WHO IS YOUR STARTING PITCHER? - ROGER CLEMENS OR #22 ON THE YANKEES?: WHY MAJOR LEAGUE BASEBALL PLAYERS SHOULD HAVE RIGHTS IN THEIR NAMES.

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Baseball has always been America’s past time. Over time, football has eclipsed baseball in popularity and national rankings but baseball is still known as America’s past time. Just like America, baseball has gone through some ups and downs. Baseball is celebrating Barry Bonds’ chase of Hank Aaron’s home run record and at the same time, it has been dealing with a cloud suspicion regarding alleged steroid use. Even though the media has scrutinized the steroid issue, the media has virtually ignored another looming issue baseball faces – whether Major League Baseball and the Major League Baseball Players’ Association have a proprietary right of a player’s name in conjunction with their statistics.

I. Background

Initially, fantasy baseball was a mere hobby amongst avid sports fans. ¹ But for millions, it has mutated into an obsession of statistics. ² Millions of people are obsessed with fantasy sports because fantasy sports allow a person to act as an owner and general manager of their own imaginary team. ³ Although people enjoy being a manager and/or general manager of their own team, when fantasy baseball was first introduced, people refused to play because playing was tedious. It required one to compile statistics manually and that was tedious and time consuming. ⁴

Fantasy baseball started in a French restaurant in Manhattan in 1980. ⁵ Its creator, Dan Okrent, was a Sports Illustrated writer. ⁶ Okrent’s creation was not what we are familiar with today, but it has grown and developed into a national obsession because of the Internet. Prior to the Internet, people would play fantasy baseball by reviewing box scores and tallying statistics. Participants would either call each other and relay statistics over the phone, or create an extensive excel spreadsheet that detailed player’s statistics and how those statistics affected a participant’s ranking. With the advent of the Internet, manually computing statistics and rankings was eliminated, which in turn, made it convenient and appealing for people to play

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² Id.
fantasy baseball. Today, over 15 million people play fantasy sports. It is likely that interest and participation will continue to increase.

With the steady increase in participation over the last 20 years, fantasy baseball has become an advertiser’s dream.Advertisers know fantasy sports participants will view their team on a daily, weekly, or monthly basis, and want to place advertisements on those websites. Fantasy sports providers make significant revenue from fantasy sports and truly fear losing the privilege of providing fantasy sports.

A. And Then Comes Trouble

In 1968 Major League Baseball entered into a collective bargaining agreement with Major League Baseball Player’s Association. The agreement preserved language that revised the ability of Major League Baseball player’s to protect the commercial use of their identities. Before 1947, players did not have a right to control the commercial use of their identity.

Today, Major League Baseball Player’s Association is responsible for group licensing of player’s names and likenesses. Major League Baseball Player’s Association is one of the

7 See id. (“The biggest headache for the commissioner used to be compiling team statistics. That was before the Internet, that is, and development of stats services.”).
9 See Sheila G. Miller, Fantasy football no longer just for men, North Jersey Media Group, September 2, 2006, http://www.northjersey.com/page.php?qstr=eXJpcnk3ZjczN2Y3dnFlZUVFeXkxMTkmZmdiZWw3Zjd2cWVIUV5eTY5ODY2ODAmeXJpcnk3Zjc2N2Y3dnFlZUVFeXk2 (discussing fantasy sports participation has increased 7 to 10 percent each year) (last visited March 10, 2007).
10 See Paul R. La Monica, Fantasy Football ., real money, CNN: Money, August 11, 2006, http://money.cnn.com/2006/08/11/news/companies/fantasyfootball/ (acknowledging that “fantasy sports participants was and continues to be one of the most engaged audiences on the Internet.”) (last visited March 10, 2007).
11 See e.g., http://sports.yahoo.com/ (showing a State Farm advertisement for car insurance in hope that the community of fantasy sports participants will become new customers or talk about their product) (last visited February 15, 2007).
12 See generally, La Monica.
strongest unions in professional sports and has always tried to protect the interests of players on and off the field. Accordingly, Major League Baseball Player’s Association would never license the use of the proprietary interest of players without authorization. 17 In particular, in 1995 Major League Baseball began licensing the right to use player’s names in conjunction with their statistics. However, even though Major League Baseball licenses player’s statistics, it is not clear whether statistics associated with Major League Baseball players’ are a proprietary interest that can be legally protected.

