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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**

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Online Golf Store's Computer Access Claim against Competitor Fails to Reach the Green

The suit between battling online golf retailers Motogolf.com, LLC ("Motogolf") and Top Shelf, LLC ("Top Shelf") is currently in the rough after a Nevada district court dismissed all but one set of claims. (*Motogolf.com, LLC v. Top Shelf Golf, LLC*, No. 20-00674 (D. Nev. Mar. 25, 2021)). Though the court order left a large divot in Motogolf's suit, the court allowed a mulligan, granting Motogolf time to file an amended complaint.

As we wrote in the May 2020 edition of *Three Point Shot*, Motogolf is an online golf retailer based in Nevada that sells golf apparel and equipment. Motogolf used online advertising to promote its online store. Motogolf contends that it contracts with online ad platforms on a pay-per-click (PPC) basis whereby Motogolf pays a specific amount of money for a certain number of ad clicks each day. If a prospective customer clicks on the ad, he or she is taken to Motogolf's website. According to Motogolf, it also receives "valuable, requested demographic and other data" about prospective customers that click on an ad. Once web viewers have clicked on the ads a certain number of times in a given period, the PPC ads are "exhausted" and stop appearing online and Motogolf allegedly must pay higher rates for future PPC ads.

Top Shelf, based in Maine, is an online golf retail competitor to Motogolf. In 2019, Motogolf claims it became aware of Top Shelf's alleged practice of selling golf equipment at lower prices than the minimum set by the equipment vendors and reported this activity to such vendors. Motogolf alleges that, in response to its calling out such irregularities on Top Shelf's scorecard, Top Shelf, being aware of how PPC ads work, used electronic devices in various locations in or near Maine to locate Motogolf's PPC ads and click on them repeatedly in an effort to "exhaust" or make Motogolf's ads disappear for other viewers, prevent future potential customers from viewing the ads, and generally increase Motogolf's ad costs and deny it access to online web advertisement data. Motogolf alleges that such actions by Top Shelf were an intentional effort to gain an economic advantage over Motogolf. In response, Motogolf sent Top Shelf multiple cease-and-desist letters stating that Top Shelf was no longer authorized to access Motogolf's website or click on its advertisements.

On April 10, 2020, Motogolf sued the defendants for multiple claims, including accessing Motogolf's computers without authorization in violation of the federal Computer Fraud and Abuse Act (CFAA), and its Nevada state law counterpart, as well as various tort-related claims over interference with contractual relationships and prospective economic relationships. The defendants moved to dismiss all claims.

The court began by looking at the CFAA claim. The CFAA is a federal computer fraud law that was passed in 1984 and was designed to address the growing problem of computer hacking. The CFAA prohibits a number of different computer crimes, the majority of which involve accessing computers without authorization, or in excess of authorization, and then taking specified forbidden actions, ranging from obtaining information to damaging a computer or computer data. See 18 U.S.C. § 1030(a)(1)-(7). In examining Motogolf's CFAA claims, the court stated that they fell under 18 U.S.C. §§1030(a)(4) and §1030(a)(5)(B)-(C).

§1030(a)(4) requires the plaintiff to allege the defendant:

> (1) accessed a "protected computer," (2) without authorization or exceeding such authorization that was granted, (3) "knowingly" and with "intent to defraud," and thereby (4) "further[ed] the intended fraud and obtain[ed] anything of value," causing (5) a loss to [Motogolf] during any one-year period aggregating at least $5,000 in value.

Additionally, §1030(a)(5)(B)-(C) requires the defendant to intentionally access a computer without authorization and either recklessly cause damage or cause damage and loss.

In the complaint, Motogolf alleged that Top Shelf, with intent to defraud, accessed Motogolf's computers (or the online advertising platform's computers that were used to conduct business with Motogolf) without authorization when it conducted its alleged illegitimate scheme to click on Motogolf's PPC ads and thereby caused "impairment to the integrity and availability of data reposed on Motogolf's Computers." Motogolf further argued that the cease and desist letters it sent to Top Shelf affirmatively revoked the defendants' access and that Motogolf was harmed because it lost valuable demographic data regarding prospective customers and the defendants gained a market advantage. The defendants countered that the claim should be dismissed because Motogolf's website is publicly available, and therefore such access cannot be "without authorization" if it is for publicly available website content. In its approach shot, Top Shelf cited Ninth Circuit precedent holding that when a computer network or website generally permits public access to its data, a user's accessing of that publicly available data will not constitute access "without authorization" under the CFAA. Additionally, the defendants argued that Motogolf had not alleged the requisite loss or damage, or that the defendants gained anything of value.

