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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. 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**

Table of Contents

Access previous issues of Three Point Shot.

Topgolf Saves Par to Win Match in Antitrust Dispute over Ball-Tracking Technology

After a couple of rounds of litigation, on March 18, 2019, the Supreme Court declined to review an antitrust lawsuit between Topgolf Int'l, Inc. ("Topgolf"), a company operating golf entertainment centers that offer point-scoring golf games and SureShot Golf Ventures, Inc. ("SureShot"), a would-be competitor that had licensed ball-tracking technology from a company that was subsequently acquired by Topgolf. With the scorecards handed in, at least for now, Topgolf remains on top of the leaderboard.

Topgolf is a global sports entertainment company that has been in business since 2000. Their parent company, Topgolf Entertainment Group, has expanded to include, among other things, online golf games, ball-tracking technologies that are used during golf tournaments to show ball flights to TV audiences and golf entertainment venues where players can hit golf balls embedded with microchips that use Topgolf's own technology to track the shot's distance and accuracy, enabling players to accumulate points for hitting specified targets, while enjoying food and beverages in a sports bar setting.

SureShot is a Texas based company formed in 2014 that aimed to compete with Topgolf's golf entertainment venues. While Topgolf used a proprietary technology to track golf balls, SureShot licensed the Protracer Range System from a Swedish company, Protracer. The 3-D ball-tracking technology helps golfers analyze their shot paths through television monitors. In its appellate brief, SureShot claimed that the Protracer model would create a more exciting 3-D experience than Topgolf's ball-tracking technology and that Protracer's turnkey system for managing and maintaining a ball-tracking system across a large golf range would assist it on the business side. SureShot considered the Protracer tech as integral to their business model as a favorite 9-iron is to a weekend duffer.

In April 2015, SureShot and Protracer entered into a licensing agreement for SureShot to use the Protracer Range System through 2020 (the "Frame Agreement"). The agreement required Protracer to provide support and maintenance services to SureShot's Protracer Range Systems. All was par for the course until May 24, 2016, when Topgolf announced it had acquired Protracer. Being that SureShot was created with an aim of competing with Topgolf, and Topgolf now owned the tech that was critical to its business, SureShot was concerned that Topgolf would deprive SureShot of long-term licensing of the Protracer tech beyond the existing five-year license term. SureShot apparently met with Topgolf to seek assurances that the Protracer system would be available after the Frame Agreement's initial term expired in 2020. However, at least according to the allegations in its antitrust complaint, talks faded and did not go as well as SureShot executives had hoped. According to SureShot, not only did Topgolf refuse to give them assurances of continued access, but one Topgolf executive purportedly commented: "If I was in your position, I would look for alternatives."

In January 2017, SureShot filed an antitrust suit against Topgolf alleging monopolization, unlawful acquisition and other related claims, arguing that the acquisition of Protracer had deprived SureShot of an opportunity to enter the market and that the primary goal of Topgolf's acquisition was to foreclose competition. More specifically, SureShot alleged that (1) Topgolf acquired the very technology that was essential to SureShot's business, (2) Topgolf refused to provide SureShot assurances that the Protracer technology would be available after the licensing agreement expired, and (3) any support and maintenance requests Protracer received under the Frame Agreement would expose SureShot confidential information to Topgolf, thus hindering SureShot's expansion plans. Topgolf countered, among other things, that SureShot's claims were not ripe and that SureShot pleaded no actual harm, but only an anticipated denial of access or future breach of contract, and that it failed to plead anticompetitive or exclusionary conduct in its complaint. Throughout all of this and during the match play between these entities, Topgolf continued to honor the terms of the Frame Agreement.

The suit had trouble getting distance off the first tee when a Texas district court dismissed SureShot's suit. (*SureShot Golf Ventures, Inc. v. Topgolf International, Inc.*, No. H-17-127 (S.D. Tex., Aug. 24, 2017)). The district court sided with Topgolf, finding: (i) SureShot failed to plead Topgolf denied SureShot access to the Protracer Range System; (ii) the alleged statement made by the Topgolf executive was not equivalent to a denial of access of the licensed tech; and (iii) SureShot lacked standing because the allegations of monopolistic of behavior were speculative and none of the antitrust behavior outlined in the complaint had actually occurred (i.e., excluding competitors from access to the tech, sending less qualified personnel for service requests, or only licensing the tech to entities outside the golf entertainment center industry). The district court also held that SureShot lacked antitrust standing because it suffered no "antitrust injury." As a result, the court dismissed SureShot's suit, ruling that the claims were not ripe for judicial determination.

