

SPORTS MERCHANDISING, PUBLICITY RIGHTS, AND THE MISSING ROLE OF THE SPORTS FAN

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Abstract: Sports fans play a tremendously important role in the success and popularity of sports teams and the enterprise of sports in general. It is somewhat curious, then, that fan interests are almost entirely missing from discussions about certain important legal issues that have a direct impact on them. Specifically, fan interests play a surprisingly limited role in discussions about sports team merchandising and player rights of publicity. This Article argues that modern sports licensing practices are coming into increasing conflict with the interests of sports fans, and that the law should take greater account of such interests. This Article starts by discussing the relatively weak legal foundation upon which modern licensing practices are based. It then draws on the expanding literature on fan interests in the field of copyright to show how the foundation is even weaker in the context of sports. It concludes by arguing for far more limited recognition of the intellectual property rights of sports franchises, leagues, and players.

INTRODUCTION

Sports fans play a tremendously important role in the success and popularity of sports teams and the enterprise of sports in general. Indeed, if the teams and sports journalists are to be believed, the fans are what it is all about. When a local team wins a championship, the owners and players first thank the fans.¹ Team owners and players all say that

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¹ See, e.g., Timothy McNulty & Kaitlynn Riely, *Penguins Fans Cheer Stanley Cup Champions*, PITTSBURGH POST-GAZETTE, June 15, 2009, <http://www.post-gazette.com/pg/09166/977553-100.stm> (quoting the Pittsburgh Penguins’ owner as saying to the fans, “You guys are part of our family. Thank you, Pittsburgh, enjoy it.”); *Crush of Red: City Says 2 Million Fans Rally for Hawks*, CHI. BREAKING NEWS (June 11, 2010, 4:44 PM), <http://www.chicagobreakingnews.com/2010/06/no-rain-on-hawks-parade.html> (quoting a Chicago Blackhawks star as saying, “You guys are the greatest. Thank you very much,” to a sea of fans at the team’s championship parade).

the fans motivate them to succeed.² And it is hard to deny that fans are critical to the team's economic success when they are the ones buying tickets to games, watching games on television, and spending money on merchandise.³ More than that, fans are unbelievably passionate about their teams, arguing constantly over tactics and desperately following the ups and downs of their teams.⁴

Given the crucial role played by fans, it is somewhat curious that fan interests are almost entirely missing from discussions about certain important legal issues that have a direct impact on fans. Specifically, fan interests play a surprisingly limited role in discussions about sports team merchandising and player rights of publicity.⁵ Over the years, sports teams and leagues have become increasingly aggressive in their licensing of team trademarks and players' rights of publicity.⁶ Teams and leagues now derive substantial revenues from merchandising and other licensing rights.⁷

This Article argues that modern sports licensing practices are coming into increasing conflict with the interests of sports fans, and that the

² See, e.g., Scoop Jackson, *Do Philadelphia Fans Deserve a World Championship?*, ESPN (Oct. 30, 2008), <http://sports.espn.go.com/espn/page2/story?page=jackson/081030> (quoting the Philadelphia Phillies' manager as saying, "This is for the fans!" after winning the World Series); Chris Merriewether, *Player Thanks Wildcat Nation*, KAN. ST. COLLEGIAN (Kan. State Univ., Manhattan, Kan.), Apr. 6, 2010, <http://www.kstatecollegian.com/sports/player-thanks-wildcat-nation-1.2212564?MMode=true> (letter from Kansas State basketball player to fans) (thanking the fans for multiple acts through the season and saying, "We could not have accomplished anything without you.").

³ See Wayne S. DeSarbo, *Measuring Fan Avidity Can Help Marketers Narrow Their Focus*, STREET & SMITH'S SPORTS BUS. J., Dec. 21, 2009, at 13, available at <http://www.sportsbusinessjournal.com/article/64438>.

⁴ See, e.g., Jeff Pearlman, *Sports Fans Are Passionate, but Many Need a Dose of Perspective*, SI.COM (Aug. 6, 2010), http://sportsillustrated.cnn.com/2010/writers/jeff_pearlman/08/06/angry.fans/index.html; *10/1: Majority of U.S. Residents College Football Fans . . . Nearly Half Watch NFL & College Ball*, MARIST POLL: PEBBLES & PUNDITS (Oct. 1, 2010), <http://maristpoll.marist.edu/101-majority-of-u-s-residents-college-football-fans-%E2%80%A6-nearly-half-watch-nfl-college-ball/>.

⁵ See generally, e.g., *Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010) (court does not discuss fan interests); *O'Bannon v. NCAA*, Nos. C 09-1967 CW, C 09-3329 CW, C 09-4882, 2010 WL 445190 (N.D. Cal. Feb. 8, 2010) (same); Sean Hanlon & Ray Yasser, "*J.J. Morrison*" and His Right of Publicity Lawsuit Against the NCAA, 15 VILL. SPORTS & ENT. L.J. 241, 271-74 (no discussion of fan interests in right of publicity argument).

⁶ See *infra* notes 23-41 and accompanying text.

⁷ See Tim Lemke, *SportsBiz: NCAA Merchandise Seeing Its Sales Fall Off*, WASH. TIMES, Oct. 15, 2009, at C6, available at <http://www.washingtontimes.com/news/2009/oct/15/sports-biz-ncaa-merchandise-seeing-its-sales-fall-o/>; Darren Rovell, *Publication: MLB Will Beat NFL in Licensing Revenue in '10*, CNBC (June 14, 2010), http://www.cnbc.com/id/37692194/Publication_MLB_Will_Beat_NFL_In_Licensing_Revenue_In_10.

law should take such interests more into account. Part I discusses the increasing economic value of sports licensing and analyzes a number of recent disputes over intellectual property and licensing.⁸ Part II discusses the relatively weak legal foundation upon which modern licensing practices are based.⁹ Part III then draws on the expanding literature on fan interests in the field of copyright to show how the foundation is even weaker in the context of sports.¹⁰ Part IV concludes by arguing that this analysis suggests a far more limited recognition of the intellectual property rights of sports franchises, leagues, and players.¹¹

I. THE INCREASING ECONOMIC VALUE OF SPORTS LICENSING

Sports licensing is big business. This Part begins by examining the growing economic impact of sports licensing on professional and collegiate athletics.¹² It then explores a number of recent disputes over intellectual property rights in which teams have asserted claims that have gone beyond traditional merchandising and trademark claims.¹³ In particular, this Part takes a close look at a number of recent disputes that have arisen in the context of fantasy sports and video games.¹⁴

A. *Big Money*

Professional sports leagues and franchises derive an increasingly large share of their revenues and profits from the licensing of trademarks, trade dress, and rights of publicity.¹⁵ Leagues and franchises sell all kinds of items—jerseys, caps, key chains, coffee mugs, posters, etc.—with their team logos on them, and their fans seem to have a near unlimited desire to buy these items. In 2009, retail sales of licensed sports products from teams, leagues, and personalities amounted to approximately \$12.5 billion in the United States and Canada and approximately \$17.5 billion worldwide.¹⁶

⁸ See *infra* notes 15–41 and accompanying text.

⁹ See *infra* notes 42–82 and accompanying text.

¹⁰ See *infra* notes 83–140 and accompanying text.

¹¹ See *infra* notes 141–161 and accompanying text.

¹² See *infra* notes 15–22 and accompanying text.

¹³ See *infra* notes 23–39 and accompanying text.

¹⁴ See *infra* notes 23–33 and accompanying text.

¹⁵ See Rovell, *supra* note 7.

