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"Quasi-property" Rights: Fantasy or Reality? An Examination of C.B.C. Distribution & Marketing Inc. v. Major League Baseball Advanced Media, L.P. and Fantasy Sports Providers' Use of Professional Athlete Statistics

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"Quasi-property" Rights: Fantasy or Reality? An Examination of *C.B.C. Distribution & Marketing Inc. v. Major League Baseball Advanced Media, L.P.* and Fantasy Sports Providers' Use of Professional Athlete Statistics

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It was the bottom of the ninth; tied game; two outs; full count; and no one on base. From its seemingly helpless position atop the mound, C.B.C. Distribution[1] ("CBC") wound up and delivered the pitch. Everyone in the stadium knew what was coming—a fastball right down the middle of the plate. Major League Baseball eyed the pitch, gripped its mighty bat, and swung for the fences . . . .

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1.

> [C.B.C. Distribution and Marketing, Inc.], which uses the trade name CDM Fantasy Sports, is a Missouri corporation whose primary offices are located in St. Louis, Missouri. CBC markets, distributes and sells fantasy sports products, including fantasy baseball games accessible over the Internet . . . . CBC offers its fantasy sports products via telephone, mail, e-mail, and the Internet through its website, www.CDMsports.com. CBC currently offers eleven fantasy baseball games, two mid-season fantasy baseball games, and one fantasy baseball playoff game. CBC provides lists of Major League baseball players for selection by participants in its games. Game participants pay fees to CBC to play its games and pay additional amounts to trade players . . . . CBC's website provides up-to-date information on each player to assist game participants in selecting players for and trading players on their fantasy teams.

C.B.C. Distribution & Mktg. Inc., v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1080 (E.D. Mo. 2006).

I. INTRODUCTION

There would be no final play at the plate in the highly anticipated "game"[2] between fantasy baseball[3] providers[4] and Major League Baseball.[5] In fact Major League Baseball was called out at first base.[6] But did the "umpire"[7] make the correct call?[8]

On August 8, 2006, the United States District Court for the Eastern District of Missouri, in *C.B.C. Distribution & Marketing Inc. v. Major League Baseball Advanced Media, L.P.*,[9] granted Plaintiff CBC's motion for summary judgment.[10] The court anchored its

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2. The "game" as presented here refers to the case of *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077 (E.D. Mo. 2006).

3. *See infra* note 14 and accompanying text.

4. *See infra* note 18.

5. In the context of this Note, Major League Baseball refers not only to the league and its teams, but also to both Major League Baseball Advanced Media ("MLBAM") and the Major League Baseball Players' Association ("MLBPA").

> The [MLBPA] is the bargaining representative for Major League baseball players and is comprised of almost all persons who are employed as Major League baseball players. [MLBAM] was formed in 2000 by various owners of Major League Baseball teams to serve as the interactive media and internet arm of Major League Baseball. As part of its responsibilities [MLBAM] is in charge of running Major League Baseball's internet site, MLB.com.

C.B.C. Distribution, 443 F. Supp. 2d at 1080.

6. *See generally id.* (holding that there was no right of publicity in Major League Baseball Players' names and playing records and thus, granting plaintiff C.B.C. Distribution's motion for summary judgment).

7. Judges have often likened themselves to umpires. In fact, "[t]he federal judiciary . . . is led by Chief Justice John G. Roberts, Jr., who during his confirmation hearings last year famously described his role as that of an umpire: 'I will remember that it's my job to call balls and strikes and not to pitch or bat.'" Andrew S. Tulumello & Travis D. Lenkner, *For Litigators, The Cry Is: "Play Ball!"* NAT'L L.J., Oct. 30, 2006. The "umpire" in this case was Magistrate Judge Mary Ann L. Medler of the United States District Court for the Eastern District of Missouri.

8. "We are disappointed by the Court's decision yesterday in *CBC v. MLBPA and MLBAM*. We expect to appeal the decision, and remain confident that we will prevail in that effort. We continue to believe that the use of the players, without their consent, to create this type of commercial venture is improper." Press Release, Major League Baseball Advanced Media & Major League Players' Ass'n, *available at* http://mlb.mlb.com/NASApp/mlb/news/press_releases/press_release.jsp?ymd=20060809&content_id=1601066&vkey=pr_mlbcom&fext=.jsp&c_id=mlb (last visited Aug. 9, 2006).

9. 443 F. Supp. 2d 1077 (E.D. Mo. 2006).

10. *C.B.C. Distribution*, 443 F. Supp. 2d at 1107. Both plaintiff and defendant filed motions for summary judgment. *Id.* at 1077.

decision on conclusions of law regarding the "right of publicity."[11] Ultimately, the court held that Major League Baseball players do not have a right of publicity in their names and playing records[12] as used in fantasy games: thus, "CBC has not violated the players' claimed right of publicity."[13] But, were the court's conclusions of law proper? This Note argues that Major League baseball players' names and statistics should be considered the "quasi-property" of Major League Baseball Advanced Media ("MLBAM") and its employees, the players.

Part II of this Note discusses the concept and evolution of fantasy baseball. It explains the origin or fantasy baseball, its development, the procedure and goals of fantasy baseball, and its current state. Part II also summarizes and analyzes both sides of the *CBC* case and examines the court's holding and rationale leading to its grant of summary judgment for *CBC*. Part III discusses why MLBAM should have survived summary judgment. Finally, Part IV of this Note concludes by arguing that professional baseball players, and professional athletes in general, should have "quasi-property" rights in their names and statistics, and the players' right of publicity is violated when fantasy providers use their names and playing records without permission for financial gain.

II. HISTORY

A. What Is Fantasy Baseball?

Fantasy baseball is an interactive game wherein a group of professional sports fans select and manipulate rosters of actual Major

11. The right of publicity has been defined as "the right of a person to control commercial use of his or her identity." Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 967 (10th Cir. 1996) (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995)); *see also* Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (6th Cir. 1983) ("The right of publicity, as we have stated, is that a celebrity has a protected pecuniary interest in the commercial exploitation of his identity.").

The *CBC court* concluded that "the undisputed facts establish that . . . CBC has not and is not violating the players' claimed right of publicity." *C.B.C. Distribution*, 443 F. Supp. 2d at 1091.

12. The terms "playing records" and "statistics" are used interchangeably throughout this Note.

13. *Id.* at 1107.

League Baseball players for the purpose of competing against one another.[14] Individuals compete for points based on their selected players' performance over the course of a single season.[15] The commercial fantasy experience begins with an individual ("GM")[16] or a group of individuals ("GMs") joining a fantasy league,[17] made available to the public by a fantasy sports provider.[18] Next, the participants select a league commissioner and set the rules.[19] After all participants have joined the league and established the scoring rules, a player draft ensues.[20] Once the draft is complete and lineups are

14. *See* Britannica Online Encyclopedia, *Baseball: Fantasy Baseball*, http://www.britannica.com/eb/article-229958/baseball (Jerome Holzman ed.) (last visited Feb. 15, 2007).

15. *See id.*

16. The General Manager is the team executive responsible for acquiring the rights to player personnel, negotiating player contracts and reassigning or dismissing players who are no longer desired on the team. *See* Brendan Roberts, *Fantasy Baseball 101*, http://fantasy.sportingnews.com/baseball/experts/brendan-roberts/20060124-p.html (last visited Feb. 29, 2008). Fantasy sports leagues require the participants to perform many of the same tasks that actual general managers of professional sports teams perform on a daily basis, including drafting and activating or deactivating players. *Id.* Thus, fantasy league participants are often referred to as general managers or "GMs" for short.

17. *See* Brendan Roberts, *Fantasy Baseball 101: Starting a League*, SPORTING NEWS, http://fantasy.sportingnews.com/baseball/help/league.html (last visited Oct. 23, 2006). Individuals have the option of joining either a free league or a paid league. Robert T. Razzano, Comment, *Intellectual Property and Baseball Statistics: Can Major League Baseball Take its Fantasy Ball and Go Home?*, 74 U. CIN. L. REV. 1157, 1160 (2006). Paid leagues charge a fee for participation based on the number of teams. *Id.* The benefits of joining a paid league often include "extra research and analysis of players, real-time statistics tracking, [and] preferred customer service . . . ." *Id.* at 1160 n.31.

18. Fantasy sports providers host fantasy sports leagues on their websites. *Id.* at 1160. Along with the interactive leagues themselves, fantasy sports providers offer "statistical sports information to subscribers, similar to newspapers and online news sites, only in a more detailed and comprehensive fashion." Matthew G. Massari, Note, *When Fantasy Meets Reality: The Clash Between On-line Fantasy Sports Providers and Intellectual Property Rights*, 19 HARV. J.L. & TECH. 443, 445 (2006).

