



## IT'S NOT JUST MAKE-BELIEVE ANYMORE

By: Kent R. Raygor and Valerie E. Alter, *Sheppard Mullin Richter & Hampton LLP*, Los Angeles, CA

In *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007), the Eighth Circuit held that fantasy baseball games are entitled to First Amendment protection that trumps baseball players' rights of publicity under state (Missouri) law. Although other courts have previously addressed the use of athletes' names in other contexts, the Eighth Circuit is the first to have considered its applicability to fantasy sports. *See, e.g., Cardtoons, L.C. v. Major League Baseball Players Association*, 95 F.3d 959 (10th Cir. 1996) (finding that the First Amendment rights of a parody baseball card producer outweighed the Major League Baseball Players Association's rights of publicity).

C.B.C. Distribution and Marketing ("CBC") sells fantasy baseball sports products over an Internet service. Essentially, its games enable fans who sign up for CBC's services to create and then "draft" real-world major league baseball players into fantasy baseball teams and to thereby simulate the ownership of a major league baseball team and all that goes with it, from drafting players to competing against other fantasy baseball clubs in fantasy baseball games. Participants pay fees to play and additional fees to trade players. The outcomes of the games depend on the "drafted" players' performances on the real-world diamond during the major league baseball

season. To enable fantasy team "owners" to select their teams and make decisions throughout the season, CBC provides up-to-date baseball statistics, much like what one would find in a newspaper's sports section.

Although CBC had previously obtained a license from the Major League Baseball Players' Association ("MLBPA") to use baseball players' names and statistics in its products, it continued to use those names and statistics after the license agreement terminated. After that termination, the MLBPA licensed the exclusive right to use players' names and statistics to Major League Baseball Advanced Media, L.P. ("Advanced Media") for use in a competitive fantasy baseball product. Advanced Media then objected to CBC's use of the names of major league baseball players as part of its fantasy baseball games, and CBC sued Advanced Media for a declaratory judgment and an injunction preventing it from interfering with CBC's fantasy sports business. The MLBPA intervened, and it and Advanced Media counterclaimed, alleging that CBC's continuing provision of fantasy baseball products (1) violated baseball players' rights of publicity, and (2) breached the earlier, but now-terminated, license agreement between the MLBPA and CBC. Both sides moved for summary judgment.

The District Court ruled in CBC's favor, holding that (1) the MLBPA and Advanced Media failed to state a claim for violation of the right of publicity under Missouri law and, even if they had,

the First Amendment barred recovery, and (2) there was no breach of contract. *See C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077 (E.D. Mo. 2006). The MLBPA and Advanced Media appealed. The Eighth Circuit affirmed the District Court's First Amendment and contract holdings. (The Eighth Circuit reversed the District Court's finding that the MLBPA and Advanced Media had failed to state a claim for a right of publicity violation under Missouri law.) This article focuses on the Courts' First Amendment analysis.

Under Missouri law, a plaintiff must establish the following to prevail on a right of publicity claim: (1) defendant used plaintiff's name as a symbol of his identity, (2) without consent, and (3) with the intent to obtain a commercial advantage. *C.B.C.*, 505 F.3d at 822. The Eighth Circuit first found that CBC's use of the players' satisfied that test. *Id.* at 822-23. But it then held that CBC's First Amendment rights trumped the MLBPA's and Advanced Media's state law right of publicity claims. The Court noted that "the information used in CBC's fantasy baseball games is all readily available in the public domain, and it would be strange law that a person would not have a first amendment right to use information that is available to everyone." *C.B.C.*, 505 F.3d at 823. In using information such as player statistics and biographical data in its fantasy baseball products, CBC was engaging in interactive speech entitled to First

*Continued on page 18*