

Sports Litigation Alert

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March Madness Isn't for Everyone

By Ben Mulcahy and Jonathan Sokolowski

It's that time of year again. College campuses around the country are buzzing, co-workers are whispering about office pools, and "bracketology" is the popular science of the day. The NCAA men's basketball tournament season, aka "March Madness," has begun. To tap into the vast media audiences generated by the NCAA Tournament (the "Tournament"), ambush marketers have started populating the market with basketball-themed promotional materials. There is little doubt that ambush marketers can legally draw on generic basketball symbols and complimentary imagery to tie into the excitement surrounding the Tournament without exposing themselves to a meaningful risk of liability to the NCAA as the Tournament operator. But what about using the phrase "March Madness"?

The History of March Madness

The term "March Madness" first appeared with prominence in 1939 as the title to an essay written by Henry V. Porter for the Illinois Interscholastic, the official magazine of the Illinois High School Association ("IHSA"). See IHSA.org, A Brief History of March Madness, <http://www.ihsa.org/marchmadness/history.htm> (last visited Mar. 11, 2011). The essay was written as a celebration of the IHSA's annual high school basketball tournament, which began in 1908. Since the early 1940s, the IHSA has used "March Madness" to



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refer to its basketball tournament. See *March Madness Athletic Association LLC v. Netfire, Inc.*, 120 Fed. Appx. 540, 544 (5th Cir. 2005). Over the years, the IHSA claimed exclusive rights over the term, and even licensed the phrase to companies such as Pepsi and the Chicago Tribune. However, it hadn't attempted to register "March Madness" as a trademark until 1990. It was then that the IHSA learned that a television production company named Intersport had already registered the phrase one year earlier, in 1989, and a dispute ensued.

Ultimately, the IHSA and Intersport agreed to resolve their dispute regarding the ownership of the mark by pooling their trademark rights. This arrangement continued until 1995, when the IHSA became embroiled in a dispute with the NCAA over the term. At that time, Intersport took itself out of the middle of the dispute and assigned its rights in the "March Madness" mark to the IHSA in exchange for a share of royalty payments and a limited license back, which allowed Intersport to continue using "March Madness" in connection with certain sports programming and to "advertise, promote, and sell publications, videos and media broadcasts" of such sports programming. See *id.*; see also *Intersport, Inc. v. National Collegiate Athletic Association*, No. 1-07-0626, 2008 Ill. App. LEXIS 227, at *3 (Ill. App. Ct. Mar. 26, 2007).

In the IHSA's dispute with the NCAA, the NCAA claimed that its rights to the term "March Madness" stemmed from a 1982 Tournament broadcast during which announcer Brent Musburger described the Tournament as "March Madness." See *Intersport*, 2008 Ill. App. LEXIS 227, at *4. Nevertheless, the IHSA brought suit to protect its interest in the mark after the NCAA purported to license the term "March Madness" to GTE Vantage Inc. in connection with the company's promotion of a video game. The district court denied the IHSA's motion for a preliminary injunction against the NCAA's licensee, and in a case of first impression

and an opinion written by Judge Posner, the Seventh Circuit affirmed.

Justice Posner pointed out that the IHSA could have supplicated the NCAA and its broadcast partners not to spoil its “March Madness” trademark by using it to name something else, but the IHSA had waited. And in the interim, “March Madness” came to identify not just the IHSA tournament, but the NCAA Tournament as well. Resolving the issue against trademark protection, the court characterized “March Madness” as a dual-use or multiple-use term, allowing the IHSA and the NCAA to co-exist in using “March Madness” to refer to their respective basketball tournaments. See *Illinois High School Ass’n v. GTE Vantage Inc.*, 99 F.3d 244, 247 (7th Cir. 1996). The court also left open the possibility that other parties beyond the IHSA and the NCAA could use “March Madness”, as well, taking pains to explain “[w]e do not opine on the scope of the trademark rights that either IHSA or NCAA has, beyond ruling that IHSA’s rights do not extend to the NCAA tournament and to merchandise such as Vantage’s game that is sold in connection with that tournament.” After the ruling, the IHSA and the NCAA consolidated their interests and formed the March Madness Athletic Association (“MMAA”) in order to jointly exploit the “March Madness” mark and sue alleged infringers. See *Intersport*, 2008 Ill. App. LEXIS 227, at *4.

The MMAA in Action

Justice Posner’s decision cast some doubt on whether “March Madness” was protectable as a trademark at all. So the first step in the infringement arena was for the MMAA to try to convince a court that “March Madness” may be a “dual use” or even a “multiple use” term, but it had not become generic. The MMAA sued Netfire Inc. to establish just that.

The MMAA sued Netfire Inc. for trademark infringement after Netfire purchased the domain name “marchmadness.com” and developed content for the site related to the Tournament. See *Netfire*, 120 Fed. Appx. at 543-44. The case was ultimately resolved in the MMAA’s favor, after the Fifth Circuit upheld a lower court’s ruling that “March Madness” was a descriptive term which had acquired secondary meaning and was therefore protectable as a trademark under the

Lanham Act. The court also upheld the ruling that the domain name marchmadness.com would create consumer confusion with March Madness. Accordingly, Netfire was compelled to surrender the marchmadness.com domain name to the MMAA. Today, users who type in marchmadness.com into their web browsers will be redirected to the home page for the Tournament.

Another such infringement suit brought the circle of rights back to Intersport itself. In that case, an Illinois state court held that Intersport’s limited license to use the term “March Madness” in order to “advertise, promote, and sell publications, videos and media broadcasts” in connection with certain sports programming, encompassed the right to distribute content via mobile devices and not just to television and radio. See *Intersport*, 2008 Ill. App. LEXIS 227, at *2-5. Despite the MMAA’s contention that Intersport’s license did not include a later-developed technology clause, the court held that when the license was agreed to in 1995, the parties could have contemplated that the term “video” might one day include distribution to mobile wireless communications devices. Thus, the MMAA was not able to enjoin Intersport from using “March Madness” to advertise, promote, and sell its mobile video content.

Conclusion

The quilt of rights-holders and the scope of their respective rights creates the possibility that an ambush marketer could secure a license from Intersport to use “March Madness” in connection with an ambush of the Tournament. That case has not yet been decided, but maybe there’s an ambush marketer this year who is willing to be the test case. If not, then in the words of Henry V. Porter, delight in the “happy Madness of March,” and enjoy the games.

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