A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime

Marc Edelman

TABLE OF CONTENTS

I. INTRODUCTION ........................................ 3

II. THE HISTORY OF FANTASY SPORTS LEAGUES ............... 4
   A. Before Fantasy Sports ............................... 4
   B. A New Game is Created ............................ 5
   C. The First Rotisserie League Baseball Auction ............ 7
   D. Rotisserie Baseball Grows in Popularity ................ 8
   E. The Internet Boom .................................. 9

III. THE FANTASY SPORTS INDUSTRY TODAY ...................... 11

1 Marc Edelman is a member of the faculty at Barry University’s Dwayne O. Andreas School of Law in Orlando, FL and a summer adjunct professor at Fordham University School of Law in New York, NY (Marc@MarcEdelman.com). Professor Edelman earned his B.S. in economics from the Wharton School (University of Pennsylvania) and both his J.D. and M.A. from the University of Michigan. While a law student at the University of Michigan, Professor Edelman founded the fantasy sports dispute resolution business, SportsJudge.com. In addition, Professor Edelman has served as a legal consultant to various fantasy sports businesses.

Professor Edelman wishes to thank Amit Schlesinger, Erica Cohen, Kristen Chiger and Raleigh Webber for their research assistance. He also wishes to thank his wife, Rachel Leeds Edelman, for her assistance in developing the concept for a course in Fantasy Sports & the Law, and the students in his 2011 seminar on Fantasy Sports & the Law for providing their insights on fantasy sports gaming.

Professor Edelman retains full copyright to this article and has agreed to provide the Harvard Journal of Sports and Entertainment Law with an irrevocable license to publish this work.

Copyright © 2011 by the President and Fellows of Harvard College.
A. Different Types of Fantasy Games .................................................. 11
  1. Different Fantasy Sports ...................................................... 12
  2. Different Ways to Initially Allocate Players .......................... 13
  3. Different Season Lengths .................................................. 15
B. The Stakeholders ................................................................. 16
  1. Participants ................................................................. 16
  2. Host Sites ........................................................................... 19
  3. Commissioners ................................................................. 21
  4. Treasurers ........................................................................... 22
  5. Strategic Advisors ............................................................. 24
  6. Insurers .............................................................................. 25

IV. Legal Risks for Fantasy Sports Host Sites ......................... 25
  A. State Gambling Law ............................................................. 26
     1. Is Fantasy Sports Illegal Gambling under State Law? .... 26
     2. Is Fantasy Sports Illegal Gambling? (Majority View) .... 29
     3. Stricter Views Toward Fantasy Sports ....................... 30
     4. Montana’s Alternative Test of Fantasy Sports .......... 33
  B. Federal Gambling Law ............................................................ 34
     1. Interstate Wire Act of 1961 ............................................. 34
     2. Illegal Gambling Business Act ...................................... 35
     3. Professional and Amateur Sports Protection Act .... 36
     4. Uniform Internet Gambling Act ................................... 37
  C. Intellectual Property Laws .................................................... 38
     1. Patent Law ..................................................................... 38
     2. Copyright Law ............................................................... 39
     3. Trademark Law ............................................................. 40
     4. Right to Publicity ........................................................... 42

V. Legal Risks for Fantasy Sports Participants ....................... 45
  A. Criminal Liability under Gambling Laws ......................... 45
  B. Civil Liability for Gambling Activities ............................ 46
  C. Violating Company Anti-Solicitation Policies .................. 46
  D. Bankruptcy ...................................................................... 47

VI. Legal Risks for Ancillary Fantasy Sports Businesses ............... 48
  A. Fantasy Sports Treasury Sites ............................................ 48
  B. Fantasy Sports Advisors .................................................... 49
  C. Fantasy Sports Insurance ................................................... 51
  D. Fantasy Sports Dispute Resolution ................................. 52

VII. Conclusion ............................................................................. 52
I. Introduction

America is in the midst of a “fantasy sports revolution” that is changing the way sports fans interact with one another. With more than 30 million Americans playing fantasy sports, today’s sports fans spend as much time predicting the performance of professional athletes as Wall Street investors spend predicting stocks and bonds.

Some fantasy sports contests, such as the World Championship of Fantasy Football, charge participants entry fees in the thousands of dollars, and offer grand prizes upwards of $300,000. Meanwhile, other business ventures, such as Bloomberg Sports, sell fantasy participants “analytical tools” and “expert advice.” One insurance carrier, Fantasy Sports Insurance, has even begun to offer fantasy participants insurance policies against injury to their star fantasy players.

Nevertheless, with the rapid and unexpected emergence of fantasy sports, few have devoted time to understanding how U.S. law applies to fantasy sports businesses and their participants. Thus, many have misconceptions about the law of fantasy sports.

This article explains how U.S. law regulates the emerging fantasy sports industry. Part I of this article provides an overview of the history of

---


4 See generally Fantasy Football Website Aims to Choose the Best Athletes Using a Formula Derived from Wall Street. Its Creators are Most Definitely Bullish on Fantasy Sports, FLA. SUN-SENTINEL, Aug. 26, 2009, at 1D (drawing comparisons between the selection of fantasy sports teams and investment portfolios).


6 See infra, notes 161 -164 and accompanying text.

7 See infra notes 165 - 169 and accompanying text.
fantasy sports leagues. Part II explores the fantasy sports industry today. Part III explains how U.S. laws apply to fantasy sports host sites. Part IV discusses how U.S. laws apply to fantasy sports participants. Finally, Part V applies U.S. laws to businesses that provide ancillary services to fantasy sports host sites and participants.

II. The History of Fantasy Sports Leagues

A. Before Fantasy Sports

For the American sports fan, professional sports once meant simply an opportunity to attend games, root for teams, and second-guess "the men who ran [the] teams." Then, in the 1920s, the company Ethan Allen released a "table game" called All-Star Baseball, which allowed baseball fans to simulate team management by choosing a "team" from a collection of player cards and selecting the team’s lineup. Each player’s performance in All-Star Baseball was determined by probabilities that were derived from the players’ actual past performances, in conjunction with the random event of rotating a spinner over these cards.

For almost forty years, All-Star Baseball was seen as the best way for sports fans to simulate team management. Then, in 1961, Hal Richman, a Bucknell University mathematics student, devised a more complex simulation game. Richman’s game, Strat-O-Matic Baseball, included one play-
ing card for each Major League Baseball player. Each card contained various ratings and result tables that corresponded to dice rolls. For each game, Strat-O-Matic participants would select teams and batting orders, roll the dice, and then review charts to determine game results.

By the 1980s, many other companies had joined Ethan Allen and Strat-O-Matic in the simulation sports market, with some companies, such as Micro League Baseball and Avalon Hill, providing their games digitally via the computer. One of the benefits of playing sports simulation games on the computer was the increased range of managerial options. However, much like the earlier “table games,” the computer sports simulations still had one significant limitation: they did not allow participants to showcase managerial prowess by predicting future events.

B. A New Game is Created

With both traditional “table games” and “computer simulation games” failing to provide sports fans with a way to predict players’ future performances, some highly educated sports fans began to experiment with ways of creating sports simulation games that incorporated future events. One of the first people to construct a forward-looking baseball simulation game was Bill Gamson, a psychology professor at Harvard University and the University of Michigan. Gamson’s game, which he called “The Baseball Seminar,” included a series of participants who paid a ten-dollar entry

---

13 See Miller, supra note 12.
15 See Miller, supra note 12; Bieretmpfe, supra note 14.
16 See generally Miller, supra note 12 (noting how computer-based simulation games began to replace card-based games).
17 See Micro League Baseball Instructions, http://www.stadium64.com/manuals/microleaguebaseball.htm (noting that Micro League Baseball participants were able to make players steal bases and bunt).
18 See generally Amorak Huey, What if Sports Provides Surfers with Dream Matchups, GRAND RAPIDS PRESS, Mar. 8, 2005, at D2 (comparing fantasy sports with simulation sports games).
19 Id.
fee to “draft” a team of baseball players. The winner of Gamson’s game was the participant who, over the course of an actual Major League Baseball season, selected players who earned the most points in a pre-determined set of statistical categories.

One of Gamson’s “Baseball Seminar” participants was Robert Sklar, a retired reporter for the Los Angeles Times who, at the time, taught journalism and film studies at the University of Michigan. In 1965, Sklar mentioned “The Baseball Seminar” to one of his mentees, Daniel Okrent. Almost fifteen years later, while working as a journalist for Texas Monthly, Okrent decided to revive “The Baseball Seminar” as a fun competition among some of his journalist and advertising friends.

Okrent first proposed the game to his friends in November 1979, over lunch at a now-defunct New York French bistro, La Rotisserie Francaise. After his friends expressed enthusiasm, Okrent contacted Sklar, who, by this time, was teaching film studies at New York University’s Tisch School of

---

21 See Hancock, supra note 20; Allis, supra note 20 (noting that Bill Gamson called his game a “Seminar” to reduce any association between it and illegal gambling).

22 See Hancock, supra note 20; Allis, supra note 20; Shea, supra note 20.

23 See Hancock, supra note 20 at 324. See generally William Grimes, Robert Sklar, 74, Historian Who Put Films in Context (Obituary), N.Y. Times, Jul. 12, 2011, at A20 (noting that Sklar was best known as a scholar for his 1975 book “Move-Made America,” which “was one of the first histories to place Hollywood films in a social and political context, finding them a key to understanding how modern American values and beliefs have been shaped.”).

24 See Van Riper, supra note 3 at 24; Hancock, supra note 20 at 324; Fantasy Baseball’s Reality Defies Belief, DETROIT NEWS, Apr. 17, 2005, at C1, available at 2005 WLNR 2698158.

25 See Walker, supra note 5; see also, Fantasy Sports Born on 1979 Flight to Texas, MYRT. BEACH SUN NEWS (Myrtle Beach, SC), Dec. 18, 2005, at B8, available at 2005 WLNR 20423098; Dave Cunningham, Still Cookin’: Rotisserie Baseball Celebrates its 20th Year, ORL. SENTINEL, Mar. 26, 2000, at C10; Brad Townsend, It Began as a Pastime Among New York Literati, But Rotisserie Baseball Soon Wound up Firing up a Fantasy World, DALL. MORNING NEWS, Sept. 19, 2003, at 1C; Patrick Hruby, The Case Against Fantasy Sports, WASH. TIMES, Apr. 29, 2003, at C1 (describing Daniel Okrent’s creation of Rotisserie Baseball on a plane flight from New York, NY to Austin, TX).

26 See Fantasy Sports Born on 1979 Flight to Texas, supra note 25; see also Mike Hale, The Few Who Founded Fantasy Baseball, N.Y. TIMES, Apr. 20, 2010, at C4 (describing the role of an inaugural owners meeting at La Rotisserie Francaise); Fred Ferretti, For Major-League Addicts, A Way to Win a Pennant, N.Y TIMES, July 8, 2000, at 8.
2012 / A Short Treatise on Fantasy Sports and the Law

the Arts. With Sklar’s help, Okrent updated the game’s rules and announced the founding of the original Rotisserie League.28

C. The First Rotisserie League Baseball Auction

In April 1980, Okrent and his friends returned to the La Rotisserie Francaise restaurant, along with Sklar, to conduct the first-ever Rotisserie League baseball player auction.29 For purposes of this auction, each of the league’s ten participants posted a $260 entry fee.30 Each participant then used his $260 entry fee to bid on players from Major League Baseball’s National League rosters.31

According to the original Rotisserie League rules, each participant earned points based on his selected players’ real-life performances in eight statistical categories: four based on hitting, and four on pitching.32 At the end of the Major League Baseball season, the Rotisserie League participant

27 See Fantasy Baseball’s Reality Defies Belief, supra note 24 (providing a profile of the original Rotisserie League team owners); Grimes, supra note 23 (noting Robert Sklar’s appointment by New York University).

28 See Josh Robbins, Geek Games: It’s Been 25 Years Since 11 Fans Held the First Rotisserie Auction, ORL. SENTINEL, Jun. 8, 2005, at D1 (discussing Daniel Okrent’s role in creating, and then reshaping, the Rotisserie League rules); see also Allis, supra note 20 at A6 (describing Sklar as the link between Gamson’s Baseball Seminar and Okrent’s Rotisserie Baseball).

29 See generally Dan Raley, Living in a Fantasy World: Rotisserie Leagues have Turned Fans into Fanatics, SEATTLE POST-INTELLIGENCER, Apr. 6, 1996, at D1 (noting that “Fantasy or Rotisserie League baseball [began with] exactly 11 people in 1980”); see also Townsend, supra note 25; Ethan Skolnick, It’s All Geek to Them, PALM BEACH POST, May 16, 1999, at 11B; Ferretti, supra note 26 at 8 (noting that the full group of inaugural owners in the Rotisserie League included: “Cork Smith, an editor at Viking and owner of the Smith Coronas; Bruce McCall, an advertising writer, the McCall Collects; Bob Sklar, a film and television critic, the Sklargazers; Tom Guinzberg, former Viking editor, the Burghers; Michael Pollet, a lawyer, the Pollet Burros; Miss Salembier, associate publisher of Ms. magazine; Mr. Fleder, an editor at Esquire; Mr. Waggoner, an assistant vice president of Columbia University; Mr. Eisenberg, a writer at Esquire, and Dan Okrent, a freelance writer, owner of the O Fenokees, and league commissioner.”).

30 See Skolnick, supra note 29; Fred Mitchell, Rotisserie Baseball Isn’t Just a Passing Fantasy, CHI. TRIB., Apr. 11, 1989, at 1.

