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Extreme Makeover: Redefining Athletes' Identities in a Fantasy World

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Comments

EXTREME MAKEOVER: REDEFINING ATHLETES’ IDENTITIES IN A FANTASY WORLD

This case is not about batting averages. It’s about the nature of celebrity in our new, wired world.¹

I. INTRODUCTION: FANTASY SPORTS JUGGERNAUT: CBC 1, MLB 0²

Internet-based fantasy sports leagues have become exceptionally successful business enterprises.³ Each year, more than ten million Americans register and pay for the opportunity to manage their own fantasy teams using live player statistics.⁴ Fantasy users have the option of joining numerous online fantasy leagues, includ-


4. See Robert Freeman & Peter Scher, Fantasy Meets Reality: Examining Ownership Rights in Player Statistics, ENT. & SPORTS LAW., Winter 2006, at 7 (“By most estimates, 10 million to 20 million Americans played fantasy sports games last year.”); see also Razzano, supra note 3, at 1160 (estimating fifteen million fantasy sports participants).

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ing well-known sites such as Yahoo!\(^5\) and ESPN,\(^6\) as well as leagues hosted by smaller, lesser-known Internet sites.\(^7\)

Fantasy sports competitors typically invest hours every day monitoring professional players' statistics in connection with their fantasy teams.\(^8\) To gain every advantage in their fantasy leagues, competitive users pay for insider services offering up-to-date news reports and information on players.\(^9\) Major sports-reporting television networks run real-time tickers and air segments dedicated to highlighting players' fantasy values.\(^10\) Despite its humble beginnings as a modest competition among friends, the fantasy sports pastime has exploded into a billion-dollar juggernaut.\(^11\)

5. See Yahoo! Fantasy Sports, http://fantasysports.yahoo.com (last visited Feb. 25, 2007) (providing online fantasy sports content, including statistical updates of professional athletes, news reports, and various fantasy leagues for professional sports).


7. See Jay T. Cohen, Comment, I'll Trade You Scott Podsednik for Alex Rodriguez: Fantasy Trademark and Copyright Protection, 13 SPORTS LAW J. 133, 134 (2006) ("[F]antasy baseball leagues are most commonly formed on the Internet, where corporations such as ESPN, Yahoo!, and others offer to tabulate results in exchange for a fee."); see also Massari, supra note 3, at 452 (estimating "approximately 23,325,000 links to fantasy league sports sites exist" on Internet).

8. See Freeman & Scher, supra note 4, at 7 (describing how fantasy users often spend hours daily monitoring their fantasy teams, reading news reports, and reviewing professional predictions of players' on-field performances).

9. See id. (describing profitable market for fantasy sports guides providing injury reports and player updates). "Providers and publishers of draft day guides, statistical packages and scouting reports sell to a captive and hungry audience of fantasy players." Id.

10. See Massari, supra note 3, at 463 (explaining fantasy sports phenomenon and illustrating various industries created by overwhelming interest in fantasy sports). The article notes:

Today, entire companies are solely dedicated to providing fantasy analysis, including numbers, projections, injury reports, scouting reports, and expert advice. Leading experts of the real game appear on television shows, dedicating time to discussing professional players' fantasy performances and offering game-play advice to the public. Comments aimed at fantasy players appear more and more often during analysis of real games, while statistical "tickers" continually update viewers on fantasy information during network television game coverage. There are fantasy conventions, trade conferences, and even a Fantasy Sports Trade Association.

Id.; see also Freeman & Scher, supra note 4, at 7 (observing that "media conglomerates create synergistic programming campaigns around their fantasy sports properties").

11. See Razzano, supra note 3, at 1157 (describing origin of fantasy baseball). "It all started in a French restaurant on Manhattan in April 1980. Dan Okrent, a writer for Sports Illustrated, led a group of friends in creating fantasy baseball, a hobby that would later become a March-to-September obsession for millions of Americans." Id.; see also Massari, supra note 3, at 463 ("What started as a simple
A. Close Call: Does Fantasy Baseball Violate Players' Rights?

Notwithstanding the surging popularity of this online addiction, fantasy sports providers face legal issues that could change the landscape of the sports world, both real and fantasy. One major legal issue received its first judicial treatment on August 8, 2006. Anticipating a lawsuit by Major League Baseball Advanced Media ("Advanced Media") - the media and Internet subsidiary of Major League Baseball ("MLB") - and seeking to protect its product, fantasy sports provider C.B.C. Distribution and Marketing, Inc. ("CBC") filed an action for declaratory judgment against Advanced Media on February 7, 2005. In the Complaint, CBC sought a declaratory judgment on counts pursuant to the Lanham Act and federal copyright law, in addition to state trademark and unfair competition laws. The parties, however, stipulated to dismiss those claims, leaving only CBC's allegations regarding the state and common law right of publicity.

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12. See Bolitho, supra note 3, at 912 (insinuating that fantasy sports has become so popular that competitors constantly seek their "fantasy 'fix'").

13. See generally Massari, supra note 3, at 443 (setting forth various legal issues arising out of fantasy sports, including copyright infringement, federal preemption, intellectual property, and First Amendment freedom of speech).

14. See C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1107 (E.D. Mo. 2006) (holding that fantasy sports provider did not violate professional baseball players' right of publicity by using players' names and statistics in conjunction with online fantasy sports leagues); see also Bolitho, supra note 3, at 947 (observing that right of publicity as applied to fantasy sports is issue of first impression in C.B.C. Distribution); Massari, supra note 3, at 443 ("The clash should have been foreseen, given the modern popularity and commercial appeal of 'fantasy' sports games.").

15. See C.B.C. Distribution, 443 F. Supp. 2d at 1081-82 (stating CBC sought to enjoin Advanced Media from interfering with fantasy sports business and also to declare propriety of unlicensed use of baseball statistics in connection with fantasy sports). Prior to the lawsuit, Advanced Media had offered CBC a license to promote MLB fantasy baseball games in exchange for a percentage of CBC's profits related to its fantasy sports products. See id. at 1081 (explaining background of parties' relationship and CBC's rationale for seeking declaratory judgment).

16. See id. at 1081 n.5 (repeating counts alleged in CBC's Complaint pursuant to Lanham Act, federal copyright law, and state unfair competition laws).

17. See id. (explaining parties' agreement to dismiss other claims, leaving primary issue: whether CBC violated MLB players' right of publicity by using players' names and statistics in its online fantasy sports leagues). The court recognized that since the federal claims were dismissed, it "has the discretion to decline to exercise supplemental jurisdiction" over the right of publicity claim. Id. The court opted to exercise jurisdiction as a matter of "judicial economy, convenience and fairness to the litigants" because the parties stipulated to dismiss the federal claims...
CBC asked the district court to declare that CBC’s unlicensed operation of fantasy sports leagues did not violate MLB players’ right of publicity. Additionally, CBC sought to enjoin Advanced Media from interfering with its fantasy sports business.

Advanced Media and intervener Major League Baseball Players Association (“MLBPA”) asserted that CBC’s unlicensed and non-consensual use of players’ names, in conjunction with its fantasy baseball games, violated players’ individual right of publicity. Advanced Media alleged that CBC, by impermissibly operating its fantasy sports leagues, unlawfully capitalized on players’ identities for commercial gain.

The United States District Court for the Eastern District of Missouri, finding no violation of MLB players’ right of publicity in CBC’s use of MLB players’ names for its fantasy baseball leagues, ruled in favor of CBC. According to the court, CBC did not intend to create an impression that players endorsed its product in order to gain a commercial advantage. Furthermore, the court determined that CBC did not use players’ names and statistics as symbols of players’ identities. The court ruled further that CBC’s

late in the case, and it would be fair to both the parties and the court to retain jurisdiction. See id.

18. See id. at 1081 (outlining CBC’s motivation for seeking declaratory judgment as preemptive action arising out of apprehension of future lawsuit by Advanced Media seeking to enforce purported exclusive ownership of players’ names and statistics).

19. See id. at 1081-82 (observing that CBC sought injunction to prevent Advanced Media from interfering with CBC’s online fantasy business by asserting rights to players’ names and statistics).

20. See C.B.C. Distribution, 443 F. Supp. 2d at 1082 (acknowledging Advanced Media’s central concern with CBC’s use of players’ names in fantasy games as opposed to CBC’s use of players’ records and biographical information, and Advanced Media’s position that players’ names are protected by right of publicity).

21. See id. (explaining Advanced Media’s counterclaim that by using players’ names and athletic records in connection with its fantasy sports leagues, CBC exploited rights of players, which violated MLB players’ right of publicity).

22. See id. at 1107 (“[P]layers do not have a right of publicity in their names and playing records as used in CBC’s fantasy games . . . . CBC has not violated the players’ claimed right of publicity.”).

23. See id. at 1087-88 (ruling that Advanced Media did not prove facts to satisfy commercial advantage element of right of publicity). The court explained that CBC in no way implied that MLB players endorsed or were otherwise associated with its fantasy sports business. See id. at 1087 (noting that all fantasy game providers use athletes’ names and records in their operation of fantasy sports leagues, and that CBC’s use of same information was not for purpose of achieving commercial advantage over other fantasy providers).

24. See id. at 1089 (holding CBC’s use of player information “simply involves historical facts”). In support of this conclusion, the court in C.B.C. Distribution stated that CBC did not use the personality, character, or physical appearance of any MLB players in its fantasy sports leagues. See id. (explaining that manner in
use of players’ names and records did not offend policy justifications supporting the right of publicity.\textsuperscript{25} As a result, Advanced Media failed to prove the required elements to establish a violation of the right of publicity.\textsuperscript{26}

B. Foul! Unlicensed Use of Player Information \textit{Does} Violate Players’ Rights

CBC’s Complaint has elevated an important and controversial legal issue to the forefront in the world of fantasy sports.\textsuperscript{27} The case is particularly significant to the parties involved; CBC expended enormous resources to develop its fantasy leagues and brought suit as a preemptive attack to protect that investment.\textsuperscript{28} MLB, on the other hand, invested $50 million to acquire exclusive rights to players’ information for use in fantasy sports leagues and other online content.\textsuperscript{29}

This Comment examines the district court’s decision in \textit{C.B.C. Distribution \& Marketing, Inc. v. Major League Baseball Advanced Media, L.P.}.\textsuperscript{30} Section II discusses the nature of fantasy sports websites which players’ names are used is more important and determinative than mere fact that name was used for purposes of right of publicity).

25. \textit{See C.B.C. Distribution}, 443 F. Supp. 2d at 1091 (ruling CBC’s use of player information does not contravene public policy because such use does not interfere with MLB players’ “ability to earn a living”). The court suggested that CBC’s use of players’ names in operations such as fantasy sports leagues might actually benefit the players. \textit{See id.} (observing that case law supports notion that use of names and records “enhances the marketability of the players” because such use arouses public interest).

26. \textit{See id.} at 1089 (concluding that CBC did not use players’ names and statistics as symbols of players’ identities or to obtain commercial advantage, meaning elements of right of publicity were not met).


28. \textit{See Massari, supra note 3}, at 443 (describing nature and extent of CBC’s thirteen-year investment in development of software and services for online fantasy sports leagues).

29. \textit{See Freeman \& Scher, supra note 4}, at 7 (stating MLBPA dealt MLB “exclusive rights to players’ names, statistics, likenesses, etc., for the development of online content, including fantasy baseball”).

30. 443 F. Supp. 2d 1077, 1107 (E.D. Mo. 2006) (holding CBC’s use of players’ names and records in its operation of fantasy sports games did not violate players’ rights of publicity).
and identifies CBC as a major fantasy sports provider. Section III assesses the right of publicity and discusses how courts have treated this legal right. Section IV explains the court’s decision in C.B.C. Distribution, where the court held that CBC did not violate MLB players’ right of publicity by using MLB players’ names and statistics in its fantasy baseball leagues. Section V questions traditional notions of identity and re-examines whether CBC violated MLB players’ right of publicity by using players’ information in its commercial enterprise. In conclusion, this Comment recognizes and evaluates the impact of the court’s decision in C.B.C. Distribution on the future of the fantasy sports world.

