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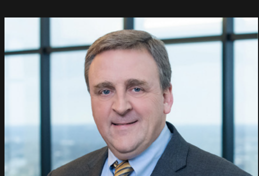

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PLAYING ON THE EDGE – SWEEPSTAKES CASINOS FACE CHALLENGES

STEVE COSENTINO, AALOK SHARMA AND DONTA DISMUKE

Sweepstakes casinos have become a force in online gaming, offering casino-style games without navigating the complex regulatory scrutiny of gaming regulators or legislators. Sweepstakes casinos use creative business models, utilizing virtual coins and alternative entry methods to circumvent legal restrictions. However, as their popularity continues to rise, so does the legal scrutiny from legislators.

Sweepstakes casinos are a spin on traditional gambling. Typically, sweepstakes casinos employ a dual-coin system. "Gold coins" are given for free and can be used to play free games, much like any other freemium model. Players are not at risk of losing real money when they use gold coins, and gold coins cannot be redeemed, transferred or exchanged for any goods or services. However, sweepstakes casinos also offer "sweep coins," which can be earned through daily logins, promotions, by alternate means of entry (i.e., mail-in letters), or purchase. Sweep coins can then be redeemed for real money prizes, including gift cards, cryptocurrency or cash. Gold coins and sweep coins can be used to play a variety of traditional casino games, including blackjack, poker, roulette and slots.

While the allure of these platforms lies in their ability to provide gambling-like experiences, their model has raised serious legal and regulatory concerns. Critics argue that the line between sweepstakes gaming and illegal gambling is thin, with many of these platforms essentially offering a form of gambling without the proper regulatory oversight. Legal challenges from plaintiffs and regulators are becoming prevalent across several states. Over 10 lawsuits have been filed across the country, with lawyers claiming fraud, breach of contract, unfair and deceptive trade practices, and violations of various state gambling loss recovery statutes.

Additionally, several state regulators have issued cease-and-desist letters to sweepstakes casino operators. In Michigan, the Gaming Control Board has issued cease-and-desist letters to several unlicensed online casinos and gambling platforms. Similarly, in Maryland, the Lottery and Gaming Control Agency sent cease-and-desist letters to multiple online casinos and sportsbooks that the agency found to be operating without proper authorization. West Virginia has also taken steps to address what it deemed as "unlicensed" online gambling activities. The state's attorney general issued subpoenas to sweepstakes operators, aiming to enforce compliance with state laws. These actions across multiple states highlight a growing effort to further regulate and monitor online gambling activities.

Noting the challenges to regulated online gambling industries in their own states, state legislatures have also taken the matter into their own hands. Several states, including Maryland and New York, have proposed legislation that would ban the sweepstakes casino model in their own jurisdiction. In proposed legislation in New York, fines could amount to $100,000 with instructions for the gaming commission and the New York attorney general to enforce the penalty. In other states, payment processors and other vendors needed to operate sweepstakes casinos could also face civil and criminal liability. Legislators are taking important steps to exempt established forms of gambling, including sweepstakes where no purchase is necessary to participate in contests.

The rise of sweepstakes casinos and their ability to operate in this legal gray area has exposed gaps in the regulation of online gaming. For several years, these platforms have operated on the assumption that a sweepstakes model could avoid the classification of illegal gambling. However, the legal and political landscape is shifting.

Ultimately, the challenges facing sweepstakes casinos are far from resolved as courts, regulators and legislators review whether these types of gambling are permissible. As the market waits for answers, the rise of sweepstakes casinos remains a stark reminder of the complexities involved in balancing innovation with regulation in the ever-changing landscape of online gaming.

PENN STATE VICTORY MAINTAINS UNEASY STATUS QUO IN SPORTS MERCHANDISING INDUSTRY

TIM FEATHERS AND MARSHALL KELNER

Most major universities have developed extremely lucrative business empires by exploiting the use of their trademarks and trade dress on apparel and merchandise, among other things. They have done so on the theory that the public inherently associates those names and logos with the universities, and therefore assumes that any merchandise or apparel bearing those marks must be licensed by the university. For the most part, the courts have supported this theory, and hence a robust licensing industry involving those properties has flourished.

That theory and the underlying business model came under direct attack in the case of *Penn State v. Vintage Brand*. Vintage Brand is attempting to build its own business empire on the backs of the same university trademarks and trade dress, but without obtaining a license or consent from the universities. As a result, Vintage Brand has been sued by Penn State and faces similar lawsuits from other universities, including Purdue, UCLA and Baylor. The Penn State case was the first to go to trial.

