



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

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I. INTRODUCTION

America is in the midst of a “fantasy sports revolution” that is changing the way sports fans interact with one another.² With more than 30 million Americans playing fantasy sports,³ today’s sports fans spend as much time predicting the performance of professional athletes as Wall Street investors spend predicting stocks and bonds.⁴

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 \$300,000.⁵ Meanwhile, other business ventures, such as Bloomberg Sports, sell fantasy participants “analytical tools” and “expert advice.”⁶ One insurance carrier, Fantasy Sports Insurance, has even begun to offer fantasy participants insurance policies against injury to their star fantasy players.⁷

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

² Neil Janowitz, *Bet on Football*, DEMOCRAT & CHRON. (Rochester, NY), Sept. 16, 2005, at I28, available at 2005 WLNR 26900861; see also *infra*, notes 159 - 169 and accompanying text.

³ See Gene Wang, *Fantasy Football Gets Benched*, WASH. POST, May 29, 2011, at D3 (estimating about 30 million participants in fantasy football); Tom Van Riper, *A Guy’s Fantasy*, FORBES, Feb. 28, 2011, at 23 (estimated the entire fantasy sports marketplace at 30 million participants).

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).

⁵ See Chris Dempsey, *Fantasy Revolution Online Craze is Intoxicating to Americans, and Expanding Outside the Sports World*, DENV. POST, Sept. 9, 2007, at B3 (describing the entry fees and prizes involved in the World Series of Fantasy Football); Erick S. Lee, *Play Ball!: Substituting Current Federal Non-Regulation of Fantasy Sports Leagues with Limited Supervision of Hyper-Competitive Leagues*, LOY. L.A. ENT. L. REV. 53, 64 (2008) (describing “the rise of hyper-competitive fantasy leagues offering cash prizes as high as \$100,000”); Childs Walker, *Dream Teams: Tired of Second Guessing How Your Favorite Sports Clubs Are Managed? Fantasy Leagues Let You Take Charge of the Action*, THE BALT. SUN, March 6, 2006, at 1D (“You can find high-stakes national games with top prizes in the hundreds of thousands of dollars.”).

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.”⁸ 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.⁹ 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.¹⁰

For almost forty years, All-Star Baseball was seen as the best way for sports fans to simulate team management.¹¹ Then, in 1961, Hal Richman, a Bucknell University mathematics student, devised a more complex simulation game.¹² Richman’s game, Strat-O-Matic Baseball, included one play-

⁸ Walker, *supra* note 5.

⁹ David G. Roberts Jr., Note, *The Right of Publicity and Fantasy Sports: Why the C.B.C. Distribution Court Got It Wrong*, 58 CASE L. REV. 223, 231 (2007); *see also Triple Play: Personal Reviews, Op-Ed Pieces, and Polemics from Outside the Purview of the Umpires*, NINE, Sept. 22, 2006, at 110, available at 2006 WLNR 24732952.

¹⁰ *See Triple Play*, *supra* note 9.

¹¹ *Id.*

¹² *See Van Riper*, *supra* note 3 at 24; Stuart Miller, *Strat-O-Matic Devotees Celebrate Its 50th Anniversary*, N.Y. TIMES, Feb. 14, 2011, at D5 (“In his 20s, after discouragement from his father and rejection from numerous companies, Richman borrowed money from friends and started [Strat-O-Matic] on his own.”); Cody Derespina, *Strat-O Turning the Big 5-Ob!*, NEWSDAY, Feb. 13, 2011, at A73 (further noting that “Richman began to develop the game as an 11-year-old in 1948 after becoming dissatisfied with the statistical randomness present in other baseball games of the era. He found that using dice added an element of predictability that jibed with the results of actual ballgames.”); *Calling All SABR Geeks*, N.Y. DAILY NEWS, Feb. 6, 2011, at 73; Mike James, *Extra Bases: Strat Stretches Board Game History to 50 Years*, USA TODAY, Jan. 11, 2011, at 8C; Rich Freeman, *Strat-O-Matic Still Going Strong*, TRENTON TIMES, Jul. 7, 2010, at B2.

ing card for each Major League Baseball player.¹³ Each card contained various ratings and result tables that corresponded to dice rolls.¹⁴ For each game, Strat-O-Matic participants would select teams and batting orders, roll the dice, and then review charts to determine game results.¹⁵

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.¹⁶ One of the benefits of playing sports simulation games on the computer was the increased range of managerial options.¹⁷ 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.¹⁸

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.¹⁹ 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.²⁰ 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.

¹⁴ *Id.*; see also Freeman, *supra* note 12; Rob Biertempfe, *MLB Q&A: Talking with Hal Richman*, PITT. TRIB. REV., May 30, 2010, available at 2010 WLNR 11122984.

