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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 Jennifer C. Ok, Jacob A. Weinberg, and David M. Duncan for their hard work on these articles.

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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Pepsi Scores Touchdown in Copyright Spat over Super Bowl Spot

Soft drink ads often pair refreshment with a vibrant lifestyle and a lively beat (e.g., Pepsi's 2020, "[That's What I Like](#)"). Going back a few years, Pepsi's high-production [2016 Super Bowl halftime commercial](#), "The Joy of Dance," featured a singer in changing costumes romping through various eras of pop music. Beyond the sheer, carbonated joy of it all, Pepsi faced claims that it had unlawfully incorporated copyrighted material from an advertising agency's rejected pitch into the final ad. But now, apparently, [Summer Time Is Pepsi Time](#) [2011], as the soda giant recently prevailed in the suit filed by the advertising agency, Betty, Inc. ("Betty"), when the U.S. Court of Appeals for the Second Circuit affirmed that the theme of changing musical genres arose from non-protected elements such as ideas, scènes à faire, and Pepsi's prior work. ([Betty, Inc. v. PepsiCo., Inc.](#), No. 20-891 (2d Cir. May 21, 2021) (summary order)).

The splendor of the Super Bowl goes beyond football: Yes, most fans tune in for the matchup, but many also watch for the commercials, which can be as iconic as the big game. Advertisers spend millions of dollars for a thirty-second slot as a means of building brand awareness and promoting their products and services to a mass audience.

Super Bowl commercials have become a proving ground for the most innovative creative directors in the advertising industry who are all vying to be the mastermind behind the next catchy ad that garners the most posts on social media and plaudits from the ad press. It is only natural for the tensions to be the highest over the rightful ownership of a buzz-creating ad. But when does an advertiser cross the line of copyright infringement in choosing amongst proposals from various ad agencies? The general question to ask is, since copyright does not protect an idea but only the expression of an idea, how much protection does copyright law provide for the overall concept, feel, setting, themes, characters, pace, or sequence of an ad pitch? Should the advertiser be held liable for an aired ad that marginally resembles one of the many pitches it considered? In this instance, no, answered the Second Circuit.

[Betty, Inc.](#) was one of fourteen advertising agencies that pitched ideas for Pepsi's 2016 Super Bowl halftime commercial on November 6, 2015. Pepsi and Betty had signed a creative agency service agreement, which, as the court noted, ultimately gave Pepsi the sole discretion to determine whether to do business with Betty. In Betty's "All Kinds/Living Jukebox" proposal, it suggested opening the ad with a man playing a rendition of Pepsi's theme song on an acoustic guitar; as the same song plays on throughout the commercial, the musical genres and physical surroundings would continually shift to more modern styles. Ultimately, Pepsi rejected Betty's idea and decided to go with another agency's pitch that had a similar concept, but with different constituent elements that were more consistent with Pepsi's previous ad campaigns, such as "[Now and Then](#)" [2001].

On February 7, 2016, [Pepsi's halftime commercial](#) "The Joy of Dance" aired. It featured a performer moving from room to room and dancing to three different songs, each representative of a particular era. In the first room, she bopped to the music from the 1950's. As she entered the second room playing a 1980's tune, her outfit and dance changed to reflect the period. Finally, her costume and moves changed again to echo the 1990's/2000's as she ran through another door to the last room playing Pepsi's theme song before the camera zoomed out into the Pepsi globe.

In its [2016 complaint](#), Betty brought claims against Pepsi for copyright infringement and breach of contract. The advertising agency argued that the halftime commercial was largely derived from its idea of changing musical styles. However, success on a claim of copyright infringement requires more than the plaintiff's ownership of a valid copyright. As the court explained, there must be 1) a substantial similarity between the two works; and this overlapping material must be 2) protectable under copyright law. To assess substantial similarity, it examined "the total concept and feel, theme, characters, plot, sequence, pace, and setting of the copyright work and the allegedly infringing work," distinguishing between non-protectable elements and protectable elements. Certain similarities that are too abstract or those that necessarily result from a choice of setting (e.g., *scènes à faire*) are not protectable even if they are part of a copyrighted work. In November 2019, the United States District Court for the Southern District of New York [granted](#) summary judgment to Pepsi, finding that the protectable elements in Betty's written proposal

for the ad were not substantially similar to Pepsi's "The Joy of Dance" halftime commercial.

