This alert is the fifth in a series of alerts discussing updates and potential developments in light of the Supreme Court’s decision in Murphy v. National Collegiate Athletic Association. The first installment outlined the Murphy decision itself, and the second installment focused on potential state and federal legislation following Murphy. The third installment identified potential revenue opportunities that may emerge following Murphy. The fourth installment outlined risks related to money laundering and key aspects of an anti-money laundering compliance program as they apply to established businesses that may now expand into sports betting as well as to those that may be new entrants into the market post-Murphy. This installment focuses on the right to publicity in a post-Murphy landscape, where sportsbooks and sports betting platforms may seek to use athletes' likenesses in connection with their enterprises in light of the Indiana Supreme Court’s guidance in Daniels v. FanDuel, Inc.

Just before the Supreme Court’s decision in Murphy v. National Collegiate Athletic Association (Murphy), which removed the barrier to legalized sports betting, the players’ associations for the NFL, NBA, MLB, and NHL put out a statement highlighting their concerns and policy objectives should the Supreme Court permit sports betting. The players’ associations cautioned that, while the legalization of sports betting may translate into profits for a number of market participants, the unions have been "discussing the potential impact of legalized gambling on players' privacy and publicity rights," among other concerns. With the expansion of sports betting nationwide, some sportsbooks may seek to use players’ names, likenesses, or statistics for in-game betting purposes, for example. Recently, the Indiana Supreme Court provided guidance as to the publicity rights of athletes in the context of fantasy sports, holding that such online fantasy contests do not violate a player’s publicity rights. The expansion of sports betting platforms and programming, based upon the usage of athletes' names, likenesses, or statistics, implicates important First Amendment concerns, which absent legislation may continue being litigated given the potential revenue sources associated with these platforms and programming. This alert analyzes the recent decision and possible implications on potential compensation for sports leagues, teams, and athletes for the usage of athlete likenesses and data on sports betting platforms.
Publicity Rights Background

Professional sports leagues and athletes have long asserted that the right of publicity prohibits companies, such as fantasy sports providers and potentially sportsbooks, from appropriating players' likenesses and information without a license for commercial gain. Over time, a publicity right began to take shape, based upon the monetary value associated with the celebrity status of athletes and other public figures. Emanating from a right to privacy, publicity rights essentially afford an individual with the exclusive right to control the commercial use of his or her photograph, name, likeness, and other personal characteristics. Publicity rights may also encompass an athlete's professional sports performance statistics.

Many states have codified a right to publicity through state statutes and common law. For example, in Indiana, one of the states affording some of the broadest protections to publicity rights, a person may not use an aspect of a personality's right of publicity for a commercial purpose during the personality's lifetime or for one hundred years following the personality's death without having obtained prior consent. Indiana defines the "right of publicity" to include a property interest in the following nine qualities: (1) name, (2) voice, (3) signature; (4) photograph; (5) image; (6) likeness; (7) distinctive appearance; (8) gestures; or (9) mannerisms. State law often provides for certain exceptions to the right of publicity. Notably, Indiana law contains a "newsworthy value" exception, which provides that the right of publicity does not apply to "[t]he use of a personality's name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms in ... [m]aterial that has political or newsworthy value." Additionally, Indiana codified a "public interest" exception. Under the public interest exception, the right of publicity does not apply if the usage is in the context of a broadcast or reporting of an event or a topic of general or public interest.

Publicity rights and data ownership rights have been fiercely litigated across the country, with courts opining on who possesses intellectual property interests in team names, athlete likenesses, statistics, and data, particularly in the fantasy sports arena. C.B.C. Distribution and Marketing (CBC) sought to use the names and information about Major League Baseball players in connection with its fantasy baseball products without a license. In response, Major League Baseball Advanced Media (MLBAM) filed a counter-claim, alleging that CBC's fantasy baseball products violated the players' publicity rights under Missouri state law, home to CBC. In Missouri, a claim involving the right to publicity has three elements: (1) use of a personality's name as a symbol of his or her identity; (2) without consent; and (3) with the intent to obtain commercial advantage. With respect to the right to publicity claim, the Eighth Circuit Court of Appeals ruled in favor of MLBAM, finding that CBC used players' identities in fantasy baseball products for pecuniary gain, and the players' identities are being used for commercial advantage, resulting in a violation of their rights of publicity under state law.
Daniels v. FanDuel

Seeking to enforce their publicity rights, three former college football players sued DraftKings and FanDuel, asserting that the DFS operators using their names, pictures, and statistics violated Indiana state law, and in particular, the right to publicity afforded to Indiana citizens. DraftKings and FanDuel moved to dismiss the players’ complaint, arguing that Indiana’s right of publicity statute contains exceptions for material protected by the First Amendment, including material falling under the newsworthy or public interest exception. Here, DraftKings and FanDuel asserted that athletes and reports on performance of athletes have been a mainstay of sports reporting and sports media and a matter of public concern. Moreover, players’ names and performances are particularly newsworthy for DFS operators as potential roster choices in fantasy games.

