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Balancing Individual and Societal Interests Under the First Amendment: How the Eighth Circuit Saved Fantasy Baseball

Salvatore Vetrini*

“There is an inherent tension between the right of publicity and the right of freedom of expression under the First Amendment.”¹

The recent Eighth Circuit decision in *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*² thoroughly exemplifies this tension. Broadly speaking, the court’s majority balanced the *individual* interest of a holder of publicity rights against the *societal* interest of the public in the free expression and flow of ideas. The United States Supreme Court has applied this type of individual-societal reasoning in other kinds of First Amendment cases.³ This Note argues that while *C.B.C. Distribution*’s traditional balancing of individual interests against societal interests does not overwhelmingly favor the latter in light of Supreme Court precedent, other factors tip the scale and lead the court to the right outcome. The ultimate result is the defanging of the right of publicity—rendering the right an ineffective means to redress the alleged harm caused by the unlicensed use of professional sports player information and statistics—and the maintenance of a widely popular vehicle baseball fans use to connect to the game.

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1. *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 931 (6th Cir. 2003).

2. 505 F.3d 818 (8th Cir. 2007), *cert. denied*, 128 S. Ct. 2872 (2008).

3. *See, e.g.*, *Rankin v. McPherson*, 483 U.S. 378 (1987) (employment speech context); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (right of privacy context); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (defamation context); *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (press publication context). *See infra* Part V.

I. Summary of the Case

In *C.B.C. Distribution*, the plaintiff, C.B.C. Distribution and Marketing, Inc. (“CBC”), an online fantasy baseball provider and former licensee of the Major League Baseball Player’s Association (“MLBPA”), brought suit, seeking a declaratory judgment that it had the right to make *unlicensed* use of player names and statistics.⁴ The defendant, Major League Baseball Advanced Media, L.P. (“MLBAM”), the *current* and exclusive licensee of such information, counterclaimed, asserting that CBC violated the players’ rights of publicity under Missouri state law.⁵ The licensor, MLBPA, subsequently intervened on behalf of MLBAM, claiming that CBC breached its prior agreement with MLBPA.⁶ In 2002, CBC and MLBPA entered into an agreement providing the former with a license to use player “names, nicknames, likenesses, signatures, pictures, playing records, and/or biographical data”⁷ This agreement, however, expired in 2005 and contained no-use and no-contest provisions—provisions that MLBPA claimed were breached by CBC in their unlicensed use of player names and statistics.⁸ In 2005, MLBPA and MLBAM entered into an agreement giving MLBAM the “exclusive right to use baseball players’ names and performance information,” the same information CBC was entitled to under the since-expired 2002 agreement.⁹

The district court found that CBC did not violate the players’ publicity rights and excused CBC’s violations of the no-use

4. *C.B.C. Distribution*, 505 F.3d at 820. A declaratory judgment is a “binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement.” BLACK’S LAW DICTIONARY 700 (8th ed. 2004). Here, CBC asked the district court for a binding adjudication securing CBC’s right to use player names and performance statistics without a license. *C.B.C. Distribution*, 505 F.3d at 820.

5. *C.B.C. Distribution*, 505 F.3d at 82. MLBAM was started by a “group of Major League Baseball [team] owners to manage the expansion of the sport onto the Internet and other new technologies. . . . [MLBAM] acquired the rights to player identities for use in fantasy sports from the [MLBPA]” Gabriel Grossman, Comment, *Switch Hitting: How C.B.C. v. MLB. Advanced Media Redefined the Right of Publicity*, 14 UCLA ENT. L. REV. 285, 289-90 (2007) (analyzing the district court’s, not the Eighth Circuit’s, decision).

6. *C.B.C. Distribution*, 505 F.3d at 820.

7. *Id.* at 821.

8. *Id.*

9. *Id.*

and no-contest provisions on public policy grounds.¹⁰ The Eighth Circuit affirmed in a 2-1 decision, albeit on different grounds.¹¹ Specifically, the Eighth Circuit found that although CBC did indeed violate the players' publicity rights under Missouri law, the First Amendment overrode the violation.¹²

II. Overview of Fantasy Sports

In order to comprehend the necessity of player names and performance statistics in fantasy baseball games, it is helpful to understand the mechanics of fantasy sports. While multiple formats exist, the game of fantasy baseball generally allows participants to create fantasy "teams" by "drafting" real professional baseball players at the start of the season.¹³ These teams are pitted against the other teams in one's "league" and accumulate points based on the real-life statistics accrued by each player.¹⁴ Essentially, a fantasy team "owner" selects players and receives points based on the individual daily performances of each player he or she drafts. Fantasy sports providers like CBC provide mechanisms to coordinate these drafts and track scoring as the season progresses. Herein lies a fantasy sports provider's (and CBC's) absolute dependence on player names and performance statistics. Without the use of names, it would be difficult to select and track players during the season. Without the use of statistics, it would be impossible to score each fantasy team.

This case was closely watched by fantasy sports providers, professional sports leagues, and fantasy sports consumers. In fact, the NFL Players Association, NBA Properties, NHL Enterprises, the National Association for Stock Car Auto Racing (NASCAR), the PGA Tour, and WNBA Enterprises filed an *amici curiae* brief in favor of the defendants, MLBAM and the

10. *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1107 (E.D. Mo. 2006).

11. *C.B.C. Distribution*, 505 F.3d at 825.

12. *Id.* at 824. The Eighth Circuit also excused CBC's breach of the no-use and no-contest provisions on different grounds, finding that the MLBPA breached a warranty in the 2002 agreement between itself and CBC. *Id.* at 825. Essentially, the MLBPA's prior breach excused CBC's breach. *Id.*

13. *See* Grossman, *supra* note 5, at 286-87.

