

DAMN DANIELS! BACK AT IT AGAIN WITH THE FANTASY SPORTS

Publicity Rights in the Realm of Fantasy Sports

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INTRODUCTION

Fantasy Sports evolved from a pastime amongst friends in a deli to a worldwide, internet phenomenon. With the increase in exposure and change in format, comes many challenges. This paper will attempt to navigate those difficulties and provide possible solutions suitable for the current landscape. Part I of this paper discusses the evolution of the landscape of fantasy sports from its inception to the present. Part II discusses the format of a typical fantasy sports league. Part III of this paper discusses the publicity rights of professional and collegiate athletes surrounding fantasy sports. Part IV suggests a solution to the federal publicity rights problem.

I. The Origins of Fantasy Sports

A. Rotisserie Leagues to the Internet Age

Since the beginning of professional sports, fans have been drawn to the idea of simulating their own team.¹ From the 1920s to the 1960s various games were introduced to allow fans to use player stats to run their own team and participate in head to head matchups.² The earliest origins of what we know today as fantasy sports can be traced back to the 1960s when a professor created a structure to draft major league baseball players for a \$10 entry

¹ Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 5 (2012)

² *Id.*

fee.³ The Rotisserie League, named for the deli where the first meetings were held, grew from the professor's model into the eventual "father" of today's fantasy sports model.⁴ Each participant paid a \$260 entry fee which was then used by the participants to bid on players from Major League Baseball's National League rosters.⁵ Points were earned based on real life player statistics.⁶ The member with the most points at the end of the season received a cash prize.⁷

The popularity of the Rotisserie League grew through word of mouth, coverage by the media, and a book written to "introduce the game to the masses,"⁸ The game grew amongst statistically minded fans and was modified per group to fit their needs with some even adding an additional category for pitching statistics or moving scoring from a points based system to a head-to-head format.⁹ Even with all of the individual modifications the core rules of the Rotisserie League remained the same and were eventually adopted by the online fantasy sports leagues we know today.¹⁰

B. The Internet Age and Beyond

Before the internet, fantasy sports leagues were viewed by outsiders as "activities for outcasts and engaged in by those presumed to be overly bookish and socially challenged" due to the amount of paperwork involved in compiling team and player statistics.¹¹ The internet boom of the 1990s brought a whole new

³ Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 5-6 (2012)

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 7-8 (2012)

⁸ *Id.*

⁹ Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 8-9 (2012)

¹⁰ *Id.*

¹¹ Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 9-10 (2012)

breath to fantasy sports. Suddenly statistics were readily available to the masses in their most updated format.¹² The internet age also greatly expanded the player pool. Suddenly a variety of players were available at your fingertips and the stress of finding a league of like-minded players seemed to vanish.¹³ Now instead of seeking out neighbors or coworkers within a specific zip code you can set up a league with anyone around the world with an internet connection. Knowing the popularity of fantasy sports was about to explode numerous sports and entertainment companies began to create their own hosting platforms with ESPN being the first in 1995.¹⁴

Since the 1990s fantasy sports have grown to a five-billion-dollar industry and have expanded to include most sports and even television shows, such as the Bachelor and RuPaul's Drag Race, have some sort of fantasy set up.¹⁵ The most popular fantasy sport today is football with approximately twenty million players per year and generates revenue that exceeds the rest of the fantasy sports world combined.¹⁶

C. Fantasy Sports v. Daily Fantasy Sports

Along with traditional fantasy sports leagues there is also Daily Fantasy Sports (DFS). Daily Fantasy Sports operate in many of the same ways as a traditional fantasy season except for the "season" length.¹⁷ Participants will select players, choose their starting lineup, pay fees, and collect prize money all in the span of a single day.¹⁸ According to the founder of DFS site, DraftStreet.com, DFS "appeal to aggressive fantasy sports players looking for more instant gratification than traditional fantasy leagues can offer."¹⁹

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 10-11 (2012)

