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## The Fantasy of Athlete Publicity Rights: Public Fascination and Fantasy Sports' Assertion of Free Use Place Athlete Publicity Rights on an Uncertain Playing Field

Maureen C. Weston\*

### INTRODUCTION

When Hugo Zacchini shot himself out of a cannon, the television station which broadcasted the performer's entire fifteen second cannonball performance without permission was held to have violated the performer's right to publicity.<sup>1</sup> Despite the station's claim that its broadcast was protected as a newsworthy event under the First Amendment, the U.S. Supreme Court ruled that broadcast of the act effectively deprived the performer of the act's commercial value and constituted unjust enrichment on behalf of the station by receiving for free what others had paid to view.<sup>2</sup> Baseball players' right to publicity in the value of their photograph precluded Topps Chewing Gum, Inc. from including trading cards in its chewing gum packets without compensation and permission of the players.<sup>3</sup> Other athletes have also restricted the commercial use of their name, image, or distinctive references by third parties without authorization. In the sports and entertainment arenas, violations of publicity rights have been adjudged in a number of settings, including the use of the name of a professional hockey player as a character in a comic book,<sup>4</sup> the use of an athlete's recognized nickname in a shaving cream commercial,<sup>5</sup> and even a drawing which contained distinctive characteristics resembling a popular athlete.<sup>6</sup>

Athletes make tremendous investments in developing their competitive skills, achievements, and reputations. Sports teams and leagues are al-

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<sup>1</sup> *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977) (recognizing that the right of publicity protects the proprietary interest of an "individual to 'reap the reward of his endeavors.'").

<sup>2</sup> *Id.* at 578.

<sup>3</sup> *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2nd Cir. 1953) (holding that New York's common law protected a baseball player's right in the publicity value of his photograph).

<sup>4</sup> *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003) (en banc).

<sup>5</sup> *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129 (Wis. 1979) (finding that Elroy Hirsch possessed publicity rights in the "Crazylegs" nickname).

<sup>6</sup> *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978).

so in the business of promoting their sport/product and developing brand recognition, goodwill, and customer loyalty. Granted, athletes may be compensated handsomely to play,<sup>7</sup> and ticket sales and broadcasting revenues may be lucrative. But much of what athletes and sport leagues own is intangible, yet extremely valuable, and derives from the infrastructure of organized competition that generates an insatiable public interest in sports and the players themselves. The proprietary value of an athlete's identity is evident by the endorsement opportunities he or she can procure.<sup>8</sup> Intellectual property rights, which encompass copyrights, trademarks, and rights of publicity, protect the rights of the owners, teams, leagues, and players to control and profit from their investments and the commercial use of their identity. Yet, in a society which holds dear free speech, free enterprise, innovation, and, increasingly, free and instant access to online information, be it news, sports, or entertainment, the state of athletes' publicity rights is uncertain. A debate ensues in determining the appropriate boundaries for players' publicity rights against the right of commerce and the interests of the public under the First Amendment.

The right to publicity is defined as the "inherent right of every human being to control the commercial use of his or her identity."<sup>9</sup> The recognition of an athlete or celebrity's right to publicity is justified by the right to control and protect one's image, reputation, and proprietary interests. Traditionally, a company that intended to use the name or identity of an athlete or celebrity in a sports-themed product, advertisement, or commercial service, obtained permission and acquired licensing rights to do so. Thus, entities in the business of selling sports-related trading cards, apparel, board games, video games, and other commercial products that used player identities secured licenses from players to do so.<sup>10</sup> However, when the union for Major League Baseball players decided to terminate licensing rights to player identities in fantasy baseball, the producers sought to use player names and statistics in online fantasy sports *for free*. They won.<sup>11</sup>

While the "Human Cannonball" act remains impressive under any standard of technology, the variety of ways an athlete's performance, identity, or persona can be used has multiplied. As new media continues to de-

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<sup>7</sup> College athletes also may garner significant publicity, yet these athletes are restricted from capitalizing on individual rights of publicity due to restrictions set out in NCAA regulations. See, e.g., Kristine Mueller, *No Control Over Their Rights of Publicity: College Athletes Left Sitting the Bench*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 70 (2004); *Bloom v. Nat'l Collegiate Athletic Ass'n*, 93 P.3d 621, 627 (Colo. Ct. App. 2004).

<sup>8</sup> For some athletes, endorsement income exceeds the pay received for playing.

<sup>9</sup> 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. 2007); *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 988 n.6 (9th Cir. 2006).

<sup>10</sup> See Matthew G. Massari, *When Fantasy Meets Reality: The Clash Between On-line Fantasy Sports Providers and Intellectual Property Rights*, 19 HARV. J.L. & TECH. 443, 457 (2006); Julie A. Garcia, *The Future of Sports Merchandise Licensing*, 18 HASTINGS COMM. & ENT. L.J. 219 (1995) (describing licensing processes in various sports leagues).

<sup>11</sup> *C.B.C. Distribution & Mktg, Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007).

velop, the landscape of the sports industry also shifts. In this age of instantaneous digital communication, Internet downloading, file sharing, and on-line commerce, discerning what constitutes the public domain while circumscribing the right to publicity is increasingly complicated.

Although “[t]he one constant through all the years . . . has been baseball,”<sup>12</sup> much has changed since baseball’s nineteenth century origins. What began simply enough as clubs coming together to give exhibitions of baseball<sup>13</sup> is now a multi-million dollar industry where the average salary of participants is nearly \$3 million, yearly revenue of teams exceed \$100 million, and the costs of stadiums and franchises are in the hundreds of millions of dollars.<sup>14</sup> Much of this revenue comes from broadcasting contracts, licenses, and endorsements.<sup>15</sup> The market for sports-related products and services continues to expand. Others want to get in the game by engaging in commercial enterprises that involve sports and player identities. While the hot dog vendor and neighborhood bar outside the baseball stadium have long profited indirectly from the public’s attention to organized games, the stakes and potential profits for outside enterprises to capitalize on the league brand are enormous. The market for fantasy sports generates millions in revenue to its producers.<sup>16</sup> The uses and potential abuses of sports intellectual property outside traditional jurisdictional boundaries are considerable. Where does the right to publicity begin, end, and public rights to commercial use of the same emerge?

This Comment examines the treatment of athlete publicity rights in the context of fantasy sports as well as new media uses. Part I examines cases where athlete publicity rights have been recognized and rejected. Part II focuses upon fantasy sports’ challenge to player publicity rights in *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*<sup>17</sup> In *C.B.C.*, both the federal district court and Eighth Circuit Court of Appeals upheld, albeit for different reasons, the unlicensed use of player names and statistics by a fantasy sports provider in the online games that

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<sup>12</sup> FIELD OF DREAMS (Universal Studios 1989); see also ESPN.com, Readers: Best Movie Quotes, available at <http://espn.go.com/page2/s/list/readers/moviequotes/best.html> (last visited Apr. 8, 2008).

<sup>13</sup> See Fed. Baseball v. Nat’l League of Prof’l Baseball Clubs, 259 U.S. 200, 209 (1922).

