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What's the CFL made of? Not Pizza Pizza: Grey Cup Ticket promotion goes awry

The CFL Grey Cup has historically been one of Canada's biggest television events, and 2016 was no exception, with nearly 10 million unique viewers (or 30% of all Canadians) tuning in to watch.¹ Thus, from a marketing perspective, this year's Grey Cup represented a significant opportunity for Canadian businesses to increase the exposure of their brands to consumers. However, one marketing campaign launched this year that attempted to capitalize on the popularity of the Grey Cup led to a highly publicized², albeit quickly resolved, conflict with the CFL. More specifically, the CFL quickly shut down a promotion being run by sixteen Hamilton-area Pizza Pizza locations that were each offering fifteen pairs of first-come, first-serve tickets to walk-in purchasers of a qualifying \$29.99 meal deal, despite the value of such tickets ranging anywhere from seventy-five to several-hundred dollars.

The basis upon which the CFL requested termination of the promotion is not clear from public sources, with the CFL's Director of Communications Paulo Senra stating on his official Twitter account that "[a]lthough [the promotion] may have been made with good intentions, it didn't have proper authorization. Once it was brought to

¹ See <<http://www.cfl.ca/2016/11/28/10-million-canadians-watch-the-104th-grey-cup-presented-by-shaw/>>.

² See, for example: "CFL calls illegal procedure on half-baked pizza promotion for Grey Cup tickets": <online: <http://ottawacitizen.com/news/local-news/cfl-calls-illegal-procedure-on-half-baked-pizza-promotion-for-grey-cup-tickets>>; "On your way to Hamilton Pizza Pizza for Grey Cup tickets? Turn around!": <online: <http://www.cbc.ca/sports/football/cfl/pizza-pizza-grey-cup-1.3866277>>, and "CFL Shuts Down pizza promotion offering Grey Cup tickets": <online: <http://www.sportsnet.ca/football/cfl/cfl-shuts-pizza-promotion-offering-grey-cup-tickets/>>.

our attention we had the promotion pulled immediately.”³ However, the ticket license terms may provide at least a partial explanation. Tickets to sporting events constitute a revocable license that provide the purchaser with certain limited rights – for example, to attend the event and sit in an assigned seat – that can be revoked by the league or team at any time and for any reason. Ticket license terms, typically found on the reverse of an event ticket and/or online, often contain statements to the following effect “...[w]ithout the express written consent of the producers, no ticket sold shall be resold, given away or disposed of by the purchaser in connection with any promotion by the purchaser of any products or services whatsoever or for any other commercial purpose...” and “...[n]o ticket(s) may be used for advertising, promotion (including contests, giveaways and sweepstakes) or any other trade or commercial purposes without the prior written consent of the [team]...”⁴ Absent prior express consent of the CFL and/or a participating team, or a more formal relationship with one or both of them (see the discussion below regarding “ambush marketing”), the CFL may have taken the view that the Pizza Pizza Grey Cup promotion was “unauthorized” in that it violated the event’s ticket license terms. It is also unclear what impact, if any, termination of the promotion had on Pizza Pizza customers who received Grey Cup tickets. Violation of ticket license terms can carry harsh penalties, including giving rise to an unrestricted right for the league and/or team to revoke or terminate the license and seize the tickets in issue without having to refund their face value.

More generally, the Pizza Pizza promotion may also provide a “ripped from the headlines” example of the perils of “ambush marketing”. This practice of attempting to capitalize on the popularity of a major event by associating one’s products or services with the event without paying the requisite fees to become an official sponsor or partner frequently occurs within the sporting industry.

“Ambush marketing” is an extension of the tort of passing-off, which arises when one party uses another party’s name, design, or other

³ See November 24, 2016 Tweet “In reference to the Pizza Pizza promotion:”: <online: https://twitter.com/paulosenra?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor>.

⁴ See, for example, the Toronto Argonauts’ Product Specific Terms & Conditions and Ticket Product Purchase License: <online: <http://www.argonauts.ca/terms-and-conditions/>>.

trade-mark, or one so closely resembling it so as to mislead consumers into thinking that the goods and services of the former are associated with that of the latter. While there are few reported decisions in this area, the case law makes clear that a party will be found to have engaged in the tort of passing-off if the party promotes its product or business in such a way so as to create the false impression that its product or business is somehow authorized or endorsed by the plaintiff entity or that implies that there is some connection between the plaintiff and the defendant⁵. On this point, the case law stresses that in order to sustain an action for passing-off, the plaintiff must clearly establish the existence of misrepresentation or confusion on behalf of members of the public – it is not sufficient for the plaintiff to simply allege that the defendant is benefiting from a particular marketing strategy. In determining whether a particular promotion or advertising campaign satisfies the above test, consideration will be given to the specific advertising materials used and whether there are any disclaimers or other indications that clearly differentiate one entity's products from another.⁶ Plaintiffs affected by ambush marketing also typically allege trade-mark infringement, deprecation of the goodwill associated with one's name and interference with contractual relations as causes of action. Depending on the specific nature of the infringement, all of these causes of action may be applicable. The tort of passing-off is a difficult standard to prove; however, revoking ticket licenses for violation of the terms is relatively easy.

While the recent dispute between the CFL and Pizza Pizza was resolved outside of the court system, businesses should be cognizant of the potential risks of "ambush marketing" and be very careful in planning their promotional and marketing strategies, particularly as they relate to any event for which the business is not a partner or official sponsor.

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⁵ *National Hockey League v Pepsi-Cola Canada Ltd.*, [1992] B.C.J. No. 1221, 92 D.L.R. (4th) 349 (B.C.S.C.), aff'd [1995] B.C.J. No. 310, 122 D.L.R. (4th) 412 (B.C.C.A.).

⁶ *Ibid.*

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[a cautionary note](#)

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