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Sports Marketing and the Law: Protecting Proprietary Interests in Sports Entertainment Events

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SPORTS MARKETING AND THE LAW: PROTECTING PROPRIETARY INTERESTS IN SPORTS ENTERTAINMENT EVENTS†

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I. INTRODUCTION

This article is intended to help owners of sports entertainment properties protect their long-term financial interests and the goodwill generated from the promotion of sports teams, events, corporate sponsorships, licensed merchandise, franchise, and broadcast rights (collectively referred to as "Sports Marketing"). To encourage development of new sports entertainment events, investors must be given a reasonable chance of obtaining a favorable return before being copied by competitors. Current laws and business practices governing athletic events afford only limited protection to new owners and organizers. Protecting the investors, then, is the challenge of the event-organizer. At the same time, event-organizers must maintain participant and spectator loyalty while satisfying the political concerns of athletic governing bodies and government regulatory agencies.

Sound business management and marketing practices which promote integrated forms of sports entertainment will help minimize risk and maximize return on investment. These risks, and ultimately the rewards, can be shared among the investors by operating sports entertainment events as businesses jointly supported by the sports organization, athletes, promoters, lead sponsors and sports broadcasters. Although risk of failure for newcomers is high, the financial rewards, challenge and feeling of satisfaction can be gratifying for those who succeed. To succeed, owners must continually improve the quality of competition and entertainment value. They must increase awareness, build brand equity and satisfy stakeholder needs. The desired outcome of these efforts is increased equity and increased market demand for the sports entertainment event. This increased demand generated among sponsors, licensees and consumers then must be satisfied. Left unsatisfied, the void is likely be filled by another competitive activity.

The next few sections of this article will define the scope of the problem and outline the critical issues involved. At issue are concerns such as: how can owners legally protect their interests in unique sports entertainment events without unfair restraint of trade?; what is the commercial value of the sports entertainment product?; what is the best method of evaluating sports sponsorships and licensing agreements?; who really owns the ancillary product?; how can stakeholder needs be satisfied equitably?; and what steps are necessary to guard against the duplication of new ideas and to help secure long-term social and economic benefits?

This article then addresses the relevant legal issues concerning intellectual property rights, sports celebrities' rights of privacy and publicity, contract negotiations, ownership of ideas and the theory of unjust enrichment. Readers will gain insight into the psychological profiles of committed supporters to better understand what motivates their purchase decisions. The final chapter will answer the question: is sports marketing just another media vehicle for delivering sponsors' advertising messages or should sports entertainment events be managed as strategic business units? The discussion concludes with a summary of specific marketing, management, and legal measures that will help owners protect their proprietary interests in sports entertainment events.

For the purpose of our discussion, the words "owner" and "event-organizer" are used interchangeably. Financial investors, promoters, organizers, sponsors, licensees, broadcasters, athletes, athletic governing bodies, government regulatory agencies and committed supporters (collectively referred to as "stakeholders") all have a vested interest in the exploitation of the commercial product. They may share ownership interest in certain events. Understanding the interrelationship of sports marketing and the law will enable professionals in the sports entertainment industry to manage stakeholder interests.

II. The Business of Sports Entertainment

A. Competitive Challenges

Left unprotected, successful events can be duplicated by suppliers, sponsors, broadcasters, employees and competitors. It is not unusual for companies seeking less expensive alternatives to existing athletic events to stage their own competitions. The desire to capitalize on the success of others drives this practice, domestically and abroad. The fact that these may be violations of common law such as "passing off" and "free-riding" does not preclude this practice.

Unlike other types of products, people cannot own sports. They can only own and control the vehicles through which sports are played (e.g., sports entertainment events, sports facilities, sports equipment, player contracts, trademarks, telecasts, publications, and other copyright material including advertising and promotional literature).

The following example summarizing Sports & Specialist Event Management's negative experience with Coors Brewing Company, a corporate sponsor of sports events, illustrates the challenge of protecting athletic event ideas:

> In an interview with *IEG Sponsorship Report* (formerly *Special Events Report*), Sports & Specialist Event Management, Inc., (SSEM) representative Mike Malekoff accused Coors of taking his company's idea for a biathlon series. Malekoff brought the idea to Coors in 1987. In 1988 and 1989, Coors Light® served as title sponsor. Around the time of the 1989 finals, Malekoff found out that Coors had hired one of SSEM's subcontractors to stage the 1990 biathlon series. Coors had decided not to renew its contract with SSEM. The brewery sent SSEM a standard form letter in which the company reserved the right to stage its own event.
>
> In a form letter used by Coors Brewing Company to respond to unsolicited ideas, field marketing manager Tim Simmons warns proposal writers that, "Coors may be developing similar or related projects, independent of any promotional ideas or proposals XYZ has submitted. Consequently, XYZ will not be contacted or compensated with respect to the execution by Coors of projects or promotions similar to XYZ which have been developed independently by Coors. Also be advised that there will be no binding agreement between the parties until a formal written agreement has been signed by both parties . . ."
>
> SSEM, Coors' event marketing agency, learned the hard way. Malekoff received the standard form letter in 1989 in response to his renewal proposal for the 1990 biathlon series. "I'd invested a large sum to get an untested concept off the ground and build credibility," Malekoff said. "No one had ever done a national biathlon series before and SSEM, not Coors, had assumed the entire financial risk, signed cosponsors, etc. Just as my investment was about to pay dividends in year three, I lost the property."[1]

SSEM's experience with Coors Brewing Company is just one of many examples. Another example involves the coast-to-coast race, out-

1. Lesa Ukman, *How Coors Manages Sponsorship Proposals*, 9 IEG SPONSORSHIP REPORT 12 (1990).

door adventure and endurance sports event called the Southern Traverse. With a few modifications, this popular New Zealand event was introduced in America and Australia under the names Eco-Challenge and Treadbo, respectively. Another example is the success of the National Football League (NFL) and the National Basketball Assocation (NBA), which gave rise to failed attempts by others to introduce the World Football League and American Basketball Association. The popularity of the NFL spawned the American Football League (AFL), which eventually merged with the NFL. Demand for professional basketball, fostered by the NBA, led to the introduction of the Asian Basketball League in overseas markets. This move will make it more difficult for the NBA to expand internationally. These examples further illustrate the need to fill market demand quickly before competitors seize the opportunity.

Faced with the challenge of satisfying increased market demand, event-organizers must safeguard the image, reputation and goodwill associated with successful athletic events while planning for their expansion. The quality and integrity must be maintained in subsequent events. Later in this article, we will explore the contractual agreements that can help preserve the quality and integrity of new sports entertainment events, as they expand to meet demand.

For novel ideas like the Extreme Games®, produced by ESPN, Inc., and aired for the first time on ESPN and ESPN2 in 1995, the challenge of satisfying increased market demand was a serious concern. ESPN must continue to satisfy the needs of the market or risk being duplicated by competitors. Expansion opportunities exist in a number of areas. The rights to qualifying events could be franchised. Alternatively, these rights can be syndicated through station affiliates or ESPN could joint-venture the games with event-organizers and athletic governing bodies. Finally, ESPN could continue its practice of using independent contractors to execute the events. All of these approaches will help satisfy increased demand from athletes, spectators, television viewers, ESPN's carriers and sponsors alike.[2]

B. Sports as an Inherent Part of Our Social Being

Sports have become so ingrained in our social culture that they appear to be a natural and essential part of life. One author summarized this phenomenon best when he said:

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2. *See infra* part III.A.

> People take pleasure in watching football [spectator sports] because, it presents a spectacle of conflict, drama, excitement and eventual resolution. They achieve social cohesion by belonging to a community of fans and by participating in the rituals of supporting a team through its wins and losses. For many supporters, their teams lend them an identity, almost tribal in its more extreme manifestations, which is an existential commitment to their football team and which sustains them through vicissitudes of their daily lives and work.[3]

Recent success of the Green Bay Packers football team illustrates this phenomenon. Packer mania has spread throughout the state of Wisconsin with fans dancing to the "Packerana," sporting cheeseheads and licensed merchandise publicly acknowledging their enthusiastic support. Packer fans proudly boast of their team's success and rally around favorite stars like Green Bay quarterback, Brett Favre, voted Most Valuable Player in the NFL for 1995 and 1996.[4]

An Australian author, Owen Covick, discussed the notion of "champ-followers." This concept helps us better understand consumer behavior as it pertains to spectator sports. What motivates die-hard fans to watch, read and listen to sports? The answer to this question is an essential part of the marketing equation. An understanding of consumer psychology and purchase behavior is necessary for developing effective sports marketing plans.

As Covick explained, the theory behind champ-followers is based on the fact that some individuals identify themselves heavily with team-sports, and individual sports heroes.[5] Individual loyalty can be so strong that the team's performance actually affects how a person feels about him or herself. When the team performs well, the individual feels good. When the team performs poorly, the person feels miserable. According to the theory, individuals become "hooked" on particular sports and individual teams, as well as the heroes within. "The positive payoff of euphoria will be accentuated by the supporter being physically present at the victorious occasion. But if the team performs poorly, the supporter will feel even more miserable than if he or she had watched the game on television at home, or had simply read about it afterwards in the newspa-

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3. B. WILSON, SPORTS AND LEISURE 27-39 (1990). *See also* HAYDEN OPIE, SPORTS COMMERCE AND THE LAW (1994).

4. *Favre Named NFL's MVP For 2nd Straight Season*, WASH. POST, Dec. 31, 1996, at CO2.

5. OWEN COVICK, SPORTING EQUALITY IN PROFESSIONAL TEAM SPORTS LEAGUES AND LABOUR MARKET CONTROLS: WHAT IS THE RELATIONSHIP? (1986). *See also* OPIE, *supra* note 3.

per."[6] This theory can be applied to committed supporters of individual sports as well. Golf, skiing, tennis and other solo sports activities are followed religiously by arm-chair supporters, each committed to his or her own sports hero. Other people watch sports for the pure enjoyment of the art form. The entertainment value for this type of champ-follower is derived from the quality of the performance.[7]

Insights into consumer psychology can help sports marketers better understand consumers' buying motivations. Understanding the motivational forces behind consumers' buying decisions is crucial to event-organizers whose products are aimed at ticket buyers and television viewers. Organizers must cater to consumers' desire to identify with sports teams and individual super stars. Event-organizers can build allegiances with customers by satisfying consumers' need for superior performances and affiliation with sports heroes, and thereby build repeat business and long term loyalty.

C. The Value of the Commercial Product

The economics of sports have played an important role in the emergence of sports marketing and the legal implications associated with the commercial enterprise of sports. In the 1970s, sports marketing was still in its infancy. Companies viewed sports marketing as another form of communication along with advertising, public relations and sales promotion. Special events and sports celebrities were used to heighten awareness for the marketer's products and services. With this came instant credibility and media exposure for the marketer's brands.

During the 1980s, television media began to compete more aggressively for its share of the sports entertainment dollar. Sports became an integral part of television programming. Spectator sports had mass market appeal that cut across social and economic barriers. Sports appealed to television viewers and corporate advertisers alike, thus enabling broadcasters to improve their ratings and increase advertising revenue. With the increase in media coverage, sports became big business in the late 1980s and into the 1990s. Shareholder interest grew. People began to look at sports as an investment opportunity instead of a charitable concern.

As we move into the next century, greater emphasis will be placed on increased customer satisfaction and return on investment. Sports will no longer be viewed as just another communication vehicle. With increased

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6. *Id.*
7. *Id.*

frequency, sports will be viewed as viable businesses — businesses that must stand on their own profit and loss records. Title sponsorships will give way to sports entertainment events in which building brand equity and goodwill value are paramount. Revenue generated from the sale of sports identified merchandise will outweigh the short-term gains derived from the sale of naming rights. Trademark and service marks associated with sports properties are likely to continue to increase in value. The economic impact on the local community and the flow-on affects of these events will spur demand.

In order to ward off competition, it will become necessary to satisfy the increased demand for sports entertainment events and related merchandise rights. In addition, it will become necessary to satisfy the consumers who attend these events, as well as those who view them on television. With increased frequency, event-organizers will look to sports lawyers for legal advice on contract law, labor law, publicity rights and the protection of intellectual property rights. They will look to marketing professionals for innovative marketing solutions and sound business management to generate bottom-line results and increase stakeholder return on investment.

As new sports entertainment events enter the market, event owners would be well advised to take certain precautions to protect their investments and, thus, enable the event to generate adequate financial returns. There are a number of measures available. The avenues for protection can be found in government regulations, legislation, and in astute business practices. Legal options include: (1) trademark and copyright protection on original works of authorship; (2) patents on unique inventions; (3) labor and personal services contracts with key participants; (4) employment contracts and service agreements with outside vendors stipulating ownership interest in work made for hire; (5) publicity releases; (6) liability waivers; (7) broadcast agreements for distribution rights; (8) long-term sponsorship and licensing agreements with exclusivity covenants, performance minimums and noncompete clauses; (9) athlete participation agreements designed to minimize conflicts of interest; (10) contracts with athletic governing bodies that control access to the athletes and sanction "official" competition and qualifying events; and (11) franchise agreements designed to control the quality, integrity and timing of future events, while expanding access.

Sponsorship spending on sports and entertainment events is on the rise. At the 1996 Sponsorship Profits IEG Event Marketing Conference, Jim Andrews, Vice President of IEG, Inc., reported an increase in sponsorship spending. In 1995, spending reached a record $4.7 billion in the

United States, up from $1 billion in 1986.[8] Worldwide spending was estimated at $10 billion.[9] The rapid climb in sponsorship spending is expected to continue. Growth of sponsorships has outpaced conventional media. In 1995, sponsorship spending grew at 11% over the prior year, compared with advertising at 8% and sales promotion at 5%. Based on its market research, IEG reported the breakdown in sponsorship spending as 66% spent on sports; 10% spent on entertainment tours and attractions; 9% spent on festivals, fairs and annual events; 9% spent on cause marketing; and 6% spent on arts and cultural events.[10]

By 1996, the spending level in North America could reach as high as $5.4 billion. During the same time period, sponsorship spending is projected at $4 billion in Europe, $2.7 billion in the Pacific Rim, $800 million in Central South America and $600 million in all other countries.[11]

1. Sports Entertainment Events: Commercial Risks and Rewards

As a commercial enterprise, sports have become "big business."[12] Just six years ago, joint-venture ownership interest and membership in the International Hockey League (IHL) could be obtained for as little as $200,000. Today, the asking price is $8 million and it is expected to increase to $10 million by the next offering.[13] IHL is a for-profit corporation. Its function is to promote the common interest of League members and perpetuate the sport of hockey. According to the former commissioner and president, Tom Berry, the League's players, all of whom are professionals, are capable of playing fourth line in the National Hockey League (NHL).[14] Thus, the IHL is considered the "triple A" level of professional ice hockey. Twenty years ago, IHL teams grossed approximately $40,000 to $50,000 annually, per club, and ran their offices with as few as four people.[15] Today, IHL clubs typically have staffs of between 30 to 45 people. On average, IHL clubs generate $10 million in annual

8. Jim Andrews, Address at the 1996 IEG Event Marketing Conference (1996).

9. *Id.*

10. *Id.*

11. Lesa Ukman, IEG's COMPLETE GUIDE TO SPONSORSHIP (1995).

12. *Outside the Lines: The Sport of Money* (ESPN television broadcast, July 15, 1992); *See also Sports For Sale*, 1991 (video presentation); Bob Stewart, *Not the Winning But the Getting Paid*, THE LONDON ECONOMIST, July 25, 1992; *Sports as Big Business*, *in* ESSAYS IN SPORTS SOCIOLOGY OF AUSTRALIAN SPORTS 64-68 (1986).

13. Telephone Interview with N. Thomas Berry, Jr., former Commissioner & President, International Hockey League, in Indianapolis, Indiana (July 27, 1995).

14. *Id.*

15. *Id.*

revenue. No application for team membership is considered unless accompanied by $600,000.[16]

What does it cost to start up a sports organization of this magnitude and how long before its owners can profit from their investment? Using the same hockey example above, consider that in the past eight years, aside from the IHL and NHL, five other so-called professional hockey leagues have started.[17] Of these, one died, another is in poor financial condition, two others are limping along, and only one appears to be thriving. 1994 was the IHL's fifteenth year in business. From the late 1980s to the present, the IHL has grown from seven clubs to twenty through controlled expansion of the franchise. "It took the organization nearly forty years to become really profitable," said Berry.[18]

The odds against survival are even greater for new sports. Roller Hockey International Association, a young organization which started with more than thirty clubs just three years ago, now has only fourteen teams in operation — less than half the original number. National and international sports events cost millions of dollars to produce and take up to three years or more to break-even. To ensure a reasonable chance for financial success, the proper steps must be taken up front to tie-up broadcast, licensing and sponsorship rights, as well as merchandising opportunities. Management must proactively protect the name, slogan and expression of original works of authorship, and contractually secure relationships with key participants and athletic sanctioning bodies.

Television contracts and expanded media coverage account for much of the revenue growth over the past decade. On a typical weekend day in 1980, viewers could select from an average of 20.5 hours of sports programming.[19] From 1980 to 1990 television networks and cable went from an average of 4,600 to 7,500 hours of sports broadcasting. By 1990, ESPN alone accounted for 4,500 hours of sports broadcasts.[20] Today, ESPN carries sports programs to 160 countries and 600 million households worldwide.[21]

The Fox Network outbid CBS for the right to broadcast the National Football Conference (NFC) from 1994-1997 by paying an increase of

16. *Id.*
17. *Id.*
18. *Id.*
19. MARTIN J. GREENBERG, SPORTS LAW PRACTICE 604 (1993).
20. *Id.*
21. Telephone Interview with Jack Wienert, ESPN Extreme Games Executive Director (July 15, 1995).

$130 million per year for the privilege.[22] This resulted in a 49% gain for the NFC, even though CBS had lost an estimated $50 million annually on its deal with the NFC. The four-year, $1.58 billion agreement with Fox was struck with the knowledge that the network could post financial losses as great as $600 million over the life of the contract.[23] By the end of the first year, Fox adjusted its projected losses to $350 million over four years. The higher than expected earnings were attributed primarily to gains in household viewership and increased advertising revenues resulting from its sports broadcasts. The Fox Network has been able to promote itself as a major player in sports broadcasting through broadcast licensing agreements with professional football, baseball and hockey.

Three factors lead to owner Rupert Murdoch's decision to acquire the NFC broadcast rights. The first two were the added prestige garnered by the network and the ability to use the NFL to promote Fox's Sunday prime-time schedule. The third factor was Murdoch's belief that to remain a major player in the media business, he needed to secure a programming jewel such as professional football.[24]

What does the increase in rights fees mean to sports organizations? It means greater broadcast revenues, increased recognition and prestige. This will likely lead to increased revenue through sponsorships, licensing, merchandising and other opportunities. The National Collegiate Athletic Association (NCAA) is a prime example. In 1991 and 1992, television contracts accounted for 73.9% of NCAA's operating budget, a budget that totaled $168 million, of which $124 million was generated from television contracts.[25]

Between 1989 and 1992 the U.S. Olympic Committee reported revenues of $67 million from television contracts and $100 million from corporate participation such as sponsorships and licensing agreements.[26] The International Olympic Committee (IOC) expects to generate $1.5 billion from the 1996 Summer Olympic Games in Atlanta, Georgia, of which half will likely come from the sale of television rights.[27] Along with its global expansion and multichannel diversification strategy, NBC

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22. DAVID M. CARTER, KEEPING SCORE: AN INSIDE LOOK AT SPORTS MARKETING (1996).

23. *Id.*

24. *Id.*

25. ROBERT C. BERRY AND GLENN M. WONG, LAW AND BUSINESS OF SPORTS 62 (1993).

26. *Id.* at 19.

27. Joe Mandese, *NBC Thinks, Spends Big With Olympics*, ADVERTISING AGE, August 14, 1995.

recently announced the purchase of television broadcast rights for the 2000 Summer Olympic Games in Sydney and 2002 Winter Olympic Games in Salt Lake for a record total of $1,270,000,000![28] With production and marketing costs factored in, the total bill will be roughly $1.5 billion.[29]

For licensed broadcasters, the games mean up to $1 million per minute for sales of advertising time.[30] For Olympic sponsors, the games provide an opportunity to associate brands with the prestige of Olympic sports; a chance to distribute product samples to spectators and to persuade consumers at the point-of-purchase through promotional tie-ins. Furthermore, the games bestow the right to use the highly coveted Olympic rings in advertising and promotion. Sponsors are granted spot television exposure and on-site signage. They can acquire the best seating for sports events and entertain clients at the hospitality center. Sponsors also benefit from the goodwill that is generated from their involvement with the Olympic Games. For licensees lucky enough to secure licensed merchandise contracts, the Olympics mean millions of dollars in incremental sales volume. In order to win the bid for the Winter Olympic Games, the Salt Lake City Bid Committee, a private nonprofit corporation, spent nearly $7 million in a corporate funded campaign that spanned the globe.[31] They were out-spent by the seventh place contender Quebec, Canada, by $2 million! The Salt Lake City Bid Committee promised INC it will budget $798 million for the games. The economic impact from Olympic related business is projected at $1.7 billion for Utah.[32]

Professional sports organizations like the IHL, the NHL, the NBA, and the NFL have corporate by-laws that grant them the ability to negotiate national broadcast agreements on behalf of members. (The 1966 Telecasting of Professional Sports Act - Section 1291 specifically provides antitrust exemptions for joint agreements under which the organ-

28. *Id.*

29. *Id.*

30. NBC's new Olympic broadcasting buy may force advertising rates to climb to a level nearly equal to those of Super Bowl television ads. Although these rates are high, the payoff can be equally significant for advertisers. For instance, Master Lock, a manufacturer of padlocks, realized significant gains in consumer brand awareness (based on agency recognition and recall scores) through its decade-old annual media buy for the Super Bowl. Master lock has not traditionally been considered a television advertiser, yet once a year for over a decade this Milwaukee-based manufacturer has purchased advertising time for the Super Bowl, at a price broaching $1 million per minute through its agency, Cramer-Krasselt.

31. Kurt Repanshek, *How the 2002 Olympics Were Won*, SNOW COUNTRY, Sept., 1995.

32. *Id.*

ized professional team sports of football, baseball, basketball and hockey can sell or otherwise transfer the rights of the leagues member clubs in sponsored telecasting of the games).[33] Depending on the league's by-laws, it may elect to share broadcast revenues equally among member clubs and/or players, or it may limit the distribution to those teams that participate in televised games, thus limiting the revenue generating potential for teams in smaller markets. With most professional and amateur sports organizations in the United States, it is customary for the "home team" to retain local broadcast rights and the "away team" to receive the right to broadcast the game back to its home territory, except during play-offs and championship matches. Gate receipts generally remain the property of the home team, although the NFL has split its gate receipts 60/40 between the home and away teams. Shared revenue distribution from local and national television broadcasts is the normal practice for NFL and NBA teams. The IHL is one of the few professional sports organizations that actually shares its broadcast revenues with players as well as team owners.

By contrast, most sports organizations in New Zealand pay for the privilege of television coverage. Sponsorship arrangements are used by organizations to offset the cost of air time. Typically, a three-way deal is arranged between the television network, sports organization and sponsors.[34] Negotiations determine category exclusivity (e.g., product or service type), naming rights and more. Because of the high cost of television coverage, organizers are turning with increased frequency to layered sponsorships (primary, secondary and tertiary sponsors) and joint sponsorships in which all sponsors share equal rights to recover their investments. Team New Zealand had eight sponsors sharing the rights to its participation in the 1995 America's Cup.[35] In public interest, broadcast legislation mandates the television coverage of key sports in New Zealand, including netball, cricket and rugby. To cover the costs of these free telecasts, New Zealand broadcasters receive a government grant and the right to sell advertising.[36]

The practice of licensing merchandise rights to popular sports events is relatively new in New Zealand. Canterbury International Limited leads the way with licensing arrangements with the New Zealand All

33. Gail P. Miles, *Broadcast Rights and Sports Law: It's Not Whether You Broadcast or Telecast, It's How You Play the Game*, SPORTS LAW, May, 1990.

34. Telephone Interview with Maria Shand, Barrister and Solicitor, Simpson Grierson, in Wellington, New Zealand (July 25, 1995).

35. *Id.*

36. *Id.*

Blacks and Australian Wallabies, two of the world's top Rugby Union teams. Canterbury of New Zealand also signed a licensing deal with Sir Edmund Hillary, a New Zealand native and the first man to climb Mt. Everest. Sir Edmund Hillary outdoor activewear is sold through retail stores in New Zealand, Australia, Japan and the United Kingdom, and until recently via mail order catalog in the United States. The 1995 Rugby World Cup, the 1995 America's Cup, the TAG Heuer Challenge and America Collections were featured in Canterbury of New Zealand's 1995 Spring/Summer Catalog.[37] The impact of these licensing deals was significant. Within the first two weeks of distribution, the 1995 Spring/Summer Catalog attained twice the sales volume of the entire 1994 Autumn/Winter Catalog in North America.[38]

Increased demand for corporate sponsorships and merchandise licensing rights by businesses has fueled growth of sports as an industry worldwide. The growth in retail sales of sports properties is more than double that of licensed goods overall.[39] Sports properties reported an increase of 7.5% in 1990 as compared to 3% of licensed goods overall. Today, the sports licensing industry generates in excess of $10 billion in annual revenue. A closer look at individual properties revealed an increase in NFL licensed merchandise sales from $19 million to $1 billion, from 1969 to 1990. In 1990, NBA Properties reported sales of $750 million.[40] At the 1988 Super Bowl, $15 million worth of licensed merchandise was sold.[41] Fan shops like Merle Harmon's Fan Fair and Sports Fantasies, have sprouted up all over the nation to satisfy increased consumer demand for licensed merchandise.[42] "People like to identify with their sports hero, especially in an age where heroes are hard to find," said sports psychologist Dan Begel.[43] During the past decade, event marketing sponsorships have been the fastest growing form of marketing, outpacing the growth of measured media advertising and sales promotion every year.