¹⁶ *Id.* (listing last five years of licensing revenue for major sports leagues); see also Michael Freedman, *NFL Still King in Sports Licensing, Fans*, PRESS BOX, <http://www.pressbox>

These trends have not been confined to professional sports. Indeed, collegiate sports teams and leagues have also begun to more aggressively license their trademarks and rights of publicity.¹⁷ Just as with professional sports teams, colleges and universities now place their logos and team colors on a wide range of merchandise for purchase by students and others. Merchandising generated more than \$4 billion in revenue for colleges and universities in 2008.¹⁸ A successful season can increase the visibility of a team and, at the same time, generate substantial added income from merchandising sales.¹⁹

As sports franchises and leagues have more aggressively licensed out their trademarks and rights of publicity, they have enforced their rights against companies and individuals who sell such items without permission.²⁰ Franchises and leagues often sue vendors of unlicensed merchandise, claiming infringement of their trademark rights.²¹ Courts have generally upheld these efforts, finding that consumers may well be confused as to the source of these unauthorized goods.²²

B. *Recent Disputes*

Recently, however, sports franchises and leagues have begun to assert more aggressive claims against third parties, targeting uses that go beyond traditional merchandising. One prominent recent example involves fantasy sports leagues. Although fantasy sports leagues have been around for a long time, they have become increasingly popular over the

online.com/story.cfm?id=2247 (last visited Mar. 2, 2011) (listing 2006 licensing revenue for major professional and college sports).

¹⁷ See Lemke, *supra* note 7.

¹⁸ *Id.*

¹⁹ See Andy Hyland, *Growth in Licensed Merchandise Increases KU Revenue*, KUSPORTS.COM (July 27, 2009), <http://www2.kusports.com/news/2009/jul/27/growth-licensed-merchandise-increases-KU-revenue/> (reporting that people spent thirty times more on licensed merchandise after the men's basketball team won the national championship in 2008 than they did ten years before that and explaining that the school gets a percentage of every item sold); see also Hanlon & Yasser, *supra* note 5, at 241–42 (noting that successful athletic institutions earn the largest share of licensed college merchandise royalties).

²⁰ See *infra* notes 21–41 and accompanying text.

²¹ See, e.g., *Bos. Prof'l Hockey Ass'n v. Dall. Cap & Emblem Mfg., Inc.*, 597 F.2d 71, 73 (5th Cir. 1979) (lawsuit brought by hockey league and member teams to enjoin manufacture and sale of embroidered cloth emblems that were “substantial duplications of artistic symbols used to designate the individual member teams of the National Hockey League”); *NBA v. Design Mgmt. Consultants, Inc.*, 289 F. Supp. 2d 373, 373–74 (S.D.N.Y. 2003) (lawsuit brought by NBA against company that allegedly violated preliminary injunction against “manufacturing, distributing, promoting or selling apparel products which bear NBA uniform designs or derivations or imitations thereof”).

²² See, e.g., *Boston Hockey*, 597 F.2d at 75; *Design Mgmt. Consultants*, 289 F. Supp. 2d at 376.

past several years.²³ Such leagues rely upon the statistics of actual sports figures from actual games, which league members use to determine how well their fantasy teams are doing.²⁴ When fantasy sports leagues were largely managed informally by groups of friends, the franchises and leagues took little interest.

In recent years, however, Internet sites have arisen to make the management of such leagues much easier.²⁵ This, in turn, has fueled an explosive growth in participation.²⁶ These sites make prominent use of the names of actual sports teams and players, as well as statistics from actual games.²⁷ In a number of cases, the real teams and leagues have asserted ownership over the trademarks and the statistics in lawsuits against these Internet websites.²⁸ Courts have thus far rejected such claims as over-reaching.²⁹

Disputes have also recently arisen over sports video games.³⁰ Popular video games such as EA Sports' *Madden NFL* make use of actual teams and include characters that represent actual players. Video game publishers such as EA Sports license the rights to the team names, team logos, team uniforms, and player identities from the sports leagues or players unions.³¹ The use of real teams and players in these games

²³ See Michael Beller, *For Fantasy Sports, Success Is the One Reality*, MEDILL REP., Feb. 24, 2010, <http://news.medill.northwestern.edu/chicago/news.aspx?id=158142>.

²⁴ See *id.*

²⁵ See *id.*; *Fantasy Sports Participation on the Rise, Association Says*, ST. LOUIS BUS. J., Aug. 14, 2003, <http://www.bizjournals.com/stlouis/stories/2003/08/11/daily62.html>.

²⁶ See Beller, *supra* note 23; *Fantasy Sports Participation on the Rise, supra* note 25.

²⁷ See Beller, *supra* note 23.

²⁸ See *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 820–21 (8th Cir. 2007) (lawsuit over publicity rights in fantasy baseball); *CBS Interactive Inc. v. Nat'l Football League Players Ass'n, Inc.*, 259 F.R.D. 398, 404 (D. Minn. 2009) (lawsuit over publicity rights in fantasy football). See generally Manav K. Bhatnagar, Comment, *Fantasy Liability: Publicity Law, the First Amendment, and Fantasy Sports*, 119 YALE L.J. 131 (2009) (discussing *C.B.C. Distribution* and conflict between publicity law and fantasy sports more generally).

²⁹ See *C.B.C. Distribution*, 505 F.3d at 823 (ruling that fantasy baseball statistics are protected by the First Amendment); *CBS Interactive*, 259 F.R.D. at 417–19 (applying *C.B.C. Distribution* to reach the same conclusion for fantasy football statistics); see also *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 404, 414 (Ct. App. 2001) (ruling that “[b]aseball’s use of [former players’] names, images and likenesses” for programs, websites, and written or video depictions of play did not violate players’ publicity rights). See generally Maureen C. Weston, *The Fantasy of Athlete Publicity Rights: Public Fascination and Fantasy Sports’ Assertion of Free Use Place Athlete Publicity Rights on an Uncertain Playing Field*, 11 CHAP. L. REV. 581 (2008) (analyzing publicity rights in fantasy sports context after *C.B.C. Distribution*).

³⁰ See *infra* notes 130–138 and accompanying text.

³¹ See Darren Rovell, *All Madden, All the Time*, ESPN, <http://sports.espn.go.com/espn/sportsbusiness/news/story?id=1945691> (last updated Dec. 14, 2004).

makes them highly desirable, as video game players can play as or against their favorite teams. There are, however, a number of ongoing disputes over the ability of these publishers to make use of player identities.³² In two separate cases that have since been consolidated, a number of former NCAA athletes have sued both EA Sports and the NCAA for allegedly using their identities in an unauthorized manner.³³

In addition to these publicity right cases, teams and leagues have asserted ever more aggressive trademark claims.³⁴ One recent example is *University of Alabama Board of Trustees v. New Life Art Inc.*, heard by the U.S. District Court for the Northern District of Alabama in 2009.³⁵ In that case, the University of Alabama brought a trademark infringement lawsuit against an artist who had painted scenes from famous moments in Alabama football history.³⁶ The university claimed that the artist violated its trademark rights by depicting the colors and uniforms of its football team.³⁷ The district court rejected the argument,³⁸ but the case is now on appeal.³⁹

Thus, in a number of cases, sports leagues, teams, and players have advanced ever more aggressive claims to be compensated for depictions of their trademarks, logos, trade dress, and rights of publicity.⁴⁰ These

³² See *infra* notes 130–138 and accompanying text. See generally *Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010); *O'Bannon v. NCAA*, Nos. C 09-1967 CW, C 09-3329 CW, C 09-4882, 2010 WL 445190 (N.D. Cal. Feb. 8, 2010); see also generally *In re NCAA Student-Athlete Name & Likeness Litig.*, No. C 09-1967 CW, 2010 WL 5644656 (N.D. Cal. Dec. 17, 2010) (consolidated title of *Keller* and *O'Bannon* cases). For a discussion of similar cases and issues, see generally Beth A. Cianfrone & Thomas A. Baker III, *The Use of Student-Athlete Likenesses in Sport Video Games: An Application of the Right of Publicity*, 20 J. LEGAL ASPECTS SPORT 35 (2010); Christian Dennie, *Tebow Drops Back to Pass: Videogames Have Crossed the Line, but Does the Right of Publicity Protect a Student-Athlete's Likeness When Balanced Against the First Amendment?*, 62 ARK. L. REV. 645 (2009).

