Professional Team Sports New Legal Arena: Television and the Player's Right of Publicity

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I. INTRODUCTION

After a decade of litigation, the furor over players' rights in professional team sports, which stemmed from the labor and antitrust issues implicated by practices such as the college draft, option clauses, and the right of compensation (the Rozelle Rule), has largely subsided through judicial determination and collective bargaining.[1] However, a new cloud of player-owner strife appears to be forming on the horizon. With lucrative television contracts providing an increasingly larger share of the professional team sports revenue package,[2] it is hardly surprising that players, both individually and through their collective bargaining agents, are now seeking to obtain part of these substantial television revenues.[3]

Other factors in the professional sports world today foreshadow even greater efforts by the players in this regard. For example, players' associations in the major team sports are increasing both in

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[1]*See, e.g.*, Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1979); Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976); Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n., Robertson v. NBA, 389 F. Supp. 867 (S.D.N.Y. 1975), 72 F.R.D. 64 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977).

[2]For example, the four-year television package entered into with all three television networks in 1977 by the National Football League (NFL) provided for more than $650 million in revenues to be paid to NFL member teams. See N.Y. Times, Mar. 11, 1979, § 5 (Sports), at 8, col. 1. These revenues exceeded more than one-half of each individual NFL team's annual total revenues. Smith v. Pro Football, Inc., 593 F.2d 1173, 1174 n.46 (D.C. Cir. 1979). Professional baseball and basketball also have lucrative network and local television contracts that provide their clubs with substantial annual revenues. In December of 1981, for example, the National Basketball Association (NBA) entered into a reported $88 million contract. *See* N.Y. Times, Dec. 23, 1981 at B6, col. 5. The NFL thereafter entered into new television contracts with each of the three networks that reportedly totaled $1.8 billion. *See* N.Y. Times, Feb. 27, 1982, at 17, col. 1.

[3]*See* Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, No. 82 (Civ. 3710 (N.D. Ill. filed June 14, 1982); Silas v. Manhattan Cable Television Inc., No. 79 Civ. 3025 (S.D.N.Y. filed June 8, 1979); *Pay-TV: Baseball's Next War*, N.Y. Post, Aug. 14, 1981, at 82, col. 1.

strength and in militancy.[4] In addition, the explosive growth of cable television[5] in recent years and, particularly, the need of cable television for sports programming to permit greater penetration into highly lucrative potential markets have precipitated a new player-owner struggle over cable television as a new source of revenues. For example, for the first time, three professional sports leagues, Major League Baseball (MLB), the National Basketball Association (NBA), and the National Hockey League (NHL) have entered into nationwide cable network television contracts. Many individual MLB, NBA, and NHL teams also have separate local cable contracts, often forming a "package" of several sports teams in the same city.[6] Indeed, all-sports networks for cable television, which have twenty-four hours per day sports programming, have been formed, while other cable stations rely heavily on sports programming.[7] Currently, both broad-

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[4]The most graphic example of player solidarity was the major league baseball players' successful strike in 1981 to prevent imposition of a system of compensation for free agents. The baseball players had no recourse except to strike: The baseball team owners did not face the threat of an antitrust litigation to prevent them from imposing the compensation system because baseball continues to have an anomalous antitrust exemption. Flood v. Kuhn, 407 U.S. 258 (1972). *But see* Mackey v. NFL, 543 F.2d 606, 616-23 (8th Cir. 1976) (although the Rozelle Rule is not an antitrust violation per se, under some circumstances, it may be a violation); Robertson v. NBA, 389 F. Supp. 867 (S.D.N.Y. 1975) (college player draft and reserve system was per se violation of antitrust laws).

The other major team sports have no such exemption. *See* Radovich v. NFL, 352 U.S. 445 (1957); Robertson v. NBA, 389 F. Supp. 867 (S.D.N.Y. 1975); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972).

[5]In the four-year period between 1975 and 1978, the cable industry's revenues nearly doubled and the number of cable subscribers increased by approximately 40%. McDowell, *Investors Drawn to Cable TV*, N.Y. Times, Mar. 6, 1979, at D1, col. 4. The most recent survey indicated that 23.7 million households, or 29% of all households with television sets, subscribe to cable systems. Harmetz, *Cable TV Buoyed by Popularity, Looks to Future*, N.Y. Times, May 4, 1982, at C16, col. 1. The expansion of cable television has continued, and the resultant impact on both the current fortunes and future plans of professional sports leagues and teams has been dramatic. *See, e.g.*, Johnson, *You Ain't Seen Nothin' Yet*, SPORTS ILLUS., Aug. 10, 1981, at 48; *Pay Cable May Make the Rich Even Richer*, THE SPORTING NEWS, Mar. 28, 1981, at 10; Eskenazi, *Cable TV Begins to Make Big Changes in Professional Sports*, N.Y. Times, Apr. 19, 1981, § 5 (Sports), at 1, col. 1; Veesey, *In Sports, Money Is the Main Issue*, N.Y. Times, Mar. 16, 1981, at C1, col. 1.

[6]*See* Taaffe, *Tooting His Own Einhorn* SPORTS ILLUS., Sept. 6, 1982, at 48; The Washington Post, Dec. 15, 1982, at D9, col. 5; *see also* articles cited *supra* note 5.

[7]*See* Johnson, *supra* note 5; Piantadosi, *Cable TV—With Its Sports Glut—Is Sneaking Up on Us*, The Washington Post, Aug. 3, 1982, at D1, col.1. The burgeoning success of cable television in the sports field has raised other disputes outside the player-owner sphere, including the question of the "pirating" of distant signals by cablecasters. *See generally* Note, *Crossed Signals: Copyright Liability for Resale Carriers of Television Broadcasts*, 16 IND. L. REV. 611 (1983). In addition, the increased popularity of

cast and cable television companies deal solely with leagues in regard to national television coverage and with individual teams in regard to local television. The leagues and teams purport to sell all rights regarding the televising of their games.

These developments have focused increasing attention on the nature of a professional team athlete's relationship with his particular team or league: Specifically, the focus is on the extent to which an athlete's "right of publicity" affects the ability of that team or league to enter into contracts with television broadcasters or cable television companies for the televising of that athlete's performance without first obtaining express consent from the athlete. The critical issue is whether a professional athlete, as a performer, relinquishes his exclusive common law, and in some cases statutory, right to his own *persona* with respect to the broadcast of his performance by signing an agreement to play with a professional sports team before a live audience. Before attempting to analyze that ultimate question, however, a detailed discussion of the rights at issue is required.

Although the development of the law regarding an individual's right of publicity has been a relatively recent phenomenon, the concept has become firmly established.[8] Furthermore, in a variety of contexts, professional athletes have been recognized as having rights of publicity that the courts will protect.[9] Not even first amendment considerations will permit broadcasters or other media representatives to violate these rights of publicity.[10]

Despite these considerations, uncertainty remains regarding the athlete's right of publicity in his performance in the context of the televising or cablecasting of a team sports event, an area in which the courts have yet to rule.[11] The ultimate resolution of this issue should reflect the fact that the players in team sports do have a right of publicity in their performances in addition to, and distinct from, any complementary right that the team or league may have in the games which they organize and promote. Contractual negotiations, either on a player-by-player basis or more likely through collective bargaining, will ultimately resolve the respective interests of players and teams.[12]

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cable television has sparked disagreements among sports franchise owners themselves regarding the extent to which individual clubs are willing to share or forego their individual cable package revenues. *Revenues Disputed In N.B.A.*, N.Y. Times, Jan. 6, 1980, § 5 (Sports), at 1, col. 6.

[8] *See infra* text accompanying notes 13-31.

[9] *See infra* text accompanying notes 32-49.

[10] *See infra* text accompanying notes 50-61.

[11] *See infra* text accompanying notes 62-71.

[12] *See infra* text accompanying notes 72-133.

II. Nature of the Right of Publicity Generally

The development of the law regarding the right of publicity has been marked by considerable confusion. Perhaps the primary reason for this confusion is the fact that the right of publicity developed from and has been grouped with the right of privacy.[13] The right of publicity protects a person's interest in his own *persona*, regardless of whether it is deemed a property interest,[14] so as to prevent someone else from using or appropriating the person's image or likeness for commercial advantage and, hence, to prevent unauthorized commercial exploitation.[15] In contrast, the right of privacy is designed primarily to protect a person's feelings, sensibilities, and his general right to be left alone.[16]

The right of publicity has been held to provide a basis for relief in contexts in which the right of privacy has been deemed inadequate. In the most common situations, the unauthorized use of a well-known person's picture has been held actionable under the right of publicity.[17] For example, in *Grant v. Esquire, Inc.*,[18] a magazine had superimposed Cary Grant's picture on the torso of a model for certain clothing. Grant had not authorized the use of his picture for that purpose or for any other purpose, although years earlier he had agreed to the use of his picture in a similar context. The court held that the right of publi-

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[13]*See* W. Prosser, Law of Torts § 117, at 804 (4th ed. 1971). Prosser identifies four distinct types of tort under the right of privacy: (1) intrusion upon the plaintiff's physical solitude or seclusion, *id.* at 807; (2) public disclosure of private acts, *id.* at 809; (3) false light in public eye, *id.* at 812; and, (4) appropriation of plaintiff's name or likeness for defendant's benefit, *id.* at 804. This fourth category is the right of publicity. *See also* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 571-72 (1977).

[14]*Compare* Uhlaender v. Henricksen, 316 F. Supp. 1277, 1280, 1282 (D. Minn. 1970) (right of publicity protects property interests) *with* Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953) ("Whether it be labelled a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth.").

[15]*See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 573 (1977); Factors Etc., Inc. v. Creative Card Co., 444 F. Supp. 279, 282-84 (S.D.N.Y. 1977); Uhlaender v. Henricksen, 316 F. Supp. 1277, 1279-83 (D. Minn. 1970).

