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C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.: the First Amendment Versus the Right of Publicity in the Eighth Circuit

Surina Mann

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C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.: The First Amendment Versus the Right of Publicity in the Eighth Circuit

by
SURINA MANN*

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I. Introduction

“The right of publicity makes it unlawful to use another’s identity for commercial advantage without permission.”¹ This right originated and developed from privacy doctrine,² but there is one essential difference between the two: privacy claims involve unwanted intrusion into a plaintiff’s personal life, while publicity claims involve uncompensated and

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1. Russell J. Frackman & Tammy C. Bloomfield, *The Right of Publicity: Going to the Dogs?*, THE UCLA ONLINE INSTITUTE FOR CYBERSPACE LAW AND POLICY ¶ 2 (1996), <http://www.gseis.ucla.edu/iclp/rftb.html>.

2. *Id.* at ¶ 4.

non-consented exploitation of a plaintiff's identity.³ The right of publicity has been acknowledged and applied by most courts, but a difficult question has arisen when applying this right: When should the right of publicity give way to the right to freedom of expression guaranteed by the First Amendment? Many different tests have been established to balance the interests of the First Amendment with those of the right of publicity, but inconsistency within this area of law remains.⁴

The ongoing conflict between the First Amendment and the right of publicity is illustrated in the case of *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*⁵ In this case, the suit was brought in federal court by a fantasy baseball league operator, C.B.C., against a company that claimed it had exclusive rights to use the players' identities.⁶ The suit asked for a declaratory judgment that C.B.C. was not violating the players' rights of publicity.⁷ The district court ruled that the right was not violated, and this decision was appealed.⁸

On October 16, 2007, the Eighth Circuit Court of Appeals issued its ruling on the appeal, affirming the District Court for the Eastern District of Missouri.⁹ The appellate court disagreed with the district court in finding that a right of publicity did exist in this case,¹⁰ but still foreclosed the right to bring a claim, finding that the First Amendment trumped the right of publicity.¹¹ The circuit court used a "public domain" theory, stating that because the information used by C.B.C. is available in the public domain, it is protected by the First Amendment.¹² The court bolstered its reasoning with other economic and non-economic policy arguments.¹³

This Note examines the circuit court decision in light of the policy rationales underlying the right of publicity. This Note will first discuss the history of the right of publicity, the policy goals the right was designed to further, and several different tests courts have proffered and used to balance this right with the rights guaranteed by the First Amendment. This Note then provides the background of fantasy baseball and discusses the

3. *Id.* at ¶ 5.

4. *See Infra* pp. 8-16.

5. 443 F. Supp. 2d 1077 (E.D. Mo. 2006) [hereinafter *C.B.C. I*].

6. *Id.* at 1080-82.

7. *Id.* at 1081.

8. *Id.* at 1107; *C.B.C. Distributing and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 820 (8th Cir. 2007) [hereinafter *C.B.C. II*].

9. *Id.* at 825.

10. *Id.* at 823.

11. *Id.* at 824.

12. *Id.* at 823.

13. *Id.* at 823-24.

history behind the *C.B.C. II* opinion. Next, this Note critiques the *C.B.C. II* decision and discusses the vagueness of the opinion and the apparent disregard for the purpose of publicity claims. This Note also analyzes the “public domain” reasoning the circuit court used in finding that the First Amendment trumped the right of publicity, and predicts and illustrates the complications that will arise if courts adopt this standard. This Note concludes that the court should have used a test that would fully recognize and support the policy goals underlying publicity claims as well as the values behind protection of freedom of expression. Such a test would have resulted in a different outcome.

II. The Makings of the Right of Publicity

The right of publicity has its origins in common law privacy doctrine.¹⁴ In *Zacchini v. Scripps-Howard Broadcasting Co.*, the United States Supreme Court quoted Professor William L. Prosser to describe the relationship between the law of privacy and the right of publicity:

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.’¹⁵

According to Prosser, “appropriation for defendant’s advantage of the plaintiff’s name or likeness” constitutes one the four torts under privacy law.¹⁶

The interchangeable use of “the right of publicity” with “the right of privacy” by courts caused much confusion for plaintiffs. This confusion is illustrated in the early case of *O’Brien v. Pabst Sales Co.*, where the plaintiff, a famous football player, brought an action against a beer company for using his picture without his permission.¹⁷ The Fifth Circuit affirmed the lower court judgment against the football player indicating that there was no invasion of privacy in this case.¹⁸ The dissent argued that the football player should have been able to recover for the mere fact that the beer company used his name for advertising purposes, but the majority

14. Frackman & Bloomfield, *supra* note 1, at ¶ 4.

15. 433 U.S. 562, 572 n.7 (1977) (citing William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960)).

