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The Seventh Circuit Beans Performer Publicity Rights in Baseball's Telecast Rights Rhubarb

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When the United States Supreme Court denied certiorari in Baltimore Orioles, Inc. v. Major League Baseball Players Association ("Baltimore Orioles")\(^1\) in March 1987, it culminated decades of dispute between the owners of the Major League Clubs ("Owners") and the Major League Baseball Players Association ("Players") over who owns the television rights to the Players' individual performances in major league baseball games.\(^2\) But in refusing to review the Seventh Circuit's decision in Baltimore Orioles, that the Owners own all rights to the Players' performances in televised major league baseball games, the Supreme Court has left the entertainment industry with significant questions as to what extent rights of publicity created by state law may now be preempted by federal copyright law.\(^3\)

The Owners first sold network television rights to major league baseball games in 1947.\(^4\) In the years that followed, professional baseball's television income increased steadily and that income represented an ever-increasing percentage of baseball's total revenues.\(^5\) Yet, despite decades of negotiation between the Owners and the Players, no consensus was reached on precisely what rights were owned by whom or on how baseball's television revenues should be divided.\(^6\)

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2. Baltimore Orioles, 805 F.2d at 665. Of course, the question of ownership in such rights also entailed the question of who would control the hundreds of millions of dollars in future television revenues sure to be generated by big-league baseball in the next few decades.
3. The questions are not new. For instance, see Shipley, Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption, 66 CORNELL L. REV. 673 (1981). Unfortunately, as discussed in the text, neither the Seventh Circuit nor the U.S. Supreme Court has provided satisfying answers to the questions.
5. In 1947, the Mutual Broadcasting System paid $65,000 for the exclusive right to air the World Series that year. World Series Televised, Bus. Wk., Oct. 4, 1947, at 65. In 1958, the 12 major league clubs that televised all or part of their schedule received $5,250,000 for the right to televise their games. A. DANZIG & J. REICHLER, BASEBALL 130 (1959). In 1983, the owners negotiated a contract that would bring them $1.1 billion from television rights over the next six years. Baseball's Big League Blues, Bus. Wk., Aug. 12, 1985, at 48.
In late May 1982, the Players sent letters to the Owners, and to the television and cable companies with whom the Owners had contracted. The Players asserted that the television rights granted to the television companies by the Owners "had been granted without 'having first obtained the authorization (written or otherwise) of the players performing in the games.'" The Owners, however, had no intention of relinquishing any part of the television licensing they had controlled for thirty-five years. In June 1982, the Owners filed an action in the United States District Court for the Northern District of Illinois seeking a declaratory judgment that they "own all property rights in Major League Baseball contests, including the exclusive right to license the telecasts of those contests."

The Owners' suit contained four counts, each based on a different theory, but each seeking essentially the same relief. Eventually, the Owners abandoned the claims contained in Counts III and IV. Thus the district court only ruled on the first two counts: Count I based on copyright law, particularly the "works made for hire" doctrine of section 201(b) of the Copyright Act of 1976 ("the Act"), and Count II based on state master-servant law. In May 1985, the district court granted sum-

7. Id.
8. Owners' Motion for Summary Judgment at 11-12.
9. Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, Case No. 82 C 3710 (N.D. Ill. May 1985). Of the plaintiffs, the Baltimore Orioles are the first of the individual American League Clubs listed in alphabetical order, followed by the individual National League Clubs, the Major League Baseball Promotion Corporation, Baseball Commissioner Bowie K. Kuhn, and The American League of Professional Baseball Clubs. Brief of Appellees, Certificate of Interest.
10. Owners' Motion for Summary Judgment at 46.
11. Count III was based on the collective bargaining agreement between the Clubs and the Players, including the Uniform Player's Contract. Count IV was based on the customs and dealings of the parties. Further, on July 1, 1982 three major league players (pitcher Steve Rogers of the Expos, pitcher Steve Renko of the Angels, and catcher Bob Boone of the Angels) filed a suit, Rogers v. Kuhn, No. 82 C 6377, against the Owners in the U.S. District Court for the Southern District of New York. The three players sought a declaration that the telecasts of the games misappropriated their property rights in their names, pictures, and performances. In asking for damages and injunctive relief, the three players put forward claims based on alleged property rights in their names, pictures, and performances, on the doctrine of unjust enrichment, and on New York Civil Rights Law §§ 50-51, which deal with privacy and publicity. The Rogers suit was later consolidated with the Baltimore Orioles suit, but, like Counts III and IV of the latter, was abandoned before the district court decision. Baltimore Orioles. 805 F.2d at 667.
12. The subtle difference between Counts I and II was explained by the Seventh Circuit as follows:

The Clubs' [The Owners'] copyright and master-servant claims are distinct. With respect to the first claim, the Clubs contend that their copyright in the simultaneously recorded telecasts of major league baseball games preempts the Players' rights of publicity in their performances. This claim, however, is limited to games that are
mary judgment to the Owners on those two counts. The Players filed an appeal with the Seventh Circuit. That court, in turn, affirmed the trial court ruling as to the copyright claim, but vacated and remanded to the trial court as to the state master-servant claim. On remand, the trial court dismissed Count II. The decision in Baltimore Orioles therefore speaks only to copyright law.

