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C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.: Why Major League Baseball Struck Out and Won't Have Better Luck in its Next Trip to the Plate

Daniel Mead[*]

I. INTRODUCTION

In *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*,[1] an online fantasy baseball provider commenced a declaratory judgment action against two corporate arms of Major League Baseball (MLB), anticipating a suit over its use of baseball player names and statistics in its fantasy baseball service.[2] The Federal District Court for the Eastern District of Missouri granted the provider's motion for summary judgment.[3] MLB stated that it would likely appeal the court's ruling.[4]

[*] Daniel Mead is a 2008 Juris Doctor candidate at the University of Minnesota Law School. He studied music theory at The Ohio State University and graduated summa cum laude in 2005. Dan would like to thank Professor Thomas Cotter for his advice on this topic.

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

2. The fantasy provider is CBC and the two MLB arms are Major League Baseball Advanced Media (Advanced Media) and the Major League Baseball Players Association (Players' Association). *Id.* at 1079-80.

3. There were other counterclaims at stake in the proceeding but the court addressed only the one described in this comment and either dismissed or denied the other claims. *Id.* at 1082.

4. *See* Donna Walter, *St. Louis-Based Fantasy Baseball Web Site Wins in Federal Court*, ST. LOUIS DAILY RECORD & ST. LOUIS COUNTIAN, Aug. 10, 2006, *available at* http://www.findarticles.com/p/articles/mi_qn4185/is_20060810/ai_n16656168.

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Over the past decade, fantasy sports have developed into a billion dollar industry.[5] As it stands, MLB is the only league that seeks licensing agreements from fantasy sports providers, but more leagues may follow suit depending on the outcome of the appeals process. The case also has ramifications for the individual company that seeks to enter the fantasy baseball market. Currently, a company has to choose between paying the league $2 million for a licensing agreement[6] and foregoing the licensing agreement, risking a lawsuit such as the *CBC* litigation.

The purpose of this Comment is twofold: (1) to provide a clear and critical analysis of the *CBC* court's ruling, and (2) to outline what a company considering entering the fantasy baseball industry should expect on appeal and what it means for that company. Part II of this Comment provides a brief history and explanation of fantasy baseball and details the relevant case law that existed at the time of the *CBC* decision. Part III will provide a detailed analysis of the *CBC* ruling. Part IV will illustrate why the court's analysis was not flawless, but resulted in a decision that should be upheld on appeal.

II. BACKGROUND: THE HISTORY OF FANTASY BASEBALL AND THE LEGAL CONTEXT OF THE *CBC* DECISION

A. FROM TABLETOP TO LAPTOP: HOW FANTASY SPORTS EVOLVED INTO A BILLION DOLLAR INDUSTRY

Fantasy baseball's precursors date back to the middle of the twentieth century. Strat-O-Matic and Cadaco-Ellis's All Star Baseball were two of the more popular baseball simulation board games.[7] All Star Baseball was introduced in 1941.[8]

5. Nick Williams, *Living the Dream: Fueled in Part by the Internet, Fantasy Sports have Exploded into a Billion-Dollar Industry*, POST STAR, July 2, 2006, *available at* http://www.poststar.com/articles/2006/07/02/news/doc44a7b0adee47e799624131.txt.

6. *See* Kurt Badenhausen, *Foul Ball*, FORBES, Feb. 27, 2006, at 52.

7. *See* ALAN SCHWARTZ, THE NUMBERS GAME: BASEBALL'S LIFELONG FASCINATION WITH STATISTICS 175 (2004).

8. *See* Wikipedia.org, All Star Baseball, http://en.wikipedia.org/wiki/All_Star_Baseball (last visited May 5, 2007).

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Children playing All Star Baseball simulated a baseball game by spinning circular cards that represented real-life players and contained fourteen outcomes depending on where the spinner stopped.[9] The outcomes coincided with the various ways an at-bat in baseball could end, such as a striking out or hitting a double.[10] The fourteen outcomes were spaced differently for each player such that the cards for good hitters in real life were more likely to stop on an outcome corresponding with a base hit.[11] Strat-O-Matic, first sold in 1961, was similar in concept but featured a more sophisticated dice system that took the pitcher's skill into account.[12]

In 1960, a professor at Harvard began a yearly competition during which he and his colleagues attempted to pick the players who would end the season with the best individual statistics.[13] When the professor transferred to the University of Michigan, he brought along his challenge.[14] It was at Michigan that Dan Okrent most likely generated the idea for what would one day become a national phenomenon.[15]

In 1980, Okrent, a writer for *Sports Illustrated* magazine, regularly ate with a group of friends at La Rotisserie Francaise in Manhattan, where the conversation would commonly turn to baseball.[16] The group constantly argued over who would make the best general manager (GM), and one day decided to settle the matter through a competition.[17] The participants each had the same amount of money and bought players for their "team" through an auction before the start of the MLB season.[18]