[16]W. Prosser, *supra* note 13, at 804. *See also* Ali v. Playgirl, Inc., 447 F. Supp. 723, 728-29 (S.D.N.Y. 1978); Uhlaender v. Henricksen, 316 F. Supp. 1277, 1279-82 (D. Minn. 1970); Lombardo v. Doyle, Dane & Bernbach, Inc., 58 A.D.2d 620, 621, 396 N.Y.S.2d 661, 664 (1977). The courts in these cases recognized the distinction between the rights of privacy and publicity, but note the failure of courts in various other cases to make such a distinction. *See generally* Brinkley v. Casablancas, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1981) (refusing to dismiss complaint that incorrectly pled right of privacy rather than right of publicity).

[17]*See, e.g.*, Factors Etc., Inc. v. Creative Card Co., 444 F. Supp. 279 (S.D.N.Y. 1977); Grant v. Esquire, Inc., 367 F. Supp. 876 (S.D.N.Y. 1973); Brinkley v. Casablancas, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1981).

[18]367 F. Supp. 876 (S.D.N.Y. 1973).

city protects even public figures from having the publicity value of their names and reputations appropriated by another without authorization, even in a case where the plaintiff did not want anyone, including himself, to profit from such publicity value.[19]

The right of publicity also has been used to prevent publication of a cartoon caricature of a public figure.[20] Despite the fact that the plaintiff, boxer Muhammad Ali, was a well-known public personality, the court in *Ali v. Playgirl, Inc.*,[21] held that an injunction had been properly granted: " 'That [plaintiff] may have voluntarily on occasion surrendered [his] privacy, for a price or gratuitously, does not forever forfeit for anyone's commercial profit so much of [his] privacy as [he] has not relinquished.' "[22] The use of a person's name and biographical data may be protected under the right of publicity when it is used for commercial purposes, such as a board game, rather than for a nonfictionalized biography.[23] Even a public personality's style may be protected by the right of publicity.[24]

Perhaps most importantly in terms of the ultimate implications for professional sports, the right of publicity has been recognized to

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[19]*Id.* at 880.

[20]Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978).

[21]447 F. Supp. 723 (S.D.N.Y. 1978).

[22]*Id.* at 727 (quoting Booth v. Curtis Publishing Co., 15 A.D.2d 343, 351-52, 223 N.Y.S.2d 737, 745, *aff'd*, 11 N.Y.2d 907, 183 N.E.2d 812, 228 N.Y.S.2d 468 (1962)). In contrast, one court held that the use of a picture on a poster sold commercially did not violate a right of privacy statute, N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney's 1976), when the individual was engaged in a political campaign. Paulsen v. Personality Posters, Inc., 59 Misc. 2d 444, 299 N.Y.S.2d 501 (1968).

[23]Rosemont Enterprises, Inc. v. Urban Systems, Inc., 72 Misc. 2d 788, 790, 340 N.Y.S.2d 144, *modified*, 42 A.D.2d 544, 345 N.Y.S.2d 17 (1973).

[24]Lombardo v. Doyle, Dane & Bernbach, Inc., 58 A.D.2d 620, 396 N.Y.S.2d 661 (1977). In *Lombardo*, the court recognized Guy Lombardo's "legitimate proprietary interest in his public personality" when the defendants produced an advertisement that used an actor who imitated Lombardo's style, in a New Year's Eve setting, with the music of "Auld Lang Syne." However, recovery under the New York privacy statute, N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976), as opposed to the common law publicity theory, was denied. Recovery under the New York privacy statute was similarly denied in Shaw v. Time-Life Records, 38 N.Y.2d 201, 205, 341 N.E.2d 817, 379 N.Y.S.2d 390 (1975). The court held that "Artie Shaw does not have any property interest in the Artie Shaw 'sound'. So long as there is an absence of palming off or confusion, competitors might 'meticulously' duplicate or imitate his renditions of musical composition." *Id.* at 205, 341 N.E.2d at 820, 379 N.Y.S.2d at 394 (citation omitted). *See also* Lahr v. Adell Chemical Co., 300 F.2d 256 (1st Cir. 1962) (no cause of action under New York privacy statute for imitation of voice and delivery style of well-known comedian, where name or likeness not used); Booth v. Colgate-Palmolive Co., 362 F. Supp. 343, 347 (S.D.N.Y. 1973) (no infringements of plaintiff's right of publicity when her name or likeness not used). *But see* Carson v. Here's Johnny Portable Toilets, Inc., No. 80-1720 (6th Cir. Feb. 1, 1983) (portable toilet manufacturer's use of the phrase, "Here's Johnny," held to violate talk show host Johnny Carson's right of publicity even though his actual name was not used).

protect a performer's interest in his own performance.[25] *Zacchini v. Scripps-Howard Broadcasting Co.*[26] involved a "human cannonball" act. A local television station, despite Zacchini's express protest, filmed Zacchini's act and showed it in its entirety on a nightly news program. Although the Ohio Supreme Court held that Zacchini's performance was protected by the right of publicity, the court also held that the broadcast was protected by the first and fourteenth amendment privileges and, therefore, the court denied recovery.[27] The United States Supreme Court, after discussing the Ohio court's holding that a right of publicity existed under Ohio law,[28] held that the broadcast of Zacchini's entire performance, even on a news program, was not protected by any constitutional privileges.[29] "[U]nlike the unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press, [such broadcast] goes to the heart of petitioner's ability to earn a living as an entertainer."[30] The Court noted that "[n]o social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay."[31]

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[25]Zacchini v. Scripps-Howard Broadcasting Co., 47 Ohio St. 2d 224, 351 N.E.2d 454 (1976), *rev'd on other grounds*, 433 U.S. 562 (1977).

[26]47 Ohio St. 2d 224, 351 N.E.2d 454 (1976), *rev'd on other grounds*, 433 U.S. 562 (1977).

[27]47 Ohio St. 2d at 232-34, 351 N.E.2d at 460-61.

[28]433 U.S. 562, 567-68 (1977). The existence of a common law right of publicity is an issue of state law, which the federal courts are bound to apply. *See* Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). Not all states have recognized a right of publicity in the same manner or to the same degree. *See generally* W. PROSSER, *supra* note 13, § 117. It should be noted that more than one state's laws may apply in a particular case given the wide geographic scope that may be encompassed by a broadcast or cablecast. The court in such circumstances may have to analyze the plaintiff's right of recovery under several different states' laws. *See, e.g.*, Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956).

[29]433 U.S. at 575-79.

[30]*Id.* at 576.

[31]*Id.* (citation omitted). Recovery under the New York privacy statute, N.Y. CIV. RIGHTS LAW, §§ 50-51 (McKinney 1976), in similar circumstances, had been denied a quarter of a century earlier in Gautier v. Pro-Football, Inc., 278 A.D. 431, 106 N.Y.S.2d 553 (1951), *aff'd*, 304 N.Y. 354, 107 N.E.2d 485 (1952). In *Gautier*, a lion-tamer performed during the half-time of a football game that was being telecast. Despite his protest, his act was also telecast. The plaintiff's action under the New York privacy statute was dismissed. The court held that there was no privacy interest involved because the plaintiff had chosen to perform in a football stadium. *Id.* at 438, 106 N.Y.S.2d at 560. The court also noted that the performer's act was newsworthy and that neither the performer nor the act was connected to any particular commercial in the broadcast. *Id.* at 435-38, 106 N.Y.S.2d at 557-60. *Gautier* can best be understood as limiting the scope of the statutory right of *privacy* in New York. *Accord* Sharman v. C. Schmidt & Sons, Inc., 216 F. Supp. 401 (E.D. Pa. 1963). *See also infra* text accompanying notes 50-61. The court in *Gautier* specifically observed that the plaintiff might have a right

III. Right of Publicity as Applied to Professional Sports and Athletes

The applicable considerations regarding the right of publicity generally have been applied in the context of professional athletes in a variety of situations. A sports figure, like any other celebrity, has a legitimate proprietary interest in his public personality: "A celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status. That identity, embodied in his name, likeness, statistics and other personal characteristics, is the fruit of his labors and is a type of property."[32] Accordingly, the right of publicity has been held to protect a professional athlete's interests in a variety of circumstances. For example, the unauthorized use of the names and statistical information of individual baseball players, which were incorporated into a board game that was sold commercially, was held to violate the players' rights of publicity.[33]

Similarly, the courts have recognized that a professional athlete has a right of publicity in his photograph, which the athlete may exploit for commercial gain, and this right of publicity may not be infringed or appropriated by anyone else.[34] In *Haelan Laboratories, Inc.*

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of recovery under some theory other than the statutory privacy claim. 278 A.D. at 439, 106 N.Y.S.2d at 561. In Ettore v. Philco Television Broadcasting Co., 229 F.2d 48 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956), this language was interpreted to permit recovery under New York law for an unauthorized telecast of a film of a boxer's performance under an unfair competition theory. Particularly in light of the decisions of the Ohio Supreme Court and the United States Supreme Court in *Zacchini, Gautier* should not preclude recovery under a right of *publicity* theory. This distinction between recovery based on privacy as opposed to recovery based on publicity was expressly relied upon in Uhlaender v. Henricksen, 316 F. Supp. 1277, 1280 n.4 (D. Minn. 1970). Recently the New York appellate division construed sections 50 and 51 of the New York Civil Rights Law to make no such distinction between the recovery rights of a public person or a private individual. Brinkley v. Casablancas, 80 A.D.2d 428, 440, 438 N.Y.S.2d 1004, 1012 (N.Y. App. Div. 1981).

[32]Uhlaender v. Henricksen, 316 F. Supp. 1277, 1282 (D. Minn. 1970) (baseball players' right of publicity in their names and statistics upheld). *See also* Spahn v. Messner, Inc., 18 N.Y.2d 324, 327, 221 N.E.2d 543, 544, 274 N.Y.S.2d 877, 878 (1966) ("The individual player's income will frequently be a direct reflection of his popularity and ability to attract an audience.").

[33]Uhlaender v. Henricksen, 316 F. Supp. 1277, 1283 (D. Minn. 1970). The right of publicity similarly was held to prevent use of professional golfers' names and statistics in Palmer v. Schonhorn Enterprises, Inc., 96 N.J. Super. 72, 232 A.2d 458 (1967). *Uhlaender* is particularly noteworthy because the co-plaintiff was the Major League Baseball Players Association, to which Uhlaender had assigned certain of his rights. A players association's standing to assert the rights of publicity of its members is an issue of increasing importance and may prove to be the ultimate means of resolving disputes in this area. *See infra* notes 111-33 and accompanying text.

