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A SUPERSTAR EXCEPTION TO PROFESSIONAL BASEBALL LICENSING LOGIC?

By David Johansen

INTRODUCTION

In the beginning, there was baseball: pure and simple. Abner Doubleday is credited with creating the game around 1839 in Cooperstown, New York. Until the early 1860's, the game had a staunch anti-commercial policy. The sport was to remain amateur and unspoiled by the influence of money, but over time this became impractical. Growing expenses made it clear that admission had to be charged at the gate and teams had to begin asking for donations for road trips.[1] The Cincinnati Red Stockings became the first fully professional team in 1869. The team's owners began offering contracts to the top athletes in the country. By the end of the season, the team touted a remarkable record with sixty-five wins and zero losses.[2] In 1875, the National League became baseball's controlling association and the game was forever transformed into an industry managed by businessmen who employ athletes.[3]

As contracts between athletes and teams grew, so did a notion that money could be made using a player's image. Early in the 20th Century, Babe Ruth became one of the most notable figures in American popular culture. Major corporations recognized the opportunity that celebrity players, such as Ruth, could successfully market their products. As the century continued, endorsement contracts became increasingly more lucrative.

Today, a player's ability to market his image is nearly as important as his performance on the playing field. However, this is not surprising, given the short duration of an athlete's professional career. An average player's career in Major League Baseball (MLB) is 5.6 years and 4.8 years for pitchers.[4] This appallingly brief lifespan leaves open only a brief window of opportunity for players to capitalize on their marketability. Given that the value of endorsement

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[1] Sean Lahman, *A Brief History of Baseball: Part I: Origins of the Game*, BASEBALL ARCHIVE, Feb. 8, 2007, http://baseball1.com/content/view/32/74.
[2] *Id.*
[3] Sean Lahman, *A Brief History of Baseball Part II: Professional Baseball's First Hundred Years*, BASEBALL ARCHIVE, Feb. 8, 2007, http://baseball1.com/content/view/33/74/.
[4] Teddy Schall & Gary Smith, *Career Trajectories in Baseball*, POMONA COLLEGE, http://www.economics.pomona.edu/GarySmith/frames/GaryFrameset.html (last visited May 9, 2007).

contracts now have the capacity to dwarf a player's athletic contract, many players are cashing in on their image.[5]

In 2004, Barry Bonds signed an athletic contract for $18 million with the San Francisco Giants.[6] Bonds received an additional $4 million in appearance income and endorsement contracts.[7] Basketball sensation LeBron James dwarfed Bonds' earnings when the recent high school graduate, having never stepped onto a professional basketball court, signed a $90 million deal with Nike.[8] These deals, along with the myriad of other athlete endorsement contracts, establish that there is an additional and highly lucrative avenue available for professional athletes.

Within the past quarter century, society has seen an astronomical increase in the number of athlete endorsed products. No longer is the public merely subjected to Joe DiMaggio hawking Mr. Coffee. Rather, it seems that any product available could have the backing of a sports figure. It is not surprising that a field of law has emerged, which is aimed at securing the most profitable endorsement and licensing agreements for athletes.

This article will examine the rise of group-licensing agreements in professional sports and the decision of a few very successful athletes to stray and negotiate separate contracts on their own behalf. First, the article reviews the legal foundation for licensing agreements, which is premised in the common law's notion of the right of publicity. Second, it turns to the scant case law regarding group-licensing agreements. Finally, it concludes by discussing the factors that affect an individual athlete's licensing decision: Whether to select the group-licensing program or to negotiate licensing agreements alone.

THE LEGAL FOUNDATION: A PLAYERS' RIGHT OF PUBLICITY

Baseball and its players have held prominent positions in developing the right of publicity. Group-licensing in professional sports is premised on the concept of a player's right of

[5] Martin J. Greenberg & James T. Gray, Sports Law Practice § 7.10(1), at 685 (2d ed. 1992).
[6] Baseball-Reference.com, *Barry Bonds*, http://www.baseball-reference.com/b/bondsba01.shtml (last visited May 9, 2007).
[7] Dan Fost, *Bonds' Marketing Muscle Imperiled by Steroid Scandal*, S.F.GATE.COM, Dec. 9, 2004, http://sfgate.com/cgi-bin/article.cgi?file=/c/a/2004/12/09/BONDSINC.TMP.
[8] Tom Withers, *LeBron James Hits Jackpot with Endorsement Deals*, USA TODAY, May 22, 2003, http://www.usatoday.com/sports/basketball/draft/2003-05-22-james-deals_x.htm.

