

ARTICLES

Contemporary Trademark Law and Sport

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INTRODUCTION

Trademark law is one of the most popular and colorful aspects of sport law. According to Gundersen (1999) "the volume of U. S. trademark applications has almost doubled in less than a decade, growing from approximately 112,000 filings in 1990. . .to more than 200,000 filings in 1998" (p. C9). One reason for the change is that companies lose an estimated \$200 billion a year to trademark counterfeiting (Noonan & Raskin, 2001). Golf is the sport that appears to be most prolific with 8,327 trademarks granted between 1996 and 2001 (Miller, N., United States Patent and Trademark Office, personal communication, December 2001). It leads the way in litigation under trademark confusion and trade dress. The dog that sells beer, the "swoosh" that markets athletic apparel, and the school districts that protect their logos have captivated the public. Society is becoming aware of the many services and products recognized by their logos and the value of those logos in business and industry. Today, start-up companies are advised to include intellectual property applications, particularly trademarks, in their initial business plan. Marketing and financial professionals are urged to weigh intellectual property assets in decision making. Trademarks are essential to the reputation of the owner and producer of products and services.

An examination of the *Journal of Legal Aspects of Sport*, 1991 to 2000, found five articles on intellectual property: Clement (2000), Moorman and Hums (1998), Alexander (1995), Wilde (1995), and Moiseichik (1994). Clement and Moiseichik addressed copyright; Clement also reviewed patent law. Trademark was the subject of Moorman & Hums, and Wilde, while Alexander dealt with the licensing of trademarked objects. This article

augments and updates the discussions initiated by Moorman and Hums, and Wilde.

The purpose of this article is to identify and discuss contemporary and significant trademark and service mark litigation in sport. Research addressed the

1. Identity of plaintiffs and defendants in sport trademark/service mark cases;
2. Elements of trademark having the greatest influence on sport court decisions;
3. Facts of the cases; and
4. Status of the sport enterprises in litigation.

Forty-two of the trademark infringement cases settled between 1976 and 2001 were selected for study. Four additional cases, *United States Olympic Comm. v. Intelicense Corp. S.A.* (1984a, 1984b), *Polaroid Corp. v. Polarad Electronics Corp* (1961), *Lone Star Steakhouse & Saloon v. Alpha of Virginia* (1995), and *Abercrombie & Fitch v. Hunting World* (1976) were added to explain components of the selected cases. Thirty-nine of the 42 decisions have been rendered after 1990. The cases were reviewed under the trademark/service mark infringement categories of name confusion, trade dress, cancellation, abandonment and the First Amendment. Cases involving more than one category of infringement are discussed under the primary category and, where significant, mentioned in a second category.

CASE ANALYSIS

Name Confusion

The number of sport name confusion court decisions is greater than is the number of sport decisions in all areas selected under trademark. They include the use of names by both non-profit and for-profit organizations including Olympic and scouting organizations, businesses, professional teams, collegiate and scholastic sports, events, and specific sports.

Olympic and Scouting Organizations

The name "Olympic" and the traditional five interlocking rings have been the topic of considerable litigation in the non-profit sector. The International Olympic Committee's (IOC) cause of action against San Francisco Arts and Athletics, a nonprofit California corporation, for its use of the word "Olympic" to promote the "Gay Olympic Games" was one of the most visible of all cases

involving potential name confusion. The confusion alleged by the IOC, and later by the USOC, was that the public would associate the word "Olympic" with the IOC and USOC and thus believe that they were sponsoring the "Gay Olympics." Also, they claimed that the word "Olympic" was protected under the Amateur Sports Act of 1978 and that the Act incorporated the Lanham Act.

The specific relief requested by the USOC was under the International Convention for the Protection of Intellectual Property and for unfair competition (15 USC 1126 (h)), for violation of the Amateur Sports Act of 1978 (36 USC 371 et seq.), for federal trademark infringement (15 USC 1114), for false designation of origin, false description or representation (15 USC 1125(a), for breach of contract between the parties, and for dilution of plaintiffs' distinctive marks (CAL. BUS. & PROF. CODE § 14330) (*International Olympic Comm. v. San Francisco Arts & Athletics, Inc.*, 1982, p. *1).

The United States District Court for the Northern District of California, granted summary judgment to the USOC and granted it a permanent injunction against San Francisco Arts & Athletics (1982). The Ninth Circuit affirmed the district court's decision (1986, p. *23-24).

The United States Supreme Court affirmed the earlier courts' holding, that the Amateur Sports Act of 1978 provided the USOC with exclusive use of the word "Olympic" but did not incorporate the defenses under the Lanham Act (*San Francisco Arts and Athletes v. United States Olympic Comm.*, 1987, p. 530); the First Amendment did not prohibit Congress from granting the USOC exclusive rights to the word "Olympic" and the authority to prohibit certain commercial and promotional uses of the word "Olympic" (p. 539-540). Also, the Court affirmed the district court's decision that the USOC's rights in the word "Olympic" did not constitute discriminatory enforcement in violation of the equal protection component of the due process clause of the Fifth Amendment (p. 542).

This complex case forces the reader to analyze the use of the word "Olympic" in the context of the Lanham Act's definition of protected word verses generic word and the Constitutional Law First Amendment analysis of speech. The Court found that the word "Olympic" was generic, thus eliminating the USOC's need to prove that unauthorized use was likely to cause confusion. Furthermore, the Court ruled that the U. S. Constitution did not prohibit the government from providing protection to the USOC for the word "Olympic" under the Amateur Sports Act of 1978.

Ownership of the word "Olympic" was established in *United States Olympic Comm. v. Intelicense Corp. S.A.* (1984a) when the court held that the "USOC's consent is a prerequisite to marketing the Olympic symbol in the

United States" (p. 264). The court concluded that even though their application of the First Amendment to free speech in this situation might be broader than that applied in other situations it was not "broader than necessary" to protect the interests of the USOC and Congress (p. 268-269).

Two more recent cases involving the Amateur Sports Act of 1978 and the United States Olympic name were *United States Olympic Committee v. O-M Bread* (1993), later *O-M Bread, Inc. v. United States Olympic Comm.* (1995), and *United States Olympic Comm. v. American Media, Inc.* (2001).

In *O-M Bread*, the USOC filed an opposition to the application of Roush Products Company, the successor to O-M Bread, to register the mark "Olympic Kids" for bakery products. Roush had obtained a trademark for the word "Olympic" in 1938; and had first used the word in 1931. The Amateur Sports Act of 1978 has a grandfather clause that enabled Roush to continue the use of the previously obtained mark "Olympic" for bread and bakery products. A grandfather clause enables marks that have been approved prior to the new law or changes in the law to be retained. Roush was successful in obtaining two marks, "Olympic Meal" and "Olympic Meal Special Formula" in 1979 following the advent of the Amateur Sports Act. Roush noted that these marks, similar to his request for the mark "Olympic Kid," were granted (*O-M Bread, Inc. v. United States Olympic Comm.*, 1995, p. 936). The United States Court of Appeals for the Federal Circuit concluded that Roush's grandfather right to the word "Olympic" did not extend to the registration of "Olympic Kids and" affirmed the Trademark Trial and Appeal Board's decision to oppose the registration (*O-M Bread, Inc.*).

In *United States Olympic Comm. v. American Media, Inc.* (2001), the USOC alleged that American Media published a magazine called Olympic USA, without authorization, thus violating the Amateur Sports Act of 1978. American Media (AMI) did, however, print a disclaimer in the publication denying affiliation with or a sanction by the USOC. AMI lost their argument that the magazine was under a First Amendment freedom of speech and press right. The Court ruled that AMI's publication did not meet the definition of commercial speech and that the failed to state a claim for violation of the Amateur Sport Act. They gave the plaintiff twenty days to make a Lanham Act claim. Further judicial decisions affecting this case are not available.

Girl Scouts of the United States of America and Boy Scouts of America v. The Bantam Doubleday Dell Publishing Group, Inc. (1992) were other not-for-profit agencies protecting their names, in this case, the name "scout." Dell had published a series of sixteen books under the title *Pee Wee Scouts*. They were written for first and second grade children and had a theme similar to traditional Girl and Boy Scout materials. Girl Scouts and Boy Scouts each

have a number of registered trademarks including the word "scout." The scout associations claimed a trademark violation; Dell countered with a claim for First Amendment rights of freedom of speech and press. The parties disputed whether the plaintiffs' had an exclusive right to the word "scout" and whether the public would be confused as to the sponsorship of the books.

