

Game On: How the Right of Publicity, Legalised Gambling and Fair Pay to Play Laws Are Changing US Professional and Amateur Sports

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While the state of the law is in flux, recent developments have confirmed the challenges and hopes for US professional and amateur athletes in controlling and monetising their name, image and likeness. In the wake of the United States Supreme Court's decision in *Murphy v National Collegiate Athletic Association*, which struck down federal legislation prohibiting the legalisation of sports betting, the stakes are higher than ever. Here, we examine recent key US decisions and legislative developments regarding athletes' right of publicity that are likely to shape the playing field moving forward.

Introduction

In May 2018, in *Murphy v National Collegiate Athletic Association*,¹ the US Supreme Court struck down the Professional and Amateur Sports Protection Act, a federal statute that prohibited individual states from legalising sports

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1 [2018] 138 S Ct 1461, 1485.

betting, finding that the law violated the Tenth Amendment to the US Constitution. With sports betting no longer federally prohibited, the business of sports betting has grown exponentially and the stakes for athletes (both professional and amateur) are higher than ever. Indeed, whether a team game or an individual endeavour, sports are fundamentally about individuals and personalities – how, then, are the publicity rights of athletes affected and what do those publicity rights mean for leagues, teams, players' associations and the gambling industry? Will courts side with sports-betting companies in any efforts to use athletes' publicity rights on a licence-free basis, as courts have in daily fantasy sports cases? Or will athletes prevail as they typically have over video game developers who incorporate player likenesses in their games? And how will 'fair pay to play' laws, like that recently enacted in California, affect collegiate athletics and the business of amateur sports?

The first part of this article presents an introduction to the right of publicity in the US, including a brief discussion of generally recognised exceptions to the right. The second part outlines sports-specific right of publicity cases, distinguishing between right of publicity claims arising in the fantasy sports league and video game contexts. The third part examines the potential implications of the legal landscape on right of publicity claims in the sports-betting context and reasons that sports-betting claims are likely to mimic the outcome of right of publicity cases dealing with fantasy sports leagues. The article concludes with a discussion of California's Fair Pay to Play Act and other states' efforts at enacting legislation to provide amateur athletes with a way to monetise their name, image and likeness.

A background on the right of publicity in the US

Unlike many of its Western counterparts, the US approach to privacy emanates from rights granted by governing documents, that is, the federal and state constitutions and laws. In particular, the right of publicity – a subspecies of privacy rights – is a function of individual state law as enacted by legislatures and interpreted by the courts (no federal law directly governs the right). Nonetheless, although the scope of the right differs from state to state, the general right of publicity is largely property-based and prevents the appropriation of an individual's likeness for commercial gain.² In fact, the state's interest in protecting publicity rights is closely analogous to the goals of patent, trademark and copyright – with the focus on the individual's right to reap the rewards of their endeavours.³ As a result, celebrities, athletes and other public figures have successfully used the right of publicity to restrict

2 RST (3d) of Unfair Comp s 46.

3 *Zacchini v Scripps-Howard Broadcasting Co* [1977] 433 US 562, 573.

others from using their name, image and likeness (NIL) for commercial gain.⁴ While the scope of protection for the right of publicity differs by state, courts have recognised ‘likeness’ to range anywhere from distinctive voices and jersey numbers to catchphrases.⁵

The right of publicity is not without its limits. Individuals attempting to assert a claim for violation of the right of publicity frequently come up against the First Amendment’s robust protection of free and open speech. Under the First Amendment’s banner, courts have generally recognised newsworthiness as a defence to right of publicity claims where matters of public interest are involved.⁶ It is ultimately against this newsworthiness exception that athletes’ right of publicity claims have historically failed, though another exception, as recognised by the California Supreme Court in *Comedy III Productions v Saderup*, finds that the use of an individual’s NIL is permissible if sufficiently transformative – that is, if the value of the product in question does not derive primarily from the appropriation.⁷

The right of publicity and sports

Professional and amateur athletes have long asserted that the right of publicity prohibits companies from the unlicensed use of their name and likeness for commercial gain. In recent years, there has been substantial litigation over video game developers’ and daily fantasy sports (DFS) leagues’ use of players’ NIL and statistics and whether such use is protected by the First Amendment. Ultimately, although athletes have found success in asserting publicity rights in certain circumstances against video game developers, this success has not translated into claims against the DFS industry.