publicity, which is described at common law as the right of a person to control the commercial use of his or her identity. The right was first acknowledged in *Haelan Laboratories v. Topps Chewing Gum.*[9] The case involved a dispute between rival chewing gum companies, where both claimed the right to use the name and image of a particular baseball player. In its opinion, the Second Circuit discussed a public figure's right of publicity:

> We think that, in addition to and independent of that right of privacy…a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made "in gross," i.e., without an accompanying transfer of a business or of anything else. Whether it be labeled a "property" right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth.[10]

The court's rationale was "prominent persons…would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways."[11] Today a majority of states recognize the right of publicity either by statute or at common law.[12]

The Tenth Circuit elaborated on a celebrity's right of publicity in *Cardtoons, L.C. v. Major League Baseball Players Ass'n.*[13] The court illustrated the distinction between a celebrity's right of publicity and a claim of false endorsement.[14] The court distinguished the claims using a hypothetical involving Madonna and a fruit company. In the hypothetical, Madonna had never eaten the company's fruit and refused to endorse their product. Assuming the company subsequently decided to post a billboard with a picture of Madonna and the slogan: "Madonna may have ten platinum albums, but she's never had a Mitchell banana," she would not be able to bring a claim for false endorsement.[15] She would, however, be able to bring an action for infringing on her right of publicity. Lacking Madonna's consent, the company misappropriated her image and likeness for commercial gain. The court then defined a

[9] *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2nd Cir.1953).
[10] *Id.* at 868.
[11] *Id.*
[12] *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 967 (10th Cir. 1996).
[13] *Id.*
[14] *Id.* at 968.
[15] *Id.*

celebrity's right of publicity as "a form of property protection that allows people to profit from the full commercial value of their identities."[16]

Since *Haelan*, many courts have recognized that each player has a clear right to profit from the commercial use of his name and likeness. A conflict arises when a player's proprietary right of publicity hinders the group-licensing program's ability to maximize profits for the participating players.

In *Uhlaender v. Henrickson*, the Major League Baseball Players Association (MLBPA) asked the court to enjoin Negamco, a board game manufacturer, from using the names of players in their games. [17] The games at issue were Negamco's "Major League Baseball" and "Big League Baseball Manager."[18] The games included names and statistics of approximately seven hundred baseball players. Negamco failed to obtain a license or consent from either the MLBPA or the individual players.[19] The court held in favor of the MLBPA, concluding the games violated each of the player's right of publicity and ordered Negamco to discontinue production until a licensing agreement was formed.[20] *Uhlaender* is significant for two reasons. First, it reinforced the right of each player to endorse or be featured in a product for financial gain. Second, it recognized the power of the MLBPA's group-licensing program to require a company to negotiate exclusively with the union.

In *Gridiron.com v. National Football League Player's Ass'n.*, the court held that Gridiron.com had violated the National Football League Player's Association's (NFLPA) group-licensing program when it negotiated individual contracts with over 150 NFL players.[21] Gridiron.com's website consisted of a "menu that leads directly to information and images of hundreds of NFL players."[22] The information was used to supplement the company's online fantasy football game with the player's names and images.[23] Gridiron.com also had plans to introduce a "Pro Shop" containing "player endorsed memorabilia, apparel, novelty items, signed

[16] *Id.*
[17] *Uhlaender v. Henrickson*, 316 F. Supp. 1277, 1278 (Minn. 1970).
[18] *Id.*
[19] *Id.*
[20] *Id.* at 1283.
[21] *Gridiron.com, Inc. v. National Football League Player's Ass'n, Inc.*, 106 F. Supp.2d 1309, 1316 (S.D. Fl. 2000).
[22] *Id.* at 1313.
[23] *Id.*

footballs, signed pictures, photographs of players, replica jerseys, helmets and artwork."[24] The court enjoined Gridiron.com from using the likenesses of six or more players without signing a group-licensing agreement.[25]

Baltimore Orioles, Inc. v. *MLBPA* limited the scope of a player's intellectual property rights. The Seventh Circuit held that baseball clubs, as opposed to the players, own the telecast rights to broadcast baseball games.[26] Therefore, while a player has a right to negotiate commercial deals and use his image for profit, he lacks any proprietary right in the telecasts of the games in which he competes.

