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The Coming Revenue Revolution in Sports

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THE COMING REVENUE REVOLUTION IN SPORTS

JACK F. WILLIAMS*

I. State of the Business of Sports	671
II. Traditional Sources of Revenue.....	673
A. National Football League (NFL)	673
B. Major League Baseball (MLB).....	676
C. National Basketball Association (NBA).....	679
D. Other Revenue Sources	680
1. Architecture.....	681
2. Luxury Suites and Club Seats	681
3. Pay-Per-View	682
4. Satellite Radio.....	683
5. Personal Seat Licensing	683
6. Media Access Charges	683
7. Naming Rights	684
8. Sport as Entertainment	684
9. International Expansion	685
III. Nontraditional Revenue Sources	686
1. Housing Related to the Sports Complex	687
2. Computers at Your Seat	688
3. Projected Ads on Field/Court/Ice.....	688
4. Name Plates on Seats	689
5. Headsets that Would Connect the Fan to the Field ...	689
6. Flat Screens in Restrooms ("The Twenty")	690
7. Interactive TV	690
8. Broadcast License for Trains and Airlines.....	691

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9. Fan Blogs (with advertising).....	691
10. Gaming.....	691
IV. Fantasy Leagues.....	693
A. History of Fantasy Leagues	694
B. The Right of Publicity	696
C. First Amendment Issues	701
D. The Four Toms	702
V. Observations	706

Along with the U.S. population, [sports'] fanbase has grown enormously in the last half century, as new professional leagues sprouted, media mushroomed, and professional sports became thoroughly assimilated into the entertainment industry. Fans are the geese who have laid the golden eggs for pro athletes, team owners, sports broadcasters. Meanwhile, that same flow of cash has altered the relationship between spectators and the contests. A newfound distance, which can verge on alienation, separates the audience from athletes and teams. Choices made within the sports and political establishments over the next few years may determine whether pro sports' dizzy growth continues, or if those golden orbs will turn into goose eggs.¹

Sports as a business has matured at an accelerating pace in the past two decades.² During this time period, participants in the business of sports have aggressively pursued alternative sources of revenue in an effort to drive earnings. These new sources are sought both to grow and stabilize revenue.³ In large part, technology has

1. Craig Lambert, *Has Winning on the Field Become Simply a Corporate Triumph?*, HARV. MAG., Oct. 2001, available at <http://www.harvardmagazine.com/on-line/09014.html>.

2. *Id.* The reader will notice that in this article, the National Hockey League (NHL) has been left out. This is intentional. The NHL broke my heart when it discontinued play and missed a season and some over labor disputes. While as an adult I understand such things happen, the child in me was, well, let's just say "upset." So, my admittedly feeble but nonetheless heart-felt response to wasted ice time is to ignore the NHL, at least for the time being.

3. Sports teams also provide an opportunity for state and local taxing authorities to grow their respective tax bases. For example, in a financial report prepared for the Minnesota State Legislature on sports activity conducted at the Metrodome (NFL Minnesota Vikings, MLB Minnesota Twins, and Big Ten University of Minnesota Gophers football), the following taxes are collected: (1) sales tax on food and alcohol; (2) 10% ticket tax (including complimentary tickets) and 6.5% state sales tax on tickets (in addition to the 10% ticket tax); (3) 6.5% gross receipts tax on merchandise licensed by professional and collegiate sports teams; (4) personal income tax paid by visiting teams; (5) lottery games with a sports theme; and (6) tax on rental vehicles in the Metro area. See Paul Wilson & Mary Jane Hedstrom, *Appendix C: Summary of Revenue Sources*, Minn. Leg. (January 31, 2002) (on file with author). See also I.R.S.,

been at the vanguard of the revenue revolution, allowing a level of fan interaction that has changed how we think about sports and the successful sports business plan. Traditionally, the sports market consists of gate revenues for live sporting events; rights fees paid by broadcast and cable television networks and TV stations to cover those events; merchandising, which includes the selling of products with team or player logos; sponsorships, which include naming rights and payments to have a product associated with a team or league; and concessions. Currently, other revenue streams such as internet, satellite, or mobile phone subscriptions to sports events or programming are transforming sports into programming content designed as a means to secure greater revenue. These new sources bring with them a host of legal, financial, and business issues that will challenge our understanding about fundamental aspects of property law, privacy, publicity, and value. This paper will discuss both traditional and non-traditional revenue sources, the legal and business implications they create, and the need for a new business paradigm to address these issues and harness the new synergies the leveraging of existing and future technologies present.

I. STATE OF THE BUSINESS OF SPORTS

Sports is big business.⁴ Its present structures and attributes are well known.⁵ The sports industry includes: (1) sports entertainment, (2) sports products, and (3) sports support organizations. The focus in this article is on the sports entertainment sector. That sector includes professional and amateur sports teams and tournament sports. This article will focus on sports teams within leagues and will not address directly tournament sports, which provide similar but significantly different issues and challenges in this area. The sports entertainment sector is comprised of various firms (i.e., clubs) that join together in leagues to provide similar, well-defined products and services (i.e.,

Sports Franchises, Market Segment Specialization Program Training 3123-005 (8-99); TPDS No. 839831 (on file with author).

4. Sports is big business in the United States and internationally. *The Sports Industry*, Bus. & Econ. Research Advisor (BERA) (2005), http://www.loc.gov/rr/business/BERA/issue3/issue3_main.html.

5. To say that the sector is well known is not to suggest that the sector is static. On the contrary, the sports sector is dynamic. For an excellent book on the evolution of the modern sports industry that includes discussions on sponsorships, franchise relocation, radio and television, stadium issues, and endorsements, see PHIL SCHAAF, *SPORTS, INC.: 100 YEARS OF SPORTS BUSINESS* (2004). See also *THE ECONOMICS OF SPORT VOLUME I* (Andrew Zimbalist ed., 2001) (covering many aspects of the business of sports).

some form of competition, media, merchandise, etc.) through similar production methods (i.e., play the game).⁶

Sports is among the largest and fastest growing industries both in the United States and abroad. An excellent source that taps into the pulse of the industry as a whole is the Street & Smith's Sports Business Journal Annual Survey.⁷ In the S&S Annual Survey one finds some eye-popping numbers. For example, the sports business industry generated over approximately \$213 billion in revenue.⁸ That makes the sports industry twice the size of the automobile industry.⁹ The S&S Annual Survey further breaks down the source of revenues. These sources include advertising at \$27.43 billion; endorsements at \$897 million; sporting goods at \$35.62 billion; facility construction at \$2.48 billion; internet at 239.1 million; licensed goods at \$10.50 billion; media broadcast rights at \$6.99 billion; professional services at \$15.25 billion; spectator spending at \$26.17 billion; sponsorships at \$6.4 billion; medical spending at \$12.6 billion; travel at \$16.06 billion; multimedia at \$2.12 billion; gambling at \$18.90 billion; and operating expenses (other than travel) at \$22.98 billion.¹⁰

Although not the focus of this article, the manufacture and sale of sports equipment and clothing shares a symbiotic existence with sports entertainment. Thus, sales of sports equipment and clothing may serve as a reasonable barometer of sports enthusiasm. That enthusiasm, if captured effectively and efficiently by the various professional leagues, may translate into revenues. According to the National Sporting Goods Association, sales for all athletic and sports clothing for 2002 were almost \$10 billion.¹¹ Additionally, sales for athletic and sports equipment were over \$21 billion.¹² Moreover, receipts from spectator sports events for 2002 were over \$1.5 billion.¹³ These numbers, among other data, suggest that large

6. See generally WILKOFSEY GRUEN ASSOC., GLOBAL ENTERTAINMENT AND MEDIA OUTLOOK: 2005-2009: FORECASTS AND ANALYSIS OF 14 INDUSTRY SEGMENTS (6th ed. 2005).

7. Street & Smith's Sports Business Journal, <http://www.sportsbusinessjournal.com/index.cfm?fuseaction=page.feature&featureId=43> (last visited May 31, 2006).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Sporting Goods Sales by Product Category: 1999-2002*, Statistical Abstract of the United States at Table 1247 (U.S. Census Bureau 2004) (on file with author).

12. *Id.*

13. *Arts, Entertainment, and Recreation – Nonemployer Establishments and Receipts by*

pockets of potential revenue have yet to be tapped.

II. TRADITIONAL SOURCES OF REVENUE

Traditionally, revenue platforms in the sports sector consist of: (1) gate revenues for live sporting events; (2) rights fees paid by broadcast and cable television networks and TV stations to cover those events; (3) merchandising, which includes the selling of products with team or player logos; (4) sponsorships, which include naming rights and payments to have a product associated with a team or league; (5) actual team ownership; and (6) concessions.¹⁴ Following is a discussion of how those revenue platforms play out in the context of three professional sports leagues—the National Football League, Major League Baseball, and the National Basketball Association.

A. National Football League (NFL)¹⁵

Established in 1920, the National Football League (NFL) has emerged as the most stable of professional sports when it comes to controlled growth, revenue, and financial success.¹⁶ Originally established as an eight team league, the NFL grew through a merger with the American Football League and expansion to a present-day thirty-two teams.¹⁷ Teams in the NFL play a regular season schedule of sixteen games. The division champions¹⁸ and the next two teams in each conference with the best won-lost records¹⁹ advance to the play-offs. A series of play-off games determines the two conference champions.²⁰ These teams then play for the National Football League title in the Super Bowl.²¹

Kind of Business: 1997-2002, Statistical Abstract of the United States at Table 1247 (U.S. Census Bureau 2004).

14. I.R.S., *supra* note 3.

15. See National Football League website, www.nfl.com (last visited May 31, 2006).

16. *The Business of Professional Football*, Bus. & Econ. Research Advisor (BERA) (2005), <http://www.loc.gov/rr/business/issue3/football.html>.

17. *Id.*

18. The divisions include the National Football Conference East, North, South and West Divisions and the American Football Conference East, North, South, and West Divisions.

