

2008 North American Society for Sport Management Conference (NASSM 2008)

"Muck Fizzou," "Vick 'em," & "I've been ejected!" Emerging First Amendment issues in sport

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Legal aspects

Session 15

Friday, May 30, 2008

2:30 PM - 2:55 PM

Presentation (25-minute)

Abstract 59

Fan expression and other speech activities are a central and enduring part of the American sport experience. Sport and speech have been described as intersecting American icons (Wasserman, 2004). That intersection often creates collisions between fans, the media, and sport organizations. This presentation will explore current legal issues affecting speech and expression in sport.

"The First Amendment provides protection for a wide range of expression . with the goal of preserving an uninhibited marketplace of ideas and fostering self-expression free of government restraint" (Grady, McKelvey, & Clement, 2005, p. 272). Three recent high-profile cases involving sport fans and sporting events have re-ignited the contentious legal issue of First Amendment protection in sport. Each reflects an attempt by sport fans or sport journalists to express their particular message in a way which is arguably protected under the First Amendment's guarantees of freedom of speech and freedom of the press. In each case, however, the sport organization or university responded with a heavy-handed approach to suppress the speech that, in effect, sanctioned them for speaking.

The first case involves a T-shirt with the phrase "Muck Fizzou" sold by a Kansas retailer, Joe-College.com. The shirt is the same shade of blue as the school colors of University of Kansas which could, as plaintiffs allege, cause consumers to believe that the shirts were licensed by the University of Kansas to poke fun at their rivals. The University of Kansas filed suit alleging that Joe-College.com was infringing the university's trademarks (Nystrom, 2007). The school's athletic director also added that the messages on the shirts were in poor taste and cast a bad light on the school. The retailer cited the First Amendment right of free speech as a defense to the trademark infringement claims and asserted that signs in his store make clear that the merchandise is not licensed by the University of Kansas, a disclaimer in effect. In analyzing the merits of the arguments presented, the applicable law in this area is rapidly evolving (McKelvey & Grady, 2007). In *Louisiana State University, et al. v. Smack Apparel Company* (2006), the plaintiffs raised similar arguments that the defendants "use of irreverent phrases or slang comments misuses the plaintiffs' reputation and good will . embodied in their trademarks" (Smack Apparel, 2006, p. 660). In a landmark decision, the court ruled that a color scheme is protectible as trademarks if it identifies and distinguishes a particular brand (McKelvey, 2007). The court left unresolved the applicability of the First Amendment to merchandise which expresses a message that contains an unauthorized use of the university's protected marks or slogans or is offensive because of the particular message (McKelvey & Grady, 2007).

The second case involves a T-shirt produced and sold by a Texas Tech fraternity. The red and black shirt, similar to Texas Tech's school colors, features the words "Vick 'em," a reference to rival Texas A & M's slogan, "Gig 'em." The back of the shirt features a football player, wearing Michael Vick's No. 7 jersey, hanging the Texas A & M dog mascot from the end of a leash. Texas Tech reacted swiftly to stop the sale of the shirts but also took the additional steps of suspending the fraternity from campus as well as imposing university judicial sanctions. The Texas Tech president said he "wouldn't allow the sale on campus of items that are 'derogatory, inflammatory, insensitive, or in such bad taste'" ("Texas Tech bans T-shirt," 2007).

Texas Tech's decision in this case, however, runs afoul of well settled First Amendment principles that such "derogatory, inflammatory, [and] insensitive" speech is unequivocally protected under the First Amendment. Past First Amendment rulings had recognized that "viewpoint discrimination is . . . an egregious form of content discrimination" (*Rosenberger v. Rector of Univ. of Va.*, 1995, p. 828-829) and that "the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable" (*Texas v. Johnson*, 1989, p. 414). In fact, there is extensive precedent that upholds protecting viewpoints that ran counter to school policies, practices, and positions (Bader, 2006). The most disturbing part of Texas Tech's apparent use of the "educational mission" argument to stop the sale of the shirts is that ordering the stopping of the sale of the shirts would, in effect, give "[a] license to suppress speech .based on disagreement with the viewpoint expressed, [an] argument [which] strikes at the very heart of the First Amendment" (*Morse v. Frederick*, 2007, p. 2637).

The final example involves the NCAA's well-publicized ejection of a reporter from the Louisville Courier Journal for posting simultaneous blogs from the press box during the 2007 NCAA Super Regional baseball game hosted by the University of Louisville (Lapointe, 2007; Moorman & Dittmore, 2007). The media controversy that followed shed new light on a critical issue that continues to plague sport properties - How to protect the value of their properties as reflected in agreements with sponsors, internet providers, and broadcasters? This also is where the law lags behind technology; thus the parties must stretch some traditional theories to cover the instant dispute. The Courier Journal threatened legal action against the NCAA for potential

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First Amendment violations - i.e. Freedom of the Press. The NCAA argues that a live blog is tantamount to a live broadcast in violation of their exclusive broadcasting agreement with ESPN and an infringement of their copyright of the live television broadcast. Of course, both the NCAA and the Courier Journal have some major legal hurdles to clear. First, reporting of sports scores in a delayed format is essentially reporting facts which are likely not protected copyright interests. Thus, while the NCAA may wish to broadly define their live copyrighted broadcast to include any "live representation" of the game action, there is no guarantee a court would agree. Likewise, the Courier Journal's constitutional claims hinge on the NCAA being held to be a state actor which may be difficult to establish given the Supreme Court's decision in *NCAA v. Tarkanian* (1988). Moreover, this controversy presents a basic contract dispute. The NCAA advised members of the media who received media credentials for the Super Regionals that live blogging was not permitted. Is it legally permissible for the NCAA to condition media access to the press box upon compliance with its blogging policy?

This presentation will trace the chronology of significant First Amendment cases that have application to the context of sport. Through discussion of recently decided cases (e.g., *Frederick v. Morse*, 2007), the researchers will analyze the merits of the arguments raised in the three recent cases. Recommendations for steps that sport properties should consider before making the drastic decision to suppress the free speech rights of fans or students will also be provided.