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The Use of Players' Identities in Fantasy Sports Leagues: Developing Workable Standards for Right of Publicity Claims

Richard T. Karcher

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The Use of Players' Identities in Fantasy Sports Leagues: Developing Workable Standards for Right of Publicity Claims

Richard T. Karcher*

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I. Introduction

This article examines the controversial issue of whether the use of professional athletes' names and playing records by fantasy sports league operators, without the consent and authorization of the players, violates the players' right of publicity. There already exists much confusion under right of publicity law in terms of, among other things, what constitutes "commercial use," what constitutes an "identity," and when the First Amendment protects the use. While the issue of fantasy league use appears to just add fuel to the existing confusion, at the same time it presents an interesting context in which to evaluate the present state of right of publicity law and to develop workable standards for courts in deciding right of publicity claims.

* Assistant Professor of Law and Director of the Center for Law and Sports at Florida Coastal School of Law. Professor Karcher played professional baseball in the Atlanta Braves organization from 1989 to 1993.

First, this article will discuss the evolution of the common law right of publicity. Next, this article will embark upon an in-depth analysis of its application to fantasy sports leagues, including a discussion about the business and economics of the fantasy sports league industry, the policy considerations involved and the application of the First Amendment. Intertwined throughout the discussion is an analysis and critique of the district court's ruling in *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*¹ Using this case as a backdrop, this article attempts to define workable standards in a confusing area of law and concludes that players have a right of publicity in the use of their names and performance statistics by fantasy sports leagues.

II. The Right of Publicity

"The right of publicity is a creature of state law. . . ."² The right of publicity has been adopted by approximately half of the states through common law or statute.³ "In many states, the parameters or even the existence of the right of publicity remains [sic] undetermined."⁴ The Second Circuit Court of Appeals has been touted as the first court to recognize the right of publicity, holding in the 1953 case of *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*,⁵ that professional baseball players have a "right of publicity" in their photographs used in connection with the sale of chewing gum.⁶ According to the Second Circuit, "[A] man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross,' i.e., without an accompanying transfer of a business or of anything else."⁷ Publicity rights "are a form of property protection that allows people to profit from the full commercial value of their identities."⁸

1. 443 F. Supp.2d 1077 (E.D. Mo. 2006).

2. *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 928 (6th Cir. 2003).

3. *Id.* at 928 n. 13. One commentator notes that there are twenty-eight states that recognize the right of publicity. John Grady, Steve McKelvey & Annie Clement, *A New "Twist" for "The Home Run Guys"?: An Analysis of the Right of Publicity Versus Parody*, 15 J. LEGAL ASPECTS OF SPORT 267, 271 (2005).

4. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995).

5. 202 F.2d 866 (2nd Cir. 1953).

6. For the first time, a court "recognized a distinction between the personal right to be left alone and the economic right to exploit one's own fame." *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 313 (Cal. Ct. App. 2001).

7. *Haelan Labs.*, 202 F.2d at 868. "For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses [sic], trains and subways." *Id.*

8. *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 968 (10th

The right of publicity is “an outgrowth of the right of privacy.”⁹ In *Zacchini v. Scripps-Howard Broad. Co.*,¹⁰ the Supreme Court addressed whether the defendant’s use was privileged under the First Amendment when it violated the plaintiff’s right of publicity by videotaping and broadcasting the plaintiff’s human cannonball act on a television news program without the plaintiff’s permission.¹¹ The Supreme Court, citing a publication authored by the renowned Torts scholar, William Prosser, expressly recognized the four distinct tort causes of action that make up the right of privacy:

“The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff . . . ‘to be let alone.’” Thus, according to Prosser, some courts had recognized a cause of action for “intrusion” upon the plaintiff’s seclusion or solitude; public disclosure of “private facts” about the plaintiff’s personal life; publicity that places the plaintiff in a “false light” in the public eye; and “appropriation” of the plaintiff’s name or likeness for commercial purposes. One may be liable for “appropriation” if he “pirate(s) the plaintiff’s identity for some advantage of his own.” (citations omitted)¹²

The Supreme Court also stated the rationale for recognizing a right of publicity cause of action:

“The rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will. No 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.”¹³

Of course, Ohio’s decision to protect petitioner’s right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to

Cir. 1996).

9. *ETW Corp.*, 332 F.3d at 928.

10. 433 U.S. 562 (1977).

11. *Id.* at 565 (“We granted certiorari to consider an issue unresolved by this Court: whether the First and Fourteenth Amendments immunized respondent from damages for its alleged infringement of petitioner’s state-law “right of publicity.” (citation omitted)).

12. *Id.* at 572, n.7. *Zacchini* is the only Supreme Court decision on the right of publicity. *ETW Corp.*, 332 F.3d at 929.

13. *Zacchini*, 433 U.S. at 576 (quoting Harry Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 *LAW & CONTEMP. PROBS.* 326, 331 (1966)).

produce a performance of interest to the public.¹⁴

The Restatement (Third) of Unfair Competition provides a definition for the right of publicity: “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 for the relief appropriate under the rules stated in §§ 48 and 49.”¹⁵ “For purposes of trade” is defined in Section 47 of the Restatement: “The name, likeness, and other indicia of a person’s identity are used ‘for purposes of trade’ under the rule stated in § 46 if they are used in advertising the user’s goods or services, or are placed on merchandise marketed by the user, or are used in connection with services rendered by the user. However, use ‘for purposes of trade’ does not ordinarily include the use of a person’s identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses.”¹⁶

There is a lot of grey area in the Restatement’s definition of “for purposes of trade.”¹⁷ At one end of the spectrum, use of an athlete’s identity in the context of news reporting, entertainment (i.e. movies, films) and literary works does not violate the athlete’s right of publicity. Such uses are privileged under the First Amendment based upon either the public’s right to know or the public interest in free expression. In addition, the primary purpose of such use is not “commercial” nor to gain any “commercial advantage.”¹⁸ This end of the spectrum will be referred to hereinafter as the “non-commercial end.” At the other end of the spectrum, use of an athlete’s identity without permission in advertisements, endorsements and marketing efforts is clearly a violation of the athlete’s right of publicity. In this context, the player’s name or likeness is being used to demonstrate to consumers that the player is associated with, or approves of, the user or the user’s product or service. This end of the spectrum will be referred to hereinafter as the “commercial end.”

14. *Id.*

15. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995). Section 48 states the rules governing the recovery of monetary relief in actions for infringement of the right of publicity, and Section 49 states the rules governing the recovery of injunctive relief.

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

17. W. Prosser and many state statutes use the phrases, “for commercial purposes” and “for commercial advantage” interchangeably. *See supra* note 12.

18. Although publishers of news profit from such endeavors, it is well-established under the law that the fact “[t]hat 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.” *Time Inc. v. Hill*, 385 U.S. 374, 396-97 (1967) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952)).

There are many uses of an athlete's identity that fall somewhere in between the two ends of the spectrum, which can be referred to as "quasi-commercial" uses. For example, trading cards, which were at issue in *Haelan Labs.*, are not being sold by Topps for news reporting purposes and there is no original literary or artistic expression associated with trading cards that warrants First Amendment protection. On the other hand, the use of the players' names and pictures on the cards do not suggest that players are making an endorsement that Topps is a more superior product than Fleer or Donruss, analogous to the way Tiger Woods endorses Nike. But the court's holding in *Haelan Labs.* that such use without permission establishes a right of publicity cause of action is consistent with the underlying rationale for protecting such right as stated by the Supreme Court in *Zacchini*. In other words, no social purpose is served in allowing Topps to obtain the commercial value of the players' identity and good will for free, and thereby reap one hundred percent of the financial rewards associated with the sale of a product that simply does not exist without such players' identity and goodwill. As a result of the court's holding in *Haelan Labs.*, trading card companies continue to recognize the players' right of publicity and pay licensing fees for the use of the players' identities.¹⁹

III. Application of Right of Publicity to Fantasy Sports Leagues

A. *The Business of Fantasy Sports Leagues*

A fantasy sports league is essentially a game by which participants draft actual professional players to create teams that score points based upon the actual performance of those players throughout their playing seasons. Fantasy sports leagues are not a new phenomenon. The original fantasy leagues relied principally on newspapers and sports periodicals to obtain their game content, then compiled the players' statistics longhand, and then revealed the fantasy league standings to their participants on a weekly basis.²⁰ The advent of the Internet

19. See also *Cardtoons*, 95 F.3d at 968 (Cardtoons' use of player likenesses on its cards violates the Oklahoma statute and infringes upon the property rights of MLBPA.). In 2005, the MLBPA received licensing fees in the amount of \$5.7 million from Upper Deck, \$5.5 million from Donruss, \$4 million from Topps, and \$1 million from Fleer. Eric Fisher, *Filings Provide a Look at how Baseball Union War Chest Operates*, SPORTS BUS. J., Nov. 7-13, 2006, at 32, available at <http://www.sportsbusinessjournal.com> with subscription. For the 2005 fiscal year, the NFLPA received an aggregate amount of \$19.5 million from Donruss, Topps and Upper Deck. Daniel Kaplan, *NFLPA Commercial Revenue Rises 20 Percent*, SPORTS BUS. J., Nov. 7-13, 2006, at 33, available at <http://www.sportsbusinessjournal.com> with subscription.

