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Welcome to *Three Point Shot*, a newsletter brought to you by the Sports Law Group at Proskauer. With this newsletter, we hope to both inform and entertain you by highlighting three sports law-related items and providing you with links to related materials. We hope you enjoy this and future issues. Any feedback, thoughts or comments you may have are both encouraged and welcome.

Pay Me If You Want To *Play* Me, Part II: Former Player of the Year Ed O'Bannon Gains Ground in Suit Relating to Use of Image

In the June 2009 edition of "Three Point Shot" (See "*Pay* Me if You Want To *Play* Me: Former Cornhusker Quarterback Seeks Payday for Virtual College Athletes"), we reported on the lawsuit brought by former Arizona State quarterback Sam Keller against videogame maker Electronic Arts ("EA"), the NCAA, and the NCAA's licensing arm, Collegiate Licensing Company ("CLC") (a subdivision of IMG). Keller's class action lawsuit, Keller v. Electronic Arts, filed in the federal District Court for the Northern District of California in May 2009, sought relief on behalf of certain NCAA football and basketball players whose teams were included in video games produced by Electronic Arts, and whose assigned jersey numbers appeared on virtual players in those games. The *Keller* case was filed on the heels of a successful lawsuit brought by another class of retired athletes – former NFL players – who won a $28 million jury verdict against the NFL Players Association relating to the inclusion of the former players' images in EA's "Madden NFL" game. See *Parrish, et al. v. National Football League Players, Inc.*, 2009 U.S. Dist. LEXIS 4289 (N.D. Cal. Jan. 13, 2009) (upholding the jury verdict).

Now, former UCLA power forward Ed O'Bannon is adding a new play to the book, which may make it possible for former college athletes to get a slice of the licensing pie. After seeing a friend's child playing a video game featuring classic teams, including the 1995 Bruins, and with encouragement from Sonny Vaccaro, O'Bannon found himself wondering why he was not entitled to a share of the related revenues for the use of his likeness. In July 2009, the erstwhile first-round NBA draft pick filed his own class action lawsuit – *O'Bannon v. National Collegiate Athletic Association and Collegiate Licensing Company* – in the same court as *Keller* on behalf of a narrower class than the one named in the *Keller* action. In *O'Bannon,* the alleged class is limited to former student athletes who competed on Division I men's basketball teams and Football Bowl Subdivision (formerly known as Division I-A) men's football teams. O'Bannon charges the NCAA and

CLC with a broad slew of misuses of former players' indicia of identity beyond the gaming world, into "television contracts, rebroadcasts of 'classic' games, DVD game and highlight film sales and rentals, 'stock footage' sales to corporate advertisers and others, photograph sales . . . and jersey and other apparel sales . . . ."

Importantly, rather than bring suit claiming violation of the right of publicity, O'Bannon alleges violations of antitrust law. According to O'Bannon, the NCAA and CLC are unreasonably restraining trade within the $4 billion annual market for collegiate licensed merchandise. O'Bannon seeks an accounting of the defendants' finances and to establish a constructive trust that would hold the licensing revenues, which current college athletes – who are not permitted to be paid for their play to preserve amateurism – could access upon leaving college. The crux of O'Bannon's complaint rests on Form 08-3a, a document that the NCAA requires prospective student athletes to sign in order to be eligible to play. According to O'Bannon, Form 08-3a is a "contract of adhesion" that requires young athletes to release in perpetuity their right to economically exploit their persona in connection with their collegiate athletic career and transfers this right to the NCAA's or its third-party designees, who can use the student athlete's name or picture to promote NCAA events, activities or programs.

The complaint goes on to allege that Form 08-3a, read together with NCAA Bylaw 12.5.1.1, allows the NCAA and third parties to license student athletes' indicia of identity and effectively blocks student athletes from participating at all in the collegiate licensing marketplace. According to O'Bannon, there are less restrictive means than the NCAA's current policy, including as an example the group licensing programs established in professional sports leagues that enable the sharing of monies between players and teams.

