

## ‘BIG BROTHER’ IS WATCHING APPLE: THE TRUTH ABOUT THE SUPER BOWL’S MOST FAMOUS AD

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*Apple’s famous 1984 ad debuting the Macintosh personal computer is studied as a paradigm example of successful marketing. The less well-known history behind the ad may also serve as fertile ground for a discussion on intellectual property law.*

Apple Computers introduced its revolutionary “Macintosh” personal computer to the world with a daring television commercial aired during the 1984 Super Bowl. The Los Angeles Times identified this commercial as “one of the most studied in U.S. marketing,”<sup>1</sup> and advertising guru Lewis Lazare of the Chicago Sun-Times noted that it “has not been equaled in terms of overall impact.”<sup>2</sup> TV Guide named the ad the “#1 All-Time Commercial.”<sup>3</sup> USA Today reporter Kevin Maney wrote that the ad “still stands as a watershed event.”<sup>4</sup> What has never been revealed about this commercial icon, until now, is that the ad was considered a flagrant infringement of copyright and trademark laws.

The 60-second commercial opens with a black-and-white view of pedestrian tubes connecting Hitlerian buildings, through which robot-like citizens trudge into a huge auditorium. A giant television screen in the auditorium depicts Big Brother pontificating in a monotone about “pure ideology,” the “poisonous weeds of disinformation,” and the “unification of thoughts,” while his abject subjects stare in obedience. Suddenly, uniformed storm troopers appear running after an unseen quarry. They are chasing a woman who carries a large hammer. She runs into the auditorium, proceeding to hurl her hammer into the screen, smashing it to bits and releasing a strong breeze and a bright light, while the citizens gape in awe. A voice-over announces, “On January 24, Apple Computer will

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<sup>1</sup> LA TIMES, April 24, 2002.

<sup>2</sup> CHICAGO SUN-TIMES, January 26, 2003.

<sup>3</sup> TV GUIDE MAGAZINE, July 3, 1999.

<sup>4</sup> Maney, Kevin. “Apple’s ‘1984’ Super Bowl commercial still stands as watershed event.” USA TODAY, January 28, 2004, [http://www.usatoday.com/tech/columnist/kevinmaney/2004-01-28-maney\\_x.htm](http://www.usatoday.com/tech/columnist/kevinmaney/2004-01-28-maney_x.htm) (last visited April 13, 2009).

introduce the Macintosh. And you'll see why 1984 won't be like *1984*.”<sup>5</sup>

Much revisionist advertising lore has followed this commercial. One myth says that the ad was never shown other than its lone Super Bowl debut. In fact, the ad aired both before and after the Super Bowl, albeit to limited audiences. Apple played it once in December 1983, on a TV station in Twin Falls, Idaho, so it would qualify for that year's industry awards.<sup>6</sup> And for five days before the 1984 Super Bowl, a truncated version of the ad ran in movie theaters before previews.<sup>7</sup> During this time Apple also previewed the ad in the ten largest TV markets, without any meaningful public or media reaction. After the Super Bowl, the ad was re-televised by numerous stations as a news item, but Apple never again paid to air the commercial. This decision may have been providential.

This Apple commercial expressly credited the George Orwell novel *1984* as its genesis. The ad goes so far as to conclude with the line, “And you'll see why 1984 won't be like *1984*.” Mr. Orwell was a British writer whose novel, *1984*, was set in a totalitarian society where telescreens (television cameras) were hidden in the walls of residences, and the dictator, “Big Brother,” harangued the citizens during assemblies from an auditorium screen. The Apple ad slavishly adopted a thematic scene from the novel: the daily “two-minute hate,” during which the docile citizenry dutifully assembled before a giant telescreen. First, the telescreen displayed a notorious “enemy of state.” The citizens were imbued with “a desire to... smash faces in with a sledgehammer.” In the novel, a “dark-haired girl... suddenly picked up a heavy...dictionary and flung it at the screen.” Then on the screen appeared “the face of Big Brother, black-haired, black-mustachio'd, full of power and mysterious calm, and so vast that it almost filled up the screen” as he uttered “words of encouragement.”<sup>8</sup>

In fact, the book *1984* was under copyright in the year 1984.<sup>9</sup> Copyright protection denotes many things.<sup>10</sup> For a novel, it means no one may capitalize commercially on any of the novel's protected elements in any medium.<sup>11</sup> Chicago attorney and film producer Marvin Rosenblum paid

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<sup>5</sup> The ad may be viewed on the internet, *available at* [www.uriah.com/apple-qt/1984/html](http://www.uriah.com/apple-qt/1984/html).

