The Freedom to Imagine Fantasy Sports: Applying New Ideas in Copyright Law to Professional Athletes' Right of Publicity

Ryan T. Holte, United States Court of Federal Claims
The Freedom to Imagine Fantasy Sports

THE FREEDOM TO IMAGINE FANTASY SPORTS:
APPLYING NEW IDEAS IN COPYRIGHT LAW TO
PROFESSIONAL ATHLETES’ RIGHT OF PUBLICITY

by RYAN T. HOLTE*

CONTENTS

I. THE CURRENT STATE OF FANTASY SPORTS AND
THE LAW .................................................. 203
  A. The Specific Legal Problem: C.B.C. v. MLB ............. 203
  B. Applicable First Amendment Law ....................... 204
  C. The History and Development of Federal Copyright
     Law ................................................. 207
II. PUBLICITY RIGHTS ..................................... 209
  A. The Commercial Advantage Element of the Right of
     Publicity .......................................... 211
  B. The Identity Element of the Right of Publicity ........ 213
  C. Right of Publicity Policy .............................. 214
III. PREVIOUSLY PROPOSED DIRECTIONS FOR
COPYRIGHT LAW ........................................ 215
  A. What’s So Fair About Fair Use? ......................... 215
  B. The Freedom of Imagination ............................ 217
IV. APPLYING NEW IDEAS IN COPYRIGHT LAW TO
FANTASY SPORTS ....................................... 220
  A. Can Baseball Statistics Be Considered Copyrightable? . 220
  B. Close Cases ........................................ 222
  C. How Fair is Right of Publicity Law? .................... 225
  D. The Freedom to Imagine Fantasy Sports ............... 227
CONCLUSION .................................................. 228

ABSTRACT

The creation and growth of online fantasy sports games has resulted in an interesting struggle between the First Amendment rights of sports fans and sports players’ right of publicity. Fantasy sports Web sites state that they have a constitutional right to use players’ names in their online programs which allow customers to build their own fantasy teams. Professional sports leagues argue that they, and the players, have spent great time and money in building the names and public images of professional

*B.S., California Maritime Academy; candidate for J.D. (2008), University of California Davis School of Law.
athletes, and deserve to be compensated through state right-of-publicity laws. Currently, courts are left with choosing between these two extremes — either allow fantasy sports Web sites to freely use the names and statistics of the players, or force them to pay for licenses at whatever cost the sports leagues set. This article examines previously proposed methods of dealing with copyright laws, and how these ideas can be applied to the conflicting rights surrounding fantasy sports. It attempts to find a middle ground where fantasy sports Web sites cannot be barred from using players’ names, but players are still allowed to be justly compensated for the effort and expense that goes into making their names famous.

**INTRODUCTION**

On a Saturday afternoon during the height of the 1985 baseball season, ten friends gather at a local sports bar to compare notes. They have each chosen an imaginary team of players from across Major League Baseball (MLB), and are now adding their players’ weekly points by hand. They flip through a national newspaper’s listings of scores and other statistics for each player, and slowly determine which friend has done the best that week. Throughout the process they laugh and joke about which MLB player did surprisingly well, and which players didn’t even play. The experience turns into a form of socialization, and the weekly winner will have his bar tab covered. Eventually, the sports bar realizes the popularity of the weekly exercise, and organizes the scores for the group. The restaurant appreciates the additional afternoon business, and the friends enjoy not having to flip through the paper.

Fast forward to 2005 — the restaurant becomes C.B.C. Distribution and Marketing, an online fantasy sports Web site, and the group of ten friends becomes around 15 million annual participants.\(^1\) The economic impact of the bar tab and online advertising grows to $1.5 billion\(^2\) and MLB wants a piece of the action.\(^3\) Does MLB have a right to some of the profits from fantasy sports?

This article will discuss previously proposed methods of dealing with copyright laws, and how they can be applied to the conflicting rights surrounding fantasy sports. Part I examines the current state of fantasy sports, applications of First Amendment and copyright law to fantasy sports, and the recent district court case, *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.* Part II analyzes

---


\(^2\) Id.

The Freedom to Imagine Fantasy Sports

the right of publicity as it applies to fantasy sports. Part III reviews some recent proposals to limit copyright intrusions on the First Amendment, including Rubenfeld's Freedom of Imagination. Part IV applies the new proposals on copyright law to the current legal problems plaguing online fantasy sports.

I. THE CURRENT STATE OF FANTASY SPORTS AND THE LAW
A. The Specific Legal Problem: C.B.C. Distribution and Marketing v. Major League Baseball Advanced Media, L.P.

To better understand the legal problems arising from the expansion of fantasy sports, this article will begin by reviewing a recent federal district court decision, C.B.C. Distribution and Marketing (CBC) v. Major League Baseball Advanced Media, L.P. (Advanced Media), from the Eastern District of Missouri. Major League Baseball Advanced Media is the Internet arm of MLB. As part of its responsibilities, Advanced Media is licensed by MLB's Players' Association to use the players' rights and trademarks for exploitation via all interactive media. CBC, commonly known as CDM Fantasy Sports, distributes and sells fantasy sports products, including fantasy baseball games, over the Internet. CBC allows paying users to “draft” players from various MLB teams, and compete against other fantasy team “owners” who have drafted their own teams. “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.” Throughout the process, CBC compiles and provides lists of MLB players as well as their statistics including “players’ batting averages, at bats, hits, runs, doubles, triples, home runs, etc.” Finally, CBC also hires journalists to write stories relevant to fantasy owners, such as the latest injury reports, player profiles, and player reports.

The problem between the two parties is that Advanced Media claims that CBC violates the players’ right of publicity by using the “players’ names in conjunction with . . . fantasy baseball games [and] that . . . the identities of the players are represented by their names.” CBC claims that: (1) the players’ names and playing records, as used in fantasy baseball games, are preempted by copyright law; (2) that the use does not vio-

---

4 Jed Rubenfeld, Slaughter Professor of Law, Yale Law School.
5 C.B.C., 443 F. Supp. 2d at 1080.
6 Id.
7 Id.
8 Id.
9 Id.
10 Id.
11 Id.
12 Id. at 1082.
late the players’ claimed right of publicity; and (3) even if the use does violate the players’ right of publicity, the First Amendment controls.13

An interesting fact about this case is that from 1995 through 2004, CBC had been paying MLB for the rights to use all applicable players’ names and statistics on its fantasy sports Web site.14 CBC had assumed for almost ten years that the players had a right to their names and images as used by fantasy sports. Finally, when problems erupted in 2005 over the intentions of MLB to minimize the amount of fantasy sports Web sites,15 CBC refused to deal and finally filed a complaint for a declaratory judgment that it has the right to use MLB statistics and names without a license in its fantasy sports business.16 The district court was subsequently left with two choices: (1) allow CBC to freely use the statistics that MLB generates through the baseball games it organizes and promotes; or (2) shut down the fantasy sports industry that has existed for over ten years, and allow Advanced Media to have a monopoly on it — current copyright and publicity laws allow for no middle ground.

