



## Summer Edition 2017

A newsletter brought to you by the Sports Law Group at Proskauer.

Welcome to Three Point Shot, a newsletter brought to you by the Sports Law Group at Proskauer. Three Point Shot brings you the latest in sports law-related news and provides you with links to related materials. In this issue, we feature contributions from our talented group of summer associates. Thanks to John Kostelnak, Eric Wertheim and Zachary Pogust for their hard work on these articles. Your feedback, thoughts and comments on the content of any issue are encouraged and welcome. We hope you enjoy this and future issues.

Edited by **Robert E. Freeman**

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### Eastern District Heavyweight Bout Ends in Stunning Trademark Technical Knockout

Floyd Mayweather and Connor McGregor's late-August 2017 [matchup](#) may be the most highly anticipated boxing event in decades. But while "The Money Team" and UFC's lightweight champion have been preparing to defend their trash talk in the ring, two judicial combatants were defending their clients in a federal courtroom in the Eastern District of New York.

[Anthem Media Group Inc.](#) ("Anthem") and Fight Media Inc. ("Fight Media") scored a major victory in a dispute with CSI Entertainment ("CSI"), which had sought to protect its trademarks "Fight Sports" and "Fight Sports Network" by seeking an injunction to enjoin Anthem from using their "Fight Network" mark. (*CSI Entertainment, Inc. v. Anthem Media Group, Inc.*, No. 15-03508 (E.D.N.Y. June 27, 2017)). CSI, a multimedia company and syndicated television network that distributes fight-related content globally to regional sports networks (RSNs) and others, had registered "Fight Sports Network" with the United States Patent and Trademark Office (USPTO) on January 10, 2006. Anthem and Fight Media, the duo of Canadian companies behind the linear combat sports cable television channel Fight Network, have been using their "Fight Network" mark in Canada since September 23, 2005.

In 2007, CSI learned of Anthem's use of the "Fight Network" mark in Canada and sent a cease-and-desist letter requesting Anthem to stop using the term. Anthem and Fight Media responded that CSI's mark was generic and its own use was not infringing, communicating that "unless I hear from you to the contrary, FN will consider this matter settled to CSI's satisfaction." CSI apparently failed to respond to the letter, which proved to be a body blow to their argument of irreparable harm over Anthem's continued use of "Fight Network." In subsequent years, the Anthem and Fight Media brand continued to grow, as the companies invested millions of dollars in establishing a domestic and international presence. A year or so before the litigation began, Anthem applied to the USPTO to register their "Fight Network" mark, but its application was rejected based on, among other things, its similarity to CSI's "Fight Sports Network" mark.

Anthem and Fight Media's earnest push into the U.S. market and its unsuccessful trademark application prompted CSI to seek a preliminary injunction in the Eastern District of New York that would bar the duo from expanding their use of "Fight Network" in the U.S. In response, Anthem landed a flurry of legal blows to their opponent's motion, which was knocked out in a [decision](#) by Magistrate Judge Ramon E. Reyes last December and confirmed in June 2017 by Eastern District Judge Ann M. Donnelly.

The most devastating punch was landed when the court affirmed the magistrate's conclusion that CSI was not likely to succeed on the merits of its claims, its "Fight Sports Network" mark was not sufficiently used in commerce to be entitled to [Lanham Act](#) protection, and its "Fight Sports" mark was likely generic. The magistrate found that CSI failed to use the "Fight Sports Network" mark in commerce because it generally was used to identify its products on "sizzle reels" displayed during private negotiations with RSNs and not used publically to identify or mark its goods. Moreover, the court found that CSI's "Fight Sports" mark was likely generic, as it was a term that CSI itself and trade journals use to describe combat sports generally. Indeed, Jon Franklin, CEO of Glory Kickboxing and witness for the plaintiff, admitted that the terms "fight sports" and "combat sports" were synonymous.

In addition, the court found CSI's support for its allegations of customer confusion and irreparable harm were lacking. In determining there was no sufficient basis to infer a likelihood of confusion between CSI's "Fight Sports" mark and the defendant's "Fight Network" mark, the court held that CSI's mark was descriptive and the consumers of its product were sophisticated industry insiders, making the likelihood of confusion low. According to the court, CSI also failed to establish a showing of irreparable harm because, among other things, it had waited in its corner over one year after Anthem entered the U.S. market before filing suit – CSI knew of the defendants' existence since 2007, making its "wait-and see" approach unreasonable.

