

## ARTICLE

# Advertised Incentives for Participation in Daily Fantasy Sports Contests in 2015 and 2016: Legal Classification and Consumer Implications

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During the summer of 2015, daily fantasy sports (DFS) advertising in the United States became ubiquitous, with DraftKings and FanDuel embarking on an aggressive advertising campaign. One year later, those commercials all but disappeared from television and radio. In the United States, DFS operators and the industry trade association have argued that fantasy games are legally distinct from prohibited forms of sports gambling; however, several state legislators have concluded differently. In this empirical examination, we examined the advertised incentives across the first two weeks of the National Football League (NFL) season in 2015 and 2016. In order to assess whether the arguments made by industry groups that DFS is distinct from gambling is conveyed in the messages being sent to consumers by the two major DFS companies, we conducted a qualitative directed content analysis. We observed that the 2015 commercials focused on the ease of play, and DFS players' ability to win money; whereas the 2016 commercials placed a greater emphasis on intrinsic themes. The implications of this study are meaningful because they suggest that as the regulatory framework surrounding DFS in the United States has become more certain, the major DFS companies have made a change in their advertising messaging while not fundamentally altering their most played products.

**Keywords:** Daily fantasy sports; gambling; content analysis; gaming; fantasy sports

## Introduction

The DFS industry gained mainstream attention in the summer of 2015 leading up to the launch of the National Football League (NFL) season. One of the two leading DFS companies, DraftKings reportedly spent more than \$82 million on television advertising in 2015, airing a commercial every one and a half minutes (Gouker 2015a). These advertisements garnered attention for a format of fantasy sports game that was different to the traditional season-long version, which gained wide popularity in the mid-1990s (Williams, Wood & Parke 2012). In fact, the advertisements were unavoidable, and regarded by some as excessive and annoying (Spies-Gans 2015; Best 2015).

The advertising campaign followed reports that upwards of 57 million people in Canada and the United States of America (US) were playing fantasy sports in 2015 (FSTA 2015a). In 2014, the DFS market was estimated to be worth \$85.6 million, with bullish market growth projected to reach into the billions by the year 2020 (Eilers Research 2014). Indeed, the investment rounds held by DraftKings and FanDuel, the market leaders, placed the values of the companies as exceeding \$1 billion (de la Merced 2015), enabling both to be classified as venture capital 'unicorns,' a status that is reserved for companies with meaningful potential and valuations of greater than \$1 billion.

The emergence of DFS led many (Schneider 2013; Breslow 2016; Dardashtian 2015) to suggest that classifying the activity as something other than gambling was a marketing strategy, and not indicative of the actual nature of the contests. Our examination sought to identify the factors that DraftKings and FanDuel emphasized in their television advertising, through a comparison of television advertisements that aired prior to and after action taken by the New York Attorney General against the two companies. The purpose of this examination was to ascertain the content of advertised messages that were transmitted to consumers, and to determine (a) whether they were associated with financial or other incentives for participation, and (b) whether advertised incentives changed between the 2015 and 2016 marketing campaigns following the initiation of legal proceedings by the New York Attorney General. These legal proceedings, in addition to the legal definitions of sports gambling will be detailed in the following sections.

### **Background of the Emergence of Daily Fantasy Sports**

The growth of the DFS industry has raised questions as to the legal status of the contests that DraftKings and FanDuel were offering. Feinman and Israel (2015) noted that DFS contests existed within an uncertain regulatory space. While the games appeared to present similarities to traditional forms of sports betting, the industry proclaimed that the games were not gambling because success in the contest was based on skill (Meehan 2015). The DFS industry has cited an exemption contained within an American internet gambling statute primarily applicable to payment processors (e.g. banks and credit card companies) to distinguish DFS from other forms of sports gambling (31 U.S. Code § 5361 2006). The Unlawful Internet Gambling Enforcement Act (UIGEA) exempts fantasy sports contests that meet three conditions from the definition of 'bet' or 'wager': (a) the prizes are made known to participants in advance and not composed of the entry fees paid by the participants; (b) winning outcomes reflect 'relative knowledge and skill of the participants'; and (c) the winner is not determined by either (i) 'the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams,' or (ii) 'solely on any single performance of an individual athlete in any single real-world sporting or other event' (31 U.S. Code § 5362 (1)(E)(ix) 2006).

The major DFS companies, the Fantasy Sports Trade Association (FSTA 2015b), and others have relied on UIGEA to support the legal position that qualifying DFS contests are distinct from prohibited forms of sports gambling. The references to the UIGEA exemption for certain fantasy sports is not dispositive as to the legal status of DFS or traditional season-long fantasy sports, as under the dual sovereignty model of the US, individual states have traditionally determined which activities constitute gambling. As a result of the split model of governance the legal status of DFS has historically rested primarily with state lawmakers.<sup>1</sup> Following the reporting of high-profile scandals involving employees from both DraftKings and FanDuel allegedly misusing inside information to compete on other industry sites (Drape & Williams 2015; Holden et al. 2017), various state regulators took notice, highlighted by the New York Attorney General Eric Schneiderman seeking a judicial order to prevent the offering of DFS contests in the state of New York (Blain 2015).<sup>2</sup> The FSTA has claimed that DFS should not be considered gambling due to the players' motives for participation: 'Fantasy sports players are motivated to enter the hobby for reasons that have nothing to do with money or prizes... The only enjoyment is winning and competing against other sports fans' (FSTA 2015b). Despite the claims of the FSTA as to the motives for fantasy sports participation, both DraftKings and FanDuel purportedly offered a combined \$3 billion in cash prizes annually (DraftKings 2015; FanDuel 2015). The public differentiation of DFS from sports gambling is the motivation for this study.

