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J. Gordon Hylton

Marquette University Law School, joseph.hylton@marquette.edu

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# BASEBALL CARDS AND THE BIRTH OF THE RIGHT OF PUBLICITY: THE CURIOUS CASE OF *HAELAN LABORATORIES V. TOPPS CHEWING GUM*

J. GORDON HYLTON\*

Formal recognition of the modern right of publicity is usually traced to the case of *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,<sup>1</sup> a 1953 decision of the United States Circuit Court of Appeals for the Second Circuit.<sup>2</sup> In *Haelan*, one producer of baseball cards packaged with bubble gum (the Bowman Gum Company) sued another (Topps Chewing Gum) alleging that the latter had infringed upon exclusive contracts that the first producer had secured with a large number of major league baseball players.

Prior to the *Haelan* decision, the boundaries of an individual's publicity rights were not clear. On the one hand, it was widely accepted that there was a right of privacy which protected individuals from the unauthorized use of their names or images for commercial purposes,<sup>3</sup> even if they were public figures.<sup>4</sup> However, this right was not typically thought

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\* Associate Professor of Law, Marquette University. A.B., Oberlin College; J.D., University of Virginia; Ph.D., Harvard University.

1. 202 F.2d 866 (2d Cir. 1953), *cert. denied*, 346 U.S. 816 (1953).

2. J. Thomas McCarthy, *The Rights of Publicity and Privacy* 1-41 to 1-45 (2d ed. 2000) (entitling the section devoted to *Haelan* "The Birth of the Right of Publicity"). See also *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 967 (10th Cir. 1996) ("The [right of publicity] was first acknowledged as a distinct privilege and termed the 'right of publicity' in [*Haelan v. Topps*]."), *aff'd*, 182 F.3d 1132 (10th Cir. 1999), *rev'd en banc*, 208 F.3d 885 (10th Cir. 2000), *cert. denied*, 531 U.S. 873 (2000). MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 39 (3d ed. 1999) ("In [*Haelan*] a court recognized for the first time an intangible property right called the 'right of publicity.'").

3. The common law right of privacy is usually traced to the famous 1890 law review article written by Louis Brandeis & Samuel Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) and to a series of judicial decisions and statutes implementing its proposals.

4. Some early cases did suggest that the right of public figures to bring actions for invasion of privacy was limited. *Atkinson v. John E. Doherty & Co.*, 80 N.W. 285 (Mich. 1899) (naming a cigar after a famous lawyer and politician was not actionable unless it was libelous); *Hanna Mfg. Co. v. Hillerich & Bradshy Co.*, 78 F.2d 763, 766 (5th Cir. 1935) ("Fame is not merchandise. It would help neither sportsmanship nor business to uphold the sale of a famous name to the highest bidder as property."), *cert. denied*, 296 U.S. 645 (1935). In *Hanna Mfg.*, the court concluded that the marketing of a baseball bat as a [Player's name]-style bat did not infringe upon another bat maker's exclusive rights to a player's signature on its bats. For a

of as a "property right," but rather as a right to bring an action in tort. As such, it was not at all clear that individual publicity rights could be alienated or enforced by a third party. Further complicating the matter was the fact that the right of privacy was derived from the common law in some jurisdictions and from statutes in others.<sup>5</sup>

In his majority opinion in *Haelan*, Judge Jerome Frank moved beyond the tort analysis and found that individuals (here, major league baseball players) also possessed a property right in their own images. More importantly, in Judge Frank's view this right could be transferred to a third party who then had the same right as the individual himself to enforce it against competing, but unauthorized, users.

Other jurisdictions were initially reluctant to follow Judge Frank's lead.<sup>6</sup> As late as 1970, courts in only five states (Pennsylvania, Georgia, New Jersey, Hawai'i and Missouri) had recognized the existence of a right of publicity of the sort described in *Haelan*,<sup>7</sup> and in only two states (Oklahoma and Florida) had the principle been adopted by statute.<sup>8</sup> However, by the year 2000, the number of American jurisdictions recognizing the right of publicity by either judicial ruling or statute had reached twenty-eight,<sup>9</sup> and the *Restatement (Second) of Unfair Competition* identifies it as an essential part of the American law of intellectual property.<sup>10</sup>

Although the *Haelan* case is frequently cited in the now voluminous literature on the right of publicity, very little attention has been paid to the circumstances that prompted this particular litigation in the first

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discussion of the early history of this issue, see Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 153-57 (1993).

5. The first statute recognizing such a right was 1903 N.Y. Laws ch. 132, §§ 1-2 (now N.Y. CIV. RIGHTS LAW §§ 50-51 (Consol. 1982)), which effectively reversed the New York Court of Appeals' holding in *Roberson v. Rochester Folding-Box Co.*, 64 N.E. 442 (N.Y. 1902) that no such right existed in New York law. The first significant case in which a right of privacy was found to exist at common law was *Pavesich v. New England Life Insurance Co.*, 50 S.E. 68 (Ga. 1905). For the historical development of the law of privacy, see PROSSER AND KEATON ON THE LAW OF TORTS 849-54 (W. Page Keeton et al. eds., 5th ed. 1984).

6. For a summary of developments between 1953 and 1960, see Harold R. Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U. L. REV. 553 (1960).

7. *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir. 1956), *cert. denied*, 351 U.S. 926 (1956) (applying Pennsylvania law); *Hogan v. A.S. Barnes & Co.*, 114 U.S.P.Q. 314, 320 (Pa. Ct. Com. Pl. 1957); *Cabaniss v. Hipsley*, 151 S.E.2d 496 (Ga. Ct. App. 1966); *Palmer v. Schonhorn Enters.*, 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967); *Fergerstrom v. Hawaiian Ocean View Estates, Inc.*, 441 P.2d 141 (Haw. 1968); *Cepeda v. Swift and Co.*, 415 F.2d 1205 (8th Cir. 1969) (applying Missouri law).

8. 1955 Okla. Sess. Laws tit. 21, ch. 70(b) § 1; 1967 Fla. Laws ch. 67-57 § 1.

9. McCarthy, *supra* note 2, at 6-8.

10. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmts. c, g (1995).

place.<sup>11</sup> This essay explores the background of *Haelan v. Topps* in an effort to explain why it was that the bubble gum and baseball card industry provided the backdrop for one of the most significant developments in the law of intellectual property in the twentieth century.

### I. THE ORIGINS OF THE BASEBALL CARD INDUSTRY

The use of baseball cards – small pieces of paper or cardboard that contain the picture of professional baseball players – to sell food-related products dates from the 1880s.<sup>12</sup> Although baseball cards were originally packaged with cigarettes and targeted at adult males, for most of the twentieth century, they were used to make candy and related snack foods more appealing to young boys. Although the G & B Chewing Gum Company of New York packaged baseball cards with chewing gum as early as 1888, the modern use of cards to sell candy is usually traced to the decision of the American Caramel Company of Philadelphia to package cards with its products in 1908.<sup>13</sup>

For the next two decades, a variety of candy manufactures relied upon baseball card inserts to attract customers, although such promotions rarely lasted for more than a year or two.<sup>14</sup> For example, Reuck Bros. & Eckstein of Brooklyn and Chicago, the maker of Cracker Jack, undertook a baseball card promotion of unprecedented size in 1914. The company printed ten million copies of cards from a 144-card set featuring players from the American, National, and Federal Leagues (the three major leagues of that time), and one player card was placed in each package of its famous snack food.<sup>15</sup> The following year, the company

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11. Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577 (1979); Robert Post, *Rereading Warren & Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647 (1991); Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 UCLA ENT. L. REV. 97 (1994); Roberta R. Kwall, *The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis*, 70 IND. L. J. 47 (1994); Madow, *supra* note 4. See generally *supra* note 2. Although these and other accounts acknowledge the importance of *Haelan*, none delve into its background in any detail.