¹⁵ See Miller, *supra* note 12; Biertempfe, *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.*

²⁰ See Geoffrey T. Hancock, *Upstaging U.S. Gaming Law: The Potential Fantasy Sports Quagmire and the Reality of U.S. Gambling Law*, 31 T. JEFFERSON L. REV. 317, 323 (2008); Sam Allis, *Lord of the Games: Fantasy Baseball Indebted to Two Innovators*, BOSTON GLOBE, Mar. 6, 2006, at A3; Bill Shea, *Yes, They are Playing Fantasy Sports at Work, but is that Bad? Some Executives Bet Not*, CRAIN’S DETROIT BUS. J., Mar. 17, 2008, at 11, available at 2008 WLNR 5404899.

fee to “draft” a team of baseball players.²¹ 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.²²

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.²³ In 1965, Sklar mentioned “The Baseball Seminar” to one of his mentees, Daniel Okrent.²⁴ 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.²⁵

Okrent first proposed the game to his friends in November 1979, over lunch at a now-defunct New York French bistro, La Rotisserie Francaise.²⁶ 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, 1980, at 8.

the Arts.²⁷ 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.³³

D. *Rotisserie Baseball Grows in Popularity*

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

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

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

³³ See Cunningham, *supra* note 25; Skolnick, *supra* note 29.

³⁴ Walker, *supra* note 5.

³⁵ Townsend, *supra* note 25.

³⁶ See Tim Feran, *Back in the Game: Major League Baseball Trying to Reattract Fantasy Players with New Online Forum*, COLUMBUS DISPATCH, Apr. 3, 2006, at 2006 WLNR 5582002; see also Hale, *supra* note 26 (“Most of those team owners were writers, editors or publishers, which guaranteed publicity.”).

³⁷ See *infra* notes 38 - 39 and accompanying text.

³⁸ See Ferretti, *supra* note 26 at 8; Townsend, *supra* note 25 at 1C.

³⁹ Townsend, *supra* note 25 at 1C.

⁴⁰ Walker, *supra* note 5, at 1D.

⁴¹ See Cunningham, *supra* note 25 at C10; see also *A Whole Different Ball Game*, ATLANTIC, June 1, 1985, at 30, available at 1985 WLNR 1370459 (noting that by 1985, the Rotisserie League Baseball Association included 157 leagues, across 48 states); Craig Davis, *The Paper Tigers: Americans’ Teams Just Read the Box Scores: It’s Not Whether they Win or Lose but How they Played Last Game*, 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).

⁴² See Paul White, *Fantasy Leagues Variations Keep Game Fresh*, USA TODAY, Aug. 24, 1990, at C6 (discussing various innovations to the Rotisserie League baseball rules that emerged in the 1980s); cf. Marc Edelman, *Why The Single Entity Defense can Never Apply to NFL Clubs: A Primer on Property Rights Theory in Professional Sports*,

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).

⁴⁶ See Cunningham, *supra* note 25 at C10; *c.f.*, Robert Thomas Jr., *Sports World Specials: A Team of One's Own*, N.Y. TIMES, Aug. 20, 1984, at C2 (discussing the creation of a book, formalizing the core rules for Rotisserie baseball).

⁴⁷ *Id.*

⁴⁸ Cunningham, *supra* note 25 at C10.

⁴⁹ See Bo J. Bernhard & Vincent H. Eade, *Gambling in a Fantasy World: An Exploratory Study of Rotisserie Baseball Games*, 9 UNLV GAMING RES. & REV. J. 29, available at 2005 WLNR 6724835.

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).

⁵² Bernhard & Eade, *supra* note 49; see also Risa J. Weaver, *Online Fantasy Sports Litigation and the Need for a Federal Right of Publicity Statute*, 210 DUKE L. & TECH. REV. 2, ¶ 1 (2010) (“This phenomenal growth [in fantasy sports] can be explained in two words: the internet.”); Nicole Davidson, Comment, *Internet Gambling: Should Fantasy Sports Leagues Be Prohibited*, 39 SAN DIEGO L. REV. 201, 202 (2002).

⁵³ See *Fantasy Sports: A Booming Business*, MISS. LINK, Sept. 17, 2003, at B1, available at 2003 WLNR 13365412.

⁵⁴ *Id.*

⁵⁵ Greg Johnson & David G. Savage, *Supreme Court Calls Fantasy Baseball Safe, Refuses to Hear Major League’s Argument to Protect Statistics*, L.A. TIMES, Jun. 3, 2008, at A1.

⁵⁶ See *infra* notes 123 - 136 and accompanying text.

⁵⁷ See Regis Behe, *Fantasy Sports Leagues Put Armchair Quarterbacks in the League*, PITT. TRIB. REV. (Greensburg, PA), Dec. 14, 2002, available at 2002 WLNR 12019633.

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.”); *c.f.* 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.⁶¹ Fantasy football is currently the most popular, with an estimated 20 million participants per year.⁶² Indeed, at present “[t]he [fantasy] football season generates more revenue than the rest of the sports combined.”⁶³

Fantasy baseball is second in terms of popularity, with approximately 11 million annual participants.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.⁶⁵

Immediately behind fantasy baseball in popularity lie fantasy racing, basketball, and hockey.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.⁶⁷

⁶¹ See *infra* notes 62 - 71 and accompanying text.

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.

⁶³ Gene Wang, *Fantasy Football Gets Benched*, WASH. POST, May 29, 2011, at D3.

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.

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).

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).

⁶⁷ See *About Fantasy Sports*, Fantasy Sports Ad Network, at <http://www.fantasysportsadnetwork.com/aboutfantasy.htm> (last visited Oct 17, 2011).

