PROSKAUER ROSE LLP

Three Point Shot

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Welcome to Three Point Shot, a newsletter brought to you by the Sports Law Practice Group at Proskauer Rose LLP. In Three Point Shot, we will attempt to both inform and entertain you by highlighting three sports law-related items and providing you with links to related materials. Any feedback, thoughts or comments you may have are both encouraged and welcome.

Who Controls the High School Gridiron (or at Least Related Media Rights): Wisconsin Athletic Association Seeks to Intercept Web Streaming of HS Football Games

In the continuing battle over control of media rights to high school athletic contests, the Wisconsin Interscholastic Athletic Association ("WIAA") is the most recent to go on the offense. In December 2008, the WIAA sued Gannett Co. Inc. ("Gannett") and the Wisconsin Newspaper Association ("WNA") alleging that each infringed on the WIAA's exclusive media ownership rights to Wisconsin high school tournament football games.

The dispute kicked off in November when *The Post-Crescent*, a Gannett-owned Wisconsin newspaper, streamed a live webcast of a local high school football tournament game. In response, the WIAA quickly huddled up and filed a complaint in Wisconsin state court in which it alleged that streaming of the game violated its "exclusive rights and ownership." In addition, the WIAA alleged that the webcast infringed on a contract between the WIAA and American-HiFi, Inc. ("American-HiFi"), a Wisconsin-based television production company. According to the WIAA, the contract grants American-HiFi exclusive rights to control all WIAA tournament series footage, including Internet streaming video. And, although the WIAA permits any member of the media to report on any tournament event, reporting is limited to the "use of up to two minutes of taped footage of any tournament event." Pursuant to the WIAA's media policies, members of the media seeking to transmit larger portions of an event, including those seeking to stream live tournament action over the Internet, whether instantaneously or delayed, must request a license from the WIAA or American-HiFi and, if granted, must pay a license fee and agree to abide by the WIAA's broadcast and media policies.

In its complaint, the WIAA asked the court to enter an order declaring that the WIAA has the exclusive right to "control the transmission, internet stream, photo, image, film,

videotape, audiotape, writing, drawing or other depiction" of WIAA-sponsored tournament games. It further requested a declaration of its "authority to assign all or portions of those rights to third parties." On April 13, 2009, the WIAA amended its complaint in order to clarify that it seeks an order declaring that the WIAA controls the right to transmit WIAA-sponsored tournament games over the Internet, that the WIAA has the right to grant exclusive or non-exclusive licenses to transmit WIAA-sponsored tournament games, and that the WIAA may require payment of a licensing fee and compliance with the WIAA's media policies as a condition of any license.

In response to the complaint, Gannett and WNA filed a notice to remove the case to federal court and asserted in both their answer and amended answer that the declaration sought by the WIAA is preempted by the Copyright Act. Gannett also asserted as separate and additional defenses that the Copyright Act precludes the WIAA's claimed rights to discriminate among news media and grant exclusive licenses with respect to sponsored events and that the declaration requested by the WIAA is barred by the First and Fourteenth Amendments. According to Gannett, the WIAA is so "pervasively entwined with public actors, institutions and polices" as to make it a state actor under 42 U.S.C. § 1983, the Federal Civil Rights Act. And, as a state actor, WIAA's only right regarding tournament coverage is to impose reasonable time, place and manner restrictions that apply equally to all news media.

This is not the WIAA's first impasse with Wisconsin newspapers. In 2007, the association tried to restrict newspapers from selling photographs taken at tournament games. The WIAA had granted exclusive photography rights to Visual Image Photography Inc. ("VIP"). The WIAA requested that all newspapers pay a flat fee to shoot unlimited photographs at regional games and further stipulated that the photographs could only be used for editorial purposes. After a number of newspapers ignored the WIAA's policy and continued to take and sell photographs, the WIAA effectively punted on the issue. VIP joined with the WIAA in the current lawsuit against The Post-Crescent, but later dropped out of the case.