14. *Id.* at 287.

MLBPA (collectively “MLB”).¹⁵ In sum, MLB and the amici professional sports leagues wanted the exclusive right to offer fantasy sports to the public by securing the exclusive right to use player names and statistics, which is, as noted above, information vital to the operation of fantasy sports. Or, as the amici sports leagues put it themselves:

To capitalize and expand upon this core business, each Amicus has developed an extensive program for licensing its intellectual property in association with a large array of goods and services, including fantasy sports games . . . on-line information, [and] interactive games. . . . The commercial exploitation of Amici’s intellectual property is an exceptionally important means of building brand awareness and creating revenue for each Amicus and its respective sports organization. Officially licensed sports-themed products and services, including those products and services licensed by Amici, generate *billions of dollars in retail sales each year*.¹⁶

Consequently, if MLB succeeded in its lawsuit, the amici sports leagues would presumably seek similar judgments against other unlicensed, “rogue” fantasy sports providers like CBC, thereby allowing the leagues to monopolize the lucrative fantasy sports market by restricting the use of their players’ names and statistics to those providers willing to pay large licensing fees. For example, MLBAM paid \$50 million for a five-year license.¹⁷ According to the Fantasy Sports Trade Association, the fantasy sports industry’s value is approximately \$1 bil-

15. *C.B.C. Distribution*, 505 F.3d at 818.

16. Brief for NBA Properties, Inc. et al. as Amici Curiae Supporting Defendants-Appellants, *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007) (Nos. 06-3357, 06-3358), 2006 WL 4003425 (emphasis added).

17. See Grossman, *supra* note 5, at 290. Without delving into the mechanics of antitrust law, “monopolize” is not used in a wholly colloquial sense here. Commentators have suggested that publicity rights, like those invoked by MLB players in *C.B.C. Distribution*, can be viewed as fungible assets. See Melissa B. Jacoby & Diane Leenheer Zimmerman, *Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity*, 77 N.Y.U. L. REV. 1322, 1323 (2002) (analyzing publicity rights as property in the debtor-creditor context where rights may be utilized to pay unsatisfied debts); Raymond J. Dowd, *Rights of Publicity: Elvis, Marilyn, and the Federal Courts*, 54 FED. L. 12 (2007) (characterizing publicity rights as property rights that are pecuniary in nature). See also Hastings H.

lion and has around twenty million consumers in the United States and Canada.¹⁸ Yahoo! Sports, the single largest fantasy sports provider, has over four million customers alone.¹⁹ If the Eighth Circuit had ruled in favor of MLB, similar litigation, perhaps this time initiated by other sports leagues, would have certainly followed. Such litigation would have been the natural result of the sports leagues' explicit strategy of capitalizing upon its core business of intellectual property licensing.

III. The Right of Publicity

In *C.B.C. Distribution*, the majority and the dissent agreed that state publicity right claims must be balanced against First Amendment considerations, and that the First Amendment trumped CBC's violation of the players' publicity rights.²⁰ For the right of publicity, Missouri state law required MLB to prove that its players' names were used as a symbol of their identities, without their consent, and with the intent to obtain some commercial advantage.²¹ More generally, the right of publicity has been defined as the privilege "to control the commercial value and exploitation of [one's] name or picture or likeness, or to prevent others from unfairly appropriating that value for commercial benefit."²²

The right of publicity, though distinct from, hatched from the right of privacy.²³ As depicted in William Prosser's seminal article on the subject,²⁴ the right of privacy is generally described as a "a complex of four torts, embracing unreasonable intrusions upon another's seclusion, public disclosure of private facts, publicity placing another in a false light, and the appro-

Beard, *Squeezing "The Juice": Can the Right of Publicity Be Used to Satisfy a Civil Judgment?*, 15 J. INTELL. PROP. L. 143, 151-57 (2007).

18. Joshua Chaffin, *All to Play for in Fantasy Sports*, FINANCIAL TIMES DEUTSCHLAND, (Dec. 24, 2007), available at http://www.ftd.de/karriere_management/business_english/Business%20English%20All/294830.html.

19. *Id.*

20. See 505 F.3d at 823; see also *id.* at 826 (Colloton, J., dissenting) (agreeing with the majority's analysis of Missouri's right of publicity and its interaction with the First Amendment).

21. *Id.* at 822 (majority opinion) (citing *Doe v. TCI Cablevision*, 110 S.W.3d 363, 369 (Mo. 2003)).

22. 63C AM. JUR. 2D *Property* § 6 (2008).

23. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995).

24. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

priation for the defendant's advantage of the plaintiff's name or likeness."²⁵ The Restatement (Second) of Torts expressly codifies these four torts,²⁶ and they are currently recognized by states across the country.²⁷ In 1953, however, the Second Circuit established a new right distinct from the right of privacy: "[I]n addition to and independent of that 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. . . . This right might be called a 'right of publicity.'"²⁸

In that same case, the Second Circuit went on to reason that "[t]his right . . . would usually yield [the right holders] no money unless it could be made the subject of an exclusive grant which barred [others] from using their pictures."²⁹ This construction derives from Prosser's fourth tort theory noted above: protecting against the advantageous appropriation of the right holder's name or likeness.³⁰ The distinction between the two rights lies in the right of publicity's emphasis on the right holder's commercial interests and the unfair use of those interests by another.³¹ Abstractly, the right of privacy is more about the "personal right to be left alone," while the right of publicity is about the "*business* right to control use of one's identity in commerce."³² In looking to courts to uphold this right, publicity right holders aim to secure the "commercial value of their fame" and "prevent[] the unjust enrichment of others seeking

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

26. RESTATEMENT (SECOND) OF TORTS § 652A (1977).

27. *Id.* at cmt. c.

28. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953). Currently, many states recognize a right of publicity by statute. *See, e.g.*, FLA. STAT. ANN. § 540.08 (West 1967); KY. REV. STAT. ANN. § 391.170 (West 1984); N.Y. CIV. RIGHTS LAW § 51 (McKinney 1992). In other states, like Missouri, the right is solely a product of common law. *See Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003). Thirty-six states recognize the right in some form; however, there is no federal right of publicity. *See* Keith D. Willis, Note, *Paparazzi, Tabloids, and the New Hollywood Press: Can Celebrities Claim A Defensible Publicity Right in Order to Prevent the Media from Following Their Every Move?*, 9 TEX. REV. ENT. & SPORTS L. 175, 183 (2007).

29. *Haelan Labs.*, 202 F.2d at 868.

30. *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 313 (Ct. App. 2001).

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

32. *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 967 (10th Cir. 1996) (emphasis added).

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to appropriate' the commercial value . . . for themselves."³³ Or, as the Eighth Circuit phrased it in *C.B.C. Distribution*, the right ensures that "an individual [can] reap the rewards of his or her endeavors"³⁴ In *C.B.C. Distribution*, the Eighth Circuit went on to emphasize that protecting *non-economic* interests in this context is the task of the right of privacy and has no application to the right of publicity.³⁵ In simpler terms, the Tenth Circuit has described the right as the "right of a person to control the *commercial* use of his or her identity."³⁶ To summarize, the individual right holder's economic interests are paramount to the right of publicity. This emphasis on solely economic interests distinguishes the right of publicity from the right of privacy.

There is another, more practical difference between privacy rights and publicity rights. Although courts have been historically reluctant to permit celebrities to rely on the right of privacy,³⁷ courts have been more receptive to celebrity right of publicity claims.³⁸ Most notably, Vanna White of "Wheel of Fortune" overcame a motion for summary judgment against electronics producer Samsung where the latter's advertisement contained a robot bearing White's resemblance.³⁹

IV. The Eighth Circuit's First Amendment Analysis

After finding that CBC indeed violated MLB players' rights of publicity under Missouri law, the court relied on the Supreme Court case of *Zacchini v. Scripps-Howard Broadcasting Co.*⁴⁰ for the proposition that "state law rights of publicity must be

33. *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1090 (E.D. Mo. 2006) (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c (1995)).

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

35. *Id.*

36. *Cardtoons*, 95 F.3d at 967 (emphasis added).

37. *See* *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 313 n.6 (Ct. App. 2001) (noting the "anomaly of a celebrity suing for loss of privacy").

38. *See, e.g., Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407 (9th Cir. 1996) (right of publicity claim brought by NBA player Kareem Abdul-Jabbar for the unauthorized use of his likeness in a television commercial).

39. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992).

40. 433 U.S. 562 (1977).

balanced against the First Amendment.”⁴¹ In *Zacchini*, the plaintiff, a human cannonball performer, sued a broadcasting company that televised his entire act on its daily news show without his permission.⁴² The *Zacchini* Court reasoned that the right of publicity’s purpose has nothing to do with “protecting feelings or reputation” like the right of privacy, but instead concerns “protecting the proprietary interest of the individual in his act in part to encourage such entertainment . . . [and] to reap the reward of his endeavors.”⁴³ Further distinguishing between privacy and publicity rights, the *Zacchini* Court asserted that the dissemination of the plaintiff’s act is not by itself the essence of the claim. Rather, such a complaint is the concern of privacy rights. In *Zacchini*, the core question of the plaintiff’s claim is “*who* gets to do the publishing” and therefore gets to profit from publication of the act.⁴⁴

Though the *Zacchini* Court ultimately found for the plaintiff, the Eighth Circuit applied the *Zacchini* rationale in *C.B.C. Distribution*. In *C.B.C. Distribution*, MLB’s real problem was not with the mere disclosure of players’ names and statistics—such is done daily in newspapers and other forms of media—but was with CBC’s unlicensed use of such information and the resulting profits. To resolve this question, the Eighth Circuit balanced MLB players’ individual interests associated with the right of publicity against the public’s First Amendment interests. Although it is perhaps simpler to view CBC’s right as a personal or individual one afforded to it by the First Amendment, federal courts’ concerns in these kinds of cases have tra-

41. *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 823 (8th Cir. 2007) (citing *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977)). Interestingly, *Zacchini* is the only case to date where the Supreme Court has subjected a right of publicity claim to constitutional analysis. *Cardtoons*, 95 F.3d at 973. However, it should be noted that the balancing approach to First Amendment-publicity rights issues has been criticized on the ground that such an approach provides unacceptable levels of uncertainty. See Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity-Free Speech Interface*, 23 LOY. L.A. ENT. L. REV. 471, 499-500 (2003).

42. *Zacchini*, 433 U.S. at 563-64.

43. *Id.* at 573. This “encouragement” or “incentive” argument has been found to be unconvincing when put forth by celebrities and MLB players specifically because they are “already handsomely compensated.” *Cardtoons*, 95 F.3d at 974.

44. *Zacchini*, 433 U.S. at 573 (emphasis added).

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ditionally been over the larger effects that restraints on a single person's First Amendment rights will have on society at large.⁴⁵

Before applying this balancing test, however, the *C.B.C. Distribution* court addressed two preliminary issues. First, the court emphasized that the information at issue "is all readily available in the public domain" and foreclosing a person's First Amendment right to use such information would be "strange law."⁴⁶ Second, the court tackled the purpose of CBC's use of the information. The court rejected MLB's argument that CBC's use of player names and statistics did not constitute speech at all, and instead held that it was immaterial whether CBC's purpose was to inform or entertain, for both purposes are entitled to First Amendment protection.⁴⁷

Beginning with the societal interest prong of the balancing test, the Eighth Circuit noted that other courts have "recognized the public value of information about the game of baseball and its players"⁴⁸ The court then remarked that "baseball is followed by millions[,] . . . the public has an enduring fascination in [baseball's] records," and there is a "substantial public interest" in this form of expression.⁴⁹ Such societal interests, as noted below, are unique in that they are not commonly invoked in cases that involve First Amendment principles.

