

# Three Point Shot

March 2014

## D'oh! Simpsons Voice Actor Scores Big Win in Baseball Character Suit

Popcorn, peanuts, character and voice rights in one jam-packed action for declaratory relief!

Thank you for joining us on this sunny day at the ballpark, where [Hank Azaria](#) is playing against the Tony award-nominated actor, [Craig Bierko](#). Known as the voice of several characters on "[The Simpsons](#)," Azaria has made a career out of stretching his vocal chords to the limit. Fellow actor Bierko is no slouch, however, as he has performed such high-profile roles as the lead in "The Music Man" on Broadway and the antagonist in the film "[Cinderella Man](#)." We know both players have what it takes to make it in Hollywood. But head-to-head in a copyright suit, who will prevail?

Over 40 years ago, Pete Rose barreled into Bud Harrelson trying to break up a double play during a 1973 NLCS Reds-Mets playoff game, [igniting a bench-clearing brawl](#). The Azaria-Bierko rivalry began a little differently - with a "[Funny or Die](#)" video. In 2010, Azaria portrayed the fictional sportscaster Jim Brockmire in an online short exhibited on the popular comedy video website. Brockmire is a colorful baseball announcer who uses obscure cultural references, wears a plaid jacket with a rose on his lapel, and has the apparent admiration of actual famous sportscasters. With over 570,000 views, Azaria aimed to develop the popular video into a feature-length motion picture based on the Brockmire character. However, Bierko cried "foul ball" when he saw the video, and subsequently claimed ownership over the baseball announcer character and voice used by the character in Azaria's video.

While Azaria and Bierko duked it out off the field, they weren't always adversaries. In 1990, Azaria met Bierko and shared his baseball announcer voice with Bierko. As it happens, Bierko also had his own announcer voice. Like comedy kindred spirits, for years the two would apparently leave voice messages for each other using their respective baseball announcer voices.

In 1997, this ballgame really started to heat up when Azaria purportedly called Bierko to find out how he would feel if Azaria developed a project using a baseball announcer voice and character. According to Azaria, Bierko stated that he "would not be comfortable" if Azaria exploited such a character, and Azaria scrapped the project at that time.

However, when "Funny or Die" asked Azaria to pitch characters for a short in 2009, he trotted out good ol' Jim Brockmire in an attempt to send laughs all the way up to the cheap seats. Following the video's release, Bierko threw a fastball by demanding that Azaria cease and desist from exploiting the baseball announcer voice and, by inference, the Brockmire character.

In response, Azaria brought in a pinch hitter, his attorney, who filed a [complaint](#) in federal court seeking declaratory relief regarding copyright ownership of the Brockmire character and Bierko's threatened claim of breach of implied contract based upon the 1997 phone conversation. Azaria claimed that Bierko's assertion "created a cloud over the rightful ownership" of the voice and impeded Azaria's ability to develop the Brockmire character.

In the bottom of the ninth, Azaria swung for the fences by filing a [motion for summary judgment](#) arguing that Bierko owned no copyright interest in the Brockmire character (and even that Bierko could not claim any copyrightable interest in his version of such a voice or non-delineated character not fixed in a tangible medium). Azaria also argued that the parties had no implied or express contract pertaining to the character. Bierko countered with a nasty curve ball, claiming in [opposition papers](#) that genuine issues of material fact existed over issues of copyrightability and whether Bierko had any right in the Brockmire character.

However, Azaria knocked Bierko's ball out of the park when the court granted Azaria's motion for summary judgment ([Azaria v. Bierko](#), No. 12-9732 (C.D. Cal. Feb. 21, 2014)). The California court held that Azaria's Jim Brockmire creation was copyrightable because the "Funny or Die" video depicted an identifiable, well-defined character, akin to other protectable characters like Tarzan, Sherlock Holmes or James Bond. In contrast, the court ruled that Bierko's "Sports Announcer Character" was not copyrightable because the character was "extremely vague" and the few personal attributes beyond the character's voice were never fixed in a tangible medium. Finally, the court tossed out Bierko's implied contract claim based upon the development of "sports announcer voices" informally discussed by the parties, finding that no particular voice was ever "disclosed for sale" as required by California precedent to form an implied contract.

In the end, the court allowed Azaria to keep on Brockmire's plaid coat and stroll over to [Moe's Tavern](#) to celebrate his victory with his pals Chief Wiggum, Comic Book Guy and Apu.

### **Shufflin' for a Cause**

[Super Bowl XLVIII](#) has come and gone, but "[Bear Down](#)" for some bonus football action as six members of the [Shufflin' Crew](#) from the [1985 Super Bowl Champion Chicago Bears](#) head to court to defend their honor.

Plaintiffs Jim McMahon, Richard Dent, Steve Fuller, Willie Gault, Mike Richardson and Otis Wilson are well-known for their exploits [on the gridiron](#). Fans surely also remember them fondly for their epic performance on the mike. "[The Super Bowl Shuffle](#)" sold more than a half-million copies and, at its peak, reached No. 41 on the Billboard charts. In agreeing to perform the song, the Shufflin' Crew had a charitable objective to give back to Chicago's neediest families, as evidenced by the late Walter Payton's rap verse: "We're not doing this because we're greedy / The Bears are doing it to feed the needy."

