

Fact or Fiction? Right of Publicity Protection of Player Names and Statistics in Fantasy Sports

John Grady, University of South Carolina

**Session 17: Legal aspects
Presentation (25-minute)**

Friday, June 1, 2007

11:00 AM - 11:25 AM

Fantasy sports have become an increasingly popular outlet for average sports fans desiring "ownership" in a fantasy professional sports league. According to the Fantasy Sports Trade Association, over 15 million players spend \$1.5 billion annually to participate (Schwarz, 2006). The driving force behind fantasy sports is their combined use of player names and statistics. A legal issue at the cornerstone of the fantasy sports industry is who owns the combination of player names and statistics when used for commercial purposes--the player, the league, or the public? The answer to this question implicates several facets of intellectual property law, in particular the right of publicity. As noted by Oliveau (2006), "the limitations on the claim of ownership of the statistics. have long been perplexing to both the leagues and potential users" (p. 1). Some legal commentators persuasively argue that the players' records are in the public domain while others view the players as either having exclusive publicity rights when their identities are used for commercial purposes or feel that the compilations of their statistics are entitled to copyright protection (Oliveau, 2006).

The recent precedent-setting ruling in *C.B.C. v. Major League Baseball Advanced Media* (2006) has shed light on the issue and catalyzed a lively debate about players' ownership rights, what belongs in the public domain, and the scope of the First Amendment. In 2005, Major League Baseball Advanced Media ("MLBAM") acquired the exclusive rights to the players' names, statistics, and likenesses for use in the development of online content (Freeman & Scher, 2006). C.B.C., a fantasy sports provider and previous licensee, sued MLBAM seeking a declaration that their continued use of player names and statistics in fantasy sports, without a license, did not constitute a violation of trademark, copyright, or right of publicity laws (C.B.C., 2006). MLBAM and the MLBPA filed a counterclaim, asserting the C.B.C. violated the players' right of publicity by exploiting "the players' names, likenesses, signatures, jersey numbers, pictures, playing records, and biographical data" (C.B.C., 2006, p. 6). The only aspects in dispute in the current litigation were C.B.C.'s use of the players' names and performance records.

The C.B.C. court had to consider whether the players have a right of publicity in their names and playing records as used in C.B.C.'s fantasy games and whether this right had been violated (C.B.C., p. 7). The required elements of a right publicity action include defendant's use of the plaintiff's name as a symbol of his identity or "persona," without consent, and with the intent to obtain a commercial advantage (Restatement (Third) of Unfair Competition 46 (2005). In considering the commercial advantage element, the C.B.C. court noted that "evidence which shows that a defendant intended to create an impression that a plaintiff is associated with the defendant's product 'alone is sufficient to establish the commercial advantage element.'" (C.B.C., p. 11). However, given that C.B.C. only used the players' names but not their likenesses in fantasy sports, the Court found that "C.B.C.'s use . in no way creates an impression that the players endorse C.B.C.'s fantasy games" (C.B.C., 2006, p. 14). The commercial advantage element was therefore not met (C.B.C., p. 15).

Analyzing the identity element, the court determined "whether C.B.C. used the players' names 'as a symbol of their identity'" (C.B.C., p. 15). The court considered "the nature and extent of the identifying characteristics used by the defendant, the defendant's intent, the fame of the plaintiff, evidence of actual identification made by third persons, and surveys . indicating the perceptions of the audience" (*Doe v. TCI Cablevision*, p. 370). This element was not met given that "C.B.C.'s use player names' in conjunction with their playing records does not involve the persona or identity of any player" (C.B.C., p. 18). The Court distinguished the current case involving players' names from cases involving appropriation of a celebrity's likeness (*Palmer v. Schonhorn Enterprises*, 1967; *Carson v. Here's Johnny Portable Toilets*, 1983; *Doe. v. TCI Cablevision*, 2003).

In discussing the policy rationale behind right of publicity protection, the Court noted that C.B.C.'s use of the players' names "does not go to the heart of their ability to earn a living as baseball players; . they do not earn a living by the publication of playing records" (C.B.C., p. 20). The Court adopted the view that the players' records are already in the public domain and their use in fantasy sports "actually enhances the marketability of the players" (C.B.C., p. 21). Relying on the Supreme Court's rationale in *Zacchini* (1977), the Court concluded that C.B.C.'s use "does not deprive the players of their proprietary interest in reaping the rewards of their endeavors" (C.B.C., p. 21).

Relying on *Gionfriddo v. Major League Baseball* (2001), the Court further held that even if it could be established that the players had a right of publicity in their names and playing records, this right would be trumped by the First Amendment given the substantial public interest in baseball (C.B.C., p. 34-35). The Court further determined that C.B.C.'s use of underlying factual data otherwise available in the public domain is not copyrightable (p. 40). On this issue, the Judge likened sport statistics to census data or information in a phone book which do not qualify for copyright protection (p. 40).

The C.B.C. decision has serious implications for professional sport, demonstrating an emerging judicial trend to reduce the

2007 North American Society for Sport Management Conference (NASSM 2007)

scope of protection under the right of publicity. This trend results in players (and the respective leagues) now being less able to rely on the protections afforded by right of publicity laws to protect the marketable aspects of their "persona" (Raff, 2006). C.B.C. highlights the "apparent tension between the player's rights to the commercial value of their names . and the rights of the gamesmaker to make use of facts that are in the public domain" (Freeman & Scher, 2006). Acknowledging this tension, future courts "may need to take a close look at what it means to use a player's name for commercial gain" (Freeman & Scher, p. 6). The C.B.C. decision also has significant implications on future licensing agreements in sport. If MLBAM prevails on appeal, leagues "could continue escalating the licensing fees" associated with fantasy sports (McCarthy, 2006). Based on the current decision, it appears professional sport leagues could still seek to license compilations of facts, along with the players' identities, but not the fact-based statistics alone (Oliveau, 2006).

During this presentation, the researcher will analyze the intellectual property issues raised in C.B.C. v. MLBAM, with specific emphasis on the right of publicity claims. Analysis of the policy rationale behind right of publicity protection, in light of inconsistent judicial interpretation, will be provided. The researcher will discuss the impact of the decision on current and future licensing agreements in professional sport. The researcher will also briefly address the copyright and First Amendment issues raised in the case.