II. A GRAND SLAM: THE FANTASY SPORTS MACHINE

Professional players’ statistics fuel fantasy sports leagues and fantasy games. Sports Illustrated writer Daniel Okrent developed the concept of fantasy sports long before the rise of the Internet in the 1990s. As a result, competitors managed their fantasy leagues...
manually, using newspaper box scores to collect and tabulate player
statistics in order to calculate fantasy points.\footnote{See Massari, supra note 3, at 445 (explaining that fantasy sports “were manually operated and used statistics from media box scores and from weekly information published in USA Today because they were easy to tabulate”); see also Glenn Mitchell, Take Me Out of the Ball Game? U.S. District Court Rejects Proprietary Rights in Player Names and Statistics, 96 TRADEMARK REP. 1258, 1259 (2006) (commenting that compiling player statistics and fantasy points was “a relatively time-consuming task before the rise of the Internet simplified data collection and management”); Bolito, supra note 3, at 916-17 (describing “laborious effort” required to operate early fantasy sports leagues, originally known as “’Rotisserie Baseball,’” including manual calculation of player statistics and submission of results to competitors via United States mail).}

Today, fantasy sports leagues operate primarily via the Internet.\footnote{See Razzano, supra note 3, at 1160 (recounting impact of Internet on fantasy sports, “which facilitated the operation of nationwide fantasy leagues and streamlined the distribution of game data”); see also Cohen, supra note 7, at 134 (noting that “fantasy baseball leagues are most commonly formed on the Internet”).} Fantasy users assemble team rosters by selecting players through an online draft process.\footnote{See Cohen, supra note 7, at 134 (describing fantasy baseball league draft and auction processes for selection of fantasy players); see also Massari, supra note 3, at 444-45 (defining fantasy sports as competitive game in which players assemble rosters of professional athletes and accumulate points in accordance with players’ actual on-field performance statistics).} Fantasy competitors can add, drop, or trade players throughout the course of the season, simulating the work of professional general managers.\footnote{See Razzano, supra note 3, at 1161 (describing gaming options of fantasy users and ability to make in-season trades and to replace current players with unclaimed players).} Point values are assigned to various game statistics and awarded based on actual on-field performances of professional players.\footnote{See Cohen, supra note 7, at 134 (explaining how fantasy competitors earn points according to actual athletes’ performances). “Scoring in a fantasy baseball league is achieved by the accumulation of specific MLB statistics, including but not limited to, batting average, home runs, and runs batted in for batters and wins, strikeouts, and earned run average for pitchers.” Id.} The ultimate success
of a fantasy team thus depends on real player performances in professional games.\textsuperscript{43}

Whereas players in early fantasy leagues manually computed statistics and scores, this process now occurs electronically and largely via the Internet.\textsuperscript{44} Fantasy sports providers typically contract with independent service companies that compile player statistics for use in online fantasy game-play.\textsuperscript{45} Thus, although fantasy leagues may also provide game box-scores and other newsworthy reports, the fantasy game itself offers a competitive contest for those who desire more than daily sports columns.\textsuperscript{46} The fantasy sports competition depends on MLB players’ statistical performances, which fantasy sports providers run through an electronic calculus to create corresponding points for the fantasy user.\textsuperscript{47} Fan-

\textsuperscript{43} See C.B.C. Distribution & Mktg., Inc., v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1080 (E.D. Mo. 2006) ("The success of one’s fantasy team over the course of the baseball season is dependent on one’s chosen players’ actual performances on their respective actual teams.").

\textsuperscript{44} See Massari, supra note 3, at 445 (describing changes in management and operation of fantasy leagues with rise of Internet). The author expanded on the Internet’s positive effects on fantasy sports, explaining how scores are currently tabulated:

Before the aid of technology, early fantasy leagues were manually operated and used statistics from media box scores and from weekly information published in USA Today because they were so easy to tabulate. The advent of powerful computers and the Internet has revolutionized fantasy games, reaching many new players, allowing scoring to be done entirely by computer, and allowing leagues to develop their own scoring systems and game play options. Real-time statistics are now recorded and distributed to the public almost instantly via the Internet.

\textit{Id.}

\textsuperscript{45} See Cohen, supra note 7, at 141 (explaining that website operators do not keep track of player statistics, but instead, task is contracted out to third parties for fantasy football games); see also Razzano, supra note 3, at 1161 (noting that independent companies “STATS, Inc. and SportsTicker Enterprises LP, provide the statistics for Yahoo! Fantasy Baseball Leagues”).

\textsuperscript{46} See Massari, supra note 3, at 464 (commenting that fantasy competitors subscribe to fantasy sports not for news reporting, but for “sophisticated game play” and that news reports and fantasy analysis constitute additional benefits); see also Schwarz, supra note 1, at 22 (commenting on unique nature of fantasy sports product, “which allows fans to divvy up players and create their own imaginary teams that compete against each other using, for example, Derek Jeter’s actual batting average with the New York Yankees”).

\textsuperscript{47} See Cohen, supra note 7, at 185 (citing Complaint for Declaratory Judgment at S-4, C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., No. 4:05-CV-00252-MLM (E.D. Mo. Feb. 7, 2005)) (highlighting that CBC uses sophisticated software programs to calculate statistics and points for its fantasy sports games); see also Bolitho, supra note 3, at 916-18 (describing “mechanics behind fantasy sports”). The author explains, “[t]he statistics entered into these [athletic] categories by the fantasy companies are generally obtained via publicly available listings of game statistics and entered into specifically designed computer software. The software performs the calculations necessary to determine
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Fantasy sports providers typically offer both “free” and competitive leagues, which require users to register and pay a fee to play.48 Furthermore, although some fantasy leagues are licensed to use players’ statistical information, others are not.49 Thus, some fantasy sports providers require users to register and pay to participate in fantasy sports leagues that use professional players’ names and playing records without obtaining the players’ consent.50

A. Role Player: The CBC Cog

On January 19, 2005, Advanced Media acquired exclusive rights to MLB players’ information, including names, statistics, and likenesses from the MLBPA for $50 million.51 Only a few licensing agreements between fantasy sports providers and the MLBPA existed prior to the January 2005 deal.52 CBC was one such fantasy sports provider that had operated under a license with the MLBPA until its expiration on December 31, 2004.53 CBC’s license included the right to use players’ names, likenesses, and biographical data during the term of the license.54

who the leading fantasy participants are on any given day.” Bolitho, supra note 3, at 918.

48. See Razzano, supra note 3, at 1160 (demonstrating that typical fantasy sports websites offer both free and paid-subscription versions of online fantasy sports leagues).

49. See Freeman & Scher, supra note 4, at 7 (stating that Advanced Media attempted to enforce its exclusive rights to MLB players’ information by contacting unlicensed fantasy sports providers and demanding they sign licensing agreements to continue use of player statistics); see also Massari, supra note 3, at 444 (explaining that Advanced Media attempted to force unlicensed fantasy sports providers to discontinue or negotiate for right to continue fantasy sports operations).


51. See Freeman & Scher, supra note 4, at 7 (acknowledging Advanced Media’s acquisition of rights to information about MLB players, including “rights to players’ names, statistics, likenesses, etc. for the development of online content, including fantasy baseball”).

52. See Razzano, supra note 3, at 1164 (asserting that prior to 2005 agreement between Advanced Media and MLBPA, only small number of fantasy sports providers had licensing agreements with MLBPA).

53. See Freeman & Scher, supra note 4, at 7 (recognizing that CBC had previously operated its fantasy sports leagues under license with MLBPA to use players’ information).

54. See C.B.C. Distribution, 443 F. Supp. 2d at 1080-81 (outlining terms of licensing agreement between CBC and MLBPA). The district court in C.B.C. Distribution also pointed out that from 2001 until early 2004, Advanced Media offered fantasy baseball games on the MLB website, MLB.com, without obtaining a license or permission to do so from the MLBPA. See id. (recognizing that Advanced Media sought to eliminate very conduct that it had engaged in previously).
Once Advanced Media secured its exclusive rights with the MLBPA in January of 2005 and after the expiration of CBC’s license, Advanced Media offered licensing and advertising deals to various fantasy sports providers, including CBC. Advanced Media’s proposal to CBC would allow CBC to receive a share of MLB.com revenue by promoting Advanced Media’s fantasy baseball games on CBC’s well-established and popular fantasy sports website, CDMFantasySports.com. The parties, however, were unable to reach a deal due to a fundamental disagreement as to the legal ownership of players’ names and statistics. Thus, CBC continued to host online fantasy games using MLB players’ names and statistics without a license. Perceiving that Advanced Media was attempting to enforce its purported rights against unlicensed fantasy sports providers, CBC filed suit, seeking a declaration that its operation of fantasy sports was legally valid and injunctive relief to prevent Advanced Media from obstructing CBC’s fantasy sports enterprise.

III. THE RIGHT OF PUBLICITY

The Second Circuit Court of Appeals first coined the phrase “right of publicity” in 1953. In Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., two competing chewing gum companies utilized

55. See id. (describing Advanced Media’s tactic of enforcing newly acquired exclusive rights by sending requests for proposals to unlicensed fantasy sports providers including CBC).

56. See id. (describing Advanced Media’s proposal to CBC to promote MLB fantasy games on CBC’s popular website in exchange for ten percent of MLB.com revenue).

57. See Schwarz, supra note 1, at 22 (noting CBC’s contention that it could rightfully operate fantasy sports leagues without obtaining license from MLBPA).

58. See C.B.C. Distribution, 443 F. Supp. 2d at 1081-82 (describing CBC’s request for injunctive relief to prevent Advanced Media from interfering with CBC’s continued operation of fantasy sports leagues).

59. See id. at 1081 (explaining CBC’s fear that Advanced Media would bring lawsuit against CBC seeking to enforce newly acquired rights under exclusive licensing deal with MLBPA); see also Massari, supra note 3, at 443-44 (citation omitted) (describing Advanced Media’s attempts to enforce exclusive rights by notifying CBC of Advanced Media’s deal with MLBPA and advising CBC to cease all unlicensed operation of fantasy sports).

60. See Stacey L. Dogan & Mark A. Lemley, What the Right of Publicity Can Learn from Trademark Law, 58 STAN. L. REV. 1161, 1172 (2006) (citing Haelan Labs., Inc. v. Topps Chewing Gum, Inc. 202 F.2d 866, 868 (2d Cir. 1953)) (attributing creation of common law right of publicity to Second Circuit Court of Appeals); see also Schwarz, supra note 1, at 23 (noting phrase “right of publicity” was “coined in a suit involving baseball”).
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baseball trading cards to market their respective products. Whereas Haelan obtained a license from MLB players to print its baseball cards complete with player pictures, Topps printed baseball cards with photographs of professional players without obtaining a license or receiving permission from the players themselves.62

Defending its unlicensed use of players’ images to sell chewing gum, Topps argued that no interest existed in publishing one’s identity beyond the protections of the right of privacy. The United States Court of Appeals for the Second Circuit responded by laying the foundation for the modern right of publicity:

We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a right may validly be made ‘in gross,’ i.e., without an accompanying transfer of a business or of anything else.64

The court labeled this newly-fashioned legal interest the “‘right of publicity.’”65

The court in Haelan Laboratories reasoned players “would feel sorely deprived” if they were no longer able to profit from the commercial use of their likenesses. According to the court, unless players have the ability to grant exclusive and enforceable licenses for the use of their identities, the right of publicity would never yield players any money.67

61. See Dogan & Lemley, supra note 60, at 1172 (“[C]ompeting chewing gum manufacturers . . . used baseball trading cards as a device to help sell their gum.”).
62. See id. at 1172 (explaining how Haelan Laboratories first obtained exclusive license from multiple baseball players to use their images on baseball cards, and then brought lawsuit against Topps to enforce exclusive right to print images of those players).
63. See Haelan Labs., 202 F.2d at 868 (outlining Topps’s assertion that “[a] man has no legal interest in the publication of his picture other than his right of privacy”).
64. Id.
65. Id.
66. See id. (adding that damaging effect of potential injury resulting from nonconsensual use of celebrity likenesses is “common knowledge”).
67. See id. (explaining that right of publicity allows plaintiff, exclusive grantee of players’ likenesses, to bring action against defendant if defendant knowingly used licensed players’ images during term of agreement).
Broadly, the right of publicity protects the legal interest in one’s "publicly recognizable persona." That is, the right of publicity protects a marketable interest in a public persona by seeking to prevent the nonconsensual commercial use of a person’s identity. According to the court in Haelan Laboratories, the right of publicity would facilitate capitalization of the commercial value of one’s public persona.

