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## Preliminary Statement

Since the creation of “Rotisserie” baseball more than a quarter of a century ago, fantasy sports have transformed from a fringe hobby into a billion dollar business which is now firmly embedded into the very fabric of American life. Today, approximately fifteen million (15,000,000) Americans participate in fantasy sports leagues. This case represents defendants’ brazen attempt to swoop in and wrest control of this booming business and quintessential American pastime by shoehorning a proverbial “square peg” of facts into their “round hole” right of publicity legal theory. As demonstrated below, the two just do not fit. The facts, the law, and fundamental fairness all weigh heavily in favor of rejecting defendants’ attempt to reap the rewards created by the hard work, vision and fortitude of others.

*Amicus curiae* Fantasy Sports Trade Association (“FSTA”) is a national non-profit trade organization founded in 1999 and comprised of approximately 244 businesses dedicated to the betterment of the fantasy sports industry. It serves as a voice for the fantasy sports industry, and looks to protect the interests of fantasy sports participants and business owners. Prior to this case reaching the dispositive motion stage, the FSTA volunteered to work as a liaison between fantasy sports providers and the players’ associations in order to create a constructive partnership built on synergy and cooperation. Thus far, those attempts have been rebuffed, though the FSTA holds out hope. That said, there is little doubt that the FSTA has a strong interest in the outcome of this motion. It is not melodramatic to note that the fate of a billion dollar industry hangs in the balance. A ruling that an individual baseball player’s “right of publicity” precludes the use of players’ names and statistics in fantasy sports products would likely result in a drastic reduction in playing options for fantasy sports enthusiasts, and would likely put most fantasy sports businesses out of business. In an attempt to avoid such inequity, the FSTA presents this *amicus* brief so that the Court can have the benefit of an industry-wide view of the facts and issues presented in this critical matter of first impression.

Two separate provisions of the United States Constitution are implicated in this dispute – the First Amendment and the Patent and Copyright Clause. The First Amendment rights of

fantasy sports operators are addressed fully by CBC. FSTA agrees with CBC's position and will not repeat those arguments herein.

Article I, Clause 8 of the United States Constitution grants Congress the power to determine the scope of rights granted to copyright holders. Congress has exercised that power and determined that only creative expression in original works of authorship, not the facts contained in those works, warrant copyright protection. Thus, in the baseball context, the recorded broadcast of a baseball game is protected by copyright law, but the underlying facts one can glean from that broadcast (including the statistics) are not protected. It is this balance, drawn by Federal Law, that governs the legal issues in this case. The principles of conflict preemption enunciated by the United States Supreme Court and the express preemption provisions of the Copyright Act itself operate to bar enforcement of any alleged state rights of publicity in the context of use of player names and statistics on fantasy sports sites. Any other result would create exactly that which Congress sought to avoid – inconsistent application of laws balancing the protection of creative expression and free interchange of ideas and information. Such inconsistent application would be unavoidable in the right of publicity context in light of the fact that 22 states and Puerto Rico have not even recognized the cause of action.

To be clear, the FSTA does not assert that all conceivable right of publicity claims are preempted by copyright law. They are not. Right of publicity claims based on the use of a persona to advertise or market a product (*i.e.*, use of a person's picture or image in an advertisement) would likely survive preemption. However, a right of publicity claim such as the one presented at bar based on the display, duplication and dissemination of information derived from copyrighted works outside of an advertising or marketing context cannot survive preemption.

Even if the Court were to analyze the application of the right of publicity to the instant action, the inescapable conclusion is that use of a player's name and statistics within a fantasy sports site is not barred. As explained more fully below, the right of publicity was developed to achieve certain enumerated policy goals: (1) to prevent unjust enrichment to the user of

someone else's identity and the resulting reduction in the commercial value of the identity that can result from unauthorized use; (2) to provide an incentive to make the investment necessary to create performances of interest to the public by securing to the performer the fruits of his or her own labor and talents; and (3) to prevent consumers from wrongly believing that someone endorses a product (*i.e.*, the prevention of consumer confusion). None of these goals would be accomplished by finding a right of publicity here. First, the fact that millions of Americans play fantasy sports increases players' marketability, not the converse. Second, given that major league players earn an average salary of over \$1 Million per year, young athletes have all the financial motivation they need to make the big leagues. No one could maintain a straight face while asserting that athletes would move to other pursuits without some right of publicity in fantasy sports sites. Third, the MLBPA has not even contended, nor could they, that merely listing the name and statistic of a player on a fantasy sports site somehow creates an impression that the player is actually endorsing that site.

Not only would application of the right of publicity to fantasy sports providers fail to accomplish any of the social goals of the right of publicity, such application would engender substantial harms. Fantasy providers who built the industry through investment, innovation and pure sweat equity would likely lose their livelihoods and fantasy sports participants would be forced to choose from fewer, more expensive options. This Court should not countenance such an inequitable and undesirable result.

## **Background**

### **History of Fantasy Sports**

Fantasy sports games began as a grass-roots hobby over a quarter of a century ago. *See* Greg Johnson, *Suing Over Statistics*, L.A. Times, Jan. 2, 2006, at D1 (Ex. 1 hereto); Bob Harris and Emil Kadlee, *A Nod and a Wink to the Founders of Fantasy Football* (Fantasy Sports Pub., Inc., fspnet.com) (referencing a fantasy football league that originated in 1962 and a fantasy baseball league that began in 1966) (Ex. 2 hereto). In 1980, writer and editor Dan Okrent joined with several like-minded baseball enthusiasts to form a fantasy baseball league. The game is

sometimes referred to as “Rotisserie baseball” after the Manhattan restaurant, La Rotisserie, where Okrent and his fellow “owners” often met. *See* <http://www.usastats.com/whatis.html>. For many years the fantasy or rotisserie games were played by groups of friends each of whom acted as “owners” of their own sports team. *See, e.g.,* Wiegert Aff. ¶ 7.<sup>1</sup> Before the season, these “owners” drafted the players they thought would accumulate the best statistics to be on their teams, and then watched the games religiously to follow their players’ actual performances. During the season, the owners would make trades to try to improve their chances of winning. The “owner” whose players did the best overall, based upon their actual statistics, won the game. The statistical information used to calculate participants standings were obtained from publicly available box scores and/or newspaper and magazine listings of player statistics. *See, e.g., id.* The games were fun and their popularity grew so much that a market developed for an official score-keeper to take over the cumbersome task of calculating the teams’ changing standings.

As fantasy sports grew in popularity, inventors capitalized on this new market by creating computer programs that took the drudgery out of running a fantasy sports league. *See, e.g.,* Wiegert Aff. ¶¶ 9-10; Thomas Decl. ¶ 4. These entrepreneurs either sold their software to fantasy players or provided “commissioner” or score-keeping services. Later, the advent of the internet allowed not only on-line scoring, but also friends and “league-mates” to conduct their drafts and make trades on-line, and to access historical information about players’ performances to assist assessing whether to draft or trade players. *See, e.g.,* Wiegert Aff. ¶¶ 15, 20-21. In essence, technology and innovation helped fantasy sports to continue to grow at a dramatic rate.

### **The Fantasy Sports Industry’s Enormous Popularity**

Today, fantasy sports are a pervasive aspect of American society. In fact, one study estimates that 12 to 15 million people are playing fantasy sports. IPSOS Study, Fantasy Sports (Krause Pub. Aug. 2005) (Ex. 4 hereto). According to Sports Illustrated, with more than 15

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<sup>1</sup> The citations to Affidavits, Declarations and Expert Reports herein are to those submitted by plaintiff CBC.

million people playing, it has become, quite literally, **a billion-dollar industry**. Chris Ballard, *Fantasy World*, Sports Illustrated, June 21, 2004, at 82 (Ex. 4 hereto); *see also* Sam Walker, *Fantasyland* at 73 (Viking 2006) (revenues and fantasy-related expenditures “well north” of 1 billion dollars). The games have moved beyond just baseball and football, and include basketball, hockey, golf, soccer, race car driving, bass fishing, and cricket. *See Fantasy World* at 87; *see also* Walker at 6 (noting that curling, jai alai, bowling and beach volleyball have their own fantasy equivalent). There is even fantasy wakeboarding. *See* <http://www.FantasyWakeBoard.com>. Currently, there are myriad websites that offer fantasy sports games. Now the “commissioner product” is just one of many offerings on fantasy sports websites. Other offerings include “high stakes” games where fantasy sports participants enter large scale competitions to compete for significant prizes (*see, e.g.*, [www.footballguys.com/highlights-fvip.htm](http://www.footballguys.com/highlights-fvip.htm)- offering a prize of \$100,000) and “salary cap” games where competitors choose a team based on players’ pre-assigned values and within a given budget. *See, e.g.*, Wiegert Aff. ¶ 10 (describing salary cap game). In addition, most fantasy sports websites have portions of the sites devoted exclusively to sporting news. *See, e.g.*, Wiegert Aff. ¶¶ 15, 17.