GROUP-LICENSING AND THE COURTS

Few cases have specifically discussed group-licensing agreements in any detail. In addition to the *Uhlaender* opinion, the other seminal cases are *Fleer Corporation v. Topps Chewing Gum, Inc.* and *Cardtoons, L.C. v. Major League Baseball Players Ass'n.*[27] These cases discuss an athlete's individual right to profit from publicity and its relation to group-licensing programs.

Fleer Corp. v. Topps Chewing Gum, Inc.

In *Fleer Corp. v. Topps Chewing Gum, Inc.*, the Third Circuit discussed the impact of antitrust law on group-licensing agreements in MLB.[28] The court held the manufacturer's licensing agreements were not an unreasonable restraint on trade and concluded such contracts do not inhibit competition in the relevant product market.[29]

In dicta, the court discussed the history of group-licensing programs. In 1966 the MLBPA was lacking sufficient capital and hired Marvin Miller as its first executive director to help relieve the burden. Miller organized a group-licensing program that authorized the union to market the likenesses and signatures of every player if distributed as part of a group series.[30] The

[24] *Id.*
[25] *Id.* at 1316.
[26] *Baltimore Orioles, Inc. v. Major League Baseball Player's Ass'n*, 805 F.2d 663, 673 (7th Cir. 1986).
[27] *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139 (3rd Cir. 1981); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996).
[28] *Fleer*, at 139.
[29] *Id.* at 141, 153.
[30] *Id.* at 142.

group-licensing program eventually became known as a "commercial authorization contract."[31]The MLBPA subsequently negotiated an agreement with Coca-Cola that permitted the company to print pictures of 500 baseball players on bottle caps.[32] The court's discussion of group-licensing agreements assumes the program's legality. The discussion is significant primarily because it acknowledges the legal validity of the procedures implemented by the MLBPA.

Players were also not required to participate in the union's group-licensing program.[33] If a player does sign the agreement, he still retains an individual right to market his name, likeness and signature.[34] To date, the vast majority of players use the MLBPA to license their likenesses in various products, including sports cards, video games and other commercial media. The program creates a union's exclusive right to negotiate all licensing agreements involving a group of players.[35]

The holding also approved the MLBPA's procedures for distributing proceeds. The contracts provided that any revenue received from the group-licensing program would be distributed to the players pro rata based upon the number of days of active MLB service.[36] The court explained that "[t]he Association, for administrative purposes, did receive the licensing income, [but it primarily acted] merely as a conduit that distributed all of the licensing revenue to the players."[37]

Cardtoons, L.C. v. Major League Baseball Players Ass'n

In *Cardtoons* the Tenth Circuit was confronted with an issue involving a series of parody baseball cards using caricatures of various ballplayers.[38] Cardtoons L.C. designed humorous baseball cards and contracted with Champs Marketing Inc. (Champs Inc.) to print the cards and

[31] *Id.* at 143.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.* (Between 1966 to 1975, the MLBPA entered into group licensing contracts with among others, Kellogg, Sports Promotions, Milk Duds, and ITT Continental Baking. The number of players included in such agreement has varied where some contracts covered all major league players while others only extended to at least 72 players but not more than 300 players).
[36] *Id.* at 144.
[37] *Id.*
[38] *Cardtoons*, at 962.

with TCM Associates for public distribution.[39] The court described an example of a caricature card depicting "Treasury Bonds," parodying San Francisco Giants' outfielder Barry Bonds.[40] That card and other cards generally made fun of the featured player and criticized their exorbitant salaries.[41]

