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AT THE CORNERS

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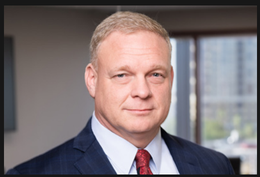
CONTACTS

Amy Anderson
ASSOCIATE \ MINNEAPOLIS
amy.anderson@stinson.com
612.335.1842

Greg Payton
ASSOCIATE \ TAMPA
greg.payton@stinson.com
813.534.7552

Aalok Sharma
PARTNER \ MINNEAPOLIS
aalok.sharma@stinson.com
612.335.1428



Marc Weintraub
PARTNER \ TAMPA
marc.weintraub@stinson.com
813.534.7550

Zane Gilmer
PARTNER \ DENVER
zane.gilmer@stinson.com
303.376.8416

Ruth Rivard
PARTNER \ MINNEAPOLIS
ruth.rivard@stinson.com
612.335.1799

Austin Tapuro
ASSOCIATE \ KANSAS CITY
austin.tapuro@stinson.com
816.691.3379

IN FLORIDA AND ELSEWHERE, OFFICIALS TARGET LATEST FANTASY SPORTS GAMES

MARC WEINTRAUB AND GREG PAYTON

A crackdown on online "pick'em"-style contests in Florida could be a sign of what's to come as state regulators struggle to keep up with the rapidly changing world of daily fantasy sports and legalized sports wagering.

In past years, several daily fantasy operators have offered pick'em-style contests that are similar to prop bets previously offered by legalized sports wagering companies. However, the Florida Gaming Control Commission (FGCC) recently sent cease-and-desist letters to three daily fantasy sports operators, directing them to stop "offering or accepting illegal bets or wagers from [Florida] residents" and "conducting any illegal lotteries." In response to the cease-and-desist letters, Betr, Underdog Fantasy and PrizePicks agreed to stop offering their pick'em style contests in Florida on March 1, 2024.

At issue are newer daily fantasy sports games in which users bet against the house, known as "DFS 2.0." In these games, users predict how well particular players will perform, either higher or lower than a statistics-based projection. Users can win more by stringing together multiple player bets, just like in traditional sports betting. This is different from DFS 1.0 contests, in which players compete against other players, with operators collecting a set entry fee to organize peer-to-peer contests, and where the winning outcome was determined by the performance of multiple athletes.

FanDuel and DraftKings were some of the earliest DFS 1.0 platforms, launching in 2009 and 2012, respectively. As DFS 1.0 contests exploded in popularity, state attorneys general and regulators began to take notice. In 2015, New York tried to shut down FanDuel and DraftKings' DFS 1.0 contests. Other states followed, but FanDuel and DraftKings fought back at state capitols and in courtrooms across the country. Two years later, they had lobbied for laws explicitly permitting daily fantasy sports in 18 states.

Now, a group of attorneys general are targeting DFS 2.0 contests. In particular, the debate regarding the legality of DFS 1.0 versus DFS 2.0 contests lies in whether the house is a participant. The Unlawful Internet Gambling Enforcement Act (UIGEA) of 2005, which does not explicitly permit DFS contests on a state level, frequently uses the term "participant" in the statute, and provides that these contents generally must occur between "participants, historically meaning peer-to-peer contests." Under the DFS 2.0 model, operators have construed "participant" to include the operator, thereby providing a substantive legal basis to offer these types of contests.

Online daily fantasy operators have long argued that their contests are permissible under applicable state law which reflects and/or incorporates the fantasy sports exemption under the UIGEA. But in Florida and several other states, daily fantasy sports still operate in a legal grey area because no regulatory authority or legislature has sought to regulate fantasy sports contests.

Florida has been slow to embrace any form of online real money gaming. In 2021, Gov. Ron DeSantis finally reached an agreement with the Seminole Tribe on a new, 30-year gaming compact. The compact allows the Seminoles to develop an online sports betting platform that can be played anywhere in the state, with bets routed through servers on tribal lands. Two other gaming establishments that operate pari-mutuel wagering and cardrooms are challenging the tribal compact in court alleging that the Seminole Tribe's acceptance of sports wagers violates the Indian Gaming Regulatory Act. While the court challenges continue, the Seminoles' Hard Rock Bet app has generated more than $120 million for the state since its launch in December 2023.

Clearly, there is money to be made from regulating and taxing sports wagering and daily fantasy contests, but legislative efforts earlier this year to authorize and regulate fantasy sports fell short. Senate Bill 1658 would have established new requirements for operators – including a hefty $500,000 application fee – and tasked the FGCC with oversight. The Senate Fiscal Policy Committee unanimously approved SB1658, but the bill failed to advance out of committee before the end of the regular session.

