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## Lawsuits by NHL players, former student keep spotlight on concussions

By Deborah Nathan, Senior Legal Writer, Westlaw Journal

Two recent lawsuits — one by former National Hockey League players and the other by a recent high school graduate — continue to put a spotlight on the issue of head injuries and concussions that plague professional and amateur athletes.

***Fritsche et al. v. National Hockey League, No. 14-5732, complaint filed (S.D.N.Y. July 25, 2014)***

***Stoddard v. Medina City Schools Board of Education et al., No. 14-0852, complaint filed (Ohio Ct. Com. Pl., Medina County Aug. 13, 2014).***

NHL veterans Dan Fritsche and Chris Ferraro and recent grad Jonathan Stoddard of Medina, Ohio, claim in their respective lawsuits that the organizations they play for have negligently contributed to or exacerbated the problem.



REUTERS/Eric Miller

**Hockey player Dan Fritsche (49), shown here in a March 2009 game, says he played in over 250 games and suffered several concussions, the last in September of that year.**

## THE STODDARD SUIT

Stoddard's suit, filed in the Ohio's Medina County Court of Common Pleas, names the local board of

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## COMMENTARY

## The O'Bannon decision and the 'ancillary restraints' doctrine

Attorneys Joel G. Chefitz and Chelsea Black of McDermott Will & Emery discuss why a recent decision holding that student-athletes can be paid for the use of their names, images and likenesses may be incorrect and subject to reversal on appeal.

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## The *O'Bannon* decision and the 'ancillary restraints' doctrine

By Joel G. Chefitz, Esq., and Chelsea Black, Esq.  
McDermott Will & Emery

On Aug. 8, U.S. District Judge Claudia Wilken of the Northern District of California issued her highly anticipated trial ruling in *O'Bannon v. National Collegiate Athletic Association*.<sup>1</sup> The plaintiffs, 20 current and former NCAA Division I football players and men's basketball players, brought a class action against the NCAA, alleging that its rules violated Section 1 of the Sherman Antitrust Act by prohibiting member schools from compensating student-athletes for the use of their names, images and likenesses in television broadcasts, video games and archival footage. The court ruled for the plaintiffs following a three-week bench trial, but its injunction limited the impact of the decision on the NCAA's amateur model.

Judge Wilken set forth her findings of fact and conclusions of law in a carefully reasoned 99-page opinion. Nevertheless, she may have departed from the U.S. Supreme Court's prescribed analysis under the "ancillary restraints" doctrine by giving short shrift to arguments that amateurism is a core feature of the NCAA's product. Believing that Judge Wilken made the wrong call, the NCAA has appealed to the 9th U.S. Circuit Court of Appeals, and the ruling may not stand on review.

### NCAA'S ARGUMENTS

The NCAA argued first that the court need not engage in a full "rule of reason" analysis

to uphold the legality of its challenged rules because the NCAA operates a joint venture with a product (intercollegiate athletics) that could not exist without at least some coordination among competitors.<sup>2</sup>

The plaintiff in a rule-of-reason case has the initial burden to establish that the challenged restraint causes anti-competitive effects in a relevant market. If the plaintiff so demonstrates, the burden shifts to the

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The central flaw in the District Court's analysis was its treatment of amateurism as only a means to an end rather than as a pro-competitive end in and of itself.

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Instead, courts that have analyzed the legality of NCAA rules in the past have been "uniform on the controlling legal standard in this context: when an NCAA bylaw is clearly meant to help maintain the revered tradition of amateurism in college sports or the preservation of the student-athlete in higher education, the bylaw will be presumed pro-competitive, since [courts] must give the NCAA ample latitude to play that role."<sup>3</sup> In the alternative, the NCAA argued that its rules were also valid when judged by the rule of reason.

### RULE OF REASON

The court rejected the NCAA's first argument and conducted a full rule-of-reason analysis, which requires that the pro-competitive and anti-competitive effects of the challenged rules be weighed.

defendant to come forward with evidence of the restraint's pro-competitive effects. If the defendant is successful, the burden shifts back to the plaintiff to prove that the pro-competitive goals behind the restraint can be achieved in a substantially less restrictive manner.<sup>4</sup>

### RESTRAINT OF TRADE IN A RELEVANT MARKET

The plaintiffs successfully established that the "college education market" is a relevant market in which "NCAA Division I schools compete to sell unique bundles of goods and services to elite football and basketball recruits" — namely, "the opportunity to earn a higher education while playing for an FBS [Football Bowl Subdivision]<sup>5</sup> football or Division I men's basketball team" — in exchange for athletic services and the right to use the athlete's name, image and likeness while enrolled.<sup>6</sup>

The court concluded that the plaintiffs had established a restraint of trade in this market in the form of "an agreement to charge every recruit the same price for the bundle of educational and athletic opportunities that they offer: to wit, the recruit's athletic services along with the use of his name, image, and likeness while he is in school."<sup>7</sup>

### NCAA'S PRO-COMPETITIVE JUSTIFICATIONS

The NCAA offered four pro-competitive justifications for the challenged restraints. First, the NCAA argued that its rules are



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necessary to preserve the amateur tradition and identity of college sports.

Rejecting the NCAA's interpretation of precedent on this issue, the court declined to consider amateurism in collegiate athletics as a legitimate pro-competitive end in and of itself. Instead, the court viewed rules promoting this goal as pro-competitive only to the extent they were "necessary to maintain the popularity of FBS football and Division I basketball."<sup>8</sup>

The court concluded that, while "the NCAA's restrictions on student-athlete compensation play a limited role in driving consumer demand for FBS football and Division I basketball-related products" and therefore "might justify a restriction on large payments to student-athletes while in school, they do not justify the rigid prohibition on compensating student-athletes, in the present or in the future, with any share of licensing revenue generated from the use of their names, images, and likenesses."<sup>9</sup>

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The remedy looks more like the result of administrative rulemaking than a permanent injunction under the Sherman Antitrust Act.

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Second, the NCAA argued that the challenged rules promote competitive balance among FBS football and Division I basketball teams. The court held that the NCAA did not present "sufficient evidence to show that its restrictions on student-athlete compensation actually have any effect on competitive balance. The consensus among sports economists who have studied the issue ... is that the NCAA's current restrictions on compensation do not have any effect on competitive balance."<sup>10</sup>

Third, the NCAA argued that its rules promote the integration of academics and athletics, which increases the quality of the educational services schools provide to student-athletes. The court agreed that improving product quality is a legitimate pro-competitive end but found that "the only way in which the challenged rules might facilitate the integration of academics and athletics is by preventing student-athletes from being cut off from the broader campus community."

As with amateurism, although "[l]imited restrictions on student-athlete compensation may help schools achieve this narrow

pro-competitive goal[,] the NCAA may not use this goal to justify its sweeping prohibition on any student-athlete compensation, paid now or in the future, from licensing revenue generated from the use of student-athletes' names, images, and likenesses."<sup>11</sup>

Fourth and finally, the NCAA "claim[ed] that its rules increase[d] output in two ways: first, by attracting schools with a 'philosophical commitment to amateurism' to compete in Division I and, second, by enabling schools that otherwise could not afford to compete in Division I to do so."<sup>12</sup> The court rejected both arguments as being unsupported by the record.