<sup>6</sup> “The 1984 Apple Commercial: The Making of a Legend”, *available at* <http://www.curtmedia.com/cine/1984.html> (last visited March 27 2009).

<sup>7</sup> *Id.*

<sup>8</sup> George Orwell, *1984*, 15-17, (1950).

<sup>9</sup> The “Sonny Bono Copyright Term Extension Act of 1998” (perjoratively called the “Mickey Mouse Protection Act”) extended the length of copyrights, including Disney's “Mickey Mouse” and other classic animated characters from the 1920s and 1930s. For the novel “1984” it extended its copyright's duration to the year 2044. 17 U.S.C § 304(b).

<sup>10</sup> The Copyright Act protects “original works of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102 (2007). Thus it does *not* protect the live telecast of a football game, for example, despite the dire warnings to the contrary regularly made by the telecasting network.

<sup>11</sup> The Act gives a copyright owner the *exclusive* rights to reproduce the work, to prepare

a significant amount to buy the television and motion picture rights from Sonia Orwell, the author's widow. Utilizing these rights, he proceeded with plans to make a film version of the novel. Producer Rosenblum had scrupulously policed his exclusive rights by permitting approved uses and by writing cease-and-desist letters to would-be infringers who sought to exploit *1984* without his permission or license on television or in motion pictures. Later, Rosenblum would expend much effort to exploit his exclusive right to present *1984* on television.

Federal and state trademark law forbids anyone from "passing off" a work or a product as being affiliated with a protected entity – such as Orwell's *1984*. The Lanham Act specifically condemns anyone who, "in connection with any goods or services...uses in commerce any word, term, name...or any combination thereof...which is likely to cause confusion as to the affiliation, connection, or association of such person with another person."<sup>12</sup> The Apple ad clearly falls under this definition as it was designed to evoke Orwell's novel as a source. The iconic Apple commercial consequentially appeared to be a violation of federal copyright and trademark rights. Producer Rosenblum promptly wrote Apple's ad agency to "cease and desist" from further publications of the ad. Apple never again ran the commercial.

In August of 2000, attorney William R. Coulson filed a trademark and copyright suit against CBS Television on behalf of producer Marvin Rosenblum and the Estate of George Orwell.<sup>13</sup> CBS had begun airing a "reality" series titled "Big Brother" in the United States. Cameras that watched the selected inhabitants 24 hours a day were installed in the walls of a specially-constructed house. The unseen but ubiquitous character "Big Brother" ordered the inhabitants about and dispensed or withheld certain privileges from the "Diary Room." This is noteworthy because in Orwell's novel the protagonist, Winston Smith, secretly keeps a diary in which he records his innermost (and illegal) personal thoughts. CBS also utilized a production company for this series, named "Orwell Productions, Inc." The suit alleged that CBS's infringement was willful and sought all of CBS's profits from the series as damages. After a year of litigation, which included depositions of CBS executives in Los Angeles, the case was settled to the satisfaction of both parties.<sup>14</sup> In the course of this litigation,

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derivative works (such as a sequel, remake, movies, recordings, products) to distribute the work, and to perform or display the work publicly. 17 U.S.C. § 106 (2007).

<sup>12</sup> 15 U.S.C. § 1125(a) (2007).

<sup>13</sup> *Estate of George Orwell v. CBS, et al.*, 00-c-5034 (N.D. Ill.) Court filings in this case are available via the Court's website: [www.ilnd.uscourts.gov](http://www.ilnd.uscourts.gov).

<sup>14</sup> The financial terms of the settlement were confidential. During the credits at the end of the "Big Brother" program, there now briefly appears a disclaimer to the effect that the program is not affiliated with the Orwell Estate.

the history of the rights to Orwell's novel and its connection with the Apple television commercial, were revealed.