Upon receiving a cease and desist letter from the MLBPA, Champs Inc. informed Cardtoons that it would stop printing the cards until a court determined whether Cardtoons was infringing on the MLBPA's rights.[42] Cardtoons sought a declaratory judgment asserting that the cards were not in violation of the MLBPA group-licensing program.[43] The Tenth Circuit used a three-step analysis to determine whether Cardtoons should receive a declaration and whether it could distribute the parody cards absent MLBPA consent:

> First, we determine whether the cards infringe upon MLBPA's property rights as established by either the Lanham Act or Oklahoma's right of publicity statute. If so, we then ascertain whether the cards are protected by the First Amendment. Finally, if both parties have cognizable rights at stake, we proceed to a final determination of the relative importance of those rights in the context of this case.[44]

With respect to the first step, the court concluded that there was no likelihood that anyone would confuse the characters on the parody cards with the real baseball players.[45] The court noted that their "success depends upon the humorous association of its parody cards with traditional, licensed baseball cards, not upon public confusion as to the source of the cards."[46]

Turning its analysis to the issue of right of publicity, the court noted that prominent persons (especially actors and athletes) would be deprived of their rights if they had no control over the usage of their likenesses.[47] Three elements are required to establish a civil suit for an

[39] *Id.* at 963.
[40] *Id.*
[41] *Id.*
[42] *Id.* at 963-964.
[43] *Id.* at 964.
[44] *Id.* at 966.
[45] *Id.* at 967.
[46] *Id.*
[47] *Id.*

infringement of the MLBPA's publicity rights: (1) the knowing use of player names or likenesses, (2) on the products, merchandise, or goods, (3) without the MLBPA's prior consent.[48]

The Tenth Circuit determined that MLBPA satisfied these elements and therefore had a legitimate property right for the group of ballplayers.[49] However, the court ultimately found against MLBPA. Citing *New York Times Co. v. Sullivan*,[50] the court explained that the cards received full protection under the First Amendment as they "provide social commentary on public figures, major league baseball players, who are involved in a significant commercial enterprise, major league baseball."[51] Thus, the First Amendment precludes the MLBPA from asserting a property right over satirized cards offering social commentary even when they feature a group of baseball players.

In summary, players have a right to control the use of their images. They also may assign the right to a players association for group-licensing agreements. Courts have however set boundaries to those rights. The right of publicity does not extend to social commentaries such as caricatures nor does the right control the broadcasts of the games in which they play. The First Amendment and the intellectual property rights of their organization, respectively, control these situations. It is within this legal framework that the modern marketplace for player endorsements has grown into the multi-million dollar business.

"NUTS AND BOLTS" OF GROUP-LICENSING IN PROFESSIONAL SPORTS

The lucrative nature of endorsement contracts and marketing campaigns prompted the MLBPA to create the first group-licensing program in 1966. It was designed to distribute licensing revenue fairly amongst the players, but it also created "one-stop shopping" for companies wishing to use the group.[52] The MLBPA benefits from the program by receiving administrative revenue for creating the deals. Today, all four of America's major professional sports have adopted some form of a group-licensing program. It is helpful to review the other major professional sports to obtain a clearer picture of group-licensing in MLB.

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[48] *Id.* at 968.
[49] *Id.*
[50] *Id.* at 968; *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
[51] *Id.* at 969.
[52] Pamela R. Lester, *Marketing the Athlete: Endorsement Contracts*, AM. L. INST.-A.B.A, §23.03 (2005).

The respective players unions for baseball, football, and hockey administer the group-licensing programs. In basketball, NBA Properties, Inc. (NBAP) administers the group-licensing program in conjunction with the National Basketball Players Association (NBPA).[53] The union's exclusive right to negotiate group-licensing agreements requires any company seeking to use a group of players to first obtain permission from the union. Each union defines a "group" of players differently. For instance, the MLBPA requires at least three players, the NHLPA requires at least five players, and the NFLPA and NBA both require six players to form a "group."[54]

MLBPA Group-licensing

The exact terms of a MLBPA group-licensing agreement are independently negotiated between the Association and the company seeking to use players' likenesses.[55] The MLBPA retains their exclusive right to grant licenses and requires that for any:

