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Is Fantasy Baseball Free Speech? Refining the Balance Between the Right of Publicity and the First Amendment

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IS FANTASY BASEBALL FREE SPEECH? REFINING THE BALANCE BETWEEN THE RIGHT OF PUBLICITY AND THE FIRST AMENDMENT

"MLB Would Like You to Stop Enjoying [Its] Product So Much."[1]

I. INTRODUCTION

Never one to shy away from a public relations "challenge," Major League Baseball (MLB) has been hyper-aggressive in seeking royalties from other businesses that use anything MLB-related.[2] Fantasy baseball, a game based on the day-to-day statistics of professional ballplayers, has been no exception.[3] When the internet enabled fantasy leagues to become commercially viable in the mid-90s,[4] MLB began to seek and obtain licensing agreements from fantasy baseball providers.[5] The providers paid MLB a share of their profits in exchange for permission to use players' names and daily statistics.[6]

But there is an interesting legal issue lurking here: Does the law require a fantasy provider to purchase a license from MLB? Fantasy baseball is yet another example of new technologies stretching old laws. On the one hand, fantasy sports are a lot like newspaper sports statistics sections, which can be printed royalty-free because they en-

1. Will Leitch, *MLB Would Like You to Stop Enjoying Their Product So Much*, DEADSPIN, Aug. 10, 2006, http://deadspin.com/sports/baseball/mlb-would-like-you-to-stop-enjoying-their-product-so-much-193396.php.

2. *See* Ebenezer Samuel & Ian Begley, *The Score Hears. . .Wright Has Eyes for Johan*, N.Y. DAILY NEWS, Jan. 13, 2008, at 81.

3. Although most readers will already be sufficiently familiar with fantasy baseball, a brief explanation is offered here. Individuals join a league, usually on the internet, where they compete against one another via imaginary piecemeal teams that are created from real Major League Baseball players. Prior to the beginning of the season, a draft is held where each participant takes turns selecting an assortment of players for his own team. As the season then unfolds, the accomplishments of each baseball player generate points for the fantasy participant who has that player on his team. Points are calculated based on the player's game statistics. All players may be traded or cut, so that an individual selects and changes his team based on who he believes will perform the best. At the end of the season, the points are tallied, and a winner emerges.

4. The game's popularity has since exploded. Today, there are over 15 million people spending about $1.5 billion every year in fantasy sports. Alan Schwarz, *Baseball Is a Game of Numbers , But Whose Numbers Are They?*, N.Y. TIMES, May 16, 2006, at A1.

5. *See, e.g.*, C.B.C. Distrib. and Mktg., Inc., v. Major League Baseball Advanced Media, L.P., 505 F.3d 818 (8th Cir. 2007). The fantasy provider in this case first obtained a license in 1995.

6. *See id.*

joy full First Amendment protection.[7] On the other hand, fantasy sports are also a lot like MLB-based electronic video games, which can be sold only if the video game makers purchase licenses for the players' collective "right of publicity."[8]

A right of publicity is defined as the inherent right of every person to control the commercial use of his identity.[9] It is a state-created law in the nature of an intellectual property right.[10] The classic violation is the case of a business unfairly using a celebrity's name or image to enhance a product's marketability.[11] For example, Gatorade bottles would not be able to lawfully display a picture of LeBron James without his permission. Similarly, a business selling a cruise marketed under the name "Tom's Cruise" would be liable to the actor.[12]

These examples illustrate only the most common violations—misleading advertisements or false endorsements. But the scope is not necessarily so limited. The wording of most states' right of publicity laws is considerably broader, seemingly prohibiting any use of another person's identity for one's own commercial gain.[13] The Restatement of Unfair Competition chose this language: "One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability. . . ."[14] A creative lawyer could suit a variety of factual circumstances to this law.

Fantasy baseball, for example, seems to fit the literal mold, albeit perhaps not quite as neatly as a false endorsement. Still, fantasy baseball "appropriates" the "commercial value" of a "person's identity," and it is done "without consent." All of the elements are present, constituting a prime facie showing.[15] Nonetheless, the saving grace of the fantasy baseball industry lies in its continual dissemination of sta-

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7. Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307, 314 (Cal. Ct. App. 2001) ("It is manifest that as news occurs, or as a baseball season unfolds, the First Amendment will protect mere recitations of the players' accomplishments.").

8. 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, 570 (2007).

9. J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2007).

10. *Id.*

11. *See id.* § 7:7.

12. A similar situation arose in *Henley v. Dillard Dep't Stores*, 46 F. Supp. 2d 587 (N.D. Tex. 1999) (holding a department store liable for advertising a shirt displaying the phrase, "This is Don's henley").

13. Currently, the right of publicity is recognized as the law, either by statute or by common law, in twenty-eight states. MCCARTHY, *supra* note 9, § 6:3.

14. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995) [hereinafter RESTATEMENT].

15. Admittedly, not everyone would agree that all elements of the claim are so easily met. *See infra* notes 134-35 and accompanying text.

tistics, which arguably offers the same free speech protection given to traditional media. After all, the First Amendment is critical in limiting the broad language of right of publicity laws. Without it, there could be liability even for legitimate parodies and social commentaries, news reporting and entertainment, and works of fiction and nonfiction.[16] Free speech principles keep right of publicity laws appropriately confined. Exactly where the balance should be struck, which is a common point of disagreement,[17] is the heart of this dispute.

With the recent popularity boom of fantasy sports, this issue became economically significant. And economic significance tends to breed litigation. In 2005, a fantasy baseball provider initiated a federal declaratory judgment action in the Eastern District of Missouri, seeking a ruling that it was under no obligation to obtain permission from MLB[18] for usage of the players' names and statistics.[19] In *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*,[20] the district court ruled in favor of the fantasy provider.[21] On appeal, the Eighth Circuit affirmed, holding that the First Amendment shields fantasy baseball providers from any right of publicity claims.[22]

Although the various state right of publicity laws comprise what Professor McCarthy has called a "crazy quilt of different responses at different times to different demands on the legislatures,"[23] their dis-

16. This list is loosely borrowed from RESTATEMENT, *supra* note 14, § 47 cmt. c. The Restatement mentions three areas in particular that should receive First Amendment protection: news, entertainment, and creative works. *Id.* Also, "the 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." *Id.*

17. *See, e.g.*, Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977); ETW Corp. v. Jireh Publ'g, Inc. 332 F.3d 915 (6th Cir. 2003); Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959 (10th Cir. 1996); Comedy III Prod., Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387 (2001); Gionfriddo v. Major League Baseball, 94 Cal. App. 4th 400 (Cal. Ct. App. 2001).

18. Although it is an oversimplification, this paper will often refer to MLB, MLB Advanced Media, and the players collectively as "MLB." However, the particular relation among them is as follows: The players assigned their rights of publicity in interactive media (which includes fantasy baseball) to the MLB Players' Association. The Players' Association then licensed those rights to MLB Advanced Media, which is a corporate sub-arm of MLB that handles interactive media and internet operations. Thus, MLB Advanced Media held the rights at the time, and was the defendant in the suit. *See* C.B.C. Distrib. and Mktg., Inc., v. Major League Baseball Advanced Media, L.P., 505 F.3d 818 (8th Cir. 2007).

