

SPECIAL INTEREST ARTICLES:

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- **Sports Agents: State & National Requirements**
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UP COMING EVENTS:

Annual New Orleans Luncheon

Join us for lunch at the New Orleans Arena and a tour of the newly renovated facility. More details to follow

Baton Rouge Spring Event

We are making final arrangements for an event to be held in Baton Rouge later in March 2014. Details will be circulated in the near future.

2013 In-Review

Thank you for helping to make the inaugural year of the Louisiana Sports Law Association a success.

On December 11, 2012, we held our **Kickoff Luncheon** at the Mercedes Benz Superdome which featured lunch on the 50 yard line, brief presentations by Doug Thornton and Alan Freeman, and guided tours through the Dome.

We held the **Baton Rouge Tip-Off Event** in Tiger Stadium which included dinner in the Lawton Room, a brief speech and question and answer session with LSU Athletic Director, Joe Alleva, a guided tour of Tiger Stadium, and tickets to the LSU v. Missouri basketball game.

With the help of several members, the LSLA also held two CLE events. The **first CLE** event was held at the Lawton Room in Tiger Stadium and provided two hours of CLE credit and CLE presentations were made by Bob Barton (Taylor Porter, Baton Rouge), outside counsel to the LSU Athletic Department and David Hardy (Roedel Parsons, Baton Rouge), outside counsel to the Tiger Athletic Foundation and LSU Foundation. Following this event, many of the attendees walked down the road and enjoyed the evening at Alex Box Stadium as LSU took on the University of New Orleans.

Finally, we held a **joint CLE** event with the Tulane Sports Law Program and the Sports Lawyers Association on November 7, 2013 at Tulane. This event featured two panel presentations. The first presentation was moderated by Professor Gabe Feldman, Associate Professor of Law and Director of the Tulane Sports Law Program, and Associate Provost for NCAA Compliance. This panel featured: Debbie Spander, Vice

President, Broadcasting, Wasserman Media Group; Roger Kaplan, Sports Arbitrator; Rich Ensor, Commissioner Metro-Athletic Conference; Robert Hacker, Vice President, Business and Legal Affairs, FOX Sports; Rich Wagenheim, Partner, Wagenheim & Wagner, PA; and Peter Goplerud, Dean and Professor of Law, Florida Coastal School of Law.

The second panel discussion was moderated by Vicky Neumeyer, general counsel to the New Orleans Saints and New Orleans Pelicans, and featured Doug Thornton, Senior Vice President, Arenas and Stadiums, SMG; Robert Walmsley, outside counsel to SMG; and Larry Roedel, general counsel to the Louisiana Stadium and Exposition District.

We have plans for a February 2014 lunch event at the New Orleans Arena, a Spring 2014 lunch event at LSU, and others. We will also hold CLE events in both New Orleans and Baton Rouge in 2014. As the LSLA remains a work in progress, we invite your input regarding ideas to enhance the Association, including topics for discussion and publication and opportunities for future events.



(Photo) Kick-Off Lunch on the 50 yard line of the Superdome.

2014 Membership Dues

As a reminder to all of our Members, the due date for payment of LSLA Membership Dues is January 30, 2014. Your payment of \$50.00 may be made on our website at www.lasportslaw.com or by check mailed to the Louisiana Sports Law Association, 8440 Jefferson Highway, Suite 301, Baton Rouge, LA 70809.

Expanding Trademark Law Toward a “Merchandizing Right”



The University of Alabama goes after the “Houndstooth Mafia”

By: Lesli D. Harris and Matthew S. Almon of Stone Pigman, New Orleans Office

Is the orange and blue color scheme of the University of Virginia's athletic teams protected by trademark law? What about the baby blue, black, and white diamond pattern of Duke University's basketball uniforms? Or the houndstooth pattern used by the University of Alabama on some of its sports uniforms and merchandise?