20. Jeff Passan, *The Reality of Fantasy*, YAHOO! SPORTS, April 20, 2006, available

transformed the fantasy league industry from one of “mom and pop” into a commercial enterprise, and provided every fantasy league with up-to-the-minute updates of all player statistics.²¹ The increased efficiencies brought millions of new participants along with it, as well as new fantasy league operators to capitalize.²²

The business of fantasy sports games is a multimillion dollar industry.²³ As an indication of the size of the fantasy league industry, CDM Fantasy Sports (CDM)²⁴ has less than a five percent market share and has annual gross revenue of approximately \$8.5 million.²⁵ According to Fantasy Sports Trade Association (FSTA), the number of fantasy game participants is estimated around 15 million annually, and fantasy games have an economic impact of \$1.5 billion.²⁶ Some sites charge players a nominal fee to join a fantasy league, and others offer free participation to attract as many players as possible for purposes of increasing advertising revenue.²⁷ “The typical fantasy consumer has played for nine years and competes in an average of six contests or leagues for various sports throughout the year.”²⁸ According to the FSTA, the average consumer of fantasy leagues spends up to \$500

at <http://sports.yahoo.com/mlb/news?slug=jp-fantasy042006&prov=yhoo&type=lgns>.

21. *See id.*

22. *See id.*

23. C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp.2d. 1077, 1080 (E.D. Mo. 2006).

24. CDM Fantasy Sports is the fantasy league operator currently involved in a lawsuit against Major League Baseball (MLB) and the Major League Baseball Players Association (MLBPA) over the right of CDM to use players' names and performance statistics without the permission of MLB and the MLBPA. *See id.* CDM Fantasy Sports was owned by C.B.C. Distribution and Marketing Inc. (CBC). *Id.* On August 8, 2006, the federal district court granted summary judgment in CBC's favor. *Id.* at 1107. Just two weeks after the court's ruling, it was announced that CBC sold CDM Fantasy Sports to a Canadian company for up to \$10 million in cash and stock. *See* Tim McLaughlin, *Canadian Company Buys CDM Fantasy Sports*, ST. LOUIS POST-DISPATCH, August 25, 2006, at B2, available at 2006 WLNR 14751306. The MLBPA and MLBAM filed notices of appeal to the United States Court of Appeals for the Eighth Circuit on September 5 and 6, 2006, respectively. Brief of Appellant MLB Advanced Media, L.P. at 2, No. 4:05-CV-00252-MLM (8th Cir. Sept. 6, 2006).

25. Passan, *supra* note 20.

26. Jeremy Herron, *NBCSports.com Redesigns Web Site, Buys Fantasy Sports Site*, BUFFALO NEWS, Sept. 18, 2006, at C2, available at 2006 WLNR 16308044.

27. *Id.* Advertising revenue is a huge component of the overall economic impact generated by fantasy sports leagues. Yahoo! Sports, for example, which offers free fantasy league games, topped the industry with 3.3 million unique visitors for the month of July. *Id.* NBC Sports just recently bought a leading fantasy sports site for the purpose of attracting more advertising revenue. *Id.*

28. Stephanie Armour, *Firms tackle pros, cons of workers' fantasy leagues*, USA TODAY, Sept. 5, 2006, available at <http://www.usatoday.com/sports/football/nfl/2006-09-05-fantasy-usatx.htm>.

annually on magazines, online information, and leagues.²⁹

There is also tremendous potential for fantasy leagues to grow and profit exponentially through expansion into other platforms. In 2004, one commentator discussed this expansion:

Because breaking news is vital to fantasy players, mobile content extensions of the games are generally regarded as one of the most promising areas of entertainment data services for carriers. Mforma recently signed a deal with CBS Sportsline to provide fantasy data to customers. Yahoo Sports charges an addition[al] \$3.95 per season to give fantasy sports subscribers mobile access to their teams. Also relatively untapped are international extensions of U.S. brands as both Europe and Asia promise to become hotbeds of fantasy league activity. . . . As part of a reported \$1 billion/four-year licensing deal with Players, Inc., Sports Business Journal says that EA Sports also licensed use of player identities in fantasy leagues so that Madden NFL gamers could use their fantasy league rosters to create teams across both fantasy and video game properties. An emerging dream of sports video game makers is having the ability to run their sports titles over connected consoles in a fantasy league-like tournament structure. . . . The deal still waiting to be struck is between EA Sports and Yahoo whereby the two goliaths of online and offline electronic sports titles merge their traffic and technology to allow fantasy players to manage teams online and play the games via connected consoles.³⁰

The growth and profit potential of fantasy sports leagues is evident by the licensing fees that companies operating these leagues are willing to pay for the right to use the players' names and performance statistics. For the 2006 baseball season, Yahoo!, ESPN, and CBS SportsLine are all licensed by MLB.³¹ Yahoo! alone pays a licensing fee of \$3 million per year.³²

B. *The CBC Case*

CDM's fantasy sports products are available by telephone, mail, e-mail and the Internet via a website.³³ CDM offers eleven fantasy baseball games.³⁴ Game participants pay fees to play its games and pay a

29. *Id.*

30. *Fantasy Sports Is Our Undiscovered Game*, ELECTRONIC GAMING BUSINESS, July 28, 2004, available at 2004 WLNR 16674480 or http://www.findarticles.com/p/articles/mi_m0PJQ/is_15_2/ai_n6131158.

31. Passan, *supra* note 20.

32. *Id.*

33. C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp.2d. 1077, 1080 (E.D. Mo. 2006).

34. *Id.*

transaction fee each time a trade is made.³⁵ Prior to the start of the MLB season, participants create their teams by “drafting” players from MLB teams.³⁶ The success of a fantasy team over the course of the season is totally dependent upon the participant’s chosen players’ actual performances on their respective actual MLB teams.³⁷

From July 1995 through 2004, C.B.C. Distribution and Marketing, Inc. (CBC), which at that time owned CDM, licensed from the MLBPA the non-exclusive right to use “the names, nicknames, likenesses, signatures, pictures, playing records, and/or biographical data of each player” in CBC’s fantasy sports products.³⁸ In 2005, Major League Baseball Advanced Media, L.P. (MLBAM) entered a license agreement with the MLBPA whereby the MLBPA granted to MLBAM the right to use the players’ names and likenesses in connection with “all interactive media,” which includes fantasy sports games.³⁹ In February of 2005, MLBAM offered CBC a license to promote MLBAM’s fantasy baseball games on CBC’s website in exchange for a ten percent share of all related revenue.⁴⁰ CBC responded by filing a complaint for declaratory judgment in the United States District Court for the Eastern District of Missouri, seeking a judgment that it has the right to use, without a license, the players’ names and performance records in connection with providing fantasy sports games.⁴¹ The MLBPA, which intervened in the matter, and MLBAM asserted a counterclaim that such use by CBC violates the players’ right of publicity.⁴²

On August 8, 2006, the court granted summary judgment in favor of CBC, holding that the use of players’ names and performance records in operating fantasy sports leagues does not violate the players’ right of publicity. The court, in applying Missouri law, stated the elements of a common law right of publicity claim: “(1) That defendant used plaintiff’s name as a symbol of his identity (2) without consent (3) and with the intent to obtain a commercial advantage.”⁴³ It was undisputed that the players’ names and performance records were being used by CBC without the players’ consent.⁴⁴

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 1080-81 (quoting the agreement made in 2002).

