

COMMENT

Fantasy Liability: Publicity Law, the First Amendment, and Fantasy Sports

Online fantasy sports¹ services have proliferated over the last decade. The success of fantasy sports, particularly for professional football and baseball, has encouraged the industry to expand to nearly a dozen sports ranging from soccer and golf to bowling and fishing. Surveys now estimate that approximately twenty-seven million adult Americans² participate in the already multi-billion dollar industry.³ Given the financial stakes, the growth of the industry has predictably given rise to disputes between fantasy leagues, seeking to enter the growing market, and professional leagues and players' unions, seeking to license the use of player publicity. One growing area of legal conflict

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1. The premise of fantasy sports is simple: users enter a league, assemble a team of players, and receive fantasy points based on the players' actual performance. While many sites are free and rely on traffic and ad revenue, others offer memberships with access to statistical tools and expert analysis for a fee. Users may also purchase research packages that may include player guides, expert predictions, additional data, strategy advice, and other benefits.

Fantasy sports sites use player names and statistics. First, participants form their teams by acquiring players that are identified by name only—unlicensed leagues do not use personality traits or images of athletes. Second, fantasy sites aggregate public statistics into customized data sets, including player rankings, percent of league ownership, eligibility categories, fantasy points, average performances, changes in ownership levels, and likelihood of playing in light of health.

2. See Fantasy Sports Trade Association, What Is the FSTA, http://www.fsta.org/what_is_the_fsta.php (last visited Sept. 9, 2009); see also Gene Wang, *Fantasy Football's Growth Felt on Halloween, Big Screen*, WASH. POST, Nov. 2, 2006, at E10 (estimating twenty million players in fantasy football alone).
3. See, e.g., Brian Garrity, *Fantasy Sports Dark Horse Goes Long*, N.Y. POST, Nov. 22, 2007, at 31 (stating that fantasy sports is a \$2 billion industry); Wang, *supra* note 2 (estimating the economic impact of the fantasy sports industry as \$1 billion to \$2 billion).

is rooted in the conflict between the publicity rights of players and the First Amendment rights of fantasy sites.

The conflict between publicity rights, and state tort law more generally, and the First Amendment has been litigated across a wide range of industries, but its application to fantasy sports is recent.⁴ *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, decided in the Eighth Circuit, remains the only federal appeals court case to raise the issue of whether the First Amendment's protection of the use of player names and statistics trumps players' publicity rights.⁵ In response to a players' union's efforts to prohibit C.B.C.'s further operation, C.B.C. brought suit to protect its right to the unlicensed use of player information.⁶ The Eighth Circuit applied a balancing test, ruling that while there was a publicity rights violation, the First Amendment interests still "supersede[d] the players' rights of publicity."⁷

This Comment argues that while fantasy leagues may have won the most recent battle in the legal war over the use of player names and statistics by online fantasy sports leagues, the victory is not on solid footing.⁸ The approach adopted in the Eighth Circuit, while nominally protective of the First Amendment right of fantasy leagues to use statistics already in the public domain, falls short of offering the strong protection that is both doctrinally correct and pragmatically desirable. This Comment criticizes the balancing test approach for too easily ceding that the use of player names and statistics constitute a violation of publicity rights⁹: prohibiting the unlicensed use of

