
RECENT CASES

INTELLECTUAL PROPERTY — EIGHTH CIRCUIT HOLDS THAT THE FIRST AMENDMENT PROTECTS ONLINE FANTASY BASEBALL PROVIDERS' USE OF BASEBALL STATISTICS IN THE PUBLIC DOMAIN. — *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007), *reh'g and reh'g en banc denied*, Nos. 06-3357 & 06-3358 (8th Cir. Nov. 26, 2007).

The First Amendment stands in tension with exclusive intellectual property rights.¹ Exclusive rights prevent free expression of the underlying content they protect,² but they also encourage the creation of content for use in speech in the first place.³ Managing this tension requires balancing the incentive benefits of exclusive rights with the expressive benefits of free public use.⁴ One area where this tension has come into unexpectedly sharp relief is the increasing commercial use of baseball statistics. With the rise of the Internet, the public fascination with these statistics⁵ has translated into consumption of online fantasy baseball products⁶: as of 2005, an estimated six million people were spending a total of more than one billion dollars annually on fantasy baseball.⁷ Realizing that statistics had become a valuable commodity, Major League Baseball and its players began to claim exclusive rights over the online use of statistics to force Internet fantasy baseball providers to buy licenses to use them. Recently, in *C.B.C. Distribution & Marketing, Inc. (CBC) v. Major League Baseball Advanced Media, L.P.*,⁸ the Eighth Circuit held that although the unlicensed use of baseball player names and statistics in online fantasy baseball products may infringe the players' rights of publicity⁹ under Missouri common

¹ See, e.g., Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970).

² See Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 446 (1999).

³ See YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 36–37 (2006).

⁴ See *id.*

⁵ See, e.g., ALAN SCHWARZ, *THE NUMBERS GAME: BASEBALL'S LIFELONG FASCINATION WITH STATISTICS* (2004).

⁶ “A fantasy sport is a game in which [participants] . . . compete against one another by maintaining rosters of actual professional athletes and using the real game statistics of those athletes to score points.” Matthew G. Massari, Note, *When Fantasy Meets Reality: The Clash Between Online Fantasy Sports Providers and Intellectual Property Rights*, 19 HARV. J.L. & TECH. 443, 444–45 (2006). For a more extensive and nuanced description of fantasy baseball, see SAM WALKER, *FANTASYLAND: A SEASON ON BASEBALL'S LUNATIC FRINGE* (2006).

⁷ See Tresa Baldas, *Sports Make IP Play*, NAT'L L.J., Feb. 21, 2005, at 1.

⁸ 505 F.3d 818 (8th Cir. 2007), *reh'g and reh'g en banc denied*, Nos. 06-3357 & 06-3358 (8th Cir. Nov. 26, 2007).

⁹ The right of publicity is “the inherent right of every human being to control the commercial use of his or her identity.” 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRI-*

law, the First Amendment trumps such rights and permits the free use of the names and statistics in online fantasy baseball products.¹⁰ In reaching its holding, the court gave newfound respect to the institution of the public domain¹¹ by identifying a presumptive First Amendment right to use information in the public domain, such as factual baseball statistics.

C.B.C. Distribution and Marketing (CBC) sold online fantasy baseball products.¹² Through agreements in 1995 and 2002, CBC purchased licenses from the Major League Baseball Players Association (MLBPA) to use player names and statistics.¹³ The 2002 agreement contained “no-use” and “no-challenge” provisions that forbade CBC from using or challenging MLBPA’s rights to player names and statistics after the agreement terminated.¹⁴ The agreement expired on December 31, 2004.¹⁵ On January 19, 2005, MLBPA announced a contract with Major League Baseball Advanced Media, L.P. (MLBAM),¹⁶ in which it sold MLBAM the exclusive rights to use and sublicense player names and statistics in interactive media.¹⁷ That same day, MLBAM ordered CBC to cease using the unlicensed names and statistics; it shortly thereafter rejected CBC’s offer to buy a sublicense.¹⁸ CBC then sued MLBAM for a declaratory judgment establishing “its right to use, without license, the names of and information about major league baseball players in connection with its fantasy baseball products.”¹⁹

VACY § 1:3 (2d ed. 2007). Derived from the right of privacy, *see id.* § 1:7, the right of publicity was first recognized as a distinct intellectual property right in 1953, *see Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953), and has since attained “independent status . . . unmoored from privacy or any other analogic anchor.” Sheldon W. Halpern, Essay, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853, 853 (1995).

¹⁰ *CBC*, 505 F.3d at 824.