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-

⁶⁸ See Bill Pennington, *A Fantasy Fulfilled, Including Yelling at the TV*, N.Y. TIMES, Jun. 9, 2009, at D6.

⁶⁹ *Id.*

⁷⁰ See Josh Bousquet, *Minor Moves May Help Signal Bargain Values*, WORCHESTER TELEGRAM & GAZETTE, Jan. 14, 2009, at C4.

⁷¹ *Id.*

⁷² See Walker, *supra* note 5 at 1D.

⁷³ See *supra* note 29 and accompanying text (describing original Rotisserie League auction).

⁷⁴ See Walker, *supra* note 5, at 1D.

⁷⁵ See Bernhard & Eade, *supra* note 49.

⁷⁶ See Walker, *supra* note 5, at 1D.

⁷⁷ See *infra* notes 78 - 79 and accompanying text (describing modified auction leagues).

⁷⁸ For fantasy sports games that allocate players in this manner, see, e.g., *Rules, DRAFTSTREET*, <http://www.draftstreet.com/rules.aspx> (follow “Draft Styles” hyperlink; then follow “Salary Cap Leagues” hyperlink) (last visited Nov 7, 2011) (describing these leagues as “salary cap” leagues); *Salary Cap Football*, YAHOO! SPORTS, <http://football.fantasysports.yahoo.com/salcap> (last visited Nov. 7, 2011).

neously select players.⁷⁹ 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.⁸⁰ Draft leagues take their inspiration from the way in which new players are allocated in the majority of real, professional sports leagues.⁸¹ 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.⁸² The initial draft order is often determined by a random event.⁸³ 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.⁸⁴

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.⁸⁵ 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.

⁸⁰ For an example of a league that initially allocates players via draft, see, e.g., *Fantasy Football 2011*, CBS SPORTS.COM, http://football.cbssports.com/splash/football/spln/single/rules#rules_single_leagues (last visited Nov 7, 2011) (Oct. 18, 2011) (discussing the “live draft” and “automated draft” options).

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.”).

⁸⁴ See, e.g., *Official Rules and Regulations of the NFBC*, NAT. FANTASY BASEBALL CHAMPIONSHIP, http://nfbc.stats.com/baseball/375_slow_rules.asp (noting the league’s draft format allows participants to express a preference for a particular slot in the draft order) (last visited Nov 7, 2011).

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 competition begins on the first day of a professional sport’s regular season, and concludes 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 thereafter 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

⁸⁶ *ESPN Fantasy Football 2011: Rules*, ESPN.COM, <http://games.espn.go.com/ffl/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 Disputes*, 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 Kendrick, *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.

⁹⁷ See *Left Tackle LLC Subsidiary Announces Business Gains, Expansion*, DAILY PAK BANKER (Pakistan) Jan. 24, 2011, available at 2011 WLNR 1483977 [hereinafter *Left Tackle*] (referring to these games as the “short-term fantasy sports model” or “short-duration leagues”); Nando DiFino, *Everyday Fantasies*, WALL STREET JOURNAL ONLINE, Mar. 5, 2010, <http://online.wsj.com/article/SB10001424052748703915204575103652233621286.html>.

⁹⁸ See, e.g., FANTASY SPORTS LIVE, <https://www.fantasysportslive.com/contests.html> (last visited Nov. 7, 2011); DRAFT STREET, *supra* note 78. See generally Oskar Garcia, *Daily Fantasy Sports Become a Gambling Reality*, CONTRA COSTA TIMES (Walnut Creek, CA), Sept. 26, 2010, at 9A (discussing growing interest among fantasy sports participants in daily fantasy sports games).

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.¹⁰³ 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 \$80,000.¹⁰⁴ 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.¹⁰⁵

There are also a number of important sub-segments of fantasy sports participants.¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸

¹⁰³ See FANTASY SPORTS TRADE ASSOCIATION, <http://www.fsta.org> (last visited Nov. 7, 2011); see also Tom Mulhern, *Fantasy Becomes Reality: Three Businesses Based in Madison are Riding a Recession-Proof Wave of Web-Based Fantasy Sports*, WIS. ST. J., June 27, 2010, at F1, available at 2010 WLNR 13369828 (noting that according to a 2008 report from the Fantasy Sports Trade Association, "[i]t is estimated 25.1 million Americans age 12 and older played fantasy sports in 2008"); BRAD R. HUMPHRIES & DENNIS TAMSAY HOWARD, *THE BUSINESS OF SPORTS: PERSPECTIVES ON THE SPORTS INDUSTRY* 269 (2008) (estimating the number of people who have tried fantasy sports to be as high as 35 million).

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/superpage.ft?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.").

¹⁰⁸ *Fantasy Footballers Cash In*, POST-CRESCENT (Appleton, WI), Jan. 16, 2009, at A1 (referencing fantasy sports participant Dave Gerczak).