With its case sitting like a fried egg in a sand trap, SureShot appealed to the Fifth Circuit, stating that the district court had mischaracterized its antitrust claim as a complaint about a future contractual decision and that the case should clear the motion to dismiss stage based on the fact that SureShot was compelled to cease operations of its golf entertainment business because of the Topgolf-Protracer acquisition and Topgolf's subsequent refusal to provide assurances that the licensed tech would be available in the future. The circuit court affirmed the lower court's ruling that SureShot failed to show antitrust injury and that their claims were not ripe for review. (*SureShot Golf Ventures, Inc. v. Topgolf Int'l, Inc.*, No. 17-20607 (5th Cir. Oct. 9, 2018) (per curiam)). The Fifth Circuit found that SureShot's alleged injury was not "certainly impending" and that Topgolf did not unequivocally state it would not extend the Frame Agreement past 2020. In a small victory for SureShot, the Fifth Circuit held that since the ruling was based on a lack of standing (i.e., a lack of subject-matter jurisdiction), the claims should be dismissed without prejudice, meaning SureShot could re-file the case sometime in the future if it could plead an actionable injury.

With its appeal having just missed the water, on January 9, 2019, SureShot filed a petition for certiorari to the Supreme Court, presenting the principal issue of "Whether the Article III ripeness doctrine bars a competitor's antitrust claims against a monopolist who acquired essential and patented technology to foreclose competitors from the market." On March 18th, the Supreme Court declined review, and, for now, the suit remains off-course.

Gold's Gym Flexes Legal Muscle in Broken Exercise Equipment Suit

Gold's Gym is known as the "Mecca of Bodybuilding" and is famous for being the training ground for some of the world's most renowned body builders (with the Venice Beach, California location having been featured in the iconic 1977 docudrama about lifting, *Pumping Iron*), and where powerlifters are routinely pushing the limits of physical fitness. Despite this reputation, however, it was cardio equipment, rather than the heavy weights, that caused the gym to sweat out a lawsuit. On January 8, 2018, AnneMichelle Johnson (the "Plaintiff") filed a premises liability claim against Gold's Gym Rockies, LLC (the "Gym"), alleging that the Gym was responsible for injuries the Plaintiff sustained while using a broken rowing machine in a Colorado Springs Gold's Gym in January 2016 (*Johnson v. Gold's Gym Rockies, LLC*, No. 18-cv-0047 (D. Colo. Mar. 11, 2019)). Striking a pose, the Gym responded by filing a motion for summary judgment, arguing that the Gym's membership agreement (the "Membership Agreement") released the Gym from any liability arising from the use of its exercise equipment and machines. Not needing a spot to render its judgment, on March 11, 2019 a Colorado federal district court judge granted the Gym's motion, holding that it was "irrefutable" that the exculpatory provisions in the Membership Agreement "clearly reflect[ed] an intent to extinguish liability for Plaintiff's type of claim, and that Plaintiff's alleged injuries [were] the type of injuries contemplated by the Membership Agreement." After only one set, the Plaintiff's tort claims were dismissed.

In the complaint, the Plaintiff alleged that the Gym had a duty to exercise reasonable care, including the duty to put an "Out of Order" sign or other notice on broken workout machines. Additionally, the Plaintiff alleged that the Gym had actual knowledge, or alternatively should have known, about the danger presented by the broken rowing machine and that the Gym's failure to warn the Plaintiff about that danger caused the Plaintiff's injuries. Ultimately, this turned out to be a fairly run-of-the-mill tort claim in which the Gym avoided without breaking too much of a sweat by trotting out the waiver provisions of its Membership Agreement.

In response to the complaint, the Gym quickly [filed](#) a motion for summary judgment in which it challenged the strength of the Plaintiff's arguments, and argued that the Membership Agreement released the Gym from liability for the Plaintiff's claims. More specifically, the Gym argued that at the time the Plaintiff executed the Membership Agreement, she understood the terms of the Membership Agreement, the possibility of gym equipment failure and the inherent risk of injury when exercising. In support of its argument, the Gym pointed to both the "waiver of liability" and the "assumption of risk and indemnification" provisions in the Membership Agreement, which, it argued, were clearly labeled, underlined, and written in bold font with all capital letters, making it more likely that the Plaintiff noticed these provisions when reading the agreement.