The FSTA (2015b) has argued that fantasy sports broadly are distinct from prohibited forms of sports gambling. Whereas DraftKings (2017) and FanDuel (2017) have both claimed that their DFS products' legality is contingent on the practice being a game of skill—an argument that has historically been cited in some states to classify whether activities are a form of gambling—we examined the content of television advertisements in order to determine what messages were being conveyed to consumers, and whether they were consistent with the arguments that the companies have advanced, i.e. that their products are difficult games of skill (Edelman 2016) and are primarily consumed by participants for reasons other than financial incentives.

### **Literature Review**

#### ***Fantasy Sports, Daily Fantasy Sports and Gambling***

The origin of fantasy sports is not certain. Edelman (2012) observed that All Star Baseball, which was produced by the company Ethan Allen, was first sold in the 1920s. Meanwhile, Kalb (2012) noted that the first iteration of computerized fantasy sports was invented by IBM programmer John Burgeson. However, the most frequently cited creator of fantasy sports is Daniel Okrent, a journalist who would annually meet with a group of friends at *La Rotisserie Française* restaurant in New York City (Di Fino 2009). Okrent and nine friends each paid a \$250 entry fee and competed in the league, with the winner being determined as the participant who produced the highest total points based on player performances (Edelman 2012; McGrath 2015).

The rise in access to the internet has been credited with exponential growth in fantasy sports participation with the US television network ESPN launching the first online fantasy sports contests (Edelman 2012). Caskey (1997) observed that online fantasy sports were not revenue generating for the many major media companies that offered and promoted the games. However, the games saw a growth in popularity as the internet became increasingly widely accessible. Despite not producing revenue for the early adopters, fantasy games were important for generating online traffic to websites.

Woodward noted that by 2003, fantasy sports as an industry was valued at approximately \$500 million (2005). The value of the industry was dispersed amongst a large number of participants, and by 2005, there were more than 15 million participants (Ballard 2004). By the mid-2000s, fantasy sports had become regarded as an important area within the sports industry, and began to receive scholarly attention. Nesbitt and King (2010) observed that fantasy players watch a significantly greater numbers of sporting events than non-fantasy sports participants. Prior to this, Halverson and Halverson (2008) argued that fantasy sports have created an entirely different means of sports consumption, with the actual underlying sporting event playing a complementary role to the fantasy contest. The works of Nesbitt and King (2010) and Halverson and Halverson (2008) are emblematic of the justifications for multi-million dollar investments in the fantasy industry by sports leagues.

Various authors have also studied why people play fantasy sports (e.g. Dwyer & Kim 2011; Dwyer, Shapiro & Drayer 2011; Farquhar & Meeds 2007; Suh et al. 2010), with many learning that the activity is a means for sports fans to engage with sport in a more active role. Despite the popularity of fantasy sports, there has been a historical connection between the activity and other forms of sports gambling. The US Congress first discussed distinguishing fantasy sports from sports gambling in 1998 as part of internet gambling legislation (Lundin Jr. 1999), which would later become UIGEA, though it would not be until 2006 that US regulators would formally provide an exemption for some fantasy games.

Unlike traditional fantasy sports, which are typically played over the length of an entire sporting season, DFS are typically played over the course of several days or a couple of hours (Schneider 2013). Edelman (2016) observed that there are four predominant daily fantasy game formats. The first format allows users to choose a roster of players based on a salary cap and then compete against other competitors for the chance to win prizes (typically money) (Edelman 2016). Participants have a hypothetical salary cap of \$100,000 and all players participating in that evening's games have associated values ranging from \$1,000 to \$50,000. The participant must make selections so as to compose a complete roster which will generate the highest number of points while not crossing the \$100,000 threshold. The second format allows participants to pay an entry fee and select a specified number of real-world athletes to perform a certain statistic – in such contests the winner receives a stipulated prize similar to parlay wagering (Edelman 2016). An example of this format would be a contest whereby a participant selects nine Major League Baseball players to hit a home run in a slate of evening games. Edelman (2016) noted that the third contest format involves participants choosing reduced numbers of real-world athletes. These games operate similarly to the first format, but participants may be selecting as few as three real-world athletes to comprise their fantasy roster. The final contest format involves users selecting athletes to reach specific statistical thresholds during a game (e.g. Messi will score during the first half of a match on 31 August 2017 and Balotelli will attempt four shots in a match on 30 August 2017) (Edelman 2016).