Finally, the court found that CSI failed to offer evidence of any reputational harm, loss of sales, or goodwill or evidence of confusion with customers. The court determined that CSI, which distributes fight-related content, and Anthem, which focuses on fight lifestyle issues and combat sports events (other than those which CSI has the right to), are "inherently different, rather than confusingly similar." In the court's opinion, the different nature of syndicated block programming as compared to a 24/7 linear channel prevented the two products from necessarily being in direct competition.

CSI's request for an injunction appears to have been an overreach, which allowed Anthem to duck the attack and deliver a fierce counterpunch. The first few rounds between these two heavyweights have ended, with Anthem ahead on points. It remains unclear as to whether CSI will answer the bell to continue this litigation or will throw in the towel and forfeit the bout.

## **Monster Truck Show Producer Crushes Appeal of Million-Dollar Verdict**

Known more for showcasing vehicular acrobatics than legal maneuvering, “Monster Jam” show producer Feld Motor Sports (“Feld”) nevertheless put on a great show before the Fifth Circuit, convincing the appellate court to uphold a million-dollar jury verdict for unpaid royalties. In its opinion, the court found that a licensing agreement between Feld and radio-controlled model maker Traxxas was ambiguous, and the district court properly presented the issue to the jury that subsequently found in Feld’s favor. ([\*Feld Motor Sports, Inc. v. Traxxas, L.P.\*](#), No. 16-40686 (5th Cir. June 30, 2017)). As such, the “monster” jury award was upheld – providing Feld with \$955,620.30 in unpaid royalties, in addition to attorneys’ fees and legal costs.

Dubbing itself “[The Fastest Name in Radio Control](#),” Traxxas produces radio-controlled models of extreme vehicles like monster trucks, speedboats and desert racers. Some of their models are powered by nitromethane and reach speeds of over 60 miles per hour. Not the basic radio-controlled cars seen buzzing on the playground, the base model wholesales for \$150 and the premium lines cost several hundred dollars.

Feld produces live entertainment, including “Monster Jam,” “[a thrill-a-second four-wheel extravaganza](#)” featuring outlandishly styled, oversized trucks (10 feet tall and weighing in at five tons), that race, perform jumps, and crush cars in a dirt arena.

In 2010, Feld licensed its “Monster Jam” branding to Traxxas for use on certain monster truck models. Under the agreement, Traxxas paid royalties to Feld for certain “Stampede” model trucks, including ones with Monster Jam branding. When the contract term ended in January 2014, Feld blew a gasket after an audit of license payments revealed Traxxas owed them an additional \$1 million in royalties. Though Traxxas claimed the agreement only covered the “base” model, Stampede, Feld insisted it was due royalties for four additional Stampede models: the Stampede VXL, Stampede Nitro, Stampede 4x4 and Stampede 4x4 VXL (the latter two models having been introduced after the parties entered into the agreement). Traxxas sought declaratory relief in Texas state court that Feld’s claims were nothing but a stunt, while Feld filed its own breach of contract suit in federal court in the Eastern District of Virginia. The cases eventually were consolidated in the Eastern District of Texas. (*Feld Motor Sports, Inc. v. Traxxas, L.P.*, No. 4:14-cv-00543 (E.D. Tex.)).

At issue in this demolition derby was the terminology in the contract setting the royalty rate, which gave Feld royalties for licensed articles “that shall be deemed to include all R/C Vehicle Units and R/C Bodies manufactured with Stampede chassis and/or Stampede bodies, whether or not branded with the Property or ‘Stampede.’” Traxxas claimed that the terms “Stampede body” and “Stampede chassis” referred to the unique parts found only on the base model Stampede and not to any additional premium models and that Feld’s theory would result in an unfair windfall. However, Feld insisted that the parties intended to include the entire Stampede line within the royalty calculation, as evidenced by their own interpretation of the contract and statements made during negotiations. The district court denied both parties’ motions for summary judgment, finding the

contract ambiguous, and empowering the jury to determine whose interpretation of the contract was correct. In a thundering verdict, [the jury found in favor of Feld](#), prompting Traxxas to mash the throttle and appeal to the Fifth Circuit. Traxxas argued that the lower court erred in determining the contract was ambiguous and the case should not have reached the jury.