19. *See* Brendan Roberts, *Fantasy Baseball 101: Starting a League*, http://fantasy.sportingnews.com/baseball/experts/brendan-roberts/20060124.html SPORTING NEWS (last visited Feb. 29, 2008). "The commissioner should be the league's best overseer, someone who is honest, responsible and consistent. He'll enforce the rules but will follow the league's consensus when a controversy occurs. . . .". *Id.* The commissioner and GMs have the option of setting daily lineups of players from their rosters or selecting a weekly lineup format. *Id.* "The most common schedule for weekly-transaction leagues is Monday through Sunday. It's the ideal format because Monday has the lightest slate of games, it's the beginning of most owners' workweek [sic] and it usually signifies the end of most series . . . . [M]ore than 75 percent of leagues follow this schedule." *Id.*

20. Razzano, *supra* note 17, at 1161 (citing Fantasy Sports Trade Association *How to Play Fantasy Baseball*, http//www.fsta.org/howtoplay/baseball.php (last visited Mar. 21,

initially set, the season begins. GM point totals are determined by the daily statistics of each active player on their respective rosters. Throughout the season, fantasy GMs have available to them many of the same options as actual GMs, including: the ability to trade players with one another, the ability to drop players off of their rosters, and the ability to add unclaimed players, or free agents.[21] "The success of one's fantasy team over the course of the season is dependent [upon] one's chosen players' actual performances on their respective actual teams."[22]

B. The Birth of Fantasy Baseball

Daniel Okrent is recognized as the inventor of Rotisserie League Baseball—the predecessor to modern day fantasy baseball.[23] In 1980, Okrent, then a writer for *Sports Illustrated*, began meeting weekly with a group of friends at La Rotisserie Francaise in Manhattan to eat and discuss which players were in fact the best in the Major Leagues.[24] Rather than argue over which players were best, Okrent decided he and his friends[25] should compete—using actual player statistics from the upcoming season—to prove which players were in fact best.[26] "Rotisserie Baseball" was born.[27] The rules of Rotisserie

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2008)); *see also* Roberts, *supra* note 19; *C.B.C. Distribution*, 443 F. Supp. 2d at 1080 ("Prior to the start of the professional baseball season participants form their teams by 'drafting' players from various Major League baseball teams.").

21. *See supra* note 16; *see also* Razzano, *supra* note 17, at 1159.

22. *C.B.C. Distribution*, 443 F. Supp. 2d at 1080. As Professor Jack F. Williams explained, "[t]he lifeblood of the competition is the actual performance statistics of [MLB] players." Jack F. Williams, *Who Owns the Back of a Baseball Card?: A Baseball Player's Rights in His Performance Statistics*, 23 CARDOZO L. REV. 1705, 1708 (2002).

23. Expert Report of Daniel Okrent, ¶ 8, C.B.C. Distribution & Mktg., Inc., v. Major League Baseball Advanced Media, 443 F. Supp. 2d 1077, 1108 (E.D. Mo. 2006) (No. 4:05 CV00 252 MLM), 2002 WL 1587249. "I first wrote down the rules on a scratch piece of paper while on an airplane flight to Austin, Texas, during the 1979–1980 off-season." *Id.*

24. Razzano, *supra* note 17, at 1159 (citing ALAN SCHWARZ, THE NUMBERS GAME: BASEBALL'S LIFELONG FASCINATION WITH STATISTICS 175 (2004)); *see also* Britannica Online Encyclopedia, *supra* note 14. According to Okrent, "I shared my rules with Austin friends, [but] they did not express great interest. So, I brought the game to a New York group of friends, most of whom were in the publishing business." Expert Report of Daniel Okrent, *supra* note 23, ¶ 8.

25. This group of friends, which consisted of eleven individuals, came to be known as the "Founding Fathers" of fantasy baseball. Expert Report of Daniel Okrent, *supra* note 23, ¶ 8.

26. Razzano, *supra* note 17, at 1159; *see also* Britannica Online Encyclopedia, *supra* note 14.

Baseball required each participant to draft twenty-three Major League Baseball players, covering each position, in either the American League or National League to create a working roster.[28] The draft took place before the season under an imaginary "salary cap."[29] GMs bid for each player, but the GMs only had a limited amount of "money"[30] at their disposal for these important personnel decisions.[31] Each day, GMs established their lineups and collected their teams' statistics from the preceding day's games.[32] The original statistical categories under review included: batting average, home runs, runs batted in (RBI), stolen bases, wins, earned run average (ERA), saves, and the ratio of walks and hits to innings pitched.[33] The GM whose

27. The Manhattan restaurant La Rotisserie Francaise inspired the name "Rotisserie League," which Okrent and the Founding Fathers ultimately adopted as the name of this early form of fantasy baseball. Expert Report of Daniel Okrent, *supra* note 23, at ¶ 8.

28. Zachary C. Bolitho, Note, *When Fantasy Meets the Courtroom: An Examination of the Intellectual Property Issues Surrounding the Burgeoning Fantasy Sports Industry*, 67 OHIO ST. L.J. 911, 916–17 (2006).

29. Razzano, *supra* note 17, at 1159. A salary cap, in essence, restricts the amount of money that management can spend on labor. Joe Sheehan, *The Daily Prospectus: Salary Cap*, http://www.baseballprospectus.com/article.php?articleid=1345 (last visited Mar. 19, 2008). Several sports leagues have made salary caps mandatory. *Id.* Ironically, Major League Baseball has no salary cap restriction. *See id.*

30. The money referred to here does not involve actual dollars. However, many fantasy league providers require an entrance fee in order to participate in a fantasy league. *See* Roberts *supra* note 17.

31. Razzano, *supra* note 17, at 1159. "The original salary cap was $250 dollars for a twenty-two man roster. The following year, the league instituted a $260 cap for a twenty-three-man roster. That cap-roster size combination remains popular in today's "salary cap" fantasy leagues." *Id.* at 1159 n.18.

32. Razzano, *supra* note 17, at 1159.

33. Bolitho, *supra* note 28, at 917. Today, fantasy baseball leagues monitor players' statistical output in a number of different categories including, *inter alia*, Okrent's original eight statistical categories. In fact, league participants almost always have the option of choosing which statistical categories they want to monitor as well as the ability to determine how much weight should be given to each specific statistical category. *See* Roberts, *supra* note 19 (commenting on categorical scoring, stating that:

> In category (Rotisserie) leagues, you earn a point value in each category based on what rank you are–first place in the homers category is worth 12 points in a 12-team league, last place gets you one point. The person with the highest total number of points is the leader. The most common category league is what's called a 5x5 league, which uses batting average, home runs, RBIs, runs and steals on offense; for pitchers, it's wins, WHIP (walks plus hits divided by innings pitched), ERA, saves and strikeouts. Even more basic is the 4x4 league, which knocks runs and strikeouts from the above equation. You don't have to limit yourself–go with as many categories as you want . . . .").

fantasy team produced the best overall statistics from the categories under review, over the course of the entire season, was declared the winner.[34]

Because Okrent and many of the Founding Fathers were members of the media, other journalists, namely sports journalists, were introduced to the Rotisserie League.[35] Articles about the Rotisserie League captured the interest of baseball fans across the country.[36] Rotisserie leagues began sprouting up everywhere; by the end of the decade, fantasy baseball had developed into its own industry.[37] Before long, specialized telephone and bookkeeping services had begun providing fantasy leagues with scores, in-depth statistical analysis, and strategic personnel advice.[38] The 1990s witnessed the rise of the internet—an invaluable tool that improved the distribution of statistical information and revolutionized fantasy baseball.[39]

C. The Current State of Fantasy Baseball

The business of fantasy sports is a multi-million dollar industry in the United States.[40] In fact, some estimates project fantasy baseball to

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34. Razzano, *supra* note 17, at 1159; *see also* Britannica Online Encyclopedia, *supra* note 14 ("The statistics that these players accumulate over the course of a season determine the winner of the . . . league."). In the original Rotisserie League, Okrent personally calculated the points accumulated by each participant's team. Expert Report of Daniel Okrent, *supra* note 23, ¶ 8. Today, it is extremely rare for fantasy scoring to be done by hand; almost all fantasy providers utilize complex computer programs to calculate and record fantasy points.