A little background on trademark law: A trademark is a word, name, symbol or device that is used to identify and distinguish the source of goods and services. The primary purpose of trademark law is consumer protection, namely preventing consumer confusion as to the source of a particular product or service. It allows consumers to rely on their expectations as to the quality of a product based on the reputation of the provider. At the federal level, the Lanham Act is the primary source of trademark law. In general, a trademark holder may prevent a third party from using its trademarks in a way that is likely to cause consumer confusion as to whether a particular product is produced or licensed by the trademark owner or the third party. That is the crux of trademark law.

Penn State has licensed its trademarks since 1983. The university claimed that Vintage Brand's products misled consumers into thinking that Penn State was either the source of the products or that the products were officially licensed by Penn State. The university's claims have the support of many courts that have used a "per se" analysis to evaluate these types of cases. In essence, the "per se" analysis assumes that consumers inherently associate university names and symbols with the institution itself. The trial court's rejection of the "per se" rule (opting instead for a fact-intensive inquiry) sent a mini shockwave through the sports merchandising industry, resulting in acute industry scrutiny of this case.

The theory espoused by Vintage Brand (which has some support in older cases), is that its use of the designs is merely ornamental, not "trademark" usage. The "decorations" (i.e. university logos and trade dress), simply allow consumers to show their allegiance and support for their favored school or team, and to that extent the use of the designs is not "source identifying" trademark use, and does not result in any consumer confusion as to the source of the goods. Consumers are merely showing their support for the university, and not assuming that the university has produced or approved the item of apparel, for example. Vintage Brand further noted that it provides disclaimers on its website and products that indicate the merchandise is not officially licensed by Penn State.

On November 19, 2024, the jury, which came from communities near Penn State, sided with the university in finding that Vintage Brand willfully infringed Penn State's trademarks by selling merchandise with Penn State logos, and awarded the university $28,000.

One interesting issue Judge Brann discussed in his pretrial order denying Penn State's motion for summary judgment is that most of the public mistakenly believes that trademark law requires a license in order to use a famous brand. As a result, when consumers see a university logo on merchandise, they think the university either produced or licensed the item, albeit perhaps based on this mistaken belief. For better or worse, this gave Penn State a key advantage. The university used survey evidence about Vintage Brand's products to bolster this argument. That put Vintage Brand in the unenviable position to argue that without the misunderstanding of the law, consumers would not presume a licensing relationship. Vintage Brand lost that battle.

Judge Brann's rejection of the "per se" rule favored by some other courts (but not expressly adopted in the Third Circuit, where this case could be appealed to), would seem to make this case a prime candidate for appeal.

In the meantime, major universities will no doubt continue the lucrative practice of exploiting their trademarks and trade dress on apparel and merchandise, but no doubt with a keen eye on developments in this area of the law due to the potential chink in the "per se" rule armor that has emerged from this case.

MLB AND SPORTS MEDIA RIGHTS IN THE STREAMING ERA

JEFF SCHLERF AND GREG PAYTON

Diamond Sport Group's recent stay in Chapter 11 proceedings provides a good illustration of evolving trends in the consumption of live sports content and the resultant changes in the media industry landscape. Less than four years after Diamond acquired various regional sports networks (RSNs) for a variety of professional teams, including MLB clubs, it filed for bankruptcy. Diamond was overleveraged based on a significant drop in the value in the "traditional" (i.e., linear TV) media rights it had acquired. Throughout Diamond's stint in Chapter 11, MLB continued to express doubts about the viability of a perceived declining business model. The ongoing transformation of the sports media landscape may explain why.

In 2019, Diamond's then-corporate parent, Sinclair Broadcast Group, purchased multiple RSNs from Disney, which, for regulatory reasons, had to divest following its acquisition of Twenty-First Century Fox. The approximate $10.6 billion purchase price was funded in significant part through debt incurred through Diamond. That entity, in turn, held the RSNs either directly, through joint ventures with Bally Sports, or by minority interests in non-Bally RSNs. The historical business had been dependent upon cable and satellite providers for distribution to consumers. Only six months before bankruptcy did it launch its first "direct to consumer" (DTC) offering, a streaming service. As of the bankruptcy filing, Diamond's RSNs held rights to broadcast games of 16 MLB clubs, yet only five of which had DTC offerings. While the number of viewers for its still-dominant linear model continued to decline, its contracts with the MLB teams had an average remaining term of 6 years, and Diamond was saddled with almost $9 billion in debt.