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37. The 1995 Spring/Summer Catalog was produced by Marketing Navigators, Inc., for DeLONG Sportswear, the North American licensee of Canterbury of New Zealand activewear.

38. CANTERBURY INTERNATIONAL NEWSLETTER, May, 1995.

39. Other than sports properties, performers, music festivals, cartoon characters and movies are examples of other licensed properties.

40. GREENBERG, *supra* note 19, at 601-602.

41. *Id.* at 607.

42. *Id.* at 606.

43. *Id.* at 603.

2. Power and Control Follow the Money Trail

The real power in sports entertainment resides in commercial hands. Money is required to train, travel and compete in sports. Power and control often lie in the hands of the corporate sponsors, advertisers and broadcasters. The income stream generated from these sources forms the financial foundation for most nonprofit athletic events.

Power also lies with athletic governing bodies (e.g., NCAA, Rugby Union and the national governing bodies for each Olympic sport). These nonprofit organizations control sanctioned events. Their approval is needed simply to run these events. The rules of these organizations govern athletic conduct and influence the labor supply. The availability and willingness of members (e.g., athletes, judges and volunteers) to participate in an athletic event is determined by the governing bodies' vote of support.

Surprisingly, some athletic organizations are actually formed by sporting goods manufacturers. They serve as a conduit for promoting the sport and the manufacturer's equipment. They also serve as support groups for customers. One-design sailboat racing is an excellent example. Melges Boat Works formed its own athletic association when the company first introduced the revolutionary Melges 24 high performance racing yacht.[44] Melges 24 One-Design Class Association, the athletic governing body founded by Melges Boat Works, communicates race information to its members and offers performance tips through its quarterly newsletter. It also organizes regattas for Melges 24 customers under the Melges 24 Class Association Rules. In order to participate in these regattas, racers' equipment must conform to Melges' specifications.[45]

Broadcasters and publishers are finding it increasingly advantageous to host their own athletic events, rather than continue to purchase the right to "piggyback" off someone else's event. The cost of staging their own events can be less expensive than the licensing fees required to cover some existing events. But cost is not the only attraction. Sports events offer news and entertainment value to television viewers, print publication readers and radio listeners. Moreover, these events create

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44. Interview with Hans Melges, former President of Melges Performance Sailboats (Aug. 1995).

45. *Id.* Melges 24 Class Association Rules, amended July 20, 1995. Section 2.2 of the rules states: "*Builder*: All Melges 24's shall be built by builders licensed to do so under the copyright of Melges Boat Works, Inc. shall comply to the building specifications detailed by Melges Boat Works, Inc."

vehicles, or theme promotions, for packaging and selling advertising space and air time.

The National Offshore One-Design (NOOD) regatta series, introduced and managed by The Sailing Company, is a vehicle for self-promotion of the company's two sailing publications, *Sailing World* and *Cruising World*.[46] To promote the publications, The Sailing Company hosted its first NOOD regatta in Newport, Rhode Island in 1988—only six teams competed in the inaugural event. NOOD regattas have had as many as 240 boats participating in its events.[47] Each year, the company runs races in six major U.S. markets and offers sponsorship opportunities to companies interested in reaching the sailing community. As part of the sponsorship package, sponsors are guaranteed exposure in *Sailing World* an *Cruising World*. They also receive on-site exposure at participating yacht clubs, product demonstrations and sampling opportunities and a chance to entertain clients on the hospitality boat.[48] The advent of manufacturers and media companies owning sports entertainment events is likely to provide formidable competition to independent agents and event-organizers. This trend also has implications for athletes.

Athletes participating in sports entertainment events are judged not only on the quality of their work, but on their commercial potential. As demonstrated earlier, conflicts often arise between athletes and their sponsors, and the sponsors of events in which these athletes participate. This point is further illustrated by the following example: "There is an ongoing struggle between promoters of sports events, who want to provide maximum exposure for their sponsors, and the athletes competing in those events, who want to maximize exposure for their own sponsors. Things got ugly in pro cycling. Teams claimed event promoters used 'pretty girls' to pounce on winners as they crossed the finish line and block clean shots of the riders' sponsor logos in the race coverage. Team directors and event organizers met last month to hash this one out and it appears the teams won."[49]

The Australian Olympic Committee resolved this type of conflict with a rule that states in relevant parts:

> . . . to ensure the continued financial support of the AOC by commercial entities; to enable the AOC to fulfill its obligations to assist Athletes; to prepare for and participate in Olympic Games as

46. National Offshore One-Design, *1996 Sponsorship Proposal*, THE SAILING COMPANY, July, 31, 1995.

47. *Id.*

48. *Id.*

49. Lesa Ukman, *Assertions*, IEG SPONSORSHIP REPORT, April 26, 1993, at 2.

> a member of an Australian Olympic Team; and to advise and assist athletes to effect the best projections of their reputations and personalities to enhance their activities as Olympians and potential Olympians in a manner compatible with established AOC fund raising . . . I covenant and agree . . . to assist and cooperate with the AOC sponsors, suppliers and licensees ("AOC sponsors and suppliers"), to enable the AOC sponsors and suppliers to maximize the potential benefits from their sponsorship of, or supply to, the AOC . . . whether whilst training or competing to wear the uniform and clothing and use the equipment supplied to me as a member of the Team provided that I may wear other clothing and use other equipment with the prior consent of the AOC or the General Manager of the Team . . . The AOC shall grant its consent . . . where advertising, promotion or marketing activities do not compete or conflict with the goods and services of AOC sponsors and suppliers.[50]

3. Build Equity Through Commercial Exploitation

a. Revenue Generating Opportunities: Local, National and International

Organizers sweat for their money. Event-organizers are judged on their ability to "make assets sweat" by maximizing the profitability of these commercial products and by controlling admittance to the sports event. To accomplish these objectives, event-organizers provide for all of the essential services needed to ensure the success of a sports entertainment event including: (1) arranging for the sports competition; (2) hiring and managing staff; (3) organizing and managing volunteers; (4) securing the participation of top athletes; (5) securing proper facilities with access to electricity, water, and fuel; (6) renting equipment; (7) obtaining the necessary licenses and permits; (8) arranging for food, drinks and hospitality; (9) orchestrating and managing the entire event; (10) obtaining insurance coverage; (11) setting up and managing the media center; (12) arranging for publicity, advertising and promotion; (13) selling luxury boxes, tickets and programs; (14) selling advertising, sponsorships, broadcast rights and licensed merchandise rights; (15) entertaining VIPs; (16) facilitating travel and lodging arrangements for guests; and (17) organizing tours.

Revenues are generated through sales and marketing. Profits are sometimes shared among the participants. Revenue sharing is becoming

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50. Australian Olympic Committee, Inc., *1992 Australian Olympic Team Membership Agreement*; *See also* Opie, *supra* note 3.

more common among sports leagues. Revenue sharing is used in joint-venture and franchise situations, particularly when major events are involved. In these situations, it is not uncommon to distinguish between revenue activities that are "local," versus those that are "national" and "international" in geographic scope. Local revenues may remain with the home team, whereas revenues from national and international deals are more likely to be divided up among all of the participants, including the athletes. Sometimes, revenue sharing with professional athletes comes in the form of prize money. Other times, revenue sharing takes the form of a bonus plan or a negotiated percentage of the profits.

Opportunities for sharing revenues generated from national and international marketing efforts include: (1) sales of national and international television broadcast rights; (2) home box office and premium cable channels; (3) home video; (4) exclusive magazine coverage; (5) corporate sponsorships and advertising; (6) national trade promotions; (7) licensed merchandise; (8) joint-venture product development; (9) subscriptions and publications; (10) donations and government grants; (11) franchise rights; and (12) tours.

Local revenues generated and maintained at the club, franchise or team level include: (1) local television broadcasts made into the team's "home territory;" (2) local radio broadcasts; (3) season, group and individual ticket sales; (4) luxury box rental and preferred seating; (5) signage; (6) program sales; (7) local promotions; (8) concessions; (9) parking; and (10) participant entry fees.

b. Costs and Other Considerations

The following expense items must be deducted from gross revenues before net profits can be realized from sports entertainment events. The nature of these expenses will vary from one sports entertainment event to another. These items include: (1) facilities and equipment rental; (2) management and staff salaries; (3) independent contractors' compensation; (4) business licenses and permits; (5) insurance; (6) professional services fees; (7) event advertising and promotion; (8) selling general and administrative expenses; (9) travel and entertainment expenses; (10) players' salaries, scouting and celebrity appearance fees, if applicable; (11) audio and video production and sometimes even broadcast fees; and (12) taxes, workmen's compensation and social security.

Financial underwriters and major sponsors may retain the right to audit event-organizer's books, as a condition of providing financial support. Therefore, it is advisable to follow standard accounting practices in the financial management of athletic events. Furthermore, financial un-

derwriters and major sponsors may require a financial pro forma, along with a long-term business plan, before making any financial commitment. Professional business management is preferred by sponsors and other financial investors, over loosely organized volunteer structures typical of nonprofit clubs and unincorporated associations run by amateurs.

If a lead sponsor or financial underwriter is required to buy or lease equipment used by event-organizers, they will want to benefit from the depreciation value on the equipment for tax purposes. In some situations, investors may be better off investing in hard assets such as equipment. These assets are needed to run events and investors can retain title to the property until it is fully depreciated. Sponsors with deep pockets can make better use of depreciation than undercapitalized event-organizers. Whether investing in a new event or an existing activity, the tax implications should be taken into consideration.

There are a number of investment opportunities available to sponsors, broadcasters and licensees. The first and most common investment approach is to acquire an interest in an existing event through licensing rights, broadcast rights and sponsorship agreements. The second approach is to purchase the franchise rights to a team in an existing league or form a partnership with an successful event, one that is looking for financial investors to grow and expand. Both methods allow investors to capitalize on the ingenuity and sweat equity of others. The most difficult way to invest in sports entertainment is to create a new event and maintain controlling interest in it.

There are many advantages in teaming up with existing events. They are less hassle and lower risk. They have proven value with known participation and exposure levels. Another advantage of capitalizing on existing events is the learning curve factor. There is an extremely high cost associated with the learning curve involved in creating new events. Like any new business, the creation of new sports entertainment events is wrought with risk. Expenses can come in at double the budget projections, while revenues may be half of what was estimated. Most new businesses fail within their first five years. Those that survive typically don't break even for several years. Investors wishing to avoid these pitfalls can take the more conservative approach by simply investing in tried and proven athletic events.

A disadvantage of teaming up with well-known events is the high cost associated with purchasing franchise, sponsorship, broadcast and licensing rights, as compared with proprietary ownership in new sports entertainment events. The high cost associated with broadcast licensing

rights was a significant motivating factor in ESPN's decision to develop proprietary sports events like the ESPY Awards and the Extreme Games. Proven venues offer lower risk and higher costs to broadcasters, while new enterprises have higher risks with potentially lower investments. One only has to look at the high costs associated with the Olympic Games, the NBA or the NFL packages. The broadcast rights for these sports entertainment events are prohibitively expensive.

The practice of securing the broadcast licensing rights to popular sports entertainment events is customary in the United States for major sports, whereas in countries like New Zealand, event-organizers typically pay for the privilege of coverage on network television. Only major sports events covered by government broadcasting legislation are exempt from broadcast service charges. Surprisingly, although this may not be well known, event-organizers for minor sports often pay for cable television coverage of in America. Hans Melges stated that "ESPN will usually agree to cover a sailing regatta if the organizers are willing to pay between $15,000 to $30,000 or more."[51]

In the past, American media used to trade ad space and time for the privilege of associating its name with a particular event. These advertising trade outs grant participating media a listing as co-sponsor of the event. Now, media ratings can be "rented" by purchasing exclusive broadcast or print publication rights to new or existing sports entertainment events. Partnerships between the media and event-organizers are used as a way to get media reps out of the agency's media department and into the client's marketing department. "Pressure to repackage sponsor benefits as a conduit for ad sales is growing . . . To sell their ad space media must offer sampling, one-on-one interaction, traffic builders and other event-like benefits in their ad packages."[52]

What can media bring to the table? According to investigative reporting by *IEG Sponsorship Report*, media partners can provide more than ad space. They can supply market research, volunteer support, access to information hot-lines, and contests.[53] Media involvement can impact the success or failure of an event in terms of its profit potential. The media is needed to create awareness, generate excitement and stimulate sales. Media exposure and the package of benefits that goes along with

51. Interview with Hans Melges, *supra* note 44. The Melges family has organized and participated in a number of televised sailing events, including the annual Melges 24 Gold Cup Challenge Regatta (Aug. 1995).

52. Lesa Ukman, *Turning Buyers into Partners*, IEG SPONSORSHIP REPORT, April 4, 1994.

53. *Id.*

it are significant factors in sponsors' buying decisions. The extent of the media's involvement is also factored into the price of sponsorship deals.

In order to justify the extra cost of events with widespread media coverage, prospective sponsors must have the production and distribution capability necessary to capitalize on the increased demand generated from the media exposure. When Ellison Holdings, Ltd. first tried to market its sponsorship package for the Haka Bowl® to New Zealand companies in 1995 and 1996, it was met with a great deal of resistance. While NCAA Bowl Games may be coveted by corporate sponsors in America, their appeal is quite different in New Zealand. Production capacity is limited by the country's labor supply. The total population equals the size of one U.S. market. Of the 3.5 million in New Zealand, nearly one-third live in Auckland. Combined domestic and overseas distribution may not justify the price tag associated with many big ticket sports entertainment events. Only a handful of New Zealand companies are large enough to fully appreciate the benefits associated with international media coverage of major events like the Haka Bowl, Rugby World Cup, America's Cup and the Whitbread Round-the-World Race. As a result, Haka Bowl lost its NCAA sanction for 1996 because it was unable to secure the necessary financial support from corporate sponsors. Although Air New Zealand eventually signed on as title sponsor, the airline's support came too late in the game for Haka Bowl to make its scheduled debut on Boxing Day in 1996.

4. Performance Measurements

With the continued rise in costs associated with sports entertainment events, it is no longer acceptable business practice to base major financial commitments in sports sponsorships solely on the amount of exposure that the events will generate. More definitive measures of return on marketing investments are required.

a. Cost-Per-Impression Analysis

In exchange for financial support, corporate sponsors seek a multitude of tangible and intangible benefits from sports entertainment events. Traditionally, of the tangible benefits the most important has been media exposure. During the 1970s and 1980s, corporate sponsors were happy to receive a ten-to-one return on investment, as compared with paid media advertising. At that time, a corporate sponsor like Miller Brewing Company was delighted if it got the media equivalent of ten impressions on sponsorships of athletic events for every one impression it received on paid advertising for the same amount of money. Of

course, the brewery actually received much more than media exposure from its sports sponsorships.[54] Today, sports sponsors are lucky to receive a three-to-one return on investment when compared with traditional media.

Many sponsors still use "cost-per-impression" of media exposure as the basis for judging an event's worth. The value of impressions is calculated by the number of times a sponsor's mark is seen by the target audience multiplied by the media rate for comparable paid advertising. The following example illustrates the value one sponsor placed on its sports sponsorship: since Valvoline's mark was on camera during the 1990 Indianapolis 500 for 16 minutes, 36 seconds, it was calculated that the television air time for which the mark was seen on television would have cost Valvoline $5.38 million.[55]

The cost-per-impression evaluation method does not factor in all of the intangible benefits that Indy Car sponsors like Valvoline receive, such as the credibility gained through image association with the Indy Car, the important business contacts developed through the event's hospitality center, or the promotional tie-ins connecting the Indianapolis 500 to Valvoline's retail outlets.

b. Rating Matrix Method of Evaluation

Sponsors can now use a rating matrix to analyze potential return on investment from sports sponsorships. The rating matrix allows corporate sponsors to take into account multiple benefits. The following is a summary of the IEG rating matrix method. IEG Inc. is a Chicago-based firm that tracks and analyzes the sports and event marketing industry:

> The first step is determining the relevant criteria against which all potential sponsorships will be evaluated. Next, weight each criterion [in relevant importance to the other criteria] by assigning it a numerical value from 1 to 10, with 10 being the most important. With this in hand, judge a potential sponsorship's ability to deliver against each criterion, scoring on an increasing scale from 1 to 10. Finally, multiply the sponsor criterion ranking by the prop-

54. The author was employed by Miller Brewing Company during the late 1970s and early 1980s. This work included, among other things, managing the brewery's sponsorship relationship with Boston Celtics, Oakland Athletics and San Francisco Giants. It also meant promoting sporting events with the U.S. Skiing, Biking and Running Associations and coordinating events with the Lite Beer Celebrities, a group of well-known retired athletes.

55. GREENBERG, *supra* note 19. Jaffe, *Moving Targets*, SKYBOX, Spring, 1991.

erty's score in each row, then add these figures for the grand total. The higher the total, the more targeted the property.[56]

This method of evaluation is a significant improvement over the old cost-per-impression method used by corporate sponsors, yet it falls short in some areas. It relies on subjective judgment, thereby assuming a certain level of knowledge on the part of the user. Experienced sports marketers will find the rating matrix method useful when comparing one sponsorship opportunity to another. The time to use this model is before marketing budgets are committed to a specific event. Sports marketing managers will find the rating matrix model ineffective when quantifying return on investment after the fact. With this model, it is impossible to project the financial impact of a sponsorship on the sale of the sponsor's products and services. The cost to generate qualified sales leads then convert these new prospects into paying customers is one of the best methods of measuring return on investment for sports sponsorships. The rating matrix model makes no attempt to measure financial returns.

What criteria can corporations use to evaluate sponsorships? The following criteria are suggested as a starting point for measuring intangible and tangible benefits. The value of these benefits will vary by sponsor. For prestigious properties, the intangible benefits will outweigh the tangible benefits, particularly when they are used to help promote new products and services. For some companies, such as business-to-business marketers, the tangible benefits associated with media exposure may have no value at all, if the sponsors are interested in client entertainment and employee morale building opportunities over consumer promotion. These needs must be taken into consideration when evaluating sponsorships: (1) image compatibility and goodwill value; (2) customer profile and targeted reach for niche marketing; (3) media coverage and message delivery; (4) direct access to sports celebrities and use of staff services; (5) category exclusivity and competitive preemption; (6) opportunities for trade involvement and client entertainment; (7) cross-promotional opportunities; (8) tie-ins with co-sponsors; (9) channel buy-in and merchandising opportunities with the trade; (10) consumer promotions; (11) product sampling and trial; (12) lead generation and database development; (13) direct access to star athletes for inclusion in paid advertising and promotions; (14) reputation, financial stability and reliability of event-organizers; (15) market demand or potential demand; (16) long-term viability; (17) anti-ethical concerns; (18) ease and cost of adminis-

56. Lesa Ukman, *Evaluating What to Sponsor: A Rating Matrix For Successful Sponsorship Selection*, IEG SPONSORSHIP REPORT, June 21, 1993.

tration; (19) anticipated return on investment, and (20) marketing and/or tax write-offs.

c. Integrated Marketing Communications Return On Investment Model

"Back-end" analysis of financial returns resulting from the sponsorship investment requires a different method of evaluation, one that is less subjective than the rating matrix method used in front-end analysis of sports entertainment events. For this, Northwestern University's Return-on-Investment Model (ROI Model) for Integrated Marketing Communications is suggested. The ROI Model was developed in 1994 at the Medill School of Journalism. Conceptually, it is appropriate for the sports entertainment industry because the model takes into consideration all of the communications disciplines engaged by promoters of sporting events: advertising, sales promotion, marketing public relations and direct response. A closed-loop system is required in which incremental sales gains can be tracked back to individual communication efforts.

In order to use this model, a marketing database must be maintained. The Return on Investment Model for IMC offers a conceptual approach to measuring the ROI of various forms of marketing communications efforts for a product or service over an extended period of time. It is based on a behavioral segmentation process using the Integrated Marketing Communications (IMC) approach. The proposed model offers an alternative approach to the traditional mass marketing and mass communication paradigm. The new approach combines the key strategic factors of customers, competitors and the company into one process which provides planning execution and measurement. It includes several characteristics such as measurable behavioral objectives, customer interaction management and measurements of success which are important to today's results-oriented top management. The approach is suitable for any product or service type for which database information is available.

The model is designed to capture the dynamics of three key factors: 1) new customer acquisition, 2) current customers in year-one, and 3) average probability of long-term customer retention. It gives marketing communications managers the flexibility to achieve payback over time, instead of judging the immediate results of a specific program, such as a

promotional offer or direct mail campaign, based on a one-time purchase transaction.[57]

III. The Practical Application of Sports Marketing and the Law

A. A Case Study: 1995 ESPN Extreme Games

The following case was developed to examine ways in which owners can protect their interests when undertaking new sports entertainment events. Through an analysis of a case involving sports broadcaster ESPN, insight is gained into the media's expanding role in sports entertainment. Additional insight is gained from ESPN's successful marketing of these events. In an effort to satisfy its own business objectives, the company instituted business practices designed to help satisfy its stakeholders' concerns. Execution of the events involved numerous athletes, athletic governing bodies, government agencies, independent contractors, sponsors and other media. Satisfying the diverse interests of each stakeholder became necessary to successfully implement the events.

Rarely is something of this magnitude undertaken in the start-up year of a new event. Athletes came from around the world to participate in the Extreme Games. The games were open to both professional and amateur athletes. Television viewership was international in scope. Demand generated by the initial results necessitated that the games be held annually, instead of every other year as originally planned. This change was designed to fill the void created by the success of the 1995 Extreme Games.

Extreme Games, "The First Global Competition of Extreme Sports," were held from June 24 to July 1, 1995. The games were the brainchild of Ron Semiao, director of the ESPN2 network. Three-hundred and fifty of the world's best athletes competed in 27 events for more than $370,000 in prize money in nine extreme sports categories: biking (BMX and mountain), bungy jumping, eco-challenge (canoeing, whitewater rafting, hiking/orienteering, mountain biking and sea kayaking over a 250 mile course), in-line skating, skateboarding, skysurfing, street luge

57. Don E. Schultz, et al., *Measuring The Return on Investment for Advertising and Other Forms of Marketing Communications Using an Integrated Marketing Communications Planning Approach*, 1994 Advertising and Consumer Psychology Conference (1994).

racing, sport climbing and water sports (barefoot jumping, kiteskiing and windsurfing).[58]

The 1995 Extreme Games cost an estimated $10 million to produce. The games were sponsored by Miller Lite Ice®, Taco Bell®, Mountain Dew®, Chevy Trucks®, Pontiac Sunfire®, ASG by Nike®, AT&T® and Advil®. The initial asking price for sponsorship was $2 million. Unofficial reports from ESPN's sales staff, claimed the company generated between $6 to $8 million in sponsorship revenue. The final figure is confidential. In exchange for financial support, sponsors received prominent on-air presence on ESPN and ESPN2 telecasts, a full-page print ad in the event program, as well as on-site marketing opportunities in association with the Extreme Games. Advil® and Mountain Dew® were among the brands sampled at the games.[59]

The games were aired in more than 100 countries. They were promoted in 16 television spots airing 2000 times on ESPN/ESPN2, a national radio campaign, print advertising and a 16-page fold-out poster in *Sports Illustrated*.[60] In the United States, an estimated 750,000 plus households watched the games. Over the course of the games, A.C. Nielsen ratings ranged between one to two points with a high of 1.9. According to one ESPN senior executive, "The games are an attempt by ESPN to develop a proprietary product instead of renting ratings [through purchasing the rights to broadcast events like NFL games and America's Cup coverage]."[61] ESPN established precedent for this practice with its highly successful ESPY Award Program.

The tremendous success of the 1995 test launch brought with it a number of challenges. The greatest challenge ESPN faced, aside from execution, was protecting its proprietary interest in the games. Before the conclusion of the 1995 Extreme Games, participants, spectators, sponsors and the media alike demanded to know when the next games would be held. To ward-off copycats, ESPN quickly moved up its schedule by committing to host Summer Extreme Games annually, instead of every other year as originally planned. In 1997, ESPN will televise the first Winter Extreme Games. These announcements arose from a need to satisfy pent-up demand created by the inaugural games. Satisfied

58. Josh Krulewitz, *ESPN Sells Out Gold Level Sponsorships For Extreme Games*, COMMUNICATIONS DEPT. RELEASE (June 2, 1995).

59. *Id.*

60. *Extreme Games Fact Sheet*, ESPN Extreme Games (June 2, 1995).

61. *Id.*

sponsors enthusiastically agreed to recommit, while participants eagerly made plans to return to the United States to defend their titles.[62]

Protecting ownership interest in the Extreme Games was not something that worried Jeff Ruhe, ESPN's senior vice president of event management. "I do not see the advantage in locking up these sports in perpetuity. The Extreme Games are not like the Olympics. They aren't such a big deal. We can't make it onerous for buyers or they won't want to participate. It's not that hot of a property."[63] When asked about competitors he said, "I am not really worried about it. We can't stop someone if they want to stage a similar event . . . a bungy jumping competition off a bridge instead of a bungy tower."[64] Contrary to Ruhe's opinion, the author believes that event-organizers should protect their long-term interests. By virtue of controlling the broadcast rights, for now ESPN has substantial control over the future of extreme sports. The nature of extreme sports like skysurfing and the eco-challenge makes for better television coverage than spectator viewing. But the power of the media alone will not stop competitors from hosting their own events, particularly if another television broadcaster decides to capitalize on the momentum created by ESPN.

Jeff Ruhe hesitated to talk about steps ESPN may be taking to franchise the games in the future. Public disclosure of some things ESPN is working on may constitute disclosure of trade secrets. Ruhe was confident that ESPN's legal counsel was taking reasonable precautions to protect the company's interest in the Extreme Games. The name and symbol carried a "TM" signifying that trademark registration has been applied for. Regardless of trademark registration, the name and logo are protected under common law recognized by the U.S. courts. International trademark registration would help to insure protection. ESPN's copyright notice was carried on promotional literature for the events. Publicity releases and liability waivers were required from all athletes participating in the events. Organization of Extreme events and much of the film production were handled through outside contractors. Copyright interests in work made for hire are vested in the employer, but it is always best to get it in writing.

