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Welcome to *Three Point Shot*, a newsletter brought to you by the Sports Law Group at Proskauer. 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. We hope you enjoy this and future issues. Any feedback, thoughts or comments you may have are both encouraged and welcome.

Let's Get Ready to Rumble – Muhammad Ali Steps Back in the (Legal) Ring

"Float like a butterfly, sting like a bee" is one of, if not the most, famous quotable phrases uttered by Muhammad Ali over his legendary boxing career and he's stepping into the ring again to protect it.

On July 13, 2011, Muhammad Ali Enterprises LLC filed suit against Kobo Inc., accusing the digital bookseller and e-book maker of unauthorized use of the former boxer's "Float like a butterfly, sting like a bee" as a slogan in an advertisement for its electronic reading device.

Muhammad Ali Enterprises LLC left the corner swinging in its trademark infringement complaint, claiming that Kobo's unauthorized use of the boxer's iconic slogan in a full-page New York Times advertisement on June 17, 2011, infringes the company's registered trademarks. Muhammad Ali's company owns several U.S. registered trademarks using the phrase, including U.S. Reg. No. 3,895,589 which covers, among other things, books, journals, writing paper, writing pads, various stationary and desk accessories, publications and writing implements and U.S. Reg. 3,768,688 which covers among other things, cups and mugs, drinking glasses and glass mugs and lunch boxes. The slogan is also the subject of an allowed federal trademark application, serial no. 78/970,537, for goods that include various toys and games, hand-held units for electronic games, entertainment services and production of various forms of media.

Going toe-to-toe with Kobo, Muhammad Ali Enterprises LLC alleges that Kobo's use of the trademarked expression falsely implies to consumers that the product is endorsed personally by the boxer or is affiliated with him. The New York Times advertisement featured the quote, attributed to Ali, alongside an image of the electronic reading device. The advertisement makes "commercial use of valuable property without authorization or compensation" to Muhammad Ali Enterprises LLC, according to the complaint.

The advertisement also included adulatory press blurbs about the electronic reading device that the complaint alleges are a "reinforcement of the persona of Muhammad Ali." One such blurb, from Computerworld magazine, describes the electronic reading device as a "real contender," according to the complaint.

According to the complaint, Muhammad Ali Enterprises LLC was formed in 2006 for the purpose of "promoting Muhammad Ali's legacy throughout the United States and the world, including the licensing of Muhammad Ali's identity." Ali's company has all right, interest and title to the boxing champion's identity, including his "name, likeness, voice, image, trademarks and other elements of Muhammad Ali's persona." Going for the knockout, the suit also contends that Kobo's conduct is likely to diminish, "if not destroy, the opportunity to license Muhammad Ali's identity to the manufacturer of competitive devices and eliminates the ability for Muhammad Ali Enterprises LLC to offer any such manufacturer an exclusive license, which typically is of greater economic value."

The complaint seeks relief against Kobo for (i) acts of federal trademark infringement, trademark dilution, unfair competition, false designation of origin and deceptive acts and practices in violation of the U.S. Trademark Act, 15 U.S.C. §1114, 1125(a) and 1125(c) et seq., (ii) trademark infringement, trademark dilution, unfair competition, unfair and deceptive practices, misappropriation and unjust enrichment in violation of the statutory and/or common law of each state in which Kobo allegedly disseminated the advertisements, including New York General Business Law §133, 349 and 360(l) and California Business and Professions Code §17200 et seq., and (iii) violation of the right to publicity under the statutory and/or common law of each state in which Kobo allegedly disseminated the advertisements, including New York Civil Rights Law §51 and California common law and California Civil Code §3344. It also seeks injunctive relief against Kobo, requests that it recall and destroy all allegedly infringing advertisements and seeks attorneys' fees and damages.

Will this bout go the distance? Stay tuned to find out.

Trying to Force a Turnover: ESPN Sues Ohio State to Compel Release of Emails Involving Jim Tressel

In Columbus, Ohio, most autumns are filled with speculation about which BCS bowl game the Ohio State Buckeyes will be playing in and which players will be receiving Heisman consideration. This year, the BCS and Heisman talk have been sidelined in favor of wondering what punishment the football team will receive for NCAA violations committed by its players and former coach Jim Tressel.

In December, the NCAA suspended five Ohio State players for selling memorabilia and awards in exchange for improper benefits. Although all parties believed that the matter had been resolved with the players' suspensions, the scandal resurfaced a month later. In an unrelated investigation, Ohio State discovered that head coach Jim Tressel had known since the previous spring that quarterback Terrelle Pryor and at least one other player had sold memorabilia to a Columbus tattoo parlor, but had never told the university or the NCAA. The revelation eventually led to Tressel's resignation and an August hearing in front of the NCAA infraction committee. As Ohio State awaits its punishment from the NCAA, it is also waiting a decision from the Ohio Supreme Court. In July, ESPN filed a complaint in that court seeking a writ of mandamus that would require that the

university be compelled to release internal correspondence related to the NCAA violations.

In April, ESPN made a written request under the Ohio Public Records Act for Ohio State to produce copies of internal correspondence between Tressel and other university personnel. ESPN's document request focused on e-mails concerning Tressel's conduct after he had been informed that his players had broken NCAA rules.