In affirming the district court's summary judgment, the Seventh Circuit agreed with the lower court's two central conclusions on the copyright claim: (1) that the Owners, alone, owned the copyright in the baseball telecasts as works made for hire, and (2) that the Owners' copyright in those telecasts preempted whatever right of publicity the Players had in their game-time performances.

THE COURT'S REASONING ON "WORKS MADE FOR HIRE"

On the issue of whether the Owners owned a copyright in the telecasts, Senior Circuit Judge Eschbach's analysis began with a statement of the relevant sections of the Act: "[Copyright] 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," as pertinent to the Owners' suit, is defined by the Act as "a work prepared by an em-

fixed in tangible form. With respect to the second claim, the Clubs assert that, as employers, they own the right to broadcast the Players' performances, regardless of whether the game is reduced to tangible form. This claim extends to games that are not broadcast or that are televised without being videotaped.

Id. at 679 n.30.

13. The Seventh Circuit pointed out how the district court in ruling on Count II relied on "traditional principles of master-servant common law." But, "[n]otwithstanding the parties' assumption to the contrary, master-servant law exists only with reference to the laws of particular states." Id. at 680. The court stated that the conflicts law of Illinois, the forum state, governed the choice of law in this case. The parties were of such varied citizenship, however, the court was unable to ascertain on the record before it which state's law governed on Count II. Id. at 681. The district court's Count II judgment was vacated and the conflicts of law matter was remanded. However, in doing so the Seventh Circuit made clear that the Owners' master-servant claim was pendant to the copyright claim, that pendant jurisdiction is a doctrine of discretion, and that normally "when the federal claims are disposed of before trial, the state claims should be dismissed without prejudice as a matter of course." Id. at 682.


15. Baltimore Orioles, 805 F.2d at 667.


17. Id. § 201(b).
ployee within the scope of his or her employment.” Therefore:

[A]n employer owns a copyright in a work if (1) the work satisfies the generally applicable requirements for copyrightability set forth in 17 U.S.C. § 102(a),[19] (2) the work is 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.[20]

As to the first ownership requirement, the Seventh Circuit, agreeing with the district court’s opinion, held that the baseball telecasts met the three conditions for copyrightability found in section 102 of the Act: (1) fixation in tangible form, (2) originality of authorship, and (3) subject matter of copyright. The court noted first that, “[s]ince the telecasts of the games are videotaped at the same time that they are broadcast, the telecasts are fixed in tangible form.”[21] Second, the telecasts were “original works of authorship” — that is, they were the independent creation of their authors and embodied a sufficient amount of intellectual labor.[22] And third, the telecasts as audiovisual works are clearly within the subject matter of copyright as set forth in section 102(a) of the Act.[23]

Regarding the second requirement for copyright ownership by an employer, the court found, and it was not disputed by the Players, “that the Players are employees of their respective Clubs.”[24]

The Seventh Circuit agreed with the lower court that the scope of the Players’ employment encompassed the performances of major league baseball before both live and remote audiences.[25] On appeal, the Players argued that there were genuine issues of material fact as to whether the Players’ scope of employment included performances for television audi-

18. Id. § 101.
19. Section 102(a) provides in pertinent part:
Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion picture and other audiovisual works; and (7) sound recordings. [Emphasis added.]
21. Id. at 668.
Section 101 of the Copyright Act expressly provides, in pertinent part, that “[a] work consisting of sounds, images, or both, that are being transmitted, is ‘fixed’ for purposes of this title if a fixation of the work is being made simultaneously with its transmission.”
22. Baltimore Orioles, 805 F.2d at 668 n.6.
23. See category (6) of the Act quoted above in note 19.
24. Baltimore Orioles, 805 F.2d at 669.
25. Id. at 670.
ences. The Players, however, failed to raise that contention before the district court and therefore failed to preserve the argument for appeal. The Seventh Circuit stated, however, that even if the contention had been preserved, the Players had not produced evidence to warrant reversing the lower court's finding on that argument.\(^{26}\) The Owners, however, had brought forward evidence that the Players are acutely aware that major league baseball games are televised and that television revenues have an important bearing on the level of their salaries.\(^{27}\)

In arguing that there were genuine issues of material fact as to the ownership of rights in their performances, the Players relied on provisions found in the Uniform Player's Contract,\(^{28}\) the Benefit Plan (setting out the details of the Players' pension fund), and the Basic Agreement (representing the collective bargaining agreement between the Owners and Players). The court, however, was not persuaded by the Players' arguments. Beginning with the premise that the Players' performances in televised baseball games are "works for hire" within the meaning of section 201(b), the court reasoned that there is a statutory presumption that the Owners own "all of the rights encompassed in the telecasts of the games."\(^{29}\) According to the court, that presumption could not be overcome unless the parties expressly agreed otherwise in a signed, written document.\(^{30}\) The court found no such express statement in the written agreements put forward by the Players and so held that the statutory presumption was not overcome.\(^{31}\)

\(^{26}\) Id. But had the contention been seriously made, perhaps evidence would have been presented.\(^{27}\) Id. at 670 n.10.\(^{28}\) Beginning in 1947, the first year the Owners sold television rights to the networks, the Uniform Player's Contract contained the following clause: "The Player agrees that his picture may be taken for still photographs, motion pictures or television at such times as the Club may designate and 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." Baltimore Orioles, 805 F.2d at 671.

