

The Danger of Ambush Marketing in the Olympic Games, and Balancing the Interests of the Athlete's Sponsors with the Olympics' Official Sponsors

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With the recent conclusion to the XXII Olympic Winter Games, the theory of ambush, or guerilla, marketing once again became a topic of discussion among those employing questionable tactics, those seeking to protect their intellectual property rights, and those concerned with protecting their sponsorship interests. In his article, Adam Epstein defines ambush marketing as an intentional attempt by an advertiser to associate itself with an event it did not pay for the right to be associated with, and then addresses these issues in greater detail. Events of the size and magnitude of the Olympic Games (Summer and Winter) and the upcoming annual NCAA Men's Basketball Tournament ("March Madness") provide an opportunity for entities selling products to associate themselves, even absent an agreement, through crafty placement and marketing.

The danger of ambush marketing is to be taken seriously because numerous consumers are susceptible to being amused and consumed with clever television and print advertisements that purport a sponsor's affiliation with the Games when that affiliation may not exist. Epstein cites the Lanham Act, prohibiting the unauthorized use of registered trademarks in association with an ambusher's product, as the most relevant federal law regarding ambush marketing. Epstein also extensively explores the intellectual property rights granted to the United States

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Olympic Committee (USOC) under the Amateur Sports Act (1978) and the Ted Stevens Olympic and Amateur Sports Act (1998). Chief among those rights are the USOC's exclusive right to the use of the familiar International Olympic Committee symbol of five interlocking rings and the use of the words "Olympic," and "Olympiad." It is common to see official sponsors of the Olympic Games stating in their advertisements that they are, in fact, an "official sponsor," to separate themselves from those engaged in ambush marketing. The author also discreetly raises the pertinent issue of cybersquatting with regard to domain names in the continuing technological evolution of the internet. Epstein raises another poignant issue; because the Olympics are generally an international event, there is difficulty in enforcing ambush marketing regulations across numerous jurisdictions.

The USOC actively seeks to protect its intellectual property rights by filing lawsuits against companies under the Lanham Act. Even so, companies have avoided lawsuits by avoiding explicitly infringing on the USOC's protected rights. As stated in the article, Nike exploited the 1996 Olympic Games in Atlanta to the point where their tactics are thought of as one of the most famous ambush strategies of all time.¹ But purchasing billboards in and around Atlanta, detracting from the official sponsor, Reebok, may not have been the "ambush" that is remembered. Nike also ran highly visible and creative commercials, handed out flags with their swoosh logo on them for fans to wave, and built a "Nike Centre" next to the Olympic Village that provided facilities for the athletes and fans.² In fact, the "ambush" that is most remembered from that Olympic

¹ Terry O'Reilly, *Sochi Olympic on lookout for ambush marketing; IOC up in arms, but fans look at rival's sneaky ads as a spectator sport*, CBC NEWS, <http://www.cbc.ca/news/business/sochi-olympics-on-lookout-for-ambush-marketing-1.2537613>, (last updated Feb. 15, 2014, 5:15 AM ET).

² *Id.*

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Games may have been unintentional. Former Olympic Gold Medalist sprinter Michael Johnson had a memorable Olympic Games in 1996, becoming the first man to win gold medals in both the 200 meters and the 400 meters, setting a world record in the former.³ People remember the races and that he set a world record, but mostly, what comes to mind, are the gold pair of Nike track spikes he wore. Reebok was the official sponsor of the '96 Games and paid \$50 million dollars for that title.⁴ But “The man with the golden shoes” prompted 22 percent of fans to cite Nike as the official sponsor of the Games when asked, and only 16 percent Reebok.⁵ An effective ambush marketing campaign is a part ingenious advertising, a part good timing, a part slight robbery, and two parts “wink, wink.”⁶ Nike's epic ambush prompted the International Olympic Committee, not wanting their official sponsors scared away by ambush marketers, to implement vast anti-ambush regulations.⁷