The court found that the scout organizations failed to prove that they had a protectable mark (*Girl Scouts of the United States of America and Boy Scouts of America*). To evaluate whether an average purchaser of the books would be confused the eight factors Polaroid test was used (*Polaroid Corp v. Polarad Electronics Corp.*, 1961). It addresses the "(1) strength of the plaintiff's mark; (2) similarity between trademarks used by parties; (3) proximity of products; (4) likelihood that plaintiff will 'bridge the gap'; (5) actual confusion; (6) defendant's good faith or intent; (7) quality of defendant's services; and (8) sophistication of purchasers" (p. 103). The Court balanced these factors with the authors' speech and press artistic rights under the First Amendment. Defendants' motion for summary judgment was granted; and the complaint was dismissed (*Girl Scouts of the United States of America and Boy Scouts of American v. The Bantam Doubleday Dell Publishing Group, Inc.*, 1992).

Exercise and Fitness Businesses

Intellectual property law treats for-profit businesses in the same manner as not-for-profit organizations. When the non-profit organization was the United State Olympic Committee they had the assistance of the Amateur Sports Act in protecting their name and logo. No similar assistance exists in for-profit organizations. Agencies involved in the selling of swimming pools and accessories, and fitness items, were the topic of *The New Kayak Pool Corp. v. R. & P. Pools, Inc.* (2000), *Quantum Fitness Corp. v. Quantum Lifestyle Ctrs., L.L.C.* (1999), *World Gym Licensing, Ltd. v. Fitness World, Inc.*, (1999), *Pilates, Inc. v. Current Concepts, Inc.* (2000) and *Thane Int'l, Inc. v. Trek Bicycle Corp.* (1999).

The New Kayak Pool Corporation filed a motion to stop R & P Pools from using its trade name, Kayak, on advertising and promotional materials. They requested an injunction for the trademark violation of confusion. The materials in question included repair and installation videos and a summer catalogue. The court found that neither the videos nor the catalogue proved a case for confusion (*The New Kayak Pool Corp. v. R. & P. Pools, Inc.*, 2000). Although actual confusion was demonstrated by consumer complaints, the court did not find this to be sufficient evidence to grant the plaintiff's request for a preliminary injunction.

The 1999 decision in *Quantum Fitness Corp. v. Quantum Lifestyle Ctrs., L.L.C.*, serves as a system for analyzing name confusion. Quantum Fitness was an established Houston business that designed, selected, maintained, repaired, and consulted in exercise and rehabilitative equipment and had held a number of trademarks since the 1990s that included the name "Quantum." Quantum Lifestyle was a company incorporated in 1995 that opened their first club in 1998.

Quantum Fitness requested an injunction against Quantum Lifestyle's use of the word "Quantum." The legal standard for a preliminary injunction requires that there be a likelihood of success on the merits in a full trial; that a threat of substantial damage exists if the injunction is not granted; that the threatened injury will be far more serious than the damage to the opposing party if nothing is done; and that the injunction will not hurt the public. To prove the likelihood of success the plaintiff had to demonstrate that the mark was valid and that defendant's mark would infringe on the plaintiff's mark. Validity of a mark is based on whether the mark is classified as generic, descriptive, suggestive, arbitrary, or fanciful. Generic marks are not protected; descriptive marks, often adjectives, are difficult to protect. Suggestive, arbitrary, and fanciful marks can be registered under federal trademark law.

According to the court Quantum Fitness' two marks, "Quantum Fitness," obtained in 1992, and "Quantum" issued in 1998, were found to be arbitrary, not descriptive as assessed by the defendant, and so "[f]or the purpose of establishing their protectability in an infringement suit, both of Quantum Fitness's registered marks are valid" (p. 818). The court also noted that when the criteria of extensive advertising, length of time in business, public recognition, and uniqueness were considered, Quantum Fitness had "established a relatively strong mark in the fitness industry" (p. 819).

The court stated that there were

significant visual dissimilarities between the marks. The marks do not have a physical appearance that, standing alone, is likely to result in or increase confusion. However, . . . given the dominance of the word 'Quantum' under the circumstances of the use, the marks are sufficiently similar that prospective purchasers are likely to believe that the two users are somehow associated (p. 824).

Infringement was demonstrated by the plaintiff in showing the court that defendant had used their mark, without permission, in advertisements.

Quantum Lifestyle was found not to have acted in bad faith. The court found "that Quantum Fitness had submitted competent evidence of actual confusion" (p. 830). Also, the court granted an injunction stating that

"Quantum Fitness lacks control over how the 'Quantum' mark is being used by Quantum LifeStyle and that Quantum Fitness' potential pecuniary injuries are both unquantifiable and undiscoverable. Accordingly, Quantum Fitness has met its burden of demonstrating irreparable harm" (p. 831) or part two of the legal standard. In light of the fact that Quantum LifeStyle had spent limited resources on promotion, only limited damages were imposed on the plaintiff and no disservice to the public was observed. The injunction was permitted.

Another fitness agency trademark confusion case involved the word "world" (*World Gym Licensing, Ltd. v. Fitness World, Inc.*, 1999). World Gym Licensing licensed gymnasiums and fitness centers throughout the United States. It also licensed merchandise. Fitness World operated primarily in Ohio, Connecticut, and California. It held a series of registered trademarks and service marks for a number of titles including the word world. These marks have been in continuous use for over twenty years.

In 1991, Peter Harvey opened the first Fitness World in Maryland. Since then, the number has grown to six, and a number of the fitness centers are in direct competition with World Gym franchises. He obtained a trademark for the name "Fitness World." World Gym brought an action for a permanent injunction for trademark infringement citing consumer confusion as one violation. They used a modified *Polaroid* analysis taken from *Lone Star Steakhouse & Saloon v. Alpha of Virginia* (1995). Four of the elements, strength of mark, similarity of mark, defendants' intent, and actual confusion were taken from the *Polaroid* analysis (*Polaroid Corp. v. Polarad Electronics Corp.*, 1961, p. 103). They added to the analysis a consideration of the "similarity of the goods and services the marks identify. . .similarity of the facilities the two parties use in their business. . .and similarity of advertising used by the parties" (*World Gym Licensing, Ltd. v. Fitness World, Inc.*, 1999, p. 621). The marks were found to be similar, actual economic harm was absent, as was proof of a need for special damages. No evidence was available to prove that Defendant attempted to pass off the mark as his own. Attorney fees were denied. The United States District Court for the District of Maryland, Southern Division, found for World Gym Licensing, Inc. (p. 627).

In a case containing the fascinating history of the Pilates method of exercise, the owner of the Pilates mark for equipment and method of exercise challenged Current Concepts, doing business as Balanced Body, for their use of the same mark. After a lengthy trial defendants were successful as the court concluded that, (1) both of the marks at issue are generic; (2) if there ever was a PILATES equipment trademark, it had been abandoned long before plaintiff applied for its registration, and its registration was obtained by plaintiff

through fraud; and (3) the exercise instruction service mark was invalidly assigned in gross (*Pilates, Inc. v. Current Concepts, Inc.*, 2000, p. 289).

Keep in mind that part two refers to the requirement of trademark law that the mark is in continuous use; a mark not in continuous use is considered abandoned.

Confusion between the title Trek bicycles and OrbiTrek was the subject of *Thane Int'l, Inc. v. Trek Bicycle Corp.* (1999). Plaintiff marketed and sold a stationary exercise machine called OrbiTrek. In 1997 he developed an exercise machine for indoor use and filed an application to register the mark "OrbiTrek." The defendant marketed and sold a wide range of bicycles and bicycle accessories under the name "Trek." He also owned a number of trademark registrations that included the name Trek. The name had been in continuous use since 1977 and had already been used at events. In 1998 Trek filed a registration for clothing.

Trek became aware of OrbiTrek as a result of OrbiTrek's infomercial and "filed a Notice of Opposition against Thane's application for registration of 'OrbiTrek' with the Trademark Trial and Appeals Board" (p. *11). Thane also filed a complaint in the United States District Court of Central California.