As to what the Players were actually granting the Owners through that clause in 1947, three points should be noted: (1) The legal term of art "right of publicity," as we now use it, did not make its appearance until 1952. See infra note 77. (2) The Players viewed the term "publicity purposes" in their Uniform Player's Contract as equivalent to "promotional purposes," not "commercial purposes." Brief of Appellants at 44-45. (3) The parties' appellate briefs indicate that they disagreed sharply over the history of their past contract negotiations and the construction of certain key contract provisions. Of course, summary judgment by the Seventh Circuit denied a full airing of these issues before the trier of fact.

\(^{29}\) Baltimore Orioles, 805 F.2d at 671.\(^{30}\) Id. at 671 (citing 17 U.S.C. § 201(b)) (emphasis added).\(^{31}\) The § 201(b) requirement that such reservation of rights be express and written is substantially different from prior law which allowed that "such an agreement could be either oral or implied." 805 F.2d at 672 (citing 1 Nimmer on Copyright § 5.03[D] (1985 rev.).
After holding that the baseball telecasts are "works made for hire," the court addressed the preemption issue. The court held that the Owners' copyright in the telecasts preempted the Players' rights of publicity in those game-time performances. The starting point of the court's reasoning was section 301 of the Act, which expressly preempts rights under state law that are equivalent to any of the bundle of rights protected by federal copyright.\textsuperscript{32} For preemption of a right under section 301(a) two requirements have to be met: (1) the work in which copyright is asserted must be "fixed in tangible form and come within the subject matter of copyright as specified in § 102,"\textsuperscript{33} and (2) "the right must be equivalent to any of the rights specified in § 106."\textsuperscript{34} The court was convinced that the Owners' videotaped telecasts, and the games themselves, met both requirements.

Applying section 102, the Players argued that the works in which they claimed rights were their live or real-time performances, and that those performances \textit{per se} were not copyrightable because, of themselves, they were not fixed in tangible form. Because their actual performances were not copyrightable, the Players contended, they retained a right of publicity in those performances that could not properly be preempted by a copyright in the telecasts.\textsuperscript{35} The court disagreed. While noting that unrecorded performances \textit{per se} are not fixed in tangible form and are therefore not copyrightable as such, it held that videotaping an evanescent performance fixed the performance in tangible form and "once a performance is reduced to tangible form, \textit{there is no distinction between the performance and the recording of the performance for the purpose of preemption under § 301(a).}"\textsuperscript{36}

The Players also argued that their performances were not copyrightable because those performances did not typify the kinds of creative or aesthetic labor which characterize the works of authorship listed in sec-

\textsuperscript{32} 17 U.S.C. § 301(a) provides, in pertinent part, that:

[A]ll legal and equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such work under the common law or statutes of any State.

\textsuperscript{33} \textit{Baltimore Orioles}, 805 F.2d at 674. \textit{See supra} note 19 regarding section 102(a) of the Act which sets forth the subject matter of copyright.

\textsuperscript{34} \textit{Baltimore Orioles}, 805 F.2d at 674.

\textsuperscript{35} \textit{Id.} at 674-75.

\textsuperscript{36} \textit{Id.} at 675 (emphasis added).
tion 102(a) of the Act. The court, however, held that "[r]egardless of the creativity of the Players' performances, the works in which they assert rights are copyrightable . . . because of the creative contributions of the individuals responsible for recording the Players' performances." 

Next, the court discussed the section 106 requirement for preemption. That section grants the copyright owner the exclusive rights to reproduce (in original or derivative form), to distribute, to perform, and to display the copyrighted work. The court was convinced that any state-law right that is infringed by reproducing, distributing, performing, or displaying a work copyrighted under the federal Act is equivalent to copyright. Citing the section 101 definition of "to perform," the court stated that the term "to broadcast" an audiovisual work is encompassed within the definition of "to perform" an audiovisual work. Because the Players asserted an infringement of their publicity rights when their performances were broadcast without their authorization, the court deemed the Players' publicity right claim equivalent to a copyright claim.

The court was not convinced by the Players' argument that copyright was intended to benefit public interests and that publicity right was intended to benefit individual pecuniary interests. The court viewed the purpose behind federal copyright protection as the encouragement of individual effort in the creation of works beneficial to the public, and the purpose behind state publicity right as the encouragement of "performances that appeal to the public." The Seventh Circuit did not see a difference in the two rights: "Because the right of publicity does not differ in kind from copyright, the Players' rights of publicity in their performances cannot escape preemption."

