Switch Hitting: How *C.B.C. v. MLB Advanced Media* Redefined the Right of Publicity

Gabriel Grossman*

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* J.D. Candidate 2008, UCLA School of Law, Managing Editor, UCLA Law Review; B.A. Human Development 2004, University of California, San Diego. I thank Professor Mark Grady for his guidance and advice in writing this Comment. Additionally, I would like to thank my friends and family for their support and encouragement, especially my father who served as a patient sounding board while I developed my arguments. I would also like to express my appreciation to the UCLA Entertainment Law Review for their diligent editing of this Comment.

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I. INTRODUCTION

In 2003, the Missouri Supreme Court held that the use of a professional hockey player's name in a comic book violated his right of publicity.[1] Despite the usual presumption that fictional works are exempted from protection under the right of publicity, the court ruled against the comic book producer.[2] This decision arguably extended the protection under the right of publicity further than any prior court had. However, just three years later, when faced with an online game that appropriated the names of every major league baseball player, a Missouri district court reached the opposite conclusion.[3] Despite the use being in the disfavored medium of gaming under the right of publicity, the Court held that there was no infringement of the right of publicity.[4]

This comment suggests that, in rejecting the players' claim that fantasy sports infringe their rights, *C.B.C. Distrib. and Mktg., Inc. v. Major League Baseball Advanced Media, L.P.* ("*CBC v MLB*") abandons prior approaches to the right of publicity and creates its own. Section II provides an explanation of fantasy baseball and how it developed. Section III discusses what initiated the controversy between C.B.C. Distribution and Marketing, Inc. ("CBC") and Major League Baseball Advanced Media, L.P. ("Advanced Media"). Section IV examines the law governing the right of publicity. Section V presents the reasoning of the *CBC v MLB* court and identifies perceived errors as well as changes to the analysis of a right of publicity claim. Section VI hypothesizes two potential explanations for the new direction taken in the court's holding. Section VII discusses how reversing the *CBC v MLB* court's decision might present a new problem in protecting the right of publicity.

II. THE GAME OF FANTASY BASEBALL AND ITS HISTORY

Fantasy baseball allows participants to create teams consisting of actual Major League Baseball players in fantasy leagues.[5] The participants draft teams at the beginning of each season, choosing the best players from all of Major League Baseball; throughout the season par-

[1] Doe v. TCI Cablevision, 110 S.W.3d 363 (Mo. 2003).
[2] *Id.* at 374.
[3] C.B.C. Distrib. and Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1107 (E.D. Mo. 2006).
[4] *Id.*
[5] *Id.* at 1080.

ticipants may add or drop players from their team and can conduct trades with other teams, much like the transactions that take place in the real world of baseball.[6] Teams within a league compete against each other, and at the end of the season a winner for that league is crowned, often with some cash prize involved.[7] Fantasy baseball essentially gives the experience of managing your own Major League Baseball team, allowing participants to showcase their knowledge of the sport and its players.

Fantasy league games assign points based on the real world accomplishments of each team's players, normally accumulated over a week-long period. Points for hitters are assigned, for example, for hits, runs-batted-in, stolen bases, and runs scored, while pitchers are awarded points based on wins, saves, strike-outs, and earned runs.[8] Team configurations vary across leagues; however, they have players from each fielding position and a roster of pitchers. For example, CDM Sports' basic fantasy baseball game has starting rosters of twenty-eight players and twelve bench players.[9] Their starting batting lineups consist of two catchers, two first-basemen, two second-basemen, two short-stops, two third-basemen, six outfielders and two designated hitters. Starting pitching lineups include six starting pitchers and four relief pitchers.[10]

Daniel Okrent is widely acknowledged to be the founder of fantasy baseball.[11] He developed the first set of rules for a fantasy baseball game and published them over twenty-five years ago. Okrent devised the rules to the game while on a flight to Austin, Texas, during the 1979-1980 off-season.[12] He presented the rules to a group of his friends there who showed little interest in his idea.[13] He then brought the game to a group of his friends from the publishing industry at a New York restaurant, La Rotisserie Francaise.[14] The first fantasy baseball draft was held at that restaurant and the group's annual draft was held there

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[6] *Id.*

[7] For a list of the fantasy baseball games available from CBC, see http://www.cdmsports.com/baseball.

[8] This list is by no means comprehensive as some fantasy baseball leagues incorporate more complex statistics such as on-base percentage or slugging percentage.

[9] CDM's basic baseball game also includes a salary cap with values assigned by CDM. There are also leagues that function without salary cap limitations. CDM Fantasy Sports, Fantasy Baseball, 2007, *available at* http://baseball.cdmsports.com/rules/index.php?page=how_to_enter_rules&display=cdm&origin=, last visited March 31, 27.

[10] *Id.*

[11] Expert Report of Daniel Okrent at ¶8, CBC v. MLB Advanced Media, 443 F. Supp. 2d 1077 (Doc. 74-18) [*hereinafter* Okrent Report].

[12] *Id.*

[13] *Id.*

[14] *Id.*

for many subsequent years.[15] In 1981, Okrent published the rules as part of an article for *Inside Sports*, which led to the spread of his game.[16]

Fantasy baseball's roots extend farther back than Okrent, as he developed the game to fill the void in his life left from being unable to play another game.[17] Okrent had been an avid fan of Strat-O-Matic, a board game that simulates baseball using dice rolls.[18] Strat-O-Matic was created by Hal Richman over forty years ago and possesses a cult-like following among many baseball enthusiasts.[19] Different rolls produce different outcomes based on the skills of a player; the probability of a result is determined by that player's statistics in a given season.[20] For example, one roll of the dice would determine if a player gets a hit and to what portion of the field it goes based on that player's success hitting during the previous year. Another roll determines if the fielder is able to make an out from the play or if the batter makes it safely to base based on the fielder's statistics. Okrent had moved away from his long time Strat-O-Matic partner in 1978, and after a year without the game, Okrent's need for a baseball related game he could play while isolated from his friends led to the development of fantasy baseball.[21]

Fantasy baseball initially gained popularity in the press boxes of baseball stadiums around the country.[22] The sports writers for virtually every team created their own leagues, which eventually spread to teams' front offices.[23] As the game increased in popularity, teams began to be flooded with calls asking about players' statuses and injury information.[24]

Fantasy sports continue to grow in popularity, expanding into football, basketball, and other professional sports.[25] Increased access to the

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[15] *Id.* It is because of this restaurant name that fantasy baseball leagues are also called Rotisserie Leagues, or "Roto" leagues for short.

[16] *Id.* at ¶13.

[17] Uri Berliner, *Baseball Fans Stay True to Low-Tech Board Game*, NPR, Apr. 19, 2005, *available at* http://www.npr.org/templates/story/story.php?storyId=4602562 (citing GLENN GUZZO, STRAT-O-MATIC FANATICS (2005)).

[18] *Id.*

[19] Steve Wulf, *The Bonds of History,* ESPN THE MAGAZINE, Feb. 13, 2002, *available at* http://espn.go.com/magazine/wulf_20020213.html.

[20] *Id.*

[21] Berliner, *supra* note 17.

[22] Okrent Report, *supra* note 11, at ¶13.

[23] *Id.*

[24] *Id.*

[25] Fantasy sports participation has increased by 7-10% per year for the last three years. Press Release, Fantasy Sports Trade Association, *FSTA 2006 Post-Conference Press Release*, March 24, 2006, *available at* http://www.fsta.org/news/pressreleases/FSTA_2006_Post_Conference_PressRelease.doc.