The parties "do not dispute that Trek owns a valid and protectable interest in the . . . mark in connection with the advertisement and sale of its services" (p. *23). The mark Trek was found to be strong with reference to bicycles but not other objects (p. *27-28). The marks Trek and OrbiTrek were found to be similar in sight, sound, and meaning; the difference was the defendant's use of Orbi (p. *30). Actual confusion was evident in the results of a professionally conducted survey of the public (p. *31).

The United States District Court for the Central District of California granted Thane a motion for summary judgment. They stated that "no reasonable juror could find that a likelihood of confusion exists between the products and trademarks. . . that no reasonable juror could find that members of the public are likely to be deceived by the products and trademarks at issue for the purposes of Trek's California state law claim of unfair competition" (p. *45).

Professional Teams

Harlem Wizards Entertainment Basketball is a company that stages show basketball games. After learning that the Washington Bullets were changing their name to the Washington Wizards, the Harlem Wizards filed suit against the National Basketball Association (NBA) Properties and others alleging that the Washington name change infringed the Harlem Wizards trademark in

violation of the Lanham Act, New Jersey Trademark Act, and case law. The Harlem Wizards claim was "reverse confusion" a situation where the junior or new user is larger and more powerful and will create confusion for the first or senior owner (*Harlem Wizards Entertainment Basketball, Inc. v. NBA Properties, Inc.*, 1997). The Harlem Wizards is a show basketball team that performs against opponents provided by schools, municipal agencies, charitable organizations, and others that employ them. They do not have a facility for their games; often their media visibility comes from the agencies that purchase their services. The team sells a number of products in conjunction with their appearances. The Washington Bullets is a National Basketball Association (NBA) member that has an arena, a fixed schedule of games, and comprehensive media attention. The perceived harm was that once the NBA team, using a similar title, became a key actor in the community, the public would associate the word "Wizards" with them. As a result, the Harlem Wizards would lose their identity as the wealthier junior user gains product and service strength.

In addition to reverse confusion the court examined the points mentioned in the *Quantum* case and dismissed the case. The court held that the "Washington Bullets' adoption of the Washington Wizards as its new name posed no likelihood of injury to the Harlem Wizards in the market place" (p. 1099). Baharlias (1998) noted that reverse confusion is a "new area of trademark law that could become a 'hot topic' in professional team sports in the very near future" (p. 101).

Blastoff v. Los Angeles Rams Football (1998, 1999a, 1999b, 2000) was another confusion case – confusion over the term "St. Louis Rams." Blastoff, owner of a corporation organized under the laws of Wisconsin that created a fictional cartoon character, was the subject of a number of marks including the word "St. Louis Rams" and a uniform football player with a head made of cheese, running with a football (1998, p. *15). He filed an intent-to-use trademark application and sold a few shirts thus meeting the minimum law requirement of continuous use. When the Los Angeles Rams learned they were moving to St Louis they applied for a federal trademark on the word "St Louis Rams." When informed that Blastoff had a prior claim the Los Angeles Rams filed an opposition proceeding to the Patent and Trademark Office.

The District Court for the Western District of Wisconsin granted the defendant's motion for summary judgment that the defendants' had "obtained protectible rights in the 'St. Louis Rams' mark before the plaintiff received its state registration, filed its first federal application or actually used the mark in commerce" (p. *2). This was affirmed by the United States Court of Appeals for the Seventh Circuit (1999a). A request for a rehearing en banc to the

United States Court of Appeals for the Seventh Circuit was denied (1999b) as was a petition to the United States Supreme Court (2000).

Dream Team Collectibles, Inc. v. NBA Properties, Inc. (1997) was a challenge of the defendant's unauthorized use of the mark Dream Team. The mark had been coined to refer to the USA basketball team that played in the 1992 and 1996 Olympic Games and the 1994 World Championship of Basketball. The plaintiff's filing included reverse confusion, trademark infringement, unfair competition, and dilutions. Dream Team Collectibles (DTC) began using the mark Dream Team in 1986 on collages of sports trading cards and on sport-related merchandise. In 1990 they filed for trademark registration.

In 1991 NBA properties filed a federal trademark application for the mark, Dream Team, to be used for publications, clothing, toys, and sporting goods, and was denied. NBA properties mentioned Dream Team in licensing agreements and continued to develop logos for use by sponsors and licenses. In 1993 the NBA again attempted to register the mark with the Patent and Trademark Office (PTO); "the PTO cited Dream Team Collectible's application in their refusal to accept the registration" (p. 1407).

After analyzing the following factors: strength of the mark; similarity between the owner's mark and the alleged infringer's mark; degree to which the products compete with each other; alleged infringer's intent to "pass off" its goods to those of the owner; actual confusion; and types of products, costs, and conditions of purchase (p. 1411), the United States District Court for the Eastern District of Missouri entered summary judgment for Dream Team Collectibles. The court concluded that "[a] reasonable jury could find that DTC's 'repackaging' of the trading cards, even without a disclaimer or explanatory label, is not likely to cause confusion" (p. 1420).

Collegiate and Scholastic

Arkansas football coach Hugo Bezdeck is credited with creating the Razorback mark when, in 1909, he referred to his players as a "wild band of Razorback hogs" (*Board of Trustees of the Univ. of Arkansas v. Professional Therapy Serv.*, 1995, p. 1283). In 1988 the University joined the Collegiate Licensing Company; a trademark for the word "Razorback" was obtained in 1989 (*Id.*). At the time the complaint was filed, the University had approximately 25 registrations for the mark, had licensed the mark to about 720 third party users, and had realized over \$405,000.00 in royalties for the previous year (p. 1284).

A physical therapy clinic located in communities near the University employed University athletic trainers, changed the clinic name to Razorback Sports and Physical Therapy Clinic, and directed their services to therapy for athletic injuries. The physical therapy clinic announcements emphasized the University employees and left an appearance that the clinic was a partnership with the University. No such relationship existed.

The University sued the therapy service for trademark infringement and false designation of origin under Federal Trademark law and for trademark infringement and dilution under Arkansas law for the service's use of the word "Razorback." The United States District Court, Western District of Arkansas, found for the University, stating that the marks were similar, the Razorback mark was a distinctive identification of the University, and that there was commonality in the services they represented (p. 1292). Further, the court stated that it would be a serious risk for the University if it lost control of its mark (*Id.*).

In 1995 the Athletic Department of the University of Nebraska, Lincoln, decided to create a shop called "Authentic Goods" to sell apparel and equipment similar to that used by the University teams. They selected a logo, and test marketed the proposed store apparel line through a catalog with Eastbay and the equipment with a Lincoln business, Awards Unlimited (*White v. Board of Regents of the Univ. of Nebraska, Lincoln*, 2000, p. 333). In July of 1996, the Board of Regents of the University of Nebraska filed an application with the Nebraska Secretary of State to register the name "Husker Athletics." The application failed to provide required information and as a result the mark was cancelled. The University first learned of the cancellation in June of 1997 (p. 334).

After discovering that Nebraska's trademark application for the name Husker Authentics had been improperly prepared, Brent White, a competitor of the University of Nebraska's apparel industry, filed an application for the same name. When the University became aware that their application had not been processed they filed again. This time Nebraska was told that White owned the registered mark.

The University's store opened in August of 1997. In September "White filed a petition requesting that the University be enjoined from using the trade name 'Husker Authentic'" (p. 335). He also sought an injunction and damages. The University counter claimed requesting "injunctive relief and damages based upon breach of contract, violation of common-law and statutory trade name and trademark rights" (*Id.*). The Supreme Court of Nebraska ruled that the University of Nebraska had a common-law right to the name "Husker

Authentic;" thus White's registration was invalid and should be cancelled (p. 339).

Events

Confusion over the words "Opening Day" and "March Madness" were the issues in *Major League Baseball Properties, Inc. v. Opening Day Productions, Inc.* (1997) and *Illinois High Sch. Assoc. v. GTE Vantage, Inc.* (1996) respectively.

"Opening Day" was a contractual agreement between major league baseball and True Value Hardware for the sharing of the trademark "Opening Day" in game promotions and the designation of True Value Hardware as the official store of major league baseball. In line with the agreement, True Value Hardware began a national promotion campaign, using the "Opening Day" logo for the 1996 season. Upon seeing the advertisements, Opening Day Productions demanded that Major League Baseball (MLB) and True Value Hardware discontinue using the name. MLB brought an "action for a declaration of non-infringement on the bases that the term 'opening day' cannot be trademarked by the Defendant" (*Major League Baseball Properties, Inc. v. Opening Day Productions, Inc.*, 1997, p. *5). The court found that the defendant had not registered the phrase "Opening Day" and dismissed the federal trademark infringement claim.