31 See Skolnick, supra note 29.

32 Id. (noting the original four hitting categories included runs scored, runs batted in home runs and steals; the original four pitching categories included earned run average, wins, saves and strikeouts); see also Cunningham, supra note 25; Ferretti, supra note 26.
whose team earned the most points would receive a cash prize, as well as a dousing in the chocolate drink Yoo-Hoo.\textsuperscript{33}

\textbf{D. Rotisserie Baseball Grows in Popularity}

The original Rotisserie League began "almost as a tongue-in-cheek exercise,"\textsuperscript{34} and as an attempt by hard-working New Yorkers to have "some goofy, albeit at times absurdly competitive, fun."\textsuperscript{35} However, because many members of the Rotisserie League were also members of the media, the Rotisserie League garnered national attention.\textsuperscript{36}

Several members of the press published stories about the Rotisserie League during its inaugural 1980 season.\textsuperscript{37} For example, just four months after the league’s inaugural auction, \textit{New York Times} reporter Fred Ferretti published an article that detailed the league’s participants and performance.\textsuperscript{38} Then, a few weeks later, the \textit{CBS Morning News} produced a story on the league.\textsuperscript{39} Shortly thereafter, members of the Rotisserie League even agreed to publish a book to "introduce the game to the masses."\textsuperscript{40}

As baseball fans came to learn about the Rotisserie League, their game began to develop a cult following among statistically-oriented sports fans.\textsuperscript{41} Like any new game, different groups added their own nuances to the rules.\textsuperscript{42}

\textsuperscript{33} See Cunningham, \textit{supra} note 25; Skolnick, \textit{supra} note 29.
\textsuperscript{34} Walker, \textit{supra} note 5.
\textsuperscript{35} Townsend, \textit{supra} note 25.
\textsuperscript{36} See Tim Feran, \textit{Back in the Game: Major League Baseball Trying to Reattract Fantasy Players with New Online Forum}, \textit{Columbus Dispatch}, Apr. 3, 2006, at 2006 WLNR 5582002; see also Hale, \textit{supra} note 26 ("Most of those team owners were writers, editors or publishers, which guaranteed publicity.").
\textsuperscript{37} See infra notes 38 - 39 and accompanying text.
\textsuperscript{38} See Ferretti, \textit{supra} note 26 at 8; Townsend, \textit{supra} note 25 at 1C.
\textsuperscript{39} Townsend, \textit{supra} note 25 at 1C.
\textsuperscript{40} Walker, \textit{supra} note 5, at 1D.
\textsuperscript{41} See Cunningham, \textit{supra} note 25 at C10; see also \textit{A Whole Different Ball Game}, \textit{Atlantic}, June 1, 1985, at 30, \textit{available at 1985 WLNR 1370459} (noting that by 1985, the Rotisserie League Baseball Association included 157 leagues, across 48 states); Craig Davis, \textit{The Paper Tigers: Americans’ Teams Just Read the Box Scores: It’s Not Whether they Win or Lose but How they Played Last Game}, \textit{Fla. Sun-Sentinel}, Mar. 22, 1988, at 1C (noting that by 1988 there were really 1,000 fantasy baseball leagues in America and 15,000 to 20,000 team owners).
Some early participants added a fifth statistical category for both batters and pitchers.43 Others replaced the player auction with a draft to select players.44 Still others replaced the points-based scoring system with a head-to-head system in which fantasy team-owners played against different fantasy teams each week.45 However, even as individual leagues added their own nuances, most leagues adopted the original Rotisserie League’s core rules.46 These core rules were thereafter adopted into fantasy games revolving around other sports.47

E. The Internet Boom

By the early 1990s, America was already in the midst of a growing fantasy sports revolution, featuring “[fantasy] magazines, season guides, radio shows, statistical services, management groups, sportswear and newsletters.”48 Yet to many, fantasy sports were seen as “activit[ies] for outcasts [and] engaged [in] by those presumed to be overly bookish and socially challenged.”49 One of the drawbacks to playing fantasy sports was the

18 Fordham Intell. Prop. Media & Ent. L.J. 891, 898 (2008) (noting a similar process of moving toward standardized rules also takes place in real sports, such as professional baseball).

43 See Cunningham, supra note 25 at C10. See generally Walker, supra note 5 at 1D (mentioning the ten-category league format).

44 See Cunningham, supra note 25 at C10; see also Frank Clancy, For Rotisserie Baseball Fanatics, A Grand Sham, L.A. Times, Apr. 30, 1986, at 1 (mentioning, as early as 1986, that some fantasy baseball leagues had moved from an auction to a draft format); White, supra note 42 at C6 (also discussing the option of a league draft).

45 See Cunningham, supra note 25 at C10; see also White, supra note 42 at C6 (noting that by 1990 some fantasy baseball leagues had moved to a head-to-head format); Ed Spaulding, Charpentier’s Fantasy Football Digest Now a Real Winner, Hous. Chron., Jul. 21, 1991, at 16 (mentioning the head-to-head format of fantasy sports).


47 Id.

48 Cunningham, supra note 25 at C10.

amount of paperwork involved in calculating both individual player statistics and team statistics.\(^{50}\)

Then, in 1994, the Internet came along and changed everything.\(^{51}\) The Internet boom brought a “broad demographic shift in fantasy sports participation”\(^{52}\) because it enabled fantasy sports participants to instantaneously download tabulated statistics.\(^{53}\) Thus, fantasy sports participants no longer needed pads of paper and calculators.\(^{54}\) In addition, the Internet brought participants together from around the globe, whereas before fantasy sports participants had “to scramble to find playmates.”\(^{55}\)

With the Internet’s facilitation of fantasy sports, by the mid-1990s a number of traditional sports and entertainment companies had begun to enter the online fantasy sports marketplace.\(^{56}\) The first of these companies to provide fantasy sports games on the web was the Entertainment Sports Programming Network (“ESPN”), which in 1995 launched its first entirely Internet-based fantasy baseball game.\(^{57}\) By the year 2000, ESPN had ex-

\(^{50}\) See Dennis Lynch, Software Helps Handle Hassles of Running a Fantasy League, Chi. Trib., Sept. 17, 1998, at 7 (explaining that even though millions participate in fantasy sports leagues, “the major drawback of such play has been the paperwork involved,” and that “[t]he process of compiling statistics and sending out standings is time-consuming and tedious.”).

\(^{51}\) See infra notes 52 - 58 and accompanying text; see also Nicholas Bamman, Is the Deck Stacked Against Internet Gambling? A Cost-Benefit Analysis of Proposed Regulation, 19 J.L. & Pol’y 231, 232 (2010) (noting that Internet gambling today is a $24 billion annual industry, with about 25 percent of revenues derived from the United States); Kevin F. King, Geolocation and Federalism on the Internet: Cutting Internet Gambling’s Gordian Knot, 11 Colum. Sci. & Tech. L. Rev. 41, 71 (2010) (noting that Americans today spend roughly $7 billion per year on Internet gambling).


\(^{54}\) Id.


\(^{56}\) See infra notes 123 – 136 and accompanying text.

panded its fantasy sports offerings into football, basketball, hockey, NASCAR, soccer, golf, and even fly fishing.\(^{58}\)

### III. The Fantasy Sports Industry Today

#### A. Different Types of Fantasy Games

Fantasy sports today represent approximately a $5 billion per year industry.\(^{59}\) Given the size of the fantasy marketplace, fantasy games are now subcategorized based on three attributes: (1) sport; (2) way of initially allocating players; and (3) season length.\(^{60}\)

---

\(^{58}\) Id.; see also Patrick Hruby, *The Case Against Fantasy Sports*, *Wash. Times*, Apr. 29, 2003, at C1; Steve Brearton, *Fantasy Sports, Real Money: How the Fantasy Sports Leagues went from a Cute Office Diversion to a $3 Billion (U.S.) Industry, Providing Daydreams for up to 30 Million North American Sports Fanatics*, *Globe & Mail* (Toronto, Canada), Apr. 24, 2009, at 56 (noting that in 2009 FLW Outdoors Fantasy Fishing offered $10 million in prizes during its Fantasy Fishing for Millions competition); Chris Dempsey, *Fantasy Revolution Online Craze is Intoxicating to Americans, and Expanding Outside the Sports World*, *Denv. Post*, Sept. 9, 2007, at B3 (“Fantasy NASCAR is growing, as is fantasy golf. There is fantasy tennis, fantasy soccer (who is Chelsea’s top midfielder again?), fantasy lacrosse, fantasy cricket and fantasy bass fishing.”); cf. Anthony Vecchione, *Fantasy Sports: Has Recent Anti-Gambling Legislation ‘Dropped the Ball’ by Providing a Statutory Carve-Out for the Fantasy Sports Industry*, 61 *SMU L. Rev.* 1689, 1693 (2008) (“A survey of fantasy sports players published in a 2003 article showed that 65% had football teams, 27% had baseball teams, 24% had basketball teams, 11% had hockey teams, 9% had NASCAR teams, and 3% had golf teams.”).

\(^{59}\) See Zach O’Malley Greenburg, *Get Real*, *Forbes*, Mar. 16, 2009, at 70 (“Add all these betting sums to revenues from magazine sales and stat-service subscriptions and you get $468 per player, reports the Fantasy Sports Trade Association. That makes for a $5 billion industry, not including undisclosed amounts from ads.”). Cf., Mike Klis, *NFL Preview ’07 Football Nation: Fantasy Football*, *Denv. Post*, Sept. 6, 2007, at J8 (“Fantasy football grosses more than $1 billion a year, and that doesn’t include the private pots accumulated from the 4 million players in the free Yahoo.com league.”); Tim Feran, *Back in the Game: Major League Baseball Trying to Reattract (sic) Fantasy Players with New Online Forum*, *Columbus Dispatch*, Apr. 3, 2006, *available at 2006 WLNR 5582002* (A 2006 “survey produced for the [Fantasy Sports Trade Association] indicates that more than $3 billion is spent annually on publications, league fees, commissioner services, transaction fees and the purchase of fantasy-sports-site content.”).

\(^{60}\) See infra notes 61 - 100 and accompanying text.
1. Different Fantasy Sports

Today’s fantasy participants play games in a wide range of different sports.\textsuperscript{61} Fantasy football is currently the most popular, with an estimated 20 million participants per year.\textsuperscript{62} Indeed, at present “[t]he [fantasy] football season generates more revenue than the rest of the sports combined.”\textsuperscript{63}

Fantasy baseball is second in terms of popularity, with approximately 11 million annual participants.\textsuperscript{64} While most sports fans consider fantasy baseball to be the original fantasy sport, one of the challenges in building its popularity is the extended length of the Major League Baseball season, and the need for fantasy baseball owners to monitor their teams on a more frequent basis than owners in other fantasy games.\textsuperscript{65}

Immediately behind fantasy baseball in popularity lie fantasy racing, basketball, and hockey.\textsuperscript{66} According to the Fantasy Sports Ad Network, as of August 2006 there were 4.6 million participants in fantasy racing games (including fantasy NASCAR), 3.2 million participants in fantasy basketball games, and 1.9 million participants in fantasy hockey.\textsuperscript{67}

\textsuperscript{61} See infra notes 62 - 71 and accompanying text.

\textsuperscript{62} See Mike Vaccaro, NFL Strife is Leaving Fans Awash in Denial, N.Y. POST, May 13, 2011, at 72 (noting that in 2010 nearly 20 million people played fantasy football); see also Larry Copeland, Americans Give Thumbs Up to Free Time – Mostly TV, USA TODAY, Dec. 23, 2010, at 4A (noting that between 20 million and 30 million Americans play fantasy football); Gene Wang, High-Stakes League Offers Camaraderie - and Agony of Defeat, VIRGINIAN PILOT & LEDGER STAR (Norfolk, VA), Nov. 25, 2010, at 7.

\textsuperscript{63} Gene Wang, Fantasy Football Gets Benched, WASH. POST, May 29, 2011, at D3.

\textsuperscript{64} See This is Not a Fantasy: Baseball Takes Legal Twist, Players Turn to Lawyers to Mediate League Disputes, S. FLA. SUN-SENTINEL, Apr. 2, 2010, at A1 (noting that there are more than 11 million fantasy baseball participants in the United States); Richard Wilner, Opening Day – Bloomberg Brings Numbers Game to Baseball Statistics, N.Y. POST, Mar. 21, 2010, at 38.

\textsuperscript{65} See Chuck Corder, Small Talk, PENSACOLA NEWS, Aug. 23, 2005, at D1, available at 2005 WLRN 27180356 (discussing “daily transactions” as the downfall of fantasy baseball).

\textsuperscript{66} See This is Not a Fantasy, supra note 64 at A1 (referencing “fantasy basketball” and “fantasy NASCAR”); Childs Walker, No More Chilly Reception for Fantasy Hockey Leagues, BALT. SUN, Sept. 21, 2006, at E2; see also, infra, note 67 and accompanying text.

Finally, one other fantasy game worth noting is fantasy golf.68 Fantasy golf is a niche game with a limited number of participants.69 However, because the demographics of golf fans skew toward the higher income brackets, fantasy golf games often include high entry fees and high prize pools.70 To meet the needs of golf fans, companies such as Fantasy Pro Tour Golf have recently begun to offer fantasy golf contests with prizes up to $3,000 per season.71

2. Different Ways to Initially Allocate Players

For each type of fantasy sport, there are four potential ways to initially allocate players.72 The original way to allocate players in fantasy sports was through an auction.73 Traditional auctions, the type used by the Rotisserie League, involve a bidding process among participants for players, one player at a time.74 Each player is ultimately assigned to the participant that bids the greatest amount from a fixed sum of money for that player.75 This continues until every team has “purchased” a full roster of players.76

A second way to allocate players is through a “modified auction.”77 In a modified auction, the price of each player is determined before the competition begins, and multiple participants in a single league may select the same player.78 The modified auction is especially popular in short-duration leagues because it does not require all of the league’s participants to simulta-
neously select players. However, the downside to a modified auction is that it removes the element of “trading” from fantasy sports because trading players would not make sense if a particular player is already on more than one team’s roster.

