

# ADVISORY

## SULLIVAN & WORCESTER INTELLECTUAL PROPERTY ADVISORY

### C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.

On October 16, 2007, the United States Court of Appeals for the Eighth Circuit handed down a decision that significantly curtails the publicity rights of professional athletes in favor of the burgeoning business of fantasy sports gaming. In the decision, *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, Nos. 06-3357, 06-3358, 2007 WL 2990366 (8<sup>th</sup> Cir. Oct. 16, 2007), the Eighth Circuit held that fantasy sports promoters have a First Amendment right to publish and use baseball players' names and statistics without payment to, or authorization, from the Major League Baseball Player's Association (the "Players Association"), the owner of professional baseball players' publicity rights.

**Background.** "Fantasy sports" generally describes a gaming format in which participants "draft" teams consisting of professional players, and, over the course of the sport's season, compile various statistics on the professional players on each team. At the end of the season, the participant whose team performed best in various pre-determined categories is awarded points, and the team with the most points at the end of the season wins. With the advent of large-scale fantasy sports games being run on-line, fantasy gaming is now played by millions of Americans. Current estimates are that Americans spend from \$500 million to \$4 billion a year playing fantasy sports.

Plaintiff C.B.C. Distribution and Marketing, Inc. ("CBC") operates a website that caters to fantasy baseball fans. Visitors to the site buy products and participate in fantasy baseball leagues. From 1995 through 2004, CBC used MLB players' names, statistics and identifying characteristics pursuant to a license from the Players Association. In 2005, when the license with CBC expired, the Players Association entered into an exclusive license with Major League Baseball Advanced Media, L.P. ("Advanced Media"), which is Major League Baseball's interactive media and Internet company. Advanced Media, in turn, offered CBC a license only to promote Advanced Media's products. CBC, however,

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continued to use players' names and statistics, and brought a declaratory judgment in the Eastern District Court of Missouri, claiming that it had a First Amendment right to publish names and statistics. The Players Association intervened in the action and joined Advanced Media's claim.<sup>1</sup> The district court held that CBC did not infringe any of the major league baseball players' rights of publicity.

**Holding.** The Eighth Circuit affirmed the district court's decision, but for different reasons. The Eighth Circuit concluded that the athletes' right of publicity under Missouri law in fact had been infringed by CBC, finding that CBC used the athletes' names as a symbol of identity, without consent and with the intention to obtain a commercial advantage. The court thereafter concluded, however, that CBC's free speech rights under the First Amendment superseded the players' state law rights of publicity. In so ruling, the court considered (1) whether the information is in the public domain; (2) whether the use of statistics and names was protected speech; (3) the public value of the activity in question; and (4) the potential harm to defendants if CBC were to prevail. The court found that the information allegedly being protected was already in the public domain and that "it would be strange law that a person would not have a first amendment right to use information that is available to everyone." (*CBC*, 2007 WL 2990366, at \*4). In addition, the court recognized the public value of information about baseball, recognizing the sport's popularity and by extension sanctioning the practice and popularity of fantasy sports. Finally, the Court found that there were no negative consequences, because the unauthorized use of player names and statistics did not materially affect the compensation professional baseball players already receive playing their sports.

**Analysis.** The *CBC* decision joins the Sixth Circuit's decision in *ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915 (6<sup>th</sup> Cir. 2003), to deal another blow to professional athletes

who seek to protect their name, likeness and image in commerce outside the sports arena. Both cases rest in part upon the dubious assumption that unauthorized use of a professional athlete's name in commercial settings causes minimal to no economic harm because athletes' income is largely derived from performing their sport. Such reasoning fails fully to appreciate the vast economic benefit many athletes can obtain through commercial endorsements, and the damage that the uncontrolled or unauthorized use of such athletes' names and likenesses can inflict on athletes' ability to achieve economic success through endorsements. The *CBC* case also constitutes a major victory for the fantasy sports industry, which is likely to proliferate further now that a US appellate court has ruled that the information and statistics vital for the industry's success is protected free speech.

Clients having questions concerning the *CBC* decision may contact any of the attorneys above.

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<sup>1</sup> The Players Association also raised contract claims alleging that a "no-challenge" and a "no-use" provision in the original contract with CBC voided CBC's claims. The Eighth Circuit found, however, that the Players Association breached a different provision in the contract, and thus could not enforce the cited provisions.