On January 2010, the District Court for the Northern District of California consolidated the *Keller* and *O'Bannon* cases and, in February, it denied part of the NCAA's motion to dismiss O'Bannon's case. The district court found that O'Bannon had pleaded enough facts to move forward on his antitrust theory. The court also found the licensing agreements at issue in the case to be vertical restraints (and not horizontal restraints between direct competitors) and therefore more appropriately analyzed under the "rule of reason" versus being "per se" illegal. The court also ruled that O'Bannon successfully identified a market – the collegiate licensing market – and pleaded sufficient facts to support a claim that the defendants' actions result in a decrease in the number of competitors in that market. In the same order, the court dismissed a related case brought by Craig Newsome for failure to plead a relevant market. On March 10, O'Bannon and Keller filed an amended complaint that added 11 additional plaintiffs, including Harry Flournoy, who was captain of the 1966 Texas Western team that defeated the University of Kentucky and was immortalized in the film *Glory Road*, and Eric Riley, who played at the University of Michigan with Chris Weber and the Fab 5.

In a separate ruling, the district court also ruled that the First Amendment did not protect EA's use of players' identities in video games, finding that such use is not sufficiently transformative nor a matter of public interest. Though EA purposefully leaves player names off jerseys in its games depicting collegiate athletes, gamers are able to download team rosters that impose player names on the jerseys.

The *O'Bannon* case will be closely watched in the months to come so stay tuned for future updates.

This is Not Your Grandmother's Pedometer: Nike & Apple Square Off with Another Alleged Inventor Relating to its Nike+ Sports Kit

In May 2006, Nike and Apple teamed up to produce and market the Nike+ Sports Kit, a wireless device designed to connect iPod handheld devices to Nike+ footwear. The Sports Kit contains two pieces: a sensor placed in the shoe and a receiver connected directly to the iPod. The information provided by the sensor in the Nike+ footwear is displayed on the iPod screen to give the runner real time data on pace, calories burned, distance and time as well as audible feedback through the runner's headphones. Once a workout is complete, the runner can connect the iPod or iPhone to a computer, and the data automatically syncs with the Nike+ website where the runner can view all past runs and interact with other runners. The system is designed to be a personal coach for either the recreational runner or high level athlete.

The result of this marriage of digital and sports technology is, according to Nike, "the ultimate personal running and workout experience." Apparently, many runners agree and, like Usain Bolt running one hundred meters, the Nike+ Sports Kit has flown out of stores. The related line of products has expanded to include armbands, iPhone apps, desktop software and more.

But whereas runners may applaud this marriage of sports and technology, at least one company believes it leaves a sneaker-mark on its patents. On February 16, 2010, Affinity Labs of Texas LLC, which holds three patents that it claims are infringed by the Nike+ Sport Kit, filed a complaint in the U.S. District Court for the Eastern District of Texas. According to Affinity, it contacted Nike and Apple in June 2006 to discuss a potential alliance, at which time Affinity informed both companies of its patent portfolio. At the time, Affinity's portfolio consisted of Patent No. 7,062,225 entitled "Pedometer System and Method of Use" and two pending patent applications that were later issued as Patent No. 7,251,454 and Patent No. 7,519,327, entitled "Athletic Monitoring System and Method." Soon after this initial contact, Nike and Apple started to sell the Nike+ Sports Kit.

Perhaps recognizing that licensing discussions at times can be more like a marathon than a sprint, Affinity says it continued to press Nike and Apple regarding its patents and possible licensing arrangements. With neither company expressing much interest, Affinity finally hit the wall and filed suit for willful infringement of its patents. Affinity contends that the patents were infringed through the manufacturing, marketing, offering for sale, importing and/or selling of the Nike+ line of products, the iPod line of products, the use of the Nike+ line of products with the Apple iPod line of products, and the development of the Nike+ website, software applications, iTunes desktop applications and certain GPS based mobile applications such as RunKeeper Pro through the Apple App Store. Affinity seeks a permanent injunction against the defendants, monetary and compensatory damages, and an increased damage award due to the willful nature of the infringement, as well as attorney and court fees.

This suit is not the first patent hurdle relating to the Nike+ Sports Kit that Nike and Apple have had to overcome in the courtroom. In February 2007, PhatRat Technology, which develops wireless devices that gauge a wearer's performance, claimed Apple and Nike had infringed a number of its patents, including one entitled "Shoes employing monitoring devices and associated methods." Later that same year, Leaper Footwear brought suit against Nike for patent infringement, claiming that Leaper had developed and patented footwear that measures locomotive performance parameters, such as walking or running

speed, and/or distance traveled in 1998. Nike and Apple, however, were able to avoid both obstacles by settling each claim out of court and the cases were dismissed.

Despite these legal troubles, the Nike-Apple alliance has sprinted away from the competition. As of April 2010, runners have logged approximately 220 million miles on the Nike+ website and it has become the world's largest online running destination.

