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NOTES

THE RIGHT OF PUBLICITY AND FANTASY SPORTS: WHY THE *C.B.C.* *DISTRIBUTION* COURT GOT IT WRONG

INTRODUCTION

A flurry of scholarly research and commentary has recently surfaced regarding the intellectual property and First Amendment rights associated with a relatively new industry—fantasy sports.¹ At the heart of the debate is one central issue: must fantasy sports providers pay a licensing fee to professional sports leagues for using professional athletes' names and performance statistics in conjunction with a fantasy sports game? The answer depends on a court's interpretation of the athletes' right of publicity and that right's intersection with the fantasy sports provider's First Amendment rights to free speech. Recently, in *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media*,² a federal district court in Missouri held that Major League Baseball (MLB) players did not have the right to demand licensing fees from the operator of a Web-based fantasy baseball game.³ But early accounts indicate that the

¹ See, e.g., J. Gordon Hylton, *The Major League Baseball Players Association and the Ownership of Sports Statistics: The Untold Story of Round One*, 17 MARQ. SPORTS L.J. 87 (2006); Zachary C. Bolitho, Note, *When Fantasy Meets the Courtroom: An Examination of the Intellectual Property Issues Surrounding the Burgeoning Fantasy Sports Industry*, 67 OHIO ST. L.J. 911 (2006); Robert T. Razzano, Note, *Intellectual Property and Baseball Statistics: Can Major League Baseball Take Its Fantasy Baseball and Go Home?*, 74 U. CIN. L. REV. 1157 (2006). In addition, some of the analysis set forth in this Note appears to have been anticipated in Richard T. Karcher, *The Use of Players' Identities in Fantasy Sports Leagues: Developing Workable Standards for Right of Publicity Claims*, 111 PENN ST. L. REV. 557 (2007). Professor Karcher's article was published after this Note was substantially complete.

² 443 F. Supp. 2d 1077 (E.D. Mo. 2006).

³ *Id.* at 1091.

Major League Baseball Players Association (MLBPA) and the media wing of Major League Baseball, Advanced Media, plan to appeal.⁴ Hence, it appears that the legal battle to allocate the massive profits in the multimillion-dollar fantasy sports industry may have just begun.

Part I of this Note provides background information concerning the evolution and present status of the modern day fantasy sport. Part II outlines the common law and statutory right of publicity—the property right central to the fantasy sport debate—and the corresponding First Amendment defense often raised in right of publicity actions. Because Missouri law controlled *C.B.C. Distribution*, Part II also outlines Missouri’s interpretation of the right of publicity. Part III addresses the *C.B.C. Distribution* opinion and argues that the court wrongly distinguished two cases that had previously raised similar legal issues concerning a commercial product analogous to fantasy sports—sports table games. Part III also contends that the court misapplied the appropriate prima facie legal analysis pertaining to the “commercial advantage” and “identity” elements of a right of publicity claim. Lastly, Part III argues that the court’s First Amendment analysis evidenced a clear misunderstanding of the intricacies and true purpose of fantasy sports games. Part IV offers a summary and conclusion.

I. THE FANTASY SPORT

Most consider American journalists Glen Waggoner and Daniel Okrent to be the creators of the modern “fantasy sport.”⁵ In 1979, these journalists recruited nine people to form a “league” to play what they dubbed “Rotisserie Baseball.”⁶ Under the rules of the new game, each individual, or “owner,” formed a “fantasy team” by drafting twenty-three players from a pool of active Major League Baseball players.⁷ After the draft, the owners tracked their players’ performance statistics—such as batting average, home runs, wins, and saves—using the box scores from *USA Today*. At the end of the season, the owner with the best overall performance statistics won the league.⁸

⁴ Chris Isidore, *Fantasy “Rights” and Wrongs*, CNNMONEY.COM, Aug. 11, 2006, <http://money.cnn.com/2006/08/11/commentary/sportsbiz/index.htm>.

⁵ See Nickolas W. Davis & Margaret Carlisle Duncan, *Sports Knowledge is Power: Reinforcing Masculine Privilege Through Fantasy Sport League Participation*, 30 J. SPORT & SOC. ISSUES 244, 246 (2006).

⁶ Bolitho, *supra* note 1, at 916.

⁷ *Id.* at 916–17.

⁸ Davis & Duncan, *supra* note 5.

The basic game-play of today's fantasy sports is not unlike Waggoner and Okrent's original fantasy game. Owners still form leagues—usually with friends, family, or coworkers—and, after an initial player draft, they still track their players' performance statistics. As was the case in 1979, the owner with the best statistics at the end of the season usually wins the league.

Although fantasy sports' original game-play has largely remained intact, the fantasy game itself has grown far more sophisticated. In addition to the initial player draft, today's fantasy sports participants engage in player trades, releases, and free agent signings.⁹ More important, owners no longer track their own statistics using box scores from a newspaper. Instead, corporate giants such as Yahoo, Walt Disney's ESPN, Fox, and Microsoft, in addition to several smaller companies, offer Web-based fantasy sports games capable of tracking performance statistics literally up to the minute.¹⁰ Moreover, fantasy sports participants are no longer limited to baseball. Currently, fantasy sports providers offer football, basketball, hockey, golf, bass fishing, professional wrestling, and NASCAR games.¹¹ According to the Fantasy Sports Trade Association (FSTA), more than fifteen million American adults played a fantasy sport during 2003.¹² The FSTA also estimates that the industry annually generates between \$150 and \$200 million in revenue.¹³

II. THE RIGHT OF PUBLICITY

A. *A Prima Facie Case*

Professional sports leagues claim that the right of publicity precludes fantasy sports providers from operating fantasy games without a license. This so-called right of publicity emerged through the common law after courts realized that the celebrity status of some public personalities had substantial pecuniary value.¹⁴ This

⁹ *Id.*

¹⁰ Isidore, *supra* note 4.

¹¹ Bolitho, *supra* note 1, at 912.

¹² *Fantasy Sports Participation on the Rise, Association Says*, ST. LOUIS BUS. J., Aug. 14, 2003, available at <http://stlouis.bizjournals.com/stlouis/stories/2003/08/11/daily62.html>.

¹³ Isidore, *supra* note 4.

¹⁴ The landmark case frequently cited for first recognizing the existence of professional athletes' "right of publicity" is *Haelan Labs., Inc. v. Topps Chewing Gum*, 202 F.2d 866 (2d Cir. 1953). In *Topps Chewing Gum*, a baseball card manufacturer argued that its license with Major League Baseball players to distribute picture cards of the players did not violate a previous license between the same players and a third party because a license to use the players' likenesses did not involve a proprietary interest subject to legal protection. The court disagreed and held that "a man has a right in the publicity of his photograph." *Id.* at 868.

intellectual property right essentially provides an individual with the exclusive right to control the commercial value and exploitation of his or her photograph,¹⁵ name,¹⁶ likeness,¹⁷ and other personal characteristics.¹⁸ On one occasion, a court also extended the right to protect an individual's professional sports performance statistics.¹⁹ In a large sense, the right of publicity prevents the unjust enrichment of third parties who exploit the value of a person's identity for their own commercial benefit.²⁰ In the 1960s, courts expanded the right of publicity to protect professional athletes.²¹

A violation of the right of publicity is recognized as either a common law or statutory tort in twenty-eight states.²² To establish a prima facie case, a plaintiff must usually prove some variation of the following four elements:

- (1) use of the plaintiff's identity;
- (2) appropriation of the plaintiff's name or likeness to the defendant's commercial advantage;
- (3) lack of consent; and,
- (4) a resulting injury.²³

This Note focuses on the first two elements since they require a more difficult analysis and were central to the *C.B.C. Distribution*

¹⁵ See *id.*

¹⁶ See *Sharman v. C. Schmidt & Sons, Inc.*, 216 F. Supp. 401, 407 (E.D. Pa. 1963) ("Public figures in the celebrity category have a valuable property right in their name and image.").

