

Nos. 06-3357, 06-3358

**United States Court of Appeals  
for the Eighth Circuit**

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C.B.C. DISTRIBUTION AND MARKETING, INC.

*Plaintiff-Counterdefendant-Appellee,*

v.

MAJOR LEAGUE BASEBALL ADVANCED MEDIA, L.P.,

*Defendant-Counterclaimant-Appellant,*

THE MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,

*Intervenor-Counterclaimant-Appellant.*

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**On Appeal from the United States District Court for the  
Eastern District of Missouri, No. 4:05-CV-00252-MLM  
Mary Ann L. Medler, Judge Presiding**

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**BRIEF OF AMICI CURIAE NBA PROPERTIES, INC., NHL ENTERPRISES, L.P., NFL  
VENTURES, L.P., NATIONAL ASSOCIATION FOR STOCK CAR AUTO RACING,  
INC., PGA TOUR, INC., AND WNBA ENTERPRISES, LLC, IN SUPPORT OF  
REHEARING AND REHEARING *EN BANC***

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**TABLE OF CONTENTS**

	<i><b>Page</b></i>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF INTEREST .....	1
ARGUMENT .....	4
I. THE PANEL MISUNDERSTOOD THE NATURE OF COMMON CONTRACTUAL AGREEMENTS BETWEEN INTELLECTUAL PROPERTY LICENSORS AND LICENSEES .....	4
II. THE PANEL MISAPPREHENDED THE NATURE OF THE PLAYERS’ RIGHT OF PUBLICITY AND THE APPROPRIATE BALANCE BETWEEN THAT RIGHT AND THE FIRST AMENDMENT.....	7
CONCLUSION .....	14

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Abdul-Jabbar v. General Motors Corp.</i> , 85 F.3d 407 (9th Cir. 1996).....	9
<i>Ali v. Playgirl</i> , 447 F. Supp. 723 (S.D.N.Y. 1978) .....	9
<i>Cardtoons, L.C. v. Major League Baseball Players Ass 'n</i> , 95 F.3d 959 (10th Cir. 1996) .....	7
<i>Carson v. Here's Johnny Portable Toilets, Inc.</i> , 698 F.2d 831 (6th Cir. 1983) .....	9
<i>Comedy III Prods., Inc. v. Gary Saderup, Inc.</i> , 25 Cal. 4th 387 (2001).....	11
<i>Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.</i> , 600 F.2d 1184 (5th Cir. 1979).....	10
<i>Doe v. TCI Cablevision</i> , 110 S.W.3d 363 (Mo. 2003).....	10, 11, 12
<i>Grant v. Esquire, Inc.</i> , 367 F. Supp. 876 (S.D.N.Y. 1973).....	8, 9, 10
<i>Henley v. Dillard Department Stores</i> , 46 F. Supp. 2d 587 (N.D. Tex. 1999).....	9
<i>Midler v. Ford Motor Co.</i> , 849 F.2d 460 (9th Cir. 1988) .....	11
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964) .....	10
<i>Onassis v. Christian Dior-N.Y., Inc.</i> , 122 Misc. 2d 603 (N.Y. Sup. Ct. 1984).....	8
<i>Palmer v. Schonhorn Enterprises, Inc.</i> , 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967) .....	13
<i>Paragould Cablevision v. City of Paragould</i> , 930 F.2d 1310 (8th Cir. 1991).....	6
<i>Rosemont Enterprises, Inc. v. Urban Systems, Inc.</i> , 72 Misc. 2d 788 (N.Y. Sup. Ct.), <i>injunction modified and judgment aff'd</i> , 42 A.D. 2d 544 (N.Y. App. Div. 1973) .....	13
<i>Saturday Evening Post Co. v. Rumbleseat Press, Inc.</i> , 816 F.2d 1191 (7th Cir. 1987) .....	5
<i>Uhlaender v. Henricksen</i> , 316 F. Supp. 1277 (D. Minn. 1970).....	13

*United States v. Eichman*, 496 U.S. 310 (1990)..... 10  
*Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) ..... 12

**Other Authorities**

Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of  
Publicity-Free Speech Interface*, 23 Loy. L.A. Ent. L. Rev. 471 (2003) ..... 11  
Restatement (Third) of Unfair Competition (1995) ..... 7