¹⁶ *Id.*

¹⁷ Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 16 (2012)

¹⁸ *Id.*

¹⁹ *Id.*

II. How to Set Up a Fantasy Sports League

A. Player Selection

Even with the introduction of the internet into the fantasy sports world, the format for drafting players onto your fantasy team remains largely unchanged. Taken from the earliest days of the Rotisserie League, participants may bid on a player to fill their roster.²⁰ The participant with the highest bid wins.²¹ This continues until the participant's roster is full of "purchased" players.²²

The most common format of selecting players for a fantasy team is a draft.²³ A fantasy draft operates similarly to a league draft. Each participant selects a player in rounds sometimes set up in a "snake format".²⁴ Snake formats usually operate with the participant who selected first in the prior round selecting last in the following round and so on until each participant has a full roster.²⁵

The rarest player selection format is done by random software allocation based on the leagues host site.²⁶ ESPN includes an "Autopick Draft Option" on its site which will "automatically draft players to each team in the league on a scheduled draft date" based on ESPN's computer program.²⁷

B. Season Length

Participants in fantasy sports also have the option to choose a season length. The most popular length coincides with the

²⁰ Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 13-15 (2012)

²¹ *Id.*

²² *Id.* The auction format may be "true", as described above, or "modified". Modified Auctions are popular in shorter season leagues because multiple participants may bid on the same player.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

length of the professional sports season.²⁸ Known as seasonal fantasy sports, the start of the fantasy season, or draft day, would coincide with the first day of the sports season and would conclude on the final day of the regular season.²⁹ None of the player rosters or other information carries over from one season to the next.³⁰

Participants can also set up perennial leagues where rosters will carry over from one year to the next.³¹ Rather than the season ending the league just goes into an “off season” where, in a similar fashion to the professional leagues, participants can make trades or “keep” members to carry over to the roster of the next season.³² Holes in the roster can be filled prior to the start of the next season with a new draft or auction.³³

C. Choosing a Host Site

Fantasy leagues cannot be held online without a host site. Host sites are classified as websites where participant data is stored, player statistics are updated, and participants can make changes to their roster or edit their “starting lineup” for the week.³⁴ Some host sites offer free play, while others charge an entry fee.³⁵ The type of league a participant joins is up to what that particular individual or their league wants from the experience.

Free host sites include the likes of ESPN, Yahoo, CBS Sports, and others.³⁶ While Yahoo and ESPN only host basic, no fee fantasy sports, CBS has multiple formats from free to a Premium

²⁸ Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 15-17 (2012)

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 19-21 (2012)

³⁵ *Id.*

³⁶ *Id.*

service for up to \$500 per team.³⁷ CBS Premium controls disbursing of any prize money, anywhere from 50% to 70% of the leagues entry fees, and collecting entry fees for the participants.³⁸ CBS' middle tier selection, CBS Commissioner, also charges entry fees, up to \$180 per league, and allows participants access to live scores and "complete control of... rules, scoring, and overall setup".³⁹ Most professional leagues also host some form of fantasy sports on their own site.⁴⁰

D. Participants

Any person who takes part in fantasy sports is a participant. The average participant is a male, in his 30s, with a bachelor's degree, has an income of around eighty-thousand-dollars, primarily competes against his real-life friends, and spends close to \$500 a year on fantasy sports.⁴¹ Some participants in the league are simply there to participate in the fantasy sport while others have specific jobs, such as treasurer or commissioner.

