July 2018 Edition

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

In *Three Point Shot*, we will attempt to both inform and entertain you by highlighting three sports law-related items and providing you with links to related materials. We hope you enjoy this and future issues. Any feedback, thoughts or comments you may have are both encouraged and welcome.

Edited by **Robert E. Freeman**

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Game (Perhaps) Over for Copyright Suit Involving Baseball Novel, "The Art of Fielding"

It's the college baseball championship game, ninth inning, two outs, 0-2 count, the team is down by one run, and the main character is at bat in a pinch-hitting role. And here's the pitch….the batter is hit by the ball and takes first base (an unexpected twist on the Mighty Casey striking out or the dramatic outcome in *The Natural*).

This climactic beaning scene appears in both Charles Green's ("Green" or "Plaintiff") work *Bucky's 9th*, a novel that the author unsuccessfully tried to place with various publishers, and in the best-selling 2011 novel *The Art of Fielding* ("TAOF"), by Chad Harbach ("Harbach"). Armed with a spreadsheet that outlined a host of other purported similarities between the two books, Green filed an idea theft lawsuit in September 2017 alleging Harbach misappropriated the content of Green's work and borrowed other plot and setting elements to create an infringing work that was "substantially similar" to *Bucky's 9th*. This month, however, a New York district court rung up Green on strikes and dismissed his copyright infringement suit, finding that, when read in context, none of the plaintiff's allegations of substantial similarity hold up. (*Green v. Harbach*, No. 17-06984 (S.D.N.Y. July 9, 2018)).

Green had played baseball at Swarthmore College in the 1980s and parlayed that experience into *Bucky's 9th*, which tells the story of a former star pitcher who dropped out of a top school after the surprising death of his father and fell idle until a former friend of his father convinced him to play ball for a small college for the deaf (even though Bucky is not deaf). Bucky hopes to find out the circumstances behind his father's death and also bring success to the baseball program that is slated to be shuttered (and also to navigate relationships with teammates and a new love interest). On the eve of the championship game, Bucky is threatened with exposure of his feigned deafness and must reconcile with his girlfriend, causing him to skip the big game. Still, Bucky arrives in the ninth to pinch hit and gets plunked; yet his team still loses the game.

The Art of Fielding is a baseball novel and character study that takes place over several years at a small Division III college, spinning the story of Henry, who becomes a star player, eventually loses confidence in his abilities and drops out, only to return to pinch-hit in the ninth inning of the championship game. Harbach played baseball in high school and eventually produced an early draft of TAOF in conjunction with an MFA program at the University of Virginia. TAOF's path to publication took nearly a decade, as Harbach languished in the minors struggling to complete the novel before finally reaching the show with the book's release in 2011.

According to the complaint, there are "extensive" similarities between *Bucky's 9th* and TAOF in terms of premise, setting, plot and timing of events; the plaintiff alleged that Harbach copied his "core narratives," namely, the "Baseball Prodigy-Comes-of-Age-Plot" within the unconventional setting of small-time college baseball and the "startlingly" shared final scenes of the third act when the protagonist rejoins the team in the ninth inning, only to be hit by a pitch. The complaint also contains an extensive appendix with a side-by-side analysis of the similarities between the two works, including similar plotlines, and shared phrases and word choice.

Green previously had voiced his opinions about the similarities between his work and TAOF, but after learning that TAOF had been optioned as a film, Green brought a copyright infringement suit seeking damages and injunctive relief that would bar Harbach from taking further steps regarding the film version of TAOF. Harbach moved to dismiss, arguing that the two works were not substantially similar because they have little in common beyond stock elements and the general idea of "an underdog college baseball team overcoming the odds to achieve success," as well as "a list of incidental, cherry-picked 'random duplications'" that Harbach contended were taken out of context.

