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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 four 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.

Whose Tat? Body Art, Copyright and Sports

Sports and Hollywood have long been inextricably linked – many athletes want to be and even become [actors](#), countless actors have lived out their athletic fantasies [on the silver screen](#), and it is no secret that athletes and actresses are often quite publicly [attracted to each other](#). Recently, another area of overlap between sports and movies has emerged: the fringes of copyright law.

Both movies and sports have given rise in recent years to disputes over the copyright ownership of and accompanying reproduction and display rights to tattoos on high-profile celebrities. In 2005, a tattoo artist who inked [colorful basketball player](#) Rasheed Wallace [sued](#) Wallace, Nike and the ad agency responsible for a commercial prominently featuring Wallace's body art. In 2011, [we wrote about the then-pending case](#) in which the artist who created Mike Tyson's infamous [face tattoo](#) brought a copyright infringement claim against Warner Brothers for featuring a similar tattoo in the movie *The Hangover Part II*. Earlier this year, EA Sports was needled by a copyright infringement claim by a tattoo artist based on a nine-year-old video game cover with a [larger-than-life illustration](#) of former NFL star Ricky Williams and the art on his bicep. Litigation is currently round-kicking its way through the courts in a [similar case](#) brought by a tattoo artist against the maker of a Mixed Martial Arts video game. The Ricky Williams case was dismissed at the request of the plaintiff, and both the Wallace case and the Hangover case subsequently [settled](#) for undisclosed amounts, but clearly this issue is not going away anytime soon.

We are unaware of any courts definitively ruling on the copyright status of tattoos, as the parties to such suits thus far have found early settlement to be the preferred solution. However, in her ruling rejecting the tattoo artist's request for a preliminary injunction to bar the release of *The Hangover Part II*, Judge Catherine Perry did indicate that the artist would likely succeed [on the merits](#) of his copyright infringement claim (*Whitmill vs. Warner Bros. Entertainment Inc.*, No. 11-cv-00752 (E.D. Mo. May 24, 2011)). Judge Perry forcefully rejected Warner Brothers' claim that the tattoo was not copyrightable, and also rejected the media giant's fair use and parody defenses.

[Commentators agree](#) with Judge Perry's position on the issue, as the broad protection afforded artists under [copyright law](#) covers "original works of authorship fixed in any tangible medium of expression" (emphasis added) and includes pictorial and graphic works. Presumably, even minimally original tattoos meet this threshold. Any subsequent dispute would likely turn on whether the author of the copyrighted content (here, the tattoo artist) retains the rights in the tat, or whether a written agreement establishes a [work-made-for-hire](#) or other assignment of rights, and whether the defendant can establish a successful fair use defense. To be sure, most disputes have not centered on the tattoo subject's own display of his tattooed skin, but rather on a third party's use of the inked athlete's image in a public medium such as a video game, movie, or other advertisement.

The Ricky Williams / EA Sports case recently [attracted the attention of the NFL Players' Association](#), which has begun advising players to protect themselves (and potential advertising partners) by obtaining a waiver or license in advance from tattoo artists. This is sound advice, but in light of recent litigation which has brought light (and ink) to the issue, such licenses may not come cheaply, as some tattoo artists are likely telling their wealthy athlete clientele "[show me the money](#)." One artist even envisions a [six-figure payday](#) for each copyright license assigned to an athlete sporting his ink – good work if you can get it! Depending on the level of celebrity, some artists may instead be content with the free advertising and exposure that comes with being a tattoo artist to the stars.

Artists aren't the only ones seeing a potential goldmine in athlete ink IP. Forbes recently [detailed](#) the story of Matt Siegler, a businessman planning to cash in on his collection of exclusive copyright licenses from tattoo artists serving high-profile NBA players (including LeBron James, arguably [the most famous athlete in the world](#)). Siegler plans to exploit the designs of the licensed tattoos for apparel and other merchandise, and also stands to profit if the NFLPA's fear of copyright infringement liability influences licensing negotiations with commercial advertisers and video game creators. It is unclear whether Siegler's venture has yielded positive results, but it is possible that his tattoo copyright licenses will turn out to be a [golden ticket](#).