The treasurer is tasked with collecting and distributing any entry fees or prize money amongst the league members.⁴² In large or high stakes leagues this job and others may be assigned to a third party, such as LeagueSafe.⁴³ LeagueSafe allows members to move money directly from their bank account to LeagueSafe who then deposits all the funds into an FDIC insured bank account that gathers interest.⁴⁴ At the end of the season LeagueSafe disburses the fund in accordance with the league rules for a fee of \$3 per transaction.⁴⁵

The commissioner is tasked with setting and enforcing the rules for the league along with settling any disputes amongst

³⁷ Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 19-21 (2012)

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 17-19 (2012)

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

participants over the rules.⁴⁶ Like the treasurer this role has moved towards outsourcing to a third-party.⁴⁷ The results of the third party's decision are not legally binding unless explicitly stated in the league rules.⁴⁸

III. Publicity Rights Issues Associated with Fantasy Sports

A. Publicity Rights of Professional Players

Athletes' whose image and likeness are used in fantasy sports have a right to publicity. Publicity rights evolved from the property and tort privacy laws.⁴⁹ Black's Law Dictionary defines publicity rights as, "the right to control the use of one's own name, picture, or likeness and to prevent another from using it for commercial benefit without one's consent."⁵⁰ The Supreme Court has summarized publicity rights as, "an economic incentive for [one] to make the investment required to [perform a skill] of interest to the public."⁵¹ While many federal circuits and the Supreme Court have ruled on publicity rights, the statutes argued over are state law. There are no federal rights to publicity statutes.

While there are no federal right to publicity statutes, many publicity rights cases end up in federal court based on diversity jurisdiction or a first amendment defense.⁵² The First Amendment, which creates the concept of free speech, has been used by some federal circuits to limit publicity rights.⁵³ In *Cardtoons v. Major League Baseball Players Association*, a baseball trading card manufacturer began to sell trading cards

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 42-45 (2012)

⁵⁰ BLACK'S LAW DICTIONARY (9th ed. 2009)

⁵¹ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1976)

⁵² Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 42-45 (2012)

⁵³ Risa J. Weaver, *Online Fantasy Sports Litigation and the Need for a Federal Right of Publicity Statute*, 2 *Duke Law and Technology Review*, 11-13 (2010)

depicting caricatures of Major League Baseball players.⁵⁴ The manufacturer sued the players' association for a declaration the association released that stated the manufacturer was violating the players' rights to publicity.⁵⁵ The Tenth Circuit ruled that application of a state statute was enough in an action between private parties to raise a claim on the restriction of freedom of expression.⁵⁶

Publicity rights have been addressed in the realm of fantasy sports with *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media*.⁵⁷ In this case, Major League Baseball's media arm, Major League Baseball Advanced Media, was sued by C.B.C Distribution because they refused to license players identity and likeness⁵⁸ to C.B.C for use in C.B.C's fantasy sports game.⁵⁹ Instead C.B.C. was only allowed to use the players to advertise the MLB Advanced Media's competing platform in exchange for a share of the revenue.⁶⁰ Originally the claim was filed in federal court and contained elements of the Lanham Act plus a Missouri publicity rights claim, but eventually the federal claims were dropped leaving on the Missouri publicity rights claim.⁶¹ The elements of publicity rights in Missouri are:

“(1) That defendant used plaintiff's name as a symbol of his identity

(2) without consent

(3) and with the intent to obtain a commercial advantage.”⁶²

The court held that the first amendment protection trumped professional athletes' rights to publicity in the assignment of their names and statistics.⁶³ The First Amendment trumped the

⁵⁴ *Cardtoons v. Major League Baseball Players Ass'n*, 95 F.3d 959, 962 (10th Cir. 1996)

⁵⁵ *Id.*

⁵⁶ *Id.* at 968

⁵⁷ *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818, 821 (8th Cir. 2007)

⁵⁸ *Id.* MLB Advanced Media was granted exclusive rights by the Major League Baseball Players Association, whom players assign the rights to license their image and likeness or to enter into any other contracts involving three or more players, to use players' names and statistics.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 822

⁶³ *Id.*

athletes' publicity rights for three reasons. First, the information of professional athletes was already in the public domain.⁶⁴ Second, players who appeared in these games "are already rewarded separately for their labors".⁶⁵ Lastly, consumers of fantasy sports services are not confused by the use of player information as the athlete endorsing the fantasy sport service.⁶⁶

1. *Can states regulate publicity rights on the internet for those outside of their state?*

The Commerce Clause, found in Article 1, Section 8, Clause 3 of the United States Constitution, gives Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."⁶⁷ Powers not granted to the federal government are given to the states under the 10th Amendment.⁶⁸ Since the Constitution gives Congress the power to regulate commerce, the states are over stepping by regulating commerce, such as fantasy sports online.

