

MAJOR LEAGUE BASEBALL ADVANCED MEDIA WHIFFS IN FEDERAL COURT:  
THE RIGHT OF PUBLICITY & THE FIRST AMENDMENT COLLIDE ON THE BASE PATHS

By Alec D. Rogers\*

In recent decades, Major League Baseball has made great strides in developing its business operation. No longer content to make money from tickets, concession sales, and a few radio and TV contracts, it has created an entirely new joint venture, Major League Baseball Advanced Media (“BAM”), that allows the baseball club owners to fully monetize not only the games themselves but nearly every aspect of the sport’s appeal.<sup>1</sup>

Recently, however, that effort suffered a serious setback when the U.S. Court of Appeals for the Eighth Circuit ruled that a baseball fantasy league operator did not need BAM’s permission to use the names of major league players and their statistics in *C.B.C. Distribution and Marketing, Inc. vs. Major League Baseball Advanced Media, L.P. and Major League Baseball Players Association* (“CBC”).<sup>2</sup> As a result, the revenue and control of fantasy sports will reside with the fantasy league operators, rather than BAM, which had acquired all of the relevant rights from the players themselves.

The Eighth Circuit’s opinion is another development in an area of law known as the “right of publicity,” or the ability of individuals to block others from using their identities for profit. Earlier publicity cases explored the contours of the right itself, and defined it relative to related areas of law, such as the right of privacy and false light. More recently, however, courts have had to reconcile the right of publicity with our First Amendment world. These are the questions that *CBC* explores in regards to baseball players and their performance records.<sup>3</sup>

THE FANTASY SPORTS INDUSTRY

Games based on the *outcome* of real sporting events have been around for decades. Two of the best known, APBA Baseball and Strat-O-Matic Baseball, were launched in 1951 and 1961, respectively. Similar games have come and gone in the intervening years. Such games generally use cards representing actual baseball players. Players roll the dice and refer to the batters’ and pitchers’ cards to determine the outcome of each at bat. For instance, more dice rolls result in hits on better hitters’ cards than weaker hitters’ cards and more outs on better pitchers’ cards than worse pitchers’ cards. In that way, the game results mimic real life performance. Despite many variations, these games have one thing in common—they are based on prior years’ performances. Cards for any particular season are released after the season is over. Unlike a real general manager or field manager, those who play the game (“owners” or “managers”) already have some idea how the actual athletes (“players”) will perform overall because they know the odds of the particular outcomes.

To overcome this gap between reality and existing board games, so-called “fantasy sports” have developed. They are different in that they are *forward-looking*. The concept was

created in the late 1970s and early 1980s and popularized with the publication of *Rotisserie Baseball*.<sup>4</sup> Fantasy gamers choose their players, field a team, and then base the outcome of their games and season by tracking their players’ actual performances as the season progresses. There are infinite variations on this basic model, and some leagues have draft, trade, and other rules that rival in complexity those of the real sports. Still, the basic concept remains the same. Fantasy games have emerged in virtually all closely followed sports.

Those who wish to play fantasy sports do not need to play one provided by a game company. They could, in theory, do everything by themselves, keeping track of their players’ performances, translating the real players’ performances into fantasy league points, and keeping all of the necessary records throughout the season. Such tasks, however, are extremely time-consuming and tedious. As a result, an entire industry has grown up revolving around automating those tasks, while at the same time providing the players with the sort of news and analysis that they need to remain competitive. For instance, if a player is injured in real life and does not play, and his fantasy owner leaves the injured player on his active roster, rather than substituting a backup, the player will not score any points. Similarly, that player’s real life backup will acquire substantially increased value as a starter and may be picked by the first fantasy owner who learns of the injury, assuming the backup was not already on one of the fantasy teams.

This industry has burgeoned to the point where it now has its own trade association. The Fantasy Sports Trade Association (FTSA) currently lists 112 companies that both run leagues and provide information and analysis for players. Providers include both large, well-known companies, such as CBS sports, ESPN, Yahoo, and many smaller, obscure companies. Some charge fees for more feature-laden games, with interactive graphics. Others provide basic “pen and paper” style, barebones versions for free, hoping to make money off advertising revenue. Similarly, many websites offer advice on which players to choose and play each week, some for free, others for a subscription fee.