35. Expert Report of Daniel Okrent, *supra* note 23, ¶ 13. Besides Okrent, a writer for *Sports Illustrated* and consultant for *Texas Monthly Magazine*, the original Rotisserie League members included a book editor, a writer-illustrator for The New Yorker, a screenwriter, and the editor of Esquire magazine. Bolitho, *supra* note 28, at 917 (quoting Chris Ballard, Fantasy World, Sports Illustrated, June 21, 2004, at 83).

36. Razzano, *supra* note 17, at 1159–60.

37. Razzano, *supra* note 17, at 1160.

38. Razzano, *supra* note 17, at 1160. "Bookkeeping services kept track of the scores for leagues whose participants did not have the time to compile the statistics themselves." *Id.*.

Originally, fantasy baseball, despite being immensely popular, was limited to only the most dedicated fans because of the extreme effort required in calculating players' statistics by hand and subsequently mailing these stats to participants. Bolitho, *supra* note 28, at 917.

39. Razzano, *supra* note 17, at 1160.

40. *See How Does Fantasy Baseball Work?*, http://www.wisegeek.com/how-does-fantasy-baseball-work.htm (last visited Mar. 20, 2008) (explaining how fantasy baseball has "transformed from a hobby practiced only by those with an extreme interest in baseball statistics to a multi-million dollar industry."); *see also C.B.C. Distribution*, 443 F. Supp. 2d at

be a more than $1 billion annual industry.[41] The internet is largely responsible for fantasy baseball's billion-dollar status.[42] Today, real-time statistics are delivered to the public instantaneously via a number of media avenues including, perhaps most significantly, the Internet.[43] As a result, "internet fantasy providers generate significant revenue through the sale of corporate advertising."[44]

In general, fantasy sports providers "agree that using players' names, likenesses, or biographical information to promote or advertise their products requires a license . . . ."[45] Furthermore, fantasy providers typically agree that licensing from professional teams is necessary for the use of protected marks, such as team names and logos.[46] The source of recent tension between MLBAM and fantasy baseball providers stems from some fantasy providers' contention that the use of Major League Baseball players' names and statistics in fantasy games does not require authorization from MLBAM.

D. C.B.C. Distribution v. Major League Baseball Advanced Media, L.P.

1. The Controversy

CBC and the MLBPA entered into license agreements in 1995 and 2002 (the "Agreements").[47] The Agreements granted CBC the right to use—among other enumerated "rights"—Major League Baseball

1080 (noting that "[t]o date, the business of fantasy sports games is a multimillion dollar industry . . . .").

41. Massari, *supra* note 18, at 445 (citing Tresa Baldas, *Pro Sports: Technology Changes Rules of the Game*, NAT'L L.J. (2005), *available at* http://www.law.com/jsp/article.jsp?id=1109128216973 (stating that "six million [people] play fantasy baseball, spending an average of $175 a year and making fantasy baseball a $1 billion annual business").

42. Massari, *supra* note 18, at 445. "Before the aid of technology, early fantasy leagues were manually operated and used statistics from media box scores and from weekly information published in *USA Today* because they were easy to tabulate." *Id.*

43. Massari, *supra* note 18, at 445.

44. Massari, *supra* note 18, at 445.

45. Massari, *supra* note 18, at 446.

46. Massari, *supra* note 18, at 446.

47. *C.B.C. Distribution*, 443 F. Supp. 2d at 1080. The Agreements covered the period from July 1, 1995, through December 31, 2004. *Id.*

players' names and playing records.[48] The 2002 Agreement contained a no-challenge provision.[49] It also included a further-use provision, which became operational upon expiration or termination of the 2002 Agreement.[50]

In 2005, the MLBPA licensed MLBAM the right to use MLB "Rights and Trademarks for exploitation via all interactive media."[51] In February of 2005, MLBAM offered CBC a license to promote MLB.com fantasy games on CBC's website.[52] However, unlike in years past, MLBAM was not offering CBC a license to promote its own fantasy baseball games for 2005.[53]

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48. *See id.* at 1080–81. The 2002 License Agreement stated that:

> [T]he Players' Association was acting on behalf of all the active baseball players of the National League and the American League who entered into a Commercial Authorization Agreement with the Players' Association; that the Players' Association in this capacity had the right to negotiate the Agreements and to grant rights in and to the logo, name, and symbol of the Players' Association, identified as the Trademarks, and "the names, nicknames, likenesses, signature, pictures, playing records, and/or biographical data of each player," identified as the "Players Rights"; and that CBC desired to use the "Rights and/or the Trademarks on or in association with the manufacture, offering for sale, sale, advertising, promotion, and distribution of certain products (the "Licensed Products").

Id.

49. *Id.* at 1081. "The [no-challenge provision] provided that 'during any License Period . . . [CBC] will not dispute or attack the title or any right of Players' Association in and to the Rights and/or the Trademarks or the validity of the license granted.'" *Id*.

50. *See id.*

> ([T]he 2002 License Agreement further stated that upon termination CBC would have no right '. . . to use in any way the Rights, the Trademarks, or any Promotional Material relating to the Licensed Products' and that upon expiration or termination of the License Agreement, CBC shall 'refrain from further use of the Rights and/or the Trademarks or any further reference to them, either directly or indirectly . . . .'

51. C.B.C. Distribution & Mktg. v. Major League Baseball, 443 F. Supp. 2d 1077, 1081 (E.D. Mo. 2006). The court noted:

> On or around January 19, 2005, Advanced Media executive George Kliavkoff sent a request for proposals (the "RFP") to various fantasy game operators and providers including CBC. The RFP invited CBC to submit a proposal under which it would enter into a license agreement with Advanced Media and participate in Advanced Media's fantasy baseball licensing program for the 2005 season.

Id.

52. *Id.*

53. *Id.* MLBAM "stated that it was offering 'a full suite of MLB fantasy games' and . . . CBC could use its 'online presence and customer relationships . . . to promote the MLB.com

2. The Arguments

CBC filed a complaint for declaratory judgment on February 7, 2005.[54] CBC's Complaint contained four counts: Count I sought a declaratory judgment pursuant to the Lanham Act,[55] Count II asserted a copyright claim, Count III addressed the right of publicity claim, and Count IV sought relief pursuant to state unfair competition or false advertising laws.[56] MLBAM and MLBPA[57] counterclaimed, asserting, among other claims, that CBC's continued use of the players' names and playing records in its fantasy games without permission violated the players' right of publicity.[58] Because of a stipulation entered into by the parties,[59] the only issues examined by the court concerned the players' claimed right of publicity.[60]

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fantasy games to [CBC's] customers in exchange for a 10% revenue share from MLB.com on all related revenue.'" *Id*.

54. *Id.* In the Complaint, CBC alleged that it had "a reasonable apprehension that it [would] be sued by Advanced Media if it continue[d] to operate its fantasy baseball games." *Id*. The Complaint also sought injunctive relief "asking that Advanced Media and its affiliates be enjoined from interfering with CBC's business related to sports fantasy teams." *Id*. at 1081–82.

Since the federal claims were dismissed, the parties stipulated that the Eastern District of Missouri could and should retain jurisdiction pursuant to 28 U.S.C. § 1367(a) (1990). *C.B.C. Distribution*, 443 F. Supp. 2d at 1081–82. The court ultimately retained jurisdiction over the matter, basing its decision on principles of judicial economy, convenience, and fairness. *Id*.

55. "[A]n express purpose of the Lanham Act is to protect commercial parties against unfair competition." Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 410 (9th Cir. 1996) (citing Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1108 (9th Cir.1992)).

56. *C.B.C. Distribution*, 443 F. Supp. 2d at 1082 n.5.

57. MLBPA intervened in the matter pursuant to Rule 24 of the FEDERAL RULES OF CIVIL PROCEDURE. *Id.*

58. *Id.* In addition, "[MLBAM] counterclaim[ed] alleging violations of state trademark and unfair competition laws, state false advertising laws, and the Lanham Act." *Id*. at 1081–82 n.5. MLBAM and MLBPA centered their counterclaim—that CBC violated the players' right of publicity—on CBC's exploitation of players' "names, nicknames, likenesses, signatures, jersey numbers, pictures, playing records and biographical data (the "Player Rights") via all interactive media with respect to fantasy baseball games." *C.B.C. Distribution*, 443 F. Supp. 2d at 1082.

59. "The parties . . . entered into a Stipulation . . . [in] which CBC dismissed Counts I, II, and IV of [the] Complaint . . . . The only count [that] remain[ed] . . . [was] . . . the right of publicity . . . a matter of state and common law." *Id.* at 1081–82 n.5.