Since the internet is not confined by geographical boundaries, it is unconstitutional to hold one state to the legal standards of another when the parties at fault may have little to no connections to that state. As we saw in the *C.B.C. Distribution* case, the federal government was asked to use Missouri law to rule on an issue of a site's infringement of players' publicity rights when that site operated online and, by default, across the globe. This case was decided in federal court, based on diversity jurisdiction, which holds at a minimum the states in Missouri's federal circuit to the ruling and creates persuasive case law for the other federal districts all based solely off the law of one state.

a *Are Fantasy Sports Host Sites Commercial?*

According to the Court in, *Gridiron.com, Inc. v. National Football League, Players' Association* a website is purely

⁶⁴ *Id.* at 823

⁶⁵ *Id.* at 824 Noting, in separate paragraphs, the athletes' compensation through their salaries and compensation through other endorsement opportunities.

⁶⁶ *Id.* at 824.

⁶⁷ U.S. CONST. art. 1 § 8 cl. 3

⁶⁸ U.S. CONST. amend. 10,

commercial.⁶⁹ Gridiron.com was devoted to statistical information surrounding professional football and its athletes. Gridiron.com linked to other websites, Gridiron's fantasy football game, and third-party advertisements.⁷⁰ Gridiron.com secured the use of 150 athletes through contracts and licensing agreements.⁷¹ The NFL Players' Association sued for violation of the NFL Players' Contract and Licensing Agreement.⁷² The court held that a website was not a "product" under the agreement⁷³ and was not entitled to First Amendment protection because it was purely commercial unlike "novels, movies, music, magazines, and newspapers."⁷⁴ Because fantasy sports host sites fall very closely in line with the website in *Gridiron*, they are commercial in nature. This distinction does not necessarily extend to the rest of the websites on the internet, but this argument is crucial for professional athletes and sports leagues to get around the first amendment defense.

2. *In light of C.B.C. Distribution, can the athletes successfully counter a First Amendment Defense?*

The most compelling arguments are found in two cases related to publicity rights in video games. The first, *Palmer v. Schonhorn Enterprises, Inc.*,⁷⁵ professional golfers argued that the use of their statistics and images in a video game violated their publicity rights.⁷⁶ The court made a distinction between the use of statistics and other factual information and the use of the image of a professional athlete to sell products.⁷⁷ The court believed it was unjust for the producer of the game to exploit and profit from

⁶⁹ *Gridiron.com, Inc. v. Nat'l Football League, Players Ass'n, Inc.*, 106 F. Supp. 2d 1309 (S.D. Fla. 2000).

⁷⁰ *Id.* at 1313

⁷¹ *Id.*

⁷² *Id.* at 1311

⁷³ *Id.* at 1314

⁷⁴ *Id.* at 1315

⁷⁵ *Palmer v. Schonhorn Enter., Inc.*, 232 A.2d 458 (N.J. Super. Ct. 1967).

⁷⁶ *Id.* at 459

⁷⁷ *Id.* at 461 "While one who is a public figure or is presently newsworthy may be the proper subject of news or informative presentation, the privilege does not extend to commercialization of his personality through a form of treatment distinct from the dissemination of news or information." (quoting *Gautier v. Pro-Football, Inc.*, 107 N.E.2d 485, 488 (N.Y. Ct. App. 1952)).

the successes of another merely because their accomplishments were highly publicized.⁷⁸ The second case, *Uhlaender v. Henricksen*,⁷⁹ revolved around a board game that used the name and statistics of over 500 Major League Baseball players.⁸⁰ The court in *Uhlaender* relied heavily on the court in *Palmer* and found the use of the players' names and statistics was infringing the players' rights.⁸¹

This distinction can also be made for fantasy sports. Fantasy sports leagues draw in membership based on the performance of specific athletes in sports. If those athletes do not perform well then no one will want to choose them to be on their team. The participant will then choose to capitalize on the success of another athlete. The draw of fantasy sports is to act as manager of a professional sport team and has been since its earliest days. Capitalizing off the success of another merely because their successes are highly publicized forms the backbone of fantasy sports.

