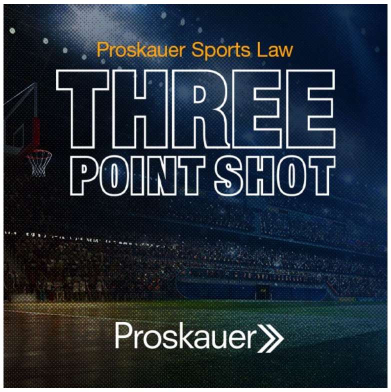

May 2025

A newsletter brought to you by the Sports Law Group at Proskauer.

Welcome to *Three Point Shot*, a newsletter brought to you by the Sports Law Group at Proskauer. *Three Point Shot* brings you the latest in sports law-related news and provides you with links to related materials. In this issue, we feature contributions from Tara K. Wahl, Meredith A. Lipson and Caroline E. Rimmer.

Your feedback, thoughts and comments on the content of any issue are encouraged and welcome. We hope you enjoy this and future issues.

Edited by **Robert E. Freeman**

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Rough Terrain Ahead: New York Ski Resort Operator Appeals Ruling That It Violated Antitrust Law by Buying Out Direct Competitor

Intermountain Management Inc. ("Intermountain"), a company operating popular ski areas around Syracuse, New York, is appealing a state supreme court decision unsealed in March 2025 that granted summary judgment on the issue of liability in favor of the New York State attorney general. The suit alleged Intermountain engaged in anticompetitive market practices when it purchased a neighboring–and rival–ski operation only to quickly shut it down, while also entering a non-compete agreement with the seller, a measure that the attorney general claimed amplified the anticompetitive effects of the acquisition and closure of the rival ski area. Intermountain's intentions, as the state court held, were to ice out its competition for local skiers in violation of state antitrust law. (*State of New York v. Intermountain Management Inc.*, No. 008588/2022, 2025 NYSlipOp 31416(U) (N.Y. Sup. Onondaga Cty. Feb. 24, 2025)).

Intermountain has owned and operated two ski areas in the Syracuse area: Song (since 2000) and Labrador Mountain (since 2014). Intermountain provides a dual-mountain ski pass, allowing holders to ski at either mountain during the season. However, since as early as 2015, Intermountain sought to acquire a third ski area, Toggenburg Mountain, also within the Syracuse region. Intermountain attempted to purchase Toggenburg multiple times over the years, but to no avail. The previous owners refused to sell to Intermountain due to the owners' alleged concerns that Intermountain would close down Toggenburg for good.

The trails eventually aligned and, in 2021, Intermountain successfully convinced new owners of Toggenburg to sell. On the very same day that Intermountain acquired Toggenburg for a price tag of $2.25 million, Intermountain announced that it was permanently shutting down the ski area and "absorb[ing] [its] operations into that of Song and Labrador." While it is true that local skiers could still ski at either Song or Labrador, the New York State Office of Attorney General ("OAG") argued that the sale and subsequent shutdown of Toggenburg left consumers with fewer local options, more crowded slopes and higher-priced ski passes from Intermountain.

According to the OAG, this melting away of the local ski market was exactly what Intermountain had envisioned. As quoted by the court, in an article published shortly after the deal closed, the Intermountain owner stated he wanted to "purchase market share without the associated expenses of opening another ski hill" and "drive the same guests to two mountains instead of three." As a result, Toggenburg was closed for the 2021-2022 ski season (with refunds given to ski pass purchasers) and has not reopened.

Intermountain's plans, however, were short-lived. After the purchase and closure of Toggenburg, the OAG sued Intermountain under the Donnelly Act, New York State's antitrust statute (N.Y. Gen. Bus. Law §340 et seq.). The OAG alleged that Intermountain's actions "illegally stifled competition and created a monopoly in the Syracuse market that harmed consumers." Count One of OAG's complaint asserted that Intermountain's acquisition of Toggenburg violated the Donnelly Act by giving Intermountain a monopoly in the season pass skiing market in the "Syracuse Area" (within a 30 minute drive of downtown Syracuse) and that Intermountain's actions harmed consumers by giving it an undue concentration of market control without any procompetitive benefit. Intermountain countered that the OAG's relevant geographic market of the "Syracuse Area" was "conclusory," "illogical" and drawn too narrowly, should have included other ski resorts that are only a slightly longer drive from downtown Syracuse and that its acquisition did not harm the "healthy" competition for season pass skiers in the broader Central New York area. Intermountain also argued that its purchase of Toggenburg did not violate the Donnelly Act because it was a unilateral act: "There was no unlawful conspiracy or reciprocal arrangement between Intermountain and anyone…to close Toggenburg."