While a more detailed description of events in the bankruptcy is beyond the scope of this article, how the proceeding began and ended is illustrative of industry changes. After filing, Diamond targeted what it viewed as its unprofitable contracts. It tried to impose upon three MLB clubs a "grace period" for payment of telecast fees, then sought court approval to unilaterally reduce such fees. MLB joined the affected teams in successfully opposing the relief. While Diamond's position was legally sound, industry economics resulted in the deals being restructured. Additionally, broadcast agreements with two other clubs, the Padres and Diamondbacks, were terminated consensually in the 2023 season. This trend towards restructuring broadcasting partnerships continued during the course of the bankruptcy case. MLB joined other clubs in expressing concerns about the viability of Diamond's proposed new business model and projections, scrutinizing its ability to pivot to a DTC-focused strategy. Eventually, MLB's objection to the reorganization plan was resolved after amended telecast agreements involving six other clubs were reached and Diamond's DTC projections improved. A very significant development was Diamond's renegotiation of its agreement arrangement with Amazon to enhance its DTC offerings.

Diamond's corporate journey over the past six years is emblematic of increased competition from new wealthy and tech-savvy entrants into sports media rights, who are well-positioned to offer sports content via DTC platforms. The combination of these new competitors include Amazon, Apple TV, Netflix and Hulu. Many would not have predicted MLB's future partnership with Apple TV for Friday Night Baseball or Amazon's acquisition of NFL's Thursday Night Football at the time Diamond acquired its RSN's.

Marketplace demand is driving these changes. The movement of sports consumers, including MLB fans, away from "bundling" under traditional cable subscriptions began a while ago. Viewers increasingly demand more tailored options. ESPN remains a sports broadcasting juggernaut, but its leverage in negotiating in the industry continues to erode as it faces this new competition. These new "players" who have entered the sports media landscape have become accepted by content originators (leagues, teams, event promoters, etc.) as reliable media partners. Moreover, they appear to have an inherent technological advantage in capitalizing on consumer trends towards viewing content on different devices at or away from home.

In parallel with this shift is a trend toward smaller or even single-event packaging. Apple TV's acquisition of media rights for Friday night MLB games is just one example of a more circumscribed offering. This arrangement can be viewed as a "foot in the door" move by this company, but to be economically viable it must attract the consumer, and apparently Apple concluded it does. Netflix's embrace of an even more limited, but exclusive, package of content in the form of NFL's Christmas Day games is another development worth following.

As a sports content originator, how is MLB positioning itself? The Diamond bankruptcy case illustrates MLB's recent desire to adapt to the evolving media trends while maintaining control of how baseball's content is distributed. The strategy appears to be for MLB to manage local and national broadcasting rights more directly, including negotiations with streaming giants like Apple TV and Amazon. At the same time, as shown in the Diamond case, the league still wishes for itself and its clubs to maintain relationships with traditional broadcasters, albeit under changing business models with greater emphasis on DTC.

Professional baseball's relationship with ESPN is instructive. It was a pivotal moment when ESPN recently elected to opt out of its national television agreement with MLB after the 2025 season. The thinking is that the broadcaster decided to move away from the traditional, linear, full-season commitment over multiple years. ESPN's shifting strategy will focus more heavily on its own streaming platform, ESPN+ to cater to sports consumer tastes. On the other hand, speculation is that this is a positive development for MLB as it's believed that the legue wants to overhaul its media rights structure by 2028 as existing deals expire. MLB's strategy could be to broaden the potential field of buyers of its content, thereby making the field more diverse than it has been, as the best means to maximize revenue.

The lesson of Diamond Sports is how a misreading by one sports media participant of industry trends led to an expensive, often contentious, Chapter 11. In the case of ESPN, it was able, through a previously negotiated contract right, to opt out of a broadcast partnership as part of its overall pivot from an aging business model. Both scenarios compel MLB to focus on how it delivers sports content to consumers. The increased number of potential buyers of media rights presents economic opportunities. However, the continuing disruption in the industry will present both business, legal and technological challenges in the years to come.

THE LINE UP

AALOK SHARMA

01

6. In early April, prediction market operator Kalshi earned at least a temporary victory when U.S. District Court Judge Andrew P. Gordon granted, in part, its motion for a temporary restraining order and preliminary injunction to continue operating its sports event contracts in Nevada while the case gets litigated. Kalshi defeated the Biden-era Commodity Futures Trading Commission in federal court last year for the right to offer betting on political events, such as the presidential election. Since then, it has expanded into sports and hosted markets on the Super Bowl and March Madness (in partnership with Robinhood), in addition to other events. Six states—Nevada, New Jersey, Illinois, Maryland, Montana and Ohio—recently issued cease-and-desist orders to Kalshi and Robinhood. Kalshi responded by suing Nevada and New Jersey in federal court. The states claim that event-based contracts on sports and elections are illegal unless they are approved as licensed gaming by the respective state gambling regulators. Kalshi argues that the Commodity Exchange Act preempts the two states' sports betting laws with respect to sports-related event contracts. The question for the courts to determine will be whether event contracts on sporting events are truly wagers.