However, while SB1658 would have formally recognized DFS 1.0 contests in Florida, it still prohibited bets against the house, including the pick'em-style contests the FGCC has targeted.

Florida isn't the only state to have taken aim at DFS 2.0 contests this year. Officials in Arkansas, Massachusetts and Ohio are challenging pick'em-style contests as unlicensed sports betting. And after New York outlawed fantasy sports contests based on proposition betting last year, operator PrizePicks has agreed to pay nearly $15 million for operating without a license and leave the state.

However, neither FanDuel nor DraftKings have been told to cease operations. In fact, the American Gaming Association, the lobbying organization that represents the fantasy sports mega-operators, praised efforts in Florida and elsewhere to shut down DFS 2.0 contests. The association has raised concerns reminiscent of those voiced by licensed gaming operators in opposition to DFS 1.0.

Without a legislative fix from Florida lawmakers, DFS 2.0 companies will continue to face regulatory scrutiny, as well as potential litigation from state attorneys general. Consequently, courts will be asked to construe the meaning of a two decades old statute, and its application to state gaming laws in Florida and across the country.

ON YOUR MARK: STRIDES IN TRADEMARK INFRINGEMENT ON SPORTS MERCHANDISING

RUTH RIVARD AND AUSTIN TAPURO

In the realm of sports merchandising, licensing is a significant revenue source for college and professional sports teams. Typically, sports teams do not directly produce sports merchandise; instead, they engage in exclusive license agreements with third-party manufacturers, who produce and sell the goods in stores. Oftentimes, businesses who have not obtained a license will attempt to profit from products that appear to be associated with a team's trademarks.

At its core, United States trademark law protects consumers from confusion when making purchasing decisions, which in turn helps trademark owners protect the reputation or "goodwill" of their brands. The key factor in a trademark infringement case is whether the alleged infringing use is likely to cause confusion to consumers as to the source of the goods or services. In the past, some have tried to take advantage of an exception to the normal likelihood of confusion analysis by claiming the trademark at issue was being used for "expressive purposes." These expressive purposes include using the trademark for parody or criticism. Such uses are reviewed under a different analysis that takes into account heightened First Amendment protections. Now, a year after the U.S. Supreme Court decision lowered the hurdles trademark owners must clear to prove infringement in cases involving artistic or expressive uses, the law continues to shift.

On June 8, 2023, the Supreme Court ruled unanimously in favor of the petitioner in *Jack Daniel's Properties, Inc. v. VIP Products, LLC*, a case involving a parody "Bad Spaniels" dog toy produced by VIP. The toy closely resembles the well-known design of a Jack Daniel's bottle, mirroring everything from the bottle shape to the black-and-white label. In 2014, VIP filed the lawsuit after receiving a cease-and-desist letter from Jack Daniel's. In response, Jack Daniel's filed counterclaims for trademark infringement and dilution.

The U.S. District Court for the District of Arizona found the Bad Spaniels toy infringed on Jack Daniel's trademark, as VIP's use of a nearly identical trade dress was likely to cause confusion as to the source of the products. The Ninth Circuit subsequently reversed, holding that the district court failed to apply the test in *Rogers v. Grimaldi* to find an expressive nature of the toy. The Second Circuit created the *Rogers* test in 1988 to balance First Amendment interests against Lanham Act rights in trademark infringement cases. The *Rogers* test is ordinarily confined to cases where a trademark is not used to identify the source of a work, but instead is used "solely to perform some other expressive function." Under the *Rogers* test, when "expressive works" are at issue, use of another's trademark in that expressive work is not infringement unless (i) the alleged infringing use of the trademark has no artistic relevance to the underlying work or (ii) the underlying work is explicitly misleading as to the work's source or content.

The U.S. Supreme Court vacated the Ninth Circuit's decision and remanded. Specifically, the Court held that the *Rogers* test does not apply when an alleged infringer uses a trademark, at least in part, to identify the source of the goods. This holds true even if the alleged infringer is also making an expressive comment. According to the Court, because VIP admitted to using the Bad Spaniels imitation of the Jack Daniel's trademarks and trade dress as indicators of the source for its toy, *Rogers* did not apply. Consequently, while the expressive nature of the toy could be considered during the infringement analysis, the analysis must include whether there is a likelihood of confusion.