Another example is an associate professor of computing and software systems at the University of Washington.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.¹¹⁰

A second sub-segment of fantasy sports participants are female participants.¹¹¹ According to a recent survey by the Fantasy Sports Trade Association, female participants are the fastest growing sub-segment of fantasy sports participants.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.¹¹³ When compared to fantasy sports participants overall, female participants are often described as being more interested in the social component of fantasy leagues.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*.¹¹⁵

¹⁰⁹ See Vincent M. Mallozzi, *In Fantasy Sports, It Helps Being a Rocket Scientist*, N.Y. TIMES, Apr. 15, 2007, available at 2007 WLNR 7152547 (referencing fantasy sports participant Clark Olson).

¹¹⁰ *Id.*

¹¹¹ See Jon Boswell, Note, *Fantasy Sports: A Game of Skill that is now Implicitly Legal Under State Law, and now Explicitly Legal Under Federal Law*, 25 CARDOZO ARTS & ENT. L. J. 1257, 1259 (2008) (noting that “[o]ut of the 8.5 million people who play fantasy football, 1 million are women”); see also Jonathan Beer, *Media World: Ranks of Women Fantasy Football Players Growing*, DAILY FINANCE, Aug. 13, 2009, <http://www.dailyfinance.com/story/media/media-world-ranks-of-women-fantasy-football-players-growing/19125945> (noting that Yahoo! estimates about 12 percent of its fantasy sports contestants are women).

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.

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).

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).

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.¹¹⁶ 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.”¹¹⁷ In stark contrast to the high-stakes participants, family gamers are generally unconcerned with league entry fees and prize money.¹¹⁸ Rather, they care primarily about the interactive experiences their games provide.¹¹⁹

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.¹²⁰ These sites provide a platform for real-time statistical updates and tracking.¹²¹ In addition, some host sites collect league entry fees, distribute prize money, manage message boards, and provide expert analysis.¹²²

In terms of market share, there are currently three dominant host sites in today’s fantasy sports marketplace: ESPN, Yahoo!, and CBS Sports.¹²³ Both the ESPN and Yahoo! sites offer only one type of hosting: a basic, free service available to all users.¹²⁴ By contrast, CBS Sports offers three types of

“Scrubs”); *see also* GIRLS GUIDE TO FANTASY FOOTBALL, <http://girlsguidetofantasyfootball.com> (last visited Oct. 17, 2011).

¹¹⁶ *See infra* notes 117 - 119 and accompanying text.

¹¹⁷ FAMILY FANTASY SPORTS WEBSITE, <http://familyfantasysports.com/about-us> (last visited Oct. 17, 2011).

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 football 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

a league counting report; a trade review service; a fantasy sports guide; and team-management and recommendation software. See *Yahoo Fantasy Baseball Premium Add-Ons*, YAHOO! SPORTS, <http://baseball.fantasysports.yahoo.com/b1/premiumaddons>.

¹²⁵ See *Fantasy Baseball 2011*, CBS SPORTS, <http://baseball.cbssports.com/splash/baseball/spln/single/chart> (last visited Oct. 17, 2011).

¹²⁶ *Fantasy Baseball 2011 Commissioner*, CBS SPORTS, <http://baseball.cbssports.com/splash/baseball/spln/mgmt> (Oct. 17, 2011).

¹²⁷ See *Fantasy Baseball Premium Games 2011*, CBS SPORTS, <http://baseball.cbssports.com/splash/baseball/spln/single> (last visited Oct. 17, 2011).

¹²⁸ See *Fantasy Baseball Premium Games 2011*, *supra* note 127.

¹²⁹ See, e.g., *Major League Baseball’s Fantasy Baseball*, MLB.COM, http://mlb.mlb.com/mlb/fantasy/?tcid=nav_mlb_fantasy (last visited Oct. 17, 2011); *National Football League’s Fantasy Football*, NFL.COM, <http://www.nfl.com/fantasy> (last visited Oct. 17, 2011).

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-CRESCENT (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.”).

fantasy football tournament, where all league entry fees are placed into an escrow account.¹³³ 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 \$100,000.¹³⁴

Finally, for the family-oriented segment of fantasy sports participants, Family Fantasy Sports provides hosting services for games that are free to enter.¹³⁵ 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.¹³⁶

3. Commissioners

In addition to selecting an appropriate hosting service, every fantasy sports league also needs to select a commissioner.¹³⁷ “Commissioners” are those who manage fantasy sports leagues by establishing league rules and resolving disputes over rule interpretations.¹³⁸ 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.

¹³⁴ See Mike Rainey, *Want to Make a Bet . . . On Fantasy Baseball?*, ST. LOUIS POST-DISPATCH, Mar. 12, 2007, at C2.

¹³⁵ See FAMILY FANTASY SPORTS, <http://familyfantasysports.com/fantasy-leagues/prize-rules/> (last visited Oct. 17, 2011).

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.¹³⁹ In most private fantasy leagues, one of the league's participants is nominated to serve in that role.¹⁴⁰

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.¹⁴¹ 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.¹⁴² 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."¹⁴³

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.¹⁴⁴ In high-stakes commercial leagues, an employee of the host site serves in this role.¹⁴⁵ In private leagues, this job

¹³⁹ See, e.g., *National Fantasy Baseball Championship Rules*, NAT. FANTASY BASEBALL CHAMPIONSHIP, http://nfbc.stats.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.

¹⁴³ See Sample SportsJudge.com League Constitution (document on file).

