

Whatever the intrinsic merits of publicity rights for players and other celebrities, creation of this new form of intellectual property posed a problem of accommodation with other branches of property law. The most pressing question involved the teams' right to broadcast games.

As we have seen, in *Zacchini* the Supreme Court characterized an entertainer's performance routine as the core feature of his publicity rights. Needless to say, sports fans are far more interested in watching LeBron James than Hugo Zacchini soaring through the air. A key difference, though, is that James and his fellow athletes in other professional team sports are employees of their clubs and leagues who have long asserted the right to sell broadcast rights in their games for increasingly lucrative fees. The legal question is whether, just as stations and networks need a license from the club to broadcast the game (after *Pittsburgh Athletic*), the clubs also need a license from their players to allow the players' likeness and performance to be displayed on the screen. Like so many other owner-player disputes in sports, this issue simmered in baseball for years before finally surfacing in the following federal court ruling.¹

BALTIMORE ORIOLES V. MAJOR LEAGUE BASEBALL PLAYERS ASS'N

United States Court of Appeals, Seventh Circuit, 1986.
805 F.2d 663.

ESCHBACH, SENIOR CIRCUIT JUDGE.

[Back in 1947, the baseball leagues inserted in the standard form player contract a clause by which the player agreed that his picture could be taken for still photographs, motion pictures, or television, and that all rights in these pictures would belong to the club and be usable for publicity purposes. When baseball players first began bargaining collectively in the late 1960s, language was inserted in the labor agreements stating that nothing in these agreements affected whatever rights or obligations either side might have with respect to broadcasts. Finally, in 1982 the players sent letters to both the clubs and the broadcasters saying that telecasts without their consent constituted misappropriation of the players' property right in their performance on the field.

The baseball clubs responded with a suit in an Illinois federal district court, seeking a declaration that they had the exclusive right to televised performance of major league games involving their players. When the case reached the Seventh Circuit on competing motions for summary judgment, instead of focusing on state law issues about the terms of the employment ("master and servant") relationship or the clubs' right to control broadcast of games, the Court rested its decision on the federal Copyright Act. The Act posed two distinct legal questions. The first was whether the clubs rather than the players owned copyright in the game broadcasts as "works made for hire." The second was whether any such copyright ownership by the clubs preempted state publicity law claims by the players about whether their performances could be broadcast in the first place.]

¹ This issue produced a law journal piece before the judicial ruling, James W. Quinn and Irving H. Warren, *Professional Team Sports New Legal Arena: Television and the Player's Right of Publicity*, 16 *Indiana L. Rev.* 487 (1983) (whose lead author was also counsel for the MLBPA), and a critical review afterwards, Shelley R. Saxer, *Baltimore Orioles v. MLBPA: The Right of Publicity in Game Performances and Federal Copyright Preemption*, 36 *UCLA L. Rev.* 861 (1989).

For an overview of amateur student-athletes' broadcast rights, see Richard T. Karcher, *Broadcast Rights, Unjust Enrichment, and the Student-Athlete*, 34 *Cardozo L. Rev.* 107 (2012).

In addition to the issue of copyrights in game broadcasts, there is some argument to be made that unique or ingenious plays or moves should be subject to intellectual property protection. See Giuliana R. Garcia, *He Shoots, He Scores . . . and Receives Copyright Protection? How the Current State of Intellectual Property Law Fumbles with Sports*, 2011 *Den. U. Sports & Ent. L.J.* 81 (2011).

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II

B. Copyright Claim

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1. *Works Made for Hire Under 17 U.S.C. § 201(b)*

Our analysis begins by ascertaining whether the Clubs own a copyright in the telecasts of major league baseball games. In general, copyright in a work “vests initially in the author or authors of the work;” however, “[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author . . . and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.” A work made for hire is defined in pertinent part as “a work prepared by an employee within the scope of his or her employment.” Thus, an employer owns a copyright in a work if (1) the work satisfies the generally applicable requirements for copyrightability . . . , (2) the work was prepared by an employee, (3) the work was prepared within the scope of the employee’s employment, and (4) the parties have not expressly agreed otherwise in a signed, written instrument.

[Here, the court concluded that the telecasts satisfy the general requirements for copyrightability, because the act of photographing a person or filming an event involves sufficient creativity to be protected. (The court cited as an example the famous Zapruder film of the Kennedy assassination.) Second, the court found that players were employees and, third, that playing games before an audience, “live and remote,” came within the scope of their employment. Finally, the Court turned to the question of whether the clubs’ presumptive ownership of these “works for hire” had been reversed by a written document. The Court quoted the relevant language from the 1947 player-contract and the 1969 and 1970 labor agreements with the MLBPA, and found nothing there that “represents an express agreement that the Players own the copyright in the telecasts. If anything they reflect the parties’ express disagreement as to the copyright’s ownership.”]

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We thus conclude that there are no genuine issues of material fact as to the ownership of the copyright in the telecasts, and that the parties did not expressly agree to rebut the statutory presumption that the employer owns the copyright in a work made for hire. We, therefore, hold that the Clubs own the copyright in telecasts of major league baseball games.

