



Three Point Shot

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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.

Floyd Mayweather, Jr. Says "Yep" to Copyright Infringement Suit

Ding ding ding! Ladies and gentlemen, in this corner of the courtroom, weighing in at [151 pounds](#), with a perfect [43-0 undefeated record](#), boxing champion [Floyd Mayweather, Jr.](#)! And in this corner, it's not Oscar de la Hoya, it's not Victor Ortiz, no, it's...rapper Anthony Lawrence Dash!

Let's have a look at the backstory, shall we? In 2005, Dash wrote a musical track entitled "Tony Gunz Beat." Meanwhile, following in the footsteps of other great [athletes-turned-musicians](#), Mayweather set his sights on becoming a rap star. To that end, Mayweather incorporated Dash's track into his own rap song, called "Yep." The only problem was, Mayweather didn't ask for permission first.

The rumble began on March 30, 2008, when Mayweather played "Yep" during his entrance at the highly publicized World Wrestling Entertainment, Inc. ("WWE") event, [WrestleMania XXIV](#). It continued on August 24, 2009, when Mayweather again used "Yep" as his theme song during his appearance on WWE's [RAW](#). To add insult to injury, both events were aired on pay-per-view and available for purchase on DVD. Moreover, "Yep" was included in advertisements for the RAW event and in numerous YouTube videos. Finally, Mayweather's record label, Philthy Rich Records, played "Yep" on the home page of its Web site.

Fed up with his song getting played without receiving payment, Dash delivered the first jab by filing a [complaint](#) in federal district court on April 26, 2010 against defendants Mayweather, his [promoters](#), the WWE, and Philthy Rich Records. Dash alleged in his complaint that Mayweather infringed his copyright by copying, publicly performing, and publicly displaying "Tony Gunz Beat" without his authorization. For these alleged acts of infringement, Dash sought damages and an injunction.

Mayweather's promoters and the WWE tag teamed Dash by filing [motions](#) to [dismiss](#) for lack of personal jurisdiction. But he "Dash-ed" his way out of trouble when the court ruled that he had made a prima facie showing of personal jurisdiction and [denied](#) the defendants' motions.

The discovery phase of the litigation became a barn burner in September 2011 when Dash sought [sanctions](#) against Mayweather after the boxer postponed a deposition at the last minute for health reasons, and then was seen partying at a dance club on the night the deposition was originally scheduled to take place. Dash submitted video evidence of Mayweather burning one-hundred dollar bills at the club and throwing money into the crowd. The judge deemed Mayweather's actions below the belt, and [sanctioned](#) him to forty hours of community service.

The sanction may have put Mayweather on the ropes, but this fighter is no quitter. He came back with a fatal uppercut to Dash in May 2012, when the court [granted](#) the defendants' motions for summary judgment on the copyright.

First, the court held that Dash was not entitled to profits of the infringer because he "failed to present any evidence demonstrating a causal link between the alleged infringement and the enhancement of [the defendants'] revenue stream," as mandated by Fourth Circuit precedent. Second, Dash was not entitled to actual damages because he did not offer evidence to show that his song had an actual market value and also that Dash could not receive statutory damages because he did not register his copyright for "Tony Gunz Beat" until after the dates of the alleged acts of infringement. Finally, the court chose not to address whether Dash was entitled to injunctive relief because Mayweather indicated that he did not plan to use the song again, and because Dash now has a registered copyright, thus "the question presented would be in a different posture" should Mayweather use the song again.

With no right to damages, the court dismissed the case, and Dash was down for the count.

Will there be a Dash-Mayweather rematch? Only time will tell. For the time being, however, Floyd Mayweather, Jr. remains undefeated in the ring and on the microphone.

[Former Gold Medalist Can't Clear Olympic Ad Hurdle](#)

The London 2012 Olympic Games may eventually be remembered for many things—another world record by Usain Bolt, the retirement of Michael Phelps, or perhaps, [public toilets with taped-over logos](#).

Taping and painting over logos on toilets is one of the ways the London Organising Committee of the Olympic and Paralympic Games ("LOCOG") is policing the Olympic brand's association with non-sponsor brands, images, and venues. Other measures have included requiring local businesses [to remove the word "Olympic" from their names](#) and [restricting the upload of content onto social media platforms](#).

These measures are an attempt by the organizers to blow the whistle on activities that might threaten the value of exclusive deals that television distributors and sponsors have signed to be associated with the Olympic brand. The actions find support in legislation passed by the English Parliament at the behest of the International Olympic Committee

(“IOC”). The [London Olympic Games and Paralympic Games Act 2006](#) (the “Act”) took the baton forward from the UK’s [Olympic Symbol Protection Act 1995](#) to provide even stricter intellectual property protection, advertising regulation, and penalties. [Section 33\(3\) of the Act](#), for example, identifies combinations of expressions that may infringe LOCOG’s intellectual property rights. Some combinations include the use of “2012” together with the word “gold” or the use of “twenty twelve” in conjunction with the word “medals.”

As we [previously reported](#), legislation at the national level in Olympics host countries that gives extra protection to the Olympics brand is not new, but sponsors may have to watch their steps more carefully in London to keep from crossing the foul line and jumping face first into the sand.