<sup>14</sup> Kurt Badenhausen et al, *Baseball’s Big Bucks* (Mar. 19, 2007), [http://www.forbes.com/2007/04/19/baseball-team-valuations-07mlb-cz\\_kb\\_0419baseballintro.html](http://www.forbes.com/2007/04/19/baseball-team-valuations-07mlb-cz_kb_0419baseballintro.html) (last visited Feb. 24, 2008) (noting that MLB’s revenues totaled \$5.1 billion in 2006). Following the 2007 season, the New York Yankees had a value of \$1.2 billion dollars. This number includes stadium income and brand management. #1 New York Yankees, FORBES.COM, Apr. 19, 2007, [http://www.forbes.com/lists/2007/33/07mlb\\_New-York-Yankees\\_334613.html](http://www.forbes.com/lists/2007/33/07mlb_New-York-Yankees_334613.html) [hereinafter *Yankees*].

<sup>15</sup> See, e.g., *Yankees*, *supra* note 14; Howard Bloom, *Going Inside MLB’s Latest \$3 Billion TV Agreements*, SPORTS BUSINESS NEWS, July 13, 2006, [www.sportsbusinessnews.com/\\_news/news\\_347260.php](http://www.sportsbusinessnews.com/_news/news_347260.php).

<sup>16</sup> See Brandon T. Moonier, Comment, *The Legal Game Behind Fantasy Sports: Copyright Protection and the Right of Publicity in Professional Performance Statistics*, 26 ST. LOUIS U. PUB. L. REV. 129 (2007) (estimating that fantasy baseball users annual expenditures of \$175 million and that fantasy baseball is a \$1 billion industry).

<sup>17</sup> 443 F. Supp. 2d 1077 (E.D. Mo. 2006), *aff’d*, 505 F.3d 818 (8th Cir. 2007), *cert. denied*, 2008 U.S. LEXIS 4574 (June 2, 2008).

CBC sells to the public.<sup>18</sup> Part III analyzes the impact of *C.B.C.* on the future of athlete publicity rights in the expanding commercial market for on-line sports content, gaming, and media. Part IV reflects upon the policy considerations underlying athletes' rights to control use of their names against what appears to be an overriding regard for free use based on public interest and proposes explicit legislative and judicial articulation of such.

## I. THE RIGHT OF PUBLICITY VERSUS FIRST AMENDMENT RIGHTS OF FAIR USE

### A. The Right of Publicity

The right of publicity is among a group of laws of intellectual property addressing unfair competition.<sup>19</sup> The right is based in state law and, to date, recognized in over half the states by common law or statute.<sup>20</sup> The right of publicity developed judicially as one aspect of the right of privacy, defined as an appropriation of one's name or likeness.<sup>21</sup> The rights are distinct, however, in that the right of privacy implies a right to be left alone. In contrast, the publicity right capitalizes on the spotlight but asserts a property right in that fame, which has commercial value that can be sold or licensed.<sup>22</sup> The right recognizes the value in intangible assets, such as name, identity, brand, and goodwill or reputation, and the right to control the commercial uses of one's identity.<sup>23</sup>

An action based on right to publicity, a state law claim, must generally establish (1) the validity of one's right of publicity; and (2) that this right has been infringed.<sup>24</sup> Under Missouri law, for example, infringement is demonstrated by showing "(1) [t]hat defendant used plaintiff's name as a symbol of his identity (2) without consent (3) and with the intent to obtain a commercial advantage."<sup>25</sup> Other states have adopted a narrower test, modifying the commercial advantage element and requiring a plaintiff to prove that: "(A) Defendant, without permission, has used some aspect of

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<sup>18</sup> See *infra* Section III.

<sup>19</sup> 1 MCCARTHY, *supra* note 9, at § 1:3.

<sup>20</sup> See Joshua Nelson, *State Right to Publicity Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, Jan. 20, 2006, <http://www.ncsl.org/programs/lis/privacy/publicity04.htm> (identifying thirty states recognizing right of publicity by statutes or common law). These states have adopted varying definitions and scopes of the right. Thus, the judicial interpretations of how the right is defined are varied and, frankly, often convoluted. See Richard T. Karcher, *The Use of Player's Identities in Fantasy Sports Leagues: Developing Workable Standards for Right of Publicity Claims*, 111 PENN. ST. L. REV. 557, 558 (2007) (noting that, "[i]n many states, the parameters or even the existence of the right of publicity remains [sic] undetermined.") (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46, cmt. b (2005)).

<sup>21</sup> See *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

<sup>22</sup> *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 134 (Wis. 1979) (distinguishing right to be let alone from a right to be compensated for the use of one's name for commercial purposes).

<sup>23</sup> See 1 MCCARTHY, *supra* note 9, at §§ 5:63–5:67.

<sup>24</sup> *Id.* at § 3:2.

<sup>25</sup> *Doe v. TCI Cablevision*, 110 S.W.3d 363, 369 (Mo. 2003) (en banc). Missouri law was at issue in *CBC*. See *infra* Part II.

identity or persona in such a way that plaintiff is identifiable from defendant's use; and (B) defendant's use is likely to cause damage to the commercial value of that persona."<sup>26</sup>

With respect to the essential element of identity, a plaintiff must establish that the defendant used some aspect of the plaintiff's identity or persona in such a way that the plaintiff is identifiable. It is important to recognize that the test for infringement is "identifiability" and not confusion as to endorsement by the person.<sup>27</sup> Deception and false endorsement are separate claims and not necessary for a publicity violation. As Professor McCarthy notes:

Identity can be stolen and used to attract attention to an advertisement or product without giving rise to a valid claim of false endorsement. The identity of a famous person is used to cut through the clutter of advertising and to merely draw attention to the advertisement. It is common in advertising just to use the picture or name of a celebrity or a person prominent in a certain field without any hint of endorsement.<sup>28</sup>

As a form of intellectual property, the right of publicity serves certain important economic interests.<sup>29</sup> Among these interests are the encouragement of creative activities and works, the preservation of the commercial value of goodwill, the prevention of unjust enrichment, dilution or exploitation of such by others, as well as protecting against false suggestions of endorsement or sponsorship.<sup>30</sup>

#### B. Related But Distinct Claims

One might reasonably question whether the right of publicity is necessary as a distinct claim.<sup>31</sup> The fact that just over half of the U.S. states recognize the right by statute or common law suggests that not all believe a separate right of publicity is needed.<sup>32</sup> Other forms of intellectual property protect similar proprietary interests as the right of publicity, yet apply to distinct areas. For example, the federal Copyright Act protects "[o]riginal

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<sup>26</sup> 1 MCCARTHY, *supra* note 9, at § 3:2.

<sup>27</sup> Some courts conflate the two, as the district court did in *C.B.C.* See *infra* notes 76–79 and accompanying text.

<sup>28</sup> J. Thomas McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 135 (1995).

<sup>29</sup> *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 967 (10th Cir. 1996).

<sup>30</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46, cmt. c (2005); see also *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576–77 (1977) (recognizing that the right of publicity encourages creativity and economic incentives to individuals); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 837 (6th Cir. 1983) ("Vindication of the right [of publicity] will also tend to prevent unjust enrichment by persons . . . who seek commercially to exploit the identity of celebrities without their consent).

<sup>31</sup> See Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 Hous. L. Rev. 903, 929–930 (2003) (although the right of publicity may be appealing, it creates too many First Amendment problems as to non-commercial speech).