**Baltimore Orioles as Precedent**

The Seventh Circuit's seventeen page opinion in *Baltimore Orioles* appears at first reading to be meticulous in its attention to factual detail, legal precedent, and legislative history. Furthermore, reading the opinion with only the actual parties in mind, the decision does not seem unreasonable. First of all, although not spotlighted in the opinion, it is clear that while the Players claimed an ongoing infringement of their publicity rights, they waited a full thirty-five years after the inception of

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37. See supra note 19.
38. *Baltimore Orioles*, 805 F.2d at 676.
39. *Id.* at 678 (emphasis added). The fact that the right of publicity includes much more than just "performances" is discussed in the text accompanying notes 80 and 81. Regarding the purpose of copyright, see 1 NIMMER ON COPYRIGHT § 1.03[A] (1987 rev.).
network baseball telecasting to assert their publicity claim in any court.\footnote{41} Second, as was emphasized repeatedly in the Owners' briefs, professional major-league ballplayers receive very substantial remuneration for their services,\footnote{42} and the Players are aware that such high remuneration is, in part, made possible by the revenues the Owners receive from television.\footnote{43} And third, as the court pointed out, even after its decision, the Players are still free to bargain with the Owners for a contractual declaration that they own a joint or exclusive interest in the copyright of the telecast.\footnote{44}

The result in *Baltimore Orioles* may represent a fair adjudication for its parties. But as precedent for other cases, what are the potential, or even likely, consequences of the reasoning in *Baltimore Orioles*? In attempting to answer that question, the following two hypotheticals are presented.

**Tanda v. DeFraud**

Miss\footnote{45} Rhonda Tanda is a young actress. A recent graduate of the American Academy of Dramatic Arts, she is still paying off her student loan and feels she cannot afford an attorney's services. She does not have an agent, and she is not yet a member of Actor's Equity, S.A.G., or A.F.T.R.A.\footnote{46} Nevertheless, Miss Tanda is both very attractive and talented. Not long ago, she came to the attention of producer Cecil B. DeFraud who immediately cast her in the lead of his new off- (very far off-) Broadway production of the play *Tehachapi*. Miss Tanda's short, non-Equity employment contract with DeFraud contained this clause: "The performer agrees that her performances may be videotaped and that such tape may be used for promotional purposes." There was no other clause

\footnote{41} "... telecasting of Major League Baseball games, which has continued without interruption for some 40 years." Brief of Appellees at 7.
\footnote{42} "... extraordinary levels of compensation..." Brief of Appellees at 7.
\footnote{43} *Baltimore Orioles*, 805 F.2d at 670 n.10.
\footnote{44} *Id.* at 679. We may speculate that had the Seventh Circuit allowed *Baltimore Orioles* to proceed to trial the Owners quite possibly could have won on a legal theory other than federal copyright preemption — e.g., implied consent and/or waiver within the context of the employer-employee relationship. A thorough development of such speculation is, however, beyond the scope of this casenote.
\footnote{45} Before embarking on her acting career, Miss Tanda preferred to be called Ms. Tanda. Since her acting debut, however, she has bowed to the show business convention that allows even oft-married Elizabeth Taylor to remain a perpetual "Miss."
\footnote{46} S.A.G. is the Screen Actor's Guild, A.F.T.R.A. is the American Federation of Television and Radio Artists, and Actor's Equity is the union representing stage actors. Like many struggling actresses, even if she could meet the professional experience prerequisites for gaining membership, Miss Tanda's limited income does not provide her with enough to pay these unions' dues.
COPYRIGHT PREEMPTION

in the contract mentioning videotaping or filming of the show. Tehachapi was a modest success, and Miss Tanda was hopeful that before long she could earn more than the thirty dollars per night DeFraud was paying her.47

One afternoon, DeFraud announced to the cast that their evening performance would be videotaped by a camera crew he had hired and that segments of the performance would be used for promotional purposes. That evening the entire show was videotaped and the next day clips were shown on the evening news. That media attention helped draw bigger audiences for a while, but in a month the show closed and Miss Tanda was out of work. Unknown to Miss Tanda and the rest of the cast, DeFraud soon put the tape of Tehachapi into post-production. At modest expense the tape was edited down to under ninety minutes and music was dubbed in. DeFraud registered the "audiovisual work" with the copyright office and within six months Tehachapi was being aired on cable television across the United States and in foreign countries. Even though the critics panned Tehachapi, DeFraud made a profit in the high six figures. Miss Tanda, however, was not given one penny from the proceeds of the telecasts, and she filed a suit against DeFraud for infringement of her rights of publicity. How will she fare in court?

