

Analysis: Fantasy Stats Case Appeal Heard

Written by Maury Brown
Friday, 15 June 2007 07:02



The following is analysis from **Maury Brown**, a sports business analyst for the [Business of Sports Network](#)

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Yesterday, oral arguments in the appeal of **CBC Marketing and Distribution v. MLB Advanced Media** took place before three judges for the 8th U.S. Circuit Court of Appeals in St. Louis. The landmark case revolves around **CDM Fantasy Sports' (who was then owned by CBC Marketing) use of player statistics without a license from MLB Advanced Media.** [MLBAM and the MLBPA reached a \\$50 million agreement which,](#) “provides MLBAM the exclusive rights to use, and to sublicense to others, Major League baseball player group rights for the development and creation of on-line games, all other online content, including fantasy baseball and interactive games, as well as all wireless applications including cell-phone enabled games.”

CBC sued MLBAM and the MLBPA arguing that they should be able to conduct the business of fantasy baseball games for-profit without a license and use player names and their associated statistics.

A judgment in US District Court in 2006 agreed.

Attorneys representing the **MLB Players Association (MLBPA) and MLB Advanced Media**

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(MLBAM) are urging the 8th U.S. Circuit Court of Appeals to reverse the lower court judgment from US District Court **Judge Mary Ann Medler** from August of last year (**see the opinion handed down by the court as well as the conclusion [here on The Biz of Sports](#)**).

The appellant brief filed by the MLBPA and MLBAM reads in part (**read the [entire brief, along with its associated addendum here](#)**):

CBC's conduct violates Missouri's publicity rights law, and enforcement of those rights does not affect expressive activity or violate the First Amendment. At the very least, disputed issues of material fact precluded summary judgment for CBC. Alternatively, no federal statute addresses publicity rights and thus federal law does not preempt enforcement of CBC's state-law contract obligations.

(To listen to the court proceedings, as well as read a partial transcript, select [Read More](#))

Virginia Seitz, representing the MLBPA in oral arguments ([listen to the oral arguments from yesterday here](#)), urged the court to reverse the ruling based on right of publicity, stating that while statistics themselves could be used, once an MLB player is associated to those statistics, it breaks with the right of publicity and therefore is not protected by the First Amendment as outlined in the lower court's judgment.

The judges seemed to be skeptical of that argument when addressing counsel for the MLBPA.

In a sharp exchange between **Chief Judge James Luken** and Seitz, Judge Luken said:

“So, now we have a limitation (referring to the use of associating a player to their statistics), and

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now I come around to, 'This isn't about statistics' -- the basic war of the brief .

'This is about names,' you say. 'This is about statistics,' they say.

And I understand the practicality of the war because the statistics are in the public domain. And it seems to me, it's clearly a use of public information to figure out that if you're going to have an ongoing fantasy sports league over the life of a real professional sports league – clearly a collateral market – you have to have an opening set of statistics and evolving statistics that will allow competition and trades and so forth.

And so where do you get those statistics?

Well you can't take the 1923 Philadelphia Athletics because that doesn't evolve over a season. So you take these statistics that are in the public domain.

And as I translate the argument in this case.... 'Well, we won't argue with that (referring to the use of statistics without player association), but don't you dare put a name next to those statistics.'

Well, of course that's ridiculous.

So you are saying that this collateral market can be monopolized by your clients. The statistics – the public statistics – cannot be marshaled and be used for another kind of game without your clients getting a share of the action.”

Seitz then replied:

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“Those statistics can appear in newspapers. Those statistics can be published on websites. But what cannot be done is have a player identity – a name – be used as a game piece for identification.”

Judge Luken shot back:

“The only identification is identifying the statistics so that this group of evolving statistics for the second baseman can be followed.”

The name is only to identify the statistics. It's not to steal the identity of the second baseman.”

Seitz responded:

“The only reason these game are valuable and marketable is precisely because these are major league baseball player names attached to those statistics. If you used ‘Player A’, ‘Player B’, no one would be interested in playing the game. The game is interesting precisely because people feel they are owning and managing real major league players.

In summarizing his points later, Judge Luken said, “Since this is completely tangential to Major League Baseball, and the success of Major League Baseball, I don't understand where that success and that identity, gives the players – at least I'm having trouble seeing – how it gives the players the right to monopolize an entirely separate entertainment industry.”

Rudy Telscher, lead counsel for CBC said during his 20 minutes that, “There's not any affidavit from players who say they feel like they have been damaged,” referring to the fantasy baseball gaming industry. He then went on to say that the Phillies front office participated in playing fantasy baseball actively.

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Telscher argued that fantasy baseball – in its various forms – have been played for years prior to the dispute between MLBAM and CBC.

“The only thing that my clients did was to create software to automate it.”

Reached for comment on Friday, **Charlie Weigert, Vice-President of CDM Marketing** said that there was extra pressure knowing that if the case remains in CDM's favor that it will create case law, and leave a lasting legacy.

As to how long he might be willing to pursue the case, Weigert stood behind his convictions.

“I’ll pursue the case as far as it goes,” Weigert said. “Hopefully this decision will produce a final opinion and the decision will be as strong as the lower court decision, so if they try to appeal this higher, they are rejected.”

A ruling on the appeal is expected from the three-judge panel in three to six months.

Maury Brown is the founder and president of [The Business of Sports Network](#), which includes

[e Biz of Baseball](#)

and

[The Biz of Football](#)

(**full launch coming in July**

). He is a contributor to

[Baseball Prospectus](#)

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and can be contacted
[here](#)

[Th](#)