



June 2010

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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.

Hey Papi! Big Pimpin' Thinks You Ain't No Playa When It Comes to His 40/40 Mark

As many of you baseball fans surely know, "40/40" is a term reserved for ballplayers who have hit 40 home runs and stolen 40 bases in a single season. And, as many of you also know, while Boston Red Sox slugger David Ortiz (aka Big Papi) is capable of slugging 40+ home runs in any given baseball season, he has little chance of joining the "40/40" club. In fact, Ortiz has stolen a grand total of 10 bases in his 14 seasons in the big leagues. That, however, did not prevent Ortiz from opening a "Forty Forty" night club in his native Santo Domingo, Dominican Republic.

Unfortunately for Ortiz, rapper-turned-mogul (and big Yankees fan) Jay-Z (aka Big Pimpin'), through a Delaware entity, The Name, LLC, owns the "40/40" U.S. trademark registration covering, among other things, restaurant and bar services, and runs a series of sports bars under the banner The 40/40 Club. In response to Ortiz's opening of his night club, The Name recently filed a complaint against Ortiz, his company, D. Ortiz por A and Albania Ortiz in the Southern District of New York.

In its complaint, The Name alleges that the Ortiz defendants, in bad faith, consciously, and without its authorization or consent, appropriated the value and goodwill associated with the "40/40" trademark in violation of Section 32 of the Lanham Act, 15 U.S.C. § 1114. The Name also claims that, through the Web site http://www.fortyforty.net, the Ortiz defendants made false statements suggesting that they had the sponsorship or approval of The Name and thereby caused confusion and damage in the marketplace in violation of Section 43(a)(1)(A) of the Lanham Act, 15 USC § 1125(a)(1)(A). Finally, The Name alleges that the Ortiz defendants, through their website, registered, trafficked, and used a domain name that was "confusingly similar and dilutive" of the "40/40" trademark in violation of the Anti-Cybersquatting Protection Act, 15 USC § 1125(d). In addition to seeking monetary damages in excess of \$5 million, The Name asked the court to bar usage of the "40/40" trademark and seeks transfer of the offending domain name.

A key issue in the case may be whether the court deems it appropriate to apply U.S. trademark laws extraterritorially to enjoin the conduct of a foreign national on foreign soil, as well as online. In the context of the Lanham Act, a three-point test, first enunciated by the Second Circuit in [Vanity Fair Mills v. The T. Eaton Co.](#) (2d Cir. 1956)), is used: (1) whether the defendants' conduct has a substantial effect on United States commerce; (2) whether the defendant is a United States citizen; and (3) whether there is a conflict with trademark rights under foreign law. Courts will balance these factors in order to determine whether the "contacts and interests of the United States are sufficient to support the exercise of [extraterritorial jurisdiction](#)."

At least two prongs of the *Vanity Fair Mills* test must be satisfied before courts will apply the Lanham Act [extraterritorially](#). In the "40/40" case, the first step will be determining whether the defendants validly registered the term "Forty Forty" under Dominican law – if this is the case, there may be a conflict between United States and foreign law (i.e., the third prong of the test will be satisfied). However, at least one court has held that, "the citizenship of the defendant is the most significant factor in determining whether to apply the Lanham Act extraterritorially to a defendant's foreign activities" ([Aerogroup International, Inc. v. Marlboro Footworks, Ltd.](#) (S.D.N.Y. 1997)). While Ortiz himself [became an American citizen in 2008](#), D. Ortiz C. por A is a Dominican entity; the citizenship status of Ortiz's sister is unclear. Therefore, it will probably be necessary to determine if the Ortiz defendants' use of the mark has the requisite "substantial effect" on US commerce.

Determining whether the first prong of the *Vanity Fair Mills* test is satisfied ultimately may be the most contentious aspect of the case. Courts have been reluctant to extend the reach of the Lanham Act to the actions that foreign defendants take abroad. A "substantial effect" has been found only in a few cases: where foreign activities created confusion among U.S. customers about the source of products sold in the U.S. ([Sterling Drug Incorporated v. Bayer AG USA](#) (2d Cir. 1994)), where infringing goods reentered the U.S. ([Steele v. Bulova Watch Co., Inc.](#) (U.S. 1952)), or where there was a danger of irreparable injury to a plaintiff's goodwill and reputation ([Calvin Klein Industries v. BFK Hong Kong, Ltd.](#) (S.D.N.Y. 1989)).

In short, this case may turn out to be one for the trademark law books – that is, of course, if the case goes the distance. Big Papi has [reportedly made an offer to settle](#) the case. We will be sure to stay on top of future developments in the case.

Be Careful What You Post about Golf Clubs; You May End Up in the Hole

The development of the Internet has had far-reaching effects on corporate America. Companies are able to take advantage of the efficiency, ease and low cost of the Internet to advertise and promote their products and services. An Internet posting can reach millions of people across the globe within seconds. And, while that convenience and reach has brought tremendous advantages, it has its downsides for certain users.