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.¹⁴⁶ Like with commissioner services, however, a growing number of private leagues are outsourcing the treasury role to third parties.¹⁴⁷

The most well-known of these third-party treasury sites is LeagueSafe, which was launched in March 2008.¹⁴⁸ LeagueSafe allows fantasy sports participants to transfer funds directly from their bank accounts to the website.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.¹⁵⁰ At the end of the season, LeagueSafe disperses these funds “in accordance with [each fantasy] league’s rules.”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.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.”¹⁵³ According to the FSV website, like LeagueSafe, “FSV secures . . . money into one of two holding accounts, both located at FDIC insured banks.”¹⁵⁴ However, the FSV website does not prominently disclose which banks hold the participant funds.

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).

¹⁴⁷ See *infra* notes 148 - 154 and accompanying text.

¹⁴⁸ See Steve Bills, *Offering Real Security to Fantasy Leagues*, AM. BANKER, Oct. 5, 2008, at 5, available at 2008 WLNR 18602682.

¹⁴⁹ See *How It Works*, LEAGUESAFE.COM, <https://www.leaguesafe.com/HowItWorks> (last visited Nov. 9, 2011).

¹⁵⁰ *Id.*; see also Bills, *supra* note 148.

¹⁵¹ See *How It Works*, *supra* note 149.

¹⁵² See *Payment Provider Offers Prepaid Cards for Fantasy Sports*, CARDLINE, Oct. 3, 2008, at 3, available at 2008 WLNR 18808298.

¹⁵³ *Why Fantasy Sports Vault*, FANTASYSPORTSVAULT.COM, <http://www.fantasysportsvault.com/View/whyfsv.aspx> (last visited Nov. 9, 2011).

¹⁵⁴ *FAQs*, FANTASYSPORTSVAULT.COM, <http://www.fantasysportsvault.com/View/Faqs.aspx> (last visited Nov. 7, 2011).

5. Strategic Advisors

Then there are the strategic advisors, who make their living by providing advice to other fantasy sports participants.¹⁵⁵ 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.¹⁵⁶

The range of services provided by fantasy sports advisors varies significantly.¹⁵⁷ 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.¹⁵⁸ 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.¹⁵⁹ 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.”¹⁶⁰

Finally, the newest form of fantasy sports advice occurs through “analytical tools” that assist participants in drafting players and optimizing their weekly lineups.¹⁶¹ One such provider of fantasy advice via “analytical tools” is Bloomberg Sports: a division of the financial services company Bloomberg L.P.¹⁶² 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.¹⁶³ Today, the Bloomberg Sports advisory software “syncs with CBSSports.com, ESPN and Yahoo! to read the settings and teams in those

¹⁵⁵ See *infra* notes 158 - 164 and accompanying text.

¹⁵⁶ See *infra* notes 158 - 164 and accompanying text.

¹⁵⁷ See *infra* notes 158 - 164 and accompanying text.

¹⁵⁸ See *Subscription Info*, THE SANDLOT SHRINK, <http://www.sandlotshrink.com> (last visited Nov.7, 2011); see also ROTOEXPERTS, <http://www.rotexperts.com/sjowbranch.php?id=94> (last visited Nov.7, 2011).

¹⁵⁹ See ROTOWIRE, <http://www.rotowire.com> (last visited Nov. 9, 2011).

¹⁶⁰ See ADVISOR FANTASYSPORTS GURU, <https://www.keen.com/details/Advisor-FantasySports-Guru/Fantasy-Sports/5300988> (last visited Nov. 9, 2011).

¹⁶¹ *Front Office 2011*, BLOOMBERG SPORTS, <http://bloombergsports.com/frontoffice/about> (last visited Nov. 9, 2011).

¹⁶² *Frequently Asked Questions*, BLOOMBERG SPORTS, <https://www.bloombergsports.com/faq> (last visited Nov. 9, 2011).

¹⁶³ *Id.*

leagues and customize rankings, recommendations and analysis to the settings of the league.”¹⁶⁴

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.¹⁶⁵ 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.¹⁶⁶ Like all traditional insurance policies, FSI insurance policies are underwritten by an A-rated carrier, Lloyd’s of London.¹⁶⁷

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.¹⁶⁸ 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.¹⁶⁹

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.¹⁷⁰ Most directly,

¹⁶⁴ *Id.*

¹⁶⁵ See Nando Di Fino, *A New Kind of Protection*, WALL ST. J., Sept. 1, 2009, <http://online.wsj.com/article/SB10001424052970203550604574360691019757738.html>.

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.

¹⁶⁸ See *Fantasy Baseball*, FANTASY SPORTS INSURANCE.COM, <http://www.fantasysportsinsurance.com/fantasy-baseball.aspx> (last visited Nov. 9, 2011) (noting that Fantasy Sports Insurance offers insurance policies to protect against injury to a single player, two players, or three players).

¹⁶⁹ See *Fantasy Sports Insurance*, NAT. FANTASY BASEBALL CHAMPIONSHIP, <http://nfbcb.com/baseball/insurance.asp> (last visited Nov. 9, 2011).

