

Three Point Shot

April 2013

The (Gold) Gloves Are Off

Cincinnati Reds second baseman Brandon Phillips has a lot to say. He's well-known for [being outspoken](#), and he's a prolific tweeter on his [@DatDudeBP](#) account, which boasts over 650,000 followers. But he's also got the goods, as reflected in the six-year, multimillion dollar contract [he signed](#) with the Reds last year. Among his other accomplishments, he has been the [recipient](#) of a Rawlings Gold Glove Award in 2008, 2010 and 2011.

Rawlings created the award in 1957 to recognize excellence in fielding by professional baseball players. The Gold Glove is annually awarded to the nine most distinguished fielders (one at each position) in both the National and American Leagues. Gold Glove recipients are selected by the Major Leagues' managers and coaches.

The relationship between Phillips and Rawlings got a bit tarnished, however, when Rawlings took issue with Phillips's endorsement agreement with Rawlings's competitor, Wilson Sporting Goods. Phillips endorsed Wilson's [metallic gold-colored glove](#), which Rawlings claimed is a little too similar in appearance to the glove featured in the Gold Glove Award trophy. Rawlings initially brought suit against only Wilson, but later amended its complaint to name Phillips as well.

In the Amended Complaint filed on December 3, 2012 in the U.S. District Court for the Eastern District of Missouri, Rawlings alleged that Wilson manufactured and issued to Phillips a baseball glove with metallicgold design details, and that Phillips has since been wearing the glove during practice, warm-ups, and games. Rawlings alleged that it owns registered and common law trademarks for the phrases "Rawlings Gold Glove Award," "Gold Glove Award," and "Gold Glove," as well as rights in the common law trade dress embodied in the physical award.

Rawlings did not claim that Wilson or Phillips used the actual words "Gold Glove."

Rather, Rawlings maintained that Wilson's use of the metallic gold color hits a little too close to home and, because Rawlings's trademark rights extend to the visual depictions embodied by those words, defendants' actions constitute trademark infringement, unfair competition, dilution, and false advertising under both the Lanham Act (the federal Trademark Act) and Missouri law. Rawlings sought monetary damages and an injunction prohibiting defendants' further use of baseball gloves featuring metallic gold design details.

Both Wilson and Phillips filed Motions to Dismiss Rawlings's Amended Complaint. Both claimed that the allegations were nothing more than a backdoor attempt to assert ownership over the use of the metallic gold color on baseball gloves. This, defendants argue, Rawlings could not do unless Rawlings demonstrated that its use of the color had acquired secondary meaning—i.e., that consumers think of Rawlings when they see a baseball glove with metallic gold design details. According to Wilson and Phillips, because Rawlings failed to allege facts to support exclusive ownership of the metallic gold color on baseball gloves, and because Rawlings did not claim that defendants used the actual phrases in any way, Rawlings failed to state a claim.

Earlier this year, the referees took over (mediators, actually), and in March the dispute was settled on undisclosed terms.

During the period in which the litigation was pending, Brandon Phillips had a few things to say about the Gold Glove Award. When he learned that he lost out on winning a fourth Gold Glove in October 2012, he [famously declared](#) that he was surprised and thought he had been "punk'd." He was still peeved about the loss a few months ago, when he attributed the loss of the award to his "flair." More recently, though, he's [stepped back a bit](#) from those comments, attributing his statements about the award to his role as an entertainer: "I entertain the fans out here. I don't try to show people that I'm the best player or the best defensive second baseman or the best offensive second baseman. I don't go out there showing people that. I entertain people."

We'll see next fall if Phillips can entertain his way to that coveted fourth Gold Glove award.

Can I Borrow the Car? I Promise I'll Be Careful ...

[Mark Hales](#) has driven a lot of fast cars, both as a Formula One driver and in his subsequent career as a freelance auto racing journalist. You'd think he could drive a car without ruining the engine, or so thought [David Piper](#), also a distinguished former racing driver. But when Hales borrowed an expensive car from Piper for a photo shoot, the result was a blown engine, and an action against Hales by Piper in the High Court of Justice, Queen's Bench Division, in the UK. In January 2013, Piper won a judgment against Hales for almost £48,000 in damages for the cost of repairs to the car.

At the center of the dispute is a replica Porsche 917 owned by Piper and valued at £1,250,000. The Porsche 917 is a racing legend; it won the [24 Hours of Le Mans](#) race in 1970 and 1971, and was famously driven by actor Steve McQueen in the 1971 film [Le Mans](#). (The 917 in the film was also wrecked, but that was [part of the script](#).)

In 2009, when Hales approached Piper about using the replica 917, a ruined engine was not part of the plan. Hales proposed to stage a comparison race with another iconic car, a Ferrari 512S owned by Pink Floyd drummer and auto racing enthusiast (and yet another legend) [Nick Mason](#). Hales would then write an article about the race for publisher Octane Media limited. Hales agreed to pay Piper £2,000 for the use of the Porsche and the services of his mechanic, and Hales arranged insurance coverage through his publisher.

It is uncontested that on the day of the event, Piper cautioned Hales not to over rev the engine of the notoriously finicky 917, as damage might result. According to Piper, the cause of the damage was driver error: Hales failed to follow his directions and the over revving caused the blown engine. According to Hales, the over revving was caused by a mechanical defect: a defective gearbox caused the 917 to jump out of gear, despite his exercise of reasonable care and skill.

