

When Your Rights Depend on Your Paycheck: The Scary Way Courts Are Deciding Right of Publicity Cases

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In striking the balance between the right of publicity and a defendant's First Amendment rights, courts often consider "the pervasive presence of celebrities in the media, sports and entertainment."¹ One court noted that celebrities are an important part of our public vocabulary and have come to symbolize certain ideas and values.² Celebrities are "common points of reference for millions of individuals who may never interact with one another, but who share, by virtue of their participation in a mediated culture, a common experience and a collective memory."³

Courts have had a hard time determining the proper or the exact uses and applications of the right of publicity. Reasoning that one of the policy reasons for publicity rights is to further economic incentives for celebrities to do what they do, a trend in recent decisions indicates that

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1. See *ETW Corp. v. Jireh Publ'g, Inc.*, 2003 FED App. 0207P, ¶ 29 (6th Cir.).
2. See *Cardtoons, L.C. v. MLB Players Ass'n*, 95 F.3d 959, 972 (10th Cir. 1996).
3. JOHN B. THOMPSON, *IDEOLOGY AND MODERN CULTURE: CRITICAL SOCIAL THEORY IN THE ERA OF MASS COMMUNICATION* 163 (1990).

court holdings may be based more on the celebrities' paychecks rather than the actual complaints.⁴

This Comment reviews the history of the right of publicity and summarizes what the law is today. Next, the Comment examines the earlier right of publicity cases followed by the United States Court of Appeals for the Eighth Circuit decision in *C.B.C. Distribution & Marketing, Inc. v. MLB Advanced Media (CBC II)*. Finally, the Comment discusses what the implications of that decision are for today's professional athletes.

I. HISTORY OF RIGHT OF PUBLICITY

The right of publicity grew out of a recognition and concern for privacy rights developed in the late nineteenth and early twentieth centuries.⁵ In an 1890 article, Louis Brandeis (later to become Justice Brandeis) and Samuel Warren wrote that intangible rights needed to be protected, including the right to privacy.⁶ The Georgia Supreme Court became the first court to recognize the right of privacy as an individual's "legal right 'to be let alone.'"⁷

The right of publicity, defined as an individual's right to control the commercial use of one's identity, was first recognized by the United States Court of Appeals for the Second Circuit in 1953.⁸ Considering a baseball player's interests in trading cards bearing his photograph without his permission, the court held "that, in addition to and independent of

4. See *Cartoons*, 95 F.3d at 973-74.

5. See Dana Howells, Note, *Log Me In to the Old Ballgame: C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media*, LP, 22 BERKELEY TECH. L.J. 477, 478 (2007).

6. Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193, 213 (1891) (discussing the desirability of protecting the right to privacy).

7. See *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 71-72 (Ga. 1905). Prior to *Pavesich*, the New York Court of Appeals had found that there was no common law right of privacy. See also *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 447 (N.Y. App. Div. 1902). Judge Parker indicated that he supported the idea of the right of privacy, writing, "[A] man has the right to pass through this world, if he wills, without having his picture published, or his business enterprises discussed . . ." *Id.* at 443. Judge Parker did not find a violation of that right because he believed that the legal right did not exist and identifying the particular privacy rights the law should recognize was the job of the legislature. MARTIN P. GOLDING, *LEGAL REASONING* 60-61, 64 (Broadview Press Ltd. 2001) (1984). Ironically, in 1903, New York was the first state to adopt both a right of privacy and a right of publicity statute. Jonathan Faber, *Indiana: A Celebrity-Friendly Jurisdiction*, 43 RES GESTAE: J. IND. BAR ASS'N (Mar. 2000), available at http://www.luminarygroup.com/Press-Center/Articlees/ResGestae_2000-03.pdf.

8. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 569 (1977); see also *Haelan Labs. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

[the] right of privacy . . . a man has a right in the publicity value of his photograph. . . . This right might be called a ‘right of publicity.’”⁹

On the heels of the Second Circuit’s decision, Melville Nimmer and William Prosser both wrote articles supporting the court’s decision.¹⁰ In 1954, Nimmer wrote that although publicity and privacy claims may overlap, the right of privacy was concerned with unwanted intrusion into an individual’s personal life, while the right of publicity was concerned with the uncompensated exploitation of an individual’s identity.¹¹ In 1960, William Prosser’s article, *Privacy*, created four separate torts out of privacy invasions, the fourth of which recognized “appropriation, for the defendant’s . . . advantage, of the plaintiff’s name or likeness.”¹² In 1977, the United States Supreme Court recognized the right of publicity in *Zacchini v. Scripps-Howard Broadcasting Co.* *Zacchini* brought suit when his human cannonball act was broadcast on television without his permission.¹³ The Court held that the right of publicity was a distinct claim from the right of privacy and that the First Amendment did not automatically entitle the broadcasting company to protection under the right of publicity.¹⁴

II. RIGHT OF PUBLICITY TODAY

Currently, uniform federal law does not protect an individual’s right of publicity.¹⁵ Thus, the right of publicity varies from state to state and is recognized in most states either through common law, statutory law, or both.¹⁶ The right of publicity is infringed when one appropriates the commercial value of another’s identity by using the person’s name, likeness, persona, or other indicia of the person’s identity for purposes of

9. *Haelan*, 202 F.2d at 868. Judge Frank needed to distinguish between the right of publicity and the right of privacy because New York had previously viewed privacy right as “purely personal and not assignable.”

10. See Russell J. Frackman & Tammy C. Bloomfield, *The Right of Publicity: Going to the Dogs?*, L.A. DAILY J., Sept. 1996, available at <http://www.gseis.ucla.edu/iclp/rftb.html>; see also Melvin Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954); William Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

11. See Nimmer, *supra* note 10, at 217.

12. Prosser, *supra* note 10, at 401.

13. See *Zacchini*, 433 U.S. at 565. The Supreme Court has not directly addressed the right of publicity since.

14. See *id.* at 567-68, 578.

15. See Lloyd Rich, *Right of Publicity* (2000), <http://www.publaw.com/rightpriv.html>.

16. See *id.* Most state statutes protect against unauthorized use for commercial purposes and advertising purposes. See *Hill v. Hayes*, 207 N.Y.S.2d 901 (Sup. Ct. 1960). Tennessee’s statute also protects against unauthorized use in fund raising or solicitation of donations or purchases. See *Gibbons v. Schwartz-Nobel*, 928 S.W.2d 922 (Tenn. App. 2003).

trade.¹⁷ Some states only recognize the right of publicity for celebrities or public personalities; other states recognize the right for all individuals.¹⁸ Whether the right of publicity survives the death of an individual also depends on the particular state.¹⁹

Generally, the right of publicity only protects the name, image, and likeness of an individual.²⁰ Most commonly, appropriation of identity occurs through use of the plaintiff's name or likeness.²¹ The way in which the individuals' names are used, rather than the mere use of the names, forms the basis of the identity element.²² Thus, not all uses of the plaintiff's name will infringe the plaintiff's right of publicity.²³

A right of publicity violation occurs when one intends to obtain a commercial advantage through the use of another's name or likeness.²⁴ Intent is established when an individual's name or likeness is used to attract customers to a product.²⁵ An intent to create the impression that the plaintiff is associated with the product is sufficient to satisfy the commercial advantage requirement.²⁶

17. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (1995).

18. See *ETW Corp. v. Jireh Publ'g, Inc.*, 2003 FED App. 0207P, ¶¶ 66-67 (6th Cir.); *Montgomery v. Montgomery*, 60 S.W.3d 524, 527 (Ky. 2001). Kentucky only recognizes the right of publicity for a person who is a public figure. See *id.* at 527-28; KY. REV. STAT. ANN. § 391.170 (2009). Texas only recognizes the right of publicity for deceased individuals, but does not protect the living. See TEX. PROP. CODE ANN. § 26.002.

19. See *Bosley v. Wildwett.com*, 310 F. Supp. 2d 914, 935 (N.D. Ohio 2004). In the states that find the right does survive death, the right of publicity is only permitted for celebrities. See also *Groucho Marx Prod. v. Day & Night Co.*, 689 F.2d 317, 319 (2d Cir. 1982). However, the states do vary in regard to length of the right post mortem.

20. See Jonathan Faber, *Indiana: A Celebrity Friendly Jurisdiction*, <http://www.msth.com/cm/custom/Indiana-a-celebrity-friendly-jurisdiction.pdf> (last visited Sept. 23, 2009). California, Nevada, Oklahoma, and Texas also provide protection to an individual's voice and signature. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (1995). Ohio further broadens the spectrum by prohibiting "any aspect of an individual's persona." *Bosley*, 310 F. Supp. 2d at 920.