A third way that some fantasy sports leagues allocate players is through a league draft. Draft leagues take their inspiration from the way in which new players are allocated in the majority of real, professional sports leagues. Most fantasy sports leagues that begin their season with a draft adopt a “snake format draft,” meaning that participants select players in rotation, often with the same owner who selected first in round one, selecting last in round two, and vice-versa. The initial draft order is often determined by a random event. However, in some of the more comprehensive fantasy sports competitions, owners have the opportunity to express their preference for a particular draft position before the draft begins.

Finally, in some rare cases, fantasy participants agree to have players allocated to their teams randomly by software provided by the league’s host site. For example, a growing number of host sites (such as ESPN.com), provide an “Autopick Draft Option,” in which a computer program, rather

79 See, e.g., Rules, supra note 78.
81 See Marc Edelman & Brian Doyle, Antitrust and “Free Movement” Risks of Expanding U.S. Professional Sports Leagues into Europe, 29 N.W. J. INT’L L. & BUS. 403, 406–7 (2009) (“The first-year player draft in [American professional sports leagues] is a procedure under which clubs allocate negotiating rights to prospective players in inverse order of the clubs’ previous season on-the-field performance. . . .[T]he team with the poorest playing-field record during the previous season has the first choice of a player seeking to enter the league for the following season. The team with the next poorest record has the second choice, and so on until the team with the best record has picked. . . . These rounds continue until an appropriate number of players is selected.”).
82 See Walker, supra note 5, at 1D.
83 See, e.g., Fantasy Football 2011, supra note 80 (stating that “[t]he order of the draft will be randomly generated between midnight and 6:00 AM ET either the day of, or the day before the draft.
85 See infra note 86 and accompanying text.
than a participant, “automatically drafts players to each team in the league
on a scheduled draft date.”86 Despite the efficiency of the “Autopick Draft
Option,” this option remains relatively unpopular because it removes all
skill from the drafting of players.

3. Different Season Lengths

Fantasy sports leagues also differ based on the lengths of their fantasy
seasons.87 Seasonal leagues (also known as “redraft leagues”) are the most
common fantasy-season length.88 In a seasonal league, the fantasy competi-
tion begins on the first day of a professional sport’s regular season, and con-
cludes on the last day.89 Thus, none of the fantasy team’s rosters or
information carries over from one year to the next.90 Rather, at the end of
the season, the league ceases to exist.91 If the league’s participants thereaft
wish to compete against each other for another season, the participants will
need to conduct an entirely new player auction or draft before the following
season begins.92

Somewhat less common than seasonal leagues are perennial leagues
(also known as “keeper leagues”) that extend beyond a single professional
sports season.93 The two main types of perennial leagues are dynasty leagues
and rollover leagues.94 In a dynasty league, each fantasy participant’s entire
roster is carried over through the off-season, so fantasy participants are able
to make player trades with one another during the off-season time period.95
Meanwhile, in a rollover league, “each team can ‘keep’ a set number of

resources/help/content?name=drafts-autopick (last visited Nov. 7, 2011).
87 See Definitions of the Various Fantasy Sports Leagues, SPORTS FANATICS FANTASY
BASEBALL, (Dec. 26, 2002), http://www.sportfanatics.net/Articles/General/
Types_Of_Fantasy_Sport_Leagues.htm.
88 See id.
89 See id.
90 See id.
91 See id.
92 See id.
93 See id.; see also Liz Farmer, Web Sites Offering Arbitration for Fantasy Sports Dis-
putes, DAILY REC. (Baltimore, MD), Sept. 10, 2007 (describing leagues where teams
keep players beyond a given season as “keeper leagues”).
94 See Definitions of the Various Fantasy Sports Leagues, supra note 87.
95 See id., supra note 87. See also David Kendricks, Pure Fantasy, SAN ANTONIO
EXPRESS-NEWS, Jan. 6, 2007, at 2C (describing a “dynasty league” as one where a
fantasy participant can keep a player on his team for as many years as he wants); see
players at the end of each season to be on their roster for next year,” with each participant filling in the remainder of his roster through a supplemental auction or draft.96

Finally, some fantasy sports seasons last for less than one full professional sports season.97 Of these partial season leagues, the most popular are daily leagues, which involve participants joining, paying entry fees, selecting players, and receiving prize money, all in a single day.98 According to Brian Schwartz, the founder of the daily fantasy league website DraftStreet.com, daily fantasy sports leagues “appeal to aggressive fantasy sports players looking for more instant gratification than traditional fantasy leagues can offer.”99 However, as Wall Street Journal fantasy sports reporter Nando DiFino has noted, daily games have struggled to “shake off the stigma of gambling.”100

B. The Stakeholders

Within each of these types of fantasy sports games, there are six different stakeholder groups involved in the action.101

1. Participants

Participants are the individuals who compete in the fantasy sports leagues.102 In 2010, there were more than twenty-five million fantasy sports

also Cathy Fazio, The Tribe Has Spoken, Liven up Your League, GRAND RAPIDS PRESS, Jan. 20, 2005, at D2.

96 See Definitions of the Various Fantasy Sports Leagues, supra note 87.


99 See Left Tackle, supra note 97.

100 DiFino, supra note 97.

101 See infra notes 102 - 169 and accompanying text.

102 See Shea, supra note 20, at 11.
participants. The typical fantasy sports participant is a male, in his middle to late 30s, with a bachelor’s degree, and a household income of between $75,000 and $80,000. He lives in the suburbs, spends between $450 and $500 per year playing fantasy sports, and competes mainly against friends he knows from real life.

There are also a number of important sub-segments of fantasy sports participants. One of these sub-segments includes the “high-stakes participants,” who play in several fantasy sports leagues per season, play in leagues with entry fees that exceed $1,000 per season, and dedicate 10 or more hours per week to their fantasy team rosters. High-stakes fantasy participants come from a wide range of different backgrounds. One example of a high-stakes fantasy participant is a small business owner from Oshkosh, WI, who, in a recent interview with his local newspaper, explained that he spends 15 to 20 hours per week attending to his fantasy sports teams and up to 30 hours per week researching players for his fantasy football drafts.


104 See Mulhern, supra note 103; see also Jeremy Fowler & Chris Silva, Living in a Fantasy World: ‘General Managers’ Take Their Sports Leagues Seriously, Fla. TODAY (Melbourne, FL), Jun. 29, 2003, at 1, available at 2003 WLNR 18145423; Lee, supra note 5, at 69-70 (describing the typical fantasy sports contestant as being educated and having disposable income); cf. Patti Waldmeir, Protect the Facts for Fantasy, Fin.Times, Oct. 23, 2007, available at http://us.ft.com/ftgateway/supergate.fr?news_id=fto102320071306479921&page=2 (“[A]ny American whose social group includes 20- or 30-something men with a broadband connection can attest to the popularity of sports fantasies online: at every cocktail party or backyard barbecue, talk soon turns to the fantasy leagues.”).

105 See Mulhern, supra note 103; see also Fowler & Silva, supra note 104.

106 See infra notes 107 - 110 and accompanying text.

107 See generally Josh Bousquet, Hopefuls Span Age and Gender, Worcester Telegram & Gazette, Aug. 22, 2008, at C4 (“Another group that is being caught up in the fantasy world is composed of high rollers. If any of you upper-crust members happen to come across these words, I direct you to the Fantasy Football Open Championship.”).

Another example is an associate professor of computing and software systems at the University of Washington.\textsuperscript{109} In an interview with the New York Times, he explained that he “spends about 10 hours a week handling the budgets of fantasy teams in high-stakes events,” and pays a $1,300 entry fee each year to compete in the National Fantasy Baseball Championship.\textsuperscript{110}

A second sub-segment of fantasy sports participants are female participants.\textsuperscript{111} According to a recent survey by the Fantasy Sports Trade Association, female participants are the fastest growing sub-segment of fantasy sports participants.\textsuperscript{112} While once representing just two percent of all fantasy sports participants, females now compose between 15 and 20 percent of the overall fantasy marketplace.\textsuperscript{113} When compared to fantasy sports participants overall, female participants are often described as being more interested in the social component of fantasy leagues.\textsuperscript{114} In addition, many female participants prefer to obtain their fantasy sports advice from websites geared toward women, such as Jordan Zucker’s Girls Guide to Fantasy Football.\textsuperscript{115}


\textsuperscript{110} Id.


\textsuperscript{112} See Anna Kim, Women Share the Fantasy on Football Draft Day: Local All-Female Group Reflects Trend of a New Audience Tracking the NFL in Leagues of their Own, BUFFALO NEWS, Sept. 9, 2009, at D1; Games People Play, GRAND RAPIDS PRESS, Sept. 4, 2008, at D8.

\textsuperscript{113} Calling All Fantasy Sports Widows - When His Fantasy is His Sports Team and Not You, BUS. WIRE, Aug. 27, 2009, http://www.businesswire.com/news/home/20090827005154/en/Calling-Fantasy-Sports-Widows---Fantasy-Sports (estimating the percentage of women fantasy participants at 15 percent); Kim, supra note 112 at D1; Games People Play, supra note 112, at D8 (noting that women currently make up 15 percent of all participants, compared to 3 percent in 2000).

\textsuperscript{114} Cf. Kim, supra note 112, at D1 (noting the number of all-woman leagues has increased steadily, as well as the number of women participating in workplace leagues).

\textsuperscript{115} See Beer, supra note 111 (noting that Jordan Zucker is an actress and female fantasy sports participant, who previously appeared on the television sitcom
A final sub-segment of the fantasy sports participants are those who compete in “family friendly” or educational leagues. Participants in family friendly leagues seek to participate within an online environment where grownups and kids can enjoy fun and interactive features that are educational. In stark contrast to the high-stakes participants, family gamers are generally unconcerned with league entry fees and prize money. Rather, they care primarily about the interactive experiences their games provide.

2. Host Sites

For each type of fantasy league, one of the first league decisions involves choosing a “host site.” Host sites are the websites that store league data and serve as the place where participants make changes to their rosters. These sites provide a platform for real-time statistical updates and tracking. In addition, some host sites collect league entry fees, distribute prize money, manage message boards, and provide expert analysis.

In terms of market share, there are currently three dominant host sites in today’s fantasy sports marketplace: ESPN, Yahoo!, and CBS Sports. Both the ESPN and Yahoo! sites offer only one type of hosting: a basic, free service available to all users. By contrast, CBS Sports offers three types of


116 See infra notes 117 - 119 and accompanying text.


118 See id.

119 See id.

120 See Humphrey v. Viacom, Inc., No. 06-2768, 2007 WL 1797648, at *1 (D.N.J. June 20, 2007) (noting that host sites obviate the need of early fantasy sports participants to compile lineups and update player statistics manually).

121 See id.

122 See id.

123 Cf. Wang, supra note 3, at D3 (“Yahoo is the most visited fantasy football site, according to recent data compiled by Experian Hitwise, a leading Internet analytics service provider. Yahoo, which offers free team scoring but charges for its enhanced game tracker function, claimed nearly 46 percent of all fantasy sports visits in September 2010, with ESPN next at 34 percent.”).

124 See ESPN Fantasy Baseball 2011: Rules, ESPN.COM, http://games.espn.go.com/flb/content?page=flbrulesindex2011 (last visited Oct. 17, 2011). Note, however, that both ESPN and Yahoo charge users for the purchase of premium add-on services. For example, Yahoo sells four premium-add on-services:
hosting: Free, Commissioner, and Premium.¹²⁵ The CBS Commissioner service costs participants $179.95 per league ($17.99 per team in a 10-team league), and gives participants the ability to view live game scoring, as well as “complete control of . . . rules, scoring, and overall setup.”¹²⁶ Meanwhile, the CBS Premium service costs anywhere from $29.99 to $499.99 per team and includes a cash prize for the league winner that ranges from 50% to 70% of the league’s total entry fees.¹²⁷ Thus, fantasy sports participants that select CBS’s Premium hosting service do not need to privately collect entry fees or pay prize money.¹²⁸

In addition to these three dominant host sites, most professional sports leagues offer free hosting services through their own centralized league,¹²⁹ and a number of niche businesses operate host sites for specialized participant groups.¹³⁰ For example, high-stakes participants today have a variety of web-hosted competitions from which to choose.¹³¹ One such competition is the World Championship of Fantasy Football (“WCOFF”), which offers an annual, approximately 600-participant, fantasy football tournament with a $1,800 entry fee and a $300,000 grand prize.¹³² Another competition, the Fantasy Football Players Championship (“FFPC”), offers a somewhat smaller

¹²⁸ See Fantasy Baseball Premium Games 2011, supra note 127.
¹³⁰ See infra notes 132 - 136 and accompanying text.
¹³¹ See infra notes 132 - 134 and accompanying text.
¹³² See Wang, supra note 62 at 7; see also Fantasy Footballers Cash In, POST-CRES- CENT (Appleton, WI), Jan. 16, 2009, at A1 (noting that the World Championship of Fantasy Football most recently consisted of 600 total teams); Mark St. Amant, When Fantasy Players Go All In, N.Y. TIMES, Aug. 2, 2007, at 16 (“The WCOFF is this country’s original high-stakes fantasy football league, the Super Bowl of the hobby. The entrance fee alone is almost $2,000 . . . including a whopping $300,000 champion’s purse.”).
2012 / A Short Treatise on Fantasy Sports and the Law

fantasy football tournament, where all league entry fees are placed into an escrow account. Meanwhile, the National Fantasy Baseball Championship (“NFBC”) offers a high-stakes fantasy baseball contest, which includes over 300 teams, a $1,300 per participant entry fee, and a grand prize of more than $100,000.