On appeal, in May 2021 the Second Circuit [affirmed](#), ruling that the district court correctly determined that the protectable elements of the pitch were not unlawfully copied by the aired commercial. First, the appeals court stated that Pepsi's halftime commercial was substantially different from Betty's pitch. Betty's proposal had no mention of dance, which was the primary focus of the aired commercial. Also, the aired commercial used three different songs from three different eras; conversely, Betty suggested using only one song throughout the entire commercial. In addition, the halftime commercial did not include a warehouse, trashcan fire or an acoustic singer as Betty had laid out in its proposal.

Second, the appeals court rejected Betty's argument that Pepsi had unlawfully copied the general theme of its pitch. The court found that the elements that Betty argued were copied from its pitch were not protectable: "Ideas and themes are often the type of material that we have determined are not copyrightable." In the court's view, "the idea of a single performer moving through various time periods or musical styles with quick cuts and costume changes is not a protectable expression but a creative idea." The court also noted that Betty's theme of changing popular music and fashion across decades is nothing new to Pepsi, noting that the soda-manufacturer's pre-2016 halftime commercials had already employed the same "through the ages" format (including the "[Now and Then](#)" ad from 2001).

The Second Circuit also affirmed that Pepsi did not breach the parties' creative agency service agreement. It found that the preliminary agreement signed by the parties was merely an "agreement to agree," under which the intellectual property rights would transfer to Pepsi upon payment to Betty under a future scope of work agreement. As the court stated: "The contract contains no indication that Pepsi was bound to negotiate a scope of work agreement for unproduced ideas." With all material terms being left for a negotiation yet to come – and with Betty clearly knowing that it was only one of many agencies pitching for the Super Bowl advertisement – the court concluded that the ad agency's prior agreement with Pepsi lacked enforceability in this instance. Furthermore, even if there were an enforceable contract, the appeals court noted that there would still be no breach because there is no

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indication that Pepsi used Betty's material in its aired commercial.

This completes the Second Circuit's instant replay. If the appellate decision stands, it is a touchdown not only for Pepsi, but also its fellow advertisers that often have to consider competing proposals that may have certain basic elements in common, or play off of the advertiser's prior ad campaign themes. The commercials have become an indelible part of the Super Bowl and substantial contributors to the game's allure. They are the digital confetti of the Super Bowl. And it looks like that glitter is not going anywhere anytime soon.

Wyoming Court Not Stumped by the Inherent Risks of Skiing

With great powder comes great responsibility. Yet according to a Wyoming district court, and later affirmed by the U.S. Court of Appeals for the Tenth Circuit, this may not actually apply in all cases. In [Standish v. Jackson Hole Mountain Resort Corp., No. 20-8045 \(10th Cir. May 14, 2021\)](#) the appeals court affirmed that Jackson Hole Mountain Resort Corporation ("JHMR") was not liable for the unfortunate, serious injuries sustained by Thomas Standish ("Plaintiff") after he struck a snow-covered tree stump while skiing on one of the resort's off-piste, but permitted trails, as the plaintiff was deemed to have assumed certain risks that are inherent to skiing.

In January 2017, Thomas Standish and then-fiancé Megan Keiter were enjoying the ski slopes at the [Jackson Hole Mountain Resort](#). Being avid skiers, the couple finished a few runs on the groomed trails before deciding to take a more adventurous run on an off-piste trail. Off-piste trails are ungroomed and are typically reserved for more advanced skiers and JHMR did not represent to Standish that the particular run would be free of obstacles. Indeed, the back of their ski tickets contained explicit disclaimers stating that:

"By using this ticket, the holder acknowledges that participation in any and all winter recreation activities at [JHMR], including without limitation: skiing...involves SUBSTANTIAL AND INHERENT RISKS.... The holder agrees that the following risks without limitation are "inherent" as defined in the Wyoming Recreation Safety

Act (W.S. § 1-1-121 et seq.): ...dangerous and/or changing weather or snow conditions; ... dangerous encounters with marked or unmarked rocks, stumps, trees...."

Plaintiff, the more experienced of the two, led the way down the trail, which was seemingly a skier's paradise covered in freshies – over the previous four days, the mountain had received almost four feet of fresh powder. This large amount of snow, however, had concealed a six and a half foot tree stump by about two inches of snow. JHMR managers had partially cut this tree down at some point in the winter, leaving a tall stump, to mitigate a falling tree hazard. Plaintiff, unaware of the hazard, collided with the top of the tree stump and suffered multiple fractures in his leg. The resulting surgery required fourteen screws, two metal plates, and a bone graft. The avalanche continued as he experienced further health issues and personal business losses due to his injuries. JHMR completely removed the tree stump following the accident.