19. These are the so-called “wild-cards.”

20. There are ten play-off games (five in each conference) that lead to the Super Bowl. 2003 SPORTS ILLUSTRATED ALMANAC 125 (2002).

21. The first Super Bowl was played between the champions of the National Football League and the American Football League in 1967. The Green Bay Packers defeated the Kansas City Chiefs 35-10 in Los Angeles. *Id.* at 149.

The NFL's attendance yield (percentage of capacity sold) has remained stable for over two decades.²² In the last five years, the NFL has experienced an estimated average of 90% attendance capacity.²³ During the 2000-01 season,²⁴ NFL gate revenues approximated \$810 million out of a possible maximum revenue of \$859 million, or about a 95% yield.²⁵

Unlike other industries, sports require the cooperation of all firms through the league and competition on the field of play. Although General Motors Corporation does not need Ford Motor Company to produce automobiles, the Atlanta Falcons need the Dallas Cowboys to produce football games. In an effort to theoretically bring greater competition to the field, the sports entertainment sector has sought various revenue models. The NFL has adopted a sourced approach to revenues: (1) retained revenues and (2) shared revenues.²⁶

Retained revenues are generated and kept by each team; thus, retained revenues are not shared among teams in the NFL. In 2001-02, retained revenues reached approximately \$2 billion.²⁷ Retained revenues include the following:

- Sixty percent of the gate receipts from home games,²⁸
- Naming rights,
- Sponsorships,
- Luxury suite revenue,
- Concessions, and
- Local broadcast rights.²⁹

Shared revenues are allocated and shared across the teams in the NFL. In 2001-2002, retained revenues reached approximately \$2.6 billion.³⁰ The primary sources of shared revenue include:

22. *The Business of Professional Football*, *supra* note 16.

23. *Id.*

24. The NFL 2000-2001 season is the most current reliable financial information that I have found on this topic.

25. PAUL KAGAN, *THE BUSINESS OF FOOTBALL* 68 (2002); *See also* FRANK P. JOZSA, JR., *AMERICAN SPORTS EMPIRE: HOW THE LEAGUES BREED SUCCESS* 21 (2003).

26. *The Business of Professional Football*, *supra* note 16.

27. *Id.*

28. *See* Soonhwan Lee & Hyosung Chun, *Economic Values of Professional Sports Franchises in the United States*, 5 *SPORTS JOURNAL* (2002), available at <http://thesportsjournal.org/2002Journal/Vol5-No3/economic-values.htm>.

29. *The Business of Professional Football*, *supra* note 16.

30. *Id.*

- National broadcast rights fees,³¹
- Forty percent of away game ticket sales,³² and
- Licensing.³³

NFL Properties, Inc., the marketing arm of the NFL, is also a major revenue source. In 2000-2001, NFL Properties generated approximately \$4 billion in sales.³⁴ Revenue from NFL Properties activities is shared equally among all thirty-two teams, the league office, and NFL Charities.³⁵ Experts, however, have observed that this particular revenue stream may be stabilizing or possibly decreasing because of competition from other sports and consolidation among vendors that deal with NFL Properties.³⁶

Finally, franchise values in the NFL have accelerated at an accelerating rate over the past three decades. For example, in 1976, the new owners of the expansion Seattle Seahawks and Tampa Bay Buccaneers each paid a franchise fee of \$16 million.³⁷ In 1999, the new owner of the Houston Texans paid a record \$700 million in franchise fees.³⁸ Based on team valuations in 2002, the NFL is valued at over \$24 billion.³⁹

For an example of values and revenues in action, consider the NFL Washington Redskins. The Washington Redskins' estimated franchise value is \$952 million.⁴⁰ For the 2002 NFL season, Washington generated over \$227 million in revenue.⁴¹ Approximately \$65 million (about 28% of total revenue) can be traced to ticket sales.⁴² FedEx is paying \$7.6 million per year to have its name on the stadium over a naming rights term that expires in

31. The current agreement with the NFL is an eight-year contract that totals \$17.6 billion. KAGAN, *supra* note 25, at 45. About 65% of all revenues of NFL teams are from television rights licensing. Lee & Chun, *supra* note 28.

32. Lee & Chun, *supra* note 28.

33. *The Business of Professional Football*, *supra* note 16.

34. *Id.*

35. KAGAN, *supra* note 25, at 64.

36. *The Business of Professional Football*, *supra* note 16.

37. *Id.*

38. *Id.*

39. Lee & Chun, *supra* note 28.

40. Steve Seepersaud, *The Richest Teams in Professional Sports*, http://www.askmen.com/sports/business_100/100_sports_business.html (last visited June 5, 2006).

41. *Id.*

42. *Id.*

2025.⁴³ Total sponsorship fees raked in by the Redskins are reported to exceed \$30 million a year.⁴⁴

*B. Major League Baseball (MLB)*⁴⁵

The beginnings of baseball in America are shrouded in some mystery and considerable controversy.⁴⁶ Although most experts agree that baseball began in the United States in the mid-1800's, some trace the game back to American Indian stickball and some to the English game of rounders. Many wrongly trace the "invention" of baseball to Abner Doubleday. The legend goes that General Doubleday, Civil War hero, invented baseball in 1839 in Cooperstown, New York. However, in 1839, Doubleday was a cadet at West Point, living a very busy day with hardly the opportunity to play let alone invent a new game. Moreover, General Doubleday never took credit or even mentioned the game of baseball in his many personal journals.⁴⁷

All early baseball players were amateurs. In 1869, that changed, and with it, the face of the game.⁴⁸ In that year, the Cincinnati Red Stockings paid its players becoming the first professional baseball team to publicly acknowledge that they actually paid their players, a

43. *Id.*

44. *Id.*

45. Major League Baseball, www.mlb.com (last visited June 5, 2006).

46. The serious student of baseball should consider the benefits membership in the Society for American Baseball Research (SABR). See Society for American Baseball Research, www.sabr.org (last visited June 5, 2006). I know this sounds like a paid advertisement. It isn't—I haven't been paid a dime! Within SABR is a wonderful committee devoted to the business of baseball. The Committee on the Business of Baseball maintains a treasure of a site. See The Business of Baseball, <http://www.businessofbaseball.com/> (last visited June 5, 2006). At that site, one can peruse a number of exciting offerings. Among these offerings are recorded interviews of various characters in professional baseball. Additionally, one can find fascinating interviews of Former MLB Commissioner Bowie Kuhn, former Commissioner Fay Vincent, former head of the Major League Baseball Players Association Marvin Miller and many others. *Id.* For interesting treatments of the business of baseball, see ANDREW ZIMBALIST, MAY THE BEST TEAM WIN: BASEBALL ECONOMICS AND PUBLIC POLICY (2003); FRED CLAIRE WITH STEVE SPRINGER, MY 30 YEARS IN DODGER BLUE (2004); CHARLES P. KORR, THE END OF BASEBALL AS WE KNEW IT: THE PLAYERS UNION, 1960-81 (2004); FAY VINCENT, THE LAST COMMISSIONER: A BASEBALL VALENTINE (2002); MARVIN MILLER, A WHOLE DIFFERENT BALL GAME: THE INSIDE STORY OF THE BASEBALL REVOLUTION (2004); JOHN HELYAR, LORDS OF THE REALM (1995); STEFAN SZYMANSKI & ANDREW ZIMBALIST, NATIONAL PASTIME: HOW AMERICANS PLAY BASEBALL AND THE REST OF THE WORLD PLAYS SOCCER (2005).

47. Abner Doubleday, BaseballLibrary.com, http://www.baseballlibrary.com/baseballlibrary/ballplayers/D/Doubleday_Abner.stm (last visited July 25, 2006).

48. Reds Timeline History Highlights, <http://mlb.mlb.com/NASApp/mlb/cin/history/timeline1.jsp> (last visited July 25, 2006).

practice that had existed surreptitiously for some time. By 1876, eight professional teams formed the National League. In 1900, eight teams formed the American League.⁴⁹ Although the Leagues increased the number of games per season over time, in 1961, the American League increased the number of games played each season by each team from 154 to 162. The National League increased its season to 162 games in 1962. Each team in both Leagues plays 81 home games and 81 away games.⁵⁰

Initially, the National League and American League acted independently of each other. Through a series of agreement the two Leagues joined forces to bring us Major League Baseball.⁵¹ Presently, there are sixteen National League teams assigned to the Eastern, Central, and Western Divisions.⁵² There are fourteen American League teams assigned to the Eastern, Central, and Western Divisions.⁵³ Each League has one wild-card.⁵⁴ The post-season playoffs culminate in a best-of-seven series known as the World Series. The First World Series took place in 1903, pitting American League Champions Boston against National League Champions Pittsburgh, with Boston winning.⁵⁵

The attendance at MLB games has steadily increased along with ticket prices. In 1994, attendance at MLB games was 50,043,384. In 2004, attendance rose to 72,968,953.⁵⁶ Each team in MLB generates its operating revenue through several sources.⁵⁷ These sources include the following:

- Regular season game receipts,
- Local television, radio, and cable contracts,
- Post Season (for those teams that qualify),
- Local operating revenue, and

49. National League, http://www.ringsurf.com/info/Sports/Baseball/National_League/ (last visited July 25, 2006).

50. See Team-By-Team Schedule, http://mlb.mlb.com/NASApp/mlb/mlb/schedule/team_by_team.jsp (last visited July 25, 2006).

51. See generally Major League Baseball, The Official Site, <http://mlb.com> (last visited July 25, 2006).

52. 2005 SPORTS ILLUSTRATED ALMANAC 51 (2004).

53. *Id.*

54. *Id.*

55. SPORTS ILLUSTRATED ALMANAC, *supra* note 52, at 73.

56. *Baseball – Major League Regular Season Attendance*, SPORTS BUSINESS JOURNAL, available at <http://www.sportsbusinessjournal.com/index.cfm?fuseaction=home.main>.

