FAIR USE & FAIR PLAY: OLYMPIC MARKETING IN THE INFORMATION AGE

By: Alex Locke†

TABLE OF CONTENTS

INTRODUCTION 339
I. THE OLYMPICS: 342
A. *The Ancient Games* 342
B. *The Modern Olympic Games and the Formation of the IOC* 343
C. *Olympic Organization Structure* 344
II. SPONSORSHIP AND AMBUSH MARKETING 345
A. *The TOP Sponsorship Program* 345
B. *Ambush Marketing* 346
C. *Sponsorship and the Athlete* 348
III. OLYMPICS AND LEGISLATION: 350
A. *Trademark Infringement and The Lanham Act:* 350
B. *The USOC and its Legislative Weapons:* 351
C. *San Fransisco Arts & Athletics, Inc. v. United States Olympic Committee:* 353
D. *Power, Not Absolute Power:* 353
IV. BROADCASTING RIGHTS AND SOCIAL MEDIA: 355
A. *Exclusive Rights; Now What?:* 355
B. *National Basketball Association v. Motorola:* 356
C. *Social Media* 357
V. THE PROPOSAL 358
A. *Fair Use: General Law vs. Ted Stevens:* 358
B. *Establish a Fair Use Board* 361
C. *Amend Ted Stevens Act to Allow for Fair Use Statutory Defense* 363

† Notes Editor, *International Comparative, Policy & Ethics Law Review*, J.D. Candidate (June 2018), Benjamin N. Cardozo School of Law; Alexander Fellows Judicial Clerk: U.S. District Court for the Eastern District of New York; B.A. in Sports Management, University of Michigan, 2014. Alex is working in intellectual property licensing upon graduation. Sincere gratitude and thanks goes to Professor David J. Weisenfeld for his advice and assistance on this note.

INTRODUCTION

The Olympics are a great spectacle that brings the world together. Sponsoring entities sign multimillion dollar contracts in order to fund the games and receive all of the benefits of association with the games. While increased intellectual property protections seemed imperative at a point to keep the Olympic Games sponsorship program intact, some legislation has had a counter-intuitive effect leading to confusion, hyper-litigation and an exploitation of the very athletes that make the games so great. There is legitimacy to the International Olympic Committee's (IOC) concerns regarding ambush marketing and sponsorship protection. This note will outline how many of the IOC's concerns regarding sponsorship protection are legitimate, yet their execution has been both overreaching and counterintuitive in today's media climate. This Note will particularly focus on legislation that goes beyond traditional intellectual property law specifically to appease Olympic organizers and outline how traditional intellectual property laws coupled with a modern approval process could help the IOC achieve their goal in a more efficient and ethical manner.

Marketing and sports first collided in the 1870s when tobacco cards began to feature prominent baseball players of the era.[1] The massive boom in sports marketing and eventually sponsorships did not begin until the advent of television and the live broadcasting of sporting events.[2] The main incentive for corporate entities to market and sponsor in conjunction with sports is to forge a connection in the mind of consumers between their brand and the emotions that sports elicit from their loyal fan base.[3] Marketers and event organizers soon realized that by commercializing sporting events they could reach large universal audiences.[4] This year global sponsorship spending is projected to reach an all-time high at $60.2 billion, approximately doubling over the past ten years.[5] But what is sponsorship and why is it important? According to the IEG Sponsorship Conference, sport sponsorship can be defined as

---

1 Douglas Idugboe, *The History of Sports and Marketing*, SMEDIO (Nov. 1, 2016), http://www.smedio.com/the-history-of-sports-and-marketing/.

2 *Id*.

3 *Id*.

4 *Id*.

5 IEG, *Global sponsorship spending from 2007 to 2016 (in billion U.S. dollars)*, STASTISTA (Nov. 1, 2016), https://www.statista.com/statistics/196864/global-sponsorship-spending-since-2007/.

"cash and/or in-kind fee paid to a property in return for access to the exploitable commercial potential associated with that property . . ."[6] Sponsorship introduced a simple way for entities to forge an association with highly favorable organizations and events; Sport sponsorship became one of the most important tools for marketers, comprising a substantial chunk of the global $100 billion advertising market.[7]

The Olympic Games in Rio this past summer made history and not in the way those involved would have had hoped. For the first time since the 2000 games, the total television audience declined from the previous games.[8] This may be troubling for NBC, as it has paid billions for the exclusive rights to air the games through 2032, but not nearly as troubling as it may be for the IOC and entities in the business of broadcasting sports as a whole.[9] This should not have come as a complete surprise as NBC CEO Steve Burke stated what he called his "nightmare scenario" prior to the Rio Games, "We wake up someday and the ratings are down 20 percent,…If that happens, my prediction would be that millennials had been in a Facebook bubble or a Snapchat bubble and the Olympics have come, and they didn't know it."[10] If it is true and the coveted millennial consumer was immersed in a social media bubble, the Olympics were surely in that bubble as the Olympics were mentioned 175 million times on Twitter during the Rio Olympic Games, with individual athletes like Michael Phelps, Usain Bolt, Simone Biles and Neymar each being mentioned over one million times.[11] The main issue is that these mentions don't necessarily convert into revenue for NBC. NBC clearly knew the importance of social media and prior to the games had created several partnerships aimed at driving millennials from social media towards either NBC on their television or the NBC website.[12] However, without a cable box or subscription, users could only watch thirty minutes of content and then would be prompted to spend thirty dollars to view more.[13] As viewing consumption preferences change, the answer may not be to use these

---

6 Jason Belzer, *The (R)evolution of Sports Sponsorships,* FORBES (Nov. 1, 2016), http://www.forbes.com/sites/jasonbelzer/2013/04/22/the-revolution-of-sport-sponsorship/#5b6b2a367b3d.