When Major League Baseball realized there was a financial interest for a player’s statistics, they worked with Major League Baseball Player’s Association to create licenses that would be extended to fantasy baseball providers. Over time, several fantasy baseball providers have cropped up. For example, today, Yahoo!, CBS Sportsline, FOX, ESPN, USA Today, and several other lesser known names provide fantasy baseball. 18 Since there are so many fantasy baseball providers, when Advanced Media, the media arm of Major League Baseball, decided to force fantasy baseball providers obtain licenses to provide fantasy baseball, nobody was able to foresee the potential trouble that was to come.

In 2005, Major League Player’s Association entered into an agreement with Advanced Media that granted Advanced Media exclusive rights to exploit all interactive media. 19 In particular, Advanced Media controlled the licensing of fantasy baseball. On or about January 19, 2005, Advanced Media executive George Kliavkoff abandoned the prior licensing process and invited fantasy baseball providers to submit a proposal for a license. 20 Advanced Media flexed it’s muscle and extended licenses to a limited number of participants, namely, Yahoo!, CBS Sportsline, ESPN and FOX. 21 Major League Baseball refused to grant licenses to several companies that wanted to provide fantasy baseball, in particular, CDC Distributing Inc. (“CBC”), a company that had previously held a license.

When Major League Baseball rejected CBC’s proposal, CBC has previously successfully overseen 11 fantasy baseball games and one playoff game. Prior to the 2005 Agreement between Major League Baseball Players Association and Advanced Media, CBC was allowed to offer fantasy baseball because it entered into multiple license agreements with Major League Baseball Player’s Association. On July 1, 2005 CBC entered into a contract with Major League Baseball

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20 Id.
21 Id.
Players Association that extended through December 31, 2004. \(^{22}\) Given this history, CBC was surprised to have its proposal for a license rejected as a result of this new agreement. \(^{23}\)

Instead of sitting on their hands, CBC continued offering fantasy baseball. Meanwhile, CBC filed a declaratory judgment action against Major League Baseball, Major League Baseball Player’s Association and Advanced Media to determine whether there is a proprietary interest in Major League Baseball players’ names that warrant a license. \(^{24}\) The case came before the Eastern District of Missouri and, in particular, it addressed whether the right of publicity protects Major League Baseball players from unauthorized use of their name in conjunction with their statistics, whether copyright law protects Major League Baseball players, and if the First Amendment protects CBC unauthorized use.

Herein below, this note analyzes why the Eastern District of Missouri incorrectly held that Major League Baseball players have no proprietary interest in their names in conjunction with their statistics. Specifically, part I will address why copyright protection should not be extended; part II will address why the Eastern District of Missouri should have extended protection through the right of publicity; part III will address why First Amendment protection should not protect fantasy baseball providers use of Major League Baseball players’ name in conjunction with statistics; and part IV will conclude what should have happened and how Major League Baseball could have prevented the situation.

II. Copyright Cannot Help Major League Baseball

The primary purpose of copyright law is to promote the progress of science and the growth of the arts. \(^{25}\) In short, Congress intended to foster the growth of knowledge. \(^{26}\) Accordingly, the hallmark of copyright law is protecting writers and/or author’s interests. However, protection cannot be extended to fact and/or ideas. \(^{27}\) Facts cannot be protected because they do not display a modicum of creativity, and if copyright law provided protection for facts, then the purpose of copyright protection would be marginalized. \(^{28}\) Copyright law protects the fixed expression or manifestation of an idea instead of the fundamental idea itself. \(^{29}\)

Information such as biographical data, historical information, or scientific data cannot be extended copyright protection because they are fundamental ideas and do not have a fixed expression. \(^{30}\) Likewise, statistics are not copyrightable because they are facts that do not