The Illinois High School Association (IHSA) reported using the word, March Madness, as early as 1940 to describe its annual March state basketball tournament. Also, the IHSA licensed the use of the trademark for merchandise associated with the trademark (*Illinois High Sch. Assoc. v. GTE Vantage, Inc.*, 1996, p. 245). In 1982, when CBS began televising the NCAA men's basketball tournament's final four round, Brent Musburger, one of CBS's announcers began describing the NCAA final four as March Madness. The term caught on and today the public tends to think of the word as a description of the NCAA's men's basketball tournament, and not the Illinois tournament.

The NCAA began licensing the use of the term "March Madness" to producers of goods and services related to the tournament in 1993 or 1994 (*Id.*). GTE Vantage, one of the NCAA's license holders, created a CD-Rom game called "NCAA Championship Basketball" but marketed it as March Madness. The IHSA sought an injunction to protect the mark against infringement from GTE Vantage. The IHSA argued confusion, confusion that the game represented the IHSA's tournament. The district court denied the injunction (p. 246).

The IHSA appealed the case to the United States Court of Appeals for the Seventh Circuit. The IHSA claims focused on reverse confusion - that use of the mark by GTE Vantage's, the more powerful and better known secondary user, would cause a substantial loss of revenue to IHSA. The court responded that the IHSA did not have a

trademark that the law will protect; and the district judge thought that IHSA does not, so far as the use of the term 'March Madness' in connection with the NCAA tournament is concerned. It has been years since the media first appropriated the term to describe the NCAA tournament. . . Most people know what they know about college basketball from the media. If the media calls the NCAA tournament 'March Madness' that is what the public will call it, and know it as (*Id.*).

The IHSA argued that First Amendment free speech rights prohibited them from suing the media the day Musburger used the word, but that they should not lose a property right for an event over which the IHSA has no control (*Id.*). The court agreed that the IHSA could not have sued Musburger or CBS for using the phrase.

In admonishing the IHSA, the court noted that "[a] serious trademark holder is assiduous in endeavoring to convince dictionary editors, magazine and newspaper editors, journalists and columnists, judges, and other lexicographically influential persons to avoid using his trademark to denote anything other than the trademarked good or service. These efforts sometimes succeed. IHSA was not assiduous" (*Id.*). Furthermore, because "a trademark is not nearly so secure an entitlement as a property right" (*Id.*), the IHSA needed to be more vigilant in protecting the mark.

Finally, an analysis of whether the term had become generic resulted in the conclusion that only the two basketball events and an unrelated event had used the term and thus March Madness would not be considered generic (p. 247). The Seventh Circuit ruled that the

preliminary injunction sought by the IHSA was rightly denied, since the suit appears to lack any merit, the district court on remand should enter judgment for the defendant. . . We do not opine on the scope of the trademark rights that either IHSA or NCAA has, beyond ruling that IHSA's rights do not extend to the NCAA tournament and to merchandise such as Vantage's game that is sold in connection with that tournament (p. 248).

Another situation in which the use of a name caused confusion for an event was *King of the Mountain Sports v. Chrysler Corporation* (1999). King

of the Mountain sold camouflage patterned outdoor clothing and mountaineering accessories. Chrysler used the words "King of the Mountain" in various prints and media advertisements to promote a series of ski races. They also put the title on clothing. King's suit against Chrysler alleged that the mark infringement violated the Federal Anti-Dilution Act and Colorado Consumer Protection Act. They specifically argued that "defendants' use of the phrase creates a likelihood of sponsorship confusion. . .that KOM sponsors, or is otherwise associated with, the downhill ski event" (p. 1088).

In determining whether a likelihood of confusion between the two marks was present, the United States Court of Appeals for the Tenth Circuit looked to several factors including

(a) the degree of similarity between the marks; (b) the intent of the alleged infringer in adopting its mark; (c) evidence of actual confusion; (d) the relation in use and the manner of marketing between the goods or services marketed by competing parties; (e) the degree of care likely to be exercised by purchasers; and (f) the strength or weakness of the mark (p. 1089-1090).

As the court explained, although consider these factors to determine whether a likelihood of confusion exists, "the weight afforded to some of the factors differs when applied in these separate contexts. In both confusion of source and confusion of sponsorship cases, the similarity of the marks factor constitutes the heart of our analysis" (p. 1090). In focusing on this factor of similarity, the court focused on three levels - sight, sound and meaning (*Id.*). The plaintiff argued that because defendants employ the phrase "King of the Mountain," the similarity factor weighed in favor of it and created a genuine issue of material fact regarding likelihood of confusion. The court disagreed and compared the stylized trademark of the plaintiff with the ways in which defendants used the phrase "king of the mountain" (*Id.*). The court then held that no reasonable jury could find similarity because even assuming that the phrase "king of the mountain" constituted the dominant portion of defendants' logo, "the marks as a whole are not confusingly similar" (*Id.*).

The court also noted that even though the defendant's logo uses the same phrase as the plaintiff's mark, "the sight and sense of meaning invoked by defendants' logo and plaintiff's stylized mark differ drastically" (p.1091), because the plaintiff's gothic lettering on a mountain ridge on a camouflage colored item of clothing is much different from the defendant's "brilliant blue, purple and orange. . .logo depicts a skier with red and orange lines shooting out from behind him to suggest speed at which he flies down the mountain" (*Id.*).

Under the second factor the court focused on "whether defendant had the intent to derive benefit from the reputation or goodwill of plaintiff" (*Id.*). The court determined that it was undisputed that Chrysler Corporation was not attempting to benefit in any way from KOM's reputation or goodwill, and so this factor also weighed against the likelihood of confusion (p. 1092).

The court dispensed with the third and fourth factors. As to the degree of care exercised by consumers, the court stated that "even if plaintiff's current and potential customers exercise a high degree of care, it would have little impact on our determination regarding likelihood of confusion in this case" (*Id.*). As to the products similarity and manner of marketing, the court found that "in a case involving pure sponsorship confusion, the parties may have little similarity in their products or manner of marketing," and so this factor also did not help the plaintiff (*Id.*).

As to the factor of actual confusion, the court explained that although the plaintiff did not need to present evidence of actual confusion to prevail in a trademark infringement action, " 'actual confusion in the marketplace is often considered the best evidence of likelihood of confusion' " (*Id.*). The court then found that "plaintiff has put into evidence, at most, only seven examples of actual confusion. This handful of anecdotal evidence is de minimis and does not support a finding of a genuine issue of material fact as to the likelihood of confusion" (*Id.*).

In assessing the final factor, the court noted that "[t]he stronger a trademark, the more likely that encroachment upon it will lead to sponsorship confusion" (p. 1093). The court found that the plaintiff's mark was quite strong "[v]iewed in the light most favorable to plaintiff, its stylized mark is at least suggestive on the conceptual strength spectrum. . . again drawing all inferences in favor of plaintiff, we assume that the mark has great commercial strength in the hunting apparel market" (*Id.*).

In the end the court affirmed the district court's decision and stated that "after reviewing the evidence in the light most favorable to plaintiff, we conclude as a matter of law that no likelihood of confusion exists" (*Id.*).

Specific Sports

Trademark concerns appear in nearly every sport. Golf, yachting, cycling and surfing were selected as examples of the range of name issues addressed under trademark.

Golf

Champions Golf Club, Inc. v. The Champions Golf Club, Inc. (1996), a service mark infringement decision involved unfair competition and false designation. Both clubs were using the word "Champions." Service marks are marks used to designate service as opposed to trademarks that describe a business or product. Basically, the courts treat both marks in the same manner; however, on occasion it may be necessary to fine tune an analysis to differentiate between a service and business or product.

In 1957 Jimmy Demaret and Jack Burke, retired from the professional golf tour, and opened a club in Houston named Champions Golf Club. In 1978 they registered the mark with the State of Texas. The club was well known and hosted many national tournaments. In 1985 Heilbron created a residential subdivision and golf course in Nicholasville, Kentucky called Champions. In 1986 he registered the mark with the Commonwealth of Kentucky.