21. See *id.*

22. See *Doe v. TCI Cablevision*, 110 S.W.3d 363, 369 (Mo. 2003); *Abdul-Jabbar v. GM Corp.*, 75 F.3d 1391, 1400 (9th Cir. 1996) (holding that use of Jabbar's former name, which he allegedly abandoned, still constituted a violation of his right of publicity because it met all the elements of the state of California's right of publicity statute).

23. See *TCI Cablevision*, 110 S.W.3d at 369.

24. See *id.*; see also *C.B.C. Distribution & Mktg., Inc. v. MLB Advanced Media, L.P. (CBC II)*, 505 F.3d 818, 822-23 (8th Cir. 2007), *cert. denied*, 128 S. Ct. 2872 (2008) (finding that there does not have to be any evidence that consumers thought there was endorsement for the commercial advantage element to be satisfied).

25. See *TCI Cablevision*, 110 S.W.3d at 371.

26. See *id.*; see also *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458, 461 (N.J. Super. Ct. 1967) (stating one is "entitled to relief when his name has been used without his consent, either to advertise the defendant's product or to enhance the sale of an article").

Numerous policy considerations also factor into the right of publicity analysis. Such considerations include protecting personal autonomy, preventing diminution in the value of one's identity from excessive use, and preventing false indications of endorsement.²⁷ Courts also consider the importance of preventing unjust enrichment, protecting one's ability to earn a living, and providing the performer with an economic incentive to perform and benefit the public.²⁸

III. IMPORTANT CASES PRE-CBC

A. *The Board Games*

In *Palmer v. Schonhorn Enterprises*, a group of professional golfers sued to enjoin the unauthorized use of their names and "profile sheets" that bore facts about their professional careers in the Pro-Am Golf Game.²⁹ The Superior Court of New Jersey held that the purpose and effect of using the names and profile sheets was to enhance the marketability of the product.³⁰ The court found that even though information about the athletes was readily available to the public, that did not extinguish the athletes' proprietary interests in their names and statistics.³¹ The court held:

[A]lthough the publication of biographical data of a well[-]known figure does not per se constitute an invasion of privacy, the use of that same data for the purpose of capitalizing upon the name by using it in connection with a commercial project other than the dissemination of news or articles or biographies does.³²

In *Uhlaender v. Hendricksen*, several professional baseball players, along with the players' association, sought to enjoin the manufacturer of a baseball table game from using the players' names without a licensing agreement.³³ The board games, "Negamco's Major League Baseball" and "Big League Manager Baseball," used the names and statistical information, such as batting and earned run averages, of several hundred Major League Baseball (MLB) players, identified by team, uniform number, and playing position.³⁴

27. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c (1995).

28. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576-77 (1977).

29. See 232 A.2d at 459.

30. See *id.* at 461.

31. See *id.* at 460-61.

32. *Id.* at 462.

33. See 316 F. Supp. 1277, 1277-78 (D. Minn., 5th Div. 1970).

34. See *id.*; see also *Rosemont Enters., Inc. v. Urban Sys., Inc.*, 340 N.Y.S.2d 144, 146-47 (App. Div. 1973). Because the plaintiff did not consent to the use of his name or his biographical

The District Court of Minnesota held that players and the players' association had proprietary or property interests in their names, sporting activities, and accomplishments sufficient to enable them to enjoin their use for commercial purposes.³⁵ The court further held:

It is this court's view that a celebrity has a legitimate proprietary interest in his public personality. A celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status. That identity, embodied in his name, likeness, statistics and other personal characteristics, is the fruit of his labors and is a type of property.³⁶

B. *The First Amendment Defenses*

In *Cardtoons L.C. v. MLB Players Ass'n*, a parody trading card producer sought to obtain a declaratory judgment that parody trading cards did not infringe on players' publicity rights.³⁷ The trading cards parodied MLB players by featuring cards with caricatures on the front and humorous commentary about their careers on the back.³⁸ The cards were made so that the professional athletes who were being parodied were identifiable based on the caricatures and commentary.³⁹ The United States Court of Appeals for the Tenth Circuit determined that the cards violated Oklahoma's right of publicity statute because the names of the players were used for a product that was sold for profit.⁴⁰ However, the court determined that the trading cards were protected under the First Amendment, because parody speech is considered a type of "commentary on an important social institution," and because baseball cards have been used to inform the public about baseball players for over a century.⁴¹