In one example, the Internet postings of stock promoter Jonathan Curshen led to the SEC to file a [civil complaint](#) against him in 2003. Curshen was hired as a stock promoter for [now-defunct golf club manufacturer Freedom Golf](#) that went public in December 1999. According to the SEC complaint, Curshen promoted the stock by posting anonymous messages on various Internet stock trading boards encouraging investors to "get in now

before the fireworks.” He also allegedly posted a hyperlink to an Investor Report prepared by Carter Allen Jones, another stock promoter for Freedom Golf. The report portrayed Freedom Golf as a growing, robust company with increasing revenues. As it turned out, the projections contained in the report did not pan out and the SEC complaint charged that Curshen’s Internet postings amounted to material misrepresentations under the anti-fraud provisions of the federal securities laws. Among other things, the SEC alleged that Curshen failed to disclose his interest in Freedom Golf (i.e., that he was not simply a disinterested observer) and encouraged the public to purchase Freedom Golf stock while, at the same time, he was selling his shares. In response, Curshen argued that his statements amounted to mere “puffery” (statements of corporate optimism) and therefore were not actionable under securities laws.

In a bench trial, the SEC prevailed in federal district court in Colorado. The [court agreed](#) with the SEC that a reasonable investor would want to know whether a person promoting a stock was being compensated for the promotion and that the person making the recommendations to buy was himself selling the stock for his own benefit. In addition, the court found that Curshen, in using pseudonyms and failing to disclose his receipt of compensation, had made material misrepresentations. The court rejected Curshen’s denial that that he was responsible for some of the communications in question; his credibility was not helped, the court found, by his protestations that they could have been created by various other individuals who used his computer, including his rabbi. The court ordered Curshen to disgorge over \$66,000 in profits and entered an injunction against further violations of the federal securities laws.

Curshen appealed, but in [Securities and Exchange Commission v. Jonathan Curshen](#), 2010 U.S. App. LEXIS 7555 (10th Cir. Apr. 13, 2010), the United States Court of Appeals for the Tenth Circuit affirmed the district court’s ruling. On appeal, Curshen argued that the anonymous Internet postings did not give rise to a fiduciary duty requiring him to disclose that he was being compensated for promoting Freedom Golf. The appeals court disagreed, noting “that some investors may use the Internet for investment advice and as a means of distilling information about a stock. Merely because the posting is anonymous or on the Internet does not mean that the securities laws are inapplicable.” The court also concluded that Curshen knew of the company’s unpromising financial condition and therefore knew, or should have known, that Jones’s Investor Report was unfounded.

Borrowing from golf’s bevy of metaphors, the court’s decision here indicates a clear view on Internet postings relating to securities: don’t just “grip it and rip it,” but instead take the time to choose your club (that is, advice) carefully and not overshoot the green (that is, make false promises and recommendations).

Is That a Hot Dog in My Eye?

At six feet, nine inches, and only fourteen years old, [Sluggerrr the Lion, the Kansas City Royals’ mascot](#), may not have considered the power of his pitching or the potential for liability when he surmounted the [third base dugout](#) with a paw full of foil-wrapped hot dogs and flung them into the stands. Like [Sluggerrr](#), the Royals fans seated around the dugout, hands in the air, shouting “Me! Me!” might not have considered the potential harm of a free flung frankfurter. But, due to John Coomer’s [lawsuit](#) against the [Kansas City Royals](#), many are considering just these questions in the context of tort liability. According to Coomer’s negligence [complaint](#) filed in Missouri state court in May 2010,

Coomer was sitting six rows back from the dugout when Sluggerrr, apparently going for a behind-the-back toss, threw the hot dog directly into Coomer's left eye, resulting in a detached retina, among other eye damage.

Intent on gaining an advantage over their neighbors, baseball fans can be seen with all manner of things on the ready, from [gloves](#) to fishing nets, in the event that a baseball might end up being batted into their section, giving them a chance to take home a souvenir ball and all the [customary bragging rights](#) that go with it. Courts have recognized the nature of baseball fans and have noted that fans actually hope to come in contact "with some projectile from the field (in the form of a souvenir baseball)." [Benejam v. Detroit Tigers, Inc.](#), (Mich. App. 2001). It is this acknowledgment, and others like it, which have led to the [limited duty rule](#), or the "[baseball rule](#)" as it is often called. The rule shelters ballpark operators from certain liability associated with game-related injuries to fans and requires only that the ball park operators provide [screening behind home plate](#) and other areas where a fan would be uniquely susceptible to an [injury](#) and provide a reasonable amount of screened seating areas for fans who desire protected seats. When an injury does occur it is often successfully argued by the defendant that the risks associated with the quintessential all-time American game are well-known and that the injured fan assumed the risks when he or she came to the game. This affirmative defense, when successful, results in [low recovery rates](#) for fans who sustain injuries from being struck by baseballs.

Notably, Coomer does not purport to have been hit by a ball or [broken bat](#), or other projectile directly related to playing baseball. The media attention generated by the lawsuit may be due to the paradoxical nature of object and associated injury. But, recent developments in America's pastime may prove to be relevant in determining what can be expected at a baseball game. Sluggerrr made his debut at [Kauffman Stadium](#), the home of the Kansas City Royals, on April 5, 1996. His debut coincided with the growing popularity of mascots and field entertainment designed to attract and engage young audience members. In the ensuing years, the [role of mascots has grown](#) and has been developed and expanded by baseball clubs and their marketers and branding experts.

Whether a team's mascot is [roughing up](#) the opposing team's mascot or shooting (with the use of an [air gun](#)) souvenir t-shirts and plush toys into stands of excited fans, many fans look forward to going to the ball park not only to "root, root, root for the home team" but to enjoy the entertainment that is associated with the game, including the antics of the mascot. Thus, it might be argued that these kinds of antics, typical of most mascots, include throwing things into the stands.

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