In addition to the competition format of DFS, Ehrman (2015) noted that there are principally three types of daily fantasy payout structures and means of competing. The first structure is the Guaranteed Prize Pool, where companies often promote million-dollar prizes, but typically only a top percentage receives a prize and thousands of other competitors receive nothing. The second structure is the double-up or 50:50 style game where the top half of participants (based on accumulated points) receives a prize. The third type of game structure is the head-to-head contests where there are only two competitors and they face off directly against each other. The emergence of DFS has changed the atmosphere of fantasy sports participation from a social activity, typically played amongst friends over the course of a season, to a fast-paced largely anonymous activity. Despite the differences between DFS and season-long fantasy sports, DFS operators and trade groups have argued that DFS contests are distinct from sports betting, citing the same arguments as those used to differentiate fantasy sports from sports gambling.

### ***What Makes an Activity Gambling?***

The determination of when an activity constitutes gambling is jurisdiction-specific. For instance, in the US there are no less than four different standards that are used for assessing whether an activity is gambling. Reber (2012) observed that the US lacks a uniform interpretation of which activities constitute gambling, but it is broadly accepted that there are three necessary elements: consideration, prize and chance.

The determining factor of whether an activity is gambling concerns the degree to which chance factors into winning the game (Rodenberg 2016). The predominance test, also called the dominant factor test, is used most commonly (Cabot & Csoka 2003). In the evaluation of activities under the dominant factor tests, courts examine whether skill or chance is the factor that has the greatest impact on success in the game (Cabot & Csoka 2003). The second most commonly applied test in the US is referred to as the material element test, which is subjective and requires a judge or jury to determine whether chance is a material element in determining the outcome of an activity (Okerberg 2014). Pandorf (2015) noted that a small number of US states employ the any chance test, which determines any activity containing a modicum of chance to be prohibited. Pandorf further observed that other jurisdictions employ what is referred to as the gambling instinct test whereby courts prohibit activities if they appeal to a 'player's gambling instinct' (p. 523).

While the US has a fragmented approach to determining whether an activity is gambling, other countries, such as the United Kingdom, have slightly different approaches. The UK's Gambling Commission (2016) distinguishes betting, gaming, and participating in a lottery as forms of gambling. Betting in the UK is broadly defined as incorporating a wager on the likelihood of any event occurring or not occurring (UK Gambling Commission, 2016); whereas the Gambling Commission (2016) defines gaming as 'playing a game of chance for a prize'.<sup>3</sup> In addition, a lottery is defined as individuals paying for the opportunity to win prizes based entirely on chance (UK Gambling Commission, 2016). In the case of determining whether an activity is betting, the Gambling Commission (2016) has determined that both the action of placing bets and the paying of entry fees to guess an outcome, likelihood or whether something is factual or not with the opportunity to win a prize is likely gambling.

Both DraftKings and FanDuel asserted in the US that their products are not gambling, while both companies have applied to the UK Gambling Commission to be licensed to offer their daily fantasy contests (Gouker 2015b). Arguing opposite positions in different jurisdictions for legal reasons could be a financially advantageous position; however, there are emergent indications that the semantic differentiation of DFS from sports gambling may not be sufficient to distinguish the activity from the concerns most cited in opposition to the latter.

### **Gambling Related Concerns**

In the US the expansion of online sports gambling has been historically opposed for several reasons; notably, addiction, and a desire to protect the integrity of sporting events. Wood and Williams (2007) noted that the 'proportion of North American gamblers who choose to gamble on the internet is increasing at a dramatic rate' (p. 520). With the move away from physical gambling spaces have come concerns about the isolation of those demonstrating characteristics associated with problematic gambling behaviours (McCormack & Griffiths 2012). The literature on fantasy sports and negative externalities such as addiction is developing (Martin & Nelson 2014; Marchica & Derevensky 2016; Martin, Nelson & Gallucci 2016). In addition to the studies on season-long fantasy sports, there is an emergent stream of evidence that some DFS participants may similarly experience symptoms of problematic gambling (Petrella 2015; Bogdanich & Williams 2015; Ramirez 2015).

Concerns regarding the manipulation of sporting events have long been credited as an important reason for opposing the legalization of sports gambling. In the US, this concern dates back to the 1919 World Series, which was manipulated by organized crime figures (Holden & Rodenberg 2015). While many of the concerns regarding sports gambling appear to be present in DFS contests, these games are likely less attractive propositions for manipulators because of having to select multiple players in DFS contests, and the prize structures of the games limiting the potential windfall (Ehrman, 2015).

Despite the historical concerns associated with match fixing of sporting events, concerns have also been raised about the integrity of the DFS contests themselves. Both FanDuel and DraftKings experienced high-profile incidents where employees with access to sensitive information were successful in tournaments on their primary competitor's contests (Wessels 2017). The scandals surrounding employees playing on other fantasy sites drew the attention of lawmakers, notably the New York Attorney General, and represented a shift from the model of self-regulation DFS companies had enjoyed (Havel 2016). The emergence of the state-level regulation has created a network of numerous different requirements for DFS operators, some more burdensome than others.

