THE SPORTS LAWYER

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National Collegiate Athletic Association

NCAA Settles EA Video Game Lawsuit

On June 9, 2014, the NCAA announced it will settle claims over college-themed basketball and football video games produced by Electronic Arts (EA). The settlement will award $20 million to the plaintiffs, certain Division I men's basketball and Division I Bowl Subdivision football student-athletes who attended certain institutions during the time the games were sold. The exact details of the settlement remain to be finalized.

The video game lawsuit filed in November 2013 was led by former Arizona State quarterback Sam Keller. This lawsuit was separate from the Ed O'Bannon lawsuit against the NCAA and is not related to the $40 million settlement reached previously by EA Sports and the Collegiate Licensing Company. The football and basketball college players due to receive payment from the lawsuit will collect up to $20,000, with all payments being capped at $5,000 per year. The value per player will be based on several factors: the number of players making a claim, what sport was (or is) played, whether or not the player was depicted by an avatar, whether the player's photograph appeared in the game, and the number of years the player was on a roster appearing in the game. Appearing in the game in any year would create a settlement check of $5,000 per season. Another $5,000 may be added for each year a player's photo appeared in the game. Not every football or basketball player will obtain a cut, but prominent players may receive large amounts.

"In no event do we consider this settlement pay-for-athletics-performance," stated NCAA chief legal officer Donald Remy. Current players who receive part of the settlement will not be punished under the rules that generally bar compensation. "Going forward, I think people will be on notice that if they are going to use players likenesses, they will have to pay for them," said the plaintiff's attorney Steve Berman of the firm Hagens Berman Sobol Shapiro LLP. United States District Judge Claudia Wilken for the Northern District of California, who is also currently presiding over the O'Bannon case against the NCAA, must approve the settlement agreement.

-- Alexandrea Kinzinger

National Football League

Redskins Trademark Registration Cancelled

On June 18th, 2014, the United States Patent and Trademark Office canceled the trademark registration of the Washington Redskins. The decision by the Trademark Trial and Appeal Board stated that the Redskins name and the team logo are disparaging and no longer receives trademark protection.

The Redskins trademark was first challenged in the 1992 case Pro-Football, Inc. v. Harjo by a different group of Native Americans led by activist Suzan Harjo, but the Trademark Trial and Appeal Board's ruling to cancel the trademark was dismissed in federal court. The court said that the plaintiffs did not have standing to file the suit, which led to the court never ruling on the merits of the case. Federal trademark law prevents the registration of trademarks that are disparaging to individuals or groups or "bring them into contempt or disrepute." The United States Patent and Trademark Office has denied the registration trademarks containing the word "Redskins" roughly twelve times since the 1992 ruling on the grounds that the term may disparage Native Americans. The Washington Redskins plan to appeal the decision to cancel the six trademarks cited in the decision, and the trademark registrations will continue to be active during the appeals process. The decision does not stand to have much effect on the team if it were to be upheld after appeal. The Redskins will continue to be able to sell merchandise with the team name and logo on it. Additionally, the decision will likely not stop the team from defending itself against others who try to profit from the team name or logo, as the team would maintain "common law" rights to the name. Washington Redskins owner Dan Snyder has been under an increasing amount of pressure to change the name of his team, but he has consistently refused to consider changing the team name. The current suit was brought by Amanda Blackhorse, Phillip Glover, Marcus Briggs-Cloud, Jillian Pappan, and Courtney Tsotigh eight years ago.

"I hope this ruling brings us a step closer to that inevitable day when the name of the Washington football team will be changed," said plaintiff Amanda Blackhorse. "We've been down this road already," said Robert Raskopf of Quinn Emanuel Urquhart & Sullivan, LLP in New York, a lawyer for the Washington Redskins since the 1992 case was filed. "We have the same evidence here that we had last time, the same arguments, the same exact case." Claudia T. Bogdanos and Todd Anten, both also of Quinn Emanuel Urquhart & Sullivan, are also representing the Redskins. The plaintiffs are represented by Jesse A. Witten, Jeffrey J. Lopez, John D. V. Ferman, Lee Roach and Stephen Wallace of Drinker, Biddle & Reath LLP in Washington, D.C.

