

The Right of Publicity of Professional Athletes

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Recently, the Major League Baseball Players Association filed a petition for a writ of certiorari with the Supreme Court regarding a ruling last October in favor of a seller of fantasy baseball products. (*Major League Baseball Advanced Media LP v. C.B.C. Distribution and Marketing Inc.* (U.S., No. 07-1099, review sought 2/22/08.) The request seeks review of a decision by the Court of Appeals for the Eighth Circuit that ruled that the players had a right of publicity in their names and professional statistics, but that right was outweighed by the First Amendment rights of sellers of "fantasy baseball" materials. So what exactly is a right of publicity?

Put simply, a person who has created a publicly-recognized persona has a right to protect their identity from misappropriation by others for commercial gain. While state laws governing the right of publicity vary, generally speaking, another person's name may not be used without consent (1) as a symbol of his or her identity, and (2) with an intent to gain a commercial advantage by using that name. However, the right of publicity is not limitless. The Supreme Court previously held that a plaintiff's right to the commercial value of his or her name must be balanced against the defendant's right to free speech, including speech about the plaintiff. This is a balancing of rights – one right does not automatically overrule the other.

Part of the analysis in determining the weight to give to First Amendment concerns in a right of publicity case is a determination of whether the speech is "commercial," such as in advertising, or is "expressive," such as the use of the person's identity in news or commentary. States differ on the use of this categorization.

In *C.B.C. Distributing and Marketing, Inc v. Major League Baseball Advanced Media, Players Association* (505 F.3d 818, 84 USPQ2d 1328 (8th Cir. Oct. 2007)), the Court affirmed a lower court decision ruling that CBC's use of major league baseball players' names and statistics was permissible. As with other fantasy baseball leagues, CBC's products called for participants to create their own mythical baseball teams by selecting players from the combined rosters of major league baseball teams in a mock "draft." Games are played between "owners" of fantasy baseball teams based on the statistics of the individual baseball players during the major league baseball season, which were supplied by CBC.

The lower court had held that selling products which used major league baseball players' names and statistics did not infringe any state law rights of publicity belonging to major league baseball players. The use of the players' names was not a use "as symbols of their identities." The lower court also held that even if CBC were infringing the players' rights, any rights that were infringed were preempted by the First Amendment. The Players Association appealed and several other associations of professional athletes and professional sports organizations filed "friend of the court" briefs in the appeal on behalf of the baseball players, including the NFL Players Association, the NHL, the NBA, the WNBA, NASCAR and the PGA.

In contrast to the District Court, the Eighth Circuit Court of Appeals found that there was "no doubt that the players' names that CBC used are understood by it and its fantasy baseball subscribers as referring to actual major league baseball players." The Court also held that this use of the players' names was for purposes of profit, even though it was not as clear cut a determination as use in advertising or merchandising. However, the Court of Appeals did agree that CBC's use of the players' identities for commercial benefit was protected by the First Amendment. The Court noted that the statistics used in the fantasy baseball games are readily available in the public domain. The Court of Appeals noted "it would be strange law that a person would not have a First Amendment right to use information that is available to everyone." The Court of Appeals also rejected the Players Association's argument that CBC's use of the information should not be protected under the First Amendment because the speech involved is meant to provide entertainment and therefore, does not demand such protection.

The Court of Appeals also noted that the right of publicity is intended to protect interests like an individual's right to earn a living, to reap the rewards of his or her endeavors, to provide incentives to encourage a person's productive activities and to protect consumers from misleading advertising. These interests were not at stake in this case. The Court found that the baseball players were not in danger of being denied the right to earn a living and that there was no danger that consumers would be misled.

Because the Major League Baseball Players Association has filed a petition for a writ of certiorari with the Supreme Court, the Court of Appeals decision may not be the end of this case. While the Supreme Court is generally very selective about the cases they will accept, particularly intellectual property cases, it has also shown a renewed interest in IP cases recently. Only time will tell if the Supreme Court invites the parties in this case to Washington D.C. to once again, "Play Ball."

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