[34]*See, e.g.*, Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953). Even the courts that have denied recovery

v. Topps Chewing Gum, Inc.,[35] a baseball player had assigned the right to use his picture to Topps, a company that sold baseball cards. When a competing baseball card company attempted to use the player's picture, Topps successfully sued. The court first had to address the issue whether the player had a right of publicity to assign. The court found that such a right indeed existed under New York law: "[I]n addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, *i.e.*, the right to grant the exclusive privilege of publishing his picture . . . ."[36] The right of publicity theory set out in *Haelan* was extended in *Ali v. Playgirl, Inc.*[37] to permit the plaintiff to enjoin the distribution of a cartoon-type caricature of himself in a magazine. The court in *Ali* stated: "The distinctive aspect of the common law right of publicity is that it recognizes the commercial value of the picture or representation of a prominent person or performer, and protects his proprietary interest in the profitability of his public reputation or 'persona.' "[38]

The Court of Appeals for the Third Circuit has come closest to addressing the issue of protecting the interest of a professional athlete from unauthorized broadcasting of his performance in *Ettore v. Philco Television Broadcasting Corp.*[39] The *Ettore* case involved a professional boxer who had signed a contract in 1936 to fight Joe Louis. At that time, Ettore also signed a contract permitting the fight to be filmed and to be shown in movie theatres. Approximately fifteen years later, during the first years of television, excerpts of the fight film were broadcast as part of a television show. Ettore sued for damages.[40]

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generally have recognized the existence of a player's right of publicity, and they have based their rulings in the cases before them on the player's contractual grant of the right to a third party. *E.g.*, Cepeda v. Swift & Co., 415 F.2d 1205 (8th Cir. 1969); Sharman v. C. Schmidt & Sons, Inc., 216 F. Supp. 401 (E.D. Pa. 1963). *Cf.* Namath v. Sports Illustrated, 80 Misc. 2d 531, 363 N.Y.S.2d 276 (Sup. Ct.), *aff'd*, 48 A.D.2d 487, 371 N.Y.S.2d 10 (1975), *aff'd*, 39 N.Y.2d 897, 352 N.E.2d 584, 386 N.Y.S.2d 397 (1976) (as part of its advertising campaign, a sports news magazine can use photographs of famous athletes that had previously appeared in the magazine's articles because the photographs demonstrated the nature and quality of the magazine's contents).

[35]202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

[36]*Id.* at 868. For a discussion of the subsequent developments and implications of the players' rights of publicity in this context, including the antitrust litigation following the assignment of such rights to the Baseball Players Association, see Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 1715 (1982).

[37]447 F. Supp. 723 (S.D.N.Y. 1978).

[38]*Id.* at 728.

[39]229 F.2d 481 (3d Cir. 1956).

[40]Although Ettore sued on several theories, it appears that what concerned him the most was the fact that only the portions of the fight in which he was not very successful were broadcast, whereas the third round, in which Ettore had had his finest

The court's analysis in *Ettore* involved two main concerns: the plaintiff's right to recover under state law,[41] and whether the plaintiff had relinquished his right to recover for an unauthorized television broadcast by consenting to the filming and subsequent exhibition of his performance.[42] The court did not speak in terms of the right of publicity, because at that time it was still a rather novel concept; however, the court did examine the plaintiff's claims based on " 'his property rights, right of privacy, good name and reputation,' "[43] as well as those based on unfair competition principles.[44] The *Ettore* court stated: "The fact is that, if a performer performs for hire, a curtailment, without consideration, of his right to control his performance is a wrong to him. Such a wrong vitally affects his livelihood, precisely as a trade libel, for example, affects the earnings of a corporation."[45]

Although the *Ettore* court's ultimate conclusion was clear, the court's reasoning and its terminology were not. Any possible confusion as to the meaning of *Ettore*, however, has been dispelled by the recent Third Circuit decision in *Fleer Corp. v. Topps Chewing Gum, Inc.*[46] in which the court, after discussing *Zacchini* and *Haelan* at length, declared:

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moments, was not included in the televised excerpts. Ettore alleged that this resulted in his being held up to ridicule and embarrassment. *See* 229 F.2d at 483.

[41]*Id.* at 484. In the first instance, the court had to determine which state law applied. It decided that because the show had been televised in Pennsylvania, New York, New Jersey, and Delaware, the laws of each of those states had to be addressed for Ettore was potentially injured in each of those states. For an example of the difficulties facing the courts in the context of injunctive relief for violation of rights of publicity, see Ali v. Playgirl, Inc., 447 F. Supp. 723, 730-31 (S.D.N.Y. 1978).

[42]229 F.2d at 487-94.

[43]*Id.* at 484 (quoting the plaintiff's complaint).

[44]*Id.* at 490, 493. The *Ettore* court specifically noted the decision in Gautier v. Pro-Football, Inc., 278 A.D. 431, 106 N.Y.S.2d 553 (1951), which had denied recovery to a performer whose act was broadcast without consent, based on the privacy statute in New York, N.Y. Civ. Rights Law §§ 50-51 (McKinney 1976). The *Ettore* court observed that the New York Court of Appeals had indicated that Gautier might have had some other, unasserted cause of action and suggested that this might be for unfair competition. The court in *Ettore*, therefore, found that Ettore did have a right of recovery under New York law, 229 F.2d at 493, a decision fully consistent with the holding of the Second Circuit in Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953). *See also* Brinkley v. Casablancas, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1981).

[45]229 F.2d at 490. *Ettore* was cited for this proposition by the United States Supreme Court in Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 572-73 n.9 (1977). The Court, in *Zacchini*, observed that "the State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors." *Id.* at 573.

[46]658 F.2d 139 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 1715 (1982).

> [E]ach player's exclusive right of publicity and its effect on the trading card market, is central to our analysis.
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> The exclusive right of major league baseball players to control the form and frequency of their commercial publicity has been long established. . . .
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>
> This circuit recognized the right of publicity not long after the landmark *Haelan* case. In *Ettore v. Philco Television Broadcasting Corp.*, . . . we held that a prize fighter who licensed the motion picture rights to his prize fight retained a right of publicity over the television rebroadcast of the same movie.[47]

Based upon the decisions that uphold professional athletes' rights of recovery in cases involving still photographs and biographical data[48] and the steady trend of the courts to recognize, to articulate, and to extend protection to a performer's right of publicity in his actual performance,[49] there is reason to conclude that a court is likely to hold that any athlete has a property right in his athletic performance, including his performance in a team sport or in other multiple participant events. After all, it would be difficult to rationalize a ruling that a player in a team sport has a right of publicity in his name, photograph, and statistics, but not in the very performance that made the right valuable in those ancillary contexts.

IV. Professional Athlete's Right of Publicity and First Amendment Privilege Considerations

Broad claims by newspapers, magazines, and broadcasting companies that their conduct in disseminating the pictures or performances of athletes and entertainers is protected under the first amendment have been rejected by the courts. In *Zacchini v. Scripps-Howard Broadcasting Co.*,[50] the Supreme Court specifically held that the first and fourteenth amendments did not give a television station the privilege of appropriating the plaintiff's performance without his consent. The Court stated:

> Wherever the line in particular situations is to be drawn between media reports that are protected and those that are

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[47]*Id.* at 148-49 (citation omitted).

[48]*See* Uhlaender v. Henricksen, 316 F. Supp. 1277 (D. Minn. 1970); *see also* Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

[49]*See, e.g.*, Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

[50]433 U.S. 562 (1977).

> not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent. The Constitution no more prevents a State from requiring respondent to compensate petitioner [Zacchini] for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner, or to film and broadcast a prize fight, or a baseball game, where the promoters or the participants had other plans for publicizing the event.[51]

Similarly, in *Grant v. Esquire, Inc.*,[52] a magazine's claims of chilling or impairing first amendment rights were rejected.[53] The court specifically recognized that a newspaper or magazine (and presumably a television station) was entitled to report on almost any activity in which a well-known public figure such as Grant might engage, but the court observed that the freedom did not entitle the media "to appropriate his services as a professional model."[54] The court held:

> This decision tells this publisher—or any other that may learn of it—just two things:
> (a) It must refrain from making under-the-table arrangements with actual or potential advertisers which would convert an apparent news story into a paid advertisement; and if it can be established by competent evidence that the publisher has not so refrained, it must respond in damages; and
> (b) If the publisher feels impelled to trade upon the name and reputation of a celebrity, it must pay the going rate for such benefit.[55]

The constitutional issue, of course, is clouded somewhat by the news/entertainment distinction in general, and is clouded, in particular, in the context of professional sports. Athletic feats certainly may be newsworthy, and they are regularly reported in the broadcast and print media. Game highlights and still photographs are regularly included in news reports. The decisions dealing with the right of

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[51]*Id.* at 574-75 (citations omitted). On remand, the Ohio Supreme Court also concluded that the Ohio State Constitution should not be deemed to immunize the station from damage claims for infringement of the right of publicity. The court saw "no compelling reason on the record . . . to render a constitutional declaration beyond that which the majority of the United States Supreme Court announced in reviewing [the] cause." 54 Ohio St. 2d 286, 287, 376 N.E.2d 582, 583 (1978).

[52]367 F. Supp. 876 (S.D.N.Y. 1973).

[53]*Id.* at 881.

[54]*Id.* at 884. *See also* Brinkley v. Casablancas, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1981).