During the decades following the court’s decision in Haelan Laboratories, the right to publicity became more widely recognized. In fact, since the decision in Haelan Laboratories, more than twenty-five states recognize some form of the right of publicity. Furthermore, courts have expanded the right of publicity to protect other uses of identity beyond the mere use of a person’s image, including the use of nicknames and “sound-alikes.”

To establish a violation of the right of publicity, the plaintiff must prove an injury resulting from the defendant’s nonconsensual use of the plaintiff’s identity, which is to the defendant’s advantage, commercial or otherwise. If a violation is found, a court will typi-

68. See Bear Foot, Inc. v. Chandler, 965 S.W.2d 386, 389 (Mo. App. E.D. 1998) (citing Haelan Labs., 202 F.2d at 866) (stating that right of publicity protects various benefits arising from creation of public persona, including commercial value of identity); see also Schwarz, supra note 1, at 22 (suggesting that right of publicity is legal protection of commercial value of one’s identity).

69. See Massari, supra note 3, at 457 (“The right of publicity prevents the unauthorized commercial use of an individual’s name, likeness, or other recognizable aspects of one’s persona.”).

70. See Haelan Labs., 202 F.2d at 868 (contemplating exclusive grants in rights to names, likenesses, and other identifiable attributes of public personalities).

71. See Dogan & Lemley, supra note 60, at 1173 (observing that right of publicity took “a couple of decades to take hold” but gained traction in courts and legislatures by 1970s); see also Massari, supra note 3, at 457 (“For almost fifty years, the courts have protected an athlete’s right of publicity by recognizing an athlete’s right to control and profit from the use of their [sic] name and nicknames, likenesses, portraits . . . or anything else that evokes a marketable identity.” (quoting Jack F. Williams, Who Owns the Back of a Baseball Card?: A Baseball Player’s Rights in His Performance Statistics, 23 CARDOZO L. REV. 1705, 1716 (2002))).

72. See Dogan & Lemley, supra note 60, at 1174 (identifying number of states that adopted right of publicity and explaining that states generally prohibit non-consensual use of person’s identity for “commercial purpose”).

73. See id. at 1174-75 (writing that right of publicity has been applied to “sound-alikes; look-alikes; use of the celebrity’s nickname in a fictional work; use of address; statues; and the use of a robot that barely resembles the celebrity but evokes her image”) (internal citations omitted).

74. See C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1085 (E.D. Mo. 2006) (“The elements of [the tort of the right of publicity], at common law, are: (1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.” (quoting Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307, 313 (Cal. Ct. App. 1 Dist. 2001))).
cally balance the value of the public interest in disseminating information against the gravity of the violation of the private right of publicity in determining whether to issue a remedy.\textsuperscript{75}

IV. THE UMPIRE'S DECISION: C.B.C. DISTRIBUTION \& MARKETING, INC. V. MAJOR LEAGUE BASEBALL ADVANCED MEDIA, L.P.\textsuperscript{76}

On August 8, 2006, the United States District Court for the Eastern District of Missouri, Eastern Division, considered CBC's declaratory judgment action in C.B.C. Distribution \& Marketing, Inc. v. Major League Baseball Advanced Media, L.P.\textsuperscript{77} The court in C.B.C. Distribution addressed whether CBC's unauthorized and unlicensed use of players' names and playing records violated MLB players' right of publicity.\textsuperscript{78} Ultimately, the court granted summary judgment for CBC, declaring "CBC has not and is not violating the players' claimed right of publicity."\textsuperscript{79}

The court in C.B.C. Distribution discussed the background facts, describing CBC's vast array of fantasy sports products, including fantasy sports leagues operated via the Internet, telephone, mail, and e-mail.\textsuperscript{80} Fantasy participants pay fees directly to CBC to play fantasy baseball games and pay additional fees to trade players.\textsuperscript{81} Through the CBC website, participants draft players to their fantasy

\textsuperscript{75} See Massari, supra note 3, at 459 (setting forth balancing test involved in determining violations of right of publicity). The author described the balancing test:

Even if each of these elements is established, however, the First Amendment requires that the right to be protected from unauthorized publicity must "be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guarantees of freedom of speech and of the press.

Id. (quoting Gionfriddo, 114 Cal. Rptr. 2d at 313).

\textsuperscript{76} See C.B.C. Distribution, 443 F. Supp. 2d at 1082-83 (addressing, inter alia, whether CBC violated MLB players' right of publicity).

\textsuperscript{77} See id. at 1082 (addressing cross motions for summary judgment). For a further discussion of the issues raised by the respective cross motions, see infra notes 97-98.

\textsuperscript{78} See id. at 1107 (holding MLB players do not have right of publicity in their names and statistics as used in CBC's fantasy sports leagues, and that CBC therefore did not violate MLB players' right of publicity).

\textsuperscript{79} Id. at 1091.

\textsuperscript{80} See id. at 1080 (listing CBC's fantasy league offerings, including total of fourteen fantasy baseball games, with both mid-season and playoff games). The court noted that CBC uses the trade name "CDM Fantasy Sports" in its operation of online fantasy sports leagues at www.CDMsports.com. See id. (providing that CBC is Missouri corporation with offices in St. Louis, but its products are accessible everywhere via Internet).

\textsuperscript{81} See C.B.C. Distribution, 443 F. Supp. 2d at 1080 (explaining how CBC customers participate in CBC's fantasy baseball games). The court identified the "Diamond Challenge" as CBC's most popular fantasy game. See id. at 1080 n.3
teams before the start of the professional baseball season. The court observed that, in addition to the fantasy sports games themselves, CBC’s website features players’ statistical information and provides breaking news stories and player reports. In a footnote, the court also recognized that players’ statistical information is available to the public on CBC’s website free of charge.

In 1995 and again in 2002, CBC entered into licensing agreements with the MLBPA, which expired on December 31, 2004. The agreements had granted CBC rights to use the logo and name of the MLBPA in addition to rights to use data and characteristics of individual MLB players. The license agreement signed in 2002 (“2002 License Agreement”) provided that upon its termination, CBC must refrain from exercising all rights expiring under the agreement.

Once CBC’s 2002 License Agreement with the MLBPA expired, Advanced Media entered into an agreement with the MLBPA for an exclusive license to use player information. Having acquired this exclusive license, Advanced Media in turn offered a li-

(Explaining league owners in Diamond Challenge must pay fee to CBC for every trade transaction).

82. See id. (explaining how CBC’s customers assemble teams via draft process, in which customers choose players from various MLB teams).

83. See id. at 1081 (detailing benefits of subscription to CBC fantasy baseball games). The court explained:

In addition to fantasy sports games, CBC’s website provides up-to-date information on each player to assist game participants in selecting players for and trading players on their fantasy teams. ... CBC also hires journalists to write stories relevant to fantasy owners, such as the latest injury reports, player profiles, and player reports.

Id.

84. See id. at 1080 n.4 (“[O]nly does not have to be a customer of CBC or a game participant to obtain the statistics which CBC provides on its website.”).

85. See id. (referring to two license agreements, “the 1995 and 2002 license agreements”). The 2002 License Agreement provided that it represented the entire agreement between the parties; the court, therefore, addressed the terms of the 2002 agreement only. See id. (explaining that 2002 License Agreement replaced 1995 agreement).

86. See C.B.C. Distribution, 443 F. Supp. 2d at 1080-81 (specifying that license agreements granted rights to “the names, nicknames, likenesses, signatures, pictures, playing records, and/or biographical data of each player” (quoting 2002 License Agreement)).

87. See id. at 1081 (“CBC would have no right ‘... to use in any way the Rights, the Trademarks, or any Promotional Material relating to the Licensed Products.’” (quoting 2002 License Agreement)). The court added that the agreement specified that CBC could make no further reference to the rights and trademarks “directly or indirectly.” Id.

88. See id. (recognizing that Advanced Media struck its licensing deal with MLBPA for use in “all interactive media”).
license deal to CBC, which CBC rejected. The deal ultimately failed because it did not include an opportunity for CBC to promote its own fantasy game product, but, rather, the deal only permitted CBC to advertise Advanced Media’s MLB fantasy game in exchange for a percentage of Advanced Media’s fantasy game revenue.

CBC filed a Complaint three days following Advanced Media’s proposed deal. In the Complaint, CBC alleged that if it continued to host fantasy sports games, Advanced Media would bring a lawsuit to enforce its exclusive rights acquired from the MLBPA. CBC believed that Advanced Media would attempt to preclude “all fantasy sports league providers from using this statistical information to provide fantasy baseball games to the consuming public.”

CBC brought a host of claims, all but one of which the parties dismissed by stipulation. The court noted that the only count remaining at issue was the right of publicity claim. The court re-

89. See id. at 1081 (describing Advanced Media’s license offer to CBC). For a further discussion of Advanced Media’s offer to CBC, see supra notes 55-58 and accompanying text.

90. See id. (articulating that Advanced Media sought to take advantage of CBC’s large and well established customer base to market its own fantasy product).

91. See C.B.C. Distribution, 443 F. Supp. 2d at 1081 (recounting that Advanced Media made offer to CBC on February 4, 2005, and CBC filed Complaint on February 7, 2005).

92. See id. (acknowledging that CBC stated expectation of lawsuit by Advanced Media because of operation of fantasy baseball games without license from Advanced Media).

93. Id. (citation omitted) (clarifying that Advanced Media did not offer CBC license to continue offering fantasy games but offered option to promote Advanced Media’s fantasy games on CBC’s website and articulating CBC’s assertion that Advanced Media sought to prevent all fantasy sports games from reaching public).

94. See id. at 1081 n.5. The court summarized:

Count III of CBC’s Complaint addressed the right of publicity. CBC also sought declaratory judgment in Count I, pursuant to the Lanham Act, 15 U.S.C. § 1051, et seq., in Count II, pursuant to copyright law, and in Count IV, pursuant to state unfair competition or false advertising laws. Advanced Media filed counterclaims alleging violations of state trademark and unfair competition laws, state false advertising laws, and the Lanham Act. The parties have entered into a Stipulation pursuant to which CBC dismissed Counts I, II, and IV of its Complaint and pursuant to which Advanced Media dismissed its counterclaims alleging violations of state trademark and unfair competition laws, state false advertising laws, and the Lanham Act.

Id. (citation omitted).