³³ See *Keller*, 2010 WL 530108, at *1–2; *O'Bannon*, 2010 WL 445190, at *1; see also L. Jon Wertheim, *Again, A Potential Game Changer*, SPORTS ILLUSTRATED MAG., Feb. 22, 2010, at 19, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1166078/index.htm>; Michael McCann, *NCAA Faces Unspecified Damages, Changes in Latest Antitrust Case*, SI.COM, http://sportsillustrated.cnn.com/2009/writers/michael_mccann/07/21/ncaa/index.html (last updated July 22, 2009).

³⁴ See *infra* notes 35–39 and accompanying text.

³⁵ 677 F. Supp. 2d 1238 (N.D. Ala. 2009).

³⁶ See *id.* at 1243–44.

³⁷ See *id.*

³⁸ See *id.* at 1259.

³⁹ See Jeffrey Sullivan, *School Seeks to Protect Color Schemes in Sports Uniforms*, MIAMI DAILY BUS. R., Oct. 20, 2010, available at <http://www.dailybusinessreview.com/PubArticleDBR.jsp?id=1202473564023&hbxlogin=>.

⁴⁰ See, e.g., *CBC Distribution*, 505 F.3d at 820 (lawsuit over baseball players' publicity rights); *Keller*, 2010 WL 530108, at *1 (former collegiate athlete brought right of publicity claim against video game manufacturer); *New Life Art*, 677 F. Supp. 2d at 1243–44 (university

cases involve claims that extend well beyond the traditional trademark rights that leagues and teams have historically enjoyed.⁴¹

II. THE WEAK JUSTIFICATIONS FOR BROAD LICENSING RIGHTS

Despite the increasingly widespread nature of sports licensing, the intellectual property rights upon which such licensing is based find surprisingly little support in broader intellectual property policy.⁴² Indeed, as many scholars have noted, the foundations for the merchandising and publicity rights rest on relatively shaky ground.⁴³

A. Merchandising

To support their exclusive right to sell merchandised goods, sports teams and leagues rely upon trademark law. A sports team's name and logo are clearly trademarks.⁴⁴ Trademarks of all sorts are protected against uses that are likely to cause confusion among consumers.⁴⁵ Thus, if a third party sells unauthorized Boston Red Sox caps, for example, consumers may be confused, thinking that the caps are being sold by the Red Sox. Standard trademark law would thus give the Red Sox a right to prevent the third party from selling such products.⁴⁶

This straightforward theory runs into trouble, however, when the third parties make a concerted effort to notify the purchasers that these

brought trademark infringement claim against artist who painted famous moments in team's football history).

⁴¹ Compare *New Life Art*, 677 F. Supp. 2d at 1243–44 (non-trademark infringement claim against artist who painted famous moments in team's football history), with *Design Mgmt. Consultants*, 289 F. Supp. 2d at 373–74 (traditional trademark infringement claim against company that manufactured, distributed, promoted, and sold apparel bearing logos identical or substantially similar to those of NBA teams).

⁴² See *supra* notes 44–82 and accompanying text.

⁴³ See generally Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?*, 54 EMORY L.J. 461, 472–78 (2005) (noting the shaky foundations on which traditional merchandising rights lie); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 178–238 (1993) (criticizing standard arguments for the right of publicity).

⁴⁴ The Lanham Act defines “trademark” to include “any word, name, symbol, or device . . . used by a person . . . to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods” 15 U.S.C. § 1127 (2006).

⁴⁵ See *Bd. of Governors of the Univ. of N.C. v. Helpingstone*, 714 F. Supp. 167, 170 (M.D.N.C. 1989) (stating that trademark infringement has been established if the plaintiff has “a protectable property right in the name or mark it seeks to defend” and “defendant’s use of a similar mark [is] likely to cause confusion, mistake or deception in the market as to source, origin, or sponsorship of the products on which the marks are used”).

⁴⁶ See *id.*

goods are not endorsed by the actual teams. For example, imagine that I sell unauthorized Red Sox caps, but have a prominent disclaimer saying that these caps are not sold by the Red Sox nor endorsed by them in any way. Can I still sell them? Under traditional trademark law principles, it would be hard to see why this should be harmful.⁴⁷ Purchasers are on clear notice that the caps are not being made by the Red Sox, so they are not deceived.⁴⁸

More broadly, an argument can be made that this kind of result in fact helps consumers more than it harms them.⁴⁹ When a consumer buys an official Red Sox cap, he or she is paying a premium (and quite a large one at that) for the appearance of the Red Sox logo on that cap.⁵⁰ Indeed, the logo itself is worth more than the material that the cap is made of. By introducing competition into this market, consumers can get access to Red Sox caps from a variety of manufacturers. And, as long as the consumer knows who is responsible for manufacturing the hat, he or she can choose to buy the higher-priced official version or the lower-priced—perhaps more cheaply made—version.⁵¹

Even though the traditional consumer confusion theory of trademark may not apply to this example, the newer dilution theory may provide a better fit. Under the dilution theory, trademarks are protected not only against uses that confuse consumers, but also against uses that dilute or blur the distinctive character of the mark.⁵² In the Red Sox example, once other companies use the Red Sox logo, con-

⁴⁷ See *id.* at 173 (finding no likelihood of confusion). In *Board of Governors of the University of North Carolina v. Helpingstine*, a 1989 case, the U.S. District Court for the Middle District of North Carolina noted that consumers of athletic apparel may not care who endorses goods bearing their favorite teams' names, stating that "it is equally likely that individuals buy the shirts to show their support for the University." *Id.*

⁴⁸ See *id.* True, third parties who later see the caps might be confused. Some courts have recognized a cause of action in these circumstances under a theory of secondary or "post-sale" confusion. See, e.g., *Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-Le Coultre Watches, Inc.*, 221 F.2d 464, 466 (2d Cir. 1955). Whether third parties are in fact confused depends, however, upon their expectations. If third parties had the right to make unlicensed baseball caps, consumer expectations would quickly change, reducing the potential for confusion. See Dogan & Lemley, *supra* note 43, at 486–90.

⁴⁹ Dogan & Lemley, *supra* note 43, at 463–64. See generally Mark A. Kahn, *May the Best Merchandise Win: The Law of Non-Trademark Uses of Sports Logos*, 14 MARQ. SPORTS L. REV. 283 (2004).

⁵⁰ See Robert C. Denicola, *Institutional Publicity Rights: An Analysis of the Merchandising of Famous Trade Symbols*, 62 N.C. L. REV. 603, 604 (1984) (noting that some people are willing to pay more for products with logos on them).

⁵¹ See Dogan & Lemley, *supra* note 43, at 481.

⁵² See 15 U.S.C. § 1125(c) (2006) (providing injunctive relief against uses that blur or dilute a trademark).

sumers will have to determine who is responsible for the particular use. Moreover, others could use the logo in a way that makes it less distinct, for example by using different colors or logo shapes.