Can Tragedy on the Ice Be Considered Wrongful Death?

By almost all accounts, the XXI Olympic Winter Games ("XXI Games") in Vancouver were an incredible success. Eighty-two countries participated in the XXI Games, combining to break the record for most competitors ever at a Winter Games; American speed-skater Apolo Ohno won his eighth Olympic medal, a record for an American athlete at the Winter Games; and Bode Miller, Lindsey Vonn and Julie Mancuso led an amazing U.S. ski team to the top of the podium. The XXI Games also were marked not just by the thrill of victory, but by the agony of an athlete's untimely death in a luge accident at the Whistler Sliding Centre. On February 12, 2010, 21-year-old Georgian luger Nodar Kumaritashvili plunged to his tragic death during a training run on the Whistler course, just hours before the opening ceremony.

The Whistler Sliding Centre is a 16-curve superspeedway that made its competition debut in the February 2009 FIBT World Cup. The Whistler course is not for the faint of heart -- the track reportedly is faster and more difficult than any other in the world. Indeed, during the XXI Games, Curve 13 of the track was coined "50-50" by American bobsledder Steve Holcomb because of the odds of a crash, and the final curve was nicknamed "Thunderbird" because the sound in the air after a competitor finished the track was compared to that of a Thunderbird flapping its huge wings. During the 2008-09 Luge World Cup season finale in February 2009, the track had the fastest registered speed in luge. But the speed of the track has come with a price. The Whistler course had more than 30 reported crashes during the 2010 Olympic competition, including Nodar's death and the crash of Romania's Violeta Strămăturaru,in which she was knocked unconscious after slamming into several walls during a training run.

Nodar was reportedly sliding at nearly 90 mph coming out of Curve 15 -- the fastest part of the track – when he lost control of his sled, bounced off a side wall, flew out of the course and slammed into uncovered steel support beams. Nodar was knocked unconscious and air-lifted to Whistler Hospital, where he died of his injuries. The XXI Games would have been Nodar's Olympic debut.

An initial assessment of the accident came quickly. The initial International Luge Federation report concluded that Nodar's death was caused by his own errors and not any deficiencies in the course. The Federation's report declared that "it appears after a routine run, the athlete came late out of curve 15 and did not compensate properly to make correct entrance into curve 16 . . . . This resulted in a late entrance into curve 16 and although the athlete worked to correct the problem he eventually lost control of the sled resulting in the tragic accident."

Despite its insistence that the Whistler course was safe, Olympic and luge officials moved the start for the men's competition lower on the track, to the women's start, to limit speeds. The wall around Curve 16, where Nodar crashed, also was extended to cover the row of steel beams into which he plunged. Svein Romstad, Secretary General for

luge's international governing body, said that the motivations behind the remedial measures reflected a concern for "the emotional component" of athletes.

The Kumaritashvili family has not expressed interest in placing legal blame. David Kumaritashvili, Nodar's father, stated: "Maybe my son was at fault, but if the beams weren't there this wouldn't have happened, he would be alive." But there are still many spectators watching from the grandstand to see whether the Kumaritashvilis change their minds and decide to file a civil lawsuit.

A wrongful death lawsuit would entail a labyrinth of legal issues. Among other issues, both venue and choice of law could be contested. Although the accident occurred in Canada, documents signed by Nodar relating to his participation in the Games in all likelihood included choice of law and venue provisions.

Given the speed of the track resulting from its design and at least arguable lack of precautions to ensure the safety of athletes, the potential defendants might include any party responsible for the design, construction or maintenance of the track and any party which sanctions athletes' use of it. Whether the track is unreasonably dangerous would likely be a key issue in the matter, as well as what type of legal duty the various defendants owed to Nodar. Joseph Fendt, the president of the International Luge Federation, was one of many concerned about the track's safety. After seeing record speeds and a number of spills by skilled riders, he stated that the course worried him. Also at issue would be whether the waiver that Olympic athletes sign to participate in the Games and/or their assumption of the risks involved in participating in inherently dangerous sports would absolve any defendant of liability.

Although an action has yet to be filed, and may never be, the untimely death of Nodar Kumaritashvili is likely to, and hopefully will, have a continuing impact on efforts to enhance safety on the ice and at future Winter Games.

For more than 45 years, Proskauer has represented sports leagues and sports teams in all aspects of their operations.

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