Proskauer

Three Point Shot

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Strike Two You're Out? Ninth Circuit Upholds Refusal to Admit Drug Test Samples in Bonds Perjury Trial

The government has swung and missed again in its criminal case against baseball slugger Barry Bonds. Federal prosecutors charged the single-season home run record holder with perjury in a 2003 statement before a grand jury, during which he denied ever taking performance-enhancing drugs. With one judge dissenting, a panel of the U.S. Court of Appeals for the Ninth Circuit ruled that the district court was correct when it refused to admit evidence in the form of lab samples bearing Bonds' name that tested positive for steroids.

The government attempted to connect those samples to Bonds through his former trainer, Greg Anderson. As the court related in its opinion, Bonds and Anderson knew each other from grade school and high school. When they reconnected years later, Anderson began to help Bonds with weight training and nutrition, and provided him with various dietary supplements. In the 2003 statement for which Bonds is being prosecuted, Bonds said that as he and Anderson were longtime friends, he trusted Anderson and didn't believe that any of the supplements that Anderson provided him were harmful or contained steroids. The government contends that some of these substances did contain steroids and that Bonds knew it.

The lab test samples at issue before the Ninth Circuit were discovered when the government raided BALCO Laboratories in 2003 and seized blood and urine samples of a number of professional athletes that tested positive for steroids. According to the government, Anderson delivered certain of the samples to the lab and identified them as having come from Bonds. That, and other evidence collected in the raid, gave the government enough dirt on Anderson to indict him on various conspiracy and drug charges. Anderson eventually pleaded guilty to illegal steroid distribution and was sentenced to three months in prison.

The government then turned its attention to prosecuting Bonds, intending to rely on the BALCO lab test samples to prove that he committed perjury before the grand jury. But things didn't go as planned. Strike one was when the government tried to get Anderson to testify that Barry Bonds gave him the samples and identified them as his own—testimony which is clearly admissible. But Anderson kept quiet and refused to testify and went to jail again, this time for contempt of court.

Strike two was when the government attempted to use the testimony of James Valente—a BALCO employee—who would have testified that Anderson gave him Bonds' samples and identified them as such. In proffering Valente's hearsay testimony, the government sought to rely on a slew of evidentiary exceptions, but the district court refused to apply any of them. On the eve of Bonds's perjury trial, the government called a time out to allow an appeal to the Ninth Circuit.

On appeal, the government stuck to three exceptions: the residual exception (Fed. R. Evid. 807), the exception for authorized statements (Fed. R. Evid. 801(d)(2)(C)), and the exception for statements by an agent (Fed. R. Evid. 801(d)(2)(D)).

The government first argued that the residual exception applies because Anderson's statements "almost" fell within several other hearsay exceptions and because Anderson was not available to testify. The Ninth Circuit disagreed, holding that "almost" is not good enough, and that "a near miss…was nevertheless a miss" and did not compel the trial court to give the Fed. R. Evid. 807 exception. The court also stated that Anderson's refusal to testify is not exceptional at all, as noted by the fact that there is a separate hearsay rule that deals with the very issue of unavailable declarants and, in fact, prevents their testimony from being used in court.

The government next attempted to bring in Anderson's statements through exceptions for authorized statements, arguing that Bonds had authorized the statements that Anderson made to Valente regarding the origin of the blood and urine samples. But the Ninth Circuit ruled again that the district court was correct in holding that the record failed to establish this particular authorization.

Finally, the government argued that because Anderson was testing Bonds' samples, there was an agent or employee relationship between the two men. But two judges agreed that Anderson was an independent contractor for several reasons, including the fact that Bonds stated that he considered Anderson a friend, not an employee (the subjective intent of the parties is relevant in determining independent contractor status). Also, there was no control by Bonds over Anderson—in fact, Anderson asked for the samples and tested them on his own initiative.

In an 0-2 hole against Bonds, you might think the prosecutors would head to the showers but, instead, the government has opted to go forward with its remaining evidence. A new trial date is set for March 2011.

McMahons' Feud with Wife of Former WWE Wrestler Goes Another Round – Will There Be a Knockout?

While the world of professional wrestling is accustomed to feuding between its members in its ongoing performance soap opera, the family of former pro wrestler Owen Hart seeks to deliver a different type of smackdown on both World Wrestling Entertainment Inc. ("WWE") and the company's corporate heads, CEO Vince McMahon and his wife, Linda McMahon. This cage match won't take place in the ring, but in the District of Connecticut, where Hart's widow, Martha Hart, filed an action in June 2010 alleging improper exploitation of Hart's career and personality. The play-by-play of this legal duel cannot be understood without knowledge of Owen Hart's tragic backstory and Martha Hart's earlier legal showdowns with the McMahons.