In *Board of Supervisors for Louisiana State University Agricultural and Mechanical College v. Smack Apparel Co.*, the United States Fifth Circuit Court of Appeal extended the trademark rights of universities and similar mark holders by holding that universities' use of their well-known color schemes, in conjunction with "other indicia" associated with those universities is entitled to trademark protection.¹ Since *Smack Apparel*, various universities have taken steps to protect the color schemes associated with their schools. The University of Alabama ("UA") recently moved a step further and filed an Opposition with the Trademark Trial and Appeal Board ("TTAB"), through which it asserts a trademark interest in a houndstooth pattern when used in conjunction with "other indicia" of UA, and opposed two Alabama residents' trademark application for "Houndstooth Mafia." Finding that UA presented no evidence that the houndstooth pattern had acquired any secondary meaning associated with UA prior to the date the Houndstooth Mafia Application was filed, the TTAB dismissed UA's Opposition. The TTAB carefully acknowledged the limits of its jurisdiction, however, and noted that whether the Houndstooth Mafia used its mark in conjunction with UA's widely recognized crimson-and-white color scheme in an infringing manner would be a matter for the courts to address. Accordingly, while UA has lost some yardage, there is still plenty of time left in the game, and UA and other universities are sure to aggressively defend their brands and continue to seek another level of trademark protection for not only their color schemes, but also design or pattern schemes as well.

Expanding Color Protection: *Smack Apparel*

In *Smack Apparel*, various universities sued Smack Apparel Company ("Smack"), alleging that it infringed their trademarks "by selling t-shirts with the schools' color schemes and other identifying indicia referencing the games of the schools' football teams."² The Fifth Circuit determined that the universities' color schemes had obtained the necessary secondary meaning necessary for trademark protection, "[g]iven the longstanding use of the color scheme marks.... in addition to the well-known nature of the colors as shorthand for the schools themselves."³ In light of "the overwhelming similarity of the marks and [Smack]'s intent to profit from the Universities' reputation," the Fifth Circuit held that "Smack's use of the Universities' color schemes and other identifying indicia create[d] a likelihood of confusion as to the source, affiliation, or sponsorship of the t-shirts."⁴ The Court noted that Smack's t-shirts were "designed to create the illusion of affiliation with the Universities and essentially obtain a 'free ride.'" *Id.* at 483-84. Thus, the *Smack Apparel* decision expanded the scope of trademark protection to include color schemes used by a university and its sports teams when used with "other indicia" of the university or its teams.

The University of Alabama and the “Houndstooth Mafia”

The University of Alabama is nationally-known for its storied football program, which has used UA's crimson-and-white color scheme for over one hundred years. For nearly twenty-five years, from 1958 to 1982, UA's football team was coached by Paul W. "Bear" Bryant ("Coach Bryant"). During his tenure at the school, Coach Bryant became well-known for wearing a houndstooth patterned hat. In 2007, two Alabama residents and admitted UA fans (the "Applicants") filed a use-based trademark application to register their "Houndstooth Mafia" mark with the United States Trademark Office. The applied-for mark, which the Applicants intended to use on t-shirts and hats, consisted of the words "Houndstooth Mafia" over a houndstooth pattern background. While the Applicants claimed no particular color combination, the specimen submitted with the application used the crimson-and-white color scheme associated with UA.

UA opposed registration of the mark, claiming that the registration would damage UA because the "Houndstooth Mafia" mark and the associated goods were likely to cause confusion with its own marks. To support its contentions, UA noted in its briefing that it had used the houndstooth pattern on uniforms and equipment for its football team as well as for other educational and athletic services, and that it had licensed the houndstooth pattern for "a wide variety of goods, including shirts and hats" at least as early as April 2006 (more than a year prior to the Applicants' first use of their mark). UA asserted that the evidence it presented created a factual situation "strikingly similar" to that presented in recent case law — including, particularly, *Smack Apparel* — and that the TTAB should follow such precedent and prevent the Applicants from "trad[ing] upon or exploit[ing] [UA's] reputation and goodwill."