95. See id. at 1082-83 (outlining remaining issues: whether MLB players have right of publicity interest in names and playing records, and if such right exists, whether CBC violated players’ right of publicity). The court also identified additional peripheral issues, including whether federal copyright law preempts the right of publicity, whether First Amendment concerns prevail over MLB players’
tained supplemental jurisdiction to consider whether CBC violated MLB players' right of publicity in its fantasy baseball games.\(^9\)

While CBC claimed that its unlicensed use of players' statistics did not violate MLB players' right of publicity, Advanced Media argued that CBC violated players' rights by using players' information in conjunction with its fantasy games.\(^8\) Accordingly, Advanced Media sought equitable relief and damages.\(^8\)

The court found the parties' claims to be overly broad and requested a teleconference to clarify the parties' positions.\(^9\) On grounds that the players' identities are represented by their names, Advanced Media objected specifically to CBC's use of players' names in its fantasy games.\(^10\) Advanced Media, expressing its concern for protecting players' names, thus asserted that CBC's use of player names in conjunction with its fantasy sports enterprise violated MLB players' rights of publicity.\(^11\)

In determining whether a violation existed, the court evaluated CBC's use of players' names and records in fantasy sports games.\(^12\) Although the court addressed additional issues closely related to the right of publicity, this Comment focuses on the heart of the case: the right of publicity claim.\(^13\)

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right of publicity interests, and whether CBC breached its prior license agreements with the MLBPA. See id. at 1083.

96. See C.B.C. Distribution, 443 F. Supp. 2d at 1082 n.5 (retaining jurisdiction because of progress in case, for reasons of judicial economy and for purposes of convenience and fairness to parties).

97. See id. at 1082 (describing nature of Advanced Media's counterclaim that CBC exploited players' rights by using players' names and other relevant data in fantasy games).

98. See id. ("Advanced Media and the [MLBPA] also seek injunctive relief and exemplary and punitive damages.") (citation omitted).

99. See id. (noting that court requested teleconference to "clarify the precise scope of the matters at issue").

100. See id. (acknowledging Advanced Media's primary concern with CBC's use of players' names in fantasy baseball games). The court clarified that Advanced Media asserted no objection to CBC's use of players' performance records or biographical data. See id. (recounting parties' contentions at scheduled teleconference to narrow scope of issues).

101. See C.B.C. Distribution, 443 F. Supp. 2d at 1082 (explaining Advanced Media's position that it sought to protect players' names). CBC contended, on the other hand, that its use of player names and statistics was preempted by federal copyright law, did not violate players' right of publicity, and, even in the event of a violation, was protected by the First Amendment. See id. (discussing CBC's counter-arguments).

102. See id. at 1083 (focusing on right of publicity claim).

A. The Right of Publicity

Having outlined the factual history of the case and narrowed the scope of the parties' contentions, the court in *C.B.C. Distribution* addressed the legal right of publicity. The court began by describing the right of publicity, which is violated by "[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..." The court highlighted the elements of the cause of action, which arises when the defendant, without the plaintiff's consent, uses the plaintiff's name as a symbol of the plaintiff's identity intending to obtain a commercial advantage. Thus, to find a violation of the right of publicity, the plaintiff must show that the defendant, without permission, used the plaintiff's identity for the defendant's own commercial advantage.

*See C.B.C. Distribution, 443 F. Supp. 2d at 1082-83 (describing remaining issues tied closely with right of publicity claim).* The court stated:

[T]he only remaining issues before this court are whether the players have a right of publicity in their names and playing records as used in CBC's fantasy games; whether, if the players have such a right, CBC has, and is, violating the players' claimed right of publicity; whether, if the players have a right of publicity and if this right has been violated by CBC, such a violation is preempted by copyright law; whether, if the players have a right of publicity which has been violated by CBC, the First Amendment applies and, if so, whether it takes precedent over the players' claimed right of publicity; and whether CBC has breached the 2002 Licensing Agreement.

*Id.*

104. *See C.B.C. Distribution, 443 F. Supp. 2d at 1083-84 (addressing legal contours of right of publicity claim).*

105. *Id.* (quoting *Restatement (Third) of Unfair Competition § 46 (2005).* The *Restatement (Third) of Unfair Competition* is a legal treatise that discusses, *inter alia*, legal rights designed to protect the commercial value of an individual's identity. *See Restatement (Third) of Unfair Competition § 46 cmt. a (2005) (describing scope of material).*

106. *See C.B.C. Distribution, 443 F. Supp. 2d at 1084-85 (quoting Doe v. TCI Cablevision, 110 S.W.3d 363, 369 (Mo. 2003) (en banc)) (setting forth required elements of right of publicity claim).* The court in *C.B.C. Distribution* listed the common law elements of the right of publicity: "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." *Id.* at 1084-85 (quoting *Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307, 313 (Cal. Ct. App. 1 Dist. 2001).*

1. Commercial Advantage Element of the Right of Publicity

The court in *C.B.C. Distribution* thus addressed the commercial advantage element of the right of publicity. The court stated that evidence showing that a defendant intended to create an impression that the plaintiff endorsed or is associated with the defendant’s product is sufficient to prove intent to gain a commercial advantage.

Applying the law, the court in *C.B.C. Distribution* cited *Henley v. Dillard Department Stores*, in which the defendant used the plaintiff’s name in a marketing scheme to help advertise its product. In *Henley*, the defendant used a catchphrase, “Don’s henley,” evoking the name of popular musician, Don Henley, in an advertising campaign to attract customers to its retail department stores.

Unlike the defendant’s advertising campaign in *Henley*, CBC’s use of names and playing records of players, according to the court in *C.B.C. Distribution*, did not create an impression that MLB players are associated with its fantasy games. Furthermore, because all fantasy leagues use players’ information, the court concluded that CBC did not improperly use such information to attract customers away from other leagues. Therefore, the court concluded that there was no triable issue of fact regarding the use of the players’ names to obtain a commercial advantage.

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108. See id. (citing *TCI Cablevision*, 110 S.W.3d at 371) (explaining that commercial element requires evidence of defendant’s intent to obtain “commercial advantage” by using plaintiff’s identity).

109. See id. (“[E]vidence which shows that a defendant intended to create an impression that a plaintiff is associated with the defendant’s product ‘alone is sufficient to establish the commercial advantage element in a right of publicity action.’” (quoting *TCI Cablevision*, 110 S.W.3d at 371)). “Additionally, using a plaintiff’s name ‘to attract attention to [a] product’ is evidence supporting a conclusion that a defendant sought to obtain a commercial advantage.” Id. (quoting *TCI Cablevision*, 110 S.W.3d at 372).

110. See id. at 1085-86 (citing *Henley v. Dillard Department Stores*, 46 F. Supp. 2d 587, 592-93 (N.D. Tex. 1999)) (contrasting defendant’s use of identity in marketing campaign to make advertisement “more interesting”).

111. See *C.B.C. Distribution*, 443 F. Supp. 2d at 1086 (citing *Henley*, 46 F. Supp. 2d at 592-93) (describing advertisement campaign clearly violative of right of publicity where defendant intended customers to associate “Don’s henley” with plaintiff, Don Henley).

112. See id. (holding that there is no evidence to suggest that MLB players either endorse or sponsor CBC’s fantasy baseball games).

113. See id. (finding that CBC’s use of players’ names and playing records was not intended to attract customers because all fantasy game providers use identical player information).

114. See id. (concluding that Advanced Media offered no evidence to imply that CBC used players’ names for commercial advantage).
2. Identity Element of the Right of Publicity

Next, the court in *C.B.C. Distribution* addressed the identity element of the right of publicity.115 Specifically, the court considered whether CBC used players’ names as “symbols” of the players’ identities.116 The court identified the appropriate considerations: the nature of the identifying characteristics, the plaintiff’s fame, and whether third parties actually identified the plaintiff.117 Additionally, the court affirmed that the nature of the use of player names is significant, as opposed to bare use of players’ names.118

In *Doe v. TCI Cablevision*, plaintiff Tony Twist, a professional player in the National Hockey League, brought a right of publicity claim against defendant TCI Cablevision.119 Twist claimed that TCI improperly used his name in its comic book series to reflect his persona as a “tough-guy ‘enforcer.’”120 The court in *TCI Cablevision* considered the fame of the plaintiff, the nature and extent of the identifying characteristics, and the similarity of the characteristics to the plaintiff’s “enforcer” persona.121 Ultimately, the court concluded that a jury could reasonably infer that the defendant intended to use Twist’s name and identity in violation of the right of publicity.122

Unlike the defendant’s use of Tony Twist’s persona in *TCI*, CBC’s use of players’ names and records in fantasy games, according to the court in *C.B.C. Distribution*, did not satisfy the identity element of the right of publicity.123 According to the court, such use does not involve the images, likenesses, or personae of MLB players.

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115. See id. at 1088 (describing next step in right of publicity determination).
116. See *C.B.C. Distribution*, 443 F. Supp. 2d at 1088 (commenting that individual’s persona is “most significant” issue in right of publicity action).
117. See id. (recounting characteristics that constitute individual identity, including “surveys or other evidence indicating the perceptions of the audience” (quoting Doe v. TCI Cablevision, 110 S.W.3d 363, 370 (Mo. 2003) (en banc))).
118. See id. at 1089 (“[H]ow players’ names are used is significant rather than the mere fact that they are used.”) (citation omitted).
119. See *TCI Cablevision*, 110 S.W.3d at 371 (holding that plaintiff sufficiently presented evidence to show that defendant used plaintiff’s name and other distinctive characteristics as symbol of his identity to obtain commercial advantage).
120. See id. at 370 (explaining substance of plaintiff’s right of publicity claim that comic book character was named in reference to plaintiff’s public persona).
121. See id. at 370-72 (describing defendant’s use of plaintiff’s identity in its comic book series).
122. See id. at 371 (concluding that evidence was sufficient for jury to find that defendant sought commercial advantage in using Twist’s name).
123. See *C.B.C. Distribution*, 443 F. Supp. 2d at 1089 (holding that mere use of players’ names in fantasy games did not violate MLB players’ right of publicity).
players. Rather, the court viewed CBC’s use of players’ names and records as involving historical facts. The court thus concluded CBC’s use of players’ names along with their statistics in its fantasy games did not involve either the personae or identities of any MLB players. As a result, the court ruled that CBC did not violate MLB players’ right of publicity.

3. Public Policy Considerations

The court in *C.B.C. Distribution* also considered whether CBC’s use of players’ information in its fantasy games violated public policy. The *Restatement (Third) of Unfair Competition* (“Restatement”) sets forth five public policy justifications for the legal right of publicity.

Under the *Restatement*, the right of publicity protects “individual dignity and autonomy” and preserves the “commercial value in [an individual’s] fame.” The right of publicity also prevents unjust enrichment of others who seek to appropriate or dilute the commercial value of one’s fame by harmful or excessive use. Moreover, the right of publicity protects against a false suggestion

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124. See id. (concluding that CBC’s use of players’ names “does not involve the character, personality, reputation, or physical appearance of the players”).

125. See id. (adding that such facts include batting averages, home runs, doubles, and triples).

126. See id. (concluding that CBC did not use MLB players’ personae or identities).

127. See id. (setting forth court’s holding). The court concluded:

For the reasons fully set forth above, the court concludes that the undisputed facts establish that CBC does not use in its fantasy baseball games Major League baseball players’ names separately or in conjunction with their playing records as a symbol of their identity; that CBC does not use players’ names separately or in conjunction with their playing records with the intent to obtain a commercial advantage; and that, therefore, the elements of the right of publicity are not present in the matter under consideration.

128. See *C.B.C. Distribution*, 443 F. Supp. 2d at 1089-90 (addressing public policy concerns regarding right of publicity and considering whether CBC’s use of players’ names and records in its fantasy baseball games violated public policy).


130. See id. (detailing contours of protection of individual under right of publicity). The right of publicity emphasizes protection of the commercial interests in a person’s identity. See id. (focusing on protection of unauthorized use of person’s fame by another for commercial advantage).