To establish copyright infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. According to the court, in the absence of direct evidence, copying generally is proven by showing (a) that the defendant had access to the copyrighted work and (b) the substantial similarity of protectable material in the two works. Thus, the court stated that it would have to examine the similarities in such aspects as the total concept and feel, theme, characters, plot, sequence, pace and setting of the two works in question. Moreover, the court explained that under the *scenes a faire* doctrine, "sequences of events that necessarily result from the choice of a setting or situation do not enjoy copyright protection" (e.g., stock elements in a story, such as the existence of cowboys and shootouts in a classic western, would not receive protection).

In this doubleheader of sorts, the district court held that although both works are about a struggling Division III baseball team, the two works are not substantially similar because the features of TAOF alleged to be similar to *Bucky's 9th* are "either abstract ideas, *scenes a faire*, or trivial details." For example, the court stated that the two works are entirely different as to why and how the protagonists arrived at the team and as to the nature of their "coming of age." In the court's mind, Bucky's development is focused on his father's death and the saga surrounding his feigned deafness and Henry's story is more about navigating college life and coming to terms with his baseball talent. Moreover, the court noted that the plaintiff mixed and matched in advancing arguments about other similarities in plot, but that such events occurred between characters of different ages or positions or happened in different contexts. In examining the related ninth inning beaning scenes, the court found the plaintiff's arguments a little off the plate and ruled the two climactic scenes were not substantially similar because, among other things, Henry and Bucky are initially absent from the championship game for different reasons, each player is beaned for different reasons (e.g., Bucky is the best player and is thrown at intentionally while Henry is a "lesser substitute" and leans into a pitch voluntarily), and the ultimate outcomes of the stories are dissimilar.

Hoping to go extra innings, Green filed a notice of appeal on July 16, 2018, so we will have to wait and see if the Second Circuit believes Green's suit can at least make it safely to first base and avoid dismissal.

Aggies' Defensive Trademark Stand Blocks Soap Manufacturers

In 1922, the Texas A&M University ("Texas A&M") football team was playing in a postseason game and suffered a series of injuries, limiting their number of available players. The head coach called for E. King Gill, a former reserve football player and member of the basketball team, to come down from the stands and suit up. Gill stood alone on the Texas A&M sideline for the remainder of the game. Although he never saw a minute of game action, the legend of the "12th Man" was born that day (and a statue of Gill stands outside the stadium). Fast-forward almost one hundred years, and Texas A&M students (the collective "12th Man") continue the tradition by standing during home football games. Off the field, that fighting spirit also is embodied in Texas A&M's defense of its IP, as this past month the Aggies legal team successfully opposed a beauty products company's federal registration of the trademark 12TH MAN HANDS for soap and cosmetic products. (*Texas A&M Univ. v. Washington Soap Co.*, No. 91223136 (TTAB July 12, 2018) (non-precedential)).

As outlined in the decision of the Trademark Trial and Appeal Board ("TTAB" or the "Board"), there are numerous references to the "12th Man" at Texas A&M football games, from the marching band spelling out the term "12th Man" since 1930, to the student section unveiling a giant banner in the stadium reading "The Twelfth Man is Here" in 1968, to the school erecting a permanent sign stating "Home of the 12th Man" in 1988. Officers of the 12th Man Student Aggie Club first created the "12th Man Towel" in 1985 and distributed them to the Texas A&M student body to wave at every home football game to show support. And in 1990, the University obtained federal registration for its 12TH MAN mark (No. 1,612,053) for a variety of goods, including hats, buttons, towels, t-shirts and athletic uniforms. Typical of other universities, Texas A&M licenses its 12TH MAN and other marks for use in connection with an array of goods and services as part of a licensing program.

The current trademark dispute began in November 2014 when Washington Soap Company ("Washington Soap"), a Seattle-based bath products company, applied to register a trademark, 12TH MAN HANDS, for a "handmade loofah soap bar or puck" named "12th Man Hands." The packaging bears a label that depicts a player's hand gripping a football by the laces. Washington Soap did not seek to clear its 12TH MAN HANDS mark before seeking registration. Lining up for a defensive stand, Texas A&M subsequently filed an opposition with the TTAB, arguing, among other things, that its mark had priority and that Washington Soap's use is likely to cause consumer confusion. Washington Soap filed an answer, pro se, generally contending that its trademark application should stand, as its soap products were unrelated to the classes of goods associated with Texas A&M's 12TH MAN mark, and because the colors of its 12th Man Hands product bore no resemblance to Aggie colors. However, it did not field a team for the fourth quarter, when it failed to file a final brief with the TTAB.