B. Publicity Rights of Collegiate Players

The Court in *C.B.C. Distribution* reasoned that using athletes' name and likeness was partially okay because, "players are rewarded, and handsomely, too, for their participation in games and can earn additional large sums from endorsements and sponsorship arrangements."⁸² Collegiate athletes are not compensated the same as professional athletes due to NCAA guidelines. According to the NCAA's guidelines for participation, college athletes must fit into their definition of amateurism.⁸³ These guidelines include accepting a salary for athletics, accepting prize money, participation with professionals and professional teams, and any financial assistance based on athletic skill or participation.⁸⁴ This means that collegiate athletes are not compensated on the same level as professional athletes. Based on

⁷⁸ *Id.* at 462

⁷⁹ *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1278 (D. Minn. 1970).

⁸⁰ *Id.*

⁸¹ *Id.* at 1282-1283

⁸² *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818, 824 (8th Cir. 2007)

⁸³ See *Amateurism*, NCAA, <http://www.ncaa.org/amateurism>

⁸⁴ *Id.*

the court's reasoning in *C.B.C. Distribution* future courts could rule in favor of the collegiate athletes.

Currently the Indiana Supreme Court is deciding this exact matter in *Daniels v. Fanduel, Inc.*⁸⁵ Originally the case was filed in the United States Court for the Southern District of Indiana.⁸⁶ Three former collegiate athletes, including Daniels, sued FanDuel and DraftKings, operators pay for play fantasy sports host sites, for use of their image on the site.⁸⁷ The three players were assigned fictitious salaries and statistics for their entries on the site.⁸⁸ Since the players were never professional athletes commentary on their likely performance to justify the fictitious salaries was also included.⁸⁹ The three athletes claim a violation of Indiana's publicity rights statute.⁹⁰ Indiana publicity rights cover,

“a personality's property interest in the personality's: (1) name; (2) voice; (3) signature; (4) photograph; (5) image; (6) likeness; (7) distinctive appearance; (8) gestures; or (9) mannerisms.”⁹¹

FanDuel and DraftKings argued the information on their site met four exceptions laid out in Ind. Code. §32-36-1-1(c).⁹² The first

⁸⁵ *Daniels v. FanDuel, Inc.*, 2018 Ind. LEXIS 279 (Ind. 2018) The case is still in litigation with the Supreme Court. No final ruling on the question has been issued.

⁸⁶ *Daniels v. FanDuel, Inc.*, 2017 U.S. Dist. 162563 (S.D. Ind. 2017)

⁸⁷ *Id.* at 4

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Indiana Code Section 32-36-1-1 *et seq.* The court specifically focused on the exceptions found in this section on applicability to address the plaintiffs' claims under Ind. Code § 32-36-1-8(a)

⁹¹ Ind. Code §32-36-1-8

⁹² Ind. Code § 32-36-1-1(c)

1. The use of a personality's name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms in material that has **political or newsworthy value** Ind. Code § 32-36-1-1(c)(1)(B) (emphasis added).

2. The use of a personality's name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms in connection with the broadcast or reporting of an event or a **topic of general or public interest**. Ind. Code § 32-36-1-1(c)(3) (emphasis added).

3. The use of a personality's name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms in **literary works**. Ind. Code. § 32-36-1-1(c)(1)(A) (emphasis added).