Although the Court expressly said the opinion "is narrow," the *Jack Daniel's* ruling will likely make potential infringers think twice about coopting other brands and relying on the expressive works argument. The *Rogers* test is no longer a safe haven from infringement, if expressive use of another's trademark also serves a source-identifying function.

Within the initial six months of the ruling, several courts applied *Jack Daniel's* right out of the gates. In *Vans, Inc. v. MSCHF Prod. Studio, Inc.*, MSCHF altered the features of an Old Skool sneaker by distorting the Vans trademark and trade dress, claiming it was a parody of the Vans product. MSCHF referred to the parody product as "Wavvy Baby." In determining the appropriate analysis, the Second Circuit held that *Rogers* is limited to cases where the alleged infringing trademark is used "***solely*** to perform some other expressive function." Even if a trademark is used to parody a product, *Rogers* does not apply if the alleged infringing trademark is used "at least in part for source identification." Because MSCHF used the distorted Vans shoe design — including the Vans trademark and trade dress — as source identifiers, *Rogers* did not apply, despite the alleged expressive nature of the MSCHF shoe.

At least one court has considered the holding in *Jack Daniel's* in the sports merchandising context. In *Pennsylvania State University v. Vintage Brand, LLC*, the university filed a suit for trademark infringement against Vintage Brand for selling unauthorized apparel bearing its logos. During summary judgment, the district court sought supplemental briefing about the implication of the *Jack Daniel's* decision and whether it applied to the case before the court. Ultimately, the district court did not directly address whether *Jack Daniel's* applied in the *Vintage Brand* case. Though not fully considered, *Vintage Brand* indicates that the application of *Jack Daniel's* to sports merchandising may arise in the near future.

As evidenced by cases like *Vans* and *Vintage Brand*, the sports world will continue to see litigation addressing trademark use and protection in the context of sports trademarks on commercial consumer goods, with a clearer guide as to when the *Rogers* test will apply. The extent to which the *Jack Daniel's* decision impacts trademarks in the sports world will likely turn on a court's understanding of what constitutes expressive works and what constitutes trademark use, which would preclude application of the *Rogers* test.

MARKETING PARTNERSHIPS WITH OLYMPIC ATHLETES: IS IT WORTH THE EFFORT FOR CANNABIS BRANDS?

AMY ANDERSON AND ZANE GILMER

As the 2024 Paris Olympics draws near, many brands are eager for an opportunity to partner with Olympic athletes to enhance brand visibility and grow market share in competitive industries. In particular, brands participating in the commercial adult-use or medical cannabis industries may see the Paris Olympics as a unique opportunity to be among the first associated with a unifying, inspirational international athletic completion, all while reaching a substantial and diverse audience of consumers. However, the requirements for any brand to officially partner with an Olympian, coupled with steep legal considerations and stigma unique to adult-use and medical cannabis – not to mention anti-doping requirements for Olympic athletes – can deeply complicate the process. While it makes sense that cannabis brands would be interested in a partnership with an athlete competing on the world stage, they will likely see very little payoff for their troubles.

Any organization or brand interested in sponsoring an Olympic athlete in the United States must apply for U.S. Rule 40 permission and complete the U.S. Olympic & Paralympic Committee (USOPC) Personal Sponsor Commitment. Rule 40 is an eligibility rule established by the International Olympic Committee (IOC) in 1991 with the intention of "maintaining the unique and universal competitive environment offered by the Olympic Games." The U.S. Rule 40 guidelines identify permissible and impermissible advertising activities for Olympians and their sponsors, which are designed to combat over-commercialization. The IOC and the USOPC have also created strict marketing guidelines that are enforced by each participating country's National Olympic Committee to control how a brand may advertise their relationship with an Olympic athlete.

For example, the marketing materials published by brands which are not official Team USA or Olympics partners may not contain any registered trademarks of the Olympics or Olympic logos and taglines. Materials are also prohibited from implying that the brand or product enhances an athlete's performance or participation in the Olympic Games. An additional challenge for cannabis brands includes IOC guidance and key principles that explicitly call for brand advertising associated with the Paris Games to be consistent with "the Olympic Movement or the relevant [National Olympic Committee], for example: prohibitions on sponsorships in connection with tobacco, prohibited drugs and other categories."

The placement of cannabis on the World Anti-Doping Agency's (WADA) prohibited substances list also suggests that the USOPC and National Olympic Committee would place higher scrutiny on any potential partnership between an athlete and an adult-use or medical cannabis brand. The WADA prohibited substances list identifies substances which competing athletes are prohibited from using both in and out of competition. WADA determines whether a substance is placed on its prohibited list based on three factors:

1. Substance has the potential to enhance or enhances sport performance.
2. Substance represents an actual or potential health risk to the athlete.
3. Substance violates the spirit of the sport.