16. Frackman & Bloomfield, *supra* note 1, at ¶ 5.

17. 124 F.2d 167 (5th Cir. 1941).

18. *Id.* at 169-70.

concluded that this is not what the plaintiff had pled.¹⁹ The plaintiff pled invasion of privacy, and the majority alluded that this was not the same as claiming injury for misuse of his name.²⁰

The distinction between the law of privacy and the right of publicity was discussed for the first time in *Haelan Laboratories Inc. v. Topps Chewing Gum, Inc.*²¹ In this case, the plaintiff and defendant both manufactured chewing gum.²² The plaintiff alleged that the defendant induced a baseball player to breach his contract with the plaintiff, which allowed the plaintiff exclusive rights to market the player's photograph.²³ The court rejected the argument that there is no legal interest for a man in the publication of his picture other than his right to privacy.²⁴ The defendant argued that there is no property right in the player's photo.²⁵ The court disagreed and concluded that along with the right of privacy, "a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross,' i.e., without an accompanying transfer of a business or of anything else."²⁶ This conclusion was drawn by the court in order to prevent celebrities from being deprived of profits earned from use of their names and/or likenesses.²⁷

The right of publicity was further differentiated from the right of privacy in Professor Melville Nimmer's seminal article *The Right of Publicity*.²⁸ At the time the article was published, Professor Nimmer worked as counsel for Paramount Pictures.²⁹ Nimmer referred to the "needs of Broadway and Hollywood" in describing the basic foundation and principles of the right of publicity.³⁰ While acknowledging that the right of publicity and the right of privacy overlap in many aspects,³¹ he argued that there is an essential difference between them: "[P]rivacy plaintiffs were concerned with unwanted intrusion into their personal lives, while publicity plaintiffs properly complained of uncompensated

19. *Id.* at 170.

20. *Id.*

21. 202 F.2d 866 (2d Cir. 1953).

22. *Id.* at 867.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 868.

27. *Id.*

28. Melville Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203-04 (1954). See *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 967 (10th Cir. 1996).

29. *Cardtoons*, 95 F.3d at 967.

30. *Id.*

31. *Id.*; Frackman & Bloomfield, *supra* note 1, at ¶ 5.

exploitation of their identities.”³² Courts began recognizing this essential difference between the right to privacy and the right to publicity and began acknowledging this difference.³³

It was not until the Supreme Court decision of *Zacchini v. Scripps-Howard Broadcasting Co.* that the right of publicity became judicially accepted everywhere.³⁴ In *Zacchini*, the plaintiff brought an action against the defendant for videotaping his “human cannonball” act without his permission and showing the tape on a news program.³⁵ The Supreme Court held that the plaintiff had a right to recover damages because his “exclusive control over the publicity given to his performance” was usurped by the defendant.³⁶ The Court reasoned that “the broadcast of a film of petitioner’s entire act poses a substantial threat to the economic value of that performance” due to the fact that the ability to see the act for free removes the incentive for the public to pay to see the performance.³⁷

The rationales used to justify the right of publicity vary from court to court. However, general policies favoring the right include the following:

[T]he right of publicity protects an individual’s interest in personal dignity and autonomy. With its emphasis on commercial interests, the right of publicity also secures for plaintiffs the commercial value of their fame and prevents the unjust enrichment of others seeking to appropriate that value for themselves. The right to prohibit unauthorized commercial exploitation of one’s identity allows a person to prevent harmful or excessive commercial use that may dilute the value of the identity. . . . [T]he right of publicity indirectly affords protection against false suggestions of endorsement or sponsorship.³⁸

In approximately half of the states, some form of the right of publicity exists either by statute or at common law.³⁹ The right of publicity was even adopted by the 1995 Restatement of Unfair Competition, which defines the right as follows: “One who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief

32. Frackman & Bloomfield, *supra* note 1, at ¶ 5.

33. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977).