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9. *Id.*

10. *Id.* In the original version of the game the fourteen outcomes were (1) home run, (2) ground out, double play with runner on first base, (3) runner reaches base on error, (4) fly out, all runners advance, (5) triple, (6) ground out, all runners advance, (7) single, runners advance one base, (8) fly out, runner on third base scores, others hold, (9) walk (base on balls), (10) strikeout, (11) double, (12) ground out, runners advance if forced, (13) single, runners advance two bases, and (14) fly out, runners hold their bases. *Id.*

11. *Id.*

12. *See* Wikipedia.org, Strat-o-Matic, http://en.wikipedia.org/wiki/Strat-o-Matic (last visited May 5, 2007).

13. *See* SCHWARTZ, *supra* note 7, at 175.

14. *See id.*

15. *See id.*

16. *See id.* at 174-75.

17. *See id.* at 175.

18. *See* SAM WALKER, FANTASY BASEBALL: A SEASON ON BASEBALL'S LUNATIC FRINGE 4 (2006).

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Throughout the season, the participants adjusted their teams by making trades with other teams or "releasing" players in exchange for unclaimed players.[19] The participant whose team had the best statistics at the end of the season won.[20]

Rotisserie baseball, as it was called at the time, spread quickly since many of the original participants were members of the New York media.[21] As Rotisserie leagues gained popularity, the hobby turned into a business as companies began to offer advice hotlines and bookkeeping services.[22] Authors wrote books tailored specifically for serious Rotisserie players.[23]

The advent of the Internet brought Rotisserie baseball, now more commonly known as "fantasy baseball," to a whole new level. Online fantasy baseball sites compile all of the player statistics for the participants, which makes the game more attractive to more casual players.[24] Online play also allows participants to compete with strangers from all over the world.[25] Today, fifteen million Americans play a fantasy sport, and an estimated three to five million Americans play fantasy baseball.[26]

B. THE IMMEDIATE LEAD UP TO THE *CBC* LITIGATION

Since 1947, MLB players have had limited ownership of commercial use of their identity.[27] For the past sixty years, teams have had the right to use a player's picture for publicity.[28] For instance, the Players' Association handles group licensing for its members for deals with trading card companies and video games.[29] The Players' Association

19. *See id.* at 5.
20. *See id.*
21. *See* SCHWARTZ, *supra* note 7, at 176.
22. *See id.*
23. *See id.*
24. *See id.* at 172.
25. *See id.*
26. *See* WALKER, *supra* note 18, at 6. The fantasy sports phenomenon has spread to some unexpected areas, including the newly created Fantasy Congress game playable at www.fantasycongress.org.
27. *See* Robert T. Razzano, Comment and Casenote, *Intellectual Property and Baseball Statistics: Can Major League Baseball Take Its Fantasy Ball and Go Home?*, 74 U. CIN. L. REV. 1157, 1163 (2006).
28. *See id.*
29. *See id.*

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members then share the profit from these group licensing deals on a pro rata basis.[30]

The Players' Association assigned its rights in fantasy baseball to Advanced Media, which offers licenses for online fantasy baseball providers.[31] In the past, there have been more than one hundred fantasy baseball providers, but Advanced Media increased the minimum licensing fee from $25,000 to $2 million, effectively pricing out all providers except for the top three: CBS Sportsline, ESPN, and Yahoo!.[32] Rather than pay the high fee, CBC chose to continue offering fantasy baseball services without a license.[33] Anticipating a suit brought by MLB, CBC commenced the case at issue seeking a declaratory judgment against MLB.[34]

C. THE LEGAL BACKDROP OF *CBC*

1. The Right of Publicity

In *Zacchini v. Scripps-Howard Broadcasting Co.*, the Supreme Court held that the right of publicity protects the individual's interest to "reap the reward of his endeavors."[35] The Court found that the "human cannonball" performer who brought the suit suffered damage when his entire act was broadcasted on television.[36]

Under Missouri law, "the elements of a right of publicity action include: (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."[37] In *TCI*, the Missouri Supreme Court held that a hockey player who was the basis for a comic book character could maintain an action for violation of right of publicity.[38] There it was important that the defendant used both the plaintiff's name and identity "with

30. *See id.*
31. *See* C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1080-81 (E.D. Mo. 2006).
32. Badenhausen, *supra* note 6, at 52.
33. *See id.*
34. *See id.*
35. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573 (1977).
36. *See id.* at 563-79.
37. Doe v. TCI Cablevision, 110 S.W.3d 363, 369 (Mo. 2003).
38. *See id.* at 369.

the intent to obtain a commercial advantage."[39]

