



## May 2018 Edition

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**

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### Breaking News: U.S. Supreme Court Strikes Down PASPA, Likely Spurring Legalized Sports Wagering on the State Level

On May 14, 2018, the U.S. Supreme Court issued its long-awaited decision in [Murphy v. NCAA](#), striking down a 26-year old federal statute that banned States from "authorizing" sports gambling. Although the Court's ruling is expected to prompt many States to adopt new legislation permitting intrastate wagering on sporting events, Congress still has the authority to enact a federal scheme that could permit regulated wagering on a nationwide basis.

For additional coverage of the decision, read the full [Client Alert on our website](#).

### Nike Closes Out Series with Win in Ninth Circuit Forum

Nike Inc. ("Nike") hit a big fourth quarter three when a split Ninth Circuit panel blocked the "Jumpman" logo copyright infringement lawsuit brought by renowned photographer Jacobus Rentmeester ("Rentmeester" or "Plaintiff") ([Rentmeester v. Nike, Inc.](#), No.15-35509 (9th Cir. Feb. 27, 2018)) . As previously chronicled in the [February 2015](#) and [June 2015](#) editions of *Three Point Shot*, Rentmeester filed an action against the prominent sportswear brand in January 2015 alleging that the company's iconic logo of the silhouetted figure of Michael Jordan caught in mid-leap infringed upon the photo that Rentmeester took of Jordan for *Life* magazine for the 1984 Summer Olympics.

The image of Jordan has become synonymous with both Nike and its famous Air Jordan line of apparel: the athletic legend striking a *grand jeté*—a pose usually reserved for ballet dancers rather than MVPs—as he soars toward an unseen basket, ball palmed in his outstretched left hand. Rentmeester first captured this idea in his famous 1984 *Life* magazine photograph, featuring Jordan flying toward a hoop over a faintly-lit grassy knoll (a photo which Nike actually licensed for a limited time). A year later, a Nike photographer staged a similar scene, with Jordan wearing Nike shoes and rising above the Chicago skyline, a reference to the Chicago Bulls. Nike used its photo on posters and billboards to promote the then-new Air Jordan brand. In 1987, Nike created the Jumpman logo based on its photo and it soon became one of the company's most famous trademarks. Almost 25 years later, Rentmeester filed his claim that Nike infringed his photo because Jordan first struck the unique *grand jeté* pose as part of the *Life* magazine photoshoot. See below:



An

Oregon federal judge disagreed

with Rentmeester and granted Nike's motion to dismiss the suit in June 2015 ([Rentmeester v. Nike, Inc.](#), No. 15-00113 (D. Or. June 16, 2015)). U.S. District Judge Michael W. Mosman explained that different works merit either "broad" or "thin" copyright protection depending on the range of expression involved in the work at issue, and found that the idea expressed in the Rentmeester photograph had a narrow range of expression, earning it only thin copyright protection. As a result, the works had to be nearly identical for Nike's photo to infringe upon Rentmeester's; since the photographs are not virtually identical, the court concluded that they were not substantially similar and the Nike photograph did not infringe. Declaring this a case of goaltending because his suit was never given a chance to reach the discovery stage, Rentmeester appealed, attempting a steal at the Ninth Circuit.

Reviewing the legal determination *de novo*, the Ninth Circuit majority affirmed the decision, but on a different reasoning than the district court. Discussing the unique challenge of separating the protected elements from the unprotected elements in a photograph, the court explained that what is protected by copyright in a photograph is the photographer's selection and arrangement of what would otherwise be unprotected elements. Like the teamwork of the [five players of a Princeton offense](#) (which envisions a beautiful interplay of pass, dribble, shoot, screen, cut and misdirection), it is "the combination of the subject matter, pose, camera angle, etc. [that] receives protection, not any individual elements standing alone." Because Rentmeester's selection and arrangement of such elements "resulted in a photo with many non-standard elements," the Ninth Circuit disagreed with the lower court's characterization and found the resulting image is "entitled to the broadest protection a photograph can receive" and that Rentmeester was "entitled to prevent others from copying the details of that pose as expressed in the photo he took."