19. *Id.* at 821.

20. C.B.C. Distrib. and Mktg., Inc., v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077 (E.D. Mo. 2006), *aff'd*, 505 F.3d 818 (8th Cir. 2007).

21. *C.B.C.*, 443 F. Supp. 2d at 1107.

22. *C.B.C.*, 505 F.3d at 820.

23. MCCARTHY, *supra* note 9, § 6:6.

tinctions are relatively minor, and their commonalities are sufficient to allow for a singular study of how fantasy sports should be treated in the majority of states.[24] Moreover, the Missouri common law right of publicity claim used in the *CBC* suit, which looks to the Restatement of Unfair Competition as legal authority,[25] is adequately representative of most states. Thus, the discussion that follows is intended to be universally applicable. In this paper, I will first argue that providers of fantasy sports should not be permitted to operate with immunity under the First Amendment.[26] I will then take a specific and critical look at the recent *CBC* decision,[27] which will be used primarily as a vehicle to address some of the more common arguments offered by those siding with the fantasy providers.

II. RIGHT OF PUBLICITY VERSUS RIGHT TO FREE SPEECH

The right of publicity and the First Amendment frequently encroach on one another, and it is not immediately clear how the tension should be resolved.[28] This is not a new problem; however, and courts in the past have developed a variety of frameworks to harmonize the competing rights.[29] In order to properly frame the issue, it is important initially to carefully define the legal test that should be used.

A. The United States Supreme Court Speaks

While the U.S. Supreme Court's First Amendment jurisprudence is vast, there has only been one decision addressing free speech's interplay with publicity rights: *Zacchini v. Scripps-Howard Broadcasting Co.*[30] While the facts of that case are readily distinguishable from fantasy sports, some general principles set out by the Court are helpful. In *Zacchini*, the Court held that when a television news program broadcast the entire fifteen second act of a performer's "human can-

24. The differences among the laws are chiefly centered on whether "photograph" and "voice" are explicitly mentioned along with "name" and "likeness," whether the rights are descendible, how long they should last after death, the nature of remedies, and whether there are specific built-in free speech protections. A chart outlining these differences can be found at MCCARTHY, *supra* note 9, § 6:8. None of these differences would have a significant impact on the *CBC* case.

25. *C.B.C.*, 505 F.3d at 822.

26. *See infra* Part II.

27. *See infra* Part III.

28. *See* MCCARTHY, *supra* note 9, § 8:23 ("It is important to remember that even if the accused communication is classified, not as 'commercial speech,' but as full-fledged communicative speech, the First Amendment does not automatically and of its own weight crush any and all assertions of the right of publicity.").

29. *See infra* Part II.B-C.

30. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977).

nonball" routine, the TV station had violated the man's right of publicity.[31] The Court rejected the TV station's argument that the broadcast was part of a news program, therefore, it was protected by free speech.[32] The Court was especially persuaded by the fact that the news program aired the entirety of the performer's act, an entertainment spectacle for which he was ordinarily paid.[33] Justice White wrote, "Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent."[34] Obviously, baseball players cannot claim that fantasy sports appropriate their "entire act" like the television station did to the human cannonball. Nonetheless, the *Zacchini* opinion suggests that free speech rights should be restricted in the face of a countervailing right of publicity.

B. Relevant Case Law

1. The Cardtoons *case*

Recent case law is more on point with respect to the relevant First Amendment issues. In *Cardtoons, L.C. v. Major League Baseball Players Ass'n*,[35] the Major League Baseball Players' Association claimed its publicity rights were being violated by Cardtoons' set of parody trading cards featuring caricatures of MLB players.[36] The cards poked fun at things such as the players' names, physical characteristics, and onfield behavior.[37] For example, a card portraying Ricky Henderson, a player notorious for basking in self involvement, read:

> Egotisticky Henderson, accepting the 'Me-Me Award' from himself at the annual 'Egotisticky Henderson Fan Club' banquet, sponsored by Egotisticky Henderson: 'I would just like to thank myself for all I have done. (Pause for cheers.) I am the greatest of all time. (Raise arms triumphantly.) I love myself. (Pause for more cheers.) I am honored to know me. (Pause for louder cheers.) I wish there were two of me so I could spend more time with myself. (Wipe tears from eyes.) I couldn't have done it without me. (Remove cap and hold it

31. *Id.* at 578-79.

32. *Id.* at 569.

33. *Id.* at 574-75.

34. *Id.*

35. Cardtoons, L.C. v. Major League Baseball Players Ass'n , 95 F.3d 959 (10th Cir. 1996).

36. *Id.* at 962.

37. *Id.* at 963.

> aloft.) It's friends like me that keep me going. (Wave to crowd and acknowledge standing ovation.)[38]

Each card also printed this disclaimer: "Cardtoons baseball is a parody and is NOT licensed by Major League Baseball Properties or Major League Baseball Players Association."[39]

The court recognized an important need to balance publicity rights with free speech rights, and it created the following legal test: "This case instead requires us to directly balance the magnitude of the speech restriction against the asserted governmental interest in protecting the intellectual property right."[40] This paper will refer to this as the "balance of interests" test. Applying this test to the parody trading cards, the court held that free speech interests were more significant than the right of publicity interests.[41] In a thorough and lengthy analysis, the court reasoned that while parody implicates "some of the core concerns of the First Amendment,"[42] the policies of enforcing publicity rights for baseball players are weak.[43] The court stated that protectible rights in names on trading cards would not provide any incentive for the players to perform better.[44] The court also rejected the players' inherent commercial interests in parody, stating that "there is little right to enjoy the fruits of socially undesirable behavior."[45] According to the court, there was no free riding on the players' fame, because the card manufacturer "is not merely hitching its wagon to a star. As in all celebrity parodies, Cardtoons added a significant creative component of its own to the celebrity identity and created an entirely new product."[46]

2. *The* Gionfriddo *case*

In *Gionfriddo v. Major League Baseball*,[47] a state appellate court in California addressed a claim, filed initially as a putative class action on behalf of retired baseball players against MLB. The suit alleged that

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38. *Id.* Other examples were "Chili Dog Davis" who "plays the game with relish," a parody of designated hitter Chili Davis; "Cloud Johnson," a parody of 6'10" pitcher Randy Johnson; and a backflipping "Ozzie Myth," a parody of shortstop Ozzie Smith. *Id.*

39. *Id.* at 962. While probably not very significant, this statement at least minimally reduces the association factor discussed at *infra* Part I.D.2.

40. Cardtoons, 95 F.3d at 972.

41. *Id.* at 976.

42. *Id.* at 972.

43. *Id.*

44. *Id.* at 974. This is the "incentive rationale," discussed at *infra* Part I.D.4.

45. *Id.* at 975-76. The court here attempts to minimize the "commercial interests" factor, which is discussed at *infra* Part I.D.1.