34. *Id.* at 578-79.

35. *Id.* at 563-64.

36. *Id.* at 578.

37. *Id.* at 575.

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

39. *ETW Corp. v. Jireh Publ’g., Inc.*, 332 F.3d 915, 928 (6th Cir. 2003).

appropriate under the rules stated in §§ 48 and 49.”⁴⁰ However, the right of publicity still faces hurdles to its implementation in many courts.

III. The First Amendment and the Right of Publicity

In *Cohen v. California*, the United States Supreme Court expressed the following:

The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.⁴¹

Since the birth of the right of publicity, courts have struggled to harmonize that right with the rights guaranteed by the First Amendment.⁴² Courts have taken many different approaches, a few of which are outlined below.

A. The Zachinni Standard

The only United States Supreme Court decision that addresses the struggle between the right of publicity and the First Amendment is *Zacchini*.⁴³ *Zacchini* involved a performer’s claim against a television station for broadcasting his entire “human cannonball” performance.⁴⁴

The Ohio Supreme Court had held below that *Zacchini*’s publicity claim was trumped by the First Amendment because the television station had the right to report news that was a matter of legitimate public interest.⁴⁵ However, the United States Supreme Court found this argument inapplicable.⁴⁶ The Court held that the First Amendment did not trump the right to publicity due to the fact that “the broadcast of a film of petitioner’s entire act poses a substantial threat to the economic value of that performance.”⁴⁷ The Court also noted that the public would not be deprived of the performer’s act as long as the performer was compensated

40. RESTATEMENT, *supra* note 35, § 46.

41. 403 U.S. 15, 24 (1971).

42. *See Infra* pp. 9-16.

43. 433 U.S. 562 (1977).

44. *Id.* at 563-64.

45. *Id.* at 569.

46. *Id.* at 578-79.

47. *Id.* at 575.

for his performance.⁴⁸ Therefore, the public would still have access to information that was legitimately of public interest.⁴⁹ The Court specifically found that the First and Fourteenth Amendments do not protect media entities when they broadcast a performer's "entire act," as in the case before it.⁵⁰

While the Supreme Court did manage to decide *Zacchini* on its facts, the Court failed to establish a universal test for global application when analyzing the conflict between the right of publicity and the First Amendment.⁵¹ This criticism of the majority's decision is discussed in Justice Powell's dissent.⁵² Justice Powell condemns the fact that the majority opinion offers no universal framework for similar future cases and does nothing but decide the case before it.⁵³ In fact, Justice Powell deliberates on whether the "entire act" test that the majority lays out is even clear enough to decide the case before the court.⁵⁴ Justice Powell's concerns appear to have been validated since no other case since *Zacchini* involving the right to publicity and the First Amendment has been decided by utilizing the Court's "entire act" standard.

B. The "Newsworthy" Exception

Along with the "entire act" standard, the *Zacchini* decision can also be interpreted to advocate a "newsworthy" exception to the right of publicity. The Court in *Zacchini* illustrated this exception by stating that "there is no doubt that entertainment, as well as news, enjoys First Amendment protection [and it] is also true that entertainment itself can be important news."⁵⁵

Although the "newsworthy" exception has been adopted by most courts, the application of the exception has been anything but consistent. This inconsistency is illustrated by the cases *Ali v. Playgirl, Inc.* and *Ann-Margret v. High Society Magazine*.⁵⁶ In *Ali*, a complaint was brought alleging the violation of Muhammad Ali's right of publicity when an unauthorized portrait of a nude man, unmistakably recognizable as Muhammad Ali, was printed in an issue of Playgirl magazine.⁵⁷ The court

48. *Id.* at 578.

49. *Id.*

50. *Id.* at 574-75.

51. *Id.*

52. *Id.* at 579.

53. *Id.*

54. *Id.*

55. *Id.* at 578.

56. 447 F. Supp. 723 (S.D.N.Y. 1978); 498 F. Supp. 401 (S.D.N.Y. 1980).