39. *Id.*

40. *Id.* In essence, the offer was for CDM to refer its clients to MLB.com and receive a one-time payment of ten percent of the revenue that those participants generated. See Passan, *supra* note 20.

41. *C.B.C. Distrib. & Mktg.*, 443 F. Supp.2d. at 1081.

42. *Id.* at 1082.

43. *Id.* at 1084-85 (quoting *Doe v. TCI Cablevision*, 110 S.W.3d 363, 369 (Mo. 2003)).

44. *Id.* at 1085.

1. The Commercial Advantage Spectrum

The *CBC* court first addressed the “intent to obtain a commercial advantage” element.⁴⁵ The court determined that this element was lacking essentially because *CBC*’s use was not all the way at the commercial end of the spectrum:

Unlike cases where the commercial advantage element of the right of publicity has been found, there is nothing about *CBC*’s fantasy games which suggests that any Major League baseball player is associated with *CBC*’s games or that any player endorses or sponsors the games in any way. The use of names and playing records of Major League baseball players in *CBC*’s games, moreover, is not intended to attract customers away from any other fantasy game provider because all fantasy game providers necessarily use names and playing records. Indeed, there is no evidence to create a triable issue as to whether *CBC* intended to create an impression that Major League baseball players are associated with its fantasy baseball games or as to whether a reasonable person would be under the impression that the baseball players are associated with *CBC*’s fantasy games any more than the players are associated with a newspaper boxscore.⁴⁶

In reaching this conclusion, the court cited cases in which the commercial advantage element was met because the defendant created an impression that the plaintiff was associated with the defendant’s product by using the plaintiff’s identity in advertisements⁴⁷ and marketing efforts.⁴⁸ As discussed in Part I, it is fairly well-settled that these uses constitute a violation of the right of publicity.⁴⁹ However, that does not mean that these are the *only* uses that constitute a violation. There are many cases in which players’ rights of publicity were held to be violated where the association element was lacking.

For example, as early as 1953, it was determined that players have a right of publicity in the context of baseball trading cards even though

45. The Supreme Court of Missouri explained the intent requirement: “[T]he commercial advantage element of the right of publicity focuses on the defendant’s intent or purpose to obtain a commercial benefit from use of the plaintiff’s identity. But in meeting the commercial advantage element, it is irrelevant whether defendant intended to injure the plaintiff, or actually succeeded in obtaining a commercial advantage from using plaintiff’s name.” *TCI Cablevision*, 110 S.W.3d at 370-71 (citation omitted). Therefore, whether the “intent to obtain a commercial advantage” element has been met essentially depends upon how commercial advantage is defined. *See generally id.* at 370-72.

46. *C.B.C. Distrib. & Mktg.*, 443 F. Supp.2d. at 1085.

47. *Id.* (citing *Henley v. Dillard Department Stores*, 46 F.Supp. 2d 587 (Tex. 1999); *Abdul-Jabbar v. Gen. Motors*, 85 F.3d 407 (9th Cir. 1996)).

48. *Id.* (citing *TCI Cablevision*, 110 S.W.3d at 363).

49. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (2005).

there is nothing about trading cards which suggests that any player is associated with Topps (or its cards) or that any player endorses or sponsors Topps (or its cards).⁵⁰ The association element was also lacking in *Palmer v. Schonhorn Enterprises, Inc.*,⁵¹ in which the court found a violation where the names, biographies and profiles of professional golfers were being used in a board game.⁵² The *Palmer* court rejected the user's assertion that "since the information contained in the profiles is readily obtainable public data and available to all, it should be denied the privilege of reproducing that which is set forth in newspapers, magazine articles and other periodicals."⁵³ The *Palmer* court essentially found that the commercial advantage element was met because the use of the golfers' identities was not all the way on the non-commercial end of the spectrum:

It would therefore seem, from a review of the authorities, that although the publication of biographical data of a wellknown figure does not per se constitute an invasion of privacy, the use of that same data for the purpose of capitalizing upon the name by using it in connection with a commercial project other than the dissemination of news or articles or biographies does. The names of plaintiff have become internationally famous, undoubtedly by reason of talent as well as hard work in perfecting it. . . . It is unfair that one should be permitted to commercialize or exploit or capitalize upon another's name, reputation or accomplishments merely because the owner's accomplishments have been highly publicized. The argument by defendant that it is not invading plaintiffs' right of privacy because it does not advertise their names on the lid of the box, and because the purchaser does not know who the "23 famous golfers are" until he purchases and sees the contents, is not tenable.⁵⁴

50. See *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2nd Cir. 1953); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 968 (10th Cir. 1996).

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

52. *Id.* at 459, 460-61.

53. *Id.* at 460. CBC made these same arguments and the federal district court agreed with it on summary judgment. See 443 F. Supp.2d. at 1091 ("CBC's use of Major League baseball players' names and playing records does not give CBC something free for which it would otherwise be required to pay; players' records are readily available in the public domain.")

54. *Palmer*, 232 A.2d at 462. The court in the *CBC* case misconstrued the *Palmer* case by suggesting that "the court in *Palmer* relied upon the defendant's use of the golfers' pictures" in finding a violation of the golfers' rights. 443 F. Supp.2d. at 1086 (emphasis omitted). To the contrary, there is no discussion whatsoever in the *Palmer* opinion regarding the use of pictures versus names. In addition, the court in the *CBC* case made the determination that "cases, including *Palmer*, which address unauthorized use of a famous person's picture are distinguishable from CBC's use of baseball players'

Under the *Palmer* court's analysis, there seems to be a presumption that the plaintiff's right of publicity has been violated unless the defendant can prove that its use of the plaintiff's identity is all the way at the non-commercial end of the spectrum.⁵⁵ The CBC court, on the other hand, seems to presume that there is no violation unless the plaintiff can demonstrate that the defendant's use is all the way at the commercial end of the spectrum.⁵⁶

In *Uhlaender v. Henricksen*,⁵⁷ a federal district court in Minnesota held that the defendants, which manufactured and sold without a license fantasy sports league table games that employed the names and performance statistics of major league baseball players identified by team, uniform number, playing position and otherwise, violated the players' right of publicity.⁵⁸ The court phrased the issue as "whether the plaintiffs' names and published statistics can be considered property subject to legal protection from unauthorized use."⁵⁹ A review of *Haelan Laboratories* and *Palmer* led the court to correctly conclude that the players' right of publicity had been violated:

A celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status. That identity, embodied in his name, likeness, statistics and other personal characteristics, is the fruit of his labors and is a type of property. Defendants' contention has no merit that by the publication in the news media and *because of the ready availability to anyone of the names and statistical information concerning the players*, such information is in the public domain and

names and playing records" without explaining why or how they are distinguishable. *Id.* The court then cited a string of cases involving the use of players' likenesses and made the false implication that the courts in those cited cases only found a violation of the right of publicity because likenesses were involved and not merely names. *Id.* However, it just so happens that likenesses were at issue in those cases; the courts in those cases did not make a distinction or hold that use of likenesses should be treated any differently from use of names under right of publicity law.

55. See *Palmer*, 232 A.2d at 462.

56. See 443 F. Supp.2d. at 1085-86.

57. *Uhlaender v. Henricksen*, 316 F.Supp. 1277 (Minn. 1970).

58. *Id.* at 1278, 1281-82.