4. The use of a personality's name to truthfully identify the personality as the **performer of a recorded performance**. Ind. Code § 32-36-1-1(c)(2)(B) (emphasis added)

exception for newsworthiness⁹³ was accepted by the court. The district court concluded that given the popularity and growing outlets from which to gather sports news that the information was of public concern and fit the definition of newsworthy.⁹⁴ The Plaintiffs argued that this exception does not apply because the sites are not a news organization and they included the fictitious information which is not newsworthy.⁹⁵ The fictitious information, according to the court, does not constitute a violation of publicity because it is not a personality's name or likeness.⁹⁶ The second exception for public interest⁹⁷ applies to fantasy sports because the host sites provide factual data and they can be used as reference sources for player information to play fantasy sports or to just gather data.⁹⁸ The court also made a distinction between player likeness in video games and on fantasy sports sites by stating that video games were purely for entertainment and did not provide updated statistics on athletics.⁹⁹ Exception three is for literary works.¹⁰⁰ The court declined to rule on this exception partly because to side with the fantasy host sites argument, that their services are similar enough to video games and video games have been ruled as literary works, would conflict with the court's opinion on the public interest exception, and also because the issue of if fantasy sports and video games are similar is a finding of fact which the host sites had not proven to the court at this stage.¹⁰¹ The final exception, performers of recorded

⁹³ Ind. Code §32-36-1(c)(1)(B),

⁹⁴ *Daniels v. FanDuel, Inc.*, 2017 U.S. Dist. 162563, 9-20

⁹⁵ *Id.* at 15-19

⁹⁶ *Id.* at 19

⁹⁷ Ind. Code § 32-36-1-1(c)(3)

⁹⁸ *Daniels v. FanDuel, Inc.*, 2017 U.S. Dist. 162563, 19-25

⁹⁹ *Id.* at 23 Citing *In re NCAA Student- Athlete Name and Licensing Litig.*, 724 F. 3d 1268, 1283 “EA is not publishing or reporting factual data. EA’s video game is a means by which users can play their own virtual football games, not a means for obtaining information about real-world football games. ... Put simply, EA’s interactive game is not a publication of facts about college football; it is a game, not a reference source. These state law defenses, therefore, do not apply.” The court in *In re NCAA* also stated, “But there is a big difference between a video game like *NCAA Football* and fantasy baseball products like those at issue in *C.B.C.* Those products merely ‘incorporate[d] the names along with performance and biographical data of actual major league baseball players.’ *NCAA Football*, on the other hand, uses virtual likenesses of actual college football players.” *Id.*

¹⁰⁰ Ind. Code. § 32-36-1-1(c)(1)(A)

¹⁰¹ *Daniels v. FanDuel, Inc.*, 2017 U.S. Dist. 162563, 26

performances,¹⁰² does not apply.¹⁰³ The court found the host sites used information protected in the statute in ways other than to identify them as performers in a performance.¹⁰⁴

The plaintiffs appealed the case to the United States Court of Appeals for the Seventh Circuit who found that the District Court erred in their decision¹⁰⁵ and sent the question to the Indiana Supreme Court to decide:

“Whether online fantasy-sports operators that condition entry on payment, and distribute cash prizes, need the consent of players whose names, pictures, and statistics are used in the contests, in advertising the contests, or both.”¹⁰⁶

While the question currently before the Indiana Supreme Court may not end this case completely it could provide a clearer picture of where collegiate athletes publicity rights stand in the fantasy sports world.¹⁰⁷ The answer will also create a distinction between pay for play fantasy sports and the free sites potentially impacting fantasy sports stance as a legal form of gambling. If the distinction is created Daniels and future plaintiffs could more easily draw a distinction between fantasy sports and video games thus opening the door to arguments based around the opinion in *O’Bannon v. NCAA*.¹⁰⁸ Sites that operate for a fee, and found to be distinctly different from their free counterparts, would have damning precedent against them in regards to their stance as commercial in nature.