George Orwell wrote his novel *1984* during the year 1948. Mr. Orwell's publisher, Harcourt Brace & Co., registered the copyright for his novel in the United States in 1949.<sup>15</sup> George Orwell died in 1950, and his will conveyed his copyright to his widow Sonia.<sup>16</sup> She authorized a black-and-white film version of the novel in 1955. Unfortunately, Sonia Orwell hated the film, ceased all distribution of it, and did not renew its license. In 1976, Sonia renewed the novel's copyright.<sup>17</sup> Under U.S. law, the book remains under copyright protection until the year 2044.<sup>18</sup>

Marvin Rosenblum admired Orwell's novel and thought that a film should be made of it to debut in the actual year of 1984.<sup>19</sup> In late 1980 he contacted Sonia Orwell, who at first was adamantly against the idea of another movie version of her late husband's work. But Rosenblum persisted. On December 1, 1980, Sonia Orwell and Rosenblum signed an agreement. In return for a cash payment and future royalties to be paid to the Orwell Estate, Rosenblum purchased the television and the motion picture rights to the novel. This meant that Rosenblum had the exclusive worldwide rights to make and market television and movie products based on Orwell's book. Within two weeks of this agreement, Sonia Orwell died. The Estate of George Orwell became her Literary Executor and now held all the rights to the novel not bought by Rosenblum.

While immersed in the production work for the motion picture, Rosenblum and the Orwell Estate were also monitoring and policing third-party uses of *1984*. Rosenblum focused on proposed and actual commercial uses of Orwell material in the United States. Most artists were well aware of the copyright implications of using material from *1984* and wrote letters seeking permission to utilize it. Rosenblum's file from this period includes over fifty instances of permissions being granted or denied. In deciding whether to grant a license to any particular requester, Rosenblum sought both to protect the artistic integrity of Orwell's work and also to maximize the revenue realized from such licenses. When he became aware of

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<sup>15</sup> "Registering" a copyright simply means submitting a form, a fee, and copies of the work to the U.S. Copyright Office. 17 U.S.C. §408-410 (2007). It establishes the date of creation and claimed ownership of the work, and is required before an infringement lawsuit may be filed 17 U.S.C. § 411 (2007).

<sup>16</sup> A copyright may be passed on by will or intestacy, like any other personal property; and it may be licensed or even sold to another 17 U.S.C. § 201, 203 (2007). Licenses are usually granted for a discreet project – like a particular motion picture version of a novel.

<sup>17</sup> Under the law in effect in 1976, a copyright could be renewed once for an additional term of 28 years. This has been changed several times since 1976.

<sup>18</sup> *Supra*, note 2.

<sup>19</sup> These facts are taken from the depositions and Court records in *Estate of George Orwell v. CBS*, 00-C-5034 (N.D. Ill.).

unauthorized commercial utilizations of *1984* material, Rosenblum sent “cease-and-desist” notices to the offender. His file for this period in the early 1980s includes such letters to a New York television station that televised the 1956 Edmund O’Brien film, to a company selling stickers containing slogans from *1984*, and to a company selling Orwell-themed calendars for the year 1984.

On January 22, 1984, Marvin Rosenblum took a break from the “1984” film production work to watch on television Super Bowl XVIII. Early in the third quarter, Apple ran its ad. Rosenblum was livid. Without any contact with him or the Estate, a major scene from the novel was being utilized by a big corporation to try to sell its products to football fans.

Rosenblum immediately got on the telephone and verified that the Orwell Estate in London had not authorized the use of the Orwell material in the commercial. After contacting the Apple legal Department, Rosenblum went to London to work on his motion picture. However, while filming he received numerous calls from the media asking him if the Apple scene was from his film. That was precisely the kind of confusion concerning affiliation that the Lanham Trademark Act condemns.