\(^{22}\) Id.
\(^{23}\) Id.
\(^{24}\) Id.
\(^{27}\) Id.
\(^{28}\) Id.
\(^{30}\) See National Basketball Ass’n v. Motorola, 105 F.3d 841, 847-48 (2d. Cor. 1997) (acknowledging the live televcasts of National Basketball Association games are copyrightable
However, when facts are organized in unique manner, and they illustrate some modicum of creativity, then they will be provided protection. For instance, in the seminal case *Feist Publications, Inc. v. Rural Technologies Services Co., Inc.*, a directory of names (i.e. facts) was provided copyright protection because the manner in which the compilation was assembled was unique and displayed a modicum of creativity. The collection of facts used in conjunction with Major League Baseball players’ name on fantasy baseball websites cannot be protected, because the compilation of facts is not unique and does not display a modicum of creativity. Fantasy baseball providers such as, Yahoo!, CBS Sportsline, FOX, and ESPN all use statistics that can be found in a newspaper and they display these facts in the same form. The only modicum of creativity present in fantasy baseball is the forum itself, which is different from the display of facts and statistics as they appear in newspaper and other print media. Even though copyright protection cannot be extended to Major League Baseball players for the use of their statistics in conjunction with their name, Major League Baseball players should seek protection of their pecuniary interest through the right of publicity.

### III. Maybe the Right of Publicity Can Protect Major League Baseball

The right of publicity attempts to protect the proprietary interest of an individual’s name, likeness, voice, and/or other personal attributes of a celebrity when used for commercial gain. The right to publicity is not explicitly stated in the Constitution and there is no federal law governing the right of publicity. By all accounts, the right of publicity is an outgrowth of the common law right to privacy. The common law right to privacy was established because Louis Brandeis and Samuel Warren persuasively wrote about the right to privacy in their essay “The Right to Privacy”. Soon after the article was published, Georgia and 14 other states recognized the right to privacy.

As time wore on, even though the right to privacy was beneficial, by itself, it was no longer adequate to meet the expanding needs and demands of the 20th century. In particular, with the advent of television, motion pictures, and the Internet, people became enamored of

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31 See *Motorola*, 105 F.3d at 847 (explaining that player’s records are purely factual information which any patron could acquire by watching the game or reading the newspaper).
32 *Fiest*, 499 U.S. at 345.
33 Id. at 340.
34 See id. at 345.
36 Id. (explaining how the Louis Brandeis and Samuel Warren’s article shaped the right to privacy).
37 Id.
38 Id. (discussing how the right to privacy no longer is sufficient to protect rights now encompassed under the right of publicity).
Accordingly, fascination with celebrities made it difficult for celebrities to enjoy the “solitude and privacy” that Brandeis and Warren had in mind.  

However, society believed, and still believes, privacy is something celebrities do “not want, or need.” Notwithstanding this nonsensical notion, celebrities enjoy their privacy and do not want their, “name, photograph, and likeness reproduced and publicized without his consent or without remuneration.” Essentially, when celebrities’ names, photos or likeness is used they want to be compensated if it is used for commercial purposes. Unfortunately, celebrities were not able to adequately find protection for the pecuniary value of their name, photographs or likeness under the right to privacy.  

At this point, courts resorted to nontraditional legal theories to protect celebrity’s pecuniary rights. The term, ‘right of publicity’, which is used today, spawned from a court’s frustration with protecting a celebrity’s interests through the right to privacy. When the right of publicity was created, it was only known and enforced in specific states. Then, the Supreme Court provided the groundwork for states to individually enforce and protect the right of publicity. Today, the right of publicity has blossomed to protect the pecuniary interest for the commercial exploitation of one’s “self” and/or a person’s name, nickname, aliases, signature, likeness, voice, catch phrases, and personality characteristics.

Even though several courts have dealt with the right of publicity, the issue of whether an individual has a pecuniary interest in his name in conjunction with their performance statistics was an issue of first impression under the right of publicity and will be discussed and speculated for sometime.