In *Gionfriddo v. MLB*, four former professional baseball players sued MLB for using their names and statistics in assorted All-Star and World Series programs without first obtaining their consent.⁴² The

data in the game, his right of publicity was violated. The First Amendment did not apply because the defendants were not disseminating news or educating the public about the achievements of the plaintiff but rather "selling a commodity, a commercial product, an entertaining game of chance . . . [and] the use of [the] plaintiff's name [and] biographical data . . . is not legitimate to the public interest. It is merely the medium used to market a commodity." *Id.* at 146.

35. *See Uhlaender*, 316 F. Supp. at 1278-79, 1283.

36. *Id.* at 1282.

37. *See* 95 F.3d 959, 962 (10th Cir. 1996).

38. *See id.* at 962-63.

39. *See id.* 963.

40. *See id.* at 968.

41. *See id.* at 969.

42. *See* 114 Cal. Rptr. 2d 307, 311 (Cal. Ct. App. 2001).

California Court of Appeal began the balancing process between the right of publicity and First Amendment considerations by noting that the information conveyed by MLB was factual data concerning the players, their performance statistics, and descriptions and video of their play, which the court described as “mere bits of baseball’s history.”⁴³ The court further noted that “[e]ntertainment features receive the same constitutional protection as factual news reports.”⁴⁴ The court held that the speech was protected because MLB “ma[de] historical facts available to the public [and t]he recitation and discussion of data concerning the athletic performance of these [athletes] command[ed] a substantial public interest.”⁴⁵

In *ETW v. Jiren Publishing Inc.*, the licensing agent for Tiger Woods sued the publisher of artwork that depicted Woods’ victory at the Master’s Tournament in Augusta for violation of Woods’ right of publicity.⁴⁶ In addition to Woods, several other golfing greats were shown in the background.⁴⁷ In quoting the Restatement (Third) of Unfair Competition, the United States Court of Appeals for the Sixth Circuit noted that “[t]he right of publicity as recognized by statute and common law is fundamentally constrained by the public and constitutional interest in freedom of expression.”⁴⁸ The court also indicated that the limitation on the right of publicity “extends to use in ‘entertainment and other creative works . . . fiction and non fiction.’”⁴⁹ The court, in adopting the Tenth Circuit’s reasoning in *Cardtoons*, found that the artwork had substantial informational and creative content that outweighed any adverse affect on ETW’s market and that the work did not violate Woods’ right of publicity.⁵⁰

C. Missouri Right of Publicity

In *Doe v. TCI Cablevision*, Tony Twist, a hockey player, brought a right of publicity claim against a comic book producer for using his

43. See *id.* at 313-14.

44. *Id.* at 314.

45. *Id.* at 315.

46. See 2003 FED App. 0207P, ¶¶ 2-6 (6th Cir. 2007). ETW also sued for trademark infringement, dilution of the mark, unfair competition and deceptive practices, and unfair competition and trademark infringement under Ohio common law. *Id.* ¶ 6.

47. See *id.* ¶ 3.

48. *Id.* ¶¶ 24-25 (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (1995)).

49. See *id.* ¶ 25 (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c).

50. See *id.* ¶¶ 35-36. Also included in the court’s decision was the transformative elements test adopted by the Supreme Court of California and used to determine where the proper balance lies between First Amendment and Woods’ intellectual property rights. *Id.* ¶¶ 38-39.

persona as the basis for “Antonio Twistelli,” one of the comic book characters.⁵¹ Although Twist and the character had few shared characteristics outside of similar names and their “tough guy” images, the writer admitted that Antonio Twistelli was based on Twist.⁵² The elements of Missouri’s right of publicity cause of action are “(1) that defendant used plaintiff’s name as a symbol of his identity (2) without consent (3) and with the intent to obtain a commercial advantage.”⁵³

The Missouri Supreme Court adopted the “predominant purpose” test to balance the tensions between the First Amendment and publicity rights.⁵⁴ In holding that Twist’s publicity rights were violated, the court reasoned that the predominant purpose of “Twistelli” was commercial in nature; there was no commentary about Twist himself and thus the inclusion of his identity was a strategic maneuver to sell comic books.⁵⁵

IV. CBC

A. *Fantasy Baseball Background*

Fantasy sports leagues constitute a billion-dollar industry with over fifteen million players worldwide.⁵⁶ Currently there are fantasy leagues for baseball, football, hockey, soccer, and basketball, among other sports.⁵⁷ In fantasy leagues, customers select and trade players to form their own teams, the success of which is based on the players’

51. See 110 S.W.3d 363, 367 (Mo. 2003).

52. See *id.* at 366.

53. *Id.* at 369.

