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A Triple Play for the Public Domain: *Delaware Lottery to Motorola to C.B.C.**

Matthew J. Mitten **

A trilogy of cases decided by federal courts over the past thirty years correctly holds that game scores, real-time game accounts, and player statistics are in the public domain. There is a consistent thread in these federal cases, based on sound legal, public policy and economic analysis, which justifies judicial rejection of state law claims by sports leagues and players asserting exclusive rights to this purely factual information. The creation of a collateral product incorporating merely public domain information about a sports event or athletes' performances, including fantasy league games, is not (and should not be) infringing—absent copyright or patent infringement in violation of federal law, or a likelihood of consumer confusion regarding its origin, endorsement, or sponsorship in violation of the Lanham Act.¹ These courts implicitly recognize the need for a uniform national standard to determine the nature and scope of one's rights to use this nationally distributed and available public information for commercial purposes without authorization.

In 1977, in *National Football League v. Governor of Delaware* (“*Delaware Lottery*”),² a federal district court held that game scores are not sub-

* The consistency of these three cases evokes memories of the Baseball Hall of Fame trio of Joe Tinker, Johnny Evers, and Frank Chance, who led the Chicago Cubs to their last World Series championship in 1908. The Official Site of the Chicago Cubs, History: Cubs Timeline, <http://chicago.cubs.mlb.com/chc/history/timeline02.jsp> (last visited Mar. 20, 2008). This double-play combination inspired the 1910 poem, *Baseball's Sad Lexicon*, written by Franklin Pierce Adams, a *New York Evening Mail* sports writer, with its famous refrain:

These are the saddest of possible words:

“Tinker to Evers to Chance.”

Trio of bear cubs and fleeter than birds,

Tinker and Evers and Chance.

Ruthlessly pricking our gonfalon bubble,

Making a Giant hit into a double—

Words that are heavy with nothing but trouble:

“Tinker to Evers to Chance.”

Baseball Almanac, *Baseball's Sad Lexicon* by Franklin Pierce Adams, http://www.baseball-almanac.com/poetry/po_sad.shtml (last visited Mar. 20, 2008).

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¹ The Lanham Act provides a federal statutory right to prevent trademark infringement and unfair competition. 15 U.S.C. §§ 1051–1141n (2000).

² 435 F. Supp. 1372 (D. Del. 1977).

ject to exclusive commercial use by the professional sports league that produced the games and voluntarily disseminated this information. Without the National Football League's ("NFL") authorization, the Delaware State Lottery conducted a "Scoreboard" lottery in which players made bets ranging from one to ten dollars based on the results of weekly NFL games. Scoreboard tickets listed the teams by their respective city names (for example, Green Bay) rather than their nicknames (for example, Packers). Players won cash prizes for correctly selecting the winning teams.³

Rejecting its state law misappropriation claim, the court held that the NFL has no legal right to prevent third parties from producing collateral products, the demand for which is created by the public popularity of the underlying games and athletic performances. Although the NFL's "popularity and reputation played a major role in defendants' choice of NFL games as the subject matter of its lottery[,]” the court refused to broadly define the NFL's "product" or exclusive property rights as encompassing "the total 'end result' of their labors, including the public interest which has been generated."⁴

Even though defendants profited from the popularity of NFL football, the court found no misappropriation of the NFL's property rights, explaining:

It is true that Delaware is thus making profits it would not make but for the existence of the NFL, but I find this difficult to distinguish from the multitude of charter bus companies who generate profit from servicing those of plaintiffs' fans who want to go to the stadium or, indeed, the sidewalk popcorn salesman who services the crowd as it surges towards the gate.

While courts have recognized that one has a right to one's own harvest, this proposition has not been construed to preclude others from profiting from demands for collateral services generated by the success of one's business venture.⁵

Because the schedule of NFL games and scores was obtained by defendants from public sources, this purely factual information could be used by defendants (and others) to create a collateral product, but not in a manner that otherwise infringed on the NFL's rights. The "Scoreboard" lottery did not violate federal⁶ or state⁷ anti-gambling laws, and defendants did not infringe on the NFL's trademarks simply by informing the public that its lottery offered the opportunity to play a betting game based on the results of NFL games.⁸ However, defendants' conduct violated the Lanham Act by creating the false impression that their lottery was approved or spon-

³ *Id.* at 1376.