12. For the early history of baseball cards, see generally SPORTS COLLECTORS DIGEST, 1999 STANDARD CATALOG OF BASEBALL CARDS *passim* (Bob Lemke, ed., 8th ed. 1999) [hereinafter STANDARD CATALOG]. This work, organized alphabetically by manufacturer, contains a wealth of information about all baseball-related card issues since 1869. See also Chris Stufflestreet, *A Somewhat Thorough History of Baseball Cards (1876-1980)*, available at <http://www.geocities.com/christufflestreet/history.html> (last visited Oct. 21, 2001).

13. STANDARD CATALOG, *supra* note 12, at 20-22, 121 (discussing American Caramel Company and G & B Chewing Gum Company, respectively).

14. For a complete list of candy companies that included baseball cards with their products before 1945, see *id.* at 1563-1567.

15. *Id.* at 79.

expanded the size of its set to 176 cards,<sup>16</sup> and it allowed customers to obtain a complete set of the cards by sending one hundred Cracker Jack coupons or one coupon and twenty-five cents to the company offices. However, after 1915, the company apparently concluded that the promotion was not worth the expense and did not again include baseball cards in its product until 1982.<sup>17</sup> American Caramel, which started the modern practice of trying to attract the attention of young boys with baseball cards, issued sets every year from 1908 to 1911 but then issued only one more set (1915) during the remainder of the decade. It produced new sets in 1921 and 1922, but produced only one more set after that (in 1927).<sup>18</sup>

A small number of companies, including the aforementioned G & B Chewing Gum Company, experimented with using baseball cards to sell chewing gum. In 1909, for example, the John H. Dockman & Sons Company placed baseball cards in packages of its "Base Ball Gum" but there is no evidence that this made the gum any more popular and the trial was not continued.<sup>19</sup> In fact, it was not until the 1930s that the once formidable linkage between bubble gum and baseball cards was established. In that decade, manufacturers of chewing gum and bubble gum – an extremely sweet chewing gum variant that was marketed almost exclusively to children – experimented with the idea of placing baseball cards in penny and nickel packages of gum. This practice began on a wide scale in 1933, when five companies (three from Boston and one each from Chicago and Montreal) all decided to market their gum by including baseball cards in penny packages. Two of the Boston companies – George C. Miller & Company and the Delong Company – produced small sets of thirty-two and twenty-four cards, respectively.<sup>20</sup> A

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16. *Id.* at 79-80.

17. *Id.* at 538.

18. *Id.* at 20-27. The most successful long-term marketer of baseball cards with candy appears to have been the Collins-McCarthy Candy Company of San Francisco (later known as the Collins-Heunke Candy Company and the Collins Candy Company), which manufactured a candy known as "Zeenuts," which was sold only on the West Coast. Baseball cards featuring players from the minor league Pacific Coast League were included in Collins products every year from 1911 to 1938. *Id.* at 1170-1183.

19. *Id.* at 95.

20. *Id.* at 86, 194 (discussing Delong and Miller, respectively). The Delong cards, which had only a limited distribution, featured pictures of the most famous stars of the games on the front and tips on playing baseball on the back. *Id.* at 86. The Miller cards featured 16 players from each league and those who collected the entire set could redeem them for prizes. *Id.* at 194.

somewhat larger set (sixty cards) was issued by the Orbit Gum Co. of Chicago, a subsidiary of the Wrigley Gum Company.<sup>21</sup>

Far more ambitious was the third Boston entrant, the Goudey Gum Company, which produced a set featuring cards of 239 different contemporary players.<sup>22</sup> The Goudey Cards featured player pictures on the front and biographical information on the back, and they were sold with Big League Chewing Gum. In addition to its United States edition, Goudey's Canadian affiliate, the World Wide Gum Company of Montreal, produced a set of ninety-four cards copied from the Goudey set (except that some were printed in both French and English).<sup>23</sup>

The following year, Miller, Delong, and Orbit abandoned baseball cards, but their place was taken by another Boston gum producer, the National Chicle Company, which introduced two different sets of cards packaged with gum – “Diamond Stars” and “Batter Up.”<sup>24</sup> From 1934 to 1936, both Goudey and National Chicle issued cards for a national market, and World Wide distributed its version of the Goudey cards in Canada. However, in 1937, both National Chicle and World Wide abandoned the business, leaving Goudey as the only national company in the baseball card business. This was the situation until 1939, when Gum, Inc. of Philadelphia entered the market with its “Play Ball” bubble gum and cards.<sup>25</sup> In 1941, it issued a second line of cards with bubble gum under the name of “Double Play.”<sup>26</sup>

In spite of the number of companies that packaged baseball cards with bubble and chewing gum in the 1930s, there is little reason to believe that the inclusion of baseball cards led to dramatically increased revenues, particularly given the small profit margin with individual pieces of gum, which normally sold for a penny whether or not a baseball

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21. *Id.* at 326.

22. *Id.* at 125-26.

23. *Id.* at 451.

24. *Id.* at 90-91, 35. It appears that the Diamond Stars cards were issued in sets of 24 cards (1934), 84 cards (1935), and 50 cards (1936). When a player's card appeared in a subsequent set, the original card was just reprinted with an updated batting average. *Id.* at 90-91. Batter Up cards had blank backs, but could be folded so that they could stand up. Eighty of these cards were issued in 1934, followed by another 112 cards over the next two years. *Id.* at 35. In 1936, National Chicle also produced a set of 120 larger than normal cards that were available as an in-store premium, as well as a 20-card set offering baseball tips from former star shortstop Rabbit Maranville that were packaged with Batter Up Gum. *Id.* at 202-03.

25. *Id.* at 272.