The author discusses another example of Nike effectively using ambush marketing during the 2012 Summer Olympic Games in London. Nike's tactful marketing campaign allowed them to skirt liability under regulations that were enacted by the British government specifically to punish ambush marketers and to throw a jab of sorts at the whole process. No host city had drafted broader regulations than the London Organizing Committee

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

of the Olympic and Paralympic Games (LOCOG).⁸ With a hint of sarcasm, Nike was praised for standing up to the Olympic branding czars and credited as having “practiced this dark art (of ambush marketing) with more verve and success than” any other player in the field.⁹ Nike’s campaign was titled “Find Your Greatness” and was said by Nike to “inspire everyone in their own personal achievements.”¹⁰ A Nike spokesperson was quoted as saying, “[g]reatness doesn’t just happen in the stadiums of London. We’re saying that greatness can be anywhere for anyone and you can achieve it on your own terms.”¹¹ Yet, the television advertisement depicted athletes from around the world, conveniently, in towns that happen to have the name London and featured a narrator with a British accent.¹² While the regulations drafted by the LOCOG did technically keep Nike from ambushing the Games in a traditional fashion, Nike still gained valuable publicity by detracting attention away from the official sponsors of the Games.¹³ Nike did this by basically saying, through a spokesperson, that greatness is not reserved for athletes performing at the Games, but is readily achievable for us all.¹⁴ Although Nike did not infringe on the use of registered trademarks under the Amateur Sports Act and the Ted Stevens Olympic and Amateur Sports Act, surely,

⁸ David Segal, *Brand Police Are on the Prowl for Ambush Marketers at London Games*, *THE NEW YORK TIMES*, http://www.nytimes.com/2012/07/25/sports/olympics/2012-london-games-brand-police-on-prowl-for-nike-and-other-ambush-marketers.html?pagewanted=all&_r=0, (July, 24, 2012).

⁹ Mark J. Miller, *London 2012 Watch: Nike Flips the Bird to Olympics Brand Police*, *BRAND CHANNEL*, <http://www.brandchannel.com/home/post/2012/07/25/London-2012-Nike-Ambush-Marketing-072512.aspx>, (July 25, 2012, 7:14 PM).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *supra* note 8

¹⁴ *Id.*

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in the end, many consumers associated Nike with the Games through this artful needling of the "Branding Czars."

Nike has found ways to escape liability with their ambush marketing strategies and should be commended for effectively marketing their product during an event as widely watched and attended as the Olympics. They have complied with the federal and international regulations by refraining from using Olympic marks and terminology. A company, such as Reebok, paying to be recognized as an official sponsor of the Olympics should not prevent competing companies from marketing their goods to consumers in the most creative and effective ways. In reality, Nike's tactics are the very essence of rigorous competition that, in the end, is healthy for the advertising market and commerce generally.

The author conveys that the IOC has adapted their regulations to the questionable tactics of ambushers by adopting new rules to address evolving concerns. The Olympic Charter now contains Rule 40, which, in tandem with the IOC Social Media Guidelines, prohibits athletes from engaging in advertising for any company other than official sponsors of the Games. The author also mentions the USOC Athlete Endorsement Guidelines, which informs athletes that the USOC will not tolerate ambush marketing by companies that are not sponsors. Companies like Nike, however, will always attempt to find ways to elude prohibitions such as Rule 40. These companies will continue to view Rule 40 as a levied attack on the marketing of their products and will assuredly become even more imaginative in eluding liability.

While ambush marketing is and should be a realistic concern, recently, there has been a discussion on whether enforcement of Rule 40 should be relaxed.¹⁵ Pushback by the athletes may have prompted this discussion, as the athletes' position is that the sponsors who support them year-round should be able to support them in their most visible, high profiled moments, even if they are not an official sponsor of the Games.¹⁶ With the support of the USOC, the IOC's Director of TV and Marketing Services indicated they intend to evaluate Rule 40 after the Games in Sochi.¹⁷ The USOC's support signifies a drastic shift in the position they have held for the last few decades, but the U.S. athletes' attack of the Rule on Twitter prior to the London Games prompted the IOC and USOC to consider changing Rule 40.¹⁸ USOC CEO Scott Blackmun, acknowledging the challenge of balancing the Rule against sponsors' interests, stated, "[I]f . . . an ad that doesn't use Olympic marks but clearly is Olympic ambush, that's not right and we want to protect our sponsors. . . . But if an athlete has a long term relationship with a company, and they want to continue that . . . that's something we need to have a conversation about."¹⁹ Blackmun's primary concern is the unofficial sponsors refrain from using Olympic marks or terminology and creating consumer confusion,²⁰ a