The court stated that, generally speaking, a party asserting a violation of the Donnelly Act is required to (1) identify the relevant product market; (2) describe the nature and effects of the purported conspiracy; (3) allege how the economic impact of that conspiracy is to restrain trade in the market in question; and (4) show a conspiracy or reciprocal relationship between two or more entities. Looking at Intermountain's argument that its closure of Toggenburg was merely a unilateral act, the court disagreed and found that, based upon direct and circumstantial evidence, a contract or "concerted action" existed within the meaning of the Donnelly Act between the buyer and seller: "Intermountain's actions were not unilateral in nature. [The Toggenburg seller] obtained a purchase price that would not have been forthcoming from any other buyer; [Intermountain] paid a premium for the ability to compress the number of options in the regional ski market from three ski areas to two — the two that he already operated."

The court also concluded that Intermountain's purchase and closure of Toggenburg amounted to an unreasonable restraint on trade in the local Syracuse ski market in violation of the Donnelly Act ("The undisputed facts surrounding the context, purpose, and nature of the acquisition and immediate closure of Toggenburg establishes a per se violation of the Donnelly Act"). The court explained that the purchase and closure of Toggenburg, a geographically proximate competitor, "amounted to an agreement to allocate markets, artificially reducing options for season pass skiers and stifling competition to Intermountain." As an alternative holding to its per se analysis, the court held that, even if a "more discerning level of scrutiny were applied," OAG established that the arrangement nonetheless violated the Donnelly Act and that the relevant defined "Syracuse Area" market "was a logical one," as "the majority of season pass holders for Intermountain's two facilities and Toggenburg came from this area." As a result, the court denied Intermountain's motion for summary judgment and granted OAG's motion for summary judgment on the issue of liability.

While the court ruled in favor of the OAG on liability under the Donnelly Act, it denied summary judgment as to the state's remedy requests, which included divestiture, disgorgement or a civil fine. The court stated that it was "loath…to levy harsh monetary or equitable relief" without additional hearings on these issues, especially given that the Toggenburg resort sits unused, with its condition and value uncertain.

Shortly after the court handed down its decision, Intermountain filed a notice of appeal in the Fourth

Department of the New York Supreme Court's Appellate Division. It appears that Intermountain will have to gear up again for another run against the OAG in challenging the lower court decision. The appeal may clarify some of the relatively novel issues surrounding the theory of the case and the scope of state antitrust authority to scrutinize industries where local monopolies can form due to acquisitions. In the interim, the trial court ordered that Intermountain and the OAG schedule a date to inspect the Toggenburg property, as the parties trade arguments and set the briefing schedule for the remedies phase of the case (the OAG argues for divestiture of Toggenburg to a competing operator and other penalties, while Intermountain has argued against the OAG's proposal and submitted its statement of proposed, less drastic "alternative remedies," which would include Intermountain season pass price caps, capital improvements at Song and Labrador, or a repurposing of Toggenburg for a public interest purpose).

Newfound Brotherly Love Between Philadelphia Newspaper and Sports Headline Framer

Dateline: Philadelphia. A recent settlement has brought newfound brotherly love between The Philadelphia Inquirer newspaper and a sports memorabilia service specializing in framed front-page headlines. The two parties agreed to a Stipulated Injunction and reached an undisclosed settlement after a suit, originally filed on Valentine's Day, was brought by The Philadelphia Inquirer for trademark infringement, copyright infringement and unfair competition over the sports framing service's selling of unauthorized, modified copies of front pages of the newspaper. (*The Philadelphia Inquirer, LLC v. Custom Prints and Frames, LLC*, No. 25-00806 (E.D. Pa. Stipulated Injunction Mar. 7, 2025)).