> [C]ompany seeking to use the names or likenesses of more than two … players in connection with a commercial product, product line or promotion must sign a licensing agreement with the MLBPA. The license grants the use of the players'… likenesses only and not the use of any MLB team logos or marks. Examples of products licensed …include trading cards, video games, T-shirts, caps, …pennants, posters, pins, action figures...
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> ….
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> …. Players receive a pro rata share of licensing revenue regardless of popularity or stature…determined by his actual days of Major League service in a given season.[56]

Thus, revenues are distributed proportionately to a player based solely upon the number of actual days he has played during the season.[57] One policy behind the MLBPA's program is it allows "one stop shopping" for a company seeking a multi-player campaign.[58] Prior to such agreements, a company wishing to use multiple players for a marketing campaign had the burden of negotiating deals with each individual player. Now a company enjoys the efficiency of

[53] NAT'L BASKETBALL PLAYERS ASS'N, COLLECTIVE BARGAINING AGREEMENT, 270 (1999) (Art. XXVII Group Licensing Rights, §§ 1, 2), http://www.nbpa.com/downloads/CBA.pdf [hereinafter *NBA-CBA*].
[54] Lester, *supra* note 52, at §23.03.
[55] The author of this article was told by the MLBPA that there is no model licensing contract and each agreement is negotiated individually with the particular company.
[56] MLBPlayers.com, Frequently Asked Questions, http://mlbplayers.mlb.com/pa /info/faq.jsp (last visited May 9, 2007) [hereinafter *MLB Group Licensing*].
[57] *Id.*
[58] Lester, *supra* note 52, at §23.03.

signing a single group-licensing agreement with the MLBPA to obtain the right to use the names and likenesses of the players.

NFLPA Group-licensing

The NFLPA administers its group-licensing program in a fashion similar to the MLBPA. The NFL's standardized Player's Contract has at least three points of interest. First, whenever a player signs the contract, he retains the ability to opt out of a particular product category if he has already negotiated a conflicting individual contract. The Player's Contract provides: "Player's inclusion in a particular NFLPA program is precluded by an individual exclusive endorsement agreement, and [p]layer provides the NFLPA with timely written notice of that preclusion, the NFLPA will exclude [p]layer from that particular program."[59] Therefore, a player may remain outside of a particular "group" negotiation so long as he shows that he is precluded by his individual contract with another company.

Second, the contract outlines the scope of the NFLPA's licensing power. The contract asserts that the NFLPA and its licensing affiliates have "exclusive right to use and grant to persons, firms, or corporations … the right to use [the player's] name, signature facsimile, voice, picture, photograph, likeness, and/or biographical information … in group-licensing programs."[60] The contract goes on to say that in any situation where a corporation seeks to use the names or likenesses of six or more NFL players, the NFLPA retains the exclusive right to negotiate for the entirety.[61]

The ultimate effect of this licensing scheme, similar to other licensing programs, is that a company wishing to use the names or images of six or more players may be required to negotiate two deals. The company must negotiate one deal with the NFLPA and the other with the NFL. To obtain a right to have a group featured in conjunction with a product, a company must negotiate with the union. If that company also wishes to have those players wearing team jerseys or any other NFL trademarked logo, it must also strike a second deal with the NFL.

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[59] NAT'L Football League Players ASS'N, COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NFL MANAGEMENT COUNCIL AND THE NFL PLAYERS ASSOCIATION, 163 (2006) (App. C., Cl.4 NFL Player Contract), http://www.nflpa.org/pdfs/Agents/CBA_Amended_2006.pdf [hereinafter NFL CBA].
[60] *Id.*
[61] *Id.*

Finally, the NFLPA uses all revenue obtained from an agreement to support NFLPA programs. The Player's Contract states:

> In consideration for this assignment of rights, the NFLPA will use the revenues it receives from group-licensing programs to support the objectives … in the [b]y-laws of the NFLPA. The NFLPA will use its best efforts to promote the use of NFL player images in group-licensing programs, to provide group-licensing opportunities to all NFL players, and to ensure that no entity utilized the group-licensing rights granted to the NFLPA without first obtaining a license from the NFLPA.[62]

As in the other sports, the NFL's group-licensing program constitutes a major source of revenue for the association, which allows the association to "support the objectives as set forth in the by-laws of the NFLPA."[63] Unlike the MLBPA's program, the NFLPA's group-licensing revenue is entirely devoted to its operating costs, contractual disputes, arbitration, and other NFLPA expenses. Thus, a NFL player does not receive a revenue distribution and is only compensated by the NFLPA's services.