As strange as it may seem to those familiar with current entertainment industry practices,48 if Baltimore Orioles is the standard applied, Miss Tanda will most probably lose. Applying the Seventh Circuit's reasoning, DeFraud's tape of Tehachapi is copyrightable: It is an audiovi-

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47. Actually, Miss Tanda was quite thankful she could earn even a small amount for her performances. Actor's Equity has a membership of 36,000 with 85% of that number currently unemployed. S.A.G. lists 70,000 dues-paying members, with 90% of that figure earning under $10,000 per year and 30% earning nothing. A.F.T.R.A. claims 65,000 members with 70% earning under $2,000 per year. Christon, The Glut of Actors — Enough Already!, Los Angeles Times, Calendar, Nov. 15, 1987, at 4, col. 1-2. Needless to say, the thousands of beginning actors unable to qualify for or afford union membership do not obtain the protection of publicity and other rights afforded through union policies.

48. "[C]ontractual arrangements which govern the televising of names, likenesses and performances throughout the sports and entertainment industry . . . reveal a single common thread — the requirement of an express written grant of television rights." Brief of Appellants at 6 n.6.

Actor's Equity specifically prohibits the filming, taping, or broadcasting of any production without its express permission. Application for such permission must be made at least thirty days in advance, and the terms and conditions under which such permission will be granted must be negotiated with Equity. The union permits shooting of productions for commercials of under three minutes only if the actors involved have signed the applicable A.F.T.R.A. or S.A.G. contracts. Filming or taping of productions for use on television news programs must also conform to a number of Equity-prescribed conditions. 3 DONALD C. FARBER, ENTERTAINMENT INDUSTRY CONTRACTS NEGOTIATING AND DRAFTING GUIDE, § 134.01[10] (1987).
sual work, fixed in a tangible medium of expression, of independent origin, and contains the requisite level of creativity. Miss Tanda was an employee of DeFraud. 49 Her acting in Tehachapi was within the scope of her employment. She knew that her performance was being taped and that it would be aired on television. There was nothing in her agreement that expressly reserved to her any rights in the videotape of the show. And, finally, applying the reasoning of Baltimore Orioles, DeFraud's federal copyright claim would preempt whatever state rights of publicity Miss Tanda might claim in the Tehachapi tape because the publicity right is "infringed" by distribution of a work copyrighted under the Act. 

Slidon v. DeFraud

The Tanda lawsuit is not DeFraud's only legal annoyance. A few days after Tehachapi aired, a news photo in the Hollywood Inquisitor caught DeFraud's attention. It was a shot of rock star Sly Slidon exiting the chic Olympic Bonded Club in Los Angeles. What really first caught DeFraud's eye was the silhouette of Sly's curvaceous companion. But then DeFraud noticed that in the center of the photo, very prominently displayed, was the logo of Feelahh clothing on the hip of Sly's tight-fit jeans. After a few moments' thought, DeFraud phoned the publisher of the Inquisitor and within minutes bought all rights to the Slidon photograph. DeFraud then contacted Feelahh's president and negotiated an advertising deal in which Feelahh agreed to give DeFraud five percent of all sales in return for a DeFraud ad campaign based on the Slidon photo.

The campaign was a tremendous success; Feelahh sales skyrocketed; and within six months DeFraud pocketed two million dollars from the venture. Rocker Slidon, however, did not receive one cent from DeFraud or Feelahh. In fact, Slidon was never even contacted regarding use of the photo in the campaign. 50 Slidon has now sued DeFraud for infringement of his right of publicity.

How will Slidon fare in his action against DeFraud? If Baltimore Orioles is the standard applied, Sly will very likely fare no better than Tanda. There is no law prohibiting the photographing of a public figure in a public place. Sly's photo was published in a copyrighted publication.

49. In addition to employer-employee work-for-hire relationships, works for hire can arise in relationships where works are specially commissioned. 17 U.S.C. § 101 (1982).
50. DeFraud took evening classes at a respected southern California law school until December 1987. (The school's registrar refuses to comment whether DeFraud was asked to leave because of grades or because of a regulations infraction.) Before leaving law school, however, DeFraud came across the Baltimore Orioles decision at the county law library, and as a result of reading that opinion, he felt there was no need to ask Slidon's permission for anything.
DeFraud purchased all rights to the *Inquisitor* photo. And by applying the broad federal copyright preemption reasoning of *Baltimore Orioles*, DeFraud's copyright under federal law will preempt whatever right of publicity Slidon might claim under state law.

**WHAT IS THE PROBLEM?**

As the above two hypotheticals illustrate, one does not have to apply the *Baltimore Orioles* decision *reductio ad absurdum* to see its potential for generating lopsided results in future cases. Neither hypothetical is based on an outlandish fact pattern; both hypotheticals are the kinds of situations that quite probably could occur at any time. Unfortunately, by methodically applying the reasoning of *Baltimore Orioles* to each, we arrive at results that seem fundamentally unfair and out of step with modern notions of rights in intellectual property. In each hypothetical DeFraud was able to appropriate for his ongoing use and profit "property" that was not his — the identities (faces, names, and personalities) of Miss Tanda and Mr. Slidon. In neither case, however, was he required to pay for the ongoing use of that property. Obviously, he did pay Miss Tanda for her performances at the theater, and he did pay the *Hollywood Inquisitor* for the rights to the Slidon photograph. DeFraud, however, did not pay either Tanda or Slidon for his continuing use of their faces, names, and personalities. And he will not have to, if the reasoning of *Baltimore Orioles* prevails.