### **Legal Framework**

The US system of governance is split between the 50 states and the federal government. Legislation passed by the federal government is backed by the supremacy clause found within the US Constitution (US Constitution art. VI), which renders inconsistent state laws void. Federal oversight is confined to those areas of regulation delegated by the Constitution to the federal government (e.g. interstate commerce, which refers to trade and the instrumentalities of trade between the states). Areas not specifically assigned to the federal government by the Constitution are presumed to be within the regulatory purview of the states.<sup>4</sup> Amongst those regulatory areas generally perceived to be left to the states has been gambling.

States have historically had the responsibility for classifying which activities constitute gambling (Keller 1999). While the states made these classifications based on determinations of the level of chance involved (Cabot & Csoka 2003), the federal government has a number of statutes that also impact the regulation of sports gambling. The Wire Act of 1961, for instance, is a federal law that prohibits those in the business of betting or wagering from transmitting wagering information about sporting events across state lines when betting or wagering is illegal in either jurisdiction (Transmission of Wagering Information 18 U.S.C. § 1084 1961). The Wire Act textually appears to implicate some DFS operators who may offer contests in states that deem the activity to violate local laws, though to date there has been no action brought against a DFS operator alleging a violation of the statute.

In addition to the Wire Act, the Professional and Amateur Sports Protection Act (PASPA) is a federal statute that is relevant to DFS. PASPA is a statute that was passed in 1992, which prohibited the expansion of any state-sanctioned sports gambling scheme that was not in existence prior to the passage of the statute (28 U.S.C. § 3701 *et seq.* 1992). DFS contests appear to implicate PASPA's prohibition in states that regulate the practice, though to date no PASPA action has been initiated against a DFS operator; however, partnerships between professional sports leagues—who are deputized to enforce the statute—and DFS companies are a complicating factor (see generally Kaburakis et al. 2015; Rodenberg & Holden 2017).

The most recent federal statute that directly relates to DFS is UIGEA, the statute that in many ways gave birth to the invention of the daily version of fantasy sports (Edelman 2016). UIGEA's exemption for certain fantasy contests created a framework for entrepreneurs to craft contests and remain in compliance with at least one of the relevant federal statutes (Edelman 2016). While UIGEA created an exemption for certain fantasy sports contests, it contains a statement that the statute does not modify any other federal or state law, which functionally limits the scope of the exemption to areas where the practice is lawful under all other laws (31 U.S.C. § 5361 *et seq.* 2006). Accompanying federal regulations that might be implicated by federal law are state-level regulations.

Various states have an outright ban on DFS contests and most major daily fantasy websites do not offer contests in these jurisdictions because of their strict definitions of gambling (Edelman 2016). To date, thirteen states have passed legislation regulating the offering of DFS games within their borders (Rodenberg 2017). Many of the states who have taken to regulating DFS have done so primarily through a licensing scheme, which applies various consumer protection requirements, such as segregation of player funds from operating accounts, and establishing a minimum age for players to play. All but four of the 50 states have at least introduced one piece of legislation aimed at regulating DFS



(Rodenberg 2017). While a number of states have taken steps towards regulating DFS, there has also been a shift in the position of some stakeholders towards sports gambling. In many respects DFS has reframed the national discussion and helped foster a sense of comfortability with awarding monetary prizes for success at predicting sporting outcomes.

The National Basketball Association (NBA) commissioner Adam Silver (2014) authored an opinion article in the *New York Times* articulating that it was time for the US to re-examine its prohibition. Within his article, Silver suggested that a regulated sports betting market is preferable to the current illegal market, and that the US is behind globally with respect to its prohibition. The NBA commissioner was joined by the commissioner of Major League Baseball in 2017, who noted that the league was re-examining its position on legal sports betting (Roberts 2017). Accompanying these pronouncements are a variety of bills being introduced at both the state and federal levels that would legalize other forms of sports gambling, though at the state level the vast majority of proposed bills predicate the legalization of sports betting on the repeal of PASPA (Legal Sports Report N.D.). While regulation of DFS is a relatively recent phenomenon driven by a variety of reasons, one important factor leading to regulation has been the association with gambling. New York Attorney General Schneiderman noted that an activity can be both entertainment (as FanDuel advocated) and gambling by stating: 'Well, gambling is entertainment. People go to casinos to be entertained. The issue here is not whether or not it's entertaining, it's whether or not it is gambling. ... And you can't have unregulated gambling without running into problems' (Breslow 2016).

The positions articulated by the two major companies and the FSTA that DFS players are motivated by entertainment or success in the activity is skill-based and thus distinct from prohibited sports gambling, was a motivation for this study. With this motivation in mind we sought to examine the content of the television advertisements of FanDuel and DraftKings and whether the themes were consistent with the position that fantasy players were participating for reasons other than financial incentives. Additionally, we sought to determine how the themes in the advertising campaigns changed following the initiation of legal proceedings by the New York Attorney General. In the following sections, we discuss the methods employed, as well as our findings and their implications.