The popularity of fantasy sports games on the internet has spurred the development of numerous related products and services. For example, many major newspapers employ “fantasy sports writers” who devote entire columns to the fantasy sports competitions. *See, e.g.*, Mike Rainey, *The Top 10 From Fantasyland*, St. Louis Post Dispatch, Mar. 12, 2006, at D15 (column by St. Louis Post Dispatch fantasy baseball writer) (Ex. 5 hereto) Television and radio shows, devoted entirely to fantasy sports, continue to air around the country. *See, e.g.*, <http://espnradio.espn.go.com> (listing Fantasy Focus radio show every Tuesday). Manufacturers have invented products to help fantasy sports participants get as much information as possible about sports. *See, e.g.*, [www.mobileespn.com](http://www.mobileespn.com) (website for mobile telephone service offering cell-phone access to real-time scores, player and team statistics, video highlights and breaking sports news). There are fantasy sports magazines, *see, e.g.*, *Fantasy World*, *supra* at 82

(reporting that there are three times as many fantasy football preview magazines as actual football preview magazines), and fantasy sports books written by mainstream writers, including one writer from the *Wall Street Journal*, see, e.g., Sam Walker, *Fantasyland* (Viking 2006). This March, fantasy sports enthusiasts, business owners and marketers of fantasy sports related products will attend the thirteenth Fantasy Sports Trade Conference. See [www.fantasysportstradeconference.com](http://www.fantasysportstradeconference.com). There is even a Fantasy Sports Hall of Fame. *Fantasy World* at 83.

Fantasy sports have become so popular that news sources routinely cover issues relating to fantasy sports. For example, a story was published in the *Los Angeles Times* on January 2, 2006 about this lawsuit. (Ex. 1 hereto) The Associated Press then ran a similar story on January 15. According to Bacon's, that AP story was reprinted in over 100 newspapers around the country and aired on more than 50 television stations and 50 talk radio stations within a week. *Associated Press Story Creates Frenzy Over Suit*, FSTA Newsletter, Vol. 5, Issue 2, Jan. 25, 2006, at 1 (Ex. 6 hereto).

#### **Fantasy Sports Positive and Revenue Enhancing Effect on Professional Sports**

Fantasy sports competitions have increased the popularity and profitability of professional sports. Fantasy sports participants are competitive by nature. They want to win. Thus, fantasy sports participants seek every edge they can. The result? The 15 million fantasy sports participants watch more sports, read more magazines, go to more games, and travel to more spring training and minor league games to gather intelligence for their fantasy sports competition. Moreover, fantasy sports competitors become attached to "their" players and buy merchandise and memorabilia to show their loyalty. Simply put, it cannot be gainsaid that fantasy sports has resulted in an increase in the popularity and profitability of all sports, including major league baseball. See Wiegert Aff. ¶ 23; Thomas Decl. ¶¶ 7-10; Okrent Expert Report ¶¶ 11, 16, 17, 19; Saundry Expert Report ¶¶ 11-20.

In addition, many professional athletes would be unknown, but for the 15 million people playing fantasy sports. Almost everyone who reads a newspaper knows of Barry Bonds or Roger

Clemens. However, how many casual fans know the backup shortstop for the Atlanta Braves or the rookie second baseman for the Texas Rangers? Not many. However, thanks to fantasy sports, there are 15 million Americans who know and read about Wilson Betemit and Ian Kinsler -- players who would otherwise be just small type in the occasional boxscore. *See* Saundry Expert Report ¶ 12.

The fantasy sports industry also creates new opportunities for professional athletes. For example, players have the opportunity to appear at fantasy sports events for a fee and have capitalized on that opportunity. *See, e.g.*, Thomas Aff. ¶ 8. Baseball players are also working for fantasy sites this season. *See, e.g.*, FSTA Newsletter, Vol. 5, Issue 6, Mar. 13, 2006 at 4 (Detroit outfielder Curtis Granderson will be a special contributor to [www.FantasyBaseball.com](http://www.FantasyBaseball.com) this season) (Ex. 7 hereto). It is also worth noting that former professional athletes Warren Moon, Steve Buerlein and Napoleon MacCallum have been keynote speakers at the three most recent FSTA Trade Conferences and that former World Series MVP Dave Stewart and former New York Yankees third baseman Mike Pagliarulo are scheduled to speak at the March 15, 2006 conference. *Id.* at 1. In addition, numerous professional athletes have made a career out of fantasy sports after their playing days ended. Thomas Decl. ¶ 9, (players such as Tony Dorsett, Goose Gosage, John Kruk, Erik Kramer, and Warren Moon have enhanced their broadcasting careers working on fantasy sports programs).

### **Major League Sports' Role In The Fantasy Sports Industry**

For over a quarter century, Major League Baseball (and the other professional leagues) shunned fantasy sports. *See Suing Over Statistics* at D1. *Wall Street Journal* reporter Sam Walker put it this way: "most baseball people thought of Rotisserie as a benign nuisance." *Fantasyland* at 242. However, the fact remains that fantasy sports were no secret. In fact, baseball front office executives and players alike had their own teams and ran their own fantasy leagues. *See, e.g.*, Okrent Expert Report ¶ 13; Walker at 116-17, 248. Only after fantasy sports became a billion dollar industry did defendants assert that fantasy sports operators need a license before putting player statistics into the complex software that runs the fantasy sport games.

MLBPA apparently has never initiated a suit against a fantasy sports operator to enforce a right of publicity. *See* Wiegert Aff. ¶ 29.<sup>2</sup> Stated another way, only after the entrepreneurs of the fantasy sports industry invested their time, money and energy to transform ideas into products and visions into reality did the professional sports leagues and players' associations swoop in and attempt to capture the spoils.

Both MLBAM and the NFLPA have thus far shunned attempts at partnership with the fantasy industry in attempt to create an environment in which everyone can benefit from this popular and profitable piece of Americana. The NFLPA has said it will only grant licenses to only 12 fantasy sports operators. Specifically, NFLPA representative Lashaun Lawson went so far as to say that it would be "too difficult" for the NFLPA to collect license fees from all of the fantasy providers even with the help of the FSTA. *See* FSTA Newsletter, Vol. 4, Issue 5, at 2-3, Apr. 8, 2005 (Ex. 8 hereto). MLBAM, in turn, has, to our knowledge, only issued a handful of licenses despite the fact that the baseball season is just weeks away.

While the FSTA holds out hope that it can avoid litigation and concentrate on further developing and improving fantasy sports games, given the current position of MLBAM and the NFLPA, that hope seems dim. Thus, this case represents a watershed moment in the history of the fantasy sports industry. This Court is positioned to be the first to decide whether display and other use of player names and statistics in fantasy sports websites violates state law rights of publicity. A ruling in favor of CBC and the FSTA will ensure that fantasy sports continue to thrive and the players and the leagues continue to profit from the increased popularity and attention that fantasy sports engender. A ruling that the MLBPA and MLBAM can wrest control of the industry from those who built it will result in businesses having to shut down and far fewer options for the millions of Americans who play fantasy sports. *Fort Expert Report* ¶ 7. Only one

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<sup>2</sup> The only two lawsuits of which we are aware that challenged fantasy sports operators' right to use player statistics were filed by the NFL Players Association. *See Nat'l Football League Players Ass'n, Inc. v. CDM Fantasy Sports, Inc.*, No. 1:04-cv-04536-KMW (S.D.N.Y., filed June 16, 2004); *Nat'l Football League Players Ass'n, Inc. v. Payday Sports, Inc.*, No. 1:05-cv-02030-JDB (D.D.C., filed Oct. 14, 2005).

of these results comports with governing law, common sense, and basic notions of fundamental fairness – a ruling in favor of CBC and the FSTA.