There are at least two major flaws in the Seventh Circuit's decision in *Baltimore Orioles*. They are found in the court's reasoning on two critical issues: First, does a copyright in a visual or audiovisual work encompass a right to the actual object or event portrayed in the work? And second, does the law of copyright protect the equivalent of what is protected by the law of publicity?

51. The right of publicity — or the right of an individual to control the commercial exploitation of his or her identity — is generally acknowledged to be only a recently developed legal doctrine. See infra note 77. It is interesting, however, that in Burrow-Giles Lithography Co. v. Sarony, 111 U.S. 53 (1884), in which the Supreme Court held for the first time that photographs were copyrightable, the plaintiff photographer who was engaged in the business of commercially exploiting his copyrighted photographs of Oscar Wilde, did so "under an agreement with Oscar Wilde." Id. at 54.

52. There also appears to be a flaw in the Seventh Circuit's expansive view of federal copyright preemption (as distinct from its position of extending copyright protection to the underlying events of recorded works). The court interpreted § 301(a) of the Act to mean that any state-created right would be preempted if that state right involved the copyright subject matter of §§ 102-103 and if the assertion of that state-created right infringed upon one of the bundle of rights enumerated in § 106. 805 F.2d at 674. Applying the court's construction of § 301(a) rigidly would seem to lead to the conclusion that a plaintiff suing a publisher for libel or
REALITY IS NOT COPYRIGHTABLE

As to the first issue, the Seventh Circuit has clearly departed from a long-standing principle of copyright law enunciated at least as far back as 1903 in *Bleistein v. Donaldson Lithographing Co.* ("Bleistein").\(^5\) That principle is that the objects, persons, or events depicted in a copyrightable work are, of themselves, not copyrightable. *Bleistein* revolved around the question of whether three picture-posters depicting circus scenes satisfied the originality requirement\(^5\) for copyrightability even though the posters depicted real people and real events. The Court held that they did. In so holding, Justice Holmes, writing for the Court, articulated what has ever since been a fundamental rule of copyright law:

> It is obvious also that the plaintiff's case is not affected by the fact, if it be one, that the pictures represented actual groups — visible things. . . . But even if they had been drawn from the life, that fact would not deprive them of protection. The opposite proposition would mean that a portrait by Velasquez or Whistler was common property because others might try their hand on the same face. Others are free to copy the original. They are not free to copy the copy.\(^5\)

In other words, although the graphic depictions of the circus acts were copyrightable, the actual circus acts were not. Others had as much right as plaintiff Bleistein to create their own graphic depictions of those circus acts.\(^5\)

Another case in which the Supreme Court articulated virtually the same principle was *International News Service v. Associated Press* ("Associated Press").\(^5\) That case involved the piracy of news information first gathered and reported by the plaintiff. While that case did not involve copyrighted materials and was essentially decided on the state-law doctrine of misappropriation,\(^5\) the Court discussed the closely related copyright law implications. The Court stated that "[i]n considering the

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\(^{53}\) 188 U.S. 239 (1903).

\(^{54}\) Originality is required in the sense that there must be an "author." U.S. CONST. ART. I, § 8. See 1 NIMMER, supra note 39, at § 1.06[A].

\(^{55}\) *Bleistein*, 188 U.S. at 249 (emphasis added).

\(^{56}\) *Bleistein* predated the development of the right of publicity by over four decades. See note 77. Thus the emphasized words of Justice Holmes should not be extended beyond their copyright subject matter.

\(^{57}\) 248 U.S. 215 (1918).

\(^{58}\) Id. at 216.
general question of property in news matter, it is necessary to recognize its dual character, distinguishing between the substance of the information and the particular form or collocation of words in which the writer had communicated." 59 Because news articles contain literary quality, they are properly copyrightable. The Court wrote, however, that it was not the intent of the Constitution's framers that the copyright clause should extend to the author of a news article the exclusive right to report on that news event. 60

While the Bleistein excerpt deals with graphic depictions and the Associated Press excerpt deals with written depictions, taken together they both reflect what has been a well-established principle of copyright law: Copyright adheres in the writing (or drawing, painting, photograph, film, etc.) created by the author; it does not adhere in the object, event, or person written about or depicted. 61 Reality itself is not copyrightable.