Athletes’ right of publicity and video games

Courts have found that video games are protected as expressive speech under the First Amendment and therefore entitled to the full force of its

4 See *Carson v Here’s Johnny Portable Toilets, Inc* [1983] 698 F 3d 831 (6th Cir); *Davis v Electronic Arts Inc*, [2015] 775 F 3d 1172, 1178 (9th Cir); *Onassis v Christian Dior-New York, Inc* [1984] 122 Misc 2d 603 (NY Special Term).

5 *Midler v Ford Motor Co* [1988] 849 F 2d 460 (9th Cir); *In re NCAA Student-Athlete Name & Likeness Licensing Litigation* [2013] 724 F 3d 1268 (9th Cir), 1276; see n 4 above, *Carson*, 831.

6 See *Comedy III Productions, Inc v Gary Saderup, Inc* [2001] 25 Cal 4th 387, 396–99; *Hoepker v Kruger* [2002] 200 F Supp 2d 340, 353–54 (SDNY); *CBC Distribution and Marketing, Inc v Major League Baseball Advanced Media, LP* [2007] 505 F 3d 818, 824 (8th Cir); but see n 3 above, *Zacchini*, 574–75 (finding that the First Amendment did not immunise the media from right of publicity claims when they broadcast a performer’s entire act).

7 See n 6 above, *Comedy III*, 407.

protections.⁸ Indeed, in *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, the US Court of Appeals for the Ninth Circuit (which covers federal courts in the western US, including California) confirmed that:

‘Video games are entitled to the full protections of the First Amendment, because like the protected books, plays, and movies that preceded them, video games communicate ideas – and even social messages – through many familiar literary devices (such as characters, dialogue, plot and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world).’⁹

Yet, the Court then recognised that ‘[s]uch rights are not absolute, and states may recognize the right of publicity to a degree consistent with the First Amendment’.¹⁰

Despite this recognition of First Amendment protection for video games, both amateur and professional athletes have been fairly successful in asserting right of publicity claims against video game developers, with courts generally rejecting any transformative use and other First Amendment defences put forward. In *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, the Ninth Circuit found in favour of a former amateur college football player in his right of publicity claim against the video game developer Electronic Arts (EA).¹¹ EA’s *NCAA Football* video game series allowed users to control avatars representing real players in simulated football games. Each player on each school’s team was accurately replicated, sharing their real-life counterpart’s jersey number, hair colour, height, weight, build and skin tone. EA argued that its use of the players’ names and likeness was protected under the First Amendment because the game as a whole contained various creative elements. The District Court disagreed, and the Ninth Circuit affirmed. It explained that simply because ‘avatars appear in the context of a video game that contains many other creative elements... does not transform the avatars into anything other than exact depictions of [athletes] doing exactly what they do as celebrities’.¹² Since EA’s game realistically portrayed college football players in the context of college football games, EA’s use of the players’ name and likeness was not sufficiently ‘transformative’ and thus violated the players’ right of publicity.¹³

8 *Brown v Entm’t Merchs Ass’n* [2011] 131 S Ct 2729.

9 See n 5 above, *In re NCAA*, 1270–71.

10 *Ibid*, 1271.

11 *Ibid*, 1279.

12 *Ibid*, 1276.

13 *Ibid*, 1279.

