THREE POINT SHOT

Proskauer

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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. In this issue, we feature contributions from our talented group of summer associates. Thanks to Oludolapo Akinkugbe, Ross Evans and Rebecca Fishbein.

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.

Documentary Filmmakers Stiff Arm Copyright Infringement Suit over Use of "Super Bowl Shuffle" Clips

For those of us of a certain age, the song "Super Bowl Shuffle" and associated music video, which featured members of the championship 1985 Chicago Bears rapping, left an indelible memory. Indeed, who can easily forget the image of a headband-wearing Jim McMahon laying down the following lyrics with panache?

I motivate the cats, I like to tease.

I play so cool, I aim to please.

That's why you all got here on the double

To catch me doin' the Super Bowl Shuffle.

More recently, a federal court in Illinois found a documentary filmmaker's limited use of clips from that infamous song in a documentary about the '85 Bears to be fair use. (*Red Label Music Publishing, Inc. v. Chila Productions*, No. 18-7252 (N.D. Ill. May 30, 2019)).

"Super Bowl Shuffle" was recorded only months before the 1985 Bears won the Super Bowl in January 1986 and it then blitzed the Billboard charts to peak at number 41. Honoring that great team's legacy, Chila Productions (the "filmmakers") released a documentary in 2016 entitled, *'85: The Greatest Team in Football History*, which features interviews of former players, coaches and fans of and from that historic season. The film also offers some commentary and historical perspective on the "Super Bowl Shuffle." In doing so, the filmmakers used snippets from both the song and the video: the video portion comprise 59 seconds broken into 16 clips, each lasting between one to eight seconds; only one of the video clips includes the music. The filmmakers also used the song for 8 seconds of the 100-minute documentary, of which only four seconds contain lyrics (and none show any of the players' individual raps or verses, or any of the chorus).

In October 2018, Red Label Music Publishing ("Plaintiff"), which owns the rights to the song, sought to strip the "Super Bowl Shuffle" clips from the documentary by filing a complaint alleging copyright infringement against the filmmakers and others involved in the production and distribution of the documentary. In response, the filmmakers quickly filed a motion to dismiss, claiming that their use of clips of the material in question was fair use because, first, their film was a historical commentary and second, the film used only brief snippets of the song.

As many of you know, fair use is a statutory defense to a claim of copyright infringement. The Copyright Act sets out four non-exclusive factors for the court to consider in making the determination whether a specific use of a protected work is fair, namely (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107. In making its determination in favor of the filmmakers, the court focused on the first, third and fourth factors.

The first factor of the fair use test is often described as an analysis of whether the use is "transformative"; that is, whether the new work merely supersedes the original work or instead adds something new with a further purpose. In this case, the court ruled that the snippets of the song and video were used for their factual content, rather than their expressive content, and that the use of the "Super Bowl Shuffle" clips in the film served as commentary and "a historical guidepost." According to the court, such uses differed from the work's original purpose to entertain and raise money for the needy.

Regarding the third factor, which considers the amount taken by the infringers "in relation to the copyrighted work as a whole," the court ruled that the filmmakers' use of the "Super Bowl Shuffle" was "insubstantial" in that the filmmakers only used eight seconds of the song's music (which represented a fraction (2%) of the six-minute song) and only a small portion of video. In all, the court found the filmmakers stayed onside when it came to fair use and that they did not take the "heart" of the work and used "no more than [was] necessary to serve as a historical reference point in the commentary." Thus, this factor also weighed in favor of fair use.

With respect to the fourth factor, which considers the effect of the use upon the potential market for the work, the court found that it did not favor either party. The Plaintiff argued that the filmmakers' use of the clips adversely affected the licensing market for its work, but the judge ruled that Plaintiff failed to articulate any tangible way that the documentary reduced or would reduce the potential licensing market for clips of the "Super Bowl Shuffle." The court surmised that the secondary use by the filmmakers served a "different market function than the song does standing alone" and it was unlikely that the use of the song in the documentary would prevent any consumer from purchasing or licensing the song, nor would potential purchasers of "Super Bowl Shuffle" clips purchase the documentary from the filmmakers instead of licensing clips themselves from the Plaintiff. Since there was a market for licensing of clips of the song, Plaintiff may have suffered a little damage, according to the court, but not enough to have this factor weigh in favor of either party.

The filmmakers' game plan was successful, as the final score in this case revealed: the first and third factors weighed in favor of fair use, and the fourth factor was neutral at best (in a footnote, the court stated that even if for the sake of argument factor four weighed in the Plaintiff's favor, it would still be insufficient to overcome the substantial weight of the other factors). In the end, the Plaintiff's claims were stuffed at the line, with the court granting summary judgment in favor of the filmmakers. As the prevailing party, the filmmakers could seek a further end zone celebration by seeking an award of attorney's fees. However, any such celebration will have to wait as the Plaintiff has filed a notice of appeal to the Seventh Circuit.