-- *Harry Wright*

NFLPA Wins Collusion Appeal

On June 20, 2014, Judge William Riley of the United States Court of Appeals for the Eighth Circuit partially reversed a federal judge's order that rejected the National Football League Players Association's (NFLPA) collusion claim. Judge Riley held that the union should still be allowed to present its case despite the 2011 collective bargaining agreement (CBA) seemingly preventing such a move.

In August of 2011, a new CBA was put in place to end the five-month long lockout. The union brought the $4 billion collusion lawsuit because the final year of the prior CBA was supposed to be uncapped, but public references by New York Giants owner John Mara and NFL Commissioner Roger Goodell demonstrated that there was a salary cap. The union has alleged that this led to a loss of $1 billion in cumulative compensation. District Court Judge David Doty had previously dismissed the case in December 2012, holding that the new CBA contained language that dismissed all prior claims. The union claimed that this dismissal was achieved through fraud and misrepresentation.

In a 21-page opinion, Judge Riley agreed with Judge Doty in finding that the collusion did not invalidate the 2011 dismissal of claims because that settlement was treated more like a contract than an actual class action. Judge Riley disagreed with Doty, however, when he found that when the party being sued reached a settlement deceitfully, the other side should be allowed to argue the merits of its case. This means that despite the 2011 dismissal, the NFLPA should still be allowed to fully argue its case.

"We are pleased that the Eighth Circuit ruled that players have the opportunity to proceed with their claims," said a spokesperson for the NFLPA. The NFLPA was represented by Jeffrey L. Kessler of Winston & Strawn LLP in New York. "Far from validating the Union's claim, the Court specifically highlighted the heavy burden that the NFLPA faces in establishing this claim, and we remain highly confident that the claim will be dismissed yet again," said the NFL in a statement issued after the 8th Circuit Court decision came down. The NFL was represented by Gregg H. Levy of Covington & Burling LLP in Washington, D.C.

-- *Wyatt Lyles*

National Hockey League

Court Enforces $1.6 Million Swiss Ruling Against Hockey Player

On June 5, 2014, United States District Judge Gordon J. Quist of Michigan delivered his opinion in the case against former NHL player Kevin Miller. In the case Allianz Suisse Versicherungs-Gesellschaft v. Kevin Miller, Judge Quist upheld a judgment of a Swiss court against Miller for $1.6 million, enforcing Swiss court's award for damages in the United States.

Miller, a former forward for the Detroit Red Wings, hit Canadian hockey player Andrew McKim from behind in 2000 in a Swiss league game, causing McKim to fall forward and hit his head on the ice. McKim suffered a severe concussion and damage to the cervical spine, ending his hockey career. Miller was convicted of simple bodily harm, intentional bodily harm, and gross negligence Switzerland's Canton of Zurich in 2004. The ruling against him was for $1.1 million, which prompted Swiss insurance company Allianz to file a separate suit to recover for its payment after the hit. On March 17, 2010, the Swiss courts ruled that Miller owed Allianz the payment on the Swiss judgment, which has increased to $1.6 million due to interest and other costs. Miller believed the ruling to not be valid, so the Swiss insurance company moved to the United States to uphold the judgment.

In an 18-page opinion, Judge Quist upheld the judgment of the Swiss Court, ruling that Miller was responsible for payment to Allianz. Miller contended that he was not permitted to confront witnesses and that the trial did not follow protocol for an American criminal proceeding. Judge Quist ruled that this was a civil suit, not a criminal case, and Miller had the opportunity to confront witnesses at various times throughout the court proceedings.

In his opinion, Judge Quist said regarding the Swiss court's ruling, "The Court cannot say that the Judgment presents a serious injustice or lacks basic fairness, such that nonrecognition is appropriate." Miller was represented by Douglas Donnell of Grand Rapids, Michigan. After the ruling, Donnell did not publicly comment on the ruling.