¹⁷ See *Doe (Tony Twist) v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003) (holding that the sale of a comic book featuring a character admittedly named after a professional hockey player and based on his tough-guy "enforcer" persona violated the hockey player's right of publicity).

¹⁸ Other personal characteristics include those that relate so "closely and uniquely . . . with the identity of a particular individual that their use enables the defendant to appropriate the commercial value of the person's identity." RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (1995).

¹⁹ See *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1283 (D. Minn. 1970) (holding that a MLB player's identity was embodied by his name and statistics).

²⁰ See *id.* at 1281; *Tony Twist*, 110 S.W.3d at 368; RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c (1995).

²¹ See, e.g., *Cepeda v. Swift & Co.*, 415 F.2d 1205 (8th Cir. 1969); *Sharman*, 216 F. Supp. 401.

²² John Grady, Steve McKelvey & Annie Clement, *A New Twist for the Home Guys?: An Analysis of the Right of Publicity Versus Parody*, 15 J. LEGAL ASPECTS OF SPORT 267, 271 (2005).

²³ See *Cardtoons v. Major League Baseball Players Ass'n*, 95 F.3d 959, 968 (10th Cir. 1996); *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media*, 443 F. Supp. 2d 1077, 1084-85 (E.D. Mo. 2006); *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 313 (Cal. Ct. App. 2001).

court's analysis. At common law, intent to infringe another's right of publicity is not an element of liability.²⁴ However, in Missouri, an element of intent is implicit in the requirement that the identity be used to obtain a commercial advantage.²⁵

1. *The Identity Element*

"Identity" is a term of art that surfaced from common law opinions. It essentially refers to a professional athlete or celebrity's "public personality,"²⁶ and, as mentioned above, has been extended to include photographs,²⁷ names,²⁸ likenesses,²⁹ and performance statistics.³⁰ In Missouri, to decide whether the appropriator actually used a plaintiff's identity, courts consider whether the alleged appropriator used identifying characteristics as a symbol of the plaintiff's identity.³¹ If a name was appropriated, the plaintiff must show that the audience understood that the name the appropriator used refers to the plaintiff. In general, a court should consider the nature and extent of the identifying characteristics used, the alleged appropriator's intent, the fame of the plaintiff, actual identification made by third persons, and any other evidence of the perceptions of the appropriator's audience.³²

2. *The Commercial Advantage Element*

The term "commercial advantage" is analogous to the phrase in section 47 of the *Restatement (Third) of Unfair Competition*, "for the purposes of trade." Appropriation is conducted "for the purposes of trade" when names, likenesses or other indicia of a person's identity are used in advertising the appropriator's goods or services, placed on merchandise marketed by the user, or used in conjunction with services rendered by the user.³³ In Missouri, this element focuses on the alleged appropriator's intent or purpose to obtain a commercial benefit from the use of another's identity.³⁴ It is irrelevant whether the appropriator intended to injure the plaintiff.³⁵ Instead, Missouri courts

²⁴ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. e (1995).

²⁵ See *Tony Twist*, 110 S.W.3d at 369.

²⁶ See *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970).

²⁷ See *Haelan Labs., Inc. v. Topps Chewing Gum*, 202 F.2d 866, 868 (2d Cir. 1953).

²⁸ See *Sharman v. C. Schmidt & Sons, Inc.*, 216 F. Supp. 401, 407 (E.D. Pa. 1963).

²⁹ See *Tony Twist*, 110 S.W.3d at 374.

³⁰ See *Uhlaender*, 316 F. Supp. at 1283.

³¹ *Tony Twist*, 110 S.W.3d at 370.

³² *Id.* (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (1995)).

³³ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (1995).

³⁴ *Tony Twist*, 110 S.W.3d at 370-71.

³⁵ *Id.* See also *Henley v. Dillard Dep't Stores*, 46 F. Supp. 2d 587, 597 (N.D. Tex. 1999)

ask whether the appropriator intended to create the impression that the plaintiff was associated with the product or materials at issue.³⁶

3. *The Consent Element*

The consent element is rarely the subject of a right of publicity case.³⁷ Generally, unless a state statute provides otherwise, consent is either granted expressly through a formal agreement such as a license or assignment, or is implied from conduct or inaction reasonably interpreted as manifesting consent.³⁸

4. *The Resulting Injury Element*

Unlike the related right of privacy, damages or injuries sustained from violations of the right of publicity are not personal but commercial in nature. Thus, the measure of damages in a right of publicity case reflects the pecuniary loss to the plaintiff or the unjust pecuniary gain to the appropriator.³⁹ In Missouri, the injury can constitute the fair market value of the license that the appropriator should have paid to use the identity.⁴⁰

B. An Affirmative Defense: The First Amendment

Even if a plaintiff satisfies all four of the prima facie elements, the defendant may still escape liability for a right of publicity violation by raising a number of affirmative defenses, most notably First Amendment protection.⁴¹ This results in a balancing test that pits the state's interest in protecting the public personality's property interest in the commercial value of his name and identity against the

(refusing to require a plaintiff to prove that a defendant made a profit or secured a tangible benefit in a right of publicity claim).

³⁶ *Tony Twist*, 110 S.W.3d at 371 ("At a minimum, respondents' statements and actions reveal their intent to create the impression that Twist was somehow associated with the *Spawn* comic book, and this alone is sufficient to establish the commercial advantage element in a right of publicity action.").

³⁷ For example, the issue of consent was not raised in *C.B.C. Distribution*.

³⁸ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. f (1995).

³⁹ *Tony Twist*, 110 S.W.3d at 368 (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 cmt. b (1995)).