## Method

### Sample

The present study did not involve human subjects beyond the authors, and thus was not submitted to an institutional ethics board. The research aims were twofold: (a) to ascertain the content of advertising messages sent to prospective DFS consumers through television advertising; and (b) to draw comparisons between the content of advertisements prior to and after the initiation of legal proceedings against DFS providers. To achieve these aims, we analyzed television commercials aired by the two DFS market leaders in the US (DraftKings and FanDuel) during the first two weeks of the 2015 (Sample A) and 2016 (Sample B) NFL seasons respectively. These periods were selected because consumer demand for related supplementary products (e.g. fantasy sports and related products) is likely to be high due to the increased publicity and promotion around the beginning of the NFL season; thus, the potential for companies to attract consumers would intuitively also peak.

Sample A comprised 28 commercials in total; 14 from each of the DFS providers. During this time period, DraftKings and FanDuel spent a combined \$54 million on television advertising, and ranked among the highest spending companies in this regard (iSpot 2015). Sample B consisted of seven commercials; four from DraftKings, and three from FanDuel. The companies' total spend during this second period is not known as the companies dropped from the iSpot list of top ten advertising spenders; however, Yoder (2016) reported that FanDuel had decreased their advertising spending by 96.5 per cent and DraftKings 70.8 per cent during the period of September 2015–September 2016. Although the reduction in spending on television advertising was not our focus, it is undoubtedly of interest to the broader issues surrounding the legal status of DFS; thus we provide some discussion later.

Video of all commercials was obtained from iSpot, an online media agency that tracks television commercials, movie trailers, and show promotions across major networks in real time. Additional information on the commercials included in Samples A and B can be found in Appendices A and B respectively.

### Data Analysis

To establish the nature of advertising messages within the television commercials, we conducted a content analysis of the DFS commercials within our samples. Content analysis of media content is a well-established and oft-used research methodology within the communication field, described by Neuendorf (2002) as being 'the primary message-centered methodology' (p. 9). More specifically, we employed directed content analysis (DCA), a deductive form of qualitative content analysis whereby the goal is to validate or conceptually extend a theory or hypothesis (Hsieh & Shannon 2005).<sup>5</sup>

This approach was selected for two primary reasons. First, a qualitative approach to content analysis was preferred because emphasis in media is not necessarily achieved through repetition, which would otherwise point toward a quantitative approach. As Newbold et al. (2002) noted, 'The problem is the extent to which the quantitative indicators are interpreted as intensity of meaning, social impact and the like. There is no simple relationship between media texts and their impact, and it would be too simplistic to base decisions in this regard on mere figures obtained from a statistical content analysis' (p. 80). As such, identification of the salient messages within the DFS commercials required our contextual interpretation as viewers.

Second, DCA was selected over other types of qualitative content analyses (e.g. conventional content analysis; summative content analysis; see Hsieh & Shannon 2005), as we wanted to explore whether the primary messages articulated within DFS commercials were directed to consumer motives that were more extrinsic (e.g. financial incentives) than intrinsic (e.g. enjoyment). The use of DCA also had implications for the development of thematic codes, and the coding process, which are addressed in the following section. In summary, the use of DCA not only made sense given the nature of the media being analyzed, but crucially it made *more* sense than using a quantitative coding process that would only provide frequency of advertisement components. Those results would be less instructive, and thus provide little to the study of advertised incentives for DFS consumers.

### **Coding Procedure**

Per Potter and Levine-Donnerstein (1999), the a priori framing of the research context enabled us to identify some key concepts and variables that were used as coding categories. Examples of these were 'financial incentive,' 'sport interest,' and 'competition,' which were identified based on the respective claims of anti-gambling legislators and the FSTA. Operational definitions were assigned to each code to ensure a common understanding between coders.

Upon analyzing the commercials, it became apparent that additional themes were present, as is common in DCA (Hsieh & Shannon 2005); thus, additional codes were established utilizing the following process. First, the authors watched the commercials independently, making notes about the audiovisual content of each. After this initial round of analysis, the authors met to discuss their observations and establish level of agreement. Cohen's kappa was calculated to establish the extent to which the authors identified the same set of themes in each commercial, none of which fell below Krippendorff's (1980) minimum threshold of  $k = .80$  ( $k > .92$ ). Although some differences existed between the authors' initial round of coding, subsequent discussion in relation to the operational definitions produced consensus in each instance.

Following the initial round of discussion, the authors also addressed additional themes that had arisen from their analyses. In each instance, an operational definition was developed for the prospective code, and this was compared to existing codes to avoid duplication. The authors then watched the commercials (independently) again, before meeting to discuss their observations and analyses in light of the new coding categories.

Although DCA has been criticized for leading researchers toward the theories and/or hypotheses upon which their analyses were predicated (see Macnamara 2003), we felt comfortable in our assessment due to the extent to which certain messages were salient, and the level of agreement between coders regarding the presence and salience of themes. A list of thematic codes and operational definitions is provided in Appendix A.

### **Results**

Analysis of the DFS commercials revealed ten content themes: (i) anyone can win; (ii) intrinsic competition; (iii) ease of use; (iv) excitement/suspense; (v) financial incentive; (vi) frequency of contests; (vii) social interaction; (viii) sport knowledge; (ix) vicarious experience; and (x) fun/hedonic value. These themes were present across commercials in Samples A and B; however, some were emphasized considerably more heavily (and often) than others in the communication of benefits to consumers.