By letter to Lee Clow of Chiat-Day, dated April 26, 1984, Rosenblum memorialized his objections to the Apple ad. The letter stated: “Your much acclaimed Apple ‘1984’ commercial which is based on Orwell’s *1984* is a blatant infringement of motion picture and other media rights I own in and to George Orwell’s *1984*.” The letter noted that the scene in the ad “is directly lifted from the novel,” that the “tag line to the commercial has the number 1984 in quotations,” and that “it therefore cannot be argued that the commercial was merely meant as a vague allusion to an Orwellian society.” Rosenblum noted that his clipping service had located more than 100 stories in the general press about the commercial and “in virtually every instance the lead refers to Orwell and the novel *1984*.” Rosenblum’s letter concluded: “I request that you cease and desist immediately from further use of the commercial.”<sup>20</sup> He asked Chiat-Day to contact him and warned that he might have to file suit in federal court to remedy continuing infringements. Marvin Rosenblum never heard back from Chiat-day, or from Apple. He did not file a lawsuit. And Apple never televised the commercial again.

It is often said that copyright laws protect the specific expression of an idea, not the idea itself.<sup>21</sup> In Orwell’s *1984*, the general idea is a totalitarian

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<sup>20</sup> Rosenblum v. CBS, No. 00 C 5034 (USDC, N.D. Ill. 2000); case file, Pl. Ex. 296: Letter dated April 26, 1984, from Marvin Rosenblum to Lee Clow of Chiat/Day.

<sup>21</sup> This “expression v. idea” dichotomy often defines copyright litigation. See, *Atari v. North American*, 672 F.2d 607 (7<sup>th</sup> Cir. 1982). The Copyright Act expressly states: “In no case does copyright protection ... extend to any idea [or] concept” embodied in the copyrighted work.

society with no privacy or independent thought. Orwell's specific expression of this idea includes "Big Brother," telescreens, and the "two-minute hate." There are, of course, a great many unique and original ways for an author to depict this idea. Each original expression can be protected by copyright. A fictional character, by itself, is protectable under the copyright act.<sup>22</sup> Anyone who wrote a story with a character named "Superman" with superhuman traits would likely breach the copyright of the owner of the character. But the idea or concept of a superhuman character is likely not protectible – that would unfairly inhibit creativity.

In many copyright lawsuits this distinction is the issue of contention – did the alleged infringer take too much of the author's work? How much is too much?<sup>23</sup> The analysis focuses on the similarities between the works, not on any dissimilarities. As Judge Learned Hand famously wrote, "no plagiarist can excuse the wrong by showing how much of his work he did not pirate."<sup>24</sup> In a hypothetical lawsuit by Rosenblum against Apple over its commercial, Rosenblum likely would have been successful. First, Apple copied a famous scene from the novel. The "two-minute hate," followed by "Big Brother's" addressing his docile subjects, is a significant theme in the novel. In *1984* the watching citizens were first compelled to "smash faces with a sledge hammer," and a woman hurled a book at the screen. In the novel it is a woman who first rebels against the conformity by seducing Winston Smith. In the Apple ad, it is a woman who rebelled against conformity by hurling a hammer at the screen and smashing the face. Second, and even more dispositively, the Apple commercial intentionally admitted it meant to copy the novel. Apple's tagline stated: "On January 24, Apple Computer will introduce the Macintosh. And you'll see why 1984 won't be like *1984*." There could be no doubt that Apple intended to refer to and trade on the Orwell novel. Apple did not merely choose to illustrate the notion of rebellion against authority. Rather, Apple chose to replicate Orwell's particular expression of this idea with a direct reference displayed in the text.

Apple's intent to trade on and exploit the novel also implicates the federal trademark laws. As noted, it is illegal for one company to confuse the public about the origin of its product; that is, to suggest falsely that the product is affiliated with another company.<sup>25</sup> In this situation Apple

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<sup>22</sup> *Nash v. CBS, Inc.*, 899 F.2d 1537 (7<sup>th</sup> Cir. 1990); *Atari, supra*; *Nimmer on Copyright*, § 2.12.

<sup>23</sup> *Atari, supra*; *Repp v. Lloyd Webber*, 947 F.Supp. 105 (S.D.N.Y. 1996), affirmed 132 F.3d 882 (2d Cir. 1997), cert den. 525 U.S. 815 (1998); *Nash, supra*.

<sup>24</sup> *Sheldon v. Metro-Goldwyn Pictures Corp.*, 8 F.2d 49, 56 (2d Cir. 1936).