57. See generally Richard C. Levin et al., *The Report of the Independent Members of the Commissioner's Blue Ribbon Panel on Baseball Economics* (July 2000).

- National revenue.⁵⁸

In 2001, reported total operating revenue exceeded \$3.5 billion.⁵⁹ Presently, MLB teams are participating in a revenue sharing program. In accordance with the program, each team invests thirty-four percent of net local revenues into a pool. The pool is then divided among the teams. Some teams are net contributors, that is, revenue sharing is a net liability, whereas, some teams are net recipients, that is, revenue sharing is a net asset.⁶⁰

In MLB, when it comes to revenue sources, the gate is still king. Approximately forty percent to fifty percent of total revenue is traced to game receipts.⁶¹ When one also considers other local revenues, including concessions, suites, and other game-day in-park revenue, the number increases to as much as sixty percent.⁶² The gate receipts are shared with approximately eighty to ninety percent retained by the home team and the remaining ten to twenty percent going to the visiting team.⁶³

An example may provide some flesh to the revenue skeleton we have constructed. The New York Yankees are considered by many to be the richest team in MLB.⁶⁴ The Yankees are estimated to be worth about \$849 million.⁶⁵ In the 2002 season, the Yankees generated approximately revenues of \$223 million. Of that total revenue, \$98 million (about 44% of total revenue) can be traced to gate receipts as a result of attendance figures in excess of 3.5 million fans. Corporate sponsorship from old standbys like Adidas, Anheuser-Busch, and JP Morgan Chase paid a total of \$30 million (about 13% of total revenue) to be associated with the Bronx Bombers.⁶⁶ In 2001, the Yankees scored about \$58 million off of television contracts. Those television broadcast rights are predicted to triple now that the

58. *Baseball, USA Today Baseball Weekly.com*, Dec. 5, 2001, <http://www.usatoday.com/sports/baseball/stories/2001-12-05-focus-expenses.htm>.

59. *Id.*

60. Tim Reason, *Squeeze Play*, *CFO.com*, Apr. 1, 2004, <http://www.cfo.com/article.cfm/3012785?f=search> ; *Baseball, USA Today Baseball Weekly.com*, <http://www.usatoday.com/sports/baseball/stories/2001-12-05-focus-expenses.htm>.

61. *Id.*

62. *Id.*

63. Lee & Chun, *supra* note 28.

64. Seepersaud, *supra* note 40.

65. Yankee Stadium Info, <http://ultimateyankees.com/yankeestadiuminfo.html> (last visited June 1, 2006).

66. Seepersaud *supra* note 40.

Yankees started its own cable channel.⁶⁷

C. *National Basketball Association (NBA)*⁶⁸

In contrast to the mystery shrouding the beginnings of baseball, basketball's inventor is well known. In 1891, James Naismith invented basketball in Springfield, Massachusetts, the present home of the Professional Basketball Hall of Fame.⁶⁹ Naismith, a physical-education instructor, sought to create a team sport that could be played indoors during the winter. For his new game, Naismith decided to use a soccer ball because it was large enough to catch easily. He then attached two peach baskets to a gymnasium balcony railing located 10 feet above the floor. With that the game was born.

Although there are many professional basketball leagues throughout the world, the National Basketball Association (NBA) is the world's leading professional basketball league. The NBA consists of the Eastern Conference and the Western Conference.⁷⁰ The Eastern Conference is divided into two divisions—the Atlantic Division and the Central Division. The Western Conference is divided into two divisions—the Midwest Division and the Pacific Division.⁷¹ Each team plays an 82-game schedule. After the regular season ends, the eight teams in each conference with the best records qualify for the championship play-offs, culminating in the NBA Finals.⁷²

NBA attendance has grown steadily over the past decade. In 1993, approximately 17 million fans attended NBA games.⁷³ During the 2004-2005 season, over 20 million fans showed up for action on the court, with an average attendance of 17,059 per game.⁷⁴ These numbers have resulted in significant increases at the gate, resulting in an arena capacity rate hovering around eighty-nine percent (89%).⁷⁵

67. *Id.*

68. National Basketball Association, www.nba.com (last visited July 28, 2006).

69. History of Basketball—James Naismith, *available at* <http://inventors.about.com/library/inventors/blbasketball.htm> (last visited June 1, 2006).

70. *See generally* National Basketball Association, *supra* note 68.

71. SPORTS ILLUSTRATED ALMANAC, *supra* note 52, at 245.

72. *Id.*

73. *The Business of Basketball*, Bus. & Econ. Research Adviser (BERA) (2005), *available at* <http://www.loc.gov/tr/business/BERA/issue3/basketball.html>.

74. NBA Attendance, InsideHoops.com, <http://www.insidehoops.com/attendance.shtml> (last visited June 1, 2006).

75. *Stern: NBA Revenues Down, Attendance Up*, MSNBC/NBC Sports (Apr. 15, 2004),

In 2001, the NBA experienced gate receipts of over \$1 billion.⁷⁶ Unlike the other sports leagues considered in this article, NBA teams keep all home gate receipts and do not share with the visiting teams.⁷⁷ NBA television contracts also generate substantial revenues.⁷⁸ For example, the NBA cable television contract with TNT contemplates a payment stream of \$2.2 billion with a six year term.⁷⁹ NBA network television contracts with ABC/ESPN provide for a payment stream of \$2.4 billion with a six year term.⁸⁰

The NBA has also focused attention on licensing fees. For example, sales of NBA-licensed merchandise have risen to over \$2.1 billion per year.⁸¹ Additionally, the National Sporting Goods Association has estimated that total consumer expenditures for basketball equipment grew from \$235 million in 1993 to over \$300 million in 2003, offering up even greater opportunities for the NBA.⁸²

Again, an example may help to put the revenue picture in context. In the NBA, the Los Angeles Lakers take the top notch when it comes to the richest team.⁸³ The Lakers are valued at \$447 million.⁸⁴ For the 2002-2003 season, revenue was recorded at \$149 million.⁸⁵ Of the total revenue, about \$61 million (41% of revenues) came from fans through the turnstile at the Staples Center.⁸⁶ Sponsors include Southwest Airlines, Miller Brewing, Toyota, and Verizon.⁸⁷

D. Other Revenue Sources

Smart financial and legal minds hover all around sports. Notwithstanding some notable setbacks, failures, and false starts,

<http://msnbc.msn.com/id/4752194>.

76. PAUL KAGAN, *THE BUSINESS OF BASKETBALL* 11 (2001). See generally David J. Berri, *Stars at the Gate: The Impact of Star Power on NBA Gate Revenues*, 5 J. SPORTS ECON. 33-50 (2004).

77. Lee & Chun, *supra* note 28.

78. KAGAN, *supra* note 76, *Executive Summary*.

79. NBA TV Contracts, InsideHoops.com, <http://www.insidehoops.com/nba-tv-contracts.shtml> (last visited June 1, 2006).

80. *Id.*

81. Rick Horrow, *NBA at Finals Time: Sustaining Three Business Goals*, CBS Sportsline.com (June 3, 2003), <http://cbs.sportsline.com/general/story/6408583>.

82. *The Business of Basketball*, *supra* note 73.

83. Seepersaud, *supra* note 40.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

those folks that toil in these fertile fields have invented and developed several interesting revenue growth models. Most of these models build on traditional revenue sources, using those traditional sources as a platform from which to spring new growth models. The following section explores just a few of these revenue growth models.

1. *Architecture*

Our first revenue source is a subtle but effective variant of the adage that “gate is king.” Architects have captured something that we fans have known intuitively for some time. If you build a nice stadium, specifically designed and suited for the game at hand, the fan experience is more gratifying. Build a baseball field, construct a football stadium, erect a basketball arena, and watch the fan base grow. Multipurpose sports facilities are out, kind of ugly, and bad for revenue growth. A well-suited facility breeds fan gratification. That gratification translates into more at the gate – both in increased attendance and higher ticket prices.⁸⁸ What the architects and financial experts have also uncovered, not so intuitive to us fans, is that the smaller the stadium (within reason), the greater the gate.⁸⁹ The data suggest that the smaller the stadium, the smaller the number of seats; the smaller the number of seats, the more scarce tickets become; the more scarce tickets become, the more a team can charge for those tickets.⁹⁰ Under the watchful eye of MLB, architects are working to get the supply-and-demand of stadium design at perfect balance.⁹¹ Other sports should also consider this formula; bigger is not always better, at least from a revenue growth perspective.

2. *Luxury Suites and Club Seats*

Our second revenue source simply seeks to retrofit existing stadiums or incorporate by design in new stadiums a new look and feel to the game that is business and corporate user-friendly. Luxury suites and club seats present a lucrative opportunity for increasing revenues.⁹² According to some experts, these products represent one of the fastest growing revenue sources in sports.⁹³ New stadiums,

88. See Reason, *supra* note 60.

89. *Id.*

90. *Id.*

91. *Id.*

92. For an interesting take on luxury suites, see Lambert, *supra* note 1.

93. Lee & Chun, *supra* note 28.

such as Detroit's Tiger Stadium, are incorporating luxury seats in their design and construction.⁹⁴ Older stadiums are re-designing and retrofitting their present seats in an effort to convert them to luxury seats.⁹⁵

Luxury suites, also known as luxury boxes, sky boxes, or executive suites, are private to semi-private rooms that ring the stadium and allow groups to mingle, schmooze, and at least occasionally watch the game either through the large window or balcony or on closed-circuit television. As mentioned these suites are lucrative, allow the team to increase revenue per seat, and, hook corporate sponsors.⁹⁶ Club seats, also referred to as premium seats, do not offer the privacy or most of the amenities of the luxury suite, but are usually more comfortable, often come with service at your seat, and usually have some of the best sight lines in the stadium.⁹⁷

NFL franchises boast luxury suites from as few as forty-seven to as many as 370.⁹⁸ MLB franchises offer luxury suites from as few as nineteen to as many as 161.⁹⁹ NBA franchises maintain luxury suites from as few as twelve to as many as 135.¹⁰⁰ It is not unusual for a team to offer several grades of luxury suites based on size, location, and amenities, in order to capture even greater premiums. The average rental is in excess of \$75,000 per season with a range from approximately \$15,000 to over \$1 million¹⁰¹ and those prices usually do not include the tickets.¹⁰²

3. *Pay-Per-View*

Professional sports franchises are adding to their revenue through pay-per-view (PPV) contracts with local networks and cable companies.¹⁰³ Revenues from PPV have increased dramatically from a humble \$435 million in 1991 to \$3 billion in 2000.¹⁰⁴ This is, by all accounts, a virtually untapped revenue resource.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. Lambert, *supra* note 1.