In an attempt to keep up with the Gym's legal calisthenics, the Plaintiff filed a [response](#) to the Gym's motion on September 13, 2018, arguing, among other things, that the Gym's exculpatory provisions were not enforceable because they were ambiguous with regard to injuries caused by defective or broken exercise equipment. The court noted that under Colorado law, when looking at whether exculpatory provisions were clearly expressed, it must examine the actual language of the agreement for "legal jargon, length and complication," and "any likelihood of confusion or failure of a party to recognize the full extent of the release provisions."

Upon review, the Plaintiff's argument ultimately proved unavailing, as a Colorado federal judge granted the Gym's motion for summary judgment in March 2019. In doing so, the court analyzed the Membership Agreement and found that the language in the exculpatory provisions was clear and unambiguous, and that the provisions were not overburdened with complex legal jargon or inordinately long (as the provisions were less than a half a page long). The court also cited the clarity of the presentation on the page, as each waiver provision had its own subheading in underlined, bold font and capital letters. The court also rejected the Plaintiff's argument that the Membership Agreement did not specifically list injuries from broken or defective machines in the waiver of liability provision, finding that other exculpatory provisions of the Membership Agreement covered injuries from defective machines and that her claim concerning the Gym's alleged negligence for not putting an "Out of Order" sign on the rowing machine before the Plaintiff used it was clearly covered as the Agreement exculpated negligence liability ("MEMBER VOLUNTARILY AGREES TO ASSUME ALL RISKS OF PERSONAL INJURY TO MEMBER . . . AND WAIVES ANY AND ALL CLAIMS OR ACTIONS THAT MEMBER MAY HAVE AGAINST GOLD'S GYM . . . FOR ANY SUCH PERSONAL INJURY . . . INCLUDING, WITHOUT

LIMITATION: . . . INJURIES ARISING FROM GOLD'S GYM'S NEGLIGENCE, WHETHER DIRECT OR INDIRECT").

As a result, the kettlebells hit the floor and the court held that the Plaintiff had waived any claims against the Gym for the injuries she sustained. Despite the Gym's victory in this suit, it is possible that the bar will be re-racked as the Plaintiff is reportedly considering an appeal – suggesting that the district court decision may have just been the warm up.

Nautilus Legs Out Victory in Elliptical Patent Fight

Elliptical machines provide gymgoers with a challenging cardio exercise and for two equipment makers, this exercise machine has recently provided a strenuous legal workout. Back in the March 2018 edition of *Three Point Shot*, we detailed the Texas district court's ruling that awarded licensing royalties to fitness equipment maker Nautilus Inc. ("Nautilus") in its dispute with its rival ICON Health & Fitness Inc. ("ICON") over whether ICON owed royalties under a license agreement for a Chinese elliptical-machine patent. More recently, the Fifth Circuit confirmed the lower court's decision awarding fitness equipment maker Nautilus $1.8 million in its lawsuit against ICON. (*Nautilus, Inc. v. Icon Health & Fitness, Inc.*, No. 18-50097 (5th Cir. Feb 22, 2019) (per curiam)).

In 2004, Nautilus and ICON entered into a Patent Licensing Agreement (PLA), under which ICON received a non-exclusive license to certain Nautilus patents in exchange for paying Nautilus a five percent (5%) royalty on all licensed "Products" that ICON made or sold during the term of the respective patents. The PLA defined "Products" as "any apparatus, systems or products covered by at least one Claim of any of [Nautilus's] Patent Rights." All of the patents licensed under the PLA – which pertained to "front-end" elliptical exercise machines – expired in January 2015, except for Nautilus' Chinese patent, which expired in January 2016. In December 2015, ICON pressed pause on its royalty payments for the Chinese patent, arguing that the manufactured-but-unassembled elliptical machines sold to American customers did not infringe the Chinese patent and thus did not qualify as a "Product" under the PLA. Because ICON manufactured and sold a partially assembled machine, it contended that it did not manufacture anything "covered by" Nautilus's patent for a fully assembled machine.

In response, Nautilus dialed up the resistance. In January 2016, Nautilus sued ICON for breach of the PLA, and then, in March 2017, both parties cross-moved for summary judgment on the contract claim. In January 2018, the lower court granted Nautilus' motion and denied ICON's, finding that, under applicable Chinese law, ICON infringed Nautilus's Chinese patent by including an assembly instruction manual with all of the necessary component parts of the elliptical machines (that were fabricated and packaged, but not finally assembled in China). By including the manual, according to the lower court judge, ICON had effectively manufactured the infringing products under Chinese law.

Consequently, the district court held that ICON had improperly withheld royalties, and hit ICON with a $1,782,608 judgment.

