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Ambush Marketing: The Off-Field Competition at the Olympic Games

Jason K. Schmitz*

I. INTRODUCTION

¶1 Athletes from around the world gathered in Athens for the 2004 Olympic Games. And while the athletes prepared for the competition of the Games, corporations prepared for the intense marketing blitz that accompanied the Games. As an event that commands the attention of the media and the entire world for two weeks every other year, the Olympic Games are the most effective international corporate marketing platform in the world, reaching billions of people in over 200 countries and territories.¹ Some corporations, including McDonald's, Coca-Cola, Visa, Kodak and Xerox, paid a multi-million dollar fee for the right to be part of The Olympic Partner ("TOP") program. The TOP program, managed by the International Olympic Committee ("IOC"), grants sponsors the exclusive worldwide marketing rights in their product categories for both the Winter and Summer Games.² Additionally, TOP companies are entitled to the use of all Olympic imagery as well as appropriate Olympic designations on products and acknowledgment of their support through a broad Olympic sponsorship program.³ Others will seek to associate their companies with the Olympics and capitalize on the attendant good will without authorization of the IOC or payment of the requisite sponsorship fees. This is commonly referred to as ambush marketing. This piece will identify the Olympic organizations that own and use the Olympic Games' intellectual property, how ambush marketing has been employed and challenged at prior Olympic Games and at the Athens Games, and the legal and ethical issues surrounding ambush marketing.

II. OLYMPIC ORGANIZATIONS AND OLYMPIC MARKETING

¶2 The goal of the Olympic Movement is to "contribute to building a peaceful and better world by educating youth through sport practiced without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of

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¹ The Official Website of the Athens 2004 Olympic Games – Games of the XXVIII Olympiad, *Unforgettable Games, Dream Games*, at www.athens2004.com (last visited May 1, 2005).

² The Official Website of the Athens 2004 Olympic Games – Games of the XXVIII Olympiad, *The Olympic Partner (TOP) Programme*, at http://www.olympic.org/uk/organisation/facts/programme/sponsors_uk.asp (last visited May 1, 2005).

³ *Id.*

friendship, solidarity and fair-play.”⁴ The IOC, a non-governmental, non-profit organization, is the supreme authority of the Olympic Movement. It was created in 1894 by Pierre de Coubertin, a French aristocrat and educator, and owns all rights concerning the Olympic symbol, the Olympic flag, the Olympic motto, the Olympic anthem, and the Olympic Games.⁵ Within the United States, the right to control the use of Olympic marks, images, and terminology resides with the United States Olympic Committee (“USOC”).⁶ The U.S. Congress granted the USOC exclusive control over the commercial exploitation of Olympic and Paralympic related trademarks, symbols, and terminology through the Amateur Sports Act of 1978.⁷ The U.S. Supreme Court later held in *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.* that the statute authorizing the USOC’s exclusive use rights in “Olympic” trademarks does not require the USOC to prove that the unauthorized use caused confusion.⁸ Twenty years after the passage of the Amateur Sports Act of 1978, it was amended and recodified as the Ted Stevens Olympic and Amateur Sports Act of 1998 (“OASA”).⁹

A. *The Marketing of the Olympics*

¶3 As the USOC holds responsibility for funding the United States’ participation in the Olympics, its authority to grant exclusive use rights to the Olympic marks and symbols greatly enhances its ability to attract the corporate sponsors, suppliers, and licensees necessary to finance an event as large as the Olympics.¹⁰ Conversely, if the USOC were unable to enforce its exclusive use rights, there would be reduced incentive on the part of the financial participants.¹¹ With this in mind, courts have concluded that the primary purpose of the OASA was to “insure the market value of licenses.”¹²

¶4 The five interlocking rings that comprise the Olympic emblem symbolize the continents of Africa, America, Asia, Australia, and Europe joining together irrespective of race, nationality, religion or economic difference.¹³ According to consumer research conducted in 1998, 1999, and 2000, underwritten by the IOC in eleven countries, unaided brand awareness for the Olympic Rings was ninety-three percent.¹⁴ As such, the Olympic Rings are indeed famous and have enormous licensing value.

⁴ INTERNATIONAL OLYMPIC COMMITTEE website, *Organisation*, at http://www.olympic.org/uk/organisation/index_uk.asp (last visited May 1, 2005).

⁵ *Id.*

⁶ Noelle K. Nish, *How Far Have We Come? A Look at the Olympic and Amateur Sports Act of 1998, the United States Olympic Committee, and the Winter Olympic Games of 2002*, 13 SETON HALL J. SPORT L. 53, 55 (2003).