<sup>32</sup> See *supra* note 25; see also McCarthy, *supra* note 28, at 19 (noting that twenty-five states have recognized the right of publicity).

works of authorship fixed in any tangible medium of expression.”<sup>33</sup> Although player names and statistics may be reported in various media, the athletes themselves do not have a claim for copyright protection because their “identities” are not works that are fixed in a medium.<sup>34</sup>

Federal trademark protection under the Lanham Act<sup>35</sup> is also distinguishable. The Lanham Act does recognize the marketable property rights in licensed merchandise and the value of brand recognition.<sup>36</sup> It restricts the unauthorized commercial use, reproduction, imitation, or sale of a distinctive “mark” or “trade name” in connection with the sale of goods or services which is likely to cause consumer confusion or to deceive as to the origin, sponsorship or approval.<sup>37</sup> Although team names and logos may qualify, trademarks generally cannot be used to protect a name identifying a particular living individual.<sup>38</sup>

Defamation law is available to protect against false statements about a person that are injurious to the individual’s reputation.<sup>39</sup> Interestingly, well-known persons, such as celebrities or athletes, have a higher burden, as “public figures,” to sustain a defamation action;<sup>40</sup> yet, these same celebrities have more name recognition value to prevail on publicity rights. Tort false endorsement claims are distinct from publicity claims, which, by definition, do not require proof of consumer confusion. Publicity rights are a form of unfair competition and misappropriation law, which perhaps most closely track publicity rights, yet contain elements beyond the unauthorized commercial use of identity.<sup>41</sup> Although the foregoing laws address distinct situations, courts noticeably conflate many of the considerations and fair use defenses recognized under statute in analyzing liability for a publicity rights violation.<sup>42</sup>

<sup>33</sup> 17 U.S.C. § 102 (2000). Congress’ authority to enact copyright laws is derived from the U.S. Constitution, article I, section 8 (providing Congress the power “to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries . . .”).

<sup>34</sup> See *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 846–47 (2d Cir. 1997) (rejecting claims that game statistics or athletic events were works of authorship within copyright protection, and stating, even if they were, “no author may copyright facts or ideas.”) (citation omitted).

<sup>35</sup> Lanham Act, 15 U.S.C. §§ 1051-1141n (2000).

<sup>36</sup> See RAY YASSER, JAMES R. MCCURDY, C. PETER GOPLERUD & MAUREEN A. WESTON, *SPORTS LAW: CASES & MATERIALS* 825 (6th ed. 2006).

<sup>37</sup> 15 U.S.C. § 1114 (2000).

<sup>38</sup> 15 U.S.C. § 1052(c) (2000).

<sup>39</sup> RESTATEMENT (SECOND) OF TORTS § 559 (2000).

<sup>40</sup> *Id.* at § 580A.

Under current constitutional standards, however, in defamation actions the nature or status of the parties involved is a significant factor in determining the applicable legal standards. The test for liability in a defamation action depends on whether the libeled figure is a public or private figure and on whether the defamatory publication addresses a matter of public or private concern.

Margaret E. O’Neill, *Civil Liability for the Defamation of Persons*, 50 AM. JUR. 2D *Libel and Slander* § 31 (2008); see also *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964).

<sup>41</sup> See 1 MCCARTHY, *supra* note 9, at § 5:48.

<sup>42</sup> See *infra* Section III.A.2.

### C. Examples of Cases Recognizing an Athlete's Right of Publicity

In the sports and entertainment arenas, publicity rights have been recognized in a number of contexts. Among these are: (1) a player's rights to preclude the use of his photograph on trading cards in a chewing gum packet;<sup>43</sup> (2) the use of a look-alike in a commercial drawing which contained characteristics of a popular athlete;<sup>44</sup> and (3) imitations of a distinctive voice.<sup>45</sup>

The unauthorized use of a recognized name, nickname, or biographical information on unrelated commercial products has also been adjudged an illegal use of identity.<sup>46</sup> In *Uhlaender v. Henricksen*,<sup>47</sup> major league baseball players successfully enjoined the use of their names and statistical information contained in a baseball board game without royalties or a license agreement.<sup>48</sup> The court held that the plaintiffs had a proprietary interest in their names and sporting accomplishments sufficient to enable them to enjoy use thereof for commercial purposes.<sup>49</sup> Professional golfers obtained a similar result regarding the unauthorized use of their names and statistics on a golfing board game.<sup>50</sup> More recently, the Missouri Supreme Court ruled illegal the usage of the name of a professional hockey player as a character in a comic book.<sup>51</sup>

In short, where an entity seeks to use a recognizable form of an athlete's identity on an unrelated commercial product or service, it risks infringing upon athlete publicity rights. Whether these cases were correctly decided or whether a publicity right attaches when a name is used, arguably incidentally or in connection with other factual information such as player statistics, became central issues in *C.B.C.* Where the rights of publicity essentially can provide one person a monopoly over a name, do competing

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

44 *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 728-29 (S.D.N.Y. 1978) (violation by unauthorized Playgirl representation of boxer, Muhammad Ali).

45 See, e.g., *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (involving singer, Tom Waits' objections to the commercial use of his identity which he considered offensive to his musical integrity); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (concerning singer in car commercial imitated Bette Midler's singing style and voice); see also *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992) (discussing Vanna White robot turning letters).

46 See, e.g., *Abdul-Jabbar v. General Motors Corp.*, 75 F.3d 1391 (9th Cir. 1996) (using name "Lew Alcindor" in commercial aired during NCAA tournament); *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129 (Wis. 1979) (ruling that football players' publicity rights in "Crazylegs" nickname precluded use of name on shaving cream product); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835-37 (6th Cir. 1983).

47 316 F. Supp. 1277 (D. Minn. 1970).

48 *Id.* at 1282-83.

49 *Id.* at 1279, 1282 (distinguishing the right of publicity from privacy or misappropriation); see also *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967) (holding defendant violated right of publicity with golf game); *Shamksy v. Garan*, 632 N.Y.S.2d 930 (Sup. Ct. 1995) (holding that the sale of clothing/jerseys emblazoned with a group portrait of a legendary 1969 Mets MLB team, without the permission of the individual players, violated their right to publicity).

50 See *Palmer*, 232 A.2d at 458 (holding defendant use of golfers' names and statistics in connection with golfing board game violated publicity rights).

51 *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003) (en banc).



policies favoring public use and access preempt individual rights?

#### D. Defenses and Fair Use

Claims of publicity rights violations fail where either the identity or commercial use elements are not established.<sup>52</sup> Freedom of speech protected under the First Amendment of the U.S. Constitution also limits enforcement of publicity rights.<sup>53</sup> Nearly absolute Constitutional protection is accorded truthful speech, which is considered “communicative.” By contrast, “commercial” speech must yield to publicity rights. The distinction is not always evident:

A “communicative” use is one in which the policy of free speech predominates over the right of a person to his identity, and no infringement of the right of publicity takes place. A “commercial” use is one in which the right of publicity is infringed because, while there are overtones of ideas being communicated, the use is primarily commercial.<sup>54</sup>

As Professor McCarthy notes, the medium used often determines the result, and, for example, “[t]he unpermitted use of a person’s identity on a product such as a coffee mug or a T-shirt will be ‘commercial’ and require a license.” By contrast, using a person’s identity or picture in a newspaper, magazine, or television news program is considered ‘communicative’ and thus immune.<sup>55</sup>

Examples of communicative speech entitled to broad First Amendment protections include use of “publicity rights” for newsworthy, political, artistic or creative purposes. Thus, use of a celebrity’s name for purposes of conveying news or use in artistic expressions, including biographies, is protected. The artistic and creative use exception has immunized use of publicity rights. For example, baseball cards that contained caricatures of prominent professional baseball players were considered within a form of free speech known as parody. The court in *Cardtoons*<sup>56</sup> thus held that parody trading cards “are not commercial speech—they do not merely advertise another unrelated product.”<sup>57</sup> Even Tiger Woods could not stop the sale of “Masters of Augusta” prints in which artist Rick Rush depicted Woods on the greens at the famous tournament.<sup>58</sup> A use that is transformative may also come within First Amendment purview. Thus, *Kirby v. Sega of America*<sup>59</sup> upheld the use of the plaintiff’s likeness where the video game

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<sup>52</sup> C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1088-1089 (E.D. Mo. 2006), *aff’d*, 505 F.3d 818 (8th Cir. 2007).