This dispute involves The Philadelphia Inquirer, LLC (the "Plaintiff" or "The Inquirer"), one of the oldest continuously published daily newspapers in the US, based in Philadelphia and the Delaware Valley, and Custom Prints and Frames, LLC (d/b/a Title Game Frames), based in Wyoming, along with the owners of the company, Timothy Rachuba and Daniel Simon Haddad, both residing in Pennsylvania (together, with Custom Prints and Frames, LLC, the "Defendant"). The Defendant is a company that makes and sells framed, modified copies of front-page stories that commemorate sports teams' iconic moments – think framed prints of local paper front pages with exciting banner headlines and triumphant photos proclaiming the beloved sports team's championship that might be hung in a big sports fan's office, TV room or den. The Defendant likened its service to a fan framing his or her favorite newspaper clippings to memorialize sports championships, but the Plaintiff considered the Defendant's modified prints as infringing and in direct competition with the Plaintiff's own reprint sales and licensing efforts.

In February 2025, the Plaintiff delivered multiple cease and desist letters to the Defendant, demanding the removal and destruction of the infringing reprints and cessation of its alleged infringing activities. However, the letters went unanswered, prompting legal action by The Inquirer. In its complaint, The Inquirer sought a temporary restraining order ("TRO"), preliminary injunction and permanent injunction, along with monetary damages, to prevent further infringement and protect its intellectual property.

The complaint advanced several claims, including trademark infringement and unfair competition action under the Lanham Act and the common law of Pennsylvania, as well as a copyright infringement claim. The Plaintiff claimed that the Defendant's use of its trademarks would confuse consumers into thinking the Defendant's products were associated with or endorsed by the Plaintiff. The lawsuit sought injunctive relief to stop the Defendant from offering unauthorized and modified reprints of The Inquirer front pages, stop any other infringing activities, order an impoundment of any unsold inventory, and recover damages for the alleged infringement. Specifically in question was the federally registered trademark THE PHILADELPHIA INQUIRER (U.S. Reg. Nos. 270,787 and 4,049,619), among others, which have "incontestable status" with the US Patent and Trademark Office. The Plaintiff has been using these trademarks for over a century in connection with newspapers, printing and journalism. The Plaintiff's store also allegedly sold authorized reprints of The Inquirer's front-page stories, similar to what the Defendant was allegedly selling.

Also at issue were Plaintiff's copyrights to specific issues of its newspaper, which it has registered with the US Copyright Office continuously for decades. If the Plaintiff does license these copyrighted works to third parties, it is compensated for these rights. Hence, as outlined in the lawsuit, Plaintiff alleged that Defendant was selling modified copies of the February 10, 2025, January 30, 2025, and February 5, 2018, issues, all instances featuring truncated versions of the front pages set in frames depicting Philadelphia sports triumphs. These unauthorized products were advertised and sold on the Defendant's website and other online marketplaces. The Inquirer deemed the unauthorized copying and/or modification of its copyrighted newspapers to be infringing derivative versions of its content. It also considered Defendant's commercial use of The Inquirer trademarks to violate the Lanham Act. [One wonders whether Defendant's headline-framing service would be the subject of an infringement suit if it offered for sale unmodified, framed, secondhand physical copies of the newspaper's front page. Perhaps the first sale doctrine would change the legal analysis in such an instance.]

On the same day that this suit was filed, the court heard and, hot off the press, issued an order granting The Inquirer's motion for a TRO, enjoining Defendant from infringing Plaintiff's marks or creating unauthorized reprints or versions of Plaintiff's copyrighted works. The court held that The Inquirer had "a reasonable probability of success on the merits" of its claims. The TRO was to expire on February 28, 2025, but the court granted Plaintiff's motion for a second edition of the TRO, extending it until March 10th.