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4. Professional sports leagues, recognizing the financial opportunity in the growing market, began to license the use of player information in the 1990s. While the largest fantasy leagues could afford licenses and eliminate liability, smaller sites continued to provide unlicensed services. Given the smaller sites' limited market share, the professional leagues and player unions did not take legal action.
 5. 505 F.3d 818 (8th Cir. 2007), *cert. denied* 128 S. Ct. 2872 (2008). The only other federal court to hear the issue followed the *C.B.C.* court's holding. See *CBS Interactive v. NFL Players' Ass'n*, No. 08-5097, 2009 U.S. Dist. LEXIS 36800 (D. Minn. Apr. 28, 2009).
 6. *C.B.C.*, 505 F.3d at 820-21.
 7. *Id.* at 824. The court supported its decision with three arguments: (1) there is a First Amendment right to use public information; (2) sports statistics have "public value"; and (3) the players' publicity interest is mitigated by their salaries. *Id.* at 823-24.
 8. This issue is particularly timely. *C.B.C.* ended with the Supreme Court's denial of *cert.* *Major League Baseball Advanced Media, L.P. v. C.B.C. Distrib. & Mktg., Inc.*, 128 S. Ct. 2872 (2008). As a result, the protections offered to fantasy leagues exist only in the Eighth Circuit. Given the financial stakes for professional leagues and players' unions, new lawsuits that seek to secure exclusive publicity rights, or at least invite a circuit split, are likely in other jurisdictions.
 9. For arguments in support of using publicity law to regulate fantasy sports, see Richard T. Karcher, *The Use of Players' Identities in Fantasy Sports Leagues: Developing Workable Standards*

names and player statistics neither falls within the doctrinal scope of publicity law nor furthers the policy rationale for publicity rights.

I: THE DOCTRINAL SCOPE OF PUBLICITY LAW

Publicity rights violations generally have two elements: first, there must be use of a protected individual's identity; and second, the identity must be appropriated to further an impermissible purpose—for example, to seek a commercial advantage. The *C.B.C.* court focused its analysis of publicity law on the second prong of the violation, virtually ceding the debate over whether use of player names and statistics satisfy the first prong.¹⁰ The first Section steps back to assess whether the use of player names by fantasy leagues constitutes a use of “identity” for the purposes of a publicity rights violation.

A. The “Identity” Requirement of a Publicity Rights Violation

Fantasy sports leagues do not use any aspect of a player's personal identity beyond the name,¹¹ which is insufficient to constitute the use of “identity.” Courts have consistently held that publicity law protects the *identity* or *persona* of a player—as expressed through images, likeness, personality, or other symbolic means—and not against “mere use of a name.”¹² More succinctly, “how players’ names are used is [more important] than the mere fact that they are used.”¹³ Thus, to meet the identity requirement, the infracting party must use expressions of personality or persona that are greater than, or at least distinct from, an individual's name.¹⁴

for Right of Publicity Claims, 111 PENN ST. L. REV. 557 (2007); and Maureen C. Weston, *The Fantasy of Athlete Publicity Rights: Public Fascination and Fantasy Sports’ Assertion of Free Use Place Athlete Publicity Rights on an Uncertain Playing Field*, 11 CHAP. L. REV. 581 (2008).

10. See *C.B.C.*, 505 F.3d at 822.

11. See *supra* note 1.

12. See, e.g., *Doe v. TCI Cablevision*, 110 S.W.3d 363, 369 (Mo. 2003) (“It is the plaintiff’s name as a symbol of [his] identity that is involved . . . not [his name] as a mere name. Name appropriation occurs where a defendant makes use of the name to pirate the plaintiff’s identity for some advantage.” (quoting *Nemani v. St. Louis Univ.*, 33 S.W.3d 184, 185 (Mo. 2000))); see also *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983) (“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.”) (emphasis added).

13. *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1088 (E.D. Mo. 2006), *aff’d*, 505 F.3d 818 (8th Cir. 2007).

14. See *Carson*, 698 F.2d at 835 (“Carson’s identity may be exploited even if his name . . . or his picture is not used.”).