If a substance meets two of the three factors, then athletes may face sanctions based on their consumption of such substance. The U.S. Anti-Doping Agency and the USOPC are signatories to the WADA code, and both adhere to its prohibited substances list. WADA has recognized that there is uncertainty as to whether cannabis can improve an athlete's performance, but has firmly concluded that cannabis meets the second and third criteria for prohibition.

According to WADA guidance, with the exception of cannabidiol (CBD), athletes are prohibited from consuming any natural or synthetic cannabinoids in the time leading up to a competition. Depending on the frequency or volume of an athlete's consumption, indicators of cannabis usage can be detected anywhere between a few days to several weeks after use. If a test performed in an in-competition setting indicates recent or frequent consumption of cannabinoids, an athlete may be subject to sanctions, including suspension for a minimum of one month from competition. Several Olympic teams have also included provisions in their Member Codes of Conduct specifically addressing the possession or consumption of illegal substances. Cannabis is a Schedule I drug under the Controlled Substances Act, and while the federal government has not rigorously enforced the act in states which have legalized adult-use cannabis, the drug still remains federally illegal.

Assuming an adult-use or medical cannabis brand can clear the necessary hurdles to associate itself with an Olympic athlete, there is still no guarantee that a brand will be able to find an enthusiastic representative associated with the Olympic Games. Athletes may reasonably be concerned about the stigma associated with cannabis consumption in sports or worry that navigating the politics of anti-doping policies or the Controlled Substances Act would distract from their performance or create more stress around the Olympic Games than they are willing to take on. Brands interested in partnerships with Olympic athletes must consider the possibility that athletes could be placed in a position where they spend more time and effort defending their partnership with an adult-use or medical cannabis brand than they spend being a successful competitor and effective brand ambassador.

Even if an adult-use or medical cannabis brand partnering with an Olympic athlete can successfully navigate the Rule 40 requirements, anti-doping enforcement and stigma related to consumption of cannabis in sports, the end result still may not be increased brand awareness or improved market share because of cannabis marketing restrictions at the state level. With few exceptions, radio, television, print and online advertising for adult-use and medical cannabis is strictly regulated by state governments. Even in states where adult-use cannabis has been legalized, cannabis brands may only be permitted to engage in advertisement if they can show a reasonable expectation that a large percentage of the audience for the advertisements is over the age of 21. This means that a cannabis brand may not see any return on their financial investment spent establishing a partnership with an Olympic athlete because the audience includes too many underage consumers.

Of note, CBD was removed from WADA's list of prohibited substances in 2017, and the 2018 Farm Bill legalized the regulated production of hemp while also removing hemp and hemp seeds from the Drug Enforcement Administration's schedule of controlled substances. These changes have significantly reduced the stigma surrounding athletes' use of CBD as part of their training and recovery regimen. As a result, athletes are more comfortable promoting the use of CBD products, and sports organizations are forming official partnerships with CBD brands. The success of CBD legalization and companies' impressive strides in athletic partnerships can make sports marketing an attractive prospect for adult-use and medical cannabis brands. However, absent federal legalization and the creation of uniform, national regulations of adult-use and medical cannabis, as well as the removal of cannabis from the WADA list of prohibited substances, Olympic partnerships and sports marketing for cannabis brands will have to wait for future Olympic Games.

THE LINE UP

AALOK SHARMA

01

30%. Roblox is a video game developer that permits users to use a fictional currency, "Rbux." Generally, Roblox users exchange Rbux for in-game experiences or digital assets created by developers. Eventually, the developers will cash out their Rbux, of which Roblox takes 30%. However, there are online casinos outside of the Roblox platform that accept wagers in Rbux. The wagers take place on third-party sites outside of the Roblox virtual world. As part of each Rbux transaction, the third-party casinos cash out the Rbux, and Roblox takes its requisite cut of the transaction. In March of this year, a district court refused to dismiss causes of action for negligence and unfair competition, claiming that Roblox permitted minor children to use Rbux in virtual casinos, and that Roblox was aware of the transactions since they received a portion of each transaction. In particular, the district court, relying on *Kater v. Churchill Downs*, which previously held that virtual chips were a "thing of value" under Washington gambling law, also held that Rbux were "things of value". Accordingly, the district court ruled that children suffered an economic loss because those children did not benefit from the use of Rbux on the platform.