26. *Id.* at 96.

card was included.<sup>27</sup> The Miller, Delong, and Orbit use of baseball cards proved to be one-time experiments, and the National Chicle and World Wide efforts lasted only three years.<sup>28</sup>

Even Goudey found that it could not profitably produce a large new set each year. After its inaugural 239-card set in 1933, it reduced the number of cards printed to 96 in 1934, and to 36 in 1935.<sup>29</sup> Whether because of the Great Depression, the declining popularity of its smaller sets, or simply the fickle nature of its target audience, Goudey's revenue from the sale of gum with baseball cards had dropped dramatically in the mid-1930s. After achieving sales of \$460,000.00 in 1933, the total dropped to \$220,000.00 in 1934, and to \$116,000.00 in 1935.<sup>30</sup> In 1933, sales of Goudey bubble gum with baseball cards more than doubled the company's sales for bubble gum alone. However, the next year, the ratio was reversed, and in 1935, the ratio of gum alone to gum with baseball cards was almost five to one.<sup>31</sup> In 1936, the company further reduced the size of the set of baseball cards sold with bubble gum to twenty-five cards, which were designed so that they could be used to play a simulated baseball game.<sup>32</sup> Sales continued to decline in 1936, and the company did not print a new set of cards until 1938. No sets were issued in 1939 or 1940, although Goudey apparently continued to sell cards from earlier years.<sup>33</sup> Revenue from its final set, issued in 1941, was a paltry \$19,800.00 over a two-year period.<sup>34</sup>

With the decline of Goudey, Philadelphia's Gum, Inc. emerged as the nation's principal marketer of baseball cards with bubble gum. In 1939, it packaged a 161-card set with its bubble gum, and in 1940, it increased the size of its player set to 240 cards.<sup>35</sup> In 1941, it offered two separate

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27. *Id.* at 272. In 1939, and perhaps later as well, Gum, Inc., of Philadelphia included three cards with a piece of gum, and the entire package sold for one cent. *Id.* (printed on the back of 1939 Play Ball sample card).

28. *Id.* at 35, 90-91, 451-52. World Wide issued its version of the Goudey sets in 1933, 1934, and 1936.

29. *Id.* at 125-27. Each of the 1935 cards featured photographs of four players, bringing the total number of players represented in the set to 144.

30. For Goudey revenues, see *In re Topps Chewing Gum, Inc.*, 67 F.T.C. 744, 806 (1965).

31. *Id.*

32. STANDARD CATALOG, *supra* note 12, at 127. In addition, Goudey produced a larger (178-card) set that was not sold with bubble gum but was available as an in-store premium. *Id.* at 127-28.

33. *Id.* at 128-29. See also *Topps Chewing Gum, Inc.*, 67 F.T.C. at 806 (stating that revenue figures for Goudey indicate that the company received income from the sale of cards with bubble gum in 1937, 1939, and 1942, even though it issued no new card sets in those years).

34. *Topps Chewing Gum, Inc.*, 67 F.T.C. at 806. Total revenues were \$13,000 in 1941, and \$6800 in 1942. *Id.*

35. STANDARD CATALOG, *supra* note 12, at 272-73.

sets: A “Play Ball” set containing seventy-two cards featuring “color” photographs – previous “Play Ball” sets used black and white photos – and a black and white “Double Play” set featuring 150 players on 75 cards.<sup>36</sup>

## II. THE BASEBALL CARD MARKET IN POST-WORLD WAR II AMERICA

War-time shortages forced Gum, Inc. to abandon the production of baseball cards after 1941, and neither Gum, Inc. nor any other gum or candy producer revived the use of baseball cards after the end of the war in 1945. However, in 1946 and 1947, major and minor league baseball reached record levels of popularity,<sup>37</sup> and in 1947, at least two bakeries packaged baseball cards with their products.<sup>38</sup> The following year, two gum companies, Gum, Inc., now renamed the Bowman Gum Company after its owner Warren Bowman, and the Leaf Gum Company of Chicago decided to resume the practice of including baseball cards with packages of gum.<sup>39</sup>

When it decided to reenter the baseball card market, Bowman sought to ward off potential competitors by signing players to contracts in which the player promised not to permit other bubble gum manufacturers to include his picture on baseball cards sold with gum. In 1948, Bowman signed 106 major league players to such contracts, a figure which represented approximately one-fourth of contemporary major league players. The fact that the subsequently published set lacked several of the best known players – including Joe DiMaggio, Ted Williams, Jackie Robinson, and Lou Boudreau – strongly suggests that not every major league player was willing to sign the contract offered by Bowman.<sup>40</sup> Given the terms of the Bowman contract, this was hardly surprising. Even in an

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36. *Id.* at 96, 273-74 (discussing Double Play and Play Ball, respectively).

37. On the popularity of post-war major league baseball, see WILLIAM MARSHALL, *BASEBALL'S PIVOTAL ERA, 1945-51* 98, 151, 161-65, 181-85, 208-13 (1999); JOHN P. ROSSI, *A WHOLE NEW GAME: OFF THE FIELD CHANGES IN BASEBALL, 1946-1960* 1-2, 57-59 (1999). For statistical documentation of this phenomenon, see *THE ENCYCLOPEDIA OF MINOR LEAGUE BASEBALL* 343-64 (Lloyd Johnson & Miles Wolff, eds., 2d ed. 1997) (giving attendance data for all major and minor league teams from 1945 to 1947).

38. *Id.* at 138 (stating that Homogenized Bond Bread issued a set of 44 major league baseball players and four boxers as well as a separate 13-card set depicting Jackie Robinson, who that year broke the major league color barrier); *Id.* at 336-37 (discussing Tip-Top Bakers, which issued a set of 163 players).

39. *STANDARD CATALOG*, *supra* note 12, at 44, 180 (discussing 1948 issues). See also TROY KIRK, *COLLECTOR'S GUIDE TO BASEBALL CARDS* 49-50 (1990) (discussing Warren Bowman).

40. *Topps Chewing Gum, Inc.*, 67 F.T.C. at 762.



era when many major league players earned less than \$7500.00 a year, Bowman offered very modest compensation.<sup>41</sup> Players granting Bowman the exclusive right to use their pictures were guaranteed only \$10.00 unless they remained on a major league roster for the first thirty-one days of the regular season. If they met this latter requirement, they were paid an additional \$90.00. The contracts were for one year, but they could be renewed by Bowman on the same terms for an additional season at \$100.00.<sup>42</sup> For this, the player granted Bowman the “exclusive right to print, publish, exhibit, display and sell” the player’s picture, name, and autograph “in connection with the advertising, promotion and selling of chewing gum products of Bowman Gum, Inc.”<sup>43</sup>

In spite of having more than one hundred players under contract, the card set issued by Bowman in 1948 contained black and white cards of only forty-eight players.<sup>44</sup> In contrast, Leaf, their competitor, issued a ninety-eight card set that featured color pictures and contained a number of the best known players – Williams, DiMaggio, Robinson, and Boudreau – that were missing from the Bowman set.<sup>45</sup> However, once the Leaf cards hit the market, Bowman accused the Chicago-based firm of foul play because a number of the players in the Leaf set had been signed to exclusive contracts by Bowman. While it is not clear how many of the players who had contracted with Bowman appeared in the Leaf set, twenty-four of the players in the Leaf set were included in the 1948 Bowman set, a sure sign that they were under contract to Bowman.<sup>46</sup>

Bowman sued Leaf alleging that the Chicago company had tortiously interfered with its own player contracts.<sup>47</sup> Little is known about the

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41. For information on player salaries in the late 1940s, see ROBERT F. BURK, *MUCH MORE THAN A GAME: PLAYERS, OWNERS, & AMERICAN BASEBALL SINCE 1921* 308 (2001).

42. *Topps Chewing Gum, Inc.*, at 67 F.T.C. at 765-66 (discussing the nature and content of the Bowman contracts).

43. *Id.* at 765.

44. STANDARD CATALOG, *supra* note 12, at 44. One student of the baseball card industry has suggested that the relatively small size of the 1948 Bowman set was the product of an unexpected difficulty in signing certain players to contracts that prevented the company from issuing all the cards it had planned. STEVE CLARK, *THE COMPLETE BOOK OF BASEBALL CARDS: FOR THE COLLECTOR, FLIPPER AND FAN* 92 (1976).

