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Fantasy Sports Sites Win Challenge to Publicity Rights in Indiana

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Yesterday, the Seventh Circuit affirmed that fantasy sports operators, such as FanDuel and Draft Kings, do not violate three student athletes' rights of publicity under Indiana law by using their names, images and likenesses without consent in the operation of fantasy sports sites. *Daniels, et al. v. FanDuel, Inc., et al.,* No. 17-3051 (7th Cir. Nov. 29, 2018). The Seventh Circuit's opinion relied upon a certified question that was sent to the Indiana Supreme Court, requesting the interpretation of Indiana's state law on the right of publicity. The Indiana Supreme Court answered the question and ruled that online fantasy sports operators are permitted to utilize a college athlete's name, image and likeness without the player's consent or compensation. The Indiana Supreme Court determined that because the athletes' information had "newsworthy value," the use of their names, images and likenesses on fantasy sites falls within an exception to Indiana's right of publicity statute. This opinion demonstrates that the determination of whether there is a right of publicity for the use of the name, image and likeness of an athlete continues to turn on a state-by-state interpretation of right of publicity statutes and in some cases, the state's common law.

Indiana Supreme Court Rules that Under Indiana Law Fantasy Sports Sites Can Use Collegiate Athlete's Name, Image and Likeness without Consent and Compensation

Former Northern Illinois running backs Akeem Daniels and Cameron Stingily, and former Indiana wide receiver Nicholas Stoner filed a class-action complaint in Indiana against FanDuel and Draft Kings asserting that use of their athletes names, images and likenesses violated Indiana's right of publicity statute. The statute provides in relevant part that "a person may not use an aspect of a personality's right of publicity for a commercial purpose . . . without having obtained previous written consent." Ind. Code § 32-36-1-8(a). After the case was removed to federal court, the Southern District of Indiana dismissed the case for failure to state a claim upon which relief can be granted. The district court held that Indiana's right of publicity statute had not been violated because the use of their likeness fell under two statutory exceptions, specifically that the use had newsworthy value and was a matter of public interest. *Daniels v. FanDuel, Inc.,* 2017 WL 4340329, at *1 (S.D. Ind. Sept. 29, 2017). The plaintiffs appealed to the Seventh Circuit Court of Appeals, which then sent the following certified question to the Indiana Supreme Court:

> Whether online fantasy-sports operators that condition entry on payment, and distribute cash prizes, need the consent of players whose names, pictures, and statistics are used in the contests, in advertising the contests, or both.

In a case of first impression, Justice David, writing for the Indiana Supreme Court, concluded that FanDuel and Draft Kings were using the athlete's name, image and likeness for a commercial purpose and therefore the use fell within Indiana's right of publicity statute. *Daniels v. FanDuel, Inc.,* 109 N.E.3d 390, 394 (Ind. 2018). However, the Court

found that the use of the athletes' images and information was "newsworthy," an exception to Indiana's right of publicity statute. *Id.* Because the use of the athlete's name, image and likeness was "newsworthy," the Court declined to address whether the use was in the public interest.

In reaching its decision, the Indiana Supreme Court determined that the term "newsworthy" should be construed broadly and found that the use of an athlete's name, likeness, and statistics in connection with a fantasy sports site "bears resemblance to the publication of the same information in newspapers and websites across the nation," agreeing that " 'it would be strange law that a person would not have a first amendment right to use information is available to everyone.' " *Id*. at 396 (*quoting C.B.C. Distribution and Marketing, Inc. v. Major League Baseball,* 505 F.3d 818, 823 (8th Cir. 2007)).

The Court further held that an athlete's name, image and likeness "is not stripped of its newsworthy value simply because it is placed behind a paywall or used in the context of a fantasy sports game," and that "both parties would seem to agree that the statistics of college athletes are newsworthy." *Id*. at 397. "On the contrary, fantasy sports operators use factual data combined with a significant, creative component that allows consumers to interact with the data in a unique way." *Id*. at 396. Applying the reasoning from the Indiana Supreme Court's ruling, the Seventh Circuit affirmed the district court's dismissal of the athletes' claims.

