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## It's One, Two, Three Strikes, You're Out, at the Old Ball Game: Use of Player Names and Statistics in Fantasy Baseball

By Michael D. Steger

In recent years, those involved in professional and college sports organizations have sought to control most, if not all, of the intellectual property developed by or in association with those sports. Sports leagues, teams, athletes and player unions have attempted to assert the same rights that their counterparts in the traditional entertainment industry have enjoyed. Some of the moves that fans decry, such as moving game broadcasts to team or league-owned pay cable channels and efforts to block out-of-market National Football League (NFL) broadcasts, rest on solid copyright or antitrust grounds; however, efforts to restrict fan photography at game sites and claims by entities associated with Major League Baseball that they own the exclusive rights to use the statistics of major league players in for-profit fantasy sports games

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have less support. Recent litigation between various Major League Baseball entities and independent fantasy sports operators focused on whether major league players have a right of publicity<sup>1</sup> that prevents anyone from using the players' statistics in fantasy games without their permission, whether those statistics are protected by copyright, and whether the First Amendment trumps any attempt to exert control over the statistics.

Earlier in 2008, the Supreme Court denied the petition for *certiorari* filed by various Major League Baseball entities and effectively upheld the Eighth Circuit's opinion in *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*<sup>2</sup> The Eighth Circuit, affirming the result of an earlier district court opinion, ruled that a fantasy sports operator's First Amendment rights trumped the publicity rights of major league baseball players, allowing fantasy sports leagues to operate without permission from the actual athletes involved in the underlying contests.

The *CBC* case placed some limitations on professional sports entities' ability to exercise control over the statistics generated in their competitions,



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while maintaining the viability of fantasy sports operators who want to operate independently of the professional leagues.

## What Are Fantasy Sports?

The Fantasy Sports Trade Association (FSTA) estimates that about 27 million Americans participate in fantasy sports, with about 80 percent playing fantasy football alone. Fantasy sports are contests in which participants, or owners, select or create teams by drafting actual players in that sport. The participants compete within their league against other fantasy owners who have selected their own teams. The contests are decided on the basis of the players' actual statistics for their real-life teams, with most leagues allowing owners to trade, release, and acquire players throughout the season. Fantasy contests are now offered in almost every North American sport including baseball, basketball, football, hockey, golf, auto racing, and even professional fishing. Overseas, fantasy soccer and cricket leagues enjoy widespread popularity.

Fantasy games are available via the Internet, email, telephone, or regular mail, and the providers include several large entities such as ESPN.com, Yahoo! Sports, and FoxSports.com, as well as a significant number of independent providers whose sole or primary business is offering fantasy games. While some entities offer the games for free, most charge some fee to participants. Most leagues offer cash prizes for winners, provided by either the league operator or the participants themselves.

In addition to the games themselves, the fantasy sports business now includes dozens of magazines, books, free and pay Internet sites that offer advice on whom to select and strategies for winning your league, and television and radio programs dedicated to fantasy sports.

Fantasy baseball is the oldest of the modern fantasy sports and the forerunner of the explosive growth of modern fantasy sports. While people have been playing fantasy baseball based on actual player statistics since at least 1960, its modern popularity arises from Rotisserie League Baseball, which was founded in 1980 by a group of New York literary and academic figures and named after the restaurant where the group met to discuss the rules. Despite the need for league operators to calculate statistics by hand and distribute results by fax or mail, the popularity of fantasy sports increased throughout the 1980s. The public appetite for fantasy sports then skyrocketed in the mid-1990s when the growth of the Internet provided participants with real-time statistical access, interactive league transactions, and reduced costs. The FSTA estimates that at least 6 million people play fantasy baseball, spending an average of \$175 per person on the game, and that the fantasy baseball industry

generates more than \$1 billion in annual revenue. This growth and the expanded revenue streams available to online fantasy operators, both from participation fees and advertising, have drawn increased interest from professional sports entities seeking to capture as much of this income as possible.

## CBC v. MLBAM: Strike One

In 2000, Major League Baseball (MLB) formed Major League Baseball Advanced Media (MLBAM) as the official Internet and interactive entity for MLB. MLBAM operates the official Web sites for the league and the 30 Major League Baseball teams, offering news, standings, statistics, and schedules, while also providing live audio and video broadcasts of most games. MLBAM also owns and operates MLB Radio and BaseballChannel. TV, an online channel Webcasting MLB games. Most importantly, MLBAM is responsible for exploiting MLB products and services in interactive, Internet, mobile, and other new media, including fantasy baseball games. From 2001 to 2004, MLBAM offered fantasy baseball games on *MLB.com*; significantly MLBAM did so without a license from Major League Baseball Players Association (MLBPA), the players' union.