⁷ Anne M. Wall, *The Game Behind the Games*, 12 MORG. SPORTS L. REV. 557, 518 (2002).

⁸ 483 U.S. 522 (1987).

⁹ 36 U.S.C. § 220506(a) (the corporation has the exclusive right to use the name United States Olympic Committee, the symbol of the International Olympic Committee, consisting of the 5 interlocking rings and the words “Olympic” and “Olympiad”).

¹⁰ Nish, *supra* note 6, at 56.

¹¹ *Id.* at 56-57.

¹² *Id.* at 57; *see, e.g.*, *Stop the Olympic Prison v. United States Olympic Comm.*, 489 F. Supp. 1112, 1120 (S.D.N.Y. 1980); *United States Olympic Comm. v. Union Sport Apparel*, 220 U.S.P.Q. 526 (E.D.Va. 1983); *United States Olympic Comm. v. Int’l Fed’n of Body Builders*, 219 U.S.P.Q. 353 (D.D.C. 1982); and *United States Olympic Comm. v. David Shoe Co., Inc.*, 835 F.2d 880 (6th Cir. 1987).

¹³ Anne M. Wall, *The Game Behind the Games*, 91 TRADEMARK REP. 1243 (2001).

¹⁴ *Id.* at 1243-44.

B. Ambush Marketing at the Olympics

¶15 In a narrow sense, ambush marketing refers to the direct efforts of one party to weaken or attack a competitor's official association with a sports organization acquired through the payment of sponsorship fees. In a broader sense, rather than such direct and intentional misrepresentation, ambush marketing refers to a company's attempt to capitalize on the goodwill, reputation, and popularity of a particular event by creating an association without the authorization or consent of the necessary parties. Some popular indirect ambush techniques include buying commercial time prior to and during event broadcasts,¹⁵ sponsoring the broadcasts of events rather than directly sponsoring the event,¹⁶ sponsoring individual teams and athletes,¹⁷ and using sporting events tickets in consumer giveaways, sweepstakes, or contests.¹⁸

¶16 Purely defined, ambush marketing does not involve counterfeiting or the illegal use of trademarks, tradenames, or symbols. Companies simply develop a creative advertising campaign around the event, never use the event logo, trademark or tradename, and capitalize by association with the event without paying for "official sponsor" status.¹⁹ When effectively employed, ambush marketing is not illegal and is therefore difficult for legitimate sponsors and the USOC to combat.

III. PAST ENFORCEMENT EFFORTS

¶17 Approximately seventy-eight percent of the 2002 Olympic Winter Games and Paralympic Winter Games budget of 1.31 billion dollars was to come from corporate marketing sponsors, broadcast rights fees, and royalties from official merchandise licensees.²⁰ Accordingly, the USOC and Salt Lake Organizing Committee ("SLOC") took no chances in their battle against trademark infringement and ambush marketing. The

¹⁵ MARY HUTCHINGS REED, IEG LEGAL GUIDE TO SPONSORSHIP 116, 159 (1989). For example, American Express bought substantial advertising time on major networks to counter Visa's official sponsorship of the 1992 Olympic Games in Albertville, France and Barcelona, Spain. Although American Express did not use the Olympic five-ring symbol or the word "Olympic" it featured commercial spots that referred generally to "winter fun and games" and depicted the French Alps. American Express also ran advertisements that stated, "And remember, to visit Spain, you don't need a visa" and "If you're traveling to Norway, you'll need a passport, but you don't need a visa." *American Express Replies to Criticism*, N.Y. TIMES, Jan. 7, 1992, at B8. The IOC threatened to sue American Express for ambush marketing but ultimately did not file a suit. Martha Moore, *Plastic War: IOC to Sue AmEx Over Ads*, USA TODAY, June 16, 1993, at 9C.

¹⁶ Alan Bayless, "Ambush" Marketing Is Becoming Popular Event at Olympic Games, WALL ST. J., Feb. 8, 1988, at 27. For example, McDonald's was an official sponsor of the 1988 Winter Games in Calgary. Michael Hiestand, *Ambushers Cut Into Sponsors' Ground*, USA Today, June 16, 1993, at 9C. Wendy's responded by sponsoring the ABC broadcast of those Games. *Id.* Furthermore, Wendy's featured ski-racing posters in its storefronts that proclaimed, "We'll Be There!", printed Olympic stories on its trayliners, and inscribed what resembled Olympic rings on its napkins. *Id.*

¹⁷ For example, Coca-Cola paid \$33 million to be an official sponsor of the 1992 Olympics but Pepsi-Cola ambushed Coca-Cola by airing a commercial featuring Magic Johnson, a member of the United States Olympic basketball team. Stuart Eliot, *Jousting by Mass Marketers Is the Newest Olympic Sport*, N.Y. TIMES, July 15, 1992, at D1.