131. See id. (stressing protection against overuse of person’s identity, resulting in dilution of commercial value). The policy justifications for the right of publicity are “less compelling” than justifications for trade secrets or trademarks because the value of one’s identity arises from successes in sports or entertainment, which “offer their own substantial rewards.” Id.
of endorsement.\(^\text{132}\) Additionally, the right of publicity protects individual pecuniary interests and facilitates control over the type and amount of publicity an individual receives.\(^\text{133}\) Lastly, the court in *C.B.C. Distribution* observed that the right of publicity safeguards the benefit of an individual’s work in establishing a public persona.\(^\text{134}\) As a result, the court concluded that all of the policy considerations supporting the right of publicity focus on preventing dilution of the commercial value of one’s identity by harmful or excessive use.\(^\text{135}\)

Applying these policy considerations, the court in *C.B.C. Distribution* stated that CBC’s use of players’ names and playing records did not interfere with MLB players’ ability to profit from their celebrity.\(^\text{136}\) Further, the public availability of players’ names and statistics led the court to conclude that CBC did not receive “something free for which it would otherwise be required to pay.”\(^\text{137}\)

Moreover, the court in *C.B.C. Distribution* suggested that CBC’s use of players’ names and statistics can increase players’ marketability.\(^\text{138}\) In *Gionfriddo v. Major League Baseball*, professional baseball players argued that professional clubs used player information to generate interest in baseball and thereby increase fan attendance at games.\(^\text{139}\) The court in *Gionfriddo* agreed and concluded that the

\(^{132}\) See id. (emphasizing need to protect against trickery regarding endorsement of products or services but clarifying that proof of confusion or deception is not required in order to establish right of publicity claim).

\(^{133}\) See *C.B.C. Distribution*, 443 F. Supp. 2d at 1090 (quoting Ventura v. Titan Sports, Inc., 65 F.3d 725, 730 (8th Cir. 1995)) (adding that right of publicity claim protects individuals from monetary damages and harm to one’s image).

\(^{134}\) See id. (citing Doe v. TCI Cablevision, 110 S.W.3d 363, 368 (Mo. 2003) (en banc)) (asserting that right of publicity protects benefits arising from creation of public persona).


\(^{136}\) See id. at 1091 (asserting that CBC’s use of players’ information “does not go to the heart of the players’ ability to earn a living as baseball players”). The court stated that baseball players make their living primarily by “playing baseball and endorsing products; they do not earn a living by the publication of their playing records.” *Id.*

\(^{137}\) *Id.* (citation omitted) (reasoning that because players’ names and playing records are in public domain, CBC did not gain any advantage by using public information in its fantasy games).

\(^{138}\) See *C.B.C. Distribution*, 443 F. Supp. 2d at 1091 (indicating that case law suggests commercial use of players’ information increases marketability of players).

\(^{139}\) See id. ("The [players] . . . argued that the baseball clubs used players’ 'information . . . to increase interest in baseball, with the belief that this would increase attendance at games.'" (quoting Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307, 316 (Cal. Ct. App. 1 Dist. 2001))).
use of players’ names and statistics in baseball programs actually increased players’ marketability.\(^{140}\) Drawing upon this reasoning, the court in *C.B.C. Distribution* determined that CBC’s use of players’ names and statistics did not strip players of the commercial use of their identities.\(^{141}\) Consequently, the court ruled that CBC’s use of players’ information did not offend the public policy justifications that protect a person’s right of publicity.\(^{142}\)

**B. The Court’s Holding**

The court in *C.B.C. Distribution* held that CBC’s use of players’ names and playing records did not violate MLB players’ right of publicity.\(^{143}\) Despite its holding, the court discussed other issues related to CBC’s use of players’ information in its fantasy baseball games.\(^{144}\) Addressing First Amendment concerns, the court concluded that even if CBC violated players’ right of publicity, the First Amendment controls and permits such use.\(^{145}\) The court also addressed federal copyright law.\(^{146}\) In the court’s view, federal law did not preempt CBC’s use of factual player information because facts

\(^{140}\) *See id.* (commenting that court in *Gionfriddo* concluded use of historical facts about professional baseball players was likely to increase ability of players to profit from careers as recognizable professional athletes).

\(^{141}\) *See id.* (concluding that CBC’s use of players’ names and records did not prevent players from capitalizing on their endeavors).

\(^{142}\) *See id.* (holding that CBC did not use players’ names and playing records in manner violative of public policy). For a further discussion of the public policy considerations that underlie the common law right of publicity, see *supra* notes 127-41 and accompanying text.

\(^{143}\) *See C.B.C. Distribution*, 443 F. Supp. 2d at 1107 (holding that because MLB players do not have right of publicity protection in names and playing records, CBC did not violate right of publicity of MLB players).

\(^{144}\) *See id.* at 1082-83 (listing other issues including First Amendment concerns, federal copyright law, and breach of contract claims).

\(^{145}\) *See id.* at 1107 (finding, alternatively, that First Amendment “takes precedence” over right of publicity here). CBC argued that even if its use of players’ names and statistics violated MLB players’ right of publicity, CBC’s First Amendment rights predominate. *See id.* at 1082 (stating CBC’s First Amendment defense against right of publicity claim). The court determined that the First Amendment applied to CBC’s use of players’ names and records in its fantasy baseball games. *See id.* at 1092-95 (reasoning that CBC’s fantasy games involve publicly available historical facts, to which First Amendment applies, and that such use does not constitute commercial speech). In the court’s view, the policy justifications behind freedom of expression outweighed the policy considerations justifying the right of publicity, and therefore the court concluded, on balance, that even if CBC violated the right of publicity, First Amendment concerns prevail. *See id.* at 1099-1100 (weighing policy factors and determining that First Amendment rights overcome right of publicity in this case).

\(^{146}\) *See id.* at 1100 (turning to issue whether federal copyright law preempts right of publicity).
Redefining Athletes’ Identities may not be copyrighted.\(^{147}\) Lastly, the court addressed the 2002 License Agreement between CBC and the MLBPA and held that the agreement was unenforceable and void against public policy.\(^{148}\) In the court’s view, the strong public policy favoring free ideas and competition outweighed the private interest in enforcement of a contract that unduly withheld information from the public domain.\(^{149}\) Therefore, in granting summary judgment in favor of CBC and declaring its fantasy sports enterprise legally valid, the court enjoined Advanced Media from obstructing CBC’s fantasy games.\(^{150}\)

V. ERROR: ADVANCED MEDIA, CONCEPTUAL CHANGE-UP: RETHINKING TRADITIONAL NOTIONS OF IDENTITY

The court in *C.B.C. Distribution* concluded that CBC did not violate MLB players’ right of publicity.\(^{151}\) Arriving at this conclusion, the court relied, in part, on the fact that CBC did not feature players’ pictures or physical appearances in its fantasy games.\(^{152}\)

Despite its conclusion, however, the court recognized that an identity encompasses more than the use of a name or even a like-

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147. See id. at 1101 (holding that information constitutes historical factual information, including names and playing records, which does not fall under scope of federal copyright law and therefore cannot be preempted).

148. See *C.B.C. Distribution*, 443 F. Supp. 2d at 1106-07 (finding licensing agreement unenforceable due to federal policy encouraging complete and free competition of ideas in public domain).

149. See id. at 1106 (concluding also that balancing interests in favor of CBC would not affect ability of players to earn living). The court concluded, drawing upon federal intellectual property law, that “strong” federal policy concerns favor the “full and free use of ideas in the public domain.” Id. at 1106-07 (citing Idaho Potato Comm’n v. M & M Produce Farm & Packaging, 335 F.3d 130, 137 (2d Cir. 2003)) (recognizing that federal policy can trump even explicit contractual provisions, rendering certain private agreements unenforceable under public policy considerations).

150. See id. at 1107 (issuing declaration in favor of CBC and ordering Advanced Media and MLBPA not to interfere with CBC’s fantasy baseball business in accordance with court’s decision).

151. See id. (holding CBC did violate MLB players’ right of publicity by its use of players’ names and playing records in fantasy games).

152. See id. at 1089 (asserting that mere use of players’ names is not as important as manner in which names are used). The court explained its position regarding CBC’s use of players’ information:

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.*
ness. The court cited the Restatement, which suggests a defendant who does not exploit the likeness of another may nevertheless violate a person's right of publicity by using "other indicia of identity for the purposes of trade." According to the Restatement, commercial use of other identifying characteristics or attributes uniquely associated with the plaintiff may violate the right of publicity. Thus, determining what constitutes "identity" is of critical importance.

In an age of rapidly advancing technology, we should consider expanding our concept of identity to encompass new forms of identification. Computer game players and online bloggers typically identify themselves via Internet pseudonyms. Even members of

153. See C.B.C. Distribution, 443 F. Supp. 2d at 1089 ("If the celebrity's identity is commercially exploited, there has been an invasion of his right whether or not his 'name or likeness' is used. [Plaintiff's] identity may be exploited even if his name . . . or his picture is not used." (quoting Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (6th Cir. 1983))).

154. See id. at 1084 (commenting that Restatement suggests liability may arise under right of publicity when one appropriates commercial value of identity by using name, likeness, or "other indicia of identity"). Under the Restatement:

The name, likeness, and other indicia of a person's identity are used "for the purposes of trade" under the rule stated in § 46 if they are used in advertising the user's goods or services, or are placed on merchandise marketed by the user, or are used in connection with services rendered by the user . . . .

Restatement (Third) of Unfair Competition § 47 (2005). The Restatement adds that the improper use of another's identity must be sufficient to identify the plaintiff: "[i]f the appropriation consists of the use of a name, for example, the name as used by the defendant must be understood by the audience as referring to the plaintiff." Id. at § 46 cmt. d (explaining criteria to determine improper use of another's identity).

155. See Restatement (Third) of Unfair Competition § 46 cmt. d ("The use of other identifying characteristics or attributes may also infringe the right of publicity, but only if they are so closely and uniquely associated with the identity of a particular individual that their use enables the defendant to appropriate the commercial value of the person's identity.").

156. See Schwarz, supra note 1, at 22 (commenting that nature of celebrity is at root of CBC's lawsuit).

157. See David W. Melville & Harvey S. Perlman, Protection for Works of Authorship Through the Law of Unfair Competition: Right of Publicity and Common Law Copyright Reconsidered, 42 St. Louis U. L.J. 363, 392 (1998) (observing that since its creation, courts have expanded scope of right of publicity in terms of both subject matter and nature of use of identity). The authors observe that the right of publicity is "no longer limited to name and likeness," but has encompassed "other identifying items and characteristics." Id. (stating that right of publicity has protected voice of singer, car of professional racing driver, and catchphrase used in television show).

CBC’s fantasy baseball “Diamond Challenge” register under a “User Identification” name and may choose to identify themselves with an online nickname.\footnote{159}

Indeed, the nature of individual identity underlies CBC’s lawsuit.\footnote{160} In a world of Internet screen-names and online aliases, it is not far-fetched to conceptualize players’ identities in terms of their playing statistics.\footnote{161} Under a broader view of identity, it is plausible that CBC’s unlicensed and nonconsensual use of MLB players’ names and records as part of a competitive game for profit might violate professional athletes’ right of publicity.\footnote{162} For this reason, Advanced Media may have committed a crucial error by objecting only to CBC’s use of players’ names and not to CBC’s use of names together with players’ numbers, playing records, and biographical and statistical data in conjunction with its fantasy games.\footnote{163} By not objecting to CBC’s use of players’ names together with player per-

\footnotesize{http://www.aclufl.org/legislature_courts/legal_department/briefs_complaints/hvideamicus.cfm (supporting motions of anonymous defendants identified by Internet screen-names to quash subpoenas); American Civil Liberties Union of Florida, \textit{Overview of the Anonymous Speech Case}, http://www.aclufl.org/take_action/students/case_of_the_month/2000/overview0300.cfm (last visited Feb. 25, 2007) (asserting importance of freedom of expression, especially in world where Internet “bloggers” identify themselves by anonymous screen-names).}


\footnote{160. See \textit{Schwarz}, supra note 1, at 22 (“[C.B.C. Distribution] is not about batting averages. It’s about the nature of celebrity in our new wired world.”).