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62. Attending the event as a guest of ESPN, Inc., the author an opportunity to go behind the scenes and meet with ESPN executives, event-organizers, agents, athletes, production crews and the media.

63. Telephone Interview with Jeff Ruhe, Senior Vice President of Event Management, ESPN, Inc. (July 12, 1995).

64. *Id.*

Aside from the logo, there was little or no consistency in the application of graphic design used across marketing communications vehicles. This is an area where event-organizers could improve. The development of a standards and style manual would help ESPN maintain uniformity in the quality, image and presentation of the events across multiple sources of supply. Without stringent controls, lack of consistency can be a serious problem for event-organizers when employing outside resources.

ESPN chose to manage the entire event through outside contractors. Why? Because the company's expertise lies in sports broadcasting, not sports event management. Jack Wienert, an independent contractor retained by ESPN to serve as Executive Director of the Extreme Games, utilized a management style of empowerment. He believes in giving employees and contractors the freedom to execute their own ideas. "They will work a lot harder making their own plans work, than making my plans work," said Wienert. "The nature of the contract depends on the people you are dealing with. If you expect to end up in court, you write a tight contract."[65] With regard to incorporating performance guarantees into sponsorship agreements, Wienert said, "Sponsors are guaranteed viewership numbers on many things. Integrity makes a difference. ESPN has credibility. We can bring in the numbers [television ratings]."[66]

ESPN did not limit media access to the Extreme Games. In fact, the sports broadcaster went out of its way to make events more accessible to news media. Two media rooms were set up and managed by outside public relations specialists, one for domestic media and the other for international press. The rooms were equipped with phones, computers, fax and a copy machine, along with a hospitality area for use by authorized personnel. Those with the proper press credentials or VIP privileges could enter at any time. Wienert felt that it would be difficult for the media to cover the event without mentioning ESPN's name. He said, "There was no point in limiting media coverage to news content alone [to prevent events from being aired in their entirety by nonlicensed broadcasters], because once ESPN's name was mentioned, it would have recourse [as the copyright owner]."[67] ESPN was willing to accept a certain amount of implied risk in order to get widespread cover-

65. Telephone Interview with Jack Wienert, ESPN Extreme Games Executive Director (July 7, 1995).

66. *Id.*

67. *Id.*

age of the Extreme Games. Press coverage by other media adds credibility to the events. The favorable coverage received by ESPN was a tribute to the company's success with the games. Coverage like that builds brand equity and goodwill.

Remote news access was also available. Extreme fans in cyberspace were among the first to receive the results of the games, second only to television viewers. Data-intensive multimedia news coverage was available around the world. Video clips capturing extreme sports action were uploaded to ESPNET SportsZone Web server. The Internet Worldwide Web site received over 7000 "hits" per week.[68] In addition to ESPNET SportsZone, news coverage of daily highlights was provided on ESPN Sportscenter, ESPN2 Sportsnight and Sportsticker. The program was carried on ESPN (65.6 million households), ESPN2 (22.5 million households) and ESPN International (150 countries including syndication).

Events were held in public places. Special permits were required for a number of extreme sports including bungy jumping, a sport that had been previously banned in Rhode Island. No admissions payment was necessary for public attendance. The bungy jumping competition was held in downtown Waterplace Park in front of the state capital building. Street luge and in-line downhill racing took place on College Hill, a public street in Providence, Rhode Island. Water sports such as windsurfing and kiteskiing were held at Second Beach, a public beach in Middleton. Skateboarding, BMX biking and in-line skating took place in Fort Adams State Park. Sport climbing was also held inside the one-time military fort, while skysurfing was staged overhead. These events were the first public use of the grounds inside of Fort Adams.[69] ESPN was given special permission to use the area. Access to the military fort was limited to a few thousand spectators because of fire code restrictions. It was not a conscious effort on the part of the organizers to restrict spectators or media access to the events.

Extreme sports events are ideally suited for television coverage. "TV can make an event more exciting. We've added story lines, drama and athlete bios," said Jack Wienert.[70] The sports were presented from the athletes' perspective thanks to advanced production technology. "This is one of the largest and most technically advanced productions ESPN has ever been involved in," said Rich Feinberg ESPN's coordinating pro-

68. *Direct Extreme Games Coverage Available on Internet*, ANS NEWS RELEASE (June 28, 1995).

69. *Id.*

70. Telephone Interview with Jack Wienert, *supra* note 65.

ducer. A robot controlled camera known as the cable-cam spanned the length of Fort Adams. The camera was suspended on a 200-foot long cable above the street course and half-pipe. Special audio equipment made it possible for ESPN to bring viewers crisp, natural sounds of extreme sports instead of the traditional musical accompaniment. Four giant screen televisions were used to enhance spectators' viewing on site. Point-of-view cameras like the "bungy-cam," "finger-cam," "ramp-cam," "bike-cam," "helmet-cam" and "ground-cam" brought live action up close and personal to television viewers.[71] "Jimmy-Jib" was an arm-shaped robotics camera cable that made it possible to follow climbers up the wall and skaters/skateboarders through the street course. The "jimmy-jib" camera captured fast-action, dual slalom, mountain bikers as they raced against the clock on a 150-yard course at extreme speeds.[72] Radar guns were used to record the racers' speed. In addition to heart rate monitors, bungy jumpers were monitored by robotics cameras positioned on the front and back of a specially-constructed robotics arm situated on the 40-foot plank where athletes jump from — a location not feasible for a camera operator.[73]

Executives were not willing to disclose how much, if any, of the communications equipment used during the Extreme Games was patented and owned by ESPN. Some of the unique robotics and point-of-view cameras were specifically designed and engineered to capture the sights, sounds and fast action of Extreme sports.[74] This raises the issue of patent protection, an issue that will be addressed in greater detail in subsequent sections of this article. In discussing the pros and cons of obtaining patents on unique equipment used to stage the Extreme Games, Ruhe said, "There is no advantage in obtaining a patent on the bungy tower when we own the rights for three years. Why patent a swivel camera on a bungy tower with an arm that goes left [when someone else can obtain a patent on a robotics camera and bungy tower with an arm that extends off to the right]?"[75] It is the opinion of this author that patent protection should be obtained on novel inventions, if these inventions are significant contributors to the success of a major sports entertainment production like the Extreme Games, and especially if they can be used repeatedly over an extended period of time. Patent protec-

71. *Extreme Games Production*, ESPN Communications Dept. release, June 5, 1995.
72. *Id.*
73. *Id.*
74. Telephone Interview with Jeff Ruhe, *supra* note 63.
75. *Id.*

tion may not be cost effective for one-time events or events that are in a constant state of change.

Extreme sports competitions may vary from year to year. "With the Extreme Games, we plan to keep it fresh and new. We are not just going to cover the same old events. We've already had lots of calls from organizations wanting their sports featured in future broadcasts," said Jack Wienert.[76] Continuous improvement and change are a way to stay ahead of the competition. Wienert feels that, "Anytime you are first and successful, everyone is going to want to jump on the bandwagon, get involved and even copy you. When you're first, you set the standards. Challenges are inevitable. They can be good because they make us become better."[77]

By staging its own events, ESPN was able to eliminate many of the conflicts that arise in contract negotiations between broadcasters, event-organizers and sponsors. "When television is in from the beginning instead of coming in at the last minute, it prevents a lot of battles. Television [networks and cable stations] can do what they want to do [by dictating the terms of a contract]. Television is the driving force. When the broadcaster comes in at the last minute and starts dictating times, et cetera, it can cause battles with the organizers."[78] Going forward into the future, Jack Wienert believes ESPN is protected because, "We have the relationships with the athletes and the associations [athletic governing bodies]."[79]

With increased frequency, media companies are staging their own sports entertainment events. Staging proprietary events is not only a way to avoid conflicts, but it is an extremely effective way to package and sell air time. Three of the senior sales executives interviewed during the Extreme Games seemed very pleased with the contributions the games were making to their department's advertising revenue.

Motivating television broadcasters to cover sports entertainment events can be a real challenge for event-organizers when the events in question are not owned by the media. Before committing to televise sports programs, broadcasters must be confident they can sell enough air time to cover the production and distribution costs and still make a reasonable profit from their efforts. In certain situations, advertising sales

76. Telephone Interview with Jack Wienert, *supra* note 65.

77. *Id.*

78. *Id.*

79. *Id.*

alone may not cost-justify the expense. This is why event-organizers may be asked to share the production costs on lesser known events.

Many of the athletes in this year's competition were hand-picked. There were no true qualifying events. Donna Allum, who managed the bungy jumping competition with her husband, Chris, contacted top athletes from around the world on behalf of ESPN.[80] With the help of the North American Bungy Association, the Allums sent bungy jumpers a letter personally inviting the best of the lot to compete in the world's first formal bungy jumping competition. Participants were expected to pay their own way. They traveled from as far away as Europe and the Pacific Rim. Upon arrival, food, lodging and transportation were provided. Although athletes were not paid to compete, they did have an opportunity to win cash prizes to off-set their travel expenses. The total bungy jumping purse was $40,000.[81] Profit-sharing with athletes and athletic governing bodies is not being considered until the games generate a profit.

Like most "extreme" sports, bungy jumping is not an income sport. Only a few elite athletes are fortunate enough to earn a living as professionals. These "pros" perform extreme stunts for television and print ad campaigns for consumer products like Mountain Dew® and Extreme Energy Nutrition Bars®. Bungy jumpers perform off bridges, cranes, hot air balloons and even helicopters. Some coach or manage businesses in their chosen sport. But for most of these energetic and courageous young athletes, participation in the Extreme sports is done for the thrill of it. While this is a hobby for most of the extremists, some participants earn over $100,000 in annual income.[82]

Television exposure can lead to additional income opportunities for talented athletes and their agents. Many of these athletes are new to the commercial aspects of sports. At least one enterprising sports agent was spotted canvassing unsuspecting athletes in the hope of signing these rising young stars. A good event-organizer will help these innocent hopefuls appreciate their potential and avoid exploitive contracts.

Since this was the first formal competition of its kind, rules were developed as needed. For instance, a panel of experts was assembled to judge forward, backward and freestyle bungy jumping events, in much the same manner as platform diving events. Judging was based on creativity, difficulty, and style. The rules governing bungy jumping loosely

80. Interview with Donna Allum, Triple C Sports Management (June 1995).
81. *Id.*
82. *Id.*

stated, "Each competitor had three jumps forward and backward, incorporating somersaults, pike dives, laybacks, spirals and twists on the way down and on the bounce back up. Freestyle competitors had two attempts to make the jump of their choice with an object of their choice."[83] Performances were not scripted for television as one might expect. Freestyle meant jumping with equipment ranging from the bizarre (e.g., snow skies, in-line skates, bicycles and surfboards) to the insane. The winner of the freestyle event, a young man from Germany, jumped with a high-performance parachute that ejected upside down.[84] Another competitor jumped with a kayak performing aerial flips on the way down and on the bounce back up. The manner and timing of these competitions changed almost constantly, as event-organizers were forced to troubleshoot all kinds of new challenges not the least of which was equipment failure when the elevator on the new bungy tower quit working. Fortunately, these difficulties were transparent to television viewers and spectators. Only the athletes, event-organizers, photographers, commentators, technicians and a few VIP's behind the scenes were even aware of the problems.

Crowd control and safety are always of concern at sporting events. Liability waivers can be used to help mitigate the owner's responsibility, but gross negligence cannot be waived. The risk of injury increases with extreme sports. ESPN made a conscious effort to ensure the safety of athletes and spectators at the Extreme Games.[85] Paid security and as many as 2,500 volunteers were on hand during the activities to help with crowd control and to provide emergency first aid and other assistance when needed. ESPN proudly boasts that there were no spectator injuries, other than people overheating. Of the hundreds of athletes that participated, only sixteen were hospitalized. None of the injuries involved overnight stays and many were a result of conditions, such as knee injuries, that occurred prior to the event.[86] ESPN was very proud of its safety record. "A lot of pre-event planning went into safety measures," said Jack Wienert. "ESPN provided immediate medical attention where needed." Although not required by the terms of its agreement, ESPN made arrangements to help the few injured athletes that required financial assistance.[87]

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83. *Id.*
84. *Id.*
85. Telephone Interview with Jack Wienert, *supra* note 65.
86. *Id.*
87. *Id.*

Although ESPN, Inc. did a tremendous job launching the inaugural Extreme Games, there is always room for improvement. As athletes continually strive to achieve their personal best, so too must event-organizers. Plans are underway for staging the 1997 Summer and Winter Games. Products developed from past games include: 1) a compact disc by ESPN and Reprise Records featuring twelve songs by alternative artists, 2) a video game released in conjunction with Sony Imagesoft that features skateboarding, biking, street luge and in-line skating, and 3) a home video distributed by ABC Video containing highlights from the 1995 Extreme Games.[88]

What about licensed merchandise? Complimentary Nike products were given to event-organizers, volunteers, staff and VIPs, as part of a promotional package. Merchandise samples included, among other things, a Nike sport bag, polo shirt and T-shirt bearing the 1995 Extreme Games logo. Extreme Games memorabilia was in short supply at the 1995 games. Complimentary items were coveted by the chosen few lucky enough to receive them.

Opportunities for realizing incremental sales gains from licensed merchandise were abundant. With proper planning, Extreme Games memorabilia could be sold on-site, at retail, on-line, over the air ways and through mail order catalogs in the future. Aside from the joint-venture products described above, many more immediate sales opportunities went unfulfilled. Future games present an excellent opportunity for ESPN to generate additional revenue from royalties on licensed merchandise and to continue its practice of co-development and marketing products under joint-venture arrangements.

Another revenue opportunity is the sale of entry tickets to spectators, now that the popularity of these events has been established. Ticket sales would enable the event-organizers to control access and stipulate the conditions under which guests are invited to attend. However, it may not be possible nor advantageous to restrict public access in some public places.

Along with the sale of merchandise and tickets comes an opportunity to build a customer database. The database can be used to extend ESPN's marketing opportunities beyond the life of the games. It can also be used for market research and analysis. Access to customer information can be made available to sponsors and licensees.

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88. *Id.*

In some locations, ESPN may be able to generate incremental revenue gains from reserved parking and concessions. Since the company does not consider this its primary business, spectators were expected to fend for themselves when it came time to food and parking. VIP hospitality was the one exception. ESPN did a nice job providing a well stocked hospitality area for VIPs. The author had no complaints about the quality of the food, transportation or care that was given to "official observers."

What is in store for the future of the Extreme Games? ESPN, having established the goodwill, is in a good position to strengthen its ties to corporate sponsors and advertisers. Distributors, event-organizers and outside investors will do well to line up at the door, rather than try to reinvent the Extreme Games or offer a competitive product of their own. ESPN may step back, then, but maintain its link by managing these agreements and continuing to work with athletic organizations that control the Extreme sports.

ESPN may look for new ways to expand its proprietary interests in sports events made for television. This allows the company to reduce its dependence on broadcast licensing deals. It has opened up a whole new world of possibilities for broadcasters and created formidable competition for promoters. We may see a new trend toward more broadcasters owning and operating their own sports entertainment events, as newspaper and magazine publishers have been organizing and funding their own events for years. This move could also lead to joint-venture deals between event-organizers and broadcasters. Instead of licensing the rights to popular sports events, it is possible organizers may team up with broadcasters to share the risks and the rewards.

IV. Legal Measures for Protecting the Uniqueness of the Commercial Product

A. Ownership, Relevant Legal Issues and Avenues For Protection

1. Ownership of Sports Properties

Because owners create sports entertainment events with their investment of time and money, they should be protected against unwanted intrusions. Legal protection should extend long enough for the originator of the idea to recover the initial investment and generate a reasonable profit. Although it is not possible nor advantageous to completely eliminate competition, certain types of legal protection are available to owners of sports properties, provided they know the law and take the necessary measures to safeguard their ownership interests.

Who is the legal owner of a sports entertainment property? Is it the participant, organizer, promoter, investor, broadcaster or sponsor of the sports entertainment event? The answer to this question often depends on who controls the quality, timing and delivery of the product (the commercial output of an athletic event); who holds the rights to the trademark, service mark, trade name; who owns the copyright; and, of course, who controls the financial purse strings.

The issue of ownership is customarily resolved through contract negotiations, prior to the event. During negotiations, struggles may arise between the various parties (e.g., event-organizer, athletic sanctioning body, financial underwriter or lead sponsor, licensed broadcaster, and/or participating athletes). The dynamics of these negotiations are represented in the following scenario. The caliber of athletes and the degree of uncertainty in the outcome of a match will effect the quality of competition and media coverage. The extent to which an event is covered will impact its earning potential. Spending against future earnings is often limited to the financial contributions committed in advance by sponsors and financial underwriters. Event-organizers are responsible for the actual production of the product as well as the quality and delivery. The timing is generally mandated by broadcasters' media schedules. Labor affects product quality. Athletic governing bodies control the flow of labor.

The following example illustrates how an athletic governing body can try and control sanctioned events: Mary O'Connor, a New Zealand marathon runner, met the selection criteria for the 1990 Commonwealth Games, but was overlooked in favor of another runner who had not met the selection criteria stipulated by the controlling body. O'Connor brought proceedings against Athletics New Zealand, the governing body. After two years, the two parties reached an out of court settlement in which Athletics New Zealand admitted that Mary O'Connor would have met the selection for the Commonwealth Games if they had followed their stated selection policy.[89]

Under some state laws in the U.S., athletes and performers actually own part of the ancillary product by virtue of their publicity rights, that is, property rights people have in the commercial use of their identity. This right can be transferred or waived via an employment contract or a publicity waiver.[90] Although the right of publicity is not recognized everywhere, sportsmen and women around the world are more zealous

89. P.W. DAVID, SPORTS AND THE LAW: A NEW FIELD FOR LAWYERS? 80-92 (1992).
90. *See infra* part IV.B.2.

to protect the earning potential of their reputations than in times past. Athletes, whether amateur or professional, are recognizing the value in their name, image and likeness. Their athletic talents are coveted by corporate sponsors and loyal fans both on and off the field.

Management has the power to grant ownership interest to athletes by agreeing to share profits from the events in which they participate. In recent years, players have successfully used collective bargaining power to negotiate for a share of the profits generated by their efforts. As part of players' compensation package, the IHL and NBA have consented to profit sharing.

Journalists often feel that they, too, are entitled to a share of the profits. Journalists' profits are generated through news and entertainment coverage of athletic events. The news value is protected by the United States Constitution and the public's right to know. Yet, there exists a fine line between "news" and "entertainment." At one time, broadcasters believed they had free access to sports coverage by virtue of the First Amendment of the U.S. Constitution which protects freedom of speech and the freedom of the press.[91]

The force of the media and commercial sponsorships was evident in the Citizen Cup Finals of the 1995 America's Cup.[92] After completing the semi-finals, all but one team should have been eliminated from the Defense and the Challenger selections. The final uncontested Challenger was Team New Zealand, a team that won all but one match race against Australia One in the Louis Vuitton Cup. But when it came to the final Defender selection, all three American teams continued to compete. It was no co-incidence that ESPN's television coverage of the match races did not begin until the final round of competition. In a press conference, Dennis Conner told reporters, "Pardon me if I sound commercial, but if Bill [Koch] or ourselves were eliminated here, there would have been a lot of sponsors that would have been disappointed." So all three American teams competed in the finals: Young America, America^3 and Stars & Stripes.[93]

Another demonstration of the chilling power of the media's impact on sports entertainment events is the author's own experience with the New York Marathon during the 1980s. It was a cold, wet, bone chilling day. The marathon was scheduled to begin and over 25,000 competitors

91. U.S. CONST. amend. I.

92. The author went behind the scenes at the 1995 America's Cup with full sponsor privileges and access to the Louis Vuitton Media Center.

93. Tim Murphy, *The San Diego Uncertainty Principle*, CRUISING WORLD, July, 1995.

were standing ready at the starting line, but the starting gun did not go off for nearly an hour and a half after the scheduled start time. While the racers waited nervously in the cold rain, the licensed broadcaster interrupted its television coverage of the marathon to cover breaking news about the Beirut massacre. A bomb had exploded at the American Embassy in Beirut killing dozens of people. Once the network resumed its coverage of the marathon, the runners were able to start. By that time, their muscles were cold and clothes were soaking wet from standing in the rain. Thousands of spectators lined the streets of New York City and hundreds of thousands of television viewers waited anxiously for the start of the race while everyone mourned the deaths of their fellow citizens in Beirut.[94]

Copy writers, photographers, commentators, agencies and many others involved in the development of sports entertainment events like the America's Cup and the New York Marathon, hold certain ownership rights to the finished product by virtue of their copyrights. Copyright exists from the moment of creation. This right, granted by law, can be terminated or transferred by contract. (Two basic legal principles are involved under U.S. labor law. One is the notion of "work made for hire" and the other is that of an "independent contractor.")[95]

Throughout this chapter, key legal issues, such as those highlighted above, are addressed in pertinent parts. Understanding these issues is critical to protecting ownership interest in sports entertainment events. Trademark, patent and copyright registration with the proper authorities guarantees owners protection of their intellectual property rights (common law affords only limited protection without registration). Once protected, these rights place owners in a stronger bargaining position. Negotiated terms and conditions set forth in contracts clarify each party's position.

Perhaps owners' greatest strength lies in their ability to empower the people around them. This approach worked very well for ESPN with the Extreme Games. Jack Wienert wisely stated that "[people] work harder making their own plans work."[96] By using joint ventures involving those who create and distribute the commercial product, sports entertainment owners can share the risks and financial rewards. Fewer conflicts are likely to arise when parties share mutual goals. Joint-venture organiza-

94. These comments and observations are based on the author's personal experience. The author competed in the New York Marathon the year of the Beirut massacre.

95. *See infra* part IV.A.2.f.

96. Telephone Interview with Jack Wienert, *supra* note 65.

tions comprised of financial investors, corporate sponsors, event-organizers, sports marketing agencies, licensed media, athletes and athletic governing bodies offer, perhaps, the strongest alliance possible to protect proprietary interests in sports entertainment events. By joining forces to produce the best commercial product possible, the proprietary interests of each organization can be better served. Each party's contribution is vital to the success of the sports entertainment event. Collectively, they can benefit from the synergy of teamwork. Time, energy, financial resources, and creative and athletic talents can be focused on satisfying stakeholder concerns and delivering a superior product to loyal fans and supporters. Instead of functioning as separate organizations, each with its own agenda, the entities should form a strategic alliance and function as a Strategic Business Unit under a new corporate structure. Together, they can deliver a totally integrated program that satisfies the needs of all of the parties concerned.

2. Intellectual Property Rights

Intellectual property rights are designed to promote the development and publication of creativity, technology and innovation. These new discoveries and creative executions improve the ability to compete in the global marketplace. Legislation regulating intellectual property rights forms the legal framework of modern sports marketing.[97] Intellectual property laws protect intangible creations of the mind. U.S. laws offer protection for many different types of intellectual property. Legal doctrines cover trademarks, service marks, collective marks, trade names, trade dress, patents, trade secrets, know-how, and copyright works.

Commentators have explored cases in intellectual property rights. In defining intellectual property and the function it serves in relation to sports, one commentator said "The principal objective of intellectual property law in the United States is to grant a limited monopoly to the originator of information [intangible creations of the mind; something of pecuniary worth]. The rationale for this protection is to encourage creativity and fairness to the consuming public and to ensure commercial morality."[98]

The United States Constitution grants Congress the power to enact laws governing trademarks, patents and copyrights. Article 1, Section 8 of the Constitution states:

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97. Opie, *supra* note 3.

98. Balaram Gupta, *Names and Logos: Protection Under Intellectual Property Law and Consequences*, 2 SPORTS LAW J. 245, 247 (1995).

> Congress shall have the power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[99]

Most countries have laws protecting patents and trademarks. There are a number of treaties between countries that facilitate and protect foreign registration. These treaties include the Paris Convention of 1883, the Patent Cooperation Treaty (PCT), the World Intellectual Property Organization, the European Patent Convention, the OAPI Countries, and the ARIPO Countries.[100] In addition, the North American Free Trade Agreement (NAFTA) and European Economic Community (EEC) agreement obligate the parties to observe minimum standards in passing laws to register and protect trademarks. Eventually, a single registration in one country may suffice and be recognized by all member countries.[101] Today, international registration can be obtained by filing with each of the central governing bodies committed to these treaties.[102]

Investors and event-organizers of sports entertainment events can profit from the exclusivity arrangement granted under intellectual property rights, without fear of antitrust litigation, as long as the arrangement is not used to create, enhance or facilitate the exercise of "market power." The right to restrain others from using intellectual property serves as a deterrent to direct competitors. It has the effect of creating a monopoly, thus increasing the perceived value of protected property. The added value vested in intellectual property can generate profits for owners when these rights are licensed to others through franchise, sponsorship, broadcast and merchandising agreements. In return for the right to use the intellectual property, the licensor is compensated by the licensee for the time and effort invested in the creation of the intellectual property. Compensation may come in the form of franchise fees, sponsorship fees, licensing fees and/or royalties on merchandise sales.

Intellectual property laws grant owners of patents, trademarks and copyrights limited market power for a designated time. This protection is designed to foster pro-competitive behavior by encouraging investment in innovation by affording inventors and authors a reasonable term in which to profit from their creations.

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99. U.S. CONST. art. I, § 8.