The District Court granted the motion to dismiss in September 2017, and the players appealed to the Seventh Circuit Court of Appeals. Instead of ruling substantively, the Seventh Circuit sought guidance from the Indiana Supreme Court on the specific certified question of 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.

Given the potential far-reaching implications of the Indiana Supreme Court’s guidance, the MLBPA, MLSPA, NBAPA, NFLPA, NHLPA, WNTPA, and WNBAPA jointly filed an amicus brief in support of the players. The players’ associations focused their arguments around the specific context of DFS, asserting that the right to publicity exceptions cannot apply because DFS operators do not function as sources of newsworthy information or as vehicles to report upon matters of public concern, but simply “games designed to promote competition for prize money.” More specifically, the players’ associations asserted that DFS operators’ purpose in using the athletes’ names and likenesses is not to disseminate newsworthy information or inform the public, but instead the purpose is to “capitalize upon the commercial value of those athletes’ identities by enticing customers to spend and win money based upon the athletes’ on-field performances.”

On October 24, 2018, the Indiana Supreme Court weighed in, holding that online fantasy sports operators that condition entry to contests on payment and distribute cash prizes do not violate the Indiana right of publicity statute when those organizations use the names, pictures, and statistics of players without their consent because the use falls within the definition of “material that has newsworthy value,” an exception under the Indiana statute. The Court noted that DFS operators’ use of players’ names, likenesses, and statistics in fantasy sports competitions is strikingly similar to the publication of the same information in newspapers and media outlets. Citing C.B.C. Distribution and Marketing, Inc. v. Major League Baseball, 505 F.3d 818, 823 (8th Cir. 2007), the Indiana Supreme Court stated it would be “strange law that a person would not have a first amendment right to use information that is available to everyone.” Additionally, the Indiana Supreme Court held that in the context of fantasy
sports, the risk of unauthorized advertising in connection with the use of a personality or likeness is minimal. Equipped with the guidance of the Indiana Supreme Court, the Seventh Circuit is now tasked with resolving the Daniels matter.

Implications

Prior to the decision in Daniels, the gaming lobby has consistently asserted that case law is clearly in favor of sports books and fantasy sports sites to use publicly available data and, as a result, leagues, teams, and players may not significantly benefit from the legalization of sports betting. The Daniels decision increases the stakes for leagues et al. to continue to fight for the right to monetize data resulting from its products and/or actions of its players. Whether that is accomplished through “official” data created or aggregated, legislation and/or practical commercial decisions is yet undetermined. However, in the days following the Daniels decision, the NHL announced a partnership with MGM resorts, which provides MGM with access to proprietary game data generated by a tracking system developed by the NHL. We suspect due to the added incentive to monetize these publicity rights each of these avenues will be aggressively pursued until legislation is in place to protect the intellectual property of players’ names and likenesses to the benefit of leagues and, most likely, players to force sportsbooks to compensate leagues, teams, and players for using sports data.


2 Id.


4 See, e.g., O’Bannon v. Nat’l Collegiate Athletic Ass’n, 802 F.3d 1049, 1052 (9th Cir. 2015), cert. denied, 137 S. Ct. 277 (2016); Davis v. Elec. Arts, Inc., 775 F.3d 1171, 1175 (9th Cir. 2015), cert. denied, 136 S. Ct. 1448 (2016), ETW Corp. v. Jireh Publ’g, Inc., 332 F.3d 915, 918-19 (6th Cir. 2003); O’Brien v. Pabst Sales, 124 F.2d 167 (5th Cir. 1941).


6 Id.


8 Ind. Code § 32-36-1-8(a).


10 Ind. Code § 32-36-1-1(c)(1)(B).
However, the Eighth Circuit noted that even if there is a right of publicity in the fantasy sports domain, this right is trumped by First Amendment concerns, as sports data is available to the general public. See C.B.C. Distrib., 505 F.3d at 823 ("[I]t would be strange law that a person would not have a first amendment right to use information that is available to everyone.").


Amicus Curiae Brief of the Major League Baseball Players Association, the Major League Soccer Players Association, the National Basketball Players Association, the National Football League Players Association, the National Hockey League Players’ Association, the United States Women’s National Team Players Association, and the Women’s National Basketball Players Association, Daniels v. FanDuel, Inc., Case No. 18S-CQ-00134 (May 18, 2018).

Id. at 9.


Id. at 9-10.

Id. at 10-11.