The results are presented and discussed in three main sections: Sample A, Sample B, and a comparison between Samples A and B; each of which contains subheadings under which specific themes are discussed. In doing so, we are able to clearly demarcate the communication of product benefits between the two time periods, and thus, provide insight into the consumer motives that DFS providers were attempting to tap. Finally, we discuss the implications of these results for various stakeholder groups; namely, DFS providers, consumers, and the state of the industry going forward.

#### **Sample A**

Through our analysis of commercials in Sample A, we identified two salient themes which pertained to the promotion of financial incentives and the potential for anyone to win DFS contests irrespective of their skill or experience. These themes are discussed in detail below.

**Promotion of financial incentives.** The commercials for both DFS providers in Sample A overwhelmingly promoted the financial incentives for participation, with cash prizes featured in 12 of the 14 DraftKings adverts, and all of those by FanDuel. While the intention was not to conduct a quantitative analysis, this basic note on the prevalence of financial incentives speaks to the strategies employed by DFS companies in their advertising. Moreover, it is the combination of this prevalence with the *nature* of the promotion of financial incentives that is most interesting. For example, DraftKings ran a contest called 'Millionaire Maker,' promoting opportunities to win a \$1 million cash prize. In DK1, a montage of contest winners celebrating is accompanied by the following narration: 'This is what it looks like when real people win a million dollars playing fantasy football.' FanDuel provides another example in FD2: 'Play in one-week fantasy football for real money, with immediate payouts. The money is real.'

These examples place emphasis on financial incentives as the benefits of participation; yet, while we could reasonably infer a link to a corresponding consumer motive, it is not explicit. As noted, the FSTA claims that fantasy participants have different (e.g. intrinsic) motives than those of gamblers (e.g. financial incentives) (FSTA 2015b), and this has been

central to their position that a distinction be made between fantasy sports and gambling (FSTA 2015b). This claim becomes harder to substantiate when DFS companies directly acknowledge financial motivation in their advertising, as is provided in DK2, where it is stated, 'At DraftKings we play for glory; for bragging rights; for fantasy football supremacy; but we also play for this, the giant check.' This narration is accompanied by winners of the 'Millionaire Maker' contest posing with an oversized ceremonial check for the million-dollar prize.

Another key argument against classification of DFS as gambling has been its proposed classification alongside season-long fantasy sports contests (FSTA 2015b). This appears to be predicated upon two key assumptions: (i) that those classifications are mutually exclusive; and (ii) that DFS and season-long fantasy sports are fundamentally similar. While the first assumption has been discussed elsewhere at length by other authors (see e.g. Edelman 2016), the second assumption is questionable in light of promotional language used within the commercials. Most notably, in DK3 scenes of celebration are accompanied by the narration: 'This is the feeling of turning the game you love into a lifetime of cash.' This language infers a change, in that the 'game you love' can be 'turned into' a financially beneficial endeavour; this position does not appear to be compatible with the statements of the FSTA (2015b). If we assume DFS companies are trying to appeal to existing consumer motives through the content of promotional messages, it is hard to reconcile this content with their claims regarding participants' intrinsic/extrinsic motives, and the classification of DFS alongside season-long fantasy sports. Only two commercials, both for DraftKings, emphasized excitement/suspense or intrinsic competition without implicitly linking it to financial incentives. Additionally, there was only one mention of fun/hedonic value that participants derive from playing DFS in Sample A.

The frequency of cash contests was another point of emphasis in a majority of commercials, with payout information (e.g. time frame, scheduling, etc.) often included. This aligns with Eilers Research's (2015) finding that factors such as the 'size of guaranteed prize pools,' 'payout structure,' and 'liquidity/plenty of cash games to choose from' were important in DFS players' contest provider selection.

**Anyone can win.** Another salient theme in the Sample A commercials was the notion that anyone can win a DFS contest. On its website, under a heading entitled 'Research,' the FSTA claimed that fantasy sports should not be considered gambling because it is a game of skill:

Fantasy sports leagues are games of skill. Managers must take into account a myriad of statistics, facts and game theory in order to be competitive. There are thousands of websites, magazines and other such publications that seek to synthesize the vast amounts of available fantasy sports information to keep their readers informed and competitive. A manager must know more than simple depth charts and statistics to win; they also must take into account injuries, coaching styles, weather patterns, prospects, home and away statistics, and many other pieces of information in order to be a successful fantasy sports manager (FSTA, 2015b).

Despite this claim, we identified a salient theme related to 'Average Joes' winning money through DFS contests. This included footage of 'candid' winners' reactions, and consumer testimonies. In one example of the latter, a FanDuel consumer stated, 'There's nothing special about me' (FD5). Statements such as this run counter to the FSTA's claim, implying that elements of chance or luck are involved in DFS contests.

Other testimonies contradicted the FSTA's position even more starkly. For example, one consumer claimed, 'Even a novice can come in and spend one or two dollars, and win ten to twenty thousand dollars' (FD10). The use of the word 'novice' draws an implicit contrast between individuals who know a great deal about the sports upon which contest is based, and those who do not. If novices *and* experts can be successful – especially given that they are likely to be competing against one another – the basis for either groups' success cannot be rooted in the expertise. In this case, either the FSTA's (2015b) claim is incorrect or the content of DFS commercials is misleading consumers as to their prospects of winning.