<sup>53</sup> U.S. CONST. amend I; *see also* 1 MCCARTHY, *supra* note 9, at § 3:1.

<sup>54</sup> J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:4 (4th ed. 2007).

<sup>55</sup> *Id.*

<sup>56</sup> *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959 (10th Cir. 1996).

<sup>57</sup> *Id.* at 970.

<sup>58</sup> *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915 (6th Cir. 2003) (holding that First Amendment protections for artistic and creative use outweighed famous golfer’s publicity rights).

<sup>59</sup> 144 Cal. App. 4th 47 (Ct. App. 2006).

character that used a celebrity's likeness was transformative.<sup>60</sup>

Courts have ruled the use of facts or information about a person, which are considered in "the public domain," "historical facts," or "in the public interest" as within First Amendment protection.<sup>61</sup> These courts have not adequately explained, however, whether information that is reported in the news can be then exploited for commercial use and stay within the communicative exception because it was obtained from the news. For example, when historical facts constitute a person's "identity," is subsequent commercial use unfettered?

Similarly, the justification for permitting the use of publicity rights under a "public interest" exception is dubious. Particularly if publicity rights are based in property, a claim of a "public interest" exception can seemingly swallow the rule.<sup>62</sup> Much of the public may be interested in a host of private or proprietary information, yet this appetite should not necessarily convert to a right to free commercial use or to deprive a holder of intellectual property rights. Significantly, the commercial use of identity sets the right of publicity apart from the newsworthy and creative communicative free use principles protected under the First Amendment.

## II. THE USE OF ATHLETE IDENTITIES IN FANTASY SPORTS: FAIR USE OR UNFAIR APPROPRIATION?

### A. Fantasy Sports' Challenge to Player Publicity Rights

Developments in technology, such as through the Internet, video games, CD-ROMs, online information, fantasy sports, and interactive games, present opportunities for emerging and lucrative markets for sports-themed products. Although fantasy sports is not a new concept, the internet's broad proliferation and accessibility have made fantasy sports into a multi-million dollar industry.<sup>63</sup> Inherent in these uses are expectations for rampant access to and use of player identities. Fantasy sports' assertion of free use of player identities in *C.B.C.* posed the challenge of identifying the boundaries or effective regulation for player publicity rights in new media.

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<sup>60</sup> *Id.*

<sup>61</sup> *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1092 (E.D. Mo. 2006), *aff'd*, 505 F.3d 818 (8th Cir. 2007).

<sup>62</sup> Dean Erwin Chemerinsky has criticized the vagueness of the "public interest" exception as within the First Amendment and proposed that only truthful speech that poses safety threat should be actionable. See Erwin Chemerinsky, *Protecting Truthful Speech: Narrowing the Tort of Public Disclosure of Private Facts*, 11 CHAP. L. REV. 423, 423 (2008).

<sup>63</sup> Formerly relying on newspapers and weekly compilations of statistics, Karcher notes that: The advent of the Internet 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. The increased efficiencies brought millions of new participants along with it, as well as new fantasy league operators to capitalize. Karcher, *supra* note 20, at 561-62.

### 1. Case Background

C.B.C. is a Missouri corporation that offers fantasy sports products and games over the internet to its paying users.<sup>64</sup> C.B.C.'s website, *www.CDMsports.com*, allows its users to fashion their own fantasy teams to play in online leagues.<sup>65</sup> Users act as team owners, participating in a draft and later trading fantasy players, if they like. The success of a user's fantasy teams corresponds to the chosen players' actual performances. The website uses the names and current statistics of actual Major League Baseball ("MLB") players and also employs journalists to write interest stories, including player profiles and reports for its users to read.<sup>66</sup> The C.B.C. website contains current and actual statistics of the MLB players. These statistics include "box score" information, such as players' "batting averages, at bats, hits, runs, doubles, triples, home runs, etc."<sup>67</sup>

From 1995 until 2004, C.B.C. had a licensing agreement with the Major League Baseball Players' Association ("MLBPA"), granting C.B.C. the rights to use "the names, nicknames, likenesses, signatures, pictures, playing records, and/or biographical data of each player," identified as the 'Player's Rights' on C.B.C. website.<sup>68</sup> The Agreement also included a "no-challenge" provision, which provided, *inter alia*, that C.B.C. refrain from using the Player Rights upon termination of the Agreement.<sup>69</sup>

In 2000, MLB team owners formed Advanced Media to act as the "interactive media and internet arm of Major League Baseball" and to operate *MLB.com*.<sup>70</sup> In 2005, Advanced Media entered into a licensing agreement with the MLBPA, giving Advanced Media exclusive authority to negotiate and sub-license rights of the players in conjunction with interactive media.<sup>71</sup> Thereafter, Advanced Media refused to extend C.B.C.'s license. In response, C.B.C. filed a preemptive suit, seeking declaratory and injunctive relief to enjoin Advanced Media from any interference it may have in C.B.C.'s interactive industry.<sup>72</sup> Advanced Media counterclaimed, alleging breach of contract and challenging C.B.C.'s use of player names and statistics as a violation of the players' publicity rights.<sup>73</sup>

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<sup>64</sup> *C.B.C.*, 443 F. Supp. 2d at 1080. C.B.C. uses the trade name, CDM Fantasy Sports. *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 1080-81.

<sup>69</sup> *Id.* at 1081.

<sup>70</sup> *Id.*

<sup>71</sup> Brandon T. Moonier, Comment, *The Legal Game Behind Fantasy Sports: Copyright Protection and the Right of Publicity in Professional Performance Statistics*, 26 ST. LOUIS U. PUB. L. REV. 129, 130 (2007) (commenting that the effect of this was to narrow the market for fantasy games to a handful of websites with licensing agreements).

<sup>72</sup> *See C.B.C.*, 443 F. Supp. 2d at 1081.