54. See *id.* at 374. The predominant purpose test is described below:

If a product is being sold that predominantly exploits the commercial value of an individual’s identity, that product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some “expressive” content in it that might qualify as “speech” in other circumstances. If, on the other hand, the predominant purpose of the product is to make an expressive comment on or about a celebrity, the expressive values could be given greater weight.

See also Michael S. Kruse, *Missouri’s Interfacing of the First Amendment and the Right of Publicity: Is the Predominant Purpose Test Really That Desirable?*, 69 MO. L. REV. 799, 815-16 (2004) (indicating that the predominant purpose test has been criticized for producing erratic results and chilling artistic expression).

55. *TCI Cablevision*, 110 S.W.3d at 374.

56. See Matthew G. Massari, *When Fantasy Meets Reality: The Clash Between On-Line Fantasy Sports Providers and Intellectual Property Rights*, 19 HARV. J.L. & TECH. 443, 445 (2006) (discussing who has rights to the players’ statistics and the problems associated with the use of these statistics in fantasy sports).

57. See *id.*

performances on their actual teams.⁵⁸ Currently there are dozens of fantasy league Web sites; some provide their services free of charge, and for more avid fans of the fantasy games, there are leagues that charge fees.⁵⁹

B. The Noted Case

In 2005, Major League Baseball Advanced Media, L.P. (Advanced Media), the Internet arm of MLB, entered into a licensing agreement with the players' association for the rights and trademarks for interactive media.⁶⁰ On February 4, 2005, Advanced Media offered C.B.C. Distribution & Marketing, Inc. (CBC) a license to promote Advanced Media's fantasy baseball games on CBC's Web site, but not to promote its own fantasy games.⁶¹ In response, on February 7, 2005, CBC filed for declaratory judgment, claiming it believed Advanced Media would bring suit against CBC for the operation of its own fantasy baseball games during the 2005 season, as well as for injunctive relief to prevent Advanced Media from interfering with CBC's fantasy sports games.⁶² Advanced Media filed a counterclaim that CBC violated the players' right of publicity by using the players' names in conjunction with their playing statistics in fantasy baseball games.⁶³ CBC responded that it did not violate the players' right of publicity, because their use of the players' names and statistics was preempted by copyright law, and even if CBC had violated the players' right of publicity, CBC was protected by the First Amendment.⁶⁴

The district court found that use of players' names in conjunction with playing statistics in fantasy baseball leagues did not violate the

58. See *C.B.C. Distribution & Mktg., Inc. v. MLB Advanced Media, L.P. (CBC I)*, 443 F. Supp. 2d 1077, 1080 (E.D. Mo. 2006), *aff'd*, 505 F.3d 818 (8th Cir. 2007), *cert. denied*, 128 S. Ct. 2872 (2008).

59. See Howells, *supra* note 5, at 488.

60. See *CBC I*, 443 F. Supp. 2d at 1080-81. From 1995 to 2004, CBC entered into license agreements with the Players' Association. *Id.* at 1080. The 2002 License Agreement, which superseded all previous agreements, gave CBC the right to use the trademarks and rights of the Players' Association, including the players' names, likenesses, and playing records. *Id.* The 2002 Agreement also stated that upon termination, CBC would have no right to use their rights and trademarks. *Id.* at 1081. In 2005, Advanced Media held the license for use of the rights and trademarks from the Players' Association for most interactive media. *Id.*

61. *Id.* at 1081.

62. See *id.* at 1081-82. CBC alleged that Advanced Media claimed it exclusively owned the use of players' statistics in conjunction with their names, thus preventing other providers from offering fantasy baseball games. *Id.* at 1081.