Use of a celebrity's name to attract attention to a product is evidence that supports a finding of intent to obtain a commercial advantage.[40] In *Henley v. Dillard Department Stores*, the use of "Don's henley" in advertisements demonstrated intent to have customers think that Don Henley was associated with the promotion in order to obtain a commercial advantage.[41] Likewise, in *Abdul-Jabbar v. General Motors*, the defendant used basketball player Kareem Abdul-Jabbar's name and achievements without consent and with the intent of gaining commercial advantage.[42]

2. First Amendment

In *Gionfriddo v. Major League Baseball*, the California Court of Appeal held that the First Amendment applied to "factual data concerning [baseball] players [and] their performance statistics."[43] That case involved retired baseball players who contended that the use of their statistics, photographs, and verbal and video descriptions of their play violated their right of publicity.[44] The court further found that the First Amendment protects:

> recitations of [baseball] players' accomplishments. "The freedom of the press is constitutionally guaranteed, and the publication of news is an acceptable and necessary function in the life of the community." "Certainly, the accomplishments . . . of those who have achieved a marked reputation or notoriety by appearing before the public such as . . . *professional athletes* . . . may legitimately be mentioned and discussed in print or on radio and television."[45]

The *Gionfriddo* court applied a balancing test: "[t]he First Amendment requires that the right to be protected from unauthorized publicity 'be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of

39. *See id.* at 371.

40. *See id.* at 372.

41. Henley v. Dillard Dep't Stores, 46 F. Supp. 2d 587, 592-93 (N.D. Tex 1999).

42. Abdul-Jabbar v. Gen. Motors, 85 F.3d 407, 415-16 (9th Cir. 1996).

43. Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307, 314 (Cal. Ct. App. 2001).

44. *See id.* at 311.

45. *See id.* (quoting Carlisle v. Fawcett Publ'ns, Inc., 20 Cal. Rptr. 405, 414 (Cal. Ct. App. 1962)) (omission and emphasis in original).

freedom of speech and of the press.'"[46] In *ETW Corp. v. Jireh Publishing, Inc.*, professional golfer Tiger Woods sued a painter for violation of right of publicity in selling a painting entitled *The Masters of Augusta*, which depicted Woods's first victory at the Masters tournament.[47] The court wrote:

> There is an inherent tension between the right of publicity and the right of freedom of expression under the First Amendment. This tension becomes particularly acute when the person seeking to enforce the right is a famous . . . athlete . . . whose exploits, activities, accomplishments, and personal life are subject to constant scrutiny and comment in the public media.[48]

The *Gionfriddo* court ultimately determined that the First Amendment superseded right of publicity and found for the defendants:

> [B]aseball fans have an abiding interest in the history of the game. The public has an enduring fascination in the records set by former players and in memorable moments from previous games. Statistics are kept on every aspect of the game imaginable. Those statistics and the records set throughout baseball's history are the standards by which the public measures the performance of today's players. The records and statistics remain of interest to the public because they provide context that allows fans to better appreciate (or deprecate) today's performances. Thus, the history of professional baseball is integral to the full understanding and enjoyment of the current game and its players.
>
> In the uses challenged, Baseball is simply making historical facts available to the public through game programs, Web sites and video clips.[49]

III. THE *CBC* COURT'S ANALYSIS

The *CBC* court ruled on summary judgment that Advanced Media and the Players' Association did not have a cause of action against CBC for its use of player statistics in its fantasy baseball website.[50] In reaching its decision, the court found that: (1) CBC's use of player names and statistics was not a violation of the players' right of publicity, (2) even if CBC

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46. *See id.* at 313 (quoting Gill v. Hearst Publ'g Co., 40 Cal.2d 224, 228 (Cal. 1953)).

47. ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 918 (6th Cir. 2003).

48. *See id.* at 931.

49. Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307, 315 (Cal. Ct. App. 2001).

50. C.B.C. Distrib. & Mktg. Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1107 (E.D. Mo. 2006).

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violated a right of publicity, the First Amendment trumped this right, (3) MLB does not have copyright in the use of player names and statistics, and (4) the clause in CBC's 2002 Agreement with the Players' Association that prohibited CBC from using player names and statistics after the termination of the Agreement was contrary to public policy and therefore unenforceable.[51]

A. RIGHT OF PUBLICITY

The *CBC* court noted that Missouri law recognizes the right of publicity as defined by the Restatement (Third) of Unfair Competition.[52] Under this definition, "the elements of a right of publicity action include: (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."[53] Applying this standard, the court found that Advanced Media and the Players' Association failed to demonstrate elements one[54] and three,[55] and thus did not have a claim for violation of right of publicity.[56] The court further found that CBC's fantasy baseball website "does not contravene the policies behind the right of publicity."[57]

1. Player Name as a Symbol for Identity[58]

The first element of the right of publicity test is use of the plaintiff's name as a symbol of his identity. Here, the court compared CBC's use of athletes' names to the facts of *Doe v. TCI Cablevision,*[59] where the plaintiff's right of publicity was violated.[60] In *TCI*, a character in the *Spawn* comic book series

51. *Id.* at 1107.