[55]367 F. Supp. at 883. *See also* Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978).

publicity do not seem to preclude such reporting nor do they generally consider use of the pictures or the videotapes to constitute a misappropriation of anyone's act.[56]

However, just as television broadcasting companies have separate news and sports divisions, the nature of particular sports conduct and of particular reports about sports also can be distinguished. It is one thing to show a particular golf shot or an isolated play in a baseball game, after the fact, accompanied by a brief narration summarizing an entire performance or contest: for example, the results of a golf tournament involving seventy shots by each of one hundred golfers, or the nightly baseball scores. In *Zacchini*, the Supreme Court recognized that "[i]t is evident, and there is no claim here to the contrary, that a plaintiff's state-law right of publicity would not serve to prevent . . . reporting [of] the newsworthy facts about [his] act."[57] On the other hand, showing an entire game as it is played—even if nothing other than the final score proves to be particularly newsworthy—plainly is conduct of a different character. It is this sort of appropriation that has been held not to be protected under the first and fourteenth amendments.

Nevertheless, cases may arise in which the distinction drawn is much closer. In *Ettore v. Philco Television Broadcasting Corp.*,[58] three of the five rounds of Ettore's fight with Joe Louis were shown: query whether showing one round of a fight would be a sufficiently limited broadcast.[59] In *Zacchini*, the fact that the act was at a local fair and

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[56]The court in Grant v. Esquire, Inc., 367 F. Supp. 876 (S.D.N.Y. 1973), specifically recognized the newsworthy aspects of public figures' conduct. *Cf.* Gautier v. Pro-Football, Inc., 278 A.D. 431, 106 N.Y.S.2d 553 (1951), *aff'd*, 304 N.Y. 354, 107 N.E.2d 485 (1952) (broad approach to the term "newsworthy" in the context of the New York privacy statute).

[57]433 U.S. at 574.

[58]229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956).

[59]In *Ettore*, because the fight had taken place some 16 years earlier, it obviously was not a news item, regardless of the length of the film clip; and the film was not shown as part of a news broadcast. Of note in this regard is the decision in New Boston Television Inc. v. Entertainment Sports Programming Network, Inc., 1981 COPYRIGHT L. REP. (CCH) ¶ 25,293, at 16,625 (D. Mass. Aug. 3, 1981). There, the owner-operator of a Boston television station and the Boston professional baseball and hockey teams sued ESPN, a network that provides sports programming to cable stations for retransmission to the public, and to certain cable systems. The plaintiffs obtained an injunction against the defendant ESPN's practice of taping the plaintiff's copyrighted broadcasts of sporting events and then including excerpts of approximately two minutes duration as part of a program entitled "Sportscenter," which was composed of highlights of current sporting events. Although *New Boston* turned on issues of "fair use" under the Copyright Act, *see* 17 U.S.C. § 107 (1976), certain aspects of the court's decision would seem applicable in the right of publicity context, particularly in light of the Supreme Court's recognition in *Zacchini* of the similar policies underlying both copyright and right of publicity doctrines. *See* 433 U.S. at 573, 574-75. *See also supra* note 45

would continue to be performed in the near future may have had news aspects. The *Zacchini* case was particularly difficult because the nature of the performance was such that it could be, and had been, shown in its entirety during the time for an average news clip. On remand to the Ohio Supreme Court, the distinction between showing all or part of a performance was the subject of a concurring opinion by three justices, which may presage difficulties for the media in future cases that involve news-type broadcasts. Specifically, the concurring justices took the position that it was not necessary for an entire act to be appropriated in order for an infringement to occur:

> It would seem that in order to reconcile the media's right to inform the public about newsworthy entertainment with the entertainer's right to enjoy the fruits of his own industry, some degree of restriction on freedom of the press is unavoidable. The only real distinction between the two proposed tests is that I would impose liability where the media appropriates [those] portions of an act which an audience would otherwise have paid to see, whereas my concurring brother has formulated a standard under which the media could avoid liability simply by excluding any portion of the appropriated act which it deems to be of lesser public interest.[60]

In a separate concurring opinion, one justice specifically recognized that this is not a major concern in the context of most sports events, which, by their nature, are too long to show on the news except in highlight form.[61]

V. Application of the Right of Publicity to Team Sports Performances: The Twilight Zone

Notwithstanding the many cases that recognize an athlete's right of publicity generally, in cases that involve an athlete's assertion of his rights of publicity in his performance in the context of team sports, the team or league defendants may argue that cases such as *Ettore* are inapposite because they deal with individual performances rather

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and *infra* note 76. Specifically, the *New Boston* court rejected the defense that ESPN was using the excerpts "primarily for 'news' purposes and hence should be protected by the fair use doctrine . . . to assure the public's right of access to newsworthy information." 1981 Copyright L. Rep. (CCH) ¶ 25,293, at 16,626. Rather, the court held that "the public right of access to such information . . . is sufficiently protected merely by enabling defendants to report the underlying facts which the plaintiff's videotapes record. It does not . . . permit defendants to appropriate the plaintiff's *expression* of that information by copying the plaintiff's films themselves." *Id.* at 16,626-27 (emphasis by court).

[60] 54 Ohio St. 2d at 290, 376 N.E.2d at 585 (Celebrezze, J., concurring).

[61] *Id.* at 295, 376 N.E.2d at 587 (Brown, J., concurring).

than with team games. For example, in *Silas v. Manhattan Cable Television, Inc.*,[62] three professional basketball players brought suit against several cable television companies for alleged violations of the players' rights of publicity, and rights of privacy under the New York Civil Rights Law. The defendants contended that the

> [p]resent plaintiffs, skilled as they claim they are, would have little of value to publicize if it were not for the basketball league and the games organized, scheduled, and produced by the NBA and the teams. It is elementary that an athlete whose skills are in a team sport cannot exploit those skills alone. Without a team, the player's skill as a basketball player is totally unmarketable.[63]

This argument does not appear to withstand analysis. There is no reason why a team sport athlete is not entitled to the full value of his performance, including that value as is reflected in broadcast revenue for the games themselves, when Zacchini and Ettore were entitled. Ettore, for example, depended upon the existence of another player-competitor with whom to fight, and upon a promoter to organize, to schedule, and to produce the fight, which was ultimately broadcast, as much as any team sport athlete depends upon his team and league. Undoubtedly, the television station would not have been interested in broadcasting clips from home movies of Ettore shadow-boxing. This is equally true with other nonteam sports such as golf or tennis, because each sport depends upon two or more individuals who compete against each other as an integral part of the sports event. Indeed, it is difficult to think of a single performer, whether an athlete or an actor, who could perform or have "value to publicize" without others to promote, to organize, to schedule, and to produce the performances. Of course, taking this argument and analysis to its logical conclusion, it is obvious that team owners and leagues would be totally incapable of staging sporting events without the players; yet the players could form their own leagues and exhibit their skills accordingly, without the current established leagues or teams.

Thus, reliance by teams or leagues on early cases like *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*,[64] which involved a team's right to control the broadcast of its games, appears to be of limited value. In *Pittsburgh Athletic*, the plaintiffs, who were the owners of the Pitts-

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[62]No. 79 Civ. 3025 (S.D.N.Y. filed June 8, 1979).

[63]Reply Memorandum of Manhattan Cable Television, Inc. in Support of its Motion to Dismiss the First Amended and Supplemental Complaint at 8-9, Silas v. Manhattan Cable Television, Inc., No. 79 Civ. 3025 (S.D.N.Y. filed June 8, 1979).

[64]24 F. Supp. 490 (W.D. Pa. 1938). *See also* National Exhibition Co. v. Fass, 143 N.Y.S.2d 767 (Sup. Ct. 1955).

burgh Pirates baseball team and the assignees, sued to enjoin unauthorized radio transmissions of play-by-play accounts of the game by individuals who were operating from a vantage point outside the ballpark. In broad, sweeping language, the court granted the injunction and stated that "the exclusive right to broadcast play-by-play descriptions of the games . . . rests in the plaintiffs."[65] The court stated that the team had a property right in such play-by-play accounts and had the right to control its use.[66]

However, the sole issue in *Pittsburgh Athletic* involved the right to broadcast the play-by-play of a game by radio as between the team owners and assignees and the third parties who had no involvement in the production or playing of the game. The players were not before the court pressing their own claims; therefore, the court did not have before it, nor did it address, the rights of the team owners or their assignees vis-a-vis the players. Because the *Pittsburgh Athletic* case preceded the earliest athletes' right of publicity cases by some fifteen years, the court could hardly have been expected to raise the players' right issue *sua sponte*. Further, because the broadcasts in *Pittsburgh Athletic* related only to play-by-play reports on radio, there was no appropriation of the likeness or performance of any one or more players. There was merely an oral description of what was transpiring on the field. To the extent that the right of publicity only protects against unauthorized use of the likeness or performance of the athlete, arguably, radio would create no infringement at all regarding the individual player.[67]

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[65]24 F. Supp. at 492.

[66]As a formal conclusion of the law, the court stated:

> 2. The right, title and interest in and to the baseball games played within the parks of members of the National League, including Pittsburgh, including the property right in, and the sole right of, disseminating or publishing or selling, or licensing the right to disseminate, news, reports, descriptions, or accounts of games played in such parks, during the playing thereof, is vested exclusively in such members.

Id. at 493-94.

[67]*Accord* Waring v. WDAS Broadcasting Station, 327 Pa. 433, 194 A. 631 (1937). In *Waring*, the court enjoined a radio station's unauthorized broadcasts of an orchestra's recorded performances. The court stated that although the orchestra conductor and musicians contributed their parts, "none of them can claim an individual property right in the composite production. It is the corporation, the orchestra organization, which alone is entitled to assert and enforce the right of property in its renditions." *Id.* at 442, 194 A. at 635. However, the court did recognize the need for judicial flexibility to protect performers' interests in light of changing circumstances and technologies:

> Just as the birth of the printing press made it necessary for equity to inaugurate a protection for literary and intellectual property, so these latter-day inventions make demands upon the creative and ever-evolving energy of equity to extend that protection so as adequately to do justice under current conditions of life.

Id. at 435, 194 A. at 632.