⁴ *Id.* at 1377.

⁵ *Id.* at 1378. The court also observed: "The NFL undoubtedly would not be in the position it is today if college football and the fan interest that it generated had not preceded the NFL's organization." *Id.*

⁶ *Id.* at 1388-89.

⁷ *Id.* at 1382-88.

⁸ *Id.* at 1380.

sored by the NFL.⁹ To prevent continuing public confusion and resulting harm to the NFL from an undesirable association with an unauthorized collateral product, the court required the defendants to include a clear and conspicuous statement disclaiming any association with, or approval by, the NFL on all future publicly distributed materials regarding the “Scoreboard” lottery.¹⁰

Similarly, in 1997, in *National Basketball Ass’n v. Motorola, Inc.*,¹¹ the Second Circuit relied on federal copyright law to preempt state misappropriation law from prohibiting the unauthorized commercial use of real-time accounts of NBA games derived from their public broadcast. Defendants manufactured and sold a handheld pager, “SportsTrax,” that displayed periodically updated information (usually every two to three minutes) regarding NBA games in progress, including the teams playing, score changes, team possession, free-throw bonus situation, and the game’s quarter and remaining time. The NBA game scores and other information displayed on the SportsTrax pager were gathered by paid personnel who watched games broadcast on television or listened to games on the radio and typed the data into their personal computers. This information was then compiled by a centralized host computer and transmitted via satellite and radio networks.¹²

The Second Circuit held that defendants’ unauthorized usage of real-time game accounts does not constitute copyright infringement. The underlying NBA basketball games (the source of this factual information) were not protected by federal copyright law because athletic events and performances do not constitute ‘original works of authorship’ under the 1976 Copyright Act.¹³ The court held the defendants did not infringe on the NBA’s copyrighted game broadcasts because “they reproduced only facts from the broadcasts, not the expression or description of the game that constitutes the broadcast.”¹⁴

Construing 17 U.S.C. section 301 of the Copyright Act, the court held that the NBA’s state law misappropriation claim was preempted because “Congress, in extending copyright protection only to the broadcasts and not to the underlying events, intended that the latter be in the public domain.”¹⁵ In other words, factual accounts of games obtained from publicly available sources—such as broadcasts—are in the public domain rather than the exclusive property of the game’s producer.¹⁶ Thus, subject to some limita-

9 *Id.* at 1380–81.

10 *Id.* at 1381.

11 105 F.3d 841 (2d Cir. 1997).

12 *Id.* at 843–44.

13 *Id.* at 846–47.

14 *Id.* at 847.

15 *Id.* at 849. Therefore, the court found it unnecessary to address defendants’ First Amendment defense to this claim. *Id.* at 854 n.10.

16 The Second Circuit observed that its ruling is consistent with *Delaware Lottery*. *Id.* at 853 n.8. See also *Morris Commc’ns Corp. v. PGA Tour, Inc.*, 235 F. Supp. 2d 1269 (M.D. Fla. 2002) (although

tions to prevent consumer confusion or unfair competition that would inhibit a sports league's economic incentive to produce or license a similar competing product, this information may be used commercially to create collateral products without the sports league's authorization.

The Second Circuit ruled that defendants did not violate the Lanham Act because there was no false advertising of any material facts regarding the SportsTrax pager that confused consumers or influenced their purchasing decisions.¹⁷ At the time suit was filed, the NBA did not offer its own pager similar to SportsTrax, but it planned to offer a competing product in the future. Although it held that a narrow "hot news" misappropriation claim is not preempted, the court concluded that all three elements of this claim (the time-sensitive value of factual information; free-riding by defendants; and a threat to the very existence of the NBA's product) were not established.¹⁸ The real-time factual information provided by the SportsTrax pager is time-sensitive, but defendants paid the costs of its collection, compilation, and transmission, rather than free-riding on the NBA's efforts to produce a similar product.¹⁹ Observing that the NBA's primary business is "producing basketball games for live attendance and licensing copyrighted broadcasts of those games[,]"²⁰ the court found "no evidence that anyone regards . . . SportsTrax as a substitute for attending NBA games or watching them on television."²¹ The court also found that the mere existence of the SportsTrax pager would not provide an economic disincentive for the NBA to produce its own pager. In fact, the NBA may have a competitive edge that will enable it to produce a more desirable superior product because it has a "temporal advantage in collecting and transmitting official statistics."²²