B. Applicable First Amendment Law

The Right of Publicity is “a form of property protection that allows people to profit from the full commercial value of their identities.”17 These rights, however, are still constrained by the First Amendment of the United States Constitution.18 Even though fantasy sports, and the use of baseball players’ names involved with them, are not a traditional First Amendment expression, the use is still not precluded from First Amendment protection.19

The Supreme Court has only addressed the crossroads of publicity rights and First Amendment rights in a single 5–4 decision, Zacchini v. Scripps-Howard Broadcasting Company.20 The Zacchini case involved a human cannonball act which was videotaped by a TV station and aired on

13 Id.
14 Id. at 1080.
16 C.B.C., 443 F. Supp. 2d at 1081.
19 C.B.C., 443 F. Supp. 2d at 1092.
20 ETW Corp. v. Jireh Publ’g, Inc., 332 F.3d 915, 929 (6th Cir. 2003).
The Freedom to Imagine Fantasy Sports

the evening news. The plaintiff performer argued that the TV station’s airing of his performance was a misappropriation of his personal property, but the Ohio Supreme Court held that the “challenged invasion was privileged, saying that the press ‘must be accorded broad latitude in its choice of how much it presents of each story or incident.’” The U.S. Supreme Court disagreed with the Ohio court’s ruling, however, and held in favor of the entertainer. The Court reasoned that much of the economic value in Zacchini’s performance rested in the right of exclusive control over his publicity. “If the public can see the act free on television, it will be less willing to” pay and see it live.

Since the Zacchini case concerns facts quite different from anything involved with fantasy sports, the review of publicity rights weighed against the First Amendment vis-à-vis baseball players must be through lower court opinions. In 1996, the Tenth Circuit ruled in Cardtoons, L.C. v. Major League Baseball Players Association (MLBPA) that the plaintiff’s parody baseball trading cards (featuring caricatures of major league baseball players on one side and player statistics on the back) receive full protection under the First Amendment despite their infringement on the players’ publicity property rights. The court reasoned that “[t]he cards provide social commentary on public figures, major league baseball players, who are involved in a significant commercial enterprise.” While distinguishing the cards from a “core political speech,” the court stated that “this type of [untraditional,] humorous rather than serious commentary . . . on an important social institution . . . [nevertheless] contain[ed] protected speech.”

While discussing the balancing of free speech rights with property rights, the court attempted to parallel Oklahoma’s publicity statute with trademark and copyright law:

Trademark and copyright have built-in mechanisms that serve to avoid First Amendment concerns of this kind . . . proof of trademark infringement under the Lanham Act requires proof of a likelihood of confusion, but, in the case of a good trademark parody, there is little likelihood of confusion, since the humor lies in the difference between the original and the parody. The Copy-

21 Zacchini, 433 U.S. at 564.
22 Id. at 569.
23 Id. at 570.
24 Id. at 574.
25 Id. at 575.
26 Id.
27 95 F.3d 959, 968 (10th Cir. 1996).
28 Id.
29 Id.
right Act of 1976 contains a similar mechanism, the fair use exception, which permits the use of copyright materials for purposes such as criticism and comment.\textsuperscript{30} After the analysis, the court stated that they found “little guidance in cases involving parodies of other forms of intellectual property,” since the state statute did “not provide a similar accommodation for parody.”\textsuperscript{31} They instead chose to take on the First Amendment directly.\textsuperscript{32}

\textit{Cardtoons’} First Amendment analysis broke into two parts, the effects of infringing upon \textit{Cardtoons’} right to free speech, and the effects of infringing upon MLBPA’s right of publicity. The court found that the effect of infringing on the free speech right of parodies would be great for a number of reasons:

Parodies of celebrities are an especially valuable means of expression because of the role celebrities play in modern society . . . ‘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.’\textsuperscript{33} Cardtoons’ trading cards, for example, comment on the state of major league baseball by turning images of our sports heroes into modern day personifications of avarice.\textsuperscript{34}

The court also noted that without First Amendment protection, the future of Cardtoons’ trading cards would be subject to MLBPA’s consent, whereas the Supreme Court had previously stated, with respect to copyright law, that the unlikelihood of creators to license “critical reviews or lampoons of their own production removes such uses from the very notion of a potential licensing market.”\textsuperscript{35} “[T]he last thing we need . . . is a law that lets public figures keep people from mocking them.”\textsuperscript{36} In contrast, the court noted the economic and noneconomic effects of infringing on the MLBPA’s right of publicity.\textsuperscript{37} Various reasons were proposed, including

\begin{itemize}
\item \textsuperscript{30} \textit{Id.} at 970.
\item \textsuperscript{31} \textit{Id.} at 971.
\item \textsuperscript{32} \textit{Id.}
\item \textsuperscript{33} \textit{Id.} at 972 (citing \textsc{John B. Thompson, Ideology and Modern Culture: Critical Social Theory in the Era of Mass Communication} 163 (1990)).
\item \textsuperscript{34} \textit{Id.}
\item \textsuperscript{35} \textit{Id.} (citing \textsc{Campbell v. Acuff-Rose Music, Inc.,} 510 U.S. 569, 591 (1994)).
\item \textsuperscript{36} \textit{Id.} at 973 (citing \textsc{White v. Samsung Elecs. Am., Inc.,} 989 F.2d 1512, 1519 (9th Cir. 1993) (Kozinski, J., dissenting)); \textit{see also Campbell,} 510 U.S. at 592 (stating that parodies may “quite legitimately . . . garrote[ ] the original,” and destroy it commercially without violating copyright law).
\item \textsuperscript{37} \textit{Id.}
\end{itemize}
The Freedom to Imagine Fantasy Sports

that allowing celebrities to control their own images provides incentives for creativity and achievement, promotes efficient allocation of resources, allows them to enjoy the fruits of their labors, prevents unjust enrichment, and precludes emotional injuries. In each case, the court undercut the increased enrichment of celebrities with the overall public good, and distribution of their images vis-à-vis the First Amendment.

The overall Cardtoons result has been distinguished on many grounds, and even criticized on others. It seems that the court was essentially trying to work as best it could within the polar options available to them. Fortunately for the parody-oriented, but financially-motivated, trading card company, the court sided with the First Amendment. But what about the players who have consciously established their images to the point that Cardtoons even has a market for their caricature trading cards?

C. The History and Development of Federal Copyright Law

As the Cardtoons court stated, the federal trademark and copyright laws are probably the best place to start an analysis when attempting to contrast the right of publicity with the rights of the First Amendment. Since copyright law has an explicit mechanism to permit the use of copyrighted materials for purposes of criticism and comment, in addition to a preemption clause with respect to other laws, understanding its history sheds light on the legislative intent of how close individual rights are to curtailing First Amendment rights.

