

YOU CAN HAVE YOUR GAME BUT YOU CAN'T ADVERTISE IT, TOO: FANTASY SPORTS AND THE RIGHT OF PUBLICITY

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INTRODUCTION

When Pierre Garçon and his attorneys brought suit against FanDuel in October of 2015, the complaint alleged that FanDuel violated his and other National Football League (“NFL”) offensive skill players’ rights of publicity through the use of their names, likenesses, images, statistics, and biographical information in the production and advertising of its daily fantasy games.¹ By January of 2016, Garçon had settled with FanDuel,² and FanDuel had entered into a licensing agreement with the National Football League Players Association (“NFLPA”), through its group licensing agent the National Football League Players, Inc. (“NFLPI”), “that allow[ed] for active NFL players to participate in FanDuel’s product marketing and promotions.”³

As a result, both major daily fantasy sports (“DFS”) platforms are paying for the use of NFL players’ identities in the context of in-product promotions and advertising,⁴ though the law is not clear whether licenses would be required and traditional fantasy sports (“TFS”) platforms enjoy protection for their products under the First Amendment.⁵ It would seem that all is settled with athletes, their respective player associations, and fantasy sports; yet, the logical end of the group licensing regime is baffling from a legal standpoint: DFS platforms have obtained a

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¹ Pierre GARCON, Individually and on behalf of all those similarly situated, Plaintiff, v. FANDUEL INC., Defendant., 2015 WL 6565995 (D.Md.)

² Docket Ent. 20, GARCON V. FANDUEL INC., 8:15CV03324.

³ *FanDuel Joins Surging Roster of NFLPA Licensees*, NFLPA, (Jan. 22, 2016), <https://www.nflpa.com/players/news/fanduel-joins-surging-roster-of-nflpa-licensees>

⁴ *See id.*; Kristi Dosh, *NFL Players Association Inks Licensing Deal with DraftKings*, Forbes. (Sept. 29, 2016).

⁵ *See e.g., C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 821 (8th Cir. 2007).

license for utilizing athletes' names, likenesses, images, statistics, and biographical information for the purposes of in-game promotions or external advertising but not for use in the games themselves.⁶

THE HISTORICAL DEVELOPMENT OF ATHLETES' RIGHTS OF PUBLICITY

The first formalization of the right of publicity was in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, when a producer of baseball cards packaged with chewing gum, Haelan Labs, sued its competitor, Topps, for doing the same.⁷ Haelan Labs alleged that Topps had infringed upon the exclusive contracts it had procured with baseball players for the use of their photographs.⁸ Topps argued that the right to one's photograph, image, or likeness was personal and thus non-transferrable.⁹ The court rejected that argument, reasoning that the athletes and celebrities, who had been paid for the use of their identities in conjunction with products, would "feel sorely deprived" should they no longer be permitted to profit from their identities.¹⁰ Though the decision was the first of a long line of cases in the right of publicity doctrine, the justification for formalizing the right was much broader than the potential consumer confusion unauthorized endorsements could create in advertising.¹¹ The court in *Haelan* suggests that the right of publicity is not justified solely on a consumer protection basis but also because the commercial value of an athlete's identity is only valuable insofar as the use of it can be restricted by its owner.¹²

⁶ Supra, n.3-4.

⁷ 202 F.2d 866 (2d Cir. 1953), *cert. denied*, 346 U.S. 816 (1953).

⁸ *Id.*

⁹ *Id.* at 869.

¹⁰ *Id.* at 868.

¹¹ Richard A. Posner, "The Right of Privacy," 12 Ga. L. Rev. 393, 412 (1977).

¹² *Haelan*, 202 F.2d at 869; *see also* Posner, supra n.10 at 411-13 (stating the misrepresentation justification for assigning a right of identity to a person is that the multiple uses of an identity "to advertise different products would reduce its advertising value, perhaps to zero.")