59. *Id.* at 1281. The *Uhlaender* court noted that there is apparent confusion in court decisions about right of privacy law as a result of the failure to recognize that the four forms of invasion of privacy are distinct and based upon different elements. *Id.* at 1279. According to the *Uhlaender* court, "Prosser's first three categories involve the incidence of specific personal harm (i.e., injury to feelings), while the fourth is generally considered to involve a pecuniary loss, an interference with property. . . . However misappropriation is classified, recent cases illustrate that there may be substantive importance in distinguishing it from torts involving invasion of plaintiff's 'right to be let alone.'" *Id.* at 1280. The court also noted that there is no "dispute that plaintiff has a valuable property right in his name, photograph and image and he may sell these property rights." *Id.* at 1282 (quoting *Cepeda v. Swift & Co.*, 415 F.2d 1205, 1206 (8th Cir. 1969)).

the players thus have waived their rights to relief in this case. Such argument may or may not have some weight against a right of privacy claim, but in an appropriation action such as in the case at bar *the names and statistics are valuable only because of their past public disclosure, publicity and circulation*. A name is commercially valuable as an endorsement of a product or for use for financial gain only because the public recognizes it and attributes good will and feats of skill and accomplishments of one sort or another to that personality. To hold that such publicity destroys a right to sue for appropriation of a name or likeness would negate any and all causes of action, for only disclosure and public acceptance does the name of a celebrity have any value at all to make its unauthorized use enjoined. (emphasis added)⁶⁰

Palmer and Uhlaender are sound decisions because public domain status has, and should have, no bearing on right of publicity law. "Public domain" simply means the "status of publications, products, and processes that are not protected under patent or copyright."⁶¹ The main purpose for even recognizing an individual's right of publicity is to afford an individual a property right in his or her name and likeness because of the fact that his name and likeness are not protected by copyright.⁶² Therefore, when something is in the public domain, the courts should be heavily scrutinizing its use, not justifying its use on the basis of its availability in the public domain. Indeed, with the advent of the Internet and other forms of technology, courts should be more concerned about the use of players' names and likenesses as well as their performance statistics, all of which can be obtained instantaneously with one click of the mouse.

Tiger Woods, for example, does not have an intellectual property right in his name or likeness, both of which by definition are in the public domain.⁶³ Indeed, the more famous the individual is, like Tiger Woods, the greater the likelihood and extent that his name and likeness will be used by the public. The sole focus for right of publicity law should be on *how* Tiger's name and/or picture *are being used*. My use of Tiger's name in this article, or a book about alleged use of performance-

60. *Id.* at 1282-83.

61. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 4th ed. (Houghton Mifflin Company 2004) available at <http://dictionary.reference.com/browse/public-domain> (last visited Oct. 01, 2006).

62. "[I]t has been suggested that a person's *identity* or *persona* is not within the subject matter of copyright." C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp.2d 1077, 1100 (E.D. Mo. 2006) (citing M. Nimmer, Nimmer on Copyright, § 1.01[B][1][c]).

63. See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 4th ed. (Houghton Mifflin Company 2004), available at <http://dictionary.reference.com/browse/public-domain> (last visited Oct. 01, 2006).

enhancing drugs by Barry Bonds, is not a violation of the right of publicity because these are literary uses that are all the way at the non-commercial end of the spectrum.⁶⁴ Nor is a discussion of Barry Bonds at work in front of the water cooler.⁶⁵ One could even clip a picture of Tiger Woods out of a newspaper or magazine and pin it to his shirt or, better yet, silk-screen Tiger's picture onto the shirt.⁶⁶ But if that shirt is sold without Tiger's consent, then a violation has occurred because the primary use of his picture in such a context is for a commercial advantage.⁶⁷

Although the *Uhlaender* case addressed the right of publicity in the context of fantasy sports leagues and is squarely on point, the district court in the CBC case merely mentioned the *Uhlaender* case in a footnote and stated: "Like *Palmer*, *Uhlaender* was decided early in the development of the recognition of the common law right of publicity and is inconsistent with more recent case authority including the Supreme Court's decision in *Zacchini*."⁶⁸ To the contrary, the holdings in *Palmer* and *Uhlaender* are entirely consistent with the rationale behind recognition of the right of publicity as stated by the Supreme Court in *Zacchini*: preventing unjust enrichment by the theft of good will and preventing the defendant from getting for free some aspect of the plaintiff that would have market value and for which he would normally pay.⁶⁹ CBC is seeking an advantage that nobody else in society enjoys, with the exception of news reporting sources; that being the ability to profit from the commercial value and good will not only associated with the players' names themselves, but also the investment made by the players in the creation of their performances that makes the compilation and publication of the statistics even possible.⁷⁰

64. See, e.g., *C.B.C. Distrib. & Mktg.*, 443 F. Supp.2d. at 1086. The sources of protection afforded to celebrity athletes in this context are defamation law as well as the other kinds of invasions that fall under the right of privacy laws, which include intrusion upon the plaintiff's seclusion or solitude, public disclosure of private facts about the plaintiff's personal life and publicity that places the plaintiff in a false light in the public eye.

65. See, e.g., *id.*

66. See, e.g., *id.*

67. See *Palmer v. Schonhorn Enterprises, Inc.*, 232 A.2d 458, 460-61 (N.J. Super. Ct. Ch. Div. 1967). However, according to the Sixth Circuit Court of Appeals, painting a picture of Tiger Woods and selling it without Tiger's consent is not a violation. See *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 928, 937-38 (6th Cir. 2003). In that case, the Sixth Circuit held that the defendant's right to paint an artistic impression of Tiger Woods outweighed Tiger's right of publicity. *Id.* at 938.

68. *C.B.C. Distrib. & Mktg.*, 443 F. Supp.2d. at 1088 n.12.

69. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977).

70. "[U]nauthorized commercial use hinders the athletes' interests in controlling and benefiting from the uses of their names and personas, diminishing the returns on their own efforts in sport." Matthew G. Massari, *When Fantasy Meets Reality: The Clash*

CBC attorney Rudolph A. Telscher recently posed the theoretical question, if a use of statistics in fantasy leagues is a violation of the right of publicity, then how is it that Trivial Pursuit, which asks how many home runs Hank Aaron hit, is not a violation?⁷¹ The distinction between Trivial Pursuit and fantasy sports leagues lies in the extent of the commercial advantage obtained. First, as the *CBC* court noted, the success of a fantasy team over the course of the season is totally dependent upon the participant's chosen players' actual performances on their respective actual MLB teams.⁷² Thus, the outcome of the fantasy league game is directly tied to the players' actual on-field performances, as opposed to the outcome of the Trivial Pursuit game which is determined based solely upon the participant's knowledge of historical facts (or lack thereof). The other primary distinction between the two uses as relates to the extent of commercial advantage is that the fantasy sports league simply does not exist without the players' names and performance statistics; indeed, they are the primary ingredient for the operation of the game.⁷³ Trivial Pursuit and Jeopardy, on the other hand, do not depend upon players' names and statistics for their existence and operation. Thus, the extent to which fantasy league operators gain a commercial advantage by the use of the players' names and playing records is so much greater than in Trivial Pursuit.

The corollary to Telscher's inquiry would be, if players do not have a right of publicity in their names and performance statistics used by fantasy league operators, then how is it that players do have a right of publicity when their identities are used in trading cards and electronic video games, in which producers currently pay a premium in order to use the players' names and likenesses? If the *CBC* court's definition of commercial advantage is applied in these two situations, players would have no right of publicity because such uses would not fall all the way on the commercial end of the spectrum.⁷⁴ When every player in the league is identified by their names, numbers, statistics and computer images in a video game, there is no implicit suggestion that the players are endorsing that particular video game over another or making any advertisement on behalf of that particular producer.⁷⁵ The same goes for trading cards.

Between On-line Fantasy Sports Providers and Intellectual Property Rights, 19 HARV. J.L. & TECH. 443, 464 (Spring 2006).

71. Charles Delafuente, *A Win for the Home Team: Judge Allows Fantasy League's Use of Major League Stats*, ABA Journal E-Report, 5 No. 33 ABAJEREP 2, August 18, 2006.

72. *C.B.C. Distrib. & Mktg.*, 443 F. Supp.2d. at 1080.

73. *See id.*

74. *See id.* at 1085-89.

75. However, the association element would definitely be apparent if a video game producer used the identity of a player on the front cover of the game.

But nobody would suggest that players should not have the right to be compensated for the use of their identities in the video game and trading card markets because there is a legitimate social purpose in preventing unjust enrichment by the theft of good will.⁷⁶

The *CBC* court suggested that misappropriation of likenesses makes for a stronger case than misappropriation of names under right of publicity law.⁷⁷ However, the states that recognize a right of publicity by common law or statute typically do not draw a distinction between the two when analyzing right of publicity claims. If confronted with the issue, the court in the *CBC* case would most likely scrutinize the use of likenesses in video games and trading cards more closely than it scrutinized the use of names in fantasy games. But the question is, why? The essence of a right of publicity action is that the player is simply seeking to be compensated for the use of his identity from somebody who is profiting from it, regardless of whether the non-consented use involves his picture or name; the player does not necessarily feel stronger about use of his likeness over his name. A right of publicity cause of action is not a claim that the player is "offended" by the use of a particular picture or form of likeness that the defendant used. That claim would be more akin to a right of privacy violation, which protects the right "to be let alone."⁷⁸

Implicit in the court's holding is that the court approves of the business of fantasy sports leagues and that the business is not demeaning to the players, and, therefore, the players should approve of it too and should not be able to hinder the operation of this business by withholding their consent or by demanding a license.⁷⁹ But what if a third party wanted to use the players' names and performance statistics in the operation of a business that was demeaning to the players or one that society would generally disapprove? The *CBC* court's definition of commercial advantage, which requires an association element of endorsement or advertisement, sets a dangerous precedent because,

76. See *Cartoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 975-76 (10th Cir. 1996). Video game producer Electronic Arts paid the NFLPA \$33.5 million in the 2005 fiscal year. See Kaplan, *supra* note 19 at 33.