The judge granted the motion to dismiss the CFAA claim, with leave to amend, sending Motogolf back to the range. The court noted that Ninth Circuit precedent interpreted the CFAA's "without authorization" language to not encompass access to publicly available websites because "information open to the public is not the kind of access that the CFAA was designed to prevent and that a computer or website would need access permissions like a password for the CFAA to apply." Finding Motogolf's novel CFAA claim no gimme, the court further stated that Motogolf's CFAA "unauthorized access" claim was insufficient because it did not plausibly allege that the defendants acted "without authorization" and that even though Motogolf revoked Top Shelf's access to its website through the cease-and-desist letters, such letters "do not affect the public website analysis." Therefore, because both Motogolf's websites and the ads at issue were public, the judge granted Top Shelf's motion to dismiss.

The court followed similar reasoning in dismissing the Nevada state computer access claims under the Nevada Computer Crimes Law (NCCL). According to the court, Motogolf's NCCL claims were similar, as that statute prohibits various acts related to accessing a computer or data on a computer "without authorization." NRS §§ 205.4765(1)(g), (h), (k). Considering the NCCL claim to "rise and fall" with the CFAA claims, the court followed the same putting line as it did with the CFAA claim and dismissed the state law claim.

On the back nine, the court, for the most part, dismissed the remaining tort- and fraud-related claims, with leave to amend. However, the court refused to dismiss Motogolf's tort claim that Top Shelf intentionally interfered with prospective economic advantage. Such a tort claim essentially involves allegations that the defendant acted with specific intent to disrupt plaintiff's business expectancy. Here, the court found that, although Motogolf did not allege any prospective customers specifically, Motogolf's outlining of a class of prospective customers (i.e., those that would click on its PPC ads) was sufficient at the pleading stage of the litigation.

Despite having a shaky first round, Motogolf filed an Amended Complaint on April 15, 2021, prompting Top Shelf to counter with another motion to dismiss. Only time will tell if Motogolf can muster a miraculous recovery shot with its amended claims to *drive* the suit forward.

Appeals Court Shutters Press Agency's Claims over Unlicensed Copying of Sports Photos

The Second Circuit Court of Appeals recently affirmed a lower court order that had found copyright-related claims brought by a press agency, Zuma Press, Inc. ("Zuma"), against one of the world's largest photo agencies, Getty Images (U.S.), Inc., ("Getty"), were underexposed. In doing so, the court determined that the presence of thousands of Zuma's sports images on Getty's website in 2016 were authorized by an unbroken chain of licensing agreements and that any photo metadata removals or alterations were not done knowingly by Getty. (*Zuma Press, Inc. v. Getty Images (US), Inc.*, No. 19-3029 (2d Cir. Mar. 3, 2021) (summary order)). Thus, the dismissal of Zuma's copyright infringement and Digital Millennium Copyright Act (DMCA) removal of copyright management information (CMI) claims against Getty was affirmed.

As we outlined in the December 2018 edition of *Three Point Shot*, Zuma is a press agency which holds a collection of millions of licensed images, including the more than 47,000 sports photographs at issue in this case. Zuma contracts with third-party image licensing companies to distribute its images in return for an agreed royalty rate. Getty is one of the world's largest photo agencies and markets its images through its website.

The opening shot of the dispute occurred when Zuma typed the phrase "Zuma Press" into Getty's search bar and discovered a cache of sports photos that Zuma believed were uploaded without proper license and with inaccurate photo credit metadata. Zuma asked Getty to take down the images and Getty eventually complied. Later that year Zuma brought suit against Getty, alleging that Getty improperly copied at least 47,000 sports photographs that Zuma allegedly owned or exclusively licensed and made them available for licensing and sale on its website. Zuma further alleged that Getty removed Zuma's CMI from the digital photographs such that the images' metadata no longer reflected Zuma's rights in the photos and placed its own watermark on the images.

The confusion over how Zuma's photos ended up on Getty's website required flipping through an array of prior licensing arrangements entered into by Zuma regarding the images at issue. According to the court, Zuma first granted Corbis Corporation ("Corbis") the license to sell Zuma's photographs for a set amount of the royalties received. Zuma later learned that NewSport Photography Inc. ("NewSport") had a similar contract with Corbis, but that NewSport's contract entitled NewSport to a higher royalty rate than that paid to Zuma. Zuma then entered into a Redirection Agreement with NewSport to upload its portfolio of sports images through NewSport's FTP onto Corbis's system. Under this new agreement, Corbis would then remit royalty payments to Zuma for the images submitted via NewSport's FTP. NewSport's contract with Corbis gave Corbis, among other things, the right to assign its rights in the images to third parties. The first muddying of the ownership rights occurred as a result of this agreement. Corbis kept "metadata" about the source and rights associated with images, and this metadata identified the relevant photographer and agency. By comingling its images with NewSport, Zuma caused "NewSport" to now be labeled in the "Credit" line of the metadata that Corbis kept on its images.