⁴⁰ *Id.*

⁴¹ Bolitho, *supra* note 1, at 942-43. This Note focuses solely on the First Amendment defense. Although other defenses, such as preemption under federal copyright law, are often raised to counter a right of publicity claim, they are outside the scope of this Note. For a discussion of preemption under federal copyright law, see Razzano, *supra* note 1, at 1177-86, and see generally David E. Shipley, *Three Strikes and They're Out at the Old Ball Game: Preemption of Performers' Rights of Publicity Under the Copyright Act of 1976*, 20 ARIZ. ST. L.J. 369 (1988).

appropriator's constitutional right to free speech. There is some disagreement among courts about the parameters of this balancing test, and three principal versions exist: the "related use" test, the "transformative use" test, and the "predominant purpose" test.⁴² Missouri has embraced the predominant purpose test.⁴³ Thus, Missouri courts decide whether a product predominantly exploits the commercial value of the individual's identity. If this exploitation exists, the court should hold that the appropriator violated the plaintiff's right of publicity even if the appropriator's use exhibits some "expressive" content that might qualify as "speech" in other circumstances.⁴⁴

III. *C.B.C. DISTRIBUTION*: THE RIGHT OF PUBLICITY APPLIED TO FANTASY SPORTS

To date, *C.B.C. Distribution* is the only case to address the right of publicity specifically in the context of fantasy sports. In *C.B.C. Distribution*, C.B.C. Distribution & Marketing, Inc., a fantasy sports provider based in St. Louis, had previously entered into a license agreement with the MLBPA to use "the names, nicknames, likenesses, signatures, pictures, playing records, and/or biographical data of each player" in conjunction with its fantasy sports products offered via telephone, mail, email, and the Internet.⁴⁵ But in 2005, Advanced Media refused to continue to offer C.B.C. a license to promote its fantasy baseball game. Instead C.B.C. was offered a license to promote only MLB's own proprietary fantasy baseball games on C.B.C.'s website in exchange for a percentage share of all related revenue.⁴⁶ After C.B.C. refused the offer, Advanced Media claimed it possessed exclusive ownership of the statistics associated with all player names and, therefore, could prohibit any unlicensed fantasy sports provider from using this information to provide fantasy games to the consuming public.⁴⁷ Advanced Media also claimed that

⁴² For a complete synopsis of these First Amendment balancing tests and a discussion of significant cases that have applied these tests, see Grady, McKelvey & Clement, *supra* note 22, at 272–82. Briefly, the "related use" test asks whether the use of a celebrity's name or likeness is sufficiently related to the celebrity. *Id.* at 272. The "transformative use" test analyzes to what extent the use in question is "transformative." A use is "transformative" when its value is not derived principally from the fame of the celebrity, but from some other source such as the appropriator's own creativity or skill. *Id.* at 276–78.

⁴³ *Tory Twist*, 110 S.W.3d at 374.

⁴⁴ *Id.* (citing Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity-Free Speech Interface*, 23 LOY. L.A. ENT. L. REV. 471, 500 (2003)).

⁴⁵ *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media*, 443 F. Supp. 2d 1077, 1080–81 (E.D. Mo. 2006).

⁴⁶ *Id.* at 1081.

⁴⁷ *Id.*

any use of the MLB players' names violated the players' right of publicity. Fearing a lawsuit, C.B.C. sought a declaratory judgment and asked a federal court to affirm that its use of MLB players' names and performance records in conjunction with its fantasy sports games was lawful notwithstanding the absence of a license from MLB, MLBPA, or Advanced Media.⁴⁸ In August 2006, the *C.B.C. Distribution* court granted the declaratory judgment and held C.B.C.'s use did not violate professional baseball players' right of publicity.⁴⁹

In *C.B.C. Distribution*, the court framed the legal issue as whether the MLB players had a right of publicity in their names and performance statistics as used in C.B.C.'s fantasy sports games.⁵⁰ In its analysis, the *C.B.C. Distribution* court distinguished the defendants' leading cases involving sports table games and held that the defendants had not established a prima facie case for a right of publicity violation. The court's prima facie analysis focused mainly on two right of publicity elements—the "commercial advantage" element and the "identity" element.⁵¹ The court further held that even if the fantasy sports provider infringed on the professional athletes' state right of publicity, the fantasy sports game was "speech" protected by the First Amendment.⁵²

Although, the *C.B.C. Distribution* court correctly framed the pertinent legal issue, its subsequent analysis was flawed in several respects. First, the defendants' leading cases involving table games were wrongly distinguished and the court should have addressed the similarities between table games and fantasy sports games. Second, the court misapplied the appropriate prima facie legal analysis pertaining to the "commercial advantage" and "identity" elements of the MLB players' right of publicity claim. Third, the court's First Amendment analysis evidenced a clear misunderstanding of the intricacies and true purpose of fantasy sports games.

A. The Table Games Cases

Perhaps the most interesting aspect of the *C.B.C. Distribution* opinion was the fact that the court abruptly distinguished the two

⁴⁸ *Id.* at 1081–82.

⁴⁹ *Id.* at 1091.

⁵⁰ *Id.* at 1084–85.

⁵¹ *Id.* at 1085–89. It should be noted that the court did address the "resulting injury" component in its public policy analysis. *Id.* at 1089–91.

⁵² *Id.* at 1099–1100. The court also addressed the issue of copyright preemption and held that federal copyright law did not preempt the state right of publicity in the context of fantasy sports games because the players' names and performance statistics were not copyrightable. *Id.* at 1100–03. Further discussion regarding this issue is outside the scope of this Note.

cases that, at least at first glance, most strongly buttressed the defendants' position. These two cases were *Uhlaender v. Henricksen*⁵³ and *Palmer v. Schonhorn Enterprises, Inc.*⁵⁴ Both cases involved the right of publicity and an older product with similarities to modern fantasy sports games—sports table games.

Table games emerged in the 1920s and still exist today.⁵⁵ They are essentially board games that allow participants to simulate the play of an actual sporting event by choosing lineups from a list of actual players. Table games use players' past performance statistics to produce a "realistic" set of outcomes determined by some form of random number generator such as dice or a spinner.⁵⁶ Although the performance statistics may not actually appear on the "cards" used in a table game, they are used to generate the probability distribution of the game's "realistic" outcomes. Hence, the probability distribution recognizes that some players are more talented than others.⁵⁷

In *Uhlaender*, professional baseball players sued a table game manufacturer that, without consent, created a baseball strategy table game that contained 520 player cards that each featured an MLB player's name, his team, his position, his uniform number, and his most recent performance statistics.⁵⁸ To market their table game, the defendants in *Uhlaender* used the following language: "Players are rated in every phase of baseball play. . . . You manage 520 big time players. Your strategy affects the outcome of every game. . . . Can be played solitaire, or leagues of 20 can be formed of neighborhood friends."⁵⁹

Today's fantasy sports games are noticeably similar to the *Uhlaender* table game. First, fantasy sports games use the same descriptive information on player profiles, including player names and performance statistics. In addition, fantasy sports games often rank players based on the number of fantasy points the player has earned or is expected to earn. For example, Yahoo Sports ranks all players before the initial draft and continuously ranks them throughout the season. Participants utilize these rankings to make "strategic" draft decisions, free agent acquisitions, or player trades with other users. As in *Uhlaender*, these strategic decisions can drastically "affect the outcome of every game." Lastly, fantasy sports

⁵³ 316 F. Supp. 1277 (D. Minn. 1970).

⁵⁴ 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967).

⁵⁵ Hylton, *supra* note 1, at 93.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Uhlaender*, 316 F. Supp. at 1278.

⁵⁹ *Id.*

users also compete in “leagues,” usually comprised of coworkers, family members, or friends.