46. Cardtoons, 95 F.3d at 976.

47. Gionfriddo v. Major League Baseball, 94 Cal. App. 4th 400 (Cal. Ct. App. 2001).

MLB had violated retired players' statutory and common law rights of publicity.[48] In enumerating various accomplishments of former baseball players on its website, MLB published historical information about Major League Baseball in the past, including rosters, box scores, game summaries, lists of award winners, and video clips of historic moments from older games.[49] The website was entirely devoted to expressive material.[50]

As in *Cardtoons*, the court struck a balance of interests: "The First Amendment requires that the right to be protected from unauthorized publicity 'be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press.'"[51] Under this framework, the court noted a strong public interest in the game of baseball and an accompanying First Amendment right for the public to receive newsworthy information pertaining to the game.[52] The material was expressive and not commercial speech.[53] Conversely, the plaintiffs did not carry their burden of showing a significant countervailing economic interest in their publicity rights.[54] The court stated that the material might even boost the retired players' marketability.[55]

3. *The* Doe *case*

One final case bearing on the issue is *Doe v. TCI Cablevision*,[56] where the Missouri Supreme Court addressed a claim by hockey "enforcer" Tony Twist that the comic book *Spawn* was infringing his publicity rights.[57] The writer of the comic book admitted that one of his characters, Antonio Twistelli, a Mafia don whose list of evil deeds included multiple murders and abduction of children, was based on real

48. *Id.* at 406. The *CBC* case thus presents a flip of positions for the players, who just five years prior argued against enforceable publicity rights in a somewhat similar context in *Gionfriddo*. In *CBC*, MLB Advanced Media makes in many respects directly opposite arguments than it did in *Gionfriddo*.

49. *Id.* at 405.

50. *Id.*

51. *Id.* at 409 (quoting Gill v. Hearst Publ'g Co., 40 Cal. 2d 224, 228 (1953).

52. *Id.* at 411.

53. Gionfriddo, 94 Cal. App. 4th at 412.

54. *Id.* at 415. "Balancing plaintiffs' negligible economic interests against the public's enduring fascination with baseball's past, we conclude that the public interest favoring the free dissemination of information regarding baseball's history far outweighs any proprietary interests at stake." *Id.*

55. *Id.*

56. Doe v. TCI Cablevision, 110 S.W.3d 363 (Mo. 2003).

57. *Id.* at 367.

life Tony Twist.[58] The hockey player and the fictional character shared little in common outside of the name similarities and vague notions of a tough-guy persona.[59]

The court noted the tension between the First Amendment and publicity rights,[60] eventually settling on the "predominant purpose" test:

> If a product is being sold that predominantly exploits the commercial value of an individual's identity, that product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some "expressive" content in it that might qualify as "speech" in other circumstances. If, on the other hand, the predominant purpose of the product is to make an expressive comment on or about a celebrity, the expressive values could be given greater weight.[61]

The court concluded that the predominant purpose of a reference to Twist was commercial in nature. Because there was no commentary about Twist himself, the inclusion of his identity was mainly a ploy to sell comic books.[62] Thus, Twist's right of publicity was violated.[63]

C. Choosing the Legal Standard

One important distinction among each of these three cases is the different legal tests used in squaring the competing rights.[64] Under *Doe*'s "predominant purpose" test, the players have a very strong case.[65] The predominant purpose of using MLB players in fantasy sports seems more commercial than expressive; fantasy baseball is a

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58. *Id.* at 366.

59. *Id.*

60. *Id.* at 373.

61. Doe, 110 S.W.3d at 374.

62. *Id.*

63. *Id.*

64. Besides these two frameworks, many other legal tests have been put forth attempting to solve this problem. Little consensus has been reached. The "transformative test" of California, often applied to cases involving artistic work, looks to "what is essentially a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation." Comedy III Prod., Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387, 391 (2001). The "relatedness test" of the Restatement of Unfair Competition looks says, "Use of a name or likeness in connection with news or entertainment may be actionable if the use is not sufficiently related to the underlying work." RESTATEMENT, *supra* note 14, § 47 cmt. c.

65. Not surprisingly, in the *CBC* case MLB Advanced Media urged that *Doe* was controlling Missouri authority. Major League Baseball Players Association's Reply Brief in Support of Motion for Summary Judgment, Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, and Response to Amicus Brief at 28-29, C.B.C. Distrib. and Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077 (E.D. Mo. 2006) (No. 4:05-cv-00252-MLM).

game for a fee. Fantasy sports providers use the statistics to make their games more marketable, not to serve the public interest.

However, the predominant purpose test has been heavily criticized for the potential to produce erratic results[66] and chill artistic expression.[67] Also, the test was developed in a case dealing with expressive artistic activity rather than news reporting.[68] While it was a feasible framework to apply *Doe*'s facts, it does not smoothly import into other contexts.[69] In regards to the *CBC* case, even though the test was adopted by the Missouri Supreme Court, basic principles of federalism establish that the holding of a state court is not binding on a federal court with respect to federal issues.[70]

The test that should be used for fantasy sports is the "balance of interests" test of *Cardtoons* and *Gionfriddo*. Many courts, including the Eighth Circuit in *CBC*, have used this test in one form or another,[71] and it seems to be the best standard for a case involving news dissemination.[72] Moreover, the cases most similar to fantasy sports have invoked this test.[73] Thus, as it bears on fantasy baseball, the public's interest in receiving newsworthy statistical information should be weighed against the players' interest in securing their right of publicity.

D. Interests of the Players

To balance the interests, we must first identify them. Historically, courts have identified several policy goals in favor of enforcing the right of publicity, and the case law accounts for much of their growth

66. Jason K. Levine, *Can the Right of Publicity Afford Free Speech? A New Right of Publicity Test for First Amendment Cases*, 27 HASTINGS COMM. & ENT L.J. 171, 220-21 (2004). It is difficult to determine exactly what is expressive and what is commercial; the distinction is not made easily. *Id.*

67. Michael S. Kruse, *Missouri's Interfacing of the First Amendment and the Right of Publicity: Is the Predominant Purpose" Test Really That Desirable?*, 69 MO. L. REV. 799, 816 (2004).

68. *See* Doe v. TCI Cablevision, 110 S.W.3d 363 (Mo. 2003).

69. Kruse, supra note 67, at 815-16.

70. McCreary v. Sigler, 406 F.2d 1264, 1268 (8th Cir. 1969).

71. *See, e.g.*, Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977) (evaluating and balancing economic interests); ETW Corp. v. Jireh Publ'g, Inc. 332 F.3d 915 (6th Cir. 2003) (evaluating and balancing free speech in relation to prints of Tiger Woods); Estate of Presley v. Russen, 513 F. Supp. 1339, 1356 (D. N.J. 1981) (evaluating and balancing social benefits); Winter v. DC Comics, 134 Cal. Rptr. 2d 634, (2003) (evaluating and balancing free speech interests regarding a book with characters that resembled two popular musicians).

72. Most of the other tests are particularized for artistic and expressive activity; factual news reporting has different interests at stake.