¹¹ In intellectual property law, “public domain” generally refers to “the vast body of ideas and expression[s] that are not copyrighted, patented, or otherwise propertized.” WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 13 (2003).

¹² *CBC*, 505 F.3d at 820.

¹³ *Id.* at 821.

¹⁴ *Id.* at 824; *see also* Brief of Appellant Major League Baseball Players Ass’n at 9, *CBC*, 505 F.3d 818 (Nos. 06-3357 & 06-3358) [hereinafter *MLBPA Brief*].

¹⁵ *MLBPA Brief*, *supra* note 14, at 7.

¹⁶ MLBAM is the “interactive media and Internet company of major league baseball.” *CBC*, 505 F.3d at 820.

¹⁷ Press Release, MLBPA, MLB Advanced Media and Major League Baseball Players Association Reach Exclusive Agreement (Jan. 19, 2005), <http://mlbplayers.mlb.com/pa/releases/releases.jsp?content=0119>.

¹⁸ *See* Appellee’s Answering Brief at 18–19, *CBC*, 505 F.3d 818 (Nos. 06-3357 & 06-3358).

¹⁹ *CBC*, 505 F.3d at 820. MLBPA intervened as a defendant. *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1082 (E.D. Mo. 2006). Throughout 2005 and 2006, CBC continued to use the information without a license. *Id.*

The United States District Court for the Eastern District of Missouri granted summary judgment to CBC.²⁰ The court found that CBC had not violated the players' rights of publicity under Missouri common law.²¹ It also held that CBC's First Amendment right to use the names and statistics superseded any potential infringement of the players' rights of publicity.²² Finally, the court concluded that "the strong federal policy favoring the full and free use of ideas in the public domain"²³ rendered unenforceable the licensing agreement's no-use and no-challenge provisions.²⁴

The Eighth Circuit affirmed. Judge Arnold, writing for a panel unanimous as to the disposition of the right of publicity and First Amendment issues,²⁵ began by finding, contrary to the district court, that the players had a valid right of publicity cause of action under Missouri law.²⁶ The court found that CBC's use of the names and statistics in its fantasy baseball products was for a commercial purpose and thus sufficient to infringe on the players' rights of publicity.²⁷

The court nevertheless held, in agreement with the district court, that "CBC's first amendment rights in offering its fantasy baseball products supersede the players' rights of publicity."²⁸ The court explained that even though CBC used the statistics for a commercial purpose, that use was still speech with an entertainment purpose entitled to full First Amendment protection.²⁹ In balancing this First Amendment interest against the right of publicity, the court started with the caution that "it would be strange law that a person would not have a first amendment right to use information that is available to everyone."³⁰ It then noted that there was "substantial public interest" in expressions pertaining to baseball statistics.³¹ It found that the players, by contrast, had only a minimal interest in owning rights of publicity over use of the statistics because they were already suffi-

²⁰ *CBC*, 443 F. Supp. 2d at 1107.

²¹ *Id.* at 1091. The elements of a right of publicity action in Missouri are: "(1) That defendant used plaintiff's name as a symbol of his identity (2) without consent (3) and with the intent to obtain a commercial advantage." *Id.* at 1084-85 (quoting *Doe v. TCI Cablevision*, 110 S.W.3d 363, 369 (Mo. 2003)).

²² *Id.* at 1099-100.

²³ *Id.* at 1106 (quoting *Lear, Inc. v. Adkins*, 395 U.S. 653, 674 (1969)) (internal quotation marks omitted).

²⁴ *Id.* at 1106-07.

²⁵ Judge Arnold was joined by Judge Loken. Judge Colloton dissented only with respect to the contract dispute. *CBC*, 505 F.3d at 826 (Colloton, J., dissenting).

²⁶ *Id.* at 822-23 (majority opinion).

²⁷ *Id.* at 822 (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (1995)).

²⁸ *Id.* at 824.

²⁹ *Id.* at 823 (citing *Cardtoons, L.C. v. MLBPA*, 95 F.3d 959, 969 (10th Cir. 1996)).