A look at the FTSA’s membership reveals an industry that is diverse and highly competitive. With many companies offering league membership for free, those that charge a fee need to constantly improve to justify the additional cost. In short, it is a thriving, competitive industry in which 17 million people are estimated to play. The total revenue affiliated with fantasy sports has been estimated at \$1.5 billion.<sup>5</sup>

For most of its existence, the fantasy sports world has grown up outside and apart from the actual sports leagues themselves. However, it appears that the explosion of the games’ popularity, and the associated revenue that it can bring, has caught their attention. The effort of BAM to assert its legal rights over the information required to play fantasy baseball, player names, and performance statistics put in motion the chain of events that led to the *CBC* Decision.

BACKGROUND TO *CBC*

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In January 2005, BAM struck a deal with Major League Baseball Players Association (MLBPA), which represents nearly all major league baseball players. The agreement gave BAM “the personal attributes and marketing power of Major League baseball players as a group” for five years for over \$50 million. BAM turned around and sent letters to some fantasy baseball operators requiring them to cease their operations.

Such letters created an obvious threat of litigation to fantasy sports league operators. Many of them had previous agreements with the MLBPA that allowed them to use the players’ names, statistics, and more. On February 5, 2005, one operator which had previously contracted with the MLBPA, CBC Distribution and Marketing, filed a lawsuit in the U.S. District Court for the Eastern District of Missouri. In its complaint, CBC alleged that BAM had “threatened” that CBC’s continued use of baseball statistics violated BAM’s intellectual property rights. BAM had threatened, according to the complaint, to “force CBC to discontinue” the use of statistics. CBC sought a declaratory judgment that it had not violated BAM’s rights, nor that it had engaged in false or deceptive advertising or any other prohibited trade practice under state or federal law. It further sought injunctive relief “Enjoining Major League Baseball... from interfering with CBC’s business related to fantasy sports....”

CBC noted that it had entered into a contract with MLBPA in 2002, which had expired at the end of 2004. The contract had given CBC the right to use names, nicknames, numbers, likenesses, signatures, pictures, playing records, and biographical data. On January 19, 2005, however, BAM notified CBC that it had entered into an exclusive relationship with MLBPA for such rights, and that it now possessed the sole right to sublicense them. Accordingly, it required CBC to halt any use of them. CBC attached to its complaint a letter to another fantasy sports company, USAToday.com, alleging that its use of property similar to CBC’s violated various laws, including section 43(a) of the Lanham Act and “applicable state law.”<sup>6</sup> Taken together, these letters, according to the complaint, created a “reasonable apprehension” that BAM would sue CBC, entitling it to declaratory relief.

#### THE RIGHT OF PUBLICITY

The right of publicity, stated simply, is why Nike must pay Michael Jordan substantial sums of money to name its premier line of sneakers “Air Jordans,” and to use his image to promote them. Or why someone cannot simply market an Alex Rodriguez baseball glove without the superstar New York Yankee third baseman’s permission. While it is a relatively evolving area of the law, in essence, the right of publicity protects individuals against the deliberate commercial exploitation of their identities.

The right of publicity is generally traced to the U.S. Court of Appeals’ decision in *Haelan Laboratories v. Topps Chewing Gum* that baseball players’ likenesses and statistics could not be placed on chewing gum cards absent their consent.<sup>7</sup> Such an assertion was different from the traditionally accepted right to privacy or an assertion of property rights. Today, the majority of states recognize the right of publicity as a matter of common law, statutory law, or in some cases, both. Accordingly, it has

been codified in the American Law Institute’s *Restatement of Unfair Competition (Third)* (“*Restatement*”).