Two years later, in January 2019 the plaintiff (along with Ms. Keiter) filed suit in the District of Wyoming alleging negligence by JHMR. In response, JHMR moved for summary judgment, arguing that: (1) Plaintiff's injuries occurred due to the inherent risks of skiing, and therefore JHMR did not owe him a duty under the WRSA; (2) there is no evidence in the record to establish that cutting down the tree increased the inherent risk of injury so as to establish JHMR's liability; and (3) Plaintiffs' claims were barred by the exculpatory agreement on the back of the ski ticket. In July 2020, the district court [granted JHMR's motion](#) and ruled that Wyoming law provided immunity from the inherent risks of skiing, including unmarked objects on ungroomed runs—even objects like trees that have been partially cut. The plaintiff subsequently filed an appeal with the Tenth Circuit.

In order to bring a claim of negligence, a plaintiff must sufficiently assert that: (1) the defendant owed the plaintiff a duty to conform to a specified standard of care; (2) the defendant breached the duty of care; (3) the breach proximately caused injury to the plaintiff; and (4) the injury is compensable by money damages. But, at the time of this injury, the Wyoming Recreation Safety Act ("WRSA") governed and provided that recreational

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providers are insulated from some types of personal injury claims. Thus, as the court noted, WRSA generally codifies the common law concept of primary assumption of risk and is intended to limit the duty (the first prong of a negligence claim) that a recreational provider owes to a participant, such that if a participant has assumed certain risks that are inherent to the activity, the recreational provider typically owes no duty for such inherent risks or no duty to eliminate, alter or control the inherent risks of an activity. So the difficult question – certainly no bunny slope for the court – became, whether a tree that has been cut, left behind as a tall stump and submerged by recent snow on an off-piste trail, should be considered an inherent risk of skiing or whether JHMR's failure to completely remove the stump substantially enhanced the risk for skiers.

The WRSA defines inherent risk as, "those dangers or conditions which are characteristic of, intrinsic to, or an integral part of any sport or recreational opportunity." However, it does not list examples of inherent risks, leaving it to courts to decide under a "reasonableness" standard. When making the decision of what a reasonable person would view as an inherent risk, the court peaked at analogous statutes in the nearby states of Colorado, New Mexico, and Utah. Each of these statutes contains examples of inherent risks in skiing, including: trees and forest debris, subsurface conditions, and man-made structures.

Plaintiff had argued, among other things, that by cutting the tree down to its tall stump and not fully removing it – even on an off-piste slope – the resort had created an unreasonable hazard that was beyond the typical inherent risks of skiing. However, the Tenth Circuit agreed with the lower court and gave Thomas the cold shoulder as well, affirming the ruling of summary judgment to the resort. The Tenth Circuit recognized the multitude of dangers and weather-created hazards involved in skiing and concluded that "encountering a snow-covered stump in an ungroomed area is an inherent risk of alpine skiing." The appeals court reasoned that cutting and managing trees were necessary for the creation of ski runs and trail upkeep. While doing this, the ski-area managers need to make judgment calls about whether and how to cut a tree that has become a hazard. The court stated that whatever

the reason for leaving the high tree stump (e.g., high snow-level during winter or the particular hazard of that tree), the ability to mitigate hazards and remove trees that pose a threat (or to create new terrain) is, "essential to managing a ski area." The court also noted that the accident occurred in an off-piste area where unmarked obstacles are "inevitable" and was due in large part because of the depth of the fresh snow that shrouded the stump (any less snow and plaintiff would have seen the tree; any more snow and he would have skied over the top of it). Speaking to policy, the court stated ski-area managers simply must make judgment calls, sometimes imprecise, about whether or how to remove tree hazards in a changing winter landscape. Staying on course, the court reasoned that plaintiff, "knew that unmarked obstacles could and would exist in this off-piste area, and he chose to proceed down this more-advanced run."

The court also noted a critical distinction between JHMR's failure to control inherent risks and actions affirmatively enhancing risks that already exist, as only the latter is actionable. It found that what made the stump's height hazardous was that day's snow level (an inherent risk of mountain recreation) and plaintiff failed to offer any evidence that cutting the tree at that particular height affirmatively enhanced the risk or placed it beyond the inherent risk that already existed. The judge also pointed to the public policy implications of holding that a ski resort has a duty to fully remove stumps or cut trees to a certain level. Such a duty, he wrote, "would disincentivize recreational managers from attempting to mitigate hazards for their guests . . . if a fallen tree in an off-piste area is an inherent hazard of skiing, and cutting it off below the break creates a non-inherent risk, a ski area manager might decide to simply leave the fallen tree so as not to potentially incur liability."