Though an athlete could restrict the commercial use of his image after *Haelan*, the court failed to instruct on whether that right extended to statistics or biographical information because the baseball cards at issue before the court contained only images, unlike the baseball cards of today.¹³ That very question was before the court in *Palmer v. Schonhorn Enterprises, Inc.*, which involved a golf board game that included the names and biographical information of real-world professional golfers.¹⁴ Although the game maker conceded its use of the professional golfers increased the marketability of the game, it argued that the use of “readily obtainable public data” did not violate the golfers’ right of privacy.¹⁵ The court rejected that argument and held that the use of “[biographical] data for the purpose of capitalizing upon the name by using it in connection with a commercial project other than the dissemination of news or articles or biographies” does violate an athlete’s right of publicity, even if the information is publicly available.¹⁶

Shortly after *Palmer*, athletes challenged the use of their statistics in a game in *Uhlaender v. Henricksen*.¹⁷ The game, which could be played solitaire or with up to twenty friends, was won or lost based on its players’ ability to coach and strategically manage the players.¹⁸ The game maker argued that because the information was in the public domain, the baseball players had waived their right to relief.¹⁹ The court rejected that argument, stating that:

A name is commercially valuable as an endorsement of a product or for use for financial gain only because the public recognizes it and attributes good will and feats of skill or accomplishments of one sort or another to that personality. To

¹³ J. Gordon Hylton, *Baseball Cards and the Birth of the Right of Publicity: The Curious Case of Haelan Laboratories v. Topps Chewing Gum*, 12 Marq. Sports L. Rev. 273, 283 n.58 (2001).

¹⁴ 96 N.J. Super. 72, 74, 232 A.2d 458, 459 (Ch. Div. 1967)

¹⁵ *Id.* at 76, 460.

¹⁶ *Id.*

¹⁷ 316 F. Supp. 1277 (D. Minn. 1970).

¹⁸ *Id.* at 1278.

¹⁹ *Id.* at 1283.

hold that such publicity destroys a right to sue for appropriation of a name or likeness would negate any and all causes of action, for only by disclosure and public acceptance does the name of a celebrity have any value at all to make its unauthorized use enjoined.²⁰

Like the court in *Palmer*, the court in *Uhlaender* found the natural rights justification of the right of publicity persuasive.²¹

BALANCING RIGHTS: THE FIRST AMENDMENT AND PUBLICITY

The right of publicity, once established, must be balanced against the First Amendment.²²

The First Amendment outweighs an athlete's right of publicity when a news or educational source uses the athlete's identity for the purposes of informing the public about an event or occurrence within the public interest.²³ In *Gionfriddo*, athletes alleged that Major League Baseball ("MLB") included their names and statistics on programs for the World Series and All-Star games, its websites, without authorization, in violation of their rights of publicity.²⁴ The court held that the use of the names and statistics was protected by the First Amendment because MLB was providing the historical statistics as a reference point to compare with current players and to promote the public's interest in baseball.²⁵

Further, the First Amendment also extends to the use of a previously published newsworthy subject in advertising for the product itself, without consent, even where the

²⁰ *Id.*

²¹ *See id.*; *Palmer*, 96 N.J. Super. at 79, 232 A.2d at 462 (stating "[p]erhaps the basic and underlying theory [of the right of publicity] is that a person has the right to enjoy the fruits of his own industry free from unjustified interference.")

²² *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 406, 114 Cal. Rptr. 2d 307, 311 (2001).

²³ *See id.*

²⁴ *Id.* 94 Cal. App. 4th at 406, 114 Cal. Rptr. 2d at 311.

²⁵ *Id.*

advertisement's purpose is not informative.²⁶ When Joe Montana sued the San Jose Mercury News for printing a photo of their newspaper containing a story about him on a poster to be used to advertise the newspaper, the court held that the newspaper's production of the poster was protected by the First Amendment.²⁷ The court reasoned that the newspaper was not implying that Montana endorsed its newspaper and the purpose of the reproduction was to show the quality and content of the newspaper.²⁸

ATHLETES' RIGHTS OF PUBLICITY AS APPLIED IN FANTASY SPORTS

Friends and colleagues have been playing some form of traditional fantasy baseball since at least 1980.²⁹ By the early 1990s, fantasy games in baseball and other sports were starting to catch on, though were limited in popularity because of the work it took to calculate scores.³⁰ When Internet-based fantasy sports platforms started to provide a more efficient score keeping method, participation in fantasy sports saw phenomenal growth.³¹ Starting in 1995 and lasting for more or less a decade, Internet-based fantasy sports platforms purchased licenses for the use of professional athletes' names and statistics from their respective licensing agents and/or players' associations.³²

²⁶ See *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 796, 40 Cal. Rptr. 2d 639, 642 (1995), as modified (May 30, 1995); see also *Booth v. Curtis Publishing Company*, 15 A.D.2d 343, 223 N.Y.S.2d 737, 738–739 (1962).

