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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.

Antitrust Class Action Suit Threatens to Put UFC in Choke Hold

When people talk about mixed martial arts ("MMA"), it is likely within the octagonal context of the Ultimate Fighting Championship ("UFC"). UFC exploded onto the domestic sports scene over 20 years ago and has since firmly established itself as the premier MMA league in the United States with an estimated value between $2 and $4 billion. UFC's parent company, Zuffa, LLC, rakes in nearly $500 million in annual revenue through the promotion of live events, merchandising, licensing fees, sponsorships, advertising fees, video game fees, and digital media revenue streams.

One way that UFC has maintained its industry dominance is by absorbing its competitors. The MMA behemoth successfully tag-teamed its way to capturing approximately 85-90% of the total revenue derived from live elite professional MMA bouts. Unfortunately for UFC, the league's dominance has prompted several disgruntled MMA fighters to punch back.

In a complaint filed on December 16, 2014 in the United States District Court in San Jose, California, three former UFC fighters contested the legality of UFC's business practices, which allegedly contributed to the league's dominance in MMA. The plaintiffs, Jon Fitch, Nate Quarry, and Cung Le (the "Plaintiffs"), claim that UFC violated Section 2 of the Sherman Antitrust Act by using overarching anticompetitive schemes to maintain and enhance its monopoly and monopsony power in the market for live elite professional MMA fighter services. (*Le, et al. v. Zuffa*, No. 14-05484 (N.D. Cal. filed Dec. 16, 2014)).

The complaint identifies UFC's alleged monopoly and monopsony power – a veritable double leg takedown – as the driving forces behind fighter compensation suppression and the inappropriate expropriation of UFC fighters' identities and likenesses. According to the complaint, UFC's industry dominance enables the league to pay fighters a mere fraction of what they would make in a competitive market. The Plaintiffs claim that UFC fighters earn approximately 10-17% of the revenue generated from a bout, compared to the nearly 50% revenue earned by athletes in the four major sports leagues.

The Plaintiffs highlight UFC's exclusivity contracts with several major physical venues for their MMA bouts as additional evidence of the league's illegal monopoly power. As a result of these contracts, the Plaintiffs claim that other MMA leagues are precluded from hosting their events in these venues, which purportedly suppresses revenue and prevents growth by eliminating channels for international exposure. The Plaintiffs further claim that UFC forces prospective UFC fighters to sign contracts that bar them from working with would-be rival MMA promotion companies.

The case against UFC might have some traction, at least in part, due to the league's social media presence. In 2012, UFC president Dana White delivered a below-the-belt blow to the industry by uploading a video of himself to YouTube holding a tombstone with the names of former MMA competitors along with their "dates of death." White refers to himself as the 'Grim Reaper' in the video, which has since been taken down. White has also made comments on Twitter and in interviews boasting about the lack of competition in MMA.

The legal battle between the Plaintiffs and UFC is only in the first round, but the stage has been set for a potentially long and brutal fight. UFC has not yet filed an answer to the complaint, but affirms that it will "vigorously defend itself and its business practices." While the Plaintiffs have been waiting for class certification for their suit, two similar lawsuits have been filed (an undercard of sorts) on behalf of four different MMA fighters.

Fighters and enthusiasts alike are sitting ringside, popcorn in hand, anxious to see how this lawsuit will affect the future of MMA. Until then, the industry eagerly awaits the judge's scorecard.

French Media Regs Leave Sports Clips on Cutting Room Floor

When it comes to sports, the U.S. touts a particular brand of American exceptionalism. After all, the United States is home to four of the top ten most popular team sports and forty out of the fifty most valuable sports franchises in the world. Yet, let's not forget that the top three most valuable sports clubs on the list are European soccer powerhouses. The Beautiful Game, the World's Game, is quite a popular sport, with legions of fans hungry (as any American sports nut) for highlights of the day's soccer matches. Indeed, in this respect, the American sports landscape is not unique at all.

Much like the U.S., sports financing for our friends across the pond has become increasingly dependent on the broadcasting rights to live content, as the exclusive rights to broadcast live sports have soared in value. This rise in sports programming licensing fees is forcing the cable and broadcasting industry into a new reality.

Sports programming appears to be one of the main reasons millions of Americans resist cancelling their traditional cable TV subscription (a/k/a "cord-cutting"). Ironically, the high premium costs programmers and distributors pay for sports ultimately get passed down to subscribers, who, due to such increasing costs, may consider less expensive cord-cutting, cord-shaving and over-the-top internet programming alternatives.

In France, the increased costs of live sports content have spurred a fight over the replay of sports highlights, pitting two fundamental rights against one another: property rights and the right to information. On the one side of the pitch we have programmers attempting to limit the manner and frequency with which non-rights holders can broadcast sports highlights, or short extracts, in order to protect the exclusivity that is so crucial to their investment. Facing off against the programmers are sports news shows asserting

their right to exploit short extracts as information that is of great interest to the public, guaranteed to them by Article L. 333-7 of the Sport Code. Not surprisingly, French fans' love of soccer is fueling this fight – a battle that has already gone into extra time, dating back to the 1980s.

According to the European Audiovisual Observatory: "Since 1986, Article L. 333-7 of the Sport Code has given the channels the right to broadcast brief excerpts of sports events for which the rights are held by another editor, by virtue of the public's entitlement to be informed." However, implementing legislation was never passed to define the parameters of a "brief excerpt." In the absence of a legislative definition, standard practice and case law in the 1990s gave rise to an accepted rule of ninety-second clips per hour of programming.

