PROSKAUER ROSE LLP

Three Point Shot

Newsletter

Summer 2009

In this issue:

Edited by

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Welcome to a special summer edition of Three Point Shot, brought to you by the Sports Law Practice Group at Proskauer Rose LLP. We apologize to those of you wondering what happened to July's newsletter but hope you will enjoy this "Summer 2009" edition while enjoying the final lazy days of summer, hopefully from a lounge chair on the beach. We hope Three Point Shot continues to both inform and entertain. Any feedback, thoughts or comments you may have are both encouraged and welcome. - REF

Be Yourself, You Twit(ter)!!

In case you've been living under a rock the last year, twitter™ is a communications platform and service that enables users to send short messages, known as "tweets." In the last few months, a day has rarely gone by where a twitter-related story has not been front and center in the media. And, for many sports teams, properties and personalities, tweeting has become such a nuisance that they have begun implementing official policies restricting (and in some cases, banning) the use of twitter by employees, players and representatives.

For St. Louis Cardinals' Manager Tony La Russa, twitter became much more than a nuisance when a user established a twitter feed parodying him. The "@tonylarussa" twitter feed, which is no longer active, poked fun at La Russa's March 2007 arrest for driving under the influence of alcohol, and made reference to the deaths of former Cardinals hurlers Darryl Kile, in 2002, and Josh Hancock, who died in an auto accident in April 2007 with a blood-alcohol level nearly twice the legal limit. One particularly nasty "tweet" on April 19, read: "Lost 2 out of 3 in Chicago, but made it out of town without one drunk-driving arrest or dead pitcher." In the section of the user account that listed biographical information, the user made a lewd reference to La Russa and Cardinals first baseman Albert Pujols, linked to the Mothers Against Drunk Driving home page, and included an aside that read: "Bio Parodies are fun for everyone."

In response, on May 6, La Russa filed a complaint against the micro-blogging website in which he alleged, among other things, misappropriation of his name and likeness and trademark infringement. In early June, it was widely reported that the two sides had reached a quick and amicable settlement, but in a blog post entitled "Not Playing Ball," twitter CEO Biz Stone went over his 140-character tweet-ing limit to deny any settlement and describe the lawsuit as "an unnecessary waste of judicial resources bordering on

frivolous." Later that same month, La Russa voluntarily dismissed his complaint with prejudice without any settlement payment from twitter. The company did, however, remove the fake twitter feed.

On the legal front, Section 230 of the Communications Decency Act of 1996 protects Web companies such as twitter from being sued for content created and uploaded by users. Section 230 provides that interactive service providers cannot themselves be held liable as the publisher or speaker of user-posted content, with exceptions that include trademark and copyright claims. La Russa's complaint, which alleged, among other things, trademark infringement and dilution, sought to attack twitter in the space left by those exceptions. As a major league manager for 30 years, the subject of several books, and the man who has lent his name to the "Tony La Russa Baseball" video game series, the complaint alleged that La Russa's "name and image have garnered fame, significance and distinction worldwide" and was thus protectable as a common law trademark. The manager attacked the @tonylarussa feed as a fraud on the marketplace. The complaint noted the headline at the top of the website: "Hey there! TonyLaRussa is using Twitter. Join today to start receiving TonyLaRussa's updates." The site also contained a photo of La Russa next to his name. In order to succeed on a trademark infringement claim, La Russa would have had to prove that consumers would have viewed this twitter feed and thought he was endorsing twitter, thus harming his trademark.

Twitter's terms of service permit parody (defined by twitter as "whether a reasonable person would be aware that it's a joke") impersonation accounts so long as the profile information on the account makes it obvious that the profile is fake. If it is not evident that the profile is fictitious, the account may be suspended permanently. Accounts created with the clear intent to mislead or confuse others will be permanently suspended. La Russa is one of many athletes and celebrities who have been subjects of fake twitter accounts or parodies; some of those accounts have been removed, while others remain as lighthearted tributes to their subjects. The longtime major league skipper is the first public figure to take twitter to court over the website's user-generated content.

Twitter and other social networking websites are adding options to their services that attempt to provide better user authentication methods. Twitter recently announced that it will begin beta testing of "verified accounts," in which people, and eventually businesses, can have an authenticated twitter feed. The initial program will be offered to "public officials, public agencies, famous artists and athletes, as well as other well-known individuals at risk of impersonation," said Stone. Meanwhile, before Facebook recently began allowing users to sign up for custom user names, the company asked people with trademarked "or other protected names" to e-mail the company with requests to reserve those names.

As of the publication of this edition of *Three Point Shot*, the Cardinals have clawed their way to the top of the NL Central division. With the dismissal of his lawsuit against twitter and the blocking of the twit(terer) sending out the hurtful tweets, La Russa presumably can now turn his full attention to the more pressing matter of gaining a playoff berth and finding some protection in the line-up for this man.