### Argument

#### **I. THE PLAYERS ASSOCIATION’S STATE LAW RIGHT OF PUBLICITY CLAIM IS PREEMPTED BY FEDERAL COPYRIGHT LAW**

State law claims restricting the mere display, reproduction, distribution and similar use of factual data about professional athletes cannot be squared with federal copyright law. In carrying out its mandate to give the public appropriate access to the work product of copyright holders, Congress exercised its Constitutional grant of authority and determined that the ideas and factual information contained within copyrightable subject matter are freely available for public exploitation. Enforcement of state laws that grant monopolistic rights to such information would violate the Supremacy Clause. Such state laws are therefore unenforceable under principals of conflict preemption. In addition, the Copyright Act itself contains an express preemption provision which applies to claims such as this that are addressed to subject matter within the scope of copyright law and that seek to restrict the mere display, reproduction, distribution, or other rights exclusively provided by copyright law.

To be clear, the FSTA does not contend that copyright law preempts all right of publicity causes of action. Rather, as explained in more detail below, that the state law “right of publicity” asserted in this action is unenforceable under both conflict and express preemption by the federal Copyright Act.

#### **A. A State Law That Prohibits The Display, Reproduction, Distribution or Other Use Of Factual Information Determined By Copyright Law To Be Available For Public Use Impermissibly Conflicts With Copyright Law**

##### **1. Conflict Preemption Defined**

Conflict preemption applies where enforcement of the state law at issue would obstruct the accomplishment of the “full purposes and objectives” of a federal statute. *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (state statute cannot be enforced when it conflicts with national system implemented by Congress in a permissible Constitutional exercise of power). In

the context of intellectual property rights, conflict preemption applies where a state law protecting intellectual property “clashes with the balance struck by Congress.” *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 152, 162 (1989) (reasoning that “[o]ne of the fundamental purposes behind the Patent and Copyright Clauses of the Constitution was to promote national uniformity in the realm of intellectual property”) (emphasis added).

In *Bonito*, the Supreme Court addressed the enforceability of a state law that prohibited use of a direct molding process to duplicate unpatented boat hulls. *Id.* at 144-45. Because Congress had struck the balance inherent in the Patent Clause “between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the ‘Progress of Science and useful Arts,’” by making freely available for copying and use articles that are unpatentable, it was not permissible for a state law to disrupt the balance by impeding the public use of otherwise unprotected designs. *Id.* at 146, 153-54, 157. The same principle applies in the copyright context. *See Eldred v. Ashcroft*, 537 U.S. 186, 201 (2003) (“Because the Clause empowering Congress to confer copyrights also authorizes patents, congressional practice with respect to patents informs our inquiry.”); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237 (1964) (state law prohibiting copying of unpatented article impermissibly “interfere[d] with the federal policy, found in Art. I, § 8, cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain”).

## **2. Congressional Exercise of Copyright Clause Power**

The Copyright and Patent Clause, U.S. Const., Art. I, § 8, cl. 8, gives Congress the power to define the scope of the exclusive rights to be granted to copyright holders “in order to give the public appropriate access to their work product.” *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). In carrying out this mandate, Congress determined that only creative expression is entitled to copyright protection. *See* 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it

is described, explained, illustrated, or embodied in such work.”). In other words, “copyright’s idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.” *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 556 (1985) (internal quotations omitted); *see also Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 356 (1991) (“Section 102(b) is universally understood to prohibit any copyright in facts.”). “Due to this distinction, every idea, theory, and fact in a copyrighted work **becomes instantly available for public exploitation at the moment of publication.**” *Eldred*, 537 U.S. at 219 (emphasis added). Put differently, non-copyrightable factual information is free for others to use, even for commercial purposes and even when the factual information being copied is the product of some else’s efforts. *Feist*, 499 U.S. at 348-51, 361-64 (copyright law did not prohibit copying of names, towns and telephone numbers listed in telephone book and inclusion in defendant’s own telephone book, which competed with plaintiff’s book; “all facts—scientific, historical, biographical, and news of the day . . . ‘may not be copyrighted and are part of the public domain available to every person’”). In short, facts such as professional athletes’ statistics “become instantly available for public exploitation” at the moment they are recorded.<sup>3</sup>

### **3. Conflict Preemption Bars Enforcement of the Players’ Asserted Right of Publicity in the Use of Names and Statistics in Fantasy Sports Products**

Any state law that impedes the public's right to utilize and build upon publicly available facts undermines a fundamental tenet of federal copyright policy. Rather than promoting the progress of science and the useful arts, that state law would hinder that progress by giving parties monopolistic control over factual information. Where, as here, application of a state law would prohibit the copying, display, reproduction or distribution of the uncopyrightable elements contained within a copyrightable work, the state law impermissibly interferes with the balance

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<sup>3</sup> The limited exception to this general proposition for “hot news” is not at issue here.

struck by Congress in implementing the Copyright Act, and the state law is preempted.<sup>4</sup> See *Bonito*, 489 U.S. at 152 (state law protecting intellectual property that “clashes with the balance struck by Congress” is preempted under principles of conflict preemption); *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 269-70 (5th Cir. 1988) (preempting Louisiana law permitting contractual prohibition on adaptation of computer programs impermissibly conflicted with Congress’s implementation of Copyright Act); *Comedy III Prods., Inc. v. New Line Cinema*, 200 F.3d 593, 595 (9th Cir. 2000) (“If material covered by copyright law has passed into the public domain, it cannot then be protected by [other law] without rendering the Copyright Act a nullity.”); *Felix the Cat Prods. Inc. v. New Line Cinema, Corp.*, No. CV 99-9339 FMC (RCx), 2000 WL 770481 (C.D. Cal. Apr. 28, 2000) (declining to extend trademark law into domain of copyright law). Accordingly, the doctrine of conflict preemption bars enforcement of alleged state rights of publicity restricting fantasy sports operators’ use of players’ names and factual statistical information.

Moreover, one of the objectives of the Copyright Act is to promote national uniformity and avoid the difficulties of determining and enforcing rights under different state laws. See H.R. Rep. No. 94-1476, at 129-30 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5745-46. As

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<sup>4</sup> Indeed, permitting a state law to protect the use of athletes’ names and statistics in fantasy sports would lead to a direct *decrease* in fantasy-sports related arts that have flourished as a result of the popularity of the games. As a practical matter, the effect of finding a right of publicity in the use of sports statistics to run fantasy sports games would put all but the biggest fantasy sports operators out of business. To avoid right of publicity lawsuits, fantasy sports operators would have to obtain a license from every single athlete whose statistics are used on their site. Because the NFL and MLBAM have already indicated they will only license a small number of fantasy sports operators, the vast majority of operators will not be able to offer fantasy football and baseball games—the most popular products. For the other games where the athletes are not, to our knowledge, represented by an association—soccer, bass fishing, etc.—the operators would have to seek licenses from each of the literally thousands of individuals whose statistics are used in the games. The majority of fantasy sports operators simply could not undertake such an endeavor. With the elimination of the majority of fantasy sports websites would come the elimination of the strictly news portion of such sites. It would also be expected that with only a dozen or so options for fantasy sports players, the number of people participating in fantasy sports through internet operators would significantly decrease, resulting in a related decrease in the number of news articles, books, radio and television shows, etc. relating to fantasy sports.

explained in section II.A. below, the right of publicity cause of action varies from state to state, with some 22 states not having recognized the law at all. Were a right of publicity claim able to protect in one state factual information not protected by federal copyright law or by right of publicity law in at least 22 other states, Congress's goal of uniformity would be severely obstructed. One can assume that a determination that the Missouri right of publicity is violated by the use of players' names and statistics in fantasy sports games would lead fantasy sports operators in the other 27 states that recognize the right of publicity to either shut down, relocate to a state that does not recognize the right of publicity, or face the uncertainty of not knowing whether its particular state's law will be applied to protect the use of factual information, derived from a copyrighted broadcast, but which Congress has determined is available for public use. This is precisely the type of uncertainty and lack of uniformity of the law of intellectual property that Congress sought to preclude through enactment of the Copyright Act.

