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Three Point Shot

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Jockeying for Dollars: Kentucky Downs Faces Two Lawsuits over Betting Machines

And they're off ... to the United States District Court for the Western District of Kentucky. One of the country's premier racetracks, Kentucky Downs faces two lawsuits surrounding its use of historical horse race betting machines. On April 2nd, AmTote International Inc., a betting machine company, sued Kentucky Downs racetrack, three of its senior executives and Encore Gaming, LLC ("Defendants"), alleging that Defendants misappropriated proprietary trade secrets relating to its pari-mutuel betting system and breached the parties' agreement prohibiting reverse engineering of AmTote's proprietary betting technology. (*AmTote International Inc. v. Kentucky Downs, LLC*, No. 1:15-CV-47-GNS (W.D. Ky., filed Apr. 2, 2015)). Not horsing around either, RaceTech, a company that produces pari-mutuel "historical racing" betting machines, filed suit on April 30th, claiming that Kentucky Downs' historical racing betting machines infringe its patents. (*RaceTech, LLC v. Kentucky Downs, LLC*, No. 1:15-CV-59-GNS (W.D. Ky., Amended Complaint filed June 19, 2015)).

As the name indicates, historical racing involves betting on previously run races. The slot-like machines randomly select a race from a video library of thousands of previously run races and remove all identifying information (e.g., identity of horse race, racetrack name and participating horses), providing gamblers with only general data from the Daily Racing Form as it existed on the day of the original race. After betting, players are shown a video clip of the race and its official results. The outcomes are taken from the actual race shown, thus differentiating historical race betting from random games of chance. Under Kentucky law established in the *Appalachian Racing* decision, bets on horse races must be based on a pari-mutuel system, in which the track is not directly involved in the wager. Gamblers bet against each other, and the odds are determined by the size of the wagering pool. The track does, however, end up "in the money," as it receives a commission.

Historical horse racing galloped onto the scene in Kentucky in July 2010 after the Kentucky Horse Racing Commission amended its regulations under Kentucky Administrative Regulations 1:120 to allow it. This change "stirrup-ed" gambling activity in the state. Following a Franklin Circuit Court decision in late December 2010 upholding the regulatory amendment, Kentucky Downs placed historical racing machines on its grounds in September 2011. The revenue generated by the new betting machines has allowed Kentucky Downs to offer the country's most lucrative purses. The track's one-month record for historical wagers trots in at nearly $32 million.

Kentucky Downs opened in 1990 in Franklin, Kentucky and the track's 1 3/8-mile-long turf course has three turns. Located next to the border with Tennessee, the track was originally known as the Dueling Grounds Racetrack, because historically it was the site of frequent duels among Tennesseans. Fortunately, aggrieved parties no longer take the Burr-Hamilton approach to problem solving and instead typically seek out the best legal counsel.

The lawsuits against Kentucky Downs stem from the track's decision, in April 2015, to replace AmTote's betting machines with machines provided by Encore Gaming (a company founded in 2013 by a Kentucky Downs executive and a Defendant in the action). In its complaint, AmTote claims: "Encore could not have feasibly developed these [betting machine] products and services using available time and resources except with reference to and reliance on AmTote's confidential and proprietary information." AmTote asserts that Encore misappropriated information provided during betting machine training sessions with Kentucky Downs personnel, and also learned about its proprietary technology by obtaining access to daily machine system reports. AmTote asks the court to award it $75,000 in compensatory damages and enjoin Defendants from using the Encore betting machines.

Kentucky Downs, keeping pace with AmTote, quickly filed a motion to dismiss, declaring that it developed its machines separately and that the two machines are different, since Encore's machines are only used for historical betting while AmTote's machines also are used to bet on live races. Kentucky Downs also stated that even if it had wanted to reverse engineer AmTote's machines it could not, because it had no access to AmTote's source code, which AmTote admits is housed securely in a facility in Maryland. In its June 2nd response in opposition to Kentucky Downs' motion to dismiss, AmTote asserts that its complaint provided sufficient factual allegations to meet the lower pleading standard for trade secret cases, which takes into account the need to protect against disclosure.

