LOG ME IN TO THE OLD BALLGAME: *C.B.C. DISTRIBUTION & MARKETING., INC. V. MAJOR LEAGUE BASEBALL ADVANCED MEDIA, LP*

By Dana Howells

On January 19, 2005, the vice president of a large-scale fantasy sports provider known as C.B.C. Distribution and Marketing ("CBC") received an unwelcome e-mail from the senior vice president of Major League Baseball's interactive media arm. The e-mail informed CBC that earlier the same morning, Major League Baseball Advanced Media ("Advanced Media") became the exclusive licensee and sublicensor of major league baseball players' identities as used in fantasy baseball. Accordingly, the e-mail stated, CBC must immediately stop using the ballplayers' names and performance statistics in its fantasy baseball league.

Less than a month later, CBC filed a complaint for declaratory judgment and injunctive relief to prevent Advanced Media from obstructing CBC's use of the ballplayers' names and statistics. Advanced Media, joined by Major League Baseball Player's Association ("the Player's Association"), counterclaimed that CBC's unlicensed use of the players' names and statistics violated the players' rights of publicity. The District Court for the Eastern District of Missouri held that CBC's use of the ballplayers' names and statistics did not violate the right of publicity.[1] The court reasoned that CBC's use did not demonstrate intent to gain a commercial advantage, and names and statistics do not symbolize the players' identities.[2] Advanced Media and the Players' Association (collectively "MLB") have appealed the district court's decision.[3]

A closer look at the dispute reveals that MLB's claim is not merely a purported right of publicity violation. Rather, at the core of the dispute is the issue of control—specifically, control over the statistical data that ballplayers generate during every batting and pitching performance. This Note suggests that MLB's right of publicity claim falls under the category of data protection, and explains the impropriety of such protection. Part I

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1. C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1091 (E.D. Mo. 2006).

2. *Id.* at 1088-89.

3. *See* Maury Brown, *MLBAM and MLBPA: Formal Appeals in the Fantasy Stats Case*, THE BIZ OF BASEBALL, Dec. 18, 2006, http://www.bizofbaseball.com/index.php?option=com_content&task=view&id=540&Itemid=42.

provides background about the right of publicity and data protection. Part II explains the district court's decision with special attention to the purported right of publicity violation. Finally, Part III explains why MLB's claim is better understood as an attempt to assert ownership over statistical data, sets forth the public policies underlying publicity rights, and suggests that in light of these policies and other countervailing concerns, MLB should not be allowed to claim ownership over the ballplayers' performance statistics.

I. BACKGROUND

Modern courts consider the right of publicity to impart an assignable and potentially descendible property right over an individual's identity.[4] As such, the right of publicity effectively gives individuals the ability to control public uses of the marketable identities they create.[5] On the other hand, the United States rarely allows an individual to prevent others from using statistical data, even if he has invested resources in creating a compilation of data.[6] This Part expands on the distinction between publicity rights and data protection. First, it sets forth the origins of publicity rights in the United States legal system. Second, this Part explains the limited circumstances under which a plaintiff can assert ownership over data in the United States, contrasting U.S. law with the European Union's more generous approach.

A. The Right of Publicity

The right of publicity grew out of judges' and commentators' recognitions of privacy rights in the early twentieth century. In 1905, the Georgia Supreme Court recognized the individual's "legal right 'to be let alone' ... which can only be properly termed his right of privacy."[7] By the

4. 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 28-46 (4th ed. 2006); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. g (1995); *see also* RESTATEMENT (SECOND) OF TORTS § 652C cmt. a (2006); CAL. CIV. CODE § 3344.1(b) (2005).

5. *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 575-76 (1977).

6. *See, e.g.*, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 359-60 (1991) (holding that a work must be original to receive protection).

7. Pavesich v. New England Life Ins. Co., 50 S.E. 68, 71-72 (Ga. 1905). The seminal New York case of *Roberson v. Rochester Folding Box Co.* provides one notable exception to the trend towards recognizing privacy rights. 64 N.E. 442, 447 (1902). In *Roberson*, the New York Court of Appeals found no common law right of privacy to preclude unauthorized use of a child's photograph in flour advertisements. The court expressed sympathy towards the plaintiff, but stated that to find for the plaintiff would overstep judicial bounds. *Id.*

1940s, most state courts recognized that individuals have privacy interests in their names and likenesses,[8] and a small number of states enacted statutes protecting that interest.[9] In 1960, Dean Prosser's influential article "Privacy" took privacy rights to a new level by defining privacy invasion as four separate torts.[10] The fourth tort, which Prosser called "appropriation," served as the immediate predecessor to the right of publicity.[11] Like the right of publicity, Prosser's definition of appropriation does not encompass all uses of another's name or likeness. Rather, Prosser determined that appropriation occurs if and only if a defendant uses a plaintiff's name as a "symbol of [the plaintiff's] *identity*."[12]

Though willing to attach tort liability for misappropriations of identity, prior to the articulation of the right of publicity authorities split over whether an individual owned a property interest in his identity.[13] In *Hanna Manufacturing Co. v. Hillerich Bradsby Co.*, for example, the Fifth Circuit held that descendants of famous baseball players could not prevent a baseball bat company from using the ballplayers' names and likenesses in marketing.[14] The court determined that public policy, business concerns, and the fate of "sportsmanship" in general precluded recognizing full-fledged descendible and vendible property rights in a ballplayer's name and likeness.[15]

The first articulation of the right of publicity appeared in the Second Circuit case *Haelan Labs., Inc. v. Topps Chewing Gum*.[16] In *Haelan*, the court held that New York common law protected a baseball player's right to profit from the public display of his photograph.[17] Prior to *Haelan*, some courts suggested that by becoming famous, an individual forfeits his

8. J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:18 (2d ed. 2006) [hereinafter MCCARTHY PUBLICITY].

9. The year following the controversial *Roberson* case, New York became the first state to pass a privacy law. Virginia and Utah followed suit in 1904 and 1909, respectively. MCCARTHY PUBLICITY, *supra* note 8, § 6:8.

10. Briefly, the four torts are: (1) intrusion, (2) disclosure, (3) false light, and (4) appropriation. William Prosser, *Privacy*, 48 CALIF. L. REV. 383, 403. (1960). Commentators call Prosser's approach the "gospel" of privacy law. *See, e.g.*, MCCARTHY PUBLICITY, *supra* note 8, § 1:19 ("Anyone who refuses to talk in Prosser's language will meet blank stares of incomprehension.").

11. MCCARTHY PUBLICITY, *supra* note 8, § 1:23.

12. Prosser, *supra* note 10, at 403 (emphasis added).

13. MCCARTHY PUBLICITY, *supra* note 8, § 1:23.

14. 78 F.2d 763, 767 (5th Cir. 1935).

15. *Id.* at 766-67.

16. 202 F.2d 866, 868 (2d Cir. 1953).

17. *Id.*

right to privacy.[18] The *Haelan* court not only recognized the plaintiff's privacy right "not to have his feelings hurt" by publication of a photograph, but also stated that the famous plaintiff was entitled to receive money for all public uses of his photograph.[19] The court termed the latter the plaintiff's "right of publicity,"[20] and the following year Professor Melville Nimmer rearticulated and refined the term in his seminal law review article.[21]

In the decades since *Haelan* and Nimmer's article, more than half of the states have judicially acknowledged the right of publicity[22] and a handful of states have enacted statutes to this effect.[23] Courts also expanded the amount and type of protection afforded by the right of publicity. *Haelan* may have hinged on misappropriation of a celebrity's photograph, but subsequent state courts gave right of publicity protection to artistic sketches of celebrities,[24] vocal mimicry,[25] famous phrases or slogans,[26] and a variety of other unauthorized appropriations of identity.

The United States Supreme Court recognized the right of publicity in 1977.[27] In *Zacchini v. Scripps-Howard Broadcasting Company*, plaintiff Hugo Zacchini brought suit after a broadcasting company replayed his human cannonball act without his permission.[28] The Court acknowledged that the right of publicity was separate and distinct from the right to privacy, and that the First Amendment did not automatically entitle the broadcasting company to broadcast matters of public interest that would other-

18. *Compare* Corliss v. E.W. Walker Co., 57 F. 434, 435 (D. Mass. 1893) (suggesting that a public man waives his privacy rights in his image) *with* Atkinson v. John E. Doherty & Co., 121 Mich. 372, 379 (1899) ("[W]e are loath to believe that the man who makes himself useful to mankind surrenders any right to privacy thereby, or that because he permits his picture to be published . . . he is forever thereafter precluded from enjoying any of his rights.").