Courts have turned to the *Restatement of Unfair Competition* for guidance in determining which uses of a public personality's name are permissible. The *Restatement* counsels courts 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."¹⁵ The *Restatement* factors were applied in *Doe v. TCI Cablevision* to determine that the comic book character Tony Twist was an impermissible appropriation of the identity of Tony Twist, a professional athlete.¹⁶ The court based its finding on similarities in personality, use of identifying physical characteristics, and the defendant's intent to capitalize on the athlete's fame.¹⁷

When applied to fantasy sports, the *Restatement* and *TCI* factors counsel against finding a violation. The use of names and statistics by fantasy leagues does not invoke the personalities, reputation, or other behavioral attributes of players; does not reference the physical characteristics, image, or likeness of the players; and is not motivated by the intent to capitalize on player fame since fantasy leagues include the statistics of *all* players irrespective of popularity and success. The only information used by fantasy leagues is the player's name, which courts have not held to be a violation on its own, and statistics, which are neither recognized by any court as an element of identity nor related to the personality or persona of the athlete.

B. The "Impermissible Purpose" Requirement of a Publicity Rights Violation

The second element of a publicity rights violation requires the identity to be used for an impermissible purpose. Different jurisdictions have assessed this "impermissibility" with a wide range of tests and mitigating factors. Examining the three major approaches suggests that holding fantasy sports sites liable for publicity right violations would extend this area of law to a breadth that is divorced from its doctrinal basis.

First, the "commercial use" test emphasizes that publicity law is targeted at the advertising context, where the danger of "the exploitation of celebrity to sell products, and an attempt to take a free ride on a celebrity's celebrity value" may be realized.¹⁸ Fantasy sports fall outside the range of these concerns. Their inclusion of players does not rely on the celebrity of a player, nor is their use of

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

16. 110 S.W.3d 363.

17. *Id.* at 370.

18. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1401 & n.3 (9th Cir. 1992).

player records intended to “associate” a particular player with the product. Fantasy leagues use the statistics of *all* athletes in a sport, remaining agnostic towards the particular identity, celebrity, or market value of any given athlete.

Second, the “purpose” test turns on the extent to which the use of identity is for commercial purposes, as opposed to expressive or noncommercial uses.¹⁹ Courts applying this test have applied the “commercial use” element to narrowly prohibit the inexpressive appropriation of identity to promote a product. Fantasy sports do not use identity for commercial promotion. The likeness, persona, and celebrity of the athletes are irrelevant to the marketing; instead, fantasy sports use statistics as a raw input to develop the product itself. Further, fantasy sports may also be sufficiently “expressive” given their re-aggregation of public data into new statistical categories.

Finally, the “commercial value” test turns on the extent to which the use of identity is *customized* to the product, as opposed to being used as a “cherry-on-top” to generate commercial value.²⁰ Courts applying this test look favorably upon the use of identity that has been transformed in a way that is expressive or adds significant expression beyond that trespass.²¹ Consistent with that view, fantasy sports use statistics as an input to create a new range of customized data particular to the game: the central statistic, fantasy points, is an aggregate and adjusted number produced by a unique formula. Fantasy sports do not use player records to attract commercial attention; instead, they customize data to attract attention to pre-existing public information, much like a phone directory or newspaper box score.

II: THE NARROW POLICY RATIONALE FOR RECOGNIZING A RIGHT OF PUBLICITY

The *Restatement (Third) of Unfair Competition* identifies five rationales for publicity law, which both federal and state courts have consistently affirmed:

- (1) protecting “an individual’s interest in personal dignity and autonomy”;
- (2) “secur[ing] for plaintiffs the commercial value of their

19. See 110 S.W.3d at 373 (noting that the use of identity “for purely commercial purposes, like advertising goods or services or the use of a person’s name or likeness on merchandise, is rarely protected”); *Gautier v. Pro-Football, Inc.*, 107 N.E.2d 485, 488 (N.Y. 1952); *Town & Country Props., Inc. v. Riggins*, 457 S.E.2d 356, 362-63 (Va. 1995).

20. See *Parks v. LaFace Records*, 329 F.3d 437, 452 (6th Cir. 2003); *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001); *Montgomery v. Montgomery*, 60 S.W.3d 524, 529 (Ky. 2001).