The Ninth Circuit reinforced this approach in 2015, finding in favour of professional athletes' publicity rights in *Davis v Electronic Arts Inc.*¹⁴ Similar to *In re NCAA*, the *Davis* case dealt with EA's creation of a virtual football game that allowed users to play simulated games against National Football League (NFL) teams. To provide a realistic simulation of an NFL game, EA created avatars for all current players of all 32 NFL teams, along with accurate player names, team logos, colours and uniforms. Although EA obtained licences to use the name and likeness of current players, it did not obtain a licence to use the likeness of any former player it included in the game. Applying the same reasoning as it did in *In re NCAA*, the Court rejected EA's transformative defence. It found that the NFL game replicated players' physical characteristics and 'allow[ed] users to manipulate them in the performance of the same activity for which they are known in real life – playing football for an NFL team'.¹⁵

In addition to arguing that its use was transformative, EA proffered two affirmative defences. The game developer argued that the players' right of publicity claim was barred by the public affairs exception under California law, which excuses the use of name and likeness in connection with any news, public affairs, sports broadcast or account.¹⁶ The Ninth Circuit rejected this argument, reasoning that 'EA's interactive game is not a publication of facts about... football; [rather] it is a game, not a reference source' [and] 'is a means by which users can play their own virtual football games, not a means for obtaining information about real-world football games.'¹⁷ Since EA's use of players' names and likenesses was not principally about distributing information to the public, the Court rejected EA's public affairs defence. The Court of Appeals also rejected EA's incidental use defence, finding that its use of players' names and likenesses was not trivial and that the value of EA's game stemmed primarily from its realistic portrayal of NFL players. EA's game was valuable because it was realistic – including because of its depiction of real players' names and likenesses.¹⁸

While both *In re NCAA* and *Davis* are Ninth Circuit cases (and both against the same video game developer), they are representative of publicity claims cases against video game developers throughout the US. For example, in *Hart v Electronic Arts*, the Third Circuit (which covers federal courts in Delaware, New Jersey and Pennsylvania) found that EA infringed on a former college athlete's right of publicity by appropriating his name and likeness in its video

14 See n 4 above, *Davis*, 1181.

15 *Ibid*, 1178.

16 *Ibid*, 1178.

17 *Ibid*, 1179 (quoting n 5 above, *In re NCAA*, 1283).

18 *Ibid*, 1181.

game.¹⁹ There too, the issue boiled down to the fact that EA appropriated the player's name and likeness for a simulated football game – the very sport for which the player was famous in real life.²⁰

A recent case standing apart from this trend of rulings against video game companies came from a district court within the Third Circuit. On 26 September 2019, in *Hamilton v Speight*, the District Court for the Eastern District of Pennsylvania found for the defendants (including Microsoft and Epic Games) against a claim for violation of the right of publicity brought by a former professional wrestler and football player who performed as 'Hard Rock Hamilton'.²¹ Hamilton alleged that the defendants' creation of a character in the *Gears of War* video game series named Augustus Cole violated Hamilton's right of publicity. The Cole character was described as 'a former professional athlete who played the fictional game thrashball, a highly fantastical and fictionalised sport that loosely imitates American football in some ways'.²² The Court noted that 'Hard Rock Hamilton and the Cole characters' likenesses certainly share some similarities²³ and described their 'broadly similar faces, hair styles, races, skin tones, and large, muscular body builds' and similar voices.²⁴ Moreover, in *Gears of War 3*, players can obtain 'skins' for Cole called Thrashball Cole (wearing what loosely resembles football padding) and Superstar Cole (which dresses him in a fedora, like Hamilton's wrestling persona, and sunglasses, sweatbands, watch and chain necklace).²⁵

The Court, however, held 'the First Amendment bars Hamilton's claims. Defendants' right to free expression outweighs Hamilton's right of publicity in this case because the Cole character is a transformative use of the Hard Rock Hamilton character.'²⁶ In doing so, it distinguished the facts at issue in *Hart*, and noted that '[i]f the Hard Rock Hamilton character influenced the creation of the Cole character at all, the Hard Rock Hamilton character was at most one of the "raw materials" from which the Cole character was synthesised: the Hard Rock Hamilton is not the "very sum and substance of the" Cole character'.²⁷

Hamilton is therefore in line with those cases like *Hart* and *Davis*, in that the Court focused on the transformative nature of the video game character,

19 *Hart v Electronic Arts, Inc* [2013] 717 F 3d 141, 169–70 (3d Cir).

