

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.

Presented by,  
Jay Wampler  
*3L, J.D. Candidate 2015*

# *North Dallas Forty*



MOVIECLIPS.COM

# 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?



*Should Student  
Athletes Get Paid?*



*Why Paying College Athletes  
Would Completely Ruin NCAA Sports*

# Conclusion

- Both the NCAA and Fantasy Sports providers must compensate student-athletes for violating multiple legal rights.





# Key Players in this Drama



FanDuel  
ONE-DAY FANTASY SPORTS LEAGUES

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



CBS SPORTS.com

2013 College Fantasy Football



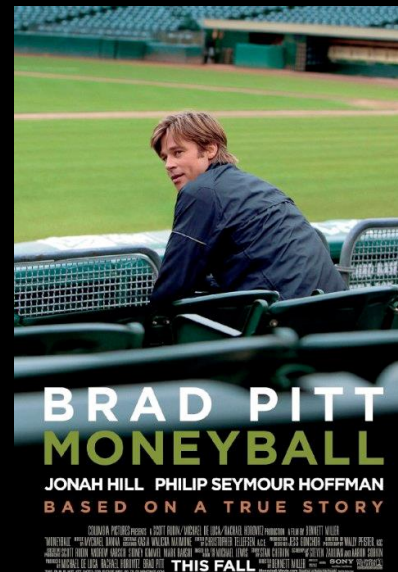


# NCAA & Collegiate Licensing Company

- 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 merchandize 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

- *Brown v. Entertainment Merchs. Ass'n* (2011)
  - 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
- *Kirby v. Sega of America, Inc.* (Cal. Ct. App. 2006)
  - “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
  - 1<sup>st</sup> 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