Among the authorities relied on by the Seventh Circuit in Baltimore Orioles was Time Inc. v. Bernard Geis Associates ("Bernard Geis"), 62 which held that the Zapruder film of the John F. Kennedy assassination possessed a sufficient degree of creativity for copyrightability. 63 Ironically, while Bernard Geis does indeed hold that films of actual events are copyrightable, in the three pages of that opinion immediately preceding the portion cited by the Seventh Circuit, 64 the court in Bernard Geis quoted with approval those portions of Bleistein and Associated Press which state that the underlying persons and events depicted in copyrightable works are themselves not copyrightable. For some reason, the Seventh Circuit ignored those sections of Bernard Geis and extended copyright protection to the actual baseball games depicted in the properly copyrightable tapes of those games. 65

If we were to apply the copyright-extension reasoning 66 of Baltimore Orioles retroactively to the facts of Bleistein and Bernard Geis, we would get curious results. A circus act once depicted graphically in a copy-

59. Id. at 234.
60. Id.
61. Bleistein and Associated Press help to clarify the actual language of the Constitution's patent and copyright clause: "To promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;" U.S. CONST. ART. I, § 8, cl. 8 (emphasis added).
63. Id. at 143 (cited in Baltimore Orioles, 805 F.2d at 668).
64. 293 F. Supp. 130 at 141-43.
65. The district court's holding that a baseball game is itself copyrightable, later affirmed by the Seventh Circuit in Baltimore Orioles, is criticized by David Nimmer on just these grounds in 1 NIMMER, supra note 39, at § 1.08[C][2] n.39.
66. See text accompanying note 36.
righted illustration could no longer, without license, be depicted graphically by others without infringing the copyright in the first illustration. And, unless the fair use doctrine was invoked, no depiction of the John F. Kennedy assassination could be made by anyone without a license from Time Inc., the owner of the copyrighted Zapruder film. Such holdings would run counter to the primary purpose of copyright protection, which is not to benefit the author but "to secure 'the general benefits derived by the public from the labors of authors.'"67 If copyright protection were actually extended in such ways the creative contributions of authors, which Congress intended to encourage as a benefit to the public, would not be encouraged, but would be stifled.

The Seventh Circuit was in error when it concluded that a baseball game is itself fixed in tangible form when it is videotaped.68 What is fixed in tangible form in such situations is not the game itself, but the game's depiction as created by the television crew's director, associate director, technical director, cameramen, editors, technicians, announcers, and audio personnel.69 No matter how accurately it seems to capture the reality of the event, a videotaped telecast of a sports event is never the equivalent of the event itself.

While a videotape of a sports event is properly copyrightable,70 the actual contest is not. Like human existence itself,71 a live sports event is evanescent. It is itself not fixed in tangible form,72 is not a writing,73 and is therefore not copyrightable.

YOUR IDENTITY IS NOT A WRITING

The Seventh Circuit held that the Players' rights of publicity in their game-time performances74 were preempted "[b]ecause the right of publicity does not differ in kind from copyright. . . ."75 In so equating the two rights, the Seventh Circuit both misconstrued the nature of the right of publicity and, to some extent, the nature of federal copyright.

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67. 1 NIMMER, supra note 39, at § 1.03[A] (citing Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)).
68. Baltimore Orioles, 805 F.2d at 675.
69. For a detailed overview of the art and craft of television production, see HERBERT ZETTL, TELEVISION PRODUCTION HANDBOOK (1984).
70. The Players never disputed this point.
71. "It is even a vapour, that appeareth for a little time, and then vanisheth away." James 4:14 (King James).
72. 1 NIMMER, supra note 39, at § 1.08[C][2].
73. Id. at § 1.08[C].
74. The Players' rights of publicity in non-game-time endeavors was not an issue in the case.
75. Baltimore Orioles, 805 F.2d at 679.
The right of publicity has been defined by one legal scholar as "the inherent right of every human being to control the commercial use of his or her identity."\textsuperscript{76} As a legal entity, the right of publicity is relatively youthful in its evolving common law development.\textsuperscript{77} It is also an area of law that has relied greatly for analogy and precedent upon privacy, trademark, copyright, and misappropriation law.\textsuperscript{78} Nevertheless, the right of publicity is a separate legal entity that has since the 1970's (if not earlier) been repeatedly recognized by many courts as distinctly different from its aforementioned relatives.\textsuperscript{79}

One important difference between federal copyright and the state-law right of publicity is that a publicity right may adhere in an individual's name\textsuperscript{80} or likeness,\textsuperscript{81} whereas federal copyright may not adhere in either.\textsuperscript{82} In \textit{Baltimore Orioles} the Players claimed that there had been an infringement of their rights of publicity in their names and likenesses, as well as in their live performances.\textsuperscript{83}

Another important difference between federal copyright and the state-law right of publicity is that while the Act specifically requires "fixation in a tangible medium of expression,"\textsuperscript{84} a state is not prohibited from recognizing a right of publicity (or common law copyright, for that matter)\textsuperscript{85} in a performance that is not fixed in tangible form.