20 *Ibid*, 170.

21 *Hamilton v Speight et al*, — F Supp 3d —, 26 September 2019, 2019 WL 4697485 (ED Pa).

22 *Ibid*, *2.

23 *Ibid*, *7.

24 *Ibid*, *3.

25 *Ibid*.

26 *Ibid*, *4.

27 *Ibid*, *7.

including its different name, backstory and wildly different context of ‘extraordinarily stylized and fantastical violence against cartoonish reptilian humanoids on a fictional planet in a fictional war’ as opposed to earth-based professional football and wrestling in which Hamilton actually competed.²⁸ In that regard, *Hamilton* confirms the proper balance between the First Amendment and right of publicity laws, in which transformative depictions are and will continue to receive strong protection.

Athletes’ rights of publicity and DFS leagues

In contrast to athletes’ generally successful forays against video game companies, athletes have not found success in asserting right of publicity claims against DFS leagues. At a basic level, the operators of DFS leagues offer customers the ability to ‘draft’ players from various sports teams and to compete against other users’ teams, with the success of their own team based on the actual game-based performance of the real-life players whom they have drafted on to their team. Users pay DFS services money to play and may win money in their own right. The question then has become whether DFS operators have the ability to use, without a licence, the NIL of athletes in operating their for-profit services. The US Courts of Appeals for the Seventh Circuit (covering Illinois, Indiana and Wisconsin) and for the Eighth Circuit (based in St Louis, Missouri) have issued two of the major decisions regarding DFS operators’ use of athletes’ NIL, setting a trend in favour of the companies’ free use of such information under the First Amendment.

In 2007, in *CBC Distribution*, the Eight Circuit grappled with whether baseball players’ right of publicity trumped the use by CBC Distribution and Marketing, Inc (CBC) of those athletes’ biographical and statistical information.²⁹ The Court found in favour of CBC, holding that the DFS operator has a First Amendment right to use the names and statistical information of baseball players in connection with their fantasy baseball service.³⁰ The Court of Appeals found that Missouri’s right of publicity had to give way to the First Amendment rights of CBC, noting that ‘the information used in CBC’s fantasy baseball games is all readily available in the public domain, and it would be strange law that a person would not have a first amendment right to use information that is available to everyone’.³¹ Moreover, the Court emphasised that the public had an interest

28 *Ibid.*

29 See n 6 above, *CBC Distribution*, 818.

30 *Ibid.*, 824.

31 *Ibid.*, 823.

in information regarding baseball and its players, given that baseball was a ‘national pastime’.³² It observed that:

‘Major league baseball is followed by millions of people across the country on a daily basis... The public has an enduring fascination in the records set by former players and in memorable moments from previous games... The records and statistics remain of interest to the public because they provide context that allows fans to better appreciate (or deprecate) today’s performances.’³³

Although not explicitly stated by the Court, its reasoning in this regard aligns with newsworthiness exceptions to the right of publicity.

In 2018, following the Eight Circuit’s lead, the Seventh Circuit in *Daniels v FanDuel, Inc*³⁴ rejected three former college football players’ suit against the DFS operators FanDuel and DraftKings alleging violations of Indiana’s right of publicity law. The Seventh Circuit had certified the following question to the Indiana Supreme Court: ‘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.’³⁵

The Indiana Supreme Court answered this question in the negative, explaining that DFS operators did not violate Indiana’s right of publicity by using the names, pictures and statistics of players without their consent.³⁶ The Court reasoned that the DFS operators’ use of players’ names and likeness in this manner was permissible because it fell within the State’s newsworthiness exception.³⁷ The Court also rejected the argument that fantasy sports operators were ineligible for the newsworthiness exception because they were not actual media companies or news broadcasters. The Court instead explained that such labelling was immaterial because Indiana’s statute spoke only to the ‘use of a personality’s right of publicity in “[m]aterial that has political or newsworthy value”’.³⁸ Accordingly, fantasy sports operators could benefit from the newsworthiness defence.