The Copyright Clause of the United States Constitution finds its roots in England with the Statute of Anne (1710). The goal of the Statute was to encourage learning and ensure that copyright law would not be used to censor speech. The Framers of the Constitution “relied on this statute when drafting the Copyright Clause of our Constitution, which reads, ‘The Congress shall have the Power . . . to promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings.’” In 1790, “Congress directly transferred the principles from the Statute of Anne into the copyright law of the United States” by passing the first American federal copyright statute. "The Copyright

38 Id. at 973-76.
39 See generally Elvis Presley Enters., Inc. v. Capece, 141 F.3d 188, 200 (5th Cir. 1998).
40 Cardtoons, L.C. v. Major League Baseball Players Ass’n, 95 F.3d 959, 970 (10th Cir. 1996).
42 Id. § 103(a).
44 Id.
45 Id. (citing U.S. CONST. art. I, § 8, cl. 8).
46 Id. at 1261.
Clause was intended ‘to be the engine of free expression’ with three main goals: the promotion of learning, the protection of the public domain, and the granting of exclusive incentive rights to authors.

The Copyright Clause has been used to “promote learning by guarding against censorship.” Initially, authors were only allowed to keep others from explicitly copying their works until the 1909 Copyright Act codified the concept of derivative work. Derivative works included translations and imitations, but in 1976 the statute was broadened to include any work “fixed in any tangible medium of expression.” The Supreme Court has recognized that “the monopoly created by copyright thus rewards the individual author in order to benefit the public.”

The Copyright Clause implicitly protects the public domain by ensuring that copyrighted works enter the public domain after the author’s exclusive rights have expired. The Supreme Court stated in *Sony v. Universal City Studios* that the grant of copyright “is intended to motivate the creative activity of authors . . . by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.” “The primary objective of copyright is not to reward the labor of authors, but to promote the Progress of Science and useful Arts.”

---


48 *See* Stowe v. Thomas, 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13,514) (holding that a translation of *Uncle Tom’s Cabin* into German was not a copyright infringement because it was not a copy of the work as it was published); *see* Jane C. Ginsburg, *Creation and Commercial Value in Works of Information*, 90 COLUM. L. REV. 1865, 1873 (1990) (“The 1710 English Statute of Anne, the 1787 United States Constitution, and the 1790 United States federal copyright statute all characterized copyright as a device to promote the advancement of knowledge.”).

49 *Harper & Row*, 471 U.S. at 546 (stating that parallel to the patent regime, the limited time period of the copyright serves the dual purpose of ensuring that the work will enter the public domain after the author has received “a fair return for [her] labors.”); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (the limited grant of copyright “is intended to motivate the creative activity of authors . . . by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”).

50 *SunTrust Bank*, 268 F.3d at 1262.

51 *Id.*


53 *Sony Corp.*, 464 U.S. at 477 (Blackmun, J., dissenting).

54 *SunTrust Bank*, 263 F.3d at1262.

55 *Id.*

The third, yet arguably most important, goal of copyright law is granting to the author limited exclusive rights in order to encourage the creation of original works. While two theories of copyright jurisprudence existed after the Statute of Anne, namely ownership in the work itself (natural copyright law), and ownership in the copyright (statutory copyright), our federal copyright protection centers around the author’s guarantee of copyright, and not in the work itself.57 “This has an important impact on modern interpretation of copyright, as it emphasizes the distinction between ownership of the work, which an author does not possess, and ownership of the copyright, which an author enjoys for a limited time.”58

While copyright law seems to have little to do with the rights of publicity MLB players claim are being infringed, one key line in the Act can drastically change the analysis. Section 301 of the Copyright Act states that “no person is entitled to any such rights or equivalent right in any such work under the common law or statutes of any state.”59 The federal law preempts state common law and state statutes from infringing on the subject matter of the Copyright Act. As discussed later, if a state law can be shown to infringe on the territory of federal copyright law, the federal law must govern,60 as well as the fair use and transformative exceptions that go along with it.

II. PUBLICITY RIGHTS

With the present conflict between the players and the fantasy sports Web site established, and the current state of First Amendment and copyright law described, one can begin working through a possible standard solution by first determining if the players actually have a publicity right to their names being used.

The right of publicity was first recognized in 1959 in an opinion which actually concerned baseball players and trading cards.61 The case was

57 SunTrust Bank, 268 F.3d at 1263.
58 Id.
60 See Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 161 (1989); Nat’l Basketball Ass’n v. Motorola, Inc., 105 F.3d 841, 848 (2d Cir. 1997) (“a state law claim is preempted when the state law claim seeks to vindicate legal or equitable rights that are equivalent to one of the bundle of exclusive rights already protected by copyright law”).
Haelan Laboratories, Inc. v. Topps Chewing Gum Inc., where the Second Circuit held that New York State's common law protected a baseball player's rights to the publicity value of his photograph. Since 1953, the right of publicity has grown and expanded as a creature of state law. Approximately half the states have already adopted the right of publicity through common law or state statute. The Supreme Court recognized in Zacchini, while citing William Prosser, that there are four distinct tort causes of action that make up the right of privacy, which the right of publicity was an outgrowth of:

The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff . . . “to be let alone.” Thus, some courts had recognized a cause of action for intrusion upon the plaintiff’s seclusion or solitude; public disclosure of private facts about the plaintiff’s personal life; publicity that places the plaintiff in a false light in the public eye; and appropriation of the plaintiff’s name or likeness for commercial purposes. One may be liable for appropriation if he “pirates the plaintiff’s identity for some advantage of his own.” (citations omitted)

The Supreme Court also stated that the rationale for protecting the right of publicity is to prevent unjust enrichment by the “theft of good will. No social purpose is served by having the defendant obtain for free some aspect of the plaintiff that would have market value, and for which he would normally pay.”

Since state laws and cases can vary widely, the best common foundation for beginning to understand the right of publicity is to look at the Restatement of Unfair Competition. Section 46 of the Restatement defines a liable person as “[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.” While this seems like a

Circuit coined the term ‘right of publicity’ in Haelan Laboratories, Inc. v. Topps Chewing Gum”).

62 Id.
63 ETW Corp. 332 F.3d at 928.
64 Karcher, supra note 17, at 2.
65 Id. at 2 (citing ETW Corp., 332 F.3d at 928).
67 Id.
68 Restatement (Third) of Unfair Competition § 46 (2005).
specific and workable definition, most courts have specified three points that must be met: (1) the defendant used the plaintiff’s name as a symbol of his identity, (2) without consent, and (3) with the intent to obtain a commercial advantage. Since the second point was obviously met in the C.B.C. v. Advanced Media case, the C.B.C. court broke the right of publicity analysis into two elements, commercial advantage and identity.