In 2007, the Eighth Circuit decided *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*²³ Its holding is consistent with *Delaware Lottery* and *Motorola*, although neither case is mentioned in the court's opinion. The court held that the First Amendment trumped Missouri's common law right of publicity and permitted the operator of an on-line fantasy baseball league to use Major League Baseball players' names to identify statistics generated by their respective game per-

PGA Tour has a "property right" in real-time tournament golf scores compiled by its own efforts and expense, it "vanishes when the scores are in the public domain."), *aff'd*, 364 F.3d 1288 (11th Cir. 2004), *cert. denied*, 534 U.S. 919 (2004).

¹⁷ *Nat'l Basketball Ass'n*, 105 F.3d at 854–55.

¹⁸ *Id.* at 853–54.

¹⁹ However, the court noted if defendants "in the future were to collect facts from an enhanced Gamestats pager [produced by the NBA] to retransmit them to SportsTrax pagers, that would constitute free-riding and might well cause Gamestats to be unprofitable because it had to bear costs to collect facts that SportsTrax did not." *Id.* at 854.

²⁰ *Id.* at 853.

²¹ *Id.* at 853–54.

²² *Id.* at 854 n.9.

²³ 505 F.3d 818 (8th Cir. 2007).

formances.²⁴ It observed that “the information used in C.B.C.’s fantasy baseball games is all readily available in the public domain, and it would be strange law that a person would not have a first amendment right to use information that is available to everyone.”²⁵ In support of its conclusion, the Eighth Circuit relied on its own precedent, holding that the expressive content of video games is protected speech under the First Amendment,²⁶ as well as a California appellate court case holding that incorporating former players’ names, bios, and statistics into Major League Baseball’s official website and several All-Star Game and World Series programs is similarly protected.²⁷

This case arose out of a declaratory judgment action filed by C.B.C. against Major League Baseball Advanced Media (“MLBAM”), the interactive media and Internet arm of Major League Baseball.²⁸ C.B.C. alleged that MLBAM maintained “exclusive ownership of statistics associated with players’ names and that it can, therefore, preclude all fantasy sports league providers from using this statistical information to provide fantasy baseball games to the consuming public.”²⁹ In 2005, MLBAM had acquired the right to use and license Major League Baseball players’ publicity rights from the Major League Baseball Players Association (“MLBPA”) for interactive media and Internet products.³⁰ From July 1995 through December 2004, MLBPA licensed C.B.C. to use its players’ publicity rights as part of its fantasy baseball league.³¹ The parties’ final agreement contained provisions pursuant to which C.B.C. agreed not to challenge the validity of the rights licensed by MLBPA during or after its expiration and to discontinue using these rights after its expiration or termination,³² which MLBPA asserted as an intervening party in a breach of contract claim against C.B.C..³³ Without determining whether these no-challenge and no-use provisions were unenforceable on First Amendment grounds, the Eighth Circuit ruled that they were invalid because MLBPA misrepresented that it owned the players’ publicity rights that were determined to be in the public domain.³⁴

Like the “Scoreboard” lottery and a SportsTrax pager, an on-line fantasy baseball league is a lawful collateral product that incorporates infor-

²⁴ *Id.* at 823.

²⁵ *Id.* In light of its holding, the court did not address C.B.C.’s alternative argument that the Copyright Act preempted the state law publicity rights. *Id.* at 824.

²⁶ *Id.* at 823 (relying on *Interactive Digital Software Ass’n v. St. Louis County, Mo.*, 329 F.3d 954, 957 (8th Cir. 2003)).

²⁷ *Id.* at 823–24 (citing *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 411 (Cal. Ct. App. 2001)).

²⁸ *C.B.C. Distribution & Mktg. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077 (E.D. Mo. 2006).