Fitbit Says Goodnight to Sleep Tracker Class Action with Settlement

Fitbit Inc.'s ("Fitbit") class action nightmare began in May 2015 when Florida-based plaintiff James P. Brickman filed a putative class action suit in the Northern District of California, alleging that certain premium Fitbit fitness-tracking devices failed to track users' sleep quality and duration accurately, despite representations and advertisements to the contrary. Almost four fitful years later—after myriad pleadings, motion papers and on-and-off-and-on again settlement proposals—the parties substantively resolved the matter. (*Brickman v. Fitbit, Inc.*, No. 15-2077 (N.D. Cal. Preliminary Approval Order Dec. 17, 2018)). Still, despite everyone's heart rate having returned to rest, the parties continue to spar over some final details, including plaintiffs' attorneys' (or class counsel's) fees.

Plaintiffs` state-specific statutory and common-law claims (fraud, negligent misrepresentation, and unjust enrichment) all stemmed from Plaintiffs' overarching theory of the case: that consumers purchased certain premium Fitbit models and paid extra for sleep-tracking functionality that hardly worked like a dream. According to the plaintiffs in their complaint, despite representations (including on the products' packaging) from the company that the devices tracked users' sleep, the Fitbits instead just measured consumers' movement throughout the night via the device's accelerometer, allegedly resulting in inaccurate sleep-tracking data.

In November 2015, it seemed that the case might prove as short-lived as an afternoon catnap when the presiding judge suggested plaintiffs' complaint did not establish a sufficient factual basis for its allegation that Fitbit's sleep-tracking functionality fell short of its various representations. Instead of dismissing the case, however, the judge allowed plaintiffs to amend their complaint to address this shortcoming.

In January 2016, Fitbit filed a motion to dismiss plaintiffs' Fourth Amended Complaint, arguing that: (1) the challenged representations surrounding the sleep-tracking Fitbit devices could not have misled a reasonable consumer about its sleep-tracking utility, (2) plaintiffs' claims were blanketed in "bad science" that were contrary to Fitbit's own studies, and (3) any representations on its device packaging were mere puffery. The court denied Fitbit's motion, finding that plaintiffs' claims were plausible. The court also rejected Fitbit's argument that their product packaging language was non-actionable, reasoning that its representations (e.g., that the device would "Track Your Night" through "Hours slept," "Times woken up," and "Sleep quality)" were "particularized statements that could be sued on."

Subsequently, in January 2017—after months of discovery—plaintiffs filed a motion to certify, as respective classes, all California and Florida residents who purchased and registered a sleep-tracking Fitbit device before October 27, 2014. Then, in April 2017, Fitbit filed a motion for summary judgment, arguing that: (1) it did not make false representations, (2) consumers neither relied upon nor were misled by its representations, (3) user error committed by consumers could have caused erroneous sleep-tracking data, and (4) plaintiffs cannot establish an entitlement to damages. In November and December 2017, respectively, the Court ruled, in turn, on these two motions—first granting class certification for plaintiffs and second denying Fitbit's motion for summary judgment.

In August 2018, there appeared to be serious movement in the class action when the parties filed a proposed settlement agreement with the court. Substantively, this initial proposed settlement—which sought to resolve not only the previously-detailed claims of the class members from California and Florida but also claims from across the nation—would have provided class members with a $10 cash payment and $5 Fitbit voucher per claim. The court, however, denied this proposed settlement, citing concerns over "the use of a coupon for another Fitbit purchase instead of an all-cash payment to the class, an overly broad release by the class, and [the lack of] conduct remedies for the alleged false advertising and marketing statements." Ultimately, the parties reached a new proposed settlement agreement, which addressed the court's concerns by implementing revisions such as an increase of the per-claim payment from $10 to $12.50 and a narrowing of the release language; this new settlement was preliminarily approved by the court in December 2018**.**

Notably, the preliminarily approved settlement mandates that Fitbit directly pay plaintiffs' attorney's fees and other costs, ensuring that such expenses do not subtract from or impact payments to class members. That said, the settlement agreement does not specify the amount owed to plaintiffs' attorneys from Fitbit; rather, it requires that the class counsel petition the court for a specific amount while also reserving Fitbit's right to oppose the amount petitioned for.

It is perhaps unsurprising, then, that the parties' latest court filings concern plaintiffs' attorneys' fees. Indeed, in May 2019, the class counsel filed a motion requesting Fitbit to pay more than $7.3 million in fees and more than $365,000 in litigation expenses. More recently, on June 14, Fitbit filed a motion opposing the class counsel's calculation of fees and costs, taking issue with the method class counsel used in its calculation and arguing that the attorneys' fees requested by class counsel, if granted, would represent a "windfall," as its $7.3 million value is

$1.8 million (i.e., 33%) greater than the actual total value of the settlement ($5.5 million, calculated based on claims made to date).

