

# Three Point Shot

January 2014

## "Yep," Floyd Mayweather, Jr. Wins Final Knockout in Copyright Infringement Suit

Facedown on the canvas, the boxer slowly opens his eyes. His ears still ringing from the punch that knocked him down, he can vaguely hear the referee counting, "1! 2! 3! 4!..." Meanwhile, the champion boastfully circles the ring, pumping his chest in celebration of imminent victory. The referee continues the count, "5! 6! 7!..." Does the opponent have the strength to stand up? In this case, the opponent is rapper Anthony Lawrence Dash, and before the referee reaches "10," Dash rises up to face boxing great [Floyd Mayweather, Jr.](#) for another round in the ring known as America's judicial system.

This is not the first time we've covered the *Dash v. Mayweather* case – avid readers will recall our discussion of the first installment of this case in the [June 2012 newsletter](#). Here's a quick recap for the uninitiated: In 2005, Dash wrote a musical track called "Tony Gunz Beat" ("TGB"), which Mayweather then incorporated into his own rap song, entitled "Yep," without permission. Then, in 2008 and 2009, Mayweather used "Yep" as his entrance music at [two World Wrestling Entertainment, Inc.](#) ("WWE") [events](#) aired on pay-per-view and sold on DVD. Dash subsequently [sued](#) Mayweather, his [promoters](#), his record label, and the WWE for copyright infringement in April 2010. Two years later, the district court [granted](#) the defendants' motions for summary judgment, ruling that Dash was not entitled to actual damages, profits of the infringer, or statutory damages, and dismissed the case. In short, Dash failed to present any evidence demonstrating a causal link between the alleged infringement and the enhancement of a revenue stream at the WWE events in question.

As it turns out, the district court's ruling was only the first round in this barnburner of a bout. Bobbing and weaving, Dash threw a counterpunch at Mayweather by filing a [Motion to Reconsider](#) on June 7, 2012. Unfortunately for Dash, the blow never landed, and the district court once again rang the bell by [denying](#) the motion and refusing to "relitigate matters previously decided by the court." Thus, for the second time, Dash was on the ropes.

But like any spirited prizefighter, Dash refused to throw in the towel. Dash jumped up from the canvas and [appealed](#) to the Fourth Circuit on the issue of his entitlement to actual damages and the infringer's profits under [17 U.S.C. § 504\(b\)](#). However, Round 3 went just like the first two, and this [Rocky](#) wannabe was dealt a knockout blow in September when the Fourth Circuit affirmed the district court's grant of summary judgment in favor of the defendants ([Dash v. Mayweather](#), 731 F.3d 303 (4th Cir. 2013)).

Regarding actual damages, the court held that Dash did not present sufficient nonspeculative evidence to show that TGB had a fair market value. Rather, to support his claim for lost licensing fees, Dash relied exclusively on his cornerman, an expert who claimed that Dash would have earned up to a \$3,000 licensing fee for TGB, a figure based upon fees paid by the WWE event promoters to use the works of other established artists. However, the court held that the works by these established artists were not comparable to TGB and Dash failed to prove a fair market value for his work, compounded by the fact that Dash had never sold or licensed one of his beats to ... well, anyone.

Regarding profit damages, the court held that Dash failed to prove the defendants' gross revenues were reasonably related to the infringement, particularly since consumers and businesses paid the promoters prior to discovering that "Yep" would be played. Finally, Dash gave Mayweather a walkover by stipulating that he had no evidence that the playing of "Yep" at the WWE events increased any of the defendants' revenue streams.

With this appellate punch, "[Money](#)" Mayweather finally has knocked out his opponent. But has Dash kissed the canvas for the last time? Check back in with Three Point Shot during the rest of 2014 and we'll see if the [highest court in the land](#) has anything to say about it.

### **Down 40-Love, Tennis Channel Serves Appeal to Supreme Court**

Never say [never](#). Just ask Andy Murray.

After years of [frustration](#), the Scottish tennis sensation (... and occasional [rap artist](#)!) broke through in July to become the first man from the UK in [77 years](#) to win Wimbledon, arguably tennis' grandest stage.

In [smashingly](#) similar fashion, the [Tennis Channel](#), coming off a disappointing defeat in the D.C. Circuit, is [now seeking](#) a major comeback on the grandest judicial stage: the Supreme Court of the United States.

For those who have been following the ball, we have written about this notable carriage discrimination case in Three Point Shot not [once](#), but [twice](#).

As explored in those articles, the match between Tennis Channel and [Comcast](#) dates back to Tennis Channel's 2010 claim that Comcast violated Section 616 of the Communications Act, [47 U.S.C. § 536](#), by not positioning Tennis Channel on the same programming tier as the Comcast-affiliated [Golf Channel](#) and [NBC Sports Network](#) (formerly, Versus). While the Federal Communications Commission ("FCC"), by way of a 3-2 vote, [found](#) on July 16, 2012 that Comcast discriminated against Tennis Channel by not distributing its video programming more broadly to subscribers, the D.C. Circuit returned serve on May 28, 2013, and [granted](#) Comcast's petition to review the FCC's ruling. In doing so, the Court of Appeals stayed the FCC's ruling, which required Comcast to carry the Tennis Channel on the same distribution tier as Golf Channel and NBC Sports Network, as well as pay a \$375,000 fine.