**B. The Right Of Publicity Claim Asserted In This Action Is Expressly Preempted By The Copyright Act**

When Congress amended the Copyright Act in 1976, it added an express preemption provision that provides in pertinent part:

On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, *are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.*

17 U.S.C. § 301(a) (emphasis added). Congress made clear that section 301 express preemption should be read broadly:

The intention of section 301 is to preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright . . . . The declaration of this principle . . . is intended to be stated in the *clearest and most unequivocal language possible*, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to *avoid the development of any vague borderline areas between State and Federal protection.*

*Daboub v. Gibbons*, 42 F.3d 285, 290 n.8 (5th Cir. 1995) (quoting H.R. Rep. No. 94-1476, at 130) (emphasis in original).

The Eighth Circuit, in *National Car Rental System v. Computer Associates International, Inc.*, 991 F.2d 426 (8th Cir. 1993), adopted the Second Circuit’s interpretation of the Section 301(a) preemption provision. *Id.* at 428-29. Under *National Car Rental*, a court evaluating copyright preemption must determine whether the “work”—the material, information, data, photograph, recording, computer code, etc. over which a right is being asserted—is within the subject matter of copyright (the “subject matter” requirement). If it is, then the court must determine whether the right being asserted is equivalent to any of the exclusive rights within the scope of copyright law. *See id.* at 428-29. As explained below, MLBPA’s assertion that *state* law gives it the exclusive right to display, reproduce, distribute and use player names and statistical data derived from recorded broadcasts of sporting events meets both requirements for express preemption, and therefore the right being asserted is expressly preempted.

**1. Both The Broadcast Of Major League Baseball Games And The Data Contained Within Such Broadcasts Meet The Subject Matter Requirement of Express Copyright Preemption**

It is beyond question that broadcasts of sporting events are copyrightable subject matter. Since the 1976 amendments to the Copyright Act,<sup>5</sup> courts repeatedly have found broadcasts of professional sporting events to fall within the subject matter of copyright. *See, e.g., Nat’l Football League v. McBee & Bruno’s, Inc.*, 792 F.2d 726, 731-32 (8th Cir. 1986) (telecasts of NFL games subject to copyright law); *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 847 (2d Cir. 1997) (broadcasts of NBA games within subject matter of copyright); *Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n.*, 805 F.2d 663, 668 (7th Cir. 1986)

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<sup>5</sup> In 1976 Congress amended the Copyright Act to expressly include simultaneously-recorded live broadcasts within the subject matter of copyright. *See* 17 U.S.C. § 101. The legislative history of the amendment makes clear that Congress intended simultaneously-recorded live broadcasts of sporting events to fall within the amendment. *See* H.R. Rep. No. 94-1476, at 52 (“[t]he bill seeks to resolve, through the definition of ‘fixation’ in section 101, the status of live broadcasts—sports, news coverage, live performances of music, etc.—that are reaching the public in unfixed form but that are simultaneously being recorded”).

(telecasts of MLB games subject to copyright protection); *Nat'l Football League v. Cousin Hugo's, Inc.*, 600 F. Supp. 84, 86-87 (E.D. Mo. 1984) (NFL entitled to injunction under copyright act to preclude showing of live broadcasts).

As the Second Circuit made clear in *National Basketball Association v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997), not only the recording of the broadcast falls within the subject matter of copyright, but also the underlying facts of the performance. *Id.* at 848. The *Motorola* court addressed the NBA's challenge to defendants' transmission of scores and other data about NBA games in progress—including player statistics—via pagers and on the internet. *Id.* at 843. Specifically, the Second Circuit reversed and rejected the doctrine of “partial preemption” applied by the District Court, which distinguished between the game broadcasts, which are copyrightable, and the underlying games, which are not, reasoning that “partial preemption” would significantly expand the reach of state law claims, render the preemption intended by Congress unworkable, and provide state law protection for non-copyrightable facts that Congress intended to be in the public domain. Adopting the reasoning of the Seventh Circuit, the Second Circuit determined that “[O]nce a performance is reduced to tangible form, there is no distinction between the performance and the recording of the performance for the purposes of preemption under § 301(a).” *Id.* at 849 (quoting *Baltimore Orioles*, 805 F.2d at 675).

It is well-settled that once a work as a whole is within the subject matter of copyright, the individual elements of the work need not be copyrightable for preemption to apply. *See, e.g., Motorola*, 105 F.3d at 849 (“Copyrightable material often contains uncopyrightable elements within it, but [copyright] preemption bars states law misappropriation claims with respect to uncopyrightable as well as copyrightable elements”); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1453 (7th Cir. 1996) (subject matter requirement met with respect to claim based on reproduction of non-copyrightable data contained in fixed tangible medium of expression, *i.e.*, plaintiffs' software, even if data itself not subject to copyright protection); *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 271 F. Supp. 2d 737, 754 (D. Md. 2003) (stock rating numbers contained in written report within subject matter of copyright, even though numbers themselves constituted

uncopyrightable factual data); *see generally*, *Pinnacle Pizza Co. v. Little Caesar Enters., Inc.*, 395 F. Supp. 2d 891, 900 (D.S.D. 2005) (citing Second, Fourth, Sixth and Seventh Circuits for proposition that preemption may apply even when particular work at issue would not be copyrightable); *Kindergartners Count, Inc. v. Demoulin*, 171 F. Supp. 2d 1183, 1193-94 (D. Kan. 2001) (scope of copyright subject matter is broader than its protection).

Here, the MLBPA is looking to protect the factual information contained within a work that is subject to copyright protection. Thus, as a matter of law, the “subject matter requirement” of the express preemption test is satisfied. *See, e.g., Motorola*, 105 F.3d at 844-45, 848-49 (claim aimed at transmission of “real time” NBA scores and other statistical data tabulated from recorded broadcasts of NBA games met subject matter requirement of express copyright preemption); *ProCD*, 86 F.3d at 1453 (claim aimed at data included in copyrighted application software program met subject matter requirement of express copyright preemption); *Baltimore Orioles*, 805 F.2d at 674 (claim aimed at players’ performance included in copyrighted broadcast met subject matter requirement for express copyright preemption).

**2. A Right Of Publicity Claim Based Only On the Display, Reproduction and Distribution of Player Names and Statistics Asserts A Right Equivalent To The Exclusive Rights Within The Scope Of Copyright Law**

The second part of the *National Car Rental* express copyright preemption test requires a showing that the right being asserted is equivalent to one of the exclusive rights within the scope of copyright law—the rights to reproduce, prepare derivative works, distribute, perform and display the material at issue. 17 U.S.C. § 106. The outcome of this test depends upon whether the right being asserted under state law would be violated by “an act which, in and of itself, would infringe one of the exclusive rights provided by federal copyright law. If an extra element is required, instead of or in addition to the acts of reproduction, performance, distribution or display, in order to constitute a state-created cause of action, then the right does not lie within the general scope of copyright and there is no preemption.” *National Car Rental*, 991 F.2d at 431 (internal quotations and citations omitted).

Instead of mechanically reciting the elements of the cause of action to determine whether an extra element is required, courts look to the conduct being alleged as the basis for the claim to determine whether it involves conduct beyond reproduction, derivative use, performance, distribution or display. *See Rubin v. Brooks/Cole Publ'g Co.*, 836 F. Supp. 909, 923 (D. Mass. 1993) (“a Court must look beyond the label affixed to the cause of action, and must determine what plaintiff seeks to protect, the theories in which the matter is thought to be protected and the rights sought to be enforced”) (internal quotations omitted).<sup>6</sup> If the challenged conduct amounts to nothing more than one of the exclusive rights of copyright law—reproduction, performance, distribution or display—the extra element test is not met and the state law claim is preempted. *See, e.g., Hartman v. Hallmark Cards, Inc.*, 833 F.2d 117, 121 (8th Cir. 1987) (misappropriation claim preempted); *Ehat*, 780 F.2d at 878 (unfair competition claim preempted); *Wolff v. Institute of Elec. & Elecs. Eng'rs, Inc.*, 768 F. Supp. 66, 69 (S.D.N.Y. 1991) (breach of contract claim preempted); *Pinnacle Pizza Co.*, 395 F. Supp. 2d at 902-03 (conversion claim preempted).

