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# major league baseball swings and misses: the first amendment protects unlicensed

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Over the last few years, interest in online "fantasy" sports games has grown from the curiosity of a few fanatics into the obsession of millions. To play fantasy baseball, participants form "teams" by "drafting" players from various Major League Baseball clubs prior to the start of the season. The success of any particular fantasy team depends on the drafted players' actual performances on their respective Major League teams.

The operation of fantasy sports leagues over the Internet has become big business. Participants often pay fees to website operators to play the fantasy games (although advertising revenue supports some fantasy games). Traditionally, players' associations have sought to license for a fee the use of player names and statistics to operators of commercial fantasy sports games. The revenue to players from these licenses results from their allowing fantasy operators to use what is freely available to the public - sports statistics. A recent decision by the United States District Court for the Eastern District of Missouri, however, calls into question the continuing viability of these revenues.

In *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, \_\_ F. Supp. 2d \_\_, 2006 WL 2263993 (E.D. Mo. August 08, 2006), the Plaintiff ("CBC") had offered a variety of licensed fantasy sports products via telephone, mail, e-mail, and through its Internet website for several years. In 2005, however, Major League Baseball Advanced Media ("Advanced Media"), operating under a license from the Major League Baseball Players' Association, decided to promote its own fantasy games instead. Advanced Media refused to grant CBC a license to use baseball players' names and statistics for the upcoming season.

Denied a license, CBC filed a declaratory relief action seeking to stop Advanced Media from interfering with CBC's fantasy sports business. In response, Advanced Media and the Players' Association claimed that CBC's unlicensed

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commercial exploitation of the player names and playing records in its fantasy baseball games violated the players' right of publicity. On August 8, 2006, the Court rejected this claim, determining that CBC's unlicensed fantasy baseball games did not violate the players' rights of publicity. The Court reasoned that CBC's use of the players' names and playing records (1) did not appropriate any symbol of the players' identities; (2) was not intended to obtain a commercial advantage; and (3) did not contravene the policy behind the right of publicity. The Court also held that, even if CBC's unlicensed fantasy games did violate the players' right of publicity, "the players' right of publicity must give way to CBC's First Amendment right to freedom of expression." The Court granted summary judgment in favor of CBC, enjoining Advanced Media and the Players' Association from "interfering with CBC's using players' names and playing records on its website and in its fantasy baseball games in the manner presented in this case."

Has Major League Baseball killed the golden goose? Although it undoubtedly will be reviewed on appeal, the decision as it currently stands places in jeopardy the revenue of all future fantasy sports licensing. From a legal perspective, the decision also serves as an illustration of the always complex intersection between the intellectual property laws and the First Amendment.