The Court further determined that newsworthiness was to be construed broadly. It noted that:

‘[T]he term “newsworthy” was understood to encompass a broad privilege that was “defined in the most liberal and far reaching terms.” ... The

32 *Ibid.*

33 *Ibid.*

34 *Daniels v FanDuel, Inc* [2018] 909 F 3d 876, 877–78 (7th Cir).

35 *Daniels v FanDuel, Inc* [2018] 109 NE 3d 390, 398 (Ind).

36 *Ibid.*

37 *Ibid.*, 396–97.

38 *Ibid.*, 394.

privilege of enlightening the public is by no means limited to dissemination of news in the sense of current events but extends far beyond to include all types of factual, educational and historical data, even entertainment and amusement, concerning interesting phases of human activity in general.³⁹

Considering this expansive view of newsworthiness, the Court reasoned that fantasy sports operators' use of players' names, images and statistics was analogous to the publication of the same information in newspapers and websites.⁴⁰ Echoing the Eighth Circuit's decision in *CBC Distribution*, the Court noted that 'it would be strange law that a person would not have a First Amendment right to use information that is available to everyone'.⁴¹ Since fantasy sports operators used factual data combined with a 'significant creative component' that allowed consumers to 'interact with the data in a unique way', the Court held that use of the data is protected by the First Amendment.⁴²

Although limited in scope to Indiana's right of publicity statute, the decision in *FanDuel* suggests that DFS operators will continue to hold the upper hand in publicity cases, including in a post-*Murphy* legalised gambling industry. However, unanswered questions remain: how far can fantasy sports organisations go in using player avatars in connection with their services? What is the line between these fantasy products and the video gaming industry? Do the different outcomes of these cases rest primarily in the creation of interactive, player avatars that are central to the video game play itself versus the primarily non-interactive, data-based use of player information for DFS leagues?⁴³ As technology and the law evolve, this line may shift and will surely be the subject of debate. Past rulings are uncertain predictors of future results because of the patchwork of state cases that form the basis for these federal cases.

Influence of fantasy sports cases on future sports-betting litigation

In light of the US Supreme Court's decision in *Murphy*, paving the way for legalised sports betting on a state-by-state basis, the question of how athletes' rights intersect with this growing industry is certain to play out in the courts. Are the results in DFS cases accurate predictors of how such cases will be resolved by the gambling industry writ large? Given the similarities between traditional sports-betting and fantasy sports leagues, the plaintiffs in *FanDuel* already argued that fantasy sports operators were violating Indiana's

39 *Ibid*, 396.

40 *Ibid*.

41 *Ibid*.

42 *Ibid*, 398.

43 See n 4 above, *Davis*, 1179.

prohibition on sports betting – an issue the Indiana Supreme Court failed to address.⁴⁴

Current publicity cases suggest that sports betting will follow the trend set by fantasy sports leagues – with appropriation falling within a newsworthiness or public interest exception to players' publicity rights. Given the factual nature of the data being used, appropriating players' name and likeness in conducting sports betting should remain analogous to the publication of the same information in newspapers – a use that is already recognised as acceptable under the First Amendment.⁴⁵ Operators of sports-betting platforms may also emphasise that they are using data that is generally publicly available. A quick Google search for 'NFL leaderboards', 'NBA standings' and 'MLB leaders' will populate numerous player statistics available through a multitude of media outlets.⁴⁶ These statistics typically appear alongside photos of each player, in addition to their team and corresponding jersey number. There remain good reasons why both DFS and gambling companies may want to strike deals with players unions, however, including 'the ability to use names and likenesses for more expansive promotional purposes'.⁴⁷

Fundamentally, athletes asserting a right to publicity against betting operators will have to overcome the same obstacle they faced in fantasy sports league claims: how can their right to publicity trump the First Amendment right to use publicly available factual information? However, the most likely wildcard in this area is the movement in state legislatures to provide increased protections to athletes, including amateur athletes.

