Every Time I Call It A Game, You Say It’s A Business. Every Time I Call It A Business, You Say It’s A Game.

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Sports In Society

• Entwinement: Sport & American History
  – Racial Issues
  – Domestic Violence Issues
  – Sports Heroism: baseball – Civil War & 9/11
  – Sexual Orientation
  – Gambling
  – Business of Sports
Amateur v. Professional

• Amateurism mirrors social constructions
  – Greeks – “Glory & Honor of Sport Alone”
  – Altruistic motives

• Professionals get paid
  – Vocation
  – Full-time Job
Blurred Lines: College Student-Athlete

• Students: Most pay to go to college
• Athletes: Scholarships as Pay to Play
Issue / Question Presented

- Should Fantasy Sports Providers and NCAA be required to pay college student-athletes for use of their “likeness” in fantasy sports games?
Conclusion

• Both the NCAA and Fantasy Sports providers must compensate student-athletes for violating multiple legal rights.
Key Players in this Drama

- Fantasy Sports Providers
- NCAA
- Collegiate Licensing Company
- College Student-Athletes
NCAA & Collegiate Licensing Company

• NCAA began in 1906; formalized in 1910
  – Authority to make & enforce rules
  – Mission: “To safeguard and protect the interests of student athletes.”
  – NCAA makes money: $1 billion profit (2014)

• CLC created in 1981
  – Represents over 90% of college merchandise and licensing sales
Fantasy Sports

- Evolution – Rotisserie Baseball to Online Fantasy Leagues
  - Over 33 million Americans play
  - $3.3 billion industry…and it’s still growing

- Collision between Fantasy Sports and Sports Analytics
Fantasy Sports cont.

- Free Leagues – Season, Weekly, Day
- 65% of Fantasy Sports are tournaments with fees
  - This permits advertising revenue
- From 2007 – 2012 fantasy sports grew 12% annually
  - From $397 million → $1.1 billion in profit
Fantasy Sports is NOT Gambling

- Gambling is illegal in many states
- Uniform Internet Gambling Enforcement Act of 2006 (UIGEA)
  – Carve out for Fantasy Sports
Huh?

• Wagering money online on an uncertain outcome based upon student-athletes’ participation in a sporting event is not gambling because...

• Using sports analysis is a skill
Causes of Action

• Violation of Intellectual Property Rights
  – Patent
    • *Fantasy Sports Properties v. ESPN/Starwave Partners* (Fed. Cir. 2002)
      – Win for Fantasy Sports

  – Copyright
    • *C.B.C. Distribution v. MLB Advance Media* (E.D. Mo. 2007)
      – Win for Fantasy Sports
        » Player stats are part of the public domain
        » Pro athletes

  – Trademark Law
    • No one has yet brought suit under Lanham Act
Causes of Action cont.

• Right of Publicity
  – Coined in 1953
  – This intellectual property right “essentially provides an individual with the exclusive right to control the commercial value and exploitation of his or her own photograph, name, likeness, other personal characteristics . . . and sports performance statistics.”
Case Law & Right of Publicity

• *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* (2d Cir. 1953)
  – Right from excessive public scrutiny
  – Right to publicity value of personal identifying information

• *Uhlaender v. Hendrickson* (D. Minn. 1970)
  – Extended the right to publicity to professional athletes’ sports performance stats
  – Fantasy table games
SCOTUS & Right of Publicity

• Zacchini v. Scripps-Howard Broadcasting Co. (1977)
  – Originated in Ohio
  – Filmed Act and aired on local television
  – Court ruled for Zacchini, declaring that the First Amendment did not give Scripps-Howard the right to appropriate Zacchini’s ‘entire act.’”
Current/Recent Cases

  – Video games are protected by First Amendment
    • Video games like plays, books, movies
    • Fantasy sports have no plot, dialogue, or characters
      – Real world sports statistics

  – “Transformation”
  – Here there is none: real photographs, likeness, stats –
    so no First Amendment defense applies
Current/Recent Cases cont.

• *Hart v. Electronic Arts* (3d Cir. 2013)
  – Misappropriation of player likeness
  – EA Sports shielded by First Amendment

• *Keller v. Electronic Arts* (N.D. Cal. 2010)
  – Misappropriation of player likeness
  – Settlement of $40 million
  – 1st time student-athletes won

• *O’Bannon v. NCAA* (N.D. Cal. 2014)
  – Antitrust case: can NCAA prevent athletes from earning $ for use of their likeness
  – Win for athletes
Closing Argument

• Under *Uhlaender*, a MLB player’s “identity” includes his name used in conjunction with his performance statistics. Similar argument of student-athletes, especially if Fantasy Sports providers want to argue a similar rule in C.B.C. applies.

• *O’Bannon* – violation of antitrust & likeness

• *Keller* – settlement
The Case is Submitted

- Hope springs eternal for student-athletes

- NCAA faces an uphill battle

- Fantasy Sports Providers are living in a “fantasy world” – pay up or expect to face litigation