<sup>73</sup> *Id.* at 1082. Advanced Media's allegation of violation of the right of publicity was based on C.B.C.'s use of "names, nicknames, likenesses, signatures, jersey numbers, pictures, playing records and biographical data . . ." *Id.*

## 2. The District Court Holds no Identity, no Commercial Use, and no Injury

The district court first examined whether the players had a right of publicity in their names and statistics as used by C.B.C.<sup>74</sup> The court rejected the Players' claim that fantasy baseball's use of name and statistical data involved players' character, personality, reputation, physical appearance, or other factors shaping identity.<sup>75</sup> The court concluded that the identity element was absent, stating that the manner in which a players' name was used mattered, not just the fact that it was used.<sup>76</sup> Here, the court determined that C.B.C.'s use "simply involv[ed] historical facts about the baseball players such as their batting averages, home runs, doubles, triples, etc."<sup>77</sup>

The district court also held that C.B.C. did not appropriate names of players for its commercial advantage.<sup>78</sup> The court stated that the use of names and associated statistical records was in conjunction with the playing of games, rather than for independent benefit to be derived from names and statistics.<sup>79</sup> It stated that C.B.C.'s use did not imply players' endorsement of C.B.C.'s games, assessing commercial use by whether "a defendant *intended to create an impression that a plaintiff is associated with the defendant's product . . .*"<sup>80</sup> Use had to be more than merely incidental.<sup>81</sup> The court declared that the evidence did not suggest player association or endorsement of C.B.C. fantasy games or that the players' names and statistics were used with an intention to draw customers from other fantasy websites, as all the websites use the same statistics.<sup>82</sup> It distinguished the use of the players' names and statistics from a situation where a person's likeness was used to convey endorsement of a product, noting that the claim focused on use of the players' names, not their pictures.<sup>83</sup>

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<sup>74</sup> *Id.* at 1084–85 (reiterating the elements of a right of publicity claim as set forth in *Doe v. TCI Cablevision*, 110 S.W.3d 363, 369 (Mo. 2003) (en banc), that "(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.").

<sup>75</sup> *Id.* at 1089.

<sup>76</sup> *Id.* To determine commercial use, the court considered "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." *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 1088.

<sup>79</sup> *Id.* at 1085.

<sup>80</sup> *Id.* (citing *Doe v. TCI Cablevision*, 110 S.W.3d 363, 371 (Mo. 2003) (en banc)).

<sup>81</sup> *Id.* at 1085 n.9.

<sup>82</sup> *Id.* at 1086. "Using a plaintiff's name 'to attract attention to [a] product' is evidence supporting a conclusion that a defendant sought to obtain a commercial advantage." *Id.* at 1085.

<sup>83</sup> *Id.* at 1086–87. The court responded to Advanced Media's attempt to analogize the present case to *Palmer* where the commercial element was satisfied, when golfer Arnold Palmer's picture, name and playing records appeared in a board game made by Schonhorn Enterprises. *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458 (N.J. Super. Ct. Ch. 1967). In comparing the two cases the court remarked: "Unlike cases where there was an appropriation of a *likeness* to create the impression that a famous person endorsed a product, C.B.C.'s use of players' names in no way creates an impression that players endorse CBC's fantasy games." *C.B.C.*, 443 F. Supp. 2d at 1087. The court suggested that

The district court also denied the players' claim of injury. According to the court, C.B.C.'s use did not pose any real damage to the players' value in their identities and the use did not "go to the heart of the players' ability to earn a living as baseball players."<sup>84</sup> The court also deemed the statistics as part of the public domain and offered that the existence of fantasy games perhaps made actual games more lucrative and enhanced a players' marketability and the popularity of baseball as a sport.<sup>85</sup>

Despite finding no right of player publicity, the court continued in categorizing the players' names and statistics as *factual data and historical facts*, akin to "bits of baseball's history," and declaring C.B.C.'s use protected under the First Amendment.<sup>86</sup> The court acknowledged that C.B.C. may profit in its use of the player names and statistics. Yet, the court declined to rule that this use constituted commercial speech.<sup>87</sup> In a footnote, the court acknowledged the Missouri Supreme Court's statement that "*the use of a persons's [sic] identity for purely commercial purposes, like advertising goods or services or the use of a person's name or likeness on merchandise, is rarely protected.*"<sup>88</sup> In what appeared to be analogous precedent, the Missouri Supreme Court held that the First Amendment did not protect a comic book publisher's unauthorized use of a former athlete's name and identity.<sup>89</sup> The district court avoided *TCI* by treating C.B.C.'s use of player names and statistics as a form of interactive expression and which had entertainment value, noting that "entertainment itself can be important news," and thus within First Amendment protection.<sup>90</sup>

The court ruled that the First Amendment rights to expression and the public's interest in fantasy sports outweighed the players' publicity rights.<sup>91</sup> It found that C.B.C.'s use serves an important public interest by informing and entertaining the public about the history of baseball. The court distinguished between cases considering the economic value of a person's identity from cases where the issue centers on the value of the performance, finding the latter more compelling and inapplicable to C.B.C.'s use.<sup>92</sup>

As to the Players' breach of contract claim, the court ruled the no-use and no-challenge provisions of the parties' prior agreement was unenforce-

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*Palmer* itself may be outdated. *Id.*

<sup>84</sup> *Id.* at 1091.

<sup>85</sup> *Id.* The court further noted that it is the players' skill and not the resulting statistics that support the player's livelihood. *Id.*

<sup>86</sup> *Id.* at 1092.

<sup>87</sup> *Id.* at 1093 (noting that merely because a product is sold for profit does not automatically mean that commercial speech is present).

<sup>88</sup> *Id.* at 1094 (citing *Doe v. TCI Cablevision*, 110 S.W.3d 363, 373 (Mo. 2003) (en banc)).

<sup>89</sup> *TCI*, 110 S.W.3d at 374.

<sup>90</sup> *C.B.C.*, 443 F. Supp. 2d at 1093 (citing *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578 (1977)).

<sup>91</sup> *Id.* at 1095-99 ("After balancing the interests at issue regarding CBC's First Amendment right to freedom of expression and those involved in the players' claimed right of publicity the court finds . . . that CBC's First Amendment right to freedom of expression prevails over the player's claimed right of publicity.")

<sup>92</sup> *Id.* at 1098.

able due to public policy concerns.<sup>93</sup> The court concluded that the theory of licensee estoppel (where a licensee is estopped from questioning the validity of its license) and contract principles collapsed when balanced against a “strong federal policy favoring the full and free use of ideas in the public domain.”<sup>94</sup> Thus, the no-challenge contractual provision was ineffective in prohibiting C.B.C. from using player names and statistics, which the court held to be within the public domain.

### 3. The Eighth Circuit Acknowledges Publicity Rights but Holds that the First Amendment Trumps

The Eighth Circuit affirmed the district court’s decision in favor of C.B.C.’s use of the players’ names and statistics, but on different grounds. Unlike the lower court, the circuit court acknowledged that the Players satisfied all three elements of a right of publicity.<sup>95</sup> First, the statistics had been used without consent.<sup>96</sup> Secondly, the court recognized that a name alone could be sufficient to establish identity. As here, the names used were identifiable by C.B.C.’s target audience as representing Major League baseball players.<sup>97</sup> This was more than “mere use” of a name and sufficient to establish a symbol of their identity.<sup>98</sup> The court also ruled that the commercial advantage element was satisfied.<sup>99</sup> The court correctly noted that the plaintiff does not have to show that users felt any endorsement was intended. Rather, Missouri law looks to a defendant’s intent to gain a profit from the use of the identity.<sup>100</sup> Thus, the court found that C.B.C. was using the names and statistics commercially.<sup>101</sup>

Although the appeals court reversed the lower court in finding a violation of the right of publicity, it upheld the ruling that the publicity claims must yield under the First Amendment. The court regarded C.B.C.’s use of player names and statistics as a form of speech, which has entertainment value but also informs, within public domain.<sup>102</sup> It stated that restricting such use would amount to incongruous law.<sup>103</sup>

The appeals court also invoked the theme (of dubious legal significance) that a certain reverence has been given to baseball as the “national

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<sup>93</sup> *Id.* at 1106–07.