45. STANDARD CATALOG, *supra* note 12, at 44, 180 (discussing Bowman and Leaf, respectively). Somewhat peculiarly, the cards in the Leaf set carried numbers ranging from 1-168 even though the set contained only 98 cards. The most obvious explanations for this discrepancy are that Leaf intended to fill in the gaps, but never did, or that the numbering system was designed to induce card buyers to keep purchasing packages of gum in hopes of finding cards that did not in fact exist. *Id.* at 180.

46. *Id.* at 44, 180 (discussing Bowman and Leaf, respectively).

47. *Topps Chewing Gum*, 67 F.T.C. at 762.

Bowman-Leaf litigation, except that Leaf did not produce new cards for 1949 (although it appears that it did continue to market the 1948 cards in 1949),<sup>48</sup> and that it ultimately agreed to settle the case on terms favorable to Bowman.<sup>49</sup> In exchange for the dismissal of the lawsuit, Leaf agreed to withdraw from the bubble gum/baseball card market until no earlier than 1951.<sup>50</sup>

In spite of the fact that it had the bubble gum market to itself, Bowman acquired exclusive rights from an even larger number of players in 1949, resulting in an expanded set of 240 cards. The composition of the set, however, suggests that Bowman was still unable to obtain contracts with some major league stars as neither DiMaggio nor Williams were included in the Bowman set, although their presence would have been of obvious value. In 1950, Bowman produced a 252-card set, and in 1951, it increased the number of cards to 324, including the first ever cards of Mickey Mantle and Willie Mays.<sup>51</sup> By 1951, Bowman's revenue from bubble gum sold with baseball cards approached one million dollars (\$973,000.00), a total more than double that achieved by Goudey in its best year.<sup>52</sup>

Not surprisingly, Bowman's success attracted new competitors to the field. Most "competitors" included baseball cards with products other than bubble gum, so the use of players' pictures for these purposes did not infringe upon Bowman's exclusive contracts. In 1949 and 1950, for example, companies issuing baseball cards with their products included Baas Cheri-Cola, Hage's Dairy, Lummis Peanut Butter, Remar Bread, Sealtest Ice Cream, Sunbeam Bread, Drake's Bakeries, and Royal Deserts.<sup>53</sup> To help businesses acquire the rights to use major league players, a number of "brokers" signed players to generic endorsement contracts which were then transferred to the producers who planned to use baseball cards as marketing devices.

In 1948, the Topps Chewing Gum Company of Brooklyn, New York decided to enter the bubble gum/baseball card market, a decision that

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48. STANDARD CATALOG, *supra* note 12, at 180.

49. *Topps Chewing Gum*, 67 F.T.C. at 762.

50. *Id.*

51. STANDARD CATALOG, *supra* note 12, at 45-47. Both the 1950 and 1951 Bowman sets contained color art reproductions of actual photographs, but were again without DiMaggio and Williams cards.

52. *Topps Chewing Gum, Inc.*, 67 F.T.C. at 806. Bubble gum with baseball cards actually accounted for less than one-third of Bowman's total sales in 1951. Even with the success of its baseball card issues, it still sold far more gum without baseball cards than with them.

53. STANDARD CATALOG, *supra* note 12, at 1568 (giving a list of all baseball card issues in 1949 and 1950).

would dramatically change the industry and initiate a sequence of events that would culminate in the *Haelan* litigation. Already well known as a producer of non-sports cards and the popular Bazooka Bubble Gum, Topps marketed a set of 104 baseball cards in 1951 packaged not with bubble gum, but with caramel candy.<sup>54</sup> While many of the players depicted in the Topps set were not included in the Bowman set, a number were.

Bowman was apparently aware of Topps' decision to enter the market in 1951. To counter the new competition, Bowman altered its standard contract so that the negative covenant provided that the player would grant similar rights to "no other manufacturer of chewing gum *or confections*" instead of just chewing gum as in earlier contracts.<sup>55</sup> To give effect to this broader restriction, Bowman had many of its players sign new contracts in the spring of 1951. In addition, it lengthened the term of some of the contracts to five years, and in some cases to ten years to secure the continued exclusive rights for some particularly popular players.<sup>56</sup>

On April 17, shortly after the opening of the 1951 baseball season, Bowman notified Topps that it intended to challenge the legality of the inclusion of players in its baseball card set who were already under contract with Bowman.<sup>57</sup> Rather than capitulate in the face of Bowman's threats to bring legal action, as Leaf had done in 1949, Topps chose to compete even more aggressively. Not only did it refuse to withdraw its 1951 cards from the market, it also made plans to produce a 407-card set (the largest ever) for the 1952 season to be packaged with bubble gum instead of candy.<sup>58</sup> Moreover, when the cards appeared the following

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54. *Id.* at 338. On first look, the 1951 Topps set did not appear to be a direct competitor to Bowman's set. Not only were the cards packaged with candy rather than bubble gum, but the set itself appeared to be more in the nature of a table-top baseball game than a traditional baseball card set. The 104-card issue was divided evenly into two sets, designated "Blue Backs" and "Red Backs." Each player's card had an identical playing card-like back (except that half were blue and half red), and, in addition to a picture of a player and a small amount of biographical information, the face of the card also contained a particular result that might occur in a baseball game. For example, Andy Pafko's card (Blue Back #27) said "ball," while Mel Parnell (Red Back #10) was marked "foul out." FRANK SLOCUM, TOPPS BASEBALL CARDS: THE COMPLETE PICTURE COLLECTION, A 35-YEAR HISTORY, 1951-1985 3, 5 (1985).

55. *Haelan Labs., Inc. v. Topps Chewing Gum Co.*, 112 F. Supp. 904, 907 (E.D.N.Y. 1953) (emphasis added).

56. For a discussion of this change in the basic Bowman contract, see *Haelan Labs., Inc.*, 112 F. Supp. at 907.

57. *Id.* at 908.

58. STANDARD CATALOG, *supra* note 12, at 45-47, 339-40 (discussing Bowman and Topps, respectively). In many ways the 1952 Topps set was highly innovative. The cards featured hand colored black and white photos along with team logos (which had never before appeared

spring, the new Topps set included almost every player who appeared in that year's Bowman issue.

Topps had obtained contractual releases from all of the players who appeared in its 1951 and 1952 sets. Some of these releases had been acquired from the Russell Publishing Company, which since at least 1950 had been signing major league players to contracts either with the intention of marketing its own card set, or, more likely, assigning the rights to another company interested in using baseball cards as a marketing tool. In addition to acquiring the Russell contracts, Topps had also retained an agent, Players Enterprise, Inc., to sign players to its contracts during the summer of 1950.

