



A Licensing Parable

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Greek mythology tells the tale of Sisyphus, a mortal King with the hubris to believe that his cleverness surpassed that of the god Zeus. His punishment in the afterlife was forever to push a boulder up a steep hill which, upon reaching the top, rolls

back to the bottom, dooming Sisyphus to an eternity of profound frustration and perpetual labor. This archetypal story offers a useful analogy to an ever-present licensing corollary: policing and protecting intellectual property.

Intellectual property forms the foundation of every branding and licensing program, from John Deere to Andy Warhol, and all points in between. Without recognition for the trademarks, copyrights, or rights of publicity which make up such assets, infringers would cannibalize the market. In the process, brands would be diluted, quality control would evaporate, and the licensing industry would be eviscerated.

This is so because without broad recognition for intellectual property such activities would not be an infringement at all. They would be perfectly legal. While this dire outcome is unlikely to come to fruition, some people would hasten its arrival, and the general public likely would initially cheer the removal of impediments that respecting intellectual property imposes on us all.

The challenge of intellectual property enforcement is not limited to the ubiquitous and all-too-familiar wave of pirated goods entering the market. A recent brouhaha emanating from Super Bowl XLI, in which the Indianapolis Colts were facing off against the Chicago Bears, while not involving piracy, yielded an equally vexing case study replete with public relation pitfalls.

The NFL Goes to Church

There was no lack of headlines and predictions during the weeks leading up to the Super Bowl, but who could have predicted that an ostensibly routine and otherwise

unremarkable intellectual property enforcement issue would make front page headlines in the home city of the Colts, just days before the Big Game?

The controversy focused on the National Football League's issuance of a cease and desist letter to Fall Creek Baptist Church in Indianapolis. The church planned to show the Super Bowl on a 12 foot projection screen and charge a fee to cover costs. The church's website referred to the viewing party as a "Super Bowl Bash." The NFL reportedly instructed the church that it could not use the league's trademarks, charge a fee or broadcast the game on a screen larger than 55 inches, all according to established league policy.

Predictably, few people know of the league's policy in this regard—why would they?—and viewing parties have been around for years. The inclination for churches to hold such gatherings this year presumably was especially strong, in light of the milestone of not just one, but two African-American head coaches reaching the Super Bowl, each with outspoken religious beliefs and a strong bond of friendship.

In this context, the NFL's cease and desist letter to the Fall Creek Baptist Church became above the fold, front page headline news in the Thursday, February 1 edition of the *Indianapolis Star*. The prominence of this particular story was striking given that it was only three short days before the Colts' first appearance in a Super Bowl during the Indianapolis era (twenty-three years, if you're counting).

The NFL's "Policy On The Public Performance Of Game Broadcasts" articulates a "homestyle exemption," which allows performance of a televised game as long as it is on a single receiving apparatus "of a kind commonly used in private

homes, and as long as there is not a direct charge to view the transmission and the transmission is not further transmitted to the public.

The NFL does not object to its games being shown on a single television receiver which is "set up in a room or bar, provided payment is not a condition of entry." NFL spokesman Greg Aiello said the league has a longstanding policy against "mass out-of-home viewings" of the Super Bowl, even if the hosts do not charge admission. The NFL allows an exception to this rule for sports bars that show televised sports on a regular basis. Churches, on the other hand, do not show televised sports on a regular basis.

It is worth noting that the church would have been able to proceed with its plans to host a gathering upon making a few modest adjustments in order to comply with the NFL's policies. For example, not charging a fee specifically for entrance, and limiting the screen size to 55". While not convenient, the NFL's position was perhaps not as Draconian as it was generally portrayed in the media. But that did not stop people from crying "foul!"

The Court of Public Opinion

A series of condemning editorials appeared in the *Star* following its cover story, and Internet postings by the general public delivered a unanimous conviction of the NFL in the court of public opinion. Several intellectual property scholars, in contrast, were unanimous in stating on record that the NFL was legally within bounds in asserting its rights based on these facts.

Those counterpoints were largely lost in the din of postings like “the NFL is out to stop churches because they’re not sponsored by Coors and Marlboro.” Obviously, the NFL had a public relations problem on its hands. 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 the NFL’s profits. While I am not intending to comment on or condone the NFL’s exact handling of the matter, there are certain factors that help contextualize the NFL’s difficult position.

Enforcement of intellectual property is not an easy business to navigate. I speak from the perspective of having handled many enforcement issues on behalf of famous trademarks and personalities. Many people or businesses, in the wake of being caught violating 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.” And yet, in most cases the offenders have no idea to whom they were sticking it, just a vague sense of someone deserving it.

