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February 2018

Marketers Beware: Don't Fumble Your 'Super Bowl' and Olympics-Related Advertising

The Super Bowl and the Olympics are among the biggest and most-visible sporting events on the planet. Marketers naturally want to take advantage of the popularity of these events to promote their brands. Without proper permission, however, attempts to ride the coattails of these events can raise an array of legal risks and headaches. Here are just a few issues to consider.

Copyright in Broadcasts

Television broadcasts of sporting events are protected by copyright. We all have heard the familiar warnings during broadcasts that any rebroadcast, recording, or other use of a broadcast without permission from the owner is prohibited. What many people may not realize, however, is that even playing the broadcast on a large-screen TV at a place of business could possibly involve a copyright violation as a form of unauthorized "public performance."

The issue arises from the definition of a "public performance" of a copyrighted work under Section 110(a)(A) of the Copyright Act, which allows: "the public reception of [a] transmission on a single receiving apparatus of a kind commonly used in private homes, unless – (i) a direct charge is made to see or hear the transmission; or (ii) the transmission thus received is further transmitted to the public.

Accordingly, if a bar, restaurant, or other public place wishes to show a copyrighted broadcast, it needs to consider the size and type of equipment on which the broadcast will be shown, and also must be careful to avoid imposing a cover charge to view the broadcast. There is no fixed guideline on the exact size or nature of a permissible screen, which could be different today from years past before large flat-screen TVs became popular in homes. (A separate provision of the law applicable to "non-dramatic musical works" provides more specific guidance with limits of 55 inches, four screens, and other details based on the size of the establishment.)

Trademarks

Marketers also need to remember that "Super Bowl" is a registered trademark of the NFL and cannot be used in any way that could cause confusion as sponsorship, endorsement, or affiliation without permission from the trademark owner. The mark also could be strong enough to support claims of "dilution" even if used with disclaimers or other wording to try to make clear that the marketer is not an official sponsor or affiliated in any way with the game.

For this reason, any marketer who is not an official sponsor of the Super Bowl – or who does not otherwise have permission from the trademark owner – cannot use that term to promote its products or services. Of course, this hasn't stopped all marketers from running football-themed promotional programs at or near the time of the Super Bowl. But it does require them to become creative, sometimes just with general football-related imagery or generic terminology to refer to the game.

Special Issues for the Olympics

In addition to the usual trademark protections, the organizers of the Olympics have at least three additional extra protections. The first is a special federal statute giving the U.S. Olympic Committee (USOC) exclusive rights in several "Olympic" terms, as well as in the familiar interlocking-ring logo. These special federal rights go beyond regular trademark law and give the USOC the ability to enforce its exclusive rights without always needing to prove whether confusion might exist.

The second special right relates to featuring athletes in ad campaigns which, even if they do not use the "Olympic" name or logo, would otherwise be understood by the public to be associated with the Olympics because (a) the featured athletes are well-known Olympians, and (b) the campaign runs during or near the time of the Olympics. Basically, running ad campaigns featuring such athletes is barred during a black-out surrounding the games unless the advertiser has obtained advance permission based on a continuous and ongoing campaign that started long before the Olympics.

The third tool is a series of special laws each host country is required to enact in connection with its edition of the games. These laws typically ban an assortment of terms, images, and references to the particular edition of the games to help cut down on "ambush" marketing by nonsponsors of the games. Examples for the 2016 winter games include "Pyeongchang 2018," and "Road to Pyeongchang," as well as the usual "Olympic" terms, and even phrases such as "Go for the Gold," "Let the games begin," etc.

In sum, any company that is not an official sponsor or does not have direct permission from the presenters of major global sporting events should take great care in trying to ride the coattails of those events for commercial advantage.

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