²⁹ *Id.* at 1081.

³⁰ *Id.*

³¹ *Id.* at 1080.

³² *C.B.C.*, 505 F.3d at 824.

³³ *Id.* at 820.

³⁴ *Id.* at 825.

mation (like baseball statistics) readily available in the public domain.³⁵ *Delaware Lottery*, *Motorola*, and *C.B.C.* recognize that there should be a uniform national right to use sports scores, game accounts, and statistics that are in the public domain, which should not be limited by individual state law rights.³⁶ In all three cases, publicly available information has been collected and incorporated into a new product without violating any copyright, patent, trademark, or contract rights—or otherwise constituting unfair competition that threatens to reduce the production of sports events and athletic performances. Collectively, these cases reflect a consistent underlying economic principle that appropriately balances the nature and scope of the exclusive rights of sports leagues and athletes with those of the public to create collateral sports-related products desired by consumers.

The law must establish an economic incentive to create intellectual property and reward those who produce it, as our federal copyright and patent statutes do. However, state misappropriation and publicity rights laws should not confer monopoly power on sports leagues and athletes that prevents others from producing collateral products that incorporate information in the public domain. Allowing free access to game scores, real-time game accounts, and player statistics will stimulate the development of new collateral products desired by consumers, without discouraging the production of “officially licensed or authorized” products by sports leagues and athletes or their licensees. For example, consumers now have the option of playing C.B.C.’s on-line fantasy league game or others officially licensed by MLBAM that may provide attractive enhancements not available as part of unauthorized games.

Unlike the unauthorized broadcast of an entire athletic performance, as occurred in *Zacchini v. Scripps-Howard Broadcasting Co.*³⁷—which the Supreme Court ruled may be prohibited under state publicity rights laws without violating the First Amendment³⁸—an unauthorized fantasy league game does not create an economic disincentive for players to perform to the best of their abilities or to develop their respective reputations and fame. Even without the exclusive rights and legal protection conferred by state publicity rights laws, athletes have sufficient economic incentives to produce high quality, creative athletic performances and market their identities.³⁹ Athletes would still be able to derive income (likely to be substan-

³⁵ *Humphrey v. Viacom, Inc.*, No. 06-2768 (DMC), 2007 WL 1797648, at *11 (D.N.J. June 20, 2007) (fantasy sports leagues do not violate the federal Unlawful Internet Gambling Enforcement Act of 2006 or state *qui tam* laws).

³⁶ For similar reasons, courts have refused to use state antitrust and labor law to regulate national professional sports leagues. *Partee v. San Diego Chargers Football Co.*, 668 P.2d 674, 679 (Cal. 1983); *State v. Milwaukee Braves, Inc.*, 144 N.W.2d 1, 18 (Wis. 1966).

³⁷ 433 U.S. 562 (1977).

³⁸ *Id.* at 578–79.

³⁹ Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 210 (1993) (observing that “even without the right of publicity the rate of return to stardom in the entertainment and sports fields is probably high enough to bring forth a more than ‘adequate’ supply of creative effort and achievement.”).

tial) from the licensed or authorized use of their identities in connection with fantasy league games.⁴⁰

In *C.B.C.*, the Eighth Circuit correctly concluded that MLBAM did not have the legal right to prevent the names of baseball players and their playing statistics from being used in connection with unauthorized fantasy baseball products. However, by holding that this conduct violated the players' publicity rights,⁴¹ it failed to recognize that public domain baseball statistics in the form of a fantasy league game—not player identities or personas—is the collateral product offered to the public. Those playing on-line fantasy league games pay a fee to the league's operator, "draft" actual Major League Baseball players prior to the start of the season, and compete against others who have drafted their own teams for prizes and/or bragging rights. As the *C.B.C.* district court explained, "[t]he success of one's fantasy team over the course of the baseball season is dependent on one's chosen players' actual performances on their respective actual teams."⁴² The players' names are used merely to identify the source of particular baseball statistics.