60. *Id.* at 1082–83. The court stated that:

> [T]he only remaining issues before this court are whether the players have a right of publicity in their names and playing records as used in CBC's fantasy games; whether, if the players have such a right, CBC has, and is, violating the players' claimed right of publicity; whether, if the players have a right of publicity and if this right has been violated by CBC, such a violation is preempted by copyright law; whether, if the

3. Conclusions of Law

According to the court, the key question to be determined was whether the undisputed facts established that CBC had, in fact, violated the players' right of publicity.[61] The court initially acknowledged the Missouri State right of publicity.[62] Subsequently, the court elaborated that "[t]o prove a violation of one's right of publicity a plaintiff must establish that the defendant commercially exploited the plaintiff's identity without the plaintiff's consent to obtain a commercial advantage."[63] Accordingly, the court began to examine whether the prima facie elements of a right of publicity claim existed.[64]

The first two elements of the common law right of publicity cause of action—that CBC was using the players' names and playing records, and CBC's use was without the players' consent—were indisputably satisfied.[65] Consequently, the court only needed to determine if elements three and four were satisfied in determining whether MLBAM and MLBPA had established a prima facie case[66] against CBC.[67]

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players have a right of publicity which has been violated by CBC, the First Amendment applies and, if so, whether it takes precedence over the players' claimed right of publicity; and whether CBC has breached the 2002 Licensing Agreement.

61. *Id.* at 1083. The court concluded that "[o]nly if [the right of publicity] is violated need the court consider whether under the facts of this case federal copyright law preempts the right of publicity and/or whether the First Amendment trumps the right of publicity." *Id*.

62. *Id.* at 1084 (citing Doe v. TCI Cablevision, 110 S.W. 3d 363, 368 (Mo. 2003) (en banc), *cert. denied*, 540 U.S. 1106, *appeal after remand*, 207 S.W. 3d 52 (Mo. Ct. App. 2006)).

63. *C.B.C. Distribution*, 443 F. Supp. 2d at 1085. The court based this conclusion on its interpretation of the RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (2005) and its analysis of *TCI*. *See C.B.C. Distribution*, 443 F. Supp. 2d at 1084–85. The court noted that "[r]elying on the Restatement, the Missouri Supreme Court held in TCI . . . that 'the elements of a right of publicity action include: (1) That defendant used plaintiff's name as a symbol of his identity (2) without consent (3) and with the intent to obtain a commercial advantage.'" *Id.* The court also relied on *Gionfriddo v. Major League Baseball*, which stated that "[t]he elements of [the tort of the right of publicity], at common law, are: '(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.'" *Id*. at 1085 (citing Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307 (Cal. Ct. App. 2001)).

64. *C.B.C. Distribution*, 443 F. Supp. 2d at 1085.

65. *Id.*

66. "A *prima facie* case is a case which is sufficient to go to the jury. It would compel a finding for plaintiff if defendant produces no evidence to rebut it." Duvall v. Smith, 950 S.W.2d

a. Commercial Advantage

Commercial advantage was the first element the court examined.[68] The court focused on intent, determining whether the defendant intended to obtain a commercial advantage through the use of players' names and playing records.[69] The court maintained that "use of a plaintiff's name must be more than 'incidental' to violate the right of publicity."[70]

After review, the court concluded that: (1) CBC's use of players' names and playing records does not suggest that any Major League Baseball player is associated with CBC's fantasy games; and (2) CBC's use of players' names and playing records is not intended to

526, 527 (Mo. Ct. App. 1997).

67. *C.B.C. Distribution*, 443 F. Supp. 2d 1077, 1085 (E.D. Mo. 2006). Since the first two elements were satisfied the court simply concluded that it "must consider whether CBC's use of players' names in conjunction with their playing records in its fantasy baseball games utilizes the players' names as a symbol of their identities to obtain a commercial advantage and, if so, whether there is resulting injury." *Id.*

68. *See id.*

69. *Id.* (citing Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 837 (6th Cir. 1983) ("[U]nder the existing authorities, a celebrity's legal right of publicity is invaded whenever his identity is intentionally appropriated for commercial purposes.")). The court stated further that "[e]vidence which shows that a defendant *intended to create an impression* that a *plaintiff is associated* with the defendant's product 'alone is sufficient to establish the commercial advantage element . . . .'" *C.B.C. Distribution*, 443 F. Supp. 2d at 1085 (quoting Doe v. TCI Cablevision, 110 S.W. 3d 363, 371 (Mo. 2003)).

70. *Id.* at 1086 n.9. The court cited examples of incidental use:

> "Incidental use" was found where a motion picture showed a factory building upon which there was a sign bearing the name and business of the plaintiff . . . . The court held that no violation of the New York statute had taken place, since in order to constitute such a violation, it must appear that the use of plaintiff's picture or name is itself for the purpose of trade and not merely an incidental part of a photograph of an actual building.
>
> The court in *Moglen v. Varsity Pajamas, Inc.*, [213 N.Y.S.2d 999 (N.Y. App. Div. 1961)] found an "incidental use" where a newspaper article reporting plaintiff's loss of a tennis match was partly reproduced, together with other articles, as a patchwork pattern in a fabric which defendants manufactured and sold for use in underwear, pajamas, and play togs. The court held that such use did not meet the requirement of a meaningful or purposeful use of a name, since the pattern of the newspaper page as a patch in the fabric was only incidental to the design of the fabric and the appearance of plaintiff's name in the article was an even more casual and incidental use . . . .

Id. (quoting Henley v. Dillard Dept. Stores, 46 F. Supp. 2d 587, 594 n.6 (N.D. Tex. 1999)).

attract customers away from other fantasy game providers.[71] Furthermore, the court distinguished *Palmer v. Schonhorn Enterprises, Inc.*[72] and *Uhlaender v. Henricksen*,[73] cases upon which MLBAM and MLBPA heavily relied, and found the cases non-controlling.[74] Thus, the court ruled, "there [was] no triable issue of fact as to whether CBC uses Major League baseball players' names in its fantasy baseball games with the intent of obtaining a commercial advantage."[75]

b. Identity

The court then focused on the identity element.[76] "[H]ow players' names are used is significant rather than the mere fact they are used."[77] A right of publicity cause of action requires that "a name . . .

71. *Id*. at 1086.

72. 96 N.J. Super. 72 (N.J. Super. Ct. 1967) (finding in favor of golfers with respect to defendant's unauthorized use of internationally known professional golfers' pictures and profiles in a board game).

73. 316 F. Supp. 1277, 1283 (D. Minn. 1970) (finding that defendant—who used professional baseball players' names, uniform numbers, and statistical information in a board game—engaged in unauthorized appropriation of the players' "names and statistics for commercial use" and therefore, the baseball players were entitled to relief).

74. C.B.C. Distribution & Mktg. Inc. v. Major League Baseball Advanced Media, 443 F. Supp. 2d 1077, 1086–87 n.12 (E.D. Mo. 2006). The court distinguished Palmer from the case at hand in two respects: (1) "Palmer has certain factual similarities to the matter under consideration, but with the critical exception that the defendant in Palmer used golfers' pictures;" and (2) "[m]ost significantly Palmer was decided in 1967 . . . ." *Id*. at 1087. The court's treatment of Uhlaender mirrored its treatment of Palmer: "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. As such, Uhlaender is not controlling." *Id*. at 1087 n.12.

75. *Id.* at 1086. "The court finds, therefore, for the reasons fully set forth above that the undisputed facts establish that the commercial advantage element of the right of publicity is not met in the matter under consideration." *Id*. at 1088.

76. *Id.* ("It remains to be determined in regard to the elements of the right of publicity whether CBC has, and is, using the players' names 'as a symbol of their identity.'"). The court noted that:

> The court in *Palmer* failed to consider the element of the right of publicity which requires that a defendant use a plaintiff's identity or persona. More recent authority reflects that use of a person's identity or persona is a critical element in establishing a right to recovery under a right of publicity theory.

Id. at 1087 n.B.

77. *Id.* at 1089. Consequently, the court determined:

be used as a *symbol* of the plaintiff's *identity*. . . ."[78] The court ultimately held that CBC was not violating the players' right of publicity because "CBC's use of players' names in conjunction with their playing records . . . does not involve the persona or identity of any player."[79] The court concluded that there was no triable issue regarding the identity element of the right of publicity.[80]

c. Policy Considerations

Finally, the court considered whether CBC's use of players' names and playing records contravenes the policy considerations at the foundation of the right of publicity. The court relied on the *Restatement*[81] and established case law in its review of the policy considerations.[82] After review, the court found that "[a]ll of the . . .

