

'BIG BROTHER' IS WATCHING APPLE: The Truth about the Super Bowl's Most Famous Ad

By William R. Coulson

Apple Computers introduced its revolutionary 'Macintosh' personal computer to the world via a daring television commercial aired during the 1984 Super Bowl. The Los Angeles Times designated this commercial as "one of the most studied in U.S. marketing", and advertising guru Lewis Lazare of the Chicago Sun-Times noted that it "has not been equaled in terms of overall impact". What has never been revealed about this commercial icon, until now, is that the ad was a flagrant civil violation of the 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 are seen running after some unseen quarry. They are chasing an athletic-looking woman, who carries a large hammer. She runs into the auditorium, then hurls the 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 introduce the Macintosh. And you'll see why 1984 won't be like '1984'." (The ad may be viewed on the internet, for educational purposes only of course, at www.uriah.com/apple-qt/1984/html.)

Much revisionist advertising lore has followed this commercial. One myth is that the ad was never shown other than its lone Super Bowl debut. Wrong. The ad was presented 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. And for five days before the 1984 Super Bowl, a truncated version of the ad ran in movie theaters, before previews. During this time the ad was also previewed 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, but as a news item! It is true, however, that after the Super Bowl, Apple never again paid to air the commercial. This decision may have been providential.

This Apple commercial expressly credited as its genesis the George Orwell novel "1984": "And you'll see why 1984 won't be like '1984'," the ad concludes. Mr. Orwell was a British writer who also penned the novel "Animal Farm", likewise about the totalitarian menace faced by the West in the late 1940s. His novel '1984' was set in a totalitarian society in which telescreens (television cameras) were hidden in the walls of residences, and in which the dictator "Big Brother" harangued the citizenry during assemblies from a huge auditorium screen. The

Apple ad slavishly adopted a thematic scene from the novel: the daily ‘two-minute hate’, for which the docile citizenry dutifully assembled before a giant telescreen. First, a notorious ‘enemy of the state’ was displayed on the telescreen. 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 there appeared on the screen, “... 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.” (‘1984’, Signet Classic edition, pages 15 - 17).

The Apple commercial was filmed at London’s Shepperton Studios in September of 1983. Just six months later at that famous studio, beginning in April of 1984, the late actor Sir Richard Burton commenced filming what would be his very last picture - the Marvin Rosenblum produced film adaptation of Mr. Orwell’s “1984”. This sequence of events at Shepperton illustrates the legal and ethical issues in play here.

In fact, the book ‘1984’ was (and still is) under copyright in 1984. Copyright protection means a lot of things. For a novel, it means that no one is free to make a commercial use out of protected elements of the novel, in any medium. Chicago attorney and film producer Marvin Rosenblum had paid dearly to buy the television and motion picture rights to the novel ‘1984’, from Sonia Orwell, the author’s widow. Utilizing these rights, he had assembled the financing and the cast to make the Richard Burton film version of the novel. And 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. Later, producer Rosenblum would expend much effort and treasure to exploit his exclusive right to present ‘1984’ in the television medium.

Moreover, 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 iconic Apple commercial was thus in fact a violation of federal copyright and trademark rights; and producer Rosenblum promptly wrote Apple’s ad agency to ‘cease and desist’ from further publications of the ad. Apple never again ran the commercial. The true story is told here for the first time.

In August of 2000 I filed a trademark and copyright suit against CBS Television, on behalf of producer Marvin Rosenblum and the Estate of George Orwell. CBS had begun airing in the United States a so-called ‘reality’ series which it titled “Big Brother”. Cameras were installed in the walls of a specially-constructed house, watching the selected inhabitants 24 hours a day. The unseen but ubiquitous character ‘Big Brother’ ordered the inhabitants about, and dispensed or withheld certain privileges, from the ‘Diary Room’ . And CBS utilized a production company for this series, named “Orwell Productions, Inc.” We alleged that CBS’ rip-off was willful, and

sought as damages all of CBS' profits from the series. After a year of litigation, which included depositions of CBS executives in Los Angeles, and the exchange of masses of documents, the case was settled to the satisfaction of both parties. In the course of this litigation, the history of the rights to Orwell's novel "1984", and its intersection with the Apple television commercial, were revealed.