The Houston club became aware of the Nicholasville club using the "Champion" title and filed a federal registration to protect the mark. In 1990 Houston's mark "Champions" was accepted by the U. S. Patent and Trademark Office as a service mark for golf and country club service. The Houston Club sent the Nicholasville club a "cease and desist" letter; Nicholasville ignored the letter. The Houston Club brought suit requesting injunctive relief and damages. The core issue was whether the continuous use of the mark by both parties was likely to cause confusion. Likelihood of confusion was based on the *Polaroid* eight factors test mentioned earlier in *Girl Scouts and Boy Scouts*. They compared the mark's strength, relatedness of services, similarity, evidence of actual confusion, marketing channels, purchasers concern, intent, and expansion of product line (p. 1116).

Analysis of the strength of the mark resulted in an inconclusive decision as to whether it was arbitrary or descriptive. Under relatedness of the services, the court could find that they were in direct competition, somewhat related, or totally unrelated. The District Court concluded that the services were related; however, "course layouts, buildings, climates, and geographical locations are different" (p. 1118). The marks were found to be similar; however, actual confusion presented by Houston, was found to be weak. The Houston and Nicholasville markets were considered distinctive and it was believed that purchasers would not be confused by the similar marks. Also, there appeared to be no intent to confuse the public.

Another argument advanced by the Nicholasville Club was that they were using the mark at a national level before the Houston Club gained a federal service mark. The United States Court of Appeals for the Sixth Circuit vacated

the district court's judgment for Nicholasville and remanded the case for further proceedings (p. 1124). Instructions were given noting that if "Houston's CHAMPIONS mark is not found to have achieved nationwide recognition then the district court must make a finding defining the trade area, if any, where Nicholasville continuously used the mark prior to Houston's registration" (*Id.*).

Hatton marketed, distributed and sold golf towels with the name "Augusta" on them. Augusta National had, since 1934 owned and operated a prominent golf course that sponsored the Masters Tournament (*Augusta Nat'l v. Hatton*, 1996, 1997). Through the years Augusta National had acquired common-law rights in the designation, "Augusta" as a "proprietary trade name, service mark and trademark" (1997, p. *3). Also, Augusta National had obtained a federal registration for the mark. Augusta National sued Hatton alleging trademark infringement and violation of the Federal Trademark Dilution Act of 1995. The District Court for the Northern District of Georgia, Atlanta Division, granted Augusta National a preliminary injunction (p. *11).

At nearly the same time, Augusta was sparing with Executive Golf Management, over the word "Masters." Augusta National held common-law rights to the designation "Masters" and federal registration for clothing, videotapes, restaurant services, and related goods. In 1995 when Augusta National learned of the Junior Masters program they immediately requested that defendants cease using the name. The request was based on the likelihood of confusion. Augusta National received permanent injunctive relief (*Augusta Nat'l, Inc. v. Executive Golf Mgmt., Inc.*, 1998).

Beginning in 1911, the United States Golf Association developed and maintained a handicap system "designed to enable individual golf players of different abilities to compete fairly with one another" (*United States Golf Assoc. v. Arroyo Software Corp.*, 1999, p. 611). Arroyo, a computer software company, created and published a software program for the USGFA Handicap System without permission from the USGA. They called the program EagleTrak. Additionally, Arroyo used the USGA's name and service marks in advertising, promoting, and selling Eagle Track to the public (p. 614). On a number of occasions, USGA asked Arroyo to stop using the USGA's handicap system. In 1993 USGA filed an action against Arroyo for misappropriation, unfair competition, and false and misleading advertising. Arroyo filed a cross-complaint alleging unfair competition, violation of California antitrust law, and tortious interference with prospective economic advantage (*Id.*).

The trial court found that "Arroyo's unauthorized use of USGA's Formulas in the EagleTrak software 'undermined' the integrity of the Handicap System, 'thereby creating substantial risk of damage to the reputation, standing and

viability of the USGA' " (p. 615). Thus, the trial court issued a permanent injunction against Arroyo.

Arroyo appealed. In submitting the appeal, Arroyo returned to a 14 year old decision involving an earlier USGA handicap system that was found to be functional, and therefore, could not be enjoined under the Lanham Act (p. 616). Arroyo claimed that the facts from this earlier case were identical.

The appellate court found that the issues on appeal were different. The USGA had invested substantial resources, both cash and person hours, in creating the new sophisticated formula. The court affirmed the trial court's decision stating that Arroyo's claim was

patently frivolous. . .appellant cannot challenge a judgment on the basis of a new cause of action it did not advance below. . .The actual gravamen of Arroyo's cross-complaint was that this action constituted a 'sham litigation' pursued for an improper motive rather than to enforce intellectual property rights. The trial court properly rejected this claim (p. 624).

Cunningham invented a device to aid golfers in improving their swings. He applied for and received the mark "Laserswing" for the device. (*Cunningham v. Laser Golf Corp.*, 2000). Laser Golf Corp. used the mark "Laser" for golf clubs and golf balls. It registered the mark in 1983. Laser Golf filed a petition to cancel Cunningham's registration; the Board granted the petition on the bases of likelihood of confusion. Cunningham appealed the Board's decision. The United States Court of Appeals for the Federal Circuit affirmed the Board's cancellation (p. 951).

Kellogg, the cereal company, invented a spokescharacter known as "Toucan Sam" to promote the breakfast cereal "Froot Loops." "Toucan Sam," a registered mark, also appeared on tee shirts and other items. Toucan Golf filed an application to the U. S. Patent & Trademark Office to register the mark "Toucan Gold" for golf clubs. Kellogg opposed registration of "Toucan Gold" because the marks were similar and might cause confusion. The Trademark Trial and Appeals Board dismissed Kellogg's complaint (*Kellogg Co. v. Toucan Golf, Inc.*, 2001).

Yachting

Two companies that manufactured boats for leisure use were found to be using essentially the same trademark. AMF used the mark Slickcraft to identify their boat; Nescher called their boats Sleekcraft. Slickcraft received federal registration in 1969 and the mark has been in continuous use since that time. Nescher selected the name Sleekcraft in 1968. After AMF alerted

Nescher to his alleged trademark violation he altered his mark to include Nescher but did not remove the title Sleekcraft. AMF brought a cause of action against Sleekcraft Boats for trademark infringement (*AMF Inc. v. Sleekcraft Boats*, 1979).

The district court found that "AMF's trademark was valid, but not infringed, and denied AMF's request for injunctive relief" (pp. 345-346). The United States Court of Appeals for the Ninth Circuit held that Heshner had infringed the Sleekcraft mark; however, given the circumstances of the use of the mark by both companies, the court recommended only a limited injunction. Further, on remand, the court requested that the trial court consider a number of interests including the use of the logo to overcome confusion and the opportunity for Sleekcraft to consume expensive supplies currently on hand (pp. 354-355).

The two person star class-racing sailboat designed in 1910, is one of the first "class boats." This single design racing craft eliminates the need for making boats equal for competition through the use of mathematical formulas. The International Star Class Yacht Racing Association is a not-for-profit association that creates rules and organizes competitions; it does not manufacture boats. It permits its logo to be used for items sold at sailboat races, it does not sell apparel. Hilfiger is a designer, manufacturer, and seller of sport clothes. Hilfiger used the word "Star class" in his 1994 collection.

The International Star Class Yacht Racing Association brought a cause of action against Hilfiger for trademark infringement and unfair competition (*International Star Class Yacht Racing Assoc. v. Tommy Hilfiger U.S.A., Inc.*, 1995, 1998, 1999a, 1999b 2000). Plaintiff's mark "Star Class" was not registered. The *Polaroid* test was used to determine confusion. The mark was found to be descriptive and to have acquired secondary meaning, a similarity was found between the marks, and there was evidence of actual confusion by the public. The United States District Court for the Southern District of New York granted plaintiff's claim for injunctive relief. The claims for money damages and attorney's fees were denied. International Star Class Yacht Racing Association appealed the aspect of bad faith (1999a). The court determined that the Star Class had not carried its burden of proving by a preponderance of the evidence that defendant acted in bad faith (p. *12).