100. BURTON A. AMERNICK, PATENT LAW FOR THE NONLAWYER (1991).

101. GLADYS GLICKMAN, BUSINESS ORGANIZATIONS: FRANCHISING § 8A.02[1] (1995).

102. *Id.*

While owners of intellectual property can legally exclude others from using their creative expressions and novel inventions, there are limits to which owners can preclude competitive activity. In a speech before the American Bar Association, Anne Bingaman, Assistant Attorney General for Antitrust under the Clinton Administration, warned:

> While intellectual property licensing arrangements are typically pro-competitive, certain arrangements present the potential to create, enhance or facilitate the exercise of market power. In evaluating these arrangements, we generally look at their effects on licensing or development of intellectual property and the immediate processes using that property and in the sale of goods and services that are either produced using the intellectual property or are complementary to such a property.[103]

Anticompetitive activity is governed by the Sherman Act[104] and the Clayton Act.[105] The guiding principle underlying antitrust law is an assessment of whether the conduct under scrutiny is likely to harm others, resulting in a net welfare loss to society through "restraint of trade,"[106]

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103. Anne K. Bingaman, Asst. Atty. General for Antitrust, Address to the American Bar Association (April 8, 1994).

104. 15 U.S.C. § 1 (1996). Section 1 of the Sherman Act states:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding ten million dollars if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments in discretion of the court.

15 U.S.C. § 2 (1996). Section 2 of the Sherman Act states:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding ten million dollars if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments in discretion of the court.

105. 15 U.S.C. § 13 (1996). Section 2 of the Clayton Act states:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of the like grade and quality, where either or any purchaser involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lesson competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

106. 15 U.S.C. § 1 (1996).

"[monopolization of] any part of trade or commerce,"[107] or if it would "substantially lessen competition."[108]

Owners of sports properties savvy enough to protect their intellectual property interests are better positioned to capitalize on expansion opportunities through the sale of franchises. This expansion method has been used successfully by many professional sports organizations in the United States, including the NBA, NFL, MLB, NHL and IHL. Without fear of antitrust litigation, owners can discourage competition by expanding to meet increased consumer demand for popular sports events by franchising these events. It is not necessary to own a sports team to benefit from franchising.

Franchise laws allow the licensor to legally control the quality, timing and delivery of licensed products and services.[109] Although the laws

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107. 15 U.S.C. § 2 (1996).

108. 15 U.S.C. § 13 (1996).

109. The following is a list of services that sports property owners could offer to franchisees, along with a corresponding list of duties and responsibilities that the franchisees might be expecting provide to the franchisor in exchange for the privilege of using the intellectual property rights granted under the franchise agreement.

Franchisor Services (national activities)

- Transfer the right to use the franchisor's trademarks, service marks, copyrights and patents to franchisees with limitations on use within a specified geography and product or service category.
- Furnish a *Standard & Style* manual governing the use of trademarks, service marks and copyright material.
- Furnish trade secrets and know-how in the form of operating manuals, research methodology, execution plans for event management, marketing communications strategy, forms and standardized contracts.
- Negotiate licensed merchandise deals, and produce and distribute licensed merchandise catalog.
- Maintain a marketing database of customers and prospects.
- Provide training and consulting services to franchisees.
- Supply awards certificates, ribbons and trophies for athletic events.
- Manage the co-op advertising program and run national and international ad campaigns.
- Handle media relations and run the Media Center.
- Develop promotional campaigns.
- Develop and manage sponsorship relationships.
- Negotiate national and international broadcast licensing contracts.
- Generate goodwill and build brand equity to increase the value of the franchise.

Franchisee's Duties and Responsibilities (local activities)

- Maintain and enhance franchiser's trademarks and service marks.
- Obtain written approval prior to using all trademarks, service marks and copyrights.
- Maintain the confidentiality of trade secrets and know-how in perpetuity.
- Make use of the franchiser's trade dress to reinforce the image and personality of the sports property.
- Invest in working capital to conduct sports entertainment events under the franchise agreement.

vary from location to location, state, federal and international franchise laws grant franchisors the right to restrict certain uses of their intellectual property. These restraints are deemed proper as long as they are enacted to protect the goodwill of the licensed trademarks, service marks, copyrights and patents. Uniform trade dress, appearance and image requirements are acceptable restraints. Restraints on usage of the trade name, trademarks and service marks can be placed on franchisees to control the type, quality and geographic distribution of licensed goods and services bearing the licensor's marks. Price restrictions are not allowed.

a. Trademark and Service Mark Protection (The Lanham Act)

The Lanham Act defines a trademark as ". . . any word, name, symbol or device, or any combination thereof used to by a person, or which a person has bona fide intention to use in commerce . . . to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of goods, even if that source is unknown."[110]

A trademark is a mark of authenticity designed to set one brand apart from another. Service marks are afforded the same protection as trademarks. A service mark is used to distinguish services, whereas trademarks are associated with products. These marks must be distinc-

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- Organize, staff and manage the successful execution of sports competitions and exhibitions within the approved territory.
- Coordinate timing and scope of the events with the franchiser.
- Coordinate local volunteer support.
- Maintain strong ties with the athletic community through local clubs, training facilities, athletic governing bodies, coaches and athletes.
- Foster goodwill in the community and sustain favorable relationships with community leaders.
- Execute an integrated marketing communications program locally, consistent with the strategy outlined by the franchiser.
- Manage the distribution and sale of licensed merchandise on-site at sanctioned athletic events.
- Execute product sampling programs within the designated territory on behalf of sponsors.
- Handle data collection for field research and product testing, if applicable.
- Collect and maintain customer/prospect records. Transfer this data electronically to a central database for management by the franchisor.
- Honor franchisor's right to inspect the facilities, financial records, permits, etc.
- Provide adequate insurance and indemnify the franchisor.
- Solicit local advertisers, sponsors and broadcasters, limiting exposure to the home territory.
- Supply qualified athletes to the international competition.

110. 15 U.S.C. § 1127 (1996).

tive or carry a secondary meaning to be registerable.[111] Words, letters, numbers, drawings and shapes (including colors and mascots) that meet the test of distinction can be protected.

A person's image can be used as a trademark. Volleyball star Steve Timmons' stylized caricature was registered as a trademark for clothing. In *M'Otto Enterprises, Inc. v. Redsand, Inc.*, the court noted that images and likeness of famous personalities are protectable.[112]

A trademark serves the following functions:

(1) it designates the source or origin of a particular product or service;

(2) it denotes a standard of quality embodied in the product or service signifying that all goods bearing the trademark are of equal quality;

(3) it identifies and distinguishes a particular product or service from others;

(4) it symbolizes the goodwill of its owners;

(5) it represents a substantial advertising investment and is treated as a species of property; and

(6) it protects the public from confusion and deception.[113]

Trademarks and service marks are the prime instruments in advertising and selling of goods and services. In the field of sports, trademarks are used to promote team loyalty ("sports marks")[114] and the sale of licensed merchandise. Service marks are used for promoting athletic events. In 1977, the New York Yacht Club filed its application to register "America's Cup" as a service mark for, "the perpetual promotion of challenge sailing matches for friendly competition between foreign countries." The date of first use was cited as 1871. (Until this point in time, the America's Cup mark was only afforded common law protection.) In 1978, the New York Yacht Club registered "America's Cup" as a trademark. America's Cup trademark registration includes designs, plus words and/or numbers.

Trademark protection is a much narrower right than patent protection, since trademark coverage extends only to similar uses. Protection is limited to a given product or service category, as demonstrated in the America's Cup example above. When the same words or symbols are

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111. *See infra* part IV.A.2.c.

112. ANTHONY L. FLETCHER AND DAVID J. KERA, TRADEMARK LAW HANDBOOK § 7.03 (1995); M'Otto Enterprises, Inc. v. Redsand, Inc., 831 F. Supp. 1491 (W.D. Wash. 1993).

113. BERRY AND WONG, *supra* note 25, at 620.

114. Steven N. Geise, *A Whole New Ballgame: The Application of Trademark Law to Sports Mark Litigation*, 5 SETON HALL J. SPORT L. 553 (1995).

used in a different category, they take on a new meaning. An electronic search of the trademark files revealed that the following marks were registered in addition to America's Cup: "Irish America's Cup," "Euro-America's Cup," and "America's Cup Cardboard Cup Regatta." Each of these terms were registered for a different purpose and, therefore, granted protection under the Lanham Act. Another example is the "New York Giants" and the "San Francisco Giants." New York uses the name "Giants" to describe a professional football team, while San Francisco uses it to describe a professional baseball team.

Registered marks and common law marks are afforded protection from infringement or delusion in the area where they are used, so long as they are used.[115] The Trademark Law Registration Act of 1988 requires that an "Affidavit of Use" be filed by the registrant after five years to certify that the mark is still in use in commerce.[116] If an affidavit is not filed, the trademark registration is automatically canceled in the United States after six years from the date of issuance. Once the affidavit is filed the mark is incontestable for twenty years.[117]

New federal legislation is pending that will expand trademark protection under an anti-delusion law. Several states already have anti-delusion laws. The law applies when a mark has been used for a long time. It must be distinctive and be of a nature that would not be confusingly similar to other marks. In such situations, protection can be extended to similar names in noncompetitive classes of trade across channels and end-users. Trademark protection alone is limited to a given class of trade and type of end-user.

The U.S. Patent and Trademark Office and the courts recognize four out of the following five terms as trademarkable:

(1) Generic Terms

Common descriptive terms ("generic terms") are not trademarkable because they cannot acquire a secondary meaning. For instance, "10K Road Race," "Bush League," "Cross-Country Ski Club," "Half-Pipe Skateboard Competition" and "International Sports Festival" are all generic terms that can not receive trademark protection, with one possible exception. The "International Sports Festival" could acquire a secondary meaning over time with sufficient advertising and public exposure. It would be subject to the court's interpretation in much the same way as the "World's Fair."

115. GLICKMAN, *supra* note 101, at § 3A.02.
116. *Id.*
117. *Id.*

The "World's Fair" is a descriptive term, as defined below. In the 1983 case of *Louisiana World Fair Exposition, Inc., v. R. Gordon-League, Jr.*,[118] the court held that "World's Fair" had acquired and secondary meaning; therefore, the plaintiff was successful at preventing the defendant from using its common law trademark.[119]

If the term "International Sports Festival" included more specific information such as "International Endurance Sports Festival," it could be considered a descriptive term. The term "Half-Pipe Skateboard Competition" could also be considered descriptive if it was reworded to "National Half-Pipe Skateboard Championship." By adding the words "National" and "Championship" the term takes on a new meaning. It now implies that the event in question will be the preeminent competition in skateboarding within the country.

(2) Descriptive Terms

A descriptive term is a word or series of words whose primary meaning identifies a product or service characteristic. Descriptive terms are not trademarkable, except when the words or name acquires a secondary meaning.

Through extensive advertising and promotion, descriptive words can become associated with a particular product or service. This is demonstrated with the "Boston Marathon." In the case of *Boston Athletic Association v. Sullivan*,[120] a service mark infringement case, the defendants, Mark Sullivan, a retailer doing business under the name of "Good Life," and Beau Tease, Inc., an imprinter and distributor of T-shirts, argued that "Boston Marathon" had become a generic term and that they had prior usage.[121] The defendants had been imprinting and selling "Boston Marathon" T-shirts since 1978. In 1986, Boston Athletic Association (BAA), the organizer of the event, signed an exclusive licensing arrangement with Image Impact, Inc. to provide wearable apparel including T-shirts for the Boston Marathon. In bringing suit against the defendants, the plaintiff alleged that unauthorized use of "Boston Marathon," or similar name and color imitation thereof, violated the exclusive rights of BAA and its licensees.[122] This includes defendant's use of designs referring to "19XX Marathon; [runners]; Hopkinton-Boston." Although the

118. Louisiana World Fair Exposition, Inc., v. R. Gordon-League, Jr., 221 U.S.P.Q. 589 (E.D. La. 1983).

119. *Id. See also* MARY HUTCHINGS REED, IEG LEGAL GUIDE TO SPONSORSHIPS 118 (1989).

120. 867 F.2d 22 (1989).

121. BERRY AND WONG, *supra* note 25, at 635-642.

122. *Id.*

BAA had not officially registered its service marks until 1985, the court found that right to a trademark or service mark accrues from use under common law property rights. The BAA's failure to register its marks until the mid-1980s did not preclude ownership. The court found in favor of the Boston Athletic Association. The words "Boston Marathon" had become widely associated with the annual running race held in the city from which it takes its name. The defendant's use of these words and variations thereof were intended to capitalize on the event-organizer's efforts.[123]

(3) Suggestive Terms

When a name or term suggests a quality or characteristic of a product or service without specifically describing the product, it can acquire trademark protection (e.g., "Extreme Games," "Indy 500" and "Whitbread Round-The-World Race"). The Extreme Games involve extreme sports. The Indy 500® refers to the Indianapolis 500. Five-hundred is the distance Indy Cars race (200 laps around a 2-1/2 mile oval race track). Indy refers to the city in which the automobile race is held. The Whitbread describes the yacht race around-the-world, and it carries with it the name of the British company that founded the event.

(4) Arbitrary Terms

When a name bears no relationship to the protected product or service it can be registered. MasterCard®, sponsor of the World Cup, might be considered an arbitrary term since it has no meaning other than the meaning given to it. The same could be said for the advertising slogan, "Master the Possibilities," used to promote the company's credit card.

(5) Fanciful Terms

The name is specifically designed for the purpose of serving as a trademark. This is the best type of mark because it is protected without the need for a secondary meaning. The term "Haka Bowl" is a good example. The Haka Bowl® is a new sports property that takes its name from the ancient Maori war dance known as the "Haka." The "Haka" is a blend of *waiata* (songs), *pukana* (grimacing) facial expressions and body movements forming an earth trembling dance to commemorate the occasion. The fearsome warrior spirit embodied in the Haka is used to intimidate the opposing team before competition and it helps keep Ma-

123. 867 F.2d 22, 24 (1989).

ori tradition alive. Haka is performed by New Zealand sports teams before international matches.

As illustrated by the Boston Marathon example, trademark property rights accrue under common law through use of the mark and extend only as far as necessary to prevent consumer confusion. Under statute, trademark rights are acquired by registration and use or intent to use.[124] The Federal Trademark Act of 1946 (the Lanham Act) provides relief for persons suffering losses due to unfair competition. Irrespective of whether the trademark or service mark has been registered, the following claims can be made:

(1) Passing Off - false designation of origin;
(2) False Advertising - false or misleading description of fact or representation of fact in which plaintiff need only demonstrate the likelihood of damage exists; or
(3) Disparagement - false or misleading description of fact or representation of fact in which plaintiff must establish that the activities actually took place and affected interstate commerce.[125]

An unfair competition cause of action is more difficult to prove than a trademark infringement claim. If the cause of action cited is unfair competition, than the plaintiff must prove:

(1) the mark was in use in commerce;
(2) it had acquired a secondary meaning in association with the plaintiff's goods or services; and
(3) the defendant's use of the mark in commerce has caused consumer confusion.[126]

In a trademark or service mark infringement claim, the plaintiff may simply argue that the defense's use of the mark is causing confusion, as illustrated in *Boston Athletic Association v. Sullivan.*[127] The Lanham Act addresses the issue of confusion as follows:

> Any person who, on or in connection with any goods or services . . . uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which is likely to cause confusion . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act[128]

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124. Geise, *supra* note 114.
125. Gupta, *supra* note 98.
126. *Id.*
127. 867 F.2d 22 (1989).
128. 15 U.S.C. § 1125 (1996)

In assessing the likelihood of confusion, the court identified eight factors:

(1) the similarity of marks;
(2) the similarity of the goods;
(3) the relationship between the parties' channels of trade;
(4) the relationship between the parties' advertising;
(5) the classes of perspective purchasers;
(6) evidence of actual confusion;
(7) the defendant's intent in adopting the mark; and
(8) the strength of the plaintiff's mark.[129]

The court found that the BAA's marks were its most valuable asset and were valid and enforceable, and the average person would infer sponsorship by someone carrying the "Boston Marathon" logo or similar name and graphic symbol referring to the marathon. All persons and entities acting in concert with Sullivan were enjoined from manufacturing and selling goods displaying the aforementioned marks.[130]

In 1978, the U.S. Congress enacted special legislation devoted entirely to the protection of Olympic terminology and symbols.[131] Congress granted added protection to the United States Olympic Committee (USOC and the Corporation), which precludes companies and individuals from using without the USOC's consent the:

> 1) symbol of the International Olympic Committee, consisting of five interlocking rings; 2) emblem of the Corporation, consisting of an escutcheon having a blue chief and vertically extended red and white bars in the base with five interlocking rings displayed on the chief; 3) any trademark, trade name, sign, symbol, or insignia falsely representing association with, or authorization by, the International Olympic Committee or Corporation; or 4) the words "Olympic," "Olympiad," "Citius Altius Fortius" or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity.[132]

With the help of the International Olympic Committee (IOC), The Australian Olympic Federation (now the Australian Olympic Committee (AOC), Inc.) sought legal protection from the government to preserve its interests in the Olympic trademarks. Pursuant to Swiss law, the five interlocking rings are the property of the IOC. With permission from

129. BERRY AND WONG, *supra* note 25, at 635-642.
130. *Id.*
131. 36 U.S.C. § 380 (1978).
132. BERRY AND WONG, *supra* note 25, at 671.

the IOC, the AOC used these designs to raise funds for athlete training, preparation and participation in the games through the sale of broadcast rights, sponsorships and licensing. The Olympic insignia was not registerable in Australia as a design under the Design Act of 1906 because it was used as a marketing symbol during the 1984 games in Los Angeles. The insignia did not qualify for protection under the Trademark Act of 1955 since it would not identify the source of manufacture of goods. Under the Copyright Act of 1968, the AOC would have lost the use of the Olympic insignia as a marketing symbol by the industrial application to more than 50 articles.[133] Therefore, special legislation was needed. The Olympic Insignia Act 1987[134] grants the AOC copyright protection on the use of the Olympic symbol, and it grants a monopoly on protected designs.

AOC sent demand letters to businesses displaying the Olympic symbol and registered Olympic designs to prevent unauthorized use of the insignia. On more than one occasion, it obtained injunctive relief from the Federal Court of Australia.[135] Where designs not covered by the Olympic Insignia Act were used in advertising and merchandising by unlicensed parties, the AOC sought relief pursuant to section 52 of the Trade Practices Act. It argued that use of such designs as the Olympic flame, medals, athletes' images and the words "Olympic" constituted misleading and deceptive conduct by implying that the businesses had sponsorship, approval and affiliation with the AOC, which they did not.[136]

In the opinion of one solicitor practicing sports law in New Zealand and Australia, New Zealand may soon seek special legislation to protect the America's Cup trademarks and service marks.[137] The challenger of record and owner of the marks, New York Yacht Club, will grant the Royal New Zealand Squadron a license to use the marks in connection with the America's Cup defense in Auckland. There is legitimate concern that other business entities may try and use the name without acquiring the rights. For example, a hotel in Auckland may choose to call

133. Simmon Rofe, *Protecting the Olympic Insignia*, ANZSLA NEWSLETTER, June, 1991, at 6.

134. *Id.*

135. L. Dowse and G. Smith, *Protecting Olympic Insignia in Australia During the 1992 Barcelona Games*, ANZSLA NEWSLETTER, June, 1991, at 8-9.

136. *Id.*

137. Telephone Interview with Tony Oxnevad, Barrister and Solicitor, Anderson Lloyd (July 9, 1995). Before joining Anderson Lloyd, Tony Oxnevad practiced law in Australia. He is a member of ANZSLA.

itself the "America's Cup Inn" or a tour operator may name its services "America's Cup Tour Group." Neither of these names would conflict with the services expressly covered by the current trademark registration since they apply to different service categories, namely hospitality and tourism. Yet, such use would likely be a direct attempt to capitalize off the goodwill associated with America's Cup. Therefore, to broaden the scope of the trademark and service mark coverage, special legislation may be needed in New Zealand for America's Cup in much the same manner it was required for the Olympics in Australia.

Intellectual property rights offer some protection for event owners to safeguard their investment in sports properties. Start by creating distinctive, fanciful marks that convey the image and positioning of the event. Although not required, it is advisable to register trademarks and service marks in all countries in which the event will take place. When specifying a product or service category, obtain as broad of coverage as possible. Where applicable, register the marks as both trademarks for use on licensed merchandise, and as service marks for perpetual promotion of the event, just as the New York Yacht Club did with the America's Cup marks.

Cost considerations should be weighed against the long-term viability of the event. For major events, national and international in scope, the cost of supporting a common law trademark defense on behalf of sponsors and licensees can be far more expensive than the initial cost of registration. Once registered, ownership of a mark is less disputable. A cease and desist notice can be issued to offenders as the first course of action. When the matter of ownership is clearly defined, this action can avoid costly court battles.[138]

Mary Hutchings Reed, attorney and author of *The IEG Legal Guide to Sponsorship*, offered the following advice to her readers:

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138. A case in point from the author's personal experience: A demand letter resolved what could have been a serious conflict between the author's company, Marketing Navigators, Inc., and The Richmark Group, a Chicago-based marketing consulting firm. The issue revolved around the use of the mark "Marketing Navigators" in connection with marketing services. Since ownership of the mark was indisputable, The Richmark Group agreed to change the name of its newsletter from *The Marketing Navigator* to *The Navigator* after receiving a cease and desist notice from Marketing Navigators, Inc., the original owner of the mark. A similar letter was sent to A.C. Nielsen after the company learned of Nielsen's plan to sell database marketing services under the name "Marketing Navigator." Although the author's company was not the first to submit its application for registration, it was the first to use the name "Marketing Navigators" in commerce, and thus Marketing Navigators, Inc., was granted ownership of the service mark.

> Another way promoters [owners or organizers] can protect themselves is to choose a fanciful name for their event and register the trademark as their own. Marks like Bumbershoot and Great American Rat Race add to an event's image, and the goodwill that attaches to them cannot be stolen by a sponsor of just another 5K race. Since the recent revision of the federal trademark act, it is easier for promoters to reserve and register a trademark based on their intent to use a mark rather than its actual use.[139]

When filing the trademark registration application it is important to include the event name (provided it is not the trade name or the name of the title sponsor), a graphic symbol (logo), and a supporting advertising slogan, thereby developing the secondary association with the event. Keep in mind that the marks must convey a secondary meaning associated with event. Once registered, usage rights can be sold to sponsors and licensees as a means of generating revenue for the event.

When negotiating sponsorship and licensing agreements, specify the product category, geographic scope (market coverage), media type, and time period for which the trademark rights are being extended. Retain approval rights to usage of the marks. State who owns the trademark or service mark in the contract and what, if any rights, are being transferred. If these rights are exclusive, state that explicitly. If the rights are nonexclusive and nontransferable, this should be clearly spelled out. With licensed merchandise agreements, it is best to incorporate clauses covering product endorsement and quality control issues, along with an indemnification clause that insulates the licensor from potential product liability suits. In sponsorship and broadcast agreements, incorporate a clause retaining control over the event. License to use a trademark or service mark does not constitute ownership, nor does it grant the licensee authority to intervene in the management of an event. The contract should limit the licensee to promotional use only. Grounds for termination of the agreement and an expiration date must be included in the contract.

During the 1995 America's Cup challenge in San Diego, American teams participating in the Defense registered their names and logos with the U.S. Dept. of Commerce Patent & Trademark Office, Washington, D.C. America^3®, The All Women's Team, licensed the right to use its name and logo to sponsors and merchandise suppliers. The women of America^3® generated $10 million in sponsorship revenue from *Glamour*

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139. REED, *supra* note 119.

magazine, L'Oreal® cosmetics, Yoplait® yogurt and Chevrolet®.[140] Additional revenue was generated from splashing its logo on candy bars, wine, coffee, sunglasses, hats, jewelry, belts, sportswear and sales of other licensed merchandise. Columbia® Sportswear, one of two official sportswear licensees, sold $1.5 million in America^3® licensed apparel.[141] The North American licensee for Canterbury of New Zealand also negotiated a license to market America^3® apparel. Royalties from these and other licensing deals were used to help underwrite the cost of participating in the event.

Normally, two companies competing in the same category would not be granted a license. In this case, Columbia® Sportswear was unable to meet all of the team's needs, nor could it keep up with increased consumer demand for sportswear bearing the team's name and logo, according to Linda Lindquist, former co-development director for America^3®. When Milwaukee-based Marketing Navigators initiated discussions with Lindquist in Spring 1994, the marketing consulting firm was told that Columbia® Sportswear had already secured an agreement with America^3®. By autumn, the firm learned that an opportunity existed for its client, DeLONG® Sportswear, Inc., to fill a void left by Columbia® Sportswear when it could no longer fulfill its obligation to the team. Client and syndicate were able to negotiate a contract to sell licensed merchandise to consumers under the team's logo without fear of a law suit.

Challenge participants from New Zealand, Team New Zealand and TAG Heuer Challenge, did not register their trademarks with the United States Department of Commerce Patent & Trademark Office.[142] Even without officially registering the team name and logo, TAG Heuer Challenge leveraged the value of its trademarks through a licensing arrangement with Canterbury of New Zealand. (The team's name carries with it the trademark of a Swiss watch manufacturer, thereby making it difficult for anyone else to use without the company's permission).

Team New Zealand, the winner of the 1995 America's Cup, did not take full advantage of the appreciated value of its name and logo through licensing agreements, although the syndicate did attract millions of dollars of sponsorship revenue. An informal survey of the team's compound and surrounding retail area uncovered little, if any, licensed

140. Bob Wofley, *Brewer's Opening Day Connects With Kids*, MILW. JOUR. SENT., April 16, 1995, at C2.

141. *Id.*

142. United States Dept. of Commerce Patent & Trademark Office (CD-ROM), Washington DC (April 1995).

merchandise carrying the official trademark of the winning team before the finals.[143] During the finals, a New Zealand sock manufacturer announced its intent to donate $5 a pair from the sale of red socks to Team New Zealand. The promotion was motivated by Peter Blake's "lucky red socks," a gift from his wife, Pippa Blake, prior to the start of the competition. "She gives me a lucky charm prior to the start of every regatta," said Peter, Team New Zealand's syndicate head.[144] In one week, the sock manufacturer sold over 100,000 pairs of lucky red socks, without the team's logo. The company raised $500,000 which it donated to Team New Zealand. How much more revenue might Team New Zealand have raised during the campaign, if the team had registered its trademark and applied marketing know-how to license the rights to its name and logo?

b. Trade Names

A trade name identifies a business entity or an individual, while trademarks and service marks identify specific products or services. A trade name can only be registered under Federal trademark laws as a trademark if it identifies a specific product or service and adheres to all rules pertaining to trademarks.[145] Names given to identify a corporation, partnership or sole proprietor are not trademarkable, although some portions of the name might be.