Nevertheless, at least two hundred of the players who signed with Russell or Players Enterprises had also signed supposedly exclusive contracts with Bowman.<sup>59</sup> New York Yankee second baseman Jerry Coleman, for example, signed an exclusive contract with Bowman on August 23, 1950, and eight days later signed with Players Enterprise (Topps' agent). Thirty days after that (on October 2, 1950), he signed a baseball card contract with Russell Publishing which had not yet assigned its contracts to Topps.<sup>60</sup> Both Russell and Topps (through Players Enterprise) appear to have offered players more money than Bowman, guaranteeing \$250.00 to any player who remained on a major league roster in contrast to Bowman's \$100.00 offer.<sup>61</sup>

### III. THE *HAELAN* LITIGATION

Although its cards continued to be marketed under the name "Bowman," in 1952 the Bowman Gum Company went through another name change as it was acquired by Haelan Laboratories, Inc.<sup>62</sup> By 1952, it was also evident that the competition with Topps was clearly affecting the company's financial well-being as revenues from bubble gum packaged with baseball cards had declined by nearly 15% (from \$973,000.00 in 1951, to \$731,000.00 in 1952).<sup>63</sup> When Topps refused to withdraw the

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on cards) and the back of the card contained the now familiar detailed statistical information on the player's performance during the previous season and his entire career. *Id.* at 339.

59. *Haelan Labs., Inc.*, 112 F. Supp. at 906.

60. *Id.* at 908. In the court's opinion, Coleman is referred to as "Gerry" Coleman.

61. *Id.* at 909.

62. *Topps Chewing Gum, Inc.*, 67 F.T.C. at 762 (discussing the purchase of Bowman by Haelan).

63. *Id.* at 806 (reporting Bowman's sales figures). Bowman also reduced the size of its 1952 set to 252 cards, perhaps in an effort to limit production costs. *STANDARD CATALOG*, *supra* note 12, at 47-48.

cards of players with Bowman contracts, Haelan proceeded to sue Topps in the United States District Court for the Eastern District of New York. In its complaint Haelan accused Topps of unfair competition, trademark infringement, and infringing upon and interfering with its exclusive contracts with professional baseball players. As it had maintained in its dispute with Leaf four years earlier, Haelan insisted that its contracts were valid and that Topps had clearly interfered with an existing contractual relationship.<sup>64</sup>

Topps defended its actions on a number of grounds. In regard to some players, Topps claimed it was in possession of a contract which predated the player's Bowman contract. However, there was no question that there were more than one hundred players under contract to Topps who had previously signed an exclusive contract with Bowman. Topps' primary legal argument in regard to these contracts was rooted in its interpretation of the law of privacy in New York (whose law, all agreed, was controlling in this case). Topps did not contend that it was free to use player pictures and biographies without the player's permission.<sup>65</sup> That practice was clearly barred by sections 50 and 51 of the New

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64. There is no reported district court opinion in this case. However, summaries of the decision of the trial court are contained in *Haelan Labs, Inc.*, 202 F.2d 866; *Haelan Labs, Inc.*, 112 F. Supp. at 904; and *Topps Chewing Gum, Inc.*, 67 F.T.C. 744 (1965).

65. The right of a player to approve the use of his photograph for promotional purposes appears to have been widely accepted, even in the nineteenth century. In 1887, the National League's Boston club paid the recently purchased Mike "King" Kelly, already a star outfielder-catcher and one of the game's most popular players, \$3000 for the right to use his photo for team publicity purposes. While this at first looks like an admission by Kelly's team that it could not use a player's photo for commercial purposes without his permission, there is widespread agreement among baseball historians that this payment was in fact a way to circumvent a league agreement that no player would be paid more than \$2000 per year. (Kelly, who had been sold for an unprecedented \$10,000, had reportedly refused to play for Boston unless he was paid at least \$5000.) MARTY APPEL, SLIDE KELLY SLIDE: THE WILD LIFE AND TIMES OF MIKE "KING" KELLY: BASEBALL'S FIRST SUPERSTAR 104 (1996).

In a well-known episode in 1909, the American Tobacco Company offered Pittsburgh Sportswriter and Pirate Official Scorer John Gruber \$10 to obtain the written permission of star Pittsburgh shortstop Honus Wagner for the use of his likeness in their current baseball card set which was packaged with cigarettes. DENNIS DEVALERIA & JEANNE BURKE DEVALERIA, HONUS WAGNER: A BIOGRAPHY 239 (1995). Assuming that Wagner would consent, the company began to package baseball cards of Wagner with its cigarettes, only to withdraw them once it became apparent that Wagner would not consent to the inclusion of his image in the set. *Id.* at 240. Contrary to the way this story is often reported, Wagner was not a strident opponent of tobacco products. He was a cigar smoker himself and had earlier appeared in cigarette advertisements. According to his biographers, his primary concern may have been that the inclusion of baseball cards with cigarettes made this product too attractive to children. *Id.*

Two decades later in 1930, a Federal Trade Commission-engineered industry agreement among sporting goods manufacturers agreed that no member of the group would use the

York Civil Rights Law, which specifically prohibited the unapproved commercial use of an individual's name or image.<sup>66</sup> Moreover, New York courts had already held that the publication of an athlete's photograph without his consent by a sports promoter constituted a violation of the statute.<sup>67</sup> In fact, at the same time that Haelan was suing Topps, a group of major league players headed by New York Giants pitcher Larry Jansen successfully sued a New York seller of popcorn and chewing gum who was placing photos of major league baseball players in his products without having obtained the players' permission.<sup>68</sup>

However, cases like the two just mentioned involved athletes themselves suing defendants who had appropriated their images for commercial purposes. In its defense, Topps argued that the right protected by New York Civil Rights Code sections 50-51 was personal to the individual player and could not be transferred.<sup>69</sup> In effect, Topps argued, the "exclusive" contracts between Bowman (Haelan) and its players amounted only to a waiver of the right to bring an action for invasion of privacy, which the player would have had, had Bowman produced a baseball card bearing his likeness without his permission. Consequently, no property interest in the ballplayer's name or interest had been transferred to Haelan. Topps acknowledged that Haelan might be able to sue an individual player who breached his contract by signing with Topps, but it insisted that Haelan had no legal right to sue, since such a right

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name of an athlete on a product when a competitor had acquired the exclusive right of that name from the athlete. *Ban Misleading Ads of Sporting Goods*, N.Y. TIMES, May 8, 1930, at 15.

Finally, Haelan's predecessor, Gum, Inc., had been sued by the well-known slugger Johnny Mize in 1941 for unlawfully using his picture in its "Double Play" card issue. (Mize appeared on Double Play card number 39 with Cardinal teammate Enos Slaughter.) STANDARD CATALOG, *supra* note 12, at 96. Little is known about this episode, although a 1965 Federal Trade Commission report on the alleged monopolization of the baseball card business by the Topps Chewing Gum Company stated that Gum, Inc. prevailed in the lawsuit. However, the specific grounds for this holding are not reported. *Topps Chewing Gum, Inc.*, 67 F.T.C. at 762. The episode illustrates that Mize at least believed that he had the right to prevent the unauthorized issuance of a card bearing his likeness.

66. N.Y. CIV. RIGHTS LAW, ch. 6 §§ 50-51.

67. *Miller v. Madison Square Garden Corp.*, 28 N.Y.S.2d 811 (N.Y. Sup. Ct. 1941). For the historical background of New York privacy law, see Lawrence Edward Savell, *Right of Publicity - Appropriation of a Person's Name, Portrait, or Picture for Advertising or Trade Purposes Without Prior Written Consent: History and Scope in New York*, 48 ALB. L. REV. 1 (1983).

