Better Good Than Lucky: Defending the Legality of "One-Week" Fantasy Football Leagues

Conner A England, The Ohio State University

Available at: https://works.bepress.com/conner_england/1/
I. Introduction

When people hear the phrase “fantasy sports” used in a conversation many different reactions may be elicited. Some see fantasy sports as a way to make the sports they watch even more interesting by making almost every game important to the viewer, while others see it as a dangerous use of time and an economic drain on employers, and still others see it as an innocuous time-waster or “dungeons and dragons for jocks.” Regardless about how you feel about fantasy sports there is no denying that they have reached a point of immense saturation in our society. Fantasy sports are here to stay and looking at the impact, significance, and future of them is an important endeavor.

Remembering a time where fantasy sports remained on the periphery of society is not very difficult due to just how rapidly participation in fantasy sports has taken off. On one side, fantasy sports are expanding exponentially and on the other is the law regarding
fantasy sports that cannot hope to keep up\textsuperscript{4}. Though the federal law has clearly established the legality of traditional fantasy sports, it has not yet touched the new “one-week” fantasy football leagues that are just now coming into existence\textsuperscript{5}. Due to complications and differences in state laws, this article will just be looking at the legality of “one-week” leagues from a federal law perspective.

This article will examine the legality of the new “one-week” fantasy football leagues that have come into existence since the 2006 Unlawful Internet Gambling Enforcement Act (UIGEA). Part II of this review will look at the history of fantasy sports as a whole. Part III will examine the current state, participation, financial standing, etc., of fantasy sports. Next, part IV describes the UIGEA and its impact on fantasy sports. Finally, part V studies “one-week” fantasy football leagues and their legality in regards to the UIGEA.

II. Fantasy Sports Origins & History

Tracing the origins of fantasy sports is surprisingly difficult. The majority of the readily available resources take an extremely simplistic approach to tracing the lineage of fantasy sports. These simplistic approaches do not seem to adequately describe just how long fantasy sports have existed, instead, opting for a beginning much more recent than the genuine beginnings of fantasy sports\textsuperscript{6}. This is understandable due to the lack of information, as well as the homegrown aspect accompanied with fantasy sports that makes knowing who did what first very difficult. Instead of settling for a simpler, less in-depth study of fantasy sports history that only tells a small portion of the story, a more complete story of fantasy sports should be told.

The earliest noted example of a fantasy sport-like game is Ethan Allen’s 1941 “All-Star Baseball” board game\textsuperscript{7}. This game involved the use of cards, representing specific players and their specific skill sets, and a spinner to determine the results of the game\textsuperscript{8}. Though the game was originally aimed at a primarily younger male audience\textsuperscript{9}, it also reached an older, more mature audience as well and as the audience grew more mature, so too did the games\textsuperscript{10}. A decade after “All Star Baseball” was released came its biggest competitors, “Stat-O-Matic” and the “America Professional Baseball Association” (APBA)\textsuperscript{11}.

\textsuperscript{4} The first major federal legislation regarding fantasy sports was not until the 2006 Unlawful Internet Gambling Enforcement Act.
\textsuperscript{5} Information available at \url{http://www.forbes.com/sites/chrissmith/2012/09/19/should-gambling-on-fantasy-football-be-legal/}
\textsuperscript{6} This article, available at \url{http://iml.jou.ufl.edu/projects/spring06/Antonio/historyoffantasy.html}, is a perfect example of the types of sources readily available regarding the history of fantasy sports. This one page article merely describes what they call the “roots of modern Internet-oriented fantasy sports” instead of giving an in depth look at fantasy sports before Dan Okrent founded “Rotisserie baseball” (to be discussed later).
\textsuperscript{7} This information is contributed to Profession Marc Edelman’s, 2011, \textit{A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime}.
\textsuperscript{8} The actual game is a lot more complicated than just spinning and winning. The original version had fourteen potential outcomes from an at-bat. Later versions added the fielding aspect to the game, further adding to the simulation. Information available at \url{http://en.wikipedia.org/wiki/All_Star_Baseball}
\textsuperscript{9} Id.
\textsuperscript{10} See Darryl Brock’s \textit{Triple Play: Personal Reviews, Op-Ed Pieces, and Polemics From Outside the Purview of the Umpires}
\textsuperscript{11} Id.
These detailed simulations of baseball games offered fans an opportunity a chance to be the manager and control the game they loved\textsuperscript{12}. Eventually, the popularity of these games grew to a point where leagues were formed and tournaments played to decide who the best player was\textsuperscript{13}. These early board games were pivotal in the formation of fantasy sports, as they exist today.