¹⁸ Lori L. Bean, *Ambush Marketing: Sports Sponsorship Conference and the Lanham Act*, 95 B.U. L. REV. 1099 (1995).

¹⁹ Robert N. Davis, *Ambushing the Olympic Games*, 3 VILL. SPORTS & ENT. L.J. 423, 430 (1996).

²⁰ Salt Lake 2002 Media Report, *What Is Brand Protection?*; see also U.S. Olympic Committee v. Intelicense Corporation, 222 U.S.P.Q 766, 768 (1984).

USOC and SLOC entered into a Joint Marketing Agreement for the purpose of marketing the 2002 Winter Olympic Games. The USOC and SLOC formed “Olympic Properties of the United States (“OPUS”), a limited liability corporation, and granted to OPUS the right to license the various Olympic and Paralympic terminology, marks, and images to sponsors, suppliers, and partners who would finance the 2002 Winter Games.²¹ Between 1999 and 2002, the SLOC investigated over 431 cases involving intellectual property rights infringements, while in the second half of 2001 alone, the USOC investigated 246 cases.²² By the end of 2001, more than half of the cases were “successfully resolved.”²³

¶8 The SLOC sought to educate the public about the basics of intellectual property and ambush marketing in its battle against trademark infringement. The SLOC official website contained a “Frequently Asked Questions” page which answered questions such as “What is a Trademark?” and “What is Ambush Marketing?”²⁴ Additionally, the SLOC and the USOC launched educational campaigns that included print advertisements in trade and consumer publications; a mass mailing outlining trademark regulations aimed at the general public, athlete agents, retailers, National Organizing Committees, Olympic sponsors, suppliers and licensees; and sponsored brand protection workshops.²⁵ The SLOC also released to the media a video entitled, “The Protection of Olympic and Paralympic Marks.”²⁶ Stories about the protection of Olympic marks appeared in newspapers and on television. The SLOC also publicized legal actions filed alleging trademark and copyright infringement of the Olympic symbols.²⁷

¶9 As part of a surveillance strategy, the SLOC used the technique of “mystery shopping” whereby brand protection agents made random, unannounced visits to area retail shops and e-commerce sites.²⁸ Agents reported that about half of the shops they visited were carrying unlicensed merchandise bearing Olympic-related marks.²⁹ In response, the SLOC sent an educational letter about brand protection to Park City retailers, asked the Chamber of Commerce to inform its members of the SLOC’s intellectual property rights involved, and ran an article in the local paper about anti-counterfeiting.³⁰ Within two weeks, the mystery shoppers found that approximately seventy-five percent of the suspected stores discontinued selling infringing items.³¹

¶10 In Athens, strict regulations by the Greeks and the IOC dictated that spectators at the Olympics could be refused admission to events unless they discarded food or drinks made by companies that were not official sponsors.³² Fans were allowed into the Olympic complex with other food and beverage as long as it was the product of an official sponsor. Olympic staff was also trained to check for t-shirts, hats, and bags displaying

²¹ See Wall, *supra* note 13, at 1244.

²² See *id.* at 1255

²³ *Id.*

²⁴ The Official Website of the Salt Lake City 2002 Olympic Games, *FAQ*, formerly at http://www.olympic.org/uk/games/past/index_uk.asp?OLGT=2&OLGY=2002 (on file with the author).

²⁵ See Wall, *supra* note 13, at 1257-58.

²⁶ *Id.* at 1257.

²⁷ *Id.*

²⁸ *Id.* at 1258.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² The Official Site of the Athens 2004 Olympic Games, *Restricted Items and Actions*, at www.athens2004.com/en/specAdviceRestricted (last visited May 1, 2005).

the unwelcome logos of non-sponsors. Those spectators who appeared to be wearing merchandise from the sponsors' rivals in an attempt to catch the eyes of television audiences were required to wear their shirts inside out or were removed from the venue.³³

IV. LEGAL CHALLENGES TO AMBUSH MARKETING

¶11 A trademark holder will most often invoke the protections and remedies provided by 15 U.S.C. §1114 (§ 32) and 15 U.S.C. §1125(a) (§ 43(a)) of the Lanham Act to challenge an ambusher. One of the problems with challenging ambush marketers under the Lanham Act is that the consumer protection-oriented approach may fail to provide courts with an appropriate rationale to find for trademark holders. Specifically, the "likelihood of confusion" analysis often does not apply to the facts of ambush cases.³⁴ Ambushers often do not use or display the Olympic marks but instead create a false association with the marks and the Olympics. Additionally, survey evidence of actual consumer confusion may not be probative of whether consumers care about the identity of the actual sponsors or the impact it may have on their respective consumer behavior. However, § 43(a) does expressly limit the actions of competitors. Section 43(a)(1) protects trademark owners' sponsorships and endorsements by prohibiting a competitor's false designation of origin when it "is likely to cause confusion . . . or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person."³⁵