The court then turned to the other element of the balancing test—the players' individual interests associated with their publicity rights. The court essentially found that those interests were not implicated by the facts of the case.⁵⁰ First, the rights of the players to reap the rewards of their endeavors and to earn a living were not issues because MLB baseball players are "rewarded, and handsomely, too" and earn additional income from "endorsements and sponsorship arrangements."⁵¹ Second, there existed no possibility that fantasy baseball participants would be misled because "fantasy baseball games de-

45. See *infra* Part V.

46. *C.B.C. Distribution*, 505 F.3d at 823.

47. *Id.*

48. *Id.*

49. *Id.* at 823-24 (quoting *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 315 (Ct. App. 2001)).

50. *Id.* at 824.

51. *Id.* This assertion echoes that of the *Cardtoons* court's repudiation of the "incentive" argument. See *supra* note 43 and accompanying text.

pend on the inclusion of all players and thus cannot create a false impression that” the players are in fact endorsing CBC’s products—online fantasy baseball games.⁵² Third, the court dismissed a set of non-economic interests some have associated with the right of publicity, such as “rewarding celebrity labors, and avoiding emotional harm,” because such interests are the domain of the right of privacy.⁵³ MLB claimed a violation of its publicity, not privacy, rights.⁵⁴

Interestingly, the court mentioned, but did not apply to the facts, the notion that publicity rights provide the right holder with incentives to continue productive activity.⁵⁵ Perhaps the court did not address this interest because of its obvious inapplicability to MLB players and their statistics. While players are certainly motivated to some extent by statistics because their on-field performances, as measured by statistics, increase or decrease their future value and celebrity, the publication of these statistics is widespread and routine. Therefore, singling out one publisher of such information while regular media coverage continues unabated would also seem like “strange law.”⁵⁶

In sum, the court’s reasoning was almost exclusively focused on why the players’ interests are hardly applicable here, as opposed to why the need for First Amendment protection is so large.⁵⁷ The only positive reason the Eighth Circuit gave for why CBC’s speech deserves such protection was America’s historical affinity towards baseball.⁵⁸ To be clear, the court supported this claim about baseball and American society with authority.⁵⁹ Specifically, the court cited *Cardtoons, L.C. v. Major League Baseball Players Ass’n*,⁶⁰ a Tenth Circuit case involving the MLBPA and a right of publicity claim.⁶¹ There, the plaintiff, a producer of baseball cards parodying MLB players, obtained a declaratory judgment against the MLBPA stating

52. *C.B.C. Distribution*, 505 F.3d at 824.

53. *Id.*

54. *Id.* See also *supra* Part III (contrasting publicity and privacy rights).

55. *C.B.C. Distribution*, 505 F.3d at 824.

56. *Id.* at 823.

57. *Id.* at 824.

58. *Id.* at 823.

59. *Id.*

60. 95 F.3d 959 (10th Cir. 1996).

61. *Id.*

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that it did not infringe on the players' publicity rights.⁶² Affirming the district court's judgment for the plaintiff, the Tenth Circuit referred to baseball as "the national pastime" and noted the importance of promoting commentary, even of the "irreverent" variety, about the game.⁶³ However, *Cardtoons* focused most of its First Amendment-societal reasoning on the merits and importance of protecting the expressive form of "parody."⁶⁴ For instance, the court characterized the plaintiff's speech—its parody baseball cards—as an "important form of entertainment and social commentary that deserve First Amendment protection."⁶⁵

V. Individual-Societal First Amendment Reasoning in Other Contexts

The *C.B.C. Distribution* court's reasoning, adopted from *Zacchini*, is not confined to situations involving state publicity rights. In fact, a wide variety of First Amendment cases contain comparisons of individual rights to the larger set of societal concerns espoused by the First Amendment. For example, in *Time, Inc., v. Hill*,⁶⁶ the Supreme Court set aside a judgment against *Life* magazine that was secured under New York's right of privacy statute.⁶⁷ There, the plaintiff sued *Life* magazine for publishing a brief article, which identified the plaintiff by name.⁶⁸ The article was about a Broadway play based on a novel that was inspired by the real-life kidnapping of the plaintiff and his family.⁶⁹ The novel, unlike the plaintiff's true experience, contained parts where the kidnappers commit violent acts against the plaintiff and his family—elements the play and the *Life* article conveyed as well.⁷⁰ *Life* magazine argued that the article

62. *Id.* at 962.

63. *Id.* at 972.

64. *Id.* at 972-73. The expressive form of parody has also received First Amendment protection when pitted against the right of publicity in non-commercial contexts. See, e.g., *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1189 (9th Cir. 2001) (parody of actor Dustin Hoffman).

65. *Cardtoons*, 95 F.3d at 976.

66. 385 U.S. 374 (1967).

67. *Id.* at 398.

68. *Id.* at 377.