Internet and thus a great deal of information previously unavailable has enabled fantasy sports to reach new heights.[26] The availability of leagues online allows individuals to play despite not having a group of friends to compete against and allows friends spread out across the country to compete against each other without coming together for a draft. Possibly of more importance is the availability of a vast array of statistics, allowing participants to make informed decisions about who to draft, which players to pick-up and which players to drop, and who to play on any given week.[27] The internet has also allowed easier calculation of points and enables participants to get real time updates on the performance of their teams.[28]

Ultimately, these benefits have opened fantasy sports to a much wider audience. Currently, roughly 1.5 billion dollars is paid annually by roughly fifteen million participants to play in fantasy sports leagues.[29] Fantasy sports have changed the focus of sports reporting with virtually every form of sports media providing news and commentary specifically designed for the fantasy sports audience. Live sports updates during games and on sports news channels have increased the focus on player performances, giving fantasy sport participant's glimpses into the performances of their teams and the teams of their competitors. Cell phones have become a tool to receive up-to-the-second updates about participants' fantasy teams.[30] One company has even developed a "stock market" based on the value of different players in fantasy sports, developing contests based on peoples "trading."[31] Overall, it is hard to find any aspect of the way fans interact with sports that has not been affected by the growth of the fantasy industry.

In response to the growth of fantasy baseball, as well as online sports coverage in general, Advanced Media was formed by a group of

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

[27] *See* Daniel Okrent Report, *supra* note 11, at ¶18.

[28] *See id.* at ¶15.

[29] Alan Schwarz, *Baseball is a Game of Numbers, But Whose Numbers are They?*, N.Y. TIMES, May 16, 2006, *available at* http://www.nytimes.com/2006/05/16/sports/baseball/16license.html?ei=5088&en=2beb4a21f74a2f06&ex=1305432000&adxnnl=1&partner=rssnyt&emc=rss&pagewanted=print&adxnnlx=1161038714-ceiCE75HitAsbd0gUfo3mQ. Other reports suggest as many as twenty million people participate in at least one fantasy league with over $4 billion spent annually. Tim Lemke, *Licensing Case Could Hurt Rotisserie Sports*, WASH. TIMES, July 29,2006, *available at* http://www.washtimes.com/sports/20060729-123135-5554r.htm.

[30] Jane McManus, *Cell Phones Emerge as Key Fantasy Sports Tools*, THE JOURNAL NEWS, Oct. 25, 2006, *available at* http://www.thejournalnews.com/apps/pbcs.dll/article?AID=/20061025/SPORTS01/610250374/1034/SPORTS.

[31] *See* http://www.protrade.com.

Major League Baseball owners to manage the expansion of the sport onto the Internet and other new technologies.[32] As part of this endeavor, Advanced Media acquired the rights to player identities for use in fantasy sports from the Major League Baseball Players' Association, paying fifty million dollars for a five-year license.[33]

III. CIRCUMSTANCES SURROUNDING *C.B.C. v. MLB ADVANCED MEDIA*

CBC, through CDM Sports, runs fantasy sports leagues and publishes sports news and commentary online.[34] Established in 1991, CBC has been offering fantasy sports games since 1992.[35] It features both free and paid-subscription fantasy sports games of all types, including multiple baseball, football, basketball, hockey, NASCAR, and golf games.[36] CBC also provides both sports and news commentary under the title "Roto-Times," with both free articles and additional content with access limited to paid subscribers.[37]

CBC began acquiring licenses to use players' names and statistics for its fantasy baseball games from the Major League Baseball Players' Association ("MLBPA") in 1995.[38] This continued through 2005, when, as a result of the decision to focus on expanding the game to casual fans, Advanced Media refused to extend CBC's contract licensing players' names for its fantasy leagues.[39] Advanced Media offered to allow CBC to link to MLB.com's fantasy baseball games and provide ten percent of revenue generated from participants originating from CBC.[40] However, they refused to permit CBC to promote its own fantasy baseball leagues.[41]

Advanced Media contends that the reduction in the number of licenses was motivated by an attempt to revamp fantasy baseball.[42] Over the past five years, while fantasy football and basketball games have

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[32] Schwarz, *supra* note 29.

[33] The MLBPA distributes this money equally amongst all major league players, regardless of popularity or performance.

[34] CBC v. MLB Advanced Media, 443 F. Supp. 2d at 1080.

[35] http://www.cdmsports.com/aboutCDM.php.

[36] *See* http://www.cdmsports.com for available games.

[37] http://www.rototimes.com.

[38] Advanced Media acquired the rights to license players' names and statistics for use in fantasy sports and other new technology endeavors from Major League Baseball Players' Association in 2005. *CBC v. MLB Advanced Media,* 443 F. Supp. 2d at 1080-81.

[39] Memorandum in Support of MLB Advanced Media, L.P.'s Motion for Summary Judgment at *7, *Id.* (Doc. 88)[*hereinafter* "Advanced Media SJ Memo"].

[40] CBC v. MLB Advanced Media, 443 F. Supp. 2d at 1081.

[41] *Id.*

[42] Advanced Media SJ Memo, *supra* note 39, at *8.

seen dramatic increases in the number of participants, fantasy baseball participation has remained relatively stagnant.[43] In an effort to counteract this trend, Advanced Media has attempted to use its licensing power over players' names to influence the content of the games being offered.[44] CBC contends that Advanced Media is seeking to establish a monopoly over fantasy baseball leagues and force smaller fantasy leagues out of competition by limiting licenses, thereby allowing it to drive up prices.[45] In response, CBC brought an action for declaratory judgment that its use of Major League Baseball players' names and statistics did not violate the players' right of publicity.[46] CBC filed suit in the Eastern District of Missouri, as CBC's corporate offices are located in St. Louis.[47] In addition to the declaratory judgment regarding the right of publicity, CBC sought declaratory judgment nullifying a non-competition term from their last contract with the MLBPA, which stated that it would not use the rights that were the subject of their license in any manner after the term of the agreement.[48]

IV. Law Governing the Right of Publicity

Though its origins are rooted in the right of privacy, the right of publicity has evolved independently over the last half-century, creating its own distinct legal protections.[49] The right to protect the commercial value of one's identity was first recognized as the "right of publicity" in 1953, by the Second Circuit, in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*[50] The court in that case recognized that a baseball player had a right to grant the exclusive privilege to publish his photograph under New York common law.[51] Early on, the right of publicity was best explained as protecting against one of four torts involving the right of privacy, consisting of "the appropriation for the defendant's

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[43] *Id.*

[44] *Id.*

[45] CBC's Answering Memorandum in Opposition to MLBPA's motion for Summary Judgment and Memorandum in Support of CBC's Motion for Summary Judgment, at *40-41, *Id.,* (Doc. 74-1).

[46] CBC v. MLB Advanced Media, 443 F. Supp. 2d at 1081-82.

[47] *Id.* at 1080.

[48] *Id.* at 1103. This article will focus solely on the right of publicity claim; however, the discussion of the court's analysis of CBC's use of players' identities is largely applicable to the courts opinion on the 2002 contract as well. The courts discussion of copyright preemption also lies outside the scope of this article.

[49] *See* Huw Beverley-Smith et al., Privacy Property and Personality, 64-68 (2005).

[50] *Id.* at 64.

[51] Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

advantage of the plaintiff's name or likeness."[52] Initially, the roots in the right of privacy led many courts to reject claims from celebrities and other public figures because the courts felt the public nature of their lives contradicted the potential for harm from invasion of privacy in any regard.[53] This led to the independent rationales for the right of publicity, which protects only against commercial exploitation of a plaintiff's identity, in contrast to the misappropriation of an individual's identity, which recognizes the personal injuries occurring from the use of a plaintiff's name or likeness.[54]

Twenty-eight states now recognize the right of publicity.[55] Eighteen states recognize it as a right under common law, while ten others have right of privacy statutes broad enough to incorporate the right of publicity.[56] Missouri is one of the ten states that recognize it as a common law right without statutory protection.[57] Though Missouri has protected the right of publicity under the right of privacy since 1911,[58] it first acknowledged the right of celebrities to control the commercial use of their identity in 1998 in *Bear Foot, Inc. v. Chandler*.[59]

The court in *CBC v MLB* accepted the definition of the right of publicity under the Restatement (Third) of Unfair Competition: "[t]his Restatement provision states that [o]ne who appropriates the commercial value of a person's identity by using without consent the person's name, likeness or other indicia of identity for purposes of trade is subject to liability. . . ."[60] It provides further explanation by relying on the courts language from a recently decided Missouri Supreme Court case, *Doe v. TCI Cablevision*, which stated that "the elements of a right of

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[52] The other three torts under right of privacy are "intrusion(s) upon another's seclusion, public disclosure of private facts, and publicity placing another in a false light. William Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

[53] *See* Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1162, 1171 (2006).