The TTAB Dismisses UA's Opposition, But Notes that the Pattern Protection Game Plays On

The TTAB found that Coach Bryant never used his houndstooth pattern hat as a trademark of any sort, and that UA's use of the pattern prior to the Applicants' 2007 filing was only decorative or commemorative and, in any event, nominal. As such, the houndstooth pattern carried no inherent distinctiveness for UA. The TTAB then found that UA also failed to carry its "unusually heavy burden" to demonstrate that the pattern had acquired any distinctiveness (*i.e.*, a secondary meaning) associated with UA — but independent and separate from other UA indicia — before the Houndstooth Mafia application was filed. The TTAB thus held that UA failed to show "that the pertinent consumers recognize and associate the Houndstooth Pattern as a *source* or *sponsorship* indicator of [UA] or that any such association was created prior to the December 3, 2007, [sic] filing date of [A]pplicants' application[.]" and dismissed UA's Opposition.⁵ In so holding, the TTAB was careful to note that its function is limited to the determination of "whether there is a right to secure or maintain a registration[,and that it] can do nothing to prevent parties from using a mark in a certain manner."⁶ **[Continued on p. 3]**

Professional Spotlight: Mike Schline

General Manager, New Orleans Zephyrs

In 1996, before beginning his senior year at Appalachian State University, Mike worked as an intern with the Charlotte Knights, a AAA baseball team in Charlotte, North Carolina owned by Don Beaver. Less than 10 years later, Don Beaver would promote Mike, then 29 years old, to the role of General Manager of the New Orleans Zephyrs.



In 1998, Mike worked in as an intern for another minor league baseball team, the Wort-Hogs of Winston Salem. Then upon graduation from Appalachian State, Mike moved back to Charlotte to work as a sales representative for the Knights. He was quickly promoted to Group Sales Director in Charlotte, and in 2002 he moved to New Orleans to work as the Group Sales Director for the Zephyrs, who are also owned by Don Beaver. By 2004, Mike was the Assistant General Manager for the Zephyrs and in 2005 Mike was named the General Manager following Dan Ranjowski's departure.

Mike admits that his quick rise from an intern to General Manager had a lot to do with being in the right place at the right time and that his learning curve was often baptism by fire. However, Mike places much of the credit of his success on the learning opportunities he had as an intern, the fact that he got involved in the business at a young age, and to those working around him when he came to the Zephyrs—Don Beaver, Dan Ranjowski, and Ron Maestri. Those individuals eased Mike's learning curve and taught him valuable lessons about being a General Manager for a minor league baseball team.

As a General Manager for the New Orleans Zephyrs, Mike's responsibilities are to oversee the business operations of the Zephyrs. To monitor and manage sales and marketing, as well as oversee the facilities, finances and attendance. Mike's biggest task is getting fans into the stadium and creating a top-notch fan experience, and his biggest hurdles are competing against the heavy weights in the New Orleans sports market—the Saints and Pelicans—for sponsorships and revenue. And thanks, in large part, to his baptism by fire Mike is up to the task and he is committed to the success of the franchise in New Orleans.

Mike's schedule usually involves getting to the Stadium at 8:30 working a full day to prep for a game which includes, meetings with the grounds keepers, hospitality, concessionaires, monitoring the volatile South Louisiana weather, all before his most important tasks of meeting and greeting fans and sponsors throughout the game. On game days, Mike doesn't leave the stadium most nights until 11:00 p.m. Long days for sure, and when the Zephyrs are in-season is not even Mike's busiest time of the year. That would be the offseason, when Mike is securing sponsors, selling season tickets, and making sure various projects at the Stadium are completed before opening day. So to all the fantasy baseball general managers out there, please consider reality before contemplating a career change.

Expanding Trademark Law (continued)

To that end, the TTAB conceded that UA may later bring suit for, *inter alia*, infringement and unfair competition.⁷ "To the extent the University contends [A]pplicants' use of the HOUNDSTOOTH MAFIA and Design mark in connection with a Crimson and White color scheme on apparel or in advertising deserves to be penalized, this is beyond the scope of the [TTAB]'s jurisdiction and for the courts to address."⁸