It should also be noted that one of the basic premises from which *Pittsburgh Athletic* proceeded would appear to help support a cause of action for team players. Specifically, the court in *Pittsburgh Athletic* noted that both the plaintiffs and the defendants were using the baseball news as it happened as material for profit.[68] The court held in favor of the team owners and their assignees because they had acquired and maintained the ballpark, had "[paid] the players who participate[d] in the game," and, therefore, had a "legitimate right to capitalize on the news value of their games by selling exclusive broadcasting rights."[69] The court was proceeding from the assumption that the team had paid for and obtained from its players the right to broadcast their performance.[70] Yet that assumption is precisely what would be challenged in a player's suit alleging violation of the right of publicity. Whether the team has that right turns upon the nature of the rights that were granted to the team in the players' contract. Based on *Ettore*, merely paying someone for the right to his performance at a live sporting event does not necessarily encompass payment to that performer as compensation for further filming or for broadcasting his performance.[71]

VI. Right of Publicity in Team Sports: The Contract and Collective Bargaining Approach

There appears to be no reason not to apply right of publicity concepts to protect the interests of an individual professional athlete in his performance merely because he participates in a team sport, such as football or hockey, rather than in an individual sport, such as golf or boxing. The unique nature of professional sports leagues, however, can lead to confusion over the precise boundaries and enforceability

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[68]24 F. Supp. at 492. The use of the "news" analysis itself casts further doubt on the applicability of *Pittsburgh Athletic* in the right of publicity context. *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

[69]24 F. Supp. at 492.

[70]*See id.*

[71]The standard form film actors' contract as agreed to by the Screen Actors Guild, the American Federation of Television and Radio Actors, and other performers' unions—quite clearly analogous to a team sport athlete's contract in terms of governing rights of one member of a larger group of employees acting in a production organized by others—has an express provision that permits a movie producer to sell the rights to the actor's performance to television and other media, thereby avoiding the *Ettore* problem. Moreover, the performers' overall collective bargaining agreements generally contain schedules that provide for payments for such ancillary performance uses in other media. The standard form professional sports contract and sport unions' collective bargaining agreements historically have not contained similar provisions. *See infra* text accompanying notes 79-83.

of an individual athlete's right of publicity in the context of a sports team's performance.[72]

The most sensible approach would be for the courts to view the right to profit from the broadcast of a team sport athletic event as composed of two complementary "half-rights": the players' rights in their performances, without which there could be no event; and the teams' or league's right in the event, made possible by their organization of the players' performances.

A. Television Performance Rights: The Team Owners' Half and the Players' Half

The basic products that the owners of professional sports teams produce are the actual games. In relation to nonplayer third parties, the team owners (team) own the exclusive right, title, and interest in the exploitation of the games that they produce.[73] As part of their franchise right, the team owners retain the sole right of selling or licensing the telecasts of the games.[74] An individual player in the game, however, is not precluded from asserting his property right in his own performance, which is a separate, divisible right that involves the player's personal right to exploit his own name, image, or likeness.[75] This personal right of exploitation is significantly different from the right of team owners to control the ultimate product, the game. The team's right to sell the television rights to this product is derived, in part, from the player's right of publicity.[76] Thus, in order for a

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[72]*See* Pittsburgh Athletic Co. v. KQV Broadcasting Co., 24 F. Supp. 490 (W.D. Pa. 1938).

[73]*See* Pittsburgh Athletic Co. v. KQV Broadcasting Co., 24 F. Supp. 490, 492-94 (W.D. Pa. 1938). *See also* National Exhibition Co. v. Fass, 143 N.Y.S.2d 767 (Sup. Ct. 1955).

[74]*See* Pittsburgh Athletic Co. v. KQV Broadcasting Co., 24 F. Supp. 490 (W.D. Pa. 1938); National Exhibition Co. v. Fass, 143 N.Y.S.2d 767 (Sup. Ct. 1955). In Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, No. 80 Civ. 3710 (N.D. Ill. filed June 14, 1982), the plaintiff baseball team owners allege that their ownership of the copyright of the telecasts of baseball games protects their right to telecast the players' pictures. This position may be countered by arguing that copyright protection creates rights only against persons who copy or misappropriate the copyrighted work. *See* 17 U.S.C. § 106 (Supp. V 1981). The players certainly are not in that position. Thus, the owners' copyright protection seems irrelevant to the question of whether they may use the players' names and pictures in the telecast of the ballgames.

[75]*See supra* text accompanying notes 32-38.

[76]In Zacchini v. Scripps-Howard Broadcasting Co., the United States Supreme Court recognized that these rights are separable:

> The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act of television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner, or to film and broadcast a prize fight, or a baseball game, where the promoters *or the participants* had other plans for publicizing the event.

sports producer, in this case the team, to sell the television rights to broadcast a sports contest, the producer must first obtain the right to make any particular use of the participating athlete's name, image, or likeness.[77] As a conceptual matter, this limitation is really no different than the limitation that is placed on the rights of a producer of a play or on other forms of live entertainment, such as a concert. No one would seriously contend that a producer could film or record the performance and sell it without the specific authorization of the performers who were involved.[78] It is equally apparent that absent a performer's express consent, the producer also would be precluded from authorizing the televising of the play or concert. Likewise, as to the telecast of a team sports event, it would seem that both the team owners and the players have complementary "half-rights" which must be packaged in the same way as any entertainment event that is put together by a theatrical producer.

B. The Grant of the Players' "Half-Right"

The specific grant of rights clause that is contained in a player's standard form contract in the major professional team sports leagues traditionally has been very limited with respect to the use of the player's image or likeness by the team or league.[79] These clauses limit

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433 U.S. at 575 (citations omitted) (emphasis added). *Cf.* Copyright Royalty Tribunal, 1978 Copyright Royalty Distribution Determination, PAT. TRADEMARK & COPYRIGHT J. (BNA), No. CRT 79-1, at D-1 (Sept. 25, 1980). The Copyright Royalty Tribunal, established pursuant to the 1976 revisions to the Copyright Act, determined that professional sports leagues hold a copyright and are entitled to share in the revenues generated as a result of those revisions with respect to the retransmission of sports events by cable television. The Tribunal, like the courts in the early cases involving broadcasts of baseball games, *see supra* notes 64-71 and accompanying text, did not attempt or purport to address the question of individual players' rights vis-a-vis the leagues and their member teams regarding the revenues so derived. The cable television companies should be accountable to the players for cablecasts of the players' performance, just as the defendant television broadcaster was held liable to the athlete in Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956).

[77]*See, e.g.*, Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956) (boxing match); Sharkey v. National Broadcasting Co., 93 F. Supp. 986 (S.D.N.Y. 1950) (boxing match).

[78]In an analogous situation, a model who consented to be photographed for certain posters—and who further consented that the modeling session be filmed and shown on cable television—was held to have a cause of action for violation of her right of publicity when, without her consent, other posters were made from photographs taken at the modeling session. Brinkley v. Casablancas, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1981).

[79]The player contract of the National League of Professional Baseball Clubs provides only that

> [t]he player agrees that his picture may be taken for still photographs, motion pictures, or television at such times as the Club may designate and agrees

the rights granted by the player to the use of his picture or likeness for promotional and publicity purposes, presumably contemplating such matters as ticket sales to the games in which the player has contracted to perform. There is neither an all-purposes grant of rights nor a specific grant of rights to the team or the league to broadcast or cablecast the player's performance or image in any other context.[80] Also the players have not granted this right directly to the television or cable companies. However, under the case law, a specific grant of rights is required in order for the right to be effectively assigned.[81] The mere fact that a professional athlete signs a contract to engage in professional sports does not mean that he automatically relinquishes his rights to otherwise exploit his name, image, or likeness through the media or elsewhere. For example, in *Ali v. Playgirl, Inc.*,[82] the court, referring to well-known boxer Muhammed Ali, held " '[t]hat [plaintiff] may have voluntarily on occasion surrendered [his] privacy

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> that all rights in such pictures shall belong to the Club and may be used by the Club *for publicity purposes* in any manner it desires.

National League of Professional Baseball Clubs, Uniform Player's Contract, ¶ 3(c). Similarly, the NBA's player contract provides:

> The Player agrees to allow the Club or the Association to take pictures of the Player, alone or together with others, for still photographs, motion pictures or television, at such times as the Club or the Association may designate, and no matter by whom taken *may be used in any manner desired by either of them for publicity or promotional purposes.*

National Basketball Association, Uniform Player Contract, ¶ 18 (emphasis added). Similar language is contained in the standard form National Football League's player contract, National Football League, Uniform Player Contract, ¶ 4. By contrast, the National Hockey League's player contract does not limit the club's use of the player's picture to any specific purpose, publicity or otherwise, except as the collective bargaining agreement may impose from time to time. National Hockey League, Standard Player's Contract, ¶ 8(a). The North American Soccer League's standard form contract includes a specific grant of rights with respect to all forms of television, so as to include broadcast and cable television. North American Soccer League, Club-Player Agreement, ¶ 2.3.

[80]Cable television is not referred to at all.

[81]*See* Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956); Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978); Sharkey v. National Broadcasting Co., 93 F. Supp. 986 (S.D.N.Y. 1950); Norman v. Century Athletic Club, Inc., 193 Md. 584, 69 A.2d 466 (1949). *See also* Cepeda v. Swift & Co., 415 F.2d 1205 (8th Cir. 1969); Price v. Hal Roach Studios, Inc., 400 F. Supp. 836 (S.D.N.Y. 1975) (court scrutinized the contractual language in issue and found very definite limitations on the extent and duration of grants of rights); Sharman v. C. Schmidt & Sons, Inc., 216 F. Supp. 401, 407 (E.D. Pa. 1963) ("A sports figure can complain when his name or likeness is used to advertise a product but he can recover damages only if he has not consented to such use or the advertising exceeds the consent granted."). *But see* Rooney v. Columbia Pictures Industries, 538 F. Supp. 211 (S.D.N.Y. 1982) (contracts granted defendants all rights with respect to all films in which plaintiff appeared prior to February 1, 1960).