Following just a few lengths behind AmTote, RaceTech sued Kentucky Downs for multiple counts of patent infringement. RaceTech alleges that the parties had "entered into a contract for Kentucky Downs to be the exclusive provider of RaceTech's Parimutuel [sic] Historical Gaming Systems," but Kentucky Downs terminated the contract and subsequently began working with Encore Gaming. As a result of their relationship, RaceTech claims that Kentucky Downs had knowledge of its historical racing machine system patents and that the track "work[ed] with Encore Gaming to make, use, offer for sale, and sell infringing systems." Kentucky Downs responded by filing a motion to dismiss, asserting that RaceTech's patents are invalid under 35 U.S.C. § 101 because "they claim the invention of an abstract idea or the implementation of an abstract idea with generic computer equipment." RaceTech then amended its complaint to include two additional counts of patent infringement based on one additional patent.

The two lawsuits have only reached the starting post of the legal process. The homestretch lays furlongs away on a track that may be muddied by the daily double of motions and lengthy discovery. Perhaps one party will pull up and settle. Or, the end might be a photo finish.

Hold That Pose: Can the Bikram Yoga Sequence Be Protected by Copyright Law?

Over the past decade, the Copyright Office has issued hundreds of yoga-related copyrights for books, videos, and the like —protecting intellectual property for a fitness/spiritual lifestyle that has bent itself into a $27 billion industry. Although yogis have several options to twist themselves into shape, one style in particular has stood off the mat—Bikram yoga.

A type of hatha yoga characterized by a set series of postures and breathing exercises, Bikram yoga is performed in a room heated to a high temperature (roughly 105 degrees Fahrenheit). All Bikram classes run for 90 minutes and consist of the same series of 26 postures (the "Sequence"), including two Pranayama breathing exercises. Popularized by esteemed guru Bikram Choudhury in the 1970s, Bikram yoga is now taught by instructors all over the United States.

The popularity of Bikram yoga appears to have shaken the original founder's zen. Indeed, Mr. Choudhury has sued several studios, like NYC's Yoga to the People, for copyright infringement, reaching settlements that have prevented studios from using the Bikram name or copying the Bikram Sequence. Faced with lawsuits, such studios must either sweat it out in court or otherwise capitulate and lie down in savasana (or corpse pose).

One such case occurred in 2011, when Choudhury and Bikram's Yoga College of India sued Evolation Yoga for copyright infringement and related claims (e.g., trademark infringement and violations of teacher-certification agreements). Codefendants (also husband and wife) Mark Drost and Zefea Samson are former trainees of Bikram's course of study and became authorized to teach Bikram's Basic Yoga System. The two eventually formed Evolation Yoga, which uses the same Sequence, prompting a cease-and-desist letter demanding the pair stop teaching Bikram yoga. The plaintiffs argued that the Bikram yoga Sequence should be protected as a compilation and as choreography (and are within the ambit of Choudhury's various copyrights for his yoga-related books depicting the Sequence).

In December 2012, a California court dismissed Choudhury's copyright claims, leaving related trademark and breach of contract claims for a future session. The court remained inflexible to the notion that the Sequence of Bikram yoga poses could be protected by copyright law, causing studios everywhere to relax their muscles. (*Bikram's Yoga College of India, L.P. v. Evolation Yoga, LLC*, 2012 WL 6548505 (C.D. Cal. Dec. 14, 2012)). The court held that although books or photographs that depict a compilation of exercises may be copyrightable, the compilation authorship would not extend to the selection of the exercises themselves depicted in the photographs: "There is a distinction between a creative work that compiles a series of exercises and the compilation of exercises itself. The former is copyrightable, the latter is not." Moreover, the court found that, as a functional system that promotes physical and mental benefits, yoga postures cannot be registered for copyright. In dismissing Choudhury's claim, the opinion meditates on a U.S. Copyright Office statement of policy declaring that a compilation of exercise or yoga moves does not fall under one of the Copyright Act's eight categories of authorship. Consequently, and according to the policy statement, yoga poses are ineligible for copyright protections. (See 77 Fed. Reg. 37605 (June 22, 2012).)

Appealing to a higher power (that is, the Ninth Circuit), Choudhury's lawyers are trying to get the case sent back to the yoga mat. Last month at oral argument, Choudhury's counsel argued that, while individual poses are not copyrightable, the guru is trying to protect his "creative vision" in his specific 26-pose Sequence. Balancing yoga positions with ballet poses, Choudhury argued that all such forms of physical movement should be eligible as a protectable compilation or expressive choreographic work, or, at the very least, protectable against verbatim copying. The appellants also argued that the Copyright Office's policy statement should not be entitled to any deference by the court.