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

20. *Id.*

21. *See generally* Melville Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).

22. MCCARTHY PUBLICITY, *supra* note 8, § 6:3.

23. For an overview of current state statutes recognizing publicity and privacy rights, see *id.* §§ 6-8.

24. Comedy III Prods., Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387 (2001) (finding violation of right of publicity in T-shirts bearing sketch of the Three Stooges).

25. Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988) (finding violation of right of publicity in mimicry of plaintiff's singing style in television commercials).

26. Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 836 (6th Cir. 1983) (finding violation in use of plaintiff's famous tag-line, "Here's Johnny!").

27. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 565 (1977) (recognizing existence of Ohio's "state-law 'right of publicity'").

28. *Id.*

wise be protected under the right of publicity.[29] Although the Court allowed Ohio state law to dictate the parameters of Zacchini's right of publicity, the Court's decision reflected the principle that in some instances, a plaintiff may have a right to prevent others from profiting financially from the marketable identity he has built.

B. Data and Data Protection

In contrast to the right of publicity, which allows individuals to control and profit from commercial uses of their identities, courts in the United States are generally unwilling to recognize an individual's right to control and profit from factual data such as statistics. Even if an individual invests substantial resources in order to compile data, and thereby creates a valuable product, he generally cannot prevent unauthorized uses of the data under U.S. law. On the other hand, the act of putting data together into a "database" does confer ownership rights in the European Union (E.U.).[30] This Section sets forth the U.S. approach to data and database protection under copyright law and the common law tort of misappropriation. The Section then describes the E.U.'s rules under the 1996 Database Directive.

1. Limited Data Protection in the United States

The American intellectual property regime offers limited protection to data and databases. Under the federal Copyright Act, protection exists for original works of authorship;[31] however, because facts are neither original nor "authored," facts are not copyrightable.[32] Further, in *Feist Publications, Inc. v. Rural Telephone Service Co.*, the Supreme Court established the principle that a compilation of factual information, such as a database, receives only a thin layer of copyright protection.[33] Under the oft-cited *Feist* rule, to receive copyright protection the compiler of data must demonstrate a "minimal degree of creativity" in his selection and arrangement of the data. But this copyright only protects the way the data are arranged–not the data themselves.[34] Thus, one telephone company can copy the names, addresses, and telephone numbers that another company meticulously compiled, so long as it does not duplicate the creative way the first company selected or arranged the data, and non-creative databases receive

29. *Id.* at 578.

30. Council Directive 1996/9 1996 O.J. (L 77) 20 (EC). [hereinafter Database Directive].

31. 17 U.S.C. § 102(a) (2006).

32. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 344-45, 349-50 (1991).

33. *Id.*

34. *Id.* at 348.

no protection at all.[35] This rubric holds true even if the first company invested time and money in compiling data.[36] Under *Feist*, evidence of hard work alone is not enough to merit copyright protection. In other words, copyright does not reward mere "sweat of the brow."[37]

The Second Circuit applied a variation of the *Feist* rule in *Kregos v. Associated Press*, in which the court upheld Mr. Kregos' copyright protection over a form that organized certain pitching statistics in order to predict a pitcher's future performance.[38] The court determined that out of the "thousands of combinations of data" he could have chosen, Kregos chose a select category of statistics.[39] Thus, by selecting which statistics to use, Kregos demonstrated the requisite level of creativity to receive copyright protection for a compilation.[40] In keeping with the *Feist* principle, however, the Second Circuit determined that the scope of Kregos's copyright protection was thin. Although his selection of statistics was creative, his arrangement of the data into columns was typical and obvious.[41] Thus, Kregos could only prevent reproduction of his own, specific, selection of data: he could not preclude others from making pitching forms using a different selection of statistics; he had no claim over the statistics themselves.[42]

Unlike federal copyright law, the common law tort of misappropriation may entitle an amasser of data to some protection over that data.[43] In the intellectual property context, misappropriation occurs when a defendant uses a plaintiff's uncopyrightable information or ideas to compete unfairly with that plaintiff.[44] Thus, under the common law a plaintiff may recover for unauthorized uses of data she has compiled even though the traditional intellectual property systems of patent, trademark, and copyright would

35. *Id.* at 349.

36. *Id.* at 349-50.

37. *See, e.g.*, *id.* at 359-60 (stating that Congress clearly intended originality, not sweat of the brow, to receive copyright protection); Charles C. Huse, Note, *Database Protection in Theory and Practice: Three Recent Cases*, 20 BERKELEY TECH. L.J. 23, 25 (2005). On the other hand, scholars on the other side of the debate contend that copyright *should* reward "sweatworks," because doing so will not only promote development of compilations of facts, but also prevent third parties from being unjustly enriched by the original compiler's work. ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 328 (3d ed. 2003).

38. 937 F.2d 700, 703-04 (2d Cir. 1991).

39. *Id.*

40. *Id.*

41. *Id.* at 709.

42. *Id.*

43. *See* Huse, *supra* note 37, at 30-32.

44. BLACK'S LAW DICTIONARY 1019 (8th ed. 2004).

not protect the data.[45] In order to prevail, however, a plaintiff must usually prove that a defendant's use unfairly competes with her ability to earn a profit. For example, in *National Basketball Association v. Motorola, Inc.*, Motorola made SportsTrax pagers that used a data feed supplied by STATS, Inc. ("STATS"), to report real-time information from professional basketball games.[46] The NBA claimed that the SportsTrax pagers misappropriated "hot news" that belonged to the NBA.[47] The Second Circuit read the "hot news" claim in light of *International News Service v. Associated Press*, in which the Supreme Court held that the International News Service's ("INS") gathering of news from its direct competitor before Associated Press publicized the news constituted misappropriation.[48] Drawing from *INS* and the 1976 amendments to the Copyright Act,[49] the Second Circuit held that only a narrow version of the "hot news" misappropriation claim survived copyright preemption.[50] The court framed the required elements as follows:

> We hold that the surviving *INS*-like "hot news" claim is limited to cases where: (i) a plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant's use of the information constitutes free riding on the plaintiff's efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.[51]

The court did not deny that the NBA incurred a cost when it put on a basketball game.[52] Unlike the INS, which culled breaking news directly

45. *Id.* (citing U.S. Golf Ass'n v. St. Andrews Sys., 749 F.2d 1028, 1034-35 (3d Cir. 1984)).

46. Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 843-44 (2d Cir. 1997). The SportsTrax pager displayed six categories of information about live basketball games: (1) the names of the teams competing, (2) the quarter of the game, (3) the amount of time remaining in the quarter, (4) the name of the team in possession of the ball, (5) whether a team was in the free-throw bonus, and (6) changes in score. *Id.* at 844.

47. *Id.* at 843.

48. Int'l News Serv. v. Associated Press, 248 U.S. 215, 240 (1918).

49. In 1976, Congress passed legislation that gave copyright protection to live broadcasts or performances that are simultaneously recorded under the author's authority. In addition, Congress' 1976 amendments provided that federal copyright law preempts state law claims that enforce "equivalent" rights to copyright and fall within the area of copyright protection. *NBA*, 105 F.3d at 845; *see also* 17 U.S.C. §§ 101, 301 (2006).

50. *NBA*, 105 F.3d at 845.

51. *Id.*

52. *See id.* at 853-54.

from Associated Press,[53] Motorola and STATS used their own resources to gather and transmit the statistics rather than free-ride on NBA's efforts.[54] Further, the court distinguished the expected harm to NBA from the expected harm to Associated Press. INS' conduct would have rendered Associated Press's primary business, news reporting, "profitless" or "cost prohibitive."[55] Because it enabled statistics reporting rather than a competing basketball game product, the court found that the SportsTrax pager did not threaten the NBA's primary business.[56] Thus, the court determined that the SportsTrax pagers met neither the third element (free-riding) nor the fifth element (threatening NBA's product).[57]

Feist and *NBA* demonstrate that a plaintiff claim ownership over data in the United States in extremely narrow instances. Under copyright law, a U.S. plaintiff receives copyright protection over the selection or arrangement of data in a compilation or other copyrightable work, but cannot prevent others from copying the facts themselves. Under the tort of misappropriation, a U.S. plaintiff can only prevent defendants from uses of data that free-ride on, or directly compete with, the plaintiff's primary business.