69. *Id.*

70. *Id.* at 378.

was “of legitimate news interest” and “of value and concern to the public”⁷¹ The majority opinion, written by Justice Brennan, read a requirement of knowing or reckless falsity under the facts of the case into New York’s right of privacy law.⁷²

However, the majority in *Time* did not declare the statute facially unconstitutional for lacking this requirement; instead it left future constitutional issues to New York courts.⁷³ While acknowledging the statute’s broad application, even as an occasional remedy against the press, the Supreme Court approvingly cited the New York courts’ construction of the statute to “avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest.”⁷⁴ To ensure the proper balance between protecting individual privacy rights and upholding public benefits like the free dissemination of ideas, however, the Court added the requirement that the plaintiff prove that the publisher knowingly or recklessly published the falsehood.⁷⁵

The seeds of the Supreme Court’s *Time* decision were planted three years earlier in the notable case of *New York Times v. Sullivan*.⁷⁶ There, the plaintiff, an elected official in the city of Montgomery, Alabama, successfully sued the New York Times and other individual defendants for libel after a partially inaccurate “editorial advertisement” was published by the newspaper without undergoing fact-checking.⁷⁷ The Alabama libel law at issue characterized any published words

71. *Id.* at 379.

72. *Id.* at 388.

73. *Id.* at 397.

74. *Id.* at 382 (quoting *Spahn v. Julian Messner, Inc.*, 221 N.E.2d 543, 544-45 (N.Y. 1966)). Although *Time* involved New York’s right of privacy, its rationale was quickly extended to New York’s right of publicity. In a case involving the biography of celebrity Howard Hughes, a New York court, closely echoing *Time*, asserted that “[j]ust as a public figure’s ‘right of privacy’ must yield to the public interest so too must the ‘right of publicity’ bow where such conflicts with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest.” *Rosemont Enters. v. Random House, Inc.*, 294 N.Y.S.2d 122, 129 (Sup. Ct. 1968).

75. *Time*, 385 U.S. at 382.

76. 376 U.S. 254 (1964). See Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1256 (1995) (calling *Sullivan* one of the “most important decisions in the First Amendment canon”).

77. *Sullivan*, 376 U.S. at 256, 261.

aimed at an individual's "reputation, profession, trade or business . . . or tend[ing] to bring the individual into public contempt" as "libelous per se," thereby allowing a plaintiff's action to succeed without proof of pecuniary injury.⁷⁸ In holding that this Alabama law insufficiently protected First Amendment rights, the Supreme Court reasoned "that debate on public issues should be uninhibited, robust, and wide-open"⁷⁹ To maintain this First Amendment ideal, the Court laid down a special rule applicable to public officials who pursue defamation actions: to prevail, the public official must prove that the "statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."⁸⁰ Though not an explicit "balancing test" like the one applied by the Eighth Circuit in *C.B.C. Distribution*, crucial to the Court's holdings in *Time* and *Sullivan* was the notion that individual rights must be balanced against the vital societal benefits promised by the First Amendment. Additionally, *Time* and *Sullivan* demonstrate that courts can alter state laws aimed at protecting individual rights, making such laws less effective vehicles for individual redress. These alterations protect media outlets to a certain extent and, more importantly, better ensure the free dissemination of ideas.

In *Gertz v. Robert Welch, Inc.*,⁸¹ the Supreme Court once again returned to this balancing act in a case dealing with a libel action against a magazine publisher.⁸² In *Gertz*, the plaintiff, an attorney representing the family of a boy shot by a police officer, sued a magazine publisher for libel after it accused the plaintiff of framing the police officer and labeled him a "Leninist" and "Communist-fronter"—claims the Court characterized as seriously inaccurate.⁸³ In its reasoning, the Court declared that the media is not absolutely immune from "the prospect of civil liability for [the publication of] injurious falsehood."⁸⁴ While acknowledging that such an absolute rule would certainly eliminate the notion of a "timorous press" self-censoring

78. *Id.* at 263.

79. *Id.* at 270.

80. *Id.* at 279-80.

81. 418 U.S. 323 (1974).

82. *Id.* at 325.

83. *Id.* at 326.

84. *Id.* at 341.

itself out of fear of civil liability, the majority highlighted the “competing value served by the law of defamation.”⁸⁵ This competing value, as the majority suggested, is the “compensation of *individuals* for harm inflicted on them by defamatory falsehood.”⁸⁶

The *Gertz* Court then linked this individual right to “our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.”⁸⁷ The Court later characterized the First Amendment balancing test as one “between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury.”⁸⁸ Attaching more weight to the individual interest than the *Time* and *Sullivan* decisions (as one can see from the language cited above), the majority refused to extend the more onerous “actual malice” standard of proof to the plaintiff in this case.⁸⁹ Furthermore, *Gertz*, decided only ten years after *Sullivan*, revealed that the Supreme Court’s protection of media outlets is not absolute. Individual rights, created by state laws, can still trump the First Amendment and its grand societal concerns.⁹⁰

In *Cox Broadcasting Corp. v. Cohn*,⁹¹ the Supreme Court again applied its individual-societal reasoning to the right of privacy.⁹² Claiming an invasion of his right of privacy, the father of a deceased rape victim sought damages against a broadcasting company for disclosing the victim’s name after it obtained the name from public records.⁹³ While citing the right of privacy’s “impressive credentials,” the Court declared that in

85. *Id.*

86. *Id.* (emphasis added).

87. *Id.* (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

88. *Id.* at 342.

89. *Id.* at 352. The Supreme Court has also refused to extend this same heightened standard to plaintiffs bringing publicity rights claims. See *Hustler Magazine v. Falwell*, 485 U.S. 46, 52, 56 (1988); see also *Doe v. TCI Cablevision*, 110 S.W.3d 363, 373 (Mo. 2003) (explaining that the combination of *Hustler* and *Zacchini* makes it clear that the “actual malice” standard does not apply to publicity rights). See also Lee, *supra* note 41, at 493-94.

90. *Gertz*, 418 U.S. at 349.

91. 420 U.S. 469 (1975).

92. *Id.* at 491, 494-95.