The court finished its run on both skis, finding no liability: "Standish's accident was the result of an unfortunate confluence of a stump, an ungroomed run, and the spectacular snow levels of the previous days. The combination of these factors is an inherent risk of skiing, a sport as thrilling as it can be risky. And the WRSA reflects this by limiting the duty owed by an entity offering access to such a sport." As a next step, Thomas could petition for a rehearing en banc or attempt to bring

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the case to the Supreme Court. While those options are unlikely, plaintiff may yet decide to take one last run at an appeal before hanging up his skis.

SCOTUS Sidesteps USA Sumo Broadcasting Copyright Appeal

Without much ceremony, the U.S. Supreme Court recently decided against getting in the [dohyō, or circular ring](#), to grapple with an international jurisdiction case involving a Japanese television network and its alleged infringing broadcast of an American Sumo competition in 2018. ([Superama Corp., Inc. v. Tokyo Broadcasting System Television, Inc.](#), 593 U.S. ___, No. 20-1359 (U.S. cert. denied May 3, 2021)). The Court's denial of certiorari upholds a [Ninth Circuit ruling](#) affirming the dismissal of Superama Corporation Inc.'s ("Superama") broadcasting copyright lawsuit against Tokyo Broadcasting System Television Inc. ("TBST" or "Defendant") due to a lack of subject matter jurisdiction, as the alleged acts of copyright infringement were found to have taken place entirely in Japan.

Superama is a Nevada-based sports and events company responsible for organizing [U.S.A. Sumo's annual Open competition in California](#). Superama takes pictures and videos of the matches and uses the content and the event's notoriety to market the sport of sumo (and its competitions) in the United States. In its original [complaint](#), [Superama details](#) that, in May 2018, the organization sponsored the annual U.S. Sumo Open competition in Long Beach, California. It photographed and filmed the event (the "Copyrighted Work") and later placed the videos on the U.S. Sumo's [competition's website](#) and [YouTube channel](#) (making them available for viewing, but not download). In February 2019, Superama registered the Copyrighted Work with the U.S. Copyright Office.

In January 2019, the defendant, [TBST, the flagship station of the Japan News Network](#), allegedly approached Superama about potentially licensing a portion of their Copyrighted Work for airing on TBST in Japan. Superama quoted TBST a licensing fee for the anticipated costs of rebroadcasting limited portions of the Copyrighted Work on their channel. However, TBST apparently never responded, and no licensing

agreement was ever signed. Instead, TBST allegedly downloaded the entire 2018 U.S. Sumo Open from YouTube, without the knowledge or consent of Superama, and aired a 125-second edited portion of the competition on a highly-rated weekly television program.

In its [complaint](#), Superama accused TBST of, among other things, direct and contributory copyright infringement. However, before the merits of the case could be addressed, a California district court [ruled](#) that the court lacked subject matter jurisdiction because TBST's alleged infringing acts took place exclusively in Japan, as the pleadings suggested that the footage was downloaded from the web to a computer in Japan and broadcast on the defendant's network in Japan. In its opinion, the district court observed that, under Ninth Circuit precedent, U.S. copyright law does not have extraterritorial application to infringements that take place entirely abroad. This conclusion rejected Superama's argument that the initial act of infringement took place in the U.S. because the defendant downloaded a copy of the Copyrighted Work from YouTube's servers located in the U.S.

Superama appealed the decision. However, the suit fared no better in a bigger arena. In October 2020, the [Ninth Circuit affirmed](#), finding that the lower court's dismissal, due to a lack of subject matter jurisdiction, was proper because Superama could not "plausibly allege that any infringement occurred in the United States." The Ninth Circuit similarly rejected Superama's argument that the actionable copying took place in the U.S. because TBST downloaded the Copyrighted Work from YouTube's U.S. servers before it was downloaded in Japan. While the appeals court stated that a plaintiff may recover damages for foreign infringement when a predicate act of infringement took place in the U.S., such a doctrine was not applicable in this case "where the only asserted predicate act of infringement – the download of copyrighted material – occurred outside of the United States." The court also took little time in wrestling with Superama's technical argument that the infringement occurred in the U.S. because a copy of the footage may have been made on YouTube's server before it was downloaded in Japan. In a quick takedown, the court ruled that precedent did not establish a rule that actionable infringement occurs when an exact copy

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of the video content was made on YouTube's server before it was downloaded in Japan.

Having already suffered two falls in this bout, Superama filed its final petition to the Supreme Court in March 2021. Despite Superama's best efforts, [SCOTUS declined the opportunity to review the Ninth Circuit's decision](#). The verdict deals a massive blow to Superama's chances of recovery in this country and forces USA Sumo to look for remedies to their alleged copyright infringement claims outside of the confines of the U.S. legal system.

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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