### LESS RESTRICTIVE ALTERNATIVES

The NCAA's demonstration that pro-competitive effects flowed from the challenged restraints shifted the burden back to the plaintiffs, who "identified two legitimate less restrictive alternatives for achieving" these pro-competitive effects.

"First, the NCAA could permit FBS football and Division I basketball schools to award stipends to student-athletes up to the full cost of attendance, as that term is defined in the NCAA's bylaws, to make up for any shortfall in its grants-in-aid."<sup>13</sup>

"Second, the NCAA could permit its schools to hold in trust limited and equal shares of its licensing revenue to be distributed to its student athletes after they leave college or their eligibility expires. The NCAA could also prohibit schools from funding the stipends or payments held in trust with anything other than revenue generated from the use of student-athletes' own names, images, and likenesses."<sup>14</sup>

### THE COURT'S CONCLUSION

Ultimately, the court found "that the challenged NCAA rules unreasonably restrain trade in the market for certain educational and athletic opportunities offered by NCAA Division I schools. The pro-competitive justifications that the NCAA offer[ed] do not justify this restraint and could be achieved through less restrictive means."<sup>15</sup>

### REMEDY

The court issued an injunction prohibiting the NCAA from restricting its member schools from offering recruits "a limited share of the revenues generated from the use of their names, images, and likenesses in addition to a full grant-in-aid."<sup>16</sup> The injunction does not preclude the NCAA from setting a cap on "the amount of compensation that may be paid to student-athletes while they are enrolled in school," provided that the cap is not set below the cost of attendance.

It also prohibits the NCAA from restricting its member schools from holding "a limited share of licensing revenue in trust" for student-athletes, "payable when they leave school or their eligibility expires." The NCAA is allowed to cap the amount held in trust, provided the cap is not set below \$5,000 per year in 2014 dollars.<sup>17</sup>

The court did not stay the injunction pending appeal. In response to a joint filing, the court clarified that the injunction will apply to both current and prospective players beginning in July 2016.

The NCAA filed a notice of appeal to the 9th Circuit on Aug. 20. The NCAA has several strong arguments to raise on appeal. Chief among them are that the District Court misapplied *NCAA v. Board of Regents of the University of Oklahoma*<sup>18</sup> and the ancillary restraints doctrine.

### BOARD OF REGENTS AND THE ANCILLARY RESTRAINTS DOCTRINE

The ancillary restraints doctrine "governs the validity of restrictions imposed by a legitimate business collaboration, such as a business association or joint venture, on nonventure activities."<sup>19</sup> It requires courts to "determine whether the [ ] restriction is a naked restraint on trade, and thus invalid, or one that is ancillary to the legitimate and competitive purposes of the business association, and thus valid."<sup>20</sup>

In the seminal *Board of Regents* decision, written by Justice John Paul Stevens, the Supreme Court held that the NCAA was a legitimate joint venture with a product (college football) that could not exist without the cooperation of its member teams. In addition, the court recognized the objective of preserving the tradition of amateurism in intercollegiate athletics as a legitimate pro-competitive purpose of the joint venture,

noting that amateurism is essential to “the character and quality of the [NCAA’s] ‘product.’”<sup>21</sup>

The court in *Board of Regents* stated that “the NCAA ... needs ample latitude to play” its “critical role in the maintenance of a revered tradition of amateurism in college sports”<sup>22</sup> and that rules designed to preserve “the type of competition that [the NCAA] and its member institutions seek to market” are presumptively pro-competitive.<sup>23</sup>

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## The first questionable aspect of its remedy is the District Court’s holding that the plaintiffs did not need to show irreparable harm in order to obtain a permanent injunction.

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The challenged restraint in *Board of Regents* was a restriction on the number of college football games member schools could broadcast. In concluding that this restraint was unreasonable, the court distinguished between restraints that serve legitimate pro-competitive objectives of the joint venture and restraints that “curtail[] output and blunt[] the ability of member institutions to respond to consumer preference,” which tend to “restrict[] rather than enhance[] the place of intercollegiate athletics in the nation’s life.”<sup>24</sup>

The 7th Circuit followed this approach in *Chicago Professional Sports v. NBA* when it held that the NBA’s output-reducing telecast rules violated the rule of reason and it rejected the NBA’s attempt to cast the rules as lawful ancillary restraints.<sup>25</sup>

In contrast, the rules challenged in *O’Bannon* are direct restrictions on student-athlete compensation and are patently ancillary to the goal of preserving amateurism in college sports. The central flaw in the District Court’s analysis was its treatment of amateurism as only a means to an end rather than as a pro-competitive end in and of itself.

The court was dismissive of the statement in *Board of Regents* that, “[i]n order to preserve the character and quality of the [NCAA’s] ‘product,’ athletes must not be paid.” It noted that this “suggestion” by the Supreme Court “was not based on any factual findings in the trial record and did not serve to resolve any disputed issues of law.”<sup>26</sup>

But Justice Stevens’ contrast between eligibility rules preserving the amateurism of student-athletes, which were core to the

NCAA’s mission and ancillary, and limits on the number of telecasts, which were not, went to the heart of the Supreme Court’s analysis. Although the Supreme Court considered amateurism a core characteristic of the NCAA, the court in *O’Bannon* viewed it as a collateral restraint, competitively justifiable only to the extent that it drives consumer demand for college sports.

Ironically, the era of lucrative broadcast contracts ushered in by the *Board of Regents*

decision may have led the district court and others to question the continuing legitimacy of classifying Division I football and basketball players as “amateurs.” For example, according to U.S. Rep. Charlie Dent, R-Pa.: “Everybody knows that big-time college football and basketball are the minor leagues for the NFL and NBA. It’s professional sports operating under the umbrella of amateur athletics. I’m not here to endorse that, but that’s the reality of what it is even if people don’t want to call it that. The NCAA says it’s all about amateurism, but they have a professional operation there.”<sup>27</sup>

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## The *O’Bannon* court’s dismissal of the Supreme Court’s treatment of amateurism as a “suggestion” or an unsupported factual finding exposes the opinion on appeal.

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### UNUSUAL INJUNCTION

Instead of simply enjoining the NCAA from enforcing its anti-competitive caps on student-athlete compensation, the District Court issued an injunction setting new caps — a highly unusual move. The remedy looks more like the result of administrative rulemaking than a permanent injunction under the Sherman Act.

The logic behind the injunction is clear: the NCAA demonstrated that its rules restricting student-athlete compensation cause at least some pro-competitive effects — enough to justify a \$5,000-per-year cap on compensation for name, image and likeness, but not enough to justify a complete ban.<sup>28</sup> But the injunction may not rest on a solid legal footing.