Merely incidental or descriptive use of players' names to identify collateral products is permissible unless it creates a likelihood of consumer confusion regarding endorsement or sponsorship.⁴³ Observing that "mere use of a name as a name is not tortious[.]"⁴⁴ the *C.B.C.* district court correctly held that "CBC's mere use of Major League baseball players' names in conjunction with their playing records does not establish a violation of the players' right of publicity."⁴⁵ The court found that *C.B.C.* was not using the players' names or identities to advertise its fantasy league games⁴⁶ and "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."⁴⁷ Agreeing with the district court, the Eighth Circuit held, "[n]or is there any danger here that consumers will be misled, because the fantasy baseball games depend on the inclusion of all players and thus cannot create a false impression that

⁴⁰ See *id.* at 211–12.

⁴¹ *C.B.C. Distribution & Mktg, Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 822–23 (8th Cir. 2007).

⁴² *C.B.C. Distribution & Mktg. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1080 (E.D. Mo. 2006).

⁴³ *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 937 (6th Cir. 2003) (holding that artist may use "Tiger Woods" on painting's packaging and in narrative description of painting because doing so does not falsely suggest that the famous golfer sponsors or approves the painting). See also *Romantics v. Activation Publ'g, Inc.*, 532 F. Supp. 2d 884 (E.D. Mich. 2008) (concluding that "[d]efendants have made no trademark use of the name of 'The Romantics,' using the name merely in the body of the Game to accurately identify the group that made the song famous," and that there is no "evidence that a substantial number of ordinarily prudent customers of the Game were deceived about whether The Romantics or Plaintiffs sponsored the Game.").

⁴⁴ *C.B.C. Distribution & Mktg.*, 443 F. Supp. 2d at 1089.

⁴⁵ *Id.*

⁴⁶ *Id.* at 1098.

⁴⁷ *Id.* at 1086.

some particular player with 'star power' is endorsing CBC's products."⁴⁸

Courts initially refused to characterize the names and identities of celebrities as protectable property rights. For example, in *Hanna Manufacturing Co. v. Hillerich & Bradsby Co.*,⁴⁹ the Fifth Circuit held: "*Fame is not merchandise. It would help neither sportsmanship nor business to uphold the sale of a famous name to the highest bidder as property.*"⁵⁰ It concluded that an athlete has a valid claim for unauthorized commercial use of his name only if such usage falsely suggests that he uses or endorses the product.

A common law right of publicity was first judicially recognized as a property right in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,⁵¹ a 1953 case that arose out of litigation regarding the rights to use baseball players' images on trading cards. Their names and photos were being used on trading cards without authorization to sell a variety of products, including bubble gum, candy, soda, peanut butter, bread, ice cream, and deserts.⁵² In *Haelan*, the Second Circuit held that "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[.]"⁵³ Thus, the court created a property right in the marketing and advertising value of one's identity, which, for example, may be enforced to prohibit the unauthorized commercial use of a baseball player's name or likeness to advertise and sell products.

Today, a narrow majority of states recognize the right of publicity.⁵⁴ As one scholar explained:

Relief for the celebrity whose persona has been appropriated for a commercial endorsement is supported by the proposition that the celebrity, by dint of effort or luck, has created in his or her personality a marketable economic value distinguishable from the emotional value of identity. The concept of value is intuitively satisfying. Our society does recognize that certain people, whom we call celebrities, specifically affect the marketability of goods, services, and creative works.⁵⁵

Other scholars, however, are more skeptical and assert that publicity

48 C.B.C. Distribution & Mktg. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818, 824 (8th Cir. 2007).

49 78 F.2d 763 (5th Cir. 1935).

50 *Id.* at 766 (emphasis added).

51 202 F.2d 866 (2d. Cir. 1953), *cert. denied*, 346 U.S. 816 (1953); *see generally* J. Gordon Hylton, *Baseball Cards and the Birth of the Right of Publicity: The Curious Case of Haelan Laboratories v. Topps Chewing Gum*, 12 MARQ. SPORTS L. REV. 273 (2001).

52 *See* GeoCities.com, Chris Stufflestreet, A Somewhat Thorough History of Baseball Cards (1876-1980), <http://www.geocities.com/chrisstufflestreet/history.html> (last visited Mar. 14, 2008).

53 *Haelan*, 202 F.2d at 868.