[54] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (2006).

[55] J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY §6:3 (2d ed. 2006).

[56] Eight of the states that recognize it as a common law right also have statutory protection for the right of privacy that encompasses much of the right of publicity as well. *Id.* The states that recognize the common law right of publicity include: Arizona, Alabama, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Michigan, Minnesota, Missouri, New Jersey, Ohio, Pennsylvania, Texas, Utah, and Wisconsin. *Id.* Of those, California, Florida, Illinois, Kentucky, Ohio, Pennsylvania, Texas, and Wisconsin also have right of privacy statutes. *Id.*

[57] CBC v. MLB Advanced Media, 443 F. Supp. 2d at 1084.

[58] *See* Munden v. Harris, 134 S.W. 1076 (Mo. Ct. App. 1911).

[59] Bear Foot, Inc. v. Chandler, 965 S.W.2d 386, 389 (Mo. Ct. App. 1998) (finding that the right of publicity did protect individual celebrities but the right was not, however, enjoyed by corporations).

[60] CBC v. MLB Advanced Media, 443 F. Supp. 2d at 1084 (citing Restatement (Third) of Unfair Competition §46 (2006).

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."[61] It is also clear from the court in *TCI Cablevision* that Missouri's protection of the right of publicity is adopted from, and consistent with, the Restatement (Third) of Unfair Competition.[62]

A. *The Right of Publicity under the Restatement of Unfair Competition*

The Restatement indicates that the right of publicity serves to "secure for plaintiffs the commercial value of their fame and prevents unjust enrichment of others seeking to appropriate that value for themselves."[63] Part of the rationale supporting this protection is that it allows individuals to "prevent harmful or excessive commercial use that may dilute the value of the identity.[64] The Restatement further explains that a plaintiff does not need to provide proof of deception or consumer confusion to qualify for protection; it recognizes an individual has an inherent interest in controlling the commercial use of his or her identity.[65]

The Restatement provides that the appropriation of an individual's identity can be proved by showing the use of either the plaintiffs name or likeness.[66] The breadth of this definition for identity is reflected in cases such as *Abdul-Jabar v. General Motors Corporation*, concerning a commercial featuring the plaintiff's name in a trivia question,[67] and *Motshenbacher v. R.J. Reynolds Tobacco Company*, concerning an advertisement featuring a modified depiction of plaintiff's racecar.[68] Both of these actions were held to be a significant appropriation of the commercial value of the individual's identity. The Restatement is clear that the use of any "identifying characteristics or attributes" of an individual may be sufficient to prove infringement if it can be linked to the com-

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[61] *Id.* at 1084 (citing Doe v. TCI Cablevision, 110 S.W.3d 363, 369 (Mo. 2003 en banc)).

[62] Doe v. TCI Cablevision, 110 S.W.3d at 369.

[63] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 CMT. C (2006).

[64] *Id.*

[65] *Id.* at § 46 cmt. b.

[66] *Id.* at § 46 cmt. d.

[67] Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 409-10 (9th Cir. 1996) (General Motors argued that Kareem Abdul-Jabbar had forfeited the right to his previous name, Lew Alcindor, when he legally changed his name, the court disagreed).

[68] Motcshecnbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 822 (9th Cir.1974) (The tobacco company producing the advertisement had modified a "stock" photo featuring plaintiff's car, changing the number of the car and adding a spoiler but retaining the plaintiff's car's unique pin-striping and oval background surrounding the car's number.).

mercial value of that person's identity.[69] Whether the user has referenced the plaintiff is judged from the perspective of the intended audience of the use in question.[70]

In defining use "for the purposes of trade," the Restatement explains that the use of a plaintiff's identity in "advertising the user's goods or services, [placement] on merchandise marked by the user, or [use] in connection with services rendered by the user" are all encompassed within the rule.[71] However, there are some favored uses that are ordinarily excluded including "news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses."[72] For example, a biographical movie about a celebrity would fall under the entertainment exemption, thus placing it outside the protection of the right of publicity.[73] Though advertisements are the clearest cases of infringement of the right of publicity, any use of an individual's identity for commercial purposes, especially outside of favored mediums, can induce liability.[74]

V. Reasoning of the Court in C.B.C. v. MLB Advanced Media

The court in *CBC v MLB* divides its discussion of the right of publicity into three sections covering the elements of identity and use for commercial advantage and then discussing policy concerns.[75] Each section creates clearly contentious distinctions in reaching the determination that CBC's use of players' names does not violate their right of publicity, which will be discussed below.[76] For the purposes of the discussion, the individual whose right of publicity is at issue will be referenced as the plaintiff, despite the fact that in *CBC v MLB* it is the user that is bringing the action for declaratory judgment that it was not infringing the right of publicity.

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[69] Restatement (Third) of Unfair Competition, *supra* note 66.

[70] *Id.*

[71] *Id.* at § 47.

[72] *Id.*

[73] As indicated by the final clause of the exemption, posters advertising for the movie would also usually be exempt from protection under the right of publicity. *Id.* at §47 cmt. c.

[74] *Id.* at § 47 cmts. a & d.

[75] CBC v. MLB Advanced Media, 443 F. Supp. 2d at 1085, 1088-89. CBC's use was without the consent of Advanced Media as the license holder of the players' rights of publicity. *Id.* at 1085.

[76] The court begins its discussion with the commercial advantage element; however, as it is necessary first to show that an individual's identity was used in order to ultimately prove that it was for a commercial advantage, this paper will begin discussion with the identity element.

A. *Identity Element of the Right of Publicity*

In initiating its analysis of the identity element of the right of publicity, the *CBC v MLB* court frames its discussion as attempting to determine whether the players' names were used as a "*symbol of his or her identity.*"[77] The court focuses on the test for identity used in *TCI Cablevision*, looking at the extent to which identifying characteristics were used to reference the individual in question.[78] It reasons that in analyzing CBC's use, it is not as important that it used players' names; rather, it is *how* its fantasy baseball games used the players' names.[79] The court argues that CBC did not use the players' names as a symbol of their identity.[80] It instead suggests that the use was merely using "a name as a name."[81] The court states that the combination of the use of the name with the statistics does not involve any portion of their identity relevant to the right of publicity as it does not involve their "character, personality, reputation or physical appearance."[82]

To reach this conclusion the *CBC v MLB* court was forced to distinguish the case at issue from a broad range of precedent that could indicate an alternative outcome. In its direct discussion of the identity element, the court first differentiates the facts at issue from *TCI Cablevision*.[83] It notes that in *TCI Cablevision*, Todd MacFarlane, the creator of the comic book *Spawn*, adopted the plaintiff, Tony Twist's, name for a character to draw allusions to his enforcer reputation, indicating the appropriate thug-like mentality for a villainous mob boss.[84] In contrast, the court explains that CBC merely uses players' names in correlation with their playing statistics to recount their accomplishments and, therefore, does not reference their persona.[85]

The court also distinguishes the use of players' identities from other right of publicity cases within its discussion of the commercial advantage element.[86] It is in that section that the court discusses the two cases that are most factually similar to *CBC v MLB*: *Palmer v.*

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[77] CBC v. MLB Advanced Media, 443 F. Supp. 2d at 1088.