"Bon Jovi's 'Soul' Accused of Giving More Than Love a Bad Name"

When the Arena Football League (AFL) cancelled its 2009 season, many teams and owners probably wanted to "Runaway." But, the Philadelphia Soul, an AFL team partially owned by Jon Bongiovi (a/k/a rock legend Jon Bon Jovi), took a different approach. According to allegations in a recently filed lawsuit, the Soul sent an e-mail to its fans explaining why the season was cancelled. The e-mail identified Joseph Krause, former sales manager of the Soul, as the sender. Today, Krause is embroiled in not one but two lawsuits with the Philadelphia Soul and Bongiovi, leaving both sides scrambling for a resolution.

Krause kicked off the proceedings on January 9, 2009 when he filed a complaint in Pennsylvania state court, alleging that Bongiovi and his partners in the AFL owed him almost $125,000 in unpaid commissions, back payments and severance. Subsequent to that case filing, Bongiovi and AFL Philadelphia filed a separate suit in federal court against Krause, alleging that Krause infringed their copyright and trademark rights when he made and sold to the public his own version of the championship rings that each Soul player received when they were crowned AFL champions in 2008. According to the complaint, Bongiovi holds multiple copyrights and trademarks for Philadelphia Soul merchandise, including a copyright registration for the 2008 championship ring. Krause then filed a counterclaim alleging trademark infringement and misappropriation of his name, citing the season cancellation e-mail that Krause claims was sent by the Soul in his name.

On June 4, 2009, the judge in AFL Philadelphia LLC v. Krause, No. 09-614, 2009 WL 1562992 (E.D. Pa. June 4, 2009), issued a potentially game-changing decision by refusing to dismiss Krause's counterclaims. For purposes of the decision, the court took as true Krause's allegations that, after the AFL "Shot Through the Heart" of its fans and cancelled their 2009 season, the Philadelphia Soul sent an explanatory e-mail to its fans. The decision to cancel the season was so unpopular among season ticket holders, who wanted refunds, that surely those responsible would be "Wanted Dead or Alive." The Soul's e-mail to fans contained the subject line "From: Joe Krause [mailto:jkrause@philadelphiasoul.com]." Krause, however, did not send the e-mail, had no role in notifying fans of the season's cancellation, and never authorized the Philadelphia Soul's use of his name or e-mail address. According to Krause, the team sought to use his good name and reputation to communicate with the fans and cause confusion about his association with the unpopular decision to cancel the 2009 season and the resulting controversy over season ticket refunds.

In reaching its decision not to dismiss the counterclaim, the court first found that Krause had standing under the Lanham Act, 15 U.S.C. §§ 1114-27. The court concluded that his pleadings on their face demonstrated damage to his "commercial reputation and goodwill," which the Act is specifically designed to protect. The court also found that Krause had satisfied the requirement by broadly pleading that the e-mail effectively "diverted some of [the Philadelphia Soul's] reputation damage to [Krause] by associating him with their actions" and that he had sufficiently pled the elements required by the Lanham Act. The court also found that Krause had sufficiently pled misappropriation of name because the

Soul made "use" of Krause's name or likeness for its own purposes and benefit. Even though the use was not a commercial one and the benefit was not a pecuniary one, misappropriation could still be found. Further, Krause asserted a Pennsylvania-recognized state common law claim for the tort of invasion of privacy by misappropriation of name.

With the future of the AFL still up in the air, but, in essence, "Livin' on a Prayer," Bon Jovi and his Soul have a lot to tackle in the upcoming months. After having been removed from state to federal court, Krause's original breach of contract action was returned to state court for lack of federal question jurisdiction, Krause v. The Philadelphia Soul, No. 09-1132 2009, WL 1175625 (E.D. Pa. April 30, 2009), and a decision is still pending on the Soul's infringement claim against Krause.

Perhaps Winning Is NOT the Only Thing and It Truly IS How You Play the Game

It's that time of year again; the time when many of us turn our attention to the kickoff of college football. This brings to mind things like the Heisman Trophy® race (Tebow or Bradford this year?), marching bands, cheerleaders, mascots, face paint, battle cries and, last but not least, tailgating parties. One thing it probably does not bring to mind is the application of Florida's Public Records Act. However, this little-known Florida law may ultimately help to shed light on the NCAA's decision to sanction Florida State University (FSU) by, among other things, causing it to forfeit fourteen football victories. Any such sanction, if upheld, could have a significant impact on FSU football coach Bobby Bowden's efforts to overtake Penn State's Joe Paterno in the battle to be the all-time winningest coach in the history of college football.