Finally, for the family-oriented segment of fantasy sports participants, Family Fantasy Sports provides hosting services for games that are free to enter. While many of the Family Fantasy Sports games have prizes for the winners, these prizes “are focused on kids and families,” and are intended to encourage healthy lifestyle behaviors such as fitness and saving money for college.

3. Commissioners

In addition to selecting an appropriate hosting service, every fantasy sports league also needs to select a commissioner. “Commissioners” are those who manage fantasy sports leagues by establishing league rules and resolving disputes over rule interpretations. In many high-stakes commercial leagues (e.g., the WCOFF, FFPC and NFBC), the competition pro-

---

133 See Fantasy Footballers Cash In, supra note 108, at A1.
136 Id.
137 See infra notes 138 - 143 and accompanying text.
138 See Walker, supra note 5, at 1D; see also Bernhard & Eade, supra note 49, at 30 (“The commissioner manages the league by establishing league rules and resolving disputes over rule interpretations. Commissioners may also be responsible for publishing league standings (or selecting the Internet service that will do so), ensuring that all fees are paid, and organizing drafts, league parties, and/or award ceremonies.”); Hancock, supra note 20, at 325 (“Using online websites to host the league, the ‘commissioner’ of the league gathers each gamer’s entry fee to create a cash prize.”).
vides a league commissioner. In most private fantasy leagues, one of the league’s participants is nominated to serve in that role.

In recent years, there has been movement in both commercial and private fantasy leagues to outsource some of the commissioner’s responsibilities to a third-party dispute resolution business, such as SportsJudge.com. While the decisions of these third-party dispute resolution businesses are not inherently legally binding, a fantasy league could write into its league constitution an arbitration clause that would give these rulings a binding effect. For example, the SportsJudge.com Model League Constitution recommends that fantasy sports participants adopt language in their league rules that states “[a]ny and all disputes amongst league members about any of the rules and terms related to either this league or the league constitution shall be resolved, in a final and binding manner, by SportsJudge.com.”

4. Treasurers

Fantasy sports leagues with entry fees and prize money also must select a treasurer to collect money at the beginning of the season, and to distribute it to the winners at the season’s end. In high-stakes commercial leagues, an employee of the host site serves in this role. In private leagues, this job

---

139 See, e.g., National Fantasy Baseball Championship Rules, Nat. Fantasy Baseball Championship, http://nfbch.sports.com/baseball/nfbcdoubleplay_rules.pdf (discussing throughout the role of the NFBC’s internal commissioner) (last visited Oct. 17, 2011); cf. Talalay, supra note 64, at 1A. (“Fort Lauderdale-based CBSSports.com gets daily inquiries but encourages players to resolve their own disputes unless they are playing premium games in which the company, rather than a league member, serves as commissioner.”).

140 See Fantasy Sports: A Booming Business, supra note 53 (“In addition to owners, each league carries a commissioner, someone responsible for managing the league.”).

141 See SPORTSJUDGE, http://www.sportsjudge.com (last visited Oct. 17, 2011) (discussing SportsJudge’s role in providing outside dispute resolution to fantasy sports leagues); Waldmeir, supra note 104 (“But, as always, where two or three people gather together online there will be disputes and, as fantasy sports continue to grow, there are likely to be more and more of them. Mr. Edelman has set up a website, www.SportsJudge.com, to arbitrate these virtual disputes online. All this legal activity is a sure sign that fantasy sports have finally come of age. Even alternative realities need some rules to live by.”).

142 See infra note 143 and accompanying text.


144 See infra notes 145 - 154 and accompanying text.

145 See, e.g., National Fantasy Baseball Championship Rules, supra note 139 at 11.
is often performed by one of the participants.\textsuperscript{146} Like with commissioner services, however, a growing number of private leagues are outsourcing the treasury role to third parties.\textsuperscript{147}

The most well-known of these third-party treasury sites is LeagueSafe, which was launched in March 2008.\textsuperscript{148} LeagueSafe allows fantasy sports participants to transfer funds directly from their bank accounts to the website.\textsuperscript{149} Once LeagueSafe receives league funds, it deposits them into an interest-generating, FDIC-insured bank account with either U.S. Bank or The Bancorp Bank.\textsuperscript{150} At the end of the season, LeagueSafe disperses these funds “in accordance with [each fantasy] league’s rules.”\textsuperscript{151} In exchange for its services, LeagueSafe charges users who wish to transfer money (by paper check or through an “electronic funds transfer”) a $3 fee.\textsuperscript{152}

Another company that provides third-party treasury services to fantasy sports leagues is Fantasy Sports Vault (“FSV”), which declares on its website that its mission is “to provide a secure, efficient, flexible, easy to use and neutral 3rd party proprietary virtual treasurer system to manage your fantasy league’s money.”\textsuperscript{153} According to the FSV website, like LeagueSafe, “FSV secures . . . money into one of two holding accounts, both located at FDIC insured banks.”\textsuperscript{154} However, the FSV website does not prominently disclose which banks hold the participant funds.

\textsuperscript{146} See How to Eliminate Those Roto Dump Trades, Cincinnati Post, Aug. 11, 1998, at 5D (suggesting that every fantasy league should select one of its participants to serve as its treasurer).
\textsuperscript{147} See infra notes 148 - 154 and accompanying text.
\textsuperscript{150} Id.; see also Bills, supra note 148.
\textsuperscript{151} See How It Works, supra note 149.
5. Strategic Advisors

Then there are the strategic advisors, who make their living by providing advice to other fantasy sports participants.\footnote{See \textit{infra} notes 158 - 164 and accompanying text.} Much like stock analysts on Wall Street, fantasy sports advisors devote their careers to following the performances of professional athletes in far greater detail than the average working professional could do independently.\footnote{See \textit{infra} notes 158 - 164 and accompanying text.}

The range of services provided by fantasy sports advisors varies significantly.\footnote{See \textit{infra} notes 158 - 164 and accompanying text.} Some advisory websites provide generalized information about premier players. For example, the advisory sites of Sandlot Shrink and Roto Experts provide information about specific players they believe are likely to perform well.\footnote{See \textit{Subscription Info, The Sandlot Shrink}, http://www.sandlotshrink.com (last visited Nov.7, 2011); see also \textit{RotoExperts}, http://www.rotoexperts.com/sjowbranch.php?id=94 (last visited Nov.7, 2011).} Other sites, such as Rotowire.com, provide news wire updates on a broader range of players, many of whom still compete on a minor league level.\footnote{See \textit{Rotowire}, http://www.rotowire.com (last visited Nov. 9, 2011).} Still other websites provide a call-in line, to which fantasy sports participants may call and pay by the minute to speak with a self-proclaimed fantasy sports “expert.”\footnote{See \textit{Advisor FantasySports Guru}, https://www.keen.com/details/Advisor-FantasySports-Guru/Fantasy-Sports/5300988 (last visited Nov. 9, 2011).}

Finally, the newest form of fantasy sports advice occurs through “analytical tools” that assist participants in drafting players and optimizing their weekly lineups.\footnote{Front Office 2011, \textit{Bloomberg Sports}, http://bloombergsports.com/frontoffice/about (last visited Nov. 9, 2011).} One such provider of fantasy advice via “analytical tools” is Bloomberg Sports: a division of the financial services company Bloomberg L.P.\footnote{Frequently Asked Questions, \textit{Bloomberg Sports}, https://www.bloomberg sports.com/faq (last visited Nov. 9, 2011).} In 2010, Bloomberg Sports launched its analytical tools business to help fantasy participants optimally draft their teams at the beginning of the season, and then analyze trade offers and potential roster moves during the season.\footnote{\textit{Id.}} Today, the Bloomberg Sports advisory software “syncs with CBSSports.com, ESPN and Yahoo! to read the settings and teams in those
leagues and customize rankings, recommendations and analysis to the settings of the league."}

6. Insurers

Finally, there is even an emerging insurance market to protect high-stakes fantasy sports participants from monetary loss in the event of an injury to a player on one's fantasy sports team. The first insurance company to get into the business of fantasy sports was Fantasy Sports Insurance ("FSI"), which is based out of Long Island, NY. Like all traditional insurance policies, FSI insurance policies are underwritten by an A-rated carrier, Lloyd's of London.

Currently, FSI policies insure fantasy participants for up to $1,900 in losses of league entry fees, league transaction fees, and fantasy magazine subscriptions, if the purchaser of the policy has a player on his fantasy team that misses more than a certain number of games in a season due to injury. In at least one instance, FSI has partnered with a high-stakes fantasy sports host site, the National Fantasy Baseball Championship, to provide contest participants with the ability to immediately insure one of their players drafted in that contest.

IV. Legal Risks for Fantasy Sports Host Sites

Although some fantasy sports stakeholders would like their games to be free from government regulation, the fantasy sports industry today is indeed subject to a wide range of federal and state laws. Most directly,

164 Id.


166 See id.; see also Alex Prewitt, This NFL Insurance Policy is No Fantasy, USA Today, Aug. 26, 2009, http://www.usatoday.com/sports/football/fantasy/2009-08-24-insurance_N.htm?csp=34.

167 See Di Fino, supra note 165; see also Prewitt, supra note 166.


170 See infra notes 172 - 305 and accompanying text.
fantasy sports host sites must follow federal and state laws related to gaming activities and intellectual property rights.\footnote{See infra notes 172 - 305 and accompanying text.}

## A. State Gambling Law

State gambling law is perhaps the most relevant area of law pertaining to fantasy sports host sites.\footnote{See Anthony N. Cabot & Louis V. Csoka, Fantasy Sports: One Form of Mainstream Wagering in the United States, 40 J. Marshall L. Rev. 1195, 1202 (2007) ("[The] natural approach to accessing the legality of fantasy sports is to begin with an analysis of state laws for two reasons. First, most federal gambling laws were enacted to help states enforce their own gambling laws. Second, given the complementary [sic] or supplemental nature of federal gambling laws to state gambling laws, those that first look to the federal laws can sometimes miss the larger theoretical framework underlying these federal laws.").} According to the \textit{Merriam-Webster Online Dictionary}, "to gamble" is defined as "to play a game for money or property," or "to bet on an uncertain outcome."\footnote{Gamble Definition, Merriam-Webster.com, http://www.merriam-webster.com/dictionary/gamble (last visited Nov. 9, 2011).} However, in most states, not every "game for money" or "bet on an uncertain outcome" is defined as illegal gambling.\footnote{See, e.g., MONT. CODE ANN. §23-5-802 (2010) (permitting under gambling law certain fantasy sports games); \textit{see also} S.E.C. v. J.W. Howrey Co., 328 U.S. 293, 298-99 (1946) (noting that Congress, under the Securities Act of 1933, has insulated from state gambling liability "investment contracts," which the Supreme Court has defined as contracts pertaining to transactions "whereby a person [(i)] invests his money [(ii)] in a common enterprise and [(iii)] is led to expect profits [(iv)] solely from the efforts of the promoter or a third party . . . ").} Rather, most states maintain explicit carve-outs that permit certain activities, such as stock trading, that otherwise would seemingly fall under the category of gambling.\footnote{See Christine Hurt, Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling, and the Speculation Paradox, 86 B.U.L. Rev. 371, 373 (2006) ("To characterize investing as gambling has become a trite and toothless analogy. However, most worn-out proverbs remain in the conventional wisdom because a kernel of truth continues to resonate with those who need them. In fact, the stereotype of an investor as a gambler seems particularly well deserved.").}

### 1. Is Fantasy Sports Illegal Gambling under State Law?

In most states, a plaintiff can make a prima facie claim of illegal gambling by showing that an activity involves three elements: "consideration,"
“reward,” and “chance.” Each of these elements has its own distinct definition.  

The element of “consideration” is described as a “quid pro quo,” or something in exchange for something else. Most courts have construed the term “consideration” narrowly in the context of gambling, limiting its definition to instances in which a participant provided money or a valuable item of property in exchange for the chance of greater winnings. However, a minority of courts have adopted the true contract-law meaning of the word “consideration,” and found that “consideration” involves any legal detriment, even non-monetary in value, in exchange for the chance to win a prize.

---

176 See Geis v. Cont’l Oil Co., 511 P.2d 725, 727 (1973) (noting, for example, that under Utah law “the statutory elements of a lottery are: (1) prize; (2) chance; and (3) any valuable consideration.”); see also McKee v. Foster, 347 P.2d 585, 590 (1959) (noting same under Oregon law); Valentin v. El Diario Prensa, 427 N.Y.S.2d 185, 186 (N.Y.C. Civ. Ct. 1980) (noting that in New York State, three elements are needed to constitute an illegal lottery: (1) consideration, (2) chance, and (3) a prize); People v. Hunt, 162 Misc. 2d 70, 71 (N.Y.Crim. Ct. 1994) (“Gambling occurs when a person stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.”) (internal citations and quotations omitted).

177 See infra notes 178 - 188 and accompanying text.

178 Corbin on Contracts § 110; see also Restatement (Second) of Contracts § 71 (1981) (“To constitute consideration, a performance or a return promise must be bargained for. . .The promise may consist of (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation.”); Thomas D. Crandall & Douglas J. Whaley, Contracts: Cases, Problems and Materials 137-38 (5th ed. 2008).

179 See, e.g., Albertson’s, Inc. v. Hansen, 600 P.2d 982, 986 (Utah 1979); Cudd v. Aschenbrenner, 377 P.2d 150, 155-56 (Or. 1962) (finding that participant’s expending of time, effort or inconvenience do not amount to consideration for purposes of Oregon’s anti-gambling statute); Glick v. MTV Networks, 796 F. Supp. 743, 747 (S.D.N.Y. 1992) (noting the New Jersey Attorney General’s position that under the current New Jersey gambling statute, “legislative intent was to exclude from the statutory elements composing the gambling offense the sort of personal inconvenience which will constitute consideration sufficient to support a contract.”).