68. *Jansen v. Hilo Packing Co.*, 118 N.Y.S.2d 162 (N.Y. Sup. Ct. 1952), *aff'd*, 125 N.Y.S.2d 648 (N.Y. App. Div. 1953).

69. In addition, Topps also asserted a counterclaim, maintaining that Haelan had interfered with a number of the exclusive contracts that it held with players. *Haelan Labs., Inc.*, 202 F.2d at 869.

would imply that Haelan had acquired a "property interest" in the player's image when in fact, according to Topps, no such property right existed.<sup>70</sup>

The federal district court, hearing the case without a jury, accepted Topps' defense and dismissed Haelan's complaint. Under this ruling Topps was free to continue to produce sets like the one it was marketing in 1952, and Haelan Laboratories could do nothing to prevent that. Were the district court opinion to stand, Haelan had only two options. First, it could file lawsuits for damages and possibly injunctive relief against the players who had violated their contractual promise not to authorize another manufacture of gum or candy to use their likenesses on baseball cards. This was hardly an attractive alternative. Although more than two hundred players appeared to have breached their contracts with Bowman/Haelan, in most cases it would be hard for Haelan to prove that it had suffered substantial damages because of the individual player's actions. Moreover, a wave of such lawsuits would almost certainly destroy Bowman's ability to sign players to contracts in the future. The second option was simply to accept that the market for baseball cards and bubble gum was likely to be an open one with a number of competing firms. This also was not attractive to Haelan, given the low survival rate of competing baseball card companies in the 1930s and the fact that its market share, relative to Topps, was already slipping badly.

Consequently, Haelan chose to appeal the district court judgment, even though the continuation of the litigation meant greater legal expenses and raised the possibility that the dispute over player contracts would continue into the 1953 baseball season. For the appeal, which was argued before the Second Circuit Court of Appeals on January 6, 1953, Haelan abandoned its trademark and unfair competition claims and concentrated instead on the issue of contract infringement.<sup>71</sup>

#### IV. JUDGE JEROME FRANK'S OPINION

In an opinion taking up barely three pages, the circuit court reversed the lower court's decision on February 16, 1953, just over a month after

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70. *Id.* at 867. Topps' claim actually echoed a widely accepted principle in the law of trademark, i.e., that trademarks are not "property rights" and, therefore, can neither be transferred in gross or licensed without the licensor retaining the right to control the quality of the product. Moreover, licensees cannot normally bring actions to enforce their interests unless they have been granted the specific authority to do so by the licensor. SHELDON W. HALPERN ET AL., FUNDAMENTALS OF UNITED STATES INTELLECTUAL PROPERTY LAW: COPYRIGHT, PATENT, AND TRADEMARK 321-23 (1999).

71. *Haelan Labs., Inc.*, 202 F.2d at 867.

hearing oral arguments in the case. Writing for the court, Judge Jerome Frank had little trouble concluding that even if Topps and the lower court were correct that the plaintiff obtained no property interest in the player's image, Topps was still guilty under the facts alleged by Haelan of tortiously inducing some players to breach their exclusive contract with the plaintiff. This alone, according to Judge Frank, was grounds for reversing the district court's dismissal of the action and remanding it for further proceedings.<sup>72</sup>

However, Judge Frank noted, this did not account for every situation before the court in this case. In those situations where Topps relied upon a contract assigned to it by Russell Publishing, it was Russell, not Topps, that had tortiously interfered with Haelan's rights (if, in fact, that had occurred). Moreover, Haelan also had alleged that in some cases Topps had printed cards of players under contract to Bowman without even bothering to acquire a contract with the player. In such situations, Topps could hardly be said to have tortiously induced anyone to breach an existing contract.<sup>73</sup> To address the situations presented by the Russell contracts and the players with whom Topps had no contracts, Judge Frank turned to the question of whether or not the Bowman contracts actually conveyed a protectable property interest from the player to the company. Rejecting the argument of Topps and the conclusion of the district court, Judge Frank announced that Haelan had acquired a legally protected interest:

We think that, in addition to and independent of that right of privacy (which in New York derives from statute), 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 labelled 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.<sup>74</sup>

Judge Frank then proceeded to use what would prove to be one of the most important phrases in modern property law. "This right," he stated, "might be called a 'right of publicity.'"<sup>75</sup> Then, to further explain

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72. *Id.* at 869.

73. Based on the subsequent finding of facts by the district court, it appears that contrary to Haelan's assertion, Topps did in fact have contracts with all of the players who were also signed to Bowman contracts. See generally *Haelan Labs., Inc.*, 112 F. Supp. 904.

74. *Haelan Labs., Inc.*, 202 F.2d at 868.

75. *Id.*



the need for such a right, he noted that the privacy basis of the right of actors and ballplayers to profit from the licensing of their images was conceptually weak, given that such individuals welcomed, rather than sought to avoid, publicity. It was better, Judge Frank suggested, to simply acknowledge their control of their own names and images and their authority to make "an exclusive grant which barred any other advertiser from using their pictures."<sup>76</sup>

The remainder of Judge Frank's brief opinion insisted that New York decisions already recognized such a right, although he made no real effort to justify this claim.<sup>77</sup> Judge Frank's analysis was accepted by his colleague Judge Charles E. Clark, but the panel's third member, Chief Judge Thomas W. Swan, concurred in the result only on the grounds that Topps may have been guilty of intentionally inducing a ballplayer to breach a contract with Haelan.<sup>78</sup> The case was then remanded to the district court for a further finding of facts and a determination of liability consistent with the circuit court opinion. In the end, Haelan Laboratories had its victory, and those who advocated a "property-style" right of publicity had an invaluable judicial precedent.

## V. THE AFTERMATH

Following the ruling of the circuit court of appeals, Topps filed both a petition for rehearing and a petition for a writ of certiorari to the United States Supreme Court. While the circuit court granted a rehearing, it used the hearing only to clear up a small number of procedural matters

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76. *Id.* In certain respects, Judge Frank's reasoning in *Haelan* was similar to that in his earlier opinion in the famous copyright case, *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951). In that decision Judge Frank greatly expanded the definition of "authorship" to recognize a protectable property interest in engravings of public domain paintings even though previous case law suggested that no such interest existed. *Id.* at 104-05. Judge Frank's opinions in *Alfred Bell* and *Haelan* appear to have been part of a general trend on the part of some postwar judges and legal scholars to expand the scope of intellectual property protection. For other examples, see Rudolph Callmann, *Unfair Competition Without Competition?: The Importance of the Property Concept in the Law of Trademarks*, 95 U. PA. L. REV. 443 (1947) and Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).

77. *Haelan Labs., Inc.*, 202 F.2d at 868 (citing *Wood v. Lucy, Lady Duff Gordon*, 118 N.E. 214 (N.Y. 1917); *Madison Square Garden Corp. v. Universal Pictures Co.*, 7 N.Y.S.2d 845 (N.Y. App. Div. 1938); *Liebig's Extract of Meat Co. v. Liebig Extract Co.*, 180 F. 688 (2d Cir. 1910). Although it is not at all clear that these cases actually support Judge Frank's contention, he made no effort to elaborate on his assertion. He did devote more time to *Pekas Co., Inc. v. Leslie*, 52 N.Y.L.J. 1864 (1915) and *Hanna Mfg. Co.*, 78 F.2d 763, cases which appeared to conclude that no such property interest existed. Judge Frank dismissed both cases as not controlling and wrongly decided.