The author's personal experience with the company name "Marketing Navigators" is an example of a trade name that qualified under the Federal Trademark Act as a service mark. To ensure that the mark could receive trademark protection, the name was registered in conjunction with a stylized typeface and nautical graphic design of a compass rose. The words, typeface and graphic design taken together comprised the company's corporate logo. When used in the logo format the abbreviation "Inc." was dropped from the service mark so that it could be registered with the U.S. Department of Commerce Patent & Trademark Office. "Inc." is still used in the trade name to denote that the business entity is incorporated.

An individual's name, surname or other name, such as a well established nickname, used to identify a person is afforded the same protec-

143. Informal retail surveys of America's Cup and team-identified apparel were conducted by the author in San Diego, California (Jan. & May, 1995).

144. Ivor Wilkins, *America's Cup Red Socks Drive Black Beasts*, GRAND PRIX SAILOR, May 13, 1995.

145. 15 U.S.C § 1125, 1127 (1996).

tion as a trademark.[146] When use of one's name does not exploit the persona of the real individual, and is not advertised or publicized, it fails to meet the commercial test of "use in commerce" required for protection under the trademark act. It must be used in commerce in order to qualify as a trademark.

In the case of *Hirsch v. S.C. Johnson & Son, Inc.*,[147] the plaintiff, a famous professional football player and former University of Wisconsin athletic director, Elroy Hirsch, brought suit against consumer packaged goods giant, S.C. Johnson & Son, for using his nickname "Crazylegs" on a moisturizing shaving gel targeted at women. The defendant acknowledged that it knew the plaintiff's nickname, a name given to him by a sportswriter for the *Chicago Daily News*. The Supreme Court of Wisconsin held that the trial court erred in applying common law standards for trademark infringement, stating that the applicable cause of action was for Wisconsin's common law trade name infringement.[148] The court acknowledged the plaintiff's property right in his nick name. As a result, S.C. Johnson discontinued its Crazylegs line of products.

In *Windsurfing International v. Ostermann*,[149] the court held that "windsurfer" was a common descriptive or generic name for sailboards because of the manner in which windsurfer was used. It was used as a name of the sporting goods rather than as a type of sailboard.[150] It had not acquired a secondary meaning, since the only sailboards that existed for a time were the Windsurfer brand. The fact that the product itself was a unique invention, for which patent protection was granted, did not impact on the court's decision with respect to the name. Simply by using the word "windsurfer" in the trade name does not afford it protection as a trademark, as evidenced by the fact that Windsurfer of Hawaii also manufactures sailboard equipment.[151] Windsurfer International holds the patent for the swivel joint that connects the rig (mast, boom and sail) to the board. Mistral and Bic as well as a number of other companies have developed their own versions of the connecting joint. Since the introduction of these competitive products, "sailboard" is now considered the generic term for windsurfer.

When developing a trademark or service mark for an athletic event, from the owner's perspective, it is better to distinguish the mark from

146. GLICKMAN, *supra* note 101, at § 3A.02[2].
147. 280 N.W. 2d 129 (Wis. 1979). *See also* Gupta, *supra* note 98, at 255.
148. *Id.*
149. 613 F.Supp. 933 (1985).
150. *Id.* at 961. *See* AMERNICK, *supra* note 100.
151. *Id.*

names associated with sponsors and shareholders of the corporation. The trade name should identify the entity that owns and controls the event. This could be a not-for-profit organization such as a foundation, club or association, or it may be a for-profit corporation, partnership or sole proprietor.

The success or failure of an event can have serious implications for the owner whose name it reflects. Those who are successful might want the flexibility to expand, thus it is better to have a trade name that identifies a holding company. Each sports entertainment event, be it a single event or a series of athletic events, controlled by the holding company can be set up as a separate corporation identified by a distinctive trademark or trade name. Not only does this insulate strong performers from poor ones, but it also distinguishes one event from another. The proposed organizational structure allows each event to stand on its own profit-loss record. With this structure, if a sports entertainment event changes ownership, the brand equity established in the name stays with the event. For failed events, which may be forced to go out of business, it can be difficult to distance oneself and start again, if the trade name and trademark or service mark are one in the same. Distancing oneself from a failed event also can be more difficult when a sports entertainment event carries the owner's name.

Title sponsorship agreements often bestow naming rights to the lead sponsor. This can be a real advantage for a sponsor because it affords the lead sponsor an opportunity to incorporate its company name or brand name into the title. By tying the name into the title of an event (known as "title sponsorship"), the chances of the sponsor obtaining exposure from media coverage of an event are significantly improved. For many sponsors, this is a requirement of lead sponsorship commitments. However, it can also be a serious disadvantage from the standpoint of developing a unique trademark that distinguishes the sports entertainment event from all others. Granting lead sponsors title sponsorship makes it difficult for organizers to build brand equity in the event. Instead, the equity is associated with the sponsor's name. This equity diminishes when title sponsorships change hands.

When Miller Maritime Days decided not to continue its sponsorship of the Milwaukee, Wisconsin lakefront nautical festival, Budweiser assumed sponsorship of the event in 1995. Throughout the 1995 festival, people continued to refer to the Budweiser Maritime Festival as Miller Maritime Days. More advertising dollars will be required to re-establish the event under the new name. This is the risk event-organizers take when they let sponsors take control over the name. It would be interest-

ing to study unaided recall levels before and after an event in which a title sponsor dissociates itself from one bowl game to affiliate with another. Consumer research would likely reveal unaided awareness and predict that recall levels would drop if the names change again.

c. Trade Dress

The total image of a business or product is protectable under Section 43 of the Federal Trademark Act of 1945. To qualify for protection as trade dress the image must avoid confusion and be inherently distinctive or acquire a secondary meaning.[152] Trade dress can include size, shape, color, texture and graphic features.

The first requirement for trade dress is that it exists. When taken as a whole, it must be nonfunctional and distinctive to avoid confusion. The tests of trade dress functionality are: (1) the feature is costly to design around, rather than costly to have; (2) the feature is necessary to compete effectively; (3) the feature is shared by other brands; and (4) the attractiveness has become so important to consumers that continued protection will destroy the ability to compete effectively.[153]

The tests for whether trade dress is arbitrary or fanciful are distinctiveness. The inherent distinctiveness of trade dress is determined by whether: (1) the trade dress has a common shape; (2) the trade dress is unique or uncommon in its field; and (3) the trade dress is merely a refinement of a common form of ornamentation for a particular class of goods.[154]

An examination of Coca-Cola®, a sports sponsor in the beverage industry, will demonstrate this point. The company originally selected its bottle shape for its flagship brand, Coke, from a consumer design contest. Coke's distinctive shape was once fashioned after a cocoa bean, according to the contest winner. This shape is so closely associated with Coke worldwide that the company brought out new Coke plastic bottles in a similar shape. Also, Coca-Cola put pictures of its glass bottle on aluminum cans of Coke. This graphic design of the bottle on the can is a prelude of things to come. Coca-Cola is about to convert its entire canning operation. In the future, Coke cans will be similar in shape to Coke bottles, an investment that will cost the company millions.[155]

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152. 15 U.S.C. § 1125 (1996).

153. FLETCHER AND KERA, *supra* note 112, at § 7.01-7.03.

154. *Id.* at § 7.02.

155. Bobby Calder, Address regarding Consumer Behavior at Northwestern University, J.L. Kellogg Graduate School of Management, Spring, 1995.

Trade dress need not be limited to package design. It can be applied to facilities. The best examples might be fast food restaurants like McDonalds®, Taco Bell® and Kentucky Fried Chicken®. Clearly, these restaurant chains maintain a distinctive look that is easily recognizable. This same concept should be applied to sports facilities. Trade dress can be incorporated into the building design, if the facilities are owned or controlled by the sports entertainment company. The Baltimore Orioles' new stadium is very distinctive. The nostalgic look of this new sports stadium sets the ball club apart from other teams in Major League Baseball.

For leased facilities or events held in public places, event owners can erect temporary structures that carry with them a distinctive image. Such structures might include ticket booths, concession stands, exhibition booths, and start and finish banners. Ideally, demarcate the entire perimeter so that the area in which an athletic competition will be held is defined by these symbols. Use colorful banners denoting the organizer's motif and sponsors' logos. This approach was adopted by ESPN, Inc., during the 1995 Extreme Games®. ESPN's fanciful banners had a lovely artistic design. They designated competition sites at public locations used for Extreme sports events. These banners created an interesting, uniform background for spectators and television viewers in parks, at beaches and on roads. Television viewers may not be treated to the same zany typeface and fanciful banner designs in subsequent broadcasts of the Extreme Games. Driven by a desire to stay fresh and exciting, ESPN will likely do away with the original image in favor of a new look for the future.[156] This may be a mistake, particularly for a new event that is just starting to build a reputation and an image.

A company's trade dress should be carried through in the consistent look and quality of all its advertising and promotional materials, including letterhead, signage, programs, press kits, staff uniforms and more. It should be reflected in the choice of typeface, colors and graphic designs used by the sports entertainment event. Through consistent application of the image associated with a particular event, the owner can distinguish its sports entertainment products and services.

When developing a marketing communications strategy for an event, event-organizers should apply the basic principles of Integrated Marketing Communications (IMC)[157] to advertising, public relations, sales promotion and direct response. Identify the primary benefit for each

156. Telephone Interview with Jack Wienert, *supra* note 65.

157. DONALD SCHULTZ, ET AL., INTEGRATED MARKETING COMMUNICATIONS (1993).

market segment. Establish a brand image and personality that reinforces this benefit. Create a trademarkable name, logo, advertising slogan and graphic representation that convey the brand image and personality. Then, develop a styles and standards manual depicting the approved names, slogans, mascots, logos, colors, graphic designs, type styles and the overall look for all marketing communication vehicles used in association with the event. Be clear and consistent in how the communications message is being conveyed on all promotional materials at all customer contact points. Build a marketing database to capture pertinent information about customers and prospects (e.g., profile, media habits, and purchase behavior.). Track responses to each marketing communications effort to measure the impact on sales volume and lead generation.

The style and standards manual will serve as a vehicle to establish the event's trade dress. Publish mandatory guidelines for usage of the trade name, trademarks, service marks and copyrights by employees, agents, sponsors, licensees and franchisees. Licensing agreements, purchase orders, supplier and agency contracts should stipulate the proper usage. The agreements should include a requirement that any such usage be in compliance with the guidelines provided in the event's style and standards manual.

Do not make the mistake of accepting "free" promotional materials and supplies as in kind gifts, if they are not in compliance with the approved specifications. Companies donating these services benefit from their donations. They should be asked to conform to the specifications outlined in the style and standards manual. Volunteer services and gifts in kind, which do not conform to the trade dress specifications, may actually be doing a sports entertainment event more harm than good by causing confusion in the minds of consumers.

As a marketing communications tool, trade dress can be very effective in building brand equity by helping to establish a clear and distinctive image for the sports entertainment event. The mystique conjured up by the brand's image is an important factor in determining the perceived value of sports properties. Together, trade dress, product quality (the quality of competition) and customer service represent the brand image associated with a particular sports property. This is an area of intellectual property law that may be under-utilized in the sports entertainment industry.

d. Trade Secrets (Uniform Trade Secrets Act) and Know-How

A trade secret is defined as "information, including formula, pattern, compilation, program, device, method, technique or process that: 1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means, by other persons who can obtain economic value from its disclosure or use, and 2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."[158] If the information falls within the public domain, it is not considered a trade secret, nor can it be held to any confidentiality agreements. A trade secret is protected so long as it remains a trade secret.[159]

Know-how is knowledge that has economic value, such as useful technical information and trade secrets not generally known or accessible to others, but not protected by patent or copyright. This information may be indispensable to the operation of the business. Disclosure of a company's know-how and trade secrets to competitors or to the public could result in a loss of the company's competitive advantage. To assess the economic value of know-how, the relevant markets must be defined so that the effect of the acquisition of the intellectual property can be ascertained. Both know-how and trade secrets are protected by unfair competition statutes and by contracts in the United States and foreign countries.[160]

Know-how can be licensed to others. The extent to which the licensor can limit the licensees use of know-how depends upon the restrictions included in the contract. For instance, in order to protect know-how and trade secrets passed from a sports league to member clubs under a franchise agreement, the following provisions should be incorporated into the contract:

> (1) Franchisee (the local sports team) is obligated to preserve before, after and during the duration of the agreement all trade secrets and know-how imparted by the franchisor (the sports league), and franchisee must impose similar obligations on all club members and employees (through nondisclosure and confidentiality covenants);
> (2) Franchiser is obligated to use know-how and trade secrets solely and exclusively for the benefit and exploitation of the franchised business;

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158. UNIFORM TRADE SECRET ACT § 1 (1986).
159. GLICKMAN, *supra* note 101, at § 3A.03[2].
160. *Id.* at § 8A.02[2]. *See* DAVID BENDER, INTELLECTUAL PROPERTY ANTITRUST COURSE HANDBOOK (1994).

> (3) Upon termination of the franchise agreement, franchisor agrees to cease all use of the know-how package and trade secrets unless the information has fallen into public domain in some way other than breach of contract;
> (4) Franchisor is forbidden to assign or transfer the rights and obligations granted by the franchise agreement; and
> (5) Any improvements, discoveries and know-how gained by franchisee through the exploitation of the business, which enhance the business, must be communicated to franchisor. The franchisor and other franchisee must be granted a non-exclusive license to use it.[161]

Business plans, marketing strategy, formal game plans, technical information, financial data, and customer lists can be construed as trade secrets or corporate know-how, if pains are taken to maintain the confidentiality of this information. To protect trade secrets and know-how associated with a particular sports entertainment event, non-disclosure clauses should be incorporated into confidentiality agreements with suppliers, agents and licensees. Company policy should stipulate the confidential nature of information that is to be maintained in secrecy. This will serve as a notice to all employees. Separate confidentiality agreements with covenants not to compete are advisable. When drafting a nondisclosure provision, attorneys often use intimidating and all inclusive language such as "This information is proprietary and shall not be reproduced, disclosed or distributed or communicated verbally, directly or indirectly or otherwise published, in whole or in part, or used for any other purpose than the express purpose stated herein without prior written authorization from the owner."

With this convoluted language, it is little wonder people are so reluctant to sign confidentiality agreements. Often, the language used in the agreement is too broad. The agreement may fail to take into consideration that which is already known by the recipient and that which falls in the public domain.

Below is a definition of "confidential information" from an agreement used by a New Zealand manufacturer, referred hereto as "XYZ Limited." The language of this agreement does a much better job acknowledging the limitations of what is construed to be confidential:

> "*Confidential Information*" means information provided by XYZ Limited to the Covenantor including technical, design and commercial data relating to its business systems, financial information, computer programs, documentation, plans, drawings and

161. *Id.* at § 8A.02[2], 8A.03[2].

> know-how whether technical or not, and all other data and information which relates to the business conducted by XYZ Limited and which is either marked or stated to be confidential or by its nature is reasonably intended to be confidential but shall not include information which can be established by written records to be already known to the Covenantor or the public at the time of disclosure or which subsequently enters the public domain through no fault of the Covenantor.

People must be made aware that the matter revealed to them is a secret. The type of information covered by a confidentiality provision should be specified, along with the purpose and its intended use or any restrictions associated with its use. When transferring these rights, special care must be taken to protect the usage and application of trade secrets and know-how to insure that they are not improperly used or allowed to fall into competitive hands.

Trust is important in any business relationship. There must be trust between event-organizers, agents, suppliers, sponsors and licensees. Yet, one cannot be expected to keep "confidential information" a secret if the person does not know it is confidential. Trust only goes so far. Where money is involved, it is better to rely on contracts. This assumes the dollars are significant enough to warrant defending the contracts in court. From a practical matter, a contract is only good if it can be enforced. Because contracts are only as reliable as the people who sign them, it may be just as acceptable to obtain written confirmation in the form of a letter from the recipient simply acknowledging that he or she is aware that the information received is confidential.

There are valid reasons for not signing confidentiality agreements, particularly if the language to the agreement is broad. Consultants and agencies are paid for their ability to transfer knowledge and experience from one business and industry to the next. While the application of certain knowledge, such as trade secrets and know-how, may be unique to a given sports entertainment event, the basic principles gained from this information can often be applied to other sports properties, whether or not they are competing against one another. It must be financially worthwhile for a recipient of confidential information to limit his or her ability to apply this knowledge elsewhere. Moreover, independent contractors may already be in possession of similar information from working with other companies in the industry. When the language used in a contract is too broad, it can limit consultants' and agencies' ability to conduct business with other companies, and thus limit their income earning potential.

e. Patent Protection

The Lanham Act, protecting trademark and patent rights, was signed into law on July 5, 1946, and was amended most recently in 1996.[162] The basic principle behind patent law is to encourage inventors to disclose publicly their product and process discoveries for which they are afforded protection to maintain an exclusive position for a limited time.[163] By giving up secrecy to gain control of use, the patented product is protected for 17 years. A patent precludes others from making, using or selling the invention. Section 35 of the United States Code provides that "[w]hoever invents or discovers any new and useful process, machine, manufacture or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."[164]

An invention must be new and useful to be patentable.[165] An invention is not novel if it is considered prior art.[166] For example, the robotics camera used by ESPN on the bungy tower for the Extreme Games® was similar to camera designs used in New Zealand by bungy operators at bridge sites. Therefore, ESPN's camera would most likely be considered prior art. The tower itself was a novel idea, but the solution was somewhat obvious. The novelty of an invention must be nonobvious to be patentable.[167] It cannot be so trivial as to be readily apparent to persons working in that particular technology.[168] While the need for a tower may have been obvious, the super-strength titanium bar used on the bungy tower was not obvious. It was an ingenious solution by the event-organizers to protect the safety of the bungy jumpers. Maximum strength was required for securing bungy ropes used by athletes jumping off the 140 foot tower. The bar had to be strong enough to withstand the forces involved. This metal was the most expensive material available.

The amount a firm will invest in new technology generally will depend upon the perceived financial reward from its investment. The patent grant is intended to increase this financial reward. It does so by offering the investor "the right for 17 years to exclude all competition

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162. 15 U.S.C. § 1051 et seq. (1996).
163. AMERNICK, *supra* note 100.
164. 35 U.S.C. § 101 (1996).
165. 35 U.S.C. § 101 (1996).
166. Prior art, as described in 35 U.S.C. § 102 (1996), refers to inventions that are publicly known, in public use, patented elsewhere in the world, described and accessible in printed publication, or available for sale more than a year prior to the patent application date.
167. 35 U.S.C. § 103 (1996).
168. AMERNICK, *supra* note 100.

from making, using, or selling certain technological advances that result from the investment."[169] This right to exclude allows a person to appropriate much of the value to society that results from technological advance. Absent such protection, "free riders" who did not make the investment that resulted in discovery of technology may be able to copy the technology and appropriate much of the value themselves.[170]

Once a patent has been granted, it cannot be used to unduly broaden the physical or temporal scope of the protected product in a way that would produce an anticompetitive effect.[171] When Windsurfing International tried to restrain AMF, Inc., from competing against windsurfer branded sailboards by broadening the interpretation of what was covered under its patent, the court ruled against Windsurfer International in favor of AMF, Inc. AMF's sailboard was sufficiently different so as not to encroach on Windsurfer's patent rights.[172]

Applications for U.S. patents are made to the United States Patent and Trademark Office in Washington, D.C. Multinational and international patent applications can be submitted individually to each country or collectively through a member organization. The decision is generally an economic one, dependant on the cost of each patent and the number of countries in which the patent will be used.

Under the Paris Convention of 1883, consisting of 101 member countries, every citizen of a member country has the same rights as a citizen of a member country where a patent is filed.[173] Pursuant to the Patent Cooperation Treaty of 1978, an "international application" can be obtained through the World Intellectual Property Organization (WIPO). Forty-five countries are members of WIPO. Other organizations offering international patents are the European Patent Convention Countries, Organization Africaine de la Propriete Intellectual Countries (also known as the African Intellectual Property Organization) and ARIPO Countries.[174] The qualifications for obtaining a patent in foreign countries are much the same as they are in the United States. European patent qualifications specify that an invention must involve nonobvious inventive steps, have industrial utility and exhibit absolute novelty.

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169. 35 U.S.C. § 154 (1996).

170. Roger Andewelt, *General Antitrust Principles, in* INTELLECTUAL PROPERTY ANTITRUST (1994).

171. PATRICIA BRANTLEY, PATENT LAW HANDBOOK § 3.04 (1995).

172. Windsurfing Int'l Inc. v. AMF, Inc., 782 F.2d 995, 999 (D.C. Cir.), *cert. denied*, 477 U.S. 905 (1986).

173. AMERNICK, *supra* note 100.

174. *Id.*

A recent patent invention in U.S. sports is the new Allsop SRS Suspension System, engineered by Softride, Inc., an Allsop Subsidiary, manufacturer of high performance bicycles. This revolutionary Softride design allows the bicycle seat to be suspended from a flexible fiberglass strut mounted horizontally to the top tubing of the bicycle frame just below the headset. The dual beam composite construction with shock absorbing visco-elastic material eliminates much of the road shock traditionally associated with cycling. The Allsop SRS Suspension technology improves comfort and performance, and eliminates the need for a conventional seat post.[175]

In sports, patents can be used to control participation in athletic events and to gain market share by excluding competitive products. Sports entertainment events are often organized by manufacturers of sporting goods equipment. These events are used to promote the manufacturers' products. Manufacturers run athletic competitions in connection with athletic governing bodies and local sports clubs.

For years, manufacturers have been creating their own class associations (athletic governing bodies) in one-design yacht racing to foster support for their products. There are over 200 class associations in the United States alone. The manufacture of Hobie Cats is probably one of the best examples. Hobie Cat® formed an association to govern the Hobie Cat class of sailboats. The association organizes local, national and international competitions for Hobie Cat sailors. As a result, Hobie Cats are now considered one of the most popular sailboats in the world.

By controlling the sports entertainment event, manufacturers can specify whatever equipment they want. Equipment specifications which conform to the design of patented inventions will ensure that the patent holder's products are used. If the organizer or lead sponsor happens to be a sporting goods manufacturer, then there is a good chance that only one design of equipment will be approved for the event.

Patents make it more difficult for competitors to make an exact reproduction of the patented product. Therefore, it is advisable to protect unique equipment with patents. Besides innovative sports equipment, patentable inventions for sports entertainment events include novel inventions in relay and timing equipment, robotics cameras and broadcast communication technology used in the production of the event. The cost of obtaining a patent is usually outweighed by the benefits afforded the patent holder through the added protection and increased economic

175. The author speaks from personal experience as one who rides a custom made high performance racing bike with a Softride frame with Allsop SRS Suspension technology.

value bestowed upon the owner. This is particularly true for sports entertainment events with the potential for franchising. Often, franchisees are willing to pay a premium for the nonexcusive rights to use the technological innovation.

A less common application for patent protection is that of registering game rules to protect ownership interests in sports. This approach was embraced by Jim Foster, founder of the Arena Football League, a sports league first conceived on the back of a manila envelope. Foster obtained a patent on the arena football idea to protect his interests and ward off competition. This established the sport's unique positioning and enabled it to progress from the club level to a professional league. The price of expansion franchises in the Arena Football League have skyrocketed, according to the AFL Commissioner, James Ducker. The owner of a new team now pays $1.25 million, up from $500,000 to $750,000 in 1994.[176]

f. Copyright Protection

Copyrights protect the expression of ideas, but not the actual ideas, process or method of operation. The copyright exists from the moment of creation. Copyright protection on works made for hire extends for 75 years from publication or 100 years from the date of creation, whichever is shorter. For individuals, it is life plus 50 years. It affords the owner of the copyright work the exclusive right to display, perform, sell, rent, lease, or otherwise distribute copies to the public. The public benefits from the author's effort through the introduction of new ideas and knowledge. The knowledge gleaned from published information falls into public domain. For a period of time, the copyright material cannot be used or reproduced without express permission from the author. The one exception to this rule is that which is used for educational purposes.[177]

Title 17 of the U.S. Code pertaining to copyright legislation reads as follows:

> (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in a tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or

176. Anthony Baldo, *Why Team Values in Arena Football League Have Increased Tenfold Thanks to a Unique Ownership Structure*, ARENA FOOTBALL, Feb. 14, 1995.

177. *See* Basic Books, Inc. v. Kinko's Graphics Corp., 758 F.Supp. 1522 (S.D.N.Y. 1991). The United States Supreme Court ruling on the Fair Use Doctrine in this case would seem to suggest a change in the Court's opinion of academic use of copyright material.

> with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) motion pictures and other audiovisual works; and (6) sound recordings.
>
> (b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.[178]

U.S. copyright law bestows the following rights and privileges to the copyright holder: (1) the right to reproduce the work; (2) the right to distribute the work; (3) the right to perform the work publicly; and (4) the right to display the work publicly.[179]

The provisions of section 101 define "publication," "perform" and "publicly" in the following manner:

> "Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for the purpose of further distribution, public performance or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.
>
> To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.
>
> To perform or display a work "publicly" means, to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle or family and its social acquaintances is gathered . . .[180]

A copyright is usually lost if a work is published without notice; therefore, the appropriate notice must be prominently displayed on the work. The word "copyright" or a ©, the owner's name and year of publication are needed. The copyright notice must be apparent to the viewer.

