

Will the Real 12th Man Please Stand Up? Texas A&M and Seattle Seahawks Settle Dispute over Right to Identify Fans as '12th Man'

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Developing brand equity has been a focus of sport marketers over the past 15 years (Milne & McDonald, 1999). Mullin, Hardy, and Sutton (2000) stated that brand equity can be built through tangible product extensions, distinct trademarks, history, tradition, festival, and spectacle. In attempting to increase brand equity through a change in the building blocks of brand equity or antecedents of equity (Gladden, Milne & Sutton, 1998; Gladden & Milne, 1999), legal conflict may arise. For example, on August 26, 1993, Ohio University attempted to improve its brand equity when it filed a trademark application for the mark "Ohio." Officials at Ohio University were concerned with a

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study that found that there was vast confusion within the national media relating to the identity of the University. Their main concern was to ensure the media realized that Ohio University was not The Ohio State University. Four of five attribution mistakes made by the national media were in favor of Ohio State. Officials at Ohio State filed for cancellation of the "Ohio" registration believing that confusion would be created if another university were given the exclusive use of the term. Both institutions pointed to their historic use of the word "Ohio" as a basis to justify their legal position (Brown & Kreutzer, 2000).

More recently, Texas A&M University and the Seattle Seahawks of the National Football League (NFL) have disputed the rights to the phrase "12th Man." Texas A&M University claimed that it owned a common law trademark right to "12th Man" under Texas law and held registered trademarks to the term granted by the U.S. Patent and Trademark Office (U.S. Regs. 1,612,053 and 1,948,306). The University further alleged that the Seahawks intentionally infringed upon and diluted the distinctive quality of the term "12th Man." Prior to its legal action, and in an attempt to protect its trademark, Texas A&M sent cease-and-desist letters to the Seahawks in 2004 and 2005, but they were unsuccessful in stopping the Seahawks (Romano, 2006b). On January 30, 2006, a week before the Seahawks played in the Super Bowl, Texas A&M filed suit in state court in Brazos County, Texas (home to Texas A&M), alleging both state and federal trademark infringement and trademark dilution. Texas A&M sought a temporary restraining order (TRO) to stop the Seahawks from using the phrase "12th Man." The state court entered the TRO after finding that the University met four requirements: The Plaintiff must 1) request a permanent injunction; 2) prove that the Plaintiff is likely to succeed on the merits of the case; 3) show that there is a probable injury to the Plaintiff; and 4) establish that there is no other adequate remedy at law. Upon demand by the Seahawks, the case was moved to federal district court in Houston, Texas (Duarte, 2006), and a preliminary injunction hearing was set for May 18, 2006 (Romero, 2006a). Just prior to the injunction hearing, on March 16, 2006, the parties entered into an Agreement Pending Temporary Injunction Hearing and continued settlement negotiations, which ultimately resulted in a settlement prior to the injunction hearing. While the merits of Texas A&M's legal claims were not resolved by the court, their legal arguments are still useful for understanding the importance of preserving and protecting intellectual property.

The Meaning and History of the 12th Man at Texas A&M

Texas A&M University asserts that the tradition of the Twelfth Man (sometimes variously spelled as "The 12th Man") at the College Station, Texas, campus dates back to January 2, 1922, and a student named E. King Gill. During a football game with Centre College, A&M began to run short of reserve players. As the tradition goes, Gill was a former football player still involved with Texas A&M athletics who was called down from the press box by Coach Dana X. Bible to suit up in the event he was needed in the game against Centre. Gill answered the coach's call and remained faithfully on the sidelines for the duration of the game (Texas A&M University, n.d.).

While Gill never played in the Aggies' 22-14 win over Centre College, his willingness to suit up and be ready for duty if called upon has been long remembered at the institution, where the knowledge of the Twelfth Man story is ubiquitous and has become established as one of the University's most cherished traditions. Gill himself is remembered on campus permanently with a statue donated by the class of 1980 (Texas A&M University, n.d.).

While it is possible to challenge whether or not Texas A&M can lay a unique claim to the particular wording and concepts associated with their use of the Twelfth Man, the centrality of its iconic nature to Aggie athletics and the University's culture is undeniable. In fact, it has been called one of the University's most important assets ("Texas A&M seeks," 2006).

Freshmen entering Texas A&M attend a multi-day orientation called "Fish Camp" where, for those who are not already familiar with it, the story of the Twelfth Man is presented as essential knowledge for incoming students and Aggie fans. During football games, the student body stands for the entire game to symbolically show their willingness to suit up if called upon. To further embellish the tradition, former coach Jackie Sherrill fielded entire teams of walk-on players for opening kickoff while former coach R.C. Slocum rotated one walk-on per game (always wearing number 12) for kickoffs (Texas A&M University, n.d.). Variations of both these traditions have continued through the 2006 football season under current Coach Dennis Franchione. The best evidence of the significance of the term is that the Texas A&M athletic fundraising organization is named "The 12th Man Foundation."