### **Sample B**

Through our analysis of commercials in Sample B, we identified three salient themes, which pertained to social interaction, fun/hedonic value, and the frequency of contests. These themes are discussed in detail below.

**Social interaction.** The first salient theme identified was that of social interaction, primarily between DFS consumers and their friends. This was exemplified by FanDuel's advertisement of 'Friends Mode', a service explicitly for facilitating contests within predefined groups of consumers (FD17). Although it appeared that playing for cash prizes within these contests was still possible, the emphasis was placed upon opportunities to better one's peers.

In this vein, the social interactions depicted within the commercials in Sample B were strongly inflected with elements of competition, as opposed to camaraderie. As such, we viewed the social interaction theme as distinct from the intrinsic competition theme, which pertained to challenging oneself through participation in DFS. A further example was provided in DK16, where a group of male friends were depicted watching a game together in what appeared to be one of their homes. The focal individual celebrated as one of 'his' players was successful, while the others look dejected: '[The player] racked up 310 points, and secured a triumphant victory in his league of 12 friends.'

Again, no cash prizes were explicitly announced in DK16, with emphasis placed instead upon the ability to 'Create a private league and play against your friends, or pick a public contest and play for weekly prizes.' Although the narrator

did not verbalize the nature of these prizes, it was heavily implied that they were, in fact, cash prizes; as an on-screen graphic that listed such contests as 'NFL \$5 m Fantasy Football,' and 'NFL \$100 k Week 1 Free Contest.'

**Fun/hedonic value.** The second theme identified in Sample B commercials was that of fun/hedonic value. This primarily manifested as enjoyment derived from playing in DFS contests, and was also demarcated from intrinsic competition, which was seen as being more dependent upon winning than participation. For example, in FD15, an actor explains why he is not subject to issues that might affect his enjoyment of season-long fantasy sports contests (e.g. injured quarterback, players already having been drafted by a competitor). This theme is continued in FD16, in which the same actor states he is always 'looking forward' in anticipation of the next contest.

**Frequency of contests.** One theme that was present in Sample A commercials, but was eminently more salient in those within Sample B was highlighting the frequency of DFS contests. This was particularly true of the FanDuel commercials (FD15, FD16, and FD17), all of which emphasized the fact that contests were available with great regularity. For example, the actor in FD16 continued the 'sports rich' advertisement, stating, 'When you're sports rich, you get as much fantasy as you want, and you get it with FanDuel.' Furthermore, the narrated close to all three commercials presented an offer for five free entries following an initial deposit, inviting prospective consumers to 'get all that fantasy football has to offer.'

Although the frequency of DraftKings contests was less pronounced in Sample B than those of FanDuel, this information was present nonetheless. Viewers were notified of 'contests running daily' (DK17), and encouraged to 'play for weekly prizes' (DK16). The key difference between the two DFS providers, in this regard, was that messages related to the frequency of contests were delivered by the focal actors in FanDuel commercials, while DraftKings gave this information through a narrated summary occurring after the main body of the commercial.

A comparative discussion of DFS commercials in Samples A and B is provided in the following section. In addition, we discuss the changing advertising strategies of both providers, and their implications.

## Discussion

Based on the themes identified in Samples A and B, it is evident that the incentives advertised in DFS television commercials have changed; most notably, trending away from making financial incentives salient and attempting to appeal to consumers' internal motivation. This is no accident, and is likely a response to the scrutiny brought upon DraftKings and FanDuel after their aggressive television advertising campaigns in the build-up to the 2015 NFL season. The new advertising campaigns (in Sample B) represented what appears to be a deliberate and concerted effort to emphasize the social aspects of DFS contests and place less emphasis on the financial incentive, as providers look to become more profitable while contending with legal fees and lobbying costs (Berzon 2016).

The continued shift in messaging exhibited by both DraftKings and FanDuel's commercials between 2015 and 2016 may be important for the companies moving forward. Indeed, both will still have to convince a number of state legislatures and individual lawmakers that their products are distinct from prohibited forms of gambling (see Rodenberg 2016). The shift in the content of commercials in the 2016 series moved the content away from motives associated with gambling such as economic gain (Hess & Diller 1969; Murray 1993; Neighbors et al. 2002) and towards messaging associated with intrinsic rewards such as excitement and socialization, which has been occasionally associated with healthier consumption of gambling activities (Chantal et al. 1995). The shift in messaging of the DFS companies as well as the adoption of consumer protection protocols should be viewed as a positive step from the industry.

The regulation of gambling by individual states in the US has led to a somewhat problematic situation whereby the DFS companies have asserted that because they are not within a definition of gambling in some states they are not a form of gambling more broadly. Increased attention on the fact that some DFS participants are exhibiting problems associated with gambling addiction (Petrella 2015; Bogdanich & Williams 2015; Ramirez 2015), may be responsible for DFS operators having undertaken some changes in marketing materials and in the implementation of self-exclusion protocols (Vaccaro 2015). However, from a consumer protection and public health perspective it may be most effective to classify products based on the characteristics consumers exhibited, instead of assessing a contest based on the amount of skill contained therein and antiquated legal definitions. Indeed, a small minority of US jurisdictions apply a test referred to as 'the gambling instinct' test, that determines an activity to be gambling if it "appeals to the player's gambling instinct." (Cabot, Light & Rutledge 2009).