The legal issue in *Uhlaender* was whether the players’ names and performance statistics used in the table games constituted the players’ “public personalities” or “identities.” Interestingly, *C.B.C. Distribution* raised the same issue. In *Uhlaender*, the court enjoined the game manufacturer from selling the sports table game and held that, “a celebrity has a legitimate proprietary interest in his public personality. . . . embodied in his *name*, likeness, *statistics* and other personal characteristics.”⁶⁰ Thus, under *Uhlaender*, an MLB player’s “identity” includes his name used in conjunction with his performance statistics.

The *Palmer* case also involved a table game and the unauthorized use of professional athletes’ names and facts relating to their professional careers. This table game featured the names of professional golfers, their pictures, and “profile sheets” that contained facts about the success of their careers much like statistical facts contained on fantasy sports games websites.⁶¹ The *Palmer* court held that the unauthorized use of the names and factual data in question was not “per se” illegal, but because the appropriation was used “for the purpose of capitalizing . . . in connection with a commercial project other than the dissemination of news or articles or biographies,” it violated the players’ protected rights.⁶² Thus, under *Palmer*, appropriation of a professional athlete’s name and performance statistics to obtain a commercial benefit for a purpose other than news reporting violates that athlete’s right of publicity.

Although the similarities of the table games in *Uhlaender* and *Palmer* to current fantasy sports games are substantial, two possible distinctions may undermine the importance of these cases as they relate to fantasy sports. First, the *Uhlaender* and *Palmer* cases may no longer be good law. Second, there may be an inherent difference between today’s fantasy sports and the *Uhlaender* and *Palmer* table games that prevents analogous treatment. The *C.B.C. Distribution* court elected to embrace the former distinction and held that both table games cases were wrongly decided in light of the Supreme Court’s analysis in the 1977 right of publicity case, *Zacchini v. Scripps-Howard Broadcasting, Co.*⁶³ This allowed the court to avoid

⁶⁰ *Id.* at 1282 (emphasis added).

⁶¹ *Palmer v. Schonhorn Enterprises, Inc.*, 232 A.2d 458, 459 (N.J. Super. Ct. Ch. Div. 1967).

⁶² *Id.* at 462.

⁶³ 433 U.S. 562, 578 (1977). See *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media*, 443 F. Supp. 2d 1077, 1087 n.12 (E.D. Mo. 2006) (“Like *Palmer*,

addressing the similarities between sports table games and fantasy sports.

1. Are the Table Games Cases Bad Law?

According to *C.B.C. Distribution*, the table games cases were no longer good law after *Zacchini*.⁶⁴ In *Zacchini*, the Supreme Court found that a television station violated a daredevil's right of publicity when the station broadcast his entire performance during a news segment without the daredevil's permission.⁶⁵ The Court also held that the daredevil's right of publicity was not trumped by the station's First Amendment rights because broadcasting the entire performance commercially threatened "the heart" of the daredevil's work.⁶⁶

It is the existence of this additional First Amendment analysis, as well as the Court's admission that "[t]here is no doubt that entertainment, as well as news, enjoys First Amendment protection,"⁶⁷ which seems to undermine *Palmer* and *Uhlaender*. Neither *Palmer* nor *Uhlaender* weighed the appropriation at issue against the appropriator's First Amendment rights. Moreover, the table games cases failed to ask whether the appropriation at issue threatened "the heart" of the professional athletes' work. Most important, the *Palmer* court claimed that the professional athletes should be able to control the use of their identities when such use is "in connection with a commercial project other than the dissemination of news or articles or biographies."⁶⁸ This contention, that all commercial use of identities for purposes other than news reporting violates a public personality's right of publicity, seems to be at odds with *Zacchini*'s proclamation that the First Amendment may preclude a right of publicity claim even if the expression at issue is entertainment, and not only some form of news.⁶⁹ Finally, *Palmer*

Uhlaender . . . is inconsistent with more recent case authority including the Supreme Court's decision in *Zacchini*.").

⁶⁴ See *C.B.C. Distribution*, 443 F. Supp. 2d at 1087.

⁶⁵ The daredevil's stunt involved shooting himself from a cannon. *Zacchini*, 433 U.S. at 578.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Palmer v. Schonhorn Enterprises, Inc.*, 232 A.2d 458, 462 (N.J. Super. Ct. Ch. Div. 1967).

⁶⁹ Although not expressly noted in *C.B.C. Distribution*, this distinction was likely a motivating factor behind the court's contention that "[m]ost significantly *Palmer* was decided in 1967 and is inconsistent with more recent case authority including the Supreme Court's decision in *Zacchini*." *C.B.C. Distribution*, 443 F. Supp. 2d at 1087.

involved not only the appropriation of athletes' names and performance statistics, but also their pictures.⁷⁰

But the fact that neither *Uhlaender* nor *Palmer* considered whether the table games' use of player names and performance records was speech protected by the First Amendment does not eliminate the fact that both courts found a prima facie case for right of publicity violations.⁷¹ This is something the *C.B.C. Distribution* court refused to recognize even before considering the fantasy sports provider's First Amendment rights. First Amendment protection is an affirmative defense to a right of publicity claim and should be addressed only *after* a plaintiff has demonstrated a prima facie case for a right of publicity analysis.⁷² Thus, regardless of whether additional First Amendment analysis would have changed the result of *Uhlaender* or *Palmer*, the *C.B.C. Distribution* court, at a minimum, could still have relied on the table games cases to analyze the prima facie elements for C.B.C.'s alleged right of publicity violation. This seems especially appropriate in light of the similarities between table games and fantasy sports games.

More important, it is possible to distinguish the facts of *Zacchini* from the facts of *Uhlaender* and *Palmer*. This distinction undermines the *C.B.C. Distribution* court's reasons for distinguishing both table games cases and buttresses the argument that *Uhlaender* and *Palmer* are still good law.⁷³

Zacchini should not control the sports table games cases because *Zacchini* and the table games cases exhibited different types of appropriation. There are two types of right of publicity cases—"identification value" cases and "performance value cases."⁷⁴ An "identification value" case involves the appropriation of a person's identity for its identification value, while a "performance value" case

⁷⁰ This distinction was actually specifically addressed by the court in *C.B.C. Distribution*. *See id.* ("[C]ases, including *Palmer*, which address unauthorized use of a famous person's picture are distinguishable from CBC's use of baseball players' names and playing records . . .").

⁷¹ According to the *C.B.C. Distribution* court, *Palmer* may not have been a prima facie case for a right of publicity violation because the *Palmer* court did not expressly consider whether the names, pictures, and performance statistics constituted the golfers' "identities." *See id.* at 1087 n.13. But this statement seems to be at odds with the *C.B.C. Distribution* court's prior reliance on *Palmer* to argue that fantasy sports games cannot invade an athlete's right of publicity because, unlike the use in *Palmer*, C.B.C. did not use player pictures. *See id.* at 1087.

⁷² *See* *Cardtoons v. Major League Baseball Players Ass'n*, 95 F.3d 959, 968-69 (10th Cir. 1996).