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40 Louis Brandies & Samuel Warren, The Right to Privacy, 4 Harv. L. Rev. 193, 196 (1890). (noting the right to privacy is intended to create protections for everyone).
42 Id., at 204.
43 Id.
44 Id.
45 Id.
46 See Haelan Labs. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953) (holding that under New York statute a person has exclusive rights in themselves. The right became known as the right of publicity because people of celebrity status were believed to have the right to bar others from rights in themselves).
48 Id. (before the Supreme Court heard Zacchini application of the right of publicity was inconsistent and sporadic).
50 Bolitho, supra note 4, 913.
of Major League Baseball player’s names in conjunction with their statistics violated Major League Baseball players’ right of publicity.

A. Commercial Advantage Element of the Right of Publicity

Prevailing case law indicates that, “a celebrity’s legal right of publicity is invaded whenever his identity is intentionally appropriated for commercial purposes.”\(^{51}\) Intentional appropriation can be shown with direct evidence.\(^ {52}\) For example, using a person’s name or likeness to “attract attention to a product” will be sufficient to show that the commercial advantage element of the right of publicity was violated.\(^ {53}\)

Despite the obvious intent of protecting the commercial advantage element of the right of publicity, the Eastern District of Missouri reasoned that, “there is nothing about CBC’s fantasy games which suggest that any Major League Baseball player is associated with CBC’s games or that any player endorses the games in that way.”\(^ {54}\) However, regardless of their intention, using Major League Baseball players’ to entice participants indicates that players are related to their fantasy baseball game.\(^ {55}\) Further, the Eastern District Court of Missouri analogized the use of Major League Baseball players’ name and statistics to the use of their name in conjunction with their statistics in a box score.\(^ {56}\) But, use of a Major League Baseball players’ name in conjunction with their statistics is primarily used to attract potential participants to CBC’s products, not to broadcast sports scores.\(^ {57}\)

CBC, like Yahoo!, CBS Sportsline, FOX, ESPN, etc., want to attract fantasy baseball participants because they are businesses that strive to make money. For instance, advertisement revenue and entrance fees appear to be significant sources of revenue for fantasy baseball providers.\(^ {58}\) The Fantasy Sports Trade Association estimates that 16 million U.S. adults (18+) played fantasy sports in 2006.\(^ {59}\) From those 16 million participants, there is a $1-2 billion

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\(^{51}\) Carson, 698 F.2d at 837.
\(^{52}\) See Doe v. TCI Cablevision, 110 S.W. 3d 363, 371 (Mo. 2003) (en banc) (explaining there must be direct evidence that a party appropriated a person’s likeness or persona for commercial advantage).
\(^{53}\) Id.
\(^{54}\) Id.
\(^{55}\) Id.; See also TCI, 110 S.W. 3d at 371 (noting regardless of TCI’s intention the actions indicated Tony Twist was associated with the product).
\(^{56}\) CBC, 2006 WL 2263993 at 6.
\(^{57}\) See TCI, 110 S.W. 3d at 371.
\(^{58}\) See generally http://www.cdmssports.com/games.php (The website has several companies advertising on the site, in particular, the page that everyone of CBC’s fantasy games. In addition, the page informs players that there is an entrance fee for participation in “Diamond Challenge Fantasy Baseball” and “Fantasy Baseball 2007”) (last visited May 1, 2007).
annual economic impact within the fantasy sports industry and a $3-4 billion annual economic impact upon the sports industry in general. Because Major League Baseball players fuel fantasy baseball, the profits derived should be attributed to Major League Baseball players. All in all, because Major League Baseball players appear to entice participation, it appears that there is an association between CBC, Yahoo! CBS Sportsline, ESPN, FOX, etc. and Major League Baseball. That being said, people would not participate in fantasy baseball if Major League Baseball players’ names were not associated with statistics.

