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The Fantasy Sports Edition

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About This Issue

Sports lovers are not called fanatics for nothing. When not playing or watching sports, the true fan entertains all manner of sports fantasies. That devotion spells big business, with the world of fantasy sports leagues enjoyed by millions of participants — and generating billions of dollars. Because fantasy leagues rest on statistics and personalities of real professional athletes, First Amendment right of publicity concerns clash with commercial interests. As detailed below, the most recent legal analysis in this area issue — coming from the Eighth Circuit Court of Appeals — was offered to the nation's high court. This morning the Supreme Court decided not to wade into the issue. Is this the end of the story or only a new beginning? Manatt has expertise on all sides of the issue and presents a timely analysis in the following two articles.

Supreme Court Denies Certiorari In Fantasy Baseball Right Of Publicity Case

By [William M. Heberer](#)

OUR PRACTICE

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In a ruling likely to have a profound impact on the economics and power structure of the rapidly growing fantasy sports industry, the Supreme Court denied a petition by the Major League Baseball Players Association (MLBPA) and Major League Baseball Advanced Media (MLBAM) to

review an Eight Circuit decision holding that the unlicensed use of MLB player names and statistics in commercial fantasy baseball products is protected by the First Amendment and does not violate the players' rights of publicity under Missouri law. *C.B.C. Distribution and Marketing, Inc. vs. Major League Baseball Advanced Media, LP*, 505 F3d 1818 (8th Cir. 2007).

The right of publicity is a right existing under state law which prevents the unauthorized use of a celebrity's name, likeness or other protectible indicia of identity for advertising or other commercial purposes. The right is not absolute, however, and a celebrity's ability to prohibit unauthorized uses of name or likeness must be balanced against and limited by the First Amendment and the public interest in the dissemination of newsworthy information regarding the celebrity.

In the professional sports world, the players' rights of publicity are typically controlled and licensed by the player unions. As the fledgling fantasy sports industry grew in the 1990s and early 2000s, the question of whether or not fantasy league operators were required to obtain licenses from these unions for the right to use athlete names and statistics in their entry fee-based products was the subject of much dispute and uncertainty.

The earliest fantasy leagues were unlicensed. In the early 1990s, however, the NFL Players Association began to recognize the popularity and revenue potential of fantasy sports and started granting licenses to fantasy league operators. The MLBPA and other player unions soon followed suit. By the mid-2000s a bifurcated industry had developed in which the larger, more established fantasy league providers were licensed and paying royalties to the unions while numerous, smaller "mom and pop" companies were proliferating and operating unlicensed games. While the unions periodically threatened to bring actions against these unlicensed companies for alleged right of publicity violations, no lawsuits were actually brought, due, in large measure, to the unsettled nature of the law in this area (and the fact that

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these were typically small companies lacking the financial wherewithal to litigate). Similarly, while many of the larger established entities may have questioned the need for a license, they generally opted to negotiate license arrangements that made sense economically rather than running the risk of operating unlicensed games and ending up in adversarial proceedings with the unions over the right of publicity issue.

The industry landscape changed dramatically in January 2005, when the MLBPA announced a 5 year licensing deal with MLBAM in which MLBAM received the exclusive right to use, and sublicense others the right to use, MLB players' name, likenesses and performance statistics in online and interactive games, including fantasy baseball games. MLBAM immediately issued Requests for Proposals to fantasy baseball site operators inviting them to submit requests for licenses for the soon-to-begin 2005 MLB season. While certain major fantasy league operators, such as CBS Sportsline and ESPN, were granted licenses, others were not.

One of the largest companies to be denied a license was C.B.C. Distribution and Marketing, Inc. (CBC) which had been a MLBPA licensee from 1995 through 2004. Upon being denied a license, CBC promptly filed a declaratory judgment action in the Eastern District of Missouri seeking a declaration that a license was not required in order to use MLB player names and statistics in its pay-to-play fantasy baseball games. MLBAM and the MBLPA counterclaimed alleging violation of the players right of publicity and breach of contract, in that CBC's prior MLBPA licenses contained no challenge provisions prohibiting CBC from attacking MLBPA's rights or the validity of the license granted.