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178. 17 U.S.C. § 102 (1976).

179. *Id.*

180. 17 U.S.C. § 101 (1976).

The position is prescribed by the Copyright Office Rules.[181] Owners of copyrights can license their rights to others.

Notice, not registration, is a condition of copyright protection. However, registration is a prerequisite for an infringement suit.[182] In order to claim statutory damages and obtain reimbursement of attorney's fees, copyright registration is necessary. Registration is a relatively simple process that involves filing a form with copyright owner's name, address, two samples of the copyright material, year of registration, month/day/year of first publication, and year of birth for individuals.

Once published, the information and many of the materials generated by the sports entertainment event are protectable by copyright. Prior to publication, some of the information may be protected as a trade secret under the Uniform Trade Secret Act. The actual athletic event becomes copyrightable when the production is, "fixed in a tangible medium of expression" such as a telecast or commentary.

The spontaneity of athletic competitions by their very nature are at odds with the notion of fixation. Sports entertainment events are not scripted performances. However, there are aspects which can be fixed in a tangible medium before the competitions take place. The instrumentalities through which events are produced can be considered fixed expressions. These include promotional literature, advertisements, rules of eligibility, and game book and execution plans. They can be copyrighted before the start of the event.

The work taken as a whole constitutes copyrightable subject matter when the compilation or organization of various elements are arranged in a manner that constitutes an original work of authorship. Some examples include videotaped coverage and commentator's play-by-play of sports and entertainment events. The issue of ownership can be complicated. If an event takes place in a public location, it is more difficult to protect ownership under copyright law.

In *Production Contractor v. WGN Continental Broadcasting Co.*,[183] the court recognized that decorative floats are copyrightable as original works of authorship, but it refused to protect the organizer's economic interests in the McDonald's Chicago Christmas Parade because the parade was held on public streets. The court found no statutory copyright infringement that would preclude WGN from airing the program. Would the court have ruled differently if the event had not been public?

181. 17 U.S.C. § 401 (1976).
182. 17 U.S.C. § 409 (1976).
183. 622 F.Supp. 1500 (N.D. Ill. 1985).

The idea of a parade is a common one, relatively simple and contains no original creative authorship. Therefore, the parade itself, including its production and promotion, is not a work of authorship entitled to copyright protection.[184] The court refused to protect the organizer's economic interest in the parade event though several legal theories were available.[185] Copyright theory might apply when an event is private, but for parades and marathons, promoters must seek legal protection under other legal theories.[186]

In theory, copyright protection should extend to the entire parade even before it is telecast, if the event was scripted in advance. The timing, parade route, float designs and even the position of each float and the participants can be choreographed as a performance and published in advance by creating execution plans with sketches and maps. In order to assert a copyright claim before the camera rolls, the plaintiff has to prove that the entertainment event was a compilation of subjective judgment and selectivity fixed in a tangible medium, prior to the event taking place ("While the idea of a parade is not protectable, the arrangement of units arguably is a copyrightable arrangement and each parade is likely to differ from others in its participants and ordering"[187]).

In 1990, a federal court ruled that the organizers of the Boston Marathon did not have the right to sell exclusive television coverage of a race that was held on public streets.[188] Rather than rely on copyright protection, event-organizers should make sure their city permits include the right to control access to the streets and sidewalks used for the event. Controlled access enables the event-organizers to protect their economic interests by restricting unlicensed telecasts to news coverage.

As organizers of the Boston Marathon and McDonald's Christmas Parade learned, copyright protection cannot be relied upon to cover public events. Access to events must be controlled in order to prevent unwanted intrusions, such as unauthorized sketches, photographs, stories, commentary, or video tapes by unlicensed personnel. Permits from local government agencies can be used to assert control by granting organizers permission to restrict access to areas where sports entertainment events are being held. Access should be limited to authorized personnel (e.g., ticket holders, sponsors, advertisers, writers, photogra-

184. *Id. See* REED, *supra* note 119, at 174.
185. *Id.*
186. *Id.*
187. *Id.* at 175.
188. Lesa Ukman, *Assertions, in* IEG SPONSORSHIP REPORT, April 30, 1990.

phers and the press). Control over the air space of major events may be necessary to prevent photographic coverage and ambush marketing by air (e.g., aerial signage on airplanes and blimps by unlicensed advertisers).

Misappropriation is a legal doctrine under which some public events can be protected. Sponsorship specialist and practicing attorney Mary Hutchings Reed believes that "[p]rotecting public events through the misappropriation doctrine makes more sense than through copyright theory."[189] Under misappropriation the plaintiff is required to prove: (1) ownership of the event and (2) unauthorized activity by the defendant. In *Int'l News Serv. v. Associated Press*,[190] the Supreme Court held that ". . . where there is a question of unfair competition, if that which complainant has acquired fairly at substantial cost may be sold fairly at substantial profit, a competitor who is misappropriating it for the purpose of disposing of it for his own profit and to the disadvantage of complainant cannot be heard to say that it is too fugitive or evanescent to be regarded as property."[191]

Furthermore, in *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*,[192] a United States District Court held that "[t]he plaintiff . . . at great expense, acquired and maintains a baseball park, pays the players who participate in the game and have, as we view it, a legitimate right to capitalize on the news value of their game by selling exclusive broadcasting rights to companies which value them as affording advertising mediums for their merchandise."[193] The essence of these two opinions is that courts are willing to protect owners' investment in sports events against misuse by those endeavoring to profit at the owner's expense.

The concepts of misappropriation and unfair competition were used in *Pittsburgh Athletic Co.* to assert the owner's property rights. In this case, the court established that the owners of Pittsburgh Pirates games could sell the rights to the transmission and protect their interests by restraining others from infringement.[194] Exclusive ownership and control over broadcast rights can be seriously compromised at times. The court held that the defendant was practicing unfair competition by violating the plaintiff's exclusive broadcast rights. The defendant claimed it had secured the "news" through observers stationed outside the playing

189. *Id.*
190. 248 U.S. 215 (1918).
191. *Id.*
192. 24 F. Supp. 490 (W.D. Pa. 1938).
193. *Id.*
194. BERRY AND WONG, *supra* note 25, at § 11.11.

field. It was the court's opinion that the play-by-play description of the games was the exclusive property of the plaintiff. The plaintiff had obtained the right, under its broadcast agreement with General Mills, to broadcast the play-by-play accounts of the games.[195]

Event-owners can act to protect their interests. To prevent others from profiting at the expense of the event-owner: 1) make the climax of events private or obtaining government permits to limit access to public areas; 2) limit nonlicensed media coverage to "news" by limiting the number and length of clips allowed or insisting that the coverage be delayed to give licensed broadcasters and publishers full value under the terms of their agreements; and, 3) control media coverage through controlled distribution of newsworthy information. These protective measures can help event-owners preserve their exclusive broadcast and publishing arrangements, as well as protect revenue.

Establish a media center on-site to control the dissemination of newsworthy information. Restrict access to the center to authorized personnel with proper credentials and issue media badges to distinguish authorized from nonauthorized personnel. Make available photographs, video new releases, audio tapes, printed news releases, press kits and a computerized database. Integrate on-line computer access to allow remote news coverage through the Internet and satellite transmissions, and hold routine press conferences to announce newsworthy activities. Post daily updates on the computer.

Where applicable, protect proprietary interests by publishing copyright notices on all original works of authorship, as mentioned earlier. Operating and training manuals, brochures, advertising and promotional materials, music, scripted performances, graphics and pictorials, logos, slogans, symbols, signs, audio and video tapes, computer programs, customer lists and marketing databases—all of these are protected by copyright, provided the copyright notice is clearly disclosed. Commissioned works and works created by permanent employees are deemed work made for hire and the employer is considered the author for the purpose of copyright. Employment contracts should stipulate the employer's ownership interest.

When commissioning work through independent contractors (e.g., advertising agencies, graphic designers, photographers, production companies, musicians, and copywriters), the client's copyright notice should be placed on the finished work at the time of publication. Use of such

195. *Id.*

creative work, although commissionable, may be limited to a single execution for a specific purpose. Repeated use of creative works typically costs more. When needed, unlimited usage rights should be negotiated in advance for master recordings (audio or video tapes) and photographs.

It is important to be aware of restrictions placed on the use of photographs, videos and music. As a practical matter, it is not always feasible to obtain unlimited usage rights on creative work. Chris Dickson, the skipper of TAG Heuer Challenge, was featured in the Canterbury of New Zealand catalog. Photographs were taken by a fashion photographer retained by the agency. Although the photography session was paid for by the client, the photographer retained copyright interest in his creative work transferring only what was needed for the catalog. Publicity releases were also limited to catalog distribution. Because of these limitations, photographs could not be reproduced in any other medium without securing additional clearance and paying more money. The theory behind the law is to allow those who create the work to share in the economic benefits.

To transfer ownership of copyrightable material produced by independent contractors, organizers should obtain written contracts or incorporate a provision into their standardized purchase order agreements that expressly transfers any and all copyrights. By obtaining ownership of the copyright event-organizers can use, edit, reproduce, transfer or sell these rights. It is important to be aware that moonlighting employees pose special problems, particularly if they freelance in copy writing, graphic art, photography, software design or music. The problems faced by employers with moonlighting employees are not covered in this discussion.

B. Rights of Privacy and Publicity

1. Right of Privacy

In a California Law Review article, William Prosser articulated the meaning of the common law right of privacy as: (1) the right to be free from intrusion on one's seclusion; (2) the right to be free from public disclosure of private, embarrassing facts; (3) the right to be free from false statements; and (4) the right to control the commercial appropriation of one's name and likeness.[196]

196. William Proser, *Privacy*, CAL. L. REV. 383 (1960). *See* REED, *supra* note 119, at 185.

The right of privacy is not absolute. Through their own voluntary actions, people who appear in public places waive their right of privacy. The actions of people in public places and celebrities are considered newsworthy events. The public's right to know, protected under the First Amendment, gives news and entertainment reporters a wide range of latitude in which to publicize individual actions or events that occur in public. The constitution guarantees freedom of expression. This applies to news and entertainment. Legitimate matters of public interest are not causal actions under right of privacy. Nor is the use of a person's name, features or biography in literature or other forms of entertainment actionable as a right of privacy.[197]

When Marketing Navigators, Inc., produced a sportswear catalog, the firm chose a stock photograph of a rugby match in a public park for inclusion in the catalog to promote rugby jerseys. Since a publicity release had not been obtained by the photographer at the time the image was captured, players' faces were altered using a computerized imaging process. The alteration was done to ensure that the players' appearances would not be recognized. Although the rugby players had forfeited their right of privacy when they chose to play in public, they retained control over their publicity rights. Image alteration was necessary to avoid possible conflicts of interest over property rights of the commercial use of the athletes' images.

2. Right of Publicity

The right of publicity is the property right a person has in his or her own identity. This right includes the exclusive right to control the asset value in commercial exploitation of the individual's name, likeness and personality.[198] It is a right that is not recognized by all states, nor is it recognized in all countries. For example, passing off and defamation actions are still used to protect celebrities' images and reputations in courts around the Pacific Rim.[199] Where recognized, the law protects the individual's proprietary interest in his or her own performance. The right of publicity in one state protects a resident celebrity in all others. Not surprising, California law offers resident celebrities broader right of publicity protection than most other states.[200]

197. REED, *supra* note 119, at 185-190.
198. THOMAS MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY § 1.8 (1992).
199. Alexander Margolies, *Sports Figures Right of Publicity*, 1 SPORT LAW J. 359 (1994).
200. *Id.*

Like the right of privacy, publicity rights preclude commercial use without consent. The rationale parallels the tenets underlying copyright and trademark laws which prevent unjust enrichment by theft of goodwill. The guiding principle behind the court's ruling is the belief that the defendant should be made to pay fair market value for the privilege of benefiting from commercial use of the plaintiff's name, image, reputation or persona.[201]

The Lanham Act can be used as an integral part of a right of publicity action because it prevents the use of false or deceptive designations of origin. It can also be used in situations where no state statute exists. With a federal trademark claim, the plaintiff must prove falsity. If falsity cannot be proven on factual evidence such as an advertisement, then consumer research studies can be used to ascertain proof that the message is misleading and causes confusion. The main distinction between a right of publicity claim and a trademark action is "The unpermitted use of a person's identity to draw attention to a product or advertisement infringes [upon state laws governing the right of publicity]. There need not be false inference that the plaintiff endorses or approves the product . . ."[202]

To be actionable as a right of publicity, the plaintiff must show proof that the confusion was impairing his or her reputation or career.[203] Evidence that the action had unjustly deprived the athlete or celebrity of his or her means of livelihood will strengthen the plaintiff's argument. Coverage under the First Amendment (freedom of speech and freedom of the press) has been used as a defense by the media. The defense makes the argument that the portrayal of sports celebrities in the media serves as a social function or contributes to cultural enrichment. The issue of property rights is less clear when news has commercial value and when vehicles through which news is communicated (media) exploit the news for economic gain. In these situations, case law is used to establish precedent.

Sports Illustrated ran a self-promotion ad featuring Joe Namath in pictures taken from earlier issues of the publication.[204] Although the pictures of the famous football star were no longer newsworthy, the court permitted the unauthorized use of these images to promote the publication. *Sports Illustrated* ran Joe Namath's picture along with copy

201. *Id.*
202. MCCARTHY, *supra* note 198. Margolies, *supra* note 199.
203. FLETCHER AND KERA, *supra* note 112, at § 13.00.
204. Namath v. Sports Illustrated, 363 N.Y.S.2d 276 (S. Ct. 1975).

that read, "How to Get Close to Joe Namath" and "The Man You Love Loves Joe Namath." Since Namath had not authorized the use of his name or photograph for this purpose, he felt he was being deprived of compensation he was entitled to receive. Surprisingly, the court upheld the publisher's First Amendment rights.[205] An interpretation of this ruling by one commentator suggests that extracting pictures from past issues was the best way *Sports Illustrated* could prove its value.[206]

In other cases, courts have repeatedly found unauthorized commercial use of sports celebrities' names and likenesses in violation of the celebrities' right of publicity when used to advertise or enhance the sale of a product. Under New York law, a cartoon rendition of Mohammad Ali published in *Playgirl* without the prize fighter's consent was found to have been in violation of his right of publicity.[207] The image was recognizable and therefore deemed to be a "portrait or picture" of Ali.[208] The right of publicity was found to have been violated when pictures and biographical profiles of Arnold Palmer and other professional golfers were used in a boxed golf game without consent.[209]

The celebrity status of an individual such as a professional performer or a star athlete is important for claiming damages under right of publicity. Generally, the greater the fame and notoriety, the greater the extent of the injury. Recognition by a small number of people may limit the damages. Since the plaintiff's reputation may be affected by the defendant's misuse, damages are measured by looking at the amount of pain and suffering to the plaintiff and by the amount of commercial gain to the defendant. For ongoing violations an injunction may be needed to stop the unauthorized use.

An actionable property right was found to exist in *Ettore v. Philco Television Broadcasting Corp.*[210] when the defendant rebroadcasted the plaintiff's boxing match without permission from Joe Louis. The court held that "[w]here a professional performer is involved, there seems to be a recognition of a kind of property right in the performance to the product of his services. The theory may be summed up as follows: The performer, as a means of livelihood, contracts for his services with an entrepreneur. The finished product is, for example, a motion picture in

205. *Id.*
206. *Id.* Margolies, *supra* note 199, at 370.
207. Ali v. Playgirl, Inc., 447 F.Supp. 773, 726 (S.D.N.Y. 1978).
208. *Id. See* Margolies, *supra* note 199, at 372.
209. Palmer v. Schonhorn Enters, Inc., 232 A.2d 458, 461 (N.J. Super Ct. Ch. Div. 1967). *See* Margolies, *supra* note 199, at 371.
210. 229 F.2d 481 (3d Cir. 1956).

which the performer's services are embodied. If the motion picture is employed for some other use other than that for which it was intended by the performer and the entrepreneur, the motion picture is employed in such a way as to deprive the performer of his right to compensation for the new use of the product."[211]

In the 1977 case of *Zacchini v. Scripps-Howard Broadcasting Co.*,[212] the court held that the television station invaded the performer's right of publicity when it televised the performance of a "Human Cannonball" act in its entirety without Zacchini's knowledge or consent. The plaintiff was shot out of a cannon at a county fair during a 15-second performance. The entire act was featured on the evening news. The court declared that "[t]he broadcast of a film of the petitioner's entire act poses a substantial threat to the economic value of that performance . . . this act is the product of the petitioner's own talents and energy, the end result of much time, effort and expense. Much of the economic value lies in the 'right of exclusive control over the publicity given to his performance;' if the public can see the act free on television, it will be less willing to pay to see it at the fair. The effect of a public broadcast of the performance is similar to preventing petitioner from charging an admission fee."[213]

One way to avoid this type of problem is to control public and media access to events by privatizing the entire event or just the climax, as mentioned earlier in our discussion of copyright protection. Restrict media coverage and dissemination of news through: 1) the sale of exclusive broadcast rights; 2) designated black out areas (50 to 75 mile radius around the home area); and 3) on-site media centers with controlled press access and distribution of news. Be careful not to over-restrict media access to the event. Name association and consumer awareness are vital to establishing goodwill in association with sports entertainment events. Increased awareness and a favorable coverage of participating celebrities and athletes can increase their popularity and their income earning potential.

Require that all participants (e.g., athletes, coaches, referees, managers, sports celebrities and entertainers) sign publicity releases that transfer their publicity rights to the event owner. Incorporate a clause into the agreement such as:

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211. *Id. See* REED, *supra* note 119, at 186.

212. 433 U.S. 562 (1976).

213. *Id. See* REED, *supra* note 119, at 185.

> I hereby grant permission to [*organizer's name and address*], its agents, sponsors, promoters and licensees the right to take, use, reproduce, edit, photograph, record, broadcast and otherwise exploit in any and all media, in whole or in part of composite or reproduction my name, image, likeness, voice, performance and biographical information in connection with the Event.

One of the best uses of sports celebrities' right of publicity is product endorsements. Athletes can be ambassadors for the products and services they use. Their endorsement and positive publicity can lift consumer brand awareness, enhance brand image and stimulate sales volume. Upon introduction, licensed products that carry a celebrity's name can establish instant credibility for the brand in the marketplace. Nike Air Jordan®, is the signature line of basketball shoes worn and endorsed by NBA basketball star, Michael Jordan. Under this type of agreement, the sports celebrity representing the brand is paid a commission, or royalty fee, for each unit of product sold under the license. The celebrity receives free merchandise and is paid a fee for personal appearances.

The New Zealand Way Limited started an Ambassador Program to promote Brand New Zealand®.[214] Three of the nation's greatest athletes were placed under contract as brand ambassadors: 1) golfer Greg Turner; 2) sailor Peter Blake; and 3) fisherman and hunter Gram Synclair. Licensees use the brand and its ambassador program to promote their products and services in connection with the image and mystique associated with the country of New Zealand.[215]

During the 1980s, Miller Brewing Company used the Lite Beer Celebrity Program to promote the sale of Lite Beer®, the nation's first low calorie beer. A group of retired athletes (Lite All Stars) were hired as independent contractors, under personal services agreements with the brewery. For years, they were featured in humorous television commercials to reinforce Miller Lite's advertising slogan, "Great Taste, Less Filling." In addition to television commercials, the sport celebrities appeared in print ads and radio campaigns as well as point-of-purchase promotions. They made personal appearances nationwide on behalf of the brewery and its distributors, both on and off-premise. The Lite All Star campaign was conceived by the brand's advertising agency, Backer and Spielvogel. Its success spanned nearly a decade and it helped to

214. Telephone Interview with Rod MacKenzie, Chief Executive of The New Zealand Way, Ltd. (July 1995).

215. *Id.*

secure the brand's position as the second largest beer in the nation.[216] Once Miller Lite® surpassed the flagship brand, Miller High Life®, the brand became second only to Budweiser® in gross sales volume, during its hey day. The Lite Beer Celebrity Program can claim much of the credit for the brand's success in the 1980s.[217]

"Character merchandising" is the process of using a celebrity's image or identity to sell a product. As the popularity and significance of sporting personalities grow, there will be further litigation here and abroad concerned with unauthorized use of publicity rights. In Australia, the tort of "passing off" and claims under the Trade Practices Act 1974 have to a certain extent been used to fill the gap where there are no specific laws protecting sports celebrities' right of publicity. In *Pacific Dunlop v. Hogan*[218] the Federal Court of Appeals found that the essence of the action of passing off[219] is whether a significant section of the public would be misled into believing, contrary to the fact, that a "commercial arrangement" had been concluded between the plaintiff and the defendant which would permit the defendant to apply the plaintiff's distinctive image to its product and marketing campaign."[220]

Andrew Ettingshausen, a celebrated Australian rugby player, brought action against Consolidated Press when the magazine published an unauthorized photograph of the athlete in the shower after a match. The picture showed the player's genitals, and it was perceived as being defamatory. The issue of invasion of privacy was not raised by the plaintiff. Had the privacy issue been raised, Ettingshausen may not have lost his case against Consolidated Press. The Australian court ruled in *Ettingshausen v. Consolidated Press, Ltd* to strike out the statement of claim that the publication was capable of conveying defamatory imputations.[221]

Gary Honey, an Australian long jumper, brought a claim against Australian Airlines when the airlines used a photograph taken of him at the 1986 Commonwealth Games.[222] The photograph was used as a poster promoting sport for children, along with a small caption identify-

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216. As a Brand Promotions Coordinator on Miller Lite during the early 1980s, the author worked on the Lite Celebrity Program at Miller Brewing Company.

217. *Id.*

218. 87 ALR 14 (1989).

219. DAVID, *supra* note 89.

220. 87 ALR 14 (1989).

221. Ettingshausen v. Consolidated Press, Ltd., 23 NSWLR 443 (1991). DAVID, *supra* note 88.

222. Honey v. Australian Airlines, ATPR 40-961 (1989). DAVID, *supra* note 88.

ing Honey. The airline had obtained permission to use the photograph from the photographer, but not Gary Honey. The airline later permitted a religious organization, House of Tabor, to use the picture for the front cover of a book and magazine to illustrate the kind of life it wanted its followers to lead. The book and magazine were in limited circulation in specialty book shops and Honey was not identified in connection with the cover photograph. The claim of "passing off" failed on its facts because the court found the plaintiff had not shown that a significant segment of the public, upon seeing the photograph, had associated Gary Honey with the airline as in some way endorsing it. The claim also failed against House of Tabor because Honey was not identified with the book and magazine and because circulation was limited.[223]

The provisions of the Australian Trade Practices Act of 1974 impose liability in the same manner as the Fair Trading Act of 1986 does in New Zealand.[224] According to one legal commentary, the removal of the "common field of activity" test (the test used to determine whether a significant section of the public was misled) gives sports celebrities in Australia a powerful legal weapon should their name and image be subject to unauthorized use. It remains to be seen whether the courts of New Zealand will broaden the tort of passing off coupled with the Fair Trading Act of 1986 to protect the general rights of "personality and privacy."[225]

Laws in the United States governing the rights of privacy and publicity and their application to sports celebrities are more developed than the legal solutions adopted by commonwealth nations in the Pacific Rim. New Zealand and Australia appear to be taking their lead from the United Kingdom and the United States. With the upcoming Olympic Games in Australia and the America's Cup in New Zealand, these legal doctrines are likely to be challenged. New legislation or a broader interpretation of current case law may be needed in both countries to protect sports celebrities' rights in the commercial exploitation of their personalities.

The approval process for commercial use of a celebrity photograph can get complicated. With stock photographs, rights are automatically transferred through the stock photo supplier, as part of the purchase agreement. Unlimited usage fees are determined by: 1) media vehicle; 2) circulation rate; 3) placement (location within the vehicle); and 4)

223. *Id.*
224. DAVID, *supra* note 89.
225. *Id.*

size. The more prominent the photograph and the more widely circulated, the more money it will cost. For custom photography, the responsibility for obtaining a publicity release usually lies with the photographer and agency. They in turn transfer these property rights to the client. A photo release from the photographer does not necessarily constitute a publicity release from the featured celebrity. Usage may be limited to a specific purpose.

In a mail order catalog for one of its clients, Marketing Navigators, Inc., featured an aerial shot of America^3®, the All Women's Team, on the front cover. This shot was supplied by an official photographer for America's Cup. Permission to use the shot had been obtained from three sources: 1) the photographer who owned the copyright, 2) the communications staff for America's Cup who employed the photographer, and 3) the marketing staff at America^3® whose team was featured in the cover shot. The process of obtaining the necessary releases took several weeks.

An earlier catalog featured photographs, biographies and signatures of New Zealand sports celebrities: Mike Brewer, Grant Dalton and Sir Edmund Hillary. Mike Brewer was a star athlete for the New Zealand All Blacks rugby team. He was employed by Canterbury International Limited, the licensor of the Canterbury of New Zealand brand featured in the catalog. Brewer's permission was easily obtained through his employer. Canterbury of New Zealand was the official activewear supplier for New Zealand Endeavour, the winning yacht in the Whitbread Round-the-World Race®. Captain Grant Dalton graciously agreed to participate in the catalog and public relations campaigns executed by the agency. A photo shoot was conducted at sea, aboard the New Zealand Endeavour with Captain Dalton and his crew. Publicity releases were obtained from the captain and crew. The photographer transferred his copyrights. A new line of Sir Edmund Hillary® outdoor wear was launched in the catalog. The Royal Geographic Society supplied a stock shot of Hillary for the lead story, transferring with it the Society's property right to the client for one-time usage. Sir Edmund was the first person to climb Mt. Everest. As a result, there was a substantial amount of goodwill and commercial value associated with his reputation.