73. *See supra* Parts II.B.1, II.B.2.

and refinement.[74] Two policy goals—protecting the commercial value of natural property rights and preventing damage to goodwill—are the most convincing justifications in the context of fantasy sports, and they form the basis of the players' interests. There are other frequently cited rationales—economic allocational efficiency and celebrity incentives—that are less persuasive in this context. All will be addressed in this section.[75]

1. Commercial interests from natural property rights

Broadly speaking, right of publicity laws confer on every person *property* rights to control the commercial use of his identity.[76] They are designed in part to protect commercial interests, or the "loss of the financial rewards flowing from the economic value of a human identity," and thus prevent unjust enrichment.[77] This rationale is based upon natural rights and has been referred to as a moral rationale.[78] The premise is that one's identity is inherently his own property, and all income generated through it belongs to the rightful owner.[79] Because the right of publicity is derived from property law, it bestows on its owners rights in the "bundle of sticks," including the right to exclude and the right to derive income.[80] Nimmer famously wrote, "It would seem to be a first principle of Anglo-American jurisprudence, an axiom of the most fundamental nature, that every person is entitled to the fruit of his labors unless there are important countervailing public policy considerations."[81] A celebrity or athlete who is able to market his persona is afforded the opportunity to preserve the full

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74. *See* Jonathan L. Faber & Wesley A. Zirkle, *Spreading Its Wings and Coming of Age: With Indiana's Law as a Model, the State-Based Right of Publicity is Ready to Move to the Federal Level*, RES GESTAE, Nov. 2001, at 33.

75. All of the policy goals identified in favor of right of publicity laws have come under criticism in one form or another. Although outside the scope of this paper, more treatment on these issues can be found at Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127 (1993); Lee Goldman, Elvis is Alive, but he Shouldn't Be: *The Right of Publicity Revisited*, 1992 B.Y.U. L. REV. 597 (1992); Diane Leenheer Zimmerman, *Fitting Publicity Rights into Intellectual Property and Free Speech Theory: Sam, You Made the Pants Too Long!*, 10 DEPAUL-LCA J. ART & ENT. 283 (2000).

76. MCCARTHY, *supra* note 9, § 3:1.

77. *Id.* § 2:2.

78. Gloria Franke, *The Right of Publicity vs. The First Amendment: Will One Test Ever Capture the Starring Role?*, 79 S. CAL. L. REV. 945, 954 (2006).

79. *Id.*

80. *See generally* Myrl L. Duncan, *Reconceiving the Bundle of Sticks: Land as a Community-Based Resource*, 32 ENVTL. L. 773, 774-75 (2002).

81. Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954).

commercial value of his fame, as well as prevent others from free riding on that value.[82]

In 1953, *Haelan Laboratories, Inc. v. Topps Chewing Gum*[83] was the first case to coin the phrase "right of publicity."[84] The court's reasoning for creating this new right rested strongly upon moral and natural rights.[85] "[I]t is common knowledge that many prominent persons (especially actors and ballplayers), far from having their feelings bruised through public exposure of their likeness, would feel sorely deprived if they no longer received money for authorizing advertisements . . . ."[86]

2. *Autonomous self-definition to protect goodwill*

A second justification is to protect a person's right to autonomous self-definition and personal dignity. Mark. P. McKenna wrote:

> Because the things with which individuals choose to associate reflect the way they wish to be perceived, unauthorized uses of one's identity in connection with products or services threatens to define that individual to the world. There are costs to whatever meaning we project, and those costs are borne uniquely by the individual.[87]

If the right to provide fantasy baseball becomes common property, any number of poor quality leagues could flood the industry.[88] This might impact the goodwill that MLB players have achieved over the years. For example, the players currently have the right to control who may produce MLB-based trading cards and video games.[89] These exclusive contracts allow the players to develop their goodwill by ensuring that their names appear only on products and services that meet their approval.[90] MLB as a whole has a significant interest in being connected only to superior services. Intentional or not, every association that is made between MLB and another entity impacts the public perception of the league, and the right of publicity is meant to offer some control over these perceptions.

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82. *See* RESTATEMENT, *supra* note 14, § 46 (1995).

83. Haelan Labs., Inc. v. Topps Chewing Gum, 202 F.2d 866 (2d Cir. 1953).

84. Faber & Zirkle, *supra* note 74, at 33.

85. *Haelan*, 202 F.2d at 868.

86. *Id.*

87. Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 294 (2005).

88. *See* Karcher, *supra* note 8, at 579.

89. *Id.*

90. *See id.*

3. Economic allocational efficiency

It is classic micro-economic theory that while common property encourages wasteful overuse, private property ensures that users of resources pay the full cost of their activities.[91] Economists argue that publicity rights are an efficient way of allocating valuable celebrity personas. If unlimited access is permitted to a celebrity's likeness, its value would diminish as more and more advertisers exploited it to attract attention to their products.[92] This harms the celebrity, who loses licensing fees, as well as members of the public, who tire of the celebrity and lose enjoyment they might otherwise derive from his talents.[93]

> For instance, the singer Tom Waits has a distinctively gravelly way of singing that many people associate with him alone . . . . Frito-Lay found a Tom Waits sound-alike and produced a TV commercial for Doritos corn chips with this person singing the voice-over in Waits's distinctive style. Even Waits's friends were fooled. When he sued, the court entered judgment on the jury's $2.4 million verdict. Analyzing the result much as an economist would, Waits declared, "Now I have a fence around my larynxization."
>
> Waits's distinctive singing style is partly a public good. When a television viewer enjoys the soundtrack for the unauthorized Doritos commercial she does not thereby prevent another fan from enjoying Waits's actual voice on an album . . . . Nevertheless, Waits's distinctive singing style is not a pure public good, because in some ranges of use—intensive ones—more commercials using Waits's voice tire his public of it and reduce its enjoyment of his artistic works. Unless Waits has his fence, free riders, such as Frito-Lay, could produce so many low-valued works that they would crowd out higher-valued ones.[94]

This rationale applies to advertising, but likely not to fantasy sports. If all fantasy leagues were permitted to operate without paying licensing fees, it is true that more fantasy businesses would be in operation. But it is difficult to envision a scenario in which the sheer volume of fantasy providers on the market tires the public of baseball players in the same way the public would tire of Waits's voice. Advertising is a pervasive medium that bombards a captive audience with coercive messages. It is no wonder that after hearing repeated Doritos commercials, the public might grow weary of Waits's voice and lose inter-

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91. Madow, *supra* note 75, at 220. *See also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 31 (3d ed. 1986).

92. Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 UCLA ENT. L. REV. 97, 100 (1994).

93. *See id.* at 101.

94. *Id.* (footnotes omitted).

est in his music. In contrast, fantasy sports operate remotely on the Internet. Consumers merely choose one league and play out a season, checking and updating their teams as they please. They would not even be aware of a flooded market, nor would it make any difference to their level of enjoyment.

4. Incentive to enter the public limelight

The "incentive rationale" states that people should be given an economic incentive to engage in activities that enrich the public.[95] But while the performances of top-notch athletes certainly can enrich the public, the quality of athletic achievement likely does not depend on enforceable publicity rights. Given the high salaries of professional athletes, the competitive nature of sports, and an independent desire for fame, it seems doubtful that publicity rights encourage athletes to compete at a higher level.[96] The Tenth Circuit has flatly rejected the incentive rationale in most situations: "The extra income generated by licensing one's identity does not provide a necessary inducement to enter and achieve in the realm of sports and entertainment."[97] Instead, the incentive rationale applies best to one limited area: non-copyrightable performances by entertainers. An example is the human cannonball in *Zacchini*, who presumably would not put on such entertainment spectacles for free.