[82]447 F. Supp. 723 (S.D.N.Y. 1978).

for a price or gratuitously, does not forever forfeit for anyone's commercial profit so much of [his] privacy as [he] has not relinquished.' "[83]

Thus, in order for a sports team or a league to insure that it obtains the player's consent to televise or cablecast the games in which that athlete performs, the team or league should obtain the broadest possible grant of rights from the player.[84] The grant of rights clause should cover specifically both the type of use[85] and the type of medium[86] involved. The courts in several sports performances cases have held that even when there is no express reservation of rights as to a specific type of use or medium, a reservation may nonetheless be implied.[87]

Alternatively, the team owners may contract with the player for a specific grant of rights with regard to a particular use by the team of the player's name, picture, or likeness in the televising of the player's performances during the team's games.[88] To the extent that

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[83]*Id.* at 727 (quoting Booth v. Curtis Publishing Co., 15 A.D.2d 343, 351-52, 223 N.Y.S.2d 737, 745, *aff'd*, 11 N.Y.2d 907, 183 N.E.2d 812, 228 N.Y.S.2d 468 (1962)). *See also* Brinkley v. Casablancas, 80 A.D.2d 428, 435, 438 N.Y.S.2d 1004, 1009 (1981) ("[P]laintiff's previous written consent to the use of other photographs of herself does not constitute implied authorization for the use of the photograph involved here.").

[84]*See, e.g.*, Bartsch v. Metro-Goldwyn-Mayer, Inc., 391 F.2d 150 (2d Cir. 1968), *cert. denied*, 393 U.S. 826 (1968); Rooney v. Columbia Pictures Industries, 538 F. Supp. 211 (S.D.N.Y. 1982); Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 838 (S.D.N.Y. 1975) (involving the assignment of all rights with respect to the exploitation of an individual or an event or series of events—a so-called "all rights" clause).

[85]An athlete may agree to have his picture used for publicity purposes with regard to the promotion of ticket sales, but not be deemed to have waived his rights regarding an unauthorized caricature in a magazine, inclusion of which promotes the trade of that magazine. *See* Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978). *See also* Cepeda v. Swift & Co., 415 F.2d 1205 (8th Cir. 1969); Brinkley v. Casablancas, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1981).

[86]A grant of rights to make a motion picture of a sports performance has been held not to include the right to broadcast those pictures as part of a television show. Ettore v. Philco Television Broadcasting Co., 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S 926 (1956); Sharkey v. National Broadcasting Co., 93 F. Supp. 986 (S.D.N.Y. 1950). Similarly, a grant of rights for radio broadcasts of boxing matches was held not to include the right to telecast boxing matches from the same arena. Norman v. Century Athletic Club, Inc., 193 Md. 584, 591, 69 A.2d 466, 468-69 (1949). *Contra* Bartsch v. Metro-Goldwyn-Mayer, Inc., 391 F.2d 150, 155 (2d Cir. 1968).

[87]*See* Ettore v. Philco Television Broadcasting Co., 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956); Sharkey v. National Broadcasting Co., 93 F. Supp. 986 (S.D.N.Y. 1950); Norman v. Century Athletic Club, Inc., 193 Md. 584, 69 A.2d 466 (1949); Kirk La Shelle Co. v. Paul Armstrong Co., 263 N.Y. 79, 188 N.E. 163 (1933). *But see* Bartsch v. Metro-Goldwyn-Mayer, Inc., 391 F.2d 150 (2d Cir. 1968).

[88]One recent player contract between an NBA player and the New York Knickerbockers provides: "The Player hereby grants to the Club the full and complete right to use, and permit others to use, his name, picture, and likeness in connection with the broadcasting, telecasting, cablecasting or other exploitation of any and all games and practices of the club during the term hereof." Affidavit of Lawrence Fleisher,

the individual grant of rights clauses are limited to promotion and publicity purposes in the standard form contracts that are currently in use in most sports leagues, the players would appear not to have granted or would appear to have impliedly reserved their rights in their performances, both as to the local broadcast and cable television which is controlled by the individual team owners, and as to the network broadcast and cable television which are controlled by the league.

C. Contentions of Waiver of the Players' "Half-Right"

For nearly a quarter of a century, players in all of the major professional team sports have had their names, images, or likenesses used in the television broadcast media without their express consent.[89] However, the cases dealing with the publicity rights of professional athletes in their actual performances have not yet involved players in team sports. This fact may lead league representatives and franchise owners in major professional team sports to conclude that the players' rights to exploit their names, images, or likenesses through the broadcast television media[90] with respect to the games in which the players perform should be precluded by the players' implied consent or by various equitable doctrines. These conclusions, however, should not survive judicial scrutiny.

The sports team owners may argue that, even though the grant of rights clause that is contained in the player's uniform player contract is limited to publicity and promotional purposes,[91] it has always been understood in the professional teams sports industry that by signing the player contract and by agreeing to perform in the team's games, the player has assigned whatever rights he may have in that performance to the team or the league. In effect, the team owners may contend that because a substantial part of the players' salaries are paid by the team from revenues received by the team from the sale of these television rights, the players should be deemed to have impliedly consented[92] to the use of their names, images or likenesses

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Esq., In Opposition to Motion to Dismiss (Exhibit D), Silas v. Manhattan Television, Inc., No. 79 Civ. 3025 (S.D.N.Y. filed June 8, 1979). These principles apply with respect to both the individual teams' local television licensing contracts and the network television contracts which are ordinarily entered into by a league on behalf of all of its teams. Although an individual player generally signs a player contract with an individual club, that contract ordinarily must be approved by the league office and contains provisions dealing with league as well as with individual club regulations.

[89]*See, e.g.*, National Exhibition Co. v. Fass, 143 N.Y.S.2d 767 (Sup. Ct. 1955). Team sports have been telecast since the early 1950's.

[90]Cable television must be treated somewhat differently. *See infra* note 104.

[91]*See supra* note 79.

[92]*See* W. PROSSER, *supra* note 13, § 117. The team owners also may argue that,

in television broadcasts, particularly because the players signed these contracts with full knowledge of the practice of televising games and they played in the games knowing the games would be televised.[93] In addition, sports leagues and team owners may contend that in light of the twenty-five years of televising games, the players have waived or are estopped from asserting their rights of publicity in their performances.

To the extent there has been any implied consent, the consent can simply be withdrawn.[94] Waiver requires a voluntary and intentional abandonment of a known right, claim, or privilege,[95] and mere passivity is not in itself a waiver of rights.[96] In the professional team

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over the last decade or more, the players have either bargained away or waived these rights as part of their collective bargaining negotiations. *See* Baltimore Orioles, Inc. v. Major League Baseball Players Association, No. 82 Civ. 3710 (N.D. Ill. filed June 14, 1982).

[93]The court in Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (3d Cir. 1956), alluded to this concept, albeit not in the professional sports context, in which express contractual provisions would be determinative: "Today also, for example, if there be telecasts of an intercollegiate football game, the players, knowing or having reasonable grounds to know that the contest was being telecast, would be presumed to have waived any right to compensation for their performances by participating in the contest." 229 F.2d at 487. This dictum, however, appears to have been meant to clarify the distinction between new and known mediums, for nothing else in the opinion in any way supports the view that a party that grants only certain rights by contract has waived his other, not-granted rights. In addition, this language would not appear to preclude an action for prospective declaratory or injunctive relief, as opposed to money damages for past injury. *See infra* note 98.

[94]62 AM. JUR. 2d *Privacy* § 20 (1972). *See, e.g.*, Garden v. Parfumerie Rigaud, Inc., 151 Misc. 692, 271 N.Y.S. 187 (Sup. Ct. 1933). In *Garden*, the court found that the plaintiff could revoke, at any time during the 20-year agreement, her gratuitous consent to the defendant's use of her name and picture in connection with its perfume:

> The court cannot lend itself to defendant's claim that, having trade-marked the article and invested considerable money to popularize it, no revocation is possible. It may well be that by revocation serious impairment of business results. But that is a danger and risk assumed in accepting a consent unlimited as to time and against which, in the beginning, guard could easily be had.

Id. at 693, 271 N.Y.S. at 189. The same rationale would appear applicable with respect to teams' arguments regarding the players' rights in their performances. *See supra* notes 79 & 88. The insufficiency of an "understanding," or even an express oral consent, is particularly clear under New York law, because N.Y. CIV. RIGHTS LAW, §§ 50-51 (McKinney 1976), which has been held to encompass the right of publicity, requires *written* consent. Furthermore, a New York court has held that "[o]ral consent is not a defense and is relevant only on the question of damages. 'Neither oral consent nor estoppel is a complete defense; they are available only as partial defenses in mitigation of damages.' " Brinkley v. Casablancas, 80 A.D.2d 428, 434, 438 N.Y.S.2d 1004, 1009 (1981) (quoting Lomax v. New Broadcasting Co., 18 A.D. 229, 229, 238 N.Y.S.2d 781, 781 (1963)).

[95]28 AM. JUR. 2d *Estoppel and Waiver* §§ 30, 154 (1966).

[96]*Id.* § 160. *See, e.g.*, Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 846-47 (S.D.N.Y. 1975).

sports field, the history of players' express reservations regarding television rights over the last ten years further reveals the weakness of a waiver theory.[97] Similarly, mere silence or inaction would not necessarily give rise to an estoppel situation.[98] The applicability of estoppel concepts to this issue is particularly questionable because sports leagues and teams do not make significant expenditures for television equipment in reliance on the players' supposed implied consent,[99] but rather merely enter into contracts permitting third parties such as television networks and local television stations, which already have equipment and trained employees, to televise the games. These contracts have fixed terms and may be renewed or may expire depending upon the desires not only of the team or league, but also of the network.[100] Because the players' consent is not determinative of the team's or league's ability to televise the games, estoppel appears to be an erroneous basis for denying the players' rights.

Finally, in light of the peculiar nature of the team sports industry in the United States, the concepts of implied consent, waiver, and estoppel may be entirely inapplicable. The games of all major professional leagues are televised; thus, the athlete who wishes to play major league professional sports has no choice but to play for a team or league which will televise his performance. He cannot avoid the telecast without foregoing his athletic career entirely or without "sitting out" the prime of his career while right of publicity litigation winds its way through the courts. In such circumstances, the equitable doctrines which the sports leagues and teams may raise are of dubious applicability.[101]

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[97]*See infra* note 105 and accompanying text.