<sup>25</sup> 15 U.S.C. § 1125(a) (2007). The Orwell lawsuit against CBS also charged CBS with "dilution" of Orwell's trademark "Big Brother" – that is, cheapening it via a frivolous reality television program. 15 U.S.C. § 1127 (2007).

induced many people to believe that its ad was affiliated with George Orwell. This false affiliation can dilute the value of Orwell's work and unfairly enhance the value of Apple's product. It is unlawful, and a court (and a jury) would likely have found a trademark violation as well.

Copyright law gives the writer exclusive rights to reproduce and to market his work. It also includes the exclusive right to make derivative works based on the work.<sup>26</sup> Derivative works can include a movie, television program, video game, any sequel, advertising based on the novel, "or any other form in which a work may be recast, transformed, or adapted."<sup>27</sup> These rights can be licensed to others for particular uses for limited times, or they can be sold outright to others.<sup>28</sup> The holder of a copyright or one of these exclusive derivative rights must "police" his rights by: granting or refusing permission to others to make a particular use of his work, sending out "cease-and-desist" letters to unauthorized users, and telling unauthorized users to stop using the protected work. The rights holder can also sue unauthorized users for copyright infringement and can be awarded damages and an injunction.<sup>29</sup> The Apple ad was a classic television "derivative work" based on the novel *1984*, and thus a creation only the rights holder - Marvin Rosenblum- could permit.

One defense often asserted in copyright cases is "fair use," a defense codified in the Copyright Act. "Fair use" seeks to insulate from copyright infringement uses of works for "criticism, comment, news reporting, teaching, scholarship, or research."<sup>30</sup> For nearly a century, courts have recognized that even a teacher's scholarly outline or "study guide" of a copyrighted novel is not a fair use if the study guide copies too much of the work itself, or of important portions of the work.<sup>31</sup> For example, Cliffs Notes and similar teacher-aid publishers thus include mostly original criticisms, analyses, and plot summaries in their books to avoid copyright infringement. They must limit the quantity they quote verbatim from the copyrighted works they review or else obtain the permission of the copyright owner.<sup>32</sup> Most recently, a British court (under analogous copyright principles) found that a "Harry Potter" guidebook infringed upon the rights of J.K. Rowling, author of the Harry Potter series.<sup>33</sup>

This likelihood of confusion as to origin, affiliation, or sponsorship under trademark laws can exist even if the individual words of a given

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<sup>26</sup> 17 U.S.C. § 106 (2007).

<sup>27</sup> 17 U.S.C. § 101 (2007).

<sup>28</sup> 17 U.S.C. § 201 (2007).

<sup>29</sup> 17 U.S.C. § 501 (2007).

<sup>30</sup> 17 U.S.C. § 107 (2007).

<sup>31</sup> *Macmillan Co. v. King*, 223 F. 862 (D. Mass. 1914)

<sup>32</sup> *Cliffs Notes, Inc. v. Bantam Doubleday*, 886 F.2d 1989 (2d Cir. 1989).

<sup>33</sup> N. Y. Times, September 9, 2008; "Rowling Wins Lawsuit Against Potter Lexicon".

trademark have otherwise become “generic.” A trademark can become generic and fall into the public domain if the public comes to utilize the trademark as a descriptive term for a type of product or a function. Examples of this include “Kleenex,” “Xerox,” “Google,” and even “aspirin,” all terms which began as trademarked names for specific products. There is no likely confusion when such trademarked words are used in ordinary discourse. Thus when a newspaper uses descriptors such as “Big Brotherish” or “Mickey Mouse,” the words are not being used as a trademark identifying the origin of a product, but as illustrative terms. But if someone sells computers and calls them “Apples,” the trademark protections come into effect. The context in which a trademarked phrase is utilized is thus important to any infringement analysis.