103. Lee & Chun, *supra* note 28.

104. *Id.*

An extension of the PPV platform is to offer the Super Bowl and World Series on PPV in addition to those marquee sports events' regular network broadcasting. The PPV version could offer different angles, additional content, trivia contests, on-field sound, and the like.

4. *Satellite Radio*

Professional sports have found a new home on satellite radio. These satellite broadcast providers look to sports to provide content that attracts listeners and advertisers. Fans love satellite broadcast. It allows them the opportunity to follow their home teams even when their employment requires that they change "homes." This revenue platform is also relatively untapped. Watch for professional sports leagues to enter into the market with a greater presence. Also, watch for the possibility that a professional sports league or combination of leagues explore consider purchasing their own satellite broadcast company. Imagine the NFL, MLB, and NBA entering into a joint agreement in order to reduce start-up costs and tap an even greater audience with greater league control. Armed with ready-made content, we may witness the revenue race thrusting back to the future when it comes to satellite broadcasts.

5. *Personal Seat Licensing*

In 1997, personal seat licensing (PSL) was estimated to raise \$500,000 in one time fees.¹⁰⁵ That number appears to have increased. The PSL is a "cheap" way in which to raise one-time revenue. However, as a revenue generating product, it lacks strategic legs.

6. *Media Access Charges*

The Media Access Charge (MAC) is a rent based on gross receipts. The MAC operates in a way similar to a percentage rent term between a tenant and a shopping mall. For example, according to the Minnesota Legislature Study on Sources of Revenues, fees from use of the broadcast facility at a stadium, at rates of \$10,000 per game for television/cable and \$5,000 per game for radio broadcast, would raise an estimated \$2.16 million per year from MLB and \$215,000 per year from NFL broadcasts.¹⁰⁶

105. Wilson & Hedstrom, *supra* note 3.

106. *Id.*

7. *Naming Rights*

Typically, naming rights in the United States for new professional sports stadiums and venues have yielded fees between \$2 million to \$2.5 million per year with terms of ten to thirty years.¹⁰⁷ Naming rights fees have ranged from a low of \$900,000 to a high of \$4 million per year.¹⁰⁸ Although quite cumbersome and the butt of many sports commentators' jokes, there seems to be no letting up on the name game.

8. *Sport as Entertainment*

In the arena of sports as entertainment, the NBA is unequivocally "best in show." Both the NBA and the National Basketball Players Association (NBPA) emphatically recognize that the sports industry, properly understood, is a sector of the entertainment industry. The NBA not only competes with the NFL and MLB, but also competes for the entertainment dollar with movies, recordings, videos, and the like.

The NBA has been aggressive in blurring the distinction between sport and entertainment, exploiting the bleed over of one form of entertainment into the other. Among products that the NBA has developed are the commissioning of a recording that captures the "NBA spirit" and video games that take the video experience to another level of entertainment. For example, the soundtrack for EA sports "NBA Live 2003" was certified a platinum album with over 1 million recordings sold, the first ever video game soundtrack to reach that recording milestone.¹⁰⁹

Although both the NFL and MLB have joined the NBA in recognizing that the sports sector is a part of a much bigger picture, the three professional sports leagues have so much unrealized potential that one should not be surprised to see more attempts at exploiting the natural fit between sports and other forms of entertainment. Some may argue that such an alliance is a pact with the devil in that it taints the game, making it too glitzy, too "Hollywood"; that view, however, is quaint and shortsighted.

107. *Id.*

108. *Id.*

109. Horrow, *supra* note 81.

9. *International Expansion*

One way in which to increase revenue is to increase the geographic pie. Historically, the NFL, MLB, and the NBA looked exclusively to the United States for their fan base and revenue growth. That has changed. Recognizing that the three professional leagues operate in a mature domestic environment, international expansion is a logical and rational next step to revenue growth. The sports industry is not immune from globalization. For some time, MLB has operated in an international market through exhibition games and the like. It also has successfully discovered and cultivated players from Mexico, the West Indies, Central America, and South America for decades. More recently, player scouting has included other countries like Australia and Canada. In 2006, the World Baseball Classic, a tournament of national teams featuring MLB players on the rosters of the United States and foreign teams, brought baseball to the world in a more formal sense. If not a domestic success, the Classic was certainly an international one. Surprisingly, however, MLB has been slow in moving outside the continental United States.

The NFL has committed to international growth through the establishment of a league—NFL Europe or the NFLE.¹¹⁰ Established in 1991 as the World League, the League changed its name to NFL Europe in 1995 with the establishment of a joint venture between it and the FOX TV Network. That joint venture ceased in 2000. Although its attendance has fluctuated and its financial position has been suspect, both the NFL and the National Football Players Association appear committed to the NFLE.¹¹¹ Although attendance may not rival or may never rival attendance in the United States, a revenue growth plan would also consider the driver that the NFLE may serve for revenue growth. An increased fan base, even a modest one, provides content for advertisers and a ready market for merchandising.

The NBA is also considering international expansion. With the popularity of basketball in Europe, that continent appears to be the likely start for the NBA. The presently existing professional league structure in countries like Italy, France, Spain, and Israel suggests an interesting possibility. Would the NBA consider a merger or alliance with an existing European league? Experts appear to think not; the

110. See NFL Europe, <http://www.nfleurope.com/> (last visited July 25, 2006).

111. See *The Business of Professional Football*, *supra* note 16.

NBA's brand is worldwide and already strong in Europe.¹¹² For example, approximately twenty percent of all NBA merchandise (about \$430 million) is sold internationally.¹¹³ Moreover, over fifteen percent of the \$900 million in annual television revenue (excluding local broadcasts) comes from 148 non-U.S. television partners in 212 countries.¹¹⁴ The NBA has also determined that approximately forty percent of its visitors to www.nba.com access the website from locations outside of the United States.¹¹⁵ More promisingly, it appears that almost fifty percent of NBA fans said that the "influx of international players has increased their interest."¹¹⁶

III. NONTRADITIONAL REVENUE SOURCES

Professional sports leagues are competing in a vicious arena, and one that is not on the playing field. With the heavy competition for the entertainment dollar coming from many different angles, every revenue dollar is precious. However, any professional sports league or organization that sets its eye on the quick buck will someday realize just how much potential revenue slipped through its collective hands.

Professional sports leagues are leaving revenue on the table. Extending existing revenue platforms are necessary but not sufficient in order to maximize revenue. With operating costs increasing, driven largely by player salaries, and with competition being launched from other entertainment sectors that are competing for the same seats and eyes, a new revenue paradigm is necessary. Take basketball, for example. The National Sporting Goods Association found that approximately 30 million Americans play basketball. The NBA must find better ways in which to tap into that ready-made fan base. Moreover, in 2001, the movie industry sold over 1.6 billion tickets, an attendance that easily surpassed the NFL, MLB, NBA, and the National Hockey League (NHL) combined.¹¹⁷ Luring movie fans to the NBA must also be a top priority.

The key is to find efficient and effective techniques in order to mine such revenue. This emerging revenue paradigm will embrace

112. Horrow, *supra* note 81.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

existing and new technologies. These new technologies will change the fan experience, allowing more interaction and greater fan control over his or her experience. These new technologies will also permit the fan to customize his or her experience, developing a cozy and personalized interface with the game.

Another example may help demonstrate what I am suggesting. NFL future revenue trends necessarily include internet and broadband media rights. For example, the NFL signed a three-year contract with ESPN for \$10 million, licensing such media rights.¹¹⁸ More recently, the NFL executed contracts with Viacom, America Online, and Sportsline.com, Inc., reportedly worth over \$110 million for such rights.¹¹⁹ Leveraging the new technologies with these and other relationships is precisely what the NFL must do to compete effectively.

Any revenue paradigm shift would not leave behind existing revenue sources. In fact, a new paradigm would continue to build on and expand such sources. What the new paradigm offers, however, that the old revenue thought experiments did not, is a new perspective. This new perspective is fueled by an understanding that professional sports is not about the game, *it is about the way in which we as fans experience the game*.

Following are some suggestions for reaping revenue:

1. *Housing Related to the Sports Complex*

NASCAR¹²⁰ has moved into the housing market with luxury suites at the Atlanta Motor Speedway, for example.¹²¹ These houses are selling for more than \$1 million. A variety of housing options could be crafted, depending on the venue, to suit a range of budgets. For example, in more rural or suburban areas, a league or team within the league might design and market communities based on their proximity to the venue, with prices descending the farther away one's home rested.

In urban markets, with land at a premium, it might make more sense to design arenas to incorporate mixed use luxury condo and

118. KAGAN, *supra* note 25, at 45.

119. *Id.*

120. OK, I am from the South—Atlanta to be precise. Did you really think I could write an article on sports and not talk about NASCAR!?

121. Watch your tongue. A southerner is writing this so no wise cracks about “double-wides!”

hotel units into the existing structure. Because major sports complexes frequently host a wide range of activities from massive religious revivals to tractor pulls and from large concerts and conventions to traditional sporting events, the demand for permanent housing to experience the full range of these events might be limited. Nonetheless, hotels allowing customers to self-select the events they wish to see, and rent suites accordingly, might be a viable option.