NBA Properties, Inc. and National Basketball Players Association Group-licensing

Basketball's group-licensing program is set forth in the NBA's Uniform Player Contract and in the Collective Bargaining Agreement between the NBPA and the League.[64] The program gives NBAP the exclusive right to use the "[p]layer's [a]ttributes' of each NBA player as such term is defined in, for such group-licensing purposes as are set forth in, and in accordance with the terms of the Group License Agreement."[65] Furthermore, an individual agreement with a company does "not preclude the player from being covered by group licenses granted by NBAP … with respect to exempted items." These items include "facsimiles, mock uniforms, trading cards and posters."[66] Similar to NFLPA's program, basketball players do not receive a revenue distribution.[67]

[62] *Id.*
[63] *Id.*
[64] *NBA CBA*, *supra* note 52, at A-1 (Exhibit A §14, Uniform Player Contract).
[65] *Id* at 270**.**
[66] *Id.*
[67] *Id.* at A-1.

INDIVIDUAL PLAYER LICENSING

While the MLBPA's group-licensing program is the easiest and most beneficial licensing method for the vast majority of players, each player has a right to independently license his likeness.[68] Companies are free to negotiate with a player to endorse their product. A company choosing this route only receives the right to have the player appear in either a generic uniform or outside the sports realm altogether.[69] But that company may negotiate separately with MLB to obtain the right to use team names or logos with the product.[70] In some cases, an individual athlete may be as marketable as the league or his team.[71]

Martin Greenberg the author of *Sports Law and Practice* asserts, "the popularity of the leagues and teams is largely dependent upon the popularity of the athletes,"[72] creating a tug-of-war over who should actually control the rights to popular players' likenesses.[73] When a conflict arises pertaining to the ownership of royalty rights, the resolution generally hinges upon whether the endorsement is of the particular athlete or whether it is of the athlete coupled with his affiliation with a team or league.[74]

If a player believes his image is marketable absent of any connection to his team, it may be more lucrative for him to opt out of the group-licensing program. This decision belongs solely to the player, but a decision to sign the group's agreement is generally perceived as an expression of loyalty towards the union, especially if more lucrative contracts are available to the individual.[75] This expression of loyalty has the greatest impact in the sports that rely heavily on the concept of "team" or unity for success. A player who sacrifices some of his own endorsement potential empowers his teammates by showing an allegiance to the team's wellbeing.

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[68] Lester, *supra* note 52, at 27-7.
[69] Greenberg & Gray, *supra* note 5, at 724.
[70] *Id.*
[71] *Id.* at 723.
[72] *Id.*
[73] *Id.*
[74] *Id.* at 724.
[75] *See* Lester, *supra* note 52, at 27-8.

Athletes possessing an image that is exceptionally marketable may be tempted to opt out of group-licensing program. While the vast majority of players participate in the programs, the unions are concerned by recent indications of a potential opt out trend.

BLAZING A TRAIL: BARRY BONDS OPTS OUT

In 2004, Barry Bonds became the first player in the 30-year-history of the MLBPA to opt out of the group-licensing program. Dwight Chapin of the San Francisco Chronicle described the impact of Bonds' decision:

> Since he opted out of the Major League Baseball Players Association's group licensing agreement early this year and took control of his own fortunes, Bonds reportedly has signed more than 20 marketing deals, as well as starting his own Web site … where -- among other things -- all manner of collectibles related to the Giants' outfielder can be found, many of them at hefty prices.
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> ….
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> Three of the four leading baseball-card makers, because of their agreement with the MLBPA, can't turn out cards of non-group licensed players. The Topps Company can negotiate with individual players, but so far it's shown no inclination to do so with Bonds, and a number of leading video-game manufacturers also have balked at negotiating individual deals with the slugger.[76]

Analysts immediately questioned the sanity of Bonds, doubting he could actually turn a profit above his group-licensing distribution. The average baseball fan is also aware of Bonds' decision. A fan opening the newest version of "MVP Baseball 2005"[77] instantly notices that Bonds' character is missing from the Giants roster. Instead, the San Francisco Giants are starting a Caucasian player named John Dowd in left field. Dowd, the fictitious left-hander, also bats in the Giants cleanup position. Bonds' decision has deprived his fans from the pleasure of managing his character in the virtual setting. Bonds is now missing from two versions of MVP Baseball simply because he is demanding too much money to license his name and likeness.