While games like “All Star Baseball” and “Stat-O-Matic” offered fans a way to manage their players based off the players past performance, none of these games offered fans an opportunity to predict future performance from the players\textsuperscript{14}. That is, until Bill Gamson created what he called the “Baseball Seminar”, where he organized a group of fans to pick players and then a winner was determined, based off statistics, at the end of the season\textsuperscript{15}. Gamson’s league’s, while being the first genuine fantasy sports league, biggest contribution was the impact it had on Daniel Okrent upon hearing about it\textsuperscript{16}.

Okrent, heavily influenced by the “Baseball Seminar”, went on to create what is known as “Rotisserie baseball”\textsuperscript{17}. As he and his colleagues were sports writers, their experience, in their “Rotisserie” league, was well documented and reached many sports fans\textsuperscript{18}. While Okrent started his “Rotisserie” leagues in the early 1980’s, it was not until the mid-1990’s, when leagues were formed for other sports such as football and basketball, that fantasy sports, in conjunction with the advent of the internet, really began to take off\textsuperscript{19}. Okrent and his colleagues contribution to fantasy sports is immeasurable, as it introduced the concept of fantasy sports to the early adopters that grew fantasy sports into what they are today.

Though the fantasy sports lineage can be clearly traced back from “All Star Baseball”, to “Rotisserie baseball”, to the internet boom in the mid 1990’s, an early version of fantasy football was first created in 1962 by Bill Winkenbach\textsuperscript{20}. Winkenbach, along with several other Oakland area football personalities, created “The Greater Oakland Professional Pigskin Prognosticators League” (GOPPL)\textsuperscript{21}. The league worked similarly to...
how fantasy football works today, but Winkenbach never extended the league beyond the group of Oakland football personalities22.

In review, fantasy sports is an industry seventy years in the making and is something that has grown into an omnipresent sports monolith.

III. Fantasy Sports Today

Today, fantasy sports is a booming international market23. Sports fans are treated to fantasy leagues for just about any sport imaginable24. These various fantasy sports leagues are now categorized based on three key attributes: the sports, method of initially allocating player, and the season length25. In sum, there is no denying that fantasy sports is no longer just for the sports nerd, but rather appeals to a wide variety of people and as a result, making a huge financial market26.

The actual increase in fantasy sports is not only surprising, but is actually quite impressive. A 2011 release from the Fantasy Sports Trade Association revealed that over a four-year span, fantasy sports participation increased by 60% in the United States and Canada27. Overall, in 2011, 32 million people actively participated in fantasy sports in the US and Canada28. A 2013 report from the same organization revealed that, while the growth rate of fantasy sports is shrinking, there is still a notable growth29. The overall participation went up to around 33.5 million while the participation rates in both the US and Canada increased30. Clearly the rate of growth is reduced, but this trend does establish

---

22 Id.
23 While finding exact numbers of non-American fantasy sports participants proved to be a fruitless endeavor it is clear that the number of participants in sports such as fantasy soccer/football is increasing. Robert Klein, the executive director of ISM Games, a fantasy soccer website, states that the participation numbers of his website alone have been going up almost 40% a year since the websites inception in 2002. As of early 2002, ISM fantasy soccer had around 2 million fantasy managers from 200 different countries around the world. These numbers look only to get larger as fantasy sports permeate throughout the world’s cultural centers. Information available at http://www.cnn.com/2010/SPORT/football/01/06/fantasy.football.moneyball.sabermetrics/
24 According to Wikipedia, the list of popular fantasy sports include the usual suspects, such as football and baseball, as well as more surprising sports like cricket, Australian rules football, rugby, golf, racing, “Congress”, professional wrestling, surfing, and MMA. Information available at http://en.wikipedia.org/wiki/Fantasy_sport
25 See note 7.
26 In addition to an increasing international fantasy sports population, the female population of fantasy sports participation is also seeing an increase. In the 2011/2012 NFL season roughly 5.8 million women played fantasy football, which equates to around 20% of all fantasy football players being women. While this is still a minority, it does show that fantasy sports are not just growing in population among male sports fans, but female as well. Information available at http://thefootballgirl.com/news-and-features/melissas-blog/2012/jul/5.8-million-women-now-playing-fantasy-football.html
27 Information available at http://rotobiz.com/news/fantasy-sports-participation-grows-32-million-north-america. The Fantasy Sports Trade Association uses the phrase “actively playing” when describing the participation rates of fantasy sports. This might mean that they did not include those people who sign up for a team and then do not participate in the league after the draft. Therefore, it is possible that the number of people who actually intended to participate in a fantasy league is actually higher than indicated by the report.
28 Id.
29 Information available at http://www.fsta.org/industry_demographics
30 Id.
that the fantasy sports market is a stable market that reaches 13% of all Americans over the age of twelve\textsuperscript{31}.