\footnote{161. See, e.g., Cohen, supra note 7, at 136-57 (suggesting that it is possible to identify MLB players by their statistics). The commentator suggests, “[c]onsider the following: two-ninety, eighty, zero, twenty-five, fifty-nine (.290-80-0-25-59). Arguably, this identifies Chicago White Sox outfielder Scott Podsednik according to his 2005 regular season statistics of batting average, runs scored, home runs, runs batted in, and stolen bases.” \textit{Id.} at 136 (citation omitted).

\footnote{162. See Massari, supra note 3, at 464 (observing that although CBC does not advertise its product with MLB players’ names, “their use is generating significant commercial revenue”).

\footnote{163. See \textit{C.B.C. Distribution}, 443 F. Supp. 2d at 1082 (clarifying that Advanced Media was only concerned with CBC’s use of players’ names in conjunction with its fantasy baseball games). The court recognized that Advanced Media expressed primary concern regarding CBC’s use of players’ names, and the court did not object to CBC’s use of players’ records and biographical data: Additionally, the [MLBPA] and Advanced Media clarified that they are not claiming that CBC cannot use players’ playing records or biographical data; that they are challenging CBC’s use of players’ names in conjunction with its fantasy baseball games; that they are claiming that the identities of players are represented by their names; that they are concerned with protecting the players’ names; and that they are claiming that CBC uses players’ names in its fantasy baseball games in violation of the players’ right of publicity.}}
formance statistics in fantasy sports, Advanced Media may have precluded the court from finding that CBC violated players' right of publicity.\textsuperscript{164}

A. CBC's Commercial Use of MLB Player's Names and Playing Records

In determining whether CBC violated players' right of publicity, the court addressed the commercial advantage element.\textsuperscript{165} In its analysis, the court observed that evidence of CBC's intent to create an impression that MLB players are associated with its fantasy games "alone is sufficient to establish the commercial advantage element [of the right of publicity]."\textsuperscript{166} Upon inspection, the court concluded there was nothing in the facts to indicate that MLB players are in any way associated with CBC's fantasy games.\textsuperscript{167} As such, the court ruled that CBC did not use player information to obtain a commercial advantage.\textsuperscript{168}

In so ruling, the court in \textit{C.B.C. Distribution} seemed to treat the lack of evidence of player endorsement as defeating the commercial advantage element of the right of publicity, rather than merely failing to prove it.\textsuperscript{169} Nowhere in its opinion did the court state that evidence of endorsement is the only evidence that will satisfy

\textsuperscript{164} See \textit{id.} at 1080 (specifying that Advanced Media expressed its concerns with CBC's use of players' names, and not statistics in CBC's fantasy baseball games).

\textsuperscript{165} See \textit{id.} at 1085 (considering whether commercial advantage element of right of publicity is satisfied).

\textsuperscript{166} \textit{Id.} (quoting Doe v. TCI Cablevision, 110 S.W.3d 363, 371 (Mo. 2003) (en banc)). The court also stated that the use of a name to attract attention to a product constitutes evidence showing a violation of the right of publicity. \textit{See id.} (identifying evidence sufficient to prove right of publicity violation).

\textsuperscript{167} See \textit{id.} at 1086 (contrasting cases in which defendant intended to create appearance that plaintiff was associated with defendant's product and commercial advantage element satisfied).

\textsuperscript{168} \textit{See C.B.C. Distribution}, 443 F. Supp. 2d at 1088 (finding no triable issue of fact regarding commercial advantage element of right of publicity).

\textsuperscript{169} See \textit{id.} at 1086 (implying that there are no other means of fulfilling commercial advantage element). The court observed that no players are associated with CBC's games:

Indeed, there is no evidence to create a triable issue as to whether CBC intended to create an impression that Major League baseball players are associated with its fantasy baseball games or as to whether a reasonable person would be under the impression that the baseball players are associated with CBC's fantasy games any more than the players are associated with a newspaper boxscore. As such, there is no triable issue of fact as to whether CBC uses Major League baseball players' names in its fantasy baseball games with the intent of obtaining a commercial advantage.

\textit{Id.}
the commercial advantage element.\textsuperscript{170} Nevertheless, the court viewed the absence of such evidence, which it described as merely "sufficient" to indicate a violation of the right of publicity, as dispositive evidence proving no violation of the legal right.\textsuperscript{171}

The broad focus of the commercial advantage element centers on whether a defendant intended to gain some "commercial advantage" by using the plaintiff's identifying characteristics.\textsuperscript{172} The court in \textit{C.B.C. Distribution} did not precisely define the meaning of "commercial advantage" but acknowledged, at the very least, that "commercial advantage" encompasses name appropriation for a commercial purpose.\textsuperscript{173} The court did, however, describe the circumstances under which the right of publicity gives rise to liability: when a defendant "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 . . . ."\textsuperscript{174} Importantly, the court omitted a key definition of the phrase "purposes of trade," which encompasses use of indicia of identity "in connection with services rendered by the user."\textsuperscript{175}

Although it is apparent that no player is associated with or endorses CBC's product, it is equally clear that CBC used players' names and records for a "commercial purpose."\textsuperscript{176} CBC undisputedly used players' names and playing records in its fantasy sports games, for which CBC charged fees.\textsuperscript{177} Furthermore, under the

\textsuperscript{170} See \textit{id.} at 1085 (stating evidence that defendant intended to create impression that plaintiff endorses product is sufficient to establish commercial advantage element); see also \textit{Restatement (Third) of Unfair Competition} \textsection{47} (2005) (defining various contexts in which right of publicity may be violated); World Wrestling Fed'n Entm't, Inc. v. Big Dog Holdings, Inc., 280 F. Supp. 2d 413, 444 (W.D. Pa. 2003) (observing common context in which right of publicity is often asserted). "The right of publicity is often invoked in the context of commercial speech when the appropriation of a celebrity likeness creates a false and misleading impression that the celebrity is endorsing a product." \textit{Id.}\textsuperscript{171} See \textit{id.} at 1086 (concluding that because nothing indicated CBC intended to create impression that players are associated with its fantasy baseball games, commercial advantage element is not satisfied).

\textsuperscript{172} See \textit{id.} at 1085 ("The intent must be to obtain a commercial advantage.") (citation omitted).

\textsuperscript{173} See \textit{C.B.C. Distribution}, 443 F. Supp. 2d at 1085 (citing Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (6th Cir. 1983)) (explaining that existing authorities find violation of right of publicity when identity is intentionally used for commercial purposes, without consent).

\textsuperscript{174} \textit{Id.} at 1084 (citing \textit{Restatement (Third) of Unfair Competition} \textsection{46}).

\textsuperscript{175} \textit{Restatement (Third) of Unfair Competition} \textsection{47}.

\textsuperscript{176} See, e.g., Massari, \textit{ supra} note 3, at 464 ("Though fantasy providers are not using players' names as commercial advertisements per se, their use is generating significant commercial revenue.").

\textsuperscript{177} See \textit{C.B.C. Distribution}, 443 F. Supp. 2d at 1080 (asserting CBC's fantasy games run on actual player performances and CBC charges fees).
broad Restatement definition of “purposes of trade,” CBC used players’ names and statistics as integral components of its fantasy service. 178

Interestingly, the court stated that CBC’s use of players’ names and records was not intended to attract customers away from other fantasy league providers. 179 Despite this view, the court also noted that CBC would have no product without the use of player names and playing records. 180 CBC necessarily used players’ names and statistical information to survive in a booming industry. 181 CBC’s entire commercial enterprise hinged wholly upon the use of player names and records in its online fantasy games. 182 Notwithstanding the court’s conclusion, it seems apparent that CBC necessarily used players’ names and records to obtain a commercial advantage in its fantasy sports business. 183

B. “Baseball Identity:” Names and Numbers as Indicia of Identity

Regarding the identity element of the right of publicity, the court in C.B.C. Distribution ruled that CBC’s use of players’ names and records implicated mere historical facts. 184 According to the court, CBC’s use of players’ names and records involved neither the character, reputation, nor physical appearance of the players. 185


179. See id. at 1086 (suggesting that CBC’s use of players’ names is not intended to draw customers away from other fantasy league providers, as all fantasy sports leagues must use names and records).

180. See id. at 1099 (“CBC would be unable to create and operate its fantasy games as the games cannot operate without the players’ NAMES and PLAYING RECORDS.”).

181. See id. (suggesting that CBC would be “out of business” if it did not use players’ names and statistics in its fantasy games); see also Bolitho, supra note 3, at 949 (explaining right of publicity argument against unlicensed use of player names and statistics in fantasy sports rests in part upon fact that “fantasy sports depend entirely upon the incorporation of both player names and statistics”).

182. See C.B.C. Distribution, 443 F. Supp. 2d at 1099 (“[I]t would be meaningless and useless to [CBC’s] game participants for CBC to report that there were five home runs or ten singles in a baseball game without identifying the players who hit the home runs or singles.”).

183. See Massari, supra note 3, at 464 (commenting that although fantasy sports providers deny using players’ names and records for commercial gain, “such use is unquestionably critical to the providers’ commercial enterprise”).

184. See C.B.C. Distribution, 443 F. Supp. 2d at 1089 (holding that CBC’s use of player names and records implicates historical, factual data).

185. See id. (asserting CBC’s use of player names and records does not involve character, reputation, or physical appearance of players, but rather historical data available in public domain).
Accordingly, the court determined that CBC’s fantasy baseball products involved neither the identities nor personae of MLB players. The court, however, did not consider that players’ identities may be closely tied to their statistical performances in MLB games.

The precise issue in establishing the “identity element” of the right of publicity is whether the defendant used plaintiff’s name as a symbol of plaintiff’s identity. In this inquiry, one must “consider the nature and extent of the plaintiff’s identifying characteristics . . . .” Additional considerations include the nature of the defendant’s intent, the relative prominence of the plaintiff, and whether third parties actually identified the plaintiff.

Unquestionably, CBC intentionally used actual players’ names and statistical accomplishments in its fantasy games. Moreover, due to the nature of fantasy sports, fantasy users identify fantasy players by their real-life counterparts. Although the fame of individual players varies, all MLB players perform before live crowds and television audiences.

CBC did not use pictures of players or players’ likenesses in its fantasy games. Nevertheless, under the Restatement, which the court in C.B.C. Distribution cited approvingly, “other indicia of identity” may be considered to suggest that a defendant appropriated a

186. See id. (holding that CBC’s use of players’ names and performance records did not involve actual identity of players).

187. See Cohen, supra note 7, at 136 (suggesting that MLB players, like Alex Rodriguez, can be identified in accordance with their unique performance statistics). The author theorized, “[D]ue to the large number of permutations and combinations, it is possible to identify numbers with corresponding MLB players.”

188. See C.B.C. Distribution, 443 F. Supp. 2d at 1089 (“[A] name must be used as a symbol of the plaintiff’s identity in a right of publicity action.”).

189. Id. at 1088 (stating considerations for determination of symbolic name usage).

190. See id. (suggesting possible considerations for identity element in right of publicity inquiry).

191. See id. at 1082 (recounting CBC’s admitted position regarding use of players’ names and statistics).

192. See id. at 1099 (“[T]he records mean nothing without the names.”).


194. See C.B.C. Distribution, 443 F. Supp. 2d at 1089 (“CBC’s use of the baseball players’ names and playing records . . . does not involve the . . . physical appearance of the players . . . .”).
plaintiff’s identity. Despite the Restatement definition of the right of publicity, the court did not address whether the combination of players’ names and performance records constituted “other indicia of identity” for purposes of the right of publicity. A professional player’s public persona can be closely tied to that player’s on-field statistical performances. Consider Kevin Youkilis of the Boston Red Sox, popularly known as the “Greek God of Walks.” Youkilis’s nickname, which has since become an integral part of his public persona, derives from his ability to consistently draw walks and reach first base. Commonly identified by his on-base percentage, Youkilis has commented, “whenever anyone writes something about me, it’s, ‘Oh, he has a great on-base percentage.’” Noting his uniqueness in the league, Youkilis added, “[m]ost people know there’s not too many players you can associate my type of game with.”

