

## Who Owns Sports?

Written by John Thorn  
Thursday, 31 August 2006 11:12

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*From "Play's the Thing," Woodstock Times, August 31, 2006:*

Money talks, bullshit walks. That coarse and yet so fine phrase, born of poker, soon became the byword of the business arena, particularly when delivered by the man with the money to the schnook with the big idea. But what happens when money comes as part and parcel with bullshit, as is so often the case?

A couple of weeks ago Major League Baseball Advanced Media (MLBAM) and the Players Association (MLBPA) lost a court case to CDM Fantasy Sports, a Missouri corporation legally named CBC that markets, distributes and sells fantasy sports products, including fantasy baseball games accessible over the Internet. Ho hum, you might say; just another argument about money in which John Q. Public has no rooting interest.

Not so. This truly fascinating case, in which Mary Ann L. Medler, United States Magistrate Judge, ruled on August 8, was about more than "Who owns facts?" — specifically here, whether a fantasy baseball game could depict the names and statistics of active players without paying for the privilege. In background a Greek chorus might have intoned not only "Who owns sports?" but also "Who owns fame?"

Without doubt a transaction takes place between and among owner, club, and fan.

The club offers its credible intent to play hard and, often if not reliably, win.

The owner provides (with the aid of the general public, silent partner in all of sport) an arena for entertainment on site and via broadcast that augments spectators' experience of the contest. He, in concert with other owners, also provides a league structure in which a championship may be contested and determined. Owner and players, in short, combine to make the game.

What does the fan contribute, besides his cash for a ticket, concessions, and parking when he goes to the game, or his inert fanny and eyeballs when advertisers bombard him at home? The fan may be said to own nothing yet give everything, for not only fortune but also fame are at one end of that two-way street in which the fan's approbation and reward are at the other. The athlete may provide the accomplishment but the fan creates the fame; neither Organized Baseball nor the players seem fully cognizant of the vital role played by the proles.

The fan, the ordinary Joe, has no property or intellectual rights in the game of baseball. But as Judge Medler averred, he cannot be made to pay in one context for something that a purported vendor acknowledges is free to all in another. Are player statistics property, or are they public information? If I say 511, .406, or 73, do you know the players I am referencing (Cy Young, Ted Williams, Barry Bonds, respectively)? How about the uniform numbers 3, 7, 24, and 44 (most famously Babe Ruth, Mickey Mantle, Willie Mays, and Henry Aaron)?

In the legal proceeding neither MLBAM nor the MLBPA contended that numbers associated with players were anything but common facts in the public domain, beyond the proprietary

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interests of anyone who might look for the protection of copyright, trademark, or patent. If a company wished to depict the line below in a fantasy game it was OK with them:

G AB R H 2B 3B HR RBI SB CS BB SO BA OBP SLG  
161 591 129 195 38 2 41 117 16 2 97 65 .330 .430 .609

If, however, an “unlicensed” (i.e., nonpaying) fantasy league like CBC combined that line with the name “Albert Pujols,” well then it was violating the player’s “right of publicity,” depriving him of the benefit of his good name and constricting his future earnings. Mind you, the MLBAM/MLBPA position was not opposed to such conjoined use by newspapers, television, or internet media, as these uses were clearly First Amendment protected instances of free speech and, besides, provided free publicity that tended to boost rather than crimp player and league revenues.

As the court summarized the opposing positions, “... the Players’ Association and Advanced Media clarified that they are not claiming that CBC cannot use players’ playing records or biographical data; that they are challenging CBC’s use of players’ names in conjunction with its fantasy baseball games; that they are claiming that the identities of players are represented by their names; that they are concerned with protecting the players’ names; and that they are claiming that CBC uses players’ names in its fantasy baseball games in violation of the players’ right of publicity.” In response to this view, “CBC stated that its position is that players’ names and playing records, as used in its fantasy baseball games, are preempted by copyright law; that CBC’s use of players’ names and playing records in its fantasy baseball games does not violate the players’ claimed right of publicity; and that even assuming, arguendo, that CBC’s use of players’ names and playing records violates the players’ right of publicity, the First Amendment controls.”