In addition to reaching a large amount of people, fantasy sports also generate obscene amounts of money. Finding a definite number of how much money fantasy sports generates is difficult due to the differences in estimates among sources. One estimate from the Fantasy Sports Trade Association estimates that fantasy sports generates roughly $15 billion a year, $11 billion of which comes from fantasy football\textsuperscript{32}. Meanwhile, Fox Business estimates that fantasy football merely generates $1 billion a year\textsuperscript{33}. This number is very low compared to the numbers from the FSTA and Fox Business never clearly states how they arrived at this $1 billion number\textsuperscript{34}. While arriving at an exact estimate for how much fantasy sports generates in a year proves to be difficult, fantasy sports, as a whole, is at least a multi-billion dollar industry with fantasy football leading the charge\textsuperscript{35}.

One indicator of how valued the fantasy sports market has become is the numerous giant acquisitions, mergers, and investments of fantasy websites. In early 2013, FanDuel, one of multiple "day draft" websites, received $11 million in investment funding from Comcast Ventures\textsuperscript{36}. This faith in "day draft" websites is well founded as the premier "day draft" website, FanDuel, paid out $10 million in winnings in 2011 and $50 million in 2012\textsuperscript{37}. Additionally, in late 2013, DraftKings, another "day draft" website, received a $24 million investment from Redpoint Ventures\textsuperscript{38}. These "day draft" websites look to offer huge investment opportunities, even though their legality has not been completely defined or defended\textsuperscript{39}.

IV. Tradtional Fantasy Football and the Law

The legal history of fantasy sports is a relatively sparse one with only three major legal decisions regarding the topic\textsuperscript{40}. These three decisions, the Stats, Inc. v. NBA case,
CDM v. MLBAM, and the Unlawful Internet Gambling Enforcement Act of 2006, have all come within the past two decades as fantasy sports has grown beyond small leagues at a friend’s house (UIEGA)\(^{41}\).

The NBA v. Sports Teams Analysis Tracking Systems, Inc (NBA v. Stats, Inc.) was a 1997 regarding copyright infringement upon professional sports\(^{42}\). It may be hard to imagine or remember a time in which sports stats and information, regarding ongoing games, were not readily available but in the late 1990’s STATS, Inc. was the first group to offer “RealTime” information for those not able to watch television\(^{43}\). STATS, Inc. hired people to attend games and record and update the information, which would then be shared via satellite to those with a “Sports Trax” pager\(^{44}\). While Stats, Inc. charged the subscribers for this service without the permission of any sports leagues or TV stations it was the NBA who sued STATS first under copyright law\(^{45}\). In the suit, the NBA asserted that they possessed exclusive rights to any NBA intellectual property and that this intellectual property included “advertising, promotion, and other products and services in all forms of commerce and media.”\(^{46}\) STATS, Inc. was in talks with the NBA to acquire the permitted rights to distribute NBA information but when the talks broke down STATS and Motorola proceeded without permission\(^{47}\). While factual information is not and cannot be protected under copyright law the case did move forward based off a misappropriation claim\(^{48}\). At the appellate level the courts sided with STATS stating that “(1) Sports Trax is not a substitute for the product offered by the NBA – being at the game or watching it on television – and (2) there was no “free-riding” because STATS and Motorola expended their own resources to collect the factual information (broadcast to the public via television or radio) which they disseminated.”\(^{49}\)

This case was pivotal in defending internet company’s rights to disseminate information in a “RealTime” manner\(^{50}\). The importance of this protection is difficult to measure but it is possible that without rapid information exchange fantasy sports would not be where they are today.

The next case, CDM v. MLBAM from 2007, was about a fantasy sports website’s, CDMsports.com, legal ability to use the names and statistical records of MLB players without proper licensing\(^{51}\). The suit was actually brought about by CDM in order to guarantee their rights to use stats and names, while the MLBAM counterclaimed that CDM’s