Agreeing with the lower court, the Fifth Circuit found “that the Agreement [was] ambiguous and worthy of submission to a factfinder.” It reasoned that the terms “Stampede body” and “Stampede chassis” do not have definite and precise meanings in the contract and that Traxxas failed to show that such terms are industry terms, rather than “specific terms for a specific contract.” The court also stated that Feld’s interpretation was “plausible” – just because the royalty provision states that compensation is due on models “that shall be deemed to include the Stampede chassis,” which Traxxas claimed only applied to the base Stampede, it does not necessarily imply that other premium Stampede models are excluded from the licensing agreement. While the jury’s interpretation ended up more favorable for Feld, the court ruled that such a result was not “absurd,” given the other promotional benefits and exemptions contained in the agreement that benefited Traxxas. Therefore, when the dust cleared, the appeals court affirmed the district court’s ruling that the contract was ambiguous and upheld the jury award.

It looks like the Fifth Circuit has waived the checkered flag over this contest, as it appears unlikely Traxxas has enough nitro in its tank to scale the Supreme Court steps.

### **SportBrain Steps into Another Patent Suit over Line of Guess Smartwatches**

Guess?, Inc. (“Guess”) is the next checkpoint on SportBrain Holdings LLC’s (“SportBrain”) run of patent infringement suits. The clothing and accessory company was hit with a lawsuit in the U.S. District Court for the Northern District of Illinois on July 4, 2017, one of a flurry of suits filed by SportBrain concerning its data collection technology patent. ([SportBrain Holdings LLC v. Guess?, Inc.](#), No. 17-04957 (N.D. Ill. filed July 4, 2017)). The complaint alleges that the [Guess Connect Watch](#) and Watch 2 (and related software and apps) infringe upon SportBrain’s [United States Patent No. 7,454,002](#) (the “’002 Patent”). The patent describes a system for monitoring a user’s physical data (such as heart rate and the number of steps taken in a given day) via a portable device, and then wirelessly transmitting the data from the device to a server that provides feedback information to the user. SportBrain claims this system made it possible to provide users access to information about their activities, thus assisting them in monitoring their daily exercise.

Specifically, the complaint alleges that Guess has infringed the ‘002 Patent by making, using, selling, providing, advertising and/or importing, directly or through intermediaries, devices for integrating a personal data-capturing functionality into a wireless communication device, and for analyzing and supplying feedback information to a user through the combined use of the personal parameter

receiver, a wireless communication device, a network server and a website.

In tracking the legal movements of SportBrain over the past few years, it seems they have increased their pace significantly as of late and have established themselves as a frequent filer of patent infringement suits. After filing only a few lawsuits in prior years, an analysis by *Law360* concluded that SportBrain filed a total of 75 suits in 2016 (all of which allege infringement of the '002 Patent), which was good enough for a bronze medal among the list of that year's most active patent plaintiffs. The suits have targeted various watchmakers, such as Timex Group USA Inc. and Tag Heuer USA Inc., and makers of wearable devices, such as Garmin International Inc. and Fitbit Inc., among others.

SportBrain initially set out to market a "[personal fitness assistant](#)" and pedometer in the early 2000s, but never met their goal of becoming an industry leader in the increasingly popular field of wearable activity trackers. In an attempt to stay in shape, in 2016 the company altered its business strategy to enforcing its '002 Patent by shifting their patents into a separate holding company and aggressively enforcing its IP; indeed, SportBrain's founder once was quoted as expressing frustration for being muscled out of the wearables market by the big tech companies, and promising to "slingshot our IP at all the offenders and unleash the full extent of the law until justice is served." SportBrain has maintained its quick pace of lawsuits in the current year, having filed more than two dozen of them according to court records.

Earlier this year, and before the race against Guess was underway, the patent at the heart of SportBrain's litigation routine was challenged in the USPTO by a third party via an inter partes review (IPR). In a [decision](#) released in February, the Patent Trial and Appeal Board (PTAB) stated that the petitioner had demonstrated a reasonable likelihood that it would prevail in establishing the unpatentability of all asserted claims of the '002 Patent and instituted the IPR.

Moving forward, it remains to be seen how things will work out as SportBrain puts Guess through its paces over its smartwatch technology. If we know one thing for sure, it's that all interested parties will continue to monitor the movements of SportBrain and the endurance of the '002 Patent in the coming weeks and months.

## Three Point Shot

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Proskauer has more than 50 years of experience counseling the world's premier sports organizations on their most critical and complex matters.

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