54 *See* John Grady, Steve McKelvey, & Annie Clement, *A New "Twist" for "The Home Guys"?: An Analysis of the Right of Publicity Versus Parody*, 15 J. LEGAL ASPECTS SPORT. 267, 271 (2005) (observing that twenty-eight states recognize the right of publicity).

55 Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1239 (1986); *see also* Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 UCLA ENT. L. REV. 97, 103 (1994) ("The legal right of publicity can be understood as a fishing license designed to avoid races that would use up reputations too quickly.").

rights should not be recognized. For example, Professor Madlow argues that “a right of publicity . . . reflects . . . the triumph of a market-oriented, instrumentalist, individualistic understanding of fame over an older, more communitarian conception.”⁵⁶ He concludes that moral, economic, and consumer protection arguments made in support of recognizing publicity rights “individually and cumulatively, are not nearly as compelling as is commonly supposed, nor as compelling as we have reason to demand.”⁵⁷

In light of the conflicting policy concerns raised by this scholarly debate—which may explain why Congress and more than twenty states have not created a property right in the commercial value of one’s identity—the nature and scope of an individual’s publicity rights should not be defined too broadly to the detriment of the public. It is necessary to consider “whether the particular use of the persona evokes a broader concept that is properly a part of the public domain and therefore not within the right of publicity.”⁵⁸ This is a particularly important inquiry in the context of collateral products such as fantasy league games, which incorporate the results of athletic performances and playing statistics therein and use players’ names only to identify their source without creating any likelihood of consumer confusion regarding approval or sponsorship.

*Abdul-Jabbar v. General Motors Corp.*⁵⁹ draws the proper line between unauthorized commercial use of an athlete’s identity that violates the right of publicity, and fair use of an athlete’s name for descriptive purposes that does not. In this case a General Motors (“GM”) television commercial was shown during the 1993 NCAA men’s basketball tournament:

A disembodied voice asks, “How ‘bout some trivia?” This question is followed by the appearance of a screen bearing the printed words, “You’re Talking to the Champ.” The voice then asks, “Who holds the record for being voted the most outstanding player of this tournament?” In the screen appear the printed words, “Lew Alcindor, UCLA, ‘67, ‘68, ‘69.” Next, the voice asks, “Has any car made the ‘Consumer Digest’s Best Buy’ list more than once? [and responds:] The Oldsmobile Eighty-Eight has.” A seven-second film clip of the automobile, with its price, follows. During the clip, the voice says, “In fact, it’s made that list three years in a row. And now you can get this Eighty-Eight special edition for just \$18,995.” At the end of the clip, a message appears in print on the screen: “A Definite First Round Pick,” accompanied by the voice saying, “it’s your money.” A final printed message appears: “Demand Better, 88 by Oldsmobile.”⁶⁰

Kareem Abdul-Jabbar, who changed his name from Lew Alcindor when he converted to the Islamic faith, alleged that this advertisement violated his right of publicity because he did not consent to the use of his

⁵⁶ Madow, *supra* note 39, at 135.

⁵⁷ *Id.*

⁵⁸ Halpern, *supra* note 55, at 1255.

⁵⁹ 85 F.3d 407 (9th Cir. 1996).

⁶⁰ *Id.* at 409.

former name therein.⁶¹ GM argued that “its use of the name ‘Lew Alcindor’ was ‘incidental’ and therefore not actionable”⁶² because it merely described his playing accomplishments. “While Lew Alcindor’s basketball record may be said to be ‘newsworthy,’”⁶³ the Ninth Circuit rejected this defense because it was used in an advertisement to sell GM’s automobile. Regarding GM’s analogous “nominative fair use defense”⁶⁴ to Abdul-Jabbar’s Lanham Act false endorsement claim, which it also rejected, the court concluded:

Had GMC limited itself to the “trivia” portion of its ad, GMC could likely defend the reference to Lew Alcindor as a nominative fair use. But by using Alcindor’s record to make a claim for its car—like the basketball star, the Olds 88 won an “award” three years in a row, and like the star, the car is a “champ” and a “first round pick”—GMC has arguably attempted to “appropriate the cachet of one product for another,” if not also to “capitalize on consumer confusion.”⁶⁵