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.¹⁷¹

A. State Gambling Law

State gambling law is perhaps the most relevant area of law pertaining to fantasy sports host sites.¹⁷² According to the *Merriam-Webster Online Dictionary*, “to gamble” is defined as “to play a game for money or property,” or “to bet on an uncertain outcome.”¹⁷³ However, in most states, not every “game for money” or “bet on an uncertain outcome” is defined as illegal gambling.¹⁷⁴ 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.¹⁷⁵

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,”

¹⁷¹ See *infra* notes 172 - 305 and accompanying text.

¹⁷² 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.”).

¹⁷³ *Gamble Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/gamble> (last visited Nov. 9, 2011).

¹⁷⁴ See, e.g., MONT. CODE ANN. §23-5-802 (2010) (permitting under gambling law certain fantasy sports games); 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 . . .”).

¹⁷⁵ 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.”).

“reward,” and “chance.”¹⁷⁶ Each of these elements has its own distinct definition.¹⁷⁷

The element of “consideration” is described as a “*quid pro quo*,” or something in exchange for something else.¹⁷⁸ 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.¹⁷⁹ 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.¹⁸⁰

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.C. 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.¹⁸¹ However, something tangible, even of small value, is sufficient to constitute a reward.¹⁸²

Finally, the element of “chance” is defined as “something that happens unpredictably without discernible intention or observable cause.”¹⁸³ In other words, courts have found that the element of chance requires that a game’s result be driven *not* by “judgment, practice, skill or adroitness,” *but rather* by factors entirely outside of the participant’s control.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.”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

sideration in the contract law context to determine whether consideration was present in a gambling context).

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).

¹⁸² See, e.g., *South Carolina Law Enforcement Div. v. 1 Speedmaster S/N 00218*, 2001 WL 2139081, at *4 (May 25, 2011).

¹⁸³ *Chance Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/chance> (last visited Nov. 7, 2011).

¹⁸⁴ *State v. Gupton*, 30 N.C. 271, 273-74 (1848); 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”).

¹⁸⁵ Anthony N. Cabot et al., *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.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,”¹⁸⁷ and the “gambling instinct test . . . looks to the nature of an activity to determine if it appeals to one’s gambling instinct.”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.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.”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.”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.¹⁹²

By contrast, other forms of pay-to-play fantasy sports games present greater legal risk.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

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”).

¹⁸⁷ *Id.* at 393.

¹⁸⁸ *Id.* at 393–94.

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”).

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).

¹⁹¹ See *supra* notes 178 - 180 and accompanying text.

¹⁹² See *supra* notes 181 - 182 and accompanying text.

¹⁹³ See *supra* notes 183 - 188 and accompanying text.

about competitor preference.¹⁹⁴ 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.¹⁹⁵ Meanwhile, the “autopick” method is based exclusively on chance, as participants are not making any independent decisions about player allocation.¹⁹⁶

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.¹⁹⁷ 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.”¹⁹⁸ 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.¹⁹⁹

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.²⁰⁰ 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,²⁰¹ Kansas,²⁰² Michigan,²⁰³ Ohio,²⁰⁴ Wisconsin,²⁰⁵ Washington,²⁰⁶ and Vermont,²⁰⁷ 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.²⁰⁸ 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.²⁰⁹

Second, fantasy sports host sites face greater risk of liability in states such as Arkansas,²¹⁰ Iowa,²¹¹ and Tennessee,²¹² which interpret the element of “chance” as outlawing games that require any chance (“The Any Chance Test”).²¹³ 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).

²⁰² KAN. STAT. ANN. § 21-6403(c) (West 2011).

²⁰³ See *Sproat-Temple Theater Co. v. Colonial Theatrical Enters.*, 267 N.W. 602, 603 (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).

²⁰⁶ See *State ex. rel. Schillberg*, 450 P.2d at 953–56 (Wash. 1969).

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.

²¹⁰ See *State v. Torres*, 831 S.W.2d 903, 905 (Ark. 1992).

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.²¹⁴

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.²¹⁵ In Florida, former Attorney General Robert A. Butterworth published an advisory opinion in January 1991 that concluded it was illegal to “participat[e] in a [draft-based] fantasy sports league whereby contestants pay a fee for the opportunity to select actual professional sports players.”²¹⁶ 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.²¹⁷

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.²¹⁸ 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.”²¹⁹ In other words, “[i]f the host takes a percentage of the pooled money, the Fantasy Sports Team contest is illegal.”²²⁰ 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-

²¹⁴ See Cabot et. al., *supra* note 185, at 393.

²¹⁵ See Fla. Op. Att’y Gen. 91-3 (1991), *available at* 1991 WL 528146; La. Op. Att’y Gen. 91-14 (1991), *available at* 1991 WL 575105.

²¹⁶ See Fla. Op. Att’y Gen., *supra* note 215.

²¹⁷ See Fla. Op. Att’y. Gen., *supra* note 215; *see also* LA. REV. STAT ANN. §14:90(A)(1)(a)(2011) (stating that “[g]ambling is the intentional conducting, or directly assisting in the conducting, as a business, of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit.”). *See generally* Jan Moller, *Bill to Legalize Online ‘Fantasy’ Sports Games Dies in House*, THE TIMES-PICAYUNE, May 10, 2010, http://www.nola.com/politics/index.ssf/2010/05/bill_to_legalize_online_fantas.html.