In August 2006, the district court granted CBC's motion for summary judgment, finding that its fantasy baseball products did not infringe MLB players' rights of publicity under Missouri law and that, even if there were an infringement, the players' rights of publicity were preempted by the First Amendment. The district court also determined that the no challenge provisions of CBC's MLBPA licenses were unenforceable as being against public policy. 443 F. Supp. 2d 1077 (E.D. Mo. 2006).

MLBAM and the MLBPA appealed to the Eighth Circuit, which issued an opinion in October 2007 affirming the ruling below. The court of appeals concluded that, while CBC's use of MLB player identities within its fantasy baseball products did not fit neatly within the more traditional categories of commercial use – namely, use for advertising and merchandising purposes

– it was done for purposes of profit and obtaining commercial advantage. Thus, the court determined that MLBAM and MLBPA could make out a cause of action for violation of the players' rights of publicity under Missouri law. Nevertheless, the court went on to conclude that the players' rights of publicity must give way to the First Amendment for a variety of reasons, including the fact that the information used in the fantasy baseball games is readily available in the public domain and because the recitation and discussion of factual data concerning the performance of MLB players is a matter of substantial public interest and, thus, a form of expression due substantial constitutional protection. The court also noted that the case did not implicate the economic interests that states typically intended to protect by providing individuals with rights of publicity. Lastly, the court determined that the no-challenge provisions of CBC's prior licenses were non-enforceable, albeit for different reasons than those proffered by the district court.

MLPBAM and the MLBPA subsequently petitioned the Eighth Circuit for a rehearing en banc, which was denied in November 2007, and then petitioned the Supreme Court to grant certiorari to hear the case, arguing that numerous standards have arisen in various circuits for balancing the right of publicity against the First Amendment and seeking clarity on this issue from the Supreme Court.

This petition was denied earlier today, which would seemingly bring closure to the issue and clarify that commercial fantasy leagues may be operated without the need for a license to use athlete names and statistical information. However, given that the right of publicity is granted under state law, and that the scope of that right varies from state to state, it is conceivable that a players union might consider bringing an action against another unlicensed operator in a different circuit under the laws of another jurisdiction in the hopes of obtaining the opposite ruling. While a long shot, if a split amongst circuits could be achieved it might induce the Supreme Court to weigh in on the issue at later date. It remains to be seen whether any players union will decide to take this step. In the interim, it is clear that the balance of power in the industry has shifted and that the players associations will need to be creative in terms of the additional benefits they can to fantasy operators if they hope to entice them to continue to take licenses in connection with the sale of their fantasy league products.

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Chaos Continued — The Supreme Court Denies *Certiorari* In *C.B.C. Distribution And Marketing V. Major League Advanced Media*

By [Mark S. Lee](#)



Speech is free, but the resources needed to create it cost money. A constitutional “speaker” may not have that money. Can the speaker take or use others’ property to enable speech without the property owner’s permission? If so, when?

Although few would argue that a constitutional “speaker” should be able to take someone else’s laptop to start a blog, this question has proven more difficult to answer when the “property” taken is a form of intellectual property called the right of publicity. Courts have developed at least seven different, inconsistent, and sometimes mutually exclusive approaches, tests, standards and guidelines to address free speech defenses to right of publicity claims. Mark S. Lee, *Entertainment and Intellectual Property* §16:12-20. (Thomson/West 2006). The Eighth Circuit’s recent decision in *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, LP*, 505 F.3d 818 (8th Cir. 2007), only adds to this confusion by applying one of the seven standards without acknowledging, let alone discussing, any of the others.