57. *Ali*, 447 F. Supp. at 725.

ruled that the “newsworthy” exception to the right of publicity did not apply in the case because there was no “informational or newsworthy dimension” to the portrait.⁵⁸ In contrast, in *Ann-Margret*, a partially nude photograph of Ann-Margret reprinted from a scene in a movie was deemed to be protected by the “newsworthy” exception because it was “in the orbit of public interest and scrutiny.”⁵⁹ The opposite results in these two arguably very similar cases illustrate the difficulty courts face in the application of the “newsworthy” exception due to its inherent subjectivity and the lack of clear and consistent factors to be weighed. As the line between news and entertainment becomes increasingly blurred in our culture and a multitude of new sources of information become available, this test seems to become less and less workable.

C. The Transformative Test

The transformative test was first introduced in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*⁶⁰ Comedy III owned all rights to a comedy show called “The Three Stooges.”⁶¹ Saderup, an artist who composed images out of charcoal and reproduced them on T-shirts and other products,⁶² created images of “The Three Stooges” without the consent of Comedy III and sold products depicting those images. Comedy III brought an action against Saderup alleging violation of its right to publicity.⁶³

The court in *Comedy III* focused on the first “fair use” factor, “the purpose and character of the use,” in fashioning a test for balancing the right of publicity and the First Amendment.⁶⁴ In the case where a “new” work is created using images or elements arguably protected by the right of publicity, the court stressed the importance of determining whether the new work is “transformative.”⁶⁵ Many definitions of the inquiry are scattered throughout the decision:

[W]hether the new work merely ‘supersede[s] the objects’ of the original creation, or instead adds something new [W]hether the celebrity likeness is one of the ‘raw materials’ from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question [And] whether a product containing a celebrity’s

58. *Id.* at 727.

59. *Ann-Margret*, 498 F. Supp. at 405-06.

60. 25 Cal. 4th 387 (2001).

61. *Id.* at 393.

62. *Id.*

63. *Id.*

64. *Id.* at 404.

65. *Id.*

likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness.⁶⁶

The California Supreme Court found that this factor should be at the "heart" of any attempt to balance the First Amendment and the right of publicity, because whether the public policy goals of one outweigh the public policy goals of the other depends on whether the depiction is "transformative."⁶⁷ When the depiction is "transformative," the First Amendment policy goal of encouraging creativity and free speech outweighs the right of publicity purpose of allowing a person to protect his or her own persona.⁶⁸ The court also reasoned that a "transformative" depiction would not threaten the economic interest protected by the right to publicity because these works are not the same as real celebrity depictions and would not harm the market for celebrity memorabilia.⁶⁹ Therefore, "transformative" depictions should be protected by the First Amendment.

In this case, the court ruled that Saderup's images were not protected by the First Amendment because there was no "creative contribution" to the works.⁷⁰ He worked only to create literal recreations of "The Three Stooges" to exploit them for financial gain.⁷¹ Therefore, the policy goals of the right of publicity far outweighed any First Amendment concerns.

D. The Predominant Use Test

The predominant use test was first introduced in *Estate of Presley v. Russen*.⁷² There, the estate of Elvis Presley brought suit against Russen asking for an injunction to stop Russen from using anything affiliated with Elvis Presley's persona for his concerts.⁷³ The court explained the predominant purpose test by stating:

[T]he purpose of the portrayal in question must be examined to determine if it predominantly serves a social function valued by the protection of free speech. If the portrayal mainly serves the purpose of contributing information, which is not false or defamatory, to the public debate of political or social issues or of providing the free expression of creative talent which contributes to society's cultural enrichment, then the portrayal generally will be immune from liability. If, however, the portrayal functions

66. *Id.* at 404, 406.

67. *Id.* at 404-05.

68. *Id.* at 405.

69. *Id.*

70. *Id.* at 409.

71. *Id.*

72. 513 F. Supp. 1339, 1356 (D.N.J. 1981).