Cycling

Is the word "Hog" generic? If so, does it identify a motorcycle? After extensive study, including magazine articles and dictionaries, the United States Court of Appeals for the Second Circuit concluded that the word "Hog" to

describe a motorcycle was generic. Harley-Davidson sued Grottanelli, for Grottanelli's use of the word "Hog" and Harley-Davidson's bar and shield logo in his business. The court found "Grottanelli liable for infringement of Harley-Davidson's bar-and-shield design mark and enjoined his future use of that mark" (*Harley-Davidson v. Grottanelli*, 1999, p. 808). However, the court concluded that the word "hog" had become generic as applied to large motorcycles before Harley-Davidson began to make trademark use of "HOG," and Harley-Davidson's attempt to withdraw this use of the word from the public domain cannot succeed" (*Id.*). They also failed in their effort to have the word "Hog" cancelled.

Ronda was the owner of a 1982 registered mark entitled Harley for various parts of watches. Harley-Davidson was the owner of a number of registrations of the mark "Harley" for motorcycles, clothing, and jewelry. In 1990 Harley Davidson filed a petition with the Patent and Trademark office to cancel Ronda's registration of the mark Harley on the grounds of priority of use, and likelihood of confusion. Harley Davidson claimed the first use. The board granted Harley Davidson's motion for summary judgment and its petition to cancel Ronda's mark. The United States Court of Appeals for the Federal Circuit affirmed the Board's decision because there was a likelihood of confusion (*Ronda AG v. Harley-Davidson, Inc.*, 1997).

Harley Davidson's logo was the subject of *Harley-Davidson Motor Company v. Iron Eagle of Central Florida* (1997). Iron Eagle substituted the word Iron Eagle in the Harley-Davidson winged logo. They also held themselves out as an official Harley Davidson dealer; they were not such a dealer. Harley Davidson sent Iron Eagle a cease and desist letter complaining of the misappropriation of their registered mark. To succeed plaintiff had to prove they were the owners of the mark and that the defendant's trade or service name was likely to be confusing to customers. Harley Davidson proved registration of the mark. Results of a *Polaroid* test determined that confusion existed. Plaintiffs received a permanent injunction. The United States District Court for the Middle District of Orlando found for the plaintiff.

Surfing

H. O. Sports and Earth & Ocean Sports manufacture and sell wakeboards and wakeboard bindings among other water sports products. Earth & Ocean Sports was selling their wakeboard with an H. O. binding altered to look like it was an Earth & Ocean Sports product. Earth & Ocean Sports catalogue contained pictures of the altered or defaced binding. H. O. sought an injunction stopping Earth & Ocean Sports from using the binding in its

advertising, sale, and promotion. Use of their binding constituted "a false designation of origin or implied passing off, and is likely to confuse consumers" (*H. O. Sports, Inc. v. Earth & Ocean Sports, Inc.*, 2001, pp. *3-4).

H. O. was able to demonstrate that there was a likelihood of confusion. The court ordered that defendants,

Earth & Ocean Sports, Inc., and O'Brien International, Inc., their respective officers, agents, servants, employees, attorneys, and any of their successors and assigns, and all persons, firms, and corporations. . .are preliminarily enjoined from. . .[u]sing wakeboard bindings of H. O. Sports or pictures or depictions. . .that have been doctored or defaced. . . [and a]uthorizing, permitting, or causing the doctoring or defacing of H. O. Sports wakeboard bindings so as to appear as if they are made by defendants (pp. *14, 15).

Also, they were required to turn over the names of people that received their catalogue.

Trade Dress

Trade dress of a product "involves the total image of a product and may include features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques" (*John H. Harland Co. v. Clarke Checks, Inc.*, 1983, p. 980). Investigation or searching the vast number of designs is particularly difficult. Trade dress usually requires that the object has taken on a secondary meaning. In other words, the public associates the trade dress with a specific source. This is referred to as distinctiveness. The test for assessing distinctiveness comes from *Abercrombie & Fitch v. Hunting World* (1976).

Under the *Abercrombie* test the marks are classified into categories to determine distinctiveness or validity as described earlier in *Quantum Fitness*. The categories are generic, descriptive, suggestive, or arbitrary and fanciful (*Abercrombie & Fitch v. Hunting World*, 1976, p. 9). Under the Lanham Act (1946), a generic name or common name of a product or service cannot be registered as a trademark because a generic name, by definition, does not distinguish the identity of a particular product. Descriptive marks are marks that have become distinctive of a product or service. A suggestive term "requires imagination, thought, and perception to reach a conclusion as to the nature of the goods" and is entitled to registration without proof of secondary meaning (p. 11). Fanciful or arbitrary terms "enjoy all the rights accorded to suggestive terms as marks - without the need of debating whether the term is 'merely descriptive' and with ease of establishing infringement" (*Id.*).

Golf courses were the topic of trade dress in *Callaway Golf Co. v. Golf Clean, Inc.* (1995), *Resorts of Pinehurst, Inc. v. Pinehurst Nat'l Dev. Corp.* (1997a, 1997b, 1997c, 1998, 2000), and *Pebble Beach Co. v. Tour 18 I Ltd* (1996, 1998).

In *Callaway Golf Co.*, the United States District Court for the Middle District of Florida, Tampa Division, granted a preliminary injunction prohibiting Golf Clean and Golf Clean International Inc. from:

[m]anufacturing, producing, distributing, circulating, selling, offering for sale, importing, exporting, advertising, promoting, displaying, shipping, marketing, or otherwise disposing of 'Canterbury Big Bursar Irons,' 'Professional Big Brother Tour' Irons, Big Bursar Iron heads, or Big Bursar Iron medallions; otherwise disposing of any golf club iron head or club that has a polished sole plate with a semi-circular relief facet; a heavy or wide top line with a peened or pebbled finish, a striking face with a peened finish...; or has a medallion substantially similar to Callaway Golf's Big Bertha Iron Medallion. . . (*Callaway Golf Co. v. Golf Clean, Inc.*, 1995, pp. 1208-1209).

The plaintiff in *Resorts of Pinehurst* was successful in the United States District Court for the Middle District of North Carolina, Rockingham Division (*Resorts of Pinehurst, Inc. v. Pinehurst Nat'l Dev. Corp.*, 1997c) and in the United States Court of Appeals for the Fourth Circuit (2000). Both plaintiff and defendant were golf course companies. Plaintiff's course was public; defendant's course was private. Pinehurst dates back to 1890 when James Walker Tufts acquired property in North Carolina and developed a golf resort community. In 1903 he named it Pinehurst. The Tufts family sold the course in 1970 to the Diamondhead Corporation. Resorts purchased it in 1984. They registered the federal service mark Pinehurst in 1990. National opened Pinehurst National in 1988 and Pinehurst Plantation in 1993. Resorts attempted to purchase Pinehurst Plantation; later it was sold to U. S. Golf Pinehurst Plantation.

In the early 1990s defendant's courses became public. As a result of this change, Resorts filed suit against the defendants alleging trademark and service mark infringement, false designation of origin, and false advertising, all under the Lanham Act, and state law claims of unfair trade practices and unfair competition, and subsequently brought a claim of dilution seeking injunctive relief and damages under the Federal Trademark Dilution Act (1997b, p. 553). Plaintiff's motion for a preliminary injunction was denied, the claim for dilution was dismissed, and all other claims were considered moot

(p. 560). The above case was reviewed in detail by *Resorts of Pinehurst, Inc. v. Pinehurst Nat'l Dev. Corp.* (1997c, p *6-7), the current decision under discussion.

To be a valid, protectable mark Pinehurst had to be either geographically descriptive or inherently distinctive; the Patent and Trademark Office originally accepted the mark as inherently distinctive. Evidence as to whether the mark was inherently distinctive was mixed. The court returned to the alternative, geographically descriptive or in their words, secondary meaning. As a result of tremendous publicity and the findings of a national survey (p. *30) the court determined that Tuft's original Pinehurst mark had acquired secondary meaning. The district court granted Resorts' summary judgment as a result of the evidence on the issue of confusion (p. *64-65). The (2000) decision affirms the district court's decision in modifying the injunction and awards attorneys fees.

Pinehurst joined Pebble Beach in suing Tour 18 I over the design of two golf courses that were replicas of holes from famous courses in Humble and Flower Mound, Texas. The Humble, Texas, course was the subject of the litigation in *Pebble Beach Company v. Tour 18 I, Ltd.* (1996). It has three holes copied from plaintiff's courses. The holes were the fourteenth hole from Pebble Beach Golf Links, third hole from Pinehurst No. 2, and Sea Pines eighteenth hole. The Flower Mound Texas course has a replica of the Harbour Town eighteenth hole.