77. See *C.B.C. Distrib. & Mktg.*, 443 F. Supp.2d. at 1086-87.

78. The available damages distinguishes a right of publicity tort from a right of privacy case in which the plaintiff may also recover for mental or emotional distress and suffering. See *Doe v. TCI Cablevision*, 110 S.W.3d 363, 368 (Mo. 2003). "Though facially similar, the protections afforded by each tort are slightly different: 'the [misappropriation of name tort] protects against intrusion upon an individual's private self-esteem and dignity, while the right of publicity protects against commercial loss caused by appropriation of an individual's [identity] for commercial exploitation.'" *Id.*

79. See, e.g., *C.B.C. Distrib. & Mktg.*, 443 F. Supp.2d. at 1095 (noting the entertainment value of fantasy leagues via educational information regarding baseball history).

presumably, the players would not be able to prevent the use of their identities in the operation of such an enterprise. The players would be left without recourse because they would not be able to establish a violation of the right of privacy on the grounds of "embarrassment."⁸⁰ Simply, unless the use is protected by the First Amendment, the players should have a say as to what types of businesses are using their names and for what purposes their names are being used.

The *CBC* court also viewed the operation of fantasy leagues as games that primarily involve statistics, with the players' names being secondary.⁸¹ Implicit in the court's holding is that the operation of a fantasy sports league is dependent upon the players' performance statistics and not their names.⁸² This logic is flawed in two respects. First, performance stats in and of themselves are meaningless without an identifiable player to associate the performance with. Hence, the reason why fantasy leagues use players' actual names as opposed to "Player X" and "Player Y." Second, it fails to acknowledge that fantasy game participants are first and foremost selecting (or "drafting" and "trading") the players for their team rosters by reference to the players' names. Simply, the players' performance statistics are useless to the participants in the fantasy league if the statistics do not reference the players' names.

Irrespective of how the form is viewed, in substance the players are providing the content for the fantasy sports league industry which is a huge profit-making service industry, and the players should be compensated for the use of that content by fantasy league operators. Even if, as the *CBC* court implicitly suggests, the use of the players' names is only secondary, does it necessarily follow that the players should still not be entitled to *any* compensation in an amount that reflects their contributions made towards the fantasy sports league industry?—Especially in an industry that has an economic impact of \$1.5 billion?⁸³

80. In rejecting Johnny Carson's right of privacy claim arising out of the use of his identity in connection with portable toilets, the Sixth Circuit stated: "Apparently, the gist of this claim is that Carson is embarrassed by and considers it odious to be associated with the appellee's product. Clearly, the association does not appeal to Carson's sense of humor. But the facts here presented do not, it appears to us, amount to an invasion of any of the interests protected by the right of privacy." *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834 (6th Cir. 1983). The court did, however, rule in favor of Carson on his right of publicity claim. *Id.* at 835-36.

81. *See, C.B.C. Distrib. & Mktg.*, 443 F. Supp.2d. at 1095.

82. For example, the court noted that players "do not earn a living by the publication of their playing records" and that "players' records are readily available in the public domain." *Id.* at 1091.

83. Herron, *supra* note 26 at http://biz.yahoo.com/ap/060905/nbcsports_website.html?v=4. The *CBC* court did not even consider the economics in assessing the commercial advantage element. The only statement in the opinion having anything to do with economics was, "To date, the business of fantasy sports games is a multimillion

In summary, defining commercial advantage for purposes of an athlete's right of publicity must focus on how the player's name or likeness is being used. The "intent to obtain a commercial advantage" element is always met when the defendant is using the name or likeness without consent in an endorsement or advertising context, or other marketing effort; that being all the way towards the commercial end of the spectrum. Even when the defendant is using the plaintiff's identity in a quasi-commercial context, the commercial advantage element is met by a two-part inquiry:

- (1) Is the individual's name or likeness being used for a purpose other than news reporting, entertainment (i.e. movie, film, etc.), or literary?
- (2) If so, is the individual's name or likeness the "essence" of the product or service being produced such that the product or service is dependent upon such use for its existence?

2. The Identity Element: You Know It When You See It

The *CBC* court next addressed the element of a right of publicity claim "that defendant used plaintiff's name as a symbol of his identity."⁸⁴ The court held that this element was not met:

CBC's use of the baseball players' names and playing records in the circumstances of this case, moreover, does not involve the 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. *CBC's* use of players' names in conjunction with their playing records, therefore, does not involve the persona or identity of any player. (citation omitted)⁸⁵

In making this conclusion, the court erroneously relied upon cases in which the plaintiff's actual name and picture were not being used by the defendant.⁸⁶ In those cases, the issue was whether the public would

dollar industry in the United States." 443 F. Supp.2d. at 1080. See Section II.A for a brief discussion about the business of fantasy sports leagues. One commentator noted that "although some fantasy providers emphasize that they are not using players' names and identities for their commercial value and consumer appeal per se, such use is unquestionably critical to the providers' commercial enterprise." Massari, *supra* note 70, at 464. The economics of the industry and the extent to which the defendant is profiting from the use should be factors for the court to consider in assessing the commercial advantage element.

84. *C.B.C. Distrib. & Mktg.*, 443 F. Supp.2d. at 1084.

85. *Id.* at 1089.

86. See *id.* (citing *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983); *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003); *Zacchini v. Scripps-*

make the connection that the defendant was referring to the plaintiff.⁸⁷ This is obviously not the issue in the context of fantasy sports leagues because fantasy league operators are using the players' actual names and performance statistics.

For example, in *Carson v. Here's Johnny Portable Toilets, Inc.*,⁸⁸ the defendant used the phrases "Here's Johnny" and "The World's Foremost Comedian" in conjunction with the sale of portable toilets.⁸⁹ The issue was whether the consuming public would connect these particular phrases with the famous comedian John W. Carson, and thus whether the famous comedian's identity had actually been exploited.⁹⁰ The court held that the celebrity's identity had been exploited even though his name or picture was not being used.⁹¹ The *CBC* court also cited *Ali v. Playgirl, Inc.*,⁹² in which the court held that the defendant's use of a drawing of a black man seated on a stool in the corner of a boxing ring captioned as "Mystery Man" and "the Greatest" sufficiently identified Muhammad Ali even though his name and picture were not being used.⁹³ Interestingly, the court in the *CBC* case omitted this decision when discussing the commercial advantage element. The court in *Ali* held that the defendant's use met the "for purposes of trade" element even though the defendant did not use the plaintiff's name or

Howard Broadcasting Co., 433 U.S. 562 (1977)).

87. See generally *Carson*, 698 F.2d 831; *TCI Cablevision*, 110 S.W.3d at 363; *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

88. 698 F.2d 831 (6th Cir. 1983).

89. *Id.* at 833.

90. See *id.* at 834.

91. *Id.* at 835 ("If the celebrity's identity is commercially exploited, there has been an invasion of his right whether or not his "name or likeness" is used. Carson's identity may be exploited even if his name, John W. Carson, or his picture is not used."). The court in *Carson* cited the famous case, *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129 (Wis. 1979), which held that use of the name "Crazylegs" on a shaving gel for women violated the right of publicity of a famous football player named Elroy Hirsch, who had been known by this nickname:

The fact that the name, "Crazylegs," used by Johnson, was a nickname rather than Hirsch's actual name does not preclude a cause of action. All that is required is that the name clearly identify the wronged person. In the instant case, it is not disputed at this juncture of the case that the nickname identified the plaintiff Hirsch. It is argued that there were others who were known by the same name. This, however, does not vitiate the existence of a cause of action. . . . [I]t would be absurd to say that Samuel L. Clemens would have a cause of action if that name had been used in advertising, but he would not have one for the use of "Mark Twain." If a fictitious name is used in a context which tends to indicate that the name is that of the plaintiff, the factual case for identity is strengthened.