2. *Another Approach to Data Protection: The European Union*

The E.U. offers much broader protection for data and databases than the United States. In 1996, the E.U. enacted its Database Directive in order to harmonize levels of legal protections offered to databases in E.U. member states, and to create an incentive for capital investment in database production.[58] The final version of the Database Directive was a response to the U.S. Supreme Court's *Feist* ruling, which leading member states thought provided too little protection to databases.[59] However, a few member states protected some "sweat of the brow" works prior to *Feist*: the United Kingdom and Ireland granted strong protections to the products

53. *See INS*, 248 U.S. at 238-40.

54. *NBA*, 105 F.3d at 854.

55. *Id.* at 852.

56. *Id.* (quoting *INS*, 248 U.S. at 241).

57. *Id.*; *see also* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 353-54 (1991) (stating that the *INS* Court intended to offer protection over Associated Press's original expression of factual happenings or news, not the facts themselves).

58. Mark Schneider, Note, *The European Union Database Directive*, 13 BERKELEY TECH. L.J. 551, 552-53 (1998).

59. John Edwards, *Has the Dreaded Doomsday Arrived?: Past, Present, and Future Effects of the European Union's Database Directive on Database and Information Availability in the European Union*, 39 GA. L. REV. 215, 224 (2004).

of newspaper and broadcasting industries; and Scandinavian countries expressly prohibited explicit reproductions of non-creative databases.[60]

While its most direct implications are for electronic databases, the Database Directive explicitly states that its principles extend to non-electronic databases as well.[61] Indeed, the E.U.'s statutory and judicial definitions of the term "database" are quite broad. Article 1(2) of the Directive defines a database as "a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means."[62] European courts have applied the term to telephone directories, collections of laws, listings of the times and locations of horse races, encyclopedias, card catalogues, and selections of websites.[63]

The Database Directive affects copyright law in European Union member states in two main ways. First, the Database Directive regularizes the amount and type of copyright protection available for databases in member states.[64] Like the U.S. Supreme Court's *Feist* decision, the Database Directive extends copyright protection to compilations of data if the selection or arrangement of data indicates "the author's own intellectual creation."[65] The creator's rights over his database parallel the exclusive rights of U.S. copyright owners: the creator can prevent temporary or permanent reproduction, adaptation, distribution (subject to the first-sale doctrine), public display, or performance of his selection or arrangement.[66] Second, the Database Directive offers *sui generis* protection for databases above and beyond copyright law, and in this way departs significantly from United States law.[67] Under the Database Directive, a database creator can prevent others from copying a "substantial part" of the contents of his database if he made a "substantial investment" in "obtaining, verif[ying] or present[ing]" the data.[68] The Database Directive does not define substantial investment or substantial copying, and member states apply the

60. *Id.* at 223.

61. Database Directive, *supra* note 30, pmbl. ¶ 14.

62. Database Directive, *supra* note 30, art. 1(2).

63. Edwards, *supra* note 59, at 241 n.177.

64. Database Directive, *supra* note 30, art. 3.

65. *Compare id. with* Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991).

66. Database Directive, *supra* note 30, art. 5. *Compare id. with* 17 U.S.C. § 106 (2006) (listing exclusive rights of U.S. Copyright owners).

67. Database Directive, *supra* note 30, art. 7.

68. Database Directive, *supra* note 30, art. 7(1). The creator may be an individual or a corporation; he does not have to demonstrate that he made a financial investment in creating the database so long as the investment was "substantial." *Id.*

terms differently.[69] The Directive also prohibits any extraction or activity that conflicts with the creator's financial or other interests.[70] The *sui generis* right might be violated by actions as simple as viewing data on one's computer screen (which constitutes "extraction" of data), or distributing the data to others in electronic or hard copy format (which constitutes "re-utilization" of the data).[71]

II. CASE SUMMARY

This Part first gives background information about both fantasy baseball and the specific dispute between CBC and MLB. Then, the Part describes the reasoning Judge Medler of the District Court for the Eastern District of Missouri applied to reach the conclusion that CBC's use of player names and statistics in fantasy baseball games does not violate the players' rights of publicity.

A. Facts and Procedural History

The Players' Association controls all group licensing of players' names and likenesses for such uses as trading cards, posters, clothing, and video games, but allows baseball clubs to take and use players' photographs for publicity purposes.[72] The Players' Association has sued violators of publicity rights in the past, but prior to 2005, the Players' Association had never brought suit against a fantasy baseball provider.[73]

1. The Fantasy Baseball Industry

With the rise of the internet in the 1990s, fantasy baseball became a multi-million dollar industry with over 15 million players worldwide.[74]

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69. Edwards, *supra* note 59, at 236-42. German courts set a low standard for substantial investment, while Dutch courts only protect business information and databases created for business-related purposes. *Id.* In addition, even copying insubstantial amounts of data is prohibited if such copying is "repeated and systematic." Database Directive, *supra* note 30, art. 7(5).

70. Exceptions exist for private use of non-electronic databases, extractions of data for teaching or scientific research, and extractions for use of public security or administrative and judicial procedures. Database Directive, *supra* note 30, art. 9.

71. Schneider, *supra* note 58, at 559.

72. C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1079-80 (E.D. Mo. 2006).

73. Robert T. Razzano, *Intellectual Property and Baseball Statistics: Can Major League Baseball Take its Fantasy Ball and Go Home?*, 74 U. CIN. L. REV. 1157, 1163-64 (2006).

74. Matthew G. Massari, *When Fantasy Meets Reality: The Clash Between On-Line Fantasy Sports Providers and Intellectual Property Rights*, 19 HARV. J.L. & TECH. 443, 445 (2006).

Fantasy sports offer avid fans a chance to participate in their favorite sports vicariously through the manipulation of athletes' actual batting and pitching statistics.[75] As one commentator put it, creating, recording, and processing data provide the "lifeblood" of the fantasy baseball industry.[76] Interestingly, fantasy baseball's roots predate the widespread availability of baseball statistics. Prior to the late 1970s, fans' only source for baseball statistics besides daily newspaper boxscores was a company called Elias Sports Bureau.[77] Elias Sports Bureau generally kept its information private and gave its statistical findings to Major League Baseball, not baseball fans.[78] As a result, when avid sports fan Bill James wrote and published *1977 Baseball Abstract: Featuring 18 Categories of Statistical Information That You Just Can't Find Anywhere Else*, he struggled to amass the statistics he needed.[79] To solve this problem, James asked his readers to serve as "volunteer scorekeepers" by attending games and keeping track of certain categories of data.[80] In 1985, James's immensely successful volunteer project joined with a small business called STATS, Inc. ("STATS").[81] STATS thereby turned its marketing focus from baseball clubs to baseball fans, who showed bottomless interest in finding out "how good [their favorite players] are."[82]

Then, the burgeoning internet age transformed fantasy baseball into the billion-dollar industry it is today.[83] Putting fantasy sports online made the onerous task of manually manipulating data unnecessary, thereby heightening fantasy baseball's appeal to the public at large and allowing

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75. Fantasy baseball players act as faux-team managers by running baseball teams composed of real-life ballplayers. Most leagues begin with a "draft" in which each fantasy manager uses a limited budget to pick the athletes he wants on his team. As the actual baseball season progresses, the company running the league computes each team's success based on the performance statistics of each player. Over the course of a season, fantasy managers can continually monitor their team's status and update their rosters by moving players from the managers' starting lineups to their benches, trading players, adding unclaimed players, and releasing unwanted players. *See* Complaint for Declaratory Judgment ¶¶ 9, 10, C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, 443 F. Supp. 2d 1077 (E.D. Mo. 2006) (No. 4:05CV252MLM), 2005 WL 433742 [hereinafter CBC Complaint].

76. Jack F. Williams, *Who Owns the Back of a Baseball Card? A Baseball Player's Rights in His Performance Statistics*, 23 CARDOZO L. REV. 1705, 1708 (2002).