Amici curiae NBA Properties, Inc., NHL Enterprises, L.P., NFL Ventures, L.P., National Association for Stock Car Auto Racing, Inc., PGA TOUR, Inc., and WNBA Enterprises, LLC (collectively “Amici”), submit this brief in support of appellants’ petitions for rehearing and rehearing *en banc*. This Court’s October 16, 2007 decision, 2007 WL 2990366 (8th Cir. Oct. 16, 2007), permits appellee C.B.C. Distribution and Marketing, Inc. (“CBC”), a producer and seller of fantasy baseball games, to use player identities in those games without the players’ consent, in breach of the “non-use” and “no-contest” provisions in CBC’s expired licensing agreement. The decision, which misapprehends the nature of common contractual licensing provisions and misapplies the proper balance between the right of publicity and the First Amendment, has implications far beyond the immediate holding. As professional sports organizations that possess valuable intellectual property rights similar in many ways to those at issue here and that have negotiated similar non-use and no-contest provisions in their licensing agreements, Amici have a substantial interest in ensuring that the Court’s decision is reconsidered and reversed.

### **STATEMENT OF INTEREST**

Each Amicus is the exclusive licensor of the intellectual property rights of a major professional sports organization that is engaged in the core business of producing and marketing an entertainment product based on competitive

professional sporting events involving professional athletes. To capitalize and expand upon this core business, each Amicus has developed an extensive program for licensing its intellectual property in association with a large array of goods and services, including fantasy sports games, apparel, trading cards, commemorative memorabilia, albums, stickers, books, publications, posters, video recordings, video games, CD ROMs, prepaid telephone calling cards, on-line information, interactive games, arcade games, toys, sporting goods, school supplies, and home furnishings. The commercial exploitation of Amici's intellectual property is an exceptionally important means of building brand awareness and creating revenue for each Amicus and its respective sports organization. Officially licensed sports-themed products and services, including those products and services licensed by Amici, generate billions of dollars in retail sales each year.

To protect the value of Amici's intellectual property rights, Amici typically negotiate license agreements pursuant to which licensees agree that (i) Amici own the rights to the intellectual property being licensed, (ii) the licensees will not use the rights being licensed except as provided in the agreement, and (iii) the licensees will not challenge Amici's ownership of the rights. These ownership, non-use and no-contest provisions are part of the bargained-for exchange of rights and obligations between Amici and their respective licensees, and are extremely valuable and important. These provisions serve to promote harmony and stability

in the licensing relationship between Amici and their licensees and to reduce or eliminate the possibility of disputes between them over the ownership of the licensed intellectual property. These provisions define the rights of the parties to the license agreement and ensure that licensees understand and bind themselves to respect the limits of the uses for which Amici have licensed their intellectual property.

Prior to the decisions of this Court and the court below, Amici had every reasonable expectation that these provisions, routinely upheld by appellate courts in the copyright and trademark context, would continue to be enforced and Amici's valuable rights protected. This Court's decision places those expectations in doubt. Although neither the parties nor the Amici had briefed or argued the issue, a majority of the panel erroneously concluded *sua sponte* that the provision of the licensing agreement in which the parties expressly *agreed* that appellant Major League Baseball Players Association ("MLBPA") was the exclusive holder of all right, title and interest in the players' identities constituted a material contractual warranty by MLBPA, the alleged breach of which relieved CBC of its obligation to comply with the non-use and no-contest provisions. Moreover, the Court incorrectly held that the First Amendment permits an entrepreneur to exploit others' identities without consent and for commercial advantage if it can show that the in-

dividuals whose identities are exploited no longer need their publicity rights to earn a living.

The panel's decision threatens (i) to undermine the validity and enforceability of the non-use and no-contest provisions in the scores of intellectual property license agreements into which Amici have entered and (ii) to eradicate the right of publicity for anyone who has achieved sufficient fame to make the right worth protecting. Accordingly, Amici urge the Court to grant the petitions for rehearing or rehearing *en banc*, and to reverse the panel's October 16, 2007 decision.

### ARGUMENT

#### **I. THE PANEL MISUNDERSTOOD THE NATURE OF COMMON CONTRACTUAL AGREEMENTS BETWEEN INTELLECTUAL PROPERTY LICENSORS AND LICENSEES.**

As an integral part of the bundle of rights it obtained and obligations it assumed in its 2002 License Agreement, CBC expressly *agreed* that (i) MLBPA was the sole and exclusive holder of the players' publicity rights, (ii) CBC would not use the players' identities after the expiration or termination of the agreement, and (iii) CBC would not contest MLBPA's ownership rights in the players' identities. Intellectual property licensees routinely acknowledge the licensor's ownership rights in the licensed intellectual property, and agree to refrain from using the licensed intellectual property after the expiration or termination of the license agreement and from challenging the licensor's ownership of the licensed rights.