There is little question that right of publicity claims based on conduct that goes beyond mere reproduction, distribution and display of material within the subject matter of copyright are not subject to preemption. *See, e.g., Toney v. L'Oreal USA, Inc.*, 406 F.3d 905, 910 (7th Cir. 2005) (model's right of publicity claim based upon use of identity in connection with packaging and promotion of product not preempted; “The basis of a right of publicity claim concerns the message—whether the plaintiff endorses, or appears to endorse the product in question.”);<sup>7</sup>

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<sup>6</sup> Consequently, the same cause of action may or may not assert a right equivalent to the exclusive rights provided by copyright law, depending upon the circumstances of the particular action. *Compare, e.g., Ehat v. Tanner*, 780 F.2d 876, 878 (10th Cir. 1985) (unfair competition based on alleged reproduction and distribution of abstracts from literary works asserted right equivalent to exclusive rights encompassed by copyright law), *with Scholastic, Inc. v. Stouffer*, 124 F. Supp. 2d 836, 847 (S.D.N.Y. 2000) (unfair competition claim based on alleged passing off as their own characters created by plaintiff did not assert right equivalent to exclusive rights encompassed by copyright law).

<sup>7</sup> The *Toney* Court also found that the plaintiff's likeness did not fall within the subject matter of copyright because a person's identity is not within the subject matter of copyright. 406 F.3d at 910. This finding would appear to misapply the subject matter requirement, which focuses on the particular work at issue—a photograph, television broadcast, or excerpts from a computer  
(continued...)

*Brown v. Ames*, 201 F.3d 654, 658 (5th Cir. 2000) (musicians’ right of publicity claim based upon use of names and likenesses to market musical performances not preempted); *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 621, 623-24 (6th Cir. 2000) (right of publicity claim aimed at marketing of action figures based on movie character played by plaintiff not preempted); *Wendt v. Host Int’l, Inc.*, 125 F.3d 806, 810 (9th Cir. 1997) (claim based on marketing of themed restaurants through use of animatronic figures that allegedly looked like plaintiffs not preempted).

However, it is equally clear that right of publicity claims based on nothing more than one of the exclusive rights encompassed by copyright law will be preempted. *See, e.g., Baltimore Orioles*, 805 F.2d at 675 (professional athletes’ right of publicity claim based upon rebroadcast of sporting events preempted); *Fleet v. CBS, Inc.*, 50 Cal. App. 4th 1911, 1913 (1996) (actors’ right of publicity claim based upon exploitation of copyrighted film preempted); *see also Ventura v. Titan Sports, Inc.*, 65 F.3d 725, 730 n.6 (8th Cir. 1995) (noting that although not addressed by the parties, right of publicity claim based upon distribution of wrestler’s videotaped commentary at wrestling events would appear to be preempted by Copyright Act; citing with approval *Baltimore Orioles*, 805 F.2d 663).

The preceding two paragraphs highlight the basic lesson the Seventh Circuit first taught in *Baltimore Orioles* and recently reaffirmed in *Toney* -- the issue of whether a state law right of publicity claim is preempted under section 301 is determined by examining what a particular complainant alleges is the violative behavior. *Baltimore Orioles* never stood for the proposition that all right of publicity claims are preempted. *Toney*, 406 F.3d at 910-11. To have so held would have been erroneous, for no such hard line is possible. Yet that is exactly the flaw in the Fifth Circuit’s analysis in *Brown*. There, the Court took a mechanical approach that failed to

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program—not the particular cause of action being asserted. Even assuming that an “identity” or “persona” cannot be captured in a tangible medium does not alter the fact that the factual elements of a recorded broadcast of a sporting event fall within the subject matter of copyright.

address the alleged violative conduct. In so doing, the Fifth Circuit ran afoul of the clear Congressional mandate that Congress desired to “foreclose any conceivable misinterpretation of its unqualified intention [to] act preemptively . . . to *avoid the development of any vague borderline areas between State and Federal protection.*” H.R. Rep. No. 94-1476, at 130 (emphasis added).

Here, the right being asserted by the MLBPA does not have the extra element necessary to avoid express copyright preemption. The challenged or allegedly violative conduct is the mere display and use (*i.e.*, copying, reproduction and distribution) of player statistics derived from recorded broadcasts of baseball games. *See* MLBPA Br. at 2. They do not allege that their names and statistics are being used to market or advertise products. They do not allege that fantasy sports operators obtained the information in violation of any breach of confidence or trust. And they do not allege that fantasy sports operators’ use of the information causes customers to believe that the players are endorsing the product. Thus, to the extent MLBPA claims that a state law right of publicity prohibits any of (1) the display of the players’ statistical data on a fantasy sports website, (2) copying of the names and statistics to input them into the software programs that keep track of fantasy league standings, or (3) distribution of recompiled statistical information about players—acts which, in and of themselves, implicate one of the exclusive rights provided by federal copyright law—such claim is preempted.

Finally, the observation of the *Baltimore Orioles* court 20 years ago resonates loudly today:

The Players’ aim is to share in the increasingly lucrative revenues derived from the sale of television rights for over-the-air broadcasts by local stations and national networks and for distribution by subscription and pay cable services.

805 F.2d at 679. The only difference is that the players now seek a piece of the “increasingly lucrative” fantasy sports revenues. Once again, the same result should obtain – Federal Copyright law preempts and prevents the Players’ attempts to use an asserted right of publicity in their performances to snare revenues they cannot legally claim.

## **II. THE RIGHT OF PUBLICITY DOES NOT APPLY TO THE DISPLAY OF A NAME WITH A STATISTIC ON A FANTASY SPORTS WEBSITE**

### **A. Historically There Was No “Right Of Publicity” And Even Today It Is Recognized In Only About Half Of the States**

As late as 1941, courts maintained that a celebrity could not maintain a cause of action for the publication of his photograph in association with the marketing of a product. *See, e.g., O’Brien v. Pabst Sales Co.*, 124 F.2d 167, 170 (5th Cir. 1941) (famous football player had no cause of action for the use of his picture alongside a glass and bottle of Pabst beer on a football schedule bearing beer company’s name). The 1953 decision in *Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953), was the first to recognize a distinct right under the name “right of publicity.” *See* Matthew Savare, *Comment, The Price of Celebrity: Valuing the Right of Publicity in Calculating Compensatory Damages*, 11 UCLA Ent. L. Rev. 129, 137-39 (2004); 4 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 28.4 (4th ed. 2005). As initially adopted by the Second Circuit, the right was limited to “a right in the publicity value of [one’s] photograph.” *Haelen*, 202 F.2d at 868. The validity of such a right was questioned by other courts for many years. *See, e.g., Ettore v. Philco Television Broad. Corp.*, 229 F.2d 481, 485 (3d Cir. 1956) (“[t]he state of the law is still that of a haystack in a hurricane”); *Strickler v. Nat’l Broad. Co.*, 167 F. Supp. 68, 70 (S.D. Cal. 1958) (“This Court does not feel it wishes to blaze the trail to establish in California a cause of action based upon the right of publicity.”)

It was not until 1977, when the United States Supreme Court upheld a right of publicity claim under Ohio law in the face of a First Amendment challenge, *see Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977), that the right of publicity gained a degree of acceptance. A right of publicity is now recognized in some form in the statutory and/or common law in slightly more than half of the states: eighteen by statute, eighteen by common law, and eight by a combination of the two. J. Thomas McCarthy, *The Right of Publicity and Privacy* § 6.3 (2d ed. 2005). The remaining states as well as Puerto Rico have either not specifically

recognized a right of publicity or have expressly rejected the concept. *Id.* The states recognizing a right of publicity do so to varying extents. *See generally id.* McCarthy, §§ 6.3, 6.8.

**B. The Purposes Of A Right of Publicity Are To Prevent Unjust Enrichment, To Provide An Incentive To Invest Time And Effort Into Public Performances, And To Prevent Consumer Confusion**

A review of the right of publicity cases shows that the right is designed to achieve three main policy objectives: (1) to prevent unjust enrichment of the user of someone else's identity and the resulting reduction in the commercial value of the identity that can result from unauthorized use; (2) to provide an incentive to make the investment necessary to create performances of interest to the public by securing to the performer the fruits of his or her labor and talents; and (3) to prevent consumers from wrongly believing that someone endorses a product (*i.e.*, the prevention of consumer confusion). *See generally, Restatement (Third) of Unfair Competition* § 46, Cmt. c. (1995).