52. *See id.* at 1084 (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (2005)).

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

54. *See id.* at 1089.

55. *See id.* at 1088.

56. As the court notes, it is undisputed that CBC used the player names and statistics without the consent of either Advanced Media or the Players' Association. *See id.* at 1085.

57. *Id.* at 1091.

58. Though the court examined elements one and three in reverse order, this Comment will address the elements in numerical order.

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

60. *See* C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced

was named after Tony Twist, a professional hockey player.[61] The court focused on "the real Tony Twist's fame as a star in the National Hockey League, the nature and extent of the identifying characteristics used by the defendant, and their similarity to those characteristics in the public persona of the real Tony Twist including the 'common persona of a tough-guy "enforcer."'"[62] Also of importance was the "intent of the defendant to draw attention to those similarities."[63]

The *CBC* court distinguished CBC's use of the player names from the *TCI* case.[64] It found that CBC was merely using the names and historical facts about the players and not using the names as symbols for the players' identities.[65] Therefore, Advanced Media failed to raise a triable issue of fact for element one of the right of publicity claim.[66]

2. Intent to Obtain a Commercial Advantage

The *CBC* court began this portion of the analysis by clarifying the "intent to obtain a commercial advantage" element of the right of publicity standard.[67] It did not matter whether the defendant intended to injure the plaintiff so long as the defendant intended to obtain a commercial advantage.[68] The court further noted that evidence that the defendant used the celebrity's name to attract attention to its own product or service supported a finding that the defendant had the intent to obtain a commercial advantage.[69]

The court found that the Players' Association and

Media, L.P., 443 F. Supp. 2d 1077, 1088-89 (E.D. Mo. 2006).

61. *TCI*, 110 S.W.3d at 366.

62. *C.B.C.*, 443 F. Supp. 2d at 1088 (quoting *TCI*, 110 S.W.3d at 366).

63. *Id.*

64. *Id.* at 1089.

65. *Id.*

> 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.

Id.

66. *Id.*

67. *See id.* at 1085-86.

68. *See id.* at 1085.

69. *See id*.

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Advanced Media failed to prove this element.[70] CBC's fantasy game did not achieve an advantage over any other fantasy game by using the player names because all fantasy baseball games inherently use every MLB player's name and statistics. Therefore, CBC was not using player names to attract consumers away from other fantasy baseball games, and there was no reason a consumer would be under the impression that players endorsed CBC's game, in the same sense that a consumer would not think that players were endorsing boxscores.[71]

The Players' Association and Advanced Media contended that they were entitled to relief under *Palmer v. Schonhorn Enterprises, Inc.*,[72] and *Uhlaender v. Henricksen.*[73] In *Palmer*, the names, pictures, and playing records were used in a board game without a licensing agreement.[74] *Uhlaender* involved a board game that used baseball players' names, uniform numbers, and statistics without permission.[75] While the athletes prevailed in each of these cases, the *CBC* court distinguished them both.[76] First, *Palmer* involved the use of the athletes' pictures and therefore was decided as a right of privacy action and the court declined to address the right of publicity theory.[77] Second, both cases were decided before the Supreme Court decided *Zacchini v. Scripps-Howard Broadcasting Co.*,[78] so the right of publicity was still evolving.[79] Further, though not noted by the court, neither decision was binding on the *CBC* court; each was persuasive at best. Therefore, since the court rejected this argument, Advanced Media and the Players' Association failed to raise a triable issue of fact as to the commercial advantage element.[80]

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70. *See id*. at 1086.

71. *Id*.

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

73. Uhlaender v. Henricksen, 316 F. Supp. 1277 (D. Minn. 1970).

74. C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1086 (E.D. Mo. 2006).

75. *See id*. at n.12.

76. *See id*. at 1087.

77. *See id*.

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

79. *See C.B.C.*, 443 F. Supp. 2d at 1088.

80. *See id*.

3. The Underlying Policy

The court next addressed whether CBC's use of player names and statistics undermined the policy justifications for recognizing a right of publicity. The court listed several justifications:

> (1) protection of 'an individual's interest in personal dignity and autonomy'; (2) 'secur[ing] for plaintiffs the commercial value of their fame'; (3) 'prevent[ing] the unjust enrichment of others seeking to appropriate' the commercial value of plaintiffs' fame for themselves; (4) 'preventing harmful or excessive commercial use that may dilute the value of [a person's] identity'; and (5) 'afford[ing] protection against false suggestions or endorsement or sponsorship.'[81]

The *CBC* court also relied heavily on language from the Supreme Court's *Zacchini* decision:

> 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 performer] that would have market value and *for which he would normally pay*. (citation omitted). Moreover, the broadcast of [the performer's] entire performance, unlike the unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press, *goes to the heart of [the performer's] ability to earn a living as an entertainer.*[82]

The court found that use of player names and statistics on a fantasy baseball website "does not go to the heart of the players' ability to earn a living as baseball players."[83] Moreover, CBC is not getting something for free that it would ordinarily have to pay for, since player statistics are in the public domain.[84] Therefore, in the court's view, the right of publicity did not extend to prohibit CBC's activity.[85]

B. THE FIRST AMENDMENT

The court could have ended its analysis upon finding that Advanced Media and the Players' Association failed to

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81. *See id.* at 1089-90 (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c (2005)).

82. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. at 576 (emphasis in original).

83. C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1091 (E.D. Mo. 2006) ("[T]he baseball players earn a living playing baseball and endorsing products; they do not earn a living by the publication of their playing records.").

84. *See id.* at 1091.

85. *See id.*

demonstrate a right of publicity cause of action, but chose to address the First Amendment defense raised by CBC.[86] The court found that even if CBC violated the players' right to publicity, it is not liable because the First Amendment preempts the state law right of publicity.[87] The court reached this decision by determining that the First Amendment applies to CBC's use of player names and statistics and applying the balancing test utilized by the *Gionfriddo* court.[88]

1. Applicability of the First Amendment

The court addressed six factors before concluding that the First Amendment applied to CBC's use of player names and statistics. First, the court found that though the expression at issue is a less traditional form of expression, it is still not precluded from First Amendment protection.[89] Second, the player names and statistics are historical facts that are covered by the First Amendment.[90] Third, the fact that CBC's expression was for profit did not preclude it from First Amendment protection.[91] Fourth, the First Amendment applies to speech that entertains, and therefore CBC's expression, which is meant for entertainment is not precluded from protection.[92] Fifth, the First Amendment applies to speech that is interactive, and therefore CBC's expression is entitled to protection.[93] Sixth, CBC's communications are not commercial speech because CBC is not using player information to sell an unrelated product.[94] Therefore, the court found that CBC's use of player names and statistics was entitled to protection under the First Amendment.[95]

86. *See id.* at 1091-92.

87. *See id.* at 1099-1100.

88. *See* C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1095 (E.D. Mo. 2006).

89. *See id.* at 1092 ("[T]he First Amendment has been applied to flag burning, nude dancing, and wearing a jacket with obscenities.").

90. *See id.* at 1092-93.

91. *See id.* at 1093.

92. *See id.* at 1093-94.

93. *See id.* at 1094.

94. *See id.* at 1094-95 ("Expression, however, is not commercial speech if it does not advertise another unrelated product, and speech is not transformed into commercial speech merely because the product at issue is sold for profit.").

95. *See id.* at 1095.

2. The First Amendment Balancing Test

The next step in the court's analysis is balancing "the right to be protected from unauthorized publicity . . . against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press."[96] There are essentially two interests at stake here: those of the players and those of the consumers.[97]

The court assigned little value to the players' interests in the present case.[98] Part of the rationale behind allowing a right of publicity is giving performers an economic incentive to perform well.[99] If someone else is able to capitalize on an athlete's performance and the athlete is unable, there is no incentive for the athlete to perform at a higher standard. However, the court found that that was not the case here.[100] Athletes have an economic incentive to perform well in the form of player contracts, and whether they perform well or poorly has no impact on their ability to profit from use of their name and statistics in a fantasy baseball game.[101]

On the other hand, the court assigned greater importance to the consumer's interest in access to factual information about sports.[102] Further, previous cases have found the consumer's interest in sports records trumps the players' publicity interest: "[s]ignificant to the matter under consideration, the court in *Gionfriddo* held that '[t]he recitation and discussion of *factual data concerning the athletic performance* of these plaintiffs [who were retired professional baseball players] command *a substantial public interest.*'"[103] The *CBC* court followed *Gionfriddo* in finding that the First Amendment would preempt the Players' Association's right of publicity claim if it had one.[104]

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96. *Id.* (quoting Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d. 307, 313 (Cal. Ct. App. 2001)).

97. *See id.* at 1097.

98. *See id.* at 1098.

99. *See id.*

100. *See id.*

101. *See id.*

102. *See id.* at 1098-99.

103. *See id.* (quoting Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d. 400, 409 (Cal. Ct. App. 2001)).