-- *Kyle Sutton*

Major League Baseball

Lawsuit Filed Against MLB Advanced Media

On June 18, 2014, Sports Technology Applications, Inc., (STA), a software developer, sued Major League Baseball Advanced Media (MLBAM) in the United States District Court for Southern District of New York for breach of contract. STA claims that MLBAM failed to promote its smartphone app and did not notify them that there was a similar agreement in place with a direct competitor.

STA entered into a license agreement with MLBAM on December 1, 2012, which provided that STA would have nonexclusive rights to use MLB intellectual property to market and sell its app. Additionally, the MLB agreed to promote the app through various social media outlets for the duration of the agreement period. When the app launched in the summer of 2013, MLBAM failed to promote the app in the manner agreed upon. STA later discovered that its main contact person from the MLB, Jamie Leece, was a board member of PrePlay, Inc., who is a direct competitor of STA, and that MLBAM was a significant shareholder of PrePlay. STA then received a letter from PrePlay stating that it was infringing on the patent owned by PrePlay. It was discovered that MLBAM had already given PrePlay an exclusive license for a gaming application before the agreement with STA was made. STA stated that it would have not entered into the agreement had it known that such an agreement was already in place. STA is seeking damages for breach of contract and breach of the implied covenant of good faith and fair dealing.

"Had STA been aware of the facts that Leece was a board member of PrePlay, that MLBAM was a significant shareholder of PrePlay, or that MLBAM had previously granted PrePlay an exclusive license for a gaming application similar to the App, then STA would have never entered into the Agreement or spent its time and money developing the App," stated the complaint. The plaintiffs are represented by Peter Safirstein of the firm Morgan & Morgan P.C. in New York City. A date has not yet been set for hearing.

-- *Wyatt Lyles*

Other News

Big Four Files Trademark Infringement Suit

On June 11, 2014, the National Hockey League (NHL), National Football League (NFL), Major League Baseball (MLB), and National Basketball Association (NBA), along with Louisiana State University (LSU) and the Collegiate Licensing Company (a trademarking group which represents 13 universities) filed suit against various foreign companies in United States District Court in the Northern District of Illinois for infringing on the plaintiffs' trademark rights by selling unauthorized products online. The suit against a group of unidentified counterfeiters believed to reside outside the United States seeks to enjoin the sale of unlicensed sports merchandise.

The four major professional sports leagues, LSU, and the Collegiate Licensing Company are suing in response to the surge of websites which offer products containing various trademarks that the sites are not authorized to use. The defendants, who are described in the suit as individuals and businesses from foreign jurisdictions cooperating in a counterfeiting operation, create many online stores and "design them to appear to be selling licensed products featuring one or more of the trademarks owned and/or licensed by Plaintiffs." In actuality, they are purportedly selling low-quality counterfeit products that contain the trademarks of the plaintiffs. The defendants are alleged to have gone to great lengths to hide their identities, but the plaintiffs claimed that it is necessary to file against them to prevent further damage to their brands. The plaintiffs are requesting that the companies be enjoined from continuing to use their trademarks and that the control of all domain names used by the defendants be transferred to the plaintiffs.

"Plaintiffs have been irreparably harmed and continue to be irreparably damaged through consumer confusion, dilution, and tarnishment of their valuable trademarks as a result of Defendants' actions and seek injunctive and monetary relief," states the complaint. The plaintiffs are represented by Kevin W. Guynn, Amy C. Ziegler, and Justin R. Gaudio of the Chicago law firm Greer, Burns & Crain, Ltd. Neither side has made a comment publicly about the case.

-- *Josh Mastracci*

Supreme Court Declines to Hear New Jersey Sports Betting Case

On June 23, 2014, the United States Supreme Court declined to review New Jersey's plea to have the Professional and Amateur Sports Protection Act ("PASPA"), which put a ban on federal sports betting, overturned. The Supreme Court informed the parties of this decision via a one-line order without comment from any of the justices.