[78] *Id.*

[79] *Id.* at 1089.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *See id.* at 1088.

[84] *Id. at n.14.* In the *TCI Cablevision* case itself, the court seems to reject this suggested literary motivation, indicating that MacFarlane had adopted the name primarily to draw increased attention to the comic book and that such a content-focused use of the name would give weight to Tony Twist's right of publicity claim. *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003).

[85] CBC v. MLB Advanced Media, 443 F. Supp. 2d at 1089.

[86] *See id.* at 1086-8.

Schonhorn Enterprises, Inc. and *Uhlaender v. Henricksen*, each of which held that the games incorporation of professional athletes violated their right of publicity.[87] *Palmer* involved a golf board game that included the names and biographical profiles of twenty-three professional golfers.[88] The advertisements and box did not refer to any individual golfer specifically, but the game and the playing pieces themselves incorporated the players and their accomplishments.[89] *Uhlaender* involved a dispute focused on a baseball board game similar to Strat-O-Matic.[90]

The *CBC v MLB* court distinguishes its case from *Palmer* primarily based on the claim that the golf board game incorporated pictures of the professional golfers.[91] The court acknowledges the overall factual similarities between the cases but finds a "critical exception" in that there are no pictures of MLB players in CBC's games.[92] Such a distinction would be noteworthy if the *Palmer* case involved pictures. The case's statement of facts makes no reference to player pictures, only discussing the use of player names, professional records and biographical histories.[93] The only discussion of pictures involved in *Palmer* is in the establishment of the relevant precedent outlining the rights involved, and the *Palmer* court specifically states that even the use of only names and biographical information can be actionable.[94] It is unclear where the *CBC v MLB* court develops the idea that pictures were a factor in the *Palmer* case, but the elimination of the "critical exception" would seemingly undermine the rationale in denying that CBC's use of players' names and statistics was sufficient to reference their identity.

The court also claims that a new line of right of publicity cases exists following *Zacchini v. Scripps Howard Broadcasting Co.*, decided by the U.S. Supreme Court in 1977, making prior cases less influential.[95] Besides using this case to discredit the value of *Palmer* as precedent, the *CBC v MLB* court also uses this argument to completely invalidate *Uhlaender* saying that it is no longer consistent with the law governing the right of publicity.[96] However, *Uhlaender* is still consid-

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[87] *Id.*

[88] Palmer v. Schonhorn Enters., 232 A.2d 458, 459 (N.J. Super. Ct. Ch. Div. 1967).

[89] *Id.*

[90] *See* Uhlaender v. Henricksen, 316 F. Supp. 1277, 1278 (D. Minn.1970).

[91] CBC v. MLB Advanced Media, 443 F. Supp. 2d at 1087.

[92] *Id.*

[93] Palmer v. Schonhorn, 232 A.2d at 459.

[94] *Id.* at 461-62.

[95] CBC v. MLB Advanced Media, 443 F. Supp. 2d at 1087-8 (referencing Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

[96] CBC v. MLB Advanced Media, 443 F. Supp. 2d at 1088 n.12.

ered to be good law in Minnesota, where it was decided. Minnesota also recognizes the right of publicity under common law, and contemporary Minnesota right of publicity cases still cite *Uhlaender* favorably.[97] Furthermore, the *CBC v MLB* court cites *Ventura v. Titan Sports, Inc.*, a Minnesota right of publicity case that follows *Uhlaender* in its discussion of policy considerations suggesting a favorable view of Minnesota's interpretation of the right of publicity.[98] Despite the contentions of the court, there is no indication that the right of publicity as stated under *Uhlaender* or *Palmer* is inconsistent with current common law surrounding the right of publicity: it is merely inconsistent with the decision that the court was inclined to make.

The court makes no attempt to distinguish many applicable cases for determining what qualifies as the appropriation of an individual's identity. For example, despite citing *Abdul-Jabbar* favorably for its discussion of the commercial advantage element, the *CBC v MLB* court does not differentiate the use of Lew Alcindor's name as an appropriation of his likeness from the use of the players' names in the case at issue. Instead, the court cabins its discussion of the identity element to a single test derived primarily from *TCI Cablevision*, a case that involved the use of an athlete's name in a medium typically excluded from the right of publicity, a fictional work.[99] The court disregards this distinction in their discussion, despite the fact that fictional works typically have to meet higher standards to demonstrate an inappropriate use of an individual's identity, as such uses are ordinarily excluded from protection.[100]

Ultimately the court is applying an inappropriate standard to the analysis of the identity element. Typically, the question of identity is merely whether the use recognizably references the plaintiff.[101] In the case of CBC's use of players' names and statistics, there is no question that they are attempting to reference the MLB players. Where the issue involves a fictional work, it is not obvious that the work is intending to identify the person whose name was incorporated making the analysis more complex. In the case where it is determined that a fictional work references the plaintiff, the *TCI Cablevision* court suggests that it is

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[97] *See* Ventura v. Titan Sports Inc., 65 F.3d 725, 730 (8th Cir. 1995); Hillerich & Bradsby Co. v. Christian Bros., Inc., 943 F. Supp. 1136, 1141 (D.Minn. Nov 05, 1996); McFarland v. E & K Corp., 1991 WL 13728, at *2 (D.Minn. Jan 17, 1991) (No. Civ. 4-89-727).

[98] *See* CBC v. MLB Advanced Media, 443 F. Supp. 2d at 1090 (citing Ventura v. Titan Sports Inc., 65 F.3d at 730 (citing Uhlaender v. Henricksen, 316 F.Supp. 1277, 1280-81 (D.Minn. 1970)).

[99] CBC v. MLB Advanced Media, 443 F. Supp. 2d at 1089-90.

[100] *See* Doe v. TCI Cablevision, 110 S.W.3d at 373.

[101] RESTATEMENT (THIRD) OF UNFAIR COMPETITION §46 CMT. D (2006).

appropriate to determine if the use of the plaintiff's identity was more to appropriate the commercial value or the expressive content; however, that concern is not relevant here because there is no potential for the use of the players' names to be employed for literary purposes.[102] The purpose of the use is not as relevant when the use is not in a favored medium that would have a claim for exclusion from protection.

The court argues that CBC's use of players' names and statistics provides the same information as a newspaper and, as such, should not be considered to improperly appropriate their identities.[103] As was the case in their analysis of *TCI Cablevision*, this does not recognize that use in favored mediums is entitled to different treatment. The law governing right of publicity recognizes favored and disfavored mediums because there is a presumption that certain uses are more likely intended to convey information or provide commentary, which presents greater concerns of inappropriately limiting speech.[104] In the case of a box score in a newspaper, there is virtually no question that the use is intended to convey the information about the player's performance, and therefore it is given an exception from protection under the right of publicity. Though CBC's use does contain the same information, it is not intended to convey that information to the public; rather, it transforms the information for use in a game incorporating players' names and statistics as elements of their product. This allows the participants to feel connected to professional sports by running a team of their favorite players and feeds off of their attraction to baseball. There is no question that enough of the players' identities, their names and statistics, are used by CBC to make it clear that they are referencing the MLB players specifically. This leaves only the question of whether CBC used the names to obtain a commercial advantage.