The Second Circuit first recognized a right of publicity based upon the economic harm to prominent persons if their photographs could be used to endorse products without payment. *Haelan*, 202 F.2d at 868. The Supreme Court in *Zacchini* echoed this concern and also that entertainers should be given an incentive to entertain. 433 U.S. at 573 (“the State’s interest in permitting a ‘right of publicity’ is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment”). The *Zacchini* Court held that the First Amendment did not permit the airing of a human cannon ball performer’s entire act in a news report. *Id.* at 574-75. The Court reasoned that the broadcast of an entire act posed a threat to the economic value of the performance because if people could see the act for free, they would not pay to see it live and that the broadcast of the entire act went to the heart of the entertainer’s ability to earn a living. *Id.* at 575-76. Thus, the right of publicity served the dual purposes of preventing unjust enrichment of the defendant by theft of the plaintiff’s good will, and providing incentive to make the investment necessary to create performances of interest to the public. *Id.* at 576.

More recent cases have continued to recognize these first two objectives. *See, e.g., Cardtoons, L.C. v. Major League Baseball Players Ass’n.*, 95 F.3d 959, 973, 976 (10th Cir.

1996) (“The principal economic argument made in support of the right of publicity is that it provides an incentive for creativity and achievement”; “The third, related justification for publicity rights is the prevention of unjust enrichment.”); *Baltimore Orioles*, 805 F.2d at 678 (“[T]he interest underlying the recognition of the right of publicity also is the promotion of performances that appeal to the public. The reason that state law protects individual pecuniary interests is to provide an incentive to performers to invest the time and resources required to develop such performances.”); *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 837 (6th Cir. 1983) (“Vindication of the right [of publicity] will tend to encourage achievement in [Johnny] Carson’s chosen field. Vindication of the right will also tend to prevent unjust enrichment by persons such as appellee who seek commercially to exploit the identity of celebrities without their consent.”).

In addition, a third goal has more recently been recognized – preventing the false impression that the person at issue endorses a particular product. *See, e.g., Toney*, 406 F.3d at 910 (“The basis of a right of publicity claim concerns the message—whether the plaintiff endorses, or appears to endorse the product in question.”); *Cardtoons*, 95 F.3d at 975 (right of publicity “protect[s] against consumer deception”). There are numerous cases applying the right of publicity in the context of the use of a celebrity’s identity in an advertisement, thereby suggesting the celebrity endorses the product. *See, e.g., Newcombe v. Adolf Coors Co.*, 157 F.3d 686 (9th Cir. 1998) (beer advertisement containing drawing alleged to depict former major league baseball pitcher); *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407 (9th Cir. 1996) (car advertisement comparing success of basketball player to that of car being sold); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (use of likeness of singer’s voice in advertisement).

**C. The Policy Goals Of the Right of Publicity Would Not Be Served By Expanding The Right to Preclude Display And Use Of Professional Athletes’ Names And Statistics In Fantasy Sports Games**

In applying the right of publicity “courts have looked to its underlying purpose—the need it was intended to fill—and rather than adhering to its exact letter have interpreted the spirit in

which it was written.” *Rand v. Hearst Corp.*, 298 N.Y.S.2d 405, 410 (1st Dep’t 1969), *aff’d*, 26 N.Y.2d 806 (1970). Even cases cited by MLBPA recognize that the “right of publicity” is a changing area of the law and that “[e]ach case must be decided by weighing conflicting policies.” *Rosemont Enters. v. Urban Sys., Inc.*, 340 N.Y.S.2d 144, 147 (N.Y. Sup. Ct. 1973). As explained below, none of the three main purposes of the right of publicity would be advanced by expanding the right of publicity to cover use of players’ names and statistics in fantasy sports games.

### **1. Players’ Marketability is Not Reduced As a Result of Fantasy Sports**

The commercial value of the players’ identities is by no means reduced because their names and statistics are included on a fantasy sports website. Unlike in *Zacchini*, sports fans who play fantasy sports are not forgoing paying to watch the sporting performance. Indeed, the fantasy sports industry has *increased* the commercial value of players’ identities because, among other things, fantasy sports participants watch sporting events in which they would not otherwise be interested, pay to attend live games, pay for TV packages so they can watch *more* games on TV, and purchase many sources of information about players so they can determine which players on their own “teams” to keep and to trade. *See, e.g.*, Okrent Expert Report ¶ 19; Saunders Expert Report ¶¶ 11-20; Thomas Decl. ¶¶ 8-10.

Notably, MLB itself argued, and the court agreed in *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400 (2001), that the inclusion of player names, statistics and other historical information on MLB’s website likely enhanced the players’ marketability. *Id.* at 415. Moreover, if the right of publicity were applied in the context at hand, the professional athletes would be unjustly enriched by taking the fruits of the labor of the pioneers of fantasy sports, who merely incorporated player names and statistics as one component of an entirely new product to which they devoted substantial time, effort and resources. *See ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 938 (6th Cir. 2001) (although right of publicity allows professional athlete to enjoy fruits of his labor, it will not be applied to extinguish someone else’s right to profit from his own efforts); *Cardtoons*, 95 F.3d at 976 (“Cardtoons added a significant creative component

of its own to the celebrity identity and created an entirely new product. Indeed, allowing MLBPA to control or profit from the parody trading cards would actually sanction the theft of Cardtoons' creative enterprise.”).<sup>8</sup>

Perhaps the most powerful fact demonstrating the lack of harm to professional athletes of fantasy sports is that they themselves play. *See, e.g.*, Walker at 86-87, 116-17, 248; Saundry Expert Report ¶ 10. Plainly, professional athletes would not play fantasy sports if they believed that fantasy sports jeopardized their livelihood or otherwise carried some risk of economic harm to players. Professional athletes play fantasy sports for the same reason everyone else does – for fun, competition, companionship, and the quest for the thrill of victory.

## **2. Fantasy Sports Provides No Economic Disincentive For Athletes**

To be blunt, it is simply ludicrous to believe that the incentive of revenue from fantasy sports licenses is necessary to ensure professional athletes will continue playing sports and that children with athletic talent will pursue careers in professional sports. Major league baseball players' salaries average over one million dollars per year. *Cardtoons*, 95 F.3d at 974. Even the lowest paid benchwarmer makes at least \$300,000 (Three Hundred Thousand Dollars) per year. Thus, “even without the right of publicity, the rate of return to stardom in the entertainment and sports fields is probably high enough to bring forth a more than ‘adequate’ supply of creative effort and achievement.’ . . . The extra income generated by licensing one’s identity does not provide a necessary inducement to enter and achieve in the realm of sports and entertainment.” *Id.* (quoting Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 Cal. L. Rev. 127, 210 (1993)); *see Restatement (Third) of Unfair*

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<sup>8</sup> *ETW* and *Cardtoons* ultimately found no actionable conduct because of the defendants' First Amendment rights. *See ETW*, 332 F.3d at 938 (“the effect of limiting Woods’s right of publicity in this case is negligible and significantly outweighed by society’s interest in freedom of artistic expression”); *Cardtoons*, 95 F.3d at 976 (application of right of publicity to parody baseball trading cards would overprotect baseball players’ rights and take away important form of entertainment and social commentary that deserves First Amendment protection). That fantasy sports operators’ First Amendment rights trump any right of publicity of the players in their names and statistics is fully presented by CBC in its opposition brief. FSTA agrees with, and hereby incorporates, the position set forth therein.

*Competition* § 46, Cmt. c (1995) (“in endeavors such as entertainment or sports that offer their own substantial rewards[,] [a]ny additional incentive attributable to the right of publicity may have only marginal significance”); *ETW*, 332 F.3d at 938 (“[Tiger] Woods, like most sports and entertainment celebrities with commercially valuable identities, engages in an activity, professional golf, that in itself generates a significant amount of income which is unrelated to his right of publicity. Even in the absence of his right of publicity, he would still be able to reap substantial financial rewards from authorized appearances and endorsements.”).