²⁷ *Montana*, 34 Cal. App. 4th at 797, 40 Cal. Rptr. 2d at 643.

²⁸ *Id.*

²⁹ Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates Its New National Pastime*, 3 Harv. J. Sports & Ent. L. 1, 7 (2012).

³⁰ *Id.* at 9-10.

³¹ *Id.* at 10.

³² See e.g. *C.B.C.*, 505 F.3d at 821 (noting CBC had licensed the use of MLB players' names and statistics from the players' association from 1995 until 2004); *CBS Interactive Inc. v. Nat'l Football League Players Ass'n, Inc.*, 259 F.R.D. 398, 403 (D. Minn. 2009) (noting the last license for use of NFL players' names and statistics expired in 2008).

One Internet-based fantasy sports platform, Gridiron.com Inc. (“Gridiron”), sought and obtained licenses from individual NFL players for the use of their images in its fantasy sports products and for advertising those products.³³ The NFLPA and its group licensing counterpart, the NFLPI, sent a cease and desist letter to Gridiron stating that the website had violated its Group Licensing Assignment (GLA) with the players, which requires those seeking to use the identities of six or more players to obtain a license through the NFLPI.³⁴ Gridiron filed a declaratory judgment and argued, among other things, that its fantasy sports platform was protected by the First Amendment and thus it outweighed the players’ rights of publicity.³⁵ The court was not persuaded by Gridiron’s arguments and held that Gridiron had violated the GLA and its products were not protected by the First Amendment.³⁶ The court reasoned that Gridiron’s licenses with the players to use their identities performed functions that were “way beyond merely conveying the news” and that Gridiron saw its competition as other Internet fantasy sports providers and not news sources.³⁷

However, the same argument was more persuasive under Missouri’s right of publicity law.³⁸ Like Gridiron, fantasy sports platform C.B.C. Distribution and Marketing, Inc. (“CBC”) secured a license for the use of player identities in its fantasy products, except that CBC utilized the appropriate group licensing channel.³⁹ CBC did not renew its license with the MLB players’

³³ *Gridiron.com, Inc. v. Nat'l Football League Player's Ass'n, Inc.*, 106 F. Supp. 2d 1309, 1311 (S.D. Fla. 2000).

³⁴ *Id.*

³⁵ *Id.* at 1315.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Though it was not bound by Missouri’s right of publicity law, a federal district court in Minnesota followed the Eighth Circuit’s ruling. *CBS*, 259 F.R.D. at 417.

³⁹ *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1080 (E.D. Mo. 2006) *aff'd*, 505 F.3d 818 (8th Cir. 2007).

association after it expired in 2004 when it found that Advanced Media, L.P.⁴⁰ was using players' names and statistics in a similar manner without a license.⁴¹ The fantasy sports platform based in St. Louis obtained a declaratory judgment that its platforms were protected by the First Amendment.⁴² On appeal, the Eighth Circuit affirmed the district court and held that the First Amendment protections of the platform outweighed the athletes' rights of publicity under Missouri law.⁴³ The court reasoned that the use of athletes' identities on the fantasy sports platforms were in the public domain and a response to the public interest in the statistics of professional athletes.⁴⁴ The court also concluded that there was not "any danger . . . that consumers will be misled, because the fantasy baseball games depend on the inclusion of all players and thus cannot create a false impression that some particular player with 'star power' is endorsing CBC's products."⁴⁵

Courts have not yet opined on whether DFS platforms enjoy the same First Amendment rights as TFS platforms; however, it would be difficult for a court to find against a DFS platform and convincingly distinguish the *C.B.C.* decision.⁴⁶ Nevertheless, both major DFS platforms have obtained group licenses from the NFLPA.⁴⁷ Assuming these decisions to obtain licenses reflect a possible legal right of publicity for the use of athlete identities in advertising daily

⁴⁰ *Id.* (noting that Advanced Media, L.P., was formed "in 2000 by various owners of Major League Baseball teams to serve as the interactive media and internet arm of Major League Baseball.")