E. Interests of the Public

Of course, the public also has interests at stake. While the First Amendment furthers several free speech goals,[98] the one that concerns this case is the "enlightenment function"—the theory that each member of the public should have access to all facts and data in order to form his own opinions and make informed choices.[99] The constitutional guarantees of free speech and a free press curtail the government's ability to impose content-based burdens on speech that could drive certain ideas or viewpoints from the marketplace.[100] The First Amendment is "designed and intended to remove governmental re-

95. MCCARTHY, *supra* note 9, § 2:6.

96. This is a common criticism. "The commercial value of a person's identity often results from success in endeavors such as entertainment or sports that offer their own substantial rewards. Any additional incentive attributable to the right of publicity may have only marginal significance." RESTATEMENT, *supra* note 14, § 46 cmt. c (1995).

97. Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 973 (10th Cir. 1996).

98. RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH §§ 1.02- 1.04 (2007).

99. MCCARTHY, *supra* note 9, § 8:3.

100. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105 (1991).

straints from the arena of public discussion . . . ."[101] Although one commentator has argued that baseball statistics fall outside the ambit of the First Amendment,[102] the better view is that the statistics are in fact "speech" because they educate the public about the most recent happenings of America's pastime.

Baseball is a unique matter of public concern; baseball statistics are newsworthy information contributing to public discussion. The statistics have been viewed as bits of baseball's history.[103] Even the Supreme Court has acknowledged baseball's enduring value in a flowery opinion by Justice Blackmun:[104] "Then there are the many names, celebrated for one reason or another, that have sparked the diamond and its environs and that have provided tinder for recaptured thrills, for reminiscence and comparisons, and for conversation and anticipation in-season and off-season."[105]

To be sure, political discourse, political news, and political opinions are the most protected forms of speech.[106] Sports statistics do not quite rise to the same level.[107] Still, because baseball is such a ubiquitous institution in American culture, the public has a legitimate interest in receiving updates about the current happenings in the game. The court in *Gionfriddo* stated it well:

> Major league baseball is followed by millions of people across this country on a daily basis . . . The public has an enduring fascination in the records set by former players and in memorable moments from previous games . The records and statistics remain of interest to the public because they provide context that allows fans to better appreciate (or deprecate) today's performances.[108]

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101. Cohen v. California, 403 U.S. 15, 24 (1971).

102. Karcher, *supra* note 8, at 581-82. This article understates the public importance of daily reports of baseball statistics.

103. C.B.C. Distrib. and Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1093 (E.D. Mo. 2006) (quoting Gionfriddo v. Major League Baseball, 94 Cal. App. 4th 400, 410 (Cal. Ct. App. 2001)).

104. Flood v. Kuhn, 407 U.S. 258, 262 (1972).

105. *Id.*

106. McCarthy, *supra* note 9, § 8:12.

107. According to Professor McCarthy:

> Within the category of "news," information about the political process is at the highest level of First Amendment protection. Other forms of "news" may receive a slightly more attenuated form of constitutional solicitude. For example, "news" about what the latest rock music star eats for dinner or what fashions in wearing apparel are "in" this season do not, and should not, receive exactly the same degree of constitutional immunity from the law as political "news."

Id. at § 8:13.

108. *Gionfriddo*, 94 Cal. App. 4th at 411.

No court would consider a challenge to the right to publish Major League statistics,[109] and every major news source in the country provides daily baseball updates.

F. Balancing the Interests

On balance, however, the free speech interests must yield. While the publishing of daily statistics is a valuable contribution to the public, fantasy sports leagues do more than just publish. They manage and reorganize the players' statistics, spinning them into an amusing game for which the public will pay to play. This is more than just educating baseball fans about what is currently happening in the league. It goes a step beyond contribution to the public discussion forum; it is not a mere repackaging of bare numbers.

Free speech only shields news distribution to a certain point. The First Amendment may give publishers a constitutional right to disseminate statistics and Americans the right to receive them, but it does not confer the right to operate a commercial enterprise that happens to be based on dissemination of those statistics. To allow fantasy providers a First Amendment defense would be to allow a violation of the players' rights merely because the violation is *accompanied by* newsworthy information.[110] The mere presence of up-to-date statistics in fantasy sports should not automatically shelter the use of the players' names. "The first amendment is not a license to trammel on legally recognized rights in intellectual property."[111]

It must be emphasized that it is not the profit-seeking nature of fantasy leagues that removes them from the First Amendment's reach. Speech that is sold is speech nonetheless; and plenty of Supreme Court precedent has established this principle.[112] Newspapers and television news programs are among the most protectible forms of speech despite their generation of income.[113] It must also be emphasized that it is not the entertaining nature of fantasy leagues that

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109. *See* Carlisle v. Fawcett Publ'ns, Inc., 201 Cal. App. 2d 733, 746-47 (Cal. Ct. App. 1962) ("Certainly, the accomplishments . . . of those who have achieved a marked reputation or notoriety by appearing before the public such as actors and actresses, *professional athletes,* public officers, may legitimately be mentioned and discussed in print or on radio and television.") (emphasis added).

110. For an analogous argument inside the trademark realm, see National Football League Props. v. Playoff Corp., 808 F. Supp. 1288, 1294 (N.D. Tex. 1992).

111. Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184 (5th Cir. 1979).

112. *See, e.g.*, Time, Inc. v. Hill, 385 U.S. 374, 396-97 (1967) ("'That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.'") (internal citations omitted).

113. *Id.*

removes them from the First Amendment's reach. Again, the Supreme Court has reiterated this numerous times,[114] and it is clear that entertaining plays, movies, cartoons, and parodies enjoy broad protection.[115]

Rather, the reason free speech does not apply to fantasy sports is that it impinges on publicity rights where that impingement is unnecessary. When the *Zacchini* opinion spoke of the "line in particular situations . . . to be drawn between media reports that are protected and those that are not,"[116] it recognized other rights in tension with free speech rights that need to be resolved through a careful balancing act. Because Zacchini owned a right of publicity in his human cannonball performance, the Court weakened the news program's First Amendment protection to broadcast the man's performance. Analogizing, it seems that where the baseball players own publicity rights, free speech defenses must be carefully monitored so as not to unnecessarily carve out portions of the players' natural property rights. The First Amendment is designed to protect against the elimination of information from the marketplace of ideas. If baseball fans across the country can already receive MLB statistical updates through straight news reporting,[117] then their interest in receiving that same information from fantasy baseball is weak.

Conversely, the players have a strong interest in controlling their personas. As stated above,[118] the players are entitled some degree of control over how their identities are used in public, particularly when others are profiting from them. The most important stick in the bundle of rights is the right to exclude,[119] and the players have a legitimate interest in overseeing how their names and daily performances are used by other businesses.