The publisher's insurance company blew off Piper's claim. Although the insurer agreed with Hales that the cause was mechanical defect, the company pointed to an express exclusion from the policy for damages from such a cause. When Piper raced to the courthouse to seek recourse against Hales personally, Hales raised additional defenses. He claimed that Piper orally agreed that he would not hold Hales liable for any damage that might result from the use of the car. Hales further contended that, as a matter of custom in the auto racing community, the owner of the automobile assumes the risk of damage to a vehicle from driver error.

Following a trial, the court awarded the prize for credibility to Piper, and rejected all of Hales's arguments.

Hales's claim that Piper orally agreed to waive liability was found "highly unlikely." The court pointed to the value of the car, the benefit of the transaction running to Hales rather than Piper, and the fact that Piper had asked for assurances as to Hales's insurance coverage. On the issue of causation, the court found Piper's evidence more credible, despite a record documenting two notorious incidents involving blown engines on Porsche 917's driven by world class champion race drivers. The court concluded that these incidents were simply other instances of driver error, not evidence supporting Hales's account of a mechanical problem with the 917 gearbox. The court also found insufficient evidence to support the existence of a custom in the racing community concerning the assumption of the risk of driver error. In order to give rise to an implied term, the court found, there must be a custom that is "invariable, certain and general," not merely a "trade practice."

At the end of the day, Hales was held liable not just for Piper's damages. Under the "[English rule](#)" or "loser pays" system, Hales was obligated to pay Piper's legal fees amounting to another £63,000.

Following the issuance of the judgment, Hales let it be known that he had previously sold everything he owned in order to pay his attorneys, and that the judgment would drive him to bankruptcy. An outpouring of support ensued in the racing and journalist community, and a fund was created to help Hales mount an appeal. Hales appears to have decided against taking an appeal, and the fund has turned to raising money to pay the judgment.

Hales's plight proves that once again, [Shakespeare was right](#): "Neither a borrower nor a lender be!" Perhaps the Bard should have added, if you do become a borrower, get your waiver of liability in writing.

The UFL's Fumbling Attempts to Survive

Football is a tough sport, and sometimes a team has to call a time out to get a breather and regroup. In [October 2012](#), the [United Football League](#) (the "UFL") took a break to deal with the money woes that have plagued the league almost since its inception.

The UFL was [formed in 2007](#) by financier William ("Bill") Hambrecht, in a bid to challenge the NFL's dominance of the sport. Hambrecht sought to leverage football's general popularity and appeal to a key demographic – described as young men who drink beer – by producing what he called "the most valuable property you can create." Despite the involvement of a number of [high-profile investors](#), however, the UFL has had some tough seasons financially, forcing it to remain perpetually down a few scores.

The October 2012 time out isn't the first for the UFL. After losing more than \$100 million in its first two years, the struggling league hacked the last two weeks off of its [2011 season](#) and accelerated the 2011 championship game in an effort to save millions of dollars and thus secure its long-term existence. The effort was not enough to offset the UFL's economic troubles, however. The 2012 season kicked off in September, but was suspended less than a month after it began, when the league was unable to pay its staff and players.

Now the game has moved from the field to the courts.

In March 2013, a group of 78 players and staff members [filed suit](#) against the UFL, its member teams, and Bill Hambrecht, seeking millions of dollars in back pay, punitive damages and attorney fees. The players and staff, all associated with the Omaha Nighthawks and Las Vegas Locomotives, allege breach of contract, unjust enrichment, misrepresentation and violation of state labor laws. The [complaint](#) filed in Albritton, et al v. UFL Management, LLC, No. A-13-677584-C (Utah Dist. Ct. Clark Cty complaint filed Mar. 1, 2013) alleges that the cash-strapped defendants failed to pay the players and staff for their participation in the UFL's 2012 season as agreed pursuant to their employment agreements.

The complaint names Hambrecht personally, stating that in mid-October 2012, the plaintiffs advised Hambrecht that they would no longer participate in the UFL unless and until they were paid. In a Hail Mary attempt to keep the league alive, Hambrecht promised full payment by the end of the month and offered to personally guarantee their salaries. Hambrecht allegedly entered agreements with the players and staff pursuant to which he personally guaranteed full payment of all compensation owed by October 31, 2012, and agreed to personally indemnify the plaintiffs in the event the UFL failed to make the required payments and they incurred damages in enforcing the personal guarantees. To further induce the players to continue with the league, Hambrecht also allegedly paid each player \$1,000, which he specifically agreed was not to be credited against the money they were owed. Shortly thereafter, the defendants disbanded the UFL.

The plaintiffs contend that payment was not made as promised at the end of October, and that Hambrecht missed at least four additional payment deadlines before the plaintiffs filed suit.

In a recent court filing, Hambrecht and his fellow defendants are seeking yet another time out. In a motion filed on April 23, 2013, they seek dismissal of the complaint or in the alternative, an order staying the proceedings and compelling arbitration. If it's up to the players, however, Hambrecht will be hit with a delay of game penalty for failing to pay their salaries when due.

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