⁴¹ *Id.*

⁴² *Id.*

⁴³ *C.B.C.*, 505 F.3d at 822.

⁴⁴ *Id.* The court further commented that the athletes were already paid well for their participation in games and sponsorships and needed no additional incentive to create the statistics. *Id.*

⁴⁵ *Id.* at 824.

⁴⁶ *See CBS*, 259 F.R.D. at 403 (following the Eighth Circuit's opinion in *C.B.C.*)

⁴⁷ *See supra*, n.3-4.

fantasy sports products,⁴⁸ then how the use athletes' identities by DFS platforms is different than the use by TFS platforms is a major question.

In distinguishing DFS from TFS, a court may consider whether the platforms' products serve different purposes or whether the use of athletes' identities is greater than necessary to inform the public about the newsworthy subject. As such, one could argue DFS platforms sell a fundamentally distinct product from TFS games, serving a different purpose and utilizing athlete identities in different ways. As for the purpose of the use of athletes' identities, whereas DFS platforms have created an entirely new game, TFS platforms are a supplement to fantasy games already being played by the public. Further, DFS platforms are geared towards players interested in winning large sums of money on a short term basis, whereas TFS platforms merely simply provide a more convenient way to keep score of and manage the game over the course of a season. As for the use of athlete identities, DFS platforms utilize the players' identities in a considerable amount of advertising on television, whereas TFS platforms advertising is non-existent outside of the Internet. Further, unlike TFS platforms which do not charge many fees and adhere in large part to previously utilized rules, DFS platforms require users to pay an upfront fee to play and require the user to draft players at the price the platform sets without exceeding a certain "salary cap." Therefore, the use of athletes' identities by DFS platforms is afforded less protection under the First Amendment than TFS platforms.

However, the similarities between the types of platforms are greater than they're differences: both platforms provide games that allow fantasy sports players to draft players and

⁴⁸ DFS platforms' decisions to obtain licensing agreements for the use of players' identities in their products may be more indicative of the bigger legal issues DFS platforms are facing today regarding the legality of their products under state gambling laws; however, if the preceding *C.B.C.* and *Montana* cases were dispositive of the issue, then a motion to dismiss for failure to state a claim in Garçon's lawsuit could have ended the suit arguably as quickly as a settlement.

compete with others based on those players' real-world statistical performances. In a sense, both platforms are responding to the demand of fans to have greater participation in professional sports. As for the difference between advertising methods, holding DFS platforms accountable would contradict well-settled case law, which instructs that advertising a product containing a previously published newsworthy subject is protected by the First Amendment.⁴⁹ Further, setting the fantasy value of players themselves in the games is even more indicative of requiring First Amendment protection as requiring licenses for the use of players' identities may allow players to censor DFS platforms' valuation of them, which is critical to the functionality of their platforms and may foreclose the speech all together.⁵⁰

CONCLUSION

The group licensing regime in the context of DFS signals that an athlete's right of publicity is hanging in the balance. If the licenses obtained by DFS platforms are any indication of a trend in the right to publicity doctrine to protect athletes' identities in the sole context of advertising or promoting products, then a major scaling back of the right of publicity has occurred. Further, if the subtle differences in DFS platforms from TFS platforms tip the balance in favor of athletes' right of publicity, then the current licenses may be incomplete where they refer only to use in the context of advertising or in-game promotions. Nevertheless, because fantasy sports platforms are both informative sources for their users and engaged in selling fantasy games, courts are left with the difficult task of balancing each right against the other. Currently, that balance is settled through group licensing. That is, until it isn't.

⁴⁹ *Montana*, 34 Cal. App. 4th at 797, 40 Cal. Rptr, 2d at 643.

⁵⁰ If requiring a license may prevent the speech all together, then the First Amendment is implicated. *See e.g., Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996) (holding that baseball cards containing parodies of baseball players were granted heightened protection because they poked fun at the players whose identities they were utilizing and requiring a license may have prevented the speech in the cards altogether.)