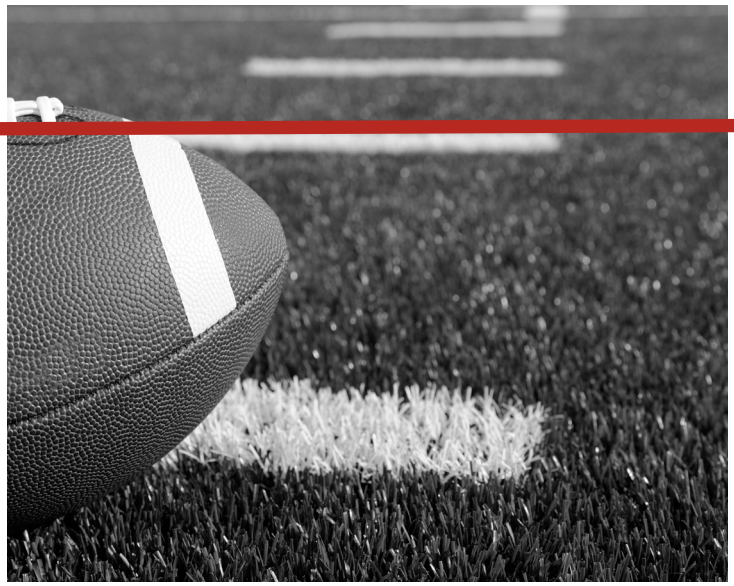
Indiana Supreme Court Followed Eighth Circuit Precedent in Determining Whether Athletes' Information is "Newsworthy"

In reaching its decision, the Indiana Supreme Court primarily relied upon *Rogers v. Grimaldi*, 695 F.Supp. 112 (S.D.N.Y. 1988) (*cited approvingly in Time, Inc. v. Sand Creek Partners, L.P.,* 825 F.Supp. 210 (S.D. Ind. 1993)) for the definition of "newsworthy" and *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball,* 505 F.3d 818, 823 (8th Cir. 2007) for the proposition that under the First Amendment, fantasy sports sites are equally entitled to use an athlete's name, image and likeness and statistics just as newspapers and websites do. *Daniels,* 109 N.E.3d at 396–97. The Indiana Supreme Court did not address the Seventh Circuit's opinions in *Baltimore Orioles v. Major League Baseball Players Association,* 805 F.2d 663 (7th Cir. 1986), *cert. denied*, 480 U.S. 941 (1987) or *United States v. Lookretis,* 422 F.2d 647 (7th Cir. 1970), *cert. denied,* 398 U.S. 904 (1970). In *Baltimore Orioles,* the Seventh Circuit acknowledged a player's right of publicity in their name, image and likeness where a company marketed a board game based upon the athlete's career statistics without their consent. 805 F.2d at 676 n. 24 (*citing Uhlaender v. Henricksen,* 316 F.Supp. 1277, 1282 (D. Minn.1970)). Similarly, in *Lookretis,* the Seventh Circuit also affirmed a conviction under an Indiana gambling statute where the defendant operated a baseball betting system based on "statistics of games played that day" that constituted a gambling pool in violation of state law. 422 F.2d at 648–49. Although these opinions were identified in the athletes' and amici curiae's briefing before the Indiana Supreme Court, it did not address this precedent.

While the Seventh Circuit's opinion is favorable for fantasy sports operators, it may lead right of publicity litigants to focus more on First Amendment issues because of the patchwork of state right of publicity laws. As sports betting expands nationwide, litigants may have to address how these activities are governed by the First Amendment.

Indeed, even after the Indiana Supreme Court determined that FanDuel and Draft Kings' use was "newsworthy," the student athletes asserted that the exception should not apply because the First Amendment does not protect illegal conduct. The student athletes asserted that during the time they played from 2014–2016, fantasy betting was still illegal in Indiana and therefore the newsworthy exception to Indiana's right of publicity statute does not apply. The Seventh Circuit rejected this approach and declined to interpret whether fantasy sports operators run a "criminal gambling syndicate" as asserted by the athletes, although it did recognize that Indiana's right of publicity still prohibited the use of athletes' name and likeness to be used as an endorsement without their consent.

It is unclear how other jurisdictions will determine where fantasy sports belong in the spectrum of protected speech, but we can expect future challenges as the industry continues to expand.



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