C.B.C. Marketing and Distribution, Inc. (CBC), an independent offeror of fantasy games, was founded in 1991 and has offered fantasy games to the public since 1992. In addition to offering its own games, CBC has operated fantasy games offered by third parties, including USA Today, The Sporting News, The Golf Channel, and The Hockey News. CBC charges its participants a fee, and it also offers current information on Major League players, including statistical information that is usually found in newspaper box scores.

CBC entered into license agreements with MLBPA from 1995 to 2004 allowing CBC to use the images and information about Major League players in conjunction with its fantasy games. The 2002 license agreement, which governed the 2002, 2003, and 2004 seasons, provided, among other things, (1) that it represented the entire agreement between the parties, (2) that MLBPA had the right to license the use of player statistics, and (3) that upon termination of the agreement, CBC would have no further rights to use any of the rights granted under the agreement, including the use of player statistics.

In January 2005, MLBAM and MLBPA announced an agreement whereby MLBAM was to be the exclusive licensor of interactive media fantasy games. This agreement purported to grant MLBAM the right to license *all* fantasy games involving Major League players. MLBAM then sent requests for proposals to dozens of fantasy operators to collect information from which

MLBAM would determine whether and under what terms it would offer licenses to participate in MLBAM's program; these requests were for proposals to promote MLBAM's own fantasy games on the operators' Web sites, but not for CBC and other operators to offer their own games involving Major League players. In the email accompanying the requests for proposal, MLBAM advised fantasy baseball operators that if they were using "MLB player's rights" "without a license, all such uses must cease immediately." The logical conclusion to draw from MLBAM's position was that MLBAM believed it had the monopoly right to determine who could operate a fantasy baseball game.

Shortly after sending the requests for proposal, MLBAM cancelled a meeting with USA Today executives to discuss USA Today's possible participation in the licensing program after learning that *USAToday.com* was offering its own fantasy baseball games for the upcoming season. In its letter to USA Today's parent company, MLBAM claimed that it was "the exclusive rightsholder with respect to uses of . . . the personal attributes of the Major League Baseball players as a group in connection with Internet-based fantasy baseball games" and further claimed that USA Today's marketing of its fantasy games without a license was false and deceptive advertising in violation of the Lanham Act and state law. Because CBC provided the fantasy games that USA Today was marketing, MLBAM also cancelled a scheduled meeting with CBC.

In February 2005, fearing that MLBAM would sue CBC if it continued to operate its own fantasy games, CBC filed a federal court action seeking declaratory relief and an injunction preventing MLBAM from interfering with CBC's business. MLBAM and MLBPA counterclaimed, seeking damages for breach of contract and violation of the players' right of publicity, as well as exemplary damages, punitive damages, and injunctive relief. Importantly, by the time it filed suit, CBC no longer used photographs of Major League players or other such images in connection with its fantasy games. CBC did not dispute MLB's exclusive right to license and control the use of its trademarks, such as team and league logos.

The principal issue in the case was whether CBC's use of player names and statistics in fantasy games without their consent violated the players' rights of publicity. MLBAM argued that it possessed exclusive rights to license player names for use in fantasy games pursuant to the January 2005 agreement with MLBPA. CBC maintained that the player names and statistics were in the public domain and could be used by anyone without permission of MLBAM. By the time the district court decided the summary judgment motions, the remaining

issues in the case were (1) whether the players had a right of publicity in their names and playing records as used in CBC's fantasy games, (2) if such a right existed, whether CBC had violated that right, (3) if CBC had violated the right to publicity, whether copyright law preempted such a violation, (4) if the players had a right of publicity and it was violated, whether the First Amendment applied, and (5) whether CBC had breached its license agreement.

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In August 2006, Magistrate Judge Mary Ann Medler of the US District Court for the Eastern District of Missouri ruled that the use of major league baseball players' names and playing statistics in fantasy baseball games does not violate the players' rights of publicity, granting summary judgment in favor of CBC on all issues in the lawsuit.

The court first explored whether CBC violated the players' rights of publicity, namely, whether the players established that CBC commercially exploited the players' identities without their consent to obtain a commercial advantage. Judge Medler found that CBC, which did not use the players' images or likenesses in its games, did not attempt to create a commercial advantage because it did not intend to or actually create an impression that the Major League players endorsed CBC's products. In so finding, Judge Medler relied heavily on *Gionfriddo v. Major League Baseball*,<sup>3</sup> in which MLB defended against a suit by retired Major League players claiming that MLB had violated their rights of publicity by using their names, images, and playing records in various written, video, and audio products sold or licensed by MLB. The *Gionfriddo* court found that MLB's use of the information at issue involved "historical fact," did not impair the plaintiffs' economic interests, and was protected by the First Amendment. Likening CBC's use of player names and statistics to newspapers' publications of game and season statistics, Judge Medler wrote that no reasonable person "would be under the impression that the baseball players are associated with CBC's fantasy games any more than the players are associated with a newspaper boxscore." Therefore, there was no implication that the players endorsed CBC's products.