> To resolve the issue of whether a public personality's name is used as a *symbol of his or her identity*, it is appropriate to consider "'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.'"

Id. at 1088 (quoting *TCI*, 110 S.W. 3d at 370).

78. *Id.* at 1089 "Indeed, not all uses of another's name are tortious; mere use of a name as a name is not tortious." *Id.*

79. *Id.* In its rationale, the court stated that:

> 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; it simply involves historical facts about the baseball players such as their batting averages, home runs, doubles, triples, etc. CBC's use of players' names in conjunction with their playing records, therefore, does not involve the persona or identity of any player.

Id.

80. C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, 443 F. Supp. 2d 1077, 1089 (E.D. Mo. 2006).

81. According to the court's reading of the *Restatement*, the justification for the right of publicity includes:

> (1) protection of "an individual's interest in personal dignity and autonomy"; (2) "secure[ing] for plaintiffs the commercial value of their fame"; (3) prevent[ing] 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) "afford[ing] protection against false suggestions or endorsement or sponsorship.

Id. at 1089–90 (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46, Cmt. c (2005)).

82. The case law revealed that "[t]he right to publicity protects the ability of public

policy considerations are aimed at preventing harmful or excessive commercial use of one's celebrity in a manner which could dilute the value of a person's identity."[83] The court then examined the players' ability to earn a living, the key inquiry being whether CBC's use of players' names and statistics "deprives the players of their proprietary interests in reaping the rewards of their endeavors."[84] The court held that CBC's use of players' names and statistics does not contravene public policy.[85]

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personae to control the types of publicity that they receive." *C.B.C. Distribution*, 443 F. Supp. 2d at 1090 (quoting Ventura v. Titan Sports, Inc., 65 F.3d 725, 730 (8th Cir.1995)). "[T]he right of publicity protects against commercial loss caused by appropriation of an individual's [identity] for commercial exploitation." *C.B.C. Distribution*, 443 F. Supp. 2d at 1090 (quoting *TCI*, 110 S.W. 3d at 368). "This right protects a public figure's right to receive pecuniary gain for the commercial use of his or her likeness." *C.B.C. Distribution*, 443 F. Supp. 2d at 1090 (citing Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d at 866, 868 (2d Cir. 1953)). Furthermore, research into respected authorities revealed that "[t]he right of publicity is the inherent right of every human being to control the commercial use of his or her identity." *C.B.C. Distribution*, 443 F. Supp. 2d at 1090 (citing J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:4 at 3 (2d ed. 2005)).

The court then looked to the Supreme Court's decision in *Zacchini* for policy considerations:

> The rationale for (protecting the right of publicity) is the straightforward one of *preventing unjust enrichment* by the theft of good will. No social purpose is served by having the defendant get free some aspect of [the performer] that would have market value and *for which he would normally pay*." (citation omitted).

C.B.C. Distribution, 443 F. Supp. 2d at 1090 (quoting Zacchini v. Scripps-Howard Broad., Co., 433 U.S. 562, 576 (1977)).

83. *C.B.C. Distribution*, 443 F. Supp. 2d at 1090.

84. *Id.* at 1091. The court determined that:

> CBC's use of Major League baseball players' names and playing records in fantasy baseball games does not go to the heart of the players' ability to earn a living as baseball players; the baseball players earn a living playing baseball and endorsing products; they do not earn a living by the publication of their playing records . . . . Moreover, CBC's use of Major League baseball players' names and playing records does not give CBC something free for which it would otherwise be required to pay; players' records are readily available in the public domain . . . . As such, it cannot be said that CBC's use of the Major League baseball players' names and playing records in the circumstances of this case deprives the players of their proprietary interest in reaping the reward of their endeavors.

Id.

85. "The court finds, therefore, for the reasons fully set forth above that the undisputed facts establish that CBC's use of players' names and/or playing records in its fantasy baseball games does not contravene the policies behind the right of publicity." *Id.*

III. SUMMARY JUDGMENT

A. The Standard

The Federal Rules of Civil Procedure set forth the standard for summary judgment: a court may grant a motion for summary judgment if the evidence shows that "there is no genuine issue as to any material fact . . . ."[86] The Supreme Court of the United States has ruled that summary judgment is not proper where the evidence presented could have led a reasonable jury to return a verdict for the nonmoving party.[87] Additionally, the Supreme Court has instructed that "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."[88]

B. Genuine Issues of Material Fact

1. Commercial Advantage

Under Missouri common law, four elements are necessary to establish a right of publicity action.[89] In the case at hand, the first two elements were concededly satisfied.[90] The court determined, however, that there was no triable issue of fact regarding the commercial advantage element.[91]

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86. Rule 56(c) specifically states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FED. R. CIV. P. 56(c).

87. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

88. *Liberty Lobby*, 477 U.S. at 255. "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id*. at 249.

89. *See supra* note 63.

90. *See supra* note 65 and accompanying text.

91. *See supra* note 75 and accompanying text.

a. Impression of Association

The *CBC* court's initial inquiry questioned whether the defendant intended to "obtain a commercial advantage."[92] An intent to "*create an impression* that a *plaintiff is associated* with the defendant's product 'alone is sufficient to establish the commercial advantage element in a right of publicity action."[93] The court concluded that, since all fantasy providers use MLB players' names and statistics, CBC's use did not intend to attract customers away from other fantasy providers.[94] However, the court's view was extremely narrow.

Fantasy games compete, not just in the fantasy sports industry, but in the gaming and entertainment industry as a whole. Fantasy providers vie for consumers against board game providers, video game providers, and a host of other gaming and entertainment providers.[95] In such a market, use of professional athletes' names and playing records can have an extreme economic impact.[96]

Furthermore, licensing is unquestionably a principle form of revenue for professional sports organizations and professional athletes.[97] It is generally known that unlicensed parties are restricted

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92. C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, 443 F. Supp. 2d 1077, 1085 (E.D. Mo. 2006); *see also supra* note 69 and accompanying text.

93. *Id.* In *TCI*, the court observed that:

> As explained, the commercial advantage element of the right of publicity focuses on the defendant's intent or purpose to obtain a commercial benefit from use of the plaintiff's identity. But in meeting the commercial advantage element, it is *irrelevant whether defendant intended to injure the plaintiff . . . or actually succeeded in obtaining a commercial advantage* from using plaintiff's name.

TCI, 110 S.W. 3d at 370–71 (quoting Doe v. TCI Cablevision, 110 S.W. 3d 363, 371 (Mo. 2003)) (emphasis added).

94. *C.B.C. Distribution*, 443 F. Supp. 2d at 1086.

95. Massari, *supra* note 18, at 464; *see also* Jon Robinson, *Mr. Robinson's Neighborhood: Take Two to Get MLB Exclusive? NBA to Sell Genre Exclusive Licenses?*, IGN.COM, Jan. 18, 2005, http://sports.ign.com/articles/580/580468p1.html (last visited Feb. 12, 2007) (discussing a licensing agreement between MLB and Visual Concepts which would affect video game companies like Nintendo and EA).

96. *See* Uhlaender, 316 F. Supp. at 1278 ("It is clear to the court that the use of the baseball players' names and statistical information is intended to and does make defendants' games more salable to the public than otherwise would be the case.").

97. *See* Hilary Cassidy, *A Winning Bid?*, BRANDWEEK, Jan. 22, 2001, http://www.findarticles.com/p/articles/mi_m0BDW/is_4_42/ai_69493301 (last visited Feb. 13, 2007)

from utilizing the names and logos of players and teams for profit without consent. It holds true, then, that consumers could reasonably perceive MLB and its players as associated with any fantasy game provider that utilizes players' names and statistics commercially, even though evidence of actual association through advertising is lacking.

Accordingly, a reasonable jury could have concluded, based on competition in the gaming and entertainment industry as a whole and on general licensing trends, that CBC intended to create the impression that MLB and its players were associated with its fantasy products.

b. "Quasi-commercial" Uses

The *CBC* court ruled as a matter of law that MLBAM had not sufficiently established the commercial advantage element of its right of publicity claim.[98] The court eventually found that CBC's use of players' names and playing records did not evidence an intent to obtain a commercial advantage. In the court's opinion, CBC's use fell short of any actionable threshold that exists on the "commercial advantage spectrum."[99]

(discussing the magnitude of the sports licensing industry in the past and examining its current profitability problems).

