organizations such as sports leagues do have the right of publicity independent of the athletes' right of publicity, scores and statistics of games in progress are naturally component

\footnote{282 See *Pittsburgh Athletic*, 24 F. Supp. at 492 (finding that defendant's communication of news of the ball games interfered with the contractual right of advertisers to exclusively broadcast the play-by-play account of games).}

\footnote{283 *Sports Team Analysis*, 939 F. Supp. at 1088; *see supra* notes 277-80 and accompanying text (discussing the applicability of the exception for news accounts to *Motorola*).}
parts of these leagues' marketable identity. That the leagues license certain media entities to disseminate these scores and statistics does not alter the leagues' interests in this information.