77. Razzano, *supra* note 73, at 1161-62.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 1162, 1162-63 (quoting MICHAEL LEWIS, MONEYBALL: THE ART OF WINNING AN UNFAIR GAME 82 (2003)).

83. *See, e.g.*, Massari, *supra* note 74, at 445.

fantasy managers to obtain fresh data during ongoing ballgames rather than wait for the next day's newspaper.[84] The internet also gave consumers access to a wide variety of fantasy sports leagues regardless of physical proximity between team managers—a significant departure from "tabletop" fantasy leagues of the 1980s.[85] Currently, dozens of websites offer fans the ability to manage fantasy baseball teams, either free of charge or, for more serious fantasy managers, as part of paid leagues that allow managers to customize play.[86] Online fantasy league providers run the gamut from large-scale enterprises hosted by Yahoo!, CBS, and ESPN, to small leagues of 5,000 players or fewer.[87] All fantasy baseball leagues use names and statistics of real baseball players. Until 2005, however, only a few fantasy baseball providers held licenses from the Players' Association to use that information.[88]

2. The Dispute

CBC was one of the few companies that held a license from the Players' Association prior to 2005.[89] From 1995 to the end of 2004 CBC licensed from the Players' Association: (1) the ballplayers' names, nicknames, likenesses, signatures, playing records, and biographical data (Players' Rights); and (2) the Players' Association's logo, name, and symbol (Trademarks).[90] By the time its license expired, CBC offered 14 different fantasy baseball games and ran fantasy sports games for such companies as USA Today, MSNBC, and the Sporting News.[91]

In contrast, prior to 2005, Advanced Media belonged to the set of a majority of fantasy providers who did not take licenses from the Players'

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84. *Id.*

85. Sports Illustrated writer Dan Okrent and his friends started one of the first fantasy baseball leagues. Making heavy use of statistics obtained from USA Today, they monitored their players' progress across a table at their favorite restaurant. Razanno, *supra* note 73, at 1159.

86. For example, Yahoo! offers a free league and a "Plus" league that requires payment depending on number of teams. Yahoo! also offers fantasy managers the option of customizing play by controlling, for example, who enters the league. *Id.* at 1160.

87. Neil DeMause, Fantasy Firefight: When IP Meets WHIP (Feb. 16, 2005), http://www.baseballprospectus.com/article.php?articleid=3763.

88. *Id.*

89. *Id.*

90. *Id.* (referring to CBC under its trade name, CDM Fantasy Sports); *see also* C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1080 (E.D. Mo. 2006) (explaining relationship of acronyms "CBC" and "CDM").

91. CBC Complaint, *supra* note 75, ¶ 4. Clients can access CBC's services by logging on to its website, http://www.CDMsports.com. *Id.* ¶ 12.

Association. On January 19, 2005, less than a month after CBC's license expired, Advanced Media obtained an exclusive license to use "players' rights with respect to interactive media Fantasy Baseball Games."[92] Advanced Media reportedly planned to implement a selective licensing scheme wherein it would offer sublicenses to the "Big 3" fantasy providers, CBS, ESPN, and Yahoo!.[93] In addition, Advanced Media planned to offer sublicenses to small fantasy sports providers who agreed to cap their membership at fewer than 5,000 players each.[94]

Unfortunately, Advanced Media's scheme left no room for companies like CBC, which was neither big enough to match the Big 3 providers nor small enough to qualify as a sub-5000 member provider.[95] On February 4, 2005, Advanced Media offered CBC a license to promote Advanced Media's fantasy baseball games on its website,[96] but stated that in no way would CBC receive "a license to promote *its own* MLB fantasy game for the 2005 season."[97] On February 7, 2005 CBC filed a complaint for declaratory judgment and injunctive relief to prevent Advanced Media from interfering with CBC's use of the Players' Rights and Trademarks in its fantasy games.[98] The parties then entered a Stipulation Agreement, which disposed of all the issues except for those concerning the right of publicity.[99] All parties moved for summary judgment regarding the purported right of publicity violation.[100]

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92. *Id.* ¶ 16; Expert Report of Rodney Douglas Fort ¶ 5, C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, 443 F. Supp. 2d 1077 (E.D. Mo. 2006), 2006 WL 157248.

93. Razzano, *supra* note 73, at 1164. Some sources report that Advanced Media might extend licenses to AOL and the Sporting News as well. *See* Neil DeMause, *supra* note 87.

94. Razzano, *supra* note 73, at 1164.

95. *See* DeMause, *supra* note 87.

96. In exchange for using its website to promote Advanced Media's fantasy baseball games, CBC would receive 10% of related revenue. *CBC*, 443 F. Supp. 2d at 1081.

97. *Id.* (emphasis added); *see also* DeMause, *supra* note 87.

98. *CBC*, 443 F. Supp. 2d at 1081. Advanced Media counterclaimed, alleging that CBC's use of Players' Right and Trademarks violated the Lanham Act, state trademark law, state unfair competition laws, and state false advertising laws. The Players' Association also intervened against CBC, alleging breach of contract and violation of the players' rights of publicity. Joined by Advanced Media, The Players' Association sought injunctive relief and exemplary and punitive damages from CBC.

99. *See id.* at 1082-83.

100. *Id.* at 1079. Following the parties' Stipulation Agreement and a court-mandated teleconference wherein the three parties clarified the scope of their dispute, five issues remained before Judge Medler of the District Court for the Eastern District of Missouri. First, did the ballplayers have a right of publicity in their names and performance records as CBC used this information in fantasy baseball games? Second, if the players do hold

B. The District Court's Analysis

The district court held that CBC's fantasy games did not violate the players' claimed right of publicity in their names and performance records.[101] Drawing from the Restatement (Third) of Unfair Competition as applied to right of publicity actions by the Missouri Supreme Court, the district court described the elements of a right of publicity action as: (1) defendant uses an individual's name or likeness with intent to obtain a commercial advantage; (2) defendant makes use of plaintiff's name or likeness as a symbol of plaintiff's identity; and (3) plaintiff did not consent to defendant's use.[102] Although the Players' Association did not consent to CBC's use of the players' names and performance records after December 31, 2004, the court granted summary judgment to CBC because it found no triable issue of fact to suggest that CBC had violated the first or second elements of the three-part test.[103]

The court found no evidence to suggest that CBC used the players' names and records with the intent to obtain a commercial advantage, because CBC's use did not convey the impression that the ballplayers endorsed or were associated with its games.[104] Indeed, the court compared CBC's listing of the players' names and performance records to a newspaper boxscore and stated that a reasonable person would not believe that baseball players endorsed or were associated with newspaper boxscores.[105] The court drew a narrow but important distinction between merely using a celebrity's name, as CBC did, and using a celebrity's picture or likeness.[106] The court proposed that products making use of a celebrity's name but not likeness are unlikely to convey a false impression of endorse-

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legitimate publicity rights in their names and performance records, had CBC violated this right? Third, did copyright law preempt this right of publicity? Fourth, if the players did have a right of publicity in their names and performance records, did the First Amendment apply and did it prevail over the right of publicity? Finally, had CBC breached the 2002 licensing agreement? *Id.* at 1082-83. Although its holding that CBC did not violate the right of publicity made the remaining issues irrelevant, the court proceeded to discuss *arguendo* copyright preemption, the First Amendment, and the breach of contract claim. *See id.* at 1092-1107. The following Section deals with only the first and second issues.

101. *Id.* at 1091. The phrase "performance records" refers to each player's personal performance statistics, including batting and pitching statistics.

102. *Id.* at 1084-85; *see also* Doe v. TCI Cablevision, 110 S.W.3d 363 (Mo. 2003) (en banc), *cert denied*, 540 U.S. 1106 (2004); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (2005).

103. *CBC*, 443 F. Supp. 2d at 1085, 1086-89.

104. *Id.* at 1086.