Unlike the right of privacy, which is a personal right, the right of publicity is generally regarded as a property right. Indeed, the right of publicity is a curious notion of startlingly recent birth. Conceptually it may be said to go back to King Kelly’s 1887 contract with the Boston Red Stockings, to whom he had just been traded by Chicago White Stockings. The contract called for \$2000 in salary, in line with the league-wide salary cap, but also provided \$3000 for the use of his likeness for advertising and promotional purposes. In reality, this was just a ploy to evade the salary limitations and induce Kelly to abide by the trade. As J. Gordon Hylton, Professor of Law at Marquette University, wrote, “What Kelly authorized was technically neither a trademark nor a copyright matter, but a waiver of what we today call his ‘right of publicity.’ The early history of the right of publicity is extremely murky, but this particular agreement seems to imply ... that Kelly’s club could not use his image for commercial purposes without his permission. It would be interesting to know if early baseball card manufactures paid players for the use of their images. Honus Wagner’s ability to stop the printing of cigarette cards with his photos in the first decade of the 20th century also suggests that something like the right of publicity was recognized prior to 1910.”

However, the term was never used in a legal context until 1953. As Judge Medler wrote in her opinion, “A fairly recent concept, according to the Sixth Circuit in *ETW Corporation v. Jireh Publishing, Inc.*, 332 F.3d 915, 929 (6th Cir. 2003), this right ‘was first recognized in Haelan

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Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2nd Cir. 1953), where the Second Circuit held that New York's common law protected a baseball player's right [Wes Westrum] in the publicity value of his photograph, and, in the process, coined the phrase 'right of publicity' as the name of this right.' Subsequently, in *Zacchini*, 433 U.S. at 573, where a performer in a 'human cannonball' act sought to recover damages from a television broadcast of his entire performance, the Supreme Court recognized that the right of publicity protects the proprietary interest of an individual to 'reap the reward of his endeavors.'"

The poor devil *Zacchini* won his suit because his act, his sole means of livelihood, was expropriated. "However," Judge Medler wrote, "CBC's use of Major League baseball players' names and playing records in fantasy baseball games does not go to the heart of the players' ability to earn a living as baseball players; the baseball players earn a living playing baseball and endorsing products; they do not earn a living by the publication of their playing records. See *Zacchini*, 433 U.S. at 576. Moreover, CBC's use of Major League baseball players' names and playing records [unlike the complete depiction of *Zacchini's* human-cannonball shot] does not give CBC something free for which it would otherwise be required to pay; players' records are readily available in the public domain."

On the free-speech front, the judge continued, "CBC argues, in the event it has violated the players' right of publicity, that speech is involved in its fantasy games; that this speech does not differ from raw statistics published in newspapers; that the speech involved in its fantasy games is expression which is protected under the First Amendment; and that the First Amendment trumps the right of publicity in the circumstances of this case. The Players' Association and Advanced Media argue that CBC's games do not involve speech or the expression of ideas; that what is at issue in this matter is not speech; and that, therefore, the First Amendment does not apply."

Wrong. Again from the ruling: "Speech which does not use 'a traditional medium of expression' does not receive less protection than more traditional means of speech.... As such, the First Amendment has been applied to flag burning, nude dancing, and wearing a jacket with obscenities. *Id.* (citations omitted). Moreover, the fact that expression appears in a novel medium does not preclude its being subject to First Amendment protection."

An earlier landmark case in this area of nontraditional free speech involved the World Wrestling Federation (in *Titan Sports v. Comics World*, 87-0178). In 1989 Judge Peter K. Leisure ruled in the Southern District of New York that a poster bound into various wrestling magazines was not an infringement of the wrestlers' right of publicity, even though the poster was bound and stapled into the center and could not be viewed without removing it from the magazine, which itself of course was first-amendment protected. "The constitutional protection of the freedom of the press does not stop at 8" x 11"; the judge ruled.

Returning to baseball, a sport in which the conclusion is not scripted, Judge Medler added: "A defendant's *making a profit* does not preclude its receiving First Amendment protection.... The court finds, therefore, that CBC's deriving a profit from its use of the names and playing records of Major League baseball players in its fantasy baseball games does not preclude such use from having First Amendment protection."

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Baseball has always been, in the words of long departed Cubs' owner Phil Wrigley, "Too much of a sport to be a business and too much of a business to be a sport." Amen.

--John Thorn

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*John Thorn wrote his first book thirty years ago and since then has produced dozens more. His next book, *Baseball in the Garden of Eden*, will be published with Simon and Schuster in Spring 2008. Thorn writes "Play's the Thing," a column for the Woodstock Times. He is also a columnist for *Voices*, the publication of the New York Folklore Society, and *108*, a new baseball quarterly. Recently announced is a new scholarly baseball journal that he will edit for the publisher McFarland & Company; it will be called *BASE BALL: A Journal of the Early Game*.*