⁷³ This is especially true for *Uhlaender*, since the only justification the *C.B.C. Distribution* court provided for refusing to follow *Uhlaender* was that *Uhlaender* was inconsistent with *Zacchini*. *C.B.C. Distribution*, 443 F. Supp. 2d at 1087 n.12.

⁷⁴ J. Thomas McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 133 (1995).

involves the appropriation of a person's performance for its performance value.⁷⁵ Performance cases are very rare and often confuse academics and judges alike.⁷⁶ The distinction between a "performance value" right of publicity case and an "identification value" right of publicity case is crucial because it changes the appropriate legal analysis.

For example, *Zacchini* involved the appropriation of the daredevil's performance value. As evidence, the Supreme Court stated that the appropriation of the daredevil's entire stunt in *Zacchini* "pose[d] a substantial threat to the economic value of that performance" since "much of its economic value [was] in the 'right of exclusive control over the publicity given to his performance.'"⁷⁷ In "performance value" cases, it is appropriate to ask if the appropriation at issue "goes to the heart" of the performer's ability to earn a living as a performer.⁷⁸ But it does not follow that the same reasoning should apply to "identification value" cases, where no threat to the performer's livelihood as a performer is at issue, since no performance was appropriated. Instead, in an "identification value" case, the court should ask whether the appropriator's use of a person's identity draws attention to an advertisement or a product.⁷⁹ This distinction is consistent with the analysis set forth by the Missouri Supreme Court three years before *C.B.C. Distribution* in an "identification value" case, *Doe (Tony Twist) v. TCI Cablevision*.⁸⁰

In *Tony Twist*, a comic book artist admittedly based one of his characters on a professional hockey player notorious for his reputation as a tough-guy "enforcer." Although the comic book character shared no physical resemblance to the hockey player, the character shared the same name, Tony Twist, and a similar persona as a "tough-guy."⁸¹ Before reversing the lower court and ultimately holding that the hockey player had established a prima facie case for a right of publicity violation, the Missouri Supreme Court reasoned that "[a]t a minimum, respondents' statements and actions reveal their

⁷⁵ *Id.*

⁷⁶ According to right of publicity scholar J. Thomas McCarthy, performance value cases like *Zacchini* make up only two percent of the right of publicity cases and "many new comers to the area are misled into thinking that is all the right of publicity is about." *Id.* In the other ninety-eight percent of cases "the right of publicity is about . . . the use of some aspect of a person to help sell a product . . ." *Id.* The Missouri Supreme Court cited McCarthy several times in *Tony Twist*. See *Doe (Tony Twist) v. TCI Cablevision*, 110 S.W.3d 363, 369 (Mo. 2003).

⁷⁷ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575 (1977) (emphasis added).

⁷⁸ See *id.* at 576.

⁷⁹ 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:6 (2006).

⁸⁰ 110 S.W.3d 363.

⁸¹ *Id.* at 366.

intent to create the impression that *Twist* was somehow associated with the *Spawn* comic book, and this alone is sufficient to establish the commercial advantage element in a right of publicity action.”⁸² Hence, the court recognized that an issue central to the analysis for an “identification value” case was whether the use of a person’s identity merely draws attention to the disputed product. At no place in the *Tony Twist* opinion did the court mention *Zacchini*’s “heart of the work” analysis.⁸³ In short, because *Tony Twist* involved the appropriation of an “identity” and not the appropriation of a “performance,” the Missouri Supreme Court applied a different right of publicity analysis than *Zacchini*. Under *Tony Twist*, the “identification value” cases *Uhlaender* and *Palmer* are still good law since the use of professional athletes’ names and performance statistics drew attention to the table games. Therefore, the table games cases were wrongly distinguished in *C.B.C. Distribution*, and the court should have addressed the similarities between sports table games and fantasy sports games.

2. Are Fantasy Games Similar to Table Games?

The above reasoning admittedly assumes that fantasy sports games are too similar to sports table games to be differentiated in a right of publicity analysis for the reasons set forth in Part III.A. But the products do have one key difference. Table game participants use past professional athlete performance statistics as a baseline to create a game of probability going forward. The actual play of the game has nothing to do with how well professional athletes are currently performing. It is purely a game of statistical probability where, for example, a professional athlete who historically has hit a lot of homeruns has a high probability of doing so while playing the table game. Fantasy games, in contrast, track actual professional athletes’ performance statistics sometimes up to the minute. Hence, the fantasy sports game results are, in a sense, “real.”

Although this distinction may prove important in First Amendment analysis,⁸⁴ it should have little impact on the initial prima facie right

⁸² *Id.* at 371.

⁸³ Instead, the court cited *Zacchini* for the proposition that “[n]o social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.” *Id.* at 372 (quoting *Zacchini*, 433 U.S. at 576). In light of the history of license agreements between MLB and C.B.C., this language seems especially pertinent.

⁸⁴ For example, because fantasy sports games track and, in effect, disseminate widely available factual information to the public, they appear at first glance to compare favorably to a news reporting service such as a magazine or newspaper. See discussion *infra* Part III.C.

of publicity analysis. In both sports table games and fantasy sports games, appropriators, without consent, use athletes' names and performance statistics to draw attention to a game sold for a commercial benefit to the consuming public. It seems irrelevant, at least from a prima facie right of publicity standpoint, whether the game played is "real" or "imaginary." In both circumstances the same identifying characteristics are still being appropriated to create a commercial benefit not shared with the owner of those identifying characteristics. Therefore, the table games cases were wrongly distinguished in *C.B.C. Distribution* and the court should have addressed the similarities between sports table games and fantasy sports games.

B. C.B.C. Distribution's Prima Facie Analysis

1. The Commercial Advantage Analysis

Throughout the commercial advantage analysis, the *C.B.C. Distribution* court correctly recognized two important legal principles that the Missouri Supreme Court set forth in *Tony Twist*: (1) "[e]vidence which shows that a defendant *intended to create an impression that a plaintiff is associated with the defendant's product* 'alone is sufficient to establish the commercial advantage element in a right of publicity action,'"⁸⁵ and (2) "using a plaintiff's name 'to attract attention to [a] product' is evidence supporting a conclusion that a defendant sought to obtain a commercial advantage."⁸⁶ Regardless of whether the players' could satisfy the other prima facie elements for their right of publicity claim, the commercial advantage element seemed fairly straightforward. Without the use of players' names and performance statistics, fantasy sports game providers could likely attract very little attention to their commercial product. In addition, fantasy sports providers were clearly using the players' names and performance statistics to obtain a commercial benefit.

Interestingly, the court decided to only narrowly apply the *Tony Twist* principles and held that the commercial advantage element was not satisfied because the appropriation at issue in *C.B.C. Distribution* was not intended to create the impression that MLB players were associated with the fantasy sports games.⁸⁷ To buttress this argument, the court compared C.B.C.'s use of player names and performance

⁸⁵ *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media*, 443 F. Supp. 2d 1077, 1085 (E.D. Mo. 2006) (quoting *Tony Twist*, 110 S.W.3d at 371).

⁸⁶ *Id.* (quoting *Tony Twist*, 110 S.W.3d at 372).