A. The Commercial Advantage Element of the Right of Publicity

The C.B.C. court centered its commercial advantage analysis on whether CBC’s use of the MLB players’ names associated them with the fantasy sports games. The court stated that intent to injure was irrelevant, but that intent to obtain a commercial advantage must be shown. Examples of obtaining a commercial advantage are “creating an impression that a plaintiff is associated with the defendant’s product,” or “using a plaintiff’s name to attract attention to a product.” The use of a name, however, “must be more than ‘incidental’ to violate the right of publicity.” Examples of incidental uses are where a movie showed a building with a sign bearing the name and business of the plaintiff, and where a newspaper article reporting plaintiff’s loss of a tennis match was partly reproduced as a patchwork pattern in a fabric.

The court held 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 or sponsors the games in any way.” As to specific commercial advantage, the use of MLB names and playing statistics “is not intended to attract customers away from any other

70 Id.
71 See generally id.
72 Id.
73 Id. Similar to the Lanham Act’s prohibitions on false designation of origin with respect to trademarks, 15 U.S.C. § 1125 (“Any person who . . . uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.”).
74 Id. (citing Doe v. TCI Cablevision, 110 S.W.3d 363 (Mo. 2003)).
75 Id. at 1086 (citing Merle v. Sociological Research Film Corp., 152 N.Y.S. 829 (1st Dep’t 1915).
76 Id. (citing Moglen v. Varsity Pajamas, Inc., 213 N.Y.S.2d 999 (1st Dep’t 1961)).
77 Id.
fantasy game provider because all fantasy game providers’ use the same names and playing records. Advanced Media attempted to draw parallels between the use of players’ names in fantasy sports and the use of a famous person’s picture in a game as well as pictures of plaintiffs in containers of popcorn and chewing gum. The court, however, distinguished these examples by stating that there are no allegations in the present case over pictures, and that pictures and names are two entirely different circumstances.

Perhaps the best argument Advanced Media proposed to the court was a district court case in Minnesota, *Uhlaender v. Henricksen*, where a defendant used baseball players’ names, uniform numbers, and statistical information in the creation of board games. The court in Minnesota found that the defendant had indeed misappropriated the names of professional baseball players, and used them for a commercial profit. The *C.B.C.* court criticized and distinguished this case on the grounds that “*Uhlaender* was decided early in the development of the recognition of the common law right of publicity and is inconsistent with more recent case authority including the Supreme Court’s decision in *Zacchini*.” The *C.B.C.* court ultimately held that the commercial advantage element of the right of publicity was not met.

The *C.B.C.* opinion has been criticized for requiring Advanced Media to demonstrate that CBC was using the players’ names in attempting to associate them with fantasy sports. This requirement has been seen as unnecessary because many of the rights of publicity cases required no such showing. For example, the first right of publicity case discussed, *Haelan Laboratories, Inc. v. Topps Chewing Gum Inc.*, found a right of publicity violation even though there was nothing about the trading cards which suggested that any player was associated with the card manufacturing company. Additionally, recent attention has been given to *C.B.C.*’s discounting of the *Uhlaender* opinion, saying that it disagreed with *Zacchini*, because *Zacchini* actually upheld the plaintiff’s right of publicity.

---

78 Id.
79 Id. at 1087.
80 Id. at 1088 (citing Uhlaender v. Henricksen, 316 F. Supp. 1277 (D. Minn. 1970)).
81 Uhlaender, 316 F. Supp at 1279.
83 Id. See also Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994) (emphasizing that the commercial character of a work is only one element of the enquiry into its purpose — quoting a letter from Samuel Johnson, “no man but a blockhead ever wrote, except for money”).
84 Karcher, supra note 17, at 8.
85 Id. at 9.
been argued that Zacchini stands for the idea of preventing defendants from getting for free some aspect of the plaintiff that would have market value and for which he would normally pay. 86

B. The Identity Element of the Right of Publicity

The C.B.C. court examined the right of publicity identity element by attempting to determine if the use of the players’ names was as a symbol of their full identities and personalities. 87 The court stated that “[o]ne’s persona is most significant in a right of publicity cause of action.” 88 The court went on to echo the Restatement’s list of consideration factors, including the nature and extent of the identifying characteristics, the defendant’s intent, the fame of the plaintiff, evidence of actual identification made by third persons, and surveys indicating perceptions of the audience. 89 Much emphasis was given to the fact that fantasy sports Web sites do not add stories or fictional tales to the names of players in the same way that other cases emphasized with respect to literary works. 90 Since CBC’s use “of the baseball players’ names and playing records in the circumstances of this case [] does not involve the character, personality, reputation, or physical appearance of the players,” 91 the court held that “no triable issue as to whether the persona or identity element of the right of publicity is present.” 92

Criticisms of the C.B.C. court’s analysis of the identity element are twofold: (1) the court erroneously relied on cases where a plaintiff’s name and picture were not being used by the defendant, where the question became whether the public would make the connection that the defendant was referring to the plaintiff, and (2) that the identity element can only be met if the defendant used the plaintiff’s persona, which was defined as personality, reputation or character. 93 It has been suggested that under the C.B.C. court’s reasoning, “a cereal company could presumably put a statement on the front cover of a cereal box stating ‘Tiger Woods eats cereal,’” and that since nothing has been described about Tiger Wood’s

86 Id. at 11 (citing Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576 (1977)).
87 C.B.C., 443 F. Supp. at 1088.
88 Id. See also Cardtoons, L.C. v. Major League Baseball Players Ass’n, 95 F.3d 959, 967 (10th Cir. 1996) (“Publicity rights, then, are a form of property protection that allows people to profit from the full commercial value of their identities.”).
89 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (2005).
90 C.B.C., 443 F. Supp. at 1089.
91 Id.
92 Id.
93 Karcher, supra note 17, at 14, 16.
personality, reputation or character, the use would be permissible. Again the court is left with an all-or-nothing choice; where a for-profit company is using a celebrity’s name in commerce, without damaging it, and the use can either be halted or allowed.

C. Right of Publicity Policy

The final analysis of publicity rights in *C.B.C. v. Advanced Media* concerned policy. The court listed the *Restatement*’s justifications for the right of publicity including:

(1) protection of an individual’s interest in personal dignity and autonomy, (2) securing for plaintiffs the commercial value of their fame, (3) preventing the unjust enrichment of others seeking to appropriate the commercial value of plaintiffs’ fame for themselves, (4) preventing harmful or excessive commercial use that may dilute the value of a person’s identity, and (5) affording protection against false suggestions or endorsement of sponsorship.

The court then cited many cases agreeing that celebrities should have publicity rights to better control their images and to profit from their personalities, which they have worked to create. In the end, the court relied on the fact that much data suggests fantasy sports actually enhance the marketability of the players, and that CBC’s use of the names does not contravene the policies behind the right of publicity because the use of the players’ names does not go to the heart of the players’ ability to earn a living as professional athletes.