[98]28 AM. JUR. 2d *Estoppel and Waiver* § 53, at 667, 669 (1966). *See generally* Brinkley v. Casablancas, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1981). *Cf.* New Boston Television, Inc. v. Entertainment Sports Programming Network, Inc., 1981 COPYRIGHT L. REP. (CCH) ¶ 25,293 at 16,625 (D. Mass. Aug. 3, 1981). In enjoining the defendant from copying and retransmitting to cable television systems excerpts of the plaintiff's copyrighted broadcasts of sporting events, the court rejected the defendant's claim that an injunction was inappropriate because the plaintiff had never made any efforts to sell excerpts of its broadcasts to cable stations in the past: "Assuming it to be true . . . this does not permit defendants to appropriate plaintiff's copyrighted material and effectively preclude such efforts in the future. *It is for plaintiffs, not defendants, to determine when and in what manner they choose to exploit their copyright.*" *Id.* at 16,627 (emphasis added).

[99]*See* 28 AM. JUR. 2d *Estoppel and Waiver* § 55 (1966).

[100]To the extent a sports league or team is a party to a television broadcasting contract currently in effect, the courts may recognize an estoppel to the point of allowing the contract to run its course. *See* Garden v. Parfumerie Rigaud, Inc., 151 Misc. 692, 271 N.Y.S. 187 (Sup. Ct. 1933) (permitting a manufacturer to sell those products which it already had produced or had commenced to manufacture in reliance on the plaintiff's consent).

[101]Further, it is difficult to see how a waiver outside the collective bargaining

In light of these considerations, players in professional team sports today and in the future should be held to have a protected property right in the value of their performances, without regard to the precise medium in question.[102]

In addition, an examination of the waiver and consent issues cannot be limited to the precise aspect of the publicity in question, for example live performance as opposed to photographs or statistics,[103] but also must be examined with regard to the type of medium involved, such as movies, broadcast television, or cable television. This latter consideration is of great importance in professional team sports today. Even if the players' rights to exploit their names, images, or likenesses and to seek additional compensation for their performances with regard to broadcast television is deemed to have been waived, the waiver theory would not appear to be applicable to the new and burgeoning cable television industry. In the context of the exploitation of sports performance rights, cable television is and must be considered a relatively new, and certainly a separate, medium.[104] To the

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arena by any individual or group of professional athletes could be deemed a waiver by, or estoppel as to all future professional athletes, such as, current amateur and college stars who have not yet signed their first professional contracts.

[102]Players in certain team sports already do share, to a limited degree, in the revenues from traditional broadcast television. For example, under the Major League Baseball Players Benefit Plan, television revenues from the All-Star games are paid directly to the players' pension fund. *See* Basic Agreement between The American League of Professional Baseball Clubs and The National League of Professional Baseball Clubs and Major League Baseball Players Association—(Jan. 1, 1980). However, such sharing appears to have been derived from the general give-and-take of the collective bargaining process, rather than from right of publicity considerations. There is no reason why unions could not collectively bargain for a greater share of such television revenues as are already shared with the players by the owners, just as there is no reason why, absent an agreement reached through such bargaining, players could not bring suit to recover a share of such funds.

[103]The court in Uhlaender v. Henricksen, 316 F. Supp. 1277 (D. Minn. 1970), specifically noted that professional athletes do not waive their rights of publicity in all respects, despite the broad use and availability of aspects of their personality in certain ways. *Id.* at 1282-83. Thus, in rejecting claims that the names and statistics of professional baseball players were not protected from use in a board game, the court stated: "Defendants' contention has no merit that by publication in the news media and because of the ready availability to anyone of the names and statistical information concerning the players, such information is in the public domain and the players thus have waived their rights to relief in this case." *Id. Accord* Palmer v. Schonhorn Enterprises, Inc., 96 N.J. Super. 72, 76, 232 A.2d 458, 460 (1967).

[104]A special Presidential committee concluded a few years ago that "cable is not merely an extension or improvement of broadcast television. It has the potential to become an important and entirely new communications medium, open and available to all." THE CABINET COMMITTEE ON CABLE COMMUNICATIONS, REPORT TO THE PRESIDENT 13 (1974). *See also* United States v. Southwestern Cable Co., 392 U.S. 157 (1968); Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977). *See generally*, SUBCOMMITTEE ON COMMUNICATIONS OF THE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE 94th

extent that the long history of television broadcasting of professional sports may impair the players' ability to exploit their rights of publicity in the future with respect to that medium, there is no such extended history of cablecasting of team sports events.[105]

This conclusion is supported by several courts that have expressly declined to find a waiver of an individual's right to exploit his publicity rights in a new and previously unforeseen way.[106] In *Ettore v. Philco Television Broadcasting Corp.*,[107] the plaintiff contracted to receive twenty percent of the proceeds from the sale of the motion picture rights to his boxing match with Joe Louis. Approximately fifteen years after both the fight and the plaintiff's receipt of the royalties from the sale of the movie, part of the film was televised as a segment of a television program. The defendants moved to dismiss the action, contending that Ettore had consented in advance to any use that could be made of the film by contracting for the sale of the motion picture rights. The defendants' motion was granted.[108] On appeal, the Third Circuit reversed, holding that Ettore had a right to proceeds of the telecast and that he had not waived his television rights by contracting for the sale of the motion picture rights.[109] The court stated that "[f]airness would seem to require that a court treat the absence of the new or unknown media, television in the instant case, as about the equivalent of a reservation against the use of the work product of the artist or performer by a known medium . . . ."[110]

CONG., 2d SESS., CABLE TELEVISION: PROMISE VERSUS REGULATORY PERFORMANCE (1976); Note, *The Wire Mire: The FCC and CATV*, 79 HARV. L. REV. 366 (1965); Note, *The Federal Communications Commission and Regulation of CATV*, 43 N.Y.U. L. REV. 117 (1968).

[105]The professional basketball players have specifically reserved their rights with respect to cable television for approximately a decade. National Basketball Players Association Agreement Art. XVIII (Apr. 29, 1976). The same provision appears in the succeeding October, 1980 agreement. National Basketball Players Association, Collective Bargaining Agreement Art. XVIII § 1 (Oct. 10, 1980). In addition, in 1980, the players agreed not to sue the NBA or its teams or assignees regarding cable television and similar media until 1987, *id.* § 2, but reserved the right to collectively bargain concerning cable television revenues in the interim, *id.* § 3. The baseball players have a similar reservation of rights. Basic Agreement between The American League of Professional Baseball Clubs and The National League of Professional Baseball Clubs and Major League Baseball Players Association—(Jan. 1, 1980).

[106]*E.g.*, Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (3d Cir. 1956); Uhlaender v. Henricksen, 316 F. Supp. 1277 (D. Minn. 1970).

[107]126 F. Supp. 143 (E.D. Pa. 1954), *aff'd*, 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956).

[108]126 F. Supp. at 151.

[109]229 F.2d at 487-91.

[110]*Id.* at 491. The *Ettore* court, whose holding in this regard was recently reaffirmed in Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139, 149 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 1715 (1982), reviewed the applicable cases, the majority of which held that a performer will not be deemed to have granted his rights regarding a use or medium

D. Effect of Collective Bargaining on Professional Athletes' "Half-Right"

Another important consideration that must be factored into the question of the enforceability of players' rights with regard to broadcast and cable television is the extent to which those rights may be affected by collective bargaining in professional sports in general and by the particular bargaining history in each of the team sports involved. The players' associations or unions in many professional sports have become increasingly powerful in recent years.[111] Thus, the extent

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which was not in existence or contemplated at the time the contract was made. 229 F.2d at 487-88. *See* Manners v. Morosco, 252 U.S. 317 (1920); Capital Records, Inc. v. Mercury Record Corp., 221 F.2d 657, 663 (2d Cir. 1955); Norman v. Century Athletic Club, 193 Md. 584, 69 A.2d 466 (1949). *See also* Redmond v. Columbia Pictures Corp., 277 N.Y. 707, 14 N.E.2d 636 (1938); Kirke La Shelle Co. v. Paul Armstrong Co., 263 N.Y. 79, 183 N.E. 163 (1933); Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 A. 631 (1937). One case, Bartsch v. Metro-Goldwyn-Mayer, Inc., 391 F.2d 150 (2d Cir. 1968), however, held that the plaintiff, an experienced businessman, did waive his rights regarding the telecast of a film by entering into a contract containing a very broad contractual grant of his rights to the movie. In *Bartsch*, the Second Circuit distinguished *Ettore*, stating that Ettore was a boxer and not an experienced businessman. The court concluded that although

> New York will not charge a grantor with the duty of expressly saving television rights when he could not know of the invention's existence, we have found no cases holding that an experienced businessman . . . is not bound by the natural implications of the language he accepted when he had reason to know of the new medium's potential.

391 F.2d at 154. The *Bartsch* case would appear to be inapplicable to the situation involving professional team sports for at least two reasons: (1) in team sports, as in *Ettore*, the players are professional athletes, often without a college education or are fresh out of college when they sign their contracts, and, therefore, are not experienced businessmen; and, more importantly, (2) in most if not all sports, unlike the situation presented in the contract in *Bartsch*, there is no broad contractual grant of rights. The grant of the rights in most professional sports contests is expressly limited to the use of a photograph for publicity and promotional purposes rather than live performance, and contains no reference to cable or other forms of pay television. *See also* Wexley v. KTTV, 108 F. Supp. 558 (S.D. Cal. 1952), *aff'd*, 220 F.2d 438 (9th Cir. 1955); Brinkley v. Casablancas, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1981). The distinction between cable and broadcast television, and the recognition by the judiciary and team owners themselves of the fact that a grant of rights with respect to one medium is not a grant of rights as to all, is revealed in Eastern Microwave, Inc. v. Doubleday Sports, Inc., 534 F. Supp. 533 (N.D.N.Y.), *rev'd on other grounds*, 691 F.2d 125 (2d Cir. 1982), *cert. denied* 51 U.S.L.W. 3601 (1983) (No. 82-957). *See also* New Boston Television, Inc. v. Entertainment Sports Programming Network, Inc., 1981 COPYRIGHT L. REP (CCH) ¶ 25,293 at 16,625 (D. Mass. Aug. 3, 1981).