⁸⁷ *Id.* at 1087-88.

records with one specific type of commercial purpose—advertising. The court cited several cases involving advertising where the commercial advantage element of a right of publicity was established.⁸⁸ Because C.B.C.’s appropriation was not analogous to these cases—specifically, because the consuming public was unlikely to believe that the fantasy sports provider was using player names or performance statistics to *advertise* a product—in the court’s opinion, there was no adequate showing of the commercial advantage element.⁸⁹

The *C.B.C. Distribution* court’s reliance on advertising cases was short-sighted since it limited the scope of its analysis only to cases that featured one particularly obvious type of right of publicity violations. According to J. Thomas McCarthy, a leading right of publicity scholar repeatedly quoted by the Missouri Supreme Court in *Tony Twist*, “the right of publicity is not merely a form of false advertising or false endorsement” and “proof of falsity, deception or confusion is not required for infringement of the right of publicity.”⁹⁰ In fact, merely using a person’s identity to draw attention to an advertisement or a product may be an infringement.⁹¹ Contrary to the court’s reasoning, showing that the public was not likely to believe the players were advertising the fantasy sports game does not complete the required analysis. The court should also consider whether the players’ identities were used primarily to draw attention to the product.⁹² Although the court recognized that “using a plaintiff’s name ‘to attract attention to [a] product’ is evidence supporting a conclusion that a defendant sought to obtain a commercial advantage,” the court surprisingly refused to admit that there was any evidence that the players’ names and performance statistics drew attention to a fantasy sports game.⁹³ This refusal seems rather peculiar since, in the case of a fantasy sports game, it appears that players’ identities not only draw attention to the product, they *are*

⁸⁸ For example, the *C.B.C. Distribution* court cited *Henley v. Dillard Department Stores*, 46 F. Supp. 2d 587 (N.D. Tex. 1999), which involved a plaintiff that admittedly used the defendant’s name without permission to make his advertisement “more interesting,” and *Abdul-Jabbar v. General Motors*, 85 F.3d 407 (9th Cir. 1996), which involved the unauthorized use of professional basketball legend Kareem Abdul-Jabbar’s name in a televised car commercial. *C.B.C. Distribution*, 443 F. Supp. 2d at 1086.

⁸⁹ *C.B.C. Distribution*, 443 F. Supp. 2d at 1087 (“CBC’s use of players’ names in no way creates an impression that players’ endorse CBC’s fantasy games.”).

⁹⁰ MCCARTHY, *supra* note 79 (referring to RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995) (“Proof of deception or consumer confusion is not required for the imposition of liability under this Section.”)).

⁹¹ *Tony Twist*, 110 S.W.3d at 371–72; MCCARTHY, *supra* note 79.

⁹² *Tony Twist*, 110 S.W.3d at 371–72; MCCARTHY, *supra* note 79.

⁹³ *C.B.C. Distribution*, 443 F. Supp. 2d at 1085 (citing *Tony Twist*, 110 S.W.3d at 372).

the product. Quite simply, without player names and performance statistics, there would be no fantasy sports game. Because the *C.B.C. Distribution* court too narrowly interpreted the *Tony Twist* analysis and relied too heavily on advertising cases, it failed to follow the Missouri principles that should apply to the commercial advantage element in a right of publicity claim. Regardless of whether the MLB players satisfied the prima facie elements, the court should have held that fantasy sports providers use players' names and performance statistics to obtain a commercial advantage.

It is worth noting that if C.B.C. had demonstrated that its alleged appropriation of MLB player names and performance statistics to obtain a commercial advantage was merely "incidental," then the court would have been correct in holding that the commercial advantage element was not satisfied. The *C.B.C. Distribution* court does attempt to at least suggest that C.B.C.'s use of player names and performance statistics was "incidental" by summarizing in a footnote several cases supporting the legal proposition that the "[u]se of a plaintiff's name . . . must be more than 'incidental' to violate the right of publicity."⁹⁴ But any attempt to portray C.B.C.'s use as "incidental" fails because the court never expressly applied this argument to the facts of the case.

Moreover, the cases cited in the footnote are factually inconsistent with *C.B.C. Distribution* because they demonstrate much clearer cases of incidental use. For example, in one cited case, "incidental use" was found where a scene in a movie briefly showed a factory building with a sign bearing the name and business of the plaintiff.⁹⁵ In another, the referenced court found "incidental use" where the defendant sold underwear and pajamas patterned with various articles, including a newspaper clipping that featured part of an article reporting on the plaintiff's loss of a tennis match.⁹⁶ Unlike the use at issue in *C.B.C. Distribution*, the uses in these cases were never central to the product sold. In the case of fantasy sports games, the players' names and performance statistics are not only central to the product sold, they *are* the product sold. Because of this difference, there is little comparison to be drawn between the uses exhibited in the cited cases and the appropriation at issue in *C.B.C. Distribution*. Consequently, it seems unlikely that C.B.C.'s use of MLB players' names and performance statistics could escape the commercial advantage element by being characterized merely as "incidental use."

⁹⁴ *Id.* at n.9.

⁹⁵ *Id.* (citing *Merle v. Sociological Research Film Corp.*, 152 N.Y.S. 829 (N.Y. App. Div. 1915)).

⁹⁶ *Id.* (citing *Molgen v. Varsity Pajamas, Inc.*, 213 N.Y.S.2d 999 (N.Y. App. Div. 1962)).

2. The Identity Analysis

The *C.B.C. Distribution* court correctly reasoned that to establish a prima facie case for a right of publicity violation, the identifying characteristics appropriated must constitute the “identity” of the public personality.⁹⁷ To frame its analysis, the court noted that in *Tony Twist*, the Missouri Supreme Court found a right of publicity violation only after “the evidence supported a finding that [the defendants] used Twist’s *name and identity*.”⁹⁸ This language prompted the *C.B.C. Distribution* court to conclude that a person’s name alone is not necessarily his identity.⁹⁹ The pertinent question then before the court was whether the fantasy sports provider’s use of players’ names alone or in conjunction with performance statistics constituted the players’ identity.

Considering the elusiveness and inherent ambiguity of the term “identity,” the court’s answer to this question was surprisingly short and unsatisfying. According to the court, because C.B.C.’s use of a baseball player’s name and performance statistics did not involve a player’s character, personality, reputation, or physical appearance, the identifying characteristics could not symbolize the persona or identity of any player.¹⁰⁰ The court supported this argument only by stating, “[the use] simply involves historical facts about the baseball players such as their batting averages, home runs, double, triples, etc.”¹⁰¹ Although true, this dismissive and rather underwhelming justification has little in common with the Missouri Supreme Court’s “identity” analysis in *Tony Twist*.

Specifically, under *Tony Twist*, to establish whether the player’s identifying characteristics used by an appropriator constitute a symbol of his identity, “the name . . . must be understood by the audience as referring to the [player].”¹⁰² The *C.B.C. Distribution* court failed to acknowledge that the player names C.B.C. used were likely understood by the target audience as referring to the player. This was particularly unusual in light of C.B.C.’s practice of marketing to sports fans, precisely the market most likely to identify the players. In

⁹⁷ *Id.* at 1089.