### **3. There is No False Impression of Player Endorsement**

The MLBPA does not, and indeed cannot, suggest that participants in fantasy sports believe that all of the players on every major league baseball team endorse all of the hundreds of fantasy sports sites that include their names and statistics in the games being offered. Such an assertion would be the equivalent of saying that Barry Bonds and Ken Griffey, Jr. appear to be endorsing the *Sacramento Bee* just because their names appear within a boxscore in that paper. Patently, no one would draw such a conclusion. Unlike the cases where a celebrity’s identity is being used in the advertising or marketing of a product such as *Newcombe* and *Abdul-Jabbar*, there is no possibility of consumer confusion in the context at hand and the objective of preventing false endorsement simply has no application.

In short, no legitimate purpose would be served by granting major league baseball players monopolistic control over the inclusion of their names and statistics in fantasy sports games. The only purpose served would be to allow the players to unjustly reap the benefit of the fantasy sports operators’ efforts over more than two decades to build the fantasy sports industry into a billion-dollar industry enjoyed by millions of Americans.

**D. Missouri's Right of Publicity Is Not Violated By The Display And Reproduction of Players' Statistics**

**1. A Right Of Publicity Claim Requires The Use Of A Name As A Symbol Of Someone's Identity and With The Intent To Obtain A Commercial Advantage and in a Manner Likely to Cause Damage to the Commercial Value of that Person**

Missouri did not recognize a distinct “right of publicity” cause of action until the 2003 Missouri Supreme Court decision in *Doe v. TCI Cablevision*, 110 S.W.3d 363, 369 (Mo. 2003). The *Doe* Court specifically lists three required elements of the cause of action: “(1) That defendant used plaintiff’s name **as a symbol of his identity** (2) without consent (3) and with the intent to obtain a commercial advantage.” *Id.* at 369 (emphasis added). However, as the MLBPA correctly recognizes, there is an additional element required – specifically, that the use of a person’s identity be “in a manner that is likely to cause damage to the commercial value of that person.” MLBPA Br. at 4. This additional element is made clear by the *Doe* Court’s observation that the right of publicity is the “protect[ion] against commercial loss caused by appropriation of an individual’s [identity].” 110 S.W.2d at 368 (internal quotation omitted). The *Doe* Court also relied heavily on the rationale of *Bear Foot, Inc. v. Chandler*, 965 S.W.2d 386 (Mo. Ct. App. 1998), *i.e.*, that a right of publicity “protects a person from losing the benefit of their work in creating a publicly recognizable persona.” *Id.* at 389. The MLBPA misstates the first element as only requiring “the defendant’s use of plaintiff’s name” thereby *sua sponte*, eliminating the critical requirement bolded above and incorrectly changing the governing legal landscape. *See* MLBPA Br. at 4. However, try as they might, the MLBPA cannot escape the Missouri Supreme Court’s clear directive that not all uses of another’s name are tortious; only the use of another’s name *as a symbol of the person’s identity* are actionable. *Doe*, 110 S.W.2d at 369.

**2. The Facts At Issue In The Only Missouri Supreme Court Right Of Publicity Case Are Distinguishable**

In *Doe*, the right of publicity was found to prevent the use of a hockey player’s name as a symbol of his identity in connection with a comic book character that had the same “tough-guy”

persona as the hockey player. *Id.* at 366. Significantly, the comic book author admitted he had used the real life hockey player to create the identity of the character, there was evidence that people identified the character with the plaintiff, and the plaintiff produced evidence that his association with the character diminished the commercial value of his name as an endorser of products. *Id.* at 367, 369. The Missouri Supreme Court held that because there was evidence that the hockey player's name was used as a symbol of his identity, there was a triable issue as to the first element of the Missouri right of publicity. *Id.* at 370. The Court also held that there was a triable issue as to whether the hockey player's name was used with the intent to obtain a commercial advantage, because there was evidence that the defendants were using the player's name to attract consumer attention to the comic book and related products and to create the impression that the player was somehow associated with the comic books. *Id.* at 370-71 ("respondents' statements and actions reveal their intent to create the impression that [plaintiff] was somehow associated with the [ ] comic book, and this alone is sufficient to establish the commercial advantage element in a right of publicity action") (citing cases where right of publicity violated through use of identity in advertising).

Under the reasoning of *Doe*, the display, and other use of professional athletes' names and statistics in the context of fantasy sports games does not violate the Missouri right of privacy. Although fantasy sports sites display the players' names, *Doe* recognized that this in itself is not actionable. And, unlike in *Doe*, there is no indication that anyone is associating major league players with the sites just because their names are listed there, or that the inclusion of their names and statistics on the sites is reducing the endorsement value of their names. Moreover, fantasy sports operators are not displaying players' names and statistics with the intent to obtain a commercial advantage through the use of the names. In fact, many fantasy sport sites do not even list or display player names until after a customer logs in and views their customer reports. Patently, the inclusion of player names and statistics on a particular fantasy sports site is not intended to attract customer attention away from competing products, like the use of plaintiff's name was in *Doe*. And, perhaps most significantly, there is no indication that

fantasy sports operators are trying to create the impression that major league players are somehow associated with, or endorse their websites.

Moreover, fantasy sports operators are not using player names and statistics to obtain a commercial advantage because that is not what fantasy sports participants pay for. Consumers of fantasy sports could—as they did historically—obtain statistics from publicly available sources and continue playing fantasy sports without fantasy sports operators. Rather, fantasy sports participants pay for the services provided by the sites—the precise calculations of the changing statistical information, the opportunity to converse with others in a mutually understood language in an easily accessible forum, and the potential of being financially rewarded for their acumen in assembling the best possible roster.

Finally, as demonstrated in section II(C)(1) *infra*, there can be no credible argument that use of player names and statistics in fantasy sports sites is use “in a manner that is likely to cause damage to the commercial value” of players. In fact, as demonstrated above, the fantasy sports industry creates greater interest in baseball and greater opportunities for players without, in any way, circumscribing their ability to use their names to promote any product or service they wish.

The facts at hand are more like those at issue in *Vinci v. American Can Co.*, 591 N.E.2d 793 (Ohio Ct. App. 1990). That Court’s reasoning is persuasive here. In *Vinci*, former Olympic weightlifting gold medalist Charles Vinci alleged that use of his name and likeness on a series of promotional disposable cups (Dixie cups) violated his right of publicity. The Ohio Court of Appeals disagreed. In an analysis completely on point to the issues raised herein, the Court noted:

The value of plaintiff’s name is **not appropriated by mere mention of it**, or by reference to it in connection with legitimate mention of his public activities; nor is the value of his likeness appropriated when it is published for purpose other than taking advantage of his reputation, prestige, or other value associated with him . . . . It is only when the publicity is given for the purpose of appropriating to the defendant’s benefit the commercial or other values associated with the name or likeness that the right of privacy is invaded.

*Id.* at 729 (internal quotations and citation omitted) (emphasis added). Just as in *Vinci*, the use of athletes’ names within fantasy sports products is “incidental to the promotion [of the product]”

without any “implication that the athletes used, supported or promoted [Dixie cups].” *Id.* The same result as that obtained in *Vinci* is appropriate here – denial of the athlete’s right of publicity claim.

**3. The Cases Relied Upon By MLBPA Are Off-Point, Non-binding, Out-of-Date and Distinguishable**

The cases cited by MLBPA are not to the contrary and are otherwise unpersuasive for numerous reasons. *Gridiron.com v. National Football League Players’ Association, Inc.*, 106 F. Supp. 2d 1309 (S.D. Fla. 2000), *has nothing to do with an alleged violation of the right of publicity.*<sup>9</sup> The court in *Gridiron.com* addressed whether contracts between a web-operator and individual NFL players violated the players’ contracts with the National Football League Players Association. *Id.* at 1311 (“This action revolves around Plaintiff’s contracts with over one hundred and fifty (150) NFL players and whether these contracts and Plaintiff’s website violate the NFL Players Contract and Group Licensing Assignment (GLA) [with the Players Association]”). Moreover, the fantasy sports sites at issue utilized not just players’ names and statistics, but also “the images of over 150 NFL players” and provided direct links to the websites of almost every player in the NFL, so that the sites at issue were marketed as “the ‘official’ web sites of the NFL football players.” *Id.* at 1312-14. The claims and facts raised in the case at bar are so dramatically different than *Gridiron*’s alleged breach of contract claim that they defy definition as “on all fours,” MLBPA Br. at 8, with *Gridiron*. Rather, *Gridiron* is simply inapposite.