105. *Id.*

106. *Id.* at 1087.

ment.[107] Further, the court found no evidence that CBC used the players' names and records to draw attention away from any other fantasy provider, so as to obtain a commercial advantage.[108] Judge Medler pointed out that all fantasy game providers use ballplayers' names and performance records in the same way, so CBC's use did not draw extra attention to its fantasy products.[109]

Regarding the second element of Missouri's right of publicity test, the court found no triable issue of fact to suggest that CBC used the ballplayers' names and performance records as a symbol of the players' identities.[110] In *Doe v. TCI Cablevision*, the Missouri Supreme Court stated that, when establishing this element, "it is appropriate to consider 'the nature and extent of identifying characteristics used by 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.'"[111] In the present case, the district court ultimately concluded that the deciding factor in determining a right of publicity violation was how CBC used the players' names, not the mere fact that CBC used the players' names.[112] Unlike the Missouri Supreme Court, the district court concentrated only on the first clause of the test—the nature and extent of distinguishing characteristics used.[113] Judge Medler reasoned that performance records are "historical facts about the baseball players" and "do not involve the character, personality, reputation, or physical appearance of the players."[114]

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107. *Id.* In support of its proposition, the court listed a number of recent decisions in which defendants were found liable for using a plaintiff's name and likeness in commercial contexts, including the Supreme Court's decision in *Zacchini*. *Id.* (*citing* Abdul-Jabbar v. Gen. Motors, 85 F.3d 407 (9th Cir. 1996); Cardtoons, L.C. v. Major League Baseball Players' Ass'n, 95 F.3d 959, 968 (10th Cir. 1996); Toney v. L'Oreal USA, 406 F.3d 905, 910 (7th Cir. 2005); Newcombe v. Adolf Coors Co., 157 F.3d 686, 692-93 (9th Cir. 1998)).

108. *Id.* at 1085-87 (applying Henley v. Dillard Dep't Stores, 46 F. Supp. 2d 487 (N.D. Tex. 1999)).

109. *Id.*

110. *Id.* at 1089-90.

111. *Id.* at 1088 (quoting Doe v. TCI Cablevision, 110 S.W.3d 363, 375 (Mo. 2003)).

112. *Id.* at 1089.

113. *Compare id. with TCI*, 110 S.W.3d at 370. Elsewhere in the *CBC* opinion, the court makes clear that where the *TCI Cablevision* approach differs from the approach followed by federal right of publicity cases, the district court must adopt the latter. *CBC*, 443 F. Supp. 2d at 1095-96 (discussing First Amendment balancing test).

114. *CBC*, 443 F. Supp. 2d at 1089.

Finally, the court found MLB's reliance on *Palmer v. Schonhorn Enterprises, Inc.* and *Uhlaender v. Henricksen* unpersuasive.[115] In *Palmer*, a New Jersey court awarded relief to twenty-three professional golfers after the defendant used their names and pictures to enhance the sale of board games.[116] In *Uhlaender*, a Minnesota district court found that defendant misappropriated professional baseball players' identities by using the players' names, uniform numbers, and statistical information in its board games.[117] CBC argued that *Palmer* and *Uhlaender* were distinguishable from the present case because the *Palmer* and *Uhlaender* defendants "singled out" certain famous athletes so as to draw attention to their products.[118] In contrast, CBC argued that its fantasy games used "comprehensive player statistics" about all ballplayers, rather than using certain players' fame to attract attention.[119] Judge Medler agreed, and also stated that both *Palmer* and *Uhlaender* were decided early in the development of the common law right of publicity and conflicted with the Supreme Court's decision in *Zacchini*.[120]

III. ANALYSIS

In *CBC*, MLB used the right of publicity as a vehicle to assert ownership over professional baseball players' batting and pitching statistics. MLB argued that when CBC listed these data alongside the players' names in fantasy games, CBC misappropriated the players' identities.[121] The Missouri District Court properly determined that public policies underlying the right of publicity do not justify offering baseball players ownership over statistical data.[122]

The origins of the right of publicity are rooted in public policy considerations. Moral justifications for publicity rights arise from a perception that individuals are morally entitled to reap financial rewards from their

115. *Id.* at 1087-88.

116. 72 N.J. Super. 72, 77 (1967).

117. 316 F. Supp. 1277, 1282-83 (D.C. Minn. 1970).

118. C.B.C.'s Answering Memorandum in Opposition to MLB PA's Motion for Summary Judgment and Memorandum in Support of C.B.C.'s Motion for Summary Judgment at 31, C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, 443 F. Supp. 2d 1077 (E.D. Mo. 2006) (No. 4:05CV252MLM) [hereinafter CBC Answer].

119. *Id.*

120. *CBC*, 443 F. Supp. 2d at 1088-89, 1088 n.12.

121. *Id.* at 1082.

122. *See id.* at 1091.

property and industry.[123] Economic justifications for the right of publicity suggest that publicity rights promote efficient resource allocation on a broad, social level.[124] In essence, the right of publicity exists to prevent harmful and excessive commercial uses of a person's identity that could dilute the identity's pecuniary value.[125] Courts award publicity rights on a case-by-case basis if, and only if, defendant uses plaintiff's identity in a way that contravenes the policies behind the right of publicity.[126] For example, the right of publicity might prevent people from imitating the distinctive singing style of a famous vocalist on the grounds that imitations will reduce both the singer's ability to profit from her industry and the commercial value of her voice.[127] In contrast, American courts award data and database rights in narrow, strictly regulated situations only. As described previously, decisions like *Feist*[128] and *NBA*[129] demonstrate that neither copyright law nor the common law tort of misappropriation offer most data compilers grounds on which to control public uses of data or databases.[130] In addition, scholars suggest that data protection might inhibit, rather than promote, database industries and poses a threat to the public domain.[131] If so, then the policy-driven analysis that determines recognition of publicity rights provides the wrong means for opening the door to data protection.

Section III.A explains why granting MLB's right of publicity claim would result in data protection, and then explains the anticipated goals and actual results of data protection. The remaining Sections set forth the mor-

123. *See generally* MCCARTHY PUBLICITY, *supra* note 8, §§ 2:1-2:5. In contrast to privacy rights, which protect an individual's right "to be let alone," moral justifications for the right of publicity rest on the issue of economic fairness—allowing people to profit from that which they own and create. *See* Pavesich v. New Eng. Life Ins. Co., 50 S.E. 68, 70-72 (1905). In *Pavesich*, the court tied privacy rights to long-standing equitable doctrines such as "a man's house is his castle" and constitutional protections against searches and seizures. *Id.*

124. *See* MCCARTHY PUBLICITY, *supra* note 8, § 2:7.

125. *E.g.*, *CBC*, 443 F. Supp. 2d at 1090; Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 575 (1977).

126. *See Zacchini*, 443 U.S. at 576; *CBC*, 443 F. Supp. 2d at 1090.

127. *See* Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).

128. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) (explaining that data compiler can prevent only the reproduction of his own creative arrangement or selection of data, not the data themselves).

129. Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir. 1997) (stating that data misappropriators are liable only if they use time-sensitive and costly information to free-ride and directly compete with plaintiff's primary business).

130. *See supra* Section I.B.

131. Edwards, *supra* note 59, at 224-25; J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51, 113-37 (1997).

al and economic policies typically used to justify the right of publicity, applies these policies to fantasy baseball, and concludes that court properly refused to give extend the players' publicity rights to encompass performance data.

A. MLB's Call for Recognizing Publicity Rights Amounts to Data Protection, and Data Protection Comes With Risks

Following the parties' Stipulation Agreement and a court-mandated teleconference, MLB stated that it did not challenge CBC's right to use the players' biographical data or playing records.[132] Rather, it purportedly sought to protect the players' *names* in fantasy games, "because the identities of players are represented by their names."[133] MLB did not seek to prohibit CBC from merely mentioning the ballplayers' names on CBC's website, however. MLB only tried to prevent CBC from using the players' names in conjunction with fantasy baseball games: that is, alongside a listing of each player's batting and/or pitching statistics.

Although every right of publicity statute[134] and the common law[135] both affirm that uses of a name can potentially violate the right of publicity, the deciding factor in right of publicity actions is how a defendant uses plaintiff's name, not the mere fact of use.[136] Use of a person's name only violates his publicity rights if the use represents that person's identity. Practically speaking, professional baseball players' names appear in electronic and print media on a regular basis, particularly during the baseball season. MLB did not dispute this point, but nonetheless argued that using the players' names *in fantasy baseball*—that is, alongside data—represented the players' identities. Therefore, what MLB really sought to control was not the players' publicity rights in their names, but the players' rights over statistical data associated with their names.[137]

In the years since the Supreme Court refused protection to "the sweat of the brow" in *Feist*,[138] courts and commentators in the U.S. and abroad have debated whether data protection serves a useful purpose. As previously explained, U.S. courts generally abide by the *Feist* principle and refuse to grant copyright protections to pieces of data, although compilers

132. C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1082 (E.D. Mo. 2006).

133. *Id.*

134. *See* MCCARTHY PUBLICITY, *supra* note 8, § 6:8 (providing a chart summarizing state statutes).