B. *Commercial Advantage Element of the Right of Publicity*

The *CBC v MLB* court begins its discussion of the commercial advantage element by acknowledging that the only intent that is required in a right of publicity case is the intent to obtain a commercial advantage.[105] Whether there was any intention to injure the plaintiff is irrelevant.[106] The court indicates that a defendant can be shown to use a plaintiff's identity for commercial advantages either by falsely associat-

[102] Doe v. TCI Cablevision, 110 S.W.3d at 373-74.
[103] CBC v. MLB Advanced Media, 443 F. Supp. 2d at 1080.
[104] RESTATEMENT (THIRD) OF UNFAIR COMPETITION §46 CMT. C (2006).
[105] CBC v. MLB Advanced Media, 443 F. Supp. 2d at 1085.
[106] *Id.*

ing the plaintiff with a product or by using the plaintiff's identity to attract attention to a product.[107]

In its analysis of CBC's use, the court notes that there is nothing that indicates that any Major League Baseball player is associated with the product.[108] Therefore, the only manner in which Advanced Media could show that the use of players' names was for a commercial advantage would be to show that CBC used the names of players to attract attention to their product.[109] The court next states that because all fantasy sports games incorporate players' names and records as part of the game, CBC cannot attract more attention to its games over its competitors by its use of players' names; therefore, the court holds that there is no possibility that Advanced Media could prove that CBC had used players' identities to gain a commercial advantage.[110]

The court then proceeds to attempt to distinguish *CBC v MLB*'s use of names from that of preceding cases. As discussed above, it distinguishes *Palmer* on the incorrect contention that pictures were used in the game. The court argues that this alters the potential commercial advantage of appropriating the plaintiffs' identities, apparently suggesting that a consumer would be more likely to buy a game that focused on the accomplishments of professional athletes only if pictures of the athletes were included.[111] Though there may be limited truth to such a claim, it is nonetheless irrelevant as there were no pictures of players in the game involved in *Palmer*. The court concludes its discussion of *Palmer* by stating that it is inconsistent with modern right of publicity cases without explanation of how it is inconsistent.[112]

CBC's use of players' names is also contrasted with four other right of publicity cases en masse; however, none of these cases are particularly informative in establishing the commercial advantage element.[113] Three of the four cases involved advertisements that featured the plaintiffs' identities, and these cases clearly indicate false associa-

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[107] *Id.* at 1086.

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.* at 1086-7.

[112] *Id.* at 1087.

[113] Abdul-Jabbar v. Gen. Motors Corp, 85 F.3d 407 (9th Cir. 1996) (car commercial featuring professional basketball player's name); Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 968 (10th Cir. 1996) (trading cards featuring cartoon images of baseball players and fact-based social commentary regarding professional sports) Toney v. L'Oreal USA, 406 F.3d 905, 910 (7th Cir. 2005) (model's likeness included on promotional materials and product packaging of hair care products); Newcombe v. Adolf Coors Co., 157 F.3d 686, 692-93 (9th Cir. 1998) (professional pitcher depicted in beer advertisement).

tion between the individual and the product.[114] The only case of the four that looks to an issue where a product used the plaintiff's likeness to gain more attention was *Cardtoons L.C. v. Major League Baseball*, which disposed of the commercial advantage element in two sentences stating that the element was satisfied because the product was designed to be marketed and sold for profit.[115] Applying the test presented by *Cardtoons*, CBC uses players' names in games that are marketed and sold for profit, clearly satisfying the element for use for commercial advantage. Instead, the *CBC v MLB* court suggests *Cardtoons* presented a case where an impression is created that the plaintiff endorsed the product, despite the fact that the product lampooned the inflated egos and salaries of major league baseball players.[116]

In much of its analysis of the element of identity, the *CBC v MLB* court appears to be tailoring the analysis for the right of publicity to produce the outcome it finds appropriate. In looking at CBC's games, the court fails to consider the possibility that all fantasy games use players' identities to draw attention to their games. Fantasy sports gain much of their popularity from the ability to follow the performance of professional athletes and the opportunity for participants to display their knowledge of professional sports and assessments of players' abilities. It is unlikely that fantasy sports would be as popular if the games featured high school athletes as the basis of the game. Rather, fantasy sports use the enthusiasm that fans have for professional sports to fuel interest in their games. Even the expert witness for CBC acknowledges that he developed the game from his interest in Major League Baseball and its history.[117] The court in *CBC v MLB* appears to be blind to this argument merely because a number of companies are using the same strategy. It seems unlikely that if every comic book used professional athletes' names to increase interest in their comic books that this court would argue that Todd MacFarlane gained no commercial advantage from using Tony Twist's name to increase interest in *Spawn*, yet it appears to accept such reasoning with regard to CBC's use of players' names. It defies logic to qualify the benefit that fantasy sports gain from

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[114] Abdul-Jabbar v. General Motors, 85 F.3d 407; Toney v. L'Oreal USA, 406 F.3d 905, Newcombe v. Adolf Coors Co., 157 F.3d 686.

[115] Cardtoons, L.C. v. MLB Players' Ass'n, 95 F.3d 959, 968 (determining that though the use of players' likenesses did infringe the players' right of publicity, the parodic nature of the cards evidenced by the content of the images and the social and economic commentary on the back of the cards made First Amendment considerations outweigh the right of publicity. The court used likeness to refer to the use of players' identity because no actual names or photographs were used on the cards).

[116] CBC v. MLB Advanced Media, 443 F. Supp. 2d at 1087.

[117] *See* Okrent Report, *supra* note 11, at ¶11-12.

their exploitation of the identities of professional athletes as providing no commercial advantages.

C. *Policy Considerations*

As discussed above, it is arguable that CBC used players' names as their identity to draw attention to its product and create a commercial advantage without their consent, thus satisfying all three elements of a right of publicity claim.[118] Though this conclusion would be sufficient to end the inquiry under the Restatement, the court next seeks to establish whether the case meets the policy considerations it feels relevant to the protection of the right of publicity and weighs these considerations against the value of protecting freedom of speech.[119]

1. Justification for Protecting the Right of Publicity

There are a number of rationales that have been suggested for protecting the right of publicity ranging from arguments for moralistic property rights in one's identity to concerns over maximizing economically efficient use of an exhaustible resource.[120] The Restatement incorporates many potential explanations, stating that the right of publicity is recognized to "(1) protect 'an individual's interest in personal dignity and autonomy'; (2) 'secur[e] for plaintiffs the commercial value of their fame'; (3) 'prevent the unjust enrichment of others seeking to appropriate' the commercial values of plaintiffs' fame for themselves; 4) prevent 'harmful or excessive commercial use that may dilute the value of [a person's] identity'; and (5) 'afford protection against false suggestions or endorsement or sponsorship."[121] The right of publicity has also been justified simply as "the inherent right of every human being to control the commercial use of his or her identity."[122] Underscoring such explanations is the recognition, as stated by the Supreme Court, that "[n]o social purpose is served by having defendant get free some aspect of

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[118] This alone should be sufficient to overturn the court's decision in *CBC v MLB*, as the court decided the outcome of the case on summary judgment. Proving each of the three elements of the claim in the manner suggested above likely creates a triable issue of facts appropriately determined by a jury.

[119] *See* CBC v. MLB Advanced Media, 443 F. Supp. 2d at 1089-90.

[120] Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, UCLA ENT. L. REV. 97, 108-10 (1994).

[121] RESTATEMENT (THIRD) OF UNFAIR COMPETITION §46 CMT. C (2006)

[122] J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY §1:4 at 3 (2d ed. 2005)

the plaintiff that would have market value and for which he would normally pay."[123]

After referencing to, and elaborating on, the above rationales for protecting the right of publicity, the court in *CBC v MLB* states that they are all "aimed at preventing harmful or excessive commercial use of one's celebrity in a manner which could dilute the value of a person's identity."[124] Though this is only one of the five rationales the court references from the Restatement, much less employed by the other sources it cites, it is from this limited perspective that the court analyzes the policy considerations for supporting the right of publicity in the case at issue. From there, the court forms its discussion around the premise that CBC's use of players' identities is limited to the publication of their playing records. It argues that since players do not earn money by licensing the publication of their statistics and CBC does not impair players' ability to endorse products or earn money playing baseball, there is no harm from the use of their celebrity that diminishes the value of their persona.[125] Furthermore, the court argues that CBC would not pay to license the players' records as they are available in the public domain because numerous news sources publish them on a daily basis.[126]

This analysis fails to acknowledge that, even though the web site only displays players' names and statistics within game play, customers are attracted, as fans of the sport, to the opportunity to play a game featuring the professional athletes. CBC does not sell the right to view statistics; it sells the opportunity to participate in its fantasy sports leagues where participants act as owners and managers of their own team of professional players. Moreover, the there is an element of skill that awards monetary prizes based on the performance of participants' teams.[127] This clearly reflects a use that goes beyond the mere publication of statistics into a larger appropriation of the players' fame for commercial gain achieved by CBC in selling its games.