With the [continuing influence](#) of the Shuffle, the underlying rights affiliated with the song have proven valuable over the years. Recently, when members of the Shufflin' Crew realized that they were arguably being deprived of their rights under "The Super Bowl Shuffle" [Royalty Agreement](#), they decided to strap on their helmets and take the field in the arena of the Illinois Circuit Court.

On January 31, they filed a [complaint](#) against Renaissance Marketing Corporation and Julia Meyer alleging that Meyer, in using Renaissance Marketing Corporation as exclusive agent for licensing "The Super Bowl Shuffle," has marketed, distributed, and sold licenses containing the likeness of the Shufflin' Crew without their permission. Meyer claims to own rights, title and an interest in the Super Bowl Shuffle after a purported assignment of the Royalty Agreement from Red Label Records, Inc. to Richard E. Meyer, her late husband.

The original Royalty Agreement between Red Label Records and the Shufflin' Crew [provides that](#) Red Label Records may assign its rights to any third party upon notice to and "consent of a majority of the members of the Shufflin' Crew, which consent shall not be unreasonably withheld." (Yes, the "Shufflin' Crew" was the actual name used in the contract.) Meanwhile, the plaintiffs allege that Red Label Records neither sought nor received permission from the Shufflin' Crew to assign its interest in "The Super Bowl Shuffle" to Richard E. Meyer in 1986. Thus, by inference, the Shufflin' Crew argues that since Richard E. Meyer was never validly assigned any rights to "The Super Bowl Shuffle," such rights could not have transferred to Julia Meyer upon her husband's death. Moreover, the plaintiffs assert that even if the assignment of rights was valid, those rights terminated and reverted back to them because the term of the underlying Royalty Agreement ended in 1989.

To further the charitable objective of "The Super Bowl Shuffle," the plaintiffs ask that a constructive trust be established to collect all funds that allegedly should have been transferred to the players for their selected charitable purposes. Additionally, they seek damages under theories of conversion and unjust enrichment, as well as a declaratory judgment: (1) that the aforementioned assignment of "The Super Bowl Shuffle" was invalid, and (2) that the members of the Shufflin' Crew own their identities, likeness and performances in "The Super Bowl Shuffle."

If the lyrics of "The Super Bowl Shuffle" are any indication, it is not wise to try to pull a trick play against the Shufflin' Crew. As best stated in a verse by William "Refrigerator" Perry: "I may be large, but I'm no dumb cookie."

Only time will tell if the Shufflin' Crew's claims prove meritorious – we already know that their performance far exceeded such past NFL footwork as [The Ickey Shuffle](#) and [Mark Gastineau's sack dance](#). For now, throw on your [shades](#) and wait for the Illinois Circuit Court's review of the "The Super Bowl Shuffle" contract.

## **The Perfect Storm over the "The U" Documentary**

Here comes the story of the hurricane.

That is, the story of the University of Miami Hurricanes.

Kevin Brinkworth, fullback for the Miami Hurricanes from 1991 to 1996, is suing filmmaker Billy Corben and his production company, claiming Corben has yet to pay or credit Brinkworth for his work on the 2009 ESPN documentary, "The U."

[Airing to a record 2.3 million viewers](#), "The U" follows the University of Miami's football program from anonymity in the 1970s to notoriety in the 1980s and 1990s. This story is told through footage of the team and the time period, cut with interviews of ex-Hurricane players and coaches – interviews which Brinkworth alleges he was integral in securing.

According to Brinkworth's [complaint](#), Brinkworth set up interviews with former Hurricane coaches and players, with whom Corben was unable to make a connection due to Miami's reticence to participate in the project. These fifteen interviews, which included the former Head Coach Jimmy Johnson, ultimately provided a third of the movie's footage. Despite this allegedly hefty contribution to the documentary, Brinkworth got the stiff arm from Corben: Brinkworth did not receive associate producer credit or any compensation for his work, and Corben refused to use any footage provided by Brinkworth.

Asserting breach of contract and unjust enrichment claims, among others, Brinkworth seeks damages to recognize and compensate him for his services on the film. ( *Brinkworth v. Corben*, No. 13-06705 (Fla. Cir. Ct. filed Feb. 25, 2013)). Brinkworth points to a contract he and the filmmakers entered into in 2008 whereby, among other things, Brinkworth would act as a consultant and liaison to former members of the University of Miami football program in exchange for associate producer credit and payment of ["industry standards and/or good faith value."](#)

Unfortunately, no such contract was attached to plaintiff's complaint initially. This [false start](#) served as the foundation for defendants' April 2013 [motion to dismiss](#) for failure to state a cause of action, arguing it is difficult to breach a contract that does not exist.

The forecast is not entirely devoid of sun for the former Hurricane. While a Florida court recently dismissed several of Brinkworth's claims, with leave to amend, and denied Brinkworth's request for an injunction barring further sales of the film, the judge did allow the breach of contract claim to go forward, taking a page from [motivational speakers](#) in suggesting that Brinkworth's damages, if any, could be quantified ("[Yes, you can](#)" - "[Big dollars. It's easily calculable.](#)")

With the case currently pending, "The U" proves that for Brinkworth and Corben, for the time being, it still is [All about the "U"](#).

#### [Related Professionals](#)

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