# Who owns a trademark?
# Jeremy Lin wins *Linsanity*, as Anthony Davis fights for his unibrow.

July 25, 2012

By Paul A. Borovay, Summer Associate

THREE-PEAT is a well-known term that refers to a sports team's third consecutive championship.[1] Byron Scott, an ex-Los Angeles Laker, coined the term after his team won its second consecutive NBA championship in 1988.[2] Unfortunately, Scott could not profit from licensing the term to apparel companies, advertising agencies, or sports teams. Why? Scott did not try to establish rights in the term THREE-PEAT, either through registration or use. Scott likely did not see the value in trademark licensing at the time, but his coach, Pat Riley, saw an opportunity and obtained a trademark registration for the term in November 1988. Even though Scott coined the term "Three-peat," Riley is the one that has been earning royalties from use of the trademark.

The arena of sports provides a ripe field for coining catchphrases such as "three-peat," as well as terms that incorporate the names and likenesses of the superstar athletes themselves. Understanding who owns a trademark that incorporates the name or likeness of one of these individuals requires understanding the basics of two distinct bodies of law: trademark and the right of publicity.

Celebrities can obtain trademark rights for catchphrases associated with them by using the marks in commerce in connection with a specific good or service. Celebrities can also obtain state registrations for their marks, or simply own common law rights without a registration after using the marks in commerce. Filing for a registration with the United States Patent and Trademark Office (USPTO) is important and will often trump later applications, except for a few exceptions that are discussed later in this article.

---

[1] The original registration for "Three-peat," Reg. No. 1552980, covered shirts, jackets, and hats, and was cancelled on May 3, 2012 because Riley did not file an acceptable declaration under Section 8, identifying that the mark was still used in commerce. Riley filed for concurring registration of THREE-PEAT in connection with different goods under Reg. No. 1878690 in 1994 for collector plates, mugs and tankards.

[2] http://www.cleveland.com/livingston/index.ssf/2010/09/he_never_got_to_coach_lebron_b.html

Under the protections afforded through state right of publicity statutes, a celebrity is protected against commercial loss caused when someone appropriates their name or likeness. The celebrity does not have to have used the catchphrase in commerce, nor would the celebrity have to use the catchphrase in the future, as the right of publicity protects celebrities' entire *persona* from commercial exploitation. For example, Michael Jordan would have a right of publicity claim against a car wash company that used his photograph to promote its business. While the photograph may not be protected under trademark law, the right of publicity prohibits any unauthorized commercial exploitation of a person's name or likeness.

Two recent trademarks surrounding basketball players Jeremy Lin and Anthony Davis illustrate the delicate balance between trademark law, the right of publicity, and the person who coins the catchphrase's rights to his or her creation.

Jeremy Lin is the basketball phenom at the center of "Linsanity," a media craze that has defined his rise to basketball stardom. Andrew Slayton, a high school basketball coach in Palo Alto, is most likely the person that coined the term in July 2010 when he registered the domain "linsanity.com" where he sold T-shirts bearing the LINSANITY mark.[3] Thus, Jeremy Lin did not create the LINSANITY mark, he was not the first to register it with the USPTO, nor was he the first to use LINSANITY in interstate commerce. While plenty of people were profiting from the LINSANITY mark, Jeremy Lin was not one of them.

Anthony Davis is another basketball player turned celebrity. Davis was the NBA's number one draft pick out of the University of Kentucky this year. Besides being a dominant power forward, Davis is well known for his profound unibrow. Reid Coffman, the owner of the University of Kentucky apparel store Blue Zone, created the catchphrase "Fear the Brow," sold merchandise with the catchphrase in interstate commerce, and filed for a trademark of the catchphrase before Davis was drafted.[4] Now, Coffman has stated publicly that he is open to selling the FEAR THE BROW trademark to the highest bidder.[5]

So what is the difference between Lin's situation and Davis'? Lin's case is rather straightforward, while Davis' is not.

The Lanham Act prohibits registration of a trademark if the mark falsely suggests a connection with a person, living or dead, [6] or if the mark consists of or comprises a name, portrait, or signature that identifies a particular living individual .[7]

---

[3] http://deadspin.com/5884068/one-of-jeremy-lins-former-unofficial-volunteer-high-school-coaches-owns-a-linsanity-website-and-now-hopes-to-cash-in. Andrew Slayton also applied to register the mark on February 9, 2012, Serial No. 85537764, with a first use of July 17, 2010 and a first use in commerce of February 8, 2012. Interestingly, Slayton's application was filed two days after Yenchen Chang filed an intent to use application for the LINSANITY mark, Serial No. 85535650. Nevertheless, the USPTO sent both applicants letters refusing their applications because (1) they included matter that falsely suggests a connection with Lin, and (2) they consist of Lin's name. *See* Trademark Manual of Examining Procedures (TMEP) §§1203.03, 1203.03(e), and 1206.