The court next extends its argument to the contention that CBC's use actually increased the marketability of the players, eliminating any justification for the right of publicity. The *CBC v MLB* court relies on *Gionfriddo v. MLB* as precedent, in which Major League Baseball's

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[123] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 576 (1977)(citation omitted).

[124] CBC v. MLB Advanced Media, 443 F. Supp. 2d at 1090.

[125] *Id.* at 1091.

[126] *Id.*

[127] This element of skill is even recognized by Congress as they created an exception from the recently adopted Unlawful Internet Gambling Act which provided an explicit exception for participation in online fantasy sports games. 31 U.S.C. § 5362(1)(E)(ix) (2006).

inclusion of the achievements of historic players in all-star game programs was found not to violate the players' right of publicity.[128] The court in *Gionfriddo* noted that MLB's use of the players' names and achievements might have increased their potential marketability.[129] The *CBC v MLB* court argues that the publication of the names and statistics by CBC would have the same potential to increase the players' marketability.[130] However, the facts of *Gionfriddo* are vastly different from the situation presented in *CBC v MLB*. The information published in the programs by MLB in *Gionfriddo* was between forty-five and sixty-five years old at the time of publication.[131] Most of the players were not well known to the public, with the exception of the most historically inclined of baseball enthusiasts. In contrast, the information published by CBC is available constantly in a variety of other forms. It is unlikely that the information they publish provides any greater exposure for the players than would readily be available through any other venue. Moreover, *Gionfriddo* involved only the publication of the players names and accomplishments, there was no attachment to any product such as the fantasy sports games that CBC sells.[132] The fact that all the materials of the game exist in the form of an online game should not preclude its recognition as more than the publication of the statistics. Additionally, Major League Baseball was presenting its own history in publishing the achievements of the players.[133] The plaintiffs' accomplishments were inherently linked to the defendants in *Gionfriddo*, and the economic value of their identities was created as a result of their participation in Major League Baseball.[134] CBC can make no such claim; it possesses no connection to the athletes or their accomplishments that would justify greater latitude in the use of players' identities.

Furthermore, though it may increase the net marketability of some players, such benefits do not negate the fact that CBC gains a pecuniary benefit trading on the celebrity of the major league players. Though players would also be able to recover if CBC's use impaired their ability to market themselves in other avenues, *TCI Cablevision* makes it

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[128] The plaintiffs in the case had played baseball prior to MLB acquiring the right to use players' names, statistics and accomplishments for the promotion of the sport which did not occur until after the 1947 season. Gionfriddo v. Major League Baseball, 94 Cal. App. 4th 400, 406 (Ct. App. 2001).

[129] *Id.* at 415.

[130] CBC v. MLB Advanced Media, 443 F. Supp. 2d at 1091.

[131] Gionfriddo v. MLB, 94 Cal. App. 4th at 405-06.

[132] *Id.* at 414.

[133] *Id.* at 412-14.

[134] *Id.*

clear that Missouri also recognizes their entitlement to the profits attributable to the defendant's inappropriate use of the plaintiff's identity.[135] This is an issue best resolved in determining damages, not in determining whether the right of publicity has been violated. It is likely that CBC could argue that damages should be limited to the cost of the licensing fee, as that is the limit of its unjust enrichment from the use of the players' identities. However, that should not preclude the players' from having the ability to determine the commercial use of their names.

Finally, there is no social utility served in allowing CBC to utilize players' names without their license. There is an established market value for the right to use the players' identities in fantasy sports games, as evidenced by the fees paid by the current license holders. This market value is also an expense "for which he would normally pay" as CBC had paid the licensing fees until Advanced Media refused to renew CBC's contract.[136] As suggested by the Supreme Court in *Zacchini*, to claim now that there is no policy consideration for protecting the players' right of publicity runs contrary to the concept that society itself can function to define the boundaries of appropriate interactions.[137]

2. Free Speech Concerns

The expansion of protection under the right of publicity has brought forth great concern about its effects on the freedom of expression.[138] There is an inherent tension at the boundary where these rights intersect, one attempting to constrain expression while the other focuses on eliminating all such restraints. *Zacchini* featured the quintessential case of these two principles at odds with each other. A local news broadcast filmed a "human cannonball" act in full, against the objections of the performer, and broadcast the entire performance as part of its news report.[139] This presents one of the clearest cases for protection under the right of publicity as the broadcast of Zacchini's human cannonball act appropriated the heart of the economic value of his celebrity, the ability to sell access to view his performance.[140] His work and training in developing his act was invested to profit from such specific use.[141] However, the broadcasters' rights also presented one of

[135] *See* Doe v. TCI Cablevision, 110 S.W.3d at 367.

[136] CBC v. MLB Advanced Media, 443 F. Supp. 2d at 1080-81.

[137] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. at 576.

[138] *See, e.g.*, Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903 (2003) (discussing how recent right of publicity cases have created excessive limitations on the freedom of speech).

[139] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. at 563-64.

[140] *Id* at 576.

[141] *Id.*

the strongest cases for protection of the freedom of speech. News reporting, as the ability to disseminate information to the public free from encumbrance, is one of the most favored forms of speech.[142] The Restatement echoes this fact, indicating that news reporting is one of the favored uses normally exempt from protection under the right of publicity.[143]

The Ohio Supreme Court had resolved the issue in favor of the news broadcasters, stating that the interest in protecting the right of publicity was outweighed by the First Amendment concerns.[144] The Supreme Court granted certiorari to resolve the conflict, as Ohio had utilized federal law to resolve the question.[145] The Court held that First Amendment does not require the state to privilege press as Ohio had done in denying the right of publicity, thus overturning the decision of the lower court.[146] Furthermore, the Court noted that in right of publicity cases, the question is not of content restriction but rather who gets the rights to publish the content.[147]

Despite the Supreme Court's endorsement of the states' ability to protect the right of publicity, the *CBC v MLB* court views *Zacchini* as establishing a new line of right of publicity cases.[148] It suggests that all prior cases are inconsistent with the new establishment of the right of publicity by the Supreme Court.[149] However, the Supreme Court had merely left it to the states to determine the enforcement of the rights and indicated that federal law should not be used as the basis for resolving the questions involved in right of publicity cases.[150] Rather than establishing a new line of analysis, the court places a stronger emphasis on the precedent that states had developed in protecting the right of publicity for determining the appropriate outcome of cases.

Beyond arguments invalidating relevant precedent, *CBC v MLB* uses *Zacchini* to justify employing a balancing test weighing First Amendment free speech concerns against any potential claim Advanced Media may have to right of publicity protection.[151] The court

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[142] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c (2006).

[143] Along with news reporting, commentary, entertainment, or works of fiction or nonfiction are considered favored uses normally found not to infringe the right of publicity. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. a (2006)

[144] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. at 565-66.

[145] *Id.* at 566.

[146] *Id.* at 579.

[147] *Id.* at 573.

[148] *Compare* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. at 578-9; *with* CBC v. MLB Advanced Media, 443 F. Supp. 2d at 1092-3.