The first questionable aspect of its remedy is the District Court’s holding that the plaintiffs did not need to show irreparable harm in order to obtain a permanent injunction. The court reasoned that the traditional standard for permanent injunctive relief did not apply here because “[t]he Sherman Act itself gives district courts the authority to enjoin violations of its provisions and does not impose any additional requirements on plaintiffs who successfully establish the existence of an unreasonable restraint of trade.”<sup>29</sup>

But the Supreme Court in *eBay Inc. v. MercExchange LLC*<sup>30</sup> explicitly rejected this reasoning in the context of the Patent Act, which also contains a provision specifically authorizing the issuance of injunctions. First, the court noted that “a major departure from the long tradition of equity practice should not be lightly implied” and found that “[n]othing in the Patent Act indicates that Congress intended such a departure.”<sup>31</sup>

Second, the District Court’s failure to conduct a remedies-specific evidentiary hearing, along with its cursory explanation (three paragraphs) for the very specific relief it ordered, could prove fatal to the injunction under the reasoning set forth in *United States v. Microsoft Corp.*<sup>32</sup> The District of Columbia Circuit in *Microsoft* vacated a decree

ordering Microsoft to divest its software business and held that the lower court had violated “the company’s basic procedural right to have disputed facts resolved through an evidentiary hearing ... when it resolved the parties’ remedies-phase factual disputes by consulting only the evidence introduced during trial and plaintiffs’ remedies phase submissions.”<sup>33</sup>

The lower court in *Microsoft* had also “failed to provide an adequate explanation for the relief it ordered” and instead “devoted a mere four paragraphs of its order to explaining the reasons for its remedy.”<sup>34</sup>

The *Microsoft* opinion does not bode well for the procedures followed in *O’Bannon*, particularly in light of the specific request the NCAA made in its post-trial brief for “the

opportunity for full briefing and argument in the event the court determines that [the plaintiffs] may be entitled to some form of injunction.”<sup>35</sup>

## CONCLUSION

The *O'Bannon* opinion is a thoughtful analysis grounded on the record of a three-week trial. But its dismissal of the Supreme Court's treatment of amateurism as a “suggestion” or an unsupported factual finding exposes the opinion on appeal. Coupled with the rulemaking nature of the remedy and the District Court's failure to require the traditional prerequisites for injunctive relief, the court may have committed reversible error. **WJ**

## NOTES

<sup>1</sup> *O'Bannon et al. v. NCAA et al.*, No. 09-3329, 2014 WL 3899815 (N.D. Cal. Aug. 8, 2014).

<sup>2</sup> NCAA's Trial Br. at 2 (citing *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984)).

<sup>3</sup> *Id.* at 3-4 (quoting *Agnew v. NCAA*, 683 F.3d 328, 342-43 (7th Cir. 2012); *Bd. of Regents*, 468 U.S. at 120) (internal quotation marks omitted)).

<sup>4</sup> *O'Bannon*, No. C 09-3329, slip op. at 49-50.

<sup>5</sup> Division I football is composed of two subdivisions: the Football Bowl Subdivision and the Football Championship Subdivision, formerly known as Division I-A and Division I-AA. FBS schools are allowed to offer full-ride scholarships to more athletes, which enables them to compete at a higher level. The class included football players from FBS schools only.

<sup>6</sup> *O'Bannon*, No. C 09-3329, slip op. at 51.

<sup>7</sup> *Id.* at 55-56.

<sup>8</sup> *Id.* at 81.

<sup>9</sup> *Id.* at 82-83.

<sup>10</sup> *Id.* at 83.

<sup>11</sup> *Id.* at 87-88.

<sup>12</sup> *Id.* at 88.

<sup>13</sup> NCAA rules cap the amount of financial aid student-athletes can receive on the basis of athletic ability (the grant-in-aid amount) and overall (the cost of attendance). The cost of attendance typically exceeds the grant-in-aid amount by a few thousand dollars. On Aug. 7 the NCAA Division I board of directors approved a new governance model in which the top five conferences will be allowed to write their own rules “on things such as cost-of-attendance stipends and insurance benefits for players, staff sizes, recruiting rules and mandatory hours spent on individual sports.” Brian Bennett, *NCAA Board Votes to Allow Autonomy*, ESPN, Aug. 8, 2014, available at [http://espn.go.com/college-sports/story/\\_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences](http://espn.go.com/college-sports/story/_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences). The top schools from the “Power Five” will vote on new rules at the NCAA convention in January 2015, and rules authorizing full cost-of-attendance stipends are likely to be approved. Smaller leagues will have the option to adopt the same rules, though their member schools' ability to afford such measures remains a separate issue.

<sup>14</sup> *O'Bannon*, No. C 09-3329, slip op. at 92.

<sup>15</sup> *Id.* at 2.

<sup>16</sup> *Id.* at 96.

<sup>17</sup> *Id.*

<sup>18</sup> 468 U.S. 85, 101 (1984) (“[W]hat is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.”).

<sup>19</sup> *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006) (citing *Bd. of Regents*, 468 U.S. at 113-15).

<sup>20</sup> *Id.*

<sup>21</sup> *Bd. of Regents*, 468 U.S. at 102.

<sup>22</sup> *Id.* at 120.

<sup>23</sup> *Id.* at 117.

<sup>24</sup> *Id.* at 120.

<sup>25</sup> 961 F.2d 667, 669, 677 (7th Cir. 1992).

<sup>26</sup> *O'Bannon*, No. C 09-3329, slip op. at 79.

<sup>27</sup> See Jon Solomon, *Can Congress (Yes, Congress) Help NCAA Find Solutions?*, CBS SPORTS, Aug. 18, 2014, available at <http://www.cbssports.com/collegefootball/writer/jon-solomon/24666147/can-congress-yes-congress-help-ncaa-find-solutions>.

<sup>28</sup> The court concluded that “while consumer preference might justify certain limited restraints on student-athlete compensation, they do not justify the rigid restrictions challenged in this case.” The \$5,000 figure was supported by testimony from an NCAA witness, who “testified that he would not be troubled if schools were allowed to make five thousand dollar payments to their student-athletes and that his general concerns about paying student-athletes would be partially assuaged if the payments were held in trust. ... Stanford's athletic director, Bernard Muir, similarly acknowledged that his concerns about paying student-athletes varied depending on the size of the payments that they would receive.” *O'Bannon*, No. C 09-3329, slip op. at 34, 45.

<sup>29</sup> *Id.* at 96.

<sup>30</sup> 547 U.S. 388 (2006).

<sup>31</sup> *Id.* at 391-92 (citation and internal quotation marks omitted).

<sup>32</sup> 253 F.3d 34 (D.C. Cir. 2001).

<sup>33</sup> *Id.* at 103.

<sup>34</sup> *Id.*

<sup>35</sup> NCAA's Post-Trial Br. at 34 n.28.

## Are copyrighted works only by and for humans? The copyright planet of the apes and robots

By **Mark Fischer, Esq.**  
*Duane Morris LLP*

Why should humans own all the world's copyrights? The question is prompted by a photograph that's made worldwide news. In Indonesia, a female crested black macaque monkey picked up a camera owned by photographer David Slater. I won't focus much on the story of the monkey and her selfie because that topic has already been well-discussed in the media. Yet the story sets the table for more intriguing and ultimately more important issues.

A brief recap of the story of the monkey and the selfie follows. The monkey did what a lot of us would do with a camera. She took selfies. Just as with selfies shot by people, some of the images were out of focus and poorly framed. Some of the images are of such impressive quality, though, that postings on photography-oriented websites question if a monkey could have really created them. Sounds a little like the ominous beginning of a sci-fi series in which humans underestimate animal intelligence. We know how that ends.

According to press reports, Mr. Slater says the monkey indeed did shoot the images but that Mr. Slater — not the monkey — is the owner. That's presumably because Mr. Slater owns the camera and established at least some of the conditions for the photo shoots.

Mr. Slater has objected to publication of the selfie on Wikipedia. He claims that the publication is infringement of his copyright.