180 See State ex rel. Schillberg v. Safeway Stores, Inc., 450 P.2d 949, 953-54 (Wash. 1969) (en banc) (applying simple contract theory as a basis to find consideration in the gaming context); see also Affiliated Enters., Inc. v. Walker, 5 A.2d 257, 259–60 (Del. Super. Ct. 1939) (using Professor Williston’s classic definition of con-
Similarly, the element of “reward” is the prize that one gets for winning a bet. Courts have held that a reward must be tangible in form.\textsuperscript{181} However, something tangible, even of small value, is sufficient to constitute a reward.\textsuperscript{182}

Finally, the element of “chance” is defined as “something that happens unpredictably without discernible intention or observable cause.”\textsuperscript{183} In other words, courts have found that the element of chance requires that a game’s result be driven \textit{not} by “judgment, practice, skill or adroitness,” \textit{but rather} by factors entirely outside of the participant’s control.\textsuperscript{184} To determine whether a particular activity satisfies the gambling element of chance, courts will traditionally apply one of three tests: the “predominant purpose test,” the “any chance test,” or the “gambling instinct test.”\textsuperscript{185} The “predominant purpose test,” which is applied by most states, deems an activity to be one of chance where “greater than 50 percent” of the result is derived

\textsuperscript{181} See, e.g., State v. 26 Gaming Machs., 356 Ark. 47, 57 (2004) (noting that an intangible reward, such as viewing a nude woman on a video strip poker game, does not qualify as a reward for purposes of gambling law).


\textsuperscript{184} State v. Gupton, 30 N.C. 271, 273-74 (1848); \textit{see also} Valentin v. El Diario Prensa, 427 N.Y.S.2d 185, 187 (N.Y. Civ. Ct. 1980) (noting that a game is best defined as one of chance if “[t]he winners are not chosen on their personal qualities, but rather on whether or not their loved ones can get together enough money to beat the competition in buying sufficient seventeen(¢)-cent coupons.”); People v. Hunt, 616 N.Y.S.2d 168, 170 (N.Y. Crim. Ct. 1994) (finding that a “contest of chance is defined as any contest, game, gambling scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.”) (internal citations omitted); Utah State Fair Ass’n v. Green, 249 P. 1016, 1020 (Utah 1926) (noting that a Utah state statute describes a game of chance as “a game determined entirely or in part by lot or mere luck, and in which judgment, practice, skill, or adroitness have honestly no office at all, are thwarted by chance; a game in which hazard entirely predominates”).

\textsuperscript{185} Anthony N. Cabot et al., \textit{Alex Rodriguez, A Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define Legality of Games of Mixed Skill and Chance}, 57 Drake L. Rev. 383, 390–94 (2009) (noting a fourth test, the “material element test,” which seems to conflate with the predominant purpose test).
from chance.\textsuperscript{186} By contrast, the "any chance test" finds that an activity is based on chance if "a particular game contains any chance that influences the outcome of the game,"\textsuperscript{187} and the "gambling instinct test . . . looks to the nature of an activity to determine if it appeals to one's gambling instinct."\textsuperscript{188}

2. Is Fantasy Sports Illegal Gambling? (Majority View)

A majority of states adopt a liberalized definition of "consideration" and the "predominant purpose test" as the measure of chance. In these states, a host site’s risk of liability under state gambling law varies based on the rules and structure of that particular fantasy sports game.\textsuperscript{189}

On one end of the spectrum, host sites that offer free league entry are unlikely to violate state gambling laws because those games fail to meet the element of "consideration."\textsuperscript{190} Similarly, fantasy sports games that do not provide prizes to winners are not likely to violate state gambling laws because they fail to meet the element of "reward."\textsuperscript{191} Meanwhile, seasonal and perennial fantasy sports leagues that initially allocate players via a traditional auction are probably legal because the results of these games are driven primarily based on skill, rather than chance.\textsuperscript{192}

By contrast, other forms of pay-to-play fantasy sports games present greater legal risk.\textsuperscript{193} For example, "modified auction," "draft," and "autopick" leagues are more likely to be categorized as games of chance because fantasy participants in these leagues are denied the strategic opportunity to bid up the price of certain players based on their presumptions

\textsuperscript{186} Id. at 392 (citing Dep’t of Corr. v. Worker’s Comp. Appeals Bd., 90 Cal. Rptr. 2d716, 720 (Cal. Ct. App. 1999) (defining the term "predominant" as "greater than 50 percent").

\textsuperscript{187} Id. at 393.

\textsuperscript{188} Id. at 393–94.

\textsuperscript{189} See Cabot & Csoka, supra note 172, at 1207 (arguing that whether a fantasy sports game is illegal under state gambling law “varies based on the method of play of the fantasy game at issue”).

\textsuperscript{190} See, e.g., Humphrey, WL 1797648 at *10 (noting that a minimal entry fee paid by a fantasy sports participant to a host site to compete in a fantasy sports game was not consideration for gambling purposes but rather consideration merely for the day-to-day statistical services provided by the website).

\textsuperscript{191} See supra notes 178 - 180 and accompanying text.

\textsuperscript{192} See supra notes 181 - 182 and accompanying text.

\textsuperscript{193} See supra notes 183 - 188 and accompanying text.
about competitor preference. In addition, the “draft” method of initially allocating players includes an additional element of chance with respect to a participant’s selection order in the fantasy league’s draft. Meanwhile, the “autopick” method is based exclusively on chance, as participants are not making any independent decisions about player allocation.

Along these same lines, pay-for-play fantasy sports leagues that extend for less than a full professional sports season involve substantially greater levels of chance than full season leagues, and thus also present heightened risks under state gambling law. This is because short-season fantasy sports games do not extend over a period of time sufficient in length for a fantasy sports participant’s strategic and negotiating skills to offset “chance factors such as the physical and mental conditions of players, potential problems between team members, and the game-time weather conditions.” In addition, team-owners in one-day fantasy sports leagues lack the opportunity to participate in strategic gamesmanship, such as negotiating trades with other owners, or engaging in other “team management” activities, such as adding or dropping players.

3. Stricter Views Toward Fantasy Sports

Fantasy sports games, meanwhile, face a far greater risk of liability in a minority of states that adopt one of four alternative positions. First, in

---

194 See Cabot & Csoka, supra note 172, at 1209 (noting that in auction-based fantasy sports games, “the fantasy owner must use strategy in assessing the other team owners. For example, do you risk bidding on players that you do not want simply to drive up their price and to reduce the amount of money that other teams have to bid on players that you want? Further, the team owner must prepare to make adjustments in the course of the draft to accommodate the players chosen and the price paid.”).

195 See supra notes 181 - 182 and accompanying text.

196 See supra notes 181 - 182 and accompanying text.

197 See Joker Club, L.L.C. v. Hardin, 643 S.E.2d 626, 629 (N.C. Ct. App. 2007) (noting that the length of a game is also an important issue in poker, as in the short term the game is primarily one of chance, whereas in the long term skill seems to predominate); cf. Geoffrey T. Hancock, Note, Upstaging U.S. Gaming Law: The Potential Fantasy Sports Quagmire and the Reality of U.S. Gambling Law, 31 T. Jefferson L. Rev. 317, 349 (2008) (noting that in regular, full-season fantasy sports contexts, the “prolonged period” of the competition may lead to the conclusion that less luck is involved).

198 Boswell, supra note 111, at 1265.

199 See Cabot & Csoka, supra note 172, at 1210.

200 See infra notes 201 - 231 and accompanying text.
states such as Delaware, Kansas, Michigan, Ohio, Wisconsin, Washington, and Vermont, fantasy sports encounter a greater risk of liability because courts in these states have adopted the true contract-law meaning of the word “consideration.” Thus, in these states, the gambling-law element of “consideration” is met, even absent an entry fee, so long as the contest participant expends substantial time or effort that benefits the contest’s host in some way. Stated in terms of fantasy sports, even if a host site offers a free fantasy sports game, the game may run afoul of state gambling law if the elements of “chance” and “reward” are both met.

Second, fantasy sports host sites face greater risk of liability in states such as Arkansas, Iowa, and Tennessee, which interpret the element of “chance” as outlawing games that require any chance (“The Any Chance Test”). In these states, all fantasy sports games would violate the state’s pertinent gambling laws because even the most intricate fantasy sports game

201 See, e.g., Affiliated Enters., 5 A.2d at 261 (Del. Super. 1939) (finding that filling out a registration and appearing at a particular lobby, at a particular time, is sufficient to constitute consideration to enter a free contest).
203 See Sproat-Temple Theater Co. v. Colonial Theatrical Enters., 267 N.W 602, 605 (Mich. 1936) (finding that there is consideration even in a free entry contest when it induces someone to attend an event that they would not otherwise attend).
204 See Kroger Co. v. Cook, 244 N.E.2d 790, 797 (Ohio Ct. App. 1968) (finding that the element of “consideration” may be met even when entering a free contest merely based on the advertising benefits derived by the contest’s host).
205 State ex. rel. Regez. v. Blumer, 294 N.W. 491, 492 (Wis. 1940) (defining “consideration” as “the disadvantage to the one party or the advantage to the other” and determining the travel to a store to fill out a free entry for a prize met this definition).
207 See, e.g., State v. Wilson, 196 A. 757, 758–59 (Vt. 1938) (noting that in Vermont the element of consideration is met as long as some participants pay an entry fee, even if all participants do not need to pay entry fees).
208 See supra notes 201 - 207 and accompanying text.
209 See supra notes 201 - 207 and accompanying text.
211 See Parker-Gordon Importing Co. v. Benakis, 238 N.W. 611, 613 (Iowa 1931) (noting that Iowa gambling law finds it irrelevant whether a particular game is predominantly based chance or skill).
212 See Tenn. Code Ann. § 39-17-501 (2010) (defining “gambling,” subject to a number of exceptions, as “risking anything of value for a profit whose return is to any degree contingent on chance”).
213 See infra note 214 and accompanying text.
involves at least some level of chance with respect to weather conditions and player injuries.  

Third, fantasy host sites face greater risk of gambling liability in the states of Florida and Louisiana because, in these states, their attorneys general have already issued advisory opinions cautioning against certain fantasy games. In Florida, former Attorney General Robert A. Butterworth published an advisory opinion in January 1991 that concluded it was illegal to "participate in a [draft-based] fantasy sports league whereby contestants pay a fee for the opportunity to select actual professional sports players." Meanwhile, in Louisiana, former Assistant Attorney General Thomas A. Warner III issued an advisory opinion in April 1991 stating that a commercial fantasy sports game with prizes, which was entered into by the participants dialing a 1-900 telephone number that charged a fee of $2.00 per minute, violated Louisiana’s state gambling law.

Finally, fantasy sports host sites face a greater risk of liability in Arizona and Kansas because these states call into doubt the legality of certain fantasy sports games on their state websites. Specifically, Arizona’s Department of Gaming Guide to Off-Reservation Gambling states that "fantasy sports team games are illegal if the host of the event receives a fee for services provided or if all the pooled money doesn’t go back to the participants." In other words, "[i]f the host takes a percentage of the pooled money, the Fantasy Sports Team contest is illegal." Meanwhile, Kansas’s Racing and Gaming Commission website states that "as with any other illegal gambling matters, if a fantasy sports league involves the elements of (1) prize, (2) chance, and (3) consideration, then it is an illegal ‘lottery’ prohib-

\footnote{See Cabot et. al., supra note 185, at 393.}


\footnote{See Fla. Op. Att’y Gen., supra note 215.}


\footnote{See infra notes 219 - 223 and accompanying text.}


\footnote{Id.}
2012 / A Short Treatise on Fantasy Sports and the Law

ited by Kansas criminal law."221 However, because in the Commission’s opinion “chance predominates over skill in fantasy sports leagues,” “if a fantasy sports league has a buy-in (no matter what it is called) for its managers and gives a prize, then all three elements of an illegal lottery are satisfied.”222 The language of both the Arizona and Kansas websites indicates that, in those states, CBS Premium fantasy sports games, as well as many of the existing high-stakes fantasy sports competitions, are likely illegal.223

4. Montana’s Alternative Test of Fantasy Sports

Finally, the State of Montana provides a different, and perhaps more insightful, way to test the legality of a particular fantasy sports game.224 Under Montana State Code 23-5-802, it is lawful to conduct or participate in a fantasy sports league as long as no wagers take place by either the telephone or internet.225 The Code further defines “fantasy sports leagues” to include games that meet the following requirements:

- any fees for adding or trading players, in total, are less than the league entry fee;226
- the total value of payouts to all league members equals the amount collected for entrance, administrative, and transactions fees, minus payment for administrative expenses;227 and
- the administrative fee for conducting a fantasy sports league, if any, is not more than 15% of the amount charged as a participant’s entrance fee.228

222 Id. (stating that, “We do not argue that there are some elements of skill involved in fantasy leagues. Particularly, fantasy managers must be knowledgeable of player statistics, and must execute some strategy in selecting the best players for their fantasy team. On the other hand, a manager leaves to chance a number of things, including: (1) how a drafted athlete performs in a future event; (2) whether a drafted player is injured; (3) whether the player’s actual team in a given week executes a game plan that fits the player’s talents; whether the coach calls plays that favor the player; and (4) how opponents of the actual player (who may be drafted by another manager) actually play. For those reasons, chance predominates over skill in fantasy sports leagues.).
223 See supra notes 218 - 222 and accompanying text.
224 See infra notes 225 - 231 and accompanying text.
226 § 23-5-801(3).
227 § 23-5-805(1).
228 § 23-5-805(2)(a).
When applying the Montana State Code to existing fantasy sports games, the ESPN and Yahoo! games seem to be free from any liability because they do not charge entry fees to participants. 229 However, the CBS Sports Premium games seem to violate the Montana code because the difference between the total entry fees charged to participants and the total amount paid back to participants in the prize pool exceeds the 15% maximum threshold permissible for administrative fees. 230 The same problem may also apply to some of the other high-stakes fantasy sports competitions. 231

B. Federal Gambling Law

In addition to state gambling laws, fantasy sports host sites also may face risks under federal gambling laws. Federal gambling laws serve an important role in preventing individual states from having their anti-gambling laws circumvented by gambling businesses that are based outside of state lines. 232 While these statutes supplement state gambling law, 233 they do not create immunity from, or reduce the reach of, any individual state’s laws. 234

1. Interstate Wire Act of 1961

One federal statute that is relevant to fantasy sports host sites is the Interstate Wire Act of 1961 (“Wire Act”). 235 The Wire Act bars “engaging in the business of betting or wagering [through the knowing use of] a wire communication for the transmission in interstate or foreign commerce.” 236

229 See supra notes 225 - 228 and accompanying text.
230 See supra notes 225 - 228 and accompanying text.
231 See supra notes 225 - 228 and accompanying text.
232 See Mitchell E. Kilby, Note, The Mouse that Roared: Implications of the WTO Ruling in US – Gambling, 44 Tex. Int’l L.J. 233, 240 (2008); see also Schneider v. United States, 459 F.2d 540, 542 (8th Cir. 1972) (noting that “[g]ambling activity conducted in one state may be a federal offense, while the same activity in another state may not be a federal offense.”).
235 18 U.S.C. § 1084; see also Kilby, supra note 232, at 239 (discussing implications of the Wire Act).
236 18 U.S.C. § 1084(a) (stating that two elements must be present for a violation of the Wire Act: (1) that information transmitted via wire assisted in placing of bets or wagers; and (2) the defendant during such time was engaged in businesses of wagering or betting).
According to at least one court, “wire communications” may include not only telephone communications, but also Internet transactions. Violators of the Wire Act are subject to both fines and imprisonment for a period of up to two years.

