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Lessons from the NFL: The Importance of Scope and Duration in Drafting Intellectual Property License Grants

Matthew Syrkin
Client Advisories

Hughes Hubbard & Reed LLP • A New York Limited Liability Partnership
One Battery Park Plaza • New York, New York 10004-1482 • +1 (212) 837-6000

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A group of retired players recently filed a class action suit (Dryer et al. v. National Football League) against the NFL claiming infringement and unauthorized use of their identities and likenesses to promote the NFL and sell NFL-related products without compensation.

This is yet another in a long list of cases brought by former athletes from the NFL, MLB, and NCAA seeking limits on the right to exploit players' likenesses. In fact, just last year, a number of retired NFL players won a class action lawsuit against the NFL Players Association, arguing that the union conspired with Electronic Arts to use their likenesses in the Madden video game series without proper compensation, in which the retired players earned a \$26 million settlement.

This time around, the league itself, not the union, is being sued by retired players who are challenging the exploitation of their images, names and likenesses in connection with the promotion of the league and the packaging, advertising and sales of products distributed by NFL Films—a division of NFL Properties which produces feature films, commercials, television programs, and documentaries on the NFL.

Each side is now preparing to do battle over both the scope (how broad) and term (how long) of the rights the players granted the NFL in the standard form player contracts and the corresponding collective bargaining agreements. The case will no doubt hinge on good old fashioned contract analysis and whether the NFL's exploitation of the players' likenesses falls squarely within the four corners of the documents. According to the players' lawyer, "During [the players'] time in the league the players' contracts gave the NFL authority to use their names and pictures for publicity and promotion in news, television and motion pictures, but they included no perpetuity clauses." The players' attorney also stated that beginning in 1993, the NFL's collective bargaining

agreement with the NFL Players Association altered the standard form player contract to contain broader rights to use the players' names, images, and likenesses, apparently plugging the loophole.

The court's contract analysis will have its own share of intricacies. First, the statute of limitations for right of publicity violations and other contract-based claims will bar a considerable amount of the alleged infringements and possibly reduce the amount of the "fair share of the revenue the NFL has earned", which the players demand in their complaint. Second, the provisions granting the NFL a license to the players' images, names, and likenesses may not have expired when the individual contracts themselves expired, as the plaintiffs claim, since the license grants incorporated therein may have been perpetual or drafted to survive any termination or expiration of the contract.

The court will also have to address another thorny issue. Specifically, even if the players granted the NFL a perpetual license to their likenesses, was that grant broad enough to encompass distribution across platforms and media, such as the internet, wireless devices, and other technologies that did not exist at the time the grants were made? This is an especially tricky issue because the grants were made in connection with what amounts to the players' employment or services agreements with the league.

We will keep an eye out for developments in this case which, regardless of its outcome, will likely provide useful and interesting guidance on drafting similar license grants in the future.

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Matthew Syrkin

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