The Ohio Public Records Act (OPRA) allows individuals to request records maintained by any public office, including public universities. OPRA requires public offices to promptly produce any records requested under the regulation, unless doing so would require providing "records the release of which is prohibited by state or federal law." Citing this exception, Ohio State denied ESPN's document request, claiming that complying with it would have required the university to make disclosures that would have violated the Family Educational Rights and Privacy Act (FERPA).

FERPA is a federal regulation intended to protect the privacy of students who attend schools and universities that receive federal funding. The regulation does not allow an educational institution to receive federal funds if it has a "policy or practice of permitting the release of educational records" without written consent. As a university that receives federal research grants, Ohio State falls under the purview of FERPA.

In a letter to ESPN, Ohio State told ESPN that complying with the network's request would require the university to release personally identifiable information about certain student athletes in violation of FERPA. Ohio State also noted that it considered ESPN to be making a "targeted request," an information request that would have required the university to release information that could have been reasonably linked to specific students. FERPA prohibits schools from responding to targeted requests.

In its complaint, ESPN argued that the documents requested, e-mails between various university employees, could not be considered education records under FERPA, and that releasing them would therefore not violate the regulation. ESPN also claimed that the records requested did not contain the type of personally identifiable information that was protected by FERPA because the focus of the request was correspondence related to the conduct of a coach, not information about any students.

On August 2, Ohio State filed its answer to ESPN's complaint with the Ohio Supreme Court, reiterating its position that the documents requested could not be released due to FERPA. Although the court has not made a final decision, it did issue an alternative writ of mandamus in a September 21 court order, which compelled Ohio State to submit under seal unredacted copies of the documents requested by ESPN, so that it can determine whether they are protected from public disclosure by FERPA.

The September 21 court order also gave ESPN and Ohio State 20 days to submit evidence, with briefs due shortly thereafter. As both parties await the court's decision, it is safe to say that Ohio State fans hope their team starts making headlines on the field again instead of in the courtroom.

Gossip about Gossip

When dealing with unsavory public gossip, especially gossip that is repeated in the media, the new trend for Britain's glitterati is the so-called "super injunction." UK courts have imposed both a gag order and a gag order *about* the gag order on the enjoined in certain kinds of cases in which the plaintiff raises a privacy interest. Once slapped with such a court order, news publications (both legitimate and salacious) are prevented from publishing anything about the claims being made by the plaintiff. This limitation includes even the mere mention that the publication is gagged at all. In short, the super enjoined cannot gossip about the gossip.

The phrase "super-injunction" was coined by the editor of the UK publication *The Guardian* while reporting on the use of the tactic by oil trader Trafigura in 2009. Since then, the equitable remedy has been sought by athletes and other celebrities to keep rumors of affairs out of the press. Those seeking super-injunctions rely on Article 8 of the European Convention on Human Rights, which provides that "Everyone has the right to respect for his private and family life, his home and his correspondence."

The practice of handing out these heightened gag orders was much discussed this summer when an anonymous athlete, identified in court papers as "CTB," sought to stanch the proliferation of rumors about a possible affair with a reality TV star, reported in the UK publication, *The Sun,* to be Imogen Thomas. On May 16, the High Court of Justice, Queen's Bench Division, ruled in *CTB v News Group Newspapers* that publishing "tittle-tattle about the activities of footballers' wives and girlfriends" is not so great a public interest so as to override the privacy rights of the celebrity. "CTB," later outed on Twitter as a soccer star whose name we will not repeat here was granted an injunction that prevented *The Sun* from mentioning the star's identity in connection with the court order, as well as any purported facts about his alleged affair with Thomas. The court appreciated the delicate balance that must be made between Article 8 of the European Convention on Human Rights and Article 10 of the Convention, which protects freedom of expression. But in this case, the court ruled, the scales were tilted in favor of privacy, given the inane subject matter.

Having kept his both his name and any suggestion that he had even sought a court order out of the tabloids, "CTB," then took aim at both the anonymous users who have tweeted details about the injunction on the social media service, and at Twitter itself. *CTB v. Twitter Inc., Persons Unknown, No. HQ11X01814,* was filed on May 18, 2011, in the High Court of Justice (Queen's Bench) in London. The specifics of the complaint are currently unclear.

However, Schillings, the law firm representing "CTB," has maintained that the suit merely attempts to compel Twitter to reveal information about its anonymous users. The number of users who have repeated CTB's identity now number in the hundreds, making this the latest demonstration of the Striesand Effect, i.e., the principle that attempts to squelch information usually lead to the wider proliferation of that information. Commentators in the UK have speculated on whether CTB may be able to succeed in the UK courts in obtaining an order against a U.S. service provider that is directed at learning the identity of unknown Twitter users. If an order does issue from the UK court and make its way across the pond, it will be greeted by decisions in U. S courts that have raised the bar for such attempts under the First Amendment.

If CTB is making a defamation or similar claim against Twitter (although it appears, from CTB's law firm, that he is not), then the company would likely avail itself of Section 230 of the Communications Decency Act should the UK court action result in a judgment on such a claim. Section 230 provides that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." That federal law principle was recently "internationalized" with the enactment of the federal Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act, which was signed into law August 10, 2010. The Act expressly protects service providers from the enforcement of judgments of foreign courts that U.S. courts would be precluded from rendering by Section 230. The SPEECH Act also protects U.S. residents from foreign libel judgments if such claims counter First Amendment principles.

But we digress. Only time will tell the exact nature of the secret lawsuit and the impact on U.S. social media platforms, and whether UK and U.S. law will thwart a British super-injunction invasion.

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