98. *See C.B.C. Distribution*, 443 F. Supp. 2d at 1086. The court reasoned that:

> Unlike cases where the commercial advantage element of the right of publicity has been found, there is nothing about CBC's fantasy games which suggests that any Major League baseball player is associated with CBC's games or that any player endorses or sponsors the games in any way. The use of names and playing records of Major League baseball players in CBC's games, moreover, is not intended to attract customers away from any other fantasy game provider because all fantasy providers necessarily use names and playing records. Indeed, there is no evidence to create a triable issue as to whether CBC intended to create an impression that Major League baseball players are associated with its fantasy baseball games or as to whether a reasonable person would be under the impression that the baseball players are associated with CBC's fantasy games any more than the players are associated with a newspaper boxscore.

Id.

99. *See* Richard T. Karcher, *The Use of Players' Identities in Fantasy Sports Leagues: Developing Workable Standards for Right of Publicity Claims*, 111 PENN. ST. L. REV. 557 (2007) (discussing the "commercial advantage spectrum" as it applied to the CBC decision).

The "commercial-advantage spectrum" is a concept that Professor Richard T. Karcher recently developed.[100] According to Professor Karcher:

> At one end of the spectrum, use of an athlete's identity in the context of news reporting, entertainment (i.e. movies, films) and literary works does not violate the athlete's right of publicity. . . . [T]he primary purpose of such use is not "commercial" nor to gain any "commercial advantage." This end of the spectrum will be referred to hereinafter as the "non-commercial end." At the other end of the spectrum, use of an athlete's identity without permission in advertisements, endorsements and marketing efforts is clearly a violation of the athlete's right of publicity. In this context, the player's name or likeness is being used to demonstrate to consumers that the player is associated with, or approves of, the user or the user's product or service. This end of the spectrum will be referred to hereinafter as the "commercial end."[101]

According to Professor Karcher, uses of players' identities are not restricted to either the commercial or non-commercial categories rather, such uses exist along a commercial spectrum; he argues that "[t]here are many uses of an athlete's identity that fall somewhere in between the two ends of the spectrum, which can be referred to as 'quasi-commercial' uses."[102]

The *CBC* court declined to accept "quasi-commercial" uses of players' names and playing records as sufficient evidence of commercial advantage;[103] ironically, though, many of the cases at the center of the court's decision did just the opposite. For example, in *Palmer*, the court found in favor of professional golfers on their right of publicity action, which involved the golfers' names, biographies, profiles, and pictures being used in the defendant's board game.[104] The defendant argued that the commercial advantage element was not

100. *See id.*
101. Karcher, *supra* note 99, at 560 (citation omitted).
102. *Id.* at 561.
103. 443 F. Supp. 2d at 1085–88.
104. *See supra* note 72.

met because its board game did not use the golfers' names on the box to attract customers.[105] Despite the lack of association, the *Palmer* court concluded that the defendant's "quasi-commercial" use was sufficient to satisfy the commercial advantage element.[106] The *Palmer* court operated on the "presumption that the plaintiff's right of publicity has been violated unless the defendant can prove that its use of the plaintiff's identity is all the way at the non-commercial end of the spectrum."[107] The *CBC court*'s presumption was exactly the opposite.[108]

In *Uhlaender*,[109] the court, applying *Palmer*, held that the defendant's use—which was inherently "quasi-commercial" because there was no attempt to associate the players with the defendant's product for the purpose of advertising—violated the players' right of publicity.[110] Thus, while it is undisputed that a defendant's intent to create an impression of association through advertising or marketing satisfies the commercial advantage element of a right of publicity claim, the authorities[111] teach that the commercial advantage element

105. Palmer v. Schonhorn Enter's., 96 N.J. Super. 458, 462 (N.J. Super Ct. Ch. Div. 1967).

106. The *Palmer* court concluded that:

> It would therefore seem, from a review of the authorities, that although the publication of biographical data of a well-known figure does not per se constitute an invasion of privacy, the use of that same data for the purpose of capitalizing upon the name by using it in connection with a commercial project other than the dissemination of news or articles or biographies does.
>
> The names of plaintiffs have become internationally famous, undoubtedly by reason of talent as well as hard work in perfecting it. . . .
>
> *It is unfair that one should be permitted to commercialize or exploit or capitalize upon another's name, reputation or accomplishments merely because the owner's accomplishments have been highly publicized.*
>
> *The argument by defendant that it is not invading plaintiffs' rights of privacy because it does not advertise their names on the lid of the box,* and because the purchaser does not know who the "23 famous golfers are" until he purchases and sees the contents, *is not tenable.*

Id. (emphasis added).

107. Karcher, *supra* note 99, at 567 (citation omitted). "The CBC court, on the other hand, seems to presume that there is no violation unless the plaintiff can demonstrate that the defendant's use is all the way at the commercial end of the spectrum." *Id*. (citation omitted).

108. *Id.*

109. *See supra* note 73.

110. *Uhlaender*, 316 F. Supp. at 1282.

111. The court attempted to dismiss *Palmer* and *Uhlaender* as non-controlling authorities.

can equally be satisfied by "quasi-commercial" uses, uses lacking evidence of the defendant's intent to create an impression of association.[112]

c. Names and Likenesses

The *CBC* court, in its commercial advantage analysis, distinguished the unauthorized use of players' names from the unauthorized use of players' likenesses, concluding that use of the

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See supra note 74. However, courts have recognized that the *Zacchini* court was constrained by the Supreme Court: "Because the Zacchini Court limited its holding to the particular facts of the case-the appropriation of plaintiff's 'entire act'-it does not control the case at hand." TCI, 110 S.W. 3d at 372. Thus, the *Palmer* decision and the *Uhlaender* decision—which is squarely on point with the case at hand—are not inconsistent with *Zacchini* and should have received more credence from the court.

112. The *CBC* court acknowledged an incidental use exception in footnote 9 of its opinion. *See* C.B.C. Distribution & Mktg. v. Major League Baseball Advanced Media, 443 F. Supp. 2d 1077, 1085 (E.D. Mo. 2006); *see also supra* note 70 and accompanying text. Under this incidental use exception, "[u]se of a plaintiff's name . . . must be more than 'incidental' to violate the right of publicity." *Id.* The court emphasized the holding in *TCI* that when a plaintiff's name and identity are used without intent to obtain a commercial advantage, but where they are used for some other purpose, the use is incidental and does not violate the right of publicity. *C.B.C. Distribution*, 443 F. Supp. 2d at 1085–86. However, the court never clearly explained what constitutes an incidental use; it merely provided unrelated examples of cases where incidental uses had been found. *Id.* at 1085 n.9; *see also supra* note 70.

Under the *TCI* court's holding, incidental use is tantamount to quasi-commercial use because, in theory, they both occupy the same territory on the "commercial-advantage spectrum," and, as *Palmer* and *Uhlaender* have demonstrated, such uses can violate the right of publicity.

Furthermore, it cannot be disputed that CBC's use of players' names and statistics is more than pure incident. Players' names and statistics do not sit idly in the background and are not merely incidental to the design and functionality of CBC's fantasy games. Players' names play an important role in CBC's fantasy games; they ensure that statistics are properly credited to the players that earned them. This link between players' names and their statistics is critical to league scoring—the foundation of fantasy sports. Fantasy baseball is completely dependent upon Major League Baseball players' statistics; CBC's fantasy games would not exist without them.

In *Cardtoons L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996), the court found that the parody trading cards at issue violated the players' right of publicity and, in the process, denied the plaintiff the protection of the incidental use exception. *Id.* at 968. The court concluded that "[t]he . . . incidental use exception . . . provide[s] no haven for Cardtoons . . . . [T]he company's use of player likenesses is directly connected with a proposed commercial endeavor . . . ." *Id.* Like the *Cardtoons* plaintiff, CBC's use of players' names and statistics is directly connected with a proposed commercial endeavor. Therefore, just as the exception could not provide a safe haven for the plaintiff in *Cardtoons*, neither should it provide a safe haven for CBC.

latter provides stronger evidence of commercial advantage.[113] However, neither the *Restatement* nor common law draws a distinction between names and likenesses in right of publicity actions.[114] The question then becomes: where does the *CBC* court draw support for such a distinction? The court states in its opinion that *Palmer* was distinguishable because of an unauthorized use of pictures, yet the court failed to explain how pictures vary significantly from names and/or playing records when determining identity.[115] More importantly, the court failed to explain why the use of pictures creates more of a commercial advantage than does the use of names and playing records.[116] As Professor Karcher points out:

> The essence of a right of publicity action is that the player is simply seeking to be compensated for the use of his identity from somebody who is profiting from it, regardless of whether the non-consented use involves his picture or name; the player does not necessarily feel stronger about use of his likeness over his name.[117]

The lack of support through case law, statutory law, or any other binding or authoritative authority makes it difficult to accept the court's assertion that a distinction between names and likenesses is in fact recognized in right of publicity actions.