[149] CBC v. MLB Advanced Media, 443 F. Supp. 2d at 1087-8.

[150] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. at 578.

[151] CBC v. MLB Advanced Media, 443 F. Supp. 2d at 1095-6.

initiates its discussion by stating that non-traditional mediums of expression are entitled to the same protection under freedom of speech as more accepted forms.[152] To establish this in the context of an interactive game, the court cites *Interactive Digital Software Association v. St. Lois County*, involving the attempted censorship of a videogame with objectionable content.[153] This reasoning fails to recognize the distinction between the analysis of right of publicity cases and other cases dealing only with free speech concerns. As noted by the Supreme Court, it is not a question about the expression itself that is at issue in right of publicity cases, rather who has the right to publish that expression.[154] As established by the Restatement, which the *CBC v MLB* court appears to otherwise accept, in right of publicity actions, when balancing the issues regarding free speech, the form of expression does influence the rationale underlying protection.[155] Certain forms of speech have a greater claim to communicating information or expressing ideas than others.[156] An almanac of baseball statistics that only uses baseball players' names for the publication of information has better standing for protection than *CBC v MLB* because the sole purpose of the work is to communicate that information. In contrast, participants do not pay to play CBC's games to gain access to the publication of players' names and statistics; they pay to play a game featuring professional athletes. This distinction gives certain forms of expression a greater presumption of appropriate use of a plaintiff's identity, which CBC's game should not be enjoy.

The *CBC v MLB* courts further discussion of the balance between the right of publicity and the First Amendment focuses on three cases as precedent for its balancing tests: *Gionfriddo*, *Zacchini,* and *Cardtoons*.[157] Of these cases, both *Gionfriddo* and *Zacchini* involve favored mediums of expression that entitled the users to a presumption of appropriate use of the plaintiff's identity, thus placing greater weight on the freedom of expression than would be appropriate in the case at issue. *Gionfriddo* involved the publication of players' names and statistics in an all-star game program.[158] Much like a newspaper or magazine, the program was designed to convey information that Major League Baseball felt would enhance baseball players' understanding of

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[152] *Id.* at 1092.

[153] *Id.*

[154] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. at 578.

[155] Restatement, *supra* note 54, §47 cmt. c.

[156] *Id.*

[157] *See* CBC v. MLB Advanced Media, 443 F. Supp. 2d at 1092-4.

[158] Gionfriddo v. MLB, 94 Cal. App. 4th at 406.

baseball history and increase their appreciation of the all-star game.[159] *Zacchini*, as noted above, involved a news broadcast, a use explicitly acknowledged to require greater First Amendment protection.[160]

The lone case in which the plaintiffs' identities were used on a product sold by a defendant, a disfavored use under right of publicity analysis, is *Cardtoons*. In *Cardtoons*, the defendant used the plaintiffs' identities on baseball trading cards, publishing their likeness with some biographical information.[161] These facts alone would indicate that a similar outcome would be appropriate in *CBC v MLB*; however, there are key factual distinctions that were relevant to the court's outcome in *Cardtoons*. The trading cards in *Cardtoons* featured parodic caricatures of the players depicted on the cards and altered their names to reflect the elements of their identities being satirized, such as changing Barry Bonds to "Treasury Bonds."[162] The backs of the cards contained cheeky social commentary further reflecting their attempted parody, highlighting the excessive egos and incomes of the players they depicted.[163] The Tenth Circuit Court decided the case from the position that the cards were parodies, stating that the lampooned players, and Major League Baseball itself, would be unlikely to license such products.[164] Much like the rationale for protecting parody within copyright, the acknowledgment that the rights holder would be unlikely to license such a depiction heavily burdens expression unless others are allowed to do so.[165] This effectively changed the issue in the case from who can publish the content to what content can be published. CBC's use of players' names does not require resolving this concern. Advanced Media is merely trying to control who has the rights to utilize players' identities in fantasy baseball games and to limit the use of those identities to those who have paid for such usage. The fact that it licenses the use of players' names in this manner to other companies creates an important distinction from the analysis employed in deciding *Cardtoons*.

In light of the above distinctions from the cases that the court references, it is appropriate to look at the balancing of free speech against the right of publicity that the Supreme Court of Missouri employed in *TCI Cablevision*. Though it featured a favored use, utilizing the plaintiff's name in a work of fiction, the court's analysis is helpful in determining the relevant issues to Missouri's recognition of the right of

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159 *Id.*
160 Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. at 576.
161 Cardtoons v. MLBPA, 95 F.3d at 962.
162 *Id.*
163 *Id.*
164 *Id.* at 972-73.
165 *See id.*

publicity. The *TCI Cablevision* court decided the case following a series of cases in other jurisdictions that had attempted to deal with the issue of how to balance the freedom of expression with the right of publicity.[166] Other courts had employed a transformative test adapted from the fair use doctrine of copyright, looking at whether the use added enough new meaning to distinguish itself from merely referencing the individual for commercial advantage.[167] Because the transformative test merely focused on the nature of the use and not its purpose, the *TCI Cablevision* court found this analysis inappropriate, and held that the important distinction was whether the use of the plaintiff's name was to appropriate the commercial value of the name or for expressive purposes.[168] The court acknowledged that although there was some evidence that the name was used to reference the thug-like nature of the villain in the comic book, it found that the primary motive for MacFarlane's primary motive in incorporating Tony Twist's name was to increase interest in the comic book amongst hockey fans.[169] MacFarlane's actions, including sponsoring *Spawn* nights at minor league hockey games and selling *Spawn* hockey jerseys and pucks provided additional evidence of his intent.[170]

When applying the reasoning employed by the Missouri Supreme Court in *TCI Cablevision* to resolve *CBC v MLB*, it is appropriate to look at the basis for using the identities of Major League Baseball players and ask whether it was to assume their commercial value or for some other expressive purpose. The *CBC v MLB* court argues the use of the players' names is merely for the purpose of identifying the statistics necessary for the functioning of the game.[171] As discussed above, however, this contention ignores the point that participants are attracted to play the game because of their interest in Major League Baseball. The primary reason for the use of players' names is that the game would garner little interest if imaginary players were used with imaginary statistics, and it is the accomplishments of the players that generate interest in the games. If it were not for the players' investment in developing themselves as athletes, the physical feats that they accom-

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[166] Specifically the court responding to a "transformative" test employed by California in *Comedy III Prods. v.Gary Saderup, Inc.*, 25 Cal. 4th 387 (Cal. 2001) that was followed in *Winters v. DC Comics*, 2003 WL 22765174 (Cal.App. 2 Dist.) (No. B121021), featuring a comic book referencing two musicians that was found not to infringe the right of publicity.

[167] *See supra* note 157.

[168] Doe v. TCI Cablevision, 110 S.W.3d at 374. It is the using of an individual's identity for a commercial purpose that is inappropriate and the *TCI* court attempted to design a more relevant test.

[169] *Id.*

[170] *Id.* at 367.

[171] CBC v. MLB Advanced Media, 443 F. Supp. 2d at 1086.

plish in professional sports would not be followed so closely, nor would the fan base for the leagues be so devoted. This is what creates value in their likenesses and what CBC appropriates to draw attention to its games. Therefore, under the balancing test determined by *TCI Cablevision*, concerns surrounding the freedom of speech would arguably be outweighed by CBC's appropriation of the commercial value in the players' identities.

VI. Potential Explanations for the Change in Enforcement

From analysis of CBC's use of the players' identities to the weighing of the right of publicity against freedom of speech, the court in *CBC v MLB* appears to defy precedent in each portion of the opinion to reach its conclusion. It abandons much of the analysis outlining the right of publicity presented by the Missouri Supreme Court just three years prior in *TCI Cablevision*. So what motivated the court to hold that CBC had not infringed the players' right of publicity?