As formulated in the *Restatement*, the right of publicity is present when a defendant uses the plaintiff’s name as (1) a symbol of her identity; (2) without her consent; and (3) with the intent to obtain a commercial advantage. It is not enough that the defendant used the same name if the facts indicate that it was not proxy to identify the plaintiff, nor is it enough that the defendant used the name unless it can be shown the intent (realized or not) was to benefit commercially by using the plaintiff’s name.

An obvious problem is how the right to publicity is to be reconciled with the First Amendment’s freedom of speech. On its face, the right to publicity would seem to prohibit an unauthorized biography of a movie star or politician, and a million other uses, in a manner that would be very troublesome, unless we acknowledge that the First Amendment protects a great number of activities that would otherwise meet the *Restatement*’s three pronged test. There are also numerous questions that arise when applying the right in different cases, especially those that differ from the more paradigmatic ones discussed above.

#### THE DISTRICT COURT OPINION<sup>8</sup>

The parties each moved for summary judgment. The district court convened a teleconference to narrow the issues and the parties’ assertions. CBC informed the court that it was seeking to use players’ statistics, by which it meant their names and performance records. MLBPA and BAM acknowledged that such information was in the public domain for many purposes, but stated that their assertion of the right of publicity was limited to CBC’s use of players’ names *in conjunction* with their fantasy games. Additionally, CBC relayed that it was asserting that the BAM/MLBPA claim of the right to publicity, even if valid, could not be raised consistent with the First Amendment. Accordingly, the court stated the issues before it for consideration were

whether the players have a right of publicity in their names and playing records as used in CBC’s fantasy games; whether, if the players have such a right, CBC has, and is, violating the players’ claimed right of publicity and if this right has been violated by CBC... whether... the First Amendment applies and, if so, whether it takes precedence over the players’ claimed right of publicity...<sup>9</sup>

The court held that CBC’s use of the players’ names and performance records did not violate the Missouri right of publicity. Although it did not, therefore, technically need to decide the constitutional issues, it analyzed them as well, concluding that even had the Missouri right of publicity provided a basis for suit, the First Amendment rights of CBC would have barred its application.

#### *The Right of Publicity*

The court noted that Missouri had a common law right of publicity established in *Doe v. TCI Cablevision*.<sup>10</sup> It stated that under Missouri law, consistent with the *Restatement*, there needed to be a showing that the defendant (1) used the plaintiff’s name as a symbol of his identity (2) without consent and (3) with the intent to gain a commercial advantage. The



the *Restatement* contained a broader definition of commercial advantage that extended to use “in connection with services rendered by the user,” and that a successful plaintiff will not have to show perspective purchasers would be confused into believing the use of the name constituted an endorsement. Finally, the district court erred in believing “commercial advantage” referred to promoting the user’s products over another’s. Instead, the court of appeals emphasized “commercial” where the district court had emphasized “advantage” and read “commercial advantage” as merely meaning “for purposes of profit.” Because CBC had knowingly used the players’ names, which were in this case synonymous with their identities, for profit, the Missouri right of publicity had been breached by CBC.

#### *First Amendment*

Having found that CBC’s use of players’ named constituted a breach of BAM’s rights under the Missouri right of publicity, it turned to the question of whether CBC’s First Amendment rights trumped the application of the Missouri law. Here, the court agreed with the dicta in the district court, stating that the U.S. Supreme Court’s ruling in *Zacchini* required state law rights of publicity to be balanced against the First Amendment, and concluded that “CBC’s First Amendment rights in offering its fantasy baseball products supersede the players’ rights of publicity.”<sup>20</sup>

In so concluding, the court first noted that the information in question was already in the public domain. Accordingly, said the court, “it would be strange law that a person would not have a First Amendment right to use information that is available to everyone.”<sup>21</sup> That CBC’s use of the speech was for entertainment purposes rather than informational was not relevant said the court, the line between them too fine for courts to engage in. The court also rejected the notion that the information was not protected because it appeared as text in a computer program rather than spoken speech.

