

## Avoiding March Sadness by Brian M. Davis

The 2015 NCAA Basketball Tournament is now underway and people throughout the country are frantically checking scores to see how they are doing in their office pool. In fact, some research indicates that the first two days of the tournament are the least productive work days of the entire year.

This popularity naturally leads to businesses offering various tournament-related promotions and events, but these efforts can also cause them to receive a demand letter from the National Collegiate Athletic Association (NCAA) for misuse of their trademarks.

Many of the terms commonly associated with the tournament, including MARCH MADNESS, THE BIG DANCE, FINAL FOUR and ELITE EIGHT, are registered trademarks of the NCAA and it is very aggressive in enforcing those rights against unlicensed use of these terms – particularly in advertising. The NCAA's official position with regard to the use of its marks, along with a current listing of said marks and the sports with which they are associated, is available at <http://www.ncaa.org/championships/marketing/ncaa-trademark-protection-program>.

In addition to those registered marks, the NCAA also recently claimed that it has acquired common law trademark rights based on use for both the word BRACKET and to the actual image of a tournament bracket. As you probably know, a “bracket” is the common name for the diagram that shows the outcomes of games in an elimination tournament, with the most popular being the bracket for the NCAA's March Madness basketball tournament. Based on its claimed “common law” trademark rights, the NCAA filed an opposition against applications to register the marks BRACK ATTACK and DON'T LET ONE TEAM BUST YOUR BRACKET for fantasy sports offerings. This appears to be the first time the NCAA has asserted rights to these BRACKET marks – at least before the Trademark Trial and Appeal Board. It's unclear if the organization has ever sued over it, or sent cease and desist letters based on its claimed rights to these marks, but this opposition bears watching as it may impact the use of these terms by the public going forward.

The NCAA's aggressive enforcement can be off-putting to the general public, and it has been asserted that use of terms like MARCH MADNESS and FINAL FOUR is permissible under the theory of nominative fair use (i.e., that they are simply using the mark to accurately state the name of the tournament and are therefore not infringing any trademark rights owned by the NCAA).

For businesses seeking to avoid any issues with the NCAA, the best course of action is simply to avoid using the NCAA's trademarks in their advertising. Consumers are becoming increasingly accustomed to the use of alternate names for sporting events for advertising purposes, such as “the big game” for the Super Bowl. As such, it is possible to convey the idea that your offering is somehow related to the trademarked term while minimizing the likelihood of receiving a demand letter and incurring the associated legal expenses.

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