

# The Front Row

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## The Chair's Comments



Rick Conner

*"If you don't know where you are going, you'll end up someplace else."*

~ Yogi Berra

In the November 2012 newsletter, I wrote that my primary goals for this year were to (1) bring council meetings and events to different parts of the state; (2) provide value to section members; (3) build upon recent momentum in growing section membership; and (4) encourage diversity among section leadership in terms of ethnicity, gender, practice area, and geographic location. Thanks to the efforts of our council, our committee chairs, and our NCBA staff, I believe we made great strides toward each of these goals.

**Getting Around the State** | We held council meetings and social events around the state this year in an attempt to give section members a chance to attend nearby events, attract new section members, and give council members an additional fun incentive to attend meetings. Events included a Durham Bulls game in August 2012, the Asheville Cinema Festival in November 2012, a Charlotte Bobcats game in February 2013, and a tour of EUE/Screen Gems Studios in Wilmington in May 2013. All of these events included networking socials and were well attended by section members and prospective members. I hope all of you can join us for similar events in the future. Plans are already in the works for a meeting and social event in August 2013 at a Winston-Salem Dash game.

**Providing Value to Section Members** | Section members who attended this year's meetings and social events enjoyed networking socials as well as behind the scenes tours at EUE/Screen Gems Studios and Time

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## So Who Owns the Rights to the Car Numbers in NASCAR Anyway?

*By Jason Larsen*

*Life has a strange circular way about it.* I once was fortunate enough to find myself in some of the most amazing cathedrals in Europe while wishing that I had paid a little more attention during my undergraduate introductory Art History course. Similarly, it was during my neophyte days as a law clerk at CMG Worldwide (CMG) when I was perplexed as to how the number 9 could be licensed and used by both Kasey Kahne and Bill

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# NASCAR Numbers

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Elliott that I first encountered the topic of this article. One of my colleagues informed me that Evernham Motorsports owned the trademark in the number 9, which was sufficient for my needs at the time. Now I find myself penning this article wishing I would have asked more questions of my mentor and then supervisor, Jonathan Faber.

While continuing to draw on my days at CMG, one way to liken the dichotomy of the rights landscape of NASCAR car numbers is to that of copyright and the right of publicity. On one hand, a person may own the copyright in and to an image, but they do not necessarily own the rights to commercially exploit the individual in their photograph. Likewise, NASCAR teams may own trademarks in their number (both stylized and unstylized), yet they do not actually “own” the number in a traditional sense and certainly not for competition purposes.

NASCAR controls and allocates the numbers used on race cars to its participating race teams on an annual basis. The first team who requests use of an available number is typically granted such use, although a preference is given to those who race full time in the respective racing series. No two cars may utilize the same number during a single event, and occasionally (primarily just in NASCAR’s lower-tier series today) a part-time team may be issued a three-digit number if another team is currently featuring the same double-digit number such team requested (e.g., #17 & #117). As the sanctioning body, NASCAR reserves the administrative right to revoke or transfer numbers at any time, for any reason. However, in practice teams are usually awarded the same number(s) on a year-to-year basis. As such, particularly as merchandise sales started to become a strong revenue stream for teams, teams began taking steps to protect their intellectual property rights, including trademarking “their” numbers.

Not surprisingly, the scion of one of NASCAR’s most prominent racing families, and its top merchandise seller, was involved in one of the more high-profile matters highlighting this dichotomy between “ownership” of numbers and NASCAR’s allocation of numbers. As Dale Earnhardt Jr. (Junior) prepared to join Hendrick Motorsports for the 2008 NASCAR season, he had been working to keep his familiar number 8 affixed to his new race car. NASCAR likely would have approved the number 8 transferring from one team to another had there been no opposition by Dale Earnhardt Incorporated (DEI) (Junior’s former team and the owner of a trademark registration to the stylized 8). Technically, NASCAR could have approved it regardless, but doing so would have been a politically sensitive matter. Ultimately NASCAR never had to make a decision, as Junior, unable to reach an agreement with DEI, made a strategic move to migrate to the then-unused number 88. Although this instance did not involve litigation, it would have been interesting to see how a court would have decided Junior’s (or NASCAR’s) theoretical challenge of DEI’s trademark rights to the number 8. It is certainly arguable that over time a highly-popular driver does develop intellectual property equity through continuous use of the same number in his or her racing series.

Just up the family tree, the iconic number 3 of Dale Earnhardt Sr. (Senior) is one of the most recognizable numbers in all of sports, despite the fact that Senior earned almost a third of his career victories in cars donning other numbers. Nevertheless, that has not stopped Richard Childress Racing (RCR), Senior’s longtime team owner and owner of the trademark to the stylized, left-slanted 3, from ensuring that his rights and Senior’s legacy remain intact. This was never more evident than when RCR initiated a lawsuit against media giant ESPN over the film “3: The Dale Earnhardt Story”, which was not properly authorized according to Senior’s widow, Teresa Earnhardt, and not properly licensed according to RCR. As with the majority of intellectual property cases, this dispute was ultimately resolved through an out-of-court settlement.

What might be the most intriguing story yet involving NASCAR numbers may occur in the near future. At issue is what will ultimately become of the number 3 in the NASCAR Sprint Cup Series. RCR owner Richard Childress (with permission of NASCAR) has been utilizing the number 3 in NASCAR Camping World Truck and NASCAR Nationwide Series events with his grandsons Ty and Austin Dillon behind the wheel, but the number has not been seen in the NASCAR Sprint Cup Series since Dale Earnhardt Sr.’s unfortunate and untimely death in 2001 during the final laps of the Daytona 500. As the Dillon brothers have progressed through the ranks, much discussion has centered on if older brother Austin will keep the number 3 if he makes the jump up to the NASCAR Sprint Cup Series on a full time basis. While Richard Childress might have to assess any possible public relations repercussions of bringing the number 3 back to the NASCAR Sprint Cup Series, he shouldn’t have to worry about any trademark issues, though as discussed above, the ultimate decision most likely will rest in the hands of NASCAR. Playing devil’s advocate, one may have to consider if over the past twelve years the left-slanted stylized number 3 has become so inextricably linked with Senior that any use in commerce could potentially expose RCR to a creative right of publicity claim which could result in a groundbreaking judgment. Ultimately, how that issue turns out will likely be up to history and the various rights holders...and lead to another article. ●

**Jason Larsen** is a graduate of the Indiana University School of Law – Indianapolis and during his career has served as in-house counsel for CMG Worldwide, NASCAR Media Group and Intersport (Chicago). He is currently a Vice President, Sourcing Lead for Bank of America in the Global Marketing & Consumer Affairs division focusing on contract negotiations with third party vendors.