The question remained, however, whether Rentmeester plausibly alleged that his photo and the Nike photo were “substantially similar” to constitute infringement. The Ninth Circuit found that Nike’s photograph did not infringe Rentmeester’s photograph because the two works, as a matter of law, are not substantially similar enough to establish unlawful appropriation. In denying Rentmeester’s drive to the basket, the panel held that “just as Rentmeester made a series of creative choices in the selection and arrangement of the elements in his photograph, so too Nike’s photographer made his own distinct choices in that regard. Those choices produced an image that differs from Rentmeester’s photo in more than just minor details.”

In order to prove unlawful appropriation, as Rentmeester was required to do, he would have had to have shown that the “two photos’ selection and arrangement of elements” were “similar enough that ‘the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them.’” The court determined that in this, Rentmeester had not succeeded, finding that the Nike photographer “borrowed only the general idea or concept” of the photo, but did not copy “the details of the pose” as expressed in the photo. By way of example, the appeals court pointed out several differences, including: the position of the limbs in each photo, the backdrop, the positioning of the basketball hoops, the placement of Jordan in the frame, and the use of shadow. Observing that Rentmeester’s copyright does not grant him a monopoly over the idea of Michael Jordan leaping in a *grand jeté*, the court ultimately found that the disparities between the Nike photograph and Rentmeester’s photograph were those that “no ordinary observer...would be disposed to overlook.” As such, since the Nike and Rentmeester photos are not substantially similar as a matter of law, the court reached the same conclusion of non-infringement with respect to the Jumpman logo.

Despite resulting in a dismissal, the judgment can’t be characterized as “nothing but net” for Nike. Judge John B. Owens dissented with the panel’s findings, in part, declaring that the majority’s ruling may have been correct, but that an ultimate comparison of the Rentmeester and Nike photos presented factual issues that were more appropriate at the motion for summary judgment stage. While agreeing that the Jumpman logo itself cannot infringe upon the copyright of the Rentmeester photograph, Judge Owens stated that he thought “that whether the Nike photo is substantially similar is not an uncontested breakaway layup, and therefore dismissal of that copyright infringement claim is premature.”

Following the Ninth Circuit’s affirmance of the dismissal, with time running out on the game clock, Rentmeester hurled a prayer from the half court line on April 12, 2018, petitioning the court for a panel rehearing and rehearing *en banc*. Given that rehearings *en banc* are generally not favored—and barring the Supreme Court deciding to take the floor—it appears this potential buzzer beater will probably rim out, leaving the Ninth Circuit panel’s ruling uncontested.

## Hacky Sack Champ Fails to Juggle Federal and State Claims before the 7th Circuit

Johannes “Ted” Martin (“Martin”) holds the men’s singles [Guinness World Record for most consecutive footbag kicks](#) – 63,326 kicks while keeping the bag airborne. He accomplished this feat over almost nine hours, quite a bit longer than the usual hacky circle back-and-forth at a jam band summer festival. For those of you not in the know, footbags are [commonly referred to](#) as Hacky Sacks, which is a popular brand that produces many footbag toys. This past month, the footbag world record holder failed to keep his false endorsement legal claims brought against fast food restaurant chain Wendy’s International Inc. (“Wendy’s”) and Guinness World Records Limited (“Guinness”) from hitting the ground when the Seventh Circuit [denied his petition for an en banc rehearing](#). (*Martin v. Wendy’s Int’l, Inc.*, No. 17-2043 (7<sup>th</sup> Cir. Apr. 9, 2018)). Martin had sued Wendy’s and Guinness for federal Lanham Act and state right of publicity claims over a Kid’s Meal promotion that included a footbag and referred to Martin by name in conjunction with his record. The Seventh Circuit panel, like every court that has heard Martin’s case thus far, found no viable claims.

Martin’s beef with Wendy’s stems from a six-week joint advertising campaign that ran during the summer of 2013 between Wendy’s and Guinness. According to a [Guinness publication](#), the two companies entered into “a partnership sure to add a little friendly record-breaking competition to family dining.” From August 12 to September 22 in the United States and Canada, every Wendy’s Kid’s Meal came with one of six Guinness “record-breaking” toys. Amongst the six toys was a “trick footbag.” The words “Guinness World Records” were written on the footbag toys and their packaging, and the text on both sides of the Kid’s Meal bag referred to the promotion’s six “record-breaking toys.”