In the interim, on March 7, 2025, the matter was settled on confidential terms, with an accompanying stipulated injunction and consent order, bylined by the district court judge. The Stipulation acknowledged, among other things, that Defendant's "unauthorized copying and/or modification of The Inquirer's Copyrighted Works, as well as their commercial use of THE PHILADELPHIA INQUIRER Trademarks…constitutes copyright infringement, trademark infringement, and unfair competition." It also permanently enjoined Defendant from directly or indirectly infringing The Inquirer's trademarks or copyrighted works or offering for sale unauthorized reprints or modified versions of The Inquirer's front pages and other content, or otherwise unfairly competing with The Inquirer. Additionally, the Defendant was required to destroy any remaining inventory of unauthorized products containing The Inquirer's intellectual property as part of the deal, in addition to complying with other undisclosed terms and obligations that are part of the written Settlement Agreement. [Note: At the time of publishing, a scan of the Title Game Frames website did not show any framed Inquirer front pages for sale].

The settlement closes the dispute for Title Game Frames in relatively quick fashion. And it looks like The Philadelphia Inquirer can return to doing what it does best – award-winning journalism, covering local sports and reviewing the best cheesesteak in Philadelphia!

Forms Over Utilitarian Function: Horse Ranch Loses Copyright Case (But Not the Farm) Over Licensed Legal Forms

An Oregon district court recently saddled a Florida horse ranch with liability for copyright infringement after it repeatedly posted copyright-protected equine transaction legal forms it licensed from the Plaintiff, despite the license terms prohibiting such online posting. Although the copyright holder galloped to legal victory, the court reined in its damages claim, awarding just $400 in statutory damages, plus costs and the potential for attorney's fees. (*Equine Legal Solutions PC v. Fireline Farms, Inc.*, No. 22-01850 (D. Ore. Feb. 12, 2025)).

The Plaintiff, Equine Legal Solutions, PC ("Equine Legal" or "Plaintiff"), is an Oregon-based law firm specializing in legal services for the equestrian industry. Among its services are downloadable legal forms such as boarding agreements and visitor releases for use in the horse rental context. Plaintiff is the registered owner of several copyrights, including two legal forms at issue in this dispute. Buyers who pay a fee to download Plaintiff's legal forms must agree to a license agreement before purchasing (the "License Agreement"), which allows licensees to copy, email and distribute the forms in connection with personal use of the forms or for horse-related business. The License Agreement, however, contains a key restriction: "You may not post any [Equine Legal] Materials to the Internet, including on your own website."

The Defendant, Fireline Farms, Inc. ("Fireline" or "Defendant"), operates a horse ranch in Florida. Defendant is also a customer of Equine Legal, having purchased various forms in 2016 as part of the "Equine Boarding Forms Package" (the "Forms") available on Plaintiff's website. In doing so, Defendant accepted Equine Legal's License Agreement.

Things went awry when Fireline hired a web developer to create its website. The developer uploaded various Fireline business documents, including the copyrighted Forms, in such a way that they were accessible at URLs connected to Defendant's website and findable through an online search. For most, finding the Forms online would have been like finding a needle in a haystack (insofar as there was a dispute whether they were ever "published online"), but not for Plaintiff who routinely conducts online searches using horse-related phrases unique to its templates to police for infringement.

Equine Legal sent multiple DMCA takedown notices to Fireline and its internet service provider between 2021 and 2022 (note: Fireline's website hosting provider, DigitalOcean, which had received several DMCA takedowns from Plaintiff, was originally a defendant in this suit, but the court dismissed the complaint against DigitalOcean in 2023 for lack of personal jurisdiction). After Fireline's representative spoke with Plaintiff in 2021, the Forms were no longer accessible at the specific URLs. However, a month or so later, the Forms were again accessible at the same URLs. This bit of horseplay continued: the Forms were removed, apparently later became accessible again at a different URL, prompting Plaintiff to send more DMCA notices, and causing Fireline to remove the Forms again, much to the puzzlement of Fireline's web developer and ISP. At one point, Fireline's site was taken offline entirely. Eventually, Equine Legal decided it was time to get off the merry-go-round and sued Fireline in late 2022, alleging willful copyright infringement.

By the middle of 2024, both parties filed motions for summary judgment, arguing that there were no material facts in dispute. Fireline claimed that the forms were merely "utilitarian" and that Equine Legal therefore had no right under copyright law to restrict their use by claiming a limitation on online distribution. Equine Legal countered that it owns valid copyrights in the Forms, has the exclusive right to distribute and display them, and that Fireline distributed and displayed them in violation of the License Agreement.