93. *Id.* at 471-72, 474.

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situations like the one in *Cox Broadcasting*, where the mere disclosure of information is at issue, the right's conflict with the First Amendment is most direct.⁹⁴ The majority characterized both sides of this conflict, the individual right of privacy and the larger benefits of a free press, as "plainly rooted in the traditions and significant concerns of our society."⁹⁵ However, the Court ultimately reasoned that "interests in privacy fade when the information involved already appears on the public record."⁹⁶ The First Amendment interests in *Cox Broadcasting* were especially weighty, the Court continued, because the public has a right to know information about the operation of government in order to "vote intelligently" and "bring to bear the benefits of public scrutiny upon the administration of justice."⁹⁷

As noted above, the Eighth Circuit in *C.B.C Distribution* did not rely on such weighty public interests. Instead, the Eighth Circuit cited America's infatuation with the game of baseball and its records.⁹⁸ The *Cox Broadcasting* Court, attaching far more weight to the societal interests advanced by a free press, ultimately held in favor of the First Amendment and rejected the right of privacy claim.⁹⁹ However, unlike *Hill*, another privacy rights case decided only eight years earlier, the *Cox Broadcasting* Court devoted a larger portion of its analysis to acknowledging the right of privacy's credentials, such as the importance of protecting the individual interests secured by the right of privacy.¹⁰⁰

Individual-societal balancing also appears in First Amendment jurisprudence not involving restraints on media outlets. In *Rankin v. McPherson*,¹⁰¹ the Supreme Court decided the case

94. *Id.* at 489.

95. *Id.* at 491.

96. *Id.* at 494-95.

97. *Id.* at 492. Justice Douglas, in a concurring opinion, argued for a broad construction of "public affairs" that would include "any matter of sufficient general interest to prompt media coverage"—a construction that would likely include professional baseball. *See id.* at 501 (Douglas, J., concurring) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 357 n.6 (1974) (Douglas, J., dissenting)). Furthermore, courts have generally "taken a very inclusive stance when deciding what information should be considered newsworthy." Willis, *supra* note 28, at 185.

98. *See supra* Part IV.

99. *Cox Broad.*, 420 U.S. at 497.

100. *Id.* at 496.

101. 483 U.S. 378 (1987).

of a clerical employee in a county government's office who was fired for a comment made after the assassination attempt on President Ronald Reagan.¹⁰² There, the Court balanced the individual interest of the employer "in promoting the efficiency of the public services" and the employee's interest in speaking about matters of public concern.¹⁰³ While this language concerned the *individual* employee's First Amendment rights, the Court's reasoning was far broader and applied to the public at large. The Court showed concern for *all* government employees and the "vigilance" (by courts, of course) that is necessary to "ensure that public employers do not use authority over employees to silence discourse . . . simply because superiors disagree with the content of employees' speech."¹⁰⁴ Therefore, while the Court ostensibly balanced the employee's First Amendment right of expression against the employer's interest, the larger *societal* impact truly troubled the *Rankin* Court. The majority ultimately held that the employee's First Amendment rights outweighed the employer's interest in firing her.¹⁰⁵

In the aforementioned cases, the Supreme Court used individual-societal balancing to produce different results. In *Time*, *Sullivan*, and *Gertz*, the Court employed this approach to change or maintain a particular element of claims that implicate the First Amendment. For example, in *Time*, the Court altered the intent element of a right of privacy claim. On the other hand, in *Cox Broadcasting* and *Rankin*, the Court's balancing was outcome-determinative. In other words, without changing (or maintaining) the elements of the claim, the outcomes in these cases were dependent on the side to which the Court attached more weight. The Eighth Circuit employed this latter approach in *C.B.C. Distribution*.¹⁰⁶

VI. Rethinking *C.B.C. Distribution*

The weight the *C.B.C. Distribution* court attached to CBC's speech was solely based on the content of the actual speech—

102. *Id.* at 379.

103. *Id.* at 384 (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 140 (1983)).

104. *Id.*

105. *Id.* at 392.

106. 505 F.3d 818 (8th Cir. 2007).

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the fact that the speech contained player names and statistics of the game of baseball. CBC is not a member of the press, as traditionally understood, in contrast to the defendants in *Time*, *Sullivan*, *Gertz*, and *Cox Broadcasting*. Nor is CBC a government employee like the speaker in *Rankin*. To be clear, content-based analysis is not unique under First Amendment case law. Like the analysis in *Time* and *Cox Broadcasting*, the newsworthy nature of the speech also mattered. However, while baseball statistics as records of the game may be newsworthy in a constitutional sense,¹⁰⁷ in *C.B.C. Distribution* there was no concern over a timid press silencing its reporting of ideas and events, as *Gertz* and *Sullivan* envisioned, due to a heightened prospect of civil liability. The *Sullivan* Court, for example, argued that the “fear of punishment” for speech creates the hazard of “discourag[ing] thought, hope and imagination” and breeds repression.¹⁰⁸

Additionally, in *C.B.C. Distribution*, there was no expressive form that the court sought to protect, as opposed to the *Cardtoons*, *L.C.* court’s defense of parody. But, according to the *C.B.C. Distribution* court, MLB players’ names and statistics are of such great public interest that they warrant constitutional protection under the First Amendment. The Eighth Circuit’s reliance on this single premise as the only positive example of First Amendment importance makes the *C.B.C. Distribution* court’s reasoning distinctive among First Amendment jurisprudence. Perhaps this explains the greater length and detail which the *C.B.C. Distribution* court employed to discredit the interests allegedly protected by the players’ publicity rights. Furthermore, the First Amendment conflict in *C.B.C. Distribution* was not as evident as the conflicts in the aforementioned cases. As the *Cox Broadcasting* Court asserted, conflict with the First Amendment is most direct where the mere disclosure of infor-

107. One court explicitly made this comparison. See *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 314 (Ct. App. 2001) (“It is manifest that as news occurs, or as a baseball season unfolds, the First Amendment will protect mere recitations of the players’ accomplishments.”). The fact that CBC is not a well-established news media outlet would not preclude protection under this theory because the “First Amendment does not limit its protection to speech in ‘recognized media.’” Lee, *supra* note 41, at 490.