Conclusion

Though the TTAB held that UA failed to show any protectable interest in the houndstooth pattern alone prior to the date of Applicant's filing, it nevertheless conceded that the question of whether the pattern could be used in an infringing manner together with UA's crimson-and-white color scheme was a matter for the courts to decide at a later date. Because of this, the TTAB explicitly noted that it did not consider applicable federal jurisprudence involving the use of color schemes with other identifying indicia — including *Smack Apparel*. If this dispute migrates to the courts and the focus of inquiry shifts from registration to infringement, it is quite possible that the factual similarities between this matter and the one presented in *Smack Apparel* will allow to UA to obtain some level of protection for its use of the houndstooth pattern *together with other indicia*, such as its crimson-and-white color scheme. If this occurs, then this TTAB opinion will prove to be only a bump in the road upon which universities and similar mark holders are traveling to obtain further "licensing" or "merchandising" rights to the various combinations of "indicia" used for their brands.

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LA R.S. 9:2795: *Limitation of Liability on Property Used for Recreational Purposes*

Under *La. R.S. 9:2795(B)(1)*, an “owner” of land—excluding an owner of commercial recreational developments or facilities—who permits with or without charge any person to use his “land” for “recreational purposes” does not: **(a)** extend any assurance that the premises are safe for any purposes, **(b)** constitute such person the legal status of an invitee or licensee to whom a duty of care is owed, or **(c)** incur liability for any injury to person or property caused by any defect in the land regardless of whether naturally occurring or manmade.

This limitation applies for owners of commercial recreational developments or facilities, but *only* for injuries to persons or property *arising out of the commercial recreational activity permitted* at such recreational facilities that occurs on land which does not comprise the commercial recreational development or facility and over which the owner has no control when the recreational activity commences, occurs, or terminates on the commercial recreational development or facility.⁹

While the purpose of *La. R.S. 9:2795* is clear—to encourage land owners to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes¹⁰—determining when the immunity applies is less so.

In *Richard v. Hall*¹¹, the Louisiana Supreme Court held it was the “owner’s” use of the premises and not the underlying classification of the premises as a commercial recreational enterprise for profit that determined the availability of the immunity provisions to a qualified owner.¹² When, as in *Richard*, the owner/lessor operates the premises as a commercial recreational enterprise but the lessee did not utilize the premises for a commercial profit from recreational activities, the lessee was entitled to the recreational immunity.¹³ Therefore, the person claiming the immunity must utilize the premises for a commercial recreational enterprise for profit to be *excluded* from the immunity.¹⁴

The recreational immunity under *La. R.S. 9:2795* does *not*, however, apply to “willful or malicious failure to warn against a dangerous condition, use, structure, or activity.”¹⁵ “A failure to warn of a dangerous conditions connotes a conscious course of action, and is deemed willful or malicious when action is knowingly taken or not taken, which would like cause injury, with conscious indifference to consequences thereof.”¹⁶

- “**Land**” means urban or rural land, roads, water, watercourses, private ways or buildings, structures, and machinery or equipment when attached to the realty.
- “**Owner**” means the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises.
- “**Recreational purposes**” includes but is not limited to any of the following, or any combination thereof: hunting, fishing, trapping, swimming, boating, camping, picnicking, hiking, horseback riding, bicycle riding, motorized, or nonmotorized vehicle operation for recreation purposes, nature study, water skiing, ice skating, roller skating, roller blading, skate boarding, sledding, snowmobiling, snow skiing, summer and winter sports, or viewing or enjoying historical, archaeological, scenic, or scientific sites.
- “**Charge**” means the admission price or fee asked in return for permission to use lands.

Sports Agents: *Louisiana Registration Requirements*

Written Application & Renewal Must Include:

- The name of the applicant and the address of the applicant’s principal place of business.
- The business or occupation engaged in by the applicant for the five years immediately preceding the date of application.
- The names and addresses of three references, including any persons, if any, with whom the applicant has dealt in his capacity as an athlete agent or in the practice of his business or profession, not to exceed three such persons.
- The names and addresses of all persons, except bona fide employees on stated salaries, who are financially interested as partners, associates, or profit sharers in the operation of the business of the athlete agent.
- The names and addresses of all athletes for whom the athlete agent is providing professional services for compensation at the time of the renewal.
- The name and address of the applicant’s agent for service of process, including an affidavit accepting such appointment from the applicant’s agent for service of process, if not previously filed and on record with the secretary of state.
- \$100 annual registration fee (waived for attorneys who are licensed to practice in Louisiana and active members of the Louisiana State Bar Association).