³⁰ *Id.*

³¹ *Id.* at 823-24 (quoting *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 315 (Ct. App. 2001)).

ciently encouraged to create statistics (by playing baseball) on account of high salaries and endorsement deals.³² Consequently, the court found that the First Amendment trumped the right of publicity.³³

Finally, as to the no-use and no-challenge provisions, the court found that section 8(a) of the agreement contained a warranty that MLBPA possessed the exclusive right to use baseball statistics.³⁴ Because the First Amendment trumped such an exclusive right, the court found that MLBPA “breached a material obligation that it undertook in the contract,” which rendered the contract unenforceable.³⁵ As a result, the court affirmed summary judgment for CBC.³⁶

Judge Colloton dissented with respect to the court’s resolution of the contract issue.³⁷ Section 8(a) used the word “agreed,” which, in his view, meant that the section was a bargain between the parties rather than a warranty of title.³⁸ Because the contract was not invalid for breach of a warranty of title, or for any other reason,³⁹ Judge Colloton concluded that the no-use and no-challenge provisions should be enforced. He therefore would have denied summary judgment.⁴⁰

CBC is best understood within the larger context of the relationship between the First Amendment and exclusive intellectual property rights. One of the main issues in *CBC* was the extent of First Amendment protection of the public domain, the content of which is free for use in speech. In recent years, other federal courts have attempted to clarify the relationships among exclusive rights, the public domain, and the First Amendment; *CBC* joined these courts by identifying a

³² *Id.* at 824.

³³ *Id.* Because it had resolved the right of publicity claim through the First Amendment, the court decided that it “need not reach CBC’s alternative argument that federal copyright law preempts the players’ state law rights of publicity.” *Id.* The court’s decision thus ignored the “ordinary rule that a federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available.” *Hagans v. Lavine*, 415 U.S. 528, 547 (1974).

³⁴ *CBC*, 505 F.3d at 825. Section 8(a) bore the heading “Ownership of Rights,” and stated in relevant part: “It is understood and agreed that MLBPA is the sole and exclusive holder of all right, title and interest in and to the Rights and/or Trademarks for the duration of this Agreement.” *Id.* at 826 (Colloton, J., dissenting) (internal quotation marks omitted).

³⁵ *Id.* at 825 (majority opinion).

³⁶ *Id.*

³⁷ *Id.* at 826 (Colloton, J., dissenting).

³⁸ *Id.*

³⁹ *Cf.* *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1104 (E.D. Mo. 2006) (invalidating the contract under *Lear, Inc. v. Adkins*, 395 U.S. 653, 673–74 (1969), a case in which federal patent law preempted state contract law for public policy reasons, including the encouragement of full use of information in the public domain). Judge Colloton deemed *Lear* inapplicable because the right of publicity, unlike patent law, has no federal counterpart, and without an indication of congressional intent to regulate that area of law, he considered it inappropriate to “fashion a rule of federal common law that abrogates . . . freely negotiated contractual provisions.” *CBC*, 505 F.3d at 826–27 (Colloton, J., dissenting). The majority found it unnecessary to address *Lear*’s applicability. *Id.* at 825 (majority opinion).

⁴⁰ *CBC*, 505 F.3d at 826–27 (Colloton, J., dissenting).

presumptive First Amendment right to use information in the public domain.

The Supreme Court most recently discussed the First Amendment's relationship with exclusive rights in *Eldred v. Ashcroft*,⁴¹ which involved a federal statute that extended the duration of existent copyrights. The Court found that "copyright law contains built-in First Amendment accommodations," such as the rule that facts cannot be copyrighted.⁴² As the Court had previously held, this rule makes "all facts . . . part of the public domain available to every person."⁴³ The rule that facts are in the public domain protects First Amendment interests because a meaningful right of free speech requires "the basic building blocks of speech," such as facts, to be available for public expression.⁴⁴ By calling this rule a "First Amendment accommodation[]," the *Eldred* Court implied that if for some reason copyright law did not prevent the exclusive appropriation of facts, the First Amendment would protect against their appropriation.⁴⁵

The court in *CBC* seems to have approached the case as just such a situation. It found that the information *CBC* used "is all readily available in the public domain."⁴⁶ The necessary foundation for such a finding must relate, as *CBC* argued,⁴⁷ to the factual nature of baseball statistics.⁴⁸ As *Eldred* noted, under copyright law, facts are committed to the public domain. Because *CBC* is a right of publicity case, however, the applicability of that copyright principle is uncertain. Moreover, the *CBC* court's refusal to rule on the issue of copyright preemption suggests that the court thought that copyright law was inapplicable to the case.⁴⁹ Instead, the facts of *CBC* represent the

⁴¹ 537 U.S. 186 (2003).

⁴² *Id.* at 219.

⁴³ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991) (quoting *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1369 (5th Cir. July 1981)) (internal quotation mark omitted).

⁴⁴ Diane Leenheer Zimmerman, *Is There a Right To Have Something To Say? One View of the Public Domain*, 73 *FORDHAM L. REV.* 297, 325 (2004).

⁴⁵ *Eldred*, 537 U.S. at 219; see also *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985).