73. *Id.* at 1348-50.

primarily as a means of commercial exploitation, then such immunity will not be granted.⁷⁴

The court found that the defendant used Elvis Presley's persona primarily as a means of commercial exploitation.⁷⁵ By presenting a live performance by an Elvis impersonator, he appropriated the very reason that Elvis gained his reputation.⁷⁶ Therefore, the court declared that the First Amendment did not trump the right of publicity in this case.⁷⁷

This predominant use test was also illustrated in *Doe v. TCI Cablevision*.⁷⁸ Tony Twist, a former professional hockey player, brought suit against the creators, publishers, and promoters of a comic book using his name as one of the villains.⁷⁹ The Supreme Court of Missouri held that if the predominant use of the likeness is to exploit commercial value, the right of publicity trumps the First Amendment even if there is some "expressive" substance.⁸⁰ In this case, the court held that the primary purpose of using Twist's name was to sell comic books and related products, and therefore the First Amendment could not insulate the defendants from liability.⁸¹

Both the "transformative" and the "predominant purpose" tests get to the heart of what courts should look at when deciding whether the First Amendment should trump the right of publicity in a case. Both tests look to see whether the use of the identity was done for a purpose that the First Amendment serves to protect. If so, that use is protected by the First Amendment and no right of publicity claim exists.

IV. Fantasy League Baseball

The shortest possible definition of Fantasy Baseball is this: You own your own team and get to choose what Major League Baseball players play on your team.⁸²

The first thing to do when establishing a fantasy baseball team is to select owners. Once owners are established, the owners give their teams a name. After this, a draft is scheduled where the owners are able to choose

74. *Id.* at 1356.

75. *Id.* at 1361.

76. *Id.*

77. *Id.*

78. 110 S.W.3d 363, 374 (Mo. 2003).

79. *Id.* at 365.

80. *Id.* at 374.

81. *Id.*

82. Lee Andrew Henderson, *What is Fantasy Baseball?*, ASSOCIATED CONTENT, Mar. 26, 2007, http://www.associatedcontent.com/article/183230/what_is_fantasy_baseball.html.

any Major League baseball players they want for their teams. Whether a team wins depends on how the players do in their real season. How the players perform during the actual season is recorded and the team that has the best performing players wins.⁸³

Every team position that actually needs to be filled in a Major League team also needs to be filled in a fantasy baseball team so players must be chosen to fulfill these different positions. Players are tracked in many different categories of their performance and not just their overall performance. Categories may include number of homeruns or number of bases stolen. Most leagues also include negative categories. “For example the pitching categories in your league won’t be just Wins, Strikeouts, and Saves, which are all positive categories for a pitcher. The pitching categories could also include walks, runs, and losses, which are all negative stats for a pitcher.”⁸⁴

“Sixteen million adults played fantasy sports in 2006, spending an average of just under \$500 a year and generating an economic impact of more than \$1 billion a year.”⁸⁵ Fantasy baseball is a growing industry and a large gaming market where people spend many hours and a substantial amount of money to participate in the leagues.⁸⁶

V. C.B.C. District Court Case History

C.B.C. Distributing and Marketing, Inc. (“C.B.C.”) is a Missouri corporation that distributes and sells fantasy sports products, including fantasy baseball games accessible over the internet.⁸⁷ The Major League Baseball Players Association (the “Players Association”) is comprised of almost all Major League baseball players and is the bargaining representative for those players.⁸⁸ Major League Baseball Advanced Media, L.P. (“Advanced Media”) was formed by different Major League Baseball teams to control the internet and interactive media aspect of Major League Baseball.⁸⁹

From the period of July 1, 1995, to December 31, 2004, C.B.C. entered into license agreements with the Players Association that allowed C.B.C. to use “the names, nicknames, likenesses, signatures, pictures, playing

83. *Id.* at para. 4-5.

84. *Id.* at para. 10.

85. Jenny Price, *Researchers studying fantasy baseball and ‘competitive fandom,’* UNIVERSITY OF WISCONSIN-MADISON NEWS, ¶ 11, July 13, 2007, <http://www.news.wisc.edu/13936>.

86. *Id.*

87. *C.B.C. I*, 443 F. Supp. 2d at 1080.

88. *Id.* at 1079-80.