135. *Id.* § 3.7.

136. *CBC*, 443 F. Supp. 2d at 1089.

137. *See* CBC Complaint, *supra* note 75, ¶ 19.

138. Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 352 (1991).

of data can copyright the original and creative aspects of their databases.[139] U.S. courts also limited plaintiffs' recourses under the common law for data misappropriation by narrowing the application of *INS* to the specific facts of that case through *NBA* and other decisions.[140] In contrast, the E.U. falls on the pro-data protection side of the debate, and in 1996 passed its Database Directive granting *sui generis* protections to compiled data.[141]

Proponents of data protection typically advance three arguments in favor of recognizing private ownership over data. The first argument holds that without protection, individuals will not invest in creating valuable databases.[142] This argument was the main force behind the E.U.'s Database Directive.[143] In the 1990s, the database market[144] grew into a billion dollar industry, but far fewer valuable database makers resided in Europe than the United States.[145] The E.U. thought that by promising property-like rights to database creators who resided in member states, related industries would profit and Europe might also attract new database creators.[146]

The second argument in favor of data protection suggests that the need to prevent copying of electronic data justifies data protection. This argument implicitly rests on a desire to prevent unfair competition and unjust

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139. *E.g.*, Key Publ'ns, Inc. v. Chinatown Today Pub. Enters., Inc., 945 F.2d 509, 512 (2d Cir. 1991).

140. *See* Cheney Bros. v. Doris Silk Corp., 35 F.2d 279, 280 (2d Cir. 1929) (stating that *INS*'s holding only applied to substantially similar situations, and does not set forth a general precedent); *see also* Reichman & Samuelson, *supra* note 131, at 140 (citing "widespread skepticism [the *INS*] extend[ed] this misappropriation doctrine too far afield").

141. *See supra* Section I.C.2.

142. *See, e.g.*, Edwards, *supra* note 59, at 224-25 (explaining E.U.'s motivations for enacting Database Directive); Reichman & Samuelson, *supra* note 131, at 117-18 (explaining then rebutting argument that data protection encourages science and education).

143. The other main purpose of the Database Directive was to harmonize discrepancies between member states' treatment of databases. Edwards, *supra* note 59, at 225-26.

144. Commentators say the "database market" affects:

> [the] publishing industry and related services, newspapers, books and magazines, data processing and network services, business information supplier[s], data processing and preparation, electronic information industr[ies], database revenues of business information, electronic information services, electronic delivery of business information (primarily online and CD-ROM), information retrieval services and commercial non-physical research.

John Tennensohn, *The Devil's in the Details: The Quest for Legal Protection of Computer Databases and the Collections of Information Act, H.R. 2652*, 38 IDEA 439, 441 n.5 (1998).

145. Edwards, *supra* note 59, at 224-25.

146. *Id.* at 219.

enrichment.[147] Unfair competition concerns underlie the Court's 1918 holding in *INS*[148] and foreign courts have also invoked unfair competition law to prohibit free-riding that would destroy a plaintiff's ability to earn a profit.[149] A proponent of data protection could rightfully argue that the contemporary technological age entices free-riding. In the current age, "second comers" can copy and manipulate public electronic databases easily and inexpensively, and devices like scanners allow free-riders to convert non-electronic databases to an easy-to-copy electronic form.[150] Thus, in recent years commercial database-makers have become increasingly vulnerable to free-riding and less likely to make a profit from their work absent legal protections.[151]

The third argument states that database creators are morally entitled to profits they might make from licensing data.[152] This reasoning likely derives from European common law. Before the Database Directive, European countries that followed the common law approach based copyright protection on the amount of effort an author expended, rather than the amount of creativity the author showed.[153] The principle of awarding hard work with copyright persists in E.U. today. In contrast, the prevailing American rule has long been that intangibles are freely appropriable absent a compelling need to prevent appropriation. While the American system views promoting invention and creativity as compelling needs, the general goal of rewarding hard work deserves no IP protection.[154]

The main argument against granting data protection is that privatizing data poses a significant threat to the public domain—that is, it hinders the free flow of information that rightly belongs to the public, not to a single individual.[155] American courts have determined that the free flow of certain ideas and information must be promoted even at the expense of private licensors.[156] Giving a person who compiles data the right to prevent

147. *See, e.g.*, Reichman & Samuelson, *supra* note 131, at 137.

148. Int'l News Serv. v. Associated Press, 248 U.S. 215, 234 (1918).

149. Reichman & Samuelson, *supra* note 131, at 139.

150. *Id.* at 66-68.

151. *See id.*

152. Edwards, *supra* note 59, at 229 (explaining initial motivations of E.U.).

153. *Id.* at 222-23.

154. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 201-02 (1993).

155. *See* Reichman & Samuelson, *supra* note 131, at 84-90.

156. *See, e.g.*, Lear, Inc. v. Adkins, 395 U.S. 653, 670 (1968) ("Surely the equities of the licensor do not weigh very heavily when they are balanced against the important public interest in permitting full and free competition in the use of ideas which are in reality a part of the public domain.").

unauthorized uses of that data allows the compiler to control who gets to see and use information: only those who are granted licenses and are willing to pay licensing fees can use the compiled information.[157] A third party who wants to use compiled data to create a new, more valuable database might not be able to get a license to use that data.[158] As a result, third parties would create fewer value-added databases and the caliber of information generated would decline.[159] In the context of academic and scientific research, this might impede scientific development and innovation.[160] In the context of entertainment data like fantasy baseball statistics, this might force fantasy baseball enthusiasts to pay higher prices for a more limited quantity of fantasy games.[161]

In addition to posing a threat to the public domain, an analysis of the E.U. database industry after the Database Directive issued suggests that data protection fails to encourage database creation.[162] Although some E.U. officials say that the Directive incited enormous growth in the E.U. database industry,[163] a study performed by Stephen Maurer calls these assertions into question.[164] Maurer's study suggests that the Directive caused a one-time rise in the number of companies entering database industries in the E.U., which directly followed the Directive's implementation in these countries.[165] Almost immediately, however, the number of database companies returned to their initial pre-Directive levels.[166] In contrast, the United States, which never enacted data protection legislation, has continued to experience a steady rise in number of database companies.[167]

Maurer's study indicates that data protection might not encourage database development; if this is true then data protection poses an unnecessary and uncompensated threat to the public domain. In light of this uncer-

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157. *See* Edwards, *supra* note 59, at 231; Reichman & Samuelson, *supra* note 131, at 88-89 (stating that a compiler can arbitrarily prevent a third party from reusing his data, thus unilaterally retarding value-added applications).

158. Reichman & Samuelson, *supra* note 131, at 88-89.

159. *Id.* at 89.

160. *See id.*

161. Expert Report of Rodney Douglas Fort ¶¶ 6, 7, C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, 443 F.Supp.2d 1077 (E.D. Mo. 2006), 2006 WL 1587248.

162. Edwards, *supra* note 59, at 232-33. According to Edwards, most of the results of the Database Directive have been kept confidential. *Id.*

163. Stephen M. Maurer, P. Bernt Hugenholtz & Harlan J. Onsrud, *Europe's Database Experiment*, 294 SCI. 789, 790 (2001).

164. *Id.* at 789.

165. *Id.* at 790.

166. *Id.*

167. *Id.*

tainty, any foray into the realm of data protections must proceed deliberately, under the guidance of formal rules. If the United States decides to explore certain types of data protection, then the right of publicity would present a poor vehicle for this exploration because it is determined on a case-by-case basis rather than by formal rules. Further, as the following Section indicates, protecting data is at odds with the moral and economic goals of the right of publicity.

