

January 30, 2012 | 5 Comments

SUPER BOWL® trademark post XI: Consumer Reports and the super-duper exemption

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Yes, it is that time of year again — the SUPER BOWL® trademark overreaching (dare I say bullying?) time of year. This January I'm focusing on this article from, of all places, *Consumer Reports*, which focuses on the BIG GAME non-trademark aspect of the NFL's X's and O's on this:

[[If you've been searching the Web for an amazing Super Bowl deal on an HDTV only to find the pickings slimmer than a runway model after a three-day fast, we have another suggestion: Try substituting the term "Big Game" for "Super Bowl" in your search engine.

*Get a bit more action? That's because retail ads and promotions can't legally use the phrase "Super Bowl"—or even "Super Sunday"—unless the companies have paid big bucks (really big bucks) to the NFL, which owns the trademarks to the two terms. Fortunately, exceptions are made for news organizations like *Consumer Reports*, or this article would have a different headline.*

Good idea on the search strategy. But not quite sure I get that last line. Yes, they're right about the application of the fair use doctrine to news and commentary, but mistaken (and surprisingly, given *Consumer Reports'* supposed mission) in suggesting that non-profit organizations are *per se* entitled to assert the defense without regard to the nature of the use in question. They are not.

Non-profit use of a trademark is indeed a factor courts consider when analyzing fair use. Now, the fact is there is no way on earth this article (but wait, there's more!) constitutes a *prima facie* copyright or trademark infringement such that fair use would have to be asserted in an action by the NFL. But even if it did, there is no bright-line "exception for news organizations."

I sure hate to think that, laboring under such a misapprehension, *Consumer Reports* is actually refraining from giving accurate, descriptive names to its publications that happen to be someone's copyright or trademarks.

In fact, *Consumer Reports'* misunderstanding of the fair use doctrine is so profound, from how I understand it, anyway, that this next part is not too surprising, though it is pretty amusing (sorry, it just is) — and it clearly does not look at all like fair use!

Find all of our Super Bowl coverage in one place on ConsumerReports.org: Super Bowl XLVI game plan helps you pick out the best TVs for watching the game, how to find those TVs, apps that'll augment your fun, the fastest TV-watching treats, and lots more.



The question of whether consumers are likely to be confused is the signal inquiry that determines if a trademark infringement claim is valid. This blog is about trademark law, copyright law, free speech (mostly as it relates to the Internet) and legal issues related to blogging.



As for me, I'm Ron Coleman, a commercial litigator, business attorney and, some say, "IP maven" with a special interest in copyright and trademark infringement involving the Internet—including advising clients how to avoid them. I am also a writer and notional general counsel of the notional Media Bloggers Association.

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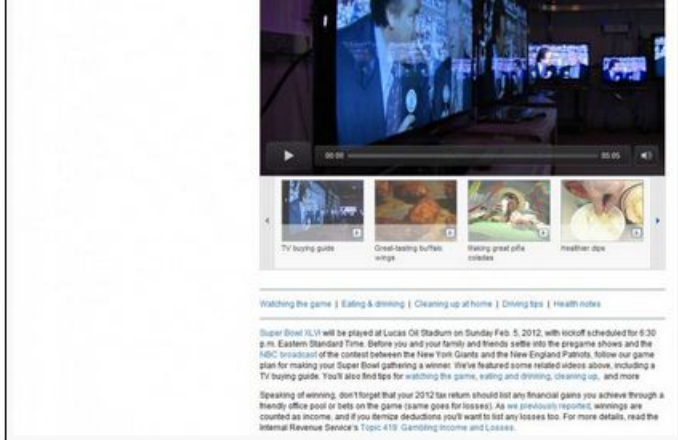


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Super Bowl XLVI will be played at Lucas Oil Stadium on Sunday Feb. 5, 2012, with kickoff scheduled for 6:30 p.m. Eastern Standard Time. Before you and your family and friends settle into the pregame shows and the NBC broadcast of the contest between the New York Giants and the New England Patriots, follow our game plan for making your Super Bowl gathering a winner. We've featured some related ideas above, including a TV buying guide. You'll also find tips for watching the game, eating and drinking, cleaning up, and more.

Speaking of winning, don't forget that your 2012 tax return should list any financial gains you achieve through a friendly office pool or bets on the game (same goes for losses). As we previously reported, winnings are counted as income, and if you itemize deductions you'll want to list any losses too. For more details, read the Internal Revenue Service's Topic 419: Gambling Income and Losses.



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Really?! Maybe there is a super-duper blanket exception for Consumer Reports! We'll see.

I do like this from the piece:

“*But just as it's done in years past, regional retailer H.H. Gregg is once again pushing up against the NFL's Super Bowl advertising restrictions—this year with a website that sports a very Super Bowl-looking logo, complete with the words “Super Sale” and the Roman numerals “XLVI.” I guess some retailers figure “Big Game” promotions call for some big-time gambles, and not just on the outcome of the game.*

Perhaps other retailers will also adopt more creative end-arounds to help promote football-oriented TV sales without violating the NFL's trademarks. As we get closer to game day, let us know if you see any local ads that tie in to a “Big Game” promotion, or if you notice any especially creative ways a dealer is finding to promote “super” sales without getting flagged by the NFL for trademark encroachment.

Ah, the old SUPER BOWL® trademark contest promo, eh? Maybe it will work better for CR than it did for LIKELIHOOD OF CONFUSION®. Could be that super-duper exemption thing?

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AUTHOR

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