Regarding existing case law, *Gionfriddo* is distinguishable because it dealt with standard news dissemination and historical facts in the model of ordinary media outlets. The website in that case was educational and informative, and nothing more. It did not set up a competition that relied on the identities of others; it was simply an

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114. *See, e.g.*, Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 969 (10th Cir. 1996) ("Speech that entertains, like speech that informs, is protected under the First Amendment.").

115. *Id.*

116. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 574-75 (1977).

117. The internet in particular has created almost instantaneous reporting. Websites such as http://espn.go.com, http://sports.yahoo.com, and others provide real time updates on almost all professional sporting events.

118. *See supra* Part II.D.2.

119. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982).

enlightening tribute to baseball players of the past. Likewise, *Cardtoons* is distinguishable because it involved parody. Unlike names and statistics, a particular parody is unique, and the satirical nature of its message cannot be obtained through other, less commercially exploitive means. Parody is highly expressive and contains socially useful messages.

III. THE RULING OF *CBC V. MLB ADVANCED MEDIA*

The recent *CBC* case was the first court ruling on this issue. Like this note, the court used the balance of interests test; however, the court arrived at a different ultimate conclusion. While I respectfully disagree with the court, there is room for argument. Right of publicity laws are written in broad and imprecise terms. When they are balanced against the (broad and imprecise) First Amendment, they become even more pliable. One commentator has noted:

> A random walk through any modern casebook in constitutional law will discover the extent to which the First Amendment has been fragmented and scattered virtually out of sight . . . . In a large and growing number of tort related cases, the tendency is to address each new dispute simply as another exercise in conventional cost-benefit terms.[120]

As a result, cases like this are often result-oriented. It is easy for a court or commentator to interpret the language in different ways, reference some policy goals yet conceal others, and eventually reach an outcome that was decided in advance. Nonetheless, my objective here is to be critical of a few aspects of the court's opinion that influenced its ruling.

A. Case Summary

C.B.C. Distribution and Marketing (CBC) was a typical provider of fantasy sports.[121] Participants played out fantasy seasons where they acted as pseudo-General Managers of baseball teams, assembling teams they hoped would perform well.[122] The participants paid a baseline fee to play the game as well as additional fees to trade players during the season.[123] From 1995 to 2004, CBC operated under a li-

120. *See* William W. Van Alstyne, First Amendment Limitations on Recovery from the Press—*An Extended Comment on "The Anderson Solution"*, 25 WM. & MARY L. REV. 795, 818 (1984).

121. *See* C.B.C. Distrib. and Mktg., Inc., v. Major League Baseball Advanced Media, L.P., 505 F.3d 818, 820 (8th Cir. 2007).

122. *Id.*

123. *Id.* at 821.

cense from the MLB Players' Association, who asserted ownership over the players' names and statistics.[124] Then in 2005, the Players' Association licensed these rights in an *exclusive* contract to MLB Advanced Media (MLBAM), the interactive media and internet arm of MLB.[125] Shut out of the exclusive deal and afraid of being sued if it continued to operate, CBC brought suit in the Eastern District of Missouri, seeking a ruling that the players did not own cognizable right of publicity interests with respect to the fantasy baseball industry.[126]

The lawsuit was filed in the federal court system, but the right of publicity is a law of the states.[127] The Missouri Supreme Court set out the elements of a right of publicity action as follows: "(1) The defendant used plaintiff's name as a symbol of his identity (2) without consent (3) and with the intent to obtain a commercial advantage."[128] Following Missouri Law, the district court in *CBC* held that the players did not own a right of publicity for various reasons: the "identity" element of the claim was not satisfied;[129] the "commercial advantage" element of the claim was not satisfied;[130] and, in any case, the First Amendment provided an affirmative defense.[131]

MLBAM appealed.[132] While the district court's reasoning was somewhat inane for its holding on the identity[133] and commercial advantage elements,[134] the Eighth Circuit Court of Appeals handily re-

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124. *Id.*

125. *Id.*

126. *See id.*

127. MCCARTHY, *supra* note 9, § 1:3.

128. Doe v. TCI Cablevision, 110 S.W.3d 363, 375 (Mo. 2003).

129. *C.B.C. Distrib. and Mktg., Inc., v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1088 (E.D. Mo. 2006).

130. *Id.* at 1086.

131. *Id.* at 1091-92.

132. *C.B.C. Distrib. and Mktg., Inc., v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 821 (8th Cir. 2007).

133. The district court said that there must be a reference to *personas* beyond the mere listing of names. *C.B.C.*, 443 F. Supp. 2d at 1089. The court said that CBC's website "does not involve character, personality, reputation, or physical appearance of the players; it simply involves historical facts about the baseball players such as their batting averages, home runs, doubles, triples, etc." *Id.* However, a symbol of one's identity should be something that references a specific person as an individual, not something that references distinguishing characteristics about him. *See* MCCARTHY, *supra* note 9, § 3:7.

134. The district court said that that "commercial advantage" means only that the advantage must have been gained by attracting consumer attention to a product in a marketing or advertising sense. *C.B.C.*, 443 F. Supp. 2d at 1086. This rule is overly narrow. A more logical interpretation is that "commercial advantage" refers to an advantage over companies who are not already using the players' identities. Likewise, the Restatement takes a broader approach to the commercial advantage element, stating there is liability when the name is "used in connection with the services rendered by the user." RESTATEMENT, *supra* note 14, § 47 (1995). To illustrate, imagine a profit-seeking fantasy league based on the Chicago Park District annual coed spring

jected that portion of the opinion.[135] More importantly, and more pertinent to this discussion, the Eighth Circuit then turned to the free speech aspect of the case and concluded that the First Amendment did in fact shield the fantasy provider.[136] The court determined that the First Amendment interests had more weight than the right of publicity interests.[137]

The court downplayed the interests of the players.[138] First, the court said that all of the information in fantasy baseball is already in the "public domain," and it would be a "strange law" to prohibit usage of it.[139] Next, the court rejected economic interests of the players because the players are separately rewarded for their endeavors.[140] The court also said that there is no danger of consumers being misled because the game is based on MLB in its entirety, thus eliminating the implication that any particular player with star power might be endorsing the fantasy league.[141] Finally, the court rejected non-monetary interests, saying that any emotional harm would be caused by the media, not fantasy baseball, and in any event, non-monetary interests are better addressed through the right of privacy.[142]

Meanwhile, the court emphasized the free speech interests of the public.[143] The court reiterated that the bare facts and figures of fantasy baseball are indeed "speech."[144] The court then stated the public importance of the statistics, saying that millions of people across the

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2007 softball tournament. It is not hard to see why the names and statistics of Major League Baseball players enhance the attractiveness of a fantasy baseball league, conferring a hefty commercial advantage.

135. The district court also erred on its copyright preemption holding. Almost all courts have held publicity rights to be outside the scope of copyright. *See, e.g.*, Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977); Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir.1992); Factors Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278 (2d Cir. 1981); Bi-Rite Enters., Inc. v. Button Master, 555 F. Supp. 1188 (S.D.N.Y. 1983); Price v. Hal Roach Studios, Inc., 400 F. Supp. 836 (S.D.N.Y. 1975). *But see* Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663 (7th Cir.1986); Motown Record Corp. v. George A. Hormel & Co., 657 F. Supp. 1236 (C.D.Cal.1987). "Under the majority rule, there is no federal copyright preemption of the state law right of publicity because the right of publicity protects human identity, which is not subject matter covered by federal copyright law." MCCARTHY, *supra* note 9, § 11:50.