Similar legal conflicts have arisen recently in Louisiana and Illinois. In Illinois, a high school athletic association filed a similar lawsuit against the state's newspaper association. That dispute was ultimately settled on terms favorable to the news media. Pursuant to the settlement agreement in the Illinois case, newspaper photographers are not restricted from covering state high school tournament events, and the athletic association will have "no authority to control or regulate the production, distribution or sale of" any photographs and video from those events.

These conflicts raise important questions about who controls media depictions of high school sporting events and, as the use of the Internet to distribute content continues to increase, the WIAA's action may foreshadow future legal battles over high school media rights.

Court Lays a Smack-Down on Wrestlers' Employee Status Claim

Wrestlers are used to taking beatings on the mat in dramatic ways. Whether it's the Big Show chokeslamming John Cena or Randy Orton punting Triple H, wrestlers seem able to recover from just about any crushing move delivered by an opponent. However, they may not be able to recover from a recent smack-down doled out by a Connecticut federal court.

Last July, three former wrestlers – Scott "Raven" Levy, Christopher "Kanyon" Klucsarits, and "Above Average" Michael Sanders – triple-teamed World Wrestling Entertainment, Inc. ("WWE") and alleged in a state court complaint that they had been "improperly characterized" as independent contractors in the standard booking contract (the "Booking Contract") each had signed with the WWE (click to download the Levy, Klucsarits and Sanders contracts). Slamming the "independent contractor" provision of the Booking Contract as a "sham and void," the wrestlers argued that because the WWE controlled everything about their employment – from their physical training to their costumes to the outcome of matches – the wrestlers should have been classified as WWE employees. According to the wrestlers, the misclassification resulted in WWE's failure to make proper withholdings and thereby denied the wrestlers the "rights, incidents and benefits" of employment. The wrestlers also claimed the WWE was unjustly enriched because it received the benefit of services rendered by the wrestlers "without payment of proper compensation." The case was removed to federal court because the wrestlers' claims implicated federal tax law issues and the Employee Retirement Income Security Act ("ERISA").

Presumably, the wrestlers were advised that the fact that a contract states that a worker is an "independent contractor" is not dispositive of the issue of employee status. In fact, the IRS considers several factors to determine whether a worker is actually an independent contractor, including *inter alia* the degree of behavioral and financial control an employer exercises over the worker. The issue of worker misclassification, from time to time, has been problematic for employers. For example, in *Vizcaino v. Microsoft Corporation*, 97 F.3d 1187 (9th Cir. 1996) (*Vizcano I*), *aff'd en banc*, 120 F.3d 1006 (9th Cir. 1997) (*Vizcaino II*), several misclassified workers sued Microsoft after an IRS audit determined that Microsoft treated several independent contractors as employees and had to treat them as such for FICA, FUTA and withholding taxes. The Microsoft workers demanded full employee benefits, including 401(k) coverage and a discount stock purchase plan. Microsoft ultimately settled the case for $97 million.

The wrestlers here, however, were not as successful as the software workers. In February 2009, the federal district court in Connecticut tossed the wrestlers' claims out of the ring. In *Levy v. World Wrestling Entertainment, Inc.*, 2009 WL455258, 2009 U.S. Dist. LEXIS 13538 (D. Conn. Feb. 23, 2009), Judge Peter C. Dorsey ruled that, because there is no private action to enforce the tax code, the wrestlers had no breach of contract claim. Even assuming the wrestlers were misclassified, the court reasoned, they were not deprived of any benefits because withholdings are deducted from an employee's compensation and paid to the government. This amount is then applied to each employee's tax liability and any

excess would be refunded. Therefore, the wrestlers would lose nothing as there was "no added earnings" they could claim.

The court also found that the wrestler's unjust enrichment claim was without legal merit because there was an express, enforceable contract between the WWE and the wrestlers that set forth the parties' rights, obligations and compensation. The wrestlers did not claim that the WWE failed to compensate them pursuant to the terms of their contract and failed to articulate the specific "rights, incidents and benefits" they were denied because of their alleged "mischaracterization" as independent contractors.