Since arguing policy is a much broader task than law, many points can be raised to address the court’s reasoning on this issue. The main concerns are that the court may have reasoned that professional sports players already make enough money, and that they should be satisfied with the endorsement and team contracts they already have. Additionally, by stating that fantasy sports add to the marketability of players, the court may have been imposing its own business judgment on the individuals’ names in question. It seemed that the court also wrestled with the fact that if it had decided in favor of the players, the fantasy sports market in general, and CBC in particular, would end up being solely controlled — or shut down — by the media arms of professional sports agencies.

---

94 *Id.* at 16.

95 *Restatement (Third) of Unfair Competition* § 46 (2005).

96 *C.B.C.*, 443 F. Supp. at 1091.

97 *Id.*

98 Karcher, *supra* note 17, at 17.
III. PREVIOUSLY PROPOSED DIRECTIONS FOR COPYRIGHT LAW

At this point in the fantasy sports rights analysis, one can clearly see effective arguments from both the players and the fantasy sports Web sites. The players have spent considerable time and effort in building their images, however, fantasy sports Web sites should not be forced out of business if companies like Advanced Media choose not to grant them a license. The question then becomes: is there any middle ground? Well, copyright law, and the individual rights associated therein, conflicting with the public’s First Amendment rights is not a new problem. Copyright infringing on the right to free speech has been a hot topic of legal discussion, and an expansion of these ideas may lead to a solution of the publicity rights v. First Amendment quagmire.

A. What’s So Fair About Fair Use?

One key aspect of copyright law is the doctrine of fair use. Prior to the codification of the doctrine in the 1976 Copyright Act, fair use was a judge-made right “developed to preserve the constitutionality of copyright legislation by protecting First Amendment values.”99 Had fair use not been part of the new Copyright Act, “the statutory abandonment of publication as a condition of copyright . . . would have jeopardized the constitutionality of the new act because there would be no statutory guarantee that new ideas . . . would be accessible to the public.”100 Included in the definition of fair use are purposes such as criticism and comment, which are at the heart of ensuring that copyrights do not infringe on the Constitution because they allow later authors to use “a previous author’s copyright to introduce new ideas or concepts to the public.”101 “Because of the First Amendment principles built into copyright law through the . . . doctrine of fair use, courts often need not entertain related First Amendment arguments in a copyright case.”102

Since the codification of fair use, the doctrine has grown and become increasingly criticized for its expansion. Essentially, if a later author criticizes, comments, or parodies a previous author’s copyright, the copyright holder can sue for an injunction to enjoin the later author from publishing. This on/off switch the courts must choose between is often done without direct First Amendment analysis, and has led commentators on the process, including one Ninth Circuit Judge, Alex Kozinski, to describe it as: “a blunt instrument . . . because the work is either banned by injunction and

100 Id.
101 Id.
102 Id.
never sees the light of day or is allowed to be published with absolutely no compensation to the original author for the [later author’s] use of the original copyrighted elements.”

To solve this polar decision judges must make, Kozinski points out that solutions must be grounded by economic and First Amendment principles. First, to bring current copyright laws within the scope of the First Amendment, Kozinski “suggests that to the extent we can do without copyright injunctions, we should.” Kozinski is also “uneasy about the ease with which copyright injunction can be granted and the silencing effect that those injunctions have.” On the economic side, Kozinski is worried that fair use law in general, and specifically parody law, “does not maximize utility since it fails to give authors and publishers any incentive to produce the kinds of famous works that inspire parody.”

Kozinski proposes five amendments to current copyright law that would strategically alter the fair use regimes:

1. the fair use provisions in current copyright law should not apply when an infringing use contains enough expression to qualify as a derivative work;
2. the Copyright Act section which allows judges to grant injunctions to halt or restrain the publication of derivative works should also be inapplicable for infringing uses;
3. copyright injunctions should be granted only when there is strong reason to believe that damages will be inadequate;
4. to ensure that copyright holders would be properly compensated for a parody’s use, later authors would be responsible for paying the copyright holder the portion of her profits that are attributable to the use of the original’s copyrighted elements;
5. with regard to damages, Kozinski would redraft the remedies for infringement to read that “the copyright owner is entitled to recover the actual damages suffered as a result of the infringe-

---


104 Id. at 638.

105 Kozinski & Newman, supra note 102, at 521.

106 Fox, supra note 103, at 638.

107 Id.


109 Id. at 525.

110 Id.

111 Id. at 526.
Kozinski believes that these new rules would solve many of the current fair use problems by “stripping copyright holders of their right to control the uses to which their work is put while strengthening their right to demand compensation for the value they create.”113 Under this reasoning, when a later author uses some copyrighted material through means that would previously be considered fair use, she would have substantial incentive to license the use from the copyright holder in advance of publishing rather than wonder what percentage of her work’s profits could be taken by a court in the future.114

The caveat, or even possible problem, to Kozinski’s proposal is that publishers would only be willing to produce infringing works when they promise to “create a lot more original value than they took from the copyright holder . . . [we will give] publishers the incentive to infringe only when it is efficient.”115 While this might be a great loss for some authors, who cannot get their work published because it is not economically efficient, the greater threat is that publishers would unfairly calculate how much of the work’s success would be attributable to non-copyrighted materials.116 The questions surrounding which elements of a work are infringing, and which are not, would be extremely subjective, and only years of case law on the new standards could help to elaborate. These questions could make the legal climate so difficult for authors to get published that they would cease to produce works that parody, criticize, or comment on works not in the public domain.117

B. The Freedom of Imagination

Another — more First Amendment oriented — approach to dealing with copyright’s expanding presence is Jed Rubenfeld’s Freedom of Imagination. While Rubenfeld centers his discussion on the constitutional protection of art, the principle can be expanded and applied to other subjects as well. Rubenfeld states that “under this freedom, no one can be penalized for imagining or for communicating what he imagines. Nor can a person be required to obtain permission from anyone in order to exercise his imagination.”118 As discussed later, can a fantasy football team be consid-

---

112 Id.
113 Id. at 527.
114 Id.
115 Id.
116 Fox, supra note 103, at 639.
117 Id.
118 Rubenfeld, supra note 102, at 1.
Rubenfeld begins his description of the freedom of imagination by attempting to discern why art has historically never had a problem with receiving First Amendment protection. He breaks down the analysis into two standard categories, individual autonomy and democracy. With respect to individual autonomy, i.e., that “art is protected because it is an apogee of self-expression,” Rubenfeld disagrees because it leads to the audience being “a consumer, a voyeur, or, at best, an interpreter of another’s act of self expression.” As for democracy, “it cannot apply to art without falsely politicizing it.” These approaches, Rubenfeld writes, try to explain the constitutional protection of art in terms of art’s value — either to the individual, or to the democratic process.