When Zuma's arrangement with NewSport ended in 2013, Zuma sent multiple emails to certain parties to unwind prior arrangements and switch the images back to Zuma, but the written consents were never obtained and the sports images at issue remained as part of the NewSport collection. Advancing the film a few clicks, in January 2016, Corbis sold its image portfolio to Unity Glory International Ltd. ("Unity Glory"), which later entered into an agreement authorizing Getty to distribute and market its images outside of China, including all the images it acquired from Corbis. These images included the photographs at issue. Thus, the direct chain of licensing agreements finally reached from Zuma to Getty, albeit requiring a telephoto lens to decipher. When the images were migrated onto Getty's system, the software looked to the existing "Credit" line metadata, which ascribed them to Zuma's former distributor, not to Zuma, even though Zuma was referenced in other metadata text fields. Other metadata anomalies also caused Getty to misapprehend the proper rights information for the photos in question.

In October 2018 a New York court found that it was Zuma's actions that caused the confusion, and granted summary judgment on Zuma's claims for copyright infringement. Getty then filed a motion seeking an award of $2.87 million in attorney's fees due to Zuma's "objective unreasonableness" in bringing the suit that it "litigated aggressively and dishonestly long after its claims had been exposed as having no merit" solely for the purpose of securing a massive statutory damages windfall. The district court denied such motion. Zuma appealed the lower court's summary judgment rulings and Getty cross-appealed the court's denial of its request for attorney's fees.

In a short, summary order, the Second Circuit affirmed dismissal of the claims and denial of the request for attorney's fees. The Second Circuit first reviewed the copyright infringement claim and Zuma's contention that the lower court erred in determining that the chain in licensing for the photos necessitated dismissal of the copyright claims against Getty. In affirming the dismissal, the appeals court found that a reasonable juror could easily find that Getty established the existence of a valid license with respect to the sports images at issue. The Second Circuit agreed with the district court's finding that the facts in the record were undisputed, and the "plain language" in each of the agreements established an unbroken chain of authorization from Zuma to Getty and that Getty obtained a valid license to use the images when it entered into its agreement with Unity Glory. Even assuming there were issues of fact relating to the 2012 Redirection Agreement between Zuma and NewSport, the court found that Corbis was entitled to use the licenses for a period of six years, well within the time period between Getty's posting and removal of the Zuma photos in 2016.

Zuma also argued that the district court erred in granting summary judgment to Getty as to its claim for altering CMI without authority under DMCA Section 1202(b)(3). As the Second Circuit explained, the CMI removal provision has a "double-scienter requirement": to violate the statute, "the defendant who distributed improperly attributed copyright material must have actual knowledge that the CMI has been removed or altered without authority of the copyright owner or the law and have actual or constructive knowledge that such distribution will induce, enable, facilitate, or conceal an infringement." The Second Circuit agreed with the district court that no reasonable juror could conclude that Getty knowingly removed or altered Zuma's CMI without authority, and that there was no evidence in the record on which Zuma could rely to establish Getty had actual knowledge that the images at issue were comingled with the NewSport collection. Rather, the court spotlighted that a reasonable juror could find that Getty did not know about Zuma's right in the images until Zuma contacted Getty to complain about the uploaded images in 2016. Further, the Second Circuit concluded that a reasonable juror could only find that the purported changes to Zuma's CMI resulted not from an intentional act on the part of Getty (or that Getty had actual knowledge that it had altered Zuma's CMI when it migrated the photos), but from aberrations and mistakes in the automatic migration process itself, some of which were due to the data fields in which Zuma's rights information was stored in Corbis's system.

The appeals court likewise affirmed Getty's appeal of the denial of attorney's fees. The Second Circuit concluded that the district court acted within its discretion when it concluded that fees would not be granted as Zuma's claims were objectively reasonable, non-frivolous, and properly motivated. The Second Circuit highlighted that Zuma's copyright claim concerned a "complex set of facts," which Zuma reasonably argued, and Zuma's DMCA claim turned on the double-scienter requirement which the Second Circuit had not yet construed in a precedential opinion when the suit was filed.

With the Second Circuit having shuttered this licensing dispute, it appears that there's little light left for this case's chances of success.