However, the Eastern District Court of Missouri never sufficiently established that CBC did not commercially exploit Major League Baseball players’ right of publicity. Instead, the Court digressed into a breakdown of how CBC did not “attract customers away from any other fantasy game provider.” Determining whether one commercially exploited a Major League Baseball player is different from determining whether a company lured customers away from another fantasy baseball provider. Even using the Eastern District of Missouri’s line of reasoning, CBC is unlikely to steal many customers away from Yahoo!, CBS Sportsline, ESPN, FOX, or any of the well known fantasy baseball providers, because people are not likely to be swayed away from a small provider if they intend on playing with the bigger providers. Further, even if participants chose CBC over the other well-known providers, the total numbers would be insignificant.

The commercial advantage element should have focused on Major League Baseball players’ ability to commercially exploit their pecuniary interest in their name. All things being considered, I believe the Eastern District Court of Missouri was afraid to create a monopoly of rights for Major League Baseball and interpreted the prevailing case law in a safe and narrow manner.

B. Identity Element of the Right of Publicity

The manner in which a person’s name is used determines whether there is a right of publicity issue. Saying this, the use of a name must be used as a symbol of the individual’s identity. However, actual use of a person’s name is not necessary to violate a person’s right

62 See TCI, 110 S.W. 3d at 371 (determining use of an enforcer similar to Tony Twist made it appear that Tony Twist was associated with Spawn).
64 See id.
65 See id.
66 See TCI, 110 S.W. 3d at 369. (holding he court found that Spawn’s use of professional hockey player Tony Twist’s name was a violation of his right of publicity because the manner in which they used it exploited his ‘tough guy’ persona, the nature of the identifying characteristics, and how Spawn played off the real Tony Twist’s fame).
67 See Carson, 698 F.2d at 835.
of publicity. To determine whether a public personality’s name is used as a symbol of his/her identity, one must address, “the nature and extent of the identifying characteristics used by the defendant, the defendant’s intent, the fame of the plaintiff, evidence of actual identification made by third persons, and surveys or other evidence indicating the perceptions of the audience.”

Despite overwhelming evidence that the use of Major League Baseball players’ names in conjunction with their statistics was symbolic and was used exclusively to profit from their use, the Eastern District of Missouri held that the use of players’ names and statistics, “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.”

Major League Baseball players are just like any celebrity; when they perform well they are celebrated. In turn, when a Major League Baseball player does not perform, they are jeered. For example, Henry (“Hank”) Aaron is associated with hitting 755 home runs, Roger Maris was associated with hitting 61 home runs, Joe DiMaggio is associated with successfully hitting in 56 consecutive games, and Ted Williams is associated with batting .400. By the same token, fans remember players for poor performance on and off the diamond. For

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68 See id. (explaining how there has been an invasion of his right whether or not his “name or likeness” has been used).
69 Restatement (Third) of Unfair Competition, § 46 cmt. d.; See also, TCI, 110 S.W.3d at 370 (discussing Tony Twist’s fame, his identifying characteristics, the common tough guy persona, and the intent of the defendant to obtain commercial advantage).
70 CBC, 2006 WL 2263993 at 8.
71 Id. at 344 (citing the “Idea/Expression Merger” doctrine for not extending protection to facts).
75 See generally Baseball Reference, http://www.baseball-reference.com/ (listing the statistics of all Major League Baseball Players since statistics were kept) (last visited April 25, 2007).
instance, people know Pete Rose gambled on baseball,\textsuperscript{77} Barry Bonds is accused of steroid use,\textsuperscript{78} Alex Rodriguez’s poor playoff performance,\textsuperscript{79} and the story of Shoeless Joe Jackson.\textsuperscript{80} Further, several fans, even before introduction of fantasy baseball, would rattle off a player’s batting average, number of hits, home runs, runs batted in, etc., regardless of the player, because that is how players are identified and most importantly, remembered.