2. *Computers at Your Seat*

It is undeniable that every game in every sport faces some down time. Why not offer fans the ability to use a computer while sitting at their seat? Initially, I thought renting a portable device would be the most effective way to go. For example, a Tough Book is a laptop computer designed by Panasonic to take a beating. However, almost immediately, the flaws in this idea become apparent. A laptop is a cumbersome device for someone sitting in cramped stadium seating; if a baseball is flying towards you and you jump up to catch it, your Toughbook is going to go flying. Moreover, because they are portable, the notebook computer would also be easy to steal. Additionally, if you are sitting in an upper deck and you dropped or threw one of those devices, it could kill someone. That is a bad thing.

Yet, still the basic idea has some merit. What if the device was small and folded up, attached to your armrest? It could have a small LCD screen and a place to swipe a credit card. You could order drinks or food from your seat and perhaps check your email. You could allow patrons to surf the web set to your website, of course. Of course, with advances in cell phones and PDAs, it seems unlikely that folks would pay for what they may be able to already do on their own devices. However, beyond ordering food and drinks and surfing the web, what if you offered up the fan the ability to cycle through the various camera signals in the facility. A fan could use the device to access the TV coverage of the game, the camera shots not on the air, and perhaps additional camera feeds (for example, in the locker room, tunnel, dug out, etc.) not available anywhere else. Advertisements could also be mixed in with this programming either in the form of logos appearing on live camera feeds or traditional commercials during breaks.

3. *Projected Ads on Field/Court/Ice*

Because soccer games do not take commercial breaks, other than

at half time, professional soccer was forced to come up with alternative ways of selling advertisements. One revenue source has been to place advertisements around the stadium along the walls surrounding the field. Most professional sports already sell similar advertising. Check out the ads around the ring of a stadium next time you take in a game. Another creative way professional leagues have made up for the lost opportunity for commercials is by selling time for companies to either attach their logo to the bug on the screen or by superimposing their logo directly onto the field of play. When MLB attempted to promote the film *Spiderman II* by placing the movie's logo on the bases during one game, MLB was widely criticized for defiling the game.¹²² Superimposing a logo on the field of play would only be seen by television viewers, and, thus, it might be less controversial. The right to sell those images might be retained by the professional sports teams when negotiating their broadcast licenses.

4. *Name Plates on Seats*

College sports programs, in an effort to raise money for new facilities, have often given fans the opportunity to purchase engraved bricks that are then included in the completed structure. This generates a small amount of money that can be used once to offset costs of construction. Fans often take advantage of these opportunities to memorialize their love of their favorite team.

Why not allow fans to show their support for their team by purchasing an engraved name plate to be placed on their seats for the season? This might give the fans a greater sense of connection to the franchise; it would also eliminate any confusion as to who is sitting in the wrong seat. While the idea is not too sexy, it would be a relatively inexpensive way of generating additional revenue and igniting new fan interest and loyalty.

5. *Headsets that Would Connect the Fan to the Field*

Technology drives new fan experiences. The use of multiple camera angles, helmet cameras, live microphones, sideline interviews, slow motion, instant replay, superimposed first down lines, and the like are designed to bring a new and fresh experience to the fan. A

122. See Darren Rovell, *The Tangled Web of Sports and Advertising*, Espn.com, May 6, 2004, <http://sports.espn.go.com/espn/sportsbusiness/news/story?id=1795742>; *Spiderman Bases Shot Down*, USA Today.com, May 6, 2004, http://www.usatoday.com/sports/baseball/2004-05-06-spider-man-plan-dropped_x.htm.

new fan experience that would extend that logic could include headsets that would connect the fan to the field of play by allowing fans to listen to the interaction among coaches or between a coach and his players. Obviously, teams would need to be certain that providing radio content did not violate any exclusivity rights offered to their broadcasters. This could be done either by renting/selling cheap headsets that could pick up a low frequency radio signal or by simply providing the signal and allowing fans to bring their own radios. It is not unusual for fans to watch a game, in person or on TV, with the sound turned down, while simultaneously listening to the play-by-play on the radio. Fans could choose to do this in most arenas already by simply tuning into their local radio station that is broadcasting the game. In addition, what if fans were given access to radio feeds that picked up sideline/on-the-field conversations or picked up signals from up in the booth? This could be offered for free with commercials or offered for a service fee with or without commercials.

6. *Flat Screens in Restrooms ("The Twenty")*

Here is the perfect opportunity to take advantage of a captive audience. Flat screen technology allows teams to cover stadium restrooms with television advertising. If something big happens in the game while someone is in the bathroom these monitors could give him or her an update. Additionally, these screens could cycle through a series of advertisements similar to what movie theaters have done to their patrons who arrive early. "The Twenty" is little more than trivia mixed with advertisements played for twenty minutes before the start of a movie.¹²³ I would suggest a similar thing for stadium restrooms.¹²⁴

7. *Interactive TV*

Interactive Television or iTV is touted as a technology that will change the way a fan interacts with the sports broadcasting. By providing greater access to content including statistics, live games, commentary, and perhaps linking content to a fan's fantasy team, the iTV promise is to generate greater interaction between a fan and the sport and to retain viewership.¹²⁵ Additionally, broadcasters could

123. See, e.g., CMPAA Message to Regal Entertainment Group, available at http://www.captiveaudience.org/response_030519.html (last visited July 25, 2006).

124. Come on, be honest, wouldn't you love one for your home, too!?

125. See Interactive TV: The Opportunities for Sport, available at

offer viewers the ability to cycle through alternative camera angles for a single game or display multiple games simultaneously.¹²⁶

8. *Broadcast License for Trains and Airlines*

Professional sports, assuming this would not violate their contracts with TV broadcasters, might license train and airline companies to provide live coverage of their games or, perhaps, video of past "classic" games. This could be either by pay-per-view with a customer swiping a credit card through the monitor on the seat back in front of him or by a licensing agreement with the carrier.

9. *Fan Blogs (with advertising)*

Blogs (Web Logs or journals) are becoming ubiquitous on the internet. Although the bane of some in the sports industries, they have become a fixture in the sports landscape.¹²⁷ They are a way for fans to express their opinions on a forum of their peers. Presently, various fans may have their own blogs where they can rant about every possible bit of minutia involving their team. Why not channel this by providing fans with the opportunity to post their thoughts on the team's webpage? It would have to be a relatively open forum allowing fans to be critical of owners, players, and management alike. The owner, manager and players might occasionally post their own thoughts on this blog, thus encouraging fans to frequently check in to see who is saying what. By channeling fans onto the team's own, free blog, the team could then sell advertisements and merchandise on its blog page.

10. *Gaming*

Professional sports and gaming present a paradox. On one hand, professional sports benefit indirectly from gaming in that placing wagers on outcomes of games and other events increases brand awareness and fan interest. On the other hand, direct involvement between the leagues and gaming establishments may call into question the integrity of the game, price shaving, throwing a

http://www.sportbusinessassociates.com/sports_reports/interactive_tv.htm (last visited June 6, 2006).

126. Global Interactive Sports TV Revenues to Increase, [Indiantelevision.com](http://www.indiantelevision.com/headlines/y2k3/mar/mar92.htm), <http://www.indiantelevision.com/headlines/y2k3/mar/mar92.htm> (last visited June 6, 2006).

127. See, e.g., Sports Illustrated, Blog Central, <http://sportsillustrated.cnn.com> (last visited June 6, 2006).

competition, etc. From a revenue generating perspective, however, gaming is the proverbial “elephant in the room.” Gaming must be addressed in a careful, deliberate manner, eschewing hyperbole and “parades of horrors.” There are many ways in which both the integrity of the game may be preserved and revenues from gaming enjoyed by professional sports teams. It really is just a matter of time.

A common approach may be the simple raffle. A team could raffle off choice sideline seating, a court or dugout presence, ride a team flight or bus, or toward an even bolder step, a chance to call a play. To be sure, there would be substantial push back. But there is with any innovation.

A more sophisticated approach may run along the same lines as the Oregon Lottery’s Sports Action game.¹²⁸ First, Sports Action is not authorized, affiliated, or associated with the NFL or any other professional league. That could change if the professional leagues adopted a different posture on gaming. However, because of the lack of authorization, Sports Action cannot use any team names in its game tickets. Instead, the gaming activity uses the city names, so the Atlanta Falcons are called simply Atlanta. In an effort strictly to comply with NFL rights, the Sports Action game refers to the Super Bowl—a mark owned by the NFL—as the Super Big Game. As one of the prizes that can be won by game participants, the Sports Action game gives away tickets to the Super Big Game so as not to run afoul of the NFL.

The Sports Action game is played every week of the regular NFL season. Each week, on Wednesday, the new schedule is announced. It appears that professional odds-makers in Las Vegas provide the lottery with the odds that are then programmed into the next week’s lottery game. The lottery, by state law, must offer games of chance; thus, each individual game, or event, must have 50/50 odds so that it is truly a coin flip, if you will, as to which wager wins. From the time the schedule is announced, it appears that participants have up to an hour before the first kickoff to place their wagers. A participant can pick as little as three events or try to pick all fourteen events for the weekend, including Monday Night Games. The payouts depend on how many events you pick, with the person picking more events winning more money. Sports Action requires that no matter how many events you pick, from three to fourteen, you

128. See Oregon Lottery, Sports Action, www.oregonlottery.org (last visited June 6, 2006) (I am indebted to Michael Elliott of the Willamette Law Review for this example).

must get all events correct in order to win any prize money.¹²⁹

A professional sports league could run the same program, partnering with a state, an Indian tribe, or the federal government through a national lottery. It could even earmark a large percentage of revenue to its charitable foundations. Thus, there are ways by which a league could limit its operational involvement in the gaming activity. Ultimately, gaming provides new opportunities for revenue growth, expansion of the fan base, content for advertising, and a new way by which fans may experience a game.