Louisiana is one of 41 states to have enacted the Uniform Athlete Agents Act (UAAA)—a model state law that provides a means of regulating the conduct of athlete agents—requiring an athlete agent to register with a state authority in order to act as an athlete agent in Louisiana. The registration requirements for athlete agents seeking to contact any Louisiana athlete are established under *La. R.S. 4:422*.

Prior to contacting an athlete in Louisiana, the agent must register with the Public Protection Division of the Department of Justice, and obtain certification with the appropriate professional players association(s) in the professional league(s) for which the agent is soliciting athletes (NBA, NFL, MLB, etc.) *before* registering as athlete agent in Louisiana. The annual registration fee is \$100, unless the agent is a licensed attorney and active member of the Louisiana Bar, in which case no fee is required. Registration is valid from July 1 through June 30 of the following year.

Agent contracts and fees are governed by *La. R.S. 4:423*. All agent contracts must be filed with the Public Protection Division of the Department of Justice.

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Around the State***Champions Square***

Champions Square continues to evolve since its inception in 2010. The development of an amphitheatre and a live concert series in the Square has recently been approved. This will include the installation of a new stage and a reconfiguration of the Square's footprint. Once completed, the Champions Square will serve as the only outdoor amphitheater in New Orleans.

Additionally, the LSED and Zelia have collaborated on the redevelopment of the former New Orleans Centre, including negotiations with a local restaurateur for the development of a restaurant, bar and deli concept which will serve as the anchor for this development.

Tulane University

Tulane remains on schedule to bring football back to campus in the Fall of 2014. With a Stadium Agreement entered into between Tulane and the City of New Orleans in January 2013, construction has been underway for much of this year, and contractors on site have been sensitive to noise levels and vibrations arising from the construction site in order to minimize impact in the surrounding area.

For more information about this project please visit www.tulanestadium.com.

Tiger Stadium

The West and North Stadium Plazas have been completed at Tiger Stadium. These areas showcase the Past, Present and Future of LSU Football. Additionally, these projects have enhanced the entrances and appearance of Tiger Stadium.

***New Orleans Arena***

The LSED is currently engaged in a \$50 million renovation of the New Orleans Arena, which has been separated into two phases. Phase I of construction is scheduled to be completed prior to the 2013-2014 NBA basketball season and Phase II by start of the 2014-2015 season. Phase I focuses on the enhancements to the facility's suites and club levels. Also included in Phase I is the addition of a new loge box section and "The Bandstand", a new bar concept on the terrace level. Phase II will result in a reconfiguration of the Arena's lobby, box offices, and team store. This reconfiguration will create a new main entrance to the Arena while also providing the facility with a distinguishable exterior.

¹ 550 F.3d 465, 483-84 (5th Cir. 2008).

² *Id.* at 471.

³ *Id.* at 478.

⁴ *Id.* at 483.

⁵ *Board of Trustees of the University of Alabama v. William Pitts, Jr.*, 107 U.S.P.Q.2d 2001, pp. 43-44, 68 (T.T.A.B. 2013) (TTAB's emphasis).

⁶ *Id.*, p. 43.

⁷ *Id.*

⁸ *Id.*, pp. 46.

⁹ La. R.S. 9:2795(B)(2)

¹⁰ *See Richard v. Hall*, 2003-1488 (La. 4/23/04), 874 So.2d 131, 150. *See also, Ramos v. State of Louisiana, Through the Department of Transportation and Development, et al.*, 2007-851 (La. App. 3 Cir. 2/6/08), 977 So.2d 1066.

¹¹ 2003-1488 (La. 4/23/04), 874 So.2d 131.

¹² *Richard v. Hall*, 2003-1488 (La. 4/23/04), 874 So.2d 131, 152.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ La. R.S. 9:2795(B)(1).

¹⁶ *Robinson v. Jefferson Parish Sch. Bd.*, 08-1224 (La. App. 5 Cir. 4/7/09), 9 So.3d 1035, 1046.