Undoubtedly, this does not apply to the parties in this particular controversy, but it does demonstrate the environment in which an owner of intellectual property is forced to operate when policing its intellectual property and protecting the value of its existing relationships and contracts.

Intellectual Property: An Inconvenient Necessity?

There seems to be a growing tension between the public’s tolerance for intellectual property laws and the public’s desire to not be restrained or even inconvenienced by such laws. Global markets are becoming more integrated, digital content

is instantly accessible worldwide, and technology lends itself to low cost manufacturing of high quality infringements. Intellectual property underscores all such progress, yet ease and access fosters infringement. As a result, it is easy to foresee both an increase in enforcement skirmishes like the NFL’s, and also a decline in the public’s respect for intellectual property.

The Super Bowl situation evokes the Napster controversy in which Metallica filed suit against thousands of defendants who had illegally downloaded the band’s music. The public outrage that the band was “suing its fans” was virtually unanimous if dangerously simplistic (and erroneous), but the band’s previously untouchable sheen took a hit.

The undeniable efficiency of peer-to-peer file sharing seemed to give birth to a “convenience” defense, and its fraternal twin, “everyone else is doing it.” In handling enforcement communications with offenders, I am often presented with these gems (which are usually served with a generous side of righteous indignation). I wonder if those same people would use this excuse with a police officer if they were caught speeding. Try the “convenience” or “everyone else is doing it” argument with the police officer, and see how that works out.

This acerbic retort probably applies more to those who produce pirated goods or who appropriate another’s trademark, copyright, or rights of publicity purely for commercial gain, than to an obviously “innocent” church. But you take those who violate your intellectual property as you find them, and being in the middle of enforcement initiatives feels much like a fisherman casting a net into water: the moment the net is pulled from the water, more fish swim into the area.

Coach's Challenge: Instant Replay

The church did not proceed with its party plans, and many other churches throughout the country scrapped plans at the eleventh hour as a result of the coverage and a sudden awareness of the NFL's policy. The Senior Pastor of the Fall Creek Baptist Church, Dr. John Newland, issued a statement on the church's website stating that he believed the church faced an ethical dilemma as to whether its beliefs gave the church the right to disobey the law and ignore the NFL's position.

The NFL gave no indication to us as to how our showing "The Game" on a screen larger than 55 inches would adversely affect them or CBS or its advertisers in any way. Another reason we thought the law was wrong stemmed from our belief that the law discriminated unfairly against Americans under the age of 21 and people who objected on moral or health grounds to being limited to sports bars as the exception to the law, because sports bars are specifically exempted from this provision in the Copyright Act. Those over 21 years of age who might potentially object to being limited to going to sports bars to watch "The Game" with a mass audience would naturally be recovering alcoholics and people of faith.

Of course, the standard for infringement is not to demonstrate how an infringement "would adversely affect" the owner. If it's an infringement, it's an infringement. That the law is discriminatory is unlikely, but perhaps that is a topic for a separate article. 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.

Use It or Lose It

In intellectual property law, there is an affirmative duty upon the owner of the intellectual property to diligently police and enforce its rights. Failure to do so can unleash a host of unpleasant consequences which undermine both the recognition of those rights and the ability to prosecute serious offenders in the future. As such, issuance of cease and desist letters has become standard practice in intellectual property enforcement.

Ironically, the media's high-profile publicizing of the church controversy may have forced the NFL to vocalize its policy against out-of-home viewing of the game more strenuously. When an intellectual property owner is required to articulate its position against unauthorized and infringing uses of its intellectual property, the owner is almost forced to go on record as articulating a "zero tolerance" policy.

I'm confident the NFL did not relish taking such a position against a church. To my knowledge, the NFL was not seeking 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 of the intellectual property 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 on an *ad hoc* basis.

Splitting the Baby: How Would King Solomon Rule?

Nothing puts things in perspective more effectively than role reversal. Many businesses have intellectual property interests which it would likely protect vigilantly if faced with a violation or infringement of its rights. The NFL is fortunate enough to have particularly valuable intellectual property interests, and its own prosperity becomes part of the public's chant ("they have enough money already, they're just being greedy").

If the prevailing sentiment is that the church wasn't doing any real harm, notwithstanding fairly clear copyright and trademark arguments in favor of the NFL, then the question must be asked, what resolution would have been appropriate?

Should an exception have been made for the Fall Creek Baptist Church? For churches only in the vicinity of a team in the big game? Where are the boundary lines drawn? Are neighboring communities outside of the beltway part of the area by virtue of proximity? 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 throughout the country 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 touched upon here.

Intellectual property forms the backbone for all licensing programs, and every intellectual property owner, or licensing agent as a steward of its clients, should be prepared to confront the eventuality of infringement. However, like Sisyphus and his rock, enforcement of intellectual property is a perpetual uphill battle.