89. *Id.* at 1080.

records, and/or biographical data of each player” for its products.⁹⁰ In 2005, Advanced Media entered into an agreement with the Players Association allowing it to use the same names, images and data for all interactive media.⁹¹ On February 4, 2005, Advanced Media approached C.B.C. and proposed that C.B.C. promote Advanced Media’s fantasy baseball games on C.B.C.’s website in exchange for a percentage of the profits.⁹² C.B.C. responded by filing for declaratory relief in the United States District Court for the Eastern District of Missouri, asking the court to declare that C.B.C. had the right to use the names and statistics of the players without obtaining a license agreement.⁹³ Advanced Media and the Players Association, which intervened in the case, counterclaimed that any such use by C.B.C. violated the players’ right of publicity.⁹⁴

In Missouri, to establish a violation of a right of publicity, the following elements must be established: “(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.”⁹⁵

The district court concluded that C.B.C. did not violate the players’ right of publicity because the “identity” and “commercial advantage” elements were not adequately established.⁹⁶ The court found that the burden of proof on the “identity” element was not met because using a player’s name with his statistics does not involve his “character, personality, reputation, or physical appearance,” which is the core of his identity.⁹⁷ The court concluded that the plaintiff’s burden on the “commercial advantage” element was also not met in this case by distinguishing it from other cases where the burden was met.⁹⁸ The court reasoned that “[u]nlike 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,” and therefore the rights of the players are not being exploited for commercial gain.⁹⁹

90. *Id.* at 1080-81.

91. *Id.* at 1081.

92. *Id.*

93. *Id.*

94. *Id.* at 1082.

95. *Id.* at 1084-85 (quoting *Doe v. TCI Cablevision*, 110 S.W. 3d 363, 365 (Mo. 2003)).

96. *C.B.C. I*, 443 F. Supp. 2d at 1088-89.

97. *Id.* at 1089.

98. *Id.* at 1086.

99. *Id.*

The court also concluded that even if the players' right of publicity had been violated, the First Amendment would have trumped the right of publicity.¹⁰⁰ The court reasoned that the statistics are "historical fact[s]" that inform the public, and this interest outweighs the interests that the right of publicity may hold in this case.¹⁰¹ The court went on to enjoin Advanced Media and the Players Association from interfering with C.B.C.'s fantasy games.¹⁰²

VI. 8th Circuit Court of Appeals Decision

The decision of the district court was appealed to the Eighth Circuit Court of Appeals and an opinion was issued on October 16, 2007.¹⁰³ The Court of Appeals affirmed the district court's ruling but did not agree with all of the district court's findings.¹⁰⁴

In contrast to the district court's opinion, the Court of Appeals found that a right of publicity did exist for the players in this case.¹⁰⁵ According to the court, the use of the players' names by C.B.C. was understood by the subscribers as referring to actual Major League Baseball players and therefore, the burden of proving the "identity" element was met.¹⁰⁶ The burden of proving the "commercial advantage" element needed for the right of publicity in Missouri was also met, according to the court.¹⁰⁷ The court stated that this element focuses on the defendant's intent to gain profit from using the plaintiff's identity, and in this case it is apparent that C.B.C. did use the players' names in order to make a profit.¹⁰⁸ Therefore, the court concluded that the players did have a right of publicity.¹⁰⁹

Even though the court found that the players' right of publicity claim was valid, the court determined that this right was trumped by the First Amendment.¹¹⁰ The court stressed that First Amendment considerations must be balanced against the right of publicity and determined that the former outweighs the latter in this situation.¹¹¹

100. *Id.* at 1100.

101. *Id.* at 1095.

102. *Id.* at 1107.

103. *C.B.C. II*, 505 F.3d at 818.

104. *Id.* at 825.

105. *Id.* at 823.

106. *Id.* at 822.

107. *Id.* at 823.

108. *Id.* at 822-23.

109. *Id.* at 823.

110. *Id.* at 824.

111. *Id.*

A. “Public Domain” Rationale

The court mostly used a “public domain” rationale in allowing the First Amendment to trump the right of publicity.¹¹² The reasoning used by the court is that the information used in C.B.C.’s fantasy baseball games is all available in the public domain and therefore, the use of this information should be protected by the First Amendment.¹¹³ The court found that “it would be strange law that a person would not have a *first amendment* right to use information that is available to everyone.”¹¹⁴