<sup>94</sup> *Id.* at 1104.

<sup>95</sup> *C.B.C. Distribution & Mktg. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 822–23 (8th Cir. 2007).

<sup>96</sup> *Id.* at 822.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* (following the standard under the RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. a, b, (2005) and *Doe v. TCI Cablevision*, 110 S.W.3d 363, 371 (Mo. 2003) (en banc), where the commercial advantage element can be found “in connection with services rendered by the user.”).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 823.

<sup>102</sup> *Id.* (noting that “[t]he line between the informing and the entertaining is too elusive for the protection of that basic right.”) (quoting *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 969 (10th Cir. 1996)).

<sup>103</sup> *Id.* (stating “[i]t would be strange law . . .”).

pastime,” making the public interest in its players and statistics very intense.<sup>104</sup> Like the district court, the Eighth Circuit viewed publicity rights as implicating economic rights, rather than privacy or intellectual property issues.<sup>105</sup> It assumed that the players’ monetary interests are protected, as the players can still earn a good living, and that no single player is viewed as endorsing a particular fantasy sports league, since the entire team is included in the league.<sup>106</sup>

The court affirmed the dismissal of the players’ contract and licensee estoppel claims, but, again, on different grounds. The court focused on a warranty of title that was present in the contract that held out the Players’ Association as the sole owner and holder of all the players’ publicity rights.<sup>107</sup> The court noted that C.B.C. relied on the warranty and considered it a material breach as the rights were found not to be under the sole control of the Players’ Association.<sup>108</sup>

#### B. Analyzing *C.B.C.*: Did the Eighth Circuit Get it Right?

In *Zacchini*, the Supreme Court declared that state law rights of publicity should be balanced against the First Amendment and its policies.<sup>109</sup> Yet, did the Eighth Circuit correctly articulate the basis for First Amendment application to trump what it conceded were player publicity rights? If the fantasy sports were a board game and not an online, interactive game, would the results be the same? What are the parameters for the use of publicity rights violations in digital media?

The *C.B.C.* ruling is incongruous with cases such as *Uhlaender v. Henricksen*,<sup>110</sup> where the use of players’ names, numbers and statistical information in board games constituted a violation of publicity rights.<sup>111</sup> While the district court in *C.B.C.* considered the *Uhlaender* decision an archaic form of publicity rights law and, thus, not controlling, the district court offered no specific reasons why *Uhlaender* should be discounted.<sup>112</sup> Although the medium used to display the names and statistics differed, it is unclear why the results in the respective cases disconnect. Even if *Uhlaender* is outdated, later cases similarly recognized publicity rights in the unauthorized use of names or voice over claims of First Amendment privilege.<sup>113</sup> As Professor Karcher notes:

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 824.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 824–25.

<sup>108</sup> *Id.*

<sup>109</sup> See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 567–68 (1977).

<sup>110</sup> 316 F. Supp. 1277, 1282 (D. Minn. 1970).

<sup>111</sup> See *id.* at 1282.

<sup>112</sup> See Karcher, *supra* note 20, at 569 (surmising that both *Uhlaender* and *Palmer* are consistent with the Supreme Court in *Zacchini*, suggesting there was no reason for the court to find either inconsistent in *C.B.C.*).

<sup>113</sup> See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1096 (9th Cir. 1992) (finding for singer Tom Waits after Frito Lay used a song based around a Waits classic paired with a singer meant to sound sim-

[I]f 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?<sup>114</sup>

Does the public fascination with sports warrant that athlete publicity rights are distinct from other celebrities? Courts have cited, oddly, the tradition and pervasive nature of sports in our society as a basis for differential legal treatment.<sup>115</sup> In *C.B.C.*, both the lower and appellate court seemed to view baseball players differently from individual public figures, regarding baseball as an inviolable tradition, which the players are bound to honor.<sup>116</sup> The Eighth Circuit's opinion carries over the district court's judgment that the players are adequately compensated and that *C.B.C.* should be allowed in the game by using player names and statistics that are reported in the news anyway.<sup>117</sup> The court's ruling negates its conclusion that the players' right to earn is unaffected by its decision as the result limits the right for players' to profit from their efforts.<sup>118</sup> A determination that

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ilar to Waits); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (finding violation of singer/actress Bette Midler's publicity rights after a car commercial included a voiceover using a Midler impersonator); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983) (violation of entertainer Carson's publicity rights found by use of the tag line "Here's Johnny"); *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 140 (Wis. 1979) (finding an issue of triable fact based upon the use by S.C. Johnson of the name "Crazylegs," which was synonymous with former football player Elroy Hirsch).

<sup>114</sup> Karcher, *supra* note 20, at 570.

<sup>115</sup> See, e.g., *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400 (Ct. App. 2001), *reh'g denied*, (Cal. 2002) (rejecting former ballplayers' claim that defendants violated their rights of publicity by disseminating factual data concerning the players, including performance statistics, photographs, and verbal descriptions and video depictions of their play without permission or compensation, stating that "[g]iven the pervasive influence of baseball on our culture, the uses at issue came within the 'public affairs' uses exempt from consent . . ."); see also *Flood v. Kuhn*, 407 U.S. 258 (1972) (affirming the judicially created exemption from antitrust laws for baseball); *Fed. Baseball v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 260 (1922).

<sup>116</sup> *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 824 (8th Cir. 2007) (citing baseball as the "nation's pastime" and noting that baseball players are already rewarded well for their effort).

<sup>117</sup>

Other motives for creating a publicity right are the desire to provide incentives to encourage a person's productive activities and to protect consumers from misleading advertising. 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.

*Id.* (citations omitted).

<sup>118</sup> See *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1097–98 (E.D. Mo. 2006), *aff'd*, 505 F.3d 818 (8th Cir. 2007) (quoting Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 210 (1993)). The district court suggested the salaries of players as being bloated and that economic inducement to play should not be as strong of a motivating factor. It stated that:

Such figures suggest that "even without the right of publicity the rate of return to stardom in the entertainment and sports fields is probably high enough to bring forth a more than 'adequate' supply of creative effort and achievement." . . . 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. Thus, while publicity rights may provide some incen-



players earn enough through their salaries should not excuse an unauthorized commercial use. The growth of the fantasy sports industry and its profitability may reveal a large disparity between profits and player salaries or endorsement opportunities.<sup>119</sup>

Notably, the *C.B.C.* court does not examine the case under the rubric of emerging media, such as the Internet. While the court critiques other decisions in the area of publicity rights law as outdated, it fails to take any substantial step forward by directly addressing the use of digital media. Perhaps the decision is consistent with a policy favoring innovation and free access for use on the Internet. Fantasy sports have become a profitable industry by virtue of the availability and efficiency of the Internet. This medium, where the expectation of free content is particularly acute, has proven far more difficult to regulate than static, tangible entities, such as magazines and board games.

