

NFL in tough spot regarding Super Bowl parties

March 12-18, 2007

With the multitude of stories and media activity leading up to the Colts' appearance in Super Bowl XLI, who would have guessed that an otherwise mundane intellectual property enforcement issue concerning the NFL and a local church would take the top headline just days before the Big Game?

Such was the case when the NFL sent a cease-and-desist letter to Fall Creek Baptist Church, thereby stopping the church's plans to show the Super Bowl on a 12-foot projection screen and charge a modest fee to cover costs. The NFL reportedly instructed the church that it could not use the league's trademarks in promotion of the event, charge a fee, or display the game on a screen larger than 55 inches, all according to established league policy.

The story made headlines and generated a series of editorials over the course of several days. In the coverage, several intellectual property scholars went on record stating that, at least technically, the NFL was within bounds in asserting its copyright and trademark interests. Those counterpoints were largely lost in the din of comments, such as "the NFL is out to stop churches because they're not sponsored by Coors and Marlboro."

Public relations dilemma

Obviously, the NFL had a public relations problem on its hands, and the unanimous verdict from the public was that the NFL acted as a corporate bully, squashing harmless activities of well-intended people for the purpose of increasing profits. While I am not commenting on the NFL's handling of the situation, there are certain factors that help contextualize the difficult position the NFL was in.

Issuance of cease-and-desist letters is standard practice in the arena of intellectual property enforcement. Enforcement of intellectual property is not an easy business to navigate, and I speak from the perspective of having handled many enforcement issues on behalf of famous trademarks and personalities.

Many people or businesses who violate a third party's intellectual property rights demonstrate a celebratory flouting of intellectual property laws. I have consistently observed an impulse to "stick it to the man," but in most cases the offenders have no idea to whom exactly they were sticking it, just a vague sense of someone deserving it. Clearly, this does not apply to the parties in this particular controversy, but it does demonstrate the environment in which the NFL is forced to operate. For the record, I agree with the notion that it is no doubt better for society to have people watching the game in church than at bars. But I'm not sure this logic frames the issue properly.

Ignoring violations unwise

In law, there is an affirmative duty upon the owner of the intellectual property to police and enforce its rights. Failure to do so can unleash a host of unpleasant consequences that undermine the ability to prosecute serious offenders in the future.

I'm confident the NFL does not relish taking such a position against a church. To my knowledge, the NFL was not seeking any damages for the promotion of the event that had already taken place. The real issue is that once an unauthorized use becomes specifically known to the owner of the intellectual property, the aforementioned duty to respond is triggered.

If infringements occur under the nose of the owner and the owner takes no action, it becomes harder to assert those rights in the future. Conversely, if the owner is diligent, then when a more serious infringement comes along—presumably not a church—the owner can show a history of protecting its assets and not making exceptions.

Should an exception have been made for the Fall Creek Baptist Church? For churches only in the area of a team in the big game? Is Shelbyville or Muncie part of this area? Is the exemption limited to churches, or does it include all places of worship? How does one define (for legal purposes) "places of worship?"

The exception would quickly swallow the rule, and the NFL could conceivably face death by a thousand paper cuts. There were probably thousands of similar parties in the pipeline. If one were allowed, they would all have to have been allowed. Perhaps it was simply easier to stop the church as it did than face the litany of problems.

I am glad I didn't have to tackle these questions, but they raise valid considerations that surely had an impact on how the NFL approached the situation. Like Sisyphus and his rock, enforcement of intellectual property is a perpetual uphill battle.

Faber is president & CEO of Luminary Group LLC.



VOICES FROM THE INDUSTRY
Jonathan L. Faber