Most relevant to this suit, the Hacky Sack came with an instructions card that showed two people (notably, not the plaintiff) playing the game. It also listed three world records aside from Martin’s below the picture. Directly under the instructions heading, the card read: “How many times in a row can you kick this footbag without it hitting the ground? Back in 1997, Ted Martin made his world record of 63,326 kicks in a little less than nine hours!” The card had further instructions on how to play and ended with the question, “What kind of family record can you set?”

Martin, who represented himself pro se, tried to keep both federal and state-law claims aloft in his first appearance in court, which is perhaps not a trick that should be tried at home. In 2015, Martin filed his complaint asserting two claims under the Lanham Act and an Illinois right of publicity claim. First, Martin alleged that by using his name on the instruction card, the public was confused into thinking that he endorsed the free footbag toy. Second, by calling the toy “record-breaking” Martin claimed the defendants misled the public into believing the give-away footbag is the same as the one he used to set the world record. Finally, on the state level, Martin argued Wendy’s and Guinness violated the Illinois Right of Publicity Act by using his name for commercial purposes without his written consent. In May 2016, an Illinois district court [granted Wendy’s and](#)

[Guinness's motion to dismiss](#). In 2017, following the plaintiff's filing of an amended complaint, the court again dismissed the suit, [punting the action](#) out of the legal circle. The district court ruled, among other things, that plaintiff's Illinois right of publicity action was barred by a statutory exception, which exempts the use of an individual's name in truthfully identifying the person as the author of a particular performance (see [765 ILCS 1075/35\(b\)\(3\)](#)). In addition, it rejected the Lanham Act claims as the plaintiff failed to plausibly allege that ordinary consumers were likely to believe he endorsed the free footbags. Merely mentioning the plaintiff's record in the instruction materials was not enough. Moreover, the court noted that the reference to Martin's record served at most as "an illustrative example" of what to do with a footbag, and had nothing to do with the qualities of the footbag from an advertising standpoint.

In March 2018, the Seventh Circuit [affirmed](#) the district court's decision in favor of Wendy's and Guinness ([Martin v. Wendy's Int'l, Inc.](#), No. 15-6998 (7<sup>th</sup> Cir. Mar. 9, 2018) (nonprecedential)). Refusing to keep Martin's hack going, the Seventh Circuit found no reasonable consumer would think that Martin endorsed the toy footbags because an instructional card factually identified Martin as a record holder. If anything, the appeals court stated that the appearance of "Guinness World Records" on the footbag might prompt a reasonable consumer to conclude that Guinness—not Martin—was associated with the footbag. As to the second Lanham Act claim, to survive dismissal, the plaintiff was required to show that the defendants made "a material false statement of fact in a commercial advertisement and that the false statement deceived or had the tendency to deceive a substantial segment of its audience." In shredding this claim, the Seventh Circuit found no misrepresentation or possibility for consumer confusion because calling the toy "record breaking" was mere non-actionable puffery, not deception. It also [found](#) no reasonable consumer "would believe that free toys accompanying kids' meals to encourage intra-family play were the same types of items used to set world records."

As to the Illinois right of publicity claims, the Seventh Circuit agreed with the lower court and ruled that the statutory exception, as mentioned above, which allows for the truthful use of an individual's name in connection with his or her own performance, barred Martin's claims. Martin argued this exception does not apply to this contest, because he did not perform in the defendant's promotion. However, the court noted that such a qualification does not appear in the statute. As Wendy's and Guinness truthfully identified the plaintiff as the holder of one of the Guinness world records, the court found this to be the exact type of instance to which the carve-out was meant to apply.

Martin is a world record holder boasting an amazing footbag achievement, but, with the Seventh Circuit rejecting an *en banc* rehearing of the dispute, it appears his side career as a pro se litigant is not on the same trajectory.

## Orangetheory Fitness in a Sweat about Three Proposed Class Actions

New Year's resolutions are a fitness club owner's best friend. Countless Americans resolve to get into better shape in the new year, leading to an uptick in sign-ups for gym memberships. These lofty goals are often short-lived and by the second week of February, [around 80% of those "resolution-ers" fail to live up to their goal](#). Gyms love this optimistic spirit because many of these new members often sign up for annual plans or forget to cancel their monthly memberships and end up paying membership fees even though they are lounging on the couch instead of reaching their target heart rate. What business owner wouldn't love to get paid for nothing?