Such agreements are commonplace, and each of the Amici has negotiated license agreements relating to its own intellectual property that include similar provisions.

As Judge Posner explained in *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191 (7th Cir. 1987), these provisions serve valid and useful purposes.

Without [such provisions] the licensee always has a club over the licensor's head: the threat that if there is a dispute the licensee will challenge the [intellectual property's] validity. The threat would discourage [intellectual property] licensing and might therefore retard rather than promote the diffusion of . . . works [containing such property]. Also, a no-contest clause might actually accelerate rather than retard challenges to invalid [intellectual property], by making the would-be licensee think hard about validity before rather than after he signed the licensing agreement.

*Id.* at 1200. Thus, ownership, non-use and no-contest agreements – and their enforceability – are critical to Amici's intellectual property licensing efforts.

The majority rejected or declined to reach CBC's arguments relating to the unenforceability of the non-use and no-contest provisions in its licensing agreement. Instead, without the benefit of briefing or a hearing, the majority held *sua sponte* that the parties' express agreement that MLBPA owned the licensed intellectual property constituted a contractual warranty. The majority further held that, although MLBPA indeed did own the players' publicity rights, the First Amendment superseded those rights in this case, which the majority concluded placed MLBPA in breach of the ownership warranty, thus relieving CBC of its obligation to comply with the non-use and no-contest provisions.

There are several errors in the majority's holding. First, the majority misapprehended the nature of the contractual provision on which it relied. As Judge Colloton correctly explained in his dissenting opinion, 2007 WL 2990366, at \*7, MLBPA and CBC explicitly *agreed* that MLBPA was the exclusive holder of the licensed rights. The clause is not a warranty by MLBPA. The mutual acknowledgement of the licensor's rights in the licensed intellectual property is commonplace in intellectual property licenses, and constitutes not a representation or warranty by the licensor, but a mutually agreed upon term of the license. Coupled with the licensee's routine agreement not to contest the licensor's rights in the licensed intellectual property, these licensing provisions are designed to promote harmony and stability in the intellectual property licensing relationship and to minimize future ownership disputes between the parties to that relationship.

Furthermore, even if the term were a warranty of ownership, it was not breached. As the majority itself held, *id.* at \*3, MLBPA had proffered sufficient evidence to demonstrate that, in fact, it did own the rights to the players' identities. Of course, these rights are subject to First Amendment considerations as to any particular use, but as Judge Colloton explained in his dissent, *id.* at \*7, CBC surely could – and in fact did – agree, as a matter of good business judgment, to bargain away any uncertain First Amendment rights that it may have had in exchange for the certainty of what it considered to be an advantageous contractual

arrangement. *Paragould Cablevision v. City of Paragould*, 930 F.2d 1310, 1315 (8th Cir. 1991). By overlooking this legal principle, the majority held – in an exercise of circular reasoning – that a licensee’s agreement not to contest the licensor’s rights to the licensed intellectual property is unenforceable if the licensee successfully contests the licensor’s rights to the licensed intellectual property. Indeed, the very purpose of no-contest provisions is to avoid entirely the type of protracted litigation that this dispute has engendered. This holding is contrary to well settled principles of contract law and threatens to eviscerate non-use and no-contest provisions in scores of Amici’s license agreements. It should therefore be reconsidered and reversed.

## **II. THE PANEL MISAPPREHENDED THE NATURE OF THE PLAYERS’ RIGHT OF PUBLICITY AND THE APPROPRIATE BALANCE BETWEEN THAT RIGHT AND THE FIRST AMENDMENT.**