104. *See id.*

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C. FEDERAL COPYRIGHT PREEMPTION

CBC argued that if Advanced Media and the Players' Association were able to demonstrate a right of publicity, federal copyright law would preempt such a claim.[105] However, the court found that since CBC's use of player names and statistics is not copyrightable, federal copyright preemption does not apply.[106]

Under the Copyright Act, "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . are governed exclusively by [the Copyright Act]."[107] In the Eighth Circuit, preemption applies "when '(1) the work at issue is within the subject matter of copyright as defined in §§ 102 and 103 of the Copyright Act, and (2) the state law-created right is equivalent to any of the exclusive rights within the general scope of copyright as specified in § 106.'"[108]

The court found that the compilation of facts pertaining to baseball games was potentially within the scope of copyright.[109] Facts themselves, however, are not copyrightable.[110] Copyright law requires originality, and facts are inherently unoriginal. Therefore, even though CBC could have valid copyright in its compilation and expression of the player names and statistics, the underlying subject matter is factual and outside the scope of copyright.[111] The court rejected the copyright preemption argument because the player names and statistics themselves were not copyrightable.[112]

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105. *See id.*

106. *See id.* at 1103.

107. 17 U.S.C. § 301(a) (2000).

108. C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1100 (E.D. Mo. 2006) (quoting Nat'l Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc., 991 F.2d 426, 428 (8th Cir. 1993)).

109. *See id.* at 1101 (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (U.S. 1991)) ("Therefore, the court finds that Feist controls and will assume, arguendo, that the names and playing records of Major League baseball players in the context of this case is within the subject matter of copyright.").

110. *See id.* (quoting Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991)) ("Facts themselves are not copyrightable because '[t]he *sine qua non* of copyright is originality.'").

111. *See id.*

112. *See id.*

D. THE 2002 LICENSING AGREEMENT

The court ended its analysis by addressing a provision in CBC's 2002 Licensing Agreement with the Players' Association. Under that contract, CBC could not "dispute or attack the title or any rights of Players' Association in and to the Rights and/or the Trademarks or the validity of the license granted" during the licensing period.[113] Further, CBC was not allowed to use the player names or statistics after the 2002 Licensing Agreement was terminated.[114] The Players' Association and Advanced Media argued that CBC violated these provisions of the Agreement, but the court rejected this argument.[115]

In rejecting the contract argument, the court began its analysis with a principle of patent law. Under *Lear, Inc. v. Adkins*, "licensees may avoid further royalty payments, regardless of the provisions of their contract, once a third party proves that the patent is invalid."[116] The court noted that this doctrine has been extended beyond the patent context[117] and applies the reasoning to the present case.[118] Under *Lear*, the court balances "the concern for the demands of contract law against the concern for full and free use of ideas in the public domain."[119] The court found that the public interest in free competition outweighed the baseball players' interest in profiting from licensing agreements with fantasy baseball companies.[120] Therefore, the court concluded that under *Lear* and its progeny, the provisions of the 2002 Licensing Agreement at issue were unenforceable, thus CBC was not contractually estopped from using player names and statistics.[121]

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113. *Id.* at 1081.
114. *See id.*
115. *See id.* at 1106-07.
116. Lear, Inc. v. Adkins, 395 U.S. 653, 667 (1969).
117. *See* C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1106 (E.D. Mo. 2006) (citing Idaho Potato Comm'n v. M&M Produce Farm & Sales, 335 F.3d 130, 131-32 (2d Cir. 2003), and Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573 (1977)).
118. *See id.* at 1105-06.
119. *Id.* at 1106.
120. *See id.*
121. *See id.* at 1106-07.

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IV. GAME ON!: THE COURT'S ANALYSIS, THOUGH NOT FLAWLESS, WAS CORRECT IN RULING IN FAVOR OF CBC.

The court found that CBC's use of the player names and statistics was not a violation of the players' right of publicity because the names were not used as a symbol of their identities and because CBC did not use the names with the intent to obtain a commercial advantage.[122] The court continued its analysis in finding, alternatively, that even if CBC violated the players' right of publicity, the First Amendment would trump the state law publicity right.[123] Copyright, however, would not trump the right of publicity.[124] Finally the court found that the contract provision did not prohibit CBC's use of the names and statistics.[125] At the heart of the matter is the right of publicity issue, and therefore, this analysis will focus on that issue.

A. PLAYER NAMES AS SYMBOL OF IDENTITY

The *CBC* court partially based its conclusion that there was no right of publicity violation on a finding that CBC did not use the players' names as a symbol of their identities.[126] This finding was incorrect.

The court was right to note that mere use of a name is insufficient to show that a name was used as a person's identity.[127] However, it incorrectly found that CBC's activity was merely use of the players' names. The following example illustrates the difference between mere use of a name and CBC's use of player names:

When Ian Fleming created the famous James Bond character, he took the spy's name from the cover of *Birds of the West Indies*, written by real-life ornithologist James Bond.[128]

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122. *See id.* at 1091.

123. *See* C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1100 (E.D. Mo. 2006).

124. *See id.* at 1103.

125. *See id.* at 1106-07.

126. *See id.* at 1091.

127. *See e.g.*, Carson v. Here's Johnny Portable Toilets, Inc.*,* 698 F.2d 831, 834-37 (6th Cir. 1983).