¶12 The court's opinion in *MasterCard International, Inc. v. Sprint Communications Co.* demonstrates the willingness of courts to protect sponsorship and licensing contracts under § 43(a) even though there may be no actual consumer confusion. MasterCard, a 1994 World Cup sponsor, successfully enjoined Sprint, a 1994 World Cup partner, from issuing "card-based payment and account access devices" with "World Cup '94" trademarks based upon MasterCard's agreement with ISL that MasterCard had the exclusive rights to use the "World Cup '94" trademarks on "card-based payment and account access devices," which was interpreted to include any telephone credit card.³⁶ Although the court mentions consumer confusion caused by the public's belief that the World Cup approved of Sprint's use of its trademarks, in reality, consumers were probably not confused. Consumers could be confused about the sponsorship only to the extent that they thought about it. Likely, most consumers did not care whether Sprint officially sponsored the 1994 World Cup Games.³⁷ Instead, the court used § 43(a) to

³³ *Id.*

³⁴ A typical list of factors courts consider in determining likelihood of confusion under §§ 32 and 43(a) are: (1) the strength of the plaintiff's mark; (2) the similarity of the parties' respective marks; (3) the similarities of the products or services; (4) evidence of actual confusion; (5) consumer sophistication; and (6) the defendant's intent to confuse.

³⁵ 15 U.S.C. 1125 (1999).

³⁶ *MasterCard Int'l, Inc. v. Sprint Communications Co.*, 1994 WL 97097 (S.D.N.Y. 1994), *aff'd*, 23 F.3d 397 (2d Cir. 1994).

³⁷ Lori L. Bean, *Ambush Marketing: Sports Sponsorship Confusion and the Lanham Act*, 75 B.U. L. REV. 1099, 1130 (1995).

protect MasterCard's investment.³⁸ This is by no means a clear precedent for ambush marketing cases.

A. *Ethical and Policy Considerations*

¶13 Unless a clear decision is made by the courts or legislature, ambush marketing will continue and increase. The question arises as to whether or not practices such as ambush marketing are ethical, illegal, or simply smart business practice. Critics call ambush marketing "parasite marketing,"³⁹ claiming that companies are deliberately looking for ways to piggyback on their rivals' sponsorship of major events despite protests from sponsors and event organizers. The ambusher that gives the impression of involvement without payment is merely serving its own narrow self-interest and, in doing so, engages in behavior that is harmful to the greater good of sport.

¶14 Supporters of ambush marketing, including the author, see it as smart business.⁴⁰ Arguably, ambush marketing provides a positive free market force. By exposing to official sponsors and event organizers the true scope of exclusivity that any sponsor can reasonably expect to enjoy, ambushers in effect help quantify the true market value of Olympic sponsorship while participating in the marketing blitz in a manner they deem most cost effective for their company. As it becomes clear to potential sponsors of future Olympic Games that event organizers will not be able to stop all ambush marketing efforts, this should be a factor that is accounted for in determining the fees to be paid for official sponsorship. Critics of ambush marketing would suggest that the threat of ambush marketing could ultimately impair the ability of event organizers to host elaborate and successful Olympic Games if ambush marketing deters large multinational corporations from being official sponsors. However, the appeal to large corporations of the world-wide exposure that results from sponsorship of the Olympic Games will never be diminished by market imperfections such as ambushers to the point of threatening the budgets of event organizers. Additionally, as is evident from the ongoing efforts to stop ambushers, the practice of ambush marketing encourages organizers to work harder to thwart intellectual property violations, and raises the awareness of intellectual property rights globally—a long-term benefit to all intellectual property owners.

³⁸ See *MasterCard Int'l, Inc.*, 1994 WL 97097, at *3 ("Irreparable harm in this case comes from the loss of MasterCard's exclusive right to issue cards with the World Cup mark").

³⁹ Stephen McKelvey, *An Analysis of the Ongoing Global Efforts to Combat Ambush Marketing: Will Corporate Marketers "Take" the Gold in Greece?*, 14 LEGAL ASPECTS SPORT 191, 193 (2004).

⁴⁰ People think ambush marketing hurts the Olympics? Good. Who cares? Are the Olympics going to disappear from the planet? I don't think so. This isn't religion or virginity here—it's business. Marketing is a form of warfare, and the ambush is a hell of a weapon.