There is an obvious First Amendment value to such uses. “Fair use” is a fact-based defense that depends on the balancing of four factors: (1) the purpose and character of the use – is it a commercial use or a non-profit use? (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion of the work used; (4) the effect of the use on the potential market or value of the copyrighted work.<sup>34</sup>

One species of “criticism” or “comment” of a work is a parody of that work. The U.S. Supreme Court weighed in on parody as a fair use in a case involving the rap group 2 Live Crew’s rendition of the Roy Orbison song “Pretty Woman.”<sup>35</sup> The Court defined a “parody” as an imitation done for comic effect or ridicule.<sup>36</sup> Even a commercial parody can constitute a “fair use,” said the Court.<sup>37</sup> The analysis adjusts on a case-by-case basis, taking into account the factors in the statute listed above. In another case, an artist who made wood sculptures of a copyrighted photograph was found liable to the photographer. The artist failed to persuade the court that his sculptures were fair use parodies. The court noted that a protected parody must necessarily imitate the parodied work, and then change it in some way to make the work look ridiculous. The sculptor, said the court, did not parody the photograph, but copied it slavishly in another medium.<sup>38</sup> Thus it was a commercial derivative work that only the photographer could have authorized.

Apple’s Super Bowl commercial could not be considered a fair use parody of Orwell’s novel. It was not meant as criticism or comment. Both

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<sup>34</sup> 17 U.S.C. § 107 (2007).

<sup>35</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). *Mad Magazine’s* song parodies had been held to be fair use back in the 1960s, a ruling which saved satiric magazines everywhere. *Berlin v. E.C. Publications*, 329 F.2d 541 (2d Cir. 1964), cert. denied 379 U.S. 822 (1964).

<sup>36</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 107 (1994).

<sup>37</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

<sup>38</sup> *Rogers v. Koons*, 960 F.2d 301, (2d Cir. 1992).



the naming of a product and the advertising of a product are considered commercial uses of a trademark. The Apple ad clearly constituted commercial use, as it was designed to sell computers. But the commercial probably had little adverse impact on sales of the novel or of the film version of *1984*. Regardless, a fair use defense would not succeed in court.

Could Apple claim that its commercial helped publicize *1984* and thus proved beneficial for Orwell, eliminating any damages? Such a symbiosis assertion is not a defense to either copyright or trademark infringement. An infringer cannot make the argument that the rights-holder has benefitted by his wrongdoing, as that judgment is reserved for the rights-holder.

So the Apple ad was indeed, as Marvin Rosenblum told Chiat-Day back in 1984, a violation of intellectual property laws. Should the case have gone to court, the bottom line is that Apple would not have been successful. A Court would have enjoined further televising of the ad and Mr. Rosenblum could have sought the profits Apple generated from it. Interestingly, either no one at Apple and Chiat/Day thought about the copyright/trademark issues or they thought about them and did not care.

Surely the advertising industry depends on vigorous obedience and enforcement of intellectual property laws for its very existence. Indeed, one of the principal objectives of a great ad agency is to create a positive trademark brand for clients. A brand identification is possible only if the law will protect the brand against unauthorized or unaffiliated use. Agencies charge clients dearly to craft and produce television commercials, which convey the desired image and message about the client's product.

Apple Computers also depends on rigorous compliance with intellectual property laws. In one of the leading trademark cases, Apple successfully defended the term "Apple" as its trademark for computers, even though the noun "Apple" is a generic English word.<sup>39</sup> Apple fought hard for the notion that the context in which a word or a scene is used in commerce is a valuable part of protectable property.

Apple should have asked Mr. Rosenblum for permission to use Orwell's materials in the commercial. We will never know whether, or for how much money, he might have granted such use. The commercial was very well done, and it obviously was true to the novel. At that time, Rosenblum was assembling the parts for his motion picture; he might have weighed the positive publicity the commercial would have generated for his upcoming film. But that was Rosenblum's, and not Apple's, decision to make.

The Apple commercial will no doubt continue to be cited in advertising schools for its quality and impact. But it should henceforth also

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<sup>39</sup> *McCarthy on Trademarks*, § 12 et seq. See [www.cbs.com/specials/2004\\_super\\_bowl\\_commercials/](http://www.cbs.com/specials/2004_super_bowl_commercials/) "Twenty Ads that Shook the World", Tutichell (Crown 2000).

Winter 2009

*BIG BROTHER*

115

be presented as a lesson in the intellectual property laws of this country, and about advertising's responsibility to respect those laws, which have meant so very much to the development of the advertising industry.