\(^{41}\) See note 24.
\(^{42}\) STATS, Inc. and Motorola worked hand in hand with this project and as such, the lawsuit also involved Motorola. Information available at [http://lsolum.typepad.com/copyfutures/2004/09/several_of_my_r.html](http://lsolum.typepad.com/copyfutures/2004/09/several_of_my_r.html)
\(^{43}\) Id. Though the “RealTime” technology of keeping scores constantly updated existed on TV, on networks such as CNN and ESPN, Motorola was the first to offer up to date information via the internet and a wireless device.
\(^{44}\) Id.
\(^{45}\) Id.
\(^{46}\) Id. While money was the main motivator behind this lawsuit, the NBA also wanted to protect its properties and its claims to these properties.
\(^{47}\) Id.
\(^{48}\) Id.
\(^{49}\) Id. Though this case defended “RealTime” information services for the most part certain sports leagues, such as MLB, have strong claims against this due to just how much “RealTime” can replicate a game with its pitch-by-pitch feature.
\(^{50}\) See note 24.
fantasy baseball service violated MLB player’s rights to publicity. Until 2005, CDM had a license to use all names and statistics and when the MLBPA gave exclusive rights to MLBAM in 2005 CDM lost this license. It was after the MLBPA gave MLBAM exclusive rights that MLBAM proceeded to attempt to shut down other fantasy baseball websites via cease-and-desist letters. MLBAM’s main argument was one of player’s rights to publicity guaranteed by the constitution. The right of publicity is recognized by many states by law, one such state is Missouri, which defines the elements of a right of publicity action as “(a) defendant used plaintiff’s name as a symbol of his or her identity (b) without consent (c) with the intent to obtain a commercial advantage.” Originally, the court found that CDM did not violate this right to publicity but upon appeal, the Eighth Circuit found that CDM used the players’ identities for commercial profit, thus violating the players’ rights of publicity. However, the players’ rights of publicity were preempted by CDM’s first amendment rights. CDM was using information “readily available in the public domain” and as such, it is not reasonable to prevent someone from using that type of information even if they are making a profit.

The CDM v. MLBAM case was pivotal in establishing and defending the legality of fantasy sports from an athlete’s rights perspective. Any future case involving the rights of athletes to protect their likeness from fantasy sports websites would be preceded by the CDM v. MLBAM case and the first amendment right to freedom of expression.

Finally, is the Unlawful Internet Gambling Enforcement Act of 2006, which firmly established the legality of pay for play fantasy leagues. This act made it illegal for gambling businesses from accepting payment, in the form of a bet or wager, from a person that involves the use of the internet and that would be illegal under any federal or state law. The reason that betting in the form of fantasy sports remains illegal is the difference between fantasy sports and typical gambling. While gambling is a game of luck, fantasy sports is a game of skill, at least according to the UIGEA, and as such remains legal. The exact set of circumstances used to defend any fantasy sports game is as follows, “has an outcome that reflects the relative knowledge of the participants, or their skill at physical reaction or physical manipulation (but not chance), and, in the case of a fantasy or simulation sports game, has an outcome that is determined predominantly by accumulated

52 Id. The MLB players’ rights to publicity were licensed through the MLB Players’ Association (MLBPA) to MLBAM and as such, the MLBPA intervened in the suit on behalf of the MLBAM.
53 Id. The 2002 agreement, the year of the final agreement between CDM and the MLBPA, stated that CDM could no longer use players’ names and statistics upon the expiration of the agreement. However, after the agreement expired in 2004, CDM continued to use names and statistics of MLB players.
54 Id.
55 Id. This right to privacy argument is the key difference between this case and the 1997 NBA v. Stats, Inc. case that merely argued over copyright law.
56 Id.
57 Id.
58 Id. The right to freedom of expression was what the courts focused upon.
59 Id. Time Inc. v. Hill in 1967 established the law that “making a profit does not preclude its receiving First Amendment protection.”
60 See note 24.
61 The purpose of this act was to stop all internet gambling sites, such as poker websites, from working around anti-gaming laws. Information available at http://www.fdic.gov/news/news/financial/2010/fi10035a.pdf
62 See note 5.
statistical results of sporting events.” It is the fact that it takes skill and knowledge to win fantasy games that makes the exchange of money, in regards to fantasy sports, legal. Additionally, the UIGEA states that a game must have a predetermined payout as opposed to a payout based upon the number of players. Every known traditional fantasy league that delivers a cash prize for victory has a predetermined payout and as such remains legal under the UIGEA.

The importance of the UIGEA is huge in that it firmly establishes the federal legality of all traditional fantasy sports leagues. This means that fantasy sports can continue to grow and provide a large financial market as long as people remain interested. That being said, when the UIGEA was written and signed into law, the writers of the bill had no conception of the “one-week” fantasy leagues to come.