The *C.B.C.* court asserts that “[t]he information used in *C.B.C.*’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.”<sup>120</sup> This conclusion seems to overlook the different ways in which information can be used. For instance, a newspaper which includes box scores as a small segment of the material it covers that day is significantly different from a website whose basic purpose and function are dependent upon the information.<sup>121</sup>

The court deems the player statistics as “historical facts” in the “public domain.” Yet, statistics do not remain fixed. They fluctuate each season and can change dramatically due to outside factors or unforeseen circumstances such as injuries. The district court argued that it is the players’ actions on the field and skill level that make them profitable, not their statistics.<sup>122</sup> But statistics are a direct interpretation of a player’s skill. A symbiotic relationship exists between the players and their statistics, as the

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tive for creativity and achievement, the magnitude and importance of that incentive has been exaggerated.

*Id.*

<sup>119</sup> Middle level players without the large endorsement deals can be most affected by such a decision because another avenue of profit from their efforts is closed.

<sup>120</sup> *C.B.C.*, 505 F.3d at 823. The NBA encountered a similar argument when it sought to prevent Motorola from transmitting real time game information on handheld pagers. The Court held that the Motorola service provided “purely factual information which any patron of an NBA game could acquire from the arena without any involvement from . . . others who contribute to the originality of a broadcast.” *Nat’l. Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 846–47 (2d Cir. 1997) (quoting *Nat’l. Basketball Ass’n v. Sports Team Analysis & Tracking Sys., Inc.*, 939 F. Supp. 1071, 1094 (S.D.N.Y. 1996)). The court rejected claims that game statistics or athletic events were within copyright protection and stated that “[n]o author may copyright facts or ideas.” *Id.* (quoting *Harper Row, Publ’rs, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985)).

<sup>121</sup> *C.B.C.*, 443 F. Supp. 2d at 1099 (the district court noted that deprivation of the right to use would mean that “CBC would be unable to create and operate its fantasy games as the games cannot operate without the players’ *names* and *playing records*.”) (emphasis added).

<sup>122</sup> See *id.* at 1089 (use of the player’s name and their record “does not involve the character, personality, reputation or physical appearance of the players.”).

statistics are largely worth nothing without the associated player. A player's worth also diminishes if his statistics drop. Having a unique statistic can also make a player more identifiable and profitable. Baseball cards provide an example, as collectors are more likely to purchase one of a player who has excelled throughout their career or who has a unique statistic such as stolen bases over a season. Fans closely follow game statistics and the results change each season. Without statistics and player names, fantasy sports have no product.

### III. *C.B.C.*'S IMPACT ON ATHLETE PUBLICITY RIGHTS IN FANTASY SPORTS AND OTHER NEW MEDIA

#### A. The Future of Fantasy Sports

What is the impact of *C.B.C.* on fantasy sports and other commercial uses of athlete identities? Viewed narrowly, the case merely holds that player names and statistics are in the public domain and may be used commercially without licensure from the players. Yet the magnitude of its impact is soon tested.<sup>123</sup> Perhaps the case can be confined to its facts. Presumably, fantasy sports providers want to use more than player names and statistics, and licensure is still required to use player photographs. But if a name and statistics constitute "identity" that can be used, why are other images different? Does *C.B.C.* suggest a re-examination of the "trading cards" law, and the necessity for licenses for videos, electronic or board games?<sup>124</sup>

Fantasy sports is a multi-million dollar industry and covers virtually all professional and many college sports. Presumably, the gaming industry will be looking to *C.B.C.* as a green light. The *C.B.C.* decision potentially enables expansion of the industry, de-licensing, and an inevitable impact on licensing revenues.<sup>125</sup>

#### B. *C.B.C.*'s Potential Impact

The *C.B.C.* decision presents complicated practical and policy concerns for media providers, users, and those who wish to have a remaining stake in their publicity rights.

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<sup>123</sup> *C.B.C.*, 505 F.3d 818.

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[I]n rejecting the players' claim that fantasy sports infringe their rights, [*C.B.C.*] abandons prior approaches to the right of publicity and creates its own . . . . If the decision is upheld, the effects could be widespread and overreaching. It has the potential to influence all sports-related products, including video games, memorabilia, and other merchandise, as the court's opinion does not resolve what portions of the athletes' identities remain protected from appropriation.

Gabriel Grossman, Comment, *Switch Hitting: How CBC v. MLB Advanced Media Redefined the Right of Publicity*, 14 UCLA ENT. L. REV. 285, 286, 313 (2007).

<sup>125</sup> Michael McCarthy, *Fantasy Sports Ruling Could Have Wide Impact*, USA TODAY, [http://www.usatoday.com/sports/fantasy/2007-10-16-fantasy-ruling\\_N.htm](http://www.usatoday.com/sports/fantasy/2007-10-16-fantasy-ruling_N.htm) (last visited Mar. 31, 2008)

### 1. Proliferating Markets and Uses

With the elimination of a licensing fee, the fantasy sports industry is likely to expand.<sup>126</sup> In light of *C.B.C.*, larger fantasy sports outlets such as ESPN are seeking to renegotiate their licensing deals.<sup>127</sup> Other providers and media outlets may follow a similar course in seeking lower licensing fees without the barrier of publicity rights. Fantasy sports providers are also considering ways to branch out and merge with other media, such as through mobile content extensions of the games that allow users to access updated statistics on players via cell phones.<sup>128</sup> Another use is by connecting fantasy sports teams to video games such as the Madden series, allowing users to insert their fantasy teams into the Madden setting.<sup>129</sup>

### 2. Limits on Player Compensation and Reputational Controls

The right to control use of one's identity and to protect one's reputation is the policy interest supporting the right to restrict what otherwise seems like free speech. Under *C.B.C.*, players' ability to earn income through licensing their names and statistics in this medium, as well as to control use of their names, is impaired. Further, without the protection of publicity rights, players may become, unknowing and unwillingly, linked to undesirable media or uses. While the *C.B.C.* courts note that no endorsement is suggested by the use of player name and statistics in fantasy sports websites,<sup>130</sup> this provides little comfort to a player who finds himself connected to objectionable media or uses.<sup>131</sup> An example would be the possible expansion into fantasy sports gambling. Websites such as Protrade<sup>132</sup> and DraftMix<sup>133</sup> allow users to bet fake money on the sports stock market and trade in their stock for prizes.<sup>134</sup> However, DraftMix is consi-

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<sup>126</sup> Marc Edelman, *Sports and the Law: Could Yahoo Sale Kill Free Fantasy Sports?*, ABOVEHELAW.COM, Feb. 8, 2008, [www.abovethelaw.com/2008/02/sports\\_and\\_the\\_law\\_could\\_yahoo.php](http://www.abovethelaw.com/2008/02/sports_and_the_law_could_yahoo.php) (noting that currently Yahoo Sports, CBS Sports and ESPN hold much of the market for fantasy gaming).

<sup>127</sup> John Ourand & Eric Fisher, *ESPN Seeks Better MLBAM Terms*, STREET & SMITH'S SPORTS BUS. J., Jan. 21, 2008, <http://www.sportsbusinessjournal.com/index.cfm?fuseaction=article.main&articleId=57807> (ESPN's 2005 digital rights agreement with Advanced Media includes an opt-out clause that ESPN is attempting to apply to reduce its payments. The agreement is a seven-year deal currently worth \$20 million a year).

<sup>128</sup> Karcher, *supra* note 20, at 563 (noting Mforma's deal with CBS Sportsline and the additional charge Yahoo Sports applies for users who want mobile access to fantasy data).