The TTAB sustained Texas A&M's opposition, finding that Texas A&M adequately showed that Washington Soap's use of its 12TH MAN HANDS mark for its soap bar was likely to cause consumers of those goods to mistakenly believe that they are licensed, sponsored, or authorized by Texas A&M. The Board focused on Texas A&M's mark in connection with its 12th MAN rally towels and conducted an analysis of the relevant likelihood of confusion factors (which include an analysis of such things as the similarity of the marks and the goods in question, and the shared channels of trade). The Board noted, among other things, that the two marks were confusingly similar because the source-identifying words 12TH MAN were identical in both marks, and the shared term gave the marks the same commercial impression (and that the presence of the word HANDS in Washington Soap's mark did not cause the marks to have "significantly different meanings"). As to the relatedness of the goods, the TTAB concluded that given that hand towels and soap commonly are packaged together and "complementary" in use, consumers might readily expect handmade loofah soap sold under the 12TH MAN HANDS mark to originate from the same source as towels sold under the 12TH MAN mark. Checking the scoreboard at the end of its analysis, the Board saw that, in all, the consumer confusion factors either supported a finding of a likelihood of confusion or were neutral.

Needless to say, the 12th Man towels were waiving following the TTAB ruling blocking Washington Soap's

registration. The ultimate fate of the mark is in limbo as the expiration of the appeal period has not yet elapsed, but given Washington Soap's limited participation in the opposition proceeding, it seems doubtful it will put its offense back on the field to continue this battle.

Massachusetts Appeals Court Pulls the Secondary Chute in Interpreting Skydiving Waiver

On July 25, 2012, Tricia Cahalane ("Cahalane" or "Plaintiff") participated in a tandem skydiving jump at Chatham Municipal Airport in Cape Cod with Skydive Cape Cod ("SCC"). She had her legs up in anticipation of landing, when suddenly a pull from the back of the chute forced her legs straight downward. Blindsided by the pull, Cahalane fractured both of her femurs.

There are over 200 skydiving centers or "drop zones" ("DZs") affiliated with United States Parachute Association ("USPA") across the United States. From these DZs, approximately 500,000 people in the U.S spread their wings annually. On its website, the USPA lists 12 published skydiving accident reports from 2018, two-thirds of which were fatal. Needless to say, while a singular thrill, skydiving can be a dangerous activity.

In January 2013, Calahane brought a lawsuit in Massachusetts state court against the individuals and entities whose alleged negligence caused her injuries during the jump (*Cahalane v. Skydive Cape Cod, Inc.*, No. 1381CV00207 (Mass. Super. Ct., Middlesex Cty filed Jan. 17, 2013)). Cahalane sued for damages in Massachusetts Superior Court against various parties and alleged, among other things, gross negligence and reckless conduct, as well as misrepresentation. The defendants dressed a full roster. Cahalane claimed damages from SCC and its owner, Jimmy Mendonca; Marcus Silva ("Silva"), her skydiving instructor at SCC; Cape Cod Flying Circus Inc. ("Flying Circus"), the airport management company, and Timothy Howard, Flying Circus' owner and Chatham Airport manager. For their part, the defendants brought counterclaims that sought to enforce waivers of liability, indemnification agreements and covenants not to sue that plaintiff executed before her tandem parachute jump. The waiver read, in pertinent part:

> "I hereby recognize that this agreement is a Contract, which includes provisions by which I have released any and all claims against the Released Parties resulting from my parachuting and related activities, included [sic] any claims caused by the negligence or gross negligence of the Released Parties."