21. See *Winter v. DC Comics*, 69 P.3d 473, 477 (Cal. 2003) (citing *Comedy III*, 21 P.3d at 807-08).

fame”; (3) “prevent[ing] the unjust enrichment of others seeking to appropriate” the commercial value of plaintiffs’ fame for themselves; (4) “prevent[ing] harmful or excessive commercial use that may dilute the value of [a person’s] identity”; and (5) “afford[ing] protection against false suggestions of endorsement or sponsorship.”²²

These rationales are narrow and, with the arguable exception of the first and fifth, are primarily concerned with commercial value. As a result, the right of publicity seems an inappropriate mechanism through which to regulate the use of names and statistics by fantasy sports leagues. The first *Restatement* rationale—“personal dignity and autonomy”—is not applicable to fantasy sports. First, under a traditional conception of dignity and autonomy, the marginal cost that the use of player statistics may have is mitigated because the information is already available in the public domain. Any loss should have already been incurred by the dissemination of that data in countless newspapers, magazines, and league compilations. Second, in practice, this *Restatement* rationale has been doctrinally reduced to just another means of protecting the commercial value of identity. Courts have circumscribed the autonomy-protecting function by consistently ruling that the right to publicity protects pecuniary interests, not emotional interests²³ or “mental anguish.”²⁴ The fifth *Restatement* rationale, “protection against false suggestions,”²⁵ does not apply to fantasy sports because it governs the commercial transaction context. Fantasy sports sites do not raise concerns about consumer deception because they do not use player data to distinguish their product. Players are not used, or perceived, as endorsers of a product. The fundamental differences between fantasy leagues are the services they offer, the prices they charge, and the statistical functions allowed on their site, *not* the players they include. The remaining three *Restatement* rationales all involve protecting the commercial value of publicity: for example, protecting an individual’s ability to control his value,²⁶ prohibiting others from unjustly profiting from his value,²⁷ and

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

23. *Ventura v. Titan Sports, Inc.*, 65 F.3d 725, 730 (8th Cir. 1995) (citing *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1280-81 (D. Minn. 1970)).

24. *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 976 (10th Cir. 1996).

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

26. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977) (stating that a goal of the right of publicity is to “focus[] on the right of the individual to reap the reward of his endeavors”).

27. See *Zacchini*, 433 U.S. at 576; *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 837 (6th Cir. 1983) (“[Publicity rights] prevent unjust enrichment by [those seeking to] commercially . . . exploit the identity of celebrities without their consent.”).

preventing the reduction of his value.²⁸ These goals are not furthered by regulating fantasy sports through publicity law because the commercial value of athletes is not implicated.

First, any concern about the adverse effect that fantasy sports have on the commercial value of athletes must be discounted because the names and statistics already exist in the public domain. The Supreme Court has held that publicity rights are designed to prevent defendants from “get[ting] free some aspect of the plaintiff that would have market value and for which he would normally pay.”²⁹ Fantasy sports do not publicize anything that would otherwise be restricted, be licensed, or need to be purchased.

Second, empirical studies suggest that fantasy sports *increase* the commercial value of players by encouraging fans to track the sport more closely, purchase television and expert analysis, or watch events they would otherwise not follow.³⁰ This is not a surprising observation; even courts have recognized that the fame of athletes may “largely be the creation of the media or the audience.”³¹ In *Gionfriddo v. Major League Baseball*, players suing over the appearance of their names, images, and statistics in league promotional material admitted that player information was a marketing device to “increase interest [and] . . . attendance.”³² The court agreed, finding that the use of athletic records would likely enhance the players’ marketability.³³ In another example, the *C.B.C.* record included two expert declarations which led the trial court to conclude that “fantasy sports games increase the commercial value of players’ identities because the games encourage participants to attend live games, pay for television packages, or watch on television sporting events in which they would otherwise not be interested.”³⁴ Thus, the use of player names and statistics by fantasy sites *enhances* the commercial value of athletes.