Wikimedia, which sources the image to Wikipedia, claims that monkey-created images are not protectable under copyright because only humans can create copyrighted works.

There is some support for Wikimedia's view. It's true that under US law copyright protection probably extends only to works of authorship created by humans. The Compendium II of Copyright Office Practices says in Section 202.02(b):

Human author: The term "authorship" implies that, for a work to be copyrightable, it must owe its origin to a human being. Materials produced solely by nature, by plants, or by animals are not copyrightable.

Further, The Compendium goes on to say in Section 503.03(a):

Works-not originated by a human author.

In order to be entitled to copyright registration, a work must be the product of human authorship. Works produced by mechanical processes or random selection without any contribution by a human author are not registrable. Thus, a linoleum floor covering featuring a multicolored pebble design which was produced by a mechanical process in unrepeatable, random patterns, is not registrable. Similarly, a work owing its

form to the forces of nature and lacking human authorship is not registrable; thus, for example, a piece of driftwood even if polished and mounted is not registrable.

Probably the best view of the law is that for Mr. Slater to own a valid copyright (if U.S. law applied to the situation) he would have had to have undertaken more to create the images, such as doing things like setting up the lighting, establishing camera angles from a camera mounted on a tripod, creating a set backdrop for the images.

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Wikimedia, which sources the image to Wikipedia, claims that monkey-created images are not protectable under copyright because only humans can create copyrighted works.

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If Mr. Slater had not actually pushed the shutter button that shouldn't matter. That final functional step is hardly the determination of creativity and copyright ownership.

It is beyond doubt that artificial intelligence ("AI") machines and systems already can and will create music, art, and literature. Some such works will be viable financially. If not valuable or even any good, protection is possible. Copyright protection for human-created works is not only for works of literary and artistic merit. Mediocrity is protected, too.

So should copyright law protect such non-human copyrights? Inevitably copyright law will have to do so. Perhaps, given the Citizens United line of reasoning, corporations will and should own the copyright in works created entirely by machines. That may well be a sensible result.

Animal-created copyrighted works might be a harder question to answer. My labradoodle,



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Madison, is talented in many ways. But I know her well enough to say with accuracy that she would much rather have a strip of bacon than a copyright. Even in recognition of the growing trend of animal rights, it may be best to keep animals and copyright lawyers apart when it comes to legal issues. Not every copyright question requires an answer.

What will be the duration of non-human copyrights? The current copyright term of protection is the life of the author plus 70 years. That duration is highly controversial for being longer than is necessary to encourage creators to create — and incentivizing creativity is at the heart of U.S. copyright law and philosophy.

Several years ago the Supreme Court decided a case objecting to that duration when it was extended from the life of the author plus 50 years. The additional 20-year term extension was upheld.

Isn't focusing on the 70 years portion of that formulation shortsighted? Given the biotech and biomedical revolutions and considering the nonhuman authors of the future, the lifetime portion may be the one to watch more closely as to long copyright terms. Robots obviously can have an indefinite lifespan. They and, for that matter animals,

than copyright law. But, one of the many issues is that new non-human systems will create copyrightable works of undeniable merit. Perhaps it isn't too much to imagine a world in which both the creators and the audiences for such works are not humans, at least as we know humanity today.

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So should copyright law protect such non-human copyrights?  
Inevitably copyright law will have to do so. Animal-created  
copyrighted works might be a harder question to answer.

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also may need different kinds of incentives to create.

With the rapidly increasing sophistication of robots and the inevitable movement toward the singularity when humans and technology become as one (in ways we probably can't grasp today), there are far bigger questions

Before someone shouts, "Take your stinking paws off my copyright, you damned dirty ape!" regarding ownership of the animal selfies of today, the future of copyright will someday be, to some extent, in the hands, paws, and appendages of non-humans, initially as creators and perhaps ultimately as appreciative non-human audiences. **WJ**

## WESTLAW JOURNAL **PRODUCT LIABILITY**



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## Puppet company sues over CBS show's 'farting hippo'

A California puppet manufacturer has alleged in a federal court lawsuit that "Bert the Farting Hippo" puppets sold by the CBS network to promote its show "NCIS" are unauthorized "slavish" copies of puppets the company created.

**Folkmanis Inc. v. Delivery Agent Inc. et al., No. 14-3828, complaint filed (N.D. Cal. Aug. 25, 2014).**

CBS has wrongfully earned \$733,000 from its alleged copyright infringement, plaintiff Folkmanis Inc. says in a complaint filed Aug. 25 in the U.S. District Court for the Northern District of California.

The company says it used to make the hippo puppets exclusively for the broadcaster to sell in its affiliated stores and online but now CBS sells nearly identical puppets imported from China.

According to the complaint, Folkmanis artists have created more than 1,000 stuffed sculptural animal puppets that the company describes as "museum quality" and which have won awards for creativity and craftsmanship.

In 2002, Folkmanis created and copyrighted a 20-inch soft-sculpture hippopotamus puppet. CBS bought the puppet, which it used as a prop on "NCIS," one of its most popular television programs. CBS dubbed in the sound of the puppet farting on one episode, and "Bert the Farting Hippo" was born, according to the complaint.

Bert has appeared on more than a dozen episodes of "NCIS" since 2003, the complaint says.

Folkmanis retired the original hippo puppet in 2009 and replaced it with a slightly smaller version, also copyrighted.

Co-defendant Delivery Agent Inc., which operates online stores for CBS, contracted with Folkmanis to create a version of the newer hippo puppet with a spiked choke collar and a sound box that emitted the sound of a fart exclusively for Delivery Agent and CBS, according to the complaint.

Delivery Agent ordered about 30,000 puppets from Folkmanis between 2010 and 2012, the complaint says.

In response to Delivery Agent's request, Folkmanis created a smaller soft sculpture

Courtesy of cbsstore.com

**The suit says CBS sold the infringing puppet on its online store for the "NCIS" show, shown here.**

hippo, also including a sound box and collar, to be used on a keychain, the company says.

All the genuine Folkmanis hippo puppets and keychains prominently display a copyright notice, according to the complaint.

It filed an application for a copyright registration for the keychain puppet July 18, prior to filing suit, and that application is pending, Folkmanis says.

Between 2011 and 2012, Folkmanis supplied Delivery Agent with several thousand hippo keychains that were sold in the CBS and other online stores, the complaint says.

The complaint says that in 2012 a Delivery Agent employee contracted with S.F. Global Sourcing LLC to procure hippo puppets and keychains from China for sale in the CBS

store. Shanghai Oriland Toys Co. Ltd. made the toys.

Delivery Agent has not placed any orders from Folkmanis since it contracted with S.F. Global, the complaint says. The Chinese-made hippo puppets and keychains that Delivery Agent distributes through the CBS store are "slavish copies" of Folkmanis' copyrighted products, the complaint alleges.

S.F. Global and Shanghai Oriland also are named as defendants. [WJ](#)

#### Attorneys:

Plaintiff: H. Michael Brucker, Emeryville, Calif.; Steven M. Kipperman, San Francisco

#### Related Court Document:

Complaint: 2014 WL 4197599

**See Document Section A (P.21) for the complaint.**

## 'Bang!' beats 'Legends' in card game copyright dispute

The similarities between two role-playing card games were enough to find that a Chinese company infringed the copyrights claimed by an Italian company in its version, a federal judge has ruled.