The ability to integrate event trademarks with character merchandising into consumer and trade promotions will greatly enhance a company's willingness to provide financial support to sports entertainment events. When profits can be quantified through incremental sales gains tied to a particular marketing communications campaign such as the Miller Brewing Company's Lite All Star campaign and Canterbury of

New Zealand's mail order catalog, then it is much easier to gain financial support. Return on investment analysis of marketing communications can cost-justify the expense of sponsorship and licensing agreements.

Sports celebrities should be encouraged to cooperate with sponsors and licensees who provide the necessary funding for their sports entertainment events. Without corporate support many athletic programs could not be funded, and athletes would not have as many opportunities outside the sports arena to increase their earning potential through character merchandising. Helping sponsors and licensees maximize the commercial potential of sports entertainment events through integrated marketing communications is an excellent way to extend the value of the event. Event-organizers can strengthen relationships with sponsors and licensees by transferring publicity rights acquired from participating athletes and celebrities.

C. Contracts: Legal Provisions and Negotiations

Contracts and their application to sports entertainment have been discussed in varying degrees in the preceding chapters. Our discussion in the following section will be limited to some of the more fundamental issues of contract law and negotiations.

Contracts are governed by state and federal laws, the Uniform Commercial Code (UCC) and common law. The Restatement of Contracts, published by the American Law Institute, provides a general overview. Common law is "law based on previous court decisions regarding fact situations not previously dealt with by statute." The elements of an enforceable contract are: (1) an offer or conditional promise in which there is mutual agreement by competent parties; (2) acceptance—mutual assent; (3) obligation—duty to perform; and (4) consideration—an exchange of value.[226]

The person to whom the offer is made has the power to accept, reject or initiate a counter offer. An offer can be revoked by the offerer or rescinded by the lapse of time. It may be voided by death or incapacity of either party.

Once an offer has been made and the terms of the agreement are accepted by both parties, it becomes binding whether or not it is restated in writing, except for contracts that cannot be fully performed within one year. Under the statute of frauds, any contract that cannot be performed within one year is not enforceable unless it is in writing. Breach of con-

226. BERRY AND WONG, *supra* note 25, at § 5.10.

tract (failure to perform one's duty under the contract) may entitle the injured party to collect monetary damages for economic loss or injunctive relief may be granted to the injured party.

Event-organizers should make an effort to cover the following points in their sports entertainment agreements and specifically exclude that which is not expressly covered under the contract: (1) subject matter; (2) identification of the parties involved; (3) nature of the relationship; (4) the offer; (5) special conditions; (6) duties and responsibilities of each party; (7) compensation; (8) representations and warranties; (9) effective date of the contract; (10) duration of the contract and expiration date; (11) conditions for termination; (12) liability and indemnification; (13) assignability; (14) sovereignty; (15) governing laws; (16) closing and signatures authorizing approval; (17) non-compete covenants; (18) category exclusivity; (19) anti-ethical and incompatibility clauses; (20) indemnification; (21) liability insurance coverage; (22) performance guarantees; (23) bonuses for exceeding stated goals; and (24) anything else that the parties deem would improve performance or compensation.

Formal agreements between organizers, investors and athletes will help to establish the market value of sports entertainment events. These agreements provide the vital financial resources necessary to execute the events. The final terms and conditions should be confirmed in writing. Formal contracts can and will help avoid many misunderstandings later.

1. Sponsorship Agreements

Sponsorship agreements allow sports entertainment events to be used as vehicles for advertising and promotion by corporations. They enable event-organizers to pay expenses and generate a profit from staging the events. Sponsors can realize many benefits, both tangible and intangible, from these relationships. To satisfy sponsors' needs on and off the playing field, event-organizers should make arrangements to help sponsors merchandise their sponsorship agreements. This can be accomplished through trade and consumer promotions that extend the events to the point-of-purchase. Through character merchandising and the use of the event's trademarks, service marks and copyrights, organizers can help sponsors further leverage the events to maximize the value of these relationships. Event-organizers should consider the following exposure opportunities when negotiating sponsorship agreements:

(1) cross-marketing opportunities between sponsors and merchandise licensees;
(2) on-site signage;
(3) visibility on staff and athletes' uniforms;

(4) display, sampling and product demonstration opportunities;
(5) sponsors' involvement in pre-event, post-event and half-time activities;
(6) complimentary tickets and reserved seating in prime locations;
(7) complimentary merchandise for consumer and trade promotions or for use by employees;
(8) the right to supply products and services to the event;
(9) access to hospitality areas for client entertainment;
(10) inclusion in press releases and on-air promotional announcements;
(11) access to sports celebrities;
(12) photo opportunities;
(13) sponsor/media tours;
(14) free promotional videos and photographs of the event;
(15) public relations support; and
(16) advertising opportunities with licensed broadcasters and publishers.

When negotiating exposure opportunities and other benefits associated with sports sponsorship, be as specific as possible about the particulars. Many points should be taken into consideration:

(1) the length, frequency and reach of free television ads and billboards, along with an option on the purchase of additional air time;
(2) the size, timing, placement and circulation rate of print ads, feature stories and adveditorial included in the sponsorship package and the cost of purchasing additional space;
(3) the number and length of radio ads and on-air promotions, along with information on when and where they will be aired, who will supply the script;
(4) the number, length and specific content of sponsor mentions made in connection with public service announcements and promotional videos;
(5) Insertion opportunities or ad placement in direct mailers and any limitations with respect to circulation, size, weight and number of colors;
(6) the exact location, color and maximum size of on-site signage and who is responsible for supplying the signage, the sponsor or event organizer;
(7) alternative media opportunities such as interactive kiosks, on-line mentions and inclusions in the event-organizer's Home Page;
(8) specific opportunities for cross-marketing between sponsors and licensees and who will facilitate and fund these;

(9) promotional opportunities at retail; the number and type of retail outlets participating, length of promotion, location of display space available for sponsor's point-of-purchase material;
(10) the number and length of celebrity appearances for autograph signing, commercials, product endorsements, speeches or client entertainment;
(11) details about hospitality events and award ceremonies along with the number of invitations extended to sponsor and guests;
(12) the number and location of entry tickets and parking spaces available as part of the sponsorship package;
(13) the number of event identified T-shirts, caps, sports bags and other memorabilia available to sponsor free of charge, along with a discount rate for purchase of additional licensed merchandise from the event-organizer;
(14) the availability of staff support; when, where, how long and for what purpose can the sponsor use the event-organizer's staff in connection with the event; and
(15) access to copyright free video footage and photographs, along with any limitations on usage and information about limitations placed on the use of copyright materials.

Sponsors should not make the assumption that the aforementioned opportunities are automatically included in the sponsorship fee. Instead, paid advertising and promotion may be required as part of the sponsorship package. Sponsors may incur additional costs for celebrity appearances and even for hospitality services provided by the event-organizer. All of these points are negotiable.

Event-organizers can build long-term satisfaction with their sponsors by reinvesting up to 30% of the sponsorship fee back into sponsorship benefits. Instead, as a money saving measure, many organizers choose not to reinvest in their sponsors. They expect the sponsors to make the additional investment. As a general rule, sponsors can expect to spend as much money leveraging the benefits of their sponsorship package as they paid for the initial package. Precautions should be taken to avoid conflicts over "category exclusivity." An example of sponsorship conflict over category exclusivity is the deal Dallas Cowboy's owner, Jerry Jones, struck with Pepsi® and Nike®. The announcement was made the night before the Cowboy's first televised NFL game. The National Football League had made prior arrangements with Coca-Cola to sponsor NFL games, but Jones felt he should be able to cut his own deal with commercial supporters. Disputes over exclusivity rights can undermine the price-value relationship of the sponsorship package. Now that Pepsi® is sharing in the NFL action, the package negotiated by its competitor is not worth as much.

Payment of sponsorship fees can be made in installments or in one lump sum. The installment plan is preferred for "lead" (primary) and "presenting" (secondary) sponsors, where large amounts of money are involved. "Supporting" (tertiary) sponsors' payments are usually due in one lump sum prior to the start of the event. Below is an example of a payment plan taken from one sponsorship proposal:

> Upon approval of the event-organizer's business plan, financial pro forma and race protocol by lead sponsor, lead and presenting sponsors are obligated to make a 30% advance payment with the remaining portion handled by a stand-by letter of credit drawn on a major U.S. bank. The letter guarantees that remaining payments will be made in two separate installments upon the event-organizer's execution of its duties and obligations in compliance with the agreed-upon schedule. All payments are to be made in U.S. dollars.[227]

Most sponsorship agreements contain a licensing provision in which the event-owner grants permission for limited use its trademarks and service marks in the sponsor's advertising and promotion. This use does not extend to the sale of products and services bearing the sports logos unless expressly stated by the event-organizer. This right is generally reserved for suppliers of licensed merchandise. In turn, the sponsor grants the event owner the nonexclusive right to use its trademarks in connection with the promotion of the event.

2. Licensing Agreements

Licensing agreements grant a permit to associate the licensees' corporate product or service with the goodwill of the licensor's trademarks and service marks. As stated earlier, trade dress, trade secrets, copyrights and patents can also be licensed in exchange for consideration to the sports entertainment owner. There are different types of licensing agreements besides the licensing provisions contained in sponsorship agreements. Separate licensing agreements are developed for: 1) a nonexclusive license to use the owner's trademarks and service marks on the lease or sale of merchandise (e.g., sports apparel or memorabilia); 2) broadcast licensing arrangements in which the event owner grants a television or radio broadcaster an exclusive agreement to record the event and distribute the telecast through specific channels (e.g., network television, home box office, home video, cable) in specified markets; and 3) a

227. This clause was included under "Sponsors Duties and Obligations" in a sponsorship proposal drafted by Marketing Navigators, Inc., on behalf of a sporting goods manufacturer that has organized its own sports entertainment event.

nonexclusive license granted by a franchisor to a franchisee to use intellectual property, trade secrets, corporate know-how, copyrights and patents for the express purpose of exploiting the business.

The outcome of these contract negotiations will depend on how "hot" the sports property is and how good each party's negotiating skills are. If the deal is a joint-venture agreement, then it should be easier to come to an equitable understanding between the parties. In many respects, negotiating a contract is like an athletic competition. It becomes a contest of wills, of strength and of motivation among the players. Negotiators view it as a game with the "deal points" used to keep score between each side.

a. Merchandise Agreements

The purpose of licensed merchandise agreements is to enhance the appeal and perceived value of the licensee's goods and services to consumers through their association with sports. From the event-owner's perspective, merchandising agreements add value by offsetting costs and increasing profits. They also serve as a commercial billboard to advertise the event.

Royalties are paid on net sales volume of the licensed products. Payments are based on the licensee's usual net sales price. This way, the licensor is not penalized for merchandise sold at a discounted price. Royalty amounts typically range from 6% to 12% of the wholesale price.[228] The payment schedule can be negotiated or licensees can be asked to pay on a standard quarterly payment plan. A non-refundable royalty advance plus a minimum annual guarantee and proof of performance in the form of audited sales records and audited financial statements are commonly required. Royalty payments accrue on all licensed products sold, shipped or distributed by the licensee. Payments are made simultaneously with the submission of financial statements.[229]

Some of the other issues that will need to be addressed during contract negotiations for licensed merchandise agreements are: what are the licensee's obligations with respect to supplying merchandise for use during the event?; is either party obligated to supply a database of customer/prospect names and addresses?; and what are the licensee's and licensor's advertising and promotional requirements? Both parties' advertising and promotional obligations should be spelled out in the licens-

228. ROGER MCCAFFREY AND THOMAS MEYER, AN EXECUTIVE'S COMPLETE GUIDE TO LICENSING (1989).

229. *Id.*

ing agreement. The contract should also identify the distribution channels, geographic territory, products and services covered under the license. Quality control procedures and trademark approval processes should be stipulated in advance. How will the licensee manage out-of-stock situations and back orders? What effect will these situations and product returns have on payment of royalties? As you can see, there are many questions that have to be answered before an agreement can be made. Licensed merchandise agreements can be long and arduous. They take time to negotiate and require the expertise of knowledgeable marketing and legal professionals.

b. Broadcast Agreements

The primary purpose of broadcast licensing agreements from the event-organizer's viewpoint is to gain exposure and, thus, increase demand. From both the broadcasters' and publishers' perspective, their purpose is to generate revenue from the sale of media through an exclusive arrangement with the event-owner. Once broadcast coverage is secured, the organizer's bargaining position is strengthened with prospective sponsors and merchandise licensees.

Broadcast licensing agreements have long been negotiated in favor of network and cable companies televising sports entertainment events, unless the event happens to be an extremely desirable property like the Olympics, the NBA or the NFL. Current trends point to the growing power of the event-organizer who may no longer be the weaker party in negotiating with the media. Event-organizers can realize equitable returns for the value of their sports properties, if they are willing to share the financial risks and rewards. Payment of television production and distribution expenses (e.g., commentator, film crew, equipment rental, post-production costs, permits, licenses and clearance fees) can be assigned to the licensee (broadcaster) or to the licensor (event-organizer), as long as these responsibilities are identified up front.

The broadcast licensing agreement should state whose responsibility it is to supply the producer, commentator and film crew. Organizers of small and medium size events have often been required to pick up these expenses when negotiating cable television contracts. A local affiliate or an outside production company may be retained to produce the television program, if the network or cable company decides not to handle it directly. With popular events, these costs can easily be covered by advertising revenues and distribution fees generated from the broadcast.

Is it the broadcaster's responsibility to sell advertising spots or the event-organizer? How many spots will be made available to sponsors?

These issues are determined by who will own the air time for advertising. It is not always in the best interests of the broadcaster to maintain control over advertising sales, particularly if the market for the event in question is limited. Event-organizers may find it advantageous to purchase and resell air time to their contacts in the industry.

Traditionally, organizers have been solely responsible for all expenses associated with staging the sports entertainment event, while broadcasters have assumed full responsibility for the production and distribution of the telecast. This practice may be changing. There appears to be a move toward sharing both types of expenses through a joint-venture agreement. In this type of agreement, event staging costs and production of the telecast are shared expenses. Revenue from ticket sales, advertising, sponsorships, and licensing can be used to offset these expenses and generate a profit for both the event-organizer and broadcast company. By including sponsors and promoters (sports marketing agencies) in the joint-venture, these risks can be further distributed.

Broadcast licensing agreements should clarify ownership of trademarks and copyrights. Geographic scope and distribution rights to the telecast should be clearly defined, along with the date, time, number of reruns and the exact length of the telecast. Event-owners should incorporate a minimum performance guarantee identifying the number of markets that will pick up the telecast and the minimum number of rating points (consumer impressions). Provide a bonus for wildly exceeding these expectations and a rebate or trade out for failure to meet the minimums. Determine who owns the distribution rights to satellite feeds, cable, pay-for-view and home video. Identify the number, length and frequency of reruns to be aired. Specify the broadcaster's obligations with respect to promotional spots and television billboards for sponsors. Be sure to protect sponsors' category exclusivity rights by precluding broadcasters and their affiliates from selling advertising spots to companies competing in the same product or service category. Lastly, the event-organizer's responsibilities with respect to the placement of signage and the availability of sports celebrities should be explicitly detailed.

c. Franchise Agreements

Franchise agreements with licensing provisions can be used to extend distribution into new markets. Franchisors can expand their reach without losing control. Franchisees supply the working capital necessary for expansion, and staff and manage sports entertainment events. They make use of the franchisor's trademarks, service marks, copyrights and

patents, and they are obligated to maintain the confidentiality of trade secrets and know-how. In addition to staging local events, they can sell tickets, solicit local sponsors, manage the on-site distribution of sale of licensed merchandise, execute product sampling programs and collect valuable information for the database. Within reason, sports franchises allow the franchisor legal control over independent businesses (franchisees), provided there are no attempts made to restrain trade.

3. Sports Celebrity Personal Service Agreements

Whenever possible and economically feasible, personal services contracts should be obtained from the key participants in major events. Agreements with star athletes will help to establish the unique and extraordinary value of the sports entertainment event. Obtain a renewal option and the sport celebrities' acknowledgment that they are willing to participate in subsequent events, over a specified period of time, for a predetermined fee. Placing top athletes under contract will enable event-owners to protect themselves by making it more difficult and costly for competitors to secure the services of star performers. As part of the personal services agreement with sports celebrities, negotiate the right to extend the athletes' services to corporate sponsors and licensees. Be sure to obtain character merchandising rights by securing a publicity release.

Personal services agreements can be negotiated with sports celebrities in professional and amateur sports. Keep in mind, however, under the regulations of certain athletic governing bodies that these types of agreements may place amateur status in jeopardy. The National Collegiate Athletic Association has very strict rules concerning compensation to student-athletes.[230] Financial compensation, cash awards, gifts, and free trips are not allowed.[231] The NCAA even has limits on what it considers reasonable for transportation and lodging expenses for athletes as well. By contrast, the International Amateur Athletic Federation (IAAF), the international governing body for track and field, has approved the use of trust funds operated by The USA Track and Field (USATF), America's national governing body for track.[232] USATF operates a fund through which athletes can receive certain financial payments in accordance with the USATF/TRUST regulation agreement

230. NCAA bylaw 13, *reprinted in* National Collegiate Athletic Association, 1994-95 NCAA MANUAL (1994).

231. *Id.*

232. BERRY AND WONG, *supra* note 25, at 2.

(formerly known as the "TAC/TRUST"). A "USATF/TRUST" account is established to protect the athlete's amateur status. Money received by amateur athletes is deposited and expenses are drawn under the watchful scrutiny of the Athletic Congress.[233] These payments can be made without fear of losing the athlete's amateur status.

In certain situations, it may be advantageous to enlist the support of athletic governing bodies before approaching athletes, just as ESPN did when it solicited international participation by top amateur and professional athletes in the Extreme Games. The involvement of athletic governing bodies can add credibility to the event and provide event-organizers with greater access to athletes. Involving regulatory groups can also cause complications. When the political and economic concerns of athletic governing bodies enter into negotiations, they may slow down the process.

A prime example of politics evident in athletic governing bodies is Mike Jacki's experience with the U.S. Ski Association. The former CEO of the U.S. Ski Team was ousted from his position in frustration, as Jacki had a $200,000 annual contract through 1998.[234] When he began, Jacki set out to transform the U.S. Ski Team from a $10 million athletic organization to a $25 million marketing company, but he came up against a formidable barrier, top executives of the U.S. Ski Association, the athletic governing body that controls U.S. Ski Team activities. In an interview with *Snow Country Magazine*, Jacki let it be known that he had planned to gain complete control of U.S. ski events and sell an all-inclusive package to corporate America and the television media. "Jacki believes U.S. skiing never gave him an opportunity to make his agenda work."[235]

Negotiating personal services agreements usually means negotiating with athlete-agents. Many top amateur and professional athletes employ agents to represent them. However, there is one major exception: as a rule, the NCAA does not allow student-athletes to work with agents.

Extreme athletes were featured demonstrating Extreme sports in promotional spots for the Extreme Games® on ESPN and ESPN2. Sports celebrities participating in the Extreme Games® were featured on program handouts and in sponsors' print and television advertising. Opportunities are abundant for trade and consumer promotional tie-ins with Extreme athletes. The athletes were only too ready to sign with

233. *Id.*
234. Andrew Bigford, *Who Runs the U.S. Ski Team?*, SNOW COUNTRY, Sept., 1995.
235. *Id.*

sponsors willing to promote their sports and cover part of their training and travel expenses. High pressure measures are not needed to sign young, ambitious and inexperienced athletes. Because most of the athletes were relatively unknown, sponsors would have a good chance of signing multi-year deals at mutually attractive rates. Only a handful of Extreme athletes had agents representing them. These were usually the athletes that had served as stunt experts in commercials or athletes who regularly performed in street shows and at fairs. Amateur status is not an issue for many of the Extreme sports, since competitions did not even exist for some of these sports until the advent of the Extreme Games®. The athletic governing bodies are new for some of these Extreme sports. They were anxious to assist in anything that could increase the popularity of their sport.

4. Publicity Releases

As a condition of a personal services agreements, sport celebrities must be required to sign a publicity release transferring the property right in their performances, personalities, images, likenesses and biographies. Even without an accompanying personal services agreement, publicity releases are needed for the promotion and telecast of sports entertainment events; therefore, it should be a condition of participation in sports entertainment events.

The critical issue is whether or not athletes should waive their right to review and approve the final product or application of that which features the athlete's personality.[236] Depending on the nature of the agreements the players may have signed with their teams, it is possible that they may not be able to restrict the usage of their persona or obtain additional compensation for photo shoots and personal appearances. Generally speaking, the team's publicity rights in its athletes do not preclude agreements from being negotiated with individual stars; although, written approval may be required from the team in addition to the star athlete.

In professional team sports, athletes are bound by employment contracts and the by-laws of their clubs and sports leagues. Publicity releases and subsequent compensation are arranged through the team's public relations department and the athlete's sports agent. Since a pub-

236. Popular athletes like Michael Jordan and Joe Namath are often advised to retain approval of final products and to limit use of their publicity rights. Talented but unknown athletes, like some of the young men and women competing in the Extreme Games, are less likely to place limits on the use of their publicity rights.

licity clause is generally included in the employment contract, employers are often free to use or transfer these rights. When Marketing Navigators produced promotional literature for the Milwaukee Brewers Baseball Club, no additional publicity releases were required to feature the Major League's star athletes in brochures, game schedules and direct mailers. Local celebrities participated in audio recordings used on inbound telephone lines to respond to consumer inquiries about season tickets purchases. The following celebrities were under contract with the ball club at the time, so they were included in the marketing communications campaign: Robin Yount, who had 3000 hits; Cal Eldred, 1992 *Sporting News* American League "Pitcher of the Year;" Pat Listach, the 1992 American League Rookie of the Year; and Phil Garner, team manager. The campaign was designed to promote season ticket sales. It resulted in a 40% increase in season ticket equivalents for the Milwaukee Brewers' 1993 baseball season.

In amateur events like the New York Marathon, athletes typically waive any further compensation for use of their persona when they sign the event-organizer's publicity release. The release is required as part of their agreement to participate in the athletic competition. T-shirts and awards issued by the event-organizer may be considered compensation enough. Use of sports personalities is tied to exposure incidental to the athlete's participation in a particular event. This does not grant organizers, sponsors or broadcasters carte blanche to exploit participating athletes in any manner desired. If the athlete's image and likeness are used to sell any particular product or service, including the sponsors' and licensees' products and services', then this must be expressly stated in the publicity release. Otherwise, it is best to assume that the release only covers that which is used in connection with the promotion of the event.

When drafting the language for the publicity release, event-organizers will want to obtain the broadest possible cover, while sports celebrities prefer language that is more restrictive so they can protect their future income earning potential.

5. Waiver of Liability

If the sports celebrity is competing in the athletic event, not just serving as a spokesperson or commentator, than a participant waiver of liability is needed as well. The liability waiver should be required as a condition of participation. This holds true for sponsorship and licensing agreements that support athletes (e.g., a clothing company that pays an

athlete for wearing its apparel products or a ski equipment manufacturer that supplies free equipment to skiers), not just organizers.

It is best to obtain a waiver of liability, along with a personal services agreement and publicity release, from athletes representing the company. The waiver will force athletes to acknowledge the risks they are taking during training and competition. To some extent, it will protect organizers, sponsors and licensees from nuisance law suits in situations involving unavoidable injuries, but not in situations of gross negligence. The "long form" will do a better job than the "short form" when it comes to waiver of liability, assumption of risk, indemnification and hold-harmless clauses.

D. Theory of Unjust Enrichment

1. Legal Principle

The fundamental principle underlying the theory of unjust enrichment is the court's desire to grant relief for a mistake in basic assumptions. It is generally applied in contract or quasi contract situations where there exists a lack of economic equivalence attributable to a mistake or where an unfair advantage is gained by one party at the expense of the other.[237] A situation where unjust enrichment may arise is in the voluntary submission of ideas. As demonstrated in the earlier Coors example, this situation is often encountered in the sports entertainment business.

In 1892, the New York Court of Appeals held that "[w]ithout denying that there may be property rights in an idea, or trade secret, or system, it is obvious that the originator or proprietor must himself protect it from escaping or disclosure. If it cannot be sold, negotiated or used without disclosure, it would seem proper that some contract should guard or regulate the disclosure, otherwise it must follow the law of ideas and become the acquisition of whoever receives it"[238] This was the old school of thought applied to voluntary disclosure of ideas. More recently, courts have adopted a different viewpoint allowing the plaintiff recovery in situations where a quasi contract was thought to have existed.

State and federal courts are reluctant to attribute individual ownership to that which is in reality common property. Ideas thought to be

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237. GEORGE PALMER, THE LAW OF RESTITUTION (1978); GEORGE PALMER, MISTAKE AND UNJUST ENRICHMENT (1962).

238. Bristol v. Equitable Life Assurance Co., 132 N.Y. 264, 267 (N.Y. 1892).

commonplace or generally known are ideas in the public domain, freely available for use by anyone. But where an idea requires the accumulation and transmission of knowledge, there is justification for holding a person liable for economic benefits obtained through its use.[239] Restitution may exist if an idea has common law copyright protection as a literary work. Classification as a literary work was the defense used in the case of John Shaw when an advertising concept was allegedly appropriated by Ford Motor Company.[240]

In cases where services were rendered to develop an advertising slogan or symbol, the plaintiff recovered the value of services but not the value of the product. To keep the law of restitution at a manageable level, in at least two cases, the courts granted restitution for services rendered, not the actual use or appropriation of the idea.[241] When ideas are disclosed in such a manner that the defendant must have known compensation was expected, a case of unjust enrichment may be based on a breach of obligation. The accepted measure of recovery is generally the reasonable value of the use of the idea.