Id. at 835-36 (citations omitted) (quoting *Hirsch*, 280 N.W.2d at 137).

92. 447 F. Supp 723 (S.D.N.Y. 1978).

93. *Id.* at 726-27.

likeness in an advertisement or marketing effort.⁹⁴

The *CBC* court also relied upon *Doe v. TCI Cablevision*,⁹⁵ in which a former professional hockey player named Tony Twist successfully established a right of publicity claim regarding the use of a fictional character named “Anthony ‘Tony Twist’ Twistelli” in a comic book without his consent.⁹⁶ The fictional character is a Mafia Don whose list of evil deeds includes multiple murders, abduction of children and sex with prostitutes.⁹⁷ The character in the comic book and the real Tony Twist bear no physical resemblance to each other, but each can similarly be characterized as having an “enforcer” or tough-guy persona.⁹⁸ The *Doe* court explained the factors to be considered in determining whether the public could make the connection that the defendant’s use was referring to the plaintiff:

To establish that a defendant used a plaintiff’s name as a symbol of his identity, “the name used by the defendant must be understood by the audience as referring to the plaintiff.” . . . In resolving this issue, the fact-finder may consider evidence including “the nature and extent of the identifying characteristics used by the defendant, the defendant’s intent, the fame of the plaintiff, evidence of actual identification made by third persons, and surveys or other evidence indicating the perceptions of the audience.” (citations omitted)⁹⁹

In applying these factors, the *Doe* court held that the defendant created “an unmistakable correlation between Twist the hockey player and Twist the Mafia don that, when coupled with Twist’s fame as a NHL star, conclusively establishes that respondents used his name and identity.”¹⁰⁰ The court further explained:

Indeed, respondent McFarlane appears to have conceded the point by informing his readers in separate issues of *Spawn* and in the *Wizard* article that the hockey player Tony Twist was the basis for the comic book character’s name. Arguably, without these concessions, some *Spawn* readers may not have made the connection between Twist and his fictional counterpart. However, other evidence at trial clearly demonstrated that, at some point, *Spawn*’s readers did in fact make the connection, for both Twist and his mother were approached by young hockey fans under the belief that appellant was somehow affiliated with the *Spawn* character. On this record, respondents

94. *Id.* at 727.

95. 110 S.W.3d 363 (Mo. 2003).

96. *Id.* at 366, 370-71.

97. *Id.* at 366.

98. *Id.*

99. *Id.* at 370.

100. *Id.*

cannot seriously maintain that a good many purchasers of Spawn did not readily understand that respondents' use of the name referred to appellant.¹⁰¹

The *CBC* court's determination that the identity element can only be met if the defendant used the plaintiff's "persona" is misplaced, not only because it is inconsistent with case precedent cited by the court but also from a policy standpoint. The *CBC* court defined "persona" as personality, reputation or character. From a practical application standpoint, how is a court to determine when somebody's persona is inappropriately being used as opposed to the permissible use of his name? The court provided no guidance in this regard. This standard could potentially preclude claims in which a celebrity's actual name is even being used in an advertisement. For example, if a cereal company put a statement on the front cover of its cereal box stating, "Tiger Woods eats cereal," there is arguably nothing being revealed about Tiger's personality, reputation or character in the statement. However, such use would most definitely violate the rationale set forth in *Zacchini*. In determining that the identity element was not met in the fantasy league context, the *CBC* court was just repeating its rationale for determining that the commercial advantage element was not met: Because *CBC* is only using names and stats that are in the public domain.

The identity element for a right of publicity cause of action addresses whether there is a sufficient link between the particular plaintiff and the defendant's use. Or, simply, is the defendant actually referring to the plaintiff? Fantasy league use clearly satisfies that element. The cases cited by the *CBC* court would be relevant if, for example, fantasy league operators replaced the player's name with "Player X," but kept the player's stats. In that situation, the plaintiff could argue that the consuming public would connect his particular stats with him even though his actual name is not being used.

3. Policy Considerations

Next, the *CBC* court addressed some policy considerations behind the right of publicity and determined that "the policy considerations are aimed at preventing harmful or excessive commercial use of one's celebrity in a manner which could dilute the value of a person's

101. *Id.* It is also curious that the *CBC* court would cite *Rosemont Enter., Inc. v. Urban Systems, Inc.*, 340 N.Y.S.2d 144 (Sup. Ct. 1973) as support when that case held that the identity element was met in the context of the use of merely the plaintiff's name and biographical data in a board game, which is essentially the same context as fantasy leagues. See Section II.B.4, *infra*, for a discussion of *Rosemont Enter.* in the context of First Amendment protection.

identity.”¹⁰² With that in mind, the court provided three policy reasons why the players should lose: (1) CBC’s use of players’ names and playing records in fantasy leagues “does not go to the heart of the players’ ability to earn a living as baseball players” because they “earn a living playing baseball and endorsing products; they do not earn a living by the publication of their playing records;”¹⁰³ (2) Fantasy sports games actually enhance the marketability of the players and “increase the commercial value of players’ identities because the games encourage participants to attend live games, pay for television packages, or watch on television sporting events in which they otherwise would not be interested;”¹⁰⁴ and (3) CBC’s use of players’ names and playing records “does not give CBC something free for which it would otherwise be required to pay; players’ records are readily available in the public domain.”¹⁰⁵

In the first policy reason, the court decides on its own that players make enough money and should simply be satisfied with the amount of money they make by way of their player contracts with the teams and any endorsements. While players do not earn a living by the publication of their playing records, nor do they earn a living by producing the products and services for which they endorse. However, the court has decided that they have a right to endorsement income without providing an explanation why, from a policy standpoint, the players should have that right. The court’s first policy reason actually makes bad policy for courts to determine whether certain individuals in society are making enough money and to limit the capacities to which these individuals may be compensated.¹⁰⁶ Even worse, it provides no standard whatsoever to enable or guide future courts in making these determinations.

The second policy reason given by the court provides that players are better off not licensing to fantasy leagues the right to use their names because, if fantasy leagues can use their names for free, it will actually enhance the players’ marketability and increase general interest in baseball. Again, the court has made another subjective determination

102. *C.B.C. Distrib. & Mktg.*, 443 F. Supp. 2d 1077 at 1090.

103. *Id.* at 1091.

104. *Id.* at n.20.

105. *Id.*

106. There are statements in the opinion that reveal the court’s unsympathetic bias against professional athletes: “[T]he additional inducement for achievement produced by publicity rights are often inconsequential because most celebrities with valuable commercial identities are already handsomely compensated. . . . [F]or example, . . . major league baseball players’ salaries currently average over one million dollars per year.” *Id.* at 1097 (alteration in original) (quoting *Cardtoons*, 95 F.3d at 974); “Indeed, professional athletes have responsibility for their celebrity status based on their athletic achievements; their fame, however, is nonetheless ‘largely [a] creation of the media or the audience.’” *Id.* at 1098 (quoting *Cardtoons*, 95 F.3d at 975).

and decided what makes good business judgment for the players. Courts have no place making business decisions on behalf of the parties, and whether the players and MLB are better off economically by not charging fantasy leagues is obviously something the players association and MLB should be determining. In addition, the court is also making a judgment, without a hearing and without considering any evidence whatsoever, that the players and MLB are not damaged as a result of CBC's use of the players' names without a license. But aside from the fact that the court supplanted its judgment for that of the players and resolved the damages issue without a hearing or considering any evidence, there are many other flaws in the court's logic here.