78. *Haelan Labs., Inc.*, 202 F.2d at 869.

and to elaborate on its observations as to what would constitute tortious interference with contract.<sup>79</sup> The court also denied Topps' motion to delay further proceedings pending the United States Supreme Court's action on its petition for certiorari, and it awarded the costs of the appeal to Haelan.<sup>80</sup> At the same time, the circuit court refused Haelan's request that Topps be enjoined from issuing its 1953 card set until after the proceedings on remand.<sup>81</sup>

The petition for certiorari was denied by the United States Supreme Court on October 13, 1953.<sup>82</sup> Given the impressive dimensions of its victory, an observer might have expected that Haelan would quickly reassert itself as the primary American producer of baseball cards packaged with bubble gum. However, this would not be the case. When the parties returned to the district court, it became clear that Haelan had not done a very good job of using its exclusive contracts to secure a paramount position in the industry. First of all, it had signed too few players to contracts to effectively tie up the market. With more than two hundred major league players unsigned by Haelan, there was an obvious player base for Topps to build on, even if it was barred from using its competitor's players. Moreover, Bowman had badly mismanaged the renewal of its contracts in 1951, making it possible for Topps to establish that its contracts, not Haelan's, were controlling for a significant group of players.

To expedite the case, Haelan and Topps had agreed that the district court would initially determine the right of the respective companies to print cards of specific players for the 1953 season. Once that was done, a later hearing would be scheduled to determine what damages were owed to Haelan for Topps' past infringements. Even with the issue so limited, the district court was required to examine several thousand contracts involving more than five hundred players signed between 1948 and 1953.<sup>83</sup> Given the volume of the evidence, District Court Judge Clarence Galston was not able to render a decision until May 25, 1953, prior to which both Topps and Haelan had issued parts of their 1953 baseball card sets. In his ruling Judge Galston issued temporary injunctions against both

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79. The court's per curiam opinion following the rehearing is printed with the primary opinion. *Id.* at 869-70.

80. *Id.* at 870. Actually, Haelan's costs were reduced by one-half of the cost of printing the Transcript of Record on grounds that Haelan had included a "great deal of matter unnecessary for adequate presentation of the questions raised by the appeal." *Id.* at 869.

81. *Id.*

82. *Haelan Labs., Inc.*, 346 U.S. 816 (1953).

83. *Haelan Labs., Inc.*, 112 F. Supp. at 905.

companies barring them from using certain named players identified by the court as bound by exclusive contracts to the other.<sup>84</sup>

Although most of the players subject to the injunction were under contract to Haelan, the initial review of the contracts had revealed that Haelan did not have exclusive rights to as many players as it had originally claimed. When Bowman had changed the terms of its contract in 1951 to include a ban on player pictures being used for the sale of candy as well as bubble gum, it had signed players to new contracts (since the renewable 1950 contracts did not contain this provision). In many cases, this meant that Bowman had inadvertently lost its claim to a particular player when it failed to renew the 1950 contracts because the affected players had earlier signed contracts with either Russell or Players Enterprise that were to take effect upon the expiration (or termination) of the player's current Bowman contract.<sup>85</sup> By asking its players to sign new contracts for 1951, Bowman effectively canceled its own current contracts with those players.

The ruling of the district court allowed both companies to continue with the sale of cards in 1953. However, one consequence of the *Haelan* decision was that both companies produced a smaller number of cards in 1953 than they had in 1952 because of the anticipated restrictions stemming from the litigation. The Bowman series contained only 160 cards (down from 252 the previous year) while the Topps issue dropped from 407 to 280, six of which were never issued, presumably because of the decision in *Haelan*.<sup>86</sup> In 1954, the numbers were Bowman, 224 cards and Topps, 250.<sup>87</sup> Although some players, like Yogi Berra and Eddie Mathews, had managed to sign non-exclusive contracts with Topps that permitted them to sign with Bowman as well and thus were able to appear in both company's sets, many players, including some of the most prominent, were available in only one of the sets. Consequently, in 1954, Bowman had Mickey Mantle and Stan Musial while Topps had Jackie Robinson and Warren Spahn. Ted Williams, who had appeared in neither set in 1952 and 1953 because he was unwilling to accept the license fee offered by either company, appeared in both sets in 1954.<sup>88</sup>

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84. *Id.* at 915.

85. Details of the contracts are discussed at length in the opinion of the district court. See generally *Haelan Labs, Inc.*, 112 F. Supp. 904.

86. STANDARD CATALOG, *supra* note 12, at 47-48, 339-41 (discussing Bowman and Topps, respectively).

87. *Id.* at 49-50, 341-42 (discussing Bowman and Topps, respectively).

88. *Id.* The Williams card was pulled from the Bowman set after the first print run, apparently as a result of contractual problems. *Id.* at 49.

For the serious collector hoping to obtain as many cards as possible of current major league players, it was necessary to buy gum from both companies.

In spite of its victory in the courtroom, Haelan never recovered its position as the leading producer of bubble gum baseball cards. Although Bowman actually produced a much larger set than Topps in 1955 (320 cards to 206), the company continued to lose ground.<sup>89</sup> It never recovered from the cost of its legal expenses in the Topps litigation, which exceeded \$110,000.00 per year, and in 1953, its baseball card related revenue fell to \$301,000.00, less than one-third of what it had been two years earlier.<sup>90</sup> Although revenues rebounded to \$602,000.00 in 1954, they were still far short of what they had been before Topps had launched its record breaking 1952 set.<sup>91</sup> Topps, in contrast, saw its revenue from gum with baseball cards increase each year, rising from \$200,000.00 in 1951, to more than \$1 million in 1954.<sup>92</sup>

Before the resolution of the damage portion of the *Haelan* litigation, Haelan Laboratories was acquired by Connelly Containers, Inc. as the result of a merger. This time, the new owners had little interest in baseball cards or bubble gum, particularly given Bowman's declining market position and total sales.<sup>93</sup> Rather than continue to compete with Topps, Connelly decided to leave the baseball card and bubble gum business altogether. On January 20, 1956, less than three years after the Second Circuit's *Haelan* decision, Connelly agreed to settle the lawsuit with Topps. In exchange for a payment of \$200,000.00 from Topps in satisfaction of past damages, Connelly assigned all of its baseball card and bubble gum making assets, including its trademarks and baseball and football player contracts, to Topps. In addition, it agreed to stay out of the baseball card and chewing gum business for at least five years.<sup>94</sup> As a consequence, the 1955 Bowman card issue was the company's last. In 1956, Topps became, for the first time, the sole producer of baseball cards for a national audience. Topps immediately moved to implement Bowman's strategy of tying up the player market with exclusive contracts, but it would do so with far greater success than Bowman (or Hae-

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89. *Id.* at 50-51, 342-43 (discussing Bowman and Topps, respectively).

90. *Topps Chewing Gum, Inc.*, 67 F.T.C. at 765, 806 (discussing legal expenses and total sales, respectively).

