

Application of C.B.C. Distribution and Marketing v.
Major League Baseball Advanced Media to Collegiate Athletes

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I want to talk this morning specifically about the decision of the Eight Circuit Court of Appeals in the CBC case, which held, as I think most of you know, that the unauthorized use of the names and statistics of professional baseball players by fantasy leagues was a violation of the players' right of publicity, but was nevertheless protected and permitted by the First Amendment. The question I want to speak to today is whether the CBC decision would necessarily also apply to the unauthorized use by fantasy leagues of the names of collegiate athletes.

My own view is that the CBC case does not require the same result for collegiate athletes as it did for professional athletes. In my view, the unauthorized use of the names of collegiate athletes for commercial purposes, such as the publication of a fantasy league game, would not be protected by the First Amendment and would be an unlawful violation of the student-athletes' right of publicity. In order to explain why I think that, I first need to summarize for you exactly what the court said in the CBC case.

In that case, the federal Court of Appeals in St. Louis recognized that the use of a professional athlete's name in a fantasy league game, without that athlete's consent, was a violation of the athlete's right of publicity. But the court went on to say that, in a right of

publicity case, you have to balance the unauthorized use of someone's name or likeness against the principles of the First Amendment and determine in each case whether the right of publicity, on the one hand, or the principles of free speech, on the other hand, should predominate.

In the CBC case, the court concluded that, with respect to professional athletes, the First Amendment should predominate, because in the court's view, the use of a professional player's name in a fantasy league game without that player's consent was not a very serious invasion of the right of publicity for several reasons. First, the players' names and statistics were already in the public domain because that information appeared in the newspapers every day. Second, the use of a player's name in a fantasy league game did not, to any significant degree, deprive a professional player of his ability to earn a living. The players would still be able to earn multi-million dollar salaries and to secure endorsement and sponsorship income. In other words, professional players just wouldn't be hurt very much economically if they lost the ability to charge fantasy league publishers for the right to use their names.

On the other side of the equation, the First Amendment side, the Court in CBC found that a fantasy league game is entitled to substantial First Amendment protection because it provides entertainment and, at least in the view of the court, a fantasy league game helps to educate and inform people about a player's performance and statistics and the First Amendment therefore trumped the right of publicity.

I have a strong disagreement with the court over that conclusion. My own view is that a fantasy league game is a commercial product, pure and simple. It is not really intended to educate or inform. It is not in any way a substitute for a newspaper that does provide news and information. And it is a commercial product based almost entirely on the unauthorized use of the commercial value of players' names. But my purpose today is not principally to criticize the

CBC decision, although I could, and I have. In the interest of full disclosure, I should tell you that I filed a friend of the court brief in the CBC case on behalf of the National Football League, the National Hockey League, the NBA, the WNBA, the PGA Tour and NASCAR, arguing that the First Amendment did not trump the players' right of publicity.

But again, my purpose today is not to reargue the CBC case, but rather to ask the following question: assuming for the sake of discussion that the CBC decision is correct with respect to professional athletes, is it also correct with respect to collegiate athletes?

And I believe those would be two very different cases. The right of publicity is based on the inherent right of every human being to control the commercial use of one's own identity. In many cases, perhaps most cases, a well-known person whose identity has commercial value, wants to exploit that commercial value for his or her own economic benefit and, for that reason, is likely to object when someone else tries to make money by using that person's identity for a commercial purpose without consent and without paying for it. That was the basis for the professional players' position in the CBC case. They wanted to maximize the financial benefits available to them through the commercial use of their own identities. For the professional player, it was an economic issue.

But the right of publicity also and equally protects those who do not want their identities commercially exploited. The right of publicity exists, not merely to ensure that a famous person can reap the greatest possible financial rewards from the commercial use of his or her name, but also to protect anyone who opposes commercialization of his or her identity from being subjected to the involuntary commercial exploitation of that identity by third parties. And that, to me, is the great difference between the case of a professional athlete, whose goal is to maximize economic return, and the case of a collegiate student-athlete, who is prohibited by

long-standing and deeply-rooted principles of amateurism, from making any commercial use of his or her name or identity.

The stark difference in these two cases can be seen very clearly by considering the following: in the CBC case, if the fantasy league publisher had offered to pay a license fee to the professional players for the use of their names, the players would have happily accepted and the case would have been over. But if a fantasy league publisher wanted to use the names of student-athletes, and offered to pay a license fee, the student-athletes could not accept the fee. And that case would have to continue.

And so the legal balance to be drawn between the right of publicity and the First Amendment is going to be very different for a student-athlete than it would be for a professional athlete. In the CBC case, the professional athlete's interest in the right of publicity was found to be weak, because allowing fantasy leagues to use the player's name was not going to impair the player's earning capacity by very much. But in the case of the student athlete, where the question has nothing to do with earning capacity, allowing third parties to commercialize the player's name destroys the underpinnings of that portion of the right of publicity that protects the wishes of anyone who does not want to have his or her identity commercialized at all. And therefore, the interest of the student athlete in the protection of his or her right of publicity is very strong.

So while the "free-speech" aspects of a fantasy league game may be sufficient to outweigh the modest impact on a professional athlete's desire to earn as much money as possible, I do not believe that the First Amendment interest in protecting fantasy league games would or should outweigh the basic right of student athletes, their universities and the NCAA to uphold and preserve the traditions of amateurism. And that is the issue on which the case of a student athlete against a fantasy league game would turn. There are, of course, no guarantees in

litigation, but in my view the student-athletes and their universities would have the far better of the argument.