In the famous "human cannonball" case, \textit{Zachini v. Scripps Howard Broadcasting Co.} ("Zachini"),\textsuperscript{86} a television station videotaped a circus performer's live (and therefore "unfixed") fifteen-second act and broadcast it on a news program without the performer's permission. The performer sued the station for lost revenues resulting from the station's

\textsuperscript{77} Professor McCarthy, while acknowledging that the right of publicity has its historical antecedents in the related law of privacy, traces the origin of the right of publicity, as he has defined it, to Judge Jerome Frank's coining of the term in \textit{Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.}, 202 F.2d 866 (2d Cir. 1953), \textit{cert. denied}, 346 U.S. 818 (1953). According to Professor McCarthy, it was Professor Melville B. Nimmer who then first studied the new property right and defined it in his article \textit{The Right of Publicity}, 19 \textit{Law & Contemp. Probs.} 203 (1954). \textit{Id.} at § 1.7.
\textsuperscript{78} J. Thomas McCarthy, \textit{The Rights of Publicity and Privacy} § 1.11 (1987).
\textsuperscript{79} \textit{Id.} at § 1.10.
\textsuperscript{80} \textit{Id.} at § 11.13[C][1].
\textsuperscript{81} \textit{Id.} at § 11.13[C][2].
\textsuperscript{82} Neither a person's name or likeness constitutes a "work of authorship." \textit{I Nimmer, supra} note 39, at § 1.01[B][1] n.49.
\textsuperscript{83} \textit{Baltimore Orioles}, 805 F.2d at 680.
\textsuperscript{84} 17 U.S.C. § 102(a) (1982).
\textsuperscript{86} 433 U.S. 564 (1977).
appropriation of his "professional property." The case came before the United States Supreme Court on the issue of whether the First Amendment's free speech and free press protections immunized the station from having to compensate Zacchini. The Court held that it did not. In so holding, the Court recognized the right of publicity as a legal entity a state could legitimately protect. Seeing the underlying purpose of the right of publicity as "closely analogous to" the underlying purpose of patent and copyright law, the Court, nevertheless, did not see any pre-emption issue in the case, but instead wrote: "The Constitution no more prevents a State from requiring [the station] to compensate [Zacchini] for broadcasting his act on television than it would privilege [the station] to film and broadcast a copyrighted dramatic work without liability to the copyright owner."  

Just as the publication or broadcast of a copyrighted work may become the means by which a libel or invasion of privacy is effected, the publication or broadcast of a copyrighted work may also become the means by which someone's right of publicity is infringed. The fact that the Seventh Circuit ignored the distinction between copyright and publicity right seems to indicate that the court may have misconstrued the copyright term "exclusive right" as being the equivalent of "right to use." Professor McCarthy points out how that is a common misconception and that properly "[a]n exclusive right is a right to exclude others. Copyright is not a federally guaranteed 'right' to use the copyrighted material." Therefore, in Professor McCarthy's view, "something like a photo or motion picture may embody two separate 'property' rights, perhaps owned by two separate persons. Copyright may be owned by A and the Right of Publicity by B."  

87. Id. at 565.  
88. Id. at 574. Zacchini was the first and only case in which the state-law right of publicity was recognized by the United States Supreme Court. Ironically, some legal scholars, who view the right of publicity as essentially a proprietary interest in one's identity, see the facts of Zacchini as more properly coming under the state law doctrine of misappropriation or under common law copyright. See J. Thomas McCarthy, The Rights of Publicity and Privacy, § 8.13 (1987). If such a view is accepted, it would suggest (with the superior vision of hindsight) that the Players would have fared better had they emphasized rights in their identities rather than rights in their performances.  
89. Zacchini, 433 U.S. at 573. Nowhere, however, did the Court refer to the right of publicity as being the same as, or identical to, copyright.  
90. Id. at 576.  
92. Id. For a detailed explanation of how the concept of two rights in one property could have been applied had the Players won in Baltimore Orioles, see James W. Quinn and Irwin H.
The Seventh Circuit erred in extending the copyright protection adhering in a videotaped telecast of a ballgame to the depicted sports event itself. The court erred again in holding that the state-created right of publicity is equivalent to federal copyright. Based on these two erroneous premises, the Seventh Circuit then inappropriately applied section 301(a) of the Act and, through federal copyright preemption, did away with the Players' rights of publicity in their game-time performances.

In so deciding, the Seventh Circuit essentially held that where a performer is employed in the creation of a copyrightable work, any rights of publicity the performer assumes to hold in his or her performance may be extinguished by the copyright holder unless the performer has expressly reserved those rights in a written agreement with the employer. The Seventh Circuit's view on retention of publicity rights in a performance is exactly opposite to the prevailing custom of the entertainment industry, where it is generally the view that rights of publicity in a performance are retained by the performer unless expressly assigned through a grant of rights clause. In the Seventh Circuit's view such publicity rights are not held by the performer unless they are expressly retained through a reservation of rights clause.

It is, of course, impossible to predict to what jurisdictions or cases the reasoning of *Baltimore Orioles* will be extended. Hopefully, *Baltimore Orioles* will eventually be overruled, or confined to its facts. In the meantime, entertainment industry contract negotiators should be aware of the implications of *Baltimore Orioles* and of the importance of expressly clarifying publicity right ownership when drafting the employment contracts of performers.

*John Trechak*

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