Merchandising claims fare better under a dilution theory. Yet even in these cases, trademark law does not provide a neat fit.⁵³ Traditional dilution theory applied to famous trademarks that were used on unrelated products—for example, Kodak bicycles or Buick aspirin.⁵⁴ These uses were problematic because they weakened the distinctive character of the mark.⁵⁵ If such uses were permitted, consumers would have to figure out whether Kodak referred to the film company or the bicycle company, even if there was no confusion.

The use by third parties in the sports cases, however, does not resemble this kind of use. The cap maker is not using the Red Sox logo on an unrelated good—say, ball bearings.⁵⁶ Instead, the cap maker is using the logo to accurately refer to the Major League Baseball team, the Red Sox, itself.⁵⁷ Accordingly, there is none of the loss of distinctiveness or uniqueness that dilution traditionally protects against.⁵⁸

Moreover, consumers are not purchasing the cap because the logo denotes the source of the good.⁵⁹ When a fan buys a Red Sox hat, it is not because he believes the Red Sox are particularly skilled at the art of making hats.⁶⁰ Rather, he is buying the Red Sox logo.⁶¹ It is the logo itself that has value, which is why the same exact hat would sell for a fraction of the price if it did not have the logo on it.⁶²

This kind of use of the trademark does not fit neatly into either the traditional likelihood of confusion framework or the newer dilution framework. Instead, merchandising treats trademarks as a form of property that can be bought and sold.⁶³ This is a significant departure

⁵³ See Dogan & Lemley, *supra* note 43, at 493–95.

⁵⁴ See H.R. REP. NO. 104-374, at 3 (1995) (“[T]he use of . . . BUICK aspirin, and KODAK pianos would be actionable . . .”).

⁵⁵ See *id.*; see also *Thane Int’l, Inc. v. Trek Bicycle Corp.*, 305 F.2d 894, 911 (9th Cir. 2002) (discussing the harm that comes from dilution).

⁵⁶ See Dogan & Lemley, *supra* note 43, at 494.

⁵⁷ See *id.*

⁵⁸ See *id.* (“Merchandising uses do not blur the distinctive significance of a mark in the mind of consumers. Rather, they reinforce it.”).

⁵⁹ See *id.* at 472.

⁶⁰ See *id.*

⁶¹ See *id.* (“Rather than indicating something to the consumer about the source or sponsorship of a product, the mark *is* the product—or at least is a critical part of what makes the product attractive.”).

⁶² See Denicola, *supra* note 50, at 604.

⁶³ See Dogan & Lemley, *supra* note 43, at 471–72.

from the traditional role of trademark as an identifier of the source of the good or service.⁶⁴

As scholars Stacey Dogan and Mark Lemley have pointed out, existing case law provides surprisingly weak support for this kind of propertization of trademarks.⁶⁵ Despite the fact that sports teams and leagues act as if they have an absolute right to prevent all kinds of merchandising, very few cases have addressed this issue, and those that have tend to point in different directions.⁶⁶ Indeed, although existing law provides teams and leagues with strong protections against uses that are likely to confuse, there is relatively little support for a strong claim of absolute privilege.⁶⁷

B. *Rights of Publicity*

The right of publicity claims advanced by teams and players also rest on shaky theoretical foundations. In these cases, the doctrinal support for the right of publicity claims is relatively strong, at least in those states that recognize such a right.⁶⁸ As many scholars have pointed out, however, the right of publicity—although perhaps intuitively appealing—is in many cases hard to justify with respect to intellectual property policy.⁶⁹

Traditionally, the strongest arguments in favor of intellectual property have been incentive-based arguments. We protect copyrights in order to provide incentives for creative expression.⁷⁰ We protect patents in order to provide incentives for innovation.⁷¹ It is difficult, however, to see what incentives are preserved by protecting the right of

⁶⁴ See *id.*

⁶⁵ See *id.* at 475–76 (noting the questionable doctrinal basis for broad merchandising rights).

⁶⁶ See, e.g., *Int'l Order of Job's Daughters v. Lindeburg & Co.*, 633 F.2d 912, 919 (9th Cir. 1980) (criticizing *Boston Professional Hockey Ass'n v. Dallas Cap & Emblem Manufacturing, Inc.* as extending protection to trademark owners too far); *Bos. Prof'l Hockey Ass'n v. Dall. Cap & Emblem Mfg., Inc.*, 510 F.2d 1004, 1012 (5th Cir. 1975) (determining confusion to exist wherever trademark is “the triggering mechanism” of sale, regardless of whether the consumer was confused as to the source of the trademark).

⁶⁷ See *Int'l Order of Job's Daughters*, 633 F.2d at 919.

⁶⁸ See Madow, *supra* note 43, at 132–34. This Article uses the term “right of publicity” to refer to the right to “control the use of one’s own name, picture, or likeness and to prevent another from using it for commercial benefit without one’s consent.” BLACK’S LAW DICTIONARY 1439 (9th ed. 2009).

⁶⁹ See *id.* at 178–238; see also *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 824 (8th Cir. 2007) (addressing and dismissing many arguments in support of the right of publicity in the context of professional sports).

⁷⁰ See Madow, *supra* note 43, at 206.

⁷¹ See *id.*

publicity. Celebrities and athletes already have strong incentives to become famous or to work hard to win.⁷² It is hard to imagine that, in the absence of a right of publicity, celebrities and athletes would stop trying so hard or that we would suffer a terrible lack of famous people.⁷³

Somewhat stronger arguments for protecting the right of publicity are based on rewarding labor. The idea is that we give celebrities and athletes a right of publicity as a reward for their hard work.⁷⁴ This intuitive idea underlies a lot of intellectual property law, and has particular appeal in the context of the right of publicity.⁷⁵ At the same time, it is difficult to determine just how much reward someone should be entitled to.⁷⁶ How much of the fame is due to the celebrity's labor and how much of it is due to other factors?⁷⁷ For example, might the public have some claim to the celebrity's fame? Why is Paris Hilton famous? Why is Tom Brady famous? In part, no doubt, it is due to their own hard work. But the value of their celebrity is also due, in no small part, to the contributions of the public and the attention the public pays to them. Without this attention, there would be no celebrity to speak of.⁷⁸

Finally, some arguments in support of the right of publicity sound in personal integrity or privacy.⁷⁹ One's name and image are particu-

⁷² See *C.B.C. Distribution*, 505 F.3d at 824 (“[M]ajor league baseball players are rewarded, and handsomely, too, for their participation in games and can earn additional large sums from endorsements and sponsorship arrangements.”); Madow, *supra* note 43, at 209 (“[T]he particular activities in our society that generate commercially marketable fame are themselves, again with isolated exceptions, very handsomely compensated.”).

⁷³ See *C.B.C. Distribution*, 505 F.3d at 824; Stacey L. Dogan & Mark Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1187–88 (2006); Madow, *supra* note 43, at 210 (“[E]ven without the right of publicity the rate of return to stardom in the entertainment and sports fields is probably high enough to bring forth a more than ‘adequate’ supply of creative effort and achievement.”).

⁷⁴ See Dogan & Lemley, *supra* note 73, at 1181; Madow, *supra* note 43, at 182.

⁷⁵ See Madow, *supra* note 43, at 182–83 (“Judicial opinions generally treat commercially valuable fame as a crown of individual achievement Law review writers, too, generally see a commercially valuable public image as something a star attains largely on her own, through some combination of talent, effort, intelligence, pluck, and grit.”).

⁷⁶ See Dogan & Lemley, *supra* note 73, at 1181.