Endorsements and advertisements by their very nature enhance players' marketability and fame. Thus, if enhanced marketability and increased public interest in the sport weigh against the players in right of publicity claims, it would also follow that no player would have the right to receive endorsement income. The more famous one becomes, the more likely it is that his name will be used in a commercial setting without authorization, and thus the greater likelihood it is that his publicity rights will be compromised. But in any event, it is irrelevant whether or not fantasy leagues enhance the players' marketability or increase interest in baseball because, in a right of publicity action, "the measure of damages properly focuses on the pecuniary loss to the plaintiff or the unjust pecuniary gain to the defendant."¹⁰⁷

The court overlooked, and in fact did not even address, the issue of pecuniary loss to the players or unjust enrichment to CBC as a result of CBC's use.¹⁰⁸ The court seemed to confuse the concepts of dilution and enhanced marketability, on the one hand, with the issue of pecuniary loss and unjust enrichment, on the other hand. Dilution is the converse of enhanced marketability, and occurs as a result of *excessive* use of a player's identity in advertisements by multiple producers of products and services. Dilution also arises through endorsement of shoddy products and services, as well as advertisements that do not project a good image of the player. Hence, typically players' marketability is enhanced, and they are able to command the most compensation, when they enter "exclusive" license arrangements for the use of their names and likenesses in a particular product line and when they are able to effectively control who uses their identities as well as the types of

107. *Doe v. TCI Cablevision*, 110 S.W.3d 363, 368 (Mo. 2003) (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 cmt. b).

108. Regarding unjust enrichment, the court merely stated, "In the circumstances of the matter under consideration, as CBC merely uses players' names and playing records which are already in the public domain, there is no possibility of unjust enrichment." *C.B.C. Distrib. & Mktg.*, 443 F. Supp. 2d at 1098.

products and services they are associated with. The players currently have the right to control who produces trading cards and video games in order to ensure the production of a quality product. Why shouldn't the players have the right to control the use of their names and playing records in the fantasy league industry to ensure that fantasy league operators produce a quality fantasy game for use by the public?—Especially when, as the court noted, these games tend to increase public interest in the sport. Indeed, as the fantasy league industry expands and the number of operators within the industry increases, the more vital it is for the players to be able to control the use in order to ensure production of higher quality games.

The pecuniary loss to the players is plain and simple—it is the market value of the license entered between the players and a fantasy league operator. Thus, there is economic harm to the players. And the unjust enrichment to CBC (or any other fantasy league operator without a license) is simply the market value of the license that the company is not otherwise required to pay. In most right of publicity cases, determining the amount of pecuniary loss or unjust enrichment can be a difficult task. However, in the CBC case, it would have been a relatively easy task for the court because there are fantasy league operators currently paying a licensing fee in the range of two to three million dollars.

The content for fantasy leagues consists *solely* of players' identities in the form of their names and playing records, of which fantasy leagues are dependent upon for the production of a service and product for the consumer.¹⁰⁹ There is obvious commercial value in those identities when fantasy league operators are selling the games to the public and substantially profiting therefrom. Professional athletes and entertainers distinguish themselves from others in society because their identities are valuable assets. Thus, many of them transfer the rights in their names and likenesses to a wholly-owned business entity that serves as a holding company for the asset, which in turn enters into licensing arrangements with third parties. CBC is appropriating and getting for free the full commercial value of the players' identities, which is contrary to the policy behind recognizing a right of publicity.¹¹⁰ No social purpose is served by allowing CBC to reap one hundred percent of the financial reward through the theft of good will that the players have created in

109. The court even acknowledged that the “games cannot operate without the players’ **names and playing records.**” (emphasis in original). *C.B.C. Distrib. & Mktg.*, 443 F. Supp. 2d at 1099.

110. Publicity rights “are a form of property protection that allows people to profit from the full commercial value of their identities.” *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 968 (10th Cir. 1996).

their identities.

The *CBC* court properly noted that a justification for the right of publicity is that it “promotes the efficient allocation of resources.”¹¹¹ But according to the court, “the matter under consideration does not involve advertising.”¹¹² Therefore, it did not address whether recognition of the right of publicity in the context of fantasy leagues would promote the efficient allocation of resources. Market incentives and efficiencies are achieved when video game and trading card producers compete for the right to use the players’ identities and the players negotiate licensing fees based upon what the market will bear for such use. Indeed, the same market efficiencies and incentives are being accomplished within the fantasy league industry, as Yahoo!, ESPN and CBS Sportsline and others compete to provide consumers with a quality product. There are no barriers to entry into the fantasy league market, and consumers have a wide range of fantasy leagues to choose from.

CBC attorney Rudolph A. Telscher said that if CBC had not prevailed on summary judgment, “[a]n entire industry would have been wiped out,” except for two or three of the biggest players.¹¹³ The court sympathized with Telscher: “CBC would be out of business if it were precluded from using in its fantasy games either players’ names or their names in conjunction with their playing records.”¹¹⁴ Yet how can the court possibly make this conclusion without evaluating any evidence regarding the financial viability of CBC and without conducting any sort of market analysis? Recall that MLBAM made an offer to CBC at the beginning stages of negotiation for the right to use the players’ names, and CBC immediately brought suit. Why does the court just assume that the parties would not ultimately come to a licensing arrangement amicable to both parties and economically feasible for CBC?

Furthermore, and more importantly, is it even legally relevant if CBC is unable to afford the licensing fees, but Yahoo!, ESPN and CBS SportsLine can afford them and are willing to pay them? If CBC cannot afford the fees and is not able to operate a fantasy league, is that necessarily harmful to the consumer? It may be that the larger companies are able to absorb these fees and produce a higher quality game at a much lower cost to the consumer than smaller companies, like CBC, are able to produce. Hence, the consumer is sometimes better off shopping at Walgreen’s as opposed to the “mom and pop” neighborhood drugstore.

111. *C.B.C. Distrib. & Mktg.*, 443 F. Supp. 2d at 1098 (quoting *Cardtoons*, 95 F.3d at 974).

112. *Id.*

113. Delafuente, *supra* note 71.

114. *C.B.C. Distrib. & Mktg.*, 443 F. Supp. 2d at 1099.

4. First Amendment Protection: The Non-Commercial End of the Spectrum

“There is an inherent tension between the right of publicity and the right of freedom of expression under the First Amendment.”¹¹⁵ According to the Restatement, “[t]he use of a person’s identity primarily for the purpose of communicating information or expressing ideas is not generally actionable as a violation of the person’s right of publicity.”¹¹⁶ Examples of such use, according to the Restatement, include (1) news reporting, (2) entertainment and other creative works (fiction and non-fiction), and (3) print or broadcast biographies, novels, plays or motion pictures.¹¹⁷ Simply, the use of players’ names in fantasy sports leagues is not any one of these.¹¹⁸

The use by fantasy leagues cannot be deemed a news reporting use. The issue here is not whether players’ names and performance statistics constitute information that is “newsworthy,” which is a difficult, and some would argue an impossible, term to define. The question of whether something is newsworthy focuses on the data and information being disseminated. But in determining whether a particular use constitutes news reporting, the focus must be on how the information is being used as well as the purpose for its use. If the purpose for the use is to inform the public, then the use should be subject to First Amendment scrutiny.¹¹⁹ Trading cards, for example, disseminate factual and historical information about players, including their performance statistics, but nobody buys a pack of trading cards because they want to

115. *ETW Corp.*, 332 F.3d at 931. See also RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (“The right of publicity as recognized by statute and common law is fundamentally constrained by the public and constitutional interest in freedom of expression”).

116. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (2005).

117. *Id.* See also *ETW Corp.*, 332 F.3d at 930-31.

118. Fantasy league use does not raise a difficult First Amendment question because there is no use involved that is protected by the First Amendment in the first instance, which would require a balancing of the public interest in free expression with the right of individuals to profit from the use of their identities. Such difficult questions are beyond the scope of this article, but involve situations in which the user is selling a product that contains an element of expression, such as a painting see *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915 (6th Cir. 2003); or a parody, see *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959 (10th Cir. 1996).