B. Protecting Data Does Not Serve "Moral" Purposes of The Right of Publicity

In his leading treatise on the rights of privacy and publicity, J. Thomas McCarthy suggests that fairness requires society to recognize an individual's "natural [property] right" over identifiable aspects of his persona.[168] McCarthy argues that unlike ideas, which receive no protection, circulation of a celebrity's identity is not necessary to promote literary development, technology, or informed discussion.[169] Because an individual's identity belongs to him, McCarthy argues that allowing unpermitted use by third parties promotes unjust enrichment.[170] Similarly, some commentators state that every individual is morally entitled to recover "the fruits of his labors" unless a countervailing public policy prevents this, and one's marketable public persona is one of these fruits.[171]

Even assuming that fairness demands recognition of publicity rights in certain cases, the unjust enrichment and fruits of labor justifications become problematic when stretched too far.[172] For example, stretching these arguments might deprive the public of its First Amendment rights to freedoms of speech (e.g., parody) and of the press.[173] Granting MLB ownership over statistical data will also overstretch the moral arguments behind publicity rights. First, CBC's use of statistics that it computes and generates on its own does not equate to unjust enrichment, so to grant MLB rights over these data would effectively discontinue CBC's fair business practice. Second, although one might argue that performance statistics

168. MCCARTHY PUBLICITY, *supra* note 8, § 2:2.

169. *Id.*

170. *Id.*

171. *Id.* § 2.5.

172. *See, e.g.*, Madow, *supra* note 154, at 179-205 (discussing moral arguments), 220-228 (discussing economic justifications).

173. *See, e.g.*, Gionfriddo v. Major League Baseball, 94 Cal. App. 4th 400, 409 (2001) ("The First Amendment requires that the right to be protected from unauthorized publicity be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press.").

represent the fruits of ballplayers' labors, fantasy baseball statistics are too far removed from the players' identities to award publicity rights over these data in light of First Amendment concerns and the intent requirement.

1. CBC Not Unjustly Enriched

Allowing CBC to use the players' names and performance records in its games without a license does not amount to unjust enrichment as the term is commonly understood. Unjust enrichment occurs when one party retains an unjustifiable benefit at another's expense.[174] The benefit CBC retains from its fantasy games is entirely justified because these games make use of statistical data that CBC computed using its own resources and ingenuity.[175] CBC's games use the performances of baseball players as a starting point, but it is CBC's compilation and arrangement of performance statistics that attract consumers to CBC's fantasy games. While CBC's ingenuity arguably deserves protection, the statistical data do not. In *Kregos v. Associated Press*, the Second Circuit gave Kregos rights over statistics he had amassed on the theory that out of "scores of available statistics" he could have calculated, Kregos selected the best data and decided what math to apply.[176] This ingenuity deserved protection, although the numbers generated did not. Similarly, CBC not only decided what mathematics to apply, but also took the initial step of collecting the data after a live performance. Thus, CBC did not "reap" what ballplayers have "sown"—CBC did "sowing" of its own.[177]

Further, CBC's games are akin to the SportsTrax pagers at issue in *NBA*, which disseminated updated facts about ongoing games to the public.[178] The *NBA* court stated that the NBA's claim "compress[ed] and confus[ed]" the primary business of the NBA—producing sports events for public viewing—with SportsTrax pagers.[179] Providing fantasy games is not MLB's primary business, much as the NBA's Gamestats service (which might directly competes with SportTrax pagers) is not NBA's primary business.[180] MLB supplied a venue for CBC to collect data for CBC's own primary business: providing fantasy games. Allowing CBC to

174. BLACK'S LAW DICTIONARY 1573 (8th ed. 2004).

175. *See* Razzano, *supra* note 73, at 1179.

176. Kregos v. Associated Press, 937 F.2d 700, 704 (2d Cir. 1991).

177. *See* Madow, *supra* note 154, at 204.

178. *See* Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 843-44 (1997).

179. *Id.* at 853.

180. *Id.* Nor is providing fantasy games the primary business of Advanced Media, which oversees multiple forms of interactive media for MLB, including operating all facets of MLB's main website, MLB.com.

profit from its own business creation does not amount to unjust enrichment.

2. *CBC Does Not Capitalize on the Fruits of Ballplayers' or Teams' Labor*

The preceding Section argued that CBC expends its own resources to make use of the ballplayers' statistics, and that because this use does not threaten the ballplayers' or ball clubs' primary business, CBC is not enriched at MLB's expense. One might still contend, however, that CBC's profits are morally untenable because they consist of the "fruits of [the ballplayers' and teams'] labors." Certainly, ballplayers expend considerable personal and financial resources to develop their talent. In addition, MLB teams expend considerable financial resources in identifying and training talented players and hosting sporting events. Through this outpouring of resources and effort, MLB players and teams create a marketable commodity: popular sporting events. In return for this effort, players and teams profit from the public's interest in the form of ticket sales, broadcasting licensing, merchandising, and other subsidiary endeavors. Why then should MLB not profit from the particular subsidiary activity in question: fantasy baseball?

The answer must be that there is a line beyond which it is unfair to reward MLB for its product. In the context of publicity rights, courts draw this line using a fact-dependent analysis, and consider, among other factors, First Amendment freedoms and a defendant's intent to capitalize on a plaintiffs' fame.[181]

In *Gionfriddo v. Major League Baseball*, major league baseball players alleged that unauthorized uses of their names and career statistics violated their rights of publicity.[182] The California Court of Appeal stated that during an ongoing baseball season, "the First Amendment will protect mere recitations of the players' accomplishments."[183] The court determined that the public is entitled to benefit from entertainment sources, just as the public is entitled to benefit from a free press.[184] In light of the popularity of major league baseball, the court reasoned that it would be unfair to deprive the public of knowing the history of professional baseball.[185] The First Amendment entitles the public to be updated about, and entertained by, professional baseball, and this entitlement takes precedence

181. Gionfriddo v. Major League Baseball, 94 Cal. App. 4th 400, 409-10 (2001).
182. *Id.* at 405-06.
183. *Id.* at 410.
184. *Id.*
185. *Id.* at 410-11.

over a baseball player's right to profit from any and all uses of his name and statistics during an ongoing baseball season.

Further, as Judge Medler pointed out, the defendant's intent to capitalize on the fame of a particular individual determines liability in right of publicity actions.[186] CBC does not intend to capitalize on the famous identity of a player or players by using player statistics. Rather, CBC amasses statistics from every individual who participated in every ballgame so as to profit from the popularity of the sport of baseball, and the popularity of the fantasy baseball industry. CBC "borrows" from the popularity of baseball in general—not the popularity of particular baseball players' identities. In sum, to argue that CBC's use of the ballplayers' names and statistics capitalizes on the fruits of the ballplayers' and MLB franchises' labors is nonsensical. First, the First Amendment gives the public a broad right to be informed about and entertained by major league baseball and baseball players, so MLB has no grounds to stop the flow of this information. Second, CBC does not single out famous players with an intent to capitalize on their identities.

C. Protecting Data Does Not Serve Economic Purposes of Right of Publicity

In addition to moral purposes, the right of publicity could serve economic purposes in certain contexts. Advocates of publicity rights argue that recognizing these rights promotes efficiency through resource allocation.[187] Under this theory, treating a celebrity's identity as property creates an "artificial scarcity" around his identity, which allows it to be purchased or licensed at a market price.[188] In general, society receives a financial benefit when buyers know the market price and can purchase goods for this price.[189] Without publicity rights, however, the identity has no market price because the celebrity's identity falls into the public domain, where anyone can use that good as much as he desires.[190] Some economists say that the public tends to over-consume goods in the public domain, result-

186. C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1085 (E.D. Mo. 2006) ("The *intent* must be *to obtain a commercial advantage*.") (emphasis added).

187. MCCARTHY PUBLICITY, *supra* note 8, § 2:7; Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 UCLA ENT. L. REV. 97, 98 (1994).

188. MCCARTHY PUBLICITY, *supra* note 8, § 2:7.

189. Grady, *supra* note 187, at 99 ("[C]ost-based prices are ordinarily indispensable to social welfare.").

190. MCCARTHY PUBLICITY, *supra* note 8, § 2:7; Grady, *supra* note 187, at 102-03.

ing in economic waste as each person uses as much as he desires without considering long-term effects of overuse.[191]

Along these lines, Professor Mark Grady argues that a celebrity's identity will likely encounter overuse if it falls into the public domain.[192] Intense use tires the public of the celebrity's identity, and the celebrity becomes unable to make a profit on his likeness.[193] Thus, the profitability of being a movie star or professional athlete decreases as the celebrity's identity slides towards the public domain.[194] In turn, Grady argues, society loses valuable financial assets when famous singers become auctioneers,[195] or famous baseball players become college batting coaches.

