

## Players' Hail Mary Pass Incomplete: Copyright Trumps Right of Publicity in NFL Dispute

Last month, the U.S. Court of Appeals for the Eighth Circuit stopped three former NFL players at the goal line when it rejected the players' appeal in their likeness lawsuit against the NFL.

The three former players, John Frederick Dryer, Elvin Lamont Bethea, and Edward Alvin White, alleged that the NFL produced, sold, and broadcasted films that used their likeness. In particular, the films at issue primarily comprise recorded footage from past live football games.<sup>1</sup> While the three players were original members of a class-action suit involving twenty-three former players, a majority of the former players resolved their issues with the NFL in a settlement agreement that put \$42 million in a "fund for the benefit of all former professional football players" and established a licensing agency tasked to "assist players in exploiting their publicity rights." The three players opted out of the settlement agreement to pursue the likeness lawsuit against the NFL.

Thus far, their arguments have fallen on deaf ears, with the Eighth Circuit affirming the lower court's granting of summary judgment to the NFL. Opting out of the settlement, as a result, has proven to be a questionable play call for the former players, as it necessitated their forfeiting eligibility to receive any benefits from the settlement or participate in the licensing agency established by the settlement agreement.

The players claimed that their athletic performances on the field were part of their "identities," protected by the right of publicity, and that the live performances were not within the scope of subject matter protectable by the NFL's copyright. While the players acknowledged the NFL was within its rights to record the games and own a copyright in the recordings, they maintained that exploiting that copyright contravened their right of publicity. Ultimately, the case boiled down to one important question of preemption: the Copyright Act versus the right of publicity.

The Eighth Circuit's decision was a win for copyright holders, ruling that the federal Copyright Act preempted the players' rights to control the commercial use of their likenesses, as guaranteed by state law. To determine whether a state-law claim is preempted by the Copyright Act, a court must determine (i) whether the work at issue is within the subject matter of copyright and, if so, (ii) whether the state-law-created right is equivalent to any of the exclusive rights within the general scope of copyright law.

First, the Court found that although the live performances on the field were not entitled to copyright protection, recordings of them were not only copyrightable, but the players' likenesses cannot be detached from those recordings. As a result, the films at issue were squarely "within the subject matter of copyright."

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<sup>1</sup> The former players challenged 155 separate NFL Films productions in which they appear, but the lower court discussed only the few in which the players made the highest percentage of total run time. Dryer appeared on screen for 10% of a 24-minute production in which his name was uttered twice. Bethea's image was on screen for 10% of a 23-minute production with the narrator summing up his one-minute running clip. Finally, White appeared on screen for 10% of the 23-minute production where he is mentioned by name in connection with the offensive-line and appears in a 10-second interview clip.

Second, the Eighth Circuit found the right of publicity, in this case, was at odds with the exclusive rights guaranteed by the Copyright Act. The Court reasoned that, due to the state's interest in protecting consumers from misleading advertising, a right of publicity suit challenging a copyrighted work in a commercial advertisement may have purposes unrelated to the aims of copyright law. However, when a right of publicity suit challenges an expressive, non-commercial use of a copyrighted work, according to the court, the suit necessary entails the displacement of the copyright holder's right to exploit the value of the work with the plaintiff's interest in controlling the distribution of the work. Applying its own precedent on the line dividing commercial and non-commercial uses, the Eight Circuit held that the NFL Films were expressive and non-commercial. Thus, in this instance, the players' state-law claims were preempted by the Copyright Act.

Although the clock has run out for these former players, the fight for publicity rights in the sports arena is far from over. Current Washington Redskins' wide receiver Pierre Garçon has kicked off a suit alleging the violation of his right of publicity by daily-fantasy sports company FanDuel, which, unlike its competitor DraftKings, does not have a marketing and licensing agreement with the NFL Players Association for the use of players' names and likenesses.

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