

# The Debate Regarding Fantasy Sport Leagues Rages On: CBSI Sues The NFLPA

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Fantasy sports products, spurred by the Internet and mobile devices, have enjoyed exponential growth in the last decade. Today, more than 27 million people participate in fantasy sports leagues in the United States and annual revenue for the industry approximates \$1 billion.<sup>1</sup> Such explosive growth has brought with it disputes over the rights to player statistics and profiles.

In the latest battle, CBS Interactive ("CBSI") sued the NFL Players Association ("NFLPA") in Minnesota federal court on September 3, 2008 alleging, among other things, that the NFLPA monopolized – or at least tried to monopolize – the fantasy football market by compelling CBSI to purchase a license to use NFL player statistics for CBSI's fantasy sports products. CBSI seeks a declaration that the NFLPA's conduct violates the Sherman Act and that CBSI's business does not violate any player publicity rights that the NFLPA may own or control.

Less than a week after CBSI filed suit, the National Football League Players Incorporated ("NFLPI") filed a countersuit in the United States District Court for the Southern District of Florida<sup>2</sup> claiming that CBSI's unauthorized use of player "names, images, likenesses, photographs, statistics and biographical information" in connection with its fantasy football games, violates NFL players' publicity rights, which are exclusively licensed by the NFLPI. The NFLPI seeks damages, an injunction preventing CBSI from using the disputed items in connection with its fantasy football business, and a declaration that it is not violating the Sherman Act.

The Minnesota and Florida actions are the latest lawsuits involving the rights to player profiles and statistics. What differentiates these litigations from prior ones, however, is the antitrust component.

## Background: The MLB Litigation

From 1995 through late 2004, C.B.C. Distribution and Marketing, Inc. ("CBC") licensed from the Major League Baseball Players Association ("MLBPA") the right to use the names and statistics of major league baseball players in connection with CBC's fantasy baseball league. In 2005, after CBC's license agreement expired, the MLBPA licensed to Major League Baseball Advanced Media, L.P. ("Advanced Media") the exclusive right to the players' names and performance information

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in connection with all interactive media. Under that agreement, Advanced Media began providing fantasy baseball games on its website, MLB.com.

After executing this exclusive license, Advanced Media elected not to renew CBC's license to offer its own fantasy baseball products. CBC – claiming that it had a reasonable apprehension it would be sued by Advanced Media if it continued to offer its unlicensed fantasy products – sued Advanced Media in federal district court in Missouri for a declaration that CBC was not infringing the players' rights of publicity. The district court granted CBC summary judgment, holding that CBC did not use the players' names as symbols of their identities and with an intent to obtain a commercial advantage, as is required under Missouri law. The district court also held that even if CBC were infringing the players' publicity rights, the First Amendment preempted those rights.

On appeal, the Eighth Circuit rejected the district court's principal analysis,<sup>3</sup> but still affirmed the outcome, holding that the First Amendment superseded the players' publicity rights. In so holding, the court emphasized that the information CBC used was in the public domain, that fantasy games are protected entertainment speech, and that "it would be strange law that a person would not have a [F]irst [A]mendment right to use information that is available to everyone." The court also reasoned that CBC's use of the players' names and performance data would in no way diminish the players' economic incentives to play professional sports or hinder their ability to earn lucrative endorsement deals. Advanced Media appealed the Eighth Circuit's decision to the United States Supreme Court, which denied certiorari.

Although the Eighth Circuit's ruling and the Supreme Court's refusal to hear the appeal arguably provided some clarity on the rights of fantasy leagues to use player names and performance information, the NFLPI claims in its Florida action that the ruling in the CBC case does not apply to its dispute with CBSI. Specifically, the NFLPI notes that the CBC holding is not binding on the Florida district court and that the NFLPA's amicus brief in the CBC case "did not make it a party to that action."<sup>4</sup> The NFLPI also contends that the Eighth Circuit's ruling was "unique and erroneous" and that the Supreme Court's denial of certiorari "has no precedential effect."<sup>5</sup>

## The Current Dispute: Fantasy Football

During oral argument before the Eighth Circuit on the CBC case, Chief Judge Judge Loken suggested that Advanced Media may have engaged in anticompetitive activity, stating:

If your clients have the exclusive rights to license the purveyors of the billion and a half [dollar a year] fantasy sports world, we're looking at concerted action by owners and players to monopolize a collateral market through conduct that's not protected by the labor anti-trust exemption.

Although antitrust issues were not before the Eighth Circuit at that time, Judge Loken's statement was – it seems – an invitation for another party to raise such claims in the next fantasy sports legal dispute. Just 15 months later, CBSI took up that invitation, bringing suit against the NFLPA claiming, *inter alia*, violations of the Sherman Act based on the NFLPA's alleged efforts to extract nationwide monopoly royalty fees for CBSI's use of NFL player statistics.