***DaVinci Editrice SRL v. Ziko Games LLC, No. 13-3415, 2014 WL 3900139 (S.D. Tex., Houston Div. Aug. 8, 2014).***

U.S. District Judge Lee H. Rosenthal of the Southern District of Texas refused to dismiss a complaint filed by DaVinci Editrice SRL against Yoka Games and its U.S. distributor, Texas-based Ziko Games LLC.

According to the judge's opinion, DaVinci created a game featuring Wild West themes called Bang! in 2002. The game involves cards that identify four character roles that players assume, with each character having an assigned set of capabilities, action cards and weapon cards, the judge explained. Each player has a number of so-called life points that determine how long the player can remain active in the game after being attacked by other players' weapon cards.

The game has been very successful, selling over 670,000 copies, the opinion says.

Yoka Games sells the role-playing game Legends of the Three Kingdoms.

While the artwork and written instructions for Legends are substantially different from Bang! and the game is set in ancient China rather than the Wild West, the parties agree that the two games have nearly identical rules for playing, the opinion says.

DaVinci sued Yoka and Ziko for copyright infringement and sought a preliminary injunction. The complaint alleged similarities in the games' overall concept and physical layout, players' roles, characters' abilities, and the rules of play.

The defendants moved to dismiss the case. They said the challenged elements of Legends were inherent in the idea of a role-playing game and either do not have copyright protection or are not substantially similar.

Judge Rosenthal said that historically, copyright protection has not extended to game mechanics and rules because the limited opportunity for expression significantly curtails the scope of copyrightable material in traditional card games.

With newer forms of card games that do not rely on the limits of a 52-card deck, copyright protection may be more extensive, the judge said.

According to the opinion, the characters in DaVinci's game are sufficiently defined and described to be entitled to copyright protection.

Judge Rosenthal said the characters in Legends have capabilities and life points that are identical or substantially similar to the corresponding characters in Bang!, despite the shift of setting from the Wild West to ancient China.

The defendants argued that the roles played by the individual characters were rules of play, which are not protected.

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Historically, copyright protection has not extended to card game mechanics and rules because of the limited opportunity for expression in 52-card decks, the judge said.

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Judge Rosenthal disagreed. She said the character's roles in the DaVinci game were not merely rules that prescribe what the players may do, but how the players may do it.

Players' roles that describe the content of the players' interactions in a sufficiently creative way can be protectable, the judge said.

Although the artistic depictions of the roles in Legends differ visually from the corresponding roles in Bang!, she said, the role and interplay among the characters in Legends resembled those of Bang! closely enough for DaVinci to defeat the motion to dismiss.

Judge Rosenthal denied DaVinci's request for a preliminary injunction. The standard for granting an injunction is a likelihood of success on the merits and a threat of irreparable harm, which is a higher standard than DaVinci has established here to defeat the motion to dismiss, she said. **WJ**

**Attorneys:**

*Plaintiff:* Christina M. Baugh and Steven M. Kushner, Fellow Labriola LLP, Atlanta; Geoffrey A. Gannaway, Beck Redden LP, Houston

*Defendants:* John W. Crittenden and Chantal Z. Hwang, Cooley LLP, San Francisco; Brendan J. Hughes, Cooley LLP, Washington; John P. Oleksiuk, Cooley LLP, Santa Monica, Calif.; John C. Rawls III, Baker Williams Matthiesen LLP, Houston

**Related Court Document:**

Opinion: 2014 WL 3900139

## COPYRIGHT INFRINGEMENT

### Antique car dealer taking the low road by infringing songs, suit says

A New York music publisher is seeking statutory damages of \$16.8 million from a Georgia antique car dealer that is allegedly using copyrighted songs in its advertising without authorization.

**Freeplay Music Inc. v. Streetside Classics, No. 14-cv-06909, complaint filed (S.D.N.Y. Aug. 25, 2014).**

In a complaint filed Aug. 25 in the U.S. District Court for the Southern District of New York, Freeplay Music accuses Streetside Classics of willfully infringing some of the publisher's 56 song copyrights despite written demands that it stop doing so.

Streetside did not respond to a request for comment.

Freeplay is a small, independent music publisher and library in New York that creates, sells, distributes and licenses music.

Streetside, which is in Lithia Springs, Ga., sells classic and exotic cars. On its website, the company calls itself the "nation's top consignment dealer of classic and collectible cars." The company does enough online business in New York to give rise to jurisdiction there, Freeplay says.

According to the complaint, Streetside began airing advertisements in October

2013 that used Freeplay's songs — which appear on collections such as Blues Volume, Sports Highlights, Jams & Bands, Alternative Rock and Tropical Vibes — without authorization or a license.

The dealership failed to contact Freeplay or seek its permission even though the music publisher's website conspicuously notifies visitors that anyone interesting in using its music commercially must obtain a signed, paid license to do so, the suit says.

The complaint seeks damages, costs, fees, and a court order prohibiting Streetside from continuing its "pervasive and willful" infringement. **WJ**

**Attorneys:**

*Plaintiff:* Seth L. Berman, Nixon Peabody LLP, Jericho, N.Y.; Jason C. Kravitz, Nixon Peabody LLP, Boston

**Related Court Document:**

Complaint: 2014 WL 4186293

**See Document Section B (P. 26) for the complaint.**

## CRIMINAL PROCEEDING

### Judge scraps electronic evidence in ex-NFL star's murder case

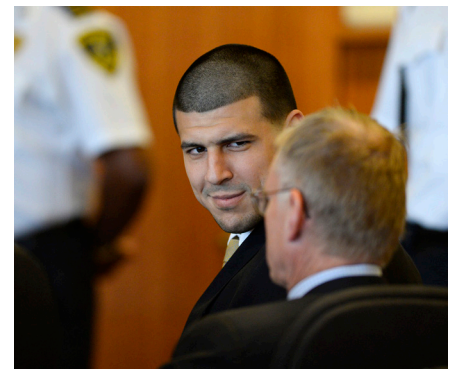
(Reuters) – A judge has thrown out some electronic evidence in a murder case against former National Football League star Aaron Hernandez because of a paperwork problem, according to local media reports on Aug. 26.

Bristol County Superior Court Judge Susan Garsh said evidence from two smartphones and three tablets seized last year from Hernandez's home in North Attleboro, Mass., could not be used in his trial for the murder of semi-pro football player Odin Lloyd because they were not listed in a police search warrant, according to the reports.

"The court attributes the omission to carelessness on the part of [State Police] and not to any loss of interest by law enforcement in seizing the items," Judge Garsh wrote in the decision, according to the Boston Globe.

Hernandez's defense team had asked that the evidence be thrown out. Evidence from other devices, including another smartphone and the home's surveillance system, will be allowed because they were listed in the warrant, according to the reports.

Prosecutors say Hernandez and two associates shot Lloyd to death in an industrial park near Hernandez's house in June 2013. Hernandez is also facing murder charges in an unrelated Boston double-murder in 2012. He has pleaded not guilty in both cases.



REUTERS/C.J. Gunther/Pool

**Former NFL player Aaron Hernandez attends a hearing in the Bristol County Superior Court in Fall River, Mass., on July 22. He is accused of murdering semi-pro football player Odin Lloyd last year.**

Hernandez was a star tight end for the New England Patriots before the team released him in June 2013, hours after his arrest for Lloyd's murder. **WJ**

*(Reporting by Richard Valdmanis; editing by Sandra Maler)*

## Insurers sued over documentary film's losses in Indonesia, Hawaii

A documentary film producer has filed a lawsuit accusing its insurers of refusing to cover losses it suffered after a series of camera malfunctions during two of the company's productions.