Plaintiff's golf courses, Pebble Beach, Pinehurst No. 2, and Sea Pines are nationally recognized and ranked among the top courses in the world. Often, courses will have one hole that is unique and will use that hole in advertising. If the entire course is not protected by trademark the unique or signature hole will usually be under trademark law. Tour 18 I copied the fourteenth hole from Pebble Beach Golf Links, one of five courses Pebble Beach owned in the area. The fourteenth hole was not the signature hole nor was it used in advertising or promotions. Pebble Beach owns an incontestable federal service mark for the title Pebble Beach for golfing services not the golf course design.

Tour 18 I copied the third hole from the Pinehurst No. 2 course, one of seven courses in the Pinehurst area. Again, the third hole was not their signature hole nor was it used in advertising or promotion. As in Pebble Beach, they hold a service mark for golf services; trademark or patent does not protect hole number three. In contrast to Pebble Beach and Pinehurst, Tour 18 I copied Sea Pine's eighteenth hole Harbour Town, the most famous and signature hole from the course. It is used in their advertisements and promotions. Sea Pines did not hold a federal service mark for golf services;

they did not hold a service mark or copyright for the Harbour Town mark or the lighthouse.

The plaintiff's complaint alleged claims under the Lanham Act for service mark and trade dress infringement, unfair competition, and false advertising. Also, they asserted common-law unfair competition, conversion, and civil conspiracy and service mark and trade-dress dilution under Texas law. Pebble Beach also claimed copyright infringement. Tour 18 I filed a counterclaim for unfair competition and interference with business relations under Texas law (p. 1526). The district court found for the plaintiffs on infringement, dilution, and unfair competition for Tour 18 I's use of their names and the image of the lighthouse (p. 1573-1574). They found for the plaintiff's on all of Tour 18I's counterclaims.

In general, the United States Court of Appeals for the Fifth Circuit affirmed the district court (*Pebble Beach Company v. Tour 18 I, Ltd.*, 1998). An interesting comment by a journalist in reference to the allegations of confusion in this case was that "no golfer would be confused into thinking he or she was playing Pebble Beach while standing on a golf courses in Texas" (Dreiter, 1999, p. C20).

Golf has also played a significant role in trade dress for apparel. *Taylor Made Golf Co., Inc. v. Carsten Sports, Ltd.* (1997), *Taylor Made Golf Co., Inc. v. Eagle Golf Products, Inc.* (1997), and *Disc Golf Assoc., Inc. v. Champion Discs, Inc.* (1998) are examples of trade dress.

Taylor Made, a nationally known golf club manufacturer, holds a series of trademarks and patents on a number of products and services. The plaintiff, in an effort to create a distinctive design that would enable purchasers to readily identify their product created the trademark "Burner Bubble." It was this mark that was alleged to have been infringed by Carsten Sports. Carsten sold colorable imitations of the Bubble Burner, clearly an example of trade dress. The United States District Court for the Southern District of California found for the plaintiff awarding \$600,000.00 in damages and \$7,910.00 in attorney fees (*Taylor Made Golf Co., Inc. v. Carsten Sports, Ltd.*, 1997).

At the same time Taylor Made was in court with Eagle Golf Products over another trademark and patent dispute. Alleged infringements were false advertising, unfair competition, and violation of the Ohio Deceptive Trade Practices Act. Defendants failed to respond to the service and received a default judgment. Their motion to set aside the default judgment to the Northern District of Ohio Court, Western Division, was denied (*Taylor Made Golf Co., Inc. v. Eagle Golf Products, Inc.*, 1997).

Disc Golf Association, Inc. (DGA) brought an action against Champion Discs "alleging trademark and trade dress infringement under Section 43 (a) of

the Lanham Act" (*Disc Golf Assoc., Inc. v. Champion Discs, Inc.* 1998, p. 1004). DGA invented and patented a disc entrapment device used in disc golf. The patent expired in 1994. Champion began marketing a similar disc entrapment device the next year. DGA sued Champion alleging trademark and trade dress infringement. The United States District Court for the Northern District of California found for Champion Discs (*Id.*). DGA appealed.

In assessing whether DGA would recover for the infringement of a trademark or trade dress the United States Court of Appeals for the Ninth Circuit stated that DGA had to prove that "(1) the parabolic chain design is nonfunctional, (2) the design is inherently distinctive or acquired distinctiveness through a secondary meaning, and (3) there is a likelihood that the consuming public will confuse Champion's DISCATCHER PRO with DGA's product" (p. 1005).

In beginning its analysis the court noted that "[a] product feature is functional 'if it is essential to the use or purpose of the article or if it affects the cost or quality of the article, that is, if exclusive use of the feature would put competitors at a significant non-reputation-related disadvantage'" (*Id.*). The court then turned to a determination of whether the product feature was functional, and considered "(1) whether the design yields a utilitarian advantage, (2) whether alternative designs are available, (3) whether advertising touts the utilitarian advantages of the design, and (4) whether the particular design results from a comparatively simple or inexpensive method of manufacture" (*Id.*).

In analyzing these factors court concluded that "there are no material issues of fact concerning utilitarian advantage" (p. 1008), insufficient evidence was presented to infer alternative designs (p. 1009), the value of advertising was unclear (*Id.*), and the "design was not relatively simple or inexpensive to manufacture." (*Id.*). Therefore, the Ninth Circuit affirmed the district court's decision, finding for Champion Discs (p. 1010). Disc Golf Association had failed to demonstrate that their parabolic chain was nonfunctional.

An interesting case was the United States Court of Appeals for the Federal Circuit's decision telling Brunswick Corporation that it could not put a mark on the color black for their outboard motor advertisements (*Brunswick Corp. v. British Seagull*, 1994).

The Mercury Marine Division of Brunswick introduced an all black outboard boat engine in 1994. The all black engine has been part of their advertising campaigns for many years. Other companies, including British Seagull, also sell black or very dark colored engines. In 1988 "Mercury filed an application to register the color black for outboard engines on the Principal Register. . .Mercury claimed that the color black, while not inherently

distinctive, acquired secondary meaning and served as a trademark for Mercury's outboard engines" (p. 1529). British Seagull and Outboard Marine Corporation filed oppositions. The Board consolidated the oppositions and considered them for proposed mark functionality. The Board concluded that buyers like black engines because they match all boat colors and "they also find it desirable under some circumstances to reduce the perception of the size of the motors in proportion to the boats" (*Id.*). Therefore, Mercury could not register its all black outboard motors.

Mercury appealed the decision the Federal Circuit. The court examined functionality by using a balancing test of two policies, *de facto* functionality and *de jure* functionality. A "*de facto* function means that the design of a product has a function, i.e., a bottle of any design holds fluid. *De jure* functionality, on the other hand, means that the product is in its particular shape because it works better in that shape" (p. 1531). Trademark protection is often provided for *defacto* functional features and is not provided for *de jure* functional features (*Id.*). The court found that a black engine was *de jure* functional because it met competitive needs. The court found for British Seagull, affirming the Board's decision.

Cancellation of Trademark

Although many have suggested that Native American names for sports teams are disparaging and scandalous (Guggenheim, 1998), *Pro-Football, Inc. v. Harjo* (2000) is a decision still in progress that used a legal theory (cancellation of trademark due to content) to deal with the issue.

Harjo represented a group of Native Americans who succeeded in their petition to the Patent and Trademark Office to cancel Pro-Football's trademark of the word, "Redskin" (p. *2). The football plaintiff's sought review of this decision in the United States District Court for the District of Columbia. The court also considered the Native American's motion to dismiss the case and or for judgment on the pleadings.

Harjo first filed the claim in the Patent and Trademark Office in 1992. In April of 1999 the Board "issued a cancellation order in which it scheduled the cancellation of the contested trademarks" (p. *4). In its appeal, Pro-Football argued

first that the trademarks do not disparage Native Americans. . .second that they do not bring Native Americans into contempt or disrepute. . . third. . .that section 2(a) of the Lanham Act violates the First Amendment because it is a vague, overbroad, and content-based restriction on speech. . .[f]ourth, it asserts that section 2(a) is unduly

vague in violation of the Fifth Amendment. . .[and f]inally, it argues that the Native Americans' cancellation petition was barred by the doctrine of laches (p. *6-7).