²¹⁸ See *infra* notes 219 - 223 and accompanying text.

²¹⁹ *Guide to Off-Reservation Gaming*, ARIZONA DEPARTMENT OF GAMING, *available at* <http://www.gm.state.az.us/misc-pdf/TopGamingViolations.pdf>.

²²⁰ *Id.*

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

²²¹ *Frequently Asked Questions*, Kansas Racing & Gaming Commission, [http://krgc.ks.gov/index.php?id=42#Fantasy Sports](http://krgc.ks.gov/index.php?id=42#Fantasy%20Sports) (citing KAN. STAT. ANN. § 21-4303 (West 2011)).

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.

²²⁵ MONT. CODE ANN. § 23-5-802 (2011).

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.").

²³³ See *Vacco v. World Interactive Gaming Corp.*, 185 Misc. 2d 852, 861 (N.Y. 1999) (discussing overlap between federal and state gambling law).

²³⁴ 18 U.S.C. § 1084(c) (1994).

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.²³⁷ Violators of the Wire Act are subject to both fines and imprisonment for a period of up to two years.²³⁸

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.²³⁹ 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.²⁴⁰

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”).²⁴¹ 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.”²⁴² 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.”²⁴³

In certain respects, the Gambling Act encompasses a broader range of conduct than does the Wire Act.²⁴⁴ For example, the Gambling Act prohibits certain gambling activities even if they occur without the use of wire technology.²⁴⁵ Thus, even if a particular court were to find a wireless In-

²³⁷ See *Vacco v. World Interactive Gaming Corp.*, 185 Misc. 2d 852, 860 (N.Y. 1999) (“To the contrary, the Wire Act, Travel Act and Paraphernalia Act all apply despite the fact that the betting instructions are transmitted from outside the United States *over the Internet.*”) (emphasis added).

²³⁸ 18 U.S.C. § 1084(a).

²³⁹ See, e.g., *Truchinski v. United States*, 393 F.2d 627, 631 (8th Cir. 1968).

²⁴⁰ See generally *United States v. Bergland*, 209 F. Supp. 547, 548 (E.D. Wis. 1962).

²⁴¹ 18 U.S.C. § 1955.

²⁴² 18 U.S.C. § 1955(a).

²⁴³ 18 U.S.C. § 1955(b)(iii).

²⁴⁴ See *infra* notes 245 - 246 and accompanying text.

²⁴⁵ See 18 U.S.C. § 1955.

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.

²⁴⁸ *United States v. Riehl*, 460 F.2d 454, 458 (3d Cir. 1972).

²⁴⁹ 18 U.S.C. § 1955(b)(iii).

²⁵⁰ *Id.*

²⁵¹ 28 U.S.C. § 3701 (1992).

²⁵² See Lee, *supra* note 5, at 78.

²⁵³ 28 U.S.C. § 3702(2).

²⁵⁴ See Lee, *supra* note 5, at 78.

²⁵⁵ 28 U.S.C. § 3702.

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.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.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.”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.”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.”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.²⁶²

Whether the Uniform Internet Gambling Enforcement Act applies to certain fantasy sports host sites remains unsettled.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).

²⁵⁸ See 28 U.S.C. § 3702 (1992).

²⁵⁹ 31 U.S.C. § 5363 (2006).

²⁶⁰ *Interactive Media Entm’t & Gaming Ass’n v. Att’y Gen. of U.S.*, 580 F.3d 113, 116 (3d. Cir. 2009).

²⁶¹ 31 U.S.C. § 5362(10)(A).

²⁶² See *Interactive Media Entm’t & 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

²⁶⁴ 31 U.S.C. § 5362(1)(E)(ix)(I)-(III) (2006).

²⁶⁵ 31 U.S.C. § 5362(1)(E)(ix) (II).

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.

²⁶⁹ See UNITED STATES PATENT AND TRADEMARK OFFICE, *What is a Patent?*, <http://www.uspto.gov/patents/index.jsp> (last modified Sep 28, 2011).

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.

²⁷⁶ See *Copyright in General (FAQ)*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/help/faq/faq-general.html> (revised Jul. 12, 2006).

²⁷⁷ *Id.*

²⁷⁸ *Id.*

ture, and once published are deemed to lie within the public domain.²⁷⁹ 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.²⁸⁰ 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.²⁸¹

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."²⁸² 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."²⁸³ 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.²⁸⁴

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.

²⁸¹ See Joy Butler, *Responding to Stolen Content with a DMCA Take-Down Letter*, GUIDE THROUGH THE LEGAL JUNGLE, <http://www.guidethroughthelegaljungleblog.com/2009/04/responding-to-stolen-content-with-a-dmca-take-down-letter.html> (intellectual property attorney and Harvard Law School graduate Joy Butler discusses best practices for responding to the use of "stolen content" on the Internet).

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).

²⁸³ *Boston Prof'l Hockey Ass'n v. Dallas Cap & Emblem Mfg. Inc.*, 510 F.2d 1004, 1009-10 (5th Cir. 1975).