Court Orders Arbitration in Video Game Loot Box Litigation

A federal judge recently sent a lawsuit against video game publisher Electronic Arts ("EA") to arbitration, citing the company's mandatory arbitration clause contained in the user agreement that appears in a pop-up window on the screen when a user first loads the EA video games in question. Plaintiff Kevin Ramirez ("Ramirez" or "Plaintiff"), a player of EA's *FIFA* and *Madden NFL* games, brought the suit as a putative class action, claiming that an online in-game feature called Ultimate Team Packs qualifies as an illegal "slot machine or device" under California law. Given that the user agreement contained an arbitration clause and class action waiver, the parties will now play the odds with an arbitrator who will decide whether the arbitration clause is enforceable against Ramirez's claims and whether any further relief is warranted (*Ramirez v. Electronic Arts Inc.*, No. 20-05672 (N.D. Cal. Mar. 5, 2021)).

Loot boxes are an increasingly common phenomenon in video games and mobile gaming apps. Loot boxes are in-game purchases that players can make that randomly generate a reward. Although players can earn loot boxes through in-game play, it can be inconvenient to purchase loot boxes without spending real money. Critics of loot boxes have argued that they should be treated as betting products to protect children from impulsive purchases, but they are not specifically regulated in this country (though a regulator in least one country, Belgium, declared that certain video game loot boxes violated the country's gambling laws). As it stands, multiple suits have been brought against mobile app gaming operators and mobile platforms (suits against the latter have faced dismissal in some cases).

The plaintiff claimed that while playing the *FIFA* and *Madden NFL* video games he was "induced" to purchase Ultimate Team Pack loot boxes with in-game currency for the random chance of winning valuable players and other virtual team items. In-game currency can be earned through game play or purchased with real money. Ramirez also alleged that as EA issues new versions of games, new players are added and players' ratings adjusted, incentivizing the player to purchase more Ultimate Team Packs to remain competitive in the updated game. According to the complaint, the odds of receiving the most desirable rewards are low and when Packs are opened, the anticipation of a big score is akin to the "slot machine effect," which feeds the purported addictive need to buy more packs as part of EA's "predatory" program.

In August 2020 Ramirez filed a complaint alleging that EA's Ultimate Team Packs are illegal "slot machines or devices" under the California Penal Code §330(d) and advanced claims under consumer protection statutes. The suit seeks, among other things, to disgorge EA of any profits it made from the use of its Ultimate Team Packs and for injunctive relief from EA that would prohibit the company from using loot boxes in its games.

Seeking to hit the reset button, EA moved to compel arbitration. To access the full features of the games, including the ability to use its Ultimate Team Packs, players are required to agree to the EA's user agreement, which appears as a pop-up window on the screen, before the player is permitted to access the game. As EA pointed out, the user agreement contains an arbitration provision and a waiver of class actions. EA further asserted that Ramirez was no newbie when it came to playing the video games in question, and by installing and repeatedly playing *FIFA* and *Madden NFL*, he accepted and agreed to be bound by the user agreement and therefore must arbitrate his claims on an individual basis. Finally, EA argued that any issues with respect to the arbitrability of certain issues (such as the validity of the arbitration provision itself) must be decided in arbitration, not court.

The district court first turned to the issue of whether Ramirez and EA had agreed to arbitrate. The court noted that in order to use EA products, users must agree to EA's user agreement containing the arbitration provision. As Ramirez was presented with the user agreement on the screen and conspicuous call-to-action language ("By using EA services, you agree to the arbitration agreement and class action waiver described in section 15 to resolve any disputes,") and was required to affirmatively click a button indicating assent, the court found the clickwrap-style electronic agreement enforceable. Thus, since Ramirez was deemed to not be AFK ("Away from the keyboard") and affirmatively clicked and accepted the EA user agreement and its arbitration provision, the court found that an agreement to arbitrate was formed.

In the alternative, Ramirez argued that even if he had formed an arbitration agreement with EA, the agreement was invalid because it barred his right to obtain public injunctive relief. Therefore, Ramirez argued, the parties should not have to arbitrate the merits of the claims and instead litigate them in court. Before determining the validity of the arbitration agreement, the court asked whether the parties had delegated decisions of contract validity to an arbitrator. The court noted that EA's user agreement had a clause specifying that the American Arbitration Association's rules on arbitration governed. These rules and their incorporation in the arbitration agreement, the court stated, provide "clear and unmistakable evidence" that the parties agreed to delegate the question of arbitrability to the arbitrator.

Although EA was successful in compelling arbitration, it did not win the grand prize, that is, dismissal of Ramirez's claims. The court pointed out that although it had the discretion to stay or dismiss claims subject to a valid arbitration agreement, it would merely stay the proceedings pending the completion of arbitration, as dismissal would not be appropriate where it is possible that an arbitrator may find that the arbitration clause is not enforceable.

As to the merits of the claim, it remains to be seen whether an arbitrator, or perhaps the district court, will issue a decision as to the Plaintiff's consumer claims pertaining to EA's loot boxes.

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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