This “public domain” rationale used by the court in determining whether the First Amendment trumps the right of publicity contradicts many policy goals that the right of publicity exists to further. One of the policies behind establishing a right of publicity is “that significant expenditure of time, effort, talent, and finances is necessary to become famous and that due to such investment, celebrities justifiably deserve any money flowing from their fame.”¹¹⁵ The right of publicity itself protects people from their identities being exploited for commercial advantage without their permission.¹¹⁶ The people that the right is trying to protect are celebrities¹¹⁷ but celebrities are the people who are most likely to be in the “public domain” due to their fame. The identities most commonly used for commercial advantage are well-known and recognizable celebrities the target audience knows and can relate to, such as the baseball players in this case.¹¹⁸ There is public information readily available about them, but the right of publicity exists to protect them from unfair commercial gain resulting from misuse of that information.¹¹⁹ The very people that the right of publicity exists to protect are those who likely have information about them in the “public domain,” and it is not “strange law” to allow these people to be protected, considering that this is the purpose of the right of publicity.

“Public domain” literally means the “status of publications, products, and processes that are not protected under patent or copyright.”¹²⁰ The right of publicity involves a real property interest in a person’s name or likeness, and the development of this area of law was necessary precisely

112. *Id.* at 823.

113. *Id.*

114. *Id.*

115. Frackman & Bloomfield, *supra* note 1, at ¶ 6.

116. *Id.* at ¶ 2.

117. *Id.* at ¶ 3.

118. *C.B.C. II*, 505 F.3d at 825.

119. Frackman & Bloomfield, *supra* note 1, at ¶ 2.

120. *The American Heritage Dictionary of the English Language 1001* (2nd ed. 1985).

because that property right is not protected by copyright.¹²¹ The right of publicity recognizes a property interest for a person's name or likeness, even though it is readily available in the "public domain." Therefore, the "public domain" rationale should not be used to justify allowing the First Amendment principles to overcome the right of publicity.

The "public domain" rationale may have worked for the court in this case, but the question remains how this standard could work for other typical right of publicity cases, such as use of players' identities in video games or advertisements. Applying the "public domain" standard, anything that is readily available to the public is protected by the First Amendment.¹²² Using this standard, every right of publicity claim could be trumped by First Amendment guarantees due to heightened technological advances. Because the internet is available to almost everyone, even a picture of a celebrity can be found online and is accessible to everyone. Taken to its logical end, this would mean that the use of a person's picture for commercial advantage would be trumped by the First Amendment simply because the information is readily available in the "public domain."

The "public domain" rationale was properly rejected in the case of *Palmer v. Schonhorn Enterprises, Inc.*¹²³ In this case, the suit was brought by well known golfers whose names, biographies, and profiles were used in a golfing board game without their permission.¹²⁴ The defendants used a "public domain" argument that the information was widely available to the public, and therefore they should be able to republish the same information.¹²⁵ The court rejected this rationale and concluded that "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."¹²⁶

The "public domain" rationale was also rejected by the court in *Uhlaender v. Henricksen*, where suit was brought by several hundred Major League baseball players to prevent companies from using their names and accomplishments in fantasy league baseball table games, almost identical to the facts of *C.B.C.*¹²⁷ In rejecting the "public domain" rationale promoted by the defendants, the court reasoned:

121. *Cardtoons*, 95 F.3d at 967; *C.B.C. I*, 443 F. Supp. 2d at 1100-01.

122. *C.B.C. II*, 505 F.3d at 823.

123. 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967).

124. *Id.* at 459.

125. *Id.* at 460.

126. *Id.* at 462.

127. 316 F. Supp. 1277, 1278 (D. Minn. 1970).

A name is commercially valuable as an endorsement of a product or 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 enjoined.¹²⁸

The use of the “public domain” rationale by the court completely disregards the whole purpose of implementing the right of publicity. Instead of justifying the use of one’s identity because it is within the “public domain,” the court should heavily scrutinize its use. Because virtually anything can be available to the public at the click of a mouse on the internet, the court should not use this to bar right of publicity claims. The court should look to see how the identity is being used and determine whether the policies of the First Amendment outweigh those of the right of publicity based on that evaluation. The tests that have been used by many courts, the predominant purpose test and the transformative test, look to see how the information was used and whether that use should be protected by the First Amendment. Whether the information is in the “public domain” should not factor into the decision whatsoever.