The court was heavily influenced by a California court of appeals case that contemplated many of the same issues. In *Gionfriddo v. Major League Baseball* the court had ruled that several baseball players’ negligible economic interests in their records and images were outweighed by “the public’s enduring fascination with baseball’s past,” and that Major League Baseball could therefore use verbal and video descriptions of their play without violating California’s common law right of publicity.<sup>22</sup> It had noted that “Major league baseball is followed by millions of people across this country on a daily basis. . . The Public has an enduring fascination in the records set by former players.” In turn, past performances establish a context for appreciating current players, according to the *Gionfriddo* court. Because such information concerning Major League Baseball players’ performances “command a substantial public interest,” they constituted a constitutionally protected form of expression.<sup>23</sup>

Alternatively, the interests protected by state rights of publicity were not seriously involved in this case, according to the court. The state interests the court identified were to protect a person’s ability to earn a livelihood and incentivize productive activity by ensuring that the party producing it was able to reap the benefits. Baseball players are “handsomely rewarded,” according to the court, implying that baseball and its players were doing well enough to make a substantial living, and would

continue to operate even if the fantasy sports leagues were allowed to continue to operate without their consent or being compensated. Nor was there any danger of the public being misled into believing that the game was endorsed by any other players, which was another goal of the law of publicity.<sup>24</sup>

#### CONCLUSION

In deciding to change from MLBPA’s model of selling rights to any fantasy company willing to pay the asking price and exerting more control over who could operate the games, BAM appears to have shot itself in the foot. It is likely that BAM will not be entitled to any revenue from such operators, and there is the distinct possibility that the other rights BAM purchased from the MLBPA will not bring in the revenue BAM had foreseen when it reached that deal. In this, there is a lesson for BAM about the long term health of baseball and the economic prospects of the team owners.

BAM’s strategy with fantasy sports appeared to be premised on the notion that there was a static pie of money, and that by allowing the fantasy sports operators a large slice, it were diminishing its own. It is likely that it was such a concern that led BAM to try to control and restrict the fantasy baseball league market. But was this premise correct?

It may be that Major League Baseball’s loss in *CBC* will eventually redound to its benefit. Games such as fantasy sports serve to enhance fans’ interest in the actual product, which translates into higher attendance and ratings that allow the league to earn more on its lucrative broadcast contracts. The current vibrant fantasy sports community is now free to develop and innovate. The result will likely be a much superior product in the long run than would have occurred if BAM had been more successful in asserting its control. A better product means more players, which means more fans with deeper ties to the game of baseball than ever before.

Not so clear, however, is where the right of publicity is left vis-à-vis the First Amendment. The Eighth Circuit’s opinion did not analyze the intersection of the right of publicity and the First Amendment in great depth, spending only a couple of pages on it.<sup>25</sup> In its motion for rehearing, MLBPA raised a number of concerns with the way the court of appeals reached its conclusion. These include the court’s apparent willingness to discount the players’ claims due to their financial success in playing baseball itself and endorsing products. Those that are not so successful generally do not have to worry about their publicity rights. Therefore, those who need them the most may be able to least avail themselves under the court’s logic. Also, as MLBPA pointed out, the *CBC* court failed to address several precedents that reached contrary conclusions of law, albeit from other jurisdictions. Finally, the court concluded that making the distinction urged by MLBPA and BAM of “information” versus “entertainment” was too fine a distinction, but did not explain its rationale for rejecting it. In fact, the Eighth Circuit’s short opinion leaves a lot of questions unanswered, and it remains to be seen how far it will actually go towards clarifying where the right of publicity leaves off and where the First Amendment begins.

Unfortunately, these questions are likely to remain unresolved for the time being. The U.S. Court of Appeals

has denied the motion for rehearing and there is no sign that BAM or MLBPA will seek Supreme Court review. Given that there is no split among the circuits, nor a pressing matter of federal law at stake, a certiorari review would likely be futile. Whether the right of publicity will be further scaled back to accommodate First Amendment concerns will therefore be left to another case; but if CBC is any indication, courts may be more sensitive to First Amendment concerns in future right of publicity cases.

