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Will Johnny Be Good, or Will Name Games Go up in Flames?

Johnny Gaudreau, left wing for the Calgary Flames, is attempting to high-stick potential interlopers by locking up rights to his now-popularized nickname – Johnny Hockey – in a move that could mean a big payday down the road. Feel like you've heard this story before? You have. Gaudreau is just the latest in a long line of athletes, including LeBron James (King James), Robert Griffin III (RG3), Jeremy Lin (Linsanity), Chris Andersen (Birdman), Marshawn Lynch (Beast Mode) and Gaudreau's namesake, Johnny (Football) Manziel, trying to secure trademark protection for marketable nicknames before others cross-check them out of the market.

Both offensive and defensive motivations underlie the flurry to seek trademark protection. On the offensive side of the ice, holding trademarks gives the athlete greater bargaining power when negotiating an endorsement deal, as sponsors pay large sums for the exclusive rights to such marks. It is yet another way that athletes increasingly rely on brand management, beyond their athletic ability, as an additional source of income and yet another tool to extract the most value out of notoriously short and unpredictable careers.

The federal trademark filing fee, generally $275 - $375, is ultimately either a worthwhile investment or a *de minimis* sunk cost, considering the potential upside of a multimillion dollar merchandising campaign or endorsement deal.   And in a system where anyone can acquire trademark rights as long as the mark is distinctive and the rights seeker is either the first to use the mark in commerce or the first to register the mark with the U.S. Patent and Trademark Office ("USPTO"), filing first or establishing first-in-use is vital. If someone else beats the athlete to it, he may be stuck watching the value of future endorsements go down in Flames, or forced to fight trademark trolls for rights to the marks. Worse, he may find himself in a face-off against the registrant in an opposition proceeding (and trust us, such proceeding is no slapstick comedy).

Nicknames present a slightly special case, however, as the Lanham Act (15 U.S.C. §1052(c)) prohibits the registration of marks that consist of a living individual's name or likeness without the individual's written consent. The USPTO seemingly treats nicknames as names for purposes of the Lanham Act, as it generally has refused to grant third parties such marks where it would falsely imply a connection to the athlete. The Zamboni race to file is therefore more crucial with respect to athletes' attempts to trademark attributes, catchphrases and poses (believe it or not, "Tebowing" is a registered mark).

On the defensive end, owning rights to one's marks allows an athlete to preempt any unwanted hooking of the mark, without relying on the ref to call interference. Indeed, though Gaudreau might one day score a Johnny Hockey line with a major apparel or sports equipment maker, for now the rookie merely seeks to prevent negative associations with the name. While there was little threat of the USPTO granting a zealous fan a trademark in the Johnny Hockey nickname, Gaudreau (assuming his application is approved) could thereafter pursue those abusing the mark in ways he would not have been able to otherwise.

Yet, rookie athletes like Gaudreau are encountering unexpected backlash. Manziel and Gaudreau both drew some jibes for acting too big for their shoulder pads, moving to trademark their nicknames before accomplishing anything substantial on a professional level. However, in the words of T. Swift, "Haters gonna hate." Indeed, a scattering of boos did not stop Manziel from once reaching number one in NFL jersey sales. Ultimately, any fan uproar will be fleeting and athletes like Gaudreau will be left not only with greater control over their names and likeness, but with the ability to sculpt the larger-than-life persona that is the modern-day superstar (and perhaps the added swagger needed to ignite the Flames to the Stanley Cup finals for the first time since 2004).

Class Action Suit Seeks Jackpot against DraftKings

Fantasy sports ("fantasy") is a dynamic industry that has surged in popularity in North America. In 2005 there were an estimated 12.6 million fantasy players in the U.S. and Canada – that number exploded to 41.5 million players in 2014. The most popular fantasy sport by far is football with a market share of nearly 70%. Most recently, the landscape of fantasy sports has changed drastically with the advent of "daily fantasy sports." Instead of maintaining traditional season-long rosters for any given sport, daily fantasy sports give players a daily or weekly roster to manage, often in a head-to-head format with cash incentives.

DraftKings, founded in 2011, is the second largest online site to offer daily fantasy sports. The Boston-based company is backed by $35 million in venture capital, and awarded a staggering $300 million in prizes to its nearly 1 million registered users in 2014, with DraftKings pulling in $30 million in revenue over that same time period. DraftKings raised the stakes in 2014 through blockbuster acquisitions of DraftStreet and StarStreet, two former competitors, solidifying the successful start-up's place amongst the fantasy elite. The company is projected to hit $1 billion in payouts and bring in nearly $100 million in revenue in 2015.

DraftKings's market share is partly attributed to its bold, yet effective, advertising. Through November 2014, DraftKings had run 1,782 separate television ads in 2014 alone. Unfortunately, at least according to one legal complaint, some of these ads may require the industry titan to cash out users who believe they were dealt a bad hand.

In a class action complaint filed on January 29, 2015 in the United States District Court in the Southern District of Florida, a DraftKings user ("Plaintiff") claims the company's advertising practices are deceptive and fraudulent. Plaintiff contends that DraftKings violated various state consumer protection laws, including the Florida Deceptive and Unfair Trade Practices Act, by making numerous false statements of material fact on its website, and in online video and television advertisements. (*Aguirre v. DraftKings, Inc.*, No. 1:15-cv-20353-DPG (S.D. Fla., filed Jan. 29, 2015)).