\textbf{C. Policy Considerations Applicable to the Right of Publicity}

Generally speaking, the right of publicity must be protected for: (1) an individual’s interest in personal dignity and autonomy, (2) ensuring commercial value of a person’s fame, (3) preventing unjust enrichment of others seeking to commercially exploit fame, (4) preventing others from diluting the commercialability of one’s name, and (5) protecting against false endorsement and/or sponsorship.\textsuperscript{81} Typically, celebrities and/or athletes are in the public eye and should enjoy their right to, “control the type of publicity they receive.”\textsuperscript{82} In particular, we do not want people to “lose the benefit of their [sic] work in creating a publicly recognizable persona.”\textsuperscript{83} Even though Major League Baseball players receive large salaries, they would be deprived if they were no longer able to receive royalties for the use of their public persona.\textsuperscript{84}

Despite the obvious pecuniary interest of Major League Baseball players, the Eastern District of Missouri found that Major League Baseball players’ name when used in conjunction with their statistics does not go to the heart of a player’s ability to earn a living.\textsuperscript{85} Even though royalties paid to Major League Baseball players are not the sole source of their income, they are entitled to some compensation for the use of their performance statistics.\textsuperscript{86} Though it may not

\textsuperscript{77} Annie Schleicher, \textit{Pete Rose Admits to Betting on Baseball}, PBS, \url{http://www.pbs.org/newshour/extra/features/jan-june04/rose_1-07.html} (last visited April 25, 2007).
\textsuperscript{78} Ron Kroicheck, \textit{WHY BONDS USED STERIODS}, San Francisco Chronicle, \url{http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/03/08/MNGAKHKF371.DTL} (last visited April 25, 2007).
\textsuperscript{80} Shoeless Joe Jackson Official Web Site, \url{http://www.newsday.com/news/columnists/n-liyank074922651oct07_0,7852907.column} (last visited April 25, 2007).
\textsuperscript{81} The Restatement (Third) of Unfair Competition § 46, Cmt. C (2005).
\textsuperscript{82} Ventura v. Titan Sports, Inc., 65 F.3d 725, 730 (8th Cir.1995).
\textsuperscript{83} TCI, 110 S.W.3d at 368.
\textsuperscript{84} Haelan Labs., 202 F.2d at 868. (noting that Major League Baseball players want to reap the benefits of their celebrity and thus want to authorize advertisements displayed in newspapers, magazines, buses, trains and subways).
\textsuperscript{85} See CBC, 2006 WL 2263993 at 1.
\textsuperscript{86} See Major League Baseball Players Association, Frequent Asked Questions, \url{http://mlbplayers.mlb.com/pa/info/faq.jsp#revenue} (last visited April 26, 2007).
go the heart of their income, the right of publicity has been extended even when the heart of a person’s income is not at stake. 87.

Further, because CBC used Major League Baseball players’ statistics in conjunction with their names to entice advertising, the unauthorized use of player’s names was unjust enrichment. 88 Using Major League Baseball players’ name in conjunction with their statistics creates the heart of income for CBC, Yahoo!, CBS Sportsline, ESPN, FOX, etc, so why should these companies be allowed to be unjustly enriched. Regardless of the potential unjust enrichment issues, the Eastern District of Missouri held that use of Major League Baseball players’ names did not go to the heart of player’s income and that CBC was not using something that one would normally be paid for. 89 Even though the Eastern District of Missouri believed CBC used something it would normally not pay for, several fantasy sports providers, such as Yahoo!, CBS Sportsline, ESPN, FOX, etc., are currently paying Advanced Media for a license to provide fantasy baseball and will continue paying for a license. 90

IV. Should the First Amendment Protect Fantasy Baseball Providers?

Even if the right of publicity protects Major League Baseball players, fantasy baseball providers may find a safe haven under the First Amendment. 91 In general, the First Amendment protects traditional forms of speech, namely, factual data and history, expression that profits, expression that entertains, or interactive expression. 92 Newspapers and magazines are classic examples of expression that is protected even though it profits and entertains. 93 Also, video games are an example of interactive expression that is protected. 94

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87 See e.g. Carson, 698 F.2d at 837 (using the phrase “Here Comes Johnny” does not go to the heart of Johnny Carson’s ability to commercially exploit his celebrity).


89 See CBC, 2006 WL 2263993 at 1.


91 See Zacchini, 433 U.S. at 567 (addressing whether the First Amendment was a valid defense to showing a significant portion of the entertainers act on television).