Like an unauthorized biography of a famous professional athlete, questions about his sports records in a Trivial Pursuit or Jeopardy game, or a board game incorporating his playing statistics, a fantasy sports league is based on facts in the public domain and uses his name only for descriptive purposes. Prior to the Eighth Circuit’s *C.B.C.* holding that the First Amendment protects the incorporation of players’ statistics in fantasy baseball games, some courts incorrectly concluded that the unauthorized use of a professional athlete’s name and playing statistics in a board game violated the right of publicity, while inconsistently acknowledging that such usage in a book would not do so.⁶⁶ As one scholar explains:

Right-of-publicity plaintiffs do not have a property interest in information about themselves. The appropriation by a defendant of playing statistics and other facts in the public domain is very different from the appropriation of an individual’s name, likeness, or other attributes protected by the right of publicity. Balanced against a publicity plaintiff’s virtually nonexistent property interest in such information is society’s substantial interest in public dissemination of information. This societal interest is equally compelling regardless of the particular vehicle in which the information is disseminated. Moreover, these situations lack the element of unjust enrichment because the users are not appropriating something to which they have no right.⁶⁷

⁶¹ *Id.*

⁶² *Id.* at 416.

⁶³ *Id.*

⁶⁴ *Id.* at 412. This defense has three required elements: “First, the product or service in question must be one not readily identifiable without use of the trademark; second, only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and third, the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.” *Id.*

⁶⁵ *Id.* at 413.

⁶⁶ *See, e.g.*, *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970); *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967); *see also Rosemont Enters., Inc. v. Urban Sys., Inc.*, 340 N.Y.S.2d 144 (N.Y. Sup. Ct. 1973) (unauthorized board game violated Howard Hughes’ publicity rights).

⁶⁷ Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 91 (1994). Professor Kwall asserts that “the use of athletes’ play-

On the other hand, another scholar asserts that the “distinction between Trivial Pursuit and fantasy sports leagues lies in the extent of the commercial advantage obtained.”⁶⁸ Professor Karcher argues that “the players are providing the content for the fantasy sports league industry which is a huge profit-making service industry, and the players should be compensated for the use of that content by fantasy league operators.”⁶⁹ He concludes that C.B.C. is unjustly enriched because it derives revenues from fantasy leagues based on results of their athletic performances and that players are entitled to royalties based on the fair market value of a license.⁷⁰

However, the commercial benefit that C.B.C. derives from its fantasy baseball league is irrelevant when public domain facts (*i.e.*, baseball statistics), which may be freely used by the public, are the essence of its game.⁷¹ Extending the right of publicity to require C.B.C. to pay a licensing fee would create an exclusive property right that precludes, or severely limits, the commercial use of public domain information, reduces the availability of collateral products, and/or increases the costs to consumers.⁷² Such a broad state-created “right of publicity on steroids” is legally and economically unjustified.

ing statistics should be completely approved when they appear in either books or board games.” *Id.* at 51.

⁶⁸ 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, 570 (2007).

⁶⁹ *Id.* at 572.

⁷⁰ *Id.* at 579. He notes that there are some “fantasy league operators currently paying a licensing fee in the range of two to three million dollars.” *Id.*

⁷¹ Detailed consideration of the complex fact-specific issue of how to appropriately balance the right of publicity with the First Amendment when the player's *identity* is the product itself or an integral part thereof, is outside the scope of this article. Depending on the nature of the unauthorized use of a player's identity—in either a photo or drawing on products such as T-shirts, trading cards, or bobble heads, or in a video game—it may be artistic expression or parody protected by the First Amendment. *See, e.g.*, *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915 (6th Cir. 2003); *Cardtoons, L.C., v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996); *Romantics v. Activision Publ'g, Inc.*, 532 F. Supp. 2d 884 (E.D. Mich. 2008); *Kirby v. Sega of Am., Inc.*, 144 Cal. App. 4th 47 (Ct. App. 2006).

⁷² The *C.B.C.* district court suggested that “CBC would be out of business if it were precluded from using in its fantasy games either players' names or their names in conjunction with their playing records.” *C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d. 1077, 1099 (E.D. Mo. 2006).