A. *Re-establishing the Importance of Freedom of Speech*

One potential explanation is that the *CBC v MLB* court was trying to counteract the expansion of the right of publicity following *TCI Cablevision*. The language from the Missouri Supreme Court's opinion is relatively broad and gives protection for the right of publicity in a case involving a favored use. In an effort to counteract the potential effects of that decision, the *CBC v MLB* court may have felt motivated to take a case on the margin and shift the balance towards a more limited recognition of the right of publicity.

There is clearly support for such a position in the legal community.[172] *CBC v MLB* presents a case that could be used to redefine the boundaries of the right of publicity within the First Amendment. Such a view of the case could be seen in the court's contention that all forms of expression should be entitled to the same protection as speech under the First Amendment, attempting to eliminate the distinction between favored and disfavored uses established by the Restatement.[173] Critics of the right of publicity have argued that this form of distinction is inappropriate and that only truly commercial speech, such as advertisements, should be recognized as appropriating the commercial value of a plaintiff's identity.[174] When a line is drawn between forms of non-com-

[172] *See, e.g.*, Volokh, *supra* note 138.
[173] *See* CBC v. MLB Advanced Media, 443 F. Supp. 2d at 1092.
[174] Volokh, *supra* note 138, at 923-24.

mercial speech, the critics argue, it fails to appreciate the potential for important expression in non-traditional mediums. As evidenced by *Cardtoons*, even these "lower" forms of speech may contain important expression. Proponents of this view might contend that the detriment created by limiting these forms of speech outweighs any potential harm caused by a reduction in the protection of the right of publicity.

If this was the motivation for denying Advanced Media's claim, the court may have reconciled its reasoning with *TCI Cablevision* by looking to MacFarlane's sponsorship of *Spawn* nights at minor league hockey games and hockey-oriented *Spawn* memorabilia. The court may have felt that establishing such a connection between hockey and the comic book worked to advertise the comic book to hockey fans. More than just using the name in the comic book to generate attention, the court may have felt that these actions reflected MacFarlane's attempts to use Tony Twist's identity separately as advertising for the comic book as well. This would suggest that the plaintiff's identity was used in commercial speech, which has even less claim to protection than CBC's use.

B. *A Rent Dissipation Theory of the Right of Publicity*

An alternative explanation for the courts decision may be that it applies a rent dissipation theory to the protection of the right of publicity. Such a theory recognizes that the ability of an individual to sell one's likeness is an exhaustible resource.[175] Uses that have no net effect on the ability of a plaintiff to market themselves, or uses that increase a plaintiffs' marketability, should arguably be left unencumbered. However, if the use has the potential to saturate the market with the plaintiff's likeness, either independently or through similar exploitation by others, such a use is seen to diminish the value of one's identity, causing actionable harm.[176] This rationale for protecting the right of publicity discounts the idea that there is an inherent right in the commercial use of ones' likeness, instead treating it as an impersonal commodity. This approach, in theory, maximizes the economically efficient exploitation of an individual's fame. Protection of the right of publicity in this manner can be seen as a trend through the majority of right of publicity cases, even if courts do not acknowledge this as a justification for protecting the right.[177]

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[175] For an explanation of this see Grady, *supra* note 120, at 98-103.

[176] *Id.* at 111-12.

[177] *See generally id.* However, this may be as much a result of potential plaintiffs' decisions to file suit as a rational for the protection. If a use increases the marketability of an individual they might feel less desire to prevent it.

The *CBC v MLB* court's analysis of the policy considerations justifying the right of publicity supports the contention that it is applying a rent dissipation theory. The court discusses only the potential harm or diminution of value in the players' likenesses, disregarding their interest in controlling the commercial exploitation of their identity.[178] Furthermore, *CBC v MLB* decision also supports this position as it would be difficult to argue that CBC's use would saturate the market with individual players' identities in any area except fantasy baseball leagues. However, this position is difficult to reconcile with the reasoning presented in *TCI Cablevision*. Though Tony Twist proved potential harm from Todd Macfarlane's use of his name, it was not from the overuse of his identity. Instead, the evidence of harm was that a potential endorsement contract was pulled because of the negative association of Tony Twist's name with the comic book villain.[179] This would not present an issue of harm normally caused by a violation of Tony Twist's right of publicity; it rather suggests that the tortious act was the damage to his reputation. Such an action would be difficult to support as it was a fictitious work not designed to depict the real Tony Twist and the portrayal was built on a reputation that Twist had developed as a player, one that he helped create.[180]

It could be contended that the *TCI Cablevision* court recognized that if every comic book used Tony Twist's name, it would be difficult for him to market his identity and limiting the use of his likeness would have prevented such harm. However, it could also be contended that Advanced Media is working in a similar manner to protect the marketability of Major League Baseball players as a whole. The value in the identity of most star players lies in their status as professional athletes, and such value in their identities is closely tied to that of the sport as a whole. As baseball has declined in popularity in recent years, it is important for Major League Baseball, as a league and through its subsidiary groups such as the MLBPA and Advanced Media, to work to protect and improve the marketability of the sport. Though some argue that fantasy games have increased interest in baseball, it is also possible that the vast array of games and overwhelming wealth of information can function to saturate the market with baseball and its players if left unchecked. As such, the ability to control the licensing of players'

[178] CBC v. MLB Advanced Media, 443 F. Supp. 2d at 1090.

[179] Doe v. TCI Cablevision, 110 S.W.3d at 367.

[180] This would reflect the tort of misappropriation of name that is generally not extended to individuals in the public eye because they have established themselves as cultural icons due to their own volition. *See id.* at 368. Furthermore, such protection is generally not extended to purely fictional works.

names and statistics is important for Advanced Media and the MLBPA to maintain the market interest in baseball and its players and protect the investment that the athletes have made to be able to achieve the physical feats incorporated in professional sports.

Whether the court was motivated by the desire to grant greater protection to free speech, the application of a rent dissipation theory to the enforcement of the right of publicity, both, or some alternative motivation is left open for debate.

VII. Effects of Reversing the CBC v MLB Decision

The analysis provided above does present a formalistic decision making process that could lend itself to abuse. For example, a fantasy company wishing to circumvent the protections offered by the right of publicity could design software that incorporated the information from separately published box-scores. The box scores could be adopted from a source that published the players' names and statistics merely for the purpose of conveying the information, and the fantasy sports games could operate without violating the right of publicity directly.

If such a loophole were utilized, courts might be motivated to recognize an extension of the right of publicity doctrine involving contributory liability. Much like the expansion of copyright law as technology has allowed for infringers to skirt direct liability, it may become necessary to create new protections under the right of publicity. In the above-mentioned hypothetical, analogies could be drawn to cases of contributory liability or vicarious liability in copyright law, such as active inducement of infringement as recognized by *MGM v. Grokster*, where the actions at issue are aimed at satisfying the demand for an infringing activity.[181] This would present a further extension of the right of publicity than that which is already opposed by some legal scholars. However, due to the continued licensing of fantasy sports to some providers and Advanced Media's own game on MLB.com, it would be unlikely that consumers would choose a more complex alternative that would skirt the right of publicity protections, making this hypothetical outcome less of a concern.

VIII. Conclusion

CBC v MLB presents a clear change in the protection of the right of publicity under common law. It makes marked departures from the analysis of previous cases, even from recent followed authority, ignor-

[181] *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 937-38 (2005) (Ginsburg, J. concurring, Breyer, J. concurring).

ing an array of potentially problematic issues created by its reasoning. 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. Moreover, it could induce a new understanding of the right of publicity, much as the *CBC v MLB* court argues was created by *Zacchini,* if other courts follow its lead as they struggle to identify the bounds of this still-emerging right. Ultimately, the outcome of Advanced Media's inevitable appeal, as well as time, will determine what fruits will come from the case, leaving only the question of what prompted the court to take this new direction.