When determining whether the commercial advantage element has been satisfied, many suggest that the inquiry focus on how either

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113. The court acknowledges that:

> Palmer has certain factual similarities to the matter under consideration, but with the critical exception that the defendant in Palmer used golfers' pictures; there is no allegation in the matter under consideration that CBC uses baseball players' pictures in conjunction with its fantasy baseball games; rather, the contention is that CBC uses players names in conjunction with their playing records. Indeed, cases, including Palmer, which address unauthorized use of a famous person's picture are distinguishable from CBC's use of baseball players' names and playing records and, therefore, do not suggest that CBC is using players' names and/or playing records to obtain a commercial advantage.

C.B.C. Distribution, 443 F. Supp. 2d at 1087.

114. *See supra* note 63 and accompanying text.

115. *See C.B.C. Distribution*, 443 F. Supp. 2d at 1087; *see also* Karcher, *supra* note 99, at 566 n.54.

116. *See id.*

117. Karcher, *supra* note 99, at 571.

players' names or likenesses are being used, rather than if an association for the purpose of advertising can be established. Professor Karcher proposes a two-part inquiry:

> (1) Is the individual's name or likeness being used for a purpose other than news reporting, entertainment (i.e. movie, film, etc.), or literary[;]
>
> (2) If so, is the individual's name or likeness the "essence" of the product or service being produced such that the product or service is dependent upon such use for its existence?[118]

Unlike the *CBC* court's analysis, this two-part test provides guidance to future courts tasked with determining whether unauthorized uses satisfy the commercial advantage element.

2. A Symbol of One's Identity

The *CBC* court next turned its attention to the issue of "whether CBC has, and is, using the players' names 'as a symbol of their identity.'"[119] The court stated that its focus must be on how players' names are being used.[120] In the end, the court determined that CBC does not use players' names and playing records as a symbol of any player's identity.[121] The court reasoned that CBC's use does not involve player traits or attributes, such as a player's reputation, but rather involves mere historical facts.[122]

In *TCI*, a case upon which the *CBC* court heavily relied, the court held that in order "[t]o establish that a defendant used a plaintiff's name as a symbol of his identity, 'the name used by the defendant

118. Karcher, *supra* note 99, at 571.

119. *C.B.C. Distribution*, 443 F. Supp. 2d at 1088.

120. "Thus, upon determining whether there is a violation of the right of publicity in the matter under consideration, how players' names are used is significant rather than the mere fact that they are used." *Id.* at 1089.

121. "CBC's use of players' names in conjunction with their playing records . . . does not involve the . . . identity of any player." *Id.*

122. "CBC's use of the baseball players' names and playing records in the circumstances of this case, moreover, does not involve the character, personality, reputation, or physical appearance of the players; it simply involves historical facts about the baseball players such as their batting averages, home runs, doubles, triples, etc." *Id.*

must be understood by the audience as referring to the plaintiff.'"[123] It would seem that the proper inquiry is simply whether the defendant is actually referring to the plaintiff.[124] CBC's use unquestionably satisfies this requirement. In CBC's fantasy baseball games, GM's are called upon to make roster decisions based on the value; past, present and future statistical performance; fame and reputation; and injury status of actual Major League Baseball players.[125] Furthermore, CBC determines players' prices, for purposes of the salary cap, by analyzing similar criteria.[126] Thus, CBC's audience undeniably understands that MLB players are being referenced, and, more specifically, which MLB players are being referenced, in CBC's fantasy baseball games.

In *Carson v. Here's Johnny Portable Toilets, Inc.*,[127] the defendant was found to have violated the plaintiff's right of privacy by using the phrases "Here's Johnny" and "The World's Foremost Commodian" in connection with the sale and rental of portable toilets.[128] The court held that Carson's identity had been exploited despite neither his name nor picture having ever been used.[129] In *Ali v. Playgirl, Inc.*,[130] Muhammad Ali brought a right of publicity action against Playgirl magazine.[131] At issue was a drawing, in the February 1978 issue of the magazine, which depicted an African-American boxer seated on a stool in a boxing ring, surrounded by the captions "Mystery Man" and "the Greatest."[132] The court held that the

123. *TCI*, 110 S.W.3d at 370 (quoting RESTATEMENT (THIRD) OF Unfair COMPETITION § 46 cmt. d) (1995).

124. "The identity element for a right of publicity cause of action addresses whether there is a sufficient link between the particular plaintiff and the defendant's use. *Or, simply, is the defendant actually referring to the plaintiff*? Fantasy league use clearly satisfies that element." Karcher, *supra* note 99, at 576 (emphasis added).

125. *See supra* note 16.

126. *See* Roberts, *supra* note 19.

127. *See supra* note 11.

128. Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d at 831, 833 (6th Cir. 1983).

129. *Id.* at 835 ("If the celebrity's *identity* is commercially exploited, there has been an invasion of his right whether or not his 'name or likeness' is used. Carson's *identity* may be exploited even if his name, John W. Carson, or his picture is not used.") (emphasis added).

130. 447 F. Supp. 723 (S.D.N.Y. 1978).

131. *Id.* at 725.

132. *Id.* at 726–27.

magazine had, in fact, violated Ali's right of publicity despite the fact that the boxer's name and photo were never used.[133]

If the identities of both Johnny Carson and Muhammad Ali were exploited without the defendant ever mentioning the plaintiff's name or displaying the plaintiff's photos; a reasonable jury could have easily concluded that CBC's use of MLB players' names and playing records in its fantasy games is referring to the players, and thus, is a symbol of the players' identities.

3. Public Policy Considerations

Finally, the *CBC* court focused its attention on public policy. The court analyzed whether CBC's use of players' names and statistics in its fantasy games contradicts policy considerations that lie at the foundation of the right of publicity cause of action.[134] The court noted the policy considerations set forth in both the RESTATEMENT[135] and case law,[136] and emphasized the policy considerations articulated by the U.S. Supreme Court in Zacchini—namely preventing unjust enrichment and unauthorized uses that "go to the heart" of a performer's ability to earn a living as an entertainer.[137] The court concluded that CBC's use of players' names and playing records does not go to the heart of the players' ability to earn a living and that CBC is not being unjustly enriched.[138]

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133. The *Ali* court reasoned that:

> Although the picture is captioned "Mystery Man," the identification of the individual as Ali is . . . implied by an accompanying verse which refers to the figure as "the Greatest." This court may take judicial notice that plaintiff Ali has regularly claimed that appellation for himself and that his efforts to identify himself in the public mind as "the Greatest" have been so successful that he is regularly identified as such in the news media.

Id.

134. C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, 443 F. Supp. 2d 1077, 1089 (E.D. Mo. 2006).

135. *See supra* note 81.

136. *See supra* note 82.

137. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977).

138. According to the court:

> CBC's use of Major League baseball players' names and playing records in fantasy baseball games does not go to the heart of the players' ability to earn a living as baseball players; the baseball players earn a living playing baseball and endorsing

a. Ability to Earn a Living as an Entertainer.

The *CBC* court determined that CBC's use does not "go to the heart of" the players' ability to earn a living as baseball players.[139] The court reasoned, without any support, that "the baseball players earn a living playing baseball and endorsing products; they do not earn a living by the publication of their playing records."[140] Professor Karcher explains why the court's analysis was misguided:

> [T]he court decides *on its own* that players make enough money and should simply be satisfied with the amount of money they make by way of their player contracts with the teams and any endorsements. . . . [The *CBC court*] actually makes bad policy for courts to determine whether certain individuals in society are making enough money and to limit the capacities to which these individuals may be compensated.[141]

Very few citizens would acquiesce in allowing a court to limit the number of ways they may legally make money, and Major League baseball players are no different. Additionally, the court's reasoning with respect to what "goes to the heart" of the profession "provides no standard whatsoever to enable or guide future courts in making these determinations."[142]

b. Unjust Enrichment

The *CBC* court also determined that "CBC's use of Major League baseball players' names and playing records does not give CBC something free for which it would otherwise be required to pay

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> products; they do not earn a living by the publication of their playing records. Moreover, CBC's use of Major League baseball players' names and playing records does not give CBC something free for which it would otherwise be required to pay; players' records are readily available in the public domain.

C.B.C. Distribution, 443 F. Supp. 2d at 1091 (citation omitted).

139. *Id*.

140. *Id*.