So where is all this headed? In a [recent op-ed](#), two law professors argue that IP rights in tattoos should be viewed as an implied license under which the tattooed athlete obtains reasonable rights regarding the public display and commercialization of the tat based upon the expectations and actions of the parties. This is especially true in the case of famous athletes, the professors maintain, where everyone (including the tattoo artist himself) knows and expects that the tattoo will be highly visible in the public eye. However, the theory of implied license is highly fact-based, and the outcome of any dispute would depend on the understanding between the artist and the athlete. Put simply, the ink is certainly not dry on this legal issue and the empowerment of tattoo artists seems to be growing. It remains to be seen what will be more valuable over the next few years: Colin Kaepernick's [cannon of an arm](#) or the [lavish tattoos](#) adorning that weapon.

Which Josh Beckett Statistic Is More Impressive: A Regular Season Win Against the Detroit Tigers or a Save for the Texas Ocelots?

He did [not win a game](#) on the baseball diamond this year, but Los Angeles Dodgers hurler Josh Beckett scored a legal victory when a federal court determined that Beckett could go forward with his suit to redirect a pipeline built on his Texas deer ranch. Beckett claims his Herradura Ranch is home to a protected species of ocelot and that the pipeline threatens the animal's natural habitat.

The ocelot is a wild cat with a [gorgeous dappled coat](#). Primarily found in South America, the breed can make its home as far north as Texas. The ocelot is an endangered animal, with reports stating that there may be as few as [fifty living in the United States](#). Apparently, some of these vulnerable felines have decided to share the mound with the two-time World Series champion. Beckett himself claims to have seen [ocelots cross his property several times](#) and has quickly become the species' super-agent and most ardent conservationist.

Beckett and his business partners own the 7,000 acre Herradura Ranch near San Antonio – which is enough land for more than [2,000 baseball fields](#). The [ranch](#) offers luxurious multiday guided hunting trips for white-tail deer, doves, quail, javelina, coyote, and bobcat. In the spring of 2012, Eagle Ford Midstream (“Eagle Ford”) [approached Beckett](#) and offered to pay for the right to build a natural gas pipeline across Heradura. But, like an anxious righty trying to hold Brett Gardner on first base, Beckett balked at the offer. Unfortunately for Beckett, later that year, Eagle Ford procured an eminent domain right-of-way in state court that allowed the pipeline to be built. At the same time, the U.S. Fish and Wildlife Service and U.S. Army Corps of Engineers approved the findings of the shale extractor's experts and certified that Eagle Ford was in compliance with the Endangered Species Act.

Soon after construction commenced in October 2012 and shortly after the Dodgers traded for him, Beckett filed a [complaint](#) seeking to reroute the pipeline (*Beckett Ventures Inc. v. Eagle Ford Midstream LP*, No. 12-00164 (S.D. Tex. filed Oct. 16, 2012)). The complaint stated that Eagle Ford engaged in “willful destruction” of ocelot habitat by clearing the land on Herradura to build a pipeline. Specifically, Beckett alleged that the pipeline builders violated Section 9 of the Endangered Species Act, which prohibits harassment or harm to protected species. The complaint further alleged that “harassment” and “harm” are broadly defined to encompass “significant habitat modification” and “acts [creating] the likelihood of injury to wildlife.”

Eagle Ford maintains that there are no ocelots on Herradura and therefore Beckett has suffered no damages. It characterizes Beckett's habitat preservation argument [as “merely a sham to leverage additional money from \[Eagle Ford\] in exchange for an easement”](#) and claims that Beckett is [actually concerned](#) about the pipeline's effect on an irrigation system and the ranch's hunting business.

[Ruling on a motion to dismiss](#), U.S. District Judge Diana Saldana found that Beckett should stay in the game and has standing to sue since he allegedly demonstrated actual injury from potential lost ecotourism revenue. The court also rejected Eagle Ford's argument that the relief sought by Beckett is moot because the pipeline is already installed, finding that the court could grant injunctive relief compelling the company to reroute the pipeline or restore the habitat to minimize the disturbance to the endangered ocelot.

Here's hoping that Beckett, who spent much of this past season on the disabled list, is home at the ranch re-habbing and getting ready for Thanksgiving alongside his two pet ocelots.

[A] Black [Suit] Is the New Yellow [Jersey]: Tracking Armstrong's Newfound Career as a...Professional Defendant?