After establishing that traditional First Amendment reasoning fails to discern exactly why nontraditional forms of speech are protected, Rubenfeld defines the Freedom of Imagination as:

The freedom to explore the world not present, creatively and communicatively. It means the freedom to see the world feelingly, to conceive as far as one is able how the world might be, or might have been, or could never be. It means the freedom to . . . explore without state penalty, any thought, any image, any emotion, and melody, as far as the imagining mind may take it. Thus are works of art — including nonverbal art — unquestionably shielded.

The freedom of imagination also draws no distinction between high and low value, and does not distinguish between what artists do and what audiences do. All are engaged directly in exploring the imagination. “At root, the freedom of imagination rests on the same foundations as the First Amendment’s core protections: that government shall not have power over what we think, cannot enforce an orthodoxy on any matter of opinion, and that in America “no one can be punished for daring to conceive or to express an unauthorized idea.”

From a judicial standpoint, to protect the freedom of imagination, courts must hold that there is no constitutional way to restrict an exercise
of the imagination. Rubenfeld cites examples of differentiating physical acts which can be punished — paying someone to murder — from exercises of the imagination — showing someone a movie which causes them to murder — which cannot. The argument that “every action expresses imagination” can be distinguished, because people could still be prosecuted without problems if it is done “without reference to what he were trying to communicate through his actions.” “The freedom of imagination demands that people be free to exercise their imagination. It is not a freedom to do what one imagines.”

Rubenfeld applies the freedom of imagination to copyright law by first stating that it supports copyright’s core prohibition, piracy, by requiring an exercise of imagination which does not exist when copying. He further explains that as applied to derivative works, current copyright law’s allowance of prepublication injunctions can be considered unconstitutional prior restraints which effectively suppress a new act of imagination. Rubenfeld states that there can be no such thing as a harmful exercise of the imagination, and that “[c]ourts have no authority to suppress a [work] on the ground that its exercise of imagination is harmful and unauthorized.”

Before the reproduction right expanded into the derivative works right, later works which creatively transformed copyrighted materials were understood to fall outside the reproduction prohibition. Rubenfeld wants this view reestablished today, and states that the copyright statute, which distinguishes between reproductions and derivative works, would not need to be amended to accommodate it. Judges would simply be required to decide if the old work “has been reimagined.”

Like Kozinski, Rubenfeld establishes middle ground between the current polar fair use choices. He proposes that if a later work is proved to be derivative, neither an injunction nor damages should be available. Instead, Rubenfeld calls for profit allocation which already has a basis in

127 Id.
128 Id. at 40.
129 See R.A.V. v. City of St. Paul, 505 U.S. 377, 385 (1992) (explaining that “burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not”). Id (explaining that a terrorist can easily be prosecuted for his actions, not his opinions).
130 Rubenfeld, supra note 103, at 42.
131 Id. at 54.
132 Id. at 55.
133 Id.
134 Id.
current copyright doctrine.\textsuperscript{135} Since “[n]othing in the First Amendment stands in the way of requiring that profits from a derivative work (if any) be apportioned to the copyright holder,” this solution could achieve the best results for both parties. It should also be noted that an action for profit allocation is not a damages action. If a new exercise of imagination injures the original author or anyone else, damages would be perfectly appropriate, but “in derivative works cases, a defendant is no more subject to damages than to an injunction.”\textsuperscript{136}

Since a profit allocation does not suppress speech or penalize an author for exercising his imagination, it does not constrain at all. “If the producer of a derivative work offers the work for free, he is immune from suit altogether.”\textsuperscript{137} If, on the other hand, a later author seeks to profit from his own work which was founded on copyrighted material, he should first seek a license agreement or soon expect an action for profit allocation.

\section*{IV. APPLYING NEW IDEAS IN COPYRIGHT LAW TO FANTASY SPORTS}

\subsection*{A. Can Baseball Statistics be Considered Copyrightable?}

One way to apply previously referenced proposals concerning copyright laws to fantasy sports is to argue that baseball statistics and players names as used by fantasy sports Web sites, are fully copyrightable, and therefore are preemptively subject to federal copyright law.\textsuperscript{138} The Eighth Circuit listed two requirements in \textit{National Car Rental System, Inc. v. Computer Associates International, Inc.} for a state cause of action, like the right of publicity, to be preempted by the Copyright Act: “(1) the work at issue is within the subject matter of copyright as defined in §102 and §103 of the Copyright Act, and (2) the state law created right is equivalent to any of the exclusive rights within the general scope of copyright as specified in §106.”\textsuperscript{139} Thus, for copyright law to apply, “not only must the subject matter at issue be within the subject matter of copyright, but the right

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{135} See 17 U.S.C. § 504(b) (2000) (providing for recovery by the copyright owner of “any profits of the infringer that are attributable to the infringement.” The statute divides the burden by requiring “the copyright owner . . . to present proof only of the infringers gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.”). \textit{Id.} See also \textit{id.} § 115 (compulsory license agreements for musical works).
\item \textsuperscript{136} Rubenfeld, \textit{supra} note 103, at 57.
\item \textsuperscript{137} \textit{Id.}
\item \textsuperscript{138} 17 U.S.C. § 103(a) (2000).
\end{itemize}
\end{footnotesize}
The Freedom to Imagine Fantasy Sports

sought under state law must be equivalent to the exclusive rights under the scope of copyright."¹⁴⁰

To determine whether the subject matter at issue is within the subject matter of copyright law, one must look no further than the Supreme Court’s decision in Feist Publications v. Rural Telephone Service Co. The Feist opinion states that “it is beyond dispute that compilations of fact are within the subject matter of copyright. Compilations were expressly mentioned in the Copyright Act of 1909, and again in the Copyright Act of 1976.”¹⁴¹ While this seems at odds with the understanding that facts and discoveries themselves are not subject to copyright protection, the compilations of them are.¹⁴²

The only question regarding online baseball statistics being subject to federal copyright law then becomes: whether the names and playing records are copyrightable. Since facts themselves are not copyrightable, courts look at the subject matter’s “originality, intellectual production, [ ] thought, and conception.”¹⁴³ At this point in the analysis, courts can tend to diverge, and circuit splits may be evident. In Feist, the Supreme Court held that “a factual compilation is eligible for copyright if it features an original selection or arrangement of facts, but the copyright is limited to the particular selection or arrangement. In no event may copyright extend to the facts themselves.”¹⁴⁴

Since the facts in Feist — names, towns, and telephone numbers listed in a telephone directory — differ substantially from baseball scores, a few more circuit court cases should be examined. In National Basketball Association v. Motorola, the Second Circuit held that while broadcasts of games are copyrightable, “the scores of basketball games represent purely factual information,” and are as such not copyrightable.¹⁴⁵ However, in Baltimore Orioles, Inc. v. Major League Baseball Players Association, the Seventh Circuit held that organized sporting events are themselves copyrightable because they contain “the modest creativity required for copyright ability.”¹⁴⁶ This statement, however, has been elaborated on by other courts, and generally assumed to mean that only the telecasts are copyrightable — “even if the [p]layers’ performances were not sufficiently