V. The UIGEA and “One-Week” Fantasy Football Leagues

Whenever something new and different becomes widespread, the knee jerk reaction is to assume the worst. This reaction is most certainly elicited from the new “one-week” fantasy football leagues but is it well founded? Based off the standards set out by the UIGEA, the document that granted all traditional fantasy sports federal legality, the answer is clear. The three main criteria set out by the UIGEA being that the fantasy game must: (1) have a predetermined prize amount not affected by the number of participants or the amount of fees paid, (2) all winning outcomes reflect the winner’s relative knowledge and skill, and (3) the fantasy game’s result is not based on the final scores of any real world game’s result.

Before comparing “one-week” fantasy football leagues against the three criteria set out in the UIGEA, it makes sense to denote the difference between these “one-week” leagues and traditional fantasy football leagues. The first difference is the length of a contest. While traditional fantasy football leagues are comprised of many weeks of head-to-head matchups, “one-week” leagues obviously only last through one week of NFL competition. After drafting your team for the week, you compete against a pool of players and if a team wins or finishes at a certain level, depending on the website used, receives a cash prize. So the cash prize aspect is similar to traditional fantasy leagues but the method of getting to the cash prize is very different. Though similarities and differences between traditional and “one-week” leagues exist, the question still remains, based off the three standards set forth by the UIGEA, are these “one-week” leagues still legal.

The first standard states that the fantasy game must have a predetermined prize amount not affected by the number of participants or the amount of fees paid. Evaluating

---

63 See note 5. In 2007, Humphrey v. Viacom, Inc. established the legal idea that fantasy sports takes skill.
64 See note 5.
65 See note 5. The UIGEA is a federal statute that can be preceded by state laws that disallow financial payouts for fantasy leagues.
66 When I first heard of these “one-week” fantasy football leagues the legality of them sounded very shaky, to say the least.
68 Information available at https://www.fanduel.com/how-it-works
69 Id.
70 See note 67.
and understanding this standard is relatively simple. Any fantasy game that wants to remain legal must have a predetermined prize that is not affected by the amount of players or fees paid. These “one-week” leagues do indeed have a predetermined prize amounts that fluctuates depending on which league you join. While the “one-week” leagues do indeed follow the predetermined part of the rule but it may fail when it comes to the “prize amount not affected by the number of participants or the amount of fees paid” aspect of the rule. In fact, even traditional leagues seem to fail when it comes to this part of the rule. For example, in a traditional ten-team league where a $10 buy-in is required the amount paid out to the victor is bound to be impacted by the amount put in. In this example, the prize might be $80-90 for the winner and $10-20 for the website hosting the league. These “one-week” leagues work very similarly with the winning amount being directly correlated with the amount of participants and fees paid\textsuperscript{71}. This may pose a risk to these leagues but even traditional leagues seem to function without any scrutiny in this regard so either the language used in the law is poorly worded or the fact that a prize is predetermined is the most important aspect of this standard.

The next standard states that in all fantasy leagues “all winning outcomes reflect the winner’s relative knowledge and skill\textsuperscript{72}.” Obviously traditional fantasy sports is a game of knowledge and skill. It requires a participant’s attention for multiple weeks in order to have a successful team. However, the skill required for “one-week” leagues is harder to defend. Due to these leagues only lasting one week, the skill level it takes to win is allegedly lower than the skill level required to win a traditional league. This is probably true but it does not mean that “one-week” leagues do not require skill or knowledge. It is hard to imagine a person with no knowledge of football winning a fantasy league of any kind. Ultimately proving or disproving that “one-week” leagues require skill to a point of certainty is impossible but logically it should be held that it takes a significant knowledge base in order to win these leagues. States that take a hard-line on any semblance of chance being involved would most likely take issue with these leagues but, at a federal level, it is impossible to act against “one-week” leagues based off a perceived lack of knowledge or skill required to win.

Finally is the third standard that states the fantasy game’s result is not based on the final scores of any real world game’s result\textsuperscript{73}. This simply means that fantasy games cannot be determined by any one game. For example, a “one-week” league taking place during the Super Bowl would be illegal but any other week of the NFL season is fine. As long as a website does not run a competition the week of the Super Bowl then they comply with the UIGEA.

V. Conclusion

Though the three rules in the UIGEA were included to defend the legality of traditional fantasy leagues, as long as the newer “one-week” leagues stay in compliance

\textsuperscript{71} See note 68.
\textsuperscript{72} See note 67.
\textsuperscript{73} See note 67.
with these three rules, then their federal legality is unquestionable. The only weak point for these leagues is that they might involved a bit more luck and chance than traditional leagues, thus making them more open to state restrictions. However, regardless of state restrictions, the knowledge required to succeed at these leagues defends them from federal restriction.