Fans are also noticing that Barry Bonds is missing from their baseball card collections. Pursuant to the agreements between the leading trading card companies and the MLBPA, three out of the four card producers do not even have an option to negotiate individually with Bonds. Topps Company Inc., the only company with the option, initially failed to negotiate with Bonds,

[76]Dwight Chapin, *The Selling of Barry Bonds – By Barry Bonds*, S.F.GATE.COM, June 8, 2004, http://sfgate.com/cgi-bin/article.cgi?f=/chronicle/archive/2004/06/08/SPGCB72DC31.DTL.

[77] MVP Baseball 2005 is a popular video game created by Electronic Arts Inc.

but has since signed a deal. For the 2005 baseball season, Topps is the only card company with the right to produce a Barry Bonds trading card. Bonds spoke of the agreement in his online journal:

> I know a lot of you have e-mailed over the past year about trading cards. This year I will have a baseball card. Topps has already started producing my cards for 2005 which will appear in packs with all the other players. This week, I approved many items from Topps and I have to say that I'm very happy with the product line for the fans.[78]

Bonds appears to be profiting, at least marginally, from his decision to opt out. Even though Bonds is not the most likable of MLB players, companies are realizing the difficulty of marketing products without the slugger who has won four Most Valuable Player Awards and is on the verge of setting a new homerun record.

A PLAYER'S ENDORSEMENT VALUE AND THE STRATEGY OF OPTING OUT

Superstar Barry Bonds vs. Whitesox Star Jermaine Dye

Bonds' decision to opt out of the MLBPA's group-licensing program poses an interesting question: Is it economically viable for a player to opt out of the commercial authorization contract? The answer is extremely particularized.

MLBPA's program distributes revenue on an egalitarian basis amongst the players. The advantage of individualized licensing is simply a player's potential to receive more money than if he relied on the MLBPA's group-licensing.[79] In 2005 Topps believed it could sell more cards by striking a deal with Barry Bonds, making it the only card company offering a Barry Bonds trading card. Bonds, as an individual, has been able to use the demand for his image and name to obtain more proceeds than if he relied on the MLBPA's group-licensing program. There are only a select few in any given sport who could stand on their own to negotiate profitable licensing agreements. In baseball, those few might include, in addition to Barry Bonds, Alex Rodriguez and Derek Jeter. LeBron James and Shaquille O'Neal may fit the mold in basketball. Football stars Michael Vick, Tom Brady or Brett Favre could also command such an agreement.

[78] MLB.com, Barry's Journal, Jan.10, 2005, http://barrybonds.mlb.com/players/bonds_barry/journal/ archives _05.html.
[79] *MLB Group Licensing*, *supra* note 55.

These players are at the very zenith of their sport and may find an advantage to independently negotiating a license.

The story is quite different when a player such as the 2005 World Series MVP comes into the picture. Prior to October 2005, Jermaine Dye was only fairly well known amongst baseball fans. Dye became the sixth outfielder in the history of MLB to win the Most Valuable Player award.[80] The unfortunate reality is that those who are not White Sox fans would have trouble recognizing Dye, even if he walked through their front door. The nine-year veteran has a superb resume, but would find it far more difficult to negotiate an individual deal with Topps. Barry Bonds has received a sum of money likely to dwarf any deal offered to Dye. The difference is that Bonds' market value is completely separate from the San Francisco Giants. Most baseball fans notice when Bonds is absent from the Giants lineup in a video game. On the other hand, most would fail to notice if Dye were missing from the White Sox lineup.