⁴⁶ *CBC*, 505 F.3d at 823.

⁴⁷ See Appellee's Answering Brief, *supra* note 18, at 71; see also *id.* at 77 ("Under both the First Amendment and copyright law, compilations of factual information, such as player statistics, are committed to the public domain.").

⁴⁸ The court's phrasing could suggest that it considered the statistics to be in the public domain because they are "readily available" through media news outlets, see *id.* at 24, but that cannot be the true reason because much information is widely published and yet not in the public domain (for example, popular copyrighted songs played on the radio), cf. *Uhlaender v. Henrickson*, 316 F. Supp. 1277, 1282-83 (D. Minn. 1970).

⁴⁹ Because the court should have ruled on statutory copyright preemption if that issue was determinative, see *supra* note 33, its failure to do so implies there was no preemption. Copyright preempts a state law exclusive right if two requirements are satisfied: first, that the right sought is

situation hinted at in *Eldred* where the First Amendment may work in copyright's stead and push facts into the public domain when copyright law does not. Because it considered the statistics to be in the public domain, the *CBC* court framed the issue it was deciding as whether a right of publicity could restrict the use of such information.

Just prior to *CBC*, the Tenth Circuit, in *Golan v. Gonzales*,⁵⁰ addressed the analogous issue of whether copyright protection could be restored to information already in the public domain. *Golan* reviewed a federal statute implementing a treaty that returned copyright protection to certain foreign musical works after their copyrights had lapsed.⁵¹ The Supreme Court had held in *Eldred* that no First Amendment scrutiny of a copyright law is necessary so long as it does not "alter[] the traditional contours of copyright protection."⁵² The Tenth Circuit found, under the *Eldred* test, that one of copyright's traditional contours was that once content passes into the public domain, it should remain there for use by others.⁵³ By removing material from the public domain, the statute altered copyright's traditional contours and was exposed to First Amendment scrutiny.⁵⁴ The Tenth Circuit noted the strong First Amendment interest in free access to public domain works for the purpose of creating new expressions,⁵⁵ but left it to the district court on remand to determine the question of whether, on balance, the statute violates the First Amendment.⁵⁶

CBC provides initial guidance to the *Golan* district court as it proceeds on remand. *CBC* used a balancing test to determine whether MLBPA's right of publicity could restrict the use of information in the public domain. The court, however, did not begin its balancing test from a neutral position, but instead started with the proposition that

equivalent to any right protected by copyright; and second, that the content sought to be protected is within the subject matter of copyright. See 17 U.S.C. § 301(a) (2000). Since the first requirement was likely satisfied, see *Laws v. Sony Music Entm't, Inc.*, 448 F.3d 1134, 1143-45 (9th Cir. 2006) (finding a right of publicity claim seeking to prevent reproduction to be equivalent to copyright), the second requirement was likely the one that prevented preemption from applying. Thus, the court might have thought that the player names and statistics were not within the subject matter of copyright, a finding that would prevent the application of the copyright rule that facts are committed to the public domain. Cf. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.01[B][1][c] (2007) (noting that the right of publicity protects personas, which are not usually thought to be within the subject matter of copyright).

⁵⁰ 501 F.3d 1179 (10th Cir. 2007).

⁵¹ *Id.* at 1181-82.

⁵² *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

⁵³ *Golan*, 501 F.3d at 1187-92. This contour maintains the proper balance between copyright and the First Amendment by allowing copyright to exist and incentivize content creation while providing the public with the opportunity to use that content freely once those incentives are no longer relevant (that is, when the copyright expires).

⁵⁴ *Id.* at 1194.

⁵⁵ *Id.* at 1192-94.

⁵⁶ See *id.* at 1196-97.

“it would be strange law that a person would not have a first amendment right to use information” in the public domain.⁵⁷ The word “strange” implies that it would be rare, but not impossible, for the First Amendment to fail to protect the right to use information in the public domain. In other words, the First Amendment entails a presumptive right to use public domain information.⁵⁸

CBC’s presumption is the first definitive judicial statement of what previous courts, such as *Golan*, have only hinted at⁵⁹: the First Amendment protects information in the public domain from exclusive appropriation. The rationale is that once information is in the public domain, there no longer exists the need to provide incentives to create that information, and thus the First Amendment interest in using that content for speech should usually prevail over an interest in exclusive appropriation. *CBC* created a presumption rather than a rule because there may be occasions in which removal from the public domain, on balance, advances free speech. Consequently, *CBC* used this presumption as part of a balancing test in which it found both that there was no need for a right of publicity over public domain statistics because baseball players already make enough money playing baseball to preclude the need for further incentives to play the sport (and play it well), and that there is a significant public interest in using baseball statistics for expressive purposes.⁶⁰