While there are many instances where courts have found that sports bookies have violated the Wire Act, there have not yet been any cases that have applied the Wire Act to fantasy sports leagues. Nevertheless, if a given fantasy sports website were to develop a commercial fantasy sports game that was deemed to be a “game of chance,” then that website would potentially face liability under the Wire Act.

2. Illegal Gambling Business Act

A second statute that potentially places fantasy sports host sites at risk of liability is the Illegal Gambling Business Act ("Gambling Act"). The Gambling Act, which was passed by Congress in 1970, states that “[w]hoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years.” According to the Gambling Act, activities of “gambling” include, but are not limited to, “pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries policy, bolita or number games, or selling chances therein.”

In certain respects, the Gambling Act encompasses a broader range of conduct than does the Wire Act. For example, the Gambling Act prohibits certain gambling activities even if they occur without the use of wire technology. Thus, even if a particular court were to find a wireless In-
ternet transaction to lie outside the scope of the Wire Act, the same transaction might fall within the scope of the Gambling Act.246

In other respects, however, the Gambling Act’s scope is narrower than that of the Wire Act.247 For example, the Gambling Act only targets “illegal gambling activities of major proportions.”248 Thus, the Gambling Act exempts gambling activities that produce less than $2,000 in daily gross revenues.249 As a result, it is highly unlikely that any fantasy sports enterprise that avoids Wire Act liability would meet the threshold for liability under the Gambling Act.250

3. Professional and Amateur Sports Protection Act

A third federal statute that could potentially apply to fantasy sports host sites is the Professional and Amateur Sports Protection Act (“PAPSA”).251 After a successful lobbying effort by the professional sports industry, Congress passed PAPSA in 1992 in response to “growing concerns over state sponsored gambling on sports.”252 PAPSA, in pertinent part, makes it illegal for any private person to operate a wagering scheme based on a competitive game in “which professional or amateur athletes participate.”253 PAPSA, however, includes a grandfather clause that exempts previously authorized government sponsored games as well as casino-style wagering from liability.254

On its face, it may seem that all fantasy sports lie within the scope of PAPSA.255 However, that would be an absurdity, as America’s premier professional sports leagues were the chief lobbyists for PAPSA,256 and most

246 Id.
247 See infra notes 248 - 250 and accompanying text.
250 Id.
252 See Lee, supra note 5, at 78.
254 See Lee, supra note 5, at 78.
256 See Mike Freeman, Congress Told Sports Lotteries Threaten Teenagers, Games, WASH. POST, Jun. 27, 1991, at B5 (noting the “passionate testimony” in support of PAPSA by commissioners of Major League Baseball, the National Basketball Association and the National Football League).
American professional sports leagues both host and endorse seasonal fantasy sports.\(^\text{257}\)

It is far more likely, however, that PAPSA could be used against daily and weekly fantasy sports games, as these games have never been formally endorsed by the professional sports industry. In addition, the substantial emphasis on buy-ins and payouts in daily fantasy sports games make it more probable that such games could be viewed as wagering schemes.\(^\text{258}\)

4. Uniform Internet Gambling Act

Finally, in 2006, Congress passed the Uniform Internet Gambling Enforcement Act (“UIGEA”), which made it illegal for those “engaged in the business of betting or wagering” to “knowingly accept” funds “in connection with the participation of another person in unlawful Internet gambling.”\(^\text{259}\) The primary purpose of the UIGEA is to supplement “traditional [gambling] law enforcement mechanisms” and to facilitate the regulating of “gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders.”\(^\text{260}\)

Pursuant to the UIGEA, the term “unlawful Internet gambling” involves knowingly transmitting a bet or wager, by means of the Internet, where the bet or wager is otherwise illegal under the laws of the place where the bet or wager is “initiated, received, or otherwise made.”\(^\text{261}\) Thus, if a person located in a state where gambling is illegal places a bet over the Internet, any business that knowingly accepts a financial instrument in connection with that bet, irrespective of the gambling business’s location, would unambiguously be violating the act.\(^\text{262}\)

Whether the Uniform Internet Gambling Enforcement Act applies to certain fantasy sports host sites remains unsettled.\(^\text{263}\) On the one hand, the UIGEA includes an explicit carve-out for “fantasy sports games” that meet three criteria: (1) the “value of the prizes is not determined by the number of participants in the game or the amount of fees paid by the participants;”

---

\(^{257}\) See supra note 129 and accompanying text (showing that most professional sports leagues even operate their own fantasy sports host sites).


\(^{260}\) Interactive Media Entmt’ & Gaming Ass’n v. Att’y Gen. of U.S., 580 F.3d 113, 116 (3d. Cir. 2009).


\(^{262}\) See Interactive Media Entmt’ & Gaming Ass’n 580 F.3d at 116.

\(^{263}\) See infra notes 264 - 266 and accompanying text.
(2) “[a]ll winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals . . . in multiple real-world sporting events”; and (3) no winning outcome is based on the outcome of the score of games or on the single performance of an individual athlete in a single, real-world event.264

Nevertheless, it is possible that not all fantasy sports games fulfill this three-part test. For instance, in daily and weekly fantasy games, “winning outcomes [may not] reflect the relative knowledge and skill of the participants” because the limited duration of these games heightens the importance of luck in game results.265 Further, as a matter of public policy, Congress may not want to provide special protection to short-duration fantasy sports games because the shortened duration of these games may feed the desires of compulsive and addicted gamblers.266

C. Intellectual Property Laws

In addition to the risk of liability under federal and state gambling law, fantasy sports host sites also risk liability under intellectual property laws, including patent law, copyright law, trademark law, and right to publicity laws.267

1. Patent Law

Patent law, in general, relates to technological innovations.268 A patent is a form of intellectual property protection that is granted by the federal government to an inventor to exclude others from making, using, or selling a particular invention.269 Modern patent law takes root in Article 1, Section

266 Boswell, supra note 111, at 1272 (noting that, prior to the creation of short-duration fantasy sports games, fantasy sports leagues may have been viewed as innocuous to society because “these games could only have a substantial negative affect on the crime rate and the economy if every participant were to compete in a great number of fantasy games [and such] an occurrence would be logistically impossible due to the amount of time that it takes to effectively compete in a single fantasy league.”)
267 See infra notes 268 - 305 and accompanying text.
268 See infra notes 269 - 270 and accompanying text.
8 of the U.S. Constitution, which grants the U.S. government the power "to promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."\(^{270}\)

Courts have held that certain aspects of fantasy sports games are indeed patentable.\(^{271}\) For example, in *Fantasy Sports Properties, Inc. v. ESPN/Starwave Partners*, the Federal Circuit found a genuine issue of relevant fact as to whether CBS Sports (F/K/A Sportsline) infringed on a patent relating to "a method of and apparatus for playing a ‘fantasy’ football game on a computer," whereby players earned "additional points awarded beyond those given in an actual football game for unusual scoring plays, such as when a player scores in a manner not typically associated with his position."\(^{272}\)

Based on the court’s reasoning in *Fantasy Sports Properties*, all fantasy sports host sites need to ensure that their products do not allow users to exploit scoring methods that have already been patented.\(^{273}\) In addition, fantasy sports games that adopt unusual methods of scoring may wish to seek patent protection for their own methodologies as a way to secure a comparative advantage over competitor host sites.\(^{274}\)

2. Copyright Law

Copyright law, meanwhile, relates to content.\(^{275}\) Like a patent, a copyright is a form of intellectual property protection grounded in the U.S. Constitution.\(^{276}\) A copyright protects "original works of authorship fixed in a tangible medium of expression."\(^{277}\) While a copyright covers both published and unpublished works, it does not protect "facts, ideas, systems, or methods of operation."\(^{278}\)

Fantasy sports host sites do not have to worry about copyright issues when publishing player statistics because player statistics are factual in na-

\(^{270}\) U.S. Const. art. I, § 8, cl. 8.

\(^{271}\) See infra notes 272 - 274 and accompanying text.

\(^{272}\) 287 F.3d at 1111, 1114 (Fed. Cir. 2002).

\(^{273}\) See supra notes 271 - 272 and accompanying text.

\(^{274}\) See supra notes 271 - 272 and accompanying text.

\(^{275}\) See infra notes 276 - 278 and accompanying text.


\(^{277}\) Id.

\(^{278}\) Id.
ture, and once published are deemed to lie within the public domain. 

Nonetheless, fantasy sports host sites still need to ensure that their additional content, such as stories and illustrations, do not violate another site’s copyright. In addition, if a fantasy sports host site believes another website is violating its copyrighted material, it is imperative for the fantasy host site to immediately send out a cease-and-desist letter (commonly known as a “notice and take down” letter) and to not sit on its rights.

3. Trademark Law

Trademarks are a third form of intellectual property protection that provides consumers with a sense of certainty about a particular product’s source, and allows holders to “develop and control the goodwill associated with a given product.”

A federal cause of action for trademark infringement typically accrues under Section 32(1) of the Lanham Act where “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.” In addition, some courts have found that, even absent the element of confusion, the Lanham Act prevents both individuals and businesses from capitalizing on the goodwill of another’s trademark.

279 See C.B.C. Distribution & Marketing Inc. v. Major League Baseball Advanced Media, 505 F.3d 818, 823 (8th Cir. 2007) (“The information used in CBC’s fantasy baseball games is all readily available in the public domain.”).

280 Cf. Copyright in General (FAQ), supra note 276.


282 See Mark A. Kahn, May the Best Merchandise Win: The Law of Non-Trademark Uses of Sports Logos, 14 Marq. Sports L. Rev. 283, 284 (2004). “Goodwill” is not an easily defined term. Id. at 288. However, one court has defined it as “the favorable consideration shown by the purchasing public to goods known to emanate from a particular source.” White Tower Sys. v. White Castle Sys. Of Eating Houses Corp., 90 F.2d 67, 69 (6th Cir. 1937).