The other three cases cited by MLBPA—*Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970), *Rosemont Enterprises, Inc. v. Urban Systems, Inc.*, 340 N.Y.S.2d 144 (N.Y. Sup. Ct. 1973), and *Palmer v. Schonhorn Enterprises, Inc.*, 232 A.2d 458 (N.J. Sup. Ct. 1967)—involved a right of publicity claim, but are still unpersuasive. As a preliminary matter, they are not binding on this Court. Additionally, all three predate the sweeping 1976 amendments to

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<sup>9</sup> Notably, the section of MLBPA’s brief discussing this case contains no pinpoint cites to any particular portion of the case.

Federal Copyright law that added a preemption provision designed to “avoid the development of any vague borderline areas between State and Federal Protection,” all three were decided before the practice of recording professional sporting events became standard and before it was widely accepted that broadcasts of such sporting events fell within the subject matter of copyright. *See* section I., *supra*. Further, each was decided before the Supreme Court’s decision in *Feist Publications, Inc. v. Rural Telephone Services Co.*, 499 U.S. 340, 356 (1991), which made clear that non-copyrightable factual information is free to be duplicated, even when used for a commercial purpose and even when the factual information being copied is the product of some else’s efforts. *Id.* at 361-64; *see* section I. A. 2., *supra*.<sup>10</sup>

These three “board game” cases are unpersuasive on a substantive basis as well. In all three cases, the names at issue were being used to market the particular game and draw attention to the product, thereby setting it apart from the competition. *See Uhlaender*, 316 F. Supp. at 1278 (“It is clear to the court that the use of the baseball players’ names and statistical information is intended to and does make defendants’ games *more salable* to the public than otherwise would be the case”) (emphasis added); *Rosemont*, 340 N.Y.S.2d at 146 (“The use of plaintiff’s name, biographical data etc. . . . is merely the medium *used to market* a commodity familiar to us all”—a board game of chance) (emphasis added); *Palmer*, 232 A.2d at 459 (“the use of plaintiffs’ names and biographies *enhance the marketability* of the game”) (emphasis added). Here, in contrast, fantasy sports operators are not using the players’ names and statistics to market a familiar product or set themselves apart from the competition. Rather, the names and statistics are merely a component of a larger product marketed and set apart from the competition

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<sup>10</sup> That these cases were decided over 30 years ago is also important for First Amendment purposes. While people playing the board games may have engaged in limited conversation, the games themselves certainly did not lead to the plethora of expression that have been a direct result of fantasy sports games. Thirty years ago, there was no internet—no chat-rooms, no free flow of ideas at the touch of a button, no instant messaging. Now, fantasy-sports participants talk about the games, they express their opinions about particular players, and the industry has resulted in numerous expressive media devoted to fantasy sports—radio and TV shows and segments, magazines, and even books.

based upon team management tools, prizes involved, lower fees, better purely informational content, etc. The use of an individual player's name and statistics simply does not increase the value or marketability of the game.<sup>11</sup>

### **III. THE PLAYERS ASSOCIATION IS BARRED BY THE DOCTRINE OF LACHES FROM ASSERTING A RIGHT OF PUBLICITY CLAIM AGAINST THE VAST MAJORITY OF FANTASY SPORTS OPERATORS**

It is well-established that “unreasonable and inexcusable delay” in asserting rights resulting in prejudice to the defendant will bar a lawsuit under the doctrine of laches. *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 804 (8th Cir. 1979) (citing *Gardner v. Panama R.R. Co.*, 342 U.S. 29, 31 (1951)). In the Eighth Circuit, the issues of delay and prejudice are intertwined, such that “[i]f only a short period of time has elapsed since the accrual of the claim, the magnitude of prejudice require [sic] before the suit should be barred is great, whereas if the delay is lengthy, prejudice is more likely to have occurred and less proof of prejudice will be required.” *Id.* at 807. Here, both the delay and the magnitude of the prejudice are great.

Defendants' delay in asserting a right to publicity in the use of names and statistics is unreasonable and unjustified. In evaluating the reasonableness of the delay in asserting a right, “[a] court should focus upon the length of the delay, the reasons therefore, how the delay affected the defendant, and the overall fairness of permitting the assertion of the claim.” *Id.* at 806. The court also should consider the statute of limitations for the claim being brought, because the doctrine of laches shares the same rationale as a statute of limitations—“the desire to avoid unfairness that can result from the prosecution of stale claims.” *Id.* at 805. Here, Missouri provides a five year statute of limitations on actions for injury to the rights of another not based upon a contract. Mo. Ann. Stat. 516.120 (2002). Yet the Players Association, MLB, and all other major sporting organizations have sat on the rights they now attempt to assert for twenty-

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<sup>11</sup> For example, this baseball season, Sammy Sosa, who is arguably one of the most well-known major league baseball players, is not playing so he will not be available for selection on a fantasy team. However, no one has, or ever can assert that fact has reduced the interest and participation in fantasy baseball, which keeps growing.

plus years. It is beyond dispute that sporting organizations have been aware of the fantasy sports industry since its inception. *See, e.g.*, Okrent Expert Report ¶¶ 13, 17; Saundry Expert Report ¶ 10. It also is beyond dispute that such organizations knew that the vast majority of fantasy sports operators did not have licenses from the organizations—obviously they knew with whom they entered into licensing agreements. Nevertheless, to our knowledge, neither the MLBPA, nor MLBAM has filed a lawsuit against a fantasy sports operator seeking to enforce a “right of publicity” based upon the mere display, reproduction and use of professional athletes’ names and statistics. To the contrary, while fantasy sports service providers grew in numbers and worked to create a successful new industry, baseball players and their proxies seemed content to reap the rewards of the increased exposure and heightened fan involvement. Only now, when the fantasy sports industry has established itself as a multi-billion dollar industry, have baseball players and organizations turned their eye toward a potentially lucrative profit center. Thus, the delay in seeking to enforce the players’ purported rights of publicity is of significant duration. It also appears to be based upon an unfair and unreasonable strategic decision to allow others to invest their time, energy, and ingenuity building an industry before asserting the right and attempting to reap the reward of others’ labor. And the effect of the delay was that hundreds of fantasy sports operators have invested their time, energy and money in small businesses they would not have started if there had been a court ruling holding that they could not use the players’ names and statistics without authorization. Under such circumstances, it would be entirely unfair to allow the Players Association—if it has a right of publicity in the use of names and statistics and that right is not preempted by federal copyright law—to assert at this late date, such claim against operators who never obtained licenses.

Not only is the Players Association’s delay unreasonable and unjustified, but permitting the Association to assert a right to publicity after all these years would result in substantial prejudice to fantasy sports operators, because such operators have changed their position “in a way that would not have occurred if the plaintiff had not delayed.” *Goodman*, 606 F.2d at 809 n.17 (citing *Tobacco Workers Int’l Union Local 317 v. Lorillard Corp.*, 448 F.2d 949, 958 (4th

Cir. 1971)). Fantasy sports services have invested substantial resources in developing the services that have drawn millions of customers and support an entire industry. To rob the innovators of fantasy sports of this investment would cause undeniable prejudice to an industry that openly presented its products to the public in reliance on not only their strong legal position, but also the complete absence of any countervailing interest asserted by the players' associations until (and only when) these investments have begun to return rewards to their investors of both liquid and intellectual capital.

### **Conclusion**

For the reasons stated herein, *amicus curie* Fantasy Sports Trade Association respectfully requests that the Court hold that the MLBPA and MLBAM have no right of publicity that can bar fantasy sports providers from using players' names and statistics in their products, and grant such further and other relief as the Court deems just and proper.

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David B. Helms  
LEWIS, RICE & FINGERSH, LC  
500 N. Broadway, Suite 2000  
St. Louis, MO 63102

Glenn C. Colton  
Tonia Ouellette Klausner  
WILSON SONSINI GOODRICH & ROSATI  
PROFESSIONAL CORPORATION  
12 E. 49<sup>th</sup> Street, 30<sup>th</sup> Floor  
New York, New York 10017

*Attorneys for Amicus Curiae  
Fantasy Sports Trade Association*