91. *Id.* at 806. Sales of all Bowman products declined from just over \$3 million in 1951 to less than \$2.5 million in 1954. *Id.*

92. *Id.* at 805. Topps revenues did decline slightly to \$950,000 in 1955.

93. *Id.* at 806.

94. *Topps Chewing Gum, Inc.*, at 752, 765.

lan) ever achieved. Instead of merely signing a group of established major league players to contracts as Bowman had done, Topps attempted to sign every player entering minor league baseball, regardless of his skill level, to a five-year contract.<sup>95</sup>

Under the terms of the new Topps contract the player received only \$5.00 at the time of signing, but was guaranteed an additional \$125.00 for each year that he was on a major league roster for the first thirty-one days of the season. When these initial contracts expired, they were typically renewed for an additional two to four years at the same terms, although Topps usually paid a \$75.00 renewal bonus.<sup>96</sup> When necessary, Topps would also threaten legal action to keep other competitors from entering the market. After the demise of Bowman/Haelan in early 1956, the Leaf Gum Company of Chicago entertained the idea of reentering the baseball card/bubble gum market. (Its original agreement not to compete with Bowman had expired in 1951.) However, when it approached Topps about some sort of collaborative agreement to jointly market cards, Topps refused to cooperate. What more, without a tinge of irony, it clearly indicated to Leaf that if it entered the market on its own, Topps would sue Leaf on precisely the same grounds that it had been sued by Haelan earlier in the decade.<sup>97</sup> The threat apparently worked, and when Leaf finally produced a major league baseball card set in 1960, the cards were packaged with marbles, not bubble gum.<sup>98</sup> Topps revenues from baseball cards also increased dramatically, rising from \$950,000.00 in its final year of competition with Haelan (1955) to \$3.8 million in 1959.<sup>99</sup>

By 1961, Topps had more than 6500 current and former professional baseball players under contract including 446 of 450 major league players.<sup>100</sup> So secure was Topps' hold on professional baseball players that a new competitor, the Frank H. Fleer Corporation of Philadelphia, was unable to break into the market in spite of a four-year effort to lure players away from Topps. By 1963, Fleer had secured the rights to only twenty-seven major league players, which was by far too few to justify a

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95. *Id.* at 766.

96. *Id.* at 766-71 (discussing terms of the Topps contract).

97. *Id.* at 788. In a letter to Leaf dated August 14, 1956, Topps favorably cited the *Haelan* decision and the failure of the United States Supreme Court to grant certiorari as evidence of the lawfulness of its own contracts. *Id.*

98. STANDARD CATALOG, *supra* note 12, at 180-81.

99. *Topps Chewing Gum, Inc.*, 67 F.T.C. at 805.

100. *Id.* at 771. At any given time in the late 1950s and early 1960s, there were approximately 1500 minor league players thought to have the potential to become major league players. *Id.* at 745. However, turnover in the player ranks was quite high in the minor leagues.

competing card issue, particularly since virtually all star players were under contract to Topps.<sup>101</sup> After a Federal Trade Commission investigation upheld the legality of Topps' practices in 1965, Fleer sold its license to Topps and abandoned the baseball card business.<sup>102</sup>

As it turned out, Topps would maintain a monopoly over the production of baseball cards and bubble gum despite a number of legal challenges for the next three decades.<sup>103</sup> Not until the early-1980s would the market finally be opened to other competitors, and only then through the diligent efforts of the Major League Baseball Players Association to increase the income of its members by breaking Topps' grip on the market.<sup>104</sup> In 1989, shortly after competition finally returned to the baseball card market, Topps itself decided to revive the Bowman brand name in the now crowded marketplace for baseball cards.<sup>105</sup>

A final irony was that Judge Frank's ruling that a right of publicity existed under the common law of New York was itself overruled in 1990 (thirty-seven years after *Haelan* was decided). The overruling came in another case involving the publicity rights of a major league baseball player. Responding to an effort by the daughter of Babe Ruth to recover against a publisher who had used her late father's picture without authorization, the Second Circuit Court of Appeals ruled that the only publicity rights that existed in New York were those created by sections 50 and 51 of the Civil Rights Law. Consequently, there was not, as

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101. *Id.* The only major league player of consequence not under contract to Topps was Los Angeles Dodger shortstop and base stealing champion, Maury Wills.

102. *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139, 142 (3d. Cir 1981), *cert. denied*, 455 U.S. 1019 (1982). It was Fleer's inability to break into the baseball card market that prompted the 1962 FTC investigation. *See generally Topps Chewing Gum, Inc.*, 67 F.T.C. 744.

103. For legal challenges to Topps' dominant position in the baseball card market, see *Topps Chewing Gum, Inc.*, 67 F.T.C. 744; *Fleer Corp. v. Topps Chewing Gum*, 501 F. Supp. 485 (E.D.Pa. 1980), *rev'd*, 658 F.2d 139 (3d Cir. 1981); *Fleer Corp. v. Topps Chewing Gum*, 658 F.2d 139 (3d. Cir 1981); *Topps Chewing Gum, Inc. v. Fleer Corp.*, 799 F.2d 851 (2d. Cir. 1986); and *Topps Chewing Gum v. Major League Baseball Players Ass'n*, 641 F. Supp. 1179 (S.D.N.Y. 1986).

104. For an account of the relationship between the Players Association and Topps, see MARVIN MILLER, *A WHOLE DIFFERENT BALL GAME: THE SPORT AND BUSINESS OF BASEBALL* 144-52 (1991). Miller was the executive director of the Players Association during this period.

105. *STANDARD CATALOG*, *supra* note 12, at 478. Shortly after the reappearance of Bowman, Topps and other baseball card manufacturers discontinued the packaging of bubble gum with baseball cards on the ground that the gum often damaged the cards with which it was packed. This move reflected the extent to which what had once been a boy's hobby had been taken over by adults.

Judge Frank had held, an independent common law right of publicity.<sup>106</sup> While this decision may have belatedly limited the right of publicity in New York state, the doctrine set down by Judge Frank in *Haelan* had long ago spread beyond the borders of the Empire State.<sup>107</sup>

In an era where professional players associations have sophisticated licensing arms and where player publicity rights literally bring in hundreds of millions of dollars each year, the facts of the *Haelan* litigation seem almost quaint. Nevertheless, it was that once inexpensive piece of Americana, the baseball card, that provided the context for the first explication of what has been one of the most valuable, and most controversial, forms of property in modern America.

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106. *Pirone v. MacMillan*, 894 F.2d 579 (2d Cir. 1990). This conclusion was apparently dictated by prior post-1953 state court decisions that had reached the conclusion that there were no rights of publicity or privacy in New York outside of the state statute. *See also* *Frosh v. Grossett & Dunlap, Inc.*, 427 N.Y.S.2d 828 (N.Y. App. Div. 1980); *Stephano v. News Group Publications*, 474 N.E.2d 580 (N.Y. 1984). However, at least one lower ranking New York court had followed Judge Frank's suggestion. *Southeast Bank, N.A. v. Lawrence*, 483 N.Y.S.2d 218 (N.Y. App. Div. 1984), *rev'd on other grounds*, 489 N.E.2d 744 (N.Y. 1985).

107. *McCarthy*, *supra* note 2, at 1-41 to 1-45; RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).