Fortunately for members of the class, however, the preliminarily approved settlement agreement expressly states, among other things, that the court should not consider the amount sought by class counsel when deciding whether to approve the settlement agreement, and that if the settlement agreement were approved, it would bind the parties regardless of the attorneys' fees awarded. As such, though Fitbit does not yet appear to have complete closure on its four-year (and counting) class action nightmare, members of the class, at least, do not have to lose sleep over whether the settlement could be voided by a party unhappy with court-awarded attorneys' fees.

UFC Fighter Hardly Breaks a Sweat in Placing a Choke Hold on Maker of Performance Product

Yoel Romero ("Romero") is best known for his Ultimate Fighting capabilities. But, he did not need to throw a punch in convincing a New Jersey state court to grant him over $27 million in damages in a default judgment against supplement maker Goldstar Performance Products ("Goldstar") under the state's Consumer Fraud Act. In his complaint against Goldstar, Romero alleged that he had taken a performance supplement made by Goldstar, which unbeknownst to him, contained a banned substance. Romero's use of the supplement resulted in a positive drug test result, a surprise uppercut that, at least according to Romero, harmed his UFC career and endorsement opportunities.

Goldstar is a supplement company apparently based somewhere in northern New Jersey. Despite best efforts to do so, Romero's counsel was never actually able to pinpoint the company's exact location (as evidenced by Romero's petition to the court concerning service of process issues and its investigatory efforts tracking the defendants around a bevy of suburban New Jersey communities).

Romero won a silver medal in freestyle wrestling for Cuba at the 2000 Olympics in Sydney and is currently a top-ranked middleweight mixed martial artist signed to the Ultimate Fighting Championship (UFC). At the time of his failed drug test, in 2016, he had won a number of fights and was considered to be in the running for a title fight. While in training, and purportedly after taking reasonable precautions to make sure the product did not contain any banned substances, Romero stated that he took a supplement SHREDRx that was manufactured, marketed, and sold by Goldstar. A short time after Romero took SHREDRx, he was subject to a random drug test given by the United States Anti-Doping Agency (USADA), which is the independent agency that administers the UFC's anti-doping policy. Romero failed this drug test and was found in violation of the UFC anti-doping policy. The cause of his positive test was Ibutamoren, a substance banned by the USADA. According to Section 2.2 of the UFC's Anti-Doping Policy, each athlete has a "personal duty" to ensure that no prohibited substance enters his or her body and "it is not necessary that intent, fault, negligence or knowing use on the Athlete's part be demonstrated in order to establish an Anti-Doping Policy Violation." As a consequence, Romero was suspended for six months starting in January 2016.

Romero accepted the suspension, but claimed he never knowingly took Ibutamoren. He sent a pill from his SHREDRx bottle to the USADA, which tested it and found it contained a small amount of Ibutamoren (5 micrograms per capsule). The USADA also tested a factory-sealed SHREDRx bottle, and it contained the banned substance as well. However, Ibutamoren was not on the ingredients list for the supplement.

Contending that his positive test and suspension was directly caused by Goldstar's mislabeled or tainted supplement, Romero filed suit in New Jersey state court against Goldstar (*Romero v Goldstar Performance Products*, No. MID-L-7287-17 (N.J. Super. filed Dec. 11, 2017)). Romero advanced claims for negligence, strict products liability, breach of implied warranties, intentional and negligent misrepresentation and violation of the New Jersey Consumer Fraud Act, and also included a request for punitive damages.

Goldstar apparently refused to enter the "Octagon" and make an appearance in the litigation. Romero's lawyers had great difficulty effecting service of process and eventually got leave from the court to serve the defendant via certified mail.

Without any answer from Goldstar, the court declared a TKO and in December 2018 granted default judgment in favor of Romero as to liability. Following a subsequent hearing, on June 3, 2019, the court entered an award of monetary damages topping $27 million. Damages for his lost wages and contracts, reputation, emotional distress and attorney's fees, tripled under the New Jersey Consumer Fraud Act, and with interest, came out to $27,653,147.80.

Following Romero's success, one could imagine similar cases against supplement makers from athletes who have also tested positive but do not believe they are personally at fault. The court of public opinion is quick to judge athletes who test positive (as indicated by the reputation damages Romero received), and a lawsuit against a supplement maker may perhaps be at least one way to try to rehabilitate one's reputation.

Proskauer has more than 50 years of experience counseling the world's premier sports organizations on their most critical and complex matters.

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