Youkilis is only a current example of an MLB player who is widely recognized by his unique playing statistics; Ted Williams, who also played for the Boston Red Sox, is popularly known as the last player to bat over .400 in a single season. At the time of his passing on July 5, 2002, Ted Williams, as he had long desired, was

195. See id. at 1084 (quoting Restatement (Third) of Unfair Competition § 46) (explaining right of publicity and suggesting “other indicia of identity” may demonstrate appropriation in violation of right of publicity).
196. See id. at 1089 (holding CBC’s use of player information only involved “historical facts”).
197. See Cohen, supra note 7, at 136-37 (“[D]ue to the large number of permutations and combinations, it is possible to identify numbers with corresponding MLB players.”); see also Alan Schwarz, Baseball is a Game of Numbers, but Whose Numbers Are They?, N.Y. TIMES, May 16, 2006, at A1 (stating that baseball "communicates in numbers" and asserting that playing statistics "become inseparable from the players to whom they belong").
200. See Ulman, supra note 198 (quoting Youkilis’s response to question regarding nickname).
201. Id. (commenting on Youkilis’s unique and distinguished baseball abilities).
202. See NewsHour: Splendid Splinter (PBS television broadcast July 5, 2002), available at http://www.pbs.org/newshour/bb/remember/july-dec02/williams_7-05.html (featuring transcript of interview reflecting on passing of Ted Williams in 2002 and providing Ray Suarez’s insight that “[t]he obituaries are moving in profu-
remembered as "the greatest hitter who ever lived" because of his extraordinary batting achievements.\textsuperscript{203}

Unique statistical achievements identify other MLB players as well, including Alfonso Soriano, Chicago Cubs outfielder and member of the exclusive "40-40 club."\textsuperscript{204} Soriano’s ability to hit forty home runs and steal forty bases make him an extremely valuable commodity in the world of fantasy sports, where he is identified as a "40-40 talent."\textsuperscript{205} Interestingly, Soriano seems to have associated himself closely with his unique professional achievement by writing "40-40" next to his name on autographed memorabilia.\textsuperscript{206} Furthermore, in baseball circles, the utterance of a new statistic, "40-40-40," will conjure the image of only one man: Alfonso Soriano, who stole forty bases, hit forty doubles, and belted forty home runs in a single season.\textsuperscript{207}

\textsuperscript{203} See Bob Hohler, ‘Splendid Splinter’ Fulfilled Dream of Becoming Greatest Hitter Ever, MILWAUKEE J. SENTINEL, July 5, 2002, at A News ("Ted Williams, an American icon who realized his dream of being recognized by the baseball world as the greatest hitter who ever lived, died Friday morning after suffering cardiac arrest."). The author quotes former MLB player and manager Tommy Lasorda’s introduction of Williams as master of ceremonies at Williams’s final public appearance, "'Ladies and gentlemen . . . the greatest hitter that God ever put on Earth, Ted Williams.'"). Id. Williams won two Triple Crown awards, two Most Valuable Player awards, six American League batting titles, and retired as a lifetime .344 hitter with 521 home runs and 1,839 runs batted in. See id. Williams expressed his desire "to have people say, 'There goes Ted Williams, the greatest hitter who ever lived.'" See Richard Corliss, A Little Respect for The Splendid Splinter, TIME, July 15, 2002, at 72 (recalling Ted Williams’ desire to be known as baseball’s greatest hitter).

\textsuperscript{204} See Stan McNeal, It's One and Done in the 40-40 Club, SPORTING NEWS, Sept. 18, 2006, http://www.sportingnews.com/yourturn/viewtopic.php?t=129093 (hypothesizing that Soriano, like other three players in MLB history to hit at least forty home runs and steal forty bases in single season, may not repeat impressive feat).


The examples of Youkilis and others illustrate that MLB players may form a "baseball identity" by their statistical achievements such that players can be identified by their unique performance numbers. In baseball, playing statistics encompass more than the day's game results; rather, baseball statistics are the benchmarks against which MLB players are remembered and revered. In the world of baseball, the numbers .406, 40-40-40, 73, and 56 refer not only to unique accomplishments during specific time periods, but to individual players who have forever carved their places in the baseball cosmos. Accounting for the special role of statistics in

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208. To the author's knowledge, the term "baseball identity" has not previously been used to describe a professional baseball player's identity or persona as created and refined by on-field performance and playing statistics.

209. See, e.g., Jon M. Sands, Book Review, Fed. Law., Nov.-Dec. 2006, at 52 (explaining unique role of numbers and statistics in baseball). The author writes: There is a fervent school of baseball kabbalah. Esoteric numbers are imbued with mystical and, indeed, spiritual meanings. More than any other sport, baseball, with its history and statistical wealth of innings, at-bats, games, and seasons, breeds this intense numerology. As observed in Bull Durham - still the best baseball movie - there are 108 beads on a Catholic rosary, and there are 108 stitches on a baseball. Id.; see also Schwarz, supra note 1, at 22 (observing that "baseball statistics are part of our national parlance" and Americans have "detailed and deliberated" over baseball statistics for many years). The author likened America's obsession with baseball and statistics to religious faithfulness, commenting that "[t]o some, The Baseball Encyclopedia is a second Bible." Id.

210. See Schwarz, supra note 197, at A1 ("Like no other corner of American popular culture, baseball communicates in numbers. From .406 (Ted Williams's 1941 batting average) to 755 (Hank Aaron's record home run total) . . . statistics convey ideas and images that, even overnight, become inseparable from the players to whom they belong."); see also Cohen, supra note 7, at 136 (asserting that MLB players can be identified according to their unique playing statistics). The author posits the following scenario:

Consider the following: two-ninety, eighty, zero, twenty-five, fifty-nine (.290-80-0-25-59). Arguably, this identifies Chicago White Sox outfielder Scott Podsednik according to his 2005 regular season statistics of batting average, runs scored, home runs, runs batted in, and stolen bases. Very few players can correspond to these numbers. Even fewer players can correspond to three-twenty-one, one-twenty-four, forty-eight, one-thirty, twenty-one (.321-124-48-130-21). Accordingly, these numbers identify New York Yankees third baseman Alex Rodriguez. In sum, due to the large number of permutations and combinations, it is possible to identify numbers with corresponding MLB players. Id. Likewise, "40-40-40" refers to Alfonso Soriano's unprecedented accomplishment in 2006, a year in which he hit forty-six home runs and forty-one doubles and stole forty-one bases. See MLB.com, Alfonso Soriano Player Profile, http://chicago.cubs.mlb.com/team/player.jsp?player_id=150093 (last visited Feb. 24, 2007) (featuring biographical and statistical data for Chicago Cubs outfielder Alfonso Soriano). The number seventy-three refers to the current single season record for home runs, set by Barry Bonds in 2001. See Baseball Player Bonds Near Historic Mark, PBS NewsHour Extra, May 24, 2006, http://www.pbs.org/newshour/extra/features/jan-june06/bonds_5-24.html (recounting Bonds' baseball achievements and describing backlash over alleged steroid use). Lastly, Joe DiMaggio recorded a
baseball, players' names and playing records might genuinely constitute "other indicia of identity" for purposes of the right of publicity.211

In the court's view, however, CBC's use of players' names and records involved mere historical facts.212 Arguably, this conclusion is only partially correct. CBC certainly did report statistics on its fantasy sports website.213 Nevertheless, CBC users did not register and pay for game box-scores; the court itself conceded in a footnote that such information is available to non-customers at CBC's website, free of charge.214

CBC's use of player information, for which customers pay, is fundamentally different from reports of historical data.215 Rather, players' statistical achievements drive a fantasy game service that CBC sold to the consuming public.216 CBC generated revenue, not by reporting information, but through its use of MLB players' names and statistics in subscription-based fantasy leagues.217

In addition to registration fees, CBC imposed fees for fantasy trades, thereby capitalizing on the changing values of player performance numbers.218 Impressive performance statistics elevate a

base hit in fifty-six consecutive games in 1941, a feat that has not been replicated by any player. See National Baseball Hall of Fame, Joe DiMaggio, http://www.baseballhalloffame.org/hofers_and_honorees/hofer_bios/dimaggio_joe.htm (last visited Feb. 24, 2007) ("Many rate [DiMaggio's] 56-consecutive-game hitting streak in 1941 as the top baseball feat of all time.").


212. See id. at 1089 (holding CBC's use of player information involved publicly available historical facts).

213. See id. at 1080 (reviewing CBC's provision of player statistics via its website).

214. See id. at 1080 n.4 ("One does not have to be a customer of CBC or a game participant to obtain the statistics which CBC provides on its website.").

215. See Massari, supra note 3, at 464 (suggesting that customers do not register and pay for fantasy sports leagues to view game box scores or news reports, "but primarily for their sophisticated game play").

216. See C.B.C. Distribution, 443 F. Supp. 2d at 1099 ("CBC would be out of business if it were precluded from using in its fantasy games either players' names or their names in conjunction with their playing records."); see also Massari, supra note 3, at 464-65 (predicting that court in C.B.C. Distribution must distinguish between recitation of historical facts, and "exploit[ation of] the intrinsic market value of names and accomplishments").

217. See C.B.C. Distribution, 443 F. Supp. 2d at 1080 (observing that CBC charges fees for fantasy games but not for news reporting, which is provided to supplement fantasy games).

218. See id. (recognizing that CBC charges additional fees to trade players in its most popular fantasy baseball game, "Diamond Challenge").
player’s “fantasy value.” As such, fantasy gamers covet players uniquely associated with strong on-field performances to maximize fantasy points. Under the Restatement, “other indicia of identity” may be considered if they are uniquely tied to the plaintiff, such that the defendant is able to capitalize on the plaintiff’s identity. Consequently, a fantasy competitor must pay CBC for acquiring a player such as David Ortiz, whose characteristic ability to hit home runs makes Ortiz a valuable fantasy points-gainer. Therefore, unlike a neutral newspaper publisher, disinterested in the quality of the statistics it prints, CBC profits directly from the quality of players uniquely identified as valuable fantasy goods by their characteristic performances in MLB games.

Instead of utilizing pictures of MLB players, CBC identified players by their names and playing records, the two attributes that drive the fantasy sports industry. By using MLB players’ names together with their unique playing records as a means to generate commercial revenue from its fantasy games, CBC’s unlicensed and nonconsensual use of player information may well stand in violation of the right of publicity.

219. See, e.g., MLB.com, On the Move, http://www.mlb.com/mlb/fantasy/mlb_fantasy_columns.jsp?story=moves0607 (last visited Feb. 24, 2007) (assessing fantasy value of MLB players for 2007 regular season); see also Cohen, supra note 7, at 134 (“Scoring in a fantasy baseball league is achieved by the accumulation of specific MLB statistics, including but not limited to, batting average, home runs, and runs batted in for batters and wins, strikeouts, and earned run average for pitchers.”).

220. See Razzano, supra note 3, at 1159 (explaining fantasy competitors’ winning strategy).

221. See Restatement (Third) of Unfair Competition § 46 cmt. d (2005) (outlining other characteristics and attributes of identity protected by right of publicity).

222. See C.B.C. Distribution, 443 F. Supp. 2d at 1080 (noting that CBC charges fees to trade players). David Ortiz is the Designated Hitter for the Boston Red Sox, who in 2006 broke a longtime Red Sox record by hitting fifty-four home runs. See CBS SportsLine.com, David Ortiz Player Profile, http://www.sportsline.com/mlb/players/playerpage/8236 (last visited Feb. 24, 2007) (providing Ortiz’s biographical and statistical playing data, in addition to “fantasy analysis,” in which Ortiz is described as “one of the top five or six best players in all of Fantasy Baseball”).