92 See Gionfriddo, 94 Cal.App.4th at 410 (holding the First Amendment was applicable to protect the use of factual data concerning baseball players).

93 See Time Inc. v. Hill, 385 U.S. 374, 396-397 (1967) (recognizing books, newspapers, and magazines are sold for profit and are protected by the First Amendment).

94 See Zacchini, 433 U.S. at 578 (explaining that entertainment receives the same level of protection as factual news reporting).

95 See Interactive Digital Software Association v. St. Louis County, 329 F.3d 954, 957 (8th Cir. 2003) (noting how the First extends protection extends to interactive expression because, “literature is most successful when it ‘draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as to the reader’s own’”).

One might think, if video games and newspapers are provided First Amendment protection, fantasy baseball providers should be provided protection.

Although use of Major League Baseball player’s names in conjunction with their statistics resembles speech that is protected under the First Amendment, it may also be an example of commercial speech that is not protected by the First Amendment. Commercial speech is a form of speech that is sold for profit and has advertisements that are unrelated to the product. Determining what commercial speech is may be difficult because it is difficult to determine what products are unrelated to the product and/or form of speech. With regard to fantasy baseball, it is likely that CBC, Yahoo!, CBS Sportsline, ESPN, FOX, etc. are all guilty of using Major League Baseball players’ names as commercial speech because they sell their product for profit and they have advertisers that are not related to baseball. For example, fantasy baseball providers such as Yahoo! profit from advertisers such as: Bank Of America, MINI, NutraSweet, and the University of Phoenix that all advertise on their fantasy sports home website. Yahoo! is profiting from these advertisers that appear to have tenuous ties to baseball.

For the sake of argument, we will assume First Amendment protection should be afforded for the use of Major League Baseball player’s names in conjunction with their statistics. In a situation where First Amendment protection may be available for fantasy baseball providers, if another right, such as the right of publicity, is conflicting with the First Amendment protection, then a court must balance the right protected versus the right it is conflicting with. But balancing First Amendment rights and the right of publicity for Major League Baseball players is difficult because of the nature of the Major League Baseball player’s celebrity status and the need for protecting certain speech.

Major League Baseball players are constantly in the public eye, which creates an inherent tension between the invocation of the First Amendment protection and the right of publicity. To alleviate the inherent tension between First Amendment protection and the right of publicity, a court must engage in “judicial line drawing” to determine what point the right of publicity collides with First Amendment protection. The extent of protection a court may provide CBC, Yahoo!, CBS Sportsline, ESPN, FOX, etc. must be weighed against the potential

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98 See id.
100 See Gionfriddo, 94 Cal. App. 4th at 409 (explaining how “the right to be protected from unauthorized publicity . . . against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press”).
101 See ETW, 332 F.3d at 931.
102 See id.; See also Cardtoons, 95 F.3d at 972 (noting how the court must “balance the magnitude” of restricting the expression at issue “against the asserted governmental interest in protecting” the right of publicity”).
limitation on Major League Baseball players’ right of publicity. If a court determined the right of publicity prevailed over First Amendment protection, they would have to distinguish whether the use was, “for purposes of trade or the incidental use of a name or picture by the press” or whether the use would “go[ ] to the heart of a person’s ability to earn a living.” As addressed above, Major League Baseball players earn income from their performance and their fame comes from that performance, so unauthorized use of Major League Baseball player’s name in conjunction with statistics strikes “the heart of a person’s ability to earn a living.”

However, some believe the incentive for protecting the right of publicity has been exaggerated. Critics argue that allowing a right of publicity claim to trump a First Amendment protection would extinguish the freedom of expression. The freedom of protection has protected for good reason, but the critics mentioned above, advance a notion that is overreaching. Preventing CBC, Yahoo!, CBS Sportsline, ESPN, FOX, etc from using Major League Baseball players’ names in conjunction with their statistics would not extinguish all rights available for the freedom of expression. Further, preventing CBC, Yahoo!, CBS Sportsline, ESPN, FOX, etc. from using the names of Major League Baseball players in conjunction with their statistics would not prevent people from participating in fantasy baseball. In particular, if CBC were forced to discontinue offering fantasy baseball nobody would lose sleep because Yahoo!, CBS Sportsline, ESPN, and FOX pay for licenses and would happily provide fantasy baseball for those that previously used CBC.