Turning first to the question of copyright infringement, the court noted that to prevail on such a claim, Plaintiff must establish (1) that it owns the allegedly infringing material and (2) that Defendant violated at least one of Plaintiff's exclusive rights afforded to it as a copyright owner.

On the threshold issue of ownership of valid copyrights in the Forms, it was an easy trot to the finish line for Plaintiff. The court noted that Fireline not only failed to challenge the validity of Equine Legal's copyright registrations but had also expressly conceded that Plaintiff "has a valid copyright and a valid business in selling its copyrighted works." In rejecting Fireline's arguments about the utilitarian nature of the Forms and a related attempt at invoking the so-called "blank forms" doctrine, the court observed that these defenses were nonstarters once Fireline conceded validity.

The court then turned to whether Fireline had infringed any of Equine Legal's exclusive rights, namely, distribution and public display.

The Copyright Act grants copyright owners the exclusive right to "distribute copies" of their works to the public. The court stated that under Ninth Circuit precedent the infringement of this right requires "actual dissemination" of the work in question, which, in the internet context, might mean the transfer of a file from one computer to another. While it was undisputed that Fireline caused the Forms to be accessible at specific URLs, the court noted that merely making available a copyright protected work to the public does not amount to a violation of the right of distribution. In this case, the court stated Plaintiff had the burden of proving there was actual dissemination but failed to offer evidence, beyond mere speculation, that users accessed and downloaded the Forms, thus sending the distribution claim out to pasture.

Next, the court examined whether Fireline infringed Equine Legal's exclusive right to display its works publicly. Drawing on the Ninth Circuit precedent, the court found that posting the Forms online on a publicly available website (even in a temporary or buried link and only accessible through a specialized search) was still a public display. Contrasting its ruling on the distribution right, the court held that Plaintiff need not show any member of the public found or viewed the Forms to establish a prima facie case of infringement of the display right. Thus, the court ruled Fireline had violated Equine Legal's exclusive display right, satisfying the second prong of infringement.

Fireline trotted out several defenses, all of which were easily overridden:

- License Defense: The court rejected Fireline's argument that its use fell within the License Agreement's permitted bounds, finding the "no internet posting" clause in the License Agreement was clear and unambiguous.
- First Sale Doctrine: The first sale doctrine provides that a copyright owner's exclusive right of public distribution may terminate with respect to a particular copy of a work that has been lawfully made and sold. In its motion papers, Fireline hinted that its right to post stemmed from ownership of a copy. But the court clarified that this doctrine doesn't apply to instances such as this, where the Forms were licensed, not sold outright. Moreover, Plaintiff did not show that Fireline violated its distribution right, so the court noted that the first sale doctrine is irrelevant anyway.
- DMCA Safe Harbor: The court rejected Fireline's argument that promptly removing the Forms entitled it to safe harbor under the DMCA. Such protection generally extends only to service providers who host infringing content uploaded by third parties. Fireline, the court noted, uploaded the infringing material itself and was not a service provider under the DMCA's definition.

Having established a claim of copyright infringement for two works, the court turned to damages. Equine Legal sought statutory damages of $75,000 for willful infringement or, failing that, $30,000; Defendant urged for a minimum award of $400 due to what it claimed were two "innocent" infringements. Overall, the judge found no evidence of bad faith on Fireline's part. According to the court, Fireline consistently removed the materials once notified and there was no indication it had profited or otherwise used the forms in its business in an infringing manner. As such, the court found the infringement to be innocent, not willful, awarding the statutory minimum: $200 per work, or $400 total.

Under the order, Equine Legal is also entitled to seek attorneys' fees and costs; likely a far bigger purse than the damages award itself (in a subsequent March 18, 2025 order, the court awarded Equine Legal over $1,600 in costs). Perhaps more significant, however, is the example established by the district court decision: copyright protection extending to industry-specific legal forms governed by restrictive license agreements.

However, hold onto your saddle horn, as this case may not be over yet. In April 2025, Equine Legal filed a notice of appeal to the Ninth Circuit challenging the judgment. Was it wise in this instance to look a gift horse in the mouth? Stay tuned!

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