119. See Russell S. Jones, Jr., *The Flip Side of Privacy: The Right of Publicity, The First Amendment, and Constitutional Line Drawing—A Presumptive Approach*, 39 CREIGHTON L. REV. 939, 959 (June 2006) (“Courts should . . . ask . . . why did the defendant creator use the celebrity’s name, likeness, or other identifying characteristic in/with/on his work? Focusing on the purpose of using the celebrity’s identity will simplify the analysis and appropriately balance celebrities’ property rights in controlling the commercial use of their identities with creators’ First Amendment interests in free expression.”).

find out how many homeruns Barry Bonds hit last year. Instead, people buy the cards for the primary purpose of obtaining a picture of their favorite player, trading them with their friends, or even attaching them to the spokes of their bicycle rims. But if people desire to be informed about players and their performances, they look instead to sources that traditionally report sporting news, such as the sports section of the newspaper, magazines like Sports Illustrated, sports encyclopedias, sports cable television programs and league websites.¹²⁰ The purpose in disseminating the information by these sources is to inform the public,¹²¹ and the public looks to these sources primarily for the purpose of being informed. Conversely, consumers of fantasy league operators log in to the fantasy league website for the purpose of playing a game, drafting players, making trades and seeing how their team is performing in the context of the fantasy league game.¹²²

In *Rosemont Enterprises, Inc. v. Urban Systems, Inc.*,¹²³ the New York Supreme Court addressed whether Howard Hughes could bring a claim over the marketing and distribution of an adult educational career game entitled, "The Howard Hughes Game." Hughes neither consented to the use of his name nor his biographical data. The court phrased the issue as follows: "Can [the game] logically be considered another form

120. The source of the dissemination (i.e. newspaper, news program, magazine) tends to influence the determination as to whether the use constitutes news reporting. However, the source should probably not be outcome determinative. In 1977, the Supreme Court in *Zacchini* held that the dissemination of a taping of the plaintiff's *entire* human cannonball act on a television news program was not protected by the First Amendment even though the source was a news program. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 (1977) ("But it is important to note that neither the public nor respondent will be deprived of the benefit of petitioner's performance as long as his commercial stake in his act is appropriately recognized. Petitioner does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it."). While most courts today would probably afford more deference to the source in determining whether the dissemination constitutes news reporting protected by the First Amendment, the purpose for the dissemination must be to inform the public. Hence, the reason why ESPN currently pays the MLBPA a licensing fee for the right to use the players' identities in its operation of a fantasy sports league even though it also operates as a sporting news program.

121. The purpose of the dissemination is distinct from the motivation for the dissemination, which, arguably, is to make a profit. It is well-established that profiting from news reporting does not prevent the protections afforded under the First Amendment. See *supra* note 18.

122. As one commentator accurately noted:

Consumers subscribe to online fantasy games not for their useful information and news reporting, but primarily for their sophisticated game play. News reports and analysis are merely added benefits. The free speech informational aspects of the games serve as aids to assist fantasy players in making informed choices in their fantasy lineups.

Massari, *supra* note 70, at 464.

123. 340 N.Y.S.2d 144 (Sup. Ct. 1973).

of distributive publication as any biography, magazine article, or motion picture would be; or, on the other hand, should the marketing and distribution of 'the game' be characterized as an act of appropriation?"¹²⁴ The court held that the defendant's use of Hughes' name and biographical data violated his right of publicity. In addition, the court held that the defendant's game did not warrant First Amendment scrutiny because it is not reporting the news:

The question apparently is where does one draw the line between the right of the public to "know" and an act of appropriation. In reality, defendants are not disseminating news. They are not educating the public as to the achievements of Howard Hughes. They are selling a commodity, a commercial product, an entertaining game of chance, the outcome of which is determined by maneuvering tokens on a game board by the throw of the dice. The use of plaintiff's name, biographical data etc. in this context is not legitimate to the public interest. It is merely the medium used to market a commodity familiar to us all in its varied types and forms. Use for such purposes is an act of appropriation of those property rights belonging to plaintiff, Hughes.¹²⁵

Similarly, fantasy league operators are selling a game and a commodity, and are not disseminating news. But the outcome of the fantasy league game is not determined by a throw of the dice; it is determined by the players' current performances. Thus, the *Zacchini* rationale of preventing unjust enrichment by the theft of good will is even more prevalent in the fantasy league game than it is in the Howard Hughes game.

The *CBC* court determined that *CBC's* use was protected by the First Amendment because the names and playing records are "bits of baseball history" that educate the public, and the statistical information about the players constitutes historical facts about baseball players.¹²⁶ For purposes of First Amendment analysis, the court, again, as it did in the right of publicity analysis, focused on the subject matter being used instead of *the use* of the subject matter. The court cited only two cases in support: A California Court of Appeal case, *Gionfriddo v. Major League Baseball*,¹²⁷ and *Cardtoons, L.C. v. Major League Baseball Players Ass'n*.¹²⁸ In *Gionfriddo*, the court held that the First Amendment

124. *Id.* at 145.

125. *Id.* at 146-47.

126. *C.B.C. Distrib. & Mktg.*, 443 F. Supp. 2d at 1093.

127. 114 Cal. Rptr. 2d 307, 314 (Cal. Ct. App. 2001).

128. 95 F.3d 959 (10th Cir. 1996). *Cardtoons* involved trading cards featuring readily identifiable caricatures of major league baseball players with humorous commentary about their careers. This case is clearly distinguishable from the *CBC* case

protected the dissemination of factual data concerning retired players, their performance statistics, photographs, and verbal descriptions and video depictions of their play, by MLB through game programs, websites and video clips. However, unlike the CBC court, the *Gionfriddo* court extensively considered how MLB used the information and the nature of the expression in which it was used.¹²⁹

Gionfriddo may be distinguishable on two grounds. First, the information disseminated consisted of “minor historical references” pertaining to America’s favorite pastime, which, as the court noted, entails a “significant public interest.”¹³⁰ It could be argued that the public interest is more prevalent in this context because of the public’s enduring fascination with baseball’s past. Secondly, and probably more importantly, the court noted that MLB is not “exploiting that interest by inserting the data in an advertisement.”¹³¹ The use by MLB of information regarding famous retired baseball players is integral to the public’s understanding of baseball’s history, and thus the purpose for the use is to inform the public. Contrary to fantasy league use, the use by MLB in *Gionfriddo* is not so much an “expression related solely to the economic interests of the speaker and its audience,” as the Supreme Court defined commercial speech.¹³² Moreover, MLB’s purpose for the use is to convey information about a product that *it* produces (the game of baseball) in order to create interest in the game, whereas fantasy league operators are third parties using the information in the context of an *unrelated* product sold to the public.¹³³ Although fantasy leagues are not using the data in an advertisement, they are in fact exploiting a business opportunity by using the players’ identities to satisfy their *own* ends, which flies directly in the face of right of publicity law.

Courts have struggled with how to properly balance First Amendment considerations with an individual’s right to control the commercial use of his identity. The standard proposed by this article for

because Cartoons’ parody trading cards provide social commentary on public figures, which constitutes the type of creative expression protected by the First Amendment.

129. *Gionfriddo*, 114 Cal. Rptr. 2d at 315-18.

130. *Id.* at 316.

131. *Id.* (emphasis added).

132. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561 (1980).

133. The *Gionfriddo* court noted that, “even if Baseball used depictions of players playing the game or recited statistics or historical facts about the game to advertise *the game* and promote attendance, . . . [t]he owner of a product is entitled to show that product to entice customers to buy it.” *Gionfriddo*, 114 Cal. Rptr. 2d at 317. MLB’s use is analogous to the permitted use by magazines, such as *Sports Illustrated*, of names and likenesses used in prior publications, in the context of advertisements for the periodical itself to illustrate the quality and content of the periodical. See, e.g., *Namath v. Sports Illustrated*, 371 N.Y.S.2d 10 (N.Y. App. Div. 1975), *aff’d*, 352 N.E.2d 584 (N.Y. 1976).

determining the commercial advantage element in right of publicity claims alleviates the necessity for courts to embark upon a separate First Amendment balancing once they have decided that the elements of a right of publicity claim have been established. The proposed standard takes into account First Amendment considerations at the non-commercial end of the commercial advantage spectrum. It precludes a right of publicity claim when the defendant's use of an individual's name or likeness is for a news reporting, entertainment (i.e. movies and films), or literary purpose.

IV. Conclusion

In right of publicity cases, it is imperative that courts extensively consider how the celebrity's name and likeness are being used. The commercial advantage inquiry does not end just because the celebrity's name and likeness is not being used in the context of an advertisement, endorsement or marketing effort. There are many quasi-commercial uses that fall somewhere in-between the non-commercial and commercial ends of the commercial advantage spectrum, like video games, trading cards, and fantasy leagues, for which players should have the right to control the use of their identities. When the content for a product or service is based almost exclusively on the celebrity's name or likeness, it is unfair and not good policy to allow the producer to reap the full commercial value of the celebrity's identity. The most efficient allocation of resources is obtained in a free market by which producers of products and services compete for the right to use celebrities' identities, and the celebrities and producers are incentivized to negotiate licensing fees based upon what the market will bear for such use.