Remaining firm in tadasana (or mountain pose), the defendants reasserted and stretched the lower court's ruling that copyright protection extends only to books containing Choudhury's instructions, not to the routine itself—much like a cookbook author's inability to protect the actual cooking of a recipe. Bikram's arguments also have drawn bad vibes from Yoga Alliance, an international trade association, which filed an amicus brief in support of defendant, finding that Bikram's position "would be devastating to the yoga community."

Until the court of appeals releases its decision, Bikram yogis across the country will continue to warrior their way through 105-degree heat. (Don't try this at *Om.*)

Update: "Jumpman" Copyright Suit Bounces Off the Rim

Six months after tip-off, the "Jumpman" copyright suit against Nike has been deemed an air ball. As we discussed back in the February edition of the newsletter, Nike's Jordan Brand has long been recognized by its "Jumpman" logo: the enduring image of the legendary Michael Jordan sailing toward the basket in grand jeté pose, ball in outstretched hand. However, well-respected photographer Jacobus Rentmeester came off the bench to file a lawsuit claiming that Nike created this logo using a photograph he took of Jordan for a special issue of LIFE magazine for the 1984 Summer Olympics. The lawsuit explained Rentmeester's thought process as he guided Jordan to leap unnaturally and hold the ball using his nontraditional left hand. Such efforts, according to Rentmeester, clearly established the distinctive and original elements of the copyrighted photo. Nike grabbed the rebound and took a similar photo of Jordan, this time in front of the Chicago skyline. This photo eventually led to the Jumpman silhouette.

Rentmeester sued Nike in Oregon federal court for copyright infringement and claims under the Digital Millenium Copyright Act (DMCA) for alleged removal of copyright management information from copies of the original photo (Rentmeester v. Nike, Inc., No. 15-00113 (D. Or. filed Jan. 22, 2015)). Rentmeester claimed that he created a unique pose that did not reflect Jordan's natural jump or dunking style. Although he admitted that Nike paid him $15,000 in March 1985 for a limited license to use the image on billboards and posters for two years, Rentmeester alleged that the company stepped out of bounds by using a similar depiction of Jordan in later marketing materials as well as when they created the Jumpman logo in 1987. In Rentmeester's mind, Nike unjustly benefited from a billion-dollar marketing slam and continued to use the Jumpman logo without payment since the deal expired in 1987. With Rentmeester now driving into the lane, Nike went up for the block, declaring in its motion to dismiss that Rentmeester "does not have a monopoly on Mr. Jordan … or images of him dunking a basketball. His copyright begins and ends with his specific original expression of that subject and theme."

On June 16, an Oregon federal judge agreed with Nike and dismissed the lawsuit, stating that Rentmeester had shot a brick (Rentmeester v. Nike, Inc., No. 15-00113 (D. Or. June 16, 2015)). U.S. District Judge Michael W. Mosman stated that Rentmeester's photo was worthy of only the narrowest copyright protection. Additionally, the court ruled that Nike's Jumpman image was not similar enough to Rentmeester's to find that Nike infringed his copyright.

The court explained the range of copyright protection available for Rentemeester's photo, requiring the court to determine whether the allegedly infringing work is "substantially similar" to the copyrighted work. What qualifies as substantially similar varies from case to case, depending on the underlying facts and whether the copyrighted work at issue involves a wide or narrow range of expression. For example, if there's a wide range of expression (e.g., there are countless ways to depict an alien invasion), the work will garner broad protection; on the other end of the floor, if there's only a narrow range of expression (e.g., such as depicting a red ball on a white canvas), then the copyright protection is deemed "thin," and a work must be virtually identical to infringe. In this argument, Nike won the doctrinal jump ball. Although a lot of creative decision-making went into staging the Rentmeester photograph, the court found the idea expressed in the Rentmeester photo – Michael Jordan in a gravity-defying dunk – to have a narrow range of expression that deserved only thin protection under the Copyright Act. The court held that although there were "certainly similarities" between the two expressions of the pose, a closer examination revealed "several material differences" (e.g., body position, background, Jordan's size), "resulting in a dismissal of the copyright claims for a lack of substantial similarity. With respect to the iconic logo developed from Jordan's pose in the photograph, Rentmeester's claims also fell short because the court found that the two respective poses depicted in the photographs were not substantially similar.

Judge Mosman's ruling resulted in a no-call against Nike, dismissing the case in its entirety. The decision allows Nike to keep pick and rolling with one of the most profitable and recognized apparel logos of all time.

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