Third, the use of names and statistics in fantasy sports does not interfere with the source of individual players’ commercial value, which comes from

28. See *Zacchini*, 433 U.S. at 576 (protecting that which “goes to the heart of [a person’s] ability to earn a living” and involves “the very activity by which the entertainer acquired his reputation in the first place”); *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1098 (E.D. Mo. 2006) (protecting against “repeated use of a celebrity’s likeness to sell products [that] may eventually diminish its commercial value”) (internal quotation omitted), *aff’d*, 505 F.3d 818 (8th Cir. 2007).

29. *Zacchini*, 433 U.S. at 576 (internal quotation omitted).

30. See Expert Report of Kevin Saundry at 4-5, *C.B.C.*, 443 F. Supp. 2d 1077 (No. 4:05-CV00252).

31. *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 975 (10th Cir. 1996).

32. 114 Cal. Rptr. 2d 307, 316 (Ct. App. 2001).

33. *Id.* at 318.

34. *C.B.C.*, 443 F. Supp. 2d at 1091 n.20.

their ability to perform and compete. Because players are compensated for their athletic performance through a contract, neither the source of their commercial value nor their ability to exchange it for financial reward is affected.³⁵ Indeed, the divergence between the publicity violation and the source of commercial value for players is even more pronounced when professional athlete salaries are considered. The *C.B.C.* court recognized that athletes are paid “handsomely,”³⁶ picking up on an established trend in publicity rights doctrine: generous salaries mitigate any adverse effect that publicity infractions have on the economic incentive of athletes to engage in the activities that secure their commercial value.³⁷

Proponents of applying publicity law³⁸ argue that fantasy sports appropriate player information for commercial gain since the industry would be unmarketable without it. First, this allegation is factually dubious. In theory, fantasy sports could exclude player names just as unlicensed video games have long done: other markers—including jersey numbers, or team name and position—could be used instead. Though this may inconvenience fantasy users, its possibility demonstrates that the essence and marketability of the game exists independent of player identity. Second, this objection proves too much: fantasy sports with incomplete player information are analogous to newspaper box scores that do not include comprehensive league-wide results or telephone directories that do not include a complete listing of city residents, both of which are on firm legal footing.³⁹ In all three cases, the business model takes publicly available facts and creates a product by re-aggregating them in a manner that has market demand.

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35. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) (observing that the “unauthorized use of another’s name for purposes of trade” does not go “to the heart of [one’s] ability to earn a living”).
 36. *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 824 (8th Cir. 2007).
 37. *See ETW Corp. v. Jireh Publ’g*, 332 F.3d 915, 938 (6th Cir. 2003) (citing salary and alternate income sources in refusing to find a painter’s portrayal of Tiger Woods to be a violation of his publicity rights); *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 974 (10th Cir. 1996) (finding no publicity rights violation in parody baseball cards because “players’ salaries currently average over one million dollars per year” and they can “reap financial reward from authorized appearances and endorsements”).
 38. *See, e.g., Karcher, supra* note 9.
 39. Admittedly, newspapers do receive uniquely strong First Amendment protections. Still, courts have held player statistics to hold newsworthy value, *see, e.g., Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 315 (Ct. App. 2001), and have extended strong protection to facts in the public domain regardless of the source in which they are published, *see Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Golan v. Gonzalez*, 510 F.3d 1179 (10th Cir. 2007).

CONCLUSION

In balancing the publicity rights of athletes against the First Amendment rights of fantasy leagues, the only federal appeals court to decide the issue has taken a doctrinally inappropriate approach. While the *C.B.C.* court's ultimate protection of fantasy leagues – not surprising given the strong countervailing First Amendment protections of the public domain – may have been the correct result, future courts should more rigorously question the existence of a publicity rights violation. While underprotection of publicity rights is a serious concern, courts must be cognizant of the dangers of overprotection in the fantasy sports context: it risks stunting the growth of an industry which, ironically, has gone a long way in actually spurring consumer interest and investment in professional athletics.

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