This presumptive First Amendment right to use public domain information should be applicable beyond the facts of this case — and even beyond right of publicity claims in general — to all cases in

⁵⁷ *CBC*, 505 F.3d at 823. The court could have written its opinion without the “strange law” sentence and proceeded directly to balancing the public interest in expressions involving baseball statistics against the players’ (minimal) interests in being compensated for such expressions. Instead, the court emphasized this sentence as the initial step of its balancing test and made it part of its own paragraph separate from those of the other interests it considered. *Id.* at 823–24. Alternatively, the court could have followed precedents that deny right of publicity claims over information in the public domain without invoking the First Amendment. *See, e.g.*, *Matthews v. Wozencraft*, 15 F.3d 432, 440 (5th Cir. 1994); *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1139 (7th Cir. 1985). Instead, it explicitly tied the fact that the information was in the public domain to a First Amendment right. That the court went to such lengths both to emphasize the “strange law” sentence in its balancing test and to connect the public domain to the First Amendment strongly indicates that its balancing test relied on a presumptive First Amendment right to use information in the public domain.

⁵⁸ Whatever force the First Amendment bears in initially determining whether information is in the public domain is logically distinct from the protection it offers to content once that content is in the public domain — this is the distinction between *Eldred*, which found that the First Amendment may animate the rule that facts cannot be copyrighted, and *Golan*, which found that the First Amendment may protect content from exclusive appropriation once it is in the public domain. *See Golan*, 501 F.3d at 1194 (noting that the First Amendment’s prohibition on what can be copyrighted is separate from its protection of removal of information from the public domain).

⁵⁹ *See, e.g., id.* (“By removing works from the public domain, [the statute] arguably hampers free expression.”).

⁶⁰ *CBC*, 505 F.3d at 823–24.

which an exclusive right attempts to restrict the use of information already in the public domain. The public domain is the shared pool of common resources that contrasts with all exclusive rights.⁶¹ Once information is created and in the public domain, the interest in making speech involving that information does not change according to which exclusive right attempts to remove or restrict it. Thus, there is no apparent reason that a First Amendment presumption that applies to public domain information in a right of publicity case should operate differently for other exclusive rights. Further, the breadth of the court's language — it speaks generally of the "first amendment" and the "public domain" and contains no limitations specific to baseball or the right of publicity⁶² — suggests that its holding should extend to all exclusive rights cases.⁶³

In sum, two federal appellate courts have recently built a protective First Amendment wall around the public domain. Whereas *Golan* held that a federal statute removing content from the public domain was subject to First Amendment scrutiny under *Eldred's* "traditional contours" test, *CBC* employed a presumption of unconstitutionality in a balancing test to hold that the First Amendment trumped a state common law right that restricted the use of information in the public domain. The similarity of these findings in different contexts suggests that federal courts are newly respectful of the public domain as a significant institution because of its importance to free expression.⁶⁴

The question going forward is whether *CBC*, in conjunction with *Golan*, marks a nascent trend. *CBC* may come to be seen as just another example of baseball's legal exceptionalism.⁶⁵ Nevertheless, the nature of the public domain and the court's broad language suggest that the presumptive First Amendment right to use information in the public domain is widely applicable.

⁶¹ See *White v. Samsung Elec. Am., Inc.*, 989 F.2d 1512, 1516 (9th Cir. 1993) (Kozinski, J., dissenting from rejection of suggestion for rehearing en banc) (noting, in a right of publicity case, that the public domain should be balanced against intellectual property rights generally).

⁶² *CBC*, 505 F.3d at 823.

⁶³ Consider, by contrast, the Supreme Court's statement that under the Copyright and Patent Clause, "Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available." *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 6 (1965). Because the Court's language was limited to "patents," lower courts have found that Congress can authorize copyright to remove information from the public domain under the Copyright and Patent Clause. See, e.g., *Golan*, 501 F.3d at 1186–87; *Luck's Music Library, Inc. v. Gonzales*, 407 F.3d 1262, 1265–66 (D.C. Cir. 2005).

⁶⁴ Cf. Benkler, *supra* note 2, at 446 (arguing that the public domain is the "institutional implementation" of First Amendment values because it makes content available for free expression); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 33, 69–74.

⁶⁵ See, e.g., *Flood v. Kuhn*, 407 U.S. 258, 282–85 (1972) (upholding baseball's antitrust exemption as an "established" aberration).