128. *See* Wikipedia.org, Birds of the West Indies,

Aside from the famous moniker, the two are completely different individuals and one can only assume that moviegoers would not confuse the imaginary secret agent for the birdwatcher.[129] This is an example of mere use of a name. Conversely, CBC's fantasy baseball games undoubtedly use Barry Bonds' name along with his statistics. Though this use does not contain references to Bonds' personality traits, the user will no doubt understand that "Barry Bonds" in the website refers to Barry Bonds the athlete and no one else. For that reason, CBC's use of "Bonds" is a symbol of his identity whereas Fleming's use of "Bond" is mere use of a name.

This distinction is supported in law. Comment (d) of the Restatement (Third) of Unfair Competition, which the *CBC* court cited, states that "[i]n most cases an appropriation of identity is accomplished through the use of a person's name *or* likeness."[130] Note that the Restatement does not require more than use of a person's name.[131] Further, "[t]he use must therefore be sufficient to identify the person whose identity the defendant is alleged to have appropriated."[132] Therefore, *A*'s name alone may be a symbol of *A*'s identity but only if the audience will recognize it as standing for *A*.[133]

TCI is consistent with this reasoning. There, Tony Twist, a hockey player, was the basis for a character in a comic book.[134] Since the character was a mob boss and not a hockey player, the use of his name alone would not be enough to show that Twist's name was a symbol of his identity.[135] In the context of a comic book, more was necessary to show that the Twist character was meant to portray Twist the athlete.[136] Indeed there were more similarities, and the court found it important

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http://en.wikipedia.org/wiki/Birds_of_the_West_Indies (last visited May 5, 2007).

129. Granted, in *Die Another Day*, the twentieth film in the series, Bond poses as an ornithologist while in Cuba, but this is a simply a reference for fans who know the source of Bond's name. DIE ANOTHER DAY (EON Productions 2002).

130. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (2005) (emphasis added).

131. *See id.*

132. *Id.*

133. *See id.*

134. *See* Doe v. TCI Cablevision, 110 S.W.3d 363, 366 (Mo. 2003).

135. *See id.* at 370.

136. *See id.*

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that the mob boss shared the hockey player's tough guy enforcer persona.[137]

In *CBC*, the player names were used in the context of a fantasy baseball website. Even though the website listed names and statistics and nothing else, this is use of the players' names as a symbol for their identities. Who else could Bonds, Pujols, and Clemens refer to *in this context*?[138] It is possible that a lay person would not identify these names as MLB players, but a fantasy baseball website's audience is baseball fans and there is no doubt that fantasy baseball participants know whom the names represent.[139]

Even if this argument were rejected on appeal, the *CBC* decision should be reversed to the extent that it found that the players' names were not the symbol of their identity because it should not have made that determination. *CBC* was decided on summary judgment and whether one's identity was misappropriated for the purpose of a right of publicity action is a question of fact to be decided by a jury.[140] It was not disputed that CBC used the player names in its fantasy baseball website, but there was dispute as to whether this was use of the players' identities.[141]

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137. *See id.*

138. I submit that courts addressing the identity issue in right of publicity cases should begin the analysis by asking, "To whom else could *X* refer?" If it is plausible that *X* could represent another person, the court should continue its analysis by determining the likelihood that the audience would perceive the use of *X's* name as a reference to *X*. But if there is no other plausible possibility, the court can safely conclude that the use of the *X's* name is a symbol of *X's* identity.

139. Russell S. Jones, attorney for the Players' Association, seems to agree:

> When a team owner drafts Albert Pujols, and he spends his time telling himself and his friends that are playing in the game with him that he owns Albert Pujols, it seems rather apparent to us that the name Albert Pujols that he's using in his fantasy is a symbol of the real Albert Pujols - especially when his fantasy team accumulates points based upon how the real Albert Pujols plays next week.

Walter, *supra* note 4.

140. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (2005).

141. *See* C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1088-89 (E.D. Mo. 2006).

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B. COMMERCIAL ADVANTAGE

Though the court was arguably wrong in addressing the identity element, it correctly found that CBC did not use the player names and statistics with the intent to obtain a commercial advantage.

At first glance, it would seem logical that CBC is in fact using the player names and statistics without paying a license to obtain a commercial advantage. Advanced Media and the Players' Association charge $2 million for its fantasy baseball licensing fees.[142] Therefore, it would only seem natural that CBC gets a commercial advantage in its ability to offer the substantially same service as the paying fantasy baseball companies without having to pass the large cost onto its customers through fees or advertisements. This, however, is a circular argument. For a commercial advantage to exist in not paying the licensing fee, we have to assume fantasy baseball providers have to pay a licensing fee. Providers would only have to pay a fee if the use of player names and statistics in a fantasy baseball program constituted a violation of a right of publicity, and a violation of a right of publicity requires the intent to obtain a commercial advantage. Therefore, the argument that CBC obtained a commercial advantage *in not paying* the licensing fee is untenable.