The panel’s decision on the First Amendment issues in this case evidences a fundamental misunderstanding of the nature of the right of publicity and its balance with the First Amendment. The right of publicity – that is, the right to control the commercial exploitation of one’s own identity – is a property right, *Cardtoons, L.C. v. MLBPA*, 95 F.3d 959, 967 (10th Cir. 1996), and state law safeguards that property right from theft by others. *See, e.g.*, Restatement (Third) of Unfair Competition § 46, cmt c (1995). As this Court explained, states initially were motivated to create the right of publicity by various interests, including pro-

moting the rights of individuals to reap the rewards of their endeavors, providing incentives to encourage a person’s productive activities, and protecting consumers from misleading advertising. 2007 WL 2990366, at \*5. Once the states created the right of publicity, however, *all* persons – regardless of their wealth, their income sources, or the commercial value of their identities – became entitled to enjoy an equal right to control the commercial use of their identity. *See, e.g., Onassis v. Christian Dior-N.Y., Inc.*, 122 Misc. 2d 603, 610 (N.Y. Sup. Ct. 1984) (“all persons, of whatever station in life, from the relatively unknown to the world famous, are to be secured against rapacious commercial exploitation”).<sup>1</sup>

It is indeed the essential nature of publicity rights that, as individuals become more successful or famous or popular, their identities and their right to control the commercial exploitation of their identities become more valuable as well. As the value of their identities increases, so too does their interest in preventing others from exploiting their identities for commercial advantage without consent. Accordingly, when the majority stated that the value of professional baseball

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<sup>1</sup> This only makes sense: no one reasonably would conclude that a small portion of a wealthy landowner’s real property could be taken and used without authorization by a third party simply because the owner has a substantial bank account and many other acres at his disposal. *See, e.g., Grant v. Esquire, Inc.*, 367 F. Supp. 876, 880 (S.D.N.Y. 1973) (“[i]f the owner of Blackacre decides for reasons of his own not to use his land but to keep it in reserve he is not precluded from prosecuting trespassers”).

players' publicity rights somehow are diminished because the players "are rewarded, and handsomely, too, for their participation in games and can earn additional large sums from endorsements and sponsorship arrangements," 2007 WL 2990366, at \*5, it demonstrated a basic misunderstanding of the nature of these important rights. The state-created right of publicity encourages athletically gifted individuals to work to achieve fame and popularity in their chosen sport so that, among other things, they will later be able to benefit from the commercial value of their achievements and their identity. The panel's decision strips that publicity right away from the players at the very moment when it is needed most – when success has been achieved and their identities have become subject to commercial exploitation.<sup>2</sup>

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<sup>2</sup> Contrary to the panel's rationale, the right of publicity protects the identities of famous, wealthy celebrities from misappropriation, even if that misappropriation has little or no effect on their ability to earn a living. *See, e.g., Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 415-16 (9th Cir. 1996) (basketball player Kareem Abdul-Jabbar stated a claim for violation of his right of publicity where General Motors used Abdul-Jabbar's former name, Lew Alcindor, in a commercial); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835-37 (6th Cir. 1983) (comedian Johnny Carson's right of publicity violated by the use of "Here's Johnny Portable Toilets"); *Henley v. Dillard Dep't Stores*, 46 F. Supp. 2d 587, 590 (N.D. Tex. 1999) (musician Don Henley's right of publicity violated by a clothing advertisement); *Ali v. Playgirl*, 447 F. Supp. 723, 728-29 (S.D.N.Y. 1978) (boxer Muhammad Ali's right of publicity violated by unauthorized Playgirl representation); *Grant*, 367 F. Supp. at 879-80 (actor Cary Grant's right of publicity violated by magazine photograph).

To be sure, the First Amendment serves to preserve an uninhibited marketplace of ideas, to limit government restraints on robust and wide-open debate and commentary on public issues, and to foster a fundamental respect for individual development and self-realization through freedom of expression. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 269-71 (1964). But the First Amendment generally does not permit the unauthorized use of another’s property to engage in speech. An artist may not walk into a store and steal the supplies necessary to paint. *See Grant*, 367 F. Supp. at 883. And “the communicative value of a well-placed bomb in the Capitol does not entitle it to the protection of the First Amendment.” *United States v. Eichman*, 496 U.S. 310, 322 (1990) (Stevens, J., dissenting). Likewise, “[t]he first amendment is not a license to trammel on legally recognized rights in intellectual property.” *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979); *see also Doe v. TCI Cablevision*, 110 S.W.3d 363, 373 (Mo. 2003) (*en banc*) (“use of a person’s identity for purely commercial purposes, like advertising goods or services or the use of a person’s name or likeness on merchandise, is rarely protected”).