Owen Hart died in May 1999 during a televised WWE match in Kansas City, Missouri, when he fell from an 80-foot-high apparatus that was supposed to lower him into the ring as part of a dramatic stunt for the main event. Mrs. Hart filed a lawsuit shortly thereafter against various parties, including WWE, and Vince and Linda McMahon individually. While the lawsuit eventually was settled for $18 million, the bad blood remained due to Martha Hart's insulted feelings over the McMahons' decision to continue the show on the night of her husband's accident.

Martha Hart's federal complaint launched a host of claims, including Lanham Act violations under 15 U.S.C. § 1125, invasion of privacy, violation of the right of publicity, unjust enrichment and breach of contract. An amended complaint was filed less than two months later, refining and abandoning some of the claims made by Hart. The focus of the case is WWE's commercial exploitation of Hart's wrestling career and personality, including the recent DVD release, "Hart & Soul: The Family Anthology," which featured Owen Hart and his brother Bret and their father Stu Hart – all famous wrestlers in their own right.

Martha Hart alleges that these videos violate various agreements between her late husband and WWE relating to the exploitation of Hart's likeness, trademarks, and other types of intellectual property used before and during his WWE career. One key clause in the agreements pertains to the use of this intellectual property upon termination, limiting WWE's rights for certain uses and requiring an approval right and royalties in other instances. Owen Hart's untimely death triggered this provision and established a new story line in which WWE allegedly profited from the release of several videos and DVDs without seeking permission from Mrs. Hart for use of trademarks and other rights that existed prior to a 1996 agreement.

What appears to rankle the Hart estate the most is the effect that the exploitation has had on the Owen Hart Foundation. Started by Mrs. Hart after Owen's death, the Foundation's "strategy and success," according to the complaint, has been Martha Hart's private and public disassociation of Owen's name and likeness from anything WWE or McMahon-related. Given the intentional efforts to create a divide between the wild world of professional wrestling and the charitable endeavors of the Foundation to further Owen Hart's legacy, the complaint poses the question of whether consumers would confuse the two "products" in a manner that is actionable under trademark or other law.

This and other questions abound as Martha Hart hopes to score a knockout and prevent WWE from whispering Hart's name. With the filing of the complaint itself, Martha Hart delivered an early blow, disrupting Linda McMahon's campaign for Senator by forcing her to field press questions regarding her business practices during her tenure as one of the heads of WWE.

Not to be outdone in terms of rhetorical flair and drama, both WWE and the McMahons filed motions to dismiss the lawsuit on September 20, 2010, accusing Hart of demonizing the defendants purely for personal gain, in part through her Web site. The legal documents, totaling more than 100 pages, deliver repeated blows to each one of Hart's "bizarre and legally defective" allegations, as they are referred to by defendants, and also argue that the lawsuit cannot be sustained against the McMahons in their capacity as corporate officers.

Although Linda McMahon may still be smarting from her electoral defeat at the hands of Richard Blumenthal, the cage match between the litigants will continue in late January 2011, when they face off for oral argument on the motions.

Illegal Procedure? Jim Brown Flags Electronic Arts for Misappropriation in Video Game

NFL Hall of Famer Jim Brown is in the midst of an overtime legal battle against Electronic Arts ("EA"), the maker of the popular Madden NFL video game, as a result of EA's inclusion of a player that allegedly resembled Brown in various editions of Madden NFL on two "historic" teams: the 1964-65 Cleveland Browns and the All Browns team. But what started as a set piece between a media titan and a football legend has turned into a First Amendment rumble. Parties as diverse as the American Association of Publishers, Viacom, ESPN and the Comic Book Legal Defense Fund, among other parties, are seeking to weigh in on the implications of the lawsuit, and put this dispute into the larger context of similar lawsuits brought by athletes alleging that video games have violated their rights relating to their celebrity status under various legal theories.

The lawsuit kicked off in July 2009, when Brown brought suit against EA in the United States District Court for the Central District of California. Brown claimed that by including a player that resembled him in the MaddenNFLgame without a licensing agreement, EA violated Section 43(a) of the federal Lanham Act, under a theory of false endorsement, and California state laws on invasion of privacy and unfair business practices. Although the character who purportedly represents Brown in MaddenNFL wears jersey number 37 (Brown wore number 32) and the facial image was purportedly scrambled by EA, Brown alleges that the statistics for the running back on the MaddenNFL1964-65 Cleveland Browns are nearly identical to his own and the changes to the image were merely superficial and nowhere near enough to transform the image of Brown.