In 1992, Congress passed PASPA, which prohibited sports betting except in four states: Nevada, Delaware, Montana, and Oregon. New Jersey was given an opportunity to join the exempted four states, but the state had originally refused. In 2011, New Jersey residents voted in favor of a referendum that supported sports wagering. Following the vote, the state legislature started to develop regulations to introduce sports wagering. In response to the new legislation, the National Collegiate Athletic Association (NCAA), National Football League (NFL), National Basketball Association (NBA), National Hockey League (NHL), and Major League Baseball (MLB) filed a lawsuit in a federal district court asking a judge to issue an injunction blocking state officials with moving forward with their plan to legalize sports wagering. The judge agreed and issued the injunction. On appeal, the Third Circuit Court of Appeals in Philadelphia, Pennsylvania upheld the injunction.

Three petitions were filed with the Supreme Court asking the Supreme Court to review the decision. The petitions were filed on behalf of New Jersey Governor Chris Christie, president of the New Jersey Senate Stephen Sweeney, and the New Jersey Thoroughbred Horsemen's Association. The main issue in the petitions were the applicability of PASPA. New Jersey representatives argued that PASPA was infringing on its rights of state sovereignty and a violation of the 10th Amendment of the United States Constitution. The sports leagues argued that there was nothing unconstitutional in the way that PASPA prohibited state sports wagering

"It's always a long shot to get certiorari from the United States Supreme Court," Governor Christie said. "That's the way it goes. They said 'no' so we have move on." Governor Christie was represented by former U.S. Solicitor General Theodore B. Olson, who now works for the firm Gibson, Dunn & Crutcher LLP out of Washington, D.C. "We are pleased the Supreme Court has denied New Jersey's final attempt for review," NCAA Chief Legal Officer Donald Remy said in a statement. "The NCAA maintains that the spread of legalized sports wagering is a threat to student-athlete well-being and the integrity of athletic competition." The NCAA and other professional sports leagues represented in the suit were represented by Paul D. Clement of Bancroft PLLC in Washington, D.C. A few hours after the Supreme Court declined to review the case, New Jersey Senator Ray Lesniak introduced a bill that would decriminalize sports wagering at the state's casinos and racetracks.

-- *Sara LaMont*

New Balance Files Suit Against Designer Karl Lagerfeld

On June 3, 2014, New Balance filed suit against German fashion designer Karl Lagerfeld in the United States District Court for the Southern District of New York for trademark infringement. New Balance alleges that Lagerfeld "recently began selling athletic footwear … that is confusingly similar to and dilutes New Balance's registered and common law rights."

New Balance's "Block N Marks," which it has used since the 1970s, are trademarked in the United States and in 70 other countries around the world. New Balance also owns the trademark for "the block capital letter 'N' with a saddle device," which has been displayed on a majority of New Balance's shoes for over thirty years. New Balance has invested millions of dollars into its products under these marks and has sold hundreds of millions of shoes containing these marks across the world. Since consumers have come to associate a block capital letter on the side-saddle of a shoe, New Balance now has protectable rights in a family of trade dress that includes a combination of the distinguishing factors of New Balance shoes. It alleges that designer Karl Lagerfeld has intentionally used a block "K" on a nearly identical shoe design with a saddle device that could dilute New Balance's Block N Marks and cause confusion for consumers. In March 2014, Lagerfeld began to sell his athletic shoes in New York for approximately $360 a pair. These athletic shoes, which were first seen on the Paris runway in January, also feature a block capital letter on the side-saddle of the shoe. New Balances seeks relief in the form of an injunction against Lagerfeld, the recalling and destruction of the allegedly infringing goods, and treble and compensatory damages.

"New Balance filed a lawsuit against Karl Lagerfeld to protect our intellectual property rights related to our iconic lifestyle footwear designs," said a spokesperson for New Balance. "Although we cannot comment on the specifics of the case, we believe it is vital to actively and vigorously defend our brand." New Balance is represented by R. David Hosp of Fish & Richardson P.C. in New York and Mark S. Puzella and Sheryl K. Garko of Fish & Richardson P.C. in Boston. This case is now before United States District Court Judge Lorna G. Schofield.

-- *Victoria Acuff*

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