California's Fair Pay to Play Act challenges NCAA's amateurism rules

One of the latest legislative developments in sports law is California's passage of the Fair Pay to Play Act on 30 September 2019, with the law set to take effect on 1 January 2023. The Act passed overwhelmingly, and is designed to provide amateur athletes with an opportunity to profit from their NIL and also allows athletes to sign with agents.⁴⁸ The

44 See n 20 above, *FanDuel*, 878.

45 *Ibid*, 396.

46 NFL, 'Player Stats', www.nfl.com/stats/player; NBA, 'NBA Advanced Stats', accessed 3 April 2020; see <https://stats.nba.com/players> accessed 3 April 2020; ESPN, 'MLB Statistics – 2019', www.espn.com/mlb/statistics accessed 31 March 2020.

47 Bill Donahue, 'Players Face Long Odds To Win Gambling Likeness Fees', *Law360* (31 May 2018), www.law360.com/articles/1049078 accessed 31 March 2020.

48 2019 California Senate Bill No 206, California 2016–2020 Regular Session.

National Collegiate Athletic Association (NCAA) opposed the bill⁴⁹ as its current amateurism rules bar players from earning a profit from their participation in collegiate sports.⁵⁰ The NCAA argued that the law ‘would erase the critical distinction between college and professional athletics and, because it gives [California] schools an unfair recruiting advantage, would result in them eventually being unable to compete in NCAA competitions’. In the wake of California’s law, at least nine other states are considering a similar version of a fair pay to play act, including Colorado, Florida, Illinois, Kentucky, Minnesota, Nevada, New York, Pennsylvania and South Carolina.⁵¹ Federal law-makers have raised the prospect of proposing national legislation to allow collegiate athletes the chance to earn endorsement money.⁵²

California’s law (despite not going into effect until 2023) and the prospect of other follow-on legislation appears to have spurred change, with the NCAA’s board of directors voting on 29 October 2019 to allow student collegiate athletes ‘the opportunity to benefit from the use of their name, image and likeness in a manner consistent with the collegiate model’.⁵³ That decision followed the NCAA board’s appointment of a working group to study NIL-related issues raised by the proposed state and federal legislation. The form and acceptability to athletes and schools of any NCAA-endorsed compensation model for student athletes’ NIL remains to be seen, however.

Mark Emmert, President of the NCAA, has noted that the bill could have dire consequences on student athletes, and has hinted that California schools may not be eligible to compete for NCAA championships if the bill passes.⁵⁴ For now, however, one thing seems certain: the passage of the Fair Pay to Play Act is likely to dramatically affect the legal landscape for right of publicity cases, including the incentives of athletes who may soon have new tools at their disposal to profit from their NIL.

49 T Baker, ‘California Should Call the NCAA’s Bluff and Pass the Fair Pay to Play Act’ (*Forbes*, 27 June 2019), www.forbes.com/sites/thomasbaker/2019/06/27/california-should-call-the-ncaas-bluff-and-pass-the-fair-pay-to-play-act/#118197e55629 accessed 31 March 2020.

50 *Ibid*; see also NCAA, ‘Amateurism’, www.ncaa.org/student-athletes/future/amateurism accessed 31 March 2020.

51 Charlotte Caroll, ‘Tracking NCAA Fair Play Legislation Across the Country’, *Sports Illustrated* (2 October 2019), www.si.com/.amp/college/2019/10/02/tracking-ncaa-fair-play-image-likeness-laws accessed 31 March 2020.

52 *Ibid*.

53 NCAA, ‘Board of Governors starts process to enhance name, image and likeness opportunities’ (29 October 2019), www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities accessed 31 March 2020.

54 *Ibid*.

Conclusion

The Supreme Court's decision striking down the federal law banning state-sponsored gambling comes at the time when both amateur and professional athletes' interests in monetising their NIL are at a peak. While the landscape is unsettled, athletes, players unions and entertainment and gambling companies all have legal precedents upon which to draw in assessing risks and enforcing their rights going forward. As ever, even in the face of new state and federal legislation, the First Amendment remains a powerful tool for those who wish to use publicly available information, even in a commercial way. A collision between these laws and the Constitution and prior precedents may be just over the horizon, and the stakes are as high as ever. Game on.