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Scores to Settle

When it comes to control of stats, golf and baseball are very different games

By Noel Humphreys

Scores and statistics are the lifeblood of sports. With the ability to corroborate greatness, expose failure or simply settle a friendly wager, statistics lend mathematical affirmation to the sporting fan's experience. Yet, the reliance on statistics is the very reason the recent steroid scandals have been so devastating. The new chemistry of athletic accomplishment has stripped the numbers of their certainty, and deprived both fans and athletes of their shared interest in sports statistics.

What few realize is that the real argument over sports scores, statistics and records is the province of big business. As fans and athletes struggle to rebuild trust in the sporting industry, leagues, unions and associations are engaged in a very differ-

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ent kind of competition — one being played on the fields of the nation's legal system. At issue are the ownership of and the right to disseminate statistical information

Recent cases from baseball and golf illustrate the difficulty in reaching a consensus regarding ownership of valuable observations about sports. The dispute has encompassed a broad array of legal theories, ranging from First Amendment freedom of speech to copyright and antitrust protection.

Take, for example, the debate over fantasy baseball.

C.B.C. Distribution and Marketing, Inc. (CBC) offers online fantasy baseball contests characterized as "products." *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1080 (D. Mo. 2006). In those contests, online participants allocate current Major Leaguers among themselves, but success depends upon the actual on-field performance of the players on a fantasy team.

Major League Baseball (MLB) claimed "exclusive ownership of statistics associated with players' names," and wanted CBC to pay to distribute that information. MLB asserted that it could "pre-

clude all fantasy sports league providers from using this statistical information to provide fantasy baseball games to the consuming public." Similarly, the players' union claimed fantasy league use of player names violated the rights of baseball players to control the use of their likenesses for profit.

CBC sought a declaratory judgment, allowing it to sell fantasy league products without paying MLB or the players. On August 8, 2006, the Eastern District of Missouri issued an opinion that sided with CBC and granted its motion for summary judgment.

"Courts have found that First Amendment freedom of expression is applicable in cases where the subject matter at issue involved *factual data and historical facts*." In this case, "the statistical information about Major League baseball players, including their hits, runs, doubles, etc., which CBC disseminates, represents historical facts about baseball players." The court sanctioned CBC's use of the information, concluding it "is speech, which is protected under the First Amendment."

Professional golf fared better in the 11th Circuit in 2004, but the rationale was completely different. See *Morris Communications Corp v. PGA Tour, Inc.*, 364 F.3d 1288 (11th Cir. 2004).

Golf tournament operator PGA Tour,

Inc. (PGA) controls dissemination of scores during its tournaments. At tournaments, volunteers follow players and record strokes as play proceeds using “an elaborate electronic relay scoring system that relies on the state-of-the-art computer technology and equipment as well as dozens of trained workers and volunteers.” The scores are then posted to the PGA Web site “nearly contemporaneously to their actual occurrence” as “real-time golf scores.” Simultaneously, the compiled scores go to a “media center” at the course, where news organizations are granted access on the condition that the information is sold only to publishers who have purchased a PGA license.

Media company Morris Communications (Morris) wanted to syndicate tournament scores sooner than PGA rules permitted. Morris claimed that the PGA Tour monopolized distribution of information and asserted an antitrust violation. The 11th Circuit affirmed the District Court’s finding that Morris’ behavior qualified as “free-riding on PGA’s investment in its costly [system].” It concluded that even a monopolist “that expends time and money to create a valuable product does not violate the antitrust laws when it declines to provide that product to its competitors for free.”

The 11th Circuit concluded that the PGA did not violate the Sherman Act. PGA’s “compiled real-time golf scores...are not a product that Morris has a right to sell because they are a derivative product of [the system] which PGA owns exclusively.... PGA ‘has a right to sell or license its product, championship golf, and its derivative product, [compiled] golf scores, on the Internet in the same way the [PGA] currently sells its rights to television broadcasting stations.’” However, the court provided no citation to any legal source to support its conclusion that scores are property, and the only footnote for this crucial legal finding was that Morris conceded that PGA “may have a property right.”

The court characterized the case as “a straightforward antitrust case involving a product and a defendant’s assertion of a valid business justification as its defense

to anticompetitive actions.” It was openly critical of Morris for using the results of PGA’s work without payment. PGA enjoyed a right to control dissemination of the scores by virtue of its investment in the tour and in the scoring system, and was justified in protecting itself from “free-riding” by publishers.

Interestingly, media organizations filed amicus briefs contending that copyright rules governed the case, but even Morris conceded that “this is not a copyright case.” The 11th Circuit dismissed copyright as having “no bearing on whether the golf scores and compilation of golf scores are the proprietary product of PGA’s” system. The possibility of copyright protection for sporting statistics was not far-fetched and had already been considered by the Second Circuit. See *National Basketball Association v. Motorola, Inc.* 105 F.3d 841 (2d Cir. 1997).

National Basketball Association v. Motorola, Inc. focused on reporters who attended basketball games or listened to broadcasts and reported scores and statistics during the game. Motorola sold pagers programmed to receive up-to-the-minute statistics and reports generated by non-NBA reporters. The National Basketball Association (NBA) claimed that Motorola’s use of its game scores and statistics qualified as misappropriation and copyright infringement. The court evaluated the copyright claim and concluded that basketball games are not “original works of authorship” as set forth under 17 U.S.C. § 102(a). To reach this result, the court examined legislative intent and found that, though Congress intended to extend copyright protection to broadcasts of athletic contests, the underlying athletic events were to remain “in the public domain.” Since the pager network service itself collected and disseminated the box score information, the service neither misappropriated nor infringed any copyright belonging to the NBA.

The 11th Circuit opinion in the PGA case distinguished the NBA case on at least two grounds. First, in basketball only the game score matters, and everyone in the arena can see the score. However, in a

golf tournament, every golfer keeps his own score and the action is spread over many acres such that no single spectator can track all of the scoring. *Morris*, 364 F.3d at 1290-91. Even in televised golf, only a few of the scores are reported. The second distinction was that, in the *NBA* case, the pager service contracted and paid the scorekeepers for their work. On the other hand, Morris sought a “free-ride” — that is, to disseminate the work of PGA employees without payment.

Neither the identity of the statistician nor the “free-riding” distinction resolves the incongruity between the MLB and PGA cases. In the baseball case, a statistician employed by the home team monitored play, and the fantasy league promoter distributed that person’s work. In the golf case, individuals representing the tournament promoter kept the statistics, and the news organization sought to distribute that output. The dissemination of baseball statistics involves as much “free-riding” as the golf case does, but the courts applied very different law. The MLB court relied on the First Amendment freedom to disseminate factual information. The PGA court relied on an anti-free-riding argument to prohibit dissemination of the same kind of information. The NBA court looked to Congressional intent.

The net result is that CBC can freely share baseball statistics in its fantasy league, while Morris cannot syndicate golf statistics. The number of times a man smacked a baseball is a historical fact, the free dissemination of which is protected by the First Amendment. The number of times a person hit a golf ball is not a historical fact but a piece of property to be licensed and sold. The measure of a team’s dexterity at throwing a ball through a hoop can be calculated by anyone and is part of the public domain.

If anything is certain, it is that these cases will not be the last on this subject. With pharmaceutical companies, chemical firms, sporting leagues, players’ unions and disgruntled fans poised to litigate the steroid issue, the debate over performance-enhancing drug use and its influence on player and game statistics may become a new “national pastime” of sorts. ■