02

500. Nationwide, horse racing has experienced a decline partially due to the expansion of differing forms of online gaming, but there are now efforts in Minnesota to revitalize the state's two horse racing tracks. Specifically, the Minnesota Racing Commission passed a rule that would allow for 500 historical horse racing terminals to be placed at Canterbury Park and Running Aces. Historical horse racing allows bettors to place wagers on video replays of past races. The prior races were operated at licensed horse racing tracks. Prior to placing a bet, the bettor is provided with handicapping information about the horses in the race. Identifying data about the horse or jockey are revised or anonymized so the bettor cannot identify the race at issue. In general, historical horse racing contests do not use a random number generator, so they differ from traditional slot gaming. However, the Minnesota Racing Commission's rule is facing opposition from the Minnesota legislature and Shakopee Mdewakanton Sioux, who claim that historical horse racing is too similar to slot machines, which in Minnesota can only be offered by tribal casinos. At issue is whether the racing terminals permit games of skill or games of chance. Meanwhile, the Minnesota Court of Appeals has been asked to weigh in by the parties.

03

$1.3 BILLION. Beginning in the 2024 college football season, the post season will expand, allowing for twelve teams to compete for a national title. Under the current agreement, which was originally signed in 2012 and expires after the 2025 college football season, ESPN pays approximately $470 million per year. The parties recently signed a new contract for the 2025 college football season, and it is expected that ESPN will pay $1.3 billion for each year during a six-year contract term. As part of the agreement, ESPN will have the exclusive linear television rights to broadcast all games of the expanded college football playoff.

04

$2.5 BILLION. March is synonymous with college basketball's post season tournaments, and it is also a time when sports betting operators see an uptick in business. Prior to the tournament, the American Gaming Association estimated that over $2.5 billion dollars would be wagered as part of the tournament. However, legislators are now considering what types of wagers should be allowed after calls by industry leaders to ban "prop bets" or proposition bets, which have little or nothing to do with the final outcome of the game. In particular, industry leaders claim prop betting is more susceptible to bad behavior. Currently, several states, including Colorado, Arizona and New York, outlaw proposition bets on contents involving collegiate athletes.

05

2,000. Since 2018, more than 2,000 lawsuits have been filed alleging violations of the Illinois Biometric Information Privacy Act (BIPA). These violations can be expensive for businesses. Under the statute, negligent violations are $1,000; violations that are reckless or intentional can cost $5,000. Last year, the Illinois Supreme Court heard arguments in *Cathron v. White Castle Systems*, in which fast food giant White Castle claimed that BIPA only applied to the initial violation, not for each subsequent and individual violation. If the Illinois Supreme Court construed the statute to include individual and subsequent violations, then the damages for businesses could be exponential. In its decision, the Illinois Supreme Court punted on the issue of damages, noting that the statute did not make a distinction, as White Castle had argued. Additionally, the Illinois Supreme Court opinion suggested that the legislature revise the statute to address these issues. Recently, the Illinois Senate has advanced bills addressing the issues identified in *Cathron*. In the past, several professional and amateur professional franchises, as well as amusement parks, have been subjected to lawsuits under BIPA.

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SUBSCRIBE

LOCATIONS

MINNEAPOLIS

50 South Sixth Street
Suite 2600
Minneapolis, MN 55402
612.335.1500

KANSAS CITY

1201 Walnut Street
Suite 2900
Kansas City, MO 64106
816.842.8600

DALLAS

2200 Ross Avenue
Suite 2900
Dallas, TX 75201
214.560.2201

ST. LOUIS

7700 Forsyth Boulevard
Suite 1100
St. Louis, MO 63105
314.863.0800

PHOENIX

1850 N. Central Avenue
Suite 2100
Phoenix, AZ 85004
602.279.1600

WASHINGTON, DC

1775 Pennsylvania Avenue NW
Suite 800
Washington, DC 20006
202.785.9100

DENVER

1144 Fifteenth Street
Suite 2400
Denver, CO 80202
303.376.8400

OMAHA

1299 Farnam Street
Suite 1500
Omaha, NE 68102
402.342.1700

WICHITA

1625 North Waterfront Parkway
Suite 300
Wichita, KS 67206
316.265.8800

TAMPA

100 Ashley Drive South
Suite 500
Tampa, FL 33602
813.534.7334

NEW YORK

100 Wall Street
Suite 201
New York, NY 10005
646.883.7471

JEFFERSON CITY

230 West McCarty Street
Jefferson City, MO 65101
573.636.6263

BISMARCK

424 South Third Street
Bismarck, ND 58504
701.221.8600