The complaint specifically targets a DraftKings commercial that claims, *inter alia*, that if a customer signs up for a DraftKings membership, the site will "double [his or her initial] deposit . . . up to $600." Plaintiff alleges that upon signing up on the site and making the initial deposit, the 100% matching bonus is never realized and customers receive no additional money immediately upon deposit. Rather than receive the guaranteed instant 100% deposit-match, the complaint asserts that customers must enter fantasy contests to receive incremental bonuses, which are a mere 4% of every dollar they put into play. Plaintiff claims, for example, that in order to receive a free matching bonus of $600 for making an initial $600 deposit, a customer would have to deposit an additional $14,400, and then wager the entire $15,000 to receive the $600 deposit bonus – an act, Plaintiff claims, requiring users to deposit 25 times more than the advertised amount, per the DraftKings's offer terms.   Plaintiff argues that this roundabout way of awarding the promised bonus is an unfair or deceptive practice under Florida law.

In addition, Plaintiff also relies on the Florida Free Gift Advertising Law, which "recognizes that the deceptive misuse of the term 'free' and words of similar meaning and intent in advertising" may be deemed a deceptive trade practice under Florida law. According to Plaintiff, the gift advertising law requires that advertising promoting free items that are tied to conditions or obligations must include a clear and conspicuous statement of any such conditions or obligations, a legal requirement which DraftKings purportedly failed to abide by.

DraftKings is now on the clock to respond to these allegations – but they may have an ace up their sleeve. Before registering for a DraftKings's account, users must agree to be bound by the site's Terms of Use, which include a mandatory arbitration clause that contains a class action waiver. If the arbitration agreement is found to be legally binding and enforceable, users would be compelled to pursue their claims individually at arbitration, driving a spade through the heart of the class action. It will now be up to the court to determine whether Plaintiff's lawsuit is a bust or if DraftKings will be forced to ante up.

Heir Jordan: Did Nike Improperly Inherit the Jumpman Logo?

Air Jordan. This phrase is both a nickname for Hall of Fame basketball player Michael Jordan and the brand name of the most successful basketball sneaker line in the world. In 1984, Nike signed Jordan to a five-year deal for a then-record $2.5 million. The deal was a slam dunk: the company sold $100 million worth of the first iteration of Air Jordan shoes in the first year of the deal. Since then, there have been 28 more versions of shoes – not including variations – in addition to several items of related apparel released under the Brand Jordan umbrella. In 2014 alone, these Jordan products generated $3.2 billion in retail sales.

For decades, Nike's Brand Jordan has been recognized by its "Jumpman" logo, the enduring image of Jordan sailing toward the basket in grand jeté pose, ball in outstretched hand. Now, a well-respected photographer, Jacobus Rentmeester, is claiming that Nike created this logo using a picture he took of Jordan for a special issue of *LIFE* magazine for the 1984 Summer Olympics. Rentmeester believes that he retained the copyright on the image despite working as a contracted photographer for the magazine the year it was taken. Shortly after publication, Nike paid Rentmeester $150 for use of two of the transparencies, which, according to the lawsuit, were only intended to be part of company presentations. Coincidentally, Nike recreated a similar photo of Jordan jumping in front of the Chicago skyline shortly thereafter. This photo eventually led to the Jumpman silhouette and, now, Rentmeester's opposition (which perhaps was inspired by the Supreme Court's *Petrella* decision interpreting the viability of infringement actions involving older works). Although the image was legally copyrighted upon publication, Rentmeester could not sue for infringement in federal court until December 18, 2014, the date he registered the photo with the U.S. Copyright Office.

With the registration in hand, Rentmeester is now suing Nike in Oregon federal court for copyright infringement and claims under the Digital Millenium Copyright Act (DMCA) for alleged removal of copyright management information from copies of the original photo. (*Rentmeester v. Nike, Inc.*, No. 15-00113 (D. Or. filed Jan. 22, 2015)). Rentmeester is seeking, among other things, a permanent injunction to bar Nike from using the logo and any profits attributable to infringement of his copyright. Rentmeester claims that he created an original pose which was not reflective of Jordan's natural jump or dunking style. Rentmeeser admits that Nike paid him $15,000 in March 1985 for a limited license to use the image on billboards and posters for two years, but alleges that the company exceeded the agreement and fouled out by using a similar depiction of Jordan in later marketing materials, as well as when they created the Jumpman logo in 1987. According to Rentmeester, he planned the shot-turned-silhouette with artistic precision. The lawsuit explains that, over approximately half an hour, Rentmeester guided Jordan to leap unnaturally and hold the ball using his nontraditional left hand. This process required persistence and repeated attempts, as it was not something Jordan had done before. Such efforts, according to Rentmeester, clearly established the distinctive and original elements of the copyrighted photo. Months afterward, though, Nike grabbed the rebound and took a similar photo of Jordan, this time in front of the Chicago skyline. Objectively speaking, this iteration had its differences, but it still possessed the elements of wider-than-normal spread legs and Jordan palming the ball in his outstretched left hand. Far from an unlawful double dribble, Nike claims that, with this new photo, it created its Brand Jordan silhouette, which gained notoriety as the Hall of Famer's stardom rose.

It is now years after Michael Jordan has retired from basketball, but Brand Jordan is still in Nike's "starting five," earning significant revenue for the apparel giant. Rentmeester hopes his claims are a "lottery pick" of sorts and that he can recover substantial monetary damages that compensate him for Nike's alleged use of his copyrighted image, which has become an integral part of the company's marketing strategy. Without an imminent settlement, it may be up to the court to decide whether Nike committed a foul on an apparent steal or whether the iconic logo was a proper (and lawful) substitiution of the original image.

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