63. See *id.* at 1082.

64. See *id.* at 1082-83.

players' right of publicity.⁶⁵ The court also stated that the right to free expression under the First Amendment took precedence over any right of publicity claimed in this case.⁶⁶ Thus, the court held that CBC's use of the players' names and statistics was lawful.⁶⁷

In determining that the players' right of publicity was not violated, the court analyzed whether CBC intended to obtain a commercial advantage through its use of the players' names and statistics.⁶⁸ The court determined that nothing about the fantasy games indicated the players were associated with the games and that the use of the names was not intended to draw customers away from other fantasy game providers because all fantasy games used players' names and statistics.⁶⁹ Further, the court distinguished this case from other cases where players' pictures were used in conjunction with products, creating the impression that the players endorsed those products.⁷⁰ Because CBC did not use the players' pictures in association with its product, the court found the use did not suggest that the baseball players were endorsing their fantasy games.⁷¹

In support of its decision that the right of publicity was not violated, the court noted that, regarding the baseball players, CBC used only facts about them, rather than their personas, and reasoned that the use of a name alone does not always or necessarily amount to the use of a symbol of one's identity.⁷² The court concluded that the use of the players' names in conjunction with their statistics did not amount to a use as a symbol of the players' identities in this case and therefore did not meet the requisite elements for a right of publicity claim.⁷³

Additionally, the court considered whether CBC's use of the players' names and statistics violated the policies underlying the right of publicity.⁷⁴ The court reasoned that CBC's use of the players' names and statistics did not affect the players' ability to earn a living, as the players earned their living from playing baseball and securing endorsement deals, not from publications of statistical information about their performance, which is part of the public domain.⁷⁵ The court further

65. *See id.* at 1089.

66. *See id.* at 1099.

67. *See id.* at 1107.

68. *Id.* at 1085.

69. *See id.* at 1086.

70. *See id.* at 1087.

71. *See id.* at 1086-87.

72. *See id.* at 1088-89.

73. *See id.* at 1089.

74. *See id.*

75. *See id.* at 1091. The court failed to address the possibility that unlimited access to the athletes' likenesses would diminish their value and thus decrease the number of endorsement

found that use of the players' names and statistics in the fantasy baseball games did not decrease the value of the players' commercial identities, but rather increased such value by increasing interest in and consumption of baseball broadcasts and by increasing attendance at baseball games.⁷⁶

Assuming *arguendo* that the players' right of publicity was violated, the court held that the First Amendment preempted the players' right of publicity.⁷⁷ The court determined that the First Amendment was applicable in cases involving the expression of nontraditional factual data that entertains and is commercial in nature.⁷⁸ Although CBC's use of the players' names and statistics online in a fantasy baseball game may have been an untraditional means of expression, the expression did not receive less protection.⁷⁹ The court reasoned that names and statistics used by CBC were "bits of baseball history" that deserved First Amendment protection.⁸⁰ The court held that although these historical facts were used to make a profit and for entertainment purposes through an interactive medium, their constitutional protection was not affected.⁸¹ Further, the court found CBC's expression through the fantasy games was expressive rather than commercial speech, and thus deserved full constitutional protection.⁸² CBC expressed factual information about the baseball players but did not use the information to advertise its fantasy games.⁸³

Because the First Amendment protected the expression of the players' names and playing records, the district court contrasted the magnitude of the right of publicity against that of the right of free expression under the First Amendment.⁸⁴ The court found three factors that weighed in favor of free expression. First, the players' commercial identities were not exploited; second, CBC had no intent to obtain a commercial advantage over other fantasy league providers; and third, CBC's use of the players' name and playing records did not affect the players' ability to make a living.⁸⁵ The court also considered that even

deals, which the court found so lucrative, if advertisers wanted celebrities who appeared to be more exclusive.

76. *Id.* Interestingly, the court did not address the issue of protection of goodwill as a policy, nor did the court make an attempt to differentiate the players' right to control production of trading cards and video games, or explain why fantasy leagues should be any different.

77. *See id.* at 1095.

78. *See id.* at 1092-95.

79. *See id.* at 1092.

80. *See id.* at 1093.

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

82. *See id.* at 1094-95.

83. *See id.*

84. *See id.* at 1095-1100. The district court chose not to adopt the predominant purpose test and used the balancing of interests test instead.