The Use of the 12th Man by Seattle

Although the Buffalo Bills and the Chicago Bears stopped using "12th Man" at Texas A&M's insistence, the Seahawks continue to claim their right to its use

based upon its historical use in Seattle (Romano, 2006a). The use of the 12th Man in Seattle grew out of a number retirement ceremony. In 1984, as a tribute to the fans that made the Seattle Kingdome the loudest stadium in the NFL, the Seahawks retired the number 12, meaning no player can wear the number 12 during games. After retiring that number, the team has marketed and sold number 12 jerseys. While their team replica jerseys include a player's name and number, the number 12 jersey comes with the word "Fan" on the back (Kelley, 2006).

Since moving into Qwest Field in 2002, the team has intensified its use of the term "12th Man." Mike Holmgren, the Seahawk's coach, awarded a game ball to the "12th Man" after the team's victory over the New York Giants in 2005. Holmgren cited crowd noise as a key to his team's victory as the Giants committed 11 false-start penalties because they were unable to hear snap counts (Romero, 2005). The team also has former players come to games and raise a number 12 banner during pre-game ceremonies. Seattle's first appearance in the Super Bowl in 2006 garnered national attention for their "12th Man." A banner with the number 12 hung from the team's Super Bowl hotel and flew from the top of Seattle's Space Needle. Also, the "12th Man" appeared on team merchandise as the team advanced toward the Super Bowl ("Texas A&M seeks," 2006). All of this attention motivated Texas A&M to take action.

Licensing and Intellectual Property Issues

The Federal Trademark Act of 1946 (known as the Lanham Act) allows the owner of a trademark (any word, name, symbol, or device) to identify and distinguish goods of the owner from those manufactured or sold by others in order to protect the value of the mark. A trademark holder has the responsibility and obligation to actively protect the mark. According to Steve Moore, Texas A&M's Vice President for Communications, Texas A&M was forced to act against the Seahawks after two previous cease-and-desist letters were ignored by the team. Further, Moore stated that as national exposure over Seattle's use of the "12th Man" increased, the university put its rights to the mark at risk (Romano, 2006c). He added that the University had the responsibility and legal obligation to protect its mark ("Texas A&M seeks," 2006).

Responding to the action taken by Texas A&M, the Seahawks claimed that their fans, not the organization, promote the "12th Man" locally, and that the organization only sells merchandise with the number 12 and raise flags with the number 12, not with the phrase "12th Man." The Seahawks argued that since they did not use the phrase "12th Man" for commercial gain, the

Trademark Act (1946) should not apply. Texas A&M disagreed with their argument, however, claiming that the team had created both 12th Man merchandise and a 12th Man Club.

Like the Ohio University and The Ohio State University conflict over the word "Ohio," the Texas A&M and Seattle Seahawks controversy over the use of the "12th Man" phrase was settled out of court. On May 8, 2006, an agreement reached between Texas A&M University and the Seattle Seahawks granted the Seahawks a license to use the "12th Man" trademark in the northwestern United States (in the team's primary television broadcast area). In exchange for its use, the Seahawks agreed to pay the University a licensing fee (lump sum payment of \$100,000 and an annual royalty of \$5,000) and state publicly that the University owns the trademark each time the "12th Man" is used. The agreement between the two parties resolved all legal issues in the lawsuit, which was dismissed ("12th Man Trademark," 2006). As a result, the Seahawks can use the phrase in the northwestern United States for promotional activities and can continue to raise the 12th Man flag prior to games. Fans also still are able to buy Seahawk jerseys and flags with the number 12 on them (Romero, 2006b).

Marketing Implications

Some of the most valuable assets a sport organization possesses are its name and the marks associated with its name. The marks can create emotional loyalty while strengthening brand equity (Revoyr, 1995). Aaker (1991) expressed this when defining brand equity as the link of assets and liabilities to a brand that both add and subtract to or from the value provided by a product to a firm or its customers. For marketers, a key then is to develop or strengthen the positive association of a team's brand in the minds of its customers in order to differentiate the brand from competitors (Gladden, Irwin, & Sutton, 2001).

Through all of its actions, Texas A&M acted to protect the value of its well-established brand and its intellectual property. The University, realizing the emotional and historic connection to its use of the Twelfth Man and how that defined Texas A&M, acted aggressively to protect the mark beginning in 1990. When it was determined that others were infringing upon the use of its protected mark, Texas A&M again acted against the Buffalo Bills, Chicago Bears, and Seattle Seahawks to enforce the University's rights to the exclusive use of the mark. After Seattle refused to stop using the mark, Texas A&M demonstrated its willingness to pursue litigation to protect its brand. In all, the Texas A&M University preserved the value received from its use of the Twelfth Man. Collegiate sport mar-

eters as well as those involved with licensing programs or brand development should similarly act proactively to preserve and protect intellectual properties.

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