108. 376 U.S. 254, 270 (1964) (quoting *Whitney v. California*, 274 U.S. 357, 375-76 (1927)).

mation is at issue (e.g., a rape victim's name). *C.B.C. Distribution* and other publicity rights cases, however, do not concern the mere disclosure and usage of the speech, but instead concern *who* gets to disclose and use the speech.

However, despite these unique features of the court's reasoning, there are other factors that distinguish this case from typical right of publicity cases, and therefore support the court's ultimate holding against MLB. First, like the court records in *Cox Broadcasting*, professional baseball player information is readily available to the public. In fact, its distribution is widespread. One does not need to go to a court or other public building to obtain baseball statistics. Instead, newspapers, television programs, and a multitude of other forms of free media provide these statistics on a daily basis. Therefore, MLB's selective attack against CBC made its case look like an attempt to claim ownership of certain information solely to offer fantasy baseball games exclusively on its own terms.

Allowing media outlets to use the information for free while foreclosing CBC's right to use the same information would be, as the court put it, "strange law."¹⁰⁹ Furthermore, the argument that such a position is valid because CBC used the information to make money (by charging a fee to fantasy participants) is constitutionally meritless¹¹⁰ and logically inconsistent. Media outlets use the same information in their coverage of baseball to draw readers, viewers, and listeners. Expansions of these constituencies increase profits as well. Second, CBC did not use the information to advertise any of its products.¹¹¹ Most successful publicity rights cases brought by celebrities or athletes involve the unauthorized use of their likeness in an *advertisement*.¹¹² In such cases, speech is "rarely pro-

109. *C.B.C. Distribution*, 505 F.3d at 823.

110. *See id.* (holding that regardless of whether speech informs or entertains the reader, First Amendment protection is due). *See also* *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964) (holding that a media outlet's profitable use of speech, by displaying an advertisement in exchange for money, does not affect the caliber of First Amendment protection given).

111. Furthermore, the *Gionfriddo* court, reviewing MLB players' publicity rights in a separate case, suggested that the use of the information MLB sought to protect in an advertisement would not necessarily be dispositive. *See Gionfriddo*, 114 Cal. Rptr. 2d at 316-17.

112. *Id.* at 317 (citing *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407 (9th Cir. 1996) (basketball player Kareem Abdul-Jabbar); *White v. Samsung Elecs.*

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tected” by the First Amendment.¹¹³ Here, while the use of player names and statistics was vital to CBC’s operation, that information was not used to draw new costumers. If anything, CBC’s use of player names and statistics promoted MLB itself by garnering interest in the players and their daily performances. This fact made the case for First Amendment protection of CBC’s speech stronger.¹¹⁴ Third, CBC did not attach the information to merchandise which it intended for sale—a fact that also bolstered the case for First Amendment protection.¹¹⁵ In the right of publicity context, most courts refuse to extend First Amendment protection to merchandise, because courts do not view merchandise as a “meaningful expression of ideas.”¹¹⁶ These three factors weakened MLB’s right of publicity claim and therefore supported the Eighth Circuit’s holding against MLB.

The adverse result for MLB in *C.B.C. Distribution* was also inconsistent with the favorable treatment MLB has received from courts in another area of law. The Supreme Court has given “favored treatment of [the] national pastime” in its interpretation of federal antitrust laws.¹¹⁷ The Court first exempted MLB from antitrust regulation in *Federal Baseball Club of Baltimore v. National League*.¹¹⁸ There, Justice Holmes, writing for the majority, let MLB off the antitrust hook by curiously reasoning that, although MLB teams travel across state lines to play against other teams, the interstate commerce requirement of the Sherman Antitrust Act was nonetheless unsatisfied.¹¹⁹ The Supreme Court reaffirmed this exemption in *Toolson v. New York Yankees*,¹²⁰ reasoning, in a short and unsigned opinion, that Congress had no intention of including MLB in the

America, Inc., 971 F.2d 1395 (9th Cir. 1992) (Vanna White of “Wheel of Fortune”); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (singer Bette Midler)).

113. *Doe v. TCI Cablevision*, 110 S.W.3d 363, 373 (Mo. 2003).

114. *See Gionfriddo*, 114 Cal. Rptr. 2d at 318.

115. *See id.*

116. Lee, *supra* note 41, at 488-89.

117. Andrew S. Oldham, *Sherman’s March (In)to the Sea*, 74 TENN. L. REV. 319, 340 (2007) (criticizing the Supreme Court’s confusing approach in construing antitrust laws).

118. *Fed. Baseball Club of Baltimore v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200 (1922).

119. *Id.* at 208-09.

120. 346 U.S. 356 (1953).