The claim under the doctrine of laches was the only issue discussed, however, because the parties were not ready for discussion on the other issues, the motion for laches was denied without prejudice. This case is still in progress and as the court stated "once the factual record has been presented and, perhaps, further developed, the parties may wish to revisit this issue by ways of motions for summary judgment" (p. *22).

Abandonment

Abandonment of a mark under the Lanham Act occurs when the mark has not been used for two years or the mark becomes generic (15 USC 1127). *Abdul-Jabbar v. General Motors Corp.* (GMC) (1996) was a discussion of abandoning a name, in this case an individual's original name "Lew Alcindor." Abdul-Jabbar brought the cause of action against GMC after GMC used the name Lew Alcindor, without his permission, as part of an advertisement in the television presentation at the 1993 NCAA men's basketball tournament. The district court said that Abdul-Jabbar had abandoned the name and thus the name could not be considered his endorsement of the product (p. 409). The point was that the court's holding forced him to lose the right to his given name because he adopted a new name for religious purposes; thus the court had placed "pressure on a religious believer to modify his behavior and violate his beliefs" (p. 411). The United States Court of Appeals for the Ninth Circuit reversed and remanded the case for a new trial (p. 416). The Ninth Circuit noted that "while Lew Alcindor's basketball record may be said to be 'newsworthy,' its use is not automatically privileged. GMC used the information in the context of an automobile advertisement, not in a news or sports account. Hence GMC is not protected by section 3344(d)." (*Id.*)

The case of *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club, Ltd. P'ship* (1994a, 1994b) dealt with problems of name abandonment encountered when a professional team moves from one city to another (McGarry, 1997). In 1984 the Baltimore Colts of the National Football League made a quick exit to Indianapolis. Unlike the unique experiences of the Cleveland Browns where the City retained the name, the Colts took the name. Ten years later Baltimore obtained a franchise from the Canadian Football League and chose to call the team the Colts. Indianapolis complained. Baltimore altered the name to Baltimore CFLColts.

National Football League Properties filed a Declaratory Judgment action in the United States District Court for the District of Maryland. Their position was that the name "Baltimore Colts" had not been abandoned (*Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club, Ltd. P'ship*, 1994a, p. *4). They obtained an injunction based on customer confusion, that Baltimore fans would believe that the team was an NFL team. The United States Court of Appeals for the Seventh Circuit, affirmed the district court's injunction (1994b).

Eh Yacht and Egg Harbor each claim the right to use the name Egg Harbor for the manufacture of boats. Eh Yacht claims to have purchased title to the mark Egg Harbor and its sailfish logo as part of a business transaction from the receiver in bankruptcy. Egg Harbor claims that they picked up the mark after it was abandoned by the business that went bankrupt. The question is whether a mark is abandoned in bankruptcy or does it go to the purchaser of the bankrupt business? In *Eh Yacht, LLC v. Egg Harbor, LLC* (2000) the court granted an injunction to protect the rights of Eh Yacht, the purchaser of the marine company, to use the word "Egg Harbor" and its sailfish logo. They rejected the defendant's argument that the trademark was abandoned in the insolvency process.

First Amendment

When the mark in question is deemed not to be generic and it involves the media or print documents the owner may have First Amendment rights. So far, First Amendment rights have been mentioned in *International Olympic Committee v. San Francisco Arts & Athletics* (1982, 1986) and *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.* (1987); *United States Olympic Comm. v. American Media, Inc.* (2001); and *Girl Scouts of the United States of America and Boy Scouts of America v. The Bantam Doubleday Dell Publishing Group, Inc.* (1992). Under a First Amendment freedom of speech analysis, a court will balance the public's interest in free speech with the consumer's chance for confusion.

World Championship Wrestling v. Titan Sports, Inc. (1999), and *Bally Total Fitness Holding Corp. v. Faber* (1998) were decisions involving freedom of speech.

World Championship Wrestling (WCW), Titan Sports, World Wrestling Federation (WWF) and USA Network were all engaged in the promotion and staging of professional wrestling. Also, they sell merchandise and licensed programs. World Championship Wrestling, a comprehensive agency, was formed in 1988. Their mark was a common law trademark. It became a

competitor of the World Wrestling Federation, a business that had existed for a number of years, and held a registered service mark.

In early 1996, the WWF began a campaign to disparage the WCW and others and to confuse the public with respect to the affiliation of professional wrestlers under contract to WCW and sponsors of wrestling programs (*World Championship Wrestling v. Titan Sports, Inc.*, 1999, p. 121). As a result of this conduct WCW filed a complaint. The complaint included trademark dilution, First Amendment, product disparagement, confusing sponsorship, confusion, and Connecticut state law claims. The dilution claim was over a license rather than trademark and thus lacked standing.

The WWF argued that the trademark dilution claim should be dismissed because their use of the marks was not for commercial purposes, and should be considered as "expressive," which is exempted from the Lanham Act and protected by the First Amendment (p.123). As the court explained

[a]n expressive use does not become a commercial use solely because the use increases sales for a user. . . But when the unauthorized use is done 'for the purpose of source identification, the trademark law generally prevails over the First Amendment'. . . [i]f the unauthorized use of a mark is for expressive purposes implicating the First Amendment, as defendants claim, the rights of the trademark owner must be weighed against the interests of free speech (*Id.*).

Therefore, the court that "[t]he balancing test called for in the case law involves factual and legal issues which cannot be disposed of at this stage in the case" (*Id.*).

The product disparagement claim involved an examination of whether the action offended public policy, was immoral, unethical, and caused substantial injury (*Id.*). Complaint statements failed to reach the level of false or misleading statements but rather were found to be continuous harassment. Old tapes, edited for satire were used on television and other forms of media to harass WCW. The court found that the denigrating remarks of Titan Sports would cause confusion among the World Wrestling Federation's sponsors (p. 124).

In the end, the United States District Court for the District of Connecticut denied Titan Sport's motion to dismiss (p. 126).

A similar case was *Bally Total Fitness Holding Corp. v. Faber* (1998). Faber created a website to deal with complaints about Bally's health club business. He superimposed the word "sucks" over Bally's logo. In order to stop Faber's use of his web site, Bally decided to sue Faber for trademark infringement, unfair competition, and dilution. He also applied for a temporary

restraining order. Bally was found to have a strong mark but it was difficult to show that there would be public confusion over the two sites. In terms of free speech, Faber's site was "dedicated to complaints, issues, problems, beefs, grievances, grumblings, accusations, and gripes with Bally Total Fitness health clubs. Faber, however, is exercising his right to publish critical commentary about Bally" (p. 1165). The court found for Faber, granting his motion for summary judgment; he was free to provide commentary over the business practices of an organization (p. 1168).

RESULTS OF RESEARCH

Analysis of the 42 cases revealed both plaintiffs and defendants as sport organizations or business in 29 of the cases studied, in three cases only the defendant was a sports organization or business, and in 10 cases only the plaintiff was a sports organization or business. Confusion involving names was by far the largest category with 29 cases involving this type of claim. Seven cases were classified as trade dress, one involved cancellation of a registered trademark, three discussed abandonment, and three focused on First Amendment issues. An additional four cases are foundational cases for widely accepted legal analyzes used in the paper.

Among the name confusion cases three involved the name "Olympic" and one involved the word "Scout." Four decisions were in exercise and fitness equipment and service; all of these cases found both parties in the sport business. Professional and collegiate sport appeared to face similar trademark problems. The cases involving infringement of the marks "March Madness" and "Opening Day" serve as a warning to marketing specialists to use caution in developing creative name ideas without first checking the status of the name.

Golf dominated the trade dress decisions with all but one case in the area. While golf courses present a rather unique opportunity for creativity in design, professionals need to monitor changes in aquatic facilities and in methods and facilities used for skiing. They will present similar problems in the immediate future.

Cancellation of a mark in light of the fact that it offended a class of people is an interesting model and one found in this study. An examination of the cases in the abandonment area demonstrates the range of environments in which it can occur. One was a former personal name, another was a contest between cities for a team name when a team re-located and the third was an insolvency.

SUMMARY

Trademark, components of intellectual property have proved to be valuable personal property to a wide range of sport businesses. The examination of the legal theories of confusion, trade dress, cancellation, abandonment, and the First Amendment; and the results of contemporary court decisions, will enable the reader to understand the need for trademarks.

Hopefully, an understanding of these decisions will enable sport business managers to search out and obtain comprehensive intellectual property plans that will protect the marks and creative ventures of the sport profession.

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