There is still the question of whether CBC's use of the player names and statistics in and of itself was done with the intent to achieve a commercial advantage. It is not clear how CBC could have obtained an advantage over another fantasy baseball website because all fantasy baseball providers use the names of every player and the same statistics.[143] Use of the player names does not give off the perception that the players endorse a fantasy website and even if it did, this would be true of all fantasy baseball websites, and there would be no commercial advantage obtained. Therefore, this element of Advanced Media's and the Players' Association's right of publicity claim was lacking. It was a harmless error that the court found that the names were not used as a symbol of the players' identities.

142. *See* Badenhausen, *supra* note 6, at 52.

143. This is inherent in a fantasy baseball league.

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C. THE UNDERLYING POLICY SUPPORTS A FINDING OF NO RIGHT OF PUBLICITY VIOLATION

The right of publicity doctrine is largely justified by natural rights and utilitarian theories.[144] We want performers to reap the rewards of their labor, and we want an incentive for performers to perform and to encourage others to perform, thus benefiting the public.[145] These theories are echoed in the *Zacchini* decision.[146] There, a performer's act was shown in its entirety on a news broadcast.[147] The court found that the purpose for the broadcast was for entertainment and not for reporting purposes.[148] The court reasoned that the performer's ability to earn a living through his performance was undermined by the public broadcast.[149]

These problems are not present in the fantasy baseball context. MLB players do benefit from fantasy baseball licensing agreements, but this pales in comparison to their salaries.[150] Fantasy baseball licensing fees do not create an incentive for players to perform at a higher level because there is a far more significant financial incentive in the form of their next playing contract. Further, CBC's use of the player names and statistics does not financially injure the players. Therefore, extending the right of publicity to the *CBC* case would be inconsistent with the goals underlying the right of publicity.

The *CBC* court correctly concluded that there was no right of publicity violation. Though CBC arguably used the names as a symbol for the players' identities, CBC, nonetheless, did not use the names with the intent to obtain a commercial advantage. Further, the court's conclusion is consistent with the underlying policies behind the right of publicity. Since

144. *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573 (1977); *see also* F. Jay Daugherty, *All the World's Not a Stooge: The "Transformativeness" Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art*, 27 COLUM. J.L. & ARTS 1, 62-69 (2003) (explaining the various policy rationales behind the right of publicity).

145. *See Zacchini*, 433 U.S. at 573.

146. *See id.*

147. *See id.* at 564.

148. *See id.* at 575-78.

149. *See id.*

150. The average salary in MLB is near $3 million. *See* Richard Hoffer, *It's Great To Be Average*, SPORTS ILLUSTRATED, July 31, 2006, at 56.

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there was no right of publicity violation, it is unnecessary to address First Amendment preemption. Further, the court correctly found that federal copyright preemption was inapplicable.

V. CONCLUSION

As stated above, the *CBC* court correctly found in favor of the fantasy baseball provider. Advanced Media's and the Players' Association's claim was centered in a right of publicity action. Under this claim, Advanced Media and the Players' Association had to prove that: (1) CBC used the player names as a symbol of the players' identities, (2) without consent, and (3) with the intent to obtain a commercial advantage. The court found that elements one and three were lacking. The court's conclusion with regard to element three is correct, but its reasoning with regard to element one is arguable at best. It is hard to imagine the players' names referring to anyone else in the context of a fantasy baseball website. In the end, the correctness of the court's identity analysis is irrelevant because CBC did not act with the intent to gain a commercial advantage. Because this element was lacking, CBC was not in violation of Advanced Media's and the Players' Association's right of publicity.

The court's ruling means that fantasy baseball providers should feel free to offer their services without paying Advanced Media and the Players' Association a licensing fee. It is important to note that this court's ruling is limited to fantasy baseball websites that only use the player names and statistics. It would not apply to team names, logos, or player photos because these are protected by other areas of law. Further, it appears that the court's reasoning is sound and current case law would not support a successful appeal for Advanced Media and the Players' Association.

Even though Advanced Media and the Players' Association did not commence the *CBC* action, the entities chose to pursue the matter, which raises a final question: should MLB care if companies provide fantasy baseball services without paying a licensing fee? It seems as though MLB has significantly more to gain in allowing the companies to proceed without a license. Fantasy baseball services lead to increased interest in baseball as a sport. Fantasy baseball creates an incentive for a casual fan or a baseball fan that follows only a specific team to pay

close attention to players on every team consistently throughout the season.[151] MLB should embrace this fan base rather than build barriers restricting their access to something that brings them closer to the game.

151. *See* Badenhausen, *supra* note 6, at 52.