**MacGillivray-Freeman Films Inc. v. OneBeacon Insurance Group Ltd. et al., No. BC554761, complaint filed (Cal. Super. Ct., L.A. County Aug. 14, 2014).**

In a complaint filed Aug. 14 in the Los Angeles County Superior Court, MacGillivray-Freeman Films claims OneBeacon Insurance Group and its affiliates breached the implied covenant of good faith and fair dealing by denying coverage for the production company's "substantial and devastating losses."

The suit also alleges breach of contract, professional negligence and negligent misrepresentation.

According to the complaint, MacGillivray-Freeman's cameras malfunctioned twice last year, during separate productions in Indonesia and Hawaii.

OneBeacon and its affiliates then "severely compounded" the company's difficulties by outright refusing to pay its insurance claims, the suit says.

The insurers allegedly told MacGillivray-Freeman that its policies only covered productions with budgets of less than \$2 million.

But OneBeacon had previously told the film company that its policies covered up to

\$10 million per individual project, according to the complaint.

The insurers were also fully aware from previous audits of the production company's policies that some of its projects costs significantly more than \$2 million, the suit says.

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The film company's insurers are fully aware that camera malfunctions are a particular risk of its operations, the suit says.

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REUTERS/Akintunde Akinleye

The lawsuit stems from camera malfunctions during two film productions in 2013. Here, an actor is shown through a camera monitor while filming a scene.

Camera malfunctions in particular are a known risk of MacGillivray-Freeman's operations, the complaint says, since the company films movies "on tight schedules in remote and inaccessible locations around the world."

Even some of the insurers' agents and brokers have admitted that the film company's policies cover its claims, "strenuously and repeatedly urg[ing] [them] to abandon their bad-faith denial," the suit claims. [WJ](#)

**Attorneys:**

*Plaintiff:* Timothy P. Dillon, Los Angeles; Gregory L. Bentley and Matthew W. Clark, Shernoff Bidart Echeverria Bentley LLP, Claremont, Calif.

**Related Court Document:**

Complaint: 2014 WL 3965599

# U.S. asks Comcast for more data to review Time Warner Cable merger

(Reuters) – U.S. communications regulators on Aug. 22 asked Comcast Corp. for additional details about its video and broadband operations, including its Web traffic management practices, to review the company’s proposed merger with Time Warner Cable Inc.

The Federal Communications Commission is reviewing whether the proposed \$45 billion merger between Comcast and Time Warner Cable, the two largest U.S. cable providers, is in the public interest.

As is common with FCC merger reviews, the agency sought more information from the companies about their business and future plans than the companies first submitted in their application earlier this year.

Notably, the FCC asked numerous questions focused on Comcast’s broadband business, seeking an overview of the company’s competitors in each geographic area, use of data caps and tools for traffic management.

competing service.” The agency also asked for all documents related to how consumers may benefit or be disadvantaged by how Comcast, thanks to its size, negotiates Internet traffic delivery agreements with content creators or delivery services, which could mean companies like Netflix Corp. Inc. and Level 3 Communications Inc.

Additionally, the FCC sought detailed tables on interconnections with other services carrying Web traffic as well as network congestion.

The FCC also sought data on consumer satisfaction and success getting and retaining customers, including in ethnic groups.

Similar requests went to Time Warner Cable and Charter Communications Inc., which has proposed to acquire some of Comcast’s subscribers to leave Comcast with less than 30 percent of the U.S. residential cable or satellite TV market.

Most of the content of Comcast’s and others’ responses are unlikely to be public, because such business information is deemed highly confidential. The responses to the FCC are due by Sept. 11.

The Department of Justice is also reviewing the proposed Comcast–Time Warner Cable merger for antitrust issues, though the companies stress they do not directly compete in any market.

The FCC is collecting public comments on the merger and replies to them through Oct. 8.

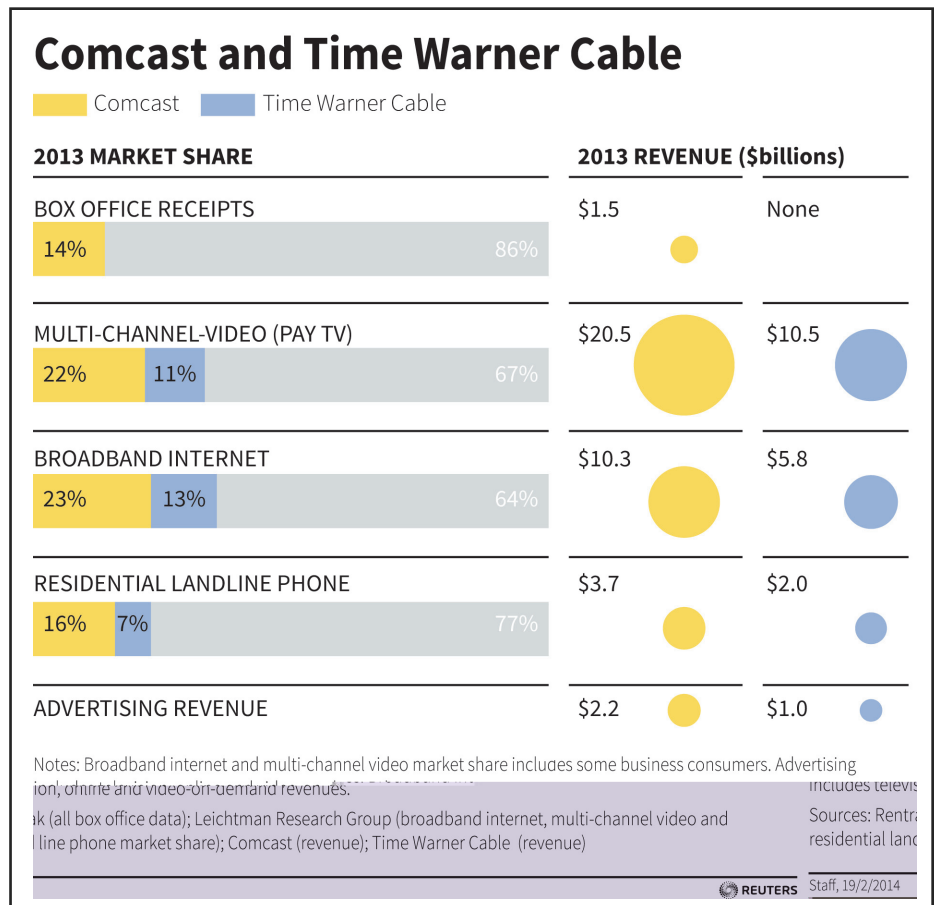
“This is just another standard step in the review process, and we look forward to continuing to work with the Commission as the process moves forward,” a Comcast spokeswoman said Aug. 22. **WJ**

(Reporting by Alina Selyukh; editing by Leslie Adler)

Though analysts predict that the FCC will ultimately approve the merger, the regulators are expected to impose various conditions.