85. *See id.* at 1096-97.

without the right of publicity, the athletes were sufficiently well compensated to provide incentives for performance.⁸⁶ Included in the court's balancing test was the fact that there was little likelihood that consumers mistakenly believed the players endorsed or were associated with the fantasy baseball league product.⁸⁷ Further, the court found that CBC was not unjustly enriched because the players' names and statistics were widely available in the public domain.⁸⁸ Because of the strong public interest in using the players' names and records to measure performances and to understand the game, the court held that First Amendment guarantees prevailed over the right of publicity.⁸⁹ Public policy also supported the court's decisions, because fantasy leagues would be impossible without the use of players' names and statistics.⁹⁰

The Eighth Circuit affirmed the district court's decision in favor of CBC's use of the players' names and statistics, but for different reasons in *CBC II*.⁹¹ The circuit court reversed the lower court in part by acknowledging that the players had a right of publicity in their name as they satisfied all three elements that make up Missouri's right of publicity claim, noting that CBC was, in fact, "us[ing] baseball players' identities . . . for commercial advantage."⁹² However, when balancing the state right of publicity laws against First Amendment considerations, the court also found that the First Amendment prevailed.⁹³ The circuit court held that the use of the players' names and statistics was a form of speech that the First Amendment protects, like speech that informs users about baseball, because the difference between the two forms of speech cannot always be clearly defined.⁹⁴

Agreeing with the lower court, the Eighth Circuit indicated that because baseball is our national pastime, the public takes more interest in its players and statistics.⁹⁵ Also, adopting the lower court's policy

86. *See id.* at 1097-98.

87. *See id.*

88. *Id.* at 1098-99.

89. *Id.* at 1098.

90. *Id.* at 1099.

91. *See* C.B.C. Distribution & Mktg., Inc. v. MLB Advanced Media, L.P. (*CBC II*), 505 F.3d 818, 822-23 (8th Cir. 2007).

92. *See id.* at 822-23; *see also* Doe v. TCI Cablevision, 110 S.W.3d 363, 369 (Mo. 2003). The elements of Missouri's right of publicity cause of action are "(1) that defendant used plaintiff's name as a symbol of his identity (2) without consent (3) and with the intent to obtain a commercial advantage." *TCI Cablevision*, 110 S.W.3d at 369.

93. *See CBC II*, 505 F.3d at 823.

94. *See id.* The court noted that "the line between the informing and the entertaining is too elusive for the protection of th[e] basic right [of publicity]." *Id.* at 823 (internal citations and quotations omitted).

95. *See id.* at 824.

considerations, the circuit court indicated that the players' monetary interests were already protected by their large salaries so there was less of an economic incentive to protect the players' publicity rights.⁹⁶

V. WHY THE EIGHTH CIRCUIT GOT IT WRONG

The Eighth Circuit's decision, which it based on content of speech, speaks more about the values of today's society, free speech, and fantasy leagues, rather than following the precedent set out by previous courts.

In *Palmer* and *Uhlaender*, the court found that statistics and names used without consent in fantasy board games constituted a misappropriation of the athletes' rights in their names.⁹⁷ Although the plaintiffs did not explicitly sue under the right of publicity, because many states did not recognize that right at the time, the courts used a similar analysis and found that the athletes did have an inherent right to profit from their own names and the statistics they created.⁹⁸

In *CBC II*, the court dismissed these two very influential cases as being an archaic form of publicity rights law.⁹⁹ While the use of technology has made the board games available over the Internet, the board games in *Palmer* and *Uhlaender* and the fantasy game in *C.B.C. Distribution & Marketing, Inc. v. MLB Advanced Media, L.P. (CBC I)* and *CBC II* provided fans an opportunity to create a new game based on statistics of the sport they love. It seems hard to comprehend how the court here found that the players' names and statistics used in the fantasy league were somehow of a different nature than those used thirty years prior and, therefore, free to use.

Additionally, the court did not address how the players' names and statistics are of more interest to the public now than those of the players in *Uhlaender*, especially when the information is so widely available through other sources that do not infringe on the players' right of publicity.

The *CBC II* court based its decision that the "speech" deserved First Amendment protection because it informed users about baseball in general, the players, and their performances.¹⁰⁰ The way fantasy leagues use names and statistics, simply put, is not news reporting. Statistics and

96. *See id.*

97. *See Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458, 461 (N.J. Super. Ct. Ch. Div. 1967); *Uhlaender v. Hendricksen*, 316 F. Supp. 1277, 1282-83 (D. Minn., 5th Div. 1970).

98. *See Palmer*, 232 A.2d at 462; *Uhlaender*, 316 F. Supp. at 1282-83.