*IV. Creating a Solution to the Publicity Rights Problem*¹⁰⁹

Without a federal publicity rights statute there is not uniform way to approach publicity rights on the internet and therefore in online Fantasy Sports. To solve this problem, I have two solutions. The first is to revise the Lanham Act which governs Trademarks to include publicity rights or the ability to allow public figures to hold trademarks in their name, image, and

¹⁰² Ind. Code § 32-36-1-1(c)(2)(B)

¹⁰³ *Daniels v. FanDuel, Inc.*, 2017 U.S. Dist. 162563, 27-28

¹⁰⁴ *Id.* at 28

¹⁰⁵ *Daniels v. FanDuel, Inc.* 884 F.3d 672, 674 (7th Cir. 2018)

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 675

¹⁰⁸ *O’Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015)

¹⁰⁹

likeness. Publicity rights do for the rich and famous what trademarks do for business: differentiate the sources of goods in commerce.

Trademark infringement provides relief when,

“a person uses (1) any reproduction ... of a mark;

(2) without the registrant’s consent;

(3) in commerce;

(4) in connection with the sale, offering for sale, distribution or advertising of any goods;

(5) where such use is likely to cause confusion, or to cause mistake or to deceive.”¹¹⁰

On the flip side, publicity rights are infringed when,

“(1) That defendant used plaintiff’s name as a symbol of his identity

(2) without consent

(3) and with the intent to obtain a commercial advantage.”¹¹¹

Both call for using an identifier, whether a trademark or a public figure’s name, image, or likeness, without consent for commercial gain. The major difference between the two is that Trademark infringement calls for a likelihood of confusion. The court in *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media*¹¹² struck down the players’ claim based partly on the fact that no consumer, or participant of fantasy sports, would not be confused by the use of the player’s image and likeness as an endorsement of the service.¹¹³ Since the two already serve the same purpose but for different types of parties it only makes sense to join the two in a revision of the Lanham Act. Public figures use their names and images to endorse products the same way trademarks “endorse” their products.

The second option is to create a separate federal right to publicity statute based around Black’s Law Dictionary’s definition

¹¹⁰ Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 40 (2012)

¹¹¹ *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818, 822 (8th Cir. 2007) Using a Missouri Statute.

¹¹² *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818 (8th Cir. 2007)

¹¹³ *Id.* at 824

of publicity rights.¹¹⁴ My federal right to publicity statute would contain at least four elements: use of plaintiff's name, image, or likeness by defendant, without consent, for a commercial advantage, and is likely to cause confusion. The first three elements we already see in Missouri's publicity rights statute. The fourth draws from trademark law and the court's reasoning in *C.B.C. Distribution* to further protect athletes and other public figures from those instances outside of commerce where a party may use another's image to create the illusion of approval.

Creating some sort of federal right of publicity statute will bring the law in line to an age where infringement of publicity rights is no longer controlled by geography, but instead can transcend all bounds. Our media, advertising, and communication is broader than ever before. National advertising campaigns are the norm and it is much easier for information to spread from one city to the next much less from state to state or even nation to nation. It would also relieve confusion amongst parties as to what law governs and erases any dormant commerce clause issues from allowing state law to control the internet. Federal courts would no longer have to tiptoe around the backlash of broadening or narrowing state law beyond the intent of the legislators.

CONCLUSION

Fantasy Sports touch every portion of Intellectual Property. While most of the areas of Intellectual Property surrounding fantasy sports are fairly settled publicity rights in fantasy sports are not. This is partly due to the lack of a federal publicity statute. With a federal publicity rights statute, the courts would not be subjected to applying state law to matters on the internet thus avoiding dormant commerce clause issues. The publicity rights between collegiate and professional athletes also is not settled despite the two categories of athletes receiving vastly different levels of compensation, a key point in the *C.B.C. Distribution* ruling.

¹¹⁴ BLACK'S LAW DICTIONARY (9th ed. 2009) "the right to control the use of one's own name, picture, or likeness and to prevent another from using it for commercial benefit without one's consent".