02

36%. North Carolina Senate Republicans recently proposed a budget that would double the tax rate on sports betting operators from 18% to 36%. If the proposal passes, the tax rate would be among the highest in the nation, along with New York (51%), New Hampshire (51%), Delaware (50%), Illinois (40%) and Pennsylvania (36%). The budget would also increase the amount of tax revenue that is distributed to UNC System schools, add UNC and NC State to that distribution, and mandate that UNC and NC State play a certain number of men's and women's basketball games against other schools in the UNC system. There are other proposed bills to use the sports gambling revenue to offset a tax deduction for members of the National Guard, increase stipends for high school coaches, and increase funding for gambling addiction prevention services.

03

3%. In Pittsburgh, athletes, entertainers and their support staff who don't live in the city and earn income at three publicly funded venues are subject to a 3% "jock tax" on those earnings. Pittsburgh only taxes its own residents 1% of their income. In 2019, several players and their unions filed a lawsuit claiming that the "jock tax" violated part of the state constitution that says similarly situated groups should be taxed uniformly. Pittsburgh claims that the total income tax burden is uniform because city residents also pay a 2% earned income tax to the local school district. The athletes argue that the city is creating an unfair distinction between residents and nonresidents, and between athletes and all other workers. Lower courts paused the "facilities fee" and held that it was unconstitutional. This occurred prior to Pittsburgh acknowledging that it was a tax or making adjustments to allow for tax credits. The case is currently pending before the Pennsylvania Supreme Court.

04

$11 MILLION. U.S. District Judge Federico A. Moreno granted Shaquille O'Neal and the creators of the Astrals nonfungible token (NFT) project final approval of an $11 million settlement to resolve a proposed securities class action with buyers of the tokens that O'Neal allegedly promoted. The Astrals NFTs were assets connected to an online role-playing game that O'Neal allegedly co-founded. The suit, filed in 2023, accused O'Neal of targeting Florida residents in his promotion of the Astrals project by highlighting his work as a promoter of the collapsed crypto exchange FTX and vice versa. The buyers argued that O'Neal should have known that his promotion of the NFTs violated securities laws. Judge Moreno said that he found the settlement to be fair, reasonable and adequate.

05

$658 MILLION. Denver Nuggets and Colorado Avalanche owner Stan Kroenke is planning to build a new downtown Denver neighborhood partly on 64 acres of parking lots near Ball Arena, where both teams play. The $685 million buildout is a 25-year plan to redevelop the area through at least 2050. Kroenke recently filed petitions in state court to establish a special district in the area. The Denver City Council approved Kroenke's plan in October, which includes a corridor of pedestrian-friendly spaces connecting Ball Arena with nearby sports venues Coors Field (Colorado Rockies) and Empower Field (Denver Broncos). Construction could begin as soon as 2026. The plan also includes 6,000 housing units (1,000 designated as affordable), a new 5,000-seat venue, a hotel, bike lanes, and a public park. The Nuggets and Avalanche would stay in the neighborhood through 2050 as well. According to petitions filed in state court, the project is expected to generate $1.7 million in tax revenues in its first year. Kroenke and his company, Kroenke Sports & Entertainment, also own the Los Angeles Rams, Arsenal F.C., and several other franchises.

06

1974. A man claiming to be the descendant of French royalty failed in his bid to have the New Orleans Saints fleur-de-lis mark canceled. Michel Messier petitioned the Trademark Trial and Appeal Board (TTAB) in 2023 to cancel the mark, claiming he had intellectual property rights in the fleur-de-lis symbol, which the Saints registered in 1974. The TTAB denied the bid in 2024 after finding that Messier wasn't actually using the symbol in commerce. The Federal Circuit threw out Messier's appeal in April and held, in a non-precedential opinion, that he didn't have standing because he couldn't show that he was actually harmed by the Saints' use. Messier claimed his family descended from "the Kings of France." He is representing himself pro se and plans to appeal the Federal Circuit's decision to the U.S. Supreme Court.

07

150. In April, the NBA's licensing arm filed a copyright infringement suit in Illinois federal court against several foreign ecommerce operators for allegedly selling counterfeit merchandise. The NBA claims that the fake products are diluting its brand, harming its reputation, and diverting money it would otherwise be earning. In addition, it says that the defendants ("partnerships and unincorporated associations") avoid liability by operating under one or more aliases that allow them to conceal their identities. NBA Properties Inc., the named plaintiff in the case, owns and is the exclusive licensee of the league's more than 150 trademarks, including logos, symbols and emblems. Sales of NBA merchandise exceeded $3 billion in 2023. Some of the ecommerce stores allegedly involved are in China, but the attachment listing all of them were filed under seal to avoid giving them an opportunity to hide or move the infringing merchandise. The NBA claims that the defendants work together regarding sales tactics and to avoid detection, which makes it "virtually impossible" to learn their true identities.

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