Though analysts predict that the FCC will ultimately approve the merger, the regulators are expected to impose various conditions. Particular attention is on Internet traffic management issues as the FCC is working on new “net neutrality” rules that guide how Internet providers route Web content on their networks and could use merger conditions in lieu of rules that are facing a heated debate.

In the Aug. 22 letter to Comcast, the FCC asked for all documents related to “the company’s decisions whether to block, stop, throttle, slow, favor, congest or otherwise hinder the transmission of any (online video distributor) service or other content ... or to favor, prioritize or otherwise advantage the company’s relevant service over such



## Exes battle over ownership of gaming patents

A woman who says her ex-husband obtained his own patents on computerized casino games they developed together is seeking a court order declaring her a co-inventor.

**Perrie v. Perrie, No. 14-cv-01872, complaint filed (E.D. Cal. Aug. 8, 2014).**

In a complaint filed Aug. 8 in the U.S. District Court for the Eastern District of California, Sally Perrie accuses Kenneth Perrie of improperly cutting her out of the lucrative distribution deal he and a partner signed with game developer Mikohn Inc. after their divorce.

According to the suit, the Perries formed Gaming Concepts Inc. in 1982 to develop electronic and table casino games. Sally Perrie says it was her idea to base the Gaming Concepts games on popular board games including Yahtzee, Battleship, Monopoly, Trivial Pursuit, Stratego and Clue.

The Perries separated in 1994 and filed for divorce, but they continued to work together on the games, the suit says.

According to the complaint, Kenneth told Sally in 1995 that he had reached a deal with Milton Bradley, which owned the name rights to the games they had developed, and that Mikohn would distribute the Gaming Concept games.

Kenneth had allegedly completed patent applications the previous year with Olaf Vancura, a Cornell University physics professor, without naming Sally as an inventor. Those improper patents effectively stripped her of her ownership rights, she says.

Sally also says she was never informed that her ex-husband had assigned all of

the venture's intellectual property rights to Mikohn.

Each of the 12 patents issued for the Gaming Concept games between 2001 and 2013 named Kenneth Perrie and Vancura as the inventors, according to the complaint, even though Sally helped to invent all of them.

Her suit seeks an accounting of the money generated from the licensing, sale and rights assignments, as well as a court order declaring her the sole or joint inventor of each patented game. **WJ**

**Attorney:**  
Plaintiff: Carl J. Schwedler, Davis, Calif.

**Related Court Document:**  
Complaint: 2014 WL 4072623

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## Warner Bros. didn't infringe software trademark in 'Dark Knight' movie

Fictional technology featured in the film "The Dark Knight Rises" does not infringe a trademark for a computer software program that removes private data from publicly shared computers, a federal appeals court has ruled.

**Fortres Grand Corp. v. Warner Bros. Entertainment Inc., No. 13-2337, 2014 WL 3953972 (7th Cir. Aug. 14, 2014).**

Software company Fortres Grand Corp. sued Warner Bros. Entertainment Inc., alleging the unauthorized use of the trademark "Clean Slate" in the Batman film and on two websites advertising the movie constituted trademark infringement and unfair competition in violation of the Lanham Act, 15 U.S.C. §§ 1114 and 1125.

But the 7th U.S. Circuit Court of Appeals said consumer confusion is unlikely given that Warner Bros. does not sell any Batman-related products similar to the Fortres Grand software.

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Fortres Grand's software and the Warner Bros. movie are "quite dissimilar, even considering common merchandising practice," the 7th Circuit said.

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The unanimous ruling affirmed a May 2013 decision in favor of Warner Bros. by U.S. District Judge Philip P. Simon of the Northern District of Indiana.

According to the 7th Circuit's ruling, "The Dark Knight Rises" includes several references to a fictional hacking tool called "the clean slate."

As part of the marketing for the 2012 blockbuster, Warner Bros. also developed a pair of websites containing descriptions of the clean slate and its operation, along with an image of a fictional patent. The websites did not offer any product for purchase or download.

Rather, the sites were "purely an informational extension of the fictional Gotham City universe," according to the ruling.

Following the release of the film, Fortres Grand says it noticed a significant decline in sales of its Clean Slate software. The company alleged this decline was due to potential customers mistakenly thinking the software is "illicit or phony" as a result of Warner Bros.' use of the name "the clean slate," the ruling said.

Dismissing the case last year, Judge Simon said Fortres Grand had not alleged a plausible theory of consumer confusion. *Fortres Grand Corp. v. Warner Bros. Entm't*, 947 F. Supp. 2d 922 (N.D. Ind. May 16, 2013).

The 7th Circuit agreed, reasoning that a superhero movie and a desktop management software program are different products in the minds of consumers.



REUTERS/Fred Prouser

**A software company said the unauthorized use of its trademark "Clean Slate" in the Batman film "The Dark Knight Rises" and on two websites advertising the movie constituted trademark infringement and unfair competition.**

"Accordingly, the only products available to compare — Fortres Grand's software and Warner Bros.' movie — are quite dissimilar, even considering common merchandising practice," the three-judge panel wrote.

As a result, the similarity of the marks "Clean Slate" and "the clean slate" are not enough to establish a claim for trademark infringement considering the dissimilarity of the two products, the panel wrote. [WJ](#)

**Related Court Document:**  
Opinion: 2014 WL 3953972

**See Document Section C (P. 31) for the opinion.**

## Concussions

CONTINUED FROM PAGE 1

education, a high school football coach and an assistant coach as defendants.

According to the complaint, Stoddard graduated from Medina High School in 2013. While a student, he was a member of the school football team.

He alleges that in August 2012 he suffered a neck injury and displayed concussion symptoms following a collision with another player during practice. Several days after the injury, Stoddard's two coaches told him to resume practicing even though he had not been medically cleared, the suit says.

Stoddard was injured again in September 2012 when he slammed his head into another player's head during a game.

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The former student-athlete claims the school district and its employees acted recklessly and with conscious disregard of the risk of harm to him.

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According to the complaint, Stoddard was dazed and unable to recognize some of his fellow players, but neither the coaches nor any other school district employee got him medical attention.

Stoddard sought medical attention on his own and was diagnosed with a severe concussion, the complaint says.

He claims the school district and its employees acted recklessly and with conscious disregard of the risk of harm to him. As a result, he says, he has suffered permanent injuries.

He seeks more than \$25,000 in damages for pain and suffering, medical costs, and a decreased ability to "enjoy a normal healthy life" because of his injuries.

The school district did not respond to a request for comment regarding Stoddard's allegations.

## THE NHL SUIT

Ex-NHL players Fritsche and Ferraro filed a class-action suit against the league July 25 in the U.S. District Court for the Southern District of New York.

Fritsche played for multiple teams in the NHL at various times from 2003-2009. He played in over 250 games and suffered several concussions, the last in September 2009, according to the suit.

Ferraro played for several NHL teams between 1995 and 2001. Like Fritsche, Ferraro says he suffered several concussions and associated health problems, including headaches and disorientation.

The suit is filed on behalf of all current and former NHL players who have suffered debilitating effects from head trauma.

The complaint alleges NHL hockey is characterized by extreme violence and fighting. The league, which generates billions of dollars in revenue, has fostered and profited from the violence of the game, the suit says.

The NHL has refused to take steps to reduce the violence because it would hurt profits, and it has failed to warn players of the risks and the long-term health problems, the suit says.

The players seek unspecified compensatory and punitive damages for negligence and fraudulent concealment.

