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## [Confused about the NCAA's Stan...](#)

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Are you confused about NCAA's various statements about CBS Sports.com's college football fantasy game? Join the crowd of people concerned about the future of intercollegiate athletics.

In case you haven't been following this issue, on July 28 CBS Sports announced that it would be giving its college football fantasy game "a dramatic facelift" by using the real names of players competing at NCAA institutions. In the past, they used generic names (e.g., USC QB, Texas WR, and Georgia RB) and found little interest by the fantasy users apparently because of their interest in playing with "real" players.

The use of actual athletes' names in the past had not been possible because of NCAA legislation prohibiting the use of an athlete's name or likeness for commercial purposes. But, a decision by the United States Court of Appeals (8th Circuit) in a case involving Major League Baseball and CDM Fantasy Sports said that athlete names and statistics are in the public domain and fantasy leagues are free to use them. On June 2 of this year, the United States Supreme Court let stand this decision which opened the door for CBS Sports to use the actual names of student athletes. Now, as an example,

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fantasy players may use “Tim Tebow,” the University of Florida, Heisman Trophy winning quarterback, instead of “Florida QB.”

There seems to be little debate that this use of athletes’ names is in direct violation of the NCAA’s legislation and general policy about amateurism. However, the Association appears to be sending mixed messages on this matter. Interestingly, a few weeks prior to the CBS Sports announcement, the NCAA, according to NCAA News, “issued an official interpretation stating that any student-athletes whose names are used in conjunction with a fantasy sports game would be required to take action to stop the third party in order to remain eligible. Then, following the announcement, the NCAA sent notice to CBS Sports “that its league could jeopardize student-athlete eligibility.”

However, NCAA spokesman Bob Williams told the Wall Street Journal, “that because of the added exposure fantasy sports can bring the student-athlete, the NCAA does not intend to stand in the way of the fantasy game for now.” Williams then defended this by saying that “the amateurism legislation was written ‘before new media’ and does not properly address a situation like this,” according to WSJ.

NCAA President Myles Brand apparently believes the Association can do little other than object. After a recent NCAA Executive meeting in speaking about the fantasy game change he said, “We are concerned and not pleased at the direction it has taken,” according to the Atlanta Journal-Constitution. He added, “Our by-laws are not consistent with the decision of the 8th Circuit (Court of Appeals)” and went on to say “that the organization will have to update those by-laws to allow for wider use of an athlete’s name,” said the Journal-Constitution.

Is the NCAA going to, simply, give-in on this matter? Where’s the fight? Some legal scholars believe that the U. S. Court of Appeals ruling does not apply to amateur athletes who are not paid for competing and cannot earn money for endorsements. Some believe that if the NCAA were to challenge this ruling in court it might prevail. Elizabeth Rowe, a University of Florida law professor, told the Palm Beach Pilot, “it would be a great case for the Supreme Court.” She added, “One could make a good argument that fantasy sports don’t serve the same information purpose protected by the First Amendment but rather is being used for commercial benefit to the detriment of players who aren’t able to reap any monetary benefit,” according to the Pilot.

The Knight Commission on Intercollegiate Athletics is strongly opposed to this change and has urged the NCAA Board of Directors to explore possible legal or contractual remedies. In an open letter signed by William E. Kirwan, Chancellor of the University of Maryland System, and R. Gerald Turner, President of Southern Methodist University, who are co-chairs of the Knight Commission, the two stated, “We believe that the creation of college sports fantasy leagues, if unchecked, is a step toward undermining the NCAA’s bedrock amateurism principles, which require colleges and their business partners to treat athletes like other students and not as commodities whose names, likenesses and/or images can be sold or licensed. NCAA rules allow the names and images of athletes to be used only to promote their teams and their games. In fact, neither the NCAA nor the universities acquire any other publicity rights to athletes; they simply cannot license the use of their names or images -- not to fantasy leagues, not to video game companies, not to sportswear companies.”

Unfortunately, the Knight Commission appears to be the only entity that’s willing to take a strong stand on this matter. It seems clear that the NCAA does not want to push this issue with its partner, CBS Sports, in the middle of its \$6 billion contract for the broadcast rights to the NCAA Division I Men’s

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Basketball Tournament. Amy Perko, Executive Director of the Knight Commission on Intercollegiate Athletics, spoke out strongly to USA Today (08.23.08). She said, "This fantasy game appears to be in direct violation of current NCAA rules. The NCAA has an obligation to ask its partner to cease and desist so its rules are not violated. At this point, what's unsettling is that they wouldn't clearly and actually say that it needs to be stopped, and you hope it's not because their partner has unveiled this as opposed to someone else. The NCAA's first responsibility is to their student-athletes not their business partners."