Like the moral rationale for publicity rights, the economic rationale does not justify imposing property rights over statistical data for several reasons. First, privatizing ballplayer's statistics would not promote economic efficiency in the way that privatizing a celebrity's photograph or singing style might promote efficiency. Second, privatizing ballplayer statistics might prove to be economically *inefficient* by imposing an unjustified deadweight loss on consumers and depressing development in the fantasy baseball industry.

1. Privatization of Statistics Does Not Promote Economic Efficiency

Economic efficiency demands that society privatize goods if, and only if, the social benefits of private use outweigh the social costs of enforcing private use.[196] Like many types of goods, an individual's identity falls into the grey area between "private" goods and "public" goods. Two elements characterize pure public goods: (1) non-excludability (the inability to exclude others from using the good) and (2) non-rivalrous consumption (the ability of one person to use the good as much as he desires without affecting another's use).[197] The "identities" that courts and statutes protect, under the guise of the right of publicity, are not pure public goods because (1) society can exclude certain uses these identities and (2) consumption is not entirely non-rivalrous.[198] For example, if anyone and everyone can

191. Grady, *supra* note 187, at 102.
192. *Id.* at 101-02.
193. *Id.*
194. *Id.*
195. *Id.* at 102.
196. *See, e.g.*, *id.* at 100-02.
197. *Id.* at 98-99. Grady offers "air for breathing" as an example of a purely public good. *Id.* at 99.
198. *Id.* at 101.

freely use Bette Midler's singing style in television commercials,[199] the public might grow tired of Midler's singing or her style might become commonplace—especially if, as Grady suggests, goods in the public domain tend to fall prey to intensive over-use.[200] If this happened, low-valued imitations might crowd out Midler's own, more expensive, product and Midler's business might suffer as fewer people buy her music and attend her concerts.[201]

The benefits of privatization outweigh the costs of privatization and justify giving Midler publicity rights in her voice when Midler's singing voice becomes independently valuable enough to offset the cost of privatization. Unlike Midler's singing voice, the "commodities" at issue in *C.B.C.* (the ballplayers' performance statistics as used in CBC's baseball games) do not have independent value. Fantasy baseball statistics only have value if one of two things happens: (1) a fantasy provider such as CBC manipulates and catalogues the data in a certain way, or (2) alternatively, if someone owns and licenses the performance records. Because the statistics are not the core of the ballplayers' identities, CBC's use does not threaten the business of baseball or the ballplayers' ability to earn a profit from their identities, such that CBC's games would negate the value of the players' performances.[202] The ability of ballplayers to earn a profit is not tied to licensing revenue, so privatizing statistics does not enrich society as a whole. As the following Section explains, privatizing statistics might *deplete* society of economic resources.

2. *Privatization of Statistics is Economically Inefficient*

As explained in the previous Section, intellectual property rights create the pretense of scarcity around types of goods—inventions, secret knowledge, art, symbols used in trade, a celebrity's identity—whose very nature protect them from true scarcity. Scholars argue that we justify creating "artificial scarcity" in order to both promote innovation and creativity (because a competitive market will not return research and development

199. *See* Midler v. Ford Motor Co., 849 F.2d 460, 461 (9th Cir. 1988).

200. Grady, *supra* note 187, at 100-02 (discussing another "singing style" right of publicity case, Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992), *amended and superseded in part*, 1992 U.S. App. LEXIS 24838 (9th Cir. Aug. 5, 1992), *cert. denied*, 114 S.Ct. 1047 (1993)).

201. *See id.*

202. *See* C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1089 (E.D. Mo. 2006).

costs) and protect the integrity of the marketplace.[203] According to Professors Peter Menell and Suzanne Scotchmer, the problem inherent in intellectual property rights is that this artificial scarcity creates a deadweight loss to consumers from being forced to pay licensing fees.[204] In other words, consumers pay too much money when they are forced to pay for goods like data or ideas that already fall in the public domain. Thus, Menell and Scotchmer argue that intellectual property protection should only adhere to "works that are new and would not be readily forthcoming without legal protection. Works already in the public domain should not be protectable."[205]

The data MLB seeks to control does not only appear on CBC's website. Statistics are published in newspaper boxscores, flashed across television screens, referenced in print and internet articles and used in other fantasy games. Thus, one might fairly argue that the players' names and performance records are already in the public domain. If this is the case, creating artificial scarcity around fantasy baseball statistics—and thus forcing CBC to pay licensing fees—is economically inefficient. Privatization creates an unnecessary deadweight loss to consumers.

Furthermore, privatizing baseball statistics might depress innovation and development in the fantasy baseball industry. Currently, the fantasy baseball industry is a highly competitive market due to the vast number of companies that offer fantasy sports.[206] In contrast, in the early- and mid-1990s, few fantasy providers existed.[207] As a result, fantasy team managers in the 1990s paid two to three times current prices to join leagues and paid higher "transaction" fees to change their rosters.[208] Competition in the market not only reduced prices, but also resulted in broader choices for play. Now, strictly regimented and more expensive leagues exist for the serious fantasy team manager, while newcomers can join inexpensive or even free leagues.[209] Advanced Media's proposed licensing scheme would

203. *See* Peter S. Menell & Suzanne Scotchmer, *Intellectual Property*, *in* HANDBOOK OF LAW AND ECONOMICS 1, 3 (A. Mitchell Polinsky & Steven Shavell, eds.) (forthcoming 2007).

204. *Id.* at 4.

205. *Id.* at 9.

206. Expert Report of Rodney Douglas Fort ¶ 6, C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, 443 F. Supp. 2d 1077 (E.D. Mo. 2006), 2006 WL 1587248.

207. *Id.* ¶ 13.

208. *Id.*

209. *See* Razzano, *supra* note 73, at 1160.

dramatically reduce the number of fantasy providers, thereby raising costs and reducing options available to consumers.[210]

Finally, allowing a private party to assert ownership over any type of data might be economically inefficient in itself. Maurer's study, showing that the U.S. database industry outperforms the E.U. database industry even without protections, casts doubt on the propriety of data protection in principle.[211] Because data protection might hinder development and inhibit the public domain, any step towards data protection must be deliberate. The IP systems provide better vehicles than publicity rights, because they closely regulate duration and breadth of protection so as to minimize deadweight loss to consumers.[212] In contrast, courts determine publicity rights on a case-by-case basis using a broad policy analysis rather than discrete time and breadth limitations.[213] The lack of clear-cut directives in the realm of publicity rights suggests that the right of publicity is a poor vehicle for implementing intellectual property rights in data.

IV. CONCLUSION

MLB's attempt to preclude CBC from using player statistics in its fantasy games is not a straightforward purported right of publicity violation. Rather, MLB's claim amounts to a call for data protection, and the Missouri District Court properly denied MLB's claim.

The policy-driven analysis that leads courts to recognize publicity rights in certain cases fails to justify privatizing fantasy baseball statistics. A fantasy provider like CBC, which uses its own resources and ingenuity to compute statistics, is not unjustly enriched when it collects a profit from these endeavors. Nor does CBC capitalize on the labors of MLB players or teams when it uses data from major league baseball games. The right of publicity protects the fruits of an individual's labors to the extent that he has built a marketable identity. CBC draws from the popularity of baseball in general, not fame of a player or players.

In addition, creating artificial scarcity around baseball players' statistics does not serve any useful economic purpose. CBC's games do not threaten the ability of MLB teams or players to earn a profit. Because baseball player data arguably already belongs to the public domain, priva-

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210. Expert Report of Rodney Douglas Fort ¶ 7, C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, 443 F. Supp. 2d 1077 (E.D. Mo. 2006), 2006 WL 1587248.

211. *See* Maurer, *supra* note 163, at 789.

212. *See* Menell & Scotchmer, *supra* note 203, at 7.

213. MCCARTHY PUBLICITY, *supra* note 8, § 2.4.

tization would create a deadweight loss to consumers. Further, data protection poses a significant threat to the public domain, and at least one study suggests that data protection does not encourage database creation. In light of these issues, courts should not open the door to data protection using the policy-driven analysis that guides right of publicity cases.