George Orwell (whose real name was Eric Blair) wrote his novel "1984" during the year 1948 (he simply transposed the year's digits for his title). The novel has become one of the most celebrated and read books in English literature. It is set in a dark future, when England is ruled by "Big Brother". Television cameras ("telescreens") are installed in the walls of homes, so the citizenry enjoys no privacy. As mentioned above, a famous plot device is Big Brother's speeches to his assembled subjects. In Big Brother's totalitarian world, original thought is a crime. Conformity and obedience is the rule. The novel's protagonist - Winston Smith - secretly keeps a diary in which he records his innermost (and illegal) personal thoughts. He carries on an illicit love affair with the novel's strong woman character - Julia. They dream of destroying Big Brother; but they are betrayed at the end, and finally tortured and brainwashed into loving Big Brother.

Mr. Orwell's publisher, Harcourt Brace & Co., dutifully registered the copyright for his novel in the United States in 1949. George Orwell died in 1950, and his will conveyed his copyright to his widow Sonia. She authorized a black-and-white film version of the novel in 1955. This movie starred Edmund O'Brien and Jan Sterling. Unfortunately, Sonia Orwell hated it, ceased all distribution of it, and did not renew its license. In 1976 Sonia renewed the novel's copyright. Under U.S. law, the book remains under copyright protection until the year 2025.

Copyright law gives to the writer the exclusive rights to reproduce and to market his work. It also gives him the exclusive right to make derivative works based on the work. These derivative works would include a movie of the novel, a television program based on the novel, a video game based on the novel, any sequel based on the novel, or advertising based on the novel. These rights can be licensed to others for particular uses for limited times, or they can be sold outright to others. 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, and by sending out what are called "cease-and-desist" letters to unauthorized users, telling them to stop their use of the protected work. The rights holder can also sue unauthorized users for copyright infringement, and can be awarded damages and an injunction.

An enterprising Chicago attorney and film producer, Marvin Rosenblum, admired the novel '1984', and thought that a film should be made of it to debut in the actual year of 1984. 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. He flew to London to meet with Sonia, who was charmed by his dedication to the novel. By that time '1984' had sold over

8.5 million copies in the United States alone. 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 the book '1984'. Within two weeks of this agreement, Sonia Orwell died. The Estate of George Orwell became her Literary Executor, now holding all the rights to the novel not bought by Rosenblum.

By late 1983 Rosenblum was ready to begin his film version. He had been able to sign Simon Perry of Virgin Films to co-produce, and Michael Radford to direct. Before settling on Mr. Radford, the producers had shown graphics and other material to Mr. Ridley Scott, and had offered Mr. Scott the directorship. The film's casting included Richard Burton (in what would be his last role), Susanna Hamilton, and John Hurt. To be totally faithful to the novel, the movie would be filmed in London during April, the month in which the novel is set. Filming was set to commence at London's Shepperton Studio on April 2, 1984.

At this same time, in September of 1983, the Apple commercial was filmed at the same studio. Apple's ad agency, Chiat-Day, budgeted \$900,000 and hired Ridley Scott as director. The Apple executives loved the resulting commercial. They showed it first at Apple's annual sales conference in Honolulu in October, to a mixed reaction. In December the commercial was aired on the Twin Falls, Idaho television station. In January 1984, it aired once in each of the ten largest tv markets, and in some movie theaters. Then, on January 22, 1984, Apple ran the ad during the Super Bowl telecast, at a cost of \$800,000. The rest, as they say, is history.

But is it? Apparently, none of the Apple executives, who were the best and the brightest at their trade, and none of the Chiat-Day creatives, who were also among the best at their craft, bothered to ask if the novel '1984' was still under copyright, and if what they were doing was legal.

While he was 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. The requests came from theater groups, record companies, film institutes, radio stations, and television producers. In deciding whether to grant a license to any particular requester, Rosenblum sought both to protect the artistic integrity of Orwell's work, while also maximizing the revenue realized from such licenses. When he became aware of unauthorized commercial utilizations of '1984' material, Rosenblum sent "cease-and-desist notices to the offender. His file for this period (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 between the Los Angeles Raiders and the Washington Redskins. The game was a blow-out, with the Raiders winning 38-9. Early in the third quarter, Apple ran its ad. Rosenblum, normally a calm, soft-spoken type, could hardly contain his rage. He revered George Orwell, and had just spent years of his life acquiring the rights to the novel. He was in the midst of the always financially risky production of his film of the novel. And now, 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. At least it was not a deodorant ad!

Rosenblum immediately got on the telephone. No, the estate had not authorized the use of the Orwell material in the commercial. He called friends in the TV and advertising communities, and tracked the ad to the Chiat-Day agency in Los Angeles. He called the Apple legal department. He then went to London to work on his motion picture. Filming began on April 2, 1984, and continued through June. Numerous callers from the media asked him if the Apple scene was from his film.