¹⁴² Id.
¹⁴³ Id. (quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884)). See also Kregos v. Associated Press, 937 F.2d 700 (2d Cir. 1991) (baseball pitching form that displayed information concerning the past performances of players being held copyrightable).
¹⁴⁴ Id. at 350.
¹⁴⁵ 105 F.3d 841, 847 (2d Cir. 1997).
¹⁴⁶ C.B.C., 443 F. Supp. 2d at 1102 (citing Baltimore Orioles, 805 F.2d at 676).
creative, the [p]layers agree that the cameramen and director contribute creative labor to the telecasts.”147 Finally, in *Morris Communications Corporation v. PGA Tour Inc.*, a district court held that real-time golf scores — as opposed to Motorola’s NBA scores — were copyrightable due to their time sensitivity and a lack of public broadcasting over the events.148

From these cases, the fantasy sport’s names and statistics can be analyzed and compared. Since any person attending a baseball game has access to players’ names and records, and the fantasy sports Web sites are not compiling the information in any novel way, it is difficult to imagine that the online compilations would be copyrightable. The *C.B.C.* court stated that “the names and playing records of Major League Baseball players as used by CBC in its fantasy baseball games are akin to the names, towns, and telephone numbers in a phone book,”149 and then went on further to state that they “do not involve the sine qua non of copyright originality.”150 While this might be a bit of an oversimplification, most commentators agree that fantasy sports statistics should not be considered copyrightable.151

**B. Close Cases**

Before discussing the functionality of new methods in dealing with publicity law disputes, one should take a brief look at some difficult court decisions to better understand the need and potential applications. One such example was a 1992 Second Circuit decision, *Rogers v. Koons*.152 The case concerned Jeff Koons, a famous artist who wanted to make a sculpture for an upcoming art show themed on the banality of life.153 He found a photo taken by Art Rogers, of a man and woman with their arms full of puppies, then tore off the bottom copyright label and sent it to his assistants with instructions on how to model the sculpture.154 After the sculpture received some publicity, it came to the attention of Art Rogers, who sued for damages and an injunction to prevent Koons from “making, selling, lending or displaying any copies of, or derivative works based on ‘Pup-
pies.'" The district court held, and then the Second Circuit agreed, that an artist copying a photo could not be protected when there was no clear need to imitate the photo for parody. The court reasoned heavily in its decision that Koons could have expressed the parody of “Puppies” without directly copying Rogers’ photo, and stated that copies of the sculpture were made primarily for Koons’ commercial benefit. Subsequently, Koons was not allowed to make, sell, lend, or display any copies of, or derivative works based on Rogers’ photographs. Does this agree with the First Amendment?

A second case dealing with the right of publicity comes from the Sixth Circuit. The case is known as ETW Corporation v. Jireh, but its subject matter concerns the publicity rights and image of Tiger Woods. The defendant was a publisher of art prints, including one entitled “The Masters of Augusta” which depicted the plaintiff in three different poses with the likeness of famous golfers of the past looking down on him. The art print was also accompanied with a signed letter from the artist, an envelope with the words “Tiger Woods” on the front, and a brief article describing Tiger Woods’ achievements in golf. The plaintiff claimed, among various other issues, that the artist’s prints constituted unauthorized use of a registered trademark, and was a violation of Ohio’s right of publicity statutes. The court held that the trademark claim was barred by the fair use defense, that as a general rule a person’s image or likeness could not function as a trademark, and that the right of publicity and state laws yielded to the First Amendment. Even though it seems obvious that the artist’s work would have little value without the image of Tiger Woods being depicted, the famous golfer still had no rights to any of the proceeds generated from the sale of the print with his image. Does this sound fair for Tiger?

A third opinion dealing with the right of publicity is Comedy III Productions, Inc. v. Gary Saderup, Inc., from the Supreme Court of California. The case dealt with a defendant who personally created a charcoal drawing of the Three Stooges and used it to create silk-screened T-shirts. The plaintiff company owned the right to the former comedy act, and objected to the sale of the T-shirts. The California Supreme Court acknowledged that “a work of art is protected by the First Amendment even if it

155 Id. at 306.
156 Id. at 307-12. (Koons sold three sculptures for over $360,000).
157 ETW Corp. v. Jireh Publ’g, Inc., 332 F.3d 915, 918 (6th Cir. 2003).
158 Id. at 919.
159 Id.
160 Id. at 919-38.
161 21 P.3d 797, 800-01 (Cal. 2001).
conveys no discernable message," however, it held that “depictions of celebrities amounting to little more than the appropriation of the celebrities economic value are not protected expression under the First Amendment.” Subsequently, the defendant was enjoined from using any likeness of the Three Stooges in:

lithographs, T-shirts, or “any other medium by which [Saderup’s] art work may be sold or marketed.” The injunction further prohibited Saderup from “[c]reating, producing, reproducing, copying, distributing, selling, or exhibiting any lithographs, prints, posters, T-shirts, buttons, or other goods, products or merchandise of any kind, bearing the photograph, image, face, symbols, trademarks, likeness, name, voice or signature of The Three Stooges or any of the individual members of The Three Stooges.” The sole exception . . . [of his] original charcoal drawing . . . .

While this opinion seems irreconcilable with the Tiger Woods case, both courts based their reasoning heavily on Cardtoons.

The fourth and final case to review before applying the new copyright ideas that this article argues for to the right of publicity is a Supreme Court decision concerning rap music, *Campbell v. Acuff-Rose Music*. This case involved the music group 2 Live Crew, who wanted to make a parody of Roy Orbison’s 1964 rock tune *Oh Pretty Woman*. In July 1989, the rap group’s manager approached Acuff-Rose Music for a license to use portions of the original lyrics and music in its parody, but the company refused. When 2 Live Crew released their song anyway, almost a year later, and after a quarter of a million copies had been sold, Acuff-Rose sued 2 Live Crew and their record company, Luke Skyewalker Records, for copyright infringement. The district court granted summary judgment for 2 Live Crew, finding that their song was a parody that made fair use of the original song under federal copyright law. The Sixth Circuit Court of Appeals reversed the district court’s decision, holding that the commercial nature of the parody rendered it presumptively unfair because it took the “heart” of the original work and made it the “heart” of the parody. Essentially, 2 Live Crew had taken too much of the original song. The Supreme Court, in an opinion by Justice Souter, reversed the

---

162 Id. at 399.
163 Id. at 400.
164 Id. at 394.
166 Id. at 572.
167 Id. at 574.
168 Id.
169 Id.
Sixth Circuit’s opinion, and held that the parody song was a fair use under copyright law. Justice Souter began by describing the inherent tension between copyright law and the First Amendment — the need to simultaneously protect copyrighted material yet still allow others to build upon it. Quoting Lord Ellenborough, Justice Souter said: “while I shall think myself bound to secure every man in the enjoyment of his copyright, one must not put manacles upon science.” The court continued by looking to Justice Story’s analysis in *Folsom v. Marsh*, which was eventually codified in the fair use doctrine of the Copyright Act of 1976:

> Look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work.