IV. FANTASY LEAGUES

Professional sports leagues should re-think their approach to fantasy leagues. *The business of professional sports is about a fan's relationship to the game; it is not about the game itself.* Moreover, recall that the fundamental attributes of the coming revenue revolution are that sports is content and that technology drives that content. With that in mind, the last thing that a professional sports league should engage in is a fight with fantasy league providers over access to player names and statistics. Yet, inexplicably, that appears precisely where professional sports leagues are heading. In *C.B.C. Distribution & Marketing Inc. v. Major League Baseball Advanced Media, L.P.*,¹³⁰ C.B.C. sought a declaratory judgment against MLBAM, asserting that C.B.C. had not violated any rights that MLBAM owned or controlled in regard to player names and performance statistics used to operate fantasy league competitions on line. According to the complaint, C.B.C. has operated sports fantasy league games since 1992 under its brand name, "CDM Fantasy

129. The money generated by Sports Action goes to fund athletic programs at state-run colleges and universities. Normally lottery proceeds go to schools, parks, salmon habitat restoration and economic development, but this game in particular is directed to those athletic programs and scholarships. Since 1991, when the game was implemented Oregon collegiate athletic programs have received about \$30 million. It appears that gross revenues from Sports Action are approximately \$10 million a year. Oregon Lottery, *supra* note 128.

130. No. 4:05CV252MLM, 2005 WL 3299137 (E.D. Mo. June 8, 2005). On August 8, 2006, as this article was going to print, Judge Ann L. Medler issued an order finding in favor of C.B.C. essentially on all counts. The court held that professional baseball players did not possess a right of publicity in their names and performance statistics as used in C.B.C.'s fantasy games. Moreover, the court held that even if a publicity right existed, that First Amendment took precedence over any such right. Furthermore, the court held that the players' names and performance statistics are not copyrightable. See *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P. et al.*, Slip Op. Case No. 4:05CV00252MLM, United States District Court, E.D. Mo. Aug. 8, 2006 (Medler, J.).

Sports” and has provided other services for various sports media.¹³¹

A. *History of Fantasy Leagues*

Appearing in the 1980's, sports fantasy leagues have grown substantially.¹³² Along with baseball, sports fantasy leagues or games of some sort operate in football, basketball, hockey, golf, and auto racing. With the ubiquitous nature of the personal computer and easy internet access, gone are the days where laborious calculations would consume a good work day for those that faced the challenge of managing a sports team in a fantasy league.

The essence of the appeal of sports fantasy games is that these games exploit the names of real players and actual performance statistics in a real time mode. Typically, each participant becomes an “owner” of a sports franchise in a given league. For example, in 1985, I was the owner/manager of the Mudville Nine in the Oklahoma City Federal Courthouse Patriot's League. The ten owners that made up the Patriot's League met over pizza and beer and conducted a mock draft prior to the start of the MLB regular season. The owners drafted actual players based on a prediction of how that player would perform in the upcoming season. Team success was directly dependent on an owner's chosen players' actual performance in specific offensive and pitching performance categories. Fantasy league sports are statistic driven competitions.

Although the participants in 1985 would have tracked the performance statistics through box scores or the weekly USA Today performance listings, today's fantasy league owner can rely on proprietary service providers to do the heavy lifting. Services like C.B.C. have created sophisticated software programs and easy web interfaces to track such things as performance statistics, player drafts, trades, and the like.¹³³ In exchange for these sophisticated services, participants in fantasy leagues pay a franchise or original fee to join a specific fantasy league (or are assigned one if they do not choose a

131. *Id.* at *1.

132. See Fantasy Sport Basics, <http://www.net-racing.com/History.htm> (last visited July 25, 2006). For a very good article in the area, see Matthew G. Massari, *When Fantasy Meets Reality: The Clash Between On-Line Fantasy Sports Providers and Intellectual Property Rights*, 19 Harv. J. L. & Tech. 443 (2006).

133. Complaint at 4, C.B.C. Distribution v. Major League Baseball (E.D. Mo. 2005), available at <http://64.233.167.104/search?q=cache:9hsRQY5b3SUJ:www.usastats.com/section58/feb2005/Complaint.pdf+complaint+copy+CBC+distribution+MLB&hl=en&gl=us&ct=clnk&cd=>.

specific league), and, depending on the service provider, may also pay a fee per transaction.¹³⁴

Many service providers, like C.B.C., had executed non-exclusive licenses with professional sports leagues and/or players' unions, like MLB Players' Association (MLBPA), to use names, nicknames, numbers, and performance statistics.¹³⁵ The license in the C.B.C. cases also appeared to include the right to use likenesses, signatures, pictures, playing records, and biographical data.

Shortly after C.B.C.'s license with the MLBPA expired, the MLBPA announced that it had agreed to exclusively license it rights with respect to interactive media Fantasy Baseball Games to MLBAM or MLB.com.¹³⁶ MLBAM then issued cease and desist letters to prior licensees, like C.B.C., asserting that they no longer had any right to use, among other things, a player's name and performance statistics.¹³⁷ Prior to the license from the MLBPA to the MLBAM, C.B.C. had agreed to pay the MLBPA nine percent of gross royalties.¹³⁸ With its inability to use actual player names and tap into real-time performance statistics, service providers like C.B.C. see the real possibility of the cessation of their business.

Much may turn on the dispute between C.B.C. and MLBAM. Presently, MLBAM is conservatively valued at approximately \$2.5 billion.¹³⁹ Its origins are quite interesting. In June 2000, MLB owners agreed to pool all internet operations in one unit, agreeing to spilt expenses and profits.¹⁴⁰ In 2000, MLBAM generated revenues of \$5 million.¹⁴¹ In 2005, MLBAM was projected to increase revenue growth to \$265 million.¹⁴² MLBAM maintains www.mlb.com, an impressive site. The site offers a cornucopia of adventure for the baseball fan. A fan may watch streamed video of MLB games. Fans did just that, watching game videos over seven million times.¹⁴³ The site includes radio broadcasts and highlight packages. MLBAM will

134. *Id.* at 3.

135. *Id.* at 4.

136. *Id.*

137. *Id.* at 5.

138. *Id.*

139. Chris Isidore, *Baseball's Secret Success Story*, CNNMoney.com, Dec. 23, 2005, http://money.cnn.com/2005/12/23/commentary/column_sportsbiz/sportsbiz/index.htm.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

use that programming to capture the eyes and ears of its fan base, grow that base, and tantalize advertisers who have grown weary of channel-surfers and TiVo. At present, approximately ten percent of MLBAM's revenue is from advertising.¹⁴⁴

B. *The Right of Publicity*

Although parties to disputes like the one between C.B.C. and MLBAM toss around a number of legal doctrines to advance or defend their rights, including copyright and trade-mark violations, the crux of the contested matter revolves around the meaning and scope of the right of publicity, if at all. Following is a brief overview of the relevant authorities.¹⁴⁵ Before I begin that summary, however, I must observe that it is far from clear that professional sports leagues, players associations, or the players themselves have any right of publicity in their names coupled with their performance statistics when used in fantasy sports leagues. First, let us begin with a review of the law; then, we shall turn to whether MLBAM is "litigating smart."

For the modern athlete, the right to market a name or image carries with it the promise of cash. It is not unusual for top athletes to exceed their salaries by endorsement revenues.¹⁴⁶ Thus, the exploitation of an athlete's name and image has emerged as one of keen importance.¹⁴⁷ "In the 1990's many entertainment and sports stars, guided by agents and law firms, have demanded control of their names and images . . . [T]hey or their agents maintain that in an age of rampant commercialism they must hold onto the hottest property they know: themselves."¹⁴⁸ The right is expansive. "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,

144. *Id.*

145. Jack F. Williams, *Who Owns The Back Of A Baseball Card?: A Baseball Player's Rights in His Performance Statistics*, 23 CARDOZO L. REV. 1705 (2002). This section relies in large part on my article in the Cardozo Law Review, as updated.

146. Laura Lee Stapleton & Matt McMurphy, *The Professional Athlete's Right of Publicity*, 10 MARQ. SPORTS L.J. 23, 23 (1999).

147. Melissa B. Jacoby and Diane Leenheer Zimmerman, *Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity*, 77 N.Y.U. L. Rev. 1322 (2002).

148. Marcia Chambers, *Lawsuit Pits Artists' Rights vs. Athletes'*, N.Y. TIMES, Feb. 16, 1999 at D1, D4.

portraits, performances (under certain circumstances), biographical facts, symbolic representations, or anything else that evokes this marketable identity.”¹⁴⁹

Although robust, the right of publicity is not limitless. Professor McCarthy, a noted expert in the field, has observed:

[The right of publicity] can give every person the right either to prevent or to permit for a fee, the use of his or her identity in an advertisement to help sell someone's product. But the right of publicity cannot be used to prevent the use of identity in an unauthorized biography. It cannot prevent use of identity in an entertainment parody or satire, such as that of Rich Little or Saturday Night Live.¹⁵⁰

Historically, Prosser identified the right of publicity as a subspecies of the right of privacy.¹⁵¹ Yet, the right of privacy proved a poor proxy where the harm complained of had more to do with uncompensated use as opposed to unwelcomed use.¹⁵² Over time, courts began to recognize that the right of privacy provided a poor vehicle by which to vindicate uncompensated use of a celebrity's name or likeness. The dissatisfaction of the right of privacy led to the case of *Haelan Labs, Inc. v. Topps Chewing Gum, Inc.*,¹⁵³ where the court coined the phrase “right of publicity,” and it found that such a right existed as a matter of New York common law in addition to the statutory right of privacy.¹⁵⁴ The court observed:

[I]n addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, *i.e.*, the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made “in gross,” *i.e.*, without an accompanying transfer of a business or of anything else. Whether it be labeled a “property” right is immaterial; for here, as often elsewhere, the tag “property” simply symbolizes the fact that courts enforce a claim

149. Pamela Edwards, *What's the Score?: Does the Right of Publicity Protect Professional Sports League?*, 62 ALB. L. REV. 579, 581 (1998).

150. J. Thomas McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 130-31 (1995).

151. See Kenneth E. Spahn, *The Right of Publicity: A Matter of Privacy, Property, or Public Domain?*, 19 NOVA L. REV. 1013, 1023-24 (1995).