284 Id. at 1012–13 (preventing Dallas Cap & Emblem Manufacturing from using NHL team trademarks on apparel); Univ. of Georgia Athletic Ass’n v. Laite, 756 F.2d 1535, 1547 (11th Cir. 1985) (preventing a wholesaler of novelty beers from
Sports teams have been one of the more successful parties at using the courts to prevent the misappropriation of the goodwill of their marks.\footnote{See infra notes 286 - 287 and accompanying text.} Most notably, in Boston Professional Hockey Association v. Dallas Cap & Emblem Manufacturing, the National Hockey League teams convinced the U.S. Court of Appeals for the Fifth Circuit that the court should award trademark protection against the unauthorized use of their logos on sportswear apparel, even though consumers were not necessarily confused about the apparel’s source or origin.\footnote{Boston Prof’l Hockey Ass’n., 510 F.2d at 1012–13 (5th Cir. 1975).} In that case, the court concluded that trademark protection extends to the need to protect “the major commercial value of [sports teams’] emblems [which is] derived from the efforts of [the teams].”\footnote{Id. at 1011; see also Univ. of Ga. Athletic Ass’n, 756 F.2d at 1546–47 (noting that a likelihood of confusion may be demonstrated by showing confusion among consumers as to the sponsorship of the mark). In University of Georgia Athletic Association, the Eleventh Circuit upheld the finding of a Lanham Act violation against Battlin’ Bulldog Beer for distributing a novelty beer with a logo that strongly resembled the Georgia Bulldog. \textit{Id.} at 1536–39. According to the court, “confusion stems not from the defendant’s unfair competition with the plaintiff’s products, but from the defendant’s misuse of the plaintiff’s reputation and good will as embodied in the plaintiff’s marks.” \textit{Id.} at 1547. In addition, no disclaimer can save a party that misuses the reputation of good will of another’s marks because “[o]nly a prohibition of the unauthorized use will sufficiently remedy the wrong.” \textit{Id.}}

Nevertheless, trademark protection rarely extends to the use of another’s mark for purposes of non-commercial speech, which is deemed by the courts to be “fair use.”\footnote{4 Calmann on Unfair Competition, Trademarks & Monopolies §22.59 (4th ed. 2011); see also Atlanta Civil Liberties Union of Georgia v. Miller, 977 F. Supp. 1228, 1233, n. 6 (N.D.Ga. 1997) ("Congress acknowledged the first amendment problems with banning non-commercial use of trademarks"); JA Apparel Corp., 682 F. Supp. 2d at 309 ("The fair use defense, which allows for some level of confusion, is an absolute defense to claims of trademark infringement, trademark dilution, and false designation of origin."). See generally \textit{id.} at 309–10 (citing Car-Freshner Corp. v. S.C. Johnson & Sons, Inc., 70 F.3d 267, 269 (2d. Cir. 1995)) (holding that a court will assess three factors in order to determine "fair use": (1) whether the mark is use descriptively; (2) whether the mark is used to indicate the origin of consumer products; and (3) whether the mark is being used in good faith).} While the fine line separating commercial speech from fair use has often been a source of more confusion than clarity,\footnote{Compare Rogers v. Grimaldi, 875 F.2d 994, 999 (2d. Cir. 1989) (using a balancing test to weigh "the public interest in avoiding consumer confusion" against the public interest in free speech) with Facenda v. NFL Films, Inc., 542 F.3d} the U.S. Court of Appeals for the Second Circuit currently applies a balancing
test that weighs the public’s interest in avoiding consumer confusion, against the public’s interest in free expression. 290 Meanwhile, the U.S. Court of Appeals for the Third Circuit has expressed support for a test that places a somewhat stronger burden on the non-trademark holding party. 291

With lingering disagreement among the circuits about where depreciation of a trademark holder’s goodwill ceases and fair use begins, fantasy sports host sites are best advised to minimize their legal risk under the Lanham Act by avoiding the use of actual sports teams’ logos without a license. 292 Additionally, in instances where fantasy sports host sites seek to identify a professional sports team by name, the host site should either obtain a license, or reference the team’s name in small print, while having its own site’s name and marks appearing far more conspicuously. 293

4. Right to Publicity

Finally, state “right of publicity” laws govern the use of names and identifying characteristics of famous individuals. 294 Right of publicity laws are derived from the common law right to privacy, which is grounded in both property law and tort law. 295 Today, publicity rights are defined by Black’s Law Dictionary 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.” 296 In addition, according to the Supreme Court, the right of publicity serves as “an economic incentive for [one] to

1007, 1018 (3d. Cir. 2008) (“[W]e need not reach the issue whether our Court will adopt the Rogers test.”).

290 See Rogers 875 F.2d at 999.

291 See Facenda, 542 F.3d at 1019.

292 Cf., supra, notes 288 - 291 and accompanying text.

293 See JA Apparel Corp., 682 F.Supp. 2d at 313–14, 316 (noting that where a company places its own trademark in far larger and more noticeable font than another’s trademark, it “arguably removes the likelihood of any confusion”).

294 See William Sloan Coats & Kenneth Maikish, The Right of Publicity: Proper Licensing of Celebrity Endorsements, 1025 PLI/Pat 269, 279 (2010) (noting that “[c]urrently, nineteen states, including California and New York, protect the right of publicity via statute . . . an additional twenty-eight states recognize the right via common law.”); see also C.B.C. Distrib. & Mktg. Inc., 505 F.3d at 822 (“An action based on the right of publicity is a state-law claim.”).


make the investment required to [perform a skill] of interest to the public.”

Whether a fantasy sports game’s unauthorized use of players’ names and statistical information would violate state right of publicity laws remains an unsettled issue on which the Supreme Court has not yet spoken. The strongest argument that the unlicensed use of players’ names and statistics in a fantasy sports game violates athletes’ publicity rights comes from Gridiron.com v. National Football Players Association, a case in which the U.S. District Court for the Southern District of Florida rejected the argument that a website operator may use players’ names and images for the purposes of selling football memorabilia and operating a fantasy sports game.

By contrast, the strongest argument in favor of a fantasy sports host site’s right to use players names and statistics without a license comes from the 2008 case C.B.C. Distribution & Marketing Inc. v. Major League Baseball Advanced Media, in which the U.S. Court of Appeals for the Eighth Circuit held that the First Amendment trumps Major League Baseball players’ assignable right to publicity in their names and statistics. This split in

297 Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576 (1976); see also Haelan Lab. Inc. v. Topps Chewing Gum, Inc., 202 F.3d 866, 877 (2d. Cir. 1953) (“[I]t is common knowledge that many prominent persons far from having their feelings bruised through public exposure of their likeness, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant, which barred any other advertiser from using their pictures.”).

298 See infra notes 299 - 301 and accompanying text.

299 106 F. Supp. 2d 1309, 1315 (S.D. Fla. 2000) (“Plaintiff actively sought out and obtained over 150 NFL Player’s publicity rights, and now argues that the information the websites produce are entitled to Free Speech protection. Plaintiff’s argument is not persuasive.”).

300 505 F.3d 818 (8th Cir. 2007). According to the Eighth Circuit view, the First Amendment trumped the right of publicity in fantasy sports cases for three reasons. First, the information used in the fantasy baseball games is already in the public domain. Id. at 823. Second, baseball players whose names appear in these games “are rewarded separately for their labors.” Id. at 824 (noting, in separate paragraphs, the athletes’ compensation through their salaries and compensation through other endorsement opportunities). Finally, consumers of fantasy products are not misled by the use of baseball players’ names and information into believing the players are endorsing a particular fantasy sports game. Id. at 824. Thereafter, in CBS Interactive Inc. v. National Football League Players Association, the U.S. District Court for the District of Minnesota (a lower court within the Eighth Circuit) held that a fantasy sports host site did not need a license to use National Football League
authority has not only led to some confusion for fantasy sports businesses, but also potentially invites the practice of “forum shopping” by plaintiffs. 301

In addition, even if a court were to conclude that the First Amendment trumps the right of publicity with respect to the use of professional athletes’ names and statistics, that same court might rule differently where the fantasy sports game involves college athletes.302 This is because, unlike professional athletes, who “are rewarded separately for their labors,”303 collegiate athletes are not otherwise compensated based on their fame.304 Thus, the American legal system has an especially strong interest in protecting the proprietary nature of the collegiate athlete’s right to publicity.305

players’ names and statistics in its fantasy football game. See 259 F.R.D. 398, 419 (D. Minn. 2009) (“Because the Eighth Circuit’s decision in C.B.C. Distribution is controlling, CBS Interactive is entitled to judgment as a matter of law.”).

301 Eric J. Goodman, A National Identity Crisis: The Need for a Federal Right of Publicity Statute, 9 DePaul-LCA J. of Art & Ent. L. 227, 244 (1999). Absent the creation of a unified, federal right to publicity, there indeed are a number of possible ways that a court could determine which state’s right to publicity laws should apply, including: (1) the player’s domicile; (2) the location where the players union is located; (3) the location of the alleged infringement; or (4) simply the law of the forum. See, e.g., Keller, 2010 WL 530108, at *2 (N.D. Cal. Feb. 8, 2010) (“Plaintiff alleges that NCAA violated his Indiana right of publicity. He argues that Indiana law applies to NCAA because its headquarters are located in Indiana and the alleged violation occurred in Indiana.”) (emphasis added). It is interesting to note that in the class action suit Keller v. Electronic Arts, the plaintiff class, which brought suit in the U.S. District Court for the Northern District of California, argued not only a breach of California’s statutory and common law right to publicity law, but also those of Indiana: presumably based on the belief that Indiana’s law, based on its broad purported applicability, would apply to all class members. See Complaint, Keller v. Electronic Arts, LEXSEE 2009 U.S. Dist. Pleadings 368791, at *26-27, ¶ 17-28 (May 5, 2009).

302 See infra notes 303 - 305 and accompanying text; see also Christian Dennie, Note, Tebow Drops Back to Pass: Videogames have Crossed the Line, but Does the Right of Publicity Protect Student-Athlete’s Likeness When Balanced Against the First Amendment?, 62 Ark.L. Rev. 645, 673 (2009) (“The fact that student-athletes are not paid may actually work in favor of a student-athlete’s argument that he or she is entitled to right-of-publicity protection.”).

303 C.B.C. Distrib. & Mktg. Inc, 505 F.3d at 824.


305 See Zacchini, 433 U.S. at 573 (noting “the State’s interest in permitting a ‘right of publicity’ is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment”).
V. LEGAL RISKS FOR FANTASY SPORTS PARTICIPANTS

While fantasy sports host sites face numerous legal issues related to their business practices, they are not the only stakeholder group potentially subject to liability for their engagement in fantasy sports. Fantasy sports participants also face some degree of legal risk, albeit to a far lesser extent.

A. Criminal Liability under Gambling Laws

Unlike fantasy sports host sites, fantasy league participants have minimal risk of violating federal gambling laws because they are unlikely to be deemed to be “engaged in the business of wagering or gambling.” Much like the operators of their host sites, however, fantasy sports participants bear some risk, albeit small, of running afoul of states’ criminal gambling statutes.

The earliest known criminal lawsuit involving a fantasy sports participant took place in Fort Lauderdale, Florida in 1991, when a local firefighter and fantasy baseball player, Randy Bramos, was charged with a misdemeanor gambling offense for running a 12-team fantasy baseball league involving $5,000 in league entry fees. These charges, however, were eventually dropped. Since then, there have not been any other instances of charges filed against fantasy sports participants.

---

306 See supra notes 172 - 305 and accompanying text.
307 See infra notes 309 - 359 and accompanying text.
308 See infra notes 309 - 331 and accompanying text.
309 18 U.S.C. § 1084(a) (1994) (emphasis added); see also United States v. Becker, 461 F.2d 230, 232 (2d. Cir. 1972), vacated on other grounds by 417 U.S. 903 (1974) (internal citations and quotations omitted) (noting that illegal “conduct” under the Illegal Gambling Business Act “does not include the player in an illegal game of chance, nor the person who participates in an illegal gambling activity by placing a bet); Kilby, supra note 232 at 240–41 (noting that the Wire Act only applies to those “engaged in the business of betting” and not to individual gamblers). But see generally United States v. Crockett, 514 F.2d 64, 75 (5th Cir. 1975) (noting that customers who are in effect partners in the operation of an illegal gambling business are within the scope of the Illegal Gambling Business Act).
310 See infra notes 311 - 313 and accompanying text.
311 See Skolnick, supra note 29 at 11B.
312 Id.
313 See id.; see also Robert J. Nobile, HUMAN RESOURCES GUIDE § 5:12.50 (Dec. 2010) (“While technically illegal, it is virtually unheard of for someone to get arrested, prosecuted and convicted for taking part in an office pool.”).
B. Civil Liability for Gambling Activities

Fantasy sports participants also risk disgorgement of their gambling winnings under civil anti-gambling statutes. These civil anti-gambling statutes, which derive from England’s 1710 Statute of Queen Anne, assert that, as a matter of public policy, a gambling winner “shall not be protected in his unlawful gains,” and a gambling loser or gambling informer “may sue to recover back the money lost.” In addition, most states that recognize disgorgement statutes refuse to allow gamblers to opt out of their home state’s choice of gambling law. This is because states that enforce disgorgement statutes are trying to prevent gambling losers from becoming wards of the state due to their risky financial behavior.

Although one recent case has held that fantasy sports host sites are immune from civil liability because they are neither “participants” nor “winners” in gambling activities, the same conclusion does not necessarily extend to fantasy participants in leagues that, under state law, are deemed to be gambling (meaning those found to involve consideration, chance, and reward).

C. Violating Company Anti-Solicitation Policies

Fantasy sports participants, on a more remote level, also are subject to termination of their employment if found to be soliciting other employees

---

315 Humphrey, 2007 WL 1797648, at *3.
317 See, e.g., In re Baum, 386 B.R. 649, 657 (Bankr. N.D. Ohio 2008) (noting some courts that do not enforce anti-gambling contracts will not allow gamblers to uphold these contracts based on out-of-state choice-of-law clauses).
318 See generally supra note 317 and accompanying text.
319 Humphrey, 2007 WL 1797648, at *9-10; see also id. at *7 (noting that fantasy sports host sites are not winners in a gambling activity but rather are “neutral parties in the fantasy sports games” that do not compete for prizes, and are indifferent about who wins the prizes.).
320 See generally Salamon v. Taft Broadcasting Co., 475 N.E.2d 1292, 1297 (Ohio Ct. App. 1984) (noting that Ohio’s civil anti-gambling statute gives a stranger to a particular gambling transaction the “right to recover only the money actually lost, and only from the winner”).
to participate in their fantasy sports games during work hours, in violation of company policy.\textsuperscript{321}

While some employers might oppose fantasy sports games based on the lost productivity of workers who spend time looking at their fantasy sports teams during the work day,\textsuperscript{322} other employers may disallow soliciting membership in fantasy sports leagues for reasons grounded in labor law.\textsuperscript{323}

According to the \textit{Human Resources Handbook}, any employer that seeks to disallow union solicitations in the workplace must, pursuant to the National Labor Relations Act, maintain a broader, content-neutral ban on solicitations.\textsuperscript{324} Such a broad, content-neutral ban would logically extend to fantasy sports.\textsuperscript{325} For instance, in \textit{Webco Industries, Inc. v. NLRB}, the U.S. Court of Appeals for the Tenth Circuit upheld a National Labor Relations Board finding that a no-solicitation policy was “selectively enforced with discriminatory intent” and thus impermissible because a company disallowed employees from soliciting union membership, but allowed employees to solicit each other for “recreational activities (such as sporting event pools, fantasy football, and baseball leagues).”\textsuperscript{326}

\textbf{D. Bankruptcy}

Finally, even if fantasy sports participants are insulated from gambling prosecution under most federal and state laws, high-stakes fantasy sports participants still run a heightened risk of bankruptcy based on their financially risky behavior.\textsuperscript{327} One of the reasons why some fantasy sports participants may run a heightened risk of bankruptcy is because, like compulsive poker players and slot machine users, they “get addicted” to the gambling aspects of fantasy sports and gamble incessantly on short-duration fantasy

\textsuperscript{321} Nobile, supra note 313.
\textsuperscript{322} Vecchione, supra note 58 at 1698.
\textsuperscript{323} See infra notes 324 - 326 and accompanying text.
\textsuperscript{324} See Nobile supra, note 313 (“Although a company’s non-solicitation policy may not be violative of the NLRA, if it selectively enforces this policy by tolerating some solicitation (such as solicitations for office pools, fantasy sports, etc.) but not union solicitation, it will likely – with some limited exceptions – be found to have violated the NLRA by discriminating against the union.”).
\textsuperscript{325} See Nobile, supra note 313.
\textsuperscript{326} 217 F.3d 1306, 1312 (10th Cir. 2000).
\textsuperscript{327} See In re Baum, 86 B.R. 649 (Bankr. N. D. Ohio Feb 29, 2008) (case in which a parties’ excessive Internet gambling led to bankruptcy); see also Hancock, supra note 20, at 348 (“Studies show increased debt in areas of legalized gambling.”).
sports contests. Indeed, "pathological gambling" is one of the few forms of addiction currently recognized by the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).

