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The Sporting Times Throws the "Spaceman" a Curveball

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Kentucky based sports magazine, *The Sporting Times*, is looking to hit a homerun in their recent lawsuit against Metro-Goldwyn-Mayer Studios ("MGM Studios") and others for trademark infringement. *The Sporting Times* is suing MGM Studios, production companies and distributors for trademark infringement over use of the magazine's logo for a fictitious headline that appeared in a news clipping montage in the documentary film *Spaceman*. (*The Sporting Times, LLC v. Orion Pictures, Inc.*, No. 17-33 (W.D. Ky. filed Feb. 24, 2017)). *Spaceman*, which opened in theaters August 2016, is a documentary about Bill "Spaceman" Lee, the colorful former left-handed pitcher for the Boston Red Sox and Montreal Expos in the 1970s, famous for his high arcing Eephus pitch (or Space Ball) and for being outspoken on politics and cultural issues like the legalization of marijuana.

In a short clip—lasting only nine seconds—the magazine cover appeared in the film with a headline, dated July 1976, reading "Boston's Bill 'Spaceman' Lee: In An Orbit All His Own." It is the only use of the plaintiff's mark in the film.

Take a Look.

The Sporting Times, a publication targeted to youth sports and families, alleges that its "squeaky clean" brand was injured by MGM Studios' use of the company's name in the clip about the iconoclastic Lee. While the magazine cover depicted in the film makes no mention of drug use or alcohol addiction, *The Sporting Times* claims that use of their name "seemingly sensationalizes and promotes drug and alcohol addiction and has-been middle-aged sports figures."

It should be noted that the news article is dated July 1976, which is 28 years before *The Sporting Times* began publication and 32 years before the trademark was registered, and was a fictional publication created by the production (and perhaps inspired by the look and feel of the former, venerable baseball weekly periodical, *The Sporting News*).

After a mound conference, MGM Studios and co-defendants decided to play hardball and filed a motion to dismiss.

MGM Studios' principal defense is that the "fleeting" use in the film of the plaintiff's mark in a "non-trademark way" as the masthead of a fictitious magazine is protected by the First Amendment. Under application of the so-called *Rogers* test, courts construe the Lanham Act to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression. As such, the First Amendment bars Lanham Act claims unless the use of the mark has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the use of the mark explicitly misleads as to the source or the content of the work. Here, according to the defendants, the use of the magazine title has artistic relevance to a film about a professional athlete, and the film does not mislead the public about its source or origin.

Additionally, defendants believe that that plaintiff's theory for a Lanham Act violation is well outside the strike zone. Defendants contend that the non-trademark use of a mark in a film or trailer is not sufficient to state a



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Lanham Act claim, as the brief appearance of the plaintiff's mark in the film would not confuse consumers as to any sponsorship of the film or somehow harm the plaintiff's business reputation. In the defendant's view, if such claims were upheld, characters in a film couldn't ask for a particular potato chip or mention traveling to a specific venue without first obtaining consent from the trademark owner.

At this point, plaintiff's lawyers are in the on-deck circle awaiting their chance to step up and file their reply to the motion.

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