[111] *See supra* note 4 and accompanying text. The players' associations today generally obtain an assignment of certain of their members' rights on a limited basis for the express purpose of exploiting those rights for the benefit of all union members. They may also agree not to exploit certain of their member's rights in this regard. *See, e.g., supra* note 105. See generally Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 1715 (1982), for an example of such assignment of rights.

to which the issue of broadcast and cable television rights has been, and will be, involved in collective bargaining in professional sports must also be analyzed.

Under the relevant labor laws,[112] parties in a collective bargaining relationship are obligated to bargain "in good faith with respect to wages, hours, and other terms and conditions of employment."[113] Further, it is well established that anything that is encompassed by the phrase "wages, hours, and other terms and conditions of employment" is a mandatory subject about which either party must bargain upon request, but about which neither party is obligated to make concessions.[114] In the event that a refusal to make concessions produces a bargaining impasse, an employer may, in most instances, institute unilateral changes in terms of employment, provided that such changes are consistent with the proposal over which the employer bargained to impasse.[115] Examples of such mandatory bargaining subjects include wages,[116] pension benefits,[117] profit sharing plans,[118] vacations,[119] sick leave,[120] and subcontracting that leads to the replacement of bargaining unit employees.[121]

In addition to mandatory subjects about which the parties must bargain, there are also permissive bargaining subjects about which the parties are free to bargain or not to bargain, as they see fit.[122] Among the more commonly bargained about permissive subjects are performance bonds,[123] internal union matters, such as the procedures for authorizing a strike,[124] and the settlement of Labor Board cases and court cases that are pending between the parties.[125] Finally, there are subjects about which it is illegal to bargain, such as contract clauses that are outlawed by the National Labor Relations Act.[126]

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[112]The National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976 & Supp. V 1982).

[113]*Id.* § 158(n)(5), (b)(3), (d).

[114]*See* NLRB v. Borg-Warner Corp., 356 U.S. 342, 349 (1958) (citing NLRB v. American Ins. Co., 343 U.S. 395 (1952)).

[115]NLRB v. Almeida Bus Lines, Inc., 333 F.2d 729 (1st Cir. 1964); Eddie's Chop House, Inc., 156 N.L.R.B. 861 (1967).

[116]American Laundry Machinery Co., 107 N.L.R.B. 1574 (1954).

[117]Inland Steel Co., 77 N.L.R.B. 1, *enforced*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

[118]Dickten & Masch Mfg. Co., 129 N.L.R.B. 112 (1960).

[119]Great Southern Trucking Co. v. NLRB, 127 F.2d 180 (4th Cir.), *cert. denied*, 317 U.S. 652 (1942).

[120]NLRB v. Katz, 369 U.S. 736 (1962).

[121]Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964).

[122]*See* NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958).

[123]Rabouin v. NLRB, 195 F.2d 906 (2d Cir. 1952).

[124]NLRB v. Corsicana Cotton Mills, 178 F.2d 344 (5th Cir. 1949).

[125]Jefferson Standard Broadcasting Co., 94 N.L.R.B. 1507 (1951).

[126]29 U.S.C. § 158(e) (1976). That section provides, in pertinent part:

> It should be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby

The subject of television and cable rights is clearly not an illegal subject and it would certainly be proper for the owners and union to bargain about such rights and the allocation of income therefrom. Whether the issue of the grant of player's rights of publicity in their performances is a permissive, rather than mandatory, subject of bargaining is not clear. However, absent an enforceable convenant not to sue that is entered into by the union on behalf of itself and its members, the resolution of this mandatory versus permissive subject does not appear to be determinative of the players' ability to assert their individual property rights regarding television.[127] Given the need for the leagues to establish uniform guidelines regarding their rights and their teams' rights to broadcast games, and given the players' opportunity to better enforce their own rights in this regard through joint action, collective bargaining would seem to provide the most logical means for teams and leagues to resolve disputes in this area.[128]

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such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void . . . .

Id.

[127]The unique bargaining structure of professional sports is another factor that must be taken into account in this regard. Many of the critical terms of employment in professional sports such as salary, contract provisions, and the team's right of termination are, to a large extent, the subject of individual negotiations between the player and team, following the establishment of minimum standards through collective bargaining. A player's property rights in his own performance could probably be negotiated either collectively or on an individual basis. *See supra* note 79 & 88 and accompanying text. It should also be noted that there is no reason why a collective bargaining agreement could not provide for certain payments to the players' association for the right to televise players' performances at the same time that a popular, well-publicized player's individual contract provides for additional compensation based on the team's television revenue and attendance. One problem that can more readily be handled in collective bargaining is the question of the rights of future players, because the players' association, as bargaining agent, can bind all of its members, present and future.

[128]The recent strike by members of the Screen Actors Guild (SAG) provides a likely script for developments in professional team sports. SAG had attempted to obtain a share of revenues from, *inter alia*, pay television contracts entered into by television and movie companies with pay television operators. When these efforts were unsuccessful, SAG called a strike. *See* Lindsey, *Movie and TV Actors Strike*, N.Y. Times, July 22, 1980, at 7, col. 1. Ultimately, the strike was ended when the actors obtained a small share of the revenues in further collective bargaining. Harmetz, *Actors Approve Contract*, N.Y. Times, Oct. 24, 1980, at C14, col. 5-8; *A Small Victory for Striking Actors*, Bus. Wk., Oct. 6, 1980, at 40. Based on the recent experience in baseball, it should be observed that the pressure of a strike in professional sports on leagues and teams would likely be far greater than the pressure from the SAG strike on television and movie companies. Television and movie companies continued to operate and to earn revenues from reruns and rereleases. A sports league cannot survive long without

It also should be noted that in past player cases, it was argued by the team owners that the players' protection from the "freedom" practices at issue, such as the college draft, option clauses, and compensation rights, were not afforded by and, indeed, were exempt from the antitrust laws because the practices involved mandatory subjects of collective bargaining.[129] In the right to publicity case, by contrast, no exemption, antitrust or otherwise, that would limit the players' rights of publicity could be asserted by the owners. Any labor law defense to an action by the players most probably would be based only on a claim that the individual rights of the players under statutory or common law have been contracted away or waived by their collective bargaining representative.[130]

Further, assuming *arguendo* that television and cable rights are a mandatory subject of bargaining, these rights would seem to belong to the more narrow category of bargaining subjects about which an employer may not institute unilateral changes, even after the parties have reached an impasse.[131] An example of such a narrow category

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any live games and with televised replays of last season's contests. *See supra* note 4 and accompanying text.

[129]These arguments have repeatedly been rejected by the courts. *See* Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1979); Mackey v. NFL, 543 F.2d 606 (3d Cir. 1976); Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 532 F.2d 615 (8th Cir. 1976); Robertson v. NBA, 389 F. Supp. 867 (S.D.N.Y. 1975), *settlement approved*, 72 F.R.D. 64 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977).

[130]A determination as to whether television rights are a mandatory or permissive subject of bargaining would provide no answer to the question whether a players' union has bargained away or waived the rights of its members. That question can only be answered by reviewing the contracts and bargaining history between the owners and the players in each of the major team sports leagues as they relate to both broadcast and cable television rights. For example, the players in basketball have expressly reserved their rights on cable television for many years. The basketball players recently agreed to reserve their right to collectively bargain, but not to sue to enforce those rights until 1987. *See supra* note 105. It should also be noted that if the right to broadcast or cablecast players' performances is a mandatory subject of collective bargaining, the players' right and the leagues' obligation to collectively bargain about it would arise each time a collective bargaining agreement expired and this would obviate any claim of waiver or consent, which a league or team owners might otherwise attempt to raise as to past negotiations.

[131]As a general proposition, if the parties to a collective bargaining agreement bargain to impasse about a mandatory subject of bargaining, the employer is free to institute unilateral changes in the agreement, consistent with the proposal over which it reached impasse. *See supra* note 115 and accompanying text. For example, owners could bargain to impasse over a proposal to lower the minimum starting salary in the league from $30,000 to $20,000 per season. Upon impasse, the owners would be within their rights to unilaterally lower the starting salary, consistent with their final offer, to $20,000. The fact that the players were formerly guaranteed a minimum starting salary of $30,000 and would be losing $10,000 of their guarantee would have no effect upon the owners' right to institute the unilateral change in salary.

of mandatory bargaining subjects is a "no-strike" clause, over which the parties may bargain to impasse.[132] If an employer bargained to impasse over a proposal for a no-strike clause, it would not have a right to unilaterally institute a no-strike provision. Although employees are free to bargain away their right to strike for the duration of a collective bargaining agreement, the right to strike is guaranteed by Chapter 7 of the National Labor Relations Act and cannot be taken unilaterally by an employer.[133] Similarly, it would appear that the publicity rights that each player possesses under statutory or common law could not unilaterally be taken away by the owners, even if the players did first bargain to impasse over a proposal to grant all or part of their rights to the owners. Moreover, such bargaining should not bar the players from enforcing their individual rights against third parties such as television networks or cable television companies, that attempt to televise games, images, or likenesses without first obtaining permission directly from the players.

Conclusion

Both professional athletes and professional sports teams and promoters have recognized interests in the players' names and likenesses and in the events in which the players are involved. Yet it may be that only by combining their respective rights that these sports events can be fully exploited and that the substantial compensation realized therefrom can be fairly apportioned among players and owners. Although recourse to litigation has proven to be a useful means of establishing the basic ground rules that concern the rights of all of the interested parties, the ultimate resolution of the parties' positions likely will be the product of contracts that result from arm's-length negotiations, and, in the case of team sports, most probably through collective bargaining.

The leagues and teams should attempt to resolve these issues through collective bargaining. If the players are forced to seek recourse in the courts, under the existing and developing case law, the leagues and teams may well learn the hard way that, in fact, it is they who must seek a share of the ever-increasing television and cablevision revenues from the players. It is the *players* who have the right to receive those revenues or to prevent the broadcasts entirely.

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[132]*In re* Shell Oil Co., Inc., 77 N.L.R.B. 1306 (1948).

[133]The National Labor Relations Act, 29 U.S.C. § 163 (1976).