The gambling instinct test is subjective; it is concerned with neither skill nor chance, and has been used historically in the classification of pinball machines as gambling devices (Cabot et al. 2009). Cabot et al. (2009) cited the case *City of Milwaukee v. Burns*, where it was noted by the court that pinball games encourage players to chase the next play, and thus appeal to an individual's 'gambling instinct.' The subjective nature of the gambling instinct test makes its legal application problematic; however, the idea behind the test from an awareness perspective may provide some utility. For instance, it may be beneficial if activities that result in negative externalities, such as those associated with problem gambling, are required to provide resources to customers without regard for the nuanced legal arguments the companies have made. Indeed, the two primary DFS companies have begun to implement some of the checks and balances that other gambling industry companies offer (e.g. self-exclusion); however, the DFS industry has not yet caught up to the regulated gambling industry of the US or other jurisdictions in terms of implementation of consumer protection protocols. The shift in not only content, but also in advertising spending between 2015 and 2016 is important because



it demonstrated a shift away from motives associated with gambling to a message more associated with entertainment. But despite the shift in message, individuals are still reportedly exhibiting gambling-like problems, which raises the question of, how meaningful the legal definitions are if they fail to protect consumers?

The aforementioned rebranding efforts and the differing content year-over-year in the television commercials suggest that the companies are not immune to change, though numerous regulatory challenges remain. With small steps utilized by other gambling providers in Europe, Asia, and in US states that allow online gambling, DFS operators could provide greater protections to their consumers. The absence of the deterrence effect of being perceived as illegal, may exacerbate the number of users who experience problems with DFS in comparison to illegal sports betting, because the activity is perceived as less risky because of its purported legality; the concept of increased access leading to increased incidence of problematic behavior has been documented in the context of other forms of online gambling (Griffiths 2003). There remain additional obstacles for the companies to overcome moving forward, including addressing potential consumer lawsuits derived from the advertised incentives from the 2015 campaigns, the content of which has already been the subject of a settlement with the New York Attorney General (Purdum 2016).

## Conclusion

DFS has reframed the American conversation around both fantasy sports and sports gambling using a strategy of rapid and repeated immersion, where consumers were bombarded with television and radio advertising at nearly every commercial break. The advertising was effective in that both major companies saw their valuations increase exponentially in the first few weeks of the 2015 NFL season; however, with the increase in revenue came an increase in scrutiny. The advertising campaign that in the 2016 NFL season involved a softened tone in both volume, and also in content as the focus of advertising shifted from the opportunity to win large amounts of money easily and frequently to increased emphasis on the social aspects of the contests.

The emergence of DFS has highlighted some of the shortcomings associated with applying different gambling definitions in different jurisdictions within the same country. While stating both on their own and through their representative trade association, the FSTA, that DFS contests are distinct from sports gambling, the companies' 2015 marketing campaigns visualized a number of features that have been associated with problem gambling (see Chantal et al. 1995). The 2016 sample of commercials showed that both DraftKings and FanDuel shifted the focus of the content of their messages so that the commercials followed more closely the motives for participating in fantasy sports that were articulated by the FSTA (2015b) as distinguishing fantasy sports from sports gambling.

The major DFS companies also implemented consumer protection protocols common in regulated gambling industries such as self-exclusion protocols. Despite the apparent incompatibility between the 2015 sample, the implementation of gambling related consumer protection measures and the application for gambling licenses in foreign jurisdictions and maintaining that their products are distinct for other forms of prohibited gambling, some consumers are displaying some of the negative externalities associated with other gambling products. This effect coupled with the 2015 advertising content may suggest that it would be beneficial from a public policy perspective to classify gambling activities based on the behaviours exhibited by consumers and on messages conveyed as opposed to subjective definitions of skill and luck.

## Notes

- <sup>1</sup> The US has a partial prohibition on sports gambling. By virtue of a 1992 statute only the state of Nevada is able to offer full-scale sportsbook-style sports betting.
- <sup>2</sup> An external review of the conduct of a DraftKings employee mentioned in the article concluded that the employee did not misuse his position and access to information to compete on FanDuel (Gouker, 2015c).
- <sup>3</sup> The game of chance definition incorporates: games with mixed skill and chance; games that involve an element of chance that can be overcome by skill and games that are marketed as containing an element of skill. Sports betting is excluded from the definition of game of chance under the UK model.
- <sup>4</sup> The federal government does have the ability to preempt a regulatory area that is reserved to the states through a number of distinct means, but to date the states have been assumed to possess the ability to define gambling as they desire within their borders.
- <sup>5</sup> The steps taken in conducting a DCA are similar to that of a standard content analysis, with the main difference being that analysis is oriented around a particular hypothesis. For a detailed comparative discussion, see Hsieh and Shannon (2005).

## Competing Interests

The authors have no competing interests to declare.

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