⁷⁷ See *id.* (“Others—writers who craft the celebrity’s dramatic roles, agents who pluck her from obscurity, studios and marketing directors who shape her public image, even devotees who fan the flames of her popularity—play a role in creating the value of a celebrity.”); Madow, *supra* note 43, at 191 (“The work of ‘fashioning the star out of the raw material of the person’ is done not only by the star herself, but by an army of specialists—consultants, mentors, coaches, advisors, agents, photographers, and publicists.”).

⁷⁸ See Madow, *supra* note 43, at 188–96.

⁷⁹ See, e.g., Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 422 (2000) (“[A] philosophical orientation permits us to reconceive the right of publicity as a freedom-based property right with both moral and economic characteristics”); Roberta Rosenthal Kwall, *A Perspective on Human Dignity, the First Amendment,*

larly important aspects of one's identity. Thus, seeing one's name or image plastered on billboards selling cars may work a harm that is akin to violating a personal or privacy interest.⁸⁰ Yet this interest, too, finds little support when applied to public figures like celebrities. Quite often, celebrities have injected themselves into the public sphere, benefiting financially from their fame. Having injected themselves into the public sphere, perhaps they are entitled to less of an expectation of privacy.⁸¹ Thus, many reasons exist to be somewhat skeptical of the right of publicity.⁸²

III. THE EVEN WEAKER JUSTIFICATIONS FOR LICENSING RIGHTS IN SPORTS

In addition to the general critique of broad licensing rights noted above,⁸³ there are even more reasons to be suspicious of such rights in the context of sports. In particular, the law does not adequately take account of the interests of sports fans and their highly interactive and personal relationship to the leagues and teams that they support.⁸⁴

A. *Fan Interests in Copyright*

In recent years, intellectual property scholars have paid increasing attention to the interests of consumers and fans.⁸⁵ In particular, copyright scholars have begun to analyze consumer interests more expressly, noting the ways in which such interests do or do not find support in the

and the Right of Publicity, 50 B.C. L. REV. 1345, 1348 (2009) ("Bloustein posited that commercial uses of a person's name or photograph are actionable because of the injury caused 'to the sense of personal dignity' by diminishing that individual's freedom.").

⁸⁰ See Madow, *supra* note 43, at 168.

⁸¹ See *id.* at 168–69.

⁸² See *supra* notes 68–81 and accompanying text.

⁸³ See *supra* notes 44–82 and accompanying text.

⁸⁴ See *infra* notes 109–129 and accompanying text.

⁸⁵ See generally Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347 (2005) (discussing absence of user interests in forming copyright doctrine); Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871 (2007) (analyzing the role of readers, listeners, viewers, and the general public in copyright's personal use doctrine); Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397 (2003) (examining interests of consumers in copyright law); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651 (1997) (arguing for legal protection for secondary creativity expressed in noncommercial fan fiction).

law.⁸⁶ This has been, to some extent, a reaction to new technologies, which enable ever greater consumer interaction with copyrighted works.⁸⁷

Take, for example, the case of fan fiction. Fan fiction is fiction written by fans of popular television shows or movies, such as *Star Trek* or *Star Wars*.⁸⁸ Fan fiction authors make use of the characters, events, and worlds of the original shows to write their own episodes, which they then post on the Internet.⁸⁹ Consumers of fan fiction download these episodes, read them, and quite often critique them. Rather robust communities can arise surrounding copyrighted works through the medium of fan fiction.⁹⁰

Fan fiction represents an interesting new challenge for traditional copyright doctrines, which generally assume a more passive audience.⁹¹ These fans are not competitors of the original copyright owners in any traditional sense, nor are they a passive audience—they are something in between.⁹² Copyright owners have, in many cases, been tolerant of these efforts as long as they do not present an economic threat.⁹³ It is not at all clear, however, how such efforts should be analyzed under copyright law. Are these derivative works?⁹⁴ And, if so, do they qualify for fair use?⁹⁵

⁸⁶ See Cohen, *supra* note 85, at 249–73; Liu, *supra* note 85, at 401–20; Tushnet, *supra* note 85, at 664–83.

⁸⁷ LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 1–19 (2008).

⁸⁸ See Tushnet, *supra* note 85, at 655 (“‘Fan fiction,’ broadly speaking, is any kind of written creativity that is based on an identifiable segment of popular culture, such as a television show, and is not produced as ‘professional’ writing.”).

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See *id.* at 664 (“Case law does not address fair use in the context of fan fiction or anything reasonably similar to it Copyright law in general has very little to say to non-commercial and noninstitutional actors because until very recently their activities have gone unnoticed.”).

⁹² See *id.* at 660 (arguing that fan fiction resembles “a musical composition inspired by a novel” (internal citations omitted)).

⁹³ Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 619, 633–34 (2008) (“There may be a variety of reasons for tolerating use. Reasons can include . . . enforcement costs . . . or a calculation that the infringement creates an economic complement to the copyrighted work—it actually benefits the owner.”).

⁹⁴ See 17 U.S.C. § 106(2) (2006) (“[T]he owner of copyright under this title has the exclusive rights to do and to authorize . . . derivative works based upon the copyrighted work.”).

⁹⁵ See *id.* § 107 (listing factors to be considered when determining if use of a copyrighted work is authorized as fair use); see also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 571–72 (1994) (analyzing whether a commercial parody of a song could be considered fair use).

Similarly, fan websites often make extensive use of copyrighted and trademarked material.⁹⁶ The many Star Wars and Star Trek fan websites often incorporate pictures, text, and descriptions of episodes, among other things, from the original copyrighted works.⁹⁷ One recent case involved a website devoted to the *Harry Potter* universe.⁹⁸ An individual created a website called “The Harry Potter Lexicon,” which was essentially an encyclopedia that defined terms, characters, spells, and events from the *Harry Potter* books.⁹⁹ Fans of the books wrote the entries, primarily drawing from the *Harry Potter* books, companion books and newsletters, published interviews of the author, and other outside reference sources.¹⁰⁰ J.K. Rowling, the author of the *Harry Potter* books, initially supported this effort.¹⁰¹ When the owner of the website decided to turn it into a published book, however, Rowling sued, alleging copyright infringement.¹⁰² Rowling won her lawsuit,¹⁰³ but the author of the website was later able to publish the book after removing a number of passages copied from the original books and rewriting the book to include substantial original commentary.¹⁰⁴

These cases generally fit within a larger trend of increasing audience and consumer engagement with copyrighted and trademarked works.¹⁰⁵ Digital technology now enables audience members to manipulate these works with ever greater sophistication and to share the results with the world. Copyright law’s response to these developments is still in its infancy. Some have argued that copyright’s fair use doctrine must be interpreted more expansively, to take into account these new opportuni-

⁹⁶ Deborah Tussey, *From Fan Sites to Filesharing: Personal Use in Cyberspace*, 35 GA. L. REV. 1129, 1139–49 (2001).

⁹⁷ See, e.g., THE FEDERATION: “KEEPING THE DREAM ALIVE!”, <http://www.trekfederation.com/> (last visited Mar. 2, 2011); WOOKIEEPEDIA: THE STAR WARS WIKI, http://starwars.wikia.com/wiki/Main_Page (last visited Mar. 2, 2011).

⁹⁸ See Warner Bros. Entm’t Inc. v. RDR Books, 575 F. Supp. 2d 513, 520–21 (S.D.N.Y. 2008).

⁹⁹ See *id.* at 520.

¹⁰⁰ See *id.*

¹⁰¹ See *id.* at 521.

¹⁰² See *id.* at 523–24.

¹⁰³ See *id.* at 554 (“Plaintiffs have established copyright infringement . . . Defendant has failed to establish its affirmative defense of fair use. Defendant’s publication of the Lexicon is hereby permanently enjoined, and Plaintiffs are awarded statutory damages” (internal citations omitted)).

