

FEBRUARY 2015

DEVOTED TO
LEADERS IN THE
INTELLECTUAL
PROPERTY AND
ENTERTAINMENT
COMMUNITY

VOLUME 35 NUMBER 2

THE *Licensing*
Journal

Edited by Gregory J. Battersby and Charles W. Grimes

Do Athletes Have Rights of Publicity in Live Broadcast Footage?

Frank Ryan, Melissa Reinckens, and Matt Ganas

Frank Ryan is a partner at DLA Piper in New York, NY. He has a broad-based practice with a particular emphasis on litigation and counseling clients in intellectual property, media and sports, and complex commercial matters. Melissa Reinckens is an associate at DLA Piper in New York, NY. She has extensive experience with intellectual property litigation matters involving patents, trademarks, copyrights, trade dress, theft of trade secrets and false advertising. Matthew Ganas is an associate at DLA Piper in New York, NY. He focuses his practice in the area of intellectual property litigation with an emphasis on patent and trademark law.

US courts have recognized that “there is no judicial consensus on how to resolve conflicts between intellectual-property rights and free-speech rights.” Indeed, courts have adopted varying approaches to analyzing right of publicity claims that implicate First Amendment and copyright concerns. In an October 10, 2014 summary judgment ruling, Minnesota district court judge Paul Magnuson tackled several of the legal standards and principles that have developed in the area where publicity rights, free speech, and copyright ownership intersect.

*Dryer v. National Football League*¹ involves right of publicity claims asserted by former NFL players in connection with the use of their images in documentary-style NFL Films productions. The court’s recent summary judgment decision provided at least three reasons why these players’ right of publicity claims fail as a matter of law:

1. The challenged productions are non-commercial speech and thus entitled to complete First Amendment protection;
2. Newsworthiness and public interest exceptions bar right of publicity claims in the films at issue; and
3. The NFL’s valid copyright in the challenged films and underlying game footage preempts the assertion of publicity rights in the copyrighted publication.

In a vacuum, the *Dryer* decision applies to previously-captured game footage later used in historical accounts of sporting events. However, when read in the context of current sports-media litigation trends, the ruling may have more far-reaching implications. Live game broadcasts—rather than rebroadcasted game footage—account for the vast majority of revenue generated in the sports-media industry. Perhaps cognizant of this, athletes have launched class action lawsuits challenging league and broadcaster activity with respect to the use of their names, images, and likenesses in live game broadcasts on both right of publicity and antitrust grounds. While *Dryer* does not directly address alleged publicity rights in live broadcasts, it nevertheless establishes a roadmap for defending such claims through its analysis of publishers’ and athletes’ respective rights and interests in “game footage.”

The *Dryer* Plaintiffs’ Right of Publicity Claims

Dryer was originally a putative class action brought by roughly two dozen former NFL players. The players alleged right of publicity violations under several state laws, as well as federal Lanham Act claims, against the NFL in connection with its use of their images and likenesses in certain NFL Films productions. Most of the original plaintiffs settled their claims with the NFL. But three plaintiffs—John Dryer, Elvin Bethea, and Edward White (Plaintiffs)—opted out of the settlement class and pursued individual claims. The court’s recent summary judgment ruling addressed only these Plaintiffs’ claims.

The challenged “NFL Films productions are essentially compilations of clips of game footage into theme-based programs describing a football game or series of games and the players on the field.” Although they also include “dramatic narrative featuring music, narration and clips of important plays from the game itself in real time and slow motion,” as well as player interviews, the Plaintiffs’ claims were limited to “only the use of the video footage of them playing football.”

The NFL moved for summary judgment, arguing that the First Amendment and Copyright Act

preclude Plaintiffs' publicity right claims in the challenged works as a matter of law.

NFL's First Amendment Defense

No universal test has developed for balancing right of publicity and free speech considerations. Recognizing this, the court engaged in alternative analyses of the NFL's First Amendment defense. The court first analyzed whether the challenged productions were commercial or non-commercial speech. Under this test, if the productions "constitute expressive, non-commercial works," then Plaintiffs' right of publicity claims fail.

Applying this standard, the court determined that the challenged NFL films are non-commercial, because they are "not advertising" and "do not promote a product separate from the productions themselves." The court reasoned that the films do not "exploit players' images for the singular purpose of brand enhancement or other commercial gain," but rather tell the story of momentous league events and "are, in that sense, a history lesson of NFL football." The court also held that the NFL's indisputable economic motivation in producing these films "cannot by itself suffice to establish that the productions are commercial speech." As non-commercial speech, the court concluded that the challenged productions are entitled to full First Amendment protection against the Plaintiffs' right of publicity claims.