136. *C.B.C.*, 505 F.3d at 824.

137. *Id.* at 823.

138. *Id.* at 824 ("In addition, the facts in this case barely, if at all, implicate the interests that states typically intend to vindicate by providing rights of publicity to individuals.").

139. *Id.* at 823.

140. *Id.*

141. *Id.* at 824.

142. *C.B.C.*, 505 F.3d at 824.

143. *Id.* at 823-24.

144. *Id.* at 823.

country have an enduring fascination with the game.[145] These interests, according to the court, carried significant weight.[146]

B. A Critical Analysis

Much of the court's analysis was erroneous. Besides overstating the free speech interests and understating the right of publicity interests, the court also used two common arguments, which I will call "public domain" and "existing wealth," that should not have been relevant.

1. Public Domain

First, the court invoked the overused (and misunderstood) public domain argument:

> [S]tate law rights of publicity must be balanced against first amendment considerations . . . . First, the information used in CBC's fantasy baseball games is all readily available in the public domain, and it would be strange law that a person would not have a first amendment right to use information that is available to everyone.[147]

We must be careful with the term "public domain." Public domain is a *legal conclusion*—a label—that applies to information that is not protected by intellectual property rights, or in this case, publicity rights.[148] Thus, it could be said that the entire issue in this case comes down to whether the players' names and statistics are considered to be in the public domain. The term "public domain" belongs in the holding, not the reasoning.

By using the term how it did, however, the court seems only to have meant that the names and statistics are readily available. In other

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145. *Id.* One final issue adjudicated by the court was a no-challenge provision in the contract. The fantasy provider agreed not to "dispute or attack the title or any rights of Players' Association in and to the Rights and/or the Trademarks or the validity of the license granted," i.e. a no-challenge provision. *Id.* at 824. The court rejected the no-challenge provision as a breach of warranty because the Players' Association claimed that it "is the sole and exclusive holder of all right, title and interest" in the names and statistics, which is was not. *Id.* at 825. Because it was a condition on which the fantasy provider relied, the contractual obligations were lifted. *Id.*

146. *Id.* at 824.

147. *Id.* at 823 (internal citations omitted).

148. Black's Law dictionary defines "public domain" as follows:

> [t]he universe of inventions and creative works that are not protected by intellectual-property rights and are therefore available for anyone to use without charge. When copyright, trademark, patent, or trade-secret rights are lost or expire, the intellectual property they had protected becomes part of the public domain and can be appropriated by anyone without liability for infringement.

BLACK'S LAW DICTIONARY 1027 (8th ed. 2005). Professor McCarthy writes that "public domain is the status of an invention, creative work, commercial symbol, or any other creation that is not protected by any form of intellectual property." J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 1:2 (4th ed. 2007).

words, anyone with an internet connection or seventy-five cents for a newspaper can obtain the statistics, view them, show them to others, or make copies of them. But even so, it is not clear why this should be a reason to deny the statistics intellectual property protection.[149] Contrary to the court's assertion, it is not a "strange law"[150] that a person should be prohibited from using readily available information in other ways. The entire bodies of copyright law and patent law are based on exactly this premise. For example, newspapers are littered with news articles, editorials, and pictures of celebrities, politicians, and athletes; but copyright law forbids any reproduction without consent. Intellectual property law reflects the assumption that in order to further certain policy goals, some readily available information should be protected from unauthorized appropriation. The touchstone is not the public availability of the information; it is simply whether it is good policy to protect that information.

2. *Existing Wealth*

Second, in rejecting the players' commercial interests, the court used their existing wealth against them:

> Economic interests that states seek to promote include the right of an individual to reap the rewards of his or her endeavors and an individual's right to earn a living . . . . But major league baseball players are rewarded, and handsomely, too, for their participation in games and can earn additional large sums from endorsements and sponsorship arrangements.[151]

Should the court deny a property right to a group of individuals because they are well-to-do? It is uncommon, to say the least, to assess a person's affluence in deciding whether he is entitled to intellectual property rights. Bill Gates is not held to a higher standard when his company applies for patents; Paul McCartney can copyright any song he writes.

True, unlike Gates and McCartney, a high-salaried ballplayer is not more likely to enrich the public further as a result of the additional incentive of exclusive property rights.[152] But few people take the "incentive rationale" seriously, especially for high profile athletes.[153] There are more important interests here—commercial gain, unjust enrichment, protection of goodwill—that have nothing to do with the

149. This is a common argument, but it does not square with the most basic principles of intellectual property.

150. *C.B.C.*, 505 F.3d at 823.

151. *C.B.C.*, 505 F.3d at 824.

152. *See supra* Part II.D.4.

153. *See id.*

players' affluence. The court should not have used salaries and endorsement opportunities as a reason to deny rights of publicity to the players.[154]

3. Implied Associations

Finally, the court rejected MLB's right to limit its association with fantasy baseball leagues:

> Other motives for creating a publicity right are . . . to protect consumers from misleading advertising . . . . [There is no] danger here that consumers will be misled, because the fantasy baseball games depend on the inclusion of all players and thus cannot create a false impression that some particular player with "star power" is endorsing CBC's products.[155]

This is a narrow view on the effects of associations that are visible to the public. Instead of focusing on how MLB chooses to define itself to the world,[156] the court looked only at individualized false advertising endorsements. Taking the court's argument to its logical conclusion, it would seem to imply that as the number of appropriated celebrity personas increases, the likelihood of liability decreases. Instead, if fantasy providers are using the identities of all MLB players on a league-wide basis, we must look at associations that are created on that level. MLB as a whole, its brand, its trademarks, its logos, and its players are all viewed in connection with third party fantasy providers over which it has no control.

C. Other Interesting Arguments

1. The Jeopardy Hypothetical

One of the fantasy provider's more interesting arguments on the district court level was that if the players won this case, then presumably traditional quiz games like Jeopardy and Trivial Pursuit could not ask questions about celebrities without facing liability.[157] Fantasy baseball, however, is different. While quiz games like Jeopardy use MLB references in only a small subset of questions, fantasy sports use

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154. For more on this argument, see Brief of Amici Curiae NBA Props., Inc. et al. as Amici Curiae Supporting Petitioners, C.B.C. Distrib. and Mktg., Inc., v. Major League Baseball Advanced Media, L.P., 505 F.3d 818 (Nos. 06-3357, 06-3358), at 6 ("The district court's decision reflects the erroneous belief that the weight to be accorded the state's interest in protecting intellectual property rights depends on the value of those rights to their owner.").

155. *C.B.C.*, 505 F.3d at 824.

156. *See supra* Part II.D.2.