¹⁰⁴ See Emilia Askari, *Potter Guide Reaches Stores: Author Sued by J.K. Rowling Says Issue Is over Now*, DETROIT FREE PRESS, Jan. 15, 2009, at 2. The rewritten book is called, *The Lexicon: An Unauthorized Guide to Harry Potter Fiction and Related Material. Id.*

¹⁰⁵ See LESSIG, *supra* note 87, at 1–19.

ties for uses of existing works.¹⁰⁶ Unsurprisingly, copyright owners do not appear to agree.¹⁰⁷

My own view is that the increasingly interactive nature of copyrighted and trademarked works means that courts should give more leeway to these uses, particularly in cases where there is little economic threat to an existing market. Such uses represent a trend that is worth encouraging as it gives the audience a way to interact with works in a much less passive manner.¹⁰⁸

B. *Application of Fan Interests in Sports*

Many of these developments in copyright apply with particular force in the realm of sports. Indeed, it is hard to imagine a stronger example of fan participation than in sports. There may be many individuals devoted to the *Harry Potter* books, but fans of *Harry Potter* do not generally gather in large groups around the country every weekend, or watch *Harry Potter* events on television in the tens of millions every week, or spend countless hours debating *Harry Potter* on talk radio.¹⁰⁹ Indeed, few things approach the dedication and intensity of interaction expressed by even the average sports fan.

At the risk of over-intellectualizing the sports fan, sports teams play an important role in the daily lives of many individuals. Individuals often derive great personal value from affiliating themselves with a particular team, joining with others in a common and well-defined goal, and discussing the tribulations of the local team.¹¹⁰ Sometimes these affiliations are regional; sometimes they cross regions. Wearing a team logo may communicate a whole host of things about the wearer. Indeed, it is probably not an exaggeration to say that sports fandom plays an important role in the formation and personhood of many individuals.¹¹¹

It is thus somewhat surprising that merchandising and right-of-publicity law currently gives such little recognition to the interests of

¹⁰⁶ See, e.g., *id.*

¹⁰⁷ See, e.g., *Warner Bros.*, 575 F. Supp. 2d at 520.

¹⁰⁸ See generally Liu, *supra* note 85.

¹⁰⁹ See Pearlman, *supra* note 4; *10/1: Majority of U.S. Residents College Football Fans*, *supra* note 4.

¹¹⁰ See *For Love or Money: The Unrequited Passion of the Sports Fan*, KNOWLEDGE @ W.P. CAREY (Jan. 3, 2007), <http://knowledge.wpcarey.asu.edu/article.cfm?articleid=1353> (“Sports obsession . . . is not about rationality; it’s about raw association.” (internal citations omitted)).

¹¹¹ See, e.g., NICK HORNBY, *FEVER PITCH* 11 (1998) (“It has become quite clear to me that my devotion says things about my own character and personal history . . .”); BILL SIMMONS, *NOW I CAN DIE IN PEACE* 7 (2009) (“I can’t remember a single day of my life that didn’t involve the Boston teams.”).

fans. Indeed, sports franchises and leagues have become ever more aggressive in their policing and protection of their trademarks and rights of publicity, and the law has largely abetted this expansion¹¹² without paying much attention to the impact on fans.

As noted above, it is not at all clear that this expansion in the intellectual property rights of sports teams benefits fans in any concrete way.¹¹³ Sports fans would probably be better off if there were meaningful competition in the market for sports merchandise. They would be able to purchase such merchandise at a far lower price and choose from a far wider range of products.¹¹⁴ They would find it much easier to identify themselves with their teams. Moreover, it is hard to imagine that the sports teams themselves would now have less incentive either to sell their own officially licensed merchandise or, more generally, to invest in the quality of their teams.¹¹⁵

Similarly, an expansive right of publicity enriches athletes at the expense of the fans without any persuasive justification. By enforcing strong rights of publicity, courts essentially raise the price of goods that contain the athlete's image, whether such goods are trading cards, posters, video games, or the like. This essentially takes funds away from fans and shifts them to the athletes, and for what reason? It is, once again, hard to imagine that teams or sports figures would not try as hard to win if they did not have this stream of compensation.¹¹⁶

And, just as in the case of copyrighted works, new technologies are making it possible for sports fans to interact more with their favorite teams.¹¹⁷ Even before such technologies existed, fans appropriated team trademarks by dressing up at games, painting faces, and creating signs. Today, sports fan websites can play many of the same roles that fan fiction websites and the like play with respect to copyrighted works.¹¹⁸ Such sports fan websites may often display copyrighted photos

¹¹² See *e.g.*, *Bos. Prof'l Hockey Ass'n v. Dall. Cap & Emblem Mfg., Inc.*, 597 F.2d 71, 75 (5th Cir. 1979); *NBA v. Design Mgmt. Consultants, Inc.*, 289 F. Supp. 2d 373, 376 (S.D.N.Y. 2003).

¹¹³ See Dogan & Lemley, *supra* note 43, at 481–84; see also *supra* notes 49–51 and accompanying text.

¹¹⁴ See Dogan & Lemley, *supra* note 43, at 481; see also *supra* notes 49–51 and accompanying text.

¹¹⁵ See *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 824 (8th Cir. 2007); Dogan & Lemley, *supra* note 73, at 1187–88; Madow, *supra* note 43, at 210.

¹¹⁶ See Madow, *supra* note 43, at 210.

¹¹⁷ See, *e.g.*, Beller, *supra* note 23 (noting how the rise of the Internet has helped increase the popularity of fantasy sports).

¹¹⁸ See *supra* notes 96–104 and accompanying text.

or trademarked logos.¹¹⁹ As mentioned above, fantasy sports leagues allow fans to participate more actively in the ups and downs of various teams and players.¹²⁰ Finally, video games allow fans to interact even more directly with their teams and favorite players.¹²¹

Given both the intensity of the fan interaction and the opportunities provided by new technology, the question becomes: how should the law respond? To begin with, the fact that fans have an intense and active relationship with their teams does not mean that the teams' intellectual property rights are not entitled to protection. Teams should still have strong rights to prevent uses that are confusing or diluting. Indeed, fans and teams may have a collective interest in maintaining the distinctiveness of a team's logo or color scheme. If competitors were able to dilute the distinctiveness of, for example, the Oakland Raiders' black and silver uniforms and logo by selling pink and green versions, fans may collectively experience this as a loss because it would undercut their ability to identify with their team.¹²² Thus, teams should still have strong rights to protect their interests against confusing and diluting uses.¹²³

At the same time, courts should more expressly recognize a greater degree of freedom of uses by fans and by companies that support these uses. Thus, for example, fan websites should have broad privileges to use team logos, colors, and trademarks to identify their teams. Currently, many teams do in fact permit such uses.¹²⁴ To the extent this happens, however, it is a matter of tolerance, not of an established right.¹²⁵

In addition, more interactive fan uses should be privileged. The fantasy sports cases highlight the importance of holding the line on this front and ensuring that fans have broad ability to interact with their teams.¹²⁶ The results of games and the statistics generated by those games should not be the exclusive property of the teams or leagues. Instead, they should belong to the public at large. Note that this con-

¹¹⁹ See, e.g., OVER THE MONSTER, <http://www.overthemonster.com/> (last visited Mar. 2, 2011).

¹²⁰ See Beller, *supra* note 23; *Fantasy Sports Participation on the Rise*, *supra* note 25.

¹²¹ See *Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108, at *1 (N.D. Cal. Feb. 8, 2010) (“[C]onsumers can simulate football matches between college and university teams.”); see also *supra* notes 30–31 and accompanying text.