152. J. THOMAS MCCARTHY, TRADEMARKS & UNFAIR COMPETITION § 28:1, at 28-3 (1996).

153. 202 F.2d 866 (2d Cir. 1953).

154. For an interesting account of the case, see J. Gordon Hylton, *Baseball Cards and the Birth of the Right of Publicity: The Curious Case of Haelan Labs. v. Topps Chewing Gum, Inc.*, 12 MARQ. SPORTS L.J. 273 (2001).

which has pecuniary worth.

This right might be called a "right of publicity." For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant that barred any other advertiser from using their pictures.¹⁵⁵

In 1977, the Supreme Court weighed in on the issue. In *Zacchini v. Scripps-Howard Broad. Co.*, the Supreme Court recognized the right of publicity by name and observed that the right was distinct from the rights of privacy.¹⁵⁶ "[W]hile this new property right (and its tortious invasion) was born in the 'right of privacy' family, it has gradually matured since 1953 into an independent legal right with its own distinct characteristics. It is entitled to its own descriptive and distinctive name: 'the right of publicity.'"¹⁵⁷

Thus, the development of the law recognized that the right of publicity has many of the attributes of property, leading many authorities to conclude that it is a property right.¹⁵⁸ This development has led to the codification of the right of publicity in the Restatement (Third) of Unfair Competition.¹⁵⁹ The property interest may, of course, be transformed into an income stream. This transformation is what causes some of the confusion surrounding the proper characterization of the right. This transformation is not unusual. Think of the common contract right to payment evidenced by an invoice. We can then turn that invoice into property by transforming the right into an account. As property, we can then sell, factor, and securitize it. The same can be done for the right of publicity.

The right of privacy, among other things, protects the right to be left alone.¹⁶⁰ The right to publicity, however, protects a person's

155. *Haelan Labs, Inc.*, 202 F.2d at 868.

156. 433 U.S. 562 (1977).

157. MCCARTHY, *supra* note 152, § 28:6, at 28-8.

158. See, e.g., Melissa B. Jacoby, *Auctioning Kim Basinger: The Imminent Collision of Bankruptcy and the "Right of Publicity,"* 1 NORTON BANKR. L. ADVISER 1 (2001), available at http://web2.westlaw.com/find/default.wl?fn=_top&rs=WLW6.07&rp=%2ffind%2fdefault.wl&mt=Westlaw&vr=2.0&sv=Split&cite=2001+No.+1+NRTN-BLA+1.

159. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46-49 (1995).

160. See *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

pecuniary interest in the commercial exploitation of his "self" and common manifestations of self such as a person's name, nickname, aliases, signature, likeness, voice, tag line (such as, "Here's Johnny!"), and distinct personality characteristics.¹⁶¹ Thus, the rights protect two fundamentally different interests and must be analyzed separately.

The right of publicity has developed to protect the commercial interest of celebrities in their identities.¹⁶² The theory of the right is that a celebrity's identity can be valuable in the promotion of products and that the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity.¹⁶³ Thus, the famous have an exclusive right during life to control and profit from the commercial use of their name and personality.¹⁶⁴ If a celebrity's identity is commercially exploited, there has been an invasion of his or her right whether or not his or her name or likeness is used.¹⁶⁵

Essentially, there are three policies furthered by the right of publicity. First, the right of publicity vindicates the economic interests of celebrities, enabling those whose achievements have imbued their identities with pecuniary value to profit from their fame.¹⁶⁶ Second, the right of publicity fosters the production of intellectual and creative works by providing the financial incentive for individuals to expend the time and resources necessary to produce them.¹⁶⁷ Finally, the right of publicity serves both individual and societal interests by preventing what our legal tradition regards as wrongful conduct, such as unfair trade and unjust enrichment.¹⁶⁸

The right of publicity encompasses more than a person's name. For example, the right includes a person's likeness.¹⁶⁹ Likeness may include sound-a-likes as well as look-a-likes. A likeness need not be identical or photographic.¹⁷⁰ A court will consider the impressionistic resemblance, caricature, or resemblance in determining whether an

161. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46 at 531 (1995).

162. *ETW, Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 954 (6th Cir. 2003).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 838 (6th Cir. 1983).

167. *Id.*

168. *Id.*

169. See *Zacchini*, 433 U.S. at 562.

170. See *Wendt v. Host Int'l, Inc.*, 125 F.3d 806 (9th Cir. 1997), *cert. denied sub nom.*, *Paramount Pictures Corp. v. Wendt*, 531 U.S. 811 (2000).

infringement of the right of publicity has been infringed.¹⁷¹ Thus, courts have found the possibility of potential rights violations where a magazine has published a composite picture of the head of a Dustin Hoffman character (named Tootsie) on the body of a model,¹⁷² the unauthorized use of an identifiable race car creating an association with an individual,¹⁷³ the unauthorized use of a nickname,¹⁷⁴ the unauthorized use of an impressionistic likeness through the use of animatronic robots,¹⁷⁵ the unauthorized use of a robot that bore an impressionistic resemblance of a celebrity,¹⁷⁶ and the unauthorized use of a slogan or phrase.¹⁷⁷

The right of publicity is generally a matter of state law. For example, California has both a statutory and common law right of publicity.¹⁷⁸ In California, the common law right is much broader than the statutory right.¹⁷⁹ The elements of the common law action include: (1) the defendant's use of the plaintiff's identity; (2) the appropriation of the plaintiff's likeness or name to the defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.¹⁸⁰ In contrast, New York does not recognize a common law right to publicity. However, New York does recognize the right in the statutory right of privacy, which requires some magnitude of notoriety.¹⁸¹

For almost 50 years, courts have protected an athlete's right of publicity by recognizing an athlete's right to control and profit from the use of his name and nicknames, likenesses, portraits, performances (under certain circumstances), biographical facts, symbolic representations, or anything else that evokes a marketable identity.¹⁸² More specifically, in *Uhlaender v. Henricksen*, the court addressed the issue of whether a game manufacturer's use of baseball players' names and statistics in a board game violated the players'

171. *Id.* at 809.

172. *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867 (C.D. Cal. 1999).

173. *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974).

174. *Hirsch v. S.C. Johnson & Son*, 90 Wis. 2d 379, 280 N.W.2d 129 (1979) ("Crazy Legs" nickname).

175. *Wendt*, 125 F.3d 806.

176. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992).

177. *Carson*, 698 F.2d 831.

178. *See Wendt*, 125 F.3d at 810-12.

179. *Id.*

180. *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 417 (1983).

181. *See* N.Y. CIV. RIGHTS. LAW §§ 50-51 (1992).

182. *See* Stapleton & McMurphy, *supra* note 146.

rights of publicity.¹⁸³ The players sought an injunction to prevent the use of their names and statistical information, such as batting, fielding, and earned run averages.¹⁸⁴ The court held, "It seems clear to the court that a celebrity's property interest in his name and likeness is unique, and therefore there is no serious question as to the propriety of injunctive relief. Defendants have violated plaintiffs' rights by the unauthorized appropriation of their names and statistics for commercial use."¹⁸⁵

In summary, an athlete's right of publicity is designed to prevent the unauthorized use of an athlete's name, likeness, etc., without compensation.¹⁸⁶ The right of publicity is distinct from the rights of privacy. The right of publicity is generally a matter of state law; however, the Restatement (Third) of Unfair Competition has had a significant impact on the development of the doctrine.¹⁸⁷

C. First Amendment Issues

In *ETW, Corp. v. Jireh Publ'g, Inc.*, the court upheld an artist's right under the First Amendment to create paintings of historical golf moments over a challenge by Tiger Woods.¹⁸⁸ Confronting the right of publicity argument advanced by Woods, the court observed that the work contained "significant transformative elements" that made it worthy of First Amendment protection.¹⁸⁹ Because the work in question "does not capitalize solely on a literal depiction of Woods[,]" but rather "consists of a collage of images . . . which are combined to describe, in artistic, [sic] form a historic event in sports history and to convey a message about the significance of Woods's achievement[s] in that event," the work was entitled to the full protection of the First Amendment, notwithstanding the fact that the artist may benefit commercially.¹⁹⁰

Moreover, in *NBA v. Motorola, Inc.*, the Second Circuit held that statistics are historical facts, and thus, not subject to copyright

183. 316 F. Supp. 1277 (D. Minn. 1970).

184. *Id.* at 1279.

185. *Id.* at 1283.

186. See generally Edwards, *supra* note 149.

187. See generally RESTATEMENT (THIRD) OF UNFAIR COMPETITION (1995).

188. 332 F.3d 915 (6th Cir. 2003).

189. *Id.* at 938.

190. *Id.*

protection.¹⁹¹ In that case, the court addressed the question of whether real time NBA game updates violated the NBA's copyright on game performances and the statistics associated therewith.¹⁹² Motorola marketed a wireless pager that provided real time updates to games to its subscribers.¹⁹³ It acknowledged that the NBA owned the copyright to television and radio broadcasts of NBA games, but argued that game scores and statistics were simply facts unprotected by copyright law.¹⁹⁴ The Second Circuit agreed, and held that as facts, real time game statistics were not protected by copyright law.¹⁹⁵ The Court did not address the issue of whether such facts were protected by rights to publicity.

D. *The Four Toms*

As mentioned, the resolution of these issues is not self-evident. In fact, MLBAM has much to lose in its dispute with C.B.C. and engages in this litigation at great risk. Let us consider the cases of the four "Toms."¹⁹⁶

First, newspapers regularly report player names, positions, and performance statistics in box scores. These reports are part of history and not protected under rights of publicity.¹⁹⁷ The First Amendment protects the use and distribution of such information.¹⁹⁸ Thus, newspapers may continue to report these statistics coupled with player names and positions without paying a licensing fee to do so.¹⁹⁹ Are newspapers commercial ventures? Do papers seek to profit financially? Of course they do. However, neither the commercial nature of the enterprise nor the profit motive prevents the newspaper

191. 105 F.3d 841 (2d Cir. 1997).