When we left off this summer, Tennis Channel had just requested a player challenge of the line judge's "out" call and petitioned the Court of Appeals for [en banc review](#) of the decision. On September 4, 2013, however, the Court of Appeals pushed Tennis Channel to match point when, in a [per curiam opinion](#), it denied Tennis Channel's petition.

Now, down two breaks, Tennis Channel is ready to take one final swing at its claim. On December 3, 2013, it [filed](#) a petition for a writ of certiorari to the U.S. Supreme Court. In a statement, Tennis Channel [explained](#) that it seeks Supreme Court review "because the lower court strayed from longstanding federal discrimination law to invent an arbitrary and unfair standard for deciding cable carriage complaints."

When Andy Murray was down 4-6, 3-6 after two sets of his 2013 Wimbledon Quarterfinal match against Fernando Verdasco, many assumed that this would be just another disappointing showing for "[Muzzard](#)" at the All England Club. However, after bouncing back 6-1, 6-4, 7-5 in the final sets against Verdasco, Murray would lose only one more set the rest of the tournament en route to his historic victory. While Tennis Channel's claims remain tenuous, only time will tell if it, like Murray, can overcome the odds on the ultimate stage.

Stay tuned for the all-important fourth Three Point Shot article about the outcome, where we will dare to complete the Grand Slam á la Rod Laver and Steffi Graf.

## **Louisiana Court Not "Ultimate Fan" of Sports Marketer's Trademark**

Ultimate sports fans can crack open a cold one to celebrate a recent Louisiana ruling clearing Anheuser-Busch's Ultimate Fan sweepstakes from trademark infringement claims. The major brewing company (and famed sponsor of the stop-motion animated [Bud Bowl](#)) prevailed in a suit over the use of the phrase "Ultimate Fan" in its sports-related marketing, a decision that effectively benched plaintiff Action Ink's THE ULTIMATE FAN trademark.

Action Ink, a sports marketing firm, first [registered its trademark](#) for THE ULTIMATE FAN in 1985 as a signifier for its concept for "promoting the goods and/or services of others by conducting a contest at sporting events." Since the mark's inception, Action Ink has both teamed up with and sparred with major sports franchises, corporations and universities in its mission to hold promotional contests at sporting events. However, its results have been mixed: some entities halted or made changes to "Ultimate Fan" promotions upon receiving a cease and desist letter from Action Ink, while others contested Action Ink's claims. In fact, Action Ink and Anheuser-Busch first exchanged polite correspondence in 1988 over the brewer's use of the mark in a baseball promotion.

Several years ago, Action Ink turned its attention to football promotions, eventually filing suit against one team's use of the "Ultimate Fan" mark in online fan pages. Subsequently, Action Ink sued Anheuser-Busch.

In its [complaint](#), Action Ink outlined Anheuser-Busch's "pervasive use" of THE ULTIMATE FAN mark in a slew of advertisements and commercials over the past three years, including a national "[Ultimate Fan Experience](#)" sweepstakes, with one prize being tickets to Super Bowl XLVI. Given defendant's use of a phrase identical to plaintiff's trademark and in association with a concept similar to defendant's (promotional contest in tandem with sporting events), Action Ink claimed Anheuser-Busch's sweepstakes were nothing short of [unsportsmanlike conduct](#) under the Lanham Act.

In July, a Louisiana district court granted defendant Anheuser-Busch's summary judgment motion and cancelled plaintiff's mark, citing two independent grounds: (1) abandonment of the mark, and (2) failure to demonstrate a likelihood of confusion between plaintiff's THE ULTIMATE FAN mark and defendant's Ultimate Fan Sweepstakes. ([Action Ink, Inc. v. Anheuser-Busch, Inc.](#), 2013 WL 3776548 (E.D. La. July 17, 2013)).

In cancelling plaintiff's mark, the court stated that it was bound by a prior decision involving Action Ink and a sports franchise, in which that judge booted Action Ink's claims, [holding](#) Action Ink had abandoned its mark due to lack of use since 1995.

In the alternative, the court dismissed the trademark infringement claims because Action Ink failed to show any likelihood of consumer confusion between its mark and defendant's promotions. In finding the plaintiff's mark "quite weak," the court pointed out that many companies and multiple sports franchises have run "Ultimate Fan" promotions, and that – ultimately – there was "no possibility that consumers have been unable to discern whether a contest called "The Ultimate Fan" originates from plaintiff or another company because plaintiff has no public presence related to the Mark."

Action Ink contested the call but, faster than you can say instant replay, the court denied plaintiff's motion for reconsideration in a succinct [order issued October 17](#). Action Ink isn't quite ready to be buds with Anheuser-Busch, however. Deeming the ruling "[incorrect](#)," Action Ink threw a Hail Mary and [appealed](#) the decision to the Fifth Circuit on October 22.

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