2. *Preemption under 17 U.S.C. § 301(a)*

[Having found that the clubs, not the players, owned the copyright in game telecasts, the Court next turned to the question whether such owner copyright under federal law preempted player publicity rights under state law. That question turned on the wording of § 301 which was added to the Copyright Act in 1976, and whose impact we encountered in the *NBA-Motorola* decision. State common law rights are preempted by federal copyright law where the right is “fixed in tangible form” within the subject matter of copyright, and where the state right is “equivalent to” rights specified in § 106 of the Copyright Act.]

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The works in which the Players claim rights are the telecasts of major league baseball games. As established above, the telecasts are fixed in tangible form because they are recorded simultaneously with their transmission and are audiovisual works which come within the subject matter of copyright. The first condition for preemption is, therefore, satisfied.

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The Players also contend that to be a “work[] of authorship that . . . [is] fixed in a tangible medium of expression” within the scope of § 301(a), a work must be copyrightable. They assert that the works in which they claim rights, namely their performances, are not copyrightable because they lack sufficient creativity. They consequently conclude that because the works in which they claim rights are not works within the meaning of § 301(a), their rights of publicity are not subject to preemption. There is a short answer to this argument. Congress contemplated that “[a]s long as a work fits within one of the general subject matter categories of section 102 and 103, . . . [section 301(a)] prevents the States from protecting it even if it fails to achieve Federal copyright because it is too minimal or lacking in originality to qualify.” Hence § 301(a) preempts all equivalent state-law rights claimed in any work within the subject matter of copyright whether or not the work embodies any creativity. Regardless of the creativity of the Players’ performances, the works in which they assert rights are copyrightable works which come within the scope of § 301(a) because of the creative contributions of the individuals responsible for recording the Players’ performances. Therefore, the Players’ rights of publicity in their performances are preempted if they are equivalent to any of the bundle of rights encompassed in a copyright.

b. Section 106 test

A right under state law is “equivalent” to one of the rights within the general scope of copyright if it is violated by the exercise of any of the rights set forth in § 106. That section grants the owner of a copyright the exclusive rights to reproduce (whether in original or derivative form), distribute, perform, and display the copyrighted work. Thus, a right is equivalent to one of the rights comprised by a copyright if it “is infringed by the mere act of reproduction, performance, distribution or display.”

In particular, the right to “perform” an audiovisual work means the right “to show its images in any sequence or to make the sounds accompanying it audible.” Thus, the right to perform an audiovisual work encompasses the right to broadcast it. Hence, a right in a work that is conferred by state law is equivalent to the right to perform a telecast of that work if the state-law right is infringed merely by broadcasting the work.

In this case, the Players claim a right of publicity in their performances. As a number of courts have held, a right of publicity in a performance is violated by a televised broadcast of the performance. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 54 Ohio St. 2d 286, 376 N.E.2d 582, (1978), on remand from 433 U.S. 562 (1977)(broadcast of human cannonball act). Indeed, from the start of this litigation, the Players consistently have maintained that their rights of publicity permit them to control telecasts of their performances, and that televised broadcasts of their performances made without their consent violate their rights of publicity in their performances. Because the exercise of the Clubs’ right to broadcast telecasts of the games infringes the Players’ rights of publicity in their performances, the Players’ rights of publicity are equivalent to at least one of the rights encompassed by copyright, viz., the right to perform an audiovisual work. Since the works in which the Players claim rights are fixed in tangible form and come within the subject matter of copyright, the Players’ rights of publicity in their performances are preempted.

The Players argue that their rights of publicity in their performances are not equivalent to the rights contained in a copyright because rights of publicity and copyrights serve different interests. In their view, the purpose of federal copyright law is to secure a benefit to the public, but the purpose of state statutory or common law concerning rights of publicity is to protect individual pecuniary interests. We disagree.

The purpose of federal copyright protection is to benefit the public by encouraging works in which it is interested. To induce individuals to undertake the personal sacrifices necessary to create such works, federal copyright law extends to the authors of such works a limited monopoly

to reap the rewards of their endeavors. Contrary to the Players' contention, the interest underlying the recognition of the right of publicity also is the promotion of performances that appeal to the public. The reason that state law protects individual pecuniary interests is to provide an incentive to performers to invest the time and resources required to develop such performances. *In Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), the principal case on which the Players rely for their assertion that different interests underlie copyright and the right to publicity, the Supreme Court recognized that the interest behind federal copyright protection is the advancement of the public welfare through the encouragement of individual effort by personal gain, action for violation of the right to publicity "is closely analogous to the goals of patent and copyright law." *Id.* at 573. Because the right of publicity does not differ in kind from copyright, the Players' rights of publicity in their performances cannot escape preemption.

In this litigation, the Players have attempted to obtain *ex post* what they did not negotiate *ex ante*. That is to say, they seek a judicial declaration that they possess a right—the right to control the telecasts of major league baseball games—that they could not procure in bargaining with the Clubs. The Players' aim is to share in the increasingly lucrative revenues derived from the sale of television rights for over-the-air broadcasts by local stations and national networks and for distribution by subscription and pay cable services. Contrary to the Players' contention, the effect of this decision is not to grant the Clubs perpetual rights to the Players' performances. The Players remain free to attain their objective by bargaining with the Clubs for a contractual declaration that the Players own a joint or an exclusive interest in the copyright of the telecasts.

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Affirmed.