192. *Id.* Other professional sports leagues, including the MLB, filed amicus briefs on behalf of the NBA position.

193. *Id.* at 843-44.

194. *Id.* at 847.

195. *Id.*; Alan D. Lieb, commentary, *NBA v. Motorola and STATS, Inc.: The Second Circuit Properly Limits the "Hot News Doctrine"*, 16 J. MARSHALL J. COMP. & INFO L. 197, 201-02 (1997).

196. With apologies to one of my favorite columnists, Alan Schwarz. See Alan Schwarz, *Stats: Claiming it owns the rights to player's names, baseball tells fantasy leagues to pay up. The leagues tell baseball to dream on*, LEGAL AFFAIRS 22 (Nov./Dec. 2005).

197. *Id.*

198. *Id.*

199. In *Motorola, Inc.*, 105 F.3d at 841, the Second Circuit held that statistics are facts and are not copyrightable. Although the case focused on real time updates and not the right to publicity, the teachings of the case informs our analysis of sports fantasy leagues and games.

from treating player names and performance statistics as historical facts. We will call this the Tom Paine scenario.

Second, sports manufacturers often tie a product to a player's endorsement, for example the Wheaties, Nike, Adidas, and Milk campaigns. Additionally, the producers of sports video games may also seek to use a player's name, image, and the like in its games. The names, images, and the statistics are direct forms of entertainment, like an actor in a movie or a play. The coupling of the product or video game with a player's name, number, position, and likeness (image) is primarily, if not exclusively, commercial, as opposed to expressive, in nature. In these situations, the players' rights of publicity should protect against the unauthorized use of such property, that is, the players' names, etc. We will call this the Tom Hanks scenario.

Third, a computer programmer and writer may seek to develop an educational game that combines history, math, and American culture for an audience of elementary school children. The vehicle that they may choose is MLB. In the interactive educational program, the developers discuss great achievements in MLB, offer methods in calculating batting average, earned run average, and on-base percentage. Throughout the program, the developers introduce various baseball stars with a collection of career performance statistics and short biographies without authorization. The players in question are retired and are no longer active participants in MLB. In this situation, the players' rights would not prevent the expressive use of their names and performance statistics by the developers. This is a variation of the Tom Paine scenario that we will call the Tom Seaver scenario.

Fourth, a writer composes a book about the life of a present MLB player. In that book, the writer obviously uses the player's name and performance statistics up to present. As part of its advertising campaign, the author and publisher maintain a website where the writer posts "blogs" about the player's current performance, role in player union negotiations, prospects after baseball, etc. Readers also have the opportunity to post comments. The player has not consented; thus, this is an unauthorized biography. Here, the courts have protected the expressive nature of the work by the writer.²⁰⁰ A player's rights would not prevent the commercial exploitation of the player's name and performance statistics in this

200. Schwarz, *supra* note 196.

manner. We will call this the Tom Glavine scenario.

MLB and other sports must make the argument that a company's use of player names and performance statistics in a fantasy league is more like Tom Hanks than it is like Tom Paine, Tom Seaver, or Tom Glavine to ultimately prevail. However, the actual value added by the fantasy league provider is much more similar to the latter three "Toms" than it is to the Tom Hanks exploiter. In fact, the only significant differences between our Tom Paine, Tom Seaver, and Tom Glavine scenarios to that of the present fantasy league provider is time. Wait a day or less (Tom Paine), wait a career (Tom Seaver), or wait a year with updates (Tom Glavine), there appears to be no problem under present legal authority. Provide the names and statistics in real time with an easy to use format to calculate total statistics, rank teams within a fantasy league, and facilitate trades and other transactions, and you roust the professional sports leagues powers. MLB has the weaker argument.

Consider the dispute from a slightly different angle. Imagine a business fantasy game where "investors" pay a nominal "buy-in" and are given \$10,000 in game currency to purchase and trade stocks listed on the New York Stock Exchange (NYSE). The "season" lasts one calendar year. Investors can buy, keep, and trade stocks throughout the course of the season. An on-line service provider has developed a sophisticated software program to track actual company names and stock prices, buys, holds, and trades, tabulating a ranking of investors on a weekly basis. Week Three—Pfizers up 2 ½, Ford up ¾, General Motors up 1 ¼, etc. Sound familiar?

Sports fantasy leagues are more like the stock market hypothetical above and our Tom Paine, Tom Seaver, and Tom Glavine scenarios than like our Tom Hanks scenario. The providers of sophisticated software that track player performance are expressive platforms housed in creative and user-friendly websites. These websites serve as virtual billboards for advertisers and portals to products and services. The actual contents are player names coupled with historical performance statistics. If the dispute centered on actual statistics, the dispute would be over—C.B.C. would prevail. However, the actual tension between C.B.C. and MLBAM is whether the right to publicity protects the association of a player's name to his performance statistics. In my opinion, although I consider this a close case, it does not.

Online service providers like C.B.C. benefit from the association of player names with performance statistics much like the newspaper

with its box scores. The actual added value that a company like C.B.C. provides is not derived from the names and statistics, but from the sophisticated software programs that allow ease in collecting and accounting for trades and other transactions. After all back in the mid-1980s, fantasy league participants culled names and statistics from newspapers. The use of these names and statistics are certainly being exploited for commercial purposes, but their use is a part of the overall expressive work protected in part by the First Amendment. The right of publicity, in these circumstances, does not appear to protect an association of a player's name to his performance statistics as used in a sports fantasy game any more than the reporting of box scores or the performance of stocks are protected from use in a newspaper or on a website.

Aside from these perplexing legal issues, MLB and MLBPA through MLBAM, are making a fundamental business mistake that may hurt them for some time. Their approach to the licensing issue in the fantasy league scenario is short-sighted. Recall the fundamental drivers of professional sports—(1) content is everything and (2) technology (including but not limited to the internet) delivers content. Those that can develop a revenue model that integrates both drivers will succeed. Additionally, a professional sports league must recognize that the value they add in the business endeavor is not the game itself; it is the fan's experience with the game. Keeping these fundamental principles in mind, a more robust, long-term business plan would recognize that the content in question is not access to the association between player name and player statistics, but the experience as an owner in accessing a software program that allows easy manipulation of that association. Moreover, the technology is not the internet per se; the technology is that ability to experience the game of baseball from an entirely new and different perspective; to see the game afresh. Thus, online providers such as C.B.C. provide a platform to grow fan base, to strengthen fan loyalty, to introduce fans to teams and players not on the home team, and to increase attendance. This technology should be encouraged and fostered. The tool for MLB to encourage the growth of its fan base through fantasy leagues is the non-exclusive license with relatively low licensing fees. MLB could then contract to include its MLB.com online store, for example, on the websites of licensed fantasy league service providers.

V. OBSERVATIONS

Baseball, one of my true loves, is elegantly spiced with adages that, at least superficially, contain all the great wisdoms of life.²⁰¹ These pearls of wisdom can be heard, nay experienced, at any sandlot across America, and, now, the world. To experience them is to taste life itself. A bit melodramatic; I dare say not. Think back. Close your eyes. Free your senses. You can hear those rhythmic refrains echoing off of Mrs. Johnson's barn now: "It only takes one!" "Rare back and let it rip!" "You got a piece of it that time!" "Choke up and make it count!" "Throw this one right down the pipe." "You're ahead now, make it your pitch!" "He's no batter!" "Pitcher is a belly itcher!" And my favorite, "Just like ducks on a pond!"²⁰²

Speaking the words (as I write this conclusion), "Just like ducks on the pond," causes my heart rate to increase and my palms to sweat. These are the infamous words that your coach blares out when you are at bat, facing the fastest and wildest fully-bearded twelve-year-old pitcher in all of creation. Of course, if that weren't bad enough, the count is 0-2, there are runners at second and third, there are two outs, you are behind by one run and two would win the game, and you have yet to see a pitch because of its velocity, let alone believe that you can actually hit the darn thing. While you start to realize that the victory snow cone is about to slip out of your hands, you hear the coach hollering again, "Just like ducks on a pond," and you smile that confident, cool smile. Coach said it twice; all is right with the world. You step out of the batter's box and rap the end of the bat against your cleats as a smile comes to your face. As you step back into the box, you whisper to yourself, "I'm going to have the grape one this time."

The coming revolution in revenue is like the runners at second and third—ducks on the pond, golden opportunities if one acts thoughtfully and boldly. The real question is whether the leagues pick up the runners. If they execute properly, we can all come out winners; if not, they will continue a revenue slide as other forms of entertainment compete for our dollar. The key is an understanding of

201. Along these lines, see the wonderful book by VINCE STATEN, *WHY IS THE FOUL POLE FAIR?: OR, ANSWERS TO THE BASEBALL QUESTIONS YOUR DAD HOPED YOU WOULDN'T ASK* (2003).

202. Of course, if this were truly authentic, I would have repeated each refrain. For as any ballplayer worth his or her salt would declare, it doesn't count unless you repeat it—we ballplayers being a superstitious lot. Alas, I spare the reader that great joy.

two fundamental drivers: (1) content is everything, and (2) technology (including, but not limited to the Internet) delivers content. Those that can develop a revenue model that integrates both drivers will succeed.

Only the most naïve would reject the notion that new technologies have changed the game and the way fans experience the game. The Internet, just one ubiquitous example of the new technologies saddling up to the sports industry, has done more than change sports—it has transformed sports. Not only is the Internet a vehicle for online retailing of merchandise and a stage for advertising, it is also one's own highlight vault and mirror into the experience of professional sports. With the advent of the Internet and its accessibility through the world wide web, the sports industry has mutated. Sports are no longer sports plus the Internet; they are a whole new industry—"new, interactive sports." Those business competitors that recognize this seismic shift will be able to position their teams, league, or organization to reap the advantages of the new technologies and the new markets. Those that do not, will fail. Ducks on the pond, indeed.