223. See C.B.C. Distribution, 443 F. Supp. 2d at 1080 (acknowledging that CBC did not generate revenue by reporting facts and recognizing that CBC charged fees for trading players).

224. See Massari, supra note 3, at 444 (describing statistics as fuel for machination of fantasy sports); see also Bollitho, supra note 3, at 918-19 (explaining that game of fantasy sports is “statistics-driven,” which would cease to exist without ability to “package statistics together with player names”).
C. CBC in Violation of Public Policy

Simply stated, the right of publicity protects the commercial value of a person's identity.225 According to the court in C.B.C. Distribution, CBC did not violate public policy considerations supporting the right of publicity.226

Quoting the United States Supreme Court, the court in C.B.C. Distribution, stated that the right of publicity protects an individual's right to "'reap the reward of his endeavors.'"227 Through its online fantasy game, however, CBC usurped the rewards of player performances specifically by charging fees to trade players.228 Players who perform well on the field increase their fantasy values, thereby creating demand for their services in the fantasy market.229 Thus, MLB players with impressive statistics become valuable commodities in the fantasy world.230 By charging fees for transactions involving such players, CBC directly profited from the performances of MLB players, thus reaping the rewards of MLB players' on-field endeavors.231

The MLBPA entered into a $50 million exclusive licensing agreement with Advanced Media in an attempt to secure the rewards of players' efforts.232 CBC, by its unlicensed use of player names and records, "gets for free" those rights which Advanced Media paid millions of dollars to acquire.233 Because CBC profited

225. See C.B.C. Distribution, 443 F. Supp. 2d at 1090 (asserting right of publicity allows individual to capitalize on commercial value of public persona).
226. See id. at 1091 (finding CBC's use of players' information in fantasy sports is not in violation of public policy).
227. Id. at 1097 ("[T]he Supreme Court considered that a goal of the right of publicity is to 'focus[] on the right of the individual to reap the reward of his endeavors....'") (quoting Zacchini v. Scripps-Howard Broadcasting, Co., 433 U.S. 562, 573 (1977)).
228. See id. at 1080 n.3 ("CBC's most popular fantasy baseball game is called Diamond Challenge, in which game customers are charged a transaction fee every time they make a trade.").
229. See Massari, supra note 3, at 465 (suggesting that fantasy sports may exploit market value in players' names and statistical achievements).
231. See C.B.C. Distribution, 443 F. Supp. 2d at 1080 (noting CBC charges fees for player trading in fantasy games).
232. See Freeman & Scher, supra note 4, at 7 (describing "$50 million deal" Advanced Media struck with MLBPA).
233. See C.B.C. Distribution, 443 F. Supp. 2d at 1090 ("No social purpose is served by having the defendant get free some aspect of [the performer] that would
directly from player performances, its use of player information in fantasy games contravened the policy considerations supporting the right of publicity.

V. Conclusion: Extra Innings and Post Game Report

Viewing player names and statistics as “other indicia of identity,” CBC violated MLB players’ rights of publicity by using, without a license, symbols of players’ identities for commercial gain in its fantasy games.234 Advanced Media may have forced the court’s decision in C.B.C. Distribution by not expressing specific concern with CBC’s use of players’ names together with players’ performance numbers as “other indicia of identity” under the Restatement.235 Instead, Advanced Media confined its objection to CBC’s use of MLB players’ names.236

In baseball, playing statistics define the player, perhaps more than any other sport.237 Part of what makes one baseball player identifiable in a long history of players, spanning over 100 years, is on-field performance statistics.238 Players receive monikers based upon their ability to post specific types of playing statistics, and they become known as “power-hitters,”239 “on-field machines,”240 and

have market value and for which he would normally pay.” (quoting Zacchini v. Scripps-Howard Broadcasting, Co., 433 U.S. 562, 576 (1977)).

234. For a further discussion of how CBC may have violated MLB players’ right of publicity, see supra notes 151-229 and accompanying text.

235. For a further discussion of Advanced Media’s primary objection to CBC’s use of players’ names in fantasy sports games, see supra notes 99-101 and accompanying text.

236. See C.B.C. Distribution, 443 F. Supp. 2d at 1081-82 (noting Advanced Media’s sole concern with CBC’s use of player names).

237. See Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307, 314-15 (Cal. Ct. App. 1 Dist. 2001) (commenting that baseball statistical data and records are regularly used by public to judge players); see also Michael Rand, Sabermetrics Redefining the Statistics of Baseball, STAR TRIB. (Minneapolis-St. Paul, MN), July 23, 2004, at 1C (“Baseball has lent itself to statistics like no other sport.”).

238. See Rick Jillson, Baseball Among Things I’m Thankful For, EVANSVILLE COURIER (Ind.), Nov. 26, 2004, at W8 (“[B]aseball has something these other sports never will: the ability to invite valid comparisons between players who were born and played in different centuries. And, more important, the power to bridge generations of fans.”).

239. See Franklin P. Huddle, Baseball Jargon, AM. SPEECH, Apr. 1943, at 103, 105 (characterizing power hitter as “hard hitter” in baseball); see also Wikipedia, http://en.wikipedia.org/wiki/List_of_baseball_jargon_%28P%29#power_hitter (last visited Feb. 24, 2007) (defining “power hitter” as “[a] powerful batter who hits many home runs and extra base hits, but who may not have a high batting average, due to an ‘all or nothing’ hitting approach”).

“contact hitters.” In effect, each player may forge for himself a publicly recognized persona, a baseball identity, by his unique athletic abilities. In this way, playing statistics become part of each individual baseball player’s identity. By using these playing statistics as indicia of identity in its fantasy games, without authorization, CBC violated MLB players’ rights of publicity.

In December 2006, Advanced Media appealed the district court’s decision in C.B.C. Distribution. Already, every major professional American sports league has submitted an amicus brief in the Eighth Circuit Court of Appeals supporting Advanced Media’s position. These leagues contend that the lower court’s ruling in C.B.C. Distribution “tramples one of the most fundamental rights a person has – the right to control his or her identity.” Undoubt-

2007 acquisition, J.D. Drew, as “on-base machine” for his ability to reach base at rate of nearly forty percent).


242. See Schwarz, supra note 197, at A1 (asserting that baseball players are “inseparable” from their statistics).

243. See C.B.C. Distribution, 443 F. Supp. 2d at 1084 (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (2005)) (describing identity element as including “other indicia of identity” for purposes of right of publicity).

244. See Andrew S. Tulumello & Travis D. Lenkner, For Litigators, The Cry is: ‘Play Ball!’, Nat’l L. J., Oct. 30, 2006, at S1 (citing Eighth Circuit Court of Appeals as venue for Advanced Media’s appeal of district court decision in C.B.C. Distribution); see also Greg Ambrosius, Leagues Join MLBAM in Licensing Fight, FANTASY SPORTS, Jan. 25, 2007, http://www.fantasysportsmag.com/default.aspx?tabid=939&articleid=5073&articleid=2401#2401Articles (confirming that Advanced Media officially appealed decision in C.B.C. Distribution in December of 2006); Charles Delafluenta, A Win for the Home Team, 5 No. 33 A.B.A. J. E-REPORT 2 (2006) (“Of course, the adage in baseball is, ‘It ain’t over ‘til it’s over.’ CBC’s victory may be the equivalent of a division title, but the teams will meet again in the playoffs – still in St. Louis, but before the 8th U.S. Circuit Court of Appeals.”).

245. See Ambrosius, supra note 244 (reporting that all major professional sports leagues have asserted their positions by filing amicus briefs siding with Advanced Media in its appeal in Eighth Circuit). The National Basketball Association Properties, National Hockey League Properties, National Football League Ventures and the National Football League Players Association, NASCAR, the PGA Tour, and Women’s National Basketball Association Enterprises filed a joint amicus brief supporting Advanced Media. See id. (listing entities supporting Advanced Media’s position in lawsuit against CBC). Conversely, the Fantasy Sports Trade Association is also expected to file an amicus brief supporting CBC. See id. (noting that Fantasy Sports Trade Association is “reportedly preparing an amicus brief on behalf of [CBC]”).

246. Id. (quoting amicus brief filed by National Football League Players Association in support of Advanced Media’s position regarding professional athletes rights).
edly, the case will continue to capture the attention of both the sports and legal worlds.247

The outcome of C.B.C. Distribution on appeal could have a profound impact on fantasy sports.248 Reversal of the district court’s decision could potentially lead to a drastic reduction in the number of fantasy sports leagues, in addition to a limitation of issued licenses and correspondingly high licensing fees.249 Conversely, if the Eighth Circuit upholds the district court’s decision, fantasy sports providers will continue to operate fantasy leagues without investing in expensive licensing agreements.250 Moreover, the effect of the decision may not be confined to the fantasy sports industry and may affect a broad range of legal rights.251

The fantasy baseball industry capitalizes on America’s interest in a national pastime by profiting on that which defines the professional athlete, on-field performance statistics. Despite the court’s decision in C.B.C. Distribution, CBC’s fantasy baseball does some-

247. See Schwarz, supra note 197, at A1 ("This could become like the Grokster case in the music-downloading world, where the Supreme Court could be asked to draw that line between the benefits of public use and ownership of property.") (quoting University of Richmond Law School dean Ron Smolla).

248. See Bolitho, supra note 3, at 914 (citing Eric Fisher, Debate Over Baseball Stats Isn’t a Fantasy, WASH. TIMES, Feb. 11, 2005 at C1, C3 (stating that experts agree that resolution of legal issues surrounding fantasy sports, including decision in C.B.C. Distribution, "could conceivably reshape the entire fantasy sports industry"); see also Tulumello & Lenkner, supra note 244, at S1 (projecting that results of "blockbuster case" between CBC and Advanced Media could affect ability to participate in fantasy sports on wide scale).

249. See Bolitho, supra note 3, at 915 (explaining that National Football League has announced its plans to limit number of licenses to fantasy sports providers and noting that MLB has increased fee to obtain license by $1,975,000). The author also prognosticates generally that if courts allow professional sports leagues to enforce licenses, Americans’ interest in fantasy sports will decline sharply. See id. ("Should the courts afford the professional sports leagues the right to require licensing of player names and statistics, the shockwaves that would reverberate across the industry could dramatically curb the fantasy sports enthusiasm of many Americans by severely limiting the available options.").

250. See id. (proposing that if fantasy leagues can operate without having to acquire expensive licenses, professional sports leagues will realize millions of dollars in losses); see also Strike 1: Major League Baseball Can’t Control Player Names, Stats, ASSOCIATED PRESS, Aug. 9, 2006, available at http://www.firstamendmentcenter.org/news.aspx?id=17252 (opining that decision in C.B.C. Distribution has already brought “some relief to more than 300 businesses that run online fantasy sports leagues and have awaited the outcome of the lawsuit”); Schwarz, supra note 197, at A1 ("Dozens of small, unlicensed fantasy-league operators, as well as their customers, are watching the case intently because [an Advanced Media] victory could put those operations out of business."") (quoting Jeff Thomas, Fantasy Sports Trade Association president).

251. See Schwarz, supra note 197, at A1 (asserting that decision on appeal could impact "celebrity rights, freedom of the press and even how the press is defined as the Internet age unfolds").
thing more than merely report facts. Unless we redefine our notions of personal identity, baseball's biggest fans will not be those seated in ballparks across the country; instead, the biggest fans will be profiteering fantasy businesses like CBC.

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252. See id. ("The business here is not about publishing statistics. The business here is running a league." (quoting chief executive Bob Bowman of Advanced Media)).