In his neverending Trek through the courts, Lance Armstrong is facing a slew of suits following his dramatic [admissions of doping to Oprah Winfrey](#). While past Tour de France champions like [Eddy Merckx](#) or [Greg LeMond](#) have left the sport in great esteem and started their own bicycle lines, Lance Armstrong, stripped of his seven titles, has lately been wearing wingtips more than toe clips.

For example, in [Martin v. FRS Co., No. 13-01456 \(C.D. Cal. filed Feb. 28, 2013\)](#), a suit seeking class certification, a putative class of consumers alleges that Armstrong and The FRS Co., a maker of sports beverages and endurance products, deceptively peddled FRS products during Armstrong's record-setting cycling career. According to the complaint, Armstrong is a partial owner of FRS and former team member of the Board of Directors who participated in "significant decisions" regarding FRS's marketing and advertising strategies. With an ad pitch steeper than the climb of the famed [Alpe d'Huez](#), Armstrong told the world that FRS supplements were his "secret weapon," a claim that his attorneys argue was nonactionable puffery and a subjective, nonquantifiable opinion. Of course, Armstrong confessed to Oprah that [he could not have possibly won his Tour titles without doping](#). The plaintiffs' unfair competition and false advertising causes of action allege that consumers would not have bought FRS products or would have paid a lesser price had they known that Armstrong's success was due to the use of PEDs. It remains to be seen whether Armstrong's [dismissal motion](#) can knock the plaintiffs out of the saddle by convincing the court that FRS's statements were non-actionable or that the plaintiffs failed to claim a real injury in fact.

The FRS dispute isn't Armstrong's first time in the class action velodrome—a prior suit fell off the back when a court [dismissed](#) the majority of claims against Armstrong and his publishers relating to his memoirs, "It's Not About the Bike" and "Every Second Counts." The plaintiffs in that action asserted that marketing the books as works of nonfiction was misleading and that they would not have purchased the books if they had been aware that Armstrong was doping. The court, however, dismissed most counts on the basis that the books and related marketing were protected by the First Amendment.

Indeed, as if on a [lone breakaway](#), Armstrong is being pursued by a peloton of claimants. In addition to the deceptive advertising suits, former teammate [Floyd Landis](#) has brought suit against Armstrong under the whistle-blower provisions of the False Claims Act, which typically allows claimants to recover 15 to 25 percent of the recovery for claims relating to a defendant's false claims for payment to the U.S. Government. (See [U.S. ex rel. Landis v. Tailwind Sports Corp., No. 10-00976 \(D.D.C. filed Apr. 23, 2013\)](#)). Ever the wheelsucker, the [federal government](#), which paid Armstrong's Tailwind team through a sponsorship agreement with the U.S. Postal Service valued at approximately \$40 million, [joined](#) Landis's suit in April 2013. The government alleges that Armstrong and the team's violation of the sponsorship agreement and failure to adhere to the rules of cycling undermined the value of the USPS sponsorship and unjustly enriched Armstrong and the team. The Department of Justice is seeking treble damages, an increase that is permitted under the False Claims Act, which could lift the defendants' liability to \$120 million.

With these litigations in full tuck, it could prove to be a very long and expensive descent for the embattled Armstrong.

Postscript: 'Raging Bull' Heir Gets Title Fight Before Supreme Court

In our [Summer 2013 Edition](#), we wrote about a copyright dispute between MGM and Paula Petrella, the heir to Frank Petrella, whose works about boxer Jake LaMotta were adapted into the classic film *Raging Bull*. In short, Paula Petrella, after entering into negotiations with MGM, the rightsholder for the movie, waited nine years after the talks broke off before filing a copyright infringement suit. The appeals court affirmed the lower court's ruling that Petrella's delay in bringing suit was unreasonable and warranted dismissal based upon the doctrine of laches. With Petrella on the canvas – and the referee about to count her out – she filed a last-gasp petition with the Supreme Court. In October, the Supreme Court [took the case](#), and will answer the following legal question: “Whether the nonstatutory defense of laches is available without restriction to bar all remedies for civil copyright claims filed within the three-year statute of limitations prescribed by Congress....” According to the [docket](#), oral arguments are scheduled for January 21, 2014. As we said in our initial post, the bout will be a prime-time spectacle with a purse of millions in royalties on the line – maybe not the [Thrilla in Manilla](#) or the [Rumble in the Jungle](#), but still worth a ringside seat.

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

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