In response to considerable criticism, Myles Brand recently posted an article on its Double-A Zone Blog (09.08.08) in which he defended the Association's hesitancy to seek a legal remedy. He said,

*"Some have urged the NCAA to seek legal remedy to this poke in the eye of intercollegiate athletics. They want us to sue the producers on the grounds that the use of names of student-athletes violates the principle of amateurism. Well, it does. But that likely isn't good enough to bring suit. The stake in the ground is the right to control publicity by athletes of their names, likenesses and identification. Indeed, courts might very well find that student-athletes should be held apart from professional athletes in this application. The benefit that naturally comes with the publicity of names and statistics for professionals is critical enough that those athletes assign their rights to organizations to manage. But in the case of intercollegiate athletics, the right of publicity is held by the student-athletes, not the NCAA. We would find it difficult to bring suit over the abuse of a right we don't own. So, is there a line so critical to the principle of amateurism that when crossed we say: 'Stop! Enough! Go no further!?' The answer is that the NCAA has defended the principle of amateurism - successfully - in numerous law suits. When we've lost at the trial level, we've appealed. When we've lost at the appellate level, we've gone higher. We've fought exploitation by commercial entities even when the student-athlete argued that no exploitation was involved. We will continue to press our point that student-athletes are amateurs. And with regard to fantasy leagues, how do we protect the principle if we stand by and just let the brave new world of fantasy leagues roll over our values? There is no such ready and obvious answer in this instance. Where we have no standing with regard to publicity rights - as in this case - to bring legal action, we must use other means to try and protect the concept of amateurism."*

Brand, after disclosing the Association's contract with CBS Sports, then goes on to say,

*"If the court decision stands - and it could be challenged from various entities other than the NCAA national office, including the member institutions, the student-athletes themselves, or other third parties - our best option is to influence the industry leader and others to conduct the fantasy leagues with as much deference to the best interests of intercollegiate athletics as possible. For that reason, CBS does not charge for its college football fantasy league, warns on its site against the use of the leagues for sports wagering purposes, offers prizes to the winners, and does not use images of the student-athletes to support the statistical information or to promote the site. In the virtual world where edginess in content is coin of the realm, that is a lot."*

With all due respect to Dr. Brand, this writer does not agree that the best option is to "influence the industry leader." Richard T. Karcher, a law professor at the Florida Coastal School of Law, said on his Sports Law Blog (07.31.08), the NCAA's position should be as follows:

1. Fantasy league use commercially exploits students-athletes.
2. We think the CBC (aka CDM Fantasy Sports) case was incorrectly decided.

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3. Even if the CBC case was correctly decided, that case does not apply to amateur athletes.
  4. Therefore, we do not condone fantasy league use of players' names and we will enforce our legal rights, including the rights of our players on their behalf, against any fantasy league operator that uses players' names or likenesses.

This position would also be consistent with its stance that video game manufacturers may not use players' names or likenesses either [even though, by the way, video game use clearly violates the players' right of publicity]. I'm not sure how the NCAA can possibly justify their inconsistent position with respect to use of names by video games and fantasy leagues.

The NCAA must take a strong stand on behalf of its student athletes and for the preservation of the amateur status of intercollegiate athletics. To cave in here is one more step in the erosion of the distinction between college and professional sports. It appears to this writer that some in the Association in recent years have become more concerned about generating revenue and less concerned about the principles of amateur sport and the legitimacy of the intercollegiate athletics program in a higher education setting. We now have NBA and NFL-type coaches' salaries, NBA and NFL-type facilities for practice and competition, all of which make it more difficult to justify to our colleagues in academia and much of the American public that this is educational sport. At the core of the NCAA's existence is the commitment to uphold the principles of amateurism and to clearly draw the line of demarcation between college athletics and professional sports. It is time for the NCAA to take a strong stand in the legal arena and with its corporate partner, CBS. It is not only right; it's the right thing to do.

[For the entire text of [Myles Brand's Double-A Zone blog](#) and Professor [Richard T. Karcher's Sports Law Blog](#) website.]

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