The district court tackled Brown for a loss and granted EA's motion to dismiss Brown's Lanham Act count on September 23, 2009, relying heavily on EA's First Amendment defense. In case you misplaced your intellectual property playbook, when a celebrity brings a false endorsement claim under Lanham Act Section 43(a), the celebrity is likely alleging that his "celebrity persona" functions as the "mark" that was allegedly misused. Although EA maintained that it did not misuse Brown's celebrity persona or likeness, the court ultimately dismissed the claim based on the First Amendment's complete defense to a Lanham Act false endorsement claim.

As a threshold matter, before the court could consider the First Amendment defense, it held that video games, and specifically MaddenNFL, are a form of expression protected by the First Amendment. Next, to evaluate Brown's Lanham Act claim in light of the First Amendment's protections, the court employed the Second Circuit's two-pronged Rogers v. Grimaldi test, under which a Lanham Act claim asserted against the creator of the expressive work can succeed only if the public interest in avoiding confusion outweighs the public interest in free expression. The first prong of the test requires that the creator's use of the subject trademark (his "persona") must be relevant to the underlying work, in this case, the Madden NFL game. The court easily tackled this issue and held that the first prong was satisfied because the "[u]se of a legendary NFL player's likeness in a game about NFL football is clearly relevant," even viewing all factual allegations in the light most favorable to Brown.

Although the first prong was easily satisfied, the second prong was a tougher play: Brown had to show that EA's use of the trademark explicitly misled consumers about the source or content of the work. Putting the second prong into context, the court stated that the relevant inquiry is whether people playing Madden NFL would be misled into thinking that Brown is somehow behind the game or is a sponsor of the product. The court held that, since neither Brown nor his name or likeness are depicted on the game's packaging or advertising, and his virtual athlete is anonymous and identifiable only by jersey number, it would require a "leap of logic" to conclude that the anonymous, misnumbered player's presence in the games equates to Brown's endorsement or an explicit attempt to convince consumers of his endorsement. Thus, the court concluded that the second prong of the Rogers test was not met, and Brown's Lanham Act claim was barred by the First Amendment's protection of expressive works.

To further jump on the pile, because Brown's Lanham Act claim did not survive the dismissal motion, the court declined to exercise supplemental jurisdiction over Brown's remaining state and common law claims, since the district court no longer had a "hook" of original jurisdiction for which to hang the supplemental jurisdiction.

On July 6, 2010, Brown called for an instant replay review, and filed his appeal of the district court's decision with the United States Court of Appeals for the Ninth Circuit. Brown's brief, among other points, argues that the district court erred because in holding that the second prong of the Rogers test was not satisfied (i.e., that there were no explicit representations of endorsement to cause consumer confusion), the court made its own finding of fact, and the issue should have been a matter for discovery. The brief also argues that EA's misappropriation is actionable under every trademark-versus-free-speech approach adopted by the Ninth Circuit, including the Rogers test.

EA went on the offensive and filed its answering brief on September 20, 2010, urging the Ninth Circuit to affirm the dismissal order and reiterating most of the district court arguments, including the application of the Rogers test. EA argued that if the court accepts the arguments in Brown's briefs, "a broad range of expressive works might be subject to Lanham Act claims," and further urged the court not to turn trademark law into a "weapon for prominent individuals to restrain the use of their name or likeness in expressive works."

A motion seeking amicus status was filed on September 27, along with a brief arguing, among other things, that the Brown case shares similar issues as those raised in Keller v. Electronic Arts on which an appeal is also pending in the Ninth Circuit. The Keller case also involves allegations that an athlete's persona was improperly included in an EA video game; in that case, a college football player. As we wrote in the April edition of Three Point Shot, the district court in Keller rejected arguments that EA was protected by the First Amendment against the athlete's claims under the California statutory and common law right of publicity. The amicus brief states: "It would be difficult to invent two related cases that more starkly illustrate the troubled state of the law concerning the relationship between the right of publicity, the Lanham Act, and the First Amendment."

On the merits, the amicus brief takes the position that the district court in the Brown case ruled correctly in finding that EA's use is protected by the First Amendment, and that the ruling in Keller should be reversed. The controversy is now in possession of the Ninth Circuit, with the parties waiting on the sidelines anxiously awaiting the court's next play.

Update: Supreme Court Denies Review in SC Trademark Case

In our February 2010 edition we reported on the ruling of the U.S. Court of Appeals for the Federal Circuit in University of South Carolina v. University of Southern California, a dispute over the schools' respective "SC" logos. The circuit court affirmed the U.S. Trademark Trial and Appeal Board's refusal to register The University of South Carolina's interlocking "SC" logo in connection with apparel, and agreed with the Board that there was a likelihood of confusion between South Carolina's logo and the "SC" interlocking logo used by the University of Southern California that had previously been registered in connection with apparel and other products. In October, the U.S. Supreme Court denied South Carolina's petition for review of that ruling.

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