In addition, Cahalane copied and signed the following statement: "I realize that skydiving, parachuting, flying and all of its related activities are inherently dangerous activities which may result in my serious injury or even death." Cahalane was given the opportunity to purchase a release from these waivers for $750, but she declined to do so.

According to the court, at some point prior to Cahalane's ill-fated jump, Jimmy Mendonca, the owner of SCC, claimed that he checked the speed of the wind and found it within acceptable limits. However, plaintiff introduced evidence from the Federal Aviation Administration (FAA) that demonstrated the wind may have gusted over twenty-five miles per hour on the day of the jump – speeds at which skydiving apparently is unsafe. Moreover, according to another witness, Calahane's instructor, Marcus Silva, claimed that he warned Mendonca that the wind conditions were dangerous before Cahalane's jump, but that Mendonca ignored such warnings and allegedly told Silva to complete the jump and perform a "hook turn" on landing to compensate for the wind. A hook turn is skydiving jargon for a canopy maneuver that results in a steep dive. The move is potentially dangerous in certain situations because the canopy turns, dives and picks up speed as the jumper swings out from under the canopy. For this reason hook turns are "highly disfavored" by the USPA at a low altitude. As such, before Cahalane and Silva landed their tandem jump, Silva purportedly made a 90-degree turn approximately 500 feet off the ground. As Cahalane and Silva swung out from under the canopy they picked up speed, and Cahalane claimed that the force of the turn caused her legs to straighten as the tandem duo impacted the ground.

In July 2016, the Superior Court granted the defendants' motion for summary judgment based upon the waiver signed by Cahalane prior to the jump that released the defendants from any claims resulting from "parachuting

and related activities," and rejected arguments that the waiver was unenforceable and unconscionable. The lower court also found that the plaintiff did not plead sufficient evidence of gross negligence, particularly since, in the court's mind, the wind speed was not readily established to be unsafe at the time of the jump.

Subsequently, plaintiff appealed the grant of summary judgment to the defendants, contending that: (1) the waiver was unenforceable; and (2) there was a dispute of material fact as to whether the defendants were grossly negligent.

On review, the appeals court rejected Cahalane's challenge to the enforceability of the waiver she signed prior to the jump, stating that the waiver was not obtained by fraud or coercion, was presented adequately to Calahane, and that Calahane knew that skydiving was a dangerous activity. However, the court cautioned that, under Massachusetts law, "although a party may exempt itself from liability caused by its ordinary negligence, a waiver cannot shield a party from responsibility for its gross negligence or reckless or intentional conduct."

Ultimately, the appeals court overturned the Superior Court's decision for summary judgment on the grounds that the circumstances of the landing may have supported a claim for gross negligence, and held that a jury should decide the issue. (*Cahalane v. Skydive Cape Cod, Inc.*, No. 17-P-706 (Mass. App. Ct. July 3, 2018) (summary decision)). For an act to count as gross negligence, the court stated that it must exceed the threshold of a "legal duty beyond a mere failure to exercise ordinary care." In short, the court held that the Superior Court overshot the mark in finding that all material facts had been established pertaining to the circumstances of the jump and whether such actions constituted gross negligence. The material facts highlighted by the appeals court were:

- The wind conditions and whether the evidence established that the winds were gusting at an unsafe speed at the time of the jump;
- Jimmy Mendonca's (SCC owner) alleged knowledge of the wind conditions and whether or not he ordered the instructor to proceed with the tandem jump in less than ideal weather conditions;
- The skydiving instructor Silva's execution of the jump and hook turn. According to the court, "a reasonable jury could find that the instructor's decision to perform a hook turn in the moments before landing was grossly negligent…if the jury were to conclude that the low hook turn violated an industry standard and [the instructor] Silva had a lapse of care in a situation of 'great and immediate danger'"; and
- The airport manager's potential knowledge of SCC's past unsafe practices and his alleged failure to report such purported FAA violations to the authorities.

Overall, the court threw a red flag and held that the case should go under further review. In late June, the parties met for a status conference and it is not clear if they reached a settlement of plaintiff's claims or whether a jury will ultimately rule on this high-flying, fateful incident.

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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