

The Football Game that Can't Be Named : Basic Trademark and Other Rules

Super Bowl, there I said it. My use of the NFL's registered trademark in this article is permitted under the legal defense of nominative fair use. But companies need to be wary of using the NFL's Super Bowl trademark and any other party's trademark in commercial speech to sell their own goods unless they obtain authorization from the trademark owner. This applies to all commercial speech regardless of media channel, including branded tweets, Facebook posts and social media. Since Lamar Hunt first coined the term and the NFL registered it as a trademark in 1969, the NFL has zealously policed the trademark. All trademark owners have a legal duty to police their marks and many companies of all types actively engage in trademark protection strategies. This is especially true of trademark owners, like the NFL, who sell sponsorships rights for events or license their name to sponsors for large fees (e.g. Super Bowl, Olympics, Final Four, March Madness, Oscars). But it is also true of other companies who have invested billions or millions of dollars in developing their brand and have a financial interest in protecting it. Legal defenses are available in some cases of use of another's trademark, such as where the use of Super Bowl or other trademark constitutes a nominative fair use. Although the federal circuit courts take different approaches to determining nominative fair use, courts generally require the advertiser to demonstrate the following:

- The trademark owner's products or services cannot be readily identified without use of the trademark;
- The advertiser uses only as much of another's trademark as is necessary to identify the goods and services; and
- The advertiser does nothing with the mark that suggests the trademark owner's sponsorship, endorsement or approval of the endorser or that confuses the consumer.

Although advertisers can, in some cases, defend their use of Super Bowl on these nominative fair use grounds, most decide the risk of an NFL cease and desist action is not worth the fight. They instead choose work arounds such as "Big Game" or "Super Sale". Other activities that create a significant risk of objection by the NFL on trademark infringement, copyright or other grounds include:

- **Sweepstakes or Giveaways** that include "Super Bowl" in the name or as a prominent feature of advertising even if the prize is lawfully purchased tickets to the Super Bowl. Like tickets to many other sporting events, tickets to the Super Bowl include language on the back prohibiting use of the ticket as a part of a sweepstakes, giveaway or other promotion.
- **Super Bowl Events or Parties** held by bars and restaurants that use Super Bowl in their advertising without authorization or charge a fee to attend (even if the establishment has a public performance license to show the game on its premises) or held by others where a fee is charged to attend in violation of the NFL copyright in the broadcast itself.

But don't let this dampen your personal plans for a Super Bowl party. So long as you don't charge admission to your friends, you are in the clear! *This article is general in nature and does not constitute legal advice. Readers with legal questions should consult with an attorney prior to making any legal decisions.