

TRADEMARKS AND COPYRIGHTS IN ADVERTISING

March Madness Advertising

Much like the Super Bowl and other major sporting events, the NCAA Men's Division I Basketball Championships provide twenty-one days of opportunity for marketers to reach their target consumers. In recent years, before COVID, television advertising alone led to over \$1 billion in revenue. After cancelling the tournament in 2020, the NCAA had a drop in revenue of over \$600 million, in part due to the loss of \$700 million in television and print marketing rights. This year, those advertising revenues will be critical to the NCAA bouncing back and one way the NCAA has historically succeeded in monetizing its branding is by monitoring trademark use.

The NCAA Trademark Portfolio

The NCAA (officially, the National Collegiate Athletic Association) has over one hundred registered trademarks, including:

- March Madness
- March Mayhem
- Sweet Sixteen
- Elite Eight
- Final Four
- And Then There Were Four
- Champions Play Here
- The Big Dance

These registrations give the NCAA the right to try to prevent the use of their trademarks if they believe a likelihood of confusion exists. And the NCAA has a demonstrated history of protecting its intellectual property with the zeal of an SEC or ACC school fan in the Final Four.

“Will the NCAA Try to Stop Us” or “When the NCAA Met Vasectomy Mayhem”

And just when you think it couldn't get any more bizarre, mere days ago, the NCAA flagged a company that was seeking to register a trademark in “Vasectomy Mayhem.” In its efforts to shut down the Virginia Urology Center's application, the NCAA argued that “Vasectomy Mayhem” was confusingly similar to the NCAA's March Mayhem and somehow would result in confusion, mistake or deception between the tournament and the procedure. As unlikely as that may be in practicality, and as questionable as “Vasectomy Mayhem” is as a marketing term for a urologist, it makes one thing clear: use the NCAA's trademarks at your peril.

And yes, the NCAA looks for print advertisements and especially looks for those that appear in online formats. That includes advertisements that are published in newspapers, even if the paper did not create the ad copy. Indeed, it's unlikely that a “pick-and-roll” will protect you from the long arm of the NCAA. At the same time, remember this applies predominantly to advertising. News coverage of the tournament or even editorial coverage can use the trademarks. This is often called “nominative fair use,” where you're using the name to describe the event and not to offer products or services with the name. So, keep on reporting and feel free to comment about

our state's number one seed or the number eleven's play-in game, but beware what your advertisers are bringing to the floor.

Finally, Don't Forget to Watch those Photos and Images

But tournament time isn't just about trademarks. Just like that valuable branding, copyrights are a protected part of intellectual property. A copyright protects original works of authorship including literary, dramatic, musical, and artistic works, such as poetry, novels, movies, songs, computer software, and architecture. In terms of advertising, and especially with the NCAA tournament in mind, publications need to consider all images that go into marketing materials to make sure that the advertiser or the newspaper has the proper rights to use these images. And the NCAA isn't the only entity watching and waiting for what they consider to be a steal.

For those who have run across the high-volume copyright infringement companies (Higbee and Associates, Evans and Dixon, and Robert Fechner), you understand the playbook. These companies use web scraping technology to find uses of copyrighted images (or, at least, images they claim are copyright protected). Once they find a use, they will either send a demand letter or a link to a payment portal where they deliver their demand for several thousand dollars. Knowing that litigation will cost far more, they hope that individuals and companies will pay the fee and avoid further expense.

The best way to avoid that style of game is to stay out of the potential infringement side of the bracket. This starts with knowing where your images come from. In recent years, more advertisers are no longer providing stock images and, instead, rely on the newspaper to use an appropriate graphic or photo. Rather than searching the web for the perfect image, it's important to make sure that there is a license in place that covers the image. Because, as experience has shown the MPA Hotline Legal Team, these companies will still send letters to those who have licensed images in the past. It's also easier to avoid cutting and pasting Google images than it is avoiding a double dribble. Make sure your team is assessing everything they add to your advertiser's content.

Is this a fair use?

In the past, the Bulletin has covered the four fair use factors. As a refresher, copyright law tends to favor the journalist and embrace the need for reporting and social commentary. But as the nature of media has evolved to embrace access to materials on the internet, the risks have also increased. To be confident in using materials, a fair use assessment is recommended.

The U.S. Copyright Act establishes four factors that must be balanced to determine if the use of a copyrighted work is a "fair" use. These include:

- the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use upon the potential market for or value of the copyrighted work.

No single category rules the day. You have to consider all four factors for each clip, video, book quote, or online content that is used.

Tips for Advertising Success: For the Tournament and Beyond

So, what do we need to do to avoid bursting our proverbial brackets? Here are a few handy tips to make sure your selections, in this case, of images and slogans, don't end up a one-and-done:

- Watch for the use of any possible NCAA trademarks in advertising copy. If you find it, call to see if it can be removed.
- Strive to use licensed photos, artwork, etc. when you are adding visual components to any ad copy. Using a stock photo account is optimal.
- Document images or retain some form of history so that you're prepared to prove that you're operating with a licensed image if the copyright firms come calling.