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.²⁸⁵ 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.²⁸⁶ 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]."²⁸⁷

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."²⁸⁸ While the fine line separating commercial speech from fair use has often been a source of more confusion than clarity,²⁸⁹ the U.S. Court of Appeals for the Second Circuit currently applies a balancing

using a symbol of an English bulldog wearing a sweater emblazoned with the letter "G" because it appeared too similar to the University of Georgia Bulldogs logo).

²⁸⁵ See *infra* notes 286 - 287 and accompanying text.

²⁸⁶ *Boston Prof'l Hockey Ass'n.*, 510F.2d at 1012-13 (5th Cir. 1975).

²⁸⁷ *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 Bartlin' Bulldog Beer for distributing a novelty beer with a logo that strongly resembled the Georgia Bulldog. *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." *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." *Id.*

²⁸⁸ 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 *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 used 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).

²⁸⁹ 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

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.").

²⁹⁵ See generally *Keller v. Electronic Arts Inc.*, No. C 09-1967 CW., 2010 WL 530108, at *3 (N.D. Cal. Feb. 8, 2010) ("The statutory right of publicity complements the common law right of publicity, which arises from the misappropriation tort derived from the law of privacy.").

²⁹⁶ BLACK'S LAW DICTIONARY (9th ed. 2009).

make the investment required to [perform a skill] of interest to the public.”²⁹⁷

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.²⁹⁸ 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.²⁹⁹

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.³⁰⁰ 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.

³⁰⁴ See Marc Edelman, Note, *Reevaluating Amateurism Standards in Men’s College Basketball*, 35 U. MICH. J.L. REFORM 861, 862 (2002).

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,³⁰⁶ they are not the only stakeholder group potentially subject to liability for their engagement in fantasy sports.³⁰⁷ Fantasy sports participants also face some degree of legal risk, albeit to a far lesser extent.³⁰⁸

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.”³⁰⁹ 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.³¹⁰

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.³¹¹ These charges, however, were eventually dropped.³¹² Since then, there have not been any other instances of charges filed against fantasy sports participants.³¹³

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.³¹⁴ These civil anti-gambling statutes, which derive from England's 1710 Statute of Queen Anne,³¹⁵ 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."³¹⁶ In addition, most states that recognize disgorgement statutes refuse to allow gamblers to opt out of their home state's choice of gambling law.³¹⁷ 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.³¹⁸

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,³¹⁹ 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).³²⁰

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

³¹⁴ See, e.g., Ga. Code Ann. § 13-8-3(b) (West 2011); OHIO REV. CODE ANN. 3763.02 (West 2011).

³¹⁵ *Humphrey*, 2007 WL 1797648, at *3.

³¹⁶ *Hardin v. NBC Universal, Inc.*, 283 Ga. 477, 478 (2008).

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.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,³²² other employers may disallow soliciting membership in fantasy sports leagues for reasons grounded in labor law.³²³

According to the *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.³²⁴ Such a broad, content-neutral ban would logically extend to fantasy sports.³²⁵ For instance, in *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).”³²⁶

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.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

³²¹ Nobile, *supra* note 313.

³²² Vecchione, *supra* note 58 at 1698.

³²³ See *infra* notes 324 - 326 and accompanying text.

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.”).

³²⁵ See Nobile, *supra* note 313.

³²⁶ 217 F.3d 1306, 1312 (10th Cir. 2000).

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.³²⁸ 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).³²⁹

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.”³³⁰ 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.”³³¹

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.³³²

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.³³³

Where a fantasy sports treasury site fails to turn over contested winnings to the proper league participant, liability may follow.³³⁴ 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; *c.f.* 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.”).

³²⁹ *Genes Play a Role in Problem Gambling*, MYADDICTION.COM (Jun. 9, 2010), <http://www.myaddiction.com/news/gambling-addiction-news/genes-play-a-role-in-problem-gambling>.

³³⁰ Nicholas K. Geranios, *Treatment One Click at a Time: Internet Addiction*, CHARLESTON GAZETTE & DAILY MAIL, Sept. 4, 2009, at 1A, *available at* 2009 WLNR 17614750.

³³¹ *Id.*

³³² *See infra* notes 333 - 359 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.³⁴² 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,³⁴³ and thus the purchaser may sue additionally if the tool fails to meet either an implied warranty of merchantability,³⁴⁴ or an implied warranty of fitness for a particular purpose.³⁴⁵

Given these contract-law risks, fantasy sports advisors are always best advised to try to minimize their potential liabilities by drafting clear “disclaimers.”³⁴⁶ 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.³⁴⁷ 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.”³⁴⁸ 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).

³⁴⁴ U.C.C. § 2-314 (1992).

³⁴⁵ U.C.C. § 2-315 (1992).

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.).

³⁴⁷ BLOOMBERGSPORTS.COM, <https://www.bloombergsports.com/frontoffice> (click on terms of service) (last visited October 21, 2011).

³⁴⁸ *Id.*

C. Fantasy Sports Insurance

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.³⁴⁹ Under most state laws, bona fide insurance contracts must conform to two doctrines: the “doctrine of insurable interest” and the “principle of indemnity.”³⁵⁰ 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.”³⁵¹ 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.”³⁵² 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.”³⁵³ 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.”³⁵⁴

Fantasy sports insurance presents a close call under the “doctrine of insurable risk.”³⁵⁵ 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.”³⁶¹ 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.