The court further found that CBC's products have no impact on the players' ability to earn a living since

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their playing records were historical facts and that CBC's use of the playing records does not constitute a misappropriation because it is using information already in the public domain.

Moving to the applicability of the First Amendment to MLBAM's and MLBPA's claims, the court emphasized that First Amendment protections extend to (1) a "novel medium," such as the Internet and interactive games, (2) expression intended to make a profit, and (3) expression that entertains rather than informs. The court found that, because CBC did not use the playing records as advertising for another product, CBC's use of the playing records was not commercial speech. Because the playing records were historical facts within the public domain, the First Amendment applied to protect CBC's expression of this information. The court emphasized that ruling that the players' right of publicity prevailed over CBC's right of free expression would extinguish CBC's First Amendment rights since CBC would be prevented from creating and operating its fantasy games that depend upon the Major League players' names and playing records. Because a contrary ruling would not affect the players' ability to earn a living playing baseball, the First Amendment analysis weighed heavily in CBC's favor.

The court further found that the players' names and playing records as used in CBC's fantasy games were simply compilations of facts by CBC and, thus, not copyrightable, so that copyright preemption did not apply in the case. Finally, the court found that a provision in the 2002 license agreement between CBC and MLBPA prohibiting CBC from using players' names and playing records without a license was void and unenforceable as a matter of public policy.

The court concluded that:

the undisputed facts establish that the players do not have a right of publicity in their names and playing records as used in CBC's fantasy games and that CBC has not violated the players' claimed right of publicity. The court finds further that the undisputed facts establish that the names and playing records of Major League baseball players as used in CBC's fantasy games are not copyrightable and, therefore, federal copyright law does not preempt the players' claimed right of publicity.

The court ordered MLBAM and MLBPA to refrain from interfering with CBC's business and dismissed the defendants' counterclaims.

## **MLBAM v. CBC: Strike Two**

After losing in the district court, MLBAM and the MLBPA appealed to the Eighth Circuit. Among the

*amici* in support of the appellants were the NFL Players Association (NFLPA) and its licensing subsidiary, the PGA Tour, and the licensing entities for the NBA, NHL, NASCAR, WNBA, and the NFL itself, as well as the International Licensing Industry Merchandisers' Association.

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The baseball entities fared no better before the appeals court than they did in the district court. In October 2007, the Eighth Circuit ruled that CBC's First Amendment rights trumped the baseball players' state law rights of publicity.

The appeals court first found that CBC was using the players' identities "for purposes of profit [and] their identities are being used for commercial advantage and that the players therefore offered sufficient evidence to make out a cause of action for violation of their rights of publicity . . ." <sup>4</sup> Then, employing the Supreme Court's balancing test set forth in *Zacchini v. Scripps-Howard Broadcasting*, <sup>5</sup> the court ruled that CBC's First Amendment rights outweighed the players' state law rights of publicity. Stating that CBC's use of the players' identities and playing statistics was speech and that speech that entertains enjoys the same protection as speech that informs, the appeals court commented that "it would be strange law that a person would not have a first amendment right to use information that is available to everyone" through the public domain.

The Court of Appeals went on to reject the arguments proffered to protect the players' incentives to encourage their own productive activities, to protect consumers from misleading advertising, "protecting natural rights, rewarding celebrity labors and avoiding emotional harm." Because the players were well compensated for their labors outside of the realm of fantasy sports, those additional interests carried little or no weight. The Eighth Circuit declined to address CBC's alternative argument that copyright law also preempted the player's rights of publicity, because CBC's First Amendment rights disposed of the case. <sup>6</sup>

Finally, the Court of Appeals addressed the MLB entities' contention that CBC had breached the 2002 agreement between MLBPA and CBC because the no-challenge and no-use provisions of that agreement barred any challenge to the MLB entities' monopoly

control over the player statistics. In the 2002 agreement, CBC agreed (1) that it would not “dispute or attack the title or any rights of Players’ Association in and to the Rights and/or the Trademarks or the validity of the license granted,” either during or after the term of the agreement (the no-challenge clause), and (2) that, upon the termination of the agreement, it would “refrain from further use of the Rights and/or the Trademarks or any further reference to them, either directly or indirectly” (the no-use clause).<sup>7</sup> MLBPA stated in § 8(a) of the 2002 agreement that MLBPA “is the sole and exclusive holder of all right, title and interest” in the playing statistics and names of almost all Major League players.<sup>8</sup> Under New York law, which governed the contract itself, a contractual warranty is “an assurance by one party to a contract of the existence of a fact upon which the other party may rely.”<sup>9</sup> Because MLBPA did not in fact own the publicity rights at issue in the agreement, it did not have the exclusive “right, title and interest” that it asserted. Therefore, it breached a material obligation in the contract, discharging CBC’s obligations in the agreement.