The Supreme Court then listed the current statutory four-part test used to determine whether the use made of a previous author’s work in a particular case is a fair use, and applied each factor to the new “Pretty Woman.” Throughout the analysis, the Court stated that the more transformative the new work, the less significance there will be on the other three factors. Additionally, the opinion reasoned that even if the “copying of the original’s first line of lyrics and characteristic opening bass riff may be said to go to the original’s ‘heart,’ that heart is what most readily conjures up the song for parody, and it is the heart at which parody takes aim.” The Court finished its analysis stating that parodies in general will rarely substitute for the original work, and that the original *Oh Pretty Woman* listeners will not likely discard their old LPs while purchasing the latest musical enjoyments 2 Live Crew has to offer.

C. How Fair is Right of Publicity Law?

Before applying Kozinski’s proposal of abolishing “categorical determinations of fair use,” and turning them into “nuanced questions of appropriate remedy,” to the right of publicity as used in fantasy sports games, we must first assume two principles. First, the use of the players’ names and statistics vis-à-vis fantasy sports teams qualifies as a new derivative work expanding the publicity of the players, not damaging it, and yet still

170 *Id.* at 593.
172 *Id.* at 576 (citing Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901)).
173 *Id.* at 578-89.
174 *Id.* at 588.
175 See *id.* at 590.
creates profits. Second, we must assume that courts do not have the ability to grant injunctions, but are instead called upon to treat injunctions “the way equitable relief is usually treated, granting them only when there is strong reason to believe that damages will be inadequate.”

The analysis then centers around what sort of remedies the court will use to allow the players to recover for the use of their likeness. The amount of profits a court should assign to the players — or the company the players have licensed their publicity rights to — should be equivalent to the degree of profits attributable to the use. Obviously, this is a fairly subjective question, and is certainly not as simple as the current profits minus the expected profits of fantasy sports games without professional sports players. The burden should be on the publicity rights holders to establish how much of the work’s value stems from the infringement.

The court’s discretion to award costs and attorney’s fees to a prevailing party will still be the same as in previous right of publicity actions with one exception. Either a publicity right holder or a publicity user can offer to “enter into a license, and an offeree who refuses will have to pay costs and attorney’s fees if he fails to be awarded better terms at any subsequent infringement trial.” The purpose of this rule is to encourage publicity rights holders and users to enter into license agreements and avoid litigation.

Applying these new methods to the fantasy sports case *du jour* seems to yield positive results. Advanced Media would have no method of preventing CBC from using the players’ names in its fantasy sports business. Since Advanced Media would know this before hand, when CBC came asking for a license renewal as they did in 2004, Advanced Media would have some incentive to bargain for the best terms it could get. But the big question is whether CBC has any incentive to bargain. It most likely would. For one thing, it would much rather have a sure deal in advance than wonder what percentage of its profits a court in the future might choose to give away. Another reason is that if Advanced Media offers to license the players’ names and CBC refuses to deal, it risks having to pay all the costs of litigation in the future.

---

177 *Id.*

178 *Id.* at 526.

179 *Id.* (borrowing an idea from Rule 68 of the Federal Rules of Civil Procedure).

180 *Id.* at 527.
The Freedom to Imagine Fantasy Sports

The downside to this proposal is that if CBC cannot strike a deal with Advanced Media prior to using the players’ names, it must determine that it is adding enough original value to the overall fantasy sports product—that using the players’ names will create far more profit than they are simply taking from them. With respect to fantasy sports, this may not be a problem, but individuals like the Three Stooges artist, Gary Saderup, and even the Tiger Woods artist, Rick Rush, may think twice. Kozinski’s answer to their refraining from marketing their works would be: “no big loss.” They can always make art for the pure enjoyment of expressing themselves and not seek a financial incentive.

D. The Freedom to Imagine Fantasy Sports

One area lacking from Kozinski’s proposals on copyright law, as applied to the right of publicity, is that there is no First Amendment evaluation. Since restricting courts from issuing injunctions is a great limitation, it would receive greater acceptance if it was done with a greater purpose in mind — such as upholding the First Amendment. This is where Rubenfeld’s freedom of imagination fits in.

Applying Rubenfeld’s theory to fantasy sports requires judges to initially decide whether fantasy sports teams are a reimagining of what already exists. If the use of a player’s likeness simply pirates from the player, the use deserves no constitutional protection. On the other hand, if the use transforms the image of the player into something new, constitutional protection should be given, although the player would have an action for profit allocation. Since Rubenfeld does not propose a framework for how to divide profits, Kozinski’s framework can easily step in.

On the specific issue of fantasy sports and the C.B.C. case, there is no question that a fantasy baseball team requires ample use of one’s imagination to be created. It would obviously be unconstitutional to enjoin CBC from using the players’ names in its fantasy sports Web site because it would prevent fantasy sports players from creating their teams. The profits CBC generates from using the names would be allocated between the parties either through a license agreement or through litigation in the same way that they would be with the previous proposal.

Rubenfeld’s theory becomes especially necessary, and maybe even informative, when dealing with other right of publicity cases. Would a judge really side with Gary Saderup, holding that his charcoal drawing printed on a T-shirt took imagination, or was it merely a way to profit from the likeness of the Three Stooges? Rubenfeld speaks to the 2 Live Crew case and says that:

181 Id.
Because it was new music, 2 Live Crew’s “Pretty Woman” should have been categorically protected from an injunction regardless of whether it criticized the original. But there is no reason why 2 Live Crew was entitled to reap all the profits . . . when some of those profits were unquestionably attributable to Roy Orbison’s immensely popular tune.\(^{182}\)

In this way, shouldn’t Jeff Koons be entitled to sculpt Art Roger’s picture, yet be required to share his profits? Doesn’t the Constitution require that Jeff Koons not be enjoined from sculpting what he imagines?

**CONCLUSION**

Courts today must begin issuing special constitutional rules to confine the expanding reach of publicity rights. Publicity, copyright, and intellectual property rights are not free: “they’re imposed at the expense of future creators and of the public at large.”\(^{183}\) We give celebrities an immense ability to be able to profit from their images, but it must still be within the limits of the First Amendment.

While the Three Stooges, Roy Orbison’s tunes, and Tiger Woods might not be what the Framers of our Bill of Rights had in mind, they still wrote the First Amendment to include not just religion and politics, but also the free development of our national culture.\(^{184}\) If ten guys want to get together on a Saturday afternoon and imagine which MLB players would be on their perfect baseball team, they have the right. And if 15 million guys want to log on to the Web and do the exact same thing, they have the right too.

---

\(^{182}\) Rubenfeld, *supra* note 103, at 56.


\(^{184}\) *Id.* at 1519.