**John Dellapina**, group vice president of communications for the **NHL**, would not comment on the allegations in the complaint, but said the league has been at the forefront in addressing concussions.

"The National Hockey League actually was the first pro sports league to establish a concussion protocol, the first to mandate baseline testing for our players and the first to establish a Concussion Working Group with our Players' Association," he said.

"In conjunction with the NHL Players' Association, our protocol is continuously reviewed and updated," he added.

## THE ONGOING TREND

The recent complaints continue the proliferation of litigation by professional and amateur athletes who have suffered concussions.

Thousands of suits were initiated against the National Football League beginning in 2011.

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The NHL, which generates billions of dollars in revenue, has fostered and profited from the violence of the game, the players' complaint says.

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The Judicial Panel for Multidistrict Litigation consolidated the suits in the U.S. District Court for the Eastern District of Pennsylvania in 2012.

On July 7, U.S. District Judge Anita Brody granted preliminary approval to a settlement between the NFL and the plaintiffs, who have brain damage and dementia as a result of concussions suffered on the field. *In re NFL Players' Concussion Injury Litigation*, No. 12-2323, 2014 WL 3054250 (E.D. Pa. July 7, 2014).

Under the terms of settlement, payments of up to \$5 million will be guaranteed to any retired player who develops neurological illnesses.

According to Reuters, the NCAA agreed in July to settle a head injury lawsuit by providing \$70 million for concussion testing and diagnosis of student-athletes to change the way colleges address sports safety. *In re NCAA Student-Athlete Concussion Injury Litig.*, No. 13-9116, *settlement filed* (N.D. Ill. July 29, 2014). [WJ](#)

### Attorneys:

*Plaintiff (Stoddard):* Vivianne Whalen, Whalen Duffrin LLC, Canton, Ohio

*Plaintiffs (Fritsche):* William C. Carmody, Arun Subramanian and Seth Ard, Susman Godfrey LLP, New York

### Related Court Documents:

Complaint (Stoddard): 2014 WL 4058546  
Complaint (Fritsche): 2014 WL 3708601



## RECENTLY FILED COMPLAINTS FROM WESTLAW COURT WIRE\*

<b>Westlaw Citation</b>	2014 WL 4146818
<b>Case Title</b>	Havensight Capital LLC v. Nike Inc., No. 14-6517 (C.D. Cal. Aug. 19, 2014).
<b>Case Description</b>	Other fraud
<b>Factual Allegations</b>	Defendant misappropriated plaintiff's "St. Thomas FC" likeness and emblem by selling T-shirts, sweatshirts and soccer products with "Nike F.C." mark on them and with pictures of its own signed professional soccer players.
<b>Damages Synopsis</b>	\$48.6 million in compensatory damages, \$150 million in punitive damages

<b>Westlaw Citation</b>	2014 WL 4095430
<b>Case Title</b>	Hayuk v. Sony Music Entertainment, No. 14-6659 (S.D.N.Y. Aug. 19, 2014)
<b>Case Description</b>	Copyrights
<b>Factual Allegations</b>	Defendants exploited the popularity and notoriety of plaintiff's artwork, Chem Trails NYC, by displaying and creating derivatives of the artwork in the promotion of the album, concert and tour of Sara Bareilles. Copyright: VAu 1-173-957
<b>Damages Synopsis</b>	Not more than \$30,000 in statutory damages, other damages, declaratory and injunctive relief, disgorgement, interest, fees and costs

<b>Westlaw Citation</b>	2014 WL 4063740
<b>Case Title</b>	Moliver v. Puck Agency LLC, No. 14-6582 (S.D.N.Y. Aug. 13, 2014)
<b>Case Description</b>	Other contract
<b>Factual Allegations</b>	Defendant has failed to pay plaintiff the compensation earned under the terms of the independent contractor agreement between the parties, in connection with the representation of professional hockey players.
<b>Damages Synopsis</b>	Unpaid compensation due to plaintiff, under the parties' agreement(s), interest, fees and costs

**\*Westlaw Court Wire is a Thomson Reuters news service that provides notice of new complaints filed in state and federal courts nationwide, sometimes within minutes of filing.**

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## NEWS IN BRIEF

### NFL CAN'T KICK FAN'S ANTITRUST CLASS-ACTION CLAIMS

A California federal judge has refused to toss a class-action lawsuit filed by a football fan alleging that an exclusive licensing agreement by the National Football League allowing Reebok International to use NFL trademarks on football apparel violates state and federal antitrust laws. Patrick Dang sued the league, its member teams and Reebok in October 2012. U.S. District Judge Edward J. Davila of the Northern District of California previously denied the defendants' motion to dismiss the suit in 2013. The defendants then moved for judgment on the pleadings, arguing that Dang's state antitrust claims were barred by a 1983 California Supreme Court ruling in a state law antitrust suit and that there is no material fact in dispute. Judge Davila denied the motion, saying he needed further factual development before he could rule on the matter.

***Dang v. San Francisco Forty Niners et al., No. 12-5481, 2014 WL 4275627 (N.D. Cal., San Jose Div. Aug. 29, 2014).***

**Related Court Document:**

Order: 2014 WL 4275627

*See Document Section D (P. 40) for the order.*

### RAPPER LIL WAYNE OWES \$1 MILLION FOR PLANE LEASE, SUIT SAYS

Dwayne Michael Carter Jr., aka hip hop recording artist Lil Wayne, breached his lease agreement for a custom private jet, a Florida state court suit says. Signature Group LLC says it entered a 36-month lease with Carter's company, Young Money Entertainment LLC, for a G-1159B Gulfstream Jet in February 2013, according to the Miami-Dade County Circuit Court complaint. The plaintiff says it made multiple, costly custom renovations to the plane at Carter's request, and Young Money was responsible for the upgrade costs. After Carter changed financial advisers in early 2014, Young Money stopped paying the \$55,000 monthly lease and operating expenses and is currently in default for over \$1 million, the suit says. According to the complaint, Young Money is not a Florida company as Carter represented. Therefore, he is liable under the contract under Fla. Stat. § 608.4238, the complaint says.

***Signature Group LLC v. Young Money Entertainment LLC et al., No. 2014-19871-CA-40, complaint filed (Fla. Cir. Ct., Miami-Dade County July 30, 2014).***

**Related Court Document:**

Complaint: 2014 WL 3809194

### INSURER DENIES OWING COVERAGE FOR GAWKER SEX TAPE POST

Nautilus Insurance Co. has sued Gawker Media in Manhattan federal court, saying it owes no coverage for an invasion-of-privacy lawsuit that former pro wrestler Hulk Hogan filed against the online media company for allegedly publishing a sex tape featuring him. According to the insurer's complaint, the wrestler's lawsuit — filed in Florida federal court under his real name, Terry Gene Bollea — includes counts for emotional distress and violation of the right to publicity. Nautilus says its commercial general liability policy only covers Gawker for certain injuries and property damage caused by "occurrences," or accidents. The policy specifically excludes coverage for privacy violations, libel, slander, and expected or intended injuries. The insurer is seeking a declaratory judgment that it does not owe the media company coverage for the underlying suit.

***Nautilus Insurance Co. v. Gawker Media LLC et al., No. 14 CV 5680, complaint filed (S.D.N.Y. July 24, 2014).***

**Related Court Document:**

Complaint: 2014 WL 3731717

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