## Endnotes

1 MLBAM's primary vehicle is its website, MLB.com, which contains news information, video and audio clips of games and baseball news, a shop for baseball related merchandise, and sells subscriptions to audio and video feeds of current and past games. It also links to a constantly streaming web channel with around the clock video programming of discussions and analysis surrounding baseball. Fans can also download baseball-related images onto their computers and cell phones for a fee. Most recently, MLB.com has begun to offer baseball-related video games online.

2 515 F.3d 818 (8th Cir. 2007) *petition for reb'g en banc denied* Nov. 26, 2007 (Nos. 06-3357, 06-3358).

3 A myriad of other issues, including those covering federal copyright and state contract law, were also part of the opinion, but will not be discussed here.

4 Okrent, Daniel, 1984 (Bantam Books).

5 It is unclear how much of this income is derived from league operations versus merely providing fantasy related news, analysis and advice via websites, newsletters, and magazines. There has been no claim that these latter activities of selling information and analysis constitute any sort of infringement, so only the revenues from those companies that actually operate the games themselves are at issue.

6 15 USC §1051 *et seq.*

7 202 F.2d 866 (2d Cir. 1953).

8 Case No. 4:05CV00252MLM ("District Court"). The District Court's opinion also dealt with copyright and contract issues distinct from the right of publicity and first amendment issues. MLBPA and BAM asserted that a provision in the 2002 contract between CBC and MLBPA precluded CBC from asserting its claims. The contract provided that CBC would not have any further rights to the players' information after its expiration after 2005 and included a clause prohibiting CBC from challenging its exclusive rights to license the information to CBC. CBC countered that MLB did not possess the rights it claimed under the 2002 agreement and that the agreement not to use the information after the expiration and the no-challenge clause were in violation of public policy. The Court held that the clauses were indeed void as a violation of "the strong federal public policy favoring the full and free use of ideas in the public domain."

9 District Court at 7.

10 110 S.W.3d 363 (Mo. 2003) (en banc), *cert denied*, 540 U.S. 1106 (2004).

11 District Court at 18.

12 *Id.* at 20.

13 *Id.*

14 Such analysis seems to violate the notion that a court should dispense with cases on non-constitutional grounds where possible. Given the ambiguous nature of the law of publicity, however, one can argue that the court was silently applying another doctrine of judicial decision-making and interpreting a statute in a manner to comport with the Constitution. Such analysis would of course require the court to undertake the constitutional analysis.

15 95 F. 3d 959, 972 (10th Cir. 1996).

16 433 US 562 (1977).

17 District Court at 30-31 (quoting *Zacchini*).

18 Although the court affirmed 2-1, the dissent was based on the contractual issue rather than the right of publicity and the application of the First Amendment. On those issues, the dissent stated it was in accord with the majority.

19 Appeals Court at 6.

20 Accordingly, the court did not consider CBC's alternative defense that the players' assertion of rights of publicity were preempted by federal copyright law. Given the traditional doctrine of avoiding constitutional questions when possible, it is unclear whether the court should have not first considered this question.

21 Appeals decision page 7.

22 94 Cal. App. 4th 400 (1991).

23 *Id.* at 411.

24 The court also dealt with the contractual issue specific to the agreement between MLBPA and CBC. In its 2002 agreement, CBC had acknowledged MLBPA's rights to its players' information and had promised not to litigate them. MLBPA had warranted that it was the sole and exclusive holder of the players' rights. Because it did not (for the reasons stated by the court in its decision), MPBPA breached its warranty, releasing CBC from being bound by the contract, according to the majority. This issue was the sole basis of the dissent, which argued that the provision was an agreement between the parties that MLBPA had those rights—not a warranty. The dissent would have reversed the district court on the basis of the previous contract between CBC and the MLBPA.

25 The entire court of appeals decision is only thirteen pages: covering the facts, citing the procedural stance, and disposing of the copyright and contract issues, in addition to the publicity and First Amendment issues. In contrast, the district court's opinion is forty-seven pages.