Sherman Antitrust Act.¹²¹ In the most recent Supreme Court case reaffirming this exemption, the Court described the rich history of the game, listed dozens of legendary players, and even quoted a poem about the game in full.¹²² However, engaging in self-critique, the Court also labeled the exemption an “anomaly,” referred to its supporting precedent as an “aberration,” and acknowledged criticisms of the underlying reasoning.¹²³ Lastly, while reaffirming the exemption yet again, the Supreme Court stated that “the aberration is an established one”¹²⁴

While it is clear that the Supreme Court has bent over backwards for MLB in the antitrust realm, the *C.B.C. Distribution* court was not so deferent to MLB. Ironically, the court used the game’s national pastime status and America’s affinity towards the game not as reasons to support MLB’s position, as the Supreme Court did in crafting the antitrust exemption, but as reasons for finding *against* MLB.¹²⁵ What makes this discrepancy even more interesting is that MLB was essentially trying to accomplish the same goals in the antitrust cases and *C.B.C. Distribution*. In the former cases, MLB’s attempts to unfairly eliminate competition were at issue. In the latter case, MLB unsuccessfully attempted to shutdown competitors to MLBAM in an effort to corner the fantasy baseball market. However, this apparent contradiction is logically consistent in a certain way. In the antitrust cases, if the Supreme Court found against MLB, the introduction of entirely new, competing baseball leagues would have been facilitated. This would have altered America’s relationship with the game, as the nation then knew it, and likely harmed MLB’s future livelihood. In *C.B.C. Distribution*, a decision for MLB would have altered the way millions of fans connect with the game today—through fantasy baseball.

121. *Id.* at 357.

122. *Flood v. Kuhn*, 407 U.S. 258, 261-64 (1972).

123. *Id.* at 282.

124. *Id.* Other courts have been critical of MLB’s antitrust exemption as well. *See, e.g.,* *Major League Baseball v. Crist*, 331 F.3d 1177, 1179 (11th Cir. 2003) (arguing that the “judge-made rule [is] premised upon dubious rationales”).

125. *See C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 823-24 (8th Cir. 2007).

In both cases, the results seem to have protected American baseball fans' status quo relationship with the game of baseball. Therefore, characterizing *C.B.C. Distribution* "as just another example of baseball's legal exceptionalism,"¹²⁶ is not entirely fair. To be clear, in order to maintain the way in which fans interact with the game, both the antitrust cases and *C.B.C. Distribution* may have employed strained reasoning at times. However, unlike the Supreme Court, the Eighth Circuit deprived MLB of vast future revenues in its effort to accommodate the fans.

VII. The Availability of Alternate Theories for MLB

Looking to the remaining forms of privacy rights (minus the one from which the right of publicity derived), MLB could have put forth three potential tort theories. As previously noted, courts have been generally reluctant to grant celebrities like baseball players relief for invasions of privacy rights.¹²⁷ However, it is still instructive to apply each tort theory to the facts of *C.B.C. Distribution* in order to further illustrate the differences between the two rights. Despite the differences, however, the reasoning that defeated MLB's publicity rights in *C.B.C. Distribution* similarly defeats any privacy rights claim MLB could have put forth in the case. Under the right of privacy, the first theory provides that "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."¹²⁸

This theory is clearly inapplicable to MLB players and the speech at issue in *C.B.C. Distribution*. Statistics represent a record of activities that professional baseball players willingly perform in public. Similarly, these players willingly place their

126. *Eighth Circuit Holds that the First Amendment Protects Online Fantasy Baseball Providers' Use of Baseball Statistics in the Public Domain*. *C.B.C. Distribution & Mktg. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007), *reh'g and reh'g en banc denied*, Nos. 06-3357 & 06-3358 (8th Cir. Nov. 26, 2007), 121 HARV. L. REV. 1439, 1446 (2008).

127. See *supra* note 37 and accompanying text.

128. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

names in the public and use that publicity for their advantage, such as to obtain endorsement deals.

The second theory provides:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.¹²⁹

This theory is inapplicable for the same reasons as the first theory—essentially because records of what MLB players do during games are not facets of their private lives. Furthermore, as noted above, courts have put forth arguments that baseball is a legitimate public concern.¹³⁰

The third theory provides:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.¹³¹

This theory was already dismissed—albeit to prove a different point—by the *C.B.C. Distribution* court. The court asserted that there is no possibility that fantasy baseball participants will be misled “because the fantasy baseball games depend on the inclusion of all players and thus cannot create a false impression”¹³² The whole point of fantasy baseball is to accurately attach points to each player based on their real-life accomplishments. Fantasy sports providers like CBC, therefore, have no incentive to distort statistics or otherwise place MLB players in a false light before the public. In fact, Yahoo!

129. *Id.* § 652D (1977).

130. *See supra* notes 93 and 107.

131. RESTATEMENT (SECOND) OF TORTS § 652E (1977).

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

Sports has a robust policy—including mechanisms for reporting statistical errors—to ensure the accuracy of all statistics.¹³³

VIII. Conclusion

In light of the Supreme Court's First Amendment jurisprudence,¹³⁴ the fact that CBC's speech embodied the history of baseball does not appear to be of sufficient First Amendment importance to override the individual harm caused by the speech. Based on their content alone, baseball statistics, regardless of the degree of America's love for the game, simply do not match the grave concerns about press freedom, public debate, informed voting, and governance the Supreme Court discussed in *Time*, *Sullivan*, and *Cox Broadcasting*. However, the right of publicity, when depicted in purely economic terms, is simply inapplicable because MLB players' economic interests are not affected by CBC's use of the information. The information is readily available to the public through other sources besides CBC, and CBC did not use the information as a means of advertising or merchandising. Therefore, it would indeed be "strange law" to penalize CBC and other fantasy sports providers for using this information in the manner they do. This common-sense approach, employed by the Eighth Circuit, saved fantasy sports from the grips of professional sports leagues and allowed millions of fans to keep enjoying baseball in the way they currently do—through fantasy baseball.

133. Yahoo! Sports Fantasy Baseball Help, *How Do I Settle Scoring Disputes?*, <http://help.yahoo.com/l/us/yahoo/baseball/scoring/basics/baseball-01.html> (last visited Mar. 13, 2008).

134. See *supra* Part V.