The background of the parties' dispute is straightforward. CBSI – which does business under the domain name "CBSSports.com" – refused to pay the NFLPA nationwide license fees for CBSI's use of NFL player names and statistics; the NFLPA, in turn, threatened suit. But before the NFLPA could make good on that threat, CBSI initiated its own action in a Minnesota federal district court. CBSI's complaint sets forth four claims, three of which seek declarations regarding the publicity rights that the NFLPA has asserted (*i.e.*, that those rights are preempted by the First Amendment and federal copyright law and that CBSI has not violated whatever rights the NFLPA may have).<sup>6</sup> The fourth claim alleges that the NFLPA monopolized and/or attempted to monopolize the market for "[t]he creation and maintenance of NFL fantasy football games, and the provision of related information services" in the United States (the "NFL Fantasy Football Market").<sup>7</sup>

CBSI's monopolization claim raises issues that do not appear to have been squarely addressed by any federal court. CBSI claims that the NFLPA wrongfully "seeks to extract monopoly profits from the entire industry by charging licensing fees for the use of publicly available information [*i.e.*, the names and statistics of NFL players] and . . . threatening objectively baseless litigation against businesses that do not succumb to its demands."<sup>8</sup> CBSI also alleges that the NFLPA threatened to exclude CBSI from the NFL Fantasy Football Market – which, CBSI claims, and the NFLPA denies, is the relevant market – if CBSI "challenged [the NFLPA's] asserted intellectual property rights."<sup>9</sup> According to CBSI, this alleged misconduct has resulted in either monopolization of the NFL Fantasy Football Market or "a dangerous probability" that the NFLPA will "achiev[e] monopoly power" in that

market.<sup>10</sup>

The NFLPA denies that there has been any anticompetitive activity and has moved to dismiss CBSI's monopolization claim. That motion raises several grounds for dismissal – including the court's alleged lack of personal jurisdiction over an indispensable party and CBSI's failure to meet the heightened *Twombly* pleading standards.<sup>11</sup> But the NFLPA's principal substantive argument is that, under the *Noerr-Pennington* Doctrine, it has rights under the First Amendment that render it immune from antitrust liability because of the NFLPA's "objectively reasonable efforts to litigate intellectual property rights, and attendant efforts leading up to such litigation."<sup>12</sup> More particularly, the NFLPA claims it is shielded from antitrust liability because it had a reasonable belief that it could prevail in a suit against CBSI.

## Conclusion

Seemingly emboldened by CBC's legal triumph, CBSI is employing the sports adage that the best defense is a good offense. Having scored a victory regarding player's publicity rights, purveyors of fantasy sports products now seek to use antitrust law to chip away at rights claimed by professional sports leagues and players' associations. But given the procedural posture of these cases and the large sums of money involved, it is evident that we are only in the early innings of a protracted battle.

<sup>1</sup> Ben Klayman, at Technology Spurs Growth of Fantasy Sports in U.S., *REUTERS*, (Sept. 25, 2008), <http://www.reuters.com/article/sportsNews/idUSTRE48C002L20080925>.

<sup>2</sup> The NFLPI claims that venue is proper in the Southern District of Florida based on, among other things, CBSSports.com's headquarters being based in Ft. Lauderdale, Florida. See complaint filed in NFLPI v. CBSI, No. 08-22504-civ ("Florida Complaint") at ¶ 5.

<sup>3</sup> The Eighth Circuit ruled that CBC's use of names alone was sufficient to establish players' identity under Missouri law and that since CBC used the names for purposes of profit, it was using the identities for commercial advantage. 505 F.3d 818 (8th Cir. 2007), cert. denied, 2008 WL 512723 (Jun. 2, 2008).

<sup>4</sup> Florida Complaint at ¶ 67.

<sup>5</sup> *Id.*

<sup>6</sup> CBSI has moved for partial summary judgment on its publicity rights claim asserting First Amendment preemption, which the NFLPA has opposed. The NFLPA has also brought several motions, including ones to transfer venue to Florida, for lack of personal jurisdiction, and to dismiss CBSI's antitrust claim. Those motions were scheduled to be argued on January 28, 2009.

<sup>7</sup> See complaint filed in CBSI v. NFLPA, No. 08-cv-5097 (D. Minn.) ("Minnesota Complaint") at ¶¶ 31-32.

<sup>8</sup> *Id.* at ¶ 33.

<sup>9</sup> *Id.* at ¶ 34.

<sup>10</sup> *Id.* at ¶ 40.

<sup>11</sup> NFLPA's Memorandum of Law in Support of Motion to Dismiss at 33-38. The NFLPA argues that because CBSI failed to properly plead a relevant market, the monopolization claim must be dismissed: "CBS Interactive has not alleged any facts to explain why other fantasy sports games – including the other fantasy sports games offered by CBS Interactive (e.g., baseball, basketball, college sports, etc.) – do not compete in the same relevant market with NFL fantasy football games." *Id.* at 37.

<sup>12</sup> *Id.*