¹²² See generally Justin Hughes, “Recoding” *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923 (1999).

¹²³ See *supra* notes 44–64 and accompanying text.

¹²⁴ See Wu, *supra* note 93, at 619.

¹²⁵ See *id.*

¹²⁶ See *C.B.C. Distribution*, 505 F.3d at 823 (baseball statistics are protected by First Amendment); *CBS Interactive Inc. v. Nat'l Football League Players Ass'n, Inc.*, 259 F.R.D. 398, 417–19 (D. Minn. 2009) (football statistics are protected by First Amendment).

cern about fans should extend not only to the fans themselves, but to companies that serve the fans.¹²⁷ So, for example, companies that set up fantasy sports leagues should be permitted to use the statistics, identities, and names of the teams and players. The operative question should not merely be how to apportion the value between the league and the company; it should ultimately be about the impact on the fans.

Similarly, the issue of using real teams, players, and statistics in video games should be decided with greater attention to the impact on fans. Fans have a great interest in playing video games that make use of actual teams and players. Allowing competition in the market for such video games would benefit fans by giving them more choices. At the same time, it is hard to argue that the leagues and teams would have any less incentive to put out a good product even if they could not exclusively license the rights to video games.¹²⁸ The teams might have a good claim if the video game manufacturers misled consumers into thinking that the games were authorized by the teams, or if the manufacturers diluted the distinctive character of the marks.¹²⁹ There would be no broad entitlement, however, to prevent the use of these marks in video games or websites.

C. *Case Studies: Keller v. Electronic Arts, Inc. and O'Bannon v. NCAA*

At least one of the video game cases currently in litigation presents the issue of fan involvement quite directly. In early 2010, the U.S. District Court for the Northern District of California heard *Keller v. Electronic Arts, Inc.*¹³⁰ In that case, a former college football player, Samuel Keller, sued Electronic Arts, alleging that its video game, *NCAA Football*, violated his right of publicity.¹³¹ Interestingly, *NCAA Football* did not use the actual names of the players.¹³² It allegedly did, however, endow video game players on a certain team with the same numbers, physical

¹²⁷ See, e.g., *C.B.C. Distribution*, 505 F.3d at 820 (granting a declaratory judgment that allowed a company providing fans with fantasy sports products to use the names and statistics of professional baseball players in connection with its fantasy baseball products).

¹²⁸ See *id.* at 824; Dogan & Lemley, *supra* note 73, at 1187–88; Madow, *supra* note 43, at 210.

¹²⁹ See *supra* notes 44–64 and accompanying text.

¹³⁰ 2010 WL 530108.

¹³¹ See *id.* at *2. For a discussion of related issues, see generally Ciafrone & Baker, *supra* note 32; Dennie, *supra* note 32.

¹³² See *Keller*, 2010 WL 530108, at *1.

characteristics, and statistics as the real players on that team.¹³³ Moreover, because the video game allowed users to change the fictional names, and several websites allowed purchasers to upload entire team rosters, users could, without much difficulty, replace the fictional names with the real names that they allegedly corresponded to.¹³⁴

In a similar case that has since been consolidated with *Keller*, a former UCLA basketball player, Ed O'Bannon, filed suit on behalf of himself and other former NCAA players against the NCAA and its licensing arm, alleging antitrust violations related to the improper appropriation of their rights of publicity.¹³⁵ Specifically, O'Bannon objected to the use of his image and likeness on various promotional materials, such as DVDs and video games.¹³⁶

The consolidated *Keller-O'Bannon* litigation presents many interesting issues that are unrelated to the intellectual property rights of the players and leagues. Much of the commentary on this litigation centers on the relationship between NCAA players and the NCAA as an organization, analyzing whether the players legitimately licensed away their publicity rights or whether the NCAA can validly license them to third parties for commercial purposes, among other issues.¹³⁷ Most of the debate over the intellectual property rights centers on whether they belong most properly with the league or the players.¹³⁸

Missing from this discussion is a broader recognition of the importance of the interests of fans of NCAA sports. Cases like *Keller* highlight the many new ways in which fans are more actively engaging with the teams that they support. Not only do the video games give individuals the ability to become participants in the games, but they also give them the chance to adjust and adapt the names of the players—and in some

¹³³ See *id.* (noting the allegation that Electronic Arts “sends questionnaires to team equipment managers of college football teams” in order “[t]o enhance the accuracy of the player depictions”).

¹³⁴ See *id.*

¹³⁵ See *O'Bannon v. NCAA*, Nos. C 09-1967 CW, C 09-3329 CW, C 09-4882, 2010 WL 445190, at *1–2 (N.D. Cal. Feb. 8, 2010). The *Keller* and *O'Bannon* cases were consolidated by order of Judge Claudia Wilken on January 15, 2010 into *In re NCAA Student-Athlete Name & Likeness Litigation*. See No. C 09-1967 CW, 2010 WL 5644656, at *1, *6 (N.D. Cal. Dec. 17, 2010) (denying certain plaintiffs’ motion to deconsolidate and referencing the January 15, 2010 order).

¹³⁶ See *id.* at *3 (“These alleged agreements are for licenses to distribute products or media containing the images of O'Bannon and other former student athletes.”).

¹³⁷ See, e.g., Hanlon & Yasser, *supra* note 5, at 271–74; Anastasios Kaburakis et al., *NCAA Student-Athletes’ Rights of Publicity, EA Sports, and the Video Game Industry*, ENT. & SPORTS LAW., Summer 2009, at 1, 25–26.

¹³⁸ See, e.g., *O'Bannon*, 2010 WL 445190, at *1; Hanlon & Yasser, *supra* note 5, at 243.

cases incorporate the names and statistics of real players. This kind of participatory involvement is something new and something that should be given wide latitude.¹³⁹

Once fan interests are taken into account, it becomes more difficult to understand why either the NCAA or the players should have the exclusive ability to control the right to make NCAA video games. Indeed, perhaps the best result, at least for fans, would be for neither party to have this right. For example, if the rights were given back to the individual players, this could make it even more difficult for video game companies to license the rights from hundreds of NCAA players. At the very least, the interest of the fans is a factor that needs to be taken into account through some changes in the scope of these intellectual property rights, discussed in the next Part. These changes would give some acknowledgement, heretofore missing, to the importance of the fan interest and the contributions that fans make to the success of a team or a league.¹⁴⁰

IV. ACCOUNTING FOR THE INTERESTS OF SPORTS FANS

Both the weak legal foundations of aggressive licensing and the increased importance of fan interests suggest a more limited and constrained legal framework for sports licensing.¹⁴¹ This Part highlights a few changes that would respond to these observations.¹⁴²

A. *Narrow Merchandising Right*

The merchandising right in the realm of sports should be far more limited than it currently is, with greater leeway given to fans for using and transforming trademarks in creative ways.¹⁴³ First, trademark protection for sports logos should be carefully limited to protect against uses that are likely to cause confusion or likely to dilute the distinctive character of the mark. The protection against confusing uses is the core, traditional trademark interest.¹⁴⁴ For example, someone selling unauthorized Red Sox caps would be liable under traditional trade-

¹³⁹ See LESSIG, *supra* note 87, at 1–19; Tushnet, *supra* note 85, at 664; Beller, *supra* note 23.

¹⁴⁰ See DeSarbo, *supra* note 3; *supra* notes 1–4 and accompanying text.

¹⁴¹ See *supra* notes 42–140 and accompanying text.

¹⁴² See *infra* notes 143–161 and accompanying text.