Recently, a fitness studio chain, [Orangetheory Fitness](#) ("Orangetheory"), which features its own one-hour, full body, group interval workout, was hit with a proposed class action lawsuit. The suit alleges the fitness chain, and one of its local franchises, went a bit farther than just marketing to hopeful "resolution-ers" and that its membership cancellation practices violated the Illinois consumer protection laws. ([Robertson v. Perloff Providence Studio 2, LLC](#), No. 2018-CH-04753 (Ill. Cir. Ct., Cook Cty filed Apr. 12, 2018)). According to the complaint, Orangetheory's agreements with its members contain language that seems to indicate that a customer can get a prorated refund if they drop the medicine ball and cancel their membership within three days of signing up. However, the lawsuit claims that, practically speaking, customers are unable to cancel a membership without paying for at least two months of classes.

Illinois state law seems to understand that consumers often make spur-of-the-moment decisions – especially if that decision was made while recovering from a New Year's Eve Party – so they require gyms to pay refunds to customers who cancel within three business days. The Illinois state law in question, the [Illinois Physical Fitness Services Act](#) ("PFSA" or the "Act"), also requires gyms to include the requirements and prohibitions of the PFSA in the written membership contract, to provide contracts to their customers in writing at the time of signing and to maintain original copies. The PFSA also provides that any waiver by the customer of the protections of the Act is unenforceable and any contract for "physical fitness services" that does not comply with the applicable provisions of the Act is void. Any customer injured by a violation of PFSA may also bring an action for monetary relief (up to treble damages), plus attorney's fees.

Prior to joining, the named plaintiff, Stuart Robertson, alleged that he viewed promotional materials from Orangetheory that suggested new members were entitled to a "Money Back 30Day Guarantee." Subsequently, the plaintiff signed up for a \$129/ month membership and claimed that the language of the membership agreement allowed for cancellation with 30 days of notice (less a prorated refund). The plaintiff also claimed he was not given a copy of his contract, as required under the PFSA. The original signed contract, Robertson claims, also allowed for a partial refund if he canceled within three days. However, several days after he joined and wasn't feeling the burn, the plaintiff notified the gym that he wanted to cancel his membership but was apparently



told he would have to sign a separate cancellation agreement whereby he would agree to pay for two months (a representative allegedly informed him that even if he cancelled the same day he joined he would have been billed for the second month). Furthermore, Robertson claimed that after he refused to sign the cancellation form and told the representative that he would instruct his credit card to block all future Orangetheory charges, he was told there would be “further consequences” for failing to pay the remaining fees. Members often join a fitness club to have a trainer coax another round of burpees out of them with some spirited encouragement, but in this case, the plaintiff was left especially deflated and decided to jog forthwith to his attorney’s office.

The lawsuit alleges that Orangetheory did not alert its customers of their cancellation and other rights under the PFSA and instead billed customers for two months of membership fees and even suggested that those accounts that refused to pay would be forwarded to collections. The suit asserts that Orangetheory violated the PFSA in several ways, including by: (1) failing to disclose the right to cancel within three days or allowing members to cancel within three days with a refund; and (2) requiring members to sign a cancellation form which conflicts with the original membership agreement. The plaintiff seeks class certification for several classes of consumers who, generally speaking, have sought cancellation of their gym memberships and have been denied refunds, compelled to pay additional fees, or have had their accounts sent to collections. Additionally, the suit also brings claims under Illinois consumer protection laws alleging that Orangetheory engaged in unfair or deceptive acts by attempting to enforce its cancellation policy and extract additional fees that may have conflicted with state law. Lastly, the plaintiff lodged a contract claim, asserting that Orangetheory breached its contracts by imposing cancellation charges that exceeded the charges imposed under the membership agreement and by failing to issue prorated refunds to members who cancelled within the first three days of membership.

“No pain, no gain” was a 1980’s catchphrase that perhaps did not reflect responsible exercise, as in some cases, joint pain and other discomforts are the body’s way of telling you to take it easy. In this case, it seems Orangetheory, at least according to the plaintiff, applied this mantra quite seriously with respect to customers who canceled their memberships, purportedly in violation of Illinois law. Now Orangetheory faces the possibility of getting its own high-intensity workout at trial.

## Three Point Shot

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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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