Although ICON attempted to stride against this judgment, the Fifth Circuit upheld the decision, finding unpersuasive arguments that the lower court had misinterpreted Chinese patent law. After accepting the lower court's interpretation that Nautilus's right to royalty payments under the PLA is "coextensive" with its right against infringement, the court examined whether ICON's activities infringed the patent. At the district court level, experts agreed that, to infringe a patent, the infringing party must "practice" all elements of the patent (the "all-elements rule") within China. However, the experts disagreed on whether the all-elements rule requires structural relationships to be practiced through full assembly, or whether those relationships can be practiced through partial assembly accompanied by instructions. ICON argued that such structural relationships may only be practiced through full assembly, which was not the case for the elliptical machines at issue, and thus that the district court improperly closed a "gap" in Chinese patent law. The Fifth Circuit rejected this argument, finding that no "gap" exists in Chinese law, and refused to reverse the district court for "improperly filling" it.

ICON was not dissuaded by the uphill battle presented by these two unfavorable judicial decisions. Instead, in March 2019, ICON petitioned the Fifth Circuit for both a panel rehearing and an en banc rehearing. In the former, ICON insisted that, under Chinese law, only "manufacture" of the patented product is prohibited, and that because the elliptical machines were disassembled when shipped, ICON could sell the machines without having to pay royalties. In its petition for an en banc rehearing, ICON claimed that Chinese patent law has the same "features" of prior U.S. patent law regarding the export of unassembled parts (before it was amended by Congress), and thus the court should have looked to a certain U.S. Supreme Court precedent as guidance about what "manufacture" might mean under Chinese patent law. However, in what appears to be the final sprint, the Fifth Circuit ended the long workout and denied ICON's petitions in a brief two-page order. Thus, Nautilus seems to have finally crossed the finish line in first place.

Postscript: Copyright Suit over "The Art of Fielding" Whiffs in Second Circuit

In the July 2018 Edition, of *Three Point Shot*, we wrote how an author of an unpublished novel that depicts certain dramatic events around a small college baseball team alleged that the author of the hit college baseball novel "The Art of Fielding" misappropriated plot and setting elements to create an infringing work that was "substantially similar" to his own manuscript. Last year, a New York district court dismissed the copyright infringement suit, finding that, when read in context, none of the plaintiff's allegations of substantial similarity between the plaintiff's manuscript and "The Art of Fielding" held up. On appeal, the plaintiff lost the second game of the doubleheader in February 2019 when the Second

Circuit affirmed the dismissal, holding that many of the alleged similarities in the works were unprotectable abstract ideas or scènes à faire, "similar only at a high level of abstraction." (*Green v. Harbach*, No. 18-2078 (2d Cir. Feb. 6, 2019) (Summary Order)).

Postscript: Supreme Court Declines to Leap into Copyright Dispute over Air Jordan "Jumpman" Logo

As previously outlined in the February 2015, June 2015 and May 2018 editions of *Three Point Shot*, renowned photographer Jacobus Rentmeester filed an action against Nike in January 2015 alleging that the company's Air Jordan logo depicting the silhouetted figure of a soaring Michael Jordan (which was based upon a Nike photo) infringed upon an iconic photo that Rentmeester had taken of Jordan for *Life* magazine. In February 2018, the Ninth Circuit affirmed the dismissal of copyright infringement claims, finding that Nike's photograph did not infringe Rentmeester's photograph because the two works, as a matter of law, were not substantially similar enough to establish unlawful appropriation. Following the adverse ruling, Rentmeester took one more shot, but on March 25, 2019, the Supreme Court rejected his petition and denied review of the case.

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For more information about this practice area, contact:

Neil H. Abramson
+1.212.969.3001 – nabramson@proskauer.com

Elise M. Bloom
+1.212.969.3410 – ebloom@proskauer.com

Robert E. Freeman
+1.212.969.3170 – rfreeman@proskauer.com

Wayne D. Katz
+1.212.969.3071 – wkatz@proskauer.com

Joseph M. Leccese
+1.212.969.3238 – jleccese@proskauer.com

Adam M. Lupion
+1.212.969.3358 – alupion@proskauer.com

Jon H. Oram
+1.212.969.3401 – joram@proskauer.com

Bernard M. Plum
+1.212.969.3070 – bplum@proskauer.com

Howard Z. Robbins
+1.212.969.3912 – hrobbins@proskauer.com

Bradley I. Ruskin
+1.212.969.3465 – bruskin@proskauer.com

Frank A. Saviano
+1.212.969.3664 – fsaviano@proskauer.com

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