In a recent example of the LOCOG’s enforcement efforts, former UK hurdler and gold medalist Sally Gunnell was participating in a photo shoot for easyJet, a non-sponsor airline, and was about to strike a pose with the UK flag draped over her shoulders, when a LOCOG official present for the shoot threw a javelin through those plans and [prohibited the pose](#). The official found that Gunnell’s stance would create too direct an association with her post-victory pose from the 1992 Olympics. Presumably, this was deemed by the official to be a violation of [Section 33\(2\) of the Act](#), which finds infringement when “in the course of trade . . . [the alleged infringer] uses in relation to goods or services any representation (of any kind) in a manner likely to suggest to the public that there is an association between the London Olympics and” those goods or services, or the person providing them.

Previously, London [organizers had promised](#), “Where there are serious or deliberate attempts to ambush the Games ... we will take swift and firm action.” Whether the alleged infringement above deserved such firm action or the organizers have jumped the gun, one thing is clear—when it comes to brand policing, no one can accuse the London 2012 Olympic Games organizers of failing to carry the torch.

Delay of Game in Former Coach’s NCAA Lawsuit

The [SUNY-Buffalo men’s basketball program](#) made some noise this spring, but not because the team made the [National Collegiate Athletic Association](#) tournament – a feat the Buffalo Bulls haven’t accomplished since joining the Mid-American Conference in 1996. Rather, the noise came from the Bulls’ mention in an Op-Ed piece in [The New York Times](#). The article concerned the team’s former coach, Tim Cohane, and the status of his lengthy legal battle with the NCAA.

Cohane’s lawsuit involves the circumstances of his [departure from SUNY-Buffalo in 1999](#). Back then, the current class of SUNY-Buffalo freshmen were barely out of kindergarten. Cohane says he was forced to resign from his coaching position due to pressure brought on SUNY-Buffalo by the NCAA. Cohane believes SUNY- Buffalo colluded with the NCAA to accuse him of minor NCAA rule violations. Further, he alleges the university threatened that students who did not participate in the NCAA investigation would not be allowed to graduate. Cohane’s legal [claim](#) is that a 2001 NCAA investigation report defamed him and destroyed his ability to pursue his chosen occupation.

As today's baby Bulls stampeded their way through grade school, Cohane's case made its way through motion practice in two federal district courts. In 2007, as they entered high school, the Cohane case stepped up too, registering an appearance before the U.S. Court of Appeals for the Second Circuit.

Constitutional gamesmanship was at the heart of Cohane's appeal to the Second Circuit. The issue: Under what circumstances may the NCAA be considered a "state actor" under the Fourteenth Amendment, and thus potentially liable for violating federal civil rights laws? Cohane argued that the NCAA should be deemed a state actor because it had acted together with the state university in violating his rights, an argument that had been rejected by the district court.

In considering the issue of state action, the Second Circuit had to account for [NCAA v. Tarkanian](#) (1988), a U.S. Supreme Court case that held the NCAA is not a "state actor." [Jerry Tarkanian](#), one of the winningest college coaches of all time, enjoyed tremendous success at UNLV, including capturing the 1990 national title. But Tarkanian bumped heads with the NCAA nearly as often as he won big games. Following a lengthy NCAA investigation of alleged improper recruiting practices by UNLV, the NCAA's Committee on Infractions found numerous violations by the university and Tarkanian himself. The Committee requested UNLV show why additional penalties should not be imposed on UNLV if it failed to suspend Tarkanian. Although UNLV initially contested the NCAA's finding, the University ultimately decided it had no choice but to sanction its prized coach.

Tarkanian brought suit in Nevada state court against UNLV and the NCAA, alleging he had been deprived "due process" under the Fourteenth Amendment. Ultimately, in a 5-4 split – a metaphorical nail-biter in the highest of courts – Justice Stevens wrote that UNLV "conducted its athletic program under color of the policies adopted by the NCAA," rather than the other way around. Still, the Court left open the possibility that under a different set of facts, state action "nonetheless might lie if [a state university], by embracing the NCAA's rules, transformed them into state rules and the NCAA into a state actor."

The opening created by *Tarkanian* prompted the Second Circuit in [Cohane v. National Collegiate Athletic Association](#) (2d Cir. 2007) to overturn the district court's dismissal of Cohane's claims. The appeals court held that Cohane's allegations, if proven, "could show that the University willfully participated in joint activity with the NCAA to deprive Cohane of his liberty." The case was remanded to the district court for further proceedings.

While there have been plenty of "further proceedings," the case has not actually "proceeded" very far. Since the remand, over a hundred docket entries detail extensive discovery disputes and motion practice. Rain delays aren't common in courtrooms, but this case even had that. On August 30, 2011, the case was held in abeyance because Hurricane Irene "caused unforeseen damage to plaintiff's counsel's property." Most recently, the case has stalled while the district court considers the parties' respective motions for summary judgment. Oral argument on the motions was heard in October, 2011.

The way things are going, a whole new generation of Bulls may reach Division I before Cohane gets his day in court.

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