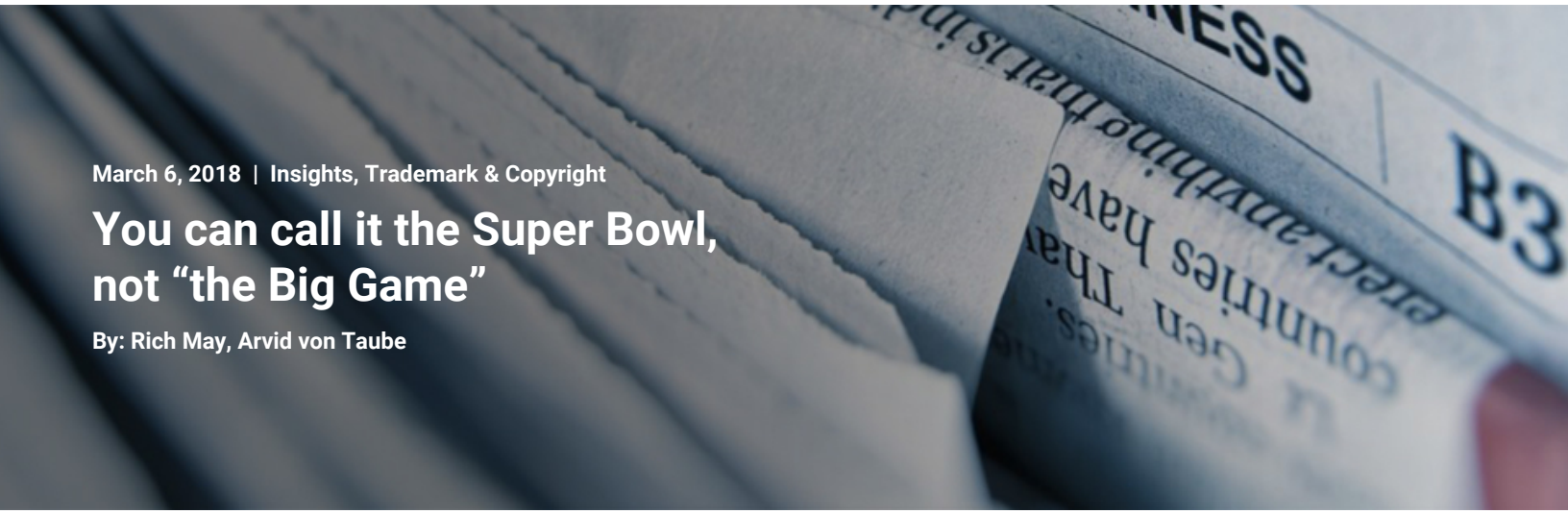

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You can call it the Super Bowl, not “the Big Game”

By: Rich May, Arvid von Taube

Now that some time has passed since the Patriots’ stinging defeat to the Eagles in Super Bowl LII, it is important to clear up a misconception about the Super Bowl name before the Patriots are back for Super Bowl LIII in 2019: you can call it the Super Bowl, you do not have to call it “the Big Game”.

Tune in to your local news TV channel or radio station leading up to … the big game … and you may never hear the term Super Bowl, but rather, “the Big Game”. There is a very specific reason for this. The lawyers for such TV or radio stations have told the on-air personalities not to use the term Super Bowl because they are afraid of popping up on the National Football League’s (“NFL”) radar. The NFL holds a federal trademark registration for the mark SUPER BOWL with the United States Patent and Trademark Office (“USPTO”). Although this is a powerful right for the NFL, it does not mean that the NFL can stop you from saying the term.

The basic purpose of a trademark is to control the important rights to branding associated with goods or services. That is, the word, phrase or logo that the public associates with what you are offering. Examples include the Nike swoosh, instantly recognizable for the sports and athletic company, or the three bars in the Adidas logo.

The NFL has many trademark registrations with the USPTO involving the words and logos associated with the Super Bowl, including for merchandise and broadcast services. One of the most important of which is Registration No. 3343714 in Class 38 for broadcast services, first used on January 12, 1969 with Super Bowl III. This means that the NFL has the right to control when and how the trademark is used in connection with merchandise or displaying and disseminating NFL games. Conversely, it means you cannot stick the term Super Bowl on a hat and sell it in such a manner that the public might confuse it with the real McCoy offered by the NFL. You also cannot broadcast a Super Bowl game to a wide audience such that those viewing it think it is being offered by the NFL. None of these instances apply to a TV or radio station’s on-air personality talking about the Super Bowl in the weeks beforehand, or you sending an email to a group of friends inviting them to a

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viewing party.

There is nothing in any established trademark law that would support the NFL in a lawsuit brought against a radio station for asking its listeners “what are you doing for the Super Bowl this weekend?” Nothing in that question alone would reasonably cause a likelihood of confusion with the NFL’s Super Bowl mark or imply a relationship of that radio station or on-air personality with the NFL. Additionally, the Nominative Fair Use doctrine lets you use someone else’s trademark “for purposes of reporting, commentary, criticism, and parody, as well as for comparative advertising.” Despite that, next January, listen for how many times you actually hear the term Super Bowl on the radio or TV. Presumably this approach is driven by broadcasters’ abundance of caution, combined with widespread misunderstanding about the scope of intellectual property protections.

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