2. Protecting the Idea

Ideas alone cannot be protected. Therefore, it is advisable to obtain a signed confidentiality agreement with a non-disclosure clause, before divulging new and novel ideas. The targeted recipient of such an agreement may deny this request simply to avoid the costly and time consuming defense sometimes necessary to prove ownership. One argument companies make is that their company may be developing or may already be in possession of similar ideas. This argument was raised by Adolf Coors Brewing Company.[242] As you may recall, the form letter released by Coor's Field Marketing Manager said:

> Please be advised that Coors may be developing similar or related projects, independent of any promotional ideas or proposals XYZ has submitted. Consequently XYZ will not be contacted or compensated with respect to the execution by Coors of projects or promotions similar to XYZ which have been developed independently by Coors. Also be advised that there will be no binding

239. Hamilton Nat'l Bank v. Belt, 210 F.2d 706 (1953).

240. John W. Advertising, Inc. v. Ford Motor Co., 112 F.Supp. 121 (1953).

241. Nash v. Alaska Airlines, Inc., 94 F.Supp. 428 (S.D.N.Y. 1950); Ryan & Assoc. v. Century Brewing Assn., 55 P.2d 1053 (1936).

242. *See supra* part II.A.

> agreement between parties until a written agreement is signed by both parties . . .[243]

In order to sell an idea, it must be disclosed to prospective buyers. Disclosure is often necessary even in situations where prospective buyers are unwilling to pay for the submission of ideas. Without full disclosure, it is often difficult to ascertain the true value of a new and novel idea. When an idea is new, its novelty may preclude accurate assessment of fair market value until it has been introduced and tested in the marketplace. Fair market value is the price the market is willing to pay at any given point in time. When Andersen Consulting requested new campaign ideas for its software products, the international consulting giant paid a nominal sum of $1,000 per submission to each agency that was invited to pitch the account. The submission fee was not intended to cover the actual cost of concept development for campaign ideas. It simply established the ground rules for the agency review process. Participating agencies retained ownership in their ideas. Once campaign concepts were disclosed, Andersen Consulting's marketing managers were better able to select the agency that best fit the company's marketing communications needs.[244]

Commissioned works are works made for hire. With some exceptions such as photography and music, the intellectual property rights in work for hire are vested in the employer. Another exception is in situations where an independent contractor was unfairly compensated for his or her work or the employer benefited from a mistake made by the contractor.

Organizers of sports entertainment events are often faced with a need for outside financing and the challenge of finding a willing investor so that their ideas can be tested. As one whose ideas have been appropriated on more than one occasion by seemingly reputable companies, it has been the author's experience that many companies are willing to pay for the service and execution of ideas, but not the actual concepts. The cost of concept development and strategic planning can run as much as three to five times greater than the cost of executing an idea.[245] Reputa-

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243. Ukman, *supra* note 1.

244. Marketing Navigators was one of the marketing agencies invited to pitch Andersen Consulting for four different lines of business.

245. Take for instance, a marketing consultant that charges $150-$250/hour for strategic planning and creative concept development. The conception of a creative or strategic idea for an advertising or event marketing campaign may cost $150-$250/hour to develop and only $50-$90/hour to execute. Concepting these ideas may take only a few hours, yet the return on investment could be potentially significant.

ble companies like Andersen Consulting are often willing to pay a small amount for development and disclosure of new concepts, without claiming ownership. The agency awarded the business can add the remaining development cost to the execution and implementation. When an idea is used for economic gain in the marketplace, the parties must agree in advance as to the terms of compensation for its implementation.

Ideas are often intangible and the development of new marketing ideas is inverse to sales. Development and implementation of marketing strategies and creative concepts for integrated marketing communications (e.g., advertising, sale promotion, public relations, direct marketing, and event marketing campaigns) precede the actual sale of products and services featured in these campaigns. Ideally, the originator of the idea should be paid on its productivity—the financial gains resulting from the implementation of novel concept or creative idea. Unfortunately, it could be a long time before the exact value of the idea can be ascertained. Even after the fact, it can be difficult to accurately assess the exact share of profits that are attributable to the marketing communications campaign. Other factors must be taken into consideration, such as the timing of the campaign, environmental conditions, and competitive activity. Rather than being considered an asset like intellectual property and patents, the creation of ideas is often construed as an expense. Profits generated from new ideas may not be fully realized until months or years later.

For these reasons, long-term contracts are advisable. If a new sports entertainment event is projected to break-even in its second year, but not generate a profit until the third year, the event-organizer should obtain a minimum contract of three years in duration. Renewal clauses should allow for compensation increases based on the increased success of the event as determined by its popularity, profitability and market demand. Sponsors and licensed broadcasters that were willing to assume some of the financial risks in the early stages of the event's development may reasonably expect first right of refusal and an opportunity to buy into subsequent events at a slightly reduced rate. Noncompete clauses should be incorporated into these agreements to prevent the sponsor and broadcaster from breaking away to implement similar programs in competition with the originator of the idea.

To prevent unjust enrichment and unfair economic advantage by either party, sponsorship agreements and broadcast licensing contracts should contain minimum performance standards (e.g., minimum participation and exposure levels). When performance levels exceed the minimum standards, then a bonus payment system should go into effect to

compensate the event-organizer for the increase in performance. This way, both parties are fairly rewarded for their participation and assumption of risk.

V. Safeguard the Mutual Interests of Investors, Management, Athletes, Sports Governing Bodies and Consumers

A. Avenues For Protection

What follows are a few recommendations to help protect proprietary interests in sports entertainment events. These recommendations are a compilation of knowledge and experience gleaned from two decades as a practitioner in sports and consumer marketing and three years of academic study in marketing, communication, business management and law. These suggestions are only the beginning. The rapid growth of sports entertainment warrants additional study by educators and practitioners alike.

1. Astute Marketing Practices

a. Image and Positioning

When planning new events, give each event a unique image to distinguish it from all other sports entertainment events. This unique image should reflect the personality and positioning of the brand as perceived by the target audience. It should appear consistently on all marketing communications through the company's trade dress, trade names and sports marks. Constant reinforcement of the brand image will help to improve consumer recall and lift awareness levels. It will also contribute to the equity value of the brand.

b. Build Brand Equity

Build brand equity in association with the business entity's trade name, trademarks and service marks, rather than relying on the brand equity of supporting sponsors. In lieu of incorporating the lead sponsor's name into the title of a sports entertainment event, connect the two entities together with clauses like: ". . . sponsored by XYZ", ". . . presented by XYZ Company", ". . . brought to you by XYZ Company," and ". . . in association with XYZ Company."

There are trade-offs which must be considered by the event-organizer between the short-term revenue gains generated from the sale of title sponsorship verses the long-term implications of branding the event. Over the long run, the additional revenue generated from the sale of

licensing rights and merchandising programs could outweigh the initial loss of revenue from foregoing the sale of naming rights. The downside risk of adopting this approach lies in the fact that the lead sponsor's name may not get picked up in some news stories. The upside benefit is the goodwill value that will remain with the event as sponsorships change hands and the additional income that can come from merchandising.

An acceptable alternative might be to offer the lead sponsor naming rights on sports facilities and equipment (e.g., race car or sailboat). Position the name so that it appears prominently in the telecast of the event. This should satisfy sponsor's needs and add value to the sponsorships.

c. Media Exposure and News Value

Attract public and media attention for the event by creating feature stories and news value from the quality of competition, intrigue associated with the event and related activities, the hero value of participants and even controversial issues surrounding it. When dealing with a series of events, it may be better to focus on a few events, which have real news value, than to overemphasize unexciting stories and promote common occurrences in press releases to the media. Consumer and trade promotions can be used to create interesting stories around sports events where none previously existed. The best way to position a story for distribution to the media will depend on the communications vehicle and customer profile. The target audience should be consistent with the desired image of the sports event and its sponsors.

To encourage press coverage, establish a media center on site at the event. Restrict access to those with proper credentials. Use the media center to hold press conferences to deliver breaking news stories. Manage press relations judiciously, and retain a competent copy writer and photographer to develop news stories and reference material for interested journalists. Make it as easy as possible for interested news media to cover athletic events, but do not allow nonlicensed broadcasters or print publications to publicize any event in its entirety, particularly if an exclusivity arrangement has been granted to a network, cable station, radio operator or publishing company.

Take advantage of alternative forms of media. For major events, provide on-line access and satellite feeds to those who want to cover these events from remote locations. Also post results on an electronic bulletin board, the Internet and World Wide Web. Negotiate proprietary media deals in advance and barter for air time and print space in exchange for sponsorship benefits. If necessary, purchase blocks of time and space to

guarantee media exposure to sponsors and generate additional revenue from advertising sales. Hold back some print space and television spots for advertising the event's licensed merchandise.

d. Hospitality Services: Business Entertainment and Employee Morale Building

Provide hospitality service complete with complimentary food and beverages, along with a quite comfortable place in which reporters and supporters can work. Install phones, fax, copy machine and computer terminals or an electronic hook-up. Make the hospitality area available to guests of sponsors and licensees. The ability to entertain clients, employees suppliers and their guests is often an important factor influencing corporate investors when deciding which events warrant their financial support. Mobile hospitality centers, luxury sky boxes, suites, tents, mobile units and even motor yachts can enhance the appeal of the event when VIPs are offered access. They are a place where busy executives can get away from the crowds and relax with their co-workers and families. They enable sponsors, event-organizers, media and sports celebrities to mingle and develop new business contacts. A great deal of serious business gets done informally at hospitality centers.

e. Trade and Consumer Promotions

Trade and consumer promotions enable sponsors to leverage their investment. Organizers can arrange for star athletes to meet sponsors' important clients and coordinate autograph signing tours at major retail stores, where sponsors' products are sold. Another way to help maximize sponsors' financial returns is to make sports celebrities available to sponsors for use in advertising and sales promotion campaigns. Give tickets to radio stations for on-air promotions linking the sponsor to the event. Provide licensed merchandise, autographed posters, complimentary tickets, free trips, and more to sponsors for sweepstakes, self-liquidating offers, and continuity programs designed to increase demand and lift sales. Incremental sales volume generated from these events can help cost-justify the sports sponsors' financial investment.

It is in the event-organizer's best interest to facilitate promotional tie-ins with retailers. Most sports organizations leave this responsibility up to their sponsors and licensees. This is a mistake. Attracting sponsors and licensees can be much easier when the event-organizer is able to guarantee distribution though end-aisle display space, trade deals and consumer promotions. This is one of the best methods of helping supporters self-liquidated their sponsorship and licensing fees and generate

a return on their sports investment. Tie-ins with major retail chains will strengthen the package by helping sell sponsors' and licensees' products and services. In addition, retailers have access to co-op funds from their suppliers that can be used as additional sources of revenue. Retailers can actually help attract new sponsors by introducing the event-organizer to manufactures that supply the store. They can run in-store promotions, local advertising and direct mail circulars that can be used to promote the event. These grassroots retail tie-ins give sponsors and licensees direct access to end-users of their products and services.

f. Cross-Marketing with Cosponsors

Take advantage of cross-marketing opportunities among sponsors and licensees with complimentary products and services. These opportunities are best facilitated through the event-organizer and designated promoters and co-funded by sponsors and licensees. Cross-marketing can often be used as a means of liquidating a portion of sponsors' and licensees' initial investment in the sports event by granting them access to new customers through which incremental revenue gains can be realized. Cross-marketing can also help reduce sponsors' and licensees' advertising and sales promotion expense by sharing these expenses with other investors. Finally, it provides an avenue for business-to-business relationship development.

2. Sound Business Management

a. Obtain Long-Term Commitments

Secure long-term agreements with sponsors, broadcasters and licensees. Multi year agreements are desired for two reasons. First, they allow start-up costs to be amortized over the initial three-year term. Secondly, they can prevent competition from arising within, assuming that a "noncompete" covenant is included in these contracts. Sponsors and broadcasters that commit early may have an opportunity to influence certain aspects of the sports events, including the timing and location of competitions. They may be able to negotiate a substantial discount off the asking price, if they are the first company to sign with the event. Corporate support is an implied endorsement that can strengthen the organizer's ability to attract additional sponsors. Additionally, for each subsequent year that a sponsor is willing to commit to, the organizer would be wise to offer a five percent discount. This can be offset by the cost of obtaining new sponsors. Goodwill value will grow over time as the momentum builds. When others begin to copy an idea,

this is usually a sign that there is real value in the idea. Longer contracts help in the challenge of staying ahead of the competition.

b. Managing Events as Businesses Rather Than Communication Vehicles

When exploiting sports entertainment as a commercial vehicle for self-promotion, manufacturers would be wise to consider separating their sports organizations and related events from their own corporate structures. This can be accomplished by setting up a separate company through which the sports event is run.

Sports entertainment events should be treated as stand-alone businesses, required to stand on their own profit and loss records. Ideally, they should have a separate budget, staff and long-range business plan. At the very least, they should be managed as a separate profit center, if the events are run as part of an existing organization. Even not-for-profit sports organizations should be run in a professional manner with earnings reinvested in the business or donated to a charitable cause. Cause-marketing overlays are increasing in popularity. The goodwill value generated by these activities appeals to sponsors and consumers alike.

Sports entertainment events can be marketed in much the same manner as manufacturers market their own products. If a manufacturer is involved, it can still serve as the financial underwriter and assume the position of lead sponsor. In this capacity, founding organizations will benefit from their association with these athletic governing bodies while reducing their downside risks, that is, risks associated with liability from major injuries or even bankruptcy. By insulating their corporate structures and management teams from those of the athletic organizations and events they founded, manufacturers will be in a better position to promote their sports as a whole.

c. Share Risks and Rewards While Maintaining Control

Avoid financial contributions and other types of recompense with too many strings attached. The price to be paid in exchange may be too high to justify some compromises. A strong desire by sports organizers to get new events off the ground or preserve the existence of old events can lead to the bastardization of these sports entertainment events. It can also lead to the dilution of solidly established sports entertainment events and, ultimately, impact negatively on the resale value of these sports properties. For instance, compromises in naming rights, modifications to trademarks and trade dress, improper use of copyright materials

and even the selection of sponsors with antiethical conflicts in association with a particular sports property may tarnish the goodwill value and lower the brand equity. This will reduce owners' potential return on investment.

Privatize the conclusion of an event to control public access, media coverage and dissemination of information in order to preserve exclusive broadcast rights. Controlled access does not preclude news coverage, but it does allow event-organizers to establish parameters on media rights so that owners can profit from their investment. It also enables owners to charge spectators an entry fee, if desired.

In assessing the commercial value of the event, one must examine all possibilities for commercial exploitation of the sports entertainment event. The trick is to do this without cheapening perceived value of the event by making it overly accessible or expanding into the sale of products and services that somehow diminish the image and reputation of the sport or its athletes. Attracting sponsors and licensees can be made easier with packages that incorporate: (1) prenegotiated retail tie-ins and display placements; (2) guaranteed media coverage; and (3) grassroots support through local activities and/or cause-marketing overlays.

Once market demand has been generated, it must be satisfied. If left unsatisfied, this increased demand arising from the success of a new sports entertainment event may leave voids of opportunity that can quickly be filled by competitive activity. Execute a defensive blocking strategy to ward-off competition. The best defense against competition may be measured and controlled growth of a new event. Avenues for expansion include growth from within, increased interdependence on subcontractors, joint-venture arrangements with suppliers, broadcasters and sponsors, and assigning proprietary rights to franchisees along with usage rights to sports marks, trade dress, trade secrets, know-how, copyrights and patents. Yet, it is important to know that over expansion can cause market saturation. This will reduce demand and lower the price-value relationship of the sports property. Conversely, delays or resistance to expansion may result in increased competitive activity in times of high consumer demand.

Stay a step ahead of the competition by supplying superior competitive challenge, fun and entertainment; maintaining high standards of quality and safety; striving for continuous improvements in the product and service offerings; and satisfy market demand by satisfying the needs of consumers, financial investors, sponsors, broadcasters, licensees and the media.

3. Legal Measures

a. Corporate Governance

When organizing a new sports entertainment event within the United States, assuming the event will not be part of an existing not-for-profit organization such as a club or educational institution, it is best to set-up a separate corporate entity. The new company should have its own corporate structure, governance and an outside board of directors or advisors. After considering the tax ramifications, choose a legal entity that offers a corporate shield for liability protection. Such entities include limited liability companies (LLCs), sub chapter S corporations, C corporations and 501(c)(3) entities. A corporation is preferred over a sole proprietor, general partnership or limited partnership simply because it offers better liability protection.

A 501(c)(3) is a not-for-profit corporation. It takes approximately six months to obtain a government ruling for not-for-profit status. This is a popular method used by many sports clubs, educational institutes and volunteer groups organizing events in the United States. It is not a good approach if the event is designed to make money and distribute profits to its owners.[246]

Determining which structure to use will depend on the business objectives, ownership interests, governing laws, tax implications and principal location of the business. If the event is international in scope, then the organizer should take into consideration governing laws of the countries in which the event will be held. For example, an LLC might be treated as a partnership in some countries. This type of organization is relatively new and it is not recognized every where. From a tax perspective it has some significant advantages over a conventional corporation.

b. Intellectual Property Protection

Identify the business entity apart from its owners, sponsors and financial underwriters through the choice of names. By separating the "trade name" from its investors as well as the products and services produced by the business entity, the brand equity remains with the sports entertainment event as ownership and sponsorship change hands.

Employ an offensive strategy to proactively protect owners' intellectual property rights, copyrights, and patent rights. Preserve intellectual property rights by registering as trademarks or service marks distinctive and fanciful names, logos, advertising slogans and unique symbols (in-

246. I.R.C. § 501(c)(3) (1986).

cluding mascots and colors) that identify and distinguish the sports entertainment event from all others. To be registered, these trademarks and service marks must be arbitrary, fanciful or carry a secondary meaning in association with a particular product or service provided by the sports entertainment event. The marks signal the source and quality of these goods and services, and symbolize the goodwill of their owners.

Develop a standards and style manual to clearly establish the company's trade dress by communicating uniform standards applying to the stylistic use of approved trademarks, as well as any nonfunctional graphic representations or design features that identify and distinguish the sports entertainment event. To insure consistency, all employees, agents, sponsors, licensees and outside contractors involved with the promotion of an event should be required to follow the guidelines set forth in the manual. This requirement should be incorporated into company purchase orders and contracts.

Restrict the disclosure of trade secrets and corporate know-how to selected individuals for the express purpose of exploiting the economic value of the business by its employees, agents, licensees and franchisees. These select persons should be required to sign a confidentiality agreement or acknowledge that certain information, which is not found in the public domain and which is indispensable to the operation of the business, must remain a secret.

Make it more difficult for competitors to make, use or sell exact reproductions of new and novel discoveries and inventions arising out of the creation and execution of sports entertainment events by securing a patent on unique equipment and nonobvious processes used to execute the event (e.g., computerized timing and relay equipment, robotics cameras, broadcast communications technology and sports equipment).

Preserve copyrights by placing a copyright notice on all original works of authorship fixed in a tangible medium of expression, thereby signifying ownership in the creative work. Register important works to make it easier to defend ownership interest in the copyright, in the event of a dispute. When using outside contractors and volunteers, require them to assign their copyrights to the event owner. Do not rely on the "work for hire" doctrine. Transfer the rights in writing.

c. Contracts

Obtain publicity releases from all participants (e.g., athletes, celebrities, coaches, judges and referees) assigning the publicity rights in their performance at a given event to the event-owner for assignment to broadcasters, publishers, promoters, sponsors and licensees. These re-

leases grant control over the asset value of the commercial exploitation of an individual's property rights in his or her own identity.

Secure personal services agreements with top athletes to ensure high caliber competition and to sustain a high level of public interest and media exposure. Compensate sports celebrities for participation, public appearances and endorsements made in connection with event advertising and promotions. Tying up the best talent can make it more difficult and expensive for competitors to secure the services of these individuals, especially if noncompete covenants are included in the personal services agreements. These agreements can help strengthen relationships with sponsors and broadcasters by extending the athlete's services to them as part of the sponsorship package and licensing agreement.

Obtain waivers of liability from participating athletes to minimize the financial exposure from known risks associated with a particular sports activity. While gross negligence cannot be waived, these waivers will serve to notify participants of their assumption of risk and may help to reduce the number of nuisance law suits brought against the event-owner when unavoidable accidents result in injury.

Draft formal contracts to clarify the agreements made between various parties. Written contracts can be extremely helpful when disputes arise and in situations where new people become involved in an execution of an agreement. One way to prevent unequal economic gain by either party at the expense of the other party is to establish minimum performance requirements. Develop a bonus compensation scheme for rewarding the other party for benefits realized in excess of the guaranteed minimum. Specify how performance of the contract will be measured and tracked. Incorporate these specifications into the contract. Both parties may want to agree to arbitration in the event of a disagreement to avoid costly and time consuming legal battles. Liability insurance and indemnification are also beneficial. If risks and rewards are shared equally among the various parties, it will be easier to consider the interests of the other side when negotiating contracts.

Establish a paper trail with letters of understanding, progress reports, purchase orders and change authorization forms. In addition to formal contracts these documents help clarify expectations, duties and obligations, compensation, performance measurements, deadlines and more. They can help minimize the chance for a mistake or misunderstanding. In the event of a dispute, they can provided the injured party with evidence. Although time consuming and cumbersome, written documentation is necessary because it provides a defense and establishes evidence of professionalism that stakeholders have come to expect.

VI. Conclusions and Recommendations

This article has dealt with protecting proprietary interests in sports entertainment events from the perspective of the event-organizer, deemed to represent the interests of owners and investors. Proprietary interests include intellectual property, creative works, ideas, novel discoveries, unique processes or inventions, and nonpublic operational information as well as property rights in one's own identity. Sports entertainment events are competitions, exhibitions, and demonstrations of athletic skills and prowess for public and private consumption designed to challenge, entertain, enrich, reward, and satisfy participants and spectators alike.

Anyone concerned with successful management of major sports entertainment events should consider organizing and operating these events as Strategic Business Units (SBU), rather than treating them solely as communication vehicles for sponsors, broadcasters and licensees. Successful sports entertainment events have all of the components of stand-alone businesses. These components include operations, finance, management, marketing communications, human resources, stakeholder relations, media and government. In addition, it may be advantageous for liability reasons to provide a separate corporate structure and governance for the SBU. The SBU should be required to stand on its own profit and loss record. Building long-term brand and customer equity must become a primary goal of management. Management should strive to serve the needs of all stakeholders. Yet, only by fully satisfying end-user needs (e.g., those of the ticket holders and television viewers) can event-organizers hope to achieve the goals established by sponsors, broadcasters and licensed merchandise suppliers.

From a marketing perspective, sports entertainment entails precise timing, placement, product, price, promotion, public relations, and pacifying customers' and investors' needs. It requires knowledge of integrated marketing communications to leverage the synergy between marketing communication vehicles and to attain the optimum level of exposure for sponsors and licensees. The integration of communication disciplines includes the use of advertising, sales promotion, marketing public relations and direct response. A closed-loop feedback system which incorporates a marketing database of customers and prospects should be employed. To be successful in the 1990s and beyond, an integrated approach to marketing communications and management is needed for cohesive coordination of all of the business functions. Event-owners should concern themselves with building brand equity in their

events in much the same manner as marketing communications managers create value in the products and services they promote.

The impact of economics on sports has evolved this enterprise into a profit generating opportunity for athletes, athletic governing bodies, media, corporate sponsors, merchandise licensees, promoters and event-organizers. While volunteer support is important, professional management is needed to safeguard investors interests and to insure adequate financial returns. The synergistic effect these parties have on one another must be harnessed. Through a collaborative effort, the parties with a vested interest in the event can delivery a fully integrated sports entertainment package. Joint-venture arrangements can allow each party's needs to be satisfied more equitably. By distributing the economic risk and sharing the financial rewards, the proprietary interests of everyone involved are more likely to be met.

Supply and demand are two factors of many that affect the value of the product. Increases in awareness, brand equity and the goodwill value of sports entertainment events affect market demand and the willingness of sponsors, broadcasters and licensees to participate. Reach and cost-per-impression are no longer the sole determinants for assessing sponsors' return on investment. Revenue streams and cost considerations are part of the equation. Profitability is determined by the difference in velocity between income flows and expenses. With sponsors, this means incremental sales gains attributable to sports sponsorships. These gains must exceed the cost of the sponsorship. A closed-loop system in which customer responses can be measured is required for back-end analysis of financial returns. Extending the sports entertainment events to the point-of-purchase and capturing data on promotional respondents will help sponsors and licensees measure financial returns. The same thing holds true for licensed merchandise suppliers and licensed media.

The equation for measurement is quite simple. Sponsors' and licensees' profits from incremental sales gains attributed to the event must exceed, by a reasonable percentage, the cost of sponsorship and licensing fees in order to cost-justify the expense. Profits on space advertising and air time are easily measured. So, too, are profits generated from mail order catalogs as well as on-site merchandise sales. More complex methods of measurement are needed to assess return on investment of multi-event sports marketing venues and multi-media marketing communications campaigns.

The time has come when event-organizers, sponsors, licensed merchandise suppliers and licensed media must quantify their financial investment in terms of future returns. Awareness and image enhancement

alone cannot cost-justify the amount of money being spent in the sports entertainment industry today.

Sports are an inherent part of our social being. We use athletic events as a manifestation of the vicissitudes of our daily lives. A well conceived sports entertainment event presents a spectacle of conflict, drama, excitement and eventual resolution. Sports aficionados enjoy the art-form while others derive pleasure from identifying themselves with champion athletes, often becoming "hooked" on a particular sport or team. Understanding the involvement of committed supporters is necessary to appreciate what motivates their behavior and purchasing decisions. This is an essential part of strategic market planning in the commercial enterprise of sports. It can be useful in determining product, price, positioning and the promotion and delivery of events in the marketplace. Targeted marketing and an understanding of consumers' psychological needs will enable event-organizers to generate repeat business and maintain brand loyalty.

Understanding the legal doctrines and their effect on business management and marketing decisions in sports is crucial to the long-term financial viability of business entities operating in this industry. Event-owners must be aware of the competitive challenges and important legal issues involved in the commercial enterprise of sports.