B. Other Policy Arguments Used by the Circuit Court

In addition to the “public domain” rationale, the *C.B.C.* circuit court also referenced another court’s holding, reasoning that since baseball is a popular national sport, the interest of the public in being able to follow baseball records should be protected.¹²⁹ The court used the case *Gionfriddo v. Major League Baseball* in support of this contention.¹³⁰ In *Gionfriddo*, former baseball players brought an action for invasion of their right of publicity when their statistics were used in a media guide that was distributed to the press at All-Star and World Series games.¹³¹ In this case, the court found that the First Amendment trumped the right of publicity because the purpose of the guides was to display information to which the public is entitled.¹³²

C.B.C. can clearly be distinguished from *Gionfriddo* because the statistics used by operators of fantasy baseball leagues are not used simply

128. *Id.* at 1283.

129. *C.B.C. II*, 505 F.3d at 823 (quoting *Gionfriddo v. Major League Baseball*, 95 Cal. App 4th 400, 411 (2001)).

130. 94 Cal. App. 4th 400 (2001).

131. *Id.* at 405.

132. *Id.* at 412-15.

to convey information, but rather used to make a profit. The *Gionfriddo* court focused on the nature and context of the information used to determine whether it was worthy of the protection offered by the First Amendment.¹³³ Players' records in fantasy league games are used by companies to entice the public to play so the purveyors of the games can make a profit. The records are not simply used to display useful information to the public, which clearly distinguishes *C.B.C.* from *Gionfriddo*.

The appellate court's opinion also states that the economic goals that the right of publicity seeks to protect, such as the right of an individual to "reap the rewards of his or her endeavors," would not be furthered by allowing a cause of action under the *C.B.C.* facts, because baseball players are already largely compensated by their salaries and sponsorship arrangements.¹³⁴ However, the fact that a baseball player may be financially well-rewarded for his athletic performance by the team that employs him should not prevent him from reaping the rewards of his performance and fame in other arenas. Courts should not attempt to place themselves in the position of determining what threshold of compensation precludes right of publicity claims simply because the potential plaintiff already makes a lot of money. The compensation that the plaintiff receives for his or her work should not factor into whether the First Amendment trumps the right of publicity. This area of inquiry has absolutely nothing to do with furthering the goals of the First Amendment or the right of publicity.

VII. Conclusion

In determining whether the right of publicity is trumped by the First Amendment in any case, courts must analyze the way in which the celebrity's name and likeness is being used. This imperative inquiry is illustrated in the tests that have already been formulated by courts, such as the predominant purpose test and the transformative test, all of which look to see what the purpose of the use of the identity is before determining whether the First Amendment trumps the right of publicity.¹³⁵ This balancing test must also take into consideration the policy goals of both the First Amendment and the right of publicity in determining which test to use.

133. *Id.* at 410.

134. *C.B.C. II*, 505 F.3d at 824.

135. *Estate of Presley*, 513 F. Supp. at 1356; *Comedy III*, 25 Cal.4th at 404.

The court's "public domain" rationale in *C.B.C. Distributing and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*¹³⁶ did not take into consideration any of the policy goals that the right of publicity was created to further. In fact, the rationale specifically undermined the policy goals of the right of publicity and failed to recognize the reason the right even exists today. Furthermore, the "public domain" rationale becomes very dangerous when being applied to other right of publicity cases and is not a workable standard. The "public domain" rationale should play no part in analyzing whether the right of publicity is trumped by the First Amendment.

If the court in *C.B.C.* had used the proper test for determining whether the First Amendment needed to trump the right of publicity and had looked to the purpose of the use, the First Amendment would not likely have trumped the right of publicity. It is apparent from the case that the identities of the players were used to gain profit. Their statistics and records were shown to entice people to select them for their team. The statistics were not "transformed" whatsoever and they are not the type of creative expression that the First Amendment is meant to protect. Therefore, the outcome of the *C.B.C.* case would have been different had a proper test been used.

The court in *C.B.C.* failed to determine the purpose of using the players' identities in the fantasy baseball leagues. The court came up with policy-based reasons to support its conclusion of allowing the First Amendment to trump the right of publicity in this case without even determining the first essential question of purpose of use.¹³⁷ The test formulated by the court in this decision is vague, unworkable, and undermines the very essence of the right of publicity.

136. 505 F.3d at 823.

137. *Id.* at 823-24.