⁹⁸ *Id.* at 1088 (quoting *Tony Twist*, 110 S.W.3d at 375).

⁹⁹ *Id.* at 1089 (“Rather, a name must be used as a *symbol of the plaintiff’s identity* in a right of publicity action.”).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* This brief, dismissive response to arguably the most important legal issue of the case may be the greatest indicator of how little the *C.B.C. Distribution* court understood the intricacies and true purpose of the fantasy sport.

¹⁰² *Tony Twist*, 110 S.W.3d at 370 (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (1995)).

Tony Twist, the fact that the comic book was marketed to hockey fans was an important factor in the identity element analysis because this was the group most likely to recognize the comic book character.¹⁰³

Also, under *Tony Twist*, a court should consider the nature and extent of the identifying characteristics used, the appropriator's intent, the fame of the plaintiff, and evidence of actual third-party identifications.¹⁰⁴ The *C.B.C. Distribution* court neglected to expressly weigh any of these factors. Admittedly, the court had already validated C.B.C.'s intent in the commercial advantage analysis.¹⁰⁵ But the fame of the MLB players and the understanding by third parties that the players' names and performance statistics referred to the players is indisputable. At a minimum, the *C.B.C. Distribution* court neglected to weigh all relevant factors as set forth by Missouri's Supreme Court in *Tony Twist* to establish whether the identifying characteristics employed by fantasy sports constituted the MLB players' identities. Regardless of the court's ultimate decision, this additional analysis would have at least forced the court to offer a more substantiated and satisfying analysis for an extremely important portion of the prima facie right of publicity analysis.¹⁰⁶ Instead, the *C.B.C. Distribution* court misapplied the appropriate legal analysis.

C. C.B.C. Distribution's First Amendment Analysis

Even if a party can show a prima facie case supporting a right of publicity violation, the common law or statutory right may be trumped by the appropriator's constitutional guarantees to free speech.¹⁰⁷ Interestingly, in *C.B.C. Distribution*, the court found no prima facie showing for a right of publicity claim, but still addressed the fantasy sports provider's First Amendment affirmative defense.¹⁰⁸ The court held that even if the fantasy sports provider had infringed

¹⁰³ See *id.* at 371.

¹⁰⁴ *Id.* at 370.

¹⁰⁵ See *supra* Part III.B.1.

¹⁰⁶ Had the *C.B.C. Distribution* court not previously distinguished *Uhlaender*, the court would likely have been forced to address *Uhlaender*'s holding that professional athletes' names used in conjunction with their performance statistics did constitute their "identities." See *supra* Part III.A.

¹⁰⁷ See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. b (1995) ("In some circumstances, however, the informational content of the particular merchandise or its utility to purchasers as a means of expression may justify the conclusion that the use is protected under the first amendment.")

¹⁰⁸ According to the *C.B.C. Distribution* court, "[o]nly if that right [of publicity] is violated need the court consider . . . whether the First Amendment trumps the right of publicity." *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media*, 443 F. Supp. 2d 1077, 1084 (E.D. Mo. 2006). Since the right of publicity was not violated in *C.B.C. Distribution*, the First Amendment analysis appears to be dicta.

on the professional athletes' state right of publicity, the fantasy sports game was "speech" protected by the First Amendment.¹⁰⁹

To arrive at this conclusion, the court first correctly reasoned that a website could involve protected speech because "[s]peech which does not use 'a traditional medium of expression' does not receive less protection [than] more traditional means of speech."¹¹⁰ Thus, an internet medium deserves no less protection than other less-traditional, but protected, means of expression such as flag-burning, nude dancing, and wearing a jacket with obscenities.¹¹¹ The court then justified why baseball performance statistics could be considered speech. For this analysis, the court relied heavily on *Cardtoons v. Major League Baseball Players Association*¹¹² and *Gionfriddo v. Major League Baseball*¹¹³ to reason that because players' performance statistics were "historical facts," the information deserved First Amendment protection because it "educate[d] the public about baseball."¹¹⁴ The court's reliance on these two cases presents two problems. First, *Cardtoons* involved a very special case for First Amendment protection because the use at issue was a parody. And second, because of the factual differences between the appropriation in *Gionfriddo* and the use at issue in *C.B.C. Distribution*, the *C.B.C. Distribution* court's reliance on *Gionfriddo* evidenced a clear misunderstanding of the intricacies and true purpose of fantasy sports games.

1. *The Cardtoons Parody*

The *C.B.C. Distribution* court relied on *Cardtoons* to determine that baseball statistics used by a fantasy sports provider are entitled to First Amendment protection. Because *Cardtoons* involved parody, its First Amendment analysis should carry little weight when applied to fantasy sports. In *Cardtoons*, a baseball card company created baseball-card-sized caricatures of current and past professional baseball players.¹¹⁵ The cards featured humorous manipulations of professional athletes' names and cartoon likenesses. For example, two cards poked fun at baseball greats Barry Bonds and Rickey

¹⁰⁹ *Id.* at 1100.

¹¹⁰ *Id.* at 1092 (quoting *Cardtoons v. Major League Baseball Players Ass'n*, 95 F.3d 959, 969 (10th Cir. 1996)).

¹¹¹ *Id.* at 1092.

¹¹² 95 F.3d 959.

¹¹³ 114 Cal. Rptr. 2d 307, 313 (Cal. Ct. App. 2001).

¹¹⁴ *C.B.C. Distribution*, 443 F. Supp. 2d at 1093.

¹¹⁵ *Cardtoons*, 95 F.3d 959.

Henderson by referring to them as “Treasury” Bonds and “Egotisticky Henderson.”¹¹⁶ The importance of the parody involved in the cards was not lost on the *Cardtoons* court.¹¹⁷ Parody is a highly valuable social commentary that dates to Greek antiquity.¹¹⁸ Moreover, caricatures have “played a prominent role in public and political debate throughout our nation’s history.”¹¹⁹ Fantasy sports games do not involve parody and, consequently, the *C.B.C. Distribution* court should not have relied on *Cardtoons*. The facts of *Cardtoons*, although admittedly concerning professional sports athletes, are distinguishable in light of the special nature of parodies.

2. Comparing *Gionfriddo* to *C.B.C. Distribution*

More important, the *C.B.C. Distribution* court’s reliance on *Gionfriddo* was problematic because it emphasized the court’s serious misunderstanding of the intricacies and true purpose of fantasy sports games. In *Gionfriddo*, retired professional baseball players sued Major League Baseball because MLB included the players’ names, photographs, and performance statistics in World Series game programs, baseball video documentaries, and MLB website pages.¹²⁰ The *Gionfriddo* court held that the use was protected by the First Amendment. Interestingly, the *Gionfriddo* opinion never actually analyzed whether baseball statistics were “speech.” Instead the *Gionfriddo* court seemed to presume that this was the case, most likely because of the medium in which the statistics were used:

It is manifest that as news occurs, or as a baseball season unfolds, the First Amendment will protect mere recitations of the players’ accomplishments. “The freedom of the press is constitutionally guaranteed, and the publication of daily news is an acceptable and necessary function in the life of the community.”¹²¹

¹¹⁶ *Id.* at 962–63.