[4] Ried Coffman applied to register the FEAR THE BROW mark, Serial No. 85477805, on November 11, 2011. Anthony Davis applied to register the FEAR THE BROW mark, Serial No. 85643417, on June 5, 2012.

[5] http://www.tmz.com/2012/06/29/fear-the-brow-anthony-davis-trademark/

[6] 15 U.S.C.A. § 1052(a) (West).

In Lin's case, the term LINSANITY both falsely suggests a connection to Lin, as well as consists of Lin's entire surname.[8] Thus, Lin should be able to prevail in any dispute over ownership of a mark incorporating his full name.

Davis, if he decides not to buy the FEAR THE BROW mark outright, could fight Coffman's ownership of the trademark using both trademark and right of publicity laws. Davis could file an opposition to the mark with the USPTO, arguing that the FEAR THE BROW mark falsely suggests a connection to him, or, more specifically, to his unibrow. Davis will need to show a number of elements, the most difficult one of which will be that the FEAR THE BROW mark points uniquely and unmistakably to him. The nickname "The Big Unit," for example, took several years to develop an inextricable link to major league baseball player Randy Johnson, who, not surprisingly, later obtained a trademark registration for the catchphrase.[9] Having yet to play a professional basketball game, Davis may not yet be unmistakably associated with the FEAR THE BROW mark to oppose Coffman's registration.[10]

Using a right of publicity statute, Davis could argue that Coffman's use of the catchphrase "Fear the Brow," although coined by Coffman, exploits Davis' likeness for commercial gain. Right of publicity law focuses on keeping individuals from exploiting celebrities' unique characteristics, of which Davis' unibrow may be one.

Despite NCAA rules that prevent college athletes from profiting from their image while playing college sports, Davis could have retained a lawyer to file intent to use trademark applications for similar marks that he planned to use in the future, like RAISE THE BROW.[11] An intent to use application would have saved his spot in the trademark application line until he was no longer a college athlete and could begin to use the mark in interstate commerce.

Unfortunately for those people who coin catchphrases that refer to professional athletes or celebrities, the time to exploit those catchphrases will likely be limited to the time it takes the famous individual to call a trademark lawyer.

But, those coiners like Byron Scott who create a catchphrase that does not refer to a specific individual may be out of luck if someone uses the mark in interstate commerce first.

Ironically, neither Scott nor Riley ever won three consecutive championships. The Chicago Bulls twice won three consecutive championships in the 1990s, the Los Angeles Lakers won three in a row in the 2000s, and the New York Yankees won three consecutive World Series at the end of the

---

[7] 15 U.S.C.A. § 1052(c) (West).

[8] As of July 24, 2012, the USPTO Trademark Electronic Search System listed seven concurrent applications to register "Linsanity." Jeremy Lin is currently listed as third in line, Serial No. 85541426, with a filing date of February 13, 2012.

[9] Randy Johnson received a trademark registration for THE BIG UNIT, Reg. No. 2914855, on December 28, 2004.

[10] This is similar to why the USPTO examiner refused to register the LINSANITY mark to anyone other than Jeremy Lin. An individual can oppose the registration of a mark if it falsely suggests a connection to the individual. Lin had a stronger case because the mark included his name. But there are many cases where a mark suggests a connection to an individual, even though the mark does not include the individual's name. TMEP §§1203.03, 1203.03(e); *see Buffett v. Chi-Chi's*, Inc., 226 USPQ 428, 429 (TTAB 1985) (holding that the term "Margaritaville" is unmistakably associated with Jimmy Buffett).

[11] Davis applied for the RAISE THE BROW mark, Serial No. 85642988, on June 4, 2012.

20th century. Unfortunately for Scott, Riley was the one making money on the use of the THREE-PEAT trademark during those streaks.

Apparently, Scott should have talked to a trademark lawyer back in 1988.

* * *

*Paul A. Borovay is a summer associate with Pattishall, McAuliffe, Newbury, Hilliard & Geraldson LLP, a leading intellectual property law firm based in Chicago, Illinois. Pattishall McAuliffe represents both plaintiffs and defendants in trademark, copyright, and unfair competition trials and appeals, and advises its clients on a broad range of domestic and international intellectual property matters, including brand protection, Internet, and e-commerce issues.*