In an irony apparently lost on the *C.B.C.* Court, it held that the type of conduct that initially created the right of publicity was no longer a violation of it. The right of publicity was first articulated in *Haelan Laboratories v. Topps Chewing Gum*, 202 F.2d 866, 868 (2d Cir. 1953), when the Second Circuit Court of Appeals held that baseball players had a “right of publicity” in their images that could prevent their unauthorized use on baseball cards. Eventually applied to a wide variety of conduct involving unauthorized commercial exploitation of an individual’s identity, courts after *Haelan* held that use of sports figures or other individuals’ names and personal information in games also violated the right of publicity. See *Palmer v. Schonhorn Enters.*, 232 A.2d 458 (N.J. Super. 1967) (granting injunction that prohibited use of the names and biographical information of Arnold Palmer, Gary Player,

Doug Sanders and Jack Nicklaus in a simulated golf board game); *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970)(enjoining use of hundreds of baseball players' names and statistics to simulate professional baseball games); *Rosemont Enters. v. Urban Sys.*, 340 N.Y.S.2d 144 (N.Y. Sup. Ct. 1973) (prohibiting use of Howard Hughes' name and life events in a board game).

The *C.B.C.* Courts' contrary holding that such use of players' names and statistics in an Internet Fantasy Sports Game was protected speech did not mention, let alone distinguish, the above-described decisions. Instead, stating that "[t]he Supreme Court has directed that state law right of publicity [claims] must be balanced against First Amendment considerations" and citing *Zacchini v. Scripps-Howard Broadcasting*, 433 U.S. 562 (1977), the court ruled that "here we conclude that the former must give way to the latter." 505 F.3d at 823.

In fact, though other courts have also applied a "balancing" test to right of publicity claims, see, e.g., *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), one can search in vain for any statement in the Supreme Court's *Zacchini* decision that courts should "balance" these competing rights according to unspecified criteria as the *C.B.C.* Court did. Perhaps because "balancing" implies fairness and describes in the broadest sense what courts often must do to reconcile competing interests, a number of courts have "balanced" these interests. See Lee, [Entertainment and Intellectual Property Law](#), supra, §16:9. However, the approach is unanchored by any meaningful evaluative guidelines or criteria, and often amounts to little more than a Rorschach test for a particular court's philosophical predilections. It has been heavily criticized by commentators for this reason, see [Nimmer on Freedom of Speech](#), §2.02 (1984); J. Thomas McCarthy, [The Rights Of Publicity And Privacy](#), §8.4 [A]P.P. 8-23-24, and can easily lead to apparently inconsistent results. See, e.g., *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003) (use of name "Rosa Parks" as title of song which included lyric "everybody to the back of the bus" not clearly protected free speech under the "balancing" approach); *ETW Corp. v. Jireh Publ'g*, 332 F.3d 915 (6th Cir. 2003) (use of Tiger Woods name and likeness in painting and posters protected speech as a matter of law under "balancing" test).

This is not to say that any of the other six approaches are obviously better. Virtually all approaches articulated to date have their controversial aspects. Further, use of these different approaches encourages inconsistent, unpredictable results. For example, although the California Supreme Court

ruled in *Winter v. DC Comics*, 30 Cal. 4th 881 (2003), that a comic book's unauthorized use of images, names, and certain characteristics of rock musicians Johnny and Edgar Winter in a cowboy science fiction comic book series was protected speech under the California Supreme Court's "transformativeness" test to defeat a right of publicity claim, the Missouri Supreme Court in *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003), held that the unauthorized use of the name and certain characteristics of hockey player Tony Twist in a comic book violated Twist's right of publicity and was not protected speech because the "predominate use" of Twist's identity was to commercially exploit rather than comment on the individual depicted. Similarly, although the California Supreme Court held that an artist's unauthorized creation and use of images of the Three Stooges on posters and t-shirts violated their rights of publicity and was not protected speech under California's transformativeness test, see *Comedy III Productions v. Gary Saderup, Inc.*, 25 Cal. 4th 387 (2001), the Sixth Circuit Court of Appeals in *ETW Corp. v. Jireh Publishing*, 332 F.3d 915 (6th Cir. 2003), held that an artist's unauthorized creation of painting and posters of Tiger Woods was protected speech as a matter of law under the "balancing" approach.

Regardless of one's view of the merits of the *C.B.C.* Court's holding, the Supreme Court's denial of certiorari represents a missed opportunity to bring clarity and predictability to what is presently a very confused area of the law. Until such time as the Supreme Court provides guidance in this area, lawyers will continue to have to make difficult decisions in uncertain legal circumstances.

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