¹¹⁷ Nor was the irony of the players’ counterclaim for profits from card sales. *Id.* at 963 (“The irony of MLBPA’s counterclaim for profits from the cards is not lost on this panel.”). For the Missouri Supreme Court’s understanding of the uniqueness of parody, see *Doe (Tony Twist) v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003) (noting that because a metaphorical reference to the plaintiff in a comic book was not a parody, it had very little literary value compared to its commercial value).

¹¹⁸ *Cardtoons*, 95 F.3d at 969.

¹¹⁹ *Id.*

¹²⁰ *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 310–11 (Cal. Ct. App. 2001).

¹²¹ *Id.* at 314 (quoting *Carlisle v. Fawcett Publ’ns, Inc.*, 20 Cal. Rptr. 405, 413 (Cal. Ct. App. 1962)).

The *Gionfriddo* court's reasoning was sound. Surely, the reproduction of players' accomplishments by a member of the press in game programs, documentaries, and on general information websites are mere recitations of the players' accomplishments for the purpose of news reporting. Admittedly, any appropriation by news reporters is worthy of heightened constitutional protection.¹²² But it does not follow that the situation with fantasy sports is analogous mainly because the purpose of fantasy sports games is not to report the news. Although a fantasy sports game does disseminate recitations of players' accomplishments, this result seems incidental to the game's central purpose—to use the players' names and accomplishments to sell a competitive and entertaining gaming product to the consuming public. This distinction is crucial, especially in Missouri after *Tony Twist*. Under the “predominant purpose” test adopted in *Tony Twist*, courts should decide whether a product predominantly exploits the commercial value of the identity.¹²³ If such a finding is made, the court should still hold that the appropriator violated the right of publicity *even* if the appropriator's use exhibits some “expressive” content that might qualify as “speech” in other circumstances.¹²⁴ A fantasy sports game seems more like the strategic board games in *Uhlaender* and *Palmer* than the informational programs, documentaries, and website pages in *Gionfriddo*. Like a table game, a fantasy sports game uses some “expressive” content that could qualify as “speech,” but not for the purpose of disseminating news. Instead, the content is used merely as a familiar medium to market a commercial product. Because the *C.B.C. Distribution* court failed to make this distinction, it misunderstood the intricacies and true purpose of fantasy sports games.

This distinction between using well-publicized factual or biographical information primarily to obtain a commercial advantage and using that information to disseminate news is certainly not an easy one to make. Nevertheless, courts have addressed the distinction before. One case on point, *Rosemont Enterprises v. Urban Systems*,¹²⁵ was actually cited in *C.B.C. Distribution*.¹²⁶

¹²² See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (1995) (“[T]he use of a person's name or likeness in news reporting, whether in newspapers, magazines, or broadcast news, does not infringe the right of publicity.”).

¹²³ *Doe (Tony Twist) v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003).

¹²⁴ *Id.*

¹²⁵ 340 N.Y.S.2d 144 (N.Y. Sup. Ct. 1973).

¹²⁶ *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media*, 443 F. Supp. 2d 1077, 1088 (E.D. Mo. 2006) (“The right of publicity has developed to protect the commercial interest of celebrities in their *identities*.”) (quoting *Rosemont Enterprises*, 340 N.Y.S.2d at 146).

In *Rosemont Enterprises*, Howard Hughes, a famous aviator, industrialist, and film producer, sued the manufacturer and marketer of an adult educational career game entitled "The Howard Hughes Game."¹²⁷ The game, created and sold without Hughes's consent, contained Hughes's name and well-publicized biographical facts detailing his exploits and professional achievements.¹²⁸ In weighing the importance of news reporting and the public interest in free dissemination of information, the court correctly acknowledged the difficulty of drawing "the line between the right of the public to 'know' and an act of appropriation."¹²⁹ However, because the well-publicized factual information was "merely the medium used to market a commodity familiar to us all," the court held the game-maker's creation and marketing of the "commercial product" was indeed an act of appropriation.¹³⁰

A similar argument extends to fantasy sports games. Fantasy sports providers use well-publicized factual information about professional athletes to create a commercial product that is familiar to their target market. Although, ultimately, fantasy sport participants receive well-publicized factual information, fantasy game providers are not disseminating news for the purpose of educating the public, like the maker of a World Series game program, video documentary, or purely informational website. Instead, they are using player names and performance statistics simply as a medium to market a commodity. Unfortunately, the *C.B.C. Distribution* court's holding that C.B.C. deserved the same First Amendment protection as the defendants in *Gionfriddo* failed to make any distinction between the underlying purposes for disseminating news. The absence of any acknowledgement of this distinction evidenced the court's serious misunderstanding of the true purpose and intricacies of fantasy sports.

It should be noted that the fact that a table game or a fantasy sports game is a commercial product that "entertains" does not preclude First Amendment protection. The United States Supreme Court admitted this in *Zacchini*,¹³¹ and the Missouri Supreme Court acknowledged the same in *Tony Twist*.¹³² But when the *C.B.C. Distribution* court compared the player names and performance

¹²⁷ *Rosemont Enterprises*, 340 N.Y.S.2d at 145.

¹²⁸ *Id.* at 145-46.

¹²⁹ *Id.* at 146.

¹³⁰ *Id.* at 146-47.

¹³¹ See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578 (1977).

¹³² See *Doe (Tony Twist) v. TCI Cablevision*, 110 S.W.3d 363, 373 (Mo. 2003) ("[T]he use of a person's identity in news, entertainment, and creative works for the purpose of communicating information or expressive ideas about that person is protected 'expressive' speech.").

statistics in fantasy baseball to those used in baseball programs and video documentaries, the court misunderstood the intricacies and purpose of a fantasy sports game. Again, unlike a game program or video documentary, the purpose of a fantasy sports game is not to communicate information to the public. Rather, the purpose is to produce a commercially viable product that benefits the fantasy game provider. The *Rosemont Industries* court understood this distinction. The *C.B.C. Distribution* court did not.

IV. SUMMARY AND CONCLUSION

The *C.B.C. Distribution* court failed in several respects. Not only did the court generally misapply the appropriate prima facie legal analysis to the right of publicity claim, the court simply did not understand the intricacies and true purpose of fantasy sports games. This was most strongly evidenced by the court's reliance on *Gionfriddo* during its First Amendment analysis. Unlike a game program, video documentary, or a general information website, the primary purpose of a fantasy sports game is not to communicate well-publicized information to the public. Instead, the purpose of a fantasy sports game is to produce a commercially viable, interactive product that financially benefits the fantasy game provider, not the athletes, by using well-publicized factual information as a medium. This purpose makes fantasy sports games similar to sports table games, which were held to violate professional athletes' right of publicity over thirty years ago. Because the *C.B.C. Distribution* court wrongfully distinguished the table games cases, the court never addressed these similarities. In light of these mistakes, although fantasy sports providers won their first legal battle with the professional sports leagues, the war to allocate the massive profits in the multimillion-dollar fantasy sports industry has likely just begun.

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