In reaching this conclusion of the breach-of-contract claim, the Eighth Circuit rejected CBC’s argument that MLBPA breached its warranty of title in § 1(b) of the 2002 agreement. In doing so, it declined to rely on the Supreme Court’s decision in *Lear, Inc. v. Adkins*<sup>10</sup> that federal patent law’s policy favoring the use of ideas in the public domain trumped contract law, which the district court relied on to defeat the right of publicity claim.

### **MLBAM v. CBC: Strike Three**

After the panel’s decision, the Eighth Circuit denied rehearing *en banc*.<sup>11</sup> MLBAM and the MLBPA then sought *certiorari* in the US Supreme Court. The Supreme Court denied the *cert* petition, effectively affirming the Eighth Circuit’s ruling.<sup>12</sup>

### **The Impact of the CBC Decisions**

The *CBC* decisions have arrested the sports leagues’ march to control the use of statistics in the public domain, at least temporarily. The immediate impact of the district court’s decision in *CBC v. MLBAM* was to remove the imminent threat that MLBAM and other major sports leagues and entities would either completely prevent CBC and other independent operators of fantasy sports games from operating their businesses or would allow them to operate only if they paid hefty licensing fees to the leagues. While many large media organizations, such as *CBSsportsline.com*, *ESPN.com*, and Yahoo! Sports, have licensed their fantasy games through MLBAM and other league entities, those companies have other valuable business relationships with

the leagues, primarily through copyrighted broadcasts, which the leagues could revoke or refuse to renew if the media companies refused to license their fantasy contests. In contrast, smaller organizations such as CBC, whose business models rest almost entirely on revenue from fantasy sports, either found such license fees prohibitive or were offered only terms that would effectively interfere with the operation of their businesses. The *CBC* decision lifted that cloud, for the time being, from the independent providers, and paved the way for the August 2006 purchase of CBC by FUN Technologies for approximately \$10 million. Several other fantasy sports companies made significant acquisitions in the months after the initial *CBC* decision, demonstrating the positive business outlook resulting from the decision.

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Litigation on this front continues, however. In September 2008, CBS Interactive (CBS) filed a lawsuit against the NFLPA, seeking declaratory relief that any right of publicity owned by NFL Players is preempted by the First Amendment and/or copyright law, that the NFLPA does not own any right of publicity, and that the NFLPA violated the Sherman Antitrust Act.<sup>13</sup> While CBS filed suit in Minnesota, within the Eighth Circuit that decided the *CBC* case, the NFLPA filed its own suit against CBS in Florida seeking a more favorable court.<sup>14</sup> The Eighth Circuit’s ruling struck an initial blow against major sports entities attempting to assert increasing control over the rights of third parties to disseminate information about the content produced by the sports entities, but, if the leagues have their way, the final word will have to come from the Supreme Court.

### **Notes**

1. Section 46 of the Restatement (Third) of Unfair Competition describes the right of publicity: “One who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability.”
2. *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007).
3. *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400 (Cal. App. 2001).
4. *CBC*, 505 F.3d at 823.

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5. *Zacchini v. Scripps-Howard Broadcasting*, 433 U.S. 562 (1977).
6. *CBC*, 505 F.3d at 824.
7. *Id.* at 824.
8. *Id.* at 825.
9. *Id.* at 825, citing *CBS, Inc. v. Ziff-Davis Publishing Co.*, 75 N.Y.2d 496, 503 (N.Y. 1990).
10. *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969).
11. *CBC*, 505 F.3d 820.
12. *Major League Baseball v. C.B.C. Distribution & Marketing*, No. 07-1099 (US Sup. Ct. June 2008).
13. *CBS Interactive, Inc. v. Football League Players' Association, Inc.*, Case No. 08-CV-5097 (D. Minn.).
14. Interestingly, shortly after CBS filed suit, NFL Players, Inc., the licensing arm of the NFLPA was found liable for \$28.1 million in damages for intentionally obscuring the identities of retired players and then failing to pay these retirees for their appearances in video games licensed by the NFLPA. *Parrish v. NFL Players, Inc.*, Case No. 3:07-CV-00943 (N.D. Cal.).

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