From a marketing standpoint, the difference between a media "superstar" and a mere baseball "star" is the ability to be recognized and marketed independently from a team or sport. In many respects, Barry Bonds transcends the sport of baseball. Playing only 14 games in 2005, Bonds still found his name in newspaper headlines on a daily basis, irrespective of his team's performance. In fact, he received more press coverage than the Giants as he hid in his Santa Monica estate. The difference between Bonds and Dye is being a media superstar compared to a baseball team's star. Bonds is a media superstar with market value beyond his association with the Giants. Dye, on the other hand, is merely the White Sox star baseball player.

Market Value & The Modern-day Ballplayer

A player's "market value" is ultimately determined by the wants and needs of the companies seeking athlete endorsements.[81] Assessing an athlete's value is a task initially assumed by a sports agent and is achieved by weighing various "intangible" factors.[82] An athlete's market value must then be matched with the appropriate potential markets. The suitability of a market is highly influenced by geographic relationships and a particular product

[80] David Kull, *Dye is Sixth Outfielder to Win MVP*, ESPN.COM, OCT. 27, 2005, http://sports.espn.go.com /mlb/playoffs2005/news/story?id=2205170 (Dye earned the award by batting .438 in the World Series and getting the game-winning hit in the World Series' final game).
[81] Lester, *supra* note 52, at 27-12.
[82] *Id.*

category.[83] The impact of an athlete's market value is best described in Pamela Lester's article *Marketing the Athlete: Endorsement Contracts*:

> The athlete's market value is difficult to determine unless the athlete is either clearly unmarketable or, conversely, a bona fide superstar. The unmarketable athlete will be fortunate to obtain free products; the superstar can attempt to negotiate record-setting contracts. In general, however, marketability depends upon many intangibles.[84]

She identifies several the intangibles as the athlete's skill and success in his sport and individual characteristics such as image, charisma, physical appearance, and personality.[85] Thus, as noted in *Uhlaender v. Henricksen*, a player's commercial worth is valuable when "the public recognizes it and attributes good will and feats of skill or accomplishments of one sort or another to that personality."[86] Therefore, a player who is popular, well liked by teammates and fans, highly skilled, and charismatic should obtain a high market value for endorsements. Conversely, these intangibles can contribute negatively to an athlete's market value. For example, an athlete loses market value if he is associated with a public scandal, illegal drug use, criminal wrongdoing, and troubled domestic relations.[87] The real effects of negative intangible factors were evident to Barry Bonds when the "BALCO" scandal consumed the media and significantly lowered the demand for his endorsements.

CONCLUSION

The Barry Bonds opt out decision is unlikely to set off a trend of individualized licensing even for bona fide superstars. Baseball players as a group have transformed a mere game into the Great American Pastime. Superstar athletes should not undervalue or forget that the group enabled their stardom.

The value of dedicated, hardworking, and reliable players, even if publicly unknown, is recognized among coaches, teammates and the league. While superstar slugger Barry Bonds may independently have substantial market value, his stardom would have never ripened without the support of his teammates. His decision to opt out perpetuates the undervaluing of his

[83] *Id.* at 27-12.
[84] *Id.*
[85] *Id.*
[86] *Uhlaender*, at 1283.
[87] Lester, *supra* note 52, at 27-12.

teammates, who are now, along with the fans, destined to absorb the financial burden of the decision.

While most MLB players lack the requisite market value to opt out, the MLBPA's wisdom recognizes the value of the group. The MLBPA's group-licensing program is designed to fairly compensate each player for an actual contribution to the sport and players are logically allocated a pro rata revenue share. Group-licensing allows "one stop shopping" for companies wishing to use the names and likenesses of numerous athletes. Group-licensing programs avoid the unnecessary transaction costs and a unified group ultimately increases the profits and benefits for everyone. The MLBPA offsets a significant portion of its operating costs with revenue from group-licensing agreements. When a player opts out, his increased profits result in decreased earnings for his teammates. Ultimately a decision to opt out creates resentment towards the superstar. In the end, a player's decision to opt out harms the fans, MLBPA, his teammates, players in the league, and eventually the superstar himself.

The power of a unified team and union is strong and a symbolic gesture of loyalty to participate in a group-licensing program benefits both the superstar and the team. A unified team is more likely to succeed and a successful team increases the market value of each player. A decision by a superstar to opt in makes the most economic sense after all.