Perhaps most importantly, the court found that the wrestlers' claims were barred by the statute of limitations, which in Connecticut is six years for breach of contract. Although the complaint did not specify a date on which the alleged breach of contract or unjust enrichment supposedly occurred, the court held that claims accrue "when injury is inflicted" regardless of when the plaintiff knew of the injury. Here, Levy, Klucsartis and Sanders knew of their status as independent contractors from the date they entered into the Booking Contracts – 2000, 2001 and 2002, respectively. None of the rights claimed occurred within the six years of the complaint and were thus barred.

Despite the judicial body slam, a rematch may be in the works. In March 2009, Levy and Klucsartis filed a motion to alter/amend the judgment. In their motion, the wrestlers ask the federal court to reconsider because it dismissed their state court complaints without giving them an opportunity to re-plead. The wrestlers also claim that the court did not allow them to amend their complaint and assert ERISA claims even though they "expressly advised the Court" that they would do so. In this match, however, the statute of limitations may be the only finishing move the WWE needs.

Oh the SHARK Bites, and the Rodeo Cowboys Pony Up $25,000

Rodeo cowboys may be adept at handling bucking broncos. But, when a group of them recently confronted an animal rights group in the legal arena, they may have been surprised by the rough ride they encountered.

The animal rights group, Showing Animals Respect and Kindness (SHARK), posted videos on its YouTube channel to expose alleged animal abuse occurring at rodeos. In response, the Professional Rodeo Cowboys Association (PRCA) had a takedown notice sent on its behalf under the Section 512(c)(3) notice and takedown provisions of the Digital Millennium Copyright Act (DMCA). As required by the DMCA, the notice, executed under penalty of perjury, alleged that the PRCA was the owner of a copyright interest in the videos.

YouTube, in accordance with its Copyright Infringement Notification system, took down all of the allegedly infringing videos and disabled SHARK's YouTube account.

SHARK responded by lassoing some attorneys from the Electronic Frontier Foundation (EFF) to represent its interests. The first step taken by the EFF was to have the SHARK

YouTube account restored, after which SHARK filed suit against the PRCA in federal court under DMCA Section 512(f), which permits an alleged infringer to sue a person who "materially misrepresents … that material or activity is infringing." In its complaint, SHARK alleged that the videos that were the subject of the takedown notice had not been made by the PRCA, but rather by SHARK members and other volunteers concerned with animal cruelty issues. Therefore, the PRCA was not the copyright owner of the videos. SHARK further alleged that its videos could not have infringed any PRCA copyright since live rodeo events are not copyrightable and that the takedown notices were merely an "attempt to stifle public discussion and criticism by [SHARK] of animal mistreatment at [PRCA-sanctioned] rodeos." As relief, SHARK asked the court for a declaratory judgment that the videos were not infringing and that PRCA wrongfully interfered with the contractual relationship between SHARK and YouTube.

The PRCA's answer to the SHARK complaint revealed that the takedown notice had been prepared and sent not by the PRCA itself, but by a media management company acting on behalf of the PRCA. Although PRCA denied the validity of SHARK's claims, on February 4, 2009, both sides agreed to holster the legal artillery and settle the case. In the settlement agreement, PRCA agreed to pony up $25,000 to SHARK and agreed not to selectively enforce a "no videotaping" provision on the back of the tickets to PRCA events. Most importantly, PRCA agreed to establish a private takedown system outside of the normal DMCA process so that PRCA will send future copyright claims first to SHARK's video contact, and then have them reviewed by PRCA's general counsel before a legal notice is sent to any ISP.

The lesson learned from the PRCA's experience is a fundamental one under the DMCA takedown process; that is, takedown notices should not be sent unless the sender is sure that it can establish copyright rights in the content in question. And, if one engages a non-lawyer third party to prepare a takedown notice, the content owner should be certain that such third party understand basic principles of copyright law. Generally speaking, in the absence of an express work for hire arrangement or assignment agreement, under U.S. law, the creator of a video is the owner of the copyright in the video. For the rodeo cowboys involved here, that lesson may have been more painful than falling off a horse.

Sports Law Group

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