99. *See C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P. (CBC I)*, 443 F. Supp. 2d 1077, 1088 & n.12 (E.D. Mo. 2006).

100. *See id.*

names are not used in fantasy leagues for users to read and be informed. Instead, the statistics and names are used to play the game and create winners and losers in the league. The court should have expanded its focus from what information was disseminated to what the purpose was for the dissemination.¹⁰¹ Because the names and statistics are not the end product, but are instead used to create something else, their use cannot be considered deserving of First Amendment protection.

In an attempt to legitimize its decision, the court tied this type of speech to that of *Cardtoons* and *Gionfriddo* by suggesting that the information disseminated serves an important purpose of informing the public about baseball.¹⁰²

However, because the statistics and names can be distinguished from the information in *Cardtoons*, the information in CBC's case is not expressive and does not deserve protection. In *Cardtoons*, the court defended the speech on the trading cards because of its parodic nature, which they determined was informative social commentary.¹⁰³ The problem with comparing the information CBC used to the commentary on the trading cards goes back to purpose; the trading cards made comments about the players and poked fun at their personalities and egos, but the purpose of using the statistics and names within the fantasy game was not to inform. While information may be a by-product of the CBC's primary purpose for their use, the main purpose of using names and statistics in fantasy leagues is to entertain by creating a new game where fans can interact as managers of teams and play other fans' teams.

In the balancing of interests, the court held that the balance leaned more towards First Amendment protection than recognizing publicity rights because the highly compensated players' incentive to play baseball would hardly be impacted by the lack of protection against the use of their names and statistics.¹⁰⁴

The problem with the above argument is that most celebrities who bring right of publicity claims are highly compensated for whatever they do, so to suggest that there should be no right of publicity when the plaintiff makes a certain amount of money would leave many plaintiffs without recourse for the harm they suffered. Further, the right of publicity grew out of the right of privacy, which means much of the right of publicity is about defending one's honor and allowing one to decide

101. See *Doe v. TCI Cablevision*, 110 S.W.3d 363, 373-74 (Mo. 2003).

102. See *C.B.C. Distribution & Mktg. v. MLB Advanced Media, L.P. (CBC II)*, 505 F.3d 818, 823-24 (8th Cir. 2007).

103. See *Cardtoons, L.C. v. MLB Players Ass'n*, 95 F.3d 959, 972, 974 (10th Cir. 1996).

104. See *CBC II*, 505 F.3d at 824.

with which products they chose to be associated. As a result of *CBC II*, players no longer have the right to choose what games they wish to be associated with, allowing game producers to use players' names without their consent and without regard for the players' wishes to be disassociated from the product. This can affect endorsement deals and even has the potential to injure the players' reputations, especially if the game is associated with gambling.

The court also failed to address the notion of "theft of goodwill" and "theft of property." Not only have the players lost their ability to control the goodwill associated with their names under the Eighth Circuit's decision, but the court allowed CBC to take property—names that are not their own—and to profit from their use. The court failed to address what social purpose is served by having fantasy leagues take property without compensation. States recognized the right of publicity, in part, to avoid unjust compensation, which is what occurs when CBC uses players' names and statistics without paying the players.

VI. FUTURE OF THE RIGHT OF PUBLICITY

The Eighth Circuit appears to have created a standard that indicates that absent an advertisement or confusion of endorsement, the First Amendment will outweigh publicity rights. The denial of writ of certiorari by the Supreme Court suggests that the standard is here to stay.

If this case is viewed narrowly, then it will mainly stand for players' names and statistics being in the public domain and available for use without needing a license from the players; however, if the holding of the case is viewed broadly, then the players' names and statistics represent their identities. Then trading card producers and video games manufacturers may also bring declaratory judgment suits asserting that their unlicensed uses are also protected by the First Amendment's catchall "free speech."

Because fantasy sports is a billion-dollar industry that covers most professional sports and some college sports, other fantasy league providers will consider this decision as the go-ahead to cancel their licenses with the players' association but continue to use the players' names and statistics without providing compensation.

Additionally, this judicial green light raises the issue of goodwill and whether the players actually have the ability to control the use of their names and statistics when the use is associated with gambling or any other Web site activities that an athlete may find immoral. Such an association may compromise players' reputations, yet they may have no

control over the use as long as courts find some type of *informative* speech in the use.