On June 15, 2009, over twenty media entities, including The Associated Press, numerous newspapers, multiple television stations and other news organizations filed a lawsuit citing Florida's Public Records Law in the Leon County, Florida Circuit Court against the National Collegiate Athletic Association (NCAA) and FSU, as well as a law firm – GrayRobinson – that represents the university. The case, *The Associated Press, et al. v. Florida State University Board of Trustees, et al.*, arose out of an academic cheating scandal at FSU in which approximately sixty-one student-athletes were found to have received improper assistance when taking exams for an online course. In addition to self-imposed punitive actions, FSU reported its findings to the NCAA. Based on FSU's report, the NCAA found a major violation of its rules and imposed various sanctions on the university. FSU filed an appeal of the NCAA's sanctions and the NCAA answered FSU's appeal by way of a secure computer that, apparently, did not permit documents to be saved, downloaded, copied or printed. The lawsuit centers on whether, under the Florida Public Records Act, the public and the media should have the right to access the NCAA's response to FSU's sanctions appeal and other relevant communications and documents related to the infractions, sanctions and appeals process.

Section 119.07 of the Act requires every person who has custody of a public record to permit that record to be inspected and copied by any person desiring to do so, at any

reasonable time, under reasonable conditions, and under supervision of the custodian of the public records. Further, Section 119.01 lays out the general state policy on public records, which includes that all state, county and municipal records should be open for public inspection and copying by any person, and that providing access to public records is a duty of every agency. "Public records" are defined in the Act as "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, means of transmission, made or received, pursuant to law or ordinance or in connection with the transactions of official business by any agency." Further, a "custodian of public records" is "the elected or appointed state, county or municipal officer charged with the responsibility of maintaining the office having public records, or his or her designee," and an agency includes "any state, county, district, authority or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law …, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency."

In the case, the media company plaintiffs have claimed that the NCAA's response to FSU's appeal is a "public record" and that the NCAA purposefully and intentionally sought to evade public access to the NCAA's response and related documents by using a secure computer or technological device that allowed the documents to be read only, which made it artificially impossible for the public to access the information. According to the plaintiffs, this arrangement violated the Act as well as Section 24 of the Florida Constitution. The plaintiffs further claim that the NCAA and GrayRobinson (through its signing of an allegedly unlawful web custodial confidentiality agreement and viewing contents of the NCAA response to and on behalf of FSU) are each "custodians" of FSU's public records and therefore have the duty to permit inspection, examination and copying of the records in accordance with Section 119.07 of the Act. Finally, the plaintiffs argue that FSU was required to demand that the public record be delivered to it and, as an agency, was required to provide access to the non-exempt information upon request.

FSU has responded to the lawsuit by arguing, first, that some or all of the documents provided by the NCAA on the secured site contain education records of the students that are protected by confidentiality requirements; second, that the university did not have custody of the documents and therefore is not the proper party from which to seek relief; and, finally, that the university did not assist in the creation of the secured site but only submitted to the procedure in order to preserve its due process right to appeal the sanctions. FSU also filed a cross-claim in which it seeks to have the NCAA ordered to disclose the records to the public. In fact, shortly after commencement of the lawsuit, the NCAA allowed FSU to create a transcript of the NCAA response to the appeal, but the plaintiffs continue to seek access to the actual records and other related documents. For its part, GrayRobinson, FSU's law firm, filed a motion to be dismissed from the case citing its lack of custody of the requested documents and has argued that it is not an "agency" solely due to its retention as FSU's attorneys. However, the court denied GrayRobinson's motion to dismiss.

The NCAA's response has been to argue, in its motion to dismiss or alternative motion for summary judgment, that the NCAA's documents are not public records and that it is not a custodian, public body or agency within the meaning of the Act. Instead, according to the NCAA, the documents are private documents created by and belonging to a private association and do not become public record simply because a public agency looks at the documents. In addition, the NCAA argues that the documents were never "transmitted," that the plaintiffs, as members of the media, do not have standing to bring the claim since only the person or entity entitled to custody of the public records can demand the records, and that forced public disclosure of its documents would be burdensome, threaten its long-standing enforcement procedures that are grounded in confidentiality and violate its constitutional rights.

Although it has been only a few months since the case was filed, it appears to be quickly heading towards the fourth quarter. The media plaintiffs filed a motion for partial summary judgment, and the Florida Attorney General got into the game with its filing of an amicus curiae brief. At a hearing on August 20, the judge issued a ruling from the bench in favor of a majority of the media plaintiffs, finding that the documents were public records under Florida law. The court also set out a time frame for release of the documents, although an application to an appellate court for a stay could possibly delay that timetable.

Although the ruling was based on Florida law, this case will likely have an impact on access to NCAA records relating to its investigations for years to come.

Sports Law Group

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