The court also analyzed whether Plaintiffs' state-based right of publicity claims are subject to recognized exceptions for newsworthy events and matters of public interest. It did so under the common or statutory law of four states at issue: (1) California, (2) Minnesota, (3) New York, and (4) Texas. The court recognized that a newsworthiness exception applies in each jurisdiction and that this issue can be resolved as a matter of law. In its analysis, the court emphasized that the challenged films report on a matter of substantial public interest and are intended to provide the public with factual, historical information. Accordingly, it concluded that the Plaintiffs' right of publicity claims are barred by each state's newsworthiness or public interest exception.

NFL's Copyright Preemption Defense

The *Dryer* court also analyzed whether Section 301 of the Copyright Act preempts Plaintiffs' state-based

right of publicity claims under a two-part test, which mandates preemption if: "(1) the disputed work is within the subject matter of copyright; and (2) the state-law created right is equivalent to any of the exclusive rights within the general scope of the [Copyright] Act."

The court first recognized a valid and enforceable copyright in the game footage captured and used by NFL Films. Plaintiffs argued that athletic events are not copyrightable and thus their appearances in those events are outside the subject matter of copyright. The court rejected this argument, however, clarifying that "the works at issue here are not the football games themselves but rather NFL Films' video recordings of the football games." Because these recordings and their use in the challenged films are within the subject matter of copyright, the court determined that the first prong of the preemption test was met.

The court next determined, under the second prong, that Plaintiffs' asserted publicity rights are equivalent to exclusive rights in the Copyright Act. Recognizing that "fixed" performances recorded with the performer's permission are copyrightable, the court reasoned that subsequent objections to the reproduction or broadcast of such recordings "in an expressive, non-advertising use" constitute claims for copyright infringement, not a violation of publicity rights. Under this view, "a claim for violation of the right of publicity against a copyrighted work will lie only if that work is used for advertising, not in an expressive work." Because the court determined that the challenged NFL Films productions are not advertisements in its First Amendment analysis, and because "Plaintiffs' likenesses cannot be 'detached from the copyrighted performances that were contained in the films,'" it concluded that the Copyright Act preempted Plaintiffs from asserting publicity rights in those works.

Key Takeaways

The *Dryer* decision highlights that the factual content and purpose of the challenged production will dictate the court's analysis in any sports-media right of publicity action, even when resolving First Amendment or Copyright Act preemption issues as a matter of law. Nonetheless, because most sports-media producers use "game footage" in the regular course of business, *Dryer* could significantly alter the landscape of sports-related right of publicity litigation, if followed by other jurisdictions. Most directly, it should limit the ability of athletes to succeed in publicity right claims related to the republication of

“game footage” in documentary-style productions. It might also provide an economic disincentive to assert right of publicity violations concerning the reproduction of previously-aired games, due to the court’s recognition that knowledge of the recording and consent to participation prevents the recovery of monetary damages for any pre-suit productions.

While the *Dryer* decision only directly addresses the repackaging of past game footage in historical film productions, the court’s reasoning arguably applies equally to the live broadcast setting, to which plaintiffs recently have turned their focus in other cases. Indeed, the parties’ respective rights and interests in the underlying (once-live) “game footage” drove the court’s analysis in several respects. In resolving the commercial speech inquiry, for example, the court noted: “The NFL is capitalizing not on the likenesses of individual players but on the drama of the game itself.” This statement is arguably even truer for live broadcasts, where the drama of the game unfolds in real time. In the

newsworthiness context, the court viewed “game footage” as “a matter of substantial public interest” for the purpose of historical story-telling. It is difficult to imagine a different result for live broadcast footage. With respect to Copyright Act preemption, the court specifically determined that game footage (*i.e.*, “video recordings of the football games”) was the relevant work being challenged, and not the underlying athletic performance constituting non-copyrightable subject matter. Under *Dryer*, the same copyright preemption analysis thus should apply to live broadcast footage.

Although *Dryer* may clear a path for broadcasters to defeat athletes’ right of publicity claims in live broadcasts, the court specifically emphasized that a fully-developed factual record was essential to analyze the challenged works and determine these issues on summary judgment. It therefore remains to be seen whether *Dryer* will provide an avenue for early dismissal of right of publicity claims concerning live broadcasts on the pleadings.

1. *Dryer v. Nat’l Football League*, USDC, (D. Minn., Oct.10, 2014).

Copyright © 2015 CCH Incorporated. All Rights Reserved.
Reprinted from *The Licensing Journal*, February 2015, Volume 35, Number 2, pages 12–14,
with permission from Wolters Kluwer, New York, NY,
1-800-638-8437, www.wklawbusiness.com