¹⁴³ See Dogan & Lemley, *supra* note 43, at 481–84 (making this argument in the context of merchandising more generally).

¹⁴⁴ See *Bd. of Governors of the Univ. of N.C. v. Helpingstine*, 714 F. Supp. 167, 170 (M.D.N.C. 1989).

mark principles if he were misleading buyers into thinking that the caps were authorized.¹⁴⁵ If that individual clearly indicated that the caps were unauthorized, however, there would be no liability for likelihood of confusion.¹⁴⁶

Under the above example, the Red Sox might still be able to bring a claim for dilution.¹⁴⁷ The scope of that claim should be significantly limited, however, with an eye toward fan interests. The main question under a limited dilution claim would be whether the use dilutes the distinctive character of the mark.¹⁴⁸ For example, if the vendor were selling caps that used significantly different colors, the Red Sox might have a claim if they could show that this would make the mark less distinctive. In some cases, there would be no impact. If the use were to become widespread enough to weaken the distinctive colors and logo, however, there would be a dilution claim.¹⁴⁹ Protection against this kind of dilution not only benefits the Red Sox, but also the fans, who have an interest in the distinctive character of the mark.

In neither case, however, would there be broad property rights over the logo or trademarks. Third parties could generally use team logos, as long as there were no likelihood of confusion or dilution of the distinctive characteristics of the mark. This would enable a wide range of creative uses of marks by third parties, including fans. Thus, for example, in *University of Alabama Board of Trustees v. New Life Art Inc.*,¹⁵⁰ the 2009 case from the U.S. District Court for the Northern District of Alabama discussed above,¹⁵¹ the University of Alabama would have no ability to stop the artist from painting famous scenes from Crimson Tide history because there would be neither risk of confusion nor dilution. A more limited right would also allow companies to use team logos in fantasy sports websites, fan websites, and video games—again, as long as there were no likelihood of confusion or dilution.¹⁵²

¹⁴⁵ *See id.*

¹⁴⁶ *See id.* at 173 (finding no likelihood of confusion); *see also supra* notes 47–48 and accompanying text.

¹⁴⁷ *See* 15 U.S.C. § 1125(c) (2006) (federal dilution statute).

¹⁴⁸ *See id.*

¹⁴⁹ *See id.* In reality, such a claim by the Red Sox seems unlikely given the fact that the team itself sells caps that deviate substantially from the traditional Red Sox design. *See, e.g., Boston Red Sox St. Patrick's Day Argyle Cleanup Cap*, RED SOX-MLB.COM SHOP, <http://shop.mlb.com/product/index.jsp?productId=3892637> (last visited Mar. 7, 2011).

¹⁵⁰ 677 F. Supp. 2d 1238 (N.D. Ala. 2009).

¹⁵¹ *See supra* notes 35–39 and accompanying text.

¹⁵² *See supra* notes 44–62 and accompanying text.

To reinforce this privilege, courts should expressly acknowledge the communicative and associative functions that these uses serve. These productive uses of trademarks are quite distinct from traditional uses of trademarks. The fan website uses the Red Sox logo, not as a marker of its own website services, but to accurately identify the Red Sox and to communicate effectively about the Red Sox. The video game uses the Red Sox logo, not to identify the source of the video game, but to accurately depict the Red Sox. Current trademark doctrine recognizes this kind of an interest through the nominative use doctrine, which permits third parties to use trademarks if there is no easy alternative to accurately identify a particular group or entity.¹⁵³

The nominative use doctrine should be interpreted more broadly in the context of sports. Sports teams are particularly susceptible to the nominative use problem.¹⁵⁴ The phrase “the major league baseball team located in Boston” is a very poor substitute for “the Boston Red Sox.”¹⁵⁵ In the context of sports, the nominative use doctrine should be expanded beyond the words to include the logo and other aspects of trade dress, where necessary. Just as the term “Red Sox” is necessary to accurately describe the team in print, the logo and trade dress are necessary to communicate about the team in a visual manner, say on a website or in a video game. This reflects an acknowledgement that we are no longer limited to describing these teams in print but now have many more tools to interact and engage with the teams that we support.

B. *Narrow Publicity Rights*

Similarly, publicity rights should be narrowed to recognize fan interests. Athletes should still have rights to control endorsements. Endorsements, which are linked to an athlete’s success and provide a lucrative source of compensation, may motivate some athletes to work harder. Moreover, false or misleading endorsements may confuse consumers (though this could be addressed through disclaimers).¹⁵⁶ Fi-

¹⁵³ See, e.g., *New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302, 306–08 (9th Cir. 1992).

¹⁵⁴ See generally Raymond Shih Ray Ku, *Is Nominal Use an Answer to the Free Speech and Right of Publicity Quandary?: Lessons from America’s National Pastime*, 11 CHAP. L. REV. 435 (2008) (suggesting such an approach with respect to the right of publicity).

¹⁵⁵ See *New Kids on the Block*, 971 F.2d at 306 (“[O]ne might refer to ‘the two-time world champions’ or ‘the professional basketball team from Chicago,’ but it is far simpler (and more likely to be understood) to refer to the Chicago Bulls.”).

¹⁵⁶ See Madow, *supra* note 43, at 229.

nally, athletes might object to being associated with certain products or services.¹⁵⁷ Thus, this core right would still be important.

Such rights should not extend, however, to all commercially valuable uses of an athlete's image or name. For example, uses of an athlete's name or image in a video game should fall outside the scope of the athlete's—or league's or union's—control. The video game company is not using the athlete's name or image in the traditional way that gives rise to a publicity claim. The presence of an athlete's name or identity in a video game is not an endorsement of that game. Rather, the game is trying to accurately depict a certain sports league. It is a communicative use—an attempt to depict reality. In that sense, it is more akin to a painting of a sports figure at an important event,¹⁵⁸ or the description of what a player did in a particular game. True, it is not exactly the same. The video game company is making money from the use of the image, and the use is certainly more commercial. Perhaps it is more accurate to say that this kind of use falls uneasily between the traditional endorsement and a purely communicative use.

In such a case, however, where the use is in between, the interests of sports fans are relevant and should tilt the balance. When fan interests are considered, it is clear that such uses should be privileged.¹⁵⁹ Fans have a strong interest in video games that accurately depict sports teams. One reason *Madden NFL* is so popular is because it licensed the exclusive rights to the team names, logos, and players.¹⁶⁰ Although such an arrangement certainly benefits the league and the players, are fans better off? Or would they be better off if there were meaningful competition in the market for video games? What if there were many football video games that all made use of the team logos and players? Games could then compete on price and features, such as game play. Ultimately, fans would benefit from a greater range of choices at lower cost.¹⁶¹

CONCLUSION

In the end, many of these changes would have the effect of reducing the compensation that the teams, leagues, players, and universities would get. They would no longer be able to get the full amount of li-

¹⁵⁷ See *id.* at 229–31.

¹⁵⁸ See *e.g.*, *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 918–19 (6th Cir. 2003) (lawsuit involving paintings of famous figures in sports and famous sporting events).

¹⁵⁹ See Dogan & Lemley, *supra* note 43, at 481–84; see also *supra* notes 113–129 and accompanying text.

¹⁶⁰ See Rovell, *supra* note 31.

¹⁶¹ See Dogan & Lemley, *supra* note 43, at 481.

censing revenues from uses such as video games, fantasy sports leagues, and the like. But intellectual property policy is not structured around compensating the teams, leagues, and players at all costs. It protects intellectual property in order to benefit society more generally. This Article has argued that, in the area of sports licensing, we need to shift away from a concern about compensating the leagues and players, and toward a view that asks what is ultimately best for the fans.