157. CBC's Reply Memorandum in Support of its Motion for Summary Judgment Against MLBAM at 9, *C.B.C. Distrib. and Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077 (E.D. Mo. 2006) (No. 4:05-cv-00252-MLM).

the players as the entire basis for their game. Baseball card producers and video game manufacturers alike, industries whose entire product lines are based on MLB, have for years paid licensing fees to MLB, while Jeopardy has not.[158]

Where the extent of the use of the players' names is *de minimis*, the players should not have enforceable publicity rights. This is supported by both case law[159] and the Restatement, which excludes from liability the use of another's identity "in advertising that is *incidental* to such uses."[160] Fantasy baseball wholly depends on Major League players, and the use of their names is pervasive, not incidental. Mere incidental uses do not implicate the core concerns of the law. Athletes do not have a significant commercial stake in a quiz game that references them infrequently among a broad array of topics, nor is there a risk of implied associations between MLB and the quiz games.[161]

2. *The Board Game cases*

Finally, I would like to address one argument put forth by MLBAM that highlights the free speech issues of this case. In its briefs, MLBAM relied on two older cases that are similar to fantasy sports. First, *Palmer v. Schonhorn*[162] involved a board game that simulated professional golf tournaments through the use of dice and charts based on the past performances of famous golfers.[163] The game contained "Profile and Playing Charts" that listed the names of each of the golfers along with accurate biographical profiles.[164] The Superior Court of New Jersey held that the game manufacturer could not use the names of the golfers without their permission.[165] The decision was significant because games of this type were common at the time, and the judge's decision prompted most of the leading game manufacturers to purchase official licenses.[166]

One of those manufacturers refused, which led to the second case. Negamco, a family-run company in Minnesota, sold a somewhat so-

158. *Id.* *See also* Karcher, *supra* note 8, at 570.

159. *See, e.g.*, Ruffin-Steinback v. dePasse, 267 F.3d 457, 461-62 (6th Cir. 2001); Titan Sports, Inc. v. Comics World Corp., 870 F.2d 85 (2d Cir. 1989).

160. RESTATEMENT, *supra* note 14, § 47 (1995) (emphasis added).

161. In my view, a trivia game based entirely on MLB would likely be a right of publicity violation.

162. Palmer v. Schonhorn, 232 A.2d 458 (N.J. Super. Ct. 1967).

163. *Id.* at 459.

164. *Id.*

165. *Id.*

166. 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. REV. 87, 96-97 (2006).

phisticated version of a baseball simulation board game.[167] The game included statistical profile cards for eleven pitchers and fifteen position players for each of the twenty major league teams.[168] The game allowed its users to make a baseball game's typical managerial decisions and then simulate the results of those decisions based upon the statistical profiles.[169] In *Uhlaender v. Hendricksen*,[170] a federal district court in Minnesota held that the players owned a right of publicity in the commercial use of their names and accomplishments.[171]

Despite many factual similarities to fantasy baseball, *Palmer* and *Uhlaender* ultimately should have little to no effect on the free speech aspect of the case. First, neither court even made mention of the First Amendment. *Palmer* was decided in 1963, *Uhlaender* in 1970, and *Zacchini* in 1977. To the extent that *Zacchini* bears on the fantasy sports dispute, it is clear that the First Amendment can conflict with right of publicity laws. Second, right of publicity law was only beginning to form in the 1960s.[172] The body of law was not well developed, and neither the parties nor judges had prior experience with the nature of the claim. For example, the defendant in the *Uhlaender* case argued "that there is nothing offensive nor demeaning about the way the names are used,"[173] which is a defense that would be relevant to an invasion of privacy claim (tort), but not a right of publicity claim (property). The case presented an issue of first impression to the Minnesota court, and most courts at the time were still inclined to think in terms of privacy rights rather than publicity rights.[174] Third, the board game makers in those cases had a weaker free speech interest than fantasy providers because unlike fantasy sports, board games do not provide up-to-date statistics similar to news reporting.

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167. *Id.*

168. *Id.*

169. *Id.* at 97-98.

170. Uhlaender v. Hendricksen, 316 F. Supp. 1277 (D. Minn. 1970). For a fascinating behind-the-scenes view of this litigation, see Hylton, *supra* note 166, at 96-105. Plaintiff Ted Uhlaender was a Minnesota Twins outfielder who filed a class action suit "on behalf of all other professional league baseball players similarly situated." *Id.* at 99. The Players Association, which as an unincorporated entity could not sue in federal court, chose Uhlaender as named plaintiff. Although not entirely clear, it is possibly that they chose him because while playing for the Twins, he was a legal resident of Texas, thereby establishing diversity jurisdiction. *Id.* at 99-100.

171. *Uhlaender*, 316 F. Supp. at 1282-83.

172. Hylton, *supra* note 166, at 102.

173. *Uhlaender*, 316 F. Supp. at 1279.

174. Hylton, *supra* note 166, at 101.

IV. CONCLUSION

There are a number of intriguing themes running through the *CBC* controversy: the difficulty of applying old laws to new technology; the never-ending battle between intellectual property rights and the First Amendment; the outrage of giving wealthy athletes another mechanism to redistribute wealth upwards; and the combination of America's two great pastimes, baseball and litigation. Perhaps the court simply did not want MLB to scrape another layer of revenue from the fans. A read-between-the-lines look at the opinion reveals a hesitancy to make the rich richer, which may have infected the court's analysis to a certain extent. In fact, the court noted that the athletes were "handsomely" rewarded athletes who earned "large sums" of money.[175]

The purpose of this note was not to address the desirability of right of publicity laws as a whole,[176] but merely to argue that *as those laws presently exist*, they encompass fantasy sports. If MLB collects fees for baseball cards and video games, then consistency suggests that it should be allowed to collect fees for fantasy baseball as well. The First Amendment simply does not extend so far as to offer protection to fantasy baseball.

Of course, MLB probably did not increase its popularity by choosing to fight this lawsuit all the way to the end. As stated by Daniel Okrent, former public editor of the *New York Times* and one of the founding fathers of fantasy baseball, "The only thing that saddens me about it is that there won't be a public trial, during which MLB's incredible greed would have been on public display."[177] Indeed, there is ample room to question MLB's business decision. But if state law has conferred upon the players a natural property right, it is a business decision that is not for the fantasy providers, not for me, and not for a court. If MLB wishes to keep a tight grip on the property it owns—

175. *C.B.C.*, 505 F.3d at 824.

176. The desirability of right of publicity laws has been argued countless times from countless perspectives. *See, e.g.*, Roberta Rosenthall Kwall, *Fame*, 73 IND. L. J. 1 (1997); Vincent M. de Grandpré, *Understanding the Market for Celebrity: An Economic Analysis of the Right of Publicity*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 73 (2001). *But see, e.g.*, Madow, *supra* note 75; White v. Samsung Electronics America, Inc., 989 F.2d 1512 (9th Cir. 1993) (Kozinski, J., dissenting from denial of the petition for rehearing en banc).

177. Greg Johnson, *Fantasy League Wins Ruling: Judge's decision that baseball statistics are in public domain could have far-reaching effects*, L.A. TIMES, Aug. 9, 2006, at 3. *See also* Gabriel Grossman, *Switch Hitting: How C.B.C. v. MLB Advanced Media Refined the Right of Publicity*, 14 UCLA ENT. L. REV. 285, 287 (2007).

for reasons rational or irrational, transparent or secretive—it should be able to do so.

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