By letter to Lee Clow of Chiat-Day, dated April 26, 1984, Rosenblum on his law firm stationery memorialized his objections to the Apple ad. Said Rosenblum; "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", and that the "tag line to the commercial has the word '1984' in quotations". "It therefore cannot be argued that the commercial was merely meant as a vague allusion to an Orwellian society", said the letter. 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". He asked Chiat-Day to contact him, and he warned that he might have to file suit in federal court in Chicago 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.

Rosenblum's film production of '1984' premiered in London on October 7, 1984. It was released in the United States in December of 1984. The film garnered much critical acclaim, but was never a smash at the box office. The film is now available on video, is shown on TV

occasionally, and the musical soundtrack by the Eurythmics can still be found in record stores. The movie's posters are hot collectibles, largely because the film was Richard Burton's last.

Rosenblum went on to produce a video game based on '1984'. He has worked with Granada Television to develop a '1984' television series, a mini-series, and a '1984' sequel. These projects were pitched to, among others, CBS Television, under the title 'Big Brother'. CBS then aired its own television series entitled 'Big Brother' in August, 2000, resulting in Mr. Rosenblum's trademark and copyright lawsuit discussed above.

Was the Apple ad a copyright/trademark violation? Based on my own thirty years as a litigator, I am of the opinion that it was, and that the question is not a difficult one to answer. The more compelling question is why no one at Apple or at Chiat-Day thought to ask the question and contact Rosenblum before the ad was televised.

It is often said that the copyright law protects the specific expression of an idea; not the idea itself. In Orwell's '1984', the general idea is a totalitarian society with no personal privacy or independent thought whatever. Orwell's specific expression of this idea is a dictator called Big Brother, cameras in the walls of people's homes, with regular assemblies of the masses in front of a large screen, listening to Big Brother. There are, of course, a great many unique and original ways for an author to depict this general idea. Each original expression of the idea is protectable by copyright. A fictional character is protectable, without more. Anyone who wrote a story with a character named "Superman" with superhuman traits would breach the copyright of the owner of the character.

In many copyright lawsuits this distinction is the issue to be decided: did the alleged infringer take too much of the author's work? How much is too much? In a hypothetical lawsuit between Rosenblum and Apple over its commercial, I believe that Apple would have a very difficult time. First, Apple copied a famous scene from the novel. The 'two-minute hate', followed by Big Brother's big screen harangues to his docile subjects is a significant theme in the novel. In the novel the watching citizens were first whipped to a desire to "smash faces with a sledge hammer", and a woman hurled a book at the screen. In the novel it is a woman - Julia - who first rebels against the conformity by seducing Winston Smith. In the Apple ad, it is a woman who rebelled against the conformity, by hurling a hammer at the screen, smashing the face. Second, and even more dispositively, the Apple commercial intentionally admitted that 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'." This is a suing lawyer's dream! There could be no doubt that Apple intended to refer to and trade on the Orwell novel. I would take my chances with such evidence any day, in front of any jury.

Apple's intent to trade on and exploit the novel also implicates the federal trademark laws.

It is illegal for one company to act to confuse the public about the origin of its product; that is, to suggest falsely that the product is affiliated with another company. Here Apple 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 it can unfairly enhance the value of Apple's product. It is unlawful, and I believe a Court (and a jury) would have found a trademark violation.

One possible defense often asserted in copyright/trademark cases would be, in my view, unavailable to Apple. There can be no doubt that Apple's use of Orwell's work was a commercial use, and not mere commentary or reporting (as is this article, for example). For this reason, Apple could not credibly claim that the ad was social satire on Orwell. It was designed to sell personal computers, not as an essay on conformity.

So the Apple ad was indeed, as Marvin Rosenblum told Chiat-Day back in 1984, a violation of the intellectual property laws. Experience tells me that Apple's lawyers could have mounted various attacks on Rosenblum's claim; but the bottom line is that I believe Apple would not have been successful. Ultimately Rosenblum would have prevailed, and I do not think it to be a close case. A Court would have enjoined further televising of the ad, and Mr. Rosenblum could have sought Apple's profits generated from it.

The more interesting question is why. Either no one at Apple and Chiat/Day thought about the copyright/trademark issues, or they thought about them and didn't care.

Surely the advertising industry depends for its very existence on vigorous obedience and enforcement of the intellectual property laws. 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, and the entire industry, similarly depend for their existence on rigorous compliance with IP 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. 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 - a license- to use Orwell's materials in the commercial. We will never know whether, or for how much money, he might have granted such a 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 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.

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