<sup>129</sup> *Id.*

<sup>130</sup> See *supra* notes 78–82 and accompanying text.

<sup>131</sup>

The *CBC* court's definition of commercial advantage, which requires an association element of endorsement or advertisement, sets a dangerous precedent because, 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.

Karcher, *supra* note 20, at 572.

<sup>132</sup> Pro Trade, <http://www.protrade.com> (last visited Sept. 12, 2008).

<sup>133</sup> DraftMix, <http://www.draftmix.com> (last visited Sept. 12, 2008).

<sup>134</sup> Nick Gonzalez, *DraftMix: Faster Fantasy Sports For Fun Or Profit*, Nov. 5, 2007, <http://www.techcrunch.com/2007/11/05/draftmix-faster-fantasy-sports-for-fun-or-profit/>.

dering allowing users to apply real money to its sports stock market.<sup>135</sup> For some, gambling in any form carries a moral stigma. Without the right to withhold the use of their name and statistics, players may feel their reputations exploited or compromised. A branching out into gambling may harm the fantasy sports industry.

Fantasy sports are exempt from the Unlawful Internet Gambling Enforcement Act of 2006.<sup>136</sup> A traditional definition of what constitutes gambling is whether a game of skill or a game of chance is being pursued, with the latter considered out of the boundaries of legality in many states.<sup>137</sup> One such claim that fantasy sports was akin to gambling was raised and defeated in *Humphrey v. Viacom*.<sup>138</sup> But shifts in uses may trigger new claims that the legality of online sports gaming be reconsidered.

### C. *C.B.C.*'s Impact on New Uses and Emerging Issues in New Media

The tension between melding publicity rights law and new media has caused conflict beyond the fantasy sports sphere. The present fascination with YouTube<sup>139</sup> provides an example. YouTube is a web-based video hosting service that allows its users free of charge to upload and tag videos for sharing, as well as watch video clips posted by other users.<sup>140</sup> The website's popularity has skyrocketed since its creation in 2005.<sup>141</sup> YouTube's relaxed internal regulation of its user-posted videos has left it vulnerable to litigation, as some of the videos infringe on existing copyrights. The website does self-policing by having YouTube employees sift through the videos using search terms that users input as well as relying on users to report objectionable materials.<sup>142</sup> When one of these terms leads to copyrighted material, the video is removed.<sup>143</sup> With this system, there can be a large gap in the time frame between the posting of the copyrighted material and its removal. YouTube has been compliant with removal requests by copyright holders, but the material is still viewed at some point before removal.

Beyond the copyright issues YouTube presents, publicity rights of athletes and other public figures are also vulnerable. For example, in 2006,

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<sup>135</sup> *See id.*

<sup>136</sup> 31 U.S.C. §§ 5365, 5366 (2000).

<sup>137</sup> *Id.*

<sup>138</sup> No. 060-2768 (DMC), slip op., 2007 WL 1797648 (D.N.J. June 20, 2007) (plaintiff filed suit against fantasy sports providers owned by Viacom alleging that the pay-to-play games were illegal gambling). The case was dismissed.

<sup>139</sup> *See* YouTube, <http://www.youtube.com> (last visited Sept. 12, 2008).

<sup>140</sup> Jason C. Breen, *YouTube Or You Lose: Can YouTube Survive a Copyright Infringement Lawsuit?*, 16 TEX. INTEL. PROP. L. J. 151, 155–56 (2007).

<sup>141</sup> Eugene C. Kim, Note, *YouTube: Testing the Safe Harbors of Digital Copyright Law*, 17 S. CAL. INTERDISC. L.J. 139, 139–40 (2007) (noting that, in July of 2006, more than sixty-three million people visited the site and, by January 2007, it controlled a 43.3% share of the online video market, ranking twelfth overall in domain traffic).

<sup>142</sup> Amy R. Mellow, Note, . . . *And The Ruling On The Field Is Fair: A Fair Use Analysis of Uploading NFL Videos Onto YouTube And Why The NFL Should License Its Material To The Website*, 17 S. CAL. INTERDISC. L. J. 173, 179 (2007).

<sup>143</sup> *Id.* at 179.

the NFL demanded that YouTube remove three thousand game clips that were posted on the website.<sup>144</sup> Other entities have made similar requests as well as instituted litigation, alleging copyright infringement.<sup>145</sup> In defense, YouTube notes that clips appearing on the website are kept to a maximum of ten minutes.<sup>146</sup> Since protection for filmed sporting events is based around the arrangement of camera angles and shots in a game, one could argue that a clip of a particular play is not a violation of any copyright or publicity claim.<sup>147</sup> The struggle to regulate developing media continues and much of the suggested regulations fall short of the task.<sup>148</sup>

#### CONCLUSION

The contours of First Amendment protection are not as cleanly delineated as the simple elements needed to establish a right of publicity claim—that of identifiability and unauthorized commercial use. Although fantasy sports are clearly using athlete identities commercially, *C.B.C.* invokes the First Amendment on an intuitive basis, reasoning that, because the box scores are free, everyone should be able to use them however desired. But, even if the press has rights to use this information for news purposes, this does not mean that this information can be used for unlicensed entrepreneurial use.<sup>149</sup>

Perhaps the decision, while dubious under a legal analytical rubric, is correct simply as a practical matter. Perhaps the right of publicity goes too far in giving athletes power to foreclose use of proprietary information that the public finds interesting and wants to use for free. But if so, the necessity of such right should be reevaluated, abolished, or at a minimum, the contours of its reach clearly delineated. Meanwhile, reliance on a “national pastime” exemption, the desire to “keep laws off baseball,” or *ad hoc* rulings that deem public interest to outweigh a right recognized as property do not provide the standard of certainty that fair play requires. The fascination with sports, athletes, and new technology does not constitute an entitlement or exception to current law according individuals rights to control use of their identities and publicity.

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<sup>144</sup> *Id.* at 174.

<sup>145</sup> *See, e.g.,* *Viacom Int'l, Inc. v. YouTube, Inc.*, No. 07 Civ. 2103, slip op., 2008 WL 629951 (S.D.N.Y. Mar. 7, 2008); *Tur v. YouTube, Inc.*, No. CV 06-4436 FMC (AJWx), 2007 WL 4947612 (C.D. Cal. June 20, 2007).

<sup>146</sup> Breen, *supra* note 140, at 157.

<sup>147</sup> Mellow, *supra* note 143, at 180–82 (arguing that that the clip becomes transformative when posted on YouTube, as it generates discussion and critique. An example would be a referee's decision.).

<sup>148</sup> An example would be the Unlawful Internet Gambling Enforcement Act, which outlaws forms of Internet gambling. 31 U.S.C. §§ 5365, 5366 (2006). The statute places the burden of regulation and implementation on online payment processors such as banks to inspect transactions. The act offers little government assistance and no initiative for the processors to carry out the regulations. *See* Letter from iMEGA to Jennifer J. Johnson, Secretary Board of Governors of the Federal Reserve System (Dec. 12, 2007) available at <http://www.imega.org/wp-content/uploads/2007/12/imega-comments-on-fed-do-1298-and-treas-do-2007-0015-12-12-07.pdf>.

<sup>149</sup> *See Doe v. TCI Cablevision*, 110 S.W.3d 363, 366 (Mo. 2003) (en banc).