¹⁵ Tripp Mickle, *A Ringing Endorsement? USOC Considering Relaxing Its Enforcement of Rule 40*, SPORTSBUSINESSDAILY.COM, <http://www.sportsbusinessdaily.com/Daily/Issues/2014/02/21/Olympics/Rule-40.aspx> (February, 21, 2014).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

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requirement of the Lanham Act.²¹ Relaxing enforcement of Rule 40 would benefit all involved. The official sponsors could proceed with their marketing without the fear of ambushers and those same potential ambushers, if allowed more latitude, would not feel the need to antagonize and ridicule the IOC/USOC with sarcastic jabs in their advertising campaigns.

Through its wily tactics, Nike has successfully eluded liability for its ambush marketing. By making sure not to use the protected Olympic marks or terminology, companies at least can argue that they are compliant with the Amateur Sports Act and the Ted Stevens Olympic and Amateur Sports Act. The Lanham Act requires an additional hurdle, that the potential ambusher's marketing campaign does not create confusion among consumers between their products and the official sponsors of the Games. Recently, however, social media has thrown a wrench into enforcement of Rule 40, with companies employing marketing campaigns through regular fans and consumers carrying messages about athletes and their products on Twitter, Instagram, and Facebook.²² As pointed out by the author, and sources cited in this note, the internet has provided a new forum with new ways to manipulate the regulations. The IOC and USOC would have a difficult

²¹ *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 780 (citing *New West Corp. v. NYM Co. of California, Inc.*, 595 F.2d 1194, 1201, holding that “[U]nder the Lanham Act [§ 43 (a)], the ultimate test is whether the public is likely to be deceived or confused by the similarity of the marks . . .”).

²² Jason Blevins, *Olympic athletes adjust to rules forbidding from open sponsorship*, THE DENVER POST, http://www.denverpost.com/olympics/ci_25006310/olympic-athletes-adjust-rules-forbidding-them-from-open, (Jan. 28, 2014, 1:00 AM MST).

time regulating average consumers and fans taking to social media and pushing a particular athlete and that athlete's personal sponsor. Additionally, athletes are now using social media to voice their displeasure with an inability to showcase their personal sponsors. It conveys a poor message when Olympic athletes are hash tagging "Rule40" and "wedemandchange"²³ on Twitter.

The IOC and USOC's willingness to consider adapting Rule 40 is a sign that they are evolving to an ever changing environment, in large part due to the internet. If changes to Rule 40 are made, it may lessen Nike's, and others', desire to not only avoid liability for ambush marketing, but also to ridicule the prohibitions in the process. The London Games in 2012, and the growing industry that is social media, have compelled the IOC and USOC to soften their once ardent stance on the use of the Olympic marks and terminology by unofficial sponsors. An adaptation of Rule 40 allowing athletes to display their personal endorsements during the games may curtail many companies' attempts to ambush market. While ambush marketing is very real and palpable, a compromise by the IOC and USOC may go a long way in lessening the intensity and frequency of such marketing. With social media being as accessible as it is today, the less negative publicity for a sponsor, the better. Athletes jumping on Twitter to disparage the IOC or USOC benefits no one, especially given that athletes (and actors, and politicians) are not generally known for exercising a great deal of discretion and judgment when it comes to Twitter. The IOC and USOC should closely examine and consider relaxing Rule 40 and other regulations to better serve all involved, their official Olympic sponsors, as well as the athletes and their personal sponsors.

²³ *Id.*