Other fantasy sports participants, meanwhile, may wager incessantly on short-duration fantasy sports contests because they suffer from Internet addiction, which "can be a symptom of other mental illness, or conditions like autism." Although Internet addiction is not a recognized form of addiction under DSM-IV, Dr. Jerald Block of the Oregon Health Sciences University in Portland notes that “[a]mong psychiatrists there is general recognition that many patients have difficulty controlling their impulses to chat online, or play computer games.”

VI. LEGAL RISKS FOR ANCILLARY FANTASY SPORTS BUSINESSES

Finally, various ancillary fantasy sports businesses also may risk legal liability if their business owners fail to knowledgably structure business activities.

A. Fantasy Sports Treasury Sites

Fantasy sports treasury sites bear two forms of potential liability: suits from fantasy sports participants for failure to turn over contested winnings, and challenges from a broader range of plaintiffs alleging a Wire Act violation.

Where a fantasy sports treasury site fails to turn over contested winnings to the proper league participant, liability may follow. This is because the treasurer/participant relationship is comparable to one of bank and

---

328 Fantasy Sports: A Booming Business, supra note 53, at B1; cf. King, supra note 51, at 71 (Advocates of banning online gaming argue that it "is harmful to minors, a source or bankruptcy and addiction among adults, and a means for illegal money laundering.")


331 Id.

332 See infra notes 333 - 335 and accompanying text.

333 See infra notes 335 - 338 and accompanying text.

334 See infra notes 335 - 336 and accompanying text.
customer, in which “the bank is indebted to the customer and promises to debit his account only at [the customer’s] direction.”335 Thus, “[i]f the bank pays, on an instrument drawn by its customer, any person other than the designated payee or a person to whom the instrument is negotiated, the bank’s indebtedness to the customer is not diminished.”336

In addition, if a particular fantasy sports game is deemed to be gambling, there is a remote argument that the affiliated fantasy sports treasury website, in collecting and dispersing funds, may be found to be in violation of the Wire Act.337 This is based on the argument that by collecting league entry fees and distributing prize money over a wired Internet, these treasury sites are “engaging in the business of betting or wagering.”338

B. Fantasy Sports Advisors

Fantasy sports advisors, meanwhile, risk liability under both tort law and contract law, if they fail to meet promised standards.339 Under tort law, fantasy sports advisors risk liability if they negligently supply misinformation that is used in a business transaction, even if that information is not sold directly to the party that suffers a financial loss as a result.340 For example, Section 552 of the Restatement of Torts describes the tort of “information negligently supplied for the guidance of others” as occurring if “[o]ne who in the course of his business or profession supplies information for the guidance of others in their business transactions [and] fails to exercise that care and competence . . . which its recipient is justified in expecting.”341

Under contract law, if a fantasy sports participant purchases advisory services that are not performed as warranted, the fantasy sports participant

---

335 Cooper v. Union Bank, 9 Cal. 3d 371, 377 (1973).
336 Id.
337 See id.
338 18 U.S.C. § 1084(a) (1994). Two elements must be present for a violation of the Wire Act: (1) that information transmitted via wire assisted in placing of bets or wagers; and (2) the defendant during such time was engaged in businesses of wagering or betting. Truchinski, 393 F.2d at 630.
339 See infra notes 340 - 348 and accompanying text.
340 See generally Restatement (First) of Torts § 552 (2011) (discussing the tort of “Information Negligently Supplied for the Guidance of Others); see also Oddi v. Avco Corp., 947 F.2d 257 (7th Cir. 1991) (finding financial advisor liable for an error in “simple number crunching”).
341 Restatement (First) of Torts § 552 (2011).
may attempt to sue their advisors for breach of an express warranty. In addition, where an advisory service provides advice in the form of an analytical tool, such a tool might be deemed to be a “good” under the Uniform Commercial Code, and thus the purchaser may sue additionally if the tool fails to meet either an implied warranty of merchantability, or an implied warranty of fitness for a particular purpose.

Given these contract-law risks, fantasy sports advisors are always best advised to try to minimize their potential liabilities by drafting clear “disclaimers.” One of the better disclaimers of liability in the context of fantasy sports advice appears on the Bloomberg Sports website under its Terms and Conditions of Service. This disclaimer requires all users to “bear all risks associated with the use of such material, including, without limitation, any reliance on the accuracy, completeness, or usefulness of such material,” and to agree that “neither Bloomberg nor its affiliates make any warranty of any kind, express or implied, as to the services or results to be attained . . . [and] disclaims all express or implied warranties.” In many courts such a disclaimer if clear and conspicuous would be deemed valid.

342 See CBS Inc. v. Ziff-Davis Publ. Co., 75 N.Y.2d 496, 503 (1990) (defining a contractual warranty as "an assurance by one party to a contract of the existence of a fact upon which the other party may rely").

343 Many courts have held that computer software qualifies as a “good” under Article 2 of the Uniform Commercial Code (UCC) and thus contracts for analytical tools, such as those provided by Bloomberg Sports, will most likely be interpreted based on the UCC, where adopted by the relevant state. See, e.g., Advent Sys., Ltd. v. Unisys Corp., 925 F.2d 670, 675 (3rd Cir. 1991) (finding computer software subject to Article 2 of the UCC because the fact that a computer program "may be copyrightable as intellectual property does not alter the fact that once in the form of a floppy disc or other medium, the program is tangible, moveable and available in the marketplace"); but see Pearl Invs., LLC v. Standard I/O, Inc., 257 F. Supp. 2d 326, 353 (D. Me. 2003) (If the computer software in question is custom designed, a court may find the predominant purpose of the transaction was the design services).


346 See U.C.C. §§ 2-316, (noting, in the context of goods, the possibility of disclaiming warranties); Burr v. Sherwin Williams Co., 268 P.2d 1041, 1049 (1954) (If a merchant wishes to do so, he must disclaim warranties in a way that makes it clearly known to the buyer.).


348 Id.
Similarly, fantasy-sports insurance businesses need to ensure that their services are deemed, under state law, to be bona fide insurance contracts and not a disguised form of illegal gambling. Under most state laws, bona fide insurance contracts must conform to two doctrines: the “doctrine of insurable interest” and the “principle of indemnity.” The “doctrine of insurable interest” requires that any insurance contract involve “some significant relationship between the insured and the person, the object, or the activity that is the subject of an insurance transaction.” Thus, in applying the “doctrine of insurable interest,” a court will void an insurance contract “where an insurance policy is obtained by a party who has no interest in the subject of the insurance.” In addition, the principle of indemnity requires that “the amount of insurance benefits paid when a loss is sustained by an insured party is not to exceed the economic measure of the loss.” According to one treatise on insurance law, “among the potential evils that were originally regarded as an undesirable consequence of insurance contracts which permitted a net gain by an insured was the prospect that such transactions would be used for gambling.”

Fantasy sports insurance presents a close call under the “doctrine of insurable risk.” On the one hand, sports participants have no direct relationships to the lives or health of the players on their fantasy sports teams.

349 Robert E. Keeton & Alan I. Widiss, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES §8.1(a), 930 (Student ed., West Publ. Co., 1988) (“In the United States, administrative regulation of insurance has been and continues to be primarily the responsibilities of state authorities.”).

350 See infra notes 351-354 an accompanying text.

351 Keeton & Widiss, supra note 349, at 135–36.

352 Ruse v. Mutual Ben. Life Ins. Co., 26 Barb. 556, 561 (N.Y. 1861) (voiding an insurance policy where the party taking the policy has no interest in the life of the insured).

353 Keeton & Widiss, supra note 349, at 135 (noting that it “is now a generally accepted fundamental tenet of insurance law that opportunities for net gain to an insured through the receipt of insurance proceeds exceeding a loss should be regarded as inimical to the public interest.”).

354 Keeton & Widiss, supra note 349, at 136-37 (“[I]nsurance transactions that appeared to be wagers generally were declared to be illegal in the United States by judicial action, even though there was usually no basis for these decisions in statutory prohibitions.”).

355 Id. at 135-36.
However, fantasy sports participants seem to have a real financial stake in a property right pertaining to the statistical output of these athletes.

Fantasy sports insurance also presents some uncertainty under the “doctrine of indemnity.”\(^{356}\) To meet the requirements of this doctrine, fantasy sports insurance agencies need to make sure that their ultimate payout never exceeds the difference between the expected winnings of a given fantasy sports owner if a particular player remains healthy throughout the season, and the expected winnings of that same fantasy sports owner given the occurrence of the insurable event.

D. Fantasy Sports Dispute Resolution

Finally, fantasy dispute resolution services face the lowest risk of legal liability among ancillary fantasy sports businesses.\(^{357}\) Any decision provided by a fantasy sports dispute resolution service may be challenged in the courts, on the basis that the dispute arbitrator acted arbitrarily, capriciously, fraudulently, or in violation of public policy.\(^{358}\) Nevertheless, the courts will probably look favorably upon fantasy sports dispute resolution services because these services not only allow courts to avoid using their limited resources on resolving fantasy sports disputes, but also allow courts to avoid “becom[ing] marred down in what has been called the ‘dismal swamp’” of a particular private association’s rules.\(^{359}\)

VII. Conclusion

When Daniel Okrent hosted the inaugural Rotisserie League baseball draft in April 1980, there was little need for him to consider how legal risks applied to his “goofy” competition.\(^{360}\) However, with the fantasy sports industry today valued at $5 billion, an understanding of the legal risks that apply to fantasy sports games has become imperative.

\(^{356}\) Id. (noting that it “is now a generally accepted fundamental tenet of insurance law that opportunities for net gain to an insured through the receipt of insurance proceeds exceeding a loss should be regarded as inimical to the public interest.”).

\(^{357}\) See infra notes 358 - 359 and accompanying text.

\(^{358}\) See, e.g., Aviles v. Charles Schwab & Co., 2010 WL 1433369 (S.D.Fla 2010), at *7 (discussing grounds for challenging a neutral arbitrator’s decision both under the Federal Arbitration Act and under common law).

\(^{359}\) Crouch v. National Ass’n for Stock Car Auto Racing, 845 F.2d 397, 403 (2d. Cir. 1988).

\(^{360}\) Townsend, supra note 25, at 1C.
For fantasy sports host sites, one source of legal risk emerges from U.S. gambling laws. While there are few court opinions that address how gambling laws apply to fantasy sports host sites, host sites can nevertheless minimize their potential liability under gambling laws by structuring contests in a way that either (1) does not award prizes or (2) allocates players through a “traditional auction,” and lasts for at least a full professional sports season.

Another source of legal risk comes from intellectual property laws. Host sites can minimize their intellectual property risks by ensuring that their game scoring systems do not infringe on existing patents and that their written and illustrated content does not infringe on existing copyrights, as well as by obtaining licenses from the requisite players associations before using player names in their games, and obtaining licenses from the requisite sports leagues before using individual team trademarks.

For fantasy sports participants, the main source of legal risk entails the possible disgorgement of fantasy winnings under Queen Anne statutes, which disallow winners in gambling contests from keeping prize money. Fantasy sports participants should avoid competing in high-stakes fantasy leagues in states that maintain Queen Anne statutes.

Fantasy sports participants are also at a potentially heightened risk of unemployment and bankruptcy. Thus, fantasy sports participants should familiarize themselves with workplace policies related to participating and soliciting participation in fantasy sports leagues, as well as with how, if at all, fantasy sports entry fees would compromise their personal finances.

For ancillary fantasy sports businesses, their main legal risks relate to gambling laws, as well as traditional contract and tort law. Specifically, fantasy sports treasury sites risk liability if they fail to properly turn over winnings or they collect and dispense funds in a way that violates the Wire Act. Fantasy sports advisory sites risk liability under both tort and contract law if their websites make inaccurate representations about their services. Fantasy sports insurance businesses risk liability under gambling law if their insurance policies are found to not serve a legitimate purpose of insurance, but rather to be a disguise for illegal gambling. Meanwhile, fantasy sports dispute resolution businesses run the risk of having their arbitration decisions challenged in federal court.

Recognizing all of these legal risks, it is no longer fair to view fantasy sports as simply a “tongue-in-cheek exercise.” However, for the many professional sports fans who wanted to experience a true simulation of the professional sports marketplace, they now have it: legal risks and all.

---

361 Walker, supra note 5, at 1D.