However, in February 2012, the French legislature forced the issue, adopting Law Number 2012-158, requiring France's media-governing body, the Conseil Superieur De L'Audiovisuel (the "CSA") to define the parameters of permissible "brief excerpts." On January 15, 2013, the CSA published a deliberation officially allowing monothematic broadcasts (those focusing on only one sport), in addition to general news outlets and multidisciplinary sports shows, to air ninety-second sports extracts, in line with long-accepted practices.

Yet, on October 30, 2014, following pressure from certain stakeholders, the CSA rolled back these previously accepted practices. Specifically, as of January 1, 2015, monothematic broadcasters must wait a full twenty-four hours after the end of the original program's broadcast before retransmitting any sports extracts. Moreover, the CSA placed two additional constraints on top of the ninety-second restriction, limiting clips to "three minutes per day of competition and thirty seconds per match."

According to commentators, the new constraints will most severely impact programs like Telefoot, a soccer-only program aired since 1977, which will now have to wait an entire week to televise clips of "goals scored in Ligue 1 matches the day before." Programmers have argued that such limitation certainly diminishes the clips' value (not to mention their show's timeliness and punch), which comes from the use of live, or near-live, game clips. While consumers can still watch general news outlets or multidisciplinary sports programs for timely highlights, such highlights will no longer be available on single-sport (e.g. soccer-only) programs.

The rights holders clearly lobbied hard and won big concessions in the latest CSA deliberation. It remains to be seen whether France's soccer fans eager for more highlights will fight back, even the score, and ultimately reach their goooooooooooal.

Pistols Drawn! Trademark Showdown over Mascot Finally Resolved

Even though the year is 2015, two schools recently engaged in a dispute reminiscent of the Old West. This past October, Oklahoma State University ("OSU" or "Oklahoma State") sued New Mexico State University ("NMSU" or "New Mexico State") for using a cowboy mascot on certain team apparel that was "confusingly similar" to Oklahoma State's venerable Pistol Pete, whose image is a registered trademark of OSU. Despite an apparent decades-long history of New Mexico State previously using a Pistol Pete mascot, Oklahoma State filed a trademark infringement complaint in federal court, formally requesting that NMSU bench its own Pistol Pete immediately. Such action had

been informally requested of NMSU previously, but NMSU had shown resistance to disassociating itself from its lucky charm, at least for use on "classic" apparel.

The Pistol Pete caricature is based on Frank Eaton, a Hall of Fame gunslinger from the late 1800s. Eaton, better known as Pistol Pete (not to be confused with "Pistol Pete" Maravich, a sharpshooter of a different kind who played in the NBA almost a half-century ago), acquired his nickname after he outshot United States Cavalry men at age 15. For Oklahoma State, Eaton is significant because he is buried in the state of Oklahoma. For New Mexico State, legend has it that he once won a hotly contested gun fight in New Mexico's capital of Albuquerque.

According to Oklahoma State, the University has been using trademarks depicting Pistol Pete since at least 1930, whereas New Mexico State waited until the 1960s to sign him as a free agent and make him their mascot. While Pistol Pete is still the face of the Oklahoma State Cowboys, New Mexico State eventually transitioned into its own gun-toting, mustachioed mascot in the 2000s, officially known as "Classic Aggie." Interestingly, the University of Wyoming also once claimed a version of Pistol Pete as its athletic mascot, and tried to register the image with the U.S. Patent & Trademark Office in 1989, provoking an outcry from Oklahoma State. Instead of the conflict reaching a boiling point, however, the two sides came to an agreement for University of Wyoming's concurrent use of a cowboy image, with different coloring. To mark its territory moving forward, OSU displayed the letter "R" on its Pistol Pete marks. While NMSU rebranded its image about a decade ago, the modern mascot was not part of the complaint. Rather, the lawsuit was sparked when an old image resurfaced as part of a line of Classic Aggie merchandise, which Oklahoma State deemed confusingly similar to its own trademarked mascot.

In a case reminiscent of Yosemite Sam's declaration to Bugs Bunny that "this town ain't big enough for the two of us," Oklahoma State filed a complaint on October 20, 2014 in the Western District of Oklahoma, asserting claims of trademark infringement and unfair competition. (*Oklahoma Agricultural and Mechanical Colleges Board of Regents v. New Mexico State University*, No. 14-01147 (W.D. Okla. Filed Oct. 20, 2014)). The complaint not only demanded attorney's fees and any and all profits derived from use of the Pistol Pete image, but also asked for all products, printed materials, signage and other articles that included Pistol Pete's image in NMSU's possession to be destroyed.

Just as the parties lined up for a legal showdown, the two schools settled the whole shootin' match and entered into a licensing agreement. Under the terms, Oklahoma State will collect a nominal fee of $10 a year and allow New Mexico State to continue using the Classic Aggie image on a limited number of items sold in the school's bookstore, online, or through alumni relations – this allowance is being capped at 3,000 items per year. Otherwise, Pistol Pete will remain in the hoosegow, or NMSU's penalty box, as the school will be prohibited from using the image or mascot in relation to its athletic program. If New Mexico State breaks one of the covenants, OSU would have the ability to bring another suit. For the time being, Pistol Pete and Classic Aggie will continue to coexist as rivals in separate leagues, refusing to go down without a bang.

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

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