141. Karcher, *supra* note 99, at 577 (emphasis added).

142. *Id*.

. . . ."[143] This conclusion turns a blind eye to the practical and financial realities of CBC's use of the player's names and records. The court's conclusion also overlooks MLBAM's varying streams of actual and potential revenue and its history of dealing with licensees, including its prior dealings with CBC.

CBC's fantasy baseball games are necessarily dependent upon the players' names and playing records.[144] A reasonable jury could have concluded, without difficulty, that "CBC is appropriating and getting for free the full commercial value of the players' identities . . . ."[145] In addition, licensing is a tremendously important part of both MLB and MLBAM's revenue stream, accounting for over $13 billion dollars in revenue in the 1990s alone.[146] The issue of whether CBC is being unjustly enriched—receiving something for free for which it would otherwise have to pay—should have been left for a jury to decide.

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143. *C.B.C. Distribution*, 443 F. Supp. 2d at 1091. The court's only rationale for this conclusion was that "players' records are readily available in the public domain." *Id.* Yet, just because information is readily available in the public domain does not mean that the information can be used by anyone for any purpose. The *Palmer* court highlighted the limits that exist when using information deemed to be within the public domain:

> It would therefore seem, from a review of the authorities, that although the publication of biographical data of a well-known figure does not *per se* constitute an invasion of privacy, the use of that same data for the purpose of capitalizing upon the name by using it in connection with a commercial project . . . does . . . . It is unfair that one should be permitted to commercialize or exploit or capitalize upon another's name, reputation or accomplishments merely because the owner's accomplishments have been highly publicized.

Palmer v. Schonhorn Enter's., 232 A.2d at 458, 462 (N.J. Super Ct. Ch. Div. 1967). CBC was assumedly aware of the boundaries associated with using information within the public domain. Beginning in 1995, MLBAM and CBC entered into a series of licensing agreements for the use of players' names in conjunction with their playing records in CBC's fantasy games. *See supra* notes 47–51 and accompanying text. CBC, as a licensee, can be said to have acquiesced in recognizing players' rights of publicity in their names and statistics as they were used in fantasy games. This history of dealing between MLBAM and CBC supports the proposition that CBC's subsequent unlicensed use conferred a benefit upon CBC for which it normally had to pay.

144. *See supra* note 22 and accompanying text.

145. Karcher, *supra* note 99, at 579.

146. *See supra* note 97.

c. The Ability to Control Publicity

The underlying purpose of the right of publicity is to "[protect] the ability of public personae to control the types of publicity that they receive."[147] Not only does the *CBC* court fail to protect the players' ability to control the types of publicity they receive, the court affirmatively eliminates player control altogether.[148] As a result, CBC has essentially been granted the right to do exactly what the law was designed to prohibit—prevent players from controlling the type of publicity they receive.

IV. CONCLUSION

The "quasi-property" right, although not yet widely accepted, is not a novel concept.[149] In fact, the "quasi-property" right has been in existence for nearly ninety years.[150] In 1918, the Supreme Court in *International News Service v. Associated Press*,[151] ruled that news "must be regarded as quasi property" as between two competitors in the business of providing news.[152] In *International News Service*, the

147. *See supra* note 82.

148. Professor Karcher noted that:

> The players currently have the right to control who produces trading cards and video games in order to ensure the production of a quality product. Why shouldn't the players have the right to control the use of their names and playing records in the fantasy league industry to ensure that fantasy league operators produce a quality fantasy game for use by the public?—Especially when, as the court noted, these games tend to increase public interest in the sport. Indeed, as the fantasy league industry expands and the number of operators within the industry increases, the more vital it is for the players to be able to control the use in order to ensure production of higher quality games.

Karcher, *supra* note 99, at 579.

149. *See* Int'l News Serv. v. Associated Press, 248 U.S. 215 (1918). Still today, scholars endorse non-traditional forms of intellectual property. *See* Robert M. Kunstadt, F. Scott Kieff & Robert G. Kramer, A NEW HOOK FOR IP PRACTICE—INTELLECTUAL PROPERTY PROTECTION FOR SPORTS MOVES, NAT'L L.J. C1–C5 (1996) (endorsing patent protection for sports moves).

150. *See generally Int'l News Serv*. 248 U.S. 215. *Int'l News Serv*. is still good law today.

151. *Id.*

152. *Int'l News Serv*. 248 U.S. at 236. The Supreme Court concluded:

> Obviously, the question of what is unfair competition in business must be determined with particular reference to the character and circumstances of the business. The question here is not so much the rights of either party as against the public, but their rights as between themselves. And, although we may and do assume that neither party

Associated Press ("AP") collected and reported news stories on the East Coast through its own efforts.[153] International News Service ("INS"), AP's direct competitor, replicated and reported AP's news stories to the rest of the country, in some instances before AP.[154] The Court ultimately held for AP, finding that INS had misappropriated AP's news stories and unlawfully interfered with AP's business.[155]

MLBAM's right of publicity action paralleled the AP's action in *International News Service* in two respects: (1) MLBAM did not claim general exclusive rights to information in the public domain, and (2) MLBAM did not assert rights against the public; rather MLBAM asserted its rights against CBC, a corporate entity. MLBAM remained mindful of the public's interest in maintaining freedom of information within the public domain. MLBAM simply asserted that, if a company such as CBC attempted to reap financial reward through the use of MLB players' names and statistics, then MLBAM should have the legal right to demand a license for that use.[156] MLBAM, in essence, has asserted that players' names and statistics should be considered the "quasi-property" rights of MLBAM.[157]

> has any remaining property interest as against the public . . . it by no means follows that there is no remaining property interest in it as between themselves. For, to both of them alike, news matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise. Regarding the news, therefore, as but the material out of which both parties are seeking to make profits at the same time and in the same field, we hardly can fail to recognize that for this purpose, and as between them, it must be regarded as quasi property, irrespective of the rights of either as against the public.

Id. (citation omitted).

153. *Id.* at 229

154. *Id.* at 231.

155. *Id.* at 245.

156. Jim Gallagher, senior vice president of corporate communications for MLBAM, stated that "[p]layer statistics are in the public domain. We've never disputed that . . . . But if you're going to use statistics in a game for profit, you need a license from us to do that. We own those statistics when they're used for commercial gain." Tresa Baldas, *Pro Sports: Technology Changes Rules of the Game*, NAT'L L.J. (2005), http://www.law.com/jsp/article.jsp?id= 1109128216973; *see also* Neil DeMause, *Fantasy Firefight: When IP Meets WHIP*, http://www.baseballprospectus.com/article.php?articleid= 3763 (last visited Feb. 20, 2008).

157. MLBAM's position draws support from the *Uhlaender* decision: "A celebrity must be considered to have invested his years of practice and competition in a public personality which

Practically speaking, the idea of a "quasi-property" right does not offend the conscience, especially when the right exists in a commercial setting.[158] Fantasy sports enthusiasts do not subscribe to fantasy games for their useful information and news reporting; they are truly drawn to the competition and "sophisticated game play."[159] "News reports and analysis are merely added benefits."[160] Moreover, the success of fantasy products, and ultimately fantasy providers, depends entirely on MLB players' names and playing records. While it is true that fantasy providers are not using players' names and statistics as direct advertisements, they are generating considerable revenue on the strength of the players' identities. Unlicensed fantasy providers, such as CBC, strip Major League baseball players of the full benefit of their efforts on the field of play, which directly contravenes the purpose of the right of publicity. There were many triable issues related to the players' right of publicity; this case should have survived summary judgment.

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eventually may reach marketable status. That identity, embodied in his name, likeness, statistics and other personal characteristics, is the fruit of his labors and is a type of property." *Uhlaender*, 316 F. Supp. at 1282. In addition, the *Uhlaender* court ruled that:

> [The] . . . contention has no merit that by the publication in the news media and because of the ready availability to anyone of the names and statistical information concerning the players . . . the players thus have waived their rights to relief . . . . [N]ames and statistics are valuable only because of their past public disclosure, publicity and circulation. A name is commercially valuable . . . for use for financial gain only because the public recognizes it and attributes good will and feats of skill or accomplishments of one sort or another to that personality. To hold that such publicity destroys a right to sue for appropriation of a name or likeness would negate any and all causes of action, for only by disclosure and public acceptance does the name of a celebrity have any value at all to make its unauthorized use enjoinable.

Id. at 1282–83.

158. *See supra* notes 102–07 and accompanying text.

159. Massari, *supra* note 18, at 464.

160. Massari, *supra* note 18, at 464.