To accommodate competing property and First Amendment rights, courts inescapably must balance the two. But that balance does not involve an assessment of an individual’s other resources or assets or an analysis of how much a court thinks that individual does, or does not, “need” the right of publicity. The

value of that right, having been recognized by the state, remains fixed for all individuals, and all individuals have an equal right to protect themselves against the unauthorized use of their identities. Rather, the requisite balance involves an examination of the nature, character and purpose of the challenged *use* of the individual's identity to determine whether it is "largely for commercial purposes, such as the sale of merchandise" – in which case the right of publicity outweighs the user's First Amendment right – or is "designed primarily to promote the dissemination of thoughts, ideas or information through news or fictionalization" – in which case the First Amendment supersedes the right of publicity. *See Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 403 (2001); *accord Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988) ("If the purpose is informative or cultural the use is immune; if it serves no such function but merely exploits the individual portrayed, immunity will not be granted"). As the Missouri Supreme Court has explained:

If a product is being sold that predominantly exploits the commercial value of an individual's identity, that product should be held to violate the right of publicity and not be protected by the First Amendment, *even if there is some "expressive" content in it* that might qualify as "speech" in other circumstances. If, on the other hand, the predominant purpose of the product is to make an expressive comment on or about a celebrity, the expressive values [w]ould be given greater weight.

*TCI Cablevision*, 110 S.W.3d at 374 (quoting Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity-Free Speech Interface*, 23 Loy.

L.A. Ent. L. Rev. 471, 500 (2003)) (emphasis added). In balancing the First Amendment against the right of publicity in this case, the panel failed to consider at all the primarily commercial and exploitative use by CBC of the players' identities.

The panel's misunderstanding of the right of publicity is further reflected in its observation that "it would be strange law that a person would not have a first amendment right to use information that is available to everyone." 2007 WL 2990366, at \*4. It is not at all strange that, although information comprising a celebrity's identity is available to everyone insofar as it is publicly known, no one has a First Amendment right to exploit that celebrity's identity for commercial advantage without the celebrity's consent. *See TCI Cablevision*, 110 S.W.3d at 372 ("No social purpose is served by having defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.") (quoting *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977)).

CBC's use of the players' identities is predominantly intended to exploit those identities commercially in order to sell its fantasy baseball games; it is not to disseminate thoughts, ideas or information through news reporting or other expressive commentary about the players. CBC's products predominantly trade on the commercial value of the players' identities by using the players' actual names and baseball accomplishments as the basis for CBC's pay-to-play fantasy game

products. In this regard, CBC's use of the players' identity is indistinguishable from earlier uses of celebrities' names and accomplishments in board games held impermissible in *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1283 (D. Minn. 1970), *Rosemont Enters., Inc. v. Urban Sys., Inc.*, 72 Misc. 2d 788, 790 (N.Y. Sup. Ct.), *injunction modified and judgment aff'd*, 42 A.D.2d 544 (N.Y. App. Div. 1973), and *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458, 462 (N.J. Super. Ct. Ch. Div. 1967). Accordingly, CBC's use of players' identities in its fantasy games is an act of appropriation of the players' property rights that does not yield to CBC's First Amendment interest in free expression. The panel's erroneous conclusion to the contrary should be reconsidered and reversed.

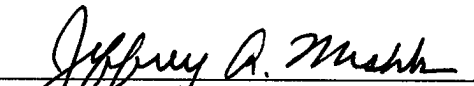
**CONCLUSION**

For the foregoing reasons, the petitions for rehearing and rehearing *en banc* should be GRANTED and this Court's prior decision should be REVERSED.

Dated: October 30, 2007

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## CERTIFICATE OF SERVICE

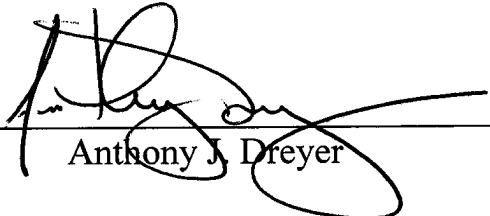
I, Anthony J. Dreyer, hereby certify that on the 30th day of October, 2007, I electronically filed the above and foregoing **BRIEF OF AMICI CURIAE NBA PROPERTIES, INC., NHL ENTERPRISES, L.P., NFL VENTURES, L.P., NATIONAL ASSOCIATION FOR STOCK CAR RACING, INC. PGA TOUR, INC., AND WNBA ENTERPRISES, LLC, IN SUPPORT OF REHEARING AND REHEARING *EN BANC*** with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in this case who are registered CM/ECF users will be served by the CMF/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. I have served the foregoing document by Federal Express to the following non-CMF/ECF participants:

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