V. What Should Have Happened

Prior to 2002, CBC signed various license agreements with Major League Baseball Player’s Association so they could provide fantasy baseball. When the 2002 License Agreement was signed, it stated that the new agreement, “represents the entire understanding between the parties and supercedes all previous representations.” In it’s official capacity, Major League Baseball Player’s Association was granted the authority to negotiate collective bargaining agreements, arbitration representation, and grant licenses for products seeking to use

103 See id.
104 Zacchini, 433 U.S. at 576.
105 Id.
106 See Cardtoons, 95 F.3d at 973.
107 See CBC 2006 WL 2263993 at 17.
108 See id. at 16-18.
109 See generally U.S.C. CONST Amend. I – Speech (proving there are other forms of speech that can broadcast the information if CBC is not provided the opportunity to offer fantasy baseball).
111 See Cardtoons, 95 F.3d at 972-76.
113 See generally 2002 License Agreement, Major League Baseball and Major League Baseball Player’s Association (“2002 License Agreement”).
the picture, likeness, or persona of two or more baseball players. When CBC entered into agreement with Major League Player’s Association in 2002, it wanted to use the “Rights and/or Trademarks on or in association with the manufacturer, offering for sale, sale, advertising, promotion, and distribution of certain products (the ‘Licensed Products’).” Although CBC enjoyed the benefits of the 2002 Agreement, they were also forced to follow the no-challenge provision that provided, “during and License Period . . . [CBC] will not dispute or attack the title or any rights of Players’ Association in and to the Rights and/or the Trademarks or the validity of the license granted.” Further, upon termination, CBC would not have any right . . . “to use in any way the Rights, the Trademarks, or any Promotional Material relating to the Licensed Products” and upon expiration of the License Agreement, assuming a license was not renewed, CBC shall “refrain from further use of the Rights and/or the Trademarks or any further reference to them, either directly or indirectly . . . .”

When Advanced Media decided to extend only four licenses for fantasy baseball in 2005, it created a situation that would certainly be unfair to several fantasy baseball providers. From 1995 to 2004 Major League Baseball Players Association offered significantly more than four licenses per year. Obviously, several fantasy baseball providers would be rejected by Advanced Media because they were only extending four licenses. This restriction on the number of licenses approved was unnecessary. Major League Baseball may have been worried about dilution of their product, or number of other reasons, but regardless of the reason, Major League Baseball could have achieved their intended goals and preserved smaller fantasy baseball providers by extending more than four licenses.

Why did Advanced Media decide to offer only four licenses for fantasy baseball after Major League Baseball Association offered significantly more than four from 1995 to 2004? Since there is no definitive answer it is hard to decide whether the decision was appropriate or not. However, it is obvious that limiting the number of licenses was unnecessary and does not appear beneficial. Yahoo!, CBS Sportsline, ESPN, FOX, and CBC all have comparable products, thus it is unlikely lesser known fantasy baseball providers like CBC would dilute Major League Baseball’s product. Although dilution of a fantasy baseball product may be important for Major League Baseball, Advanced Media should have reviewed the performance of fantasy baseball providers under the 2002 Agreement, and assuming performance was up to par, extended licenses to those under the 2002 agreement. Further, if Major League Baseball wanted to generate more money from fantasy baseball providers, they could have accomplished the same goal by providing more licenses.

114 See http://mlbplayers.mlb.com/pa/info/faq.jsp#mlbpa (explaining the various responsibilities of the Major League Player’s Association) (last visited April 27, 2007).
115 See 2002 License Agreement.
116 Id.
117 Id.
119 See generally http://www.fantasysportsunion.net/baseball07.html?gclid=CN3dh7-pgYsCFSNXXAod2xDMIQ. (showing why Major League Baseball does not want everyone to provide fantasy baseball) (last visited April 30, 2007).