7 *Id.*

8 Eric Deggins, *NBC Declares Rio A 'Media' Success, Though TV Ratings Were Down*, NPR (Nov. 1, 2016), http://www.npr.org/sections/thetorch/2016/08/23/491024790/nbc-declares-rio-a-media-success-though-tv-ratings-were-down.

9 *Id.*

10 Jeff Andrews, *NBC Blames Millenials and Social Media For Awful Olympics Ratings*, VOCATIV (Aug. 22, 2016), http://www.vocativ.com/352888/nbc-blames-millennials-and-social-media-for-awful-olympics-ratings/.

11 *Id.*

12 Clio Chang, *How the Olympics Lost Millennials*, THE NEW REPUBLIC (Aug. 17, 2016), https://newrepublic.com/article/136096/olympics-lost-millennials.

13 *Id.*

new platforms to drive consumers to the old viewership methods, but rather, to adapt to the new medium and use creative advertising by official sponsors to provide cheaper and more available content to all.

As the numbers spent on sponsorship have risen at a dramatic rate, the return of such partnerships are beginning to be called in to question due to a multitude of factors including the rise of social media prominence which has led to the availability of virtually endless content for consumers as well as difficulties controlling a message once it is posted to social media.[14] Some companies like State Farm and MillerCoors have reacted to the changing consumption model of the times and in turn have adjusted their sponsorship budget and strategy noting that while the sponsorship market has grown drastically, the consumer base that the sponsorship is geared to target has remained relatively stagnant.[15] Other entities, like the IOC and the companies that sponsor the IOC have looked primarily to government legislation and hyper-litigious methods to protect their investments.[16]

Section I of this Note will examine the history of the Olympics and the formation of the modern Olympic movement. Section II will examine how the Olympics are funded and why ambush marketing is one of the greatest threats to the Olympic movement. Section III of this note will examine how the IOC have used intellectual property laws and further legislation, such as the Amateur Sports Act to protect its interests. Section IV will highlight and try to clarify where to draw the line along the slippery slope at the intersection of broadcasting rights and the previously mentioned enforcement methods. Section V of this Note will examine the unique issues the rise in social media and the shifting of the media landscape will pose for the future of the Olympic games, as well as, highlight my proposal of eliminating national Olympic legislation and instead creating an international Olympic fair use board.

I. THE OLYMPICS:

A. The Ancient Games

The ancient Olympic Games began in the year 776 BC. The original games were created primarily as a part of a religious festival in honor of Zeus, the father of Greek gods and goddesses. The ancient

---

14 Eric Deggins, *supra* note 8.

15 *Id*.

16 Paul Geohegan, *Has Protection of Olympic Sponsors Gone Too Far?*, METRO (Nov. 1 2016), http://metro.co.uk/2012/07/24/has-protection-olympic-sponsors-gone-far-3819263/.

games concluded in 393 AD.[17] The ancient games were hosted in Olympia, a sanctuary site named after Mt. Olympus, a nod to Greek mythology, which posited that Mt. Olympus was home to the greatest gods and goddesses.[18] According to some literary texts, the only athletic event for the first thirteen years of Olympic competition was the stadion race, a 600-foot long foot race.[19] The games consisted of all male competitors from Greek city-states that all followed the same religion and spoke the same language and were held in Olympia every four years for nearly twelve centuries.[20] In 393 AD Emperor Theodosius deemed the games a "pagan cult" and banned their existence.[21]

B. The Modern Olympic Games and the Formation of the IOC

The Olympics remained abandoned for nearly 1,500 years.[22] It was not until the late 1800s when French educator Pierre, baron de Coubertin, took a particular interest in reforming education, particularly in the physical education context.[23] Coubertin believed that the best way to develop the minds of the youth was to develop their physical strength and body simultaneously.[24] When Coubertin visited the ruins of Olympia, it occurred to him that reviving the Olympic Games could combine elements of character building, courage and endurance through international competition during a time that he saw as the infancy of the commercialization of sports while proving his theory regarding physical education to be true.[25]

After first pitching his idea in 1892 and receiving little enthusiasm, Coubertin went ahead and formed the International Olympic Committee (IOC) in 1894 and began planning the first modern Olympic Games. [26] Unlike the ancient games, which only allowed Greek citizens to compete, Coubertin organized the games to feature athletes from across the globe and the first modern games took place in

---

17 *The Real Story of the Ancient Olympic Games*, PENN. MUSEUM (Nov. 2, 2016), http://www.penn.museum/sites/olympics/olympicorigins.shtml.

18 *Id.*

19 *Id.*

20 *Id.*

21 *Ancient Olympics: History*, OLYMPIC (Nov. 2, 2016), https://www.olympic.org/ancient-olympic-games/history.

22 John J. Macaloon, *Pierre, baron de Coubertin*, BRITANNICA (Nov. 2, 2016), https://www.britannica.com/biography/Pierre-baron-de-Coubertin.

23 *Id.*

24 *The Modern Olympic Games,* SCHOLASTIC (Nov. 2, 2016), *http://teacher.scholastic.com/activities/athens_games/modern.htm*.

25 *Id.*

26 *Id.*

Athens, Greece in 1896.[27] The first modern games featured forty-three events consisting of track-and-field, swimming, gymnastics, cycling, wrestling, weightlifting, fencing, shooting and tennis in which 280 male competitors representing thirteen nations competed in.[28]

In its infancy, the modern Olympics did not have much support and Coubertin became the president of the IOC in 1896 and tried to establish the Olympics as a legitimate event worldwide while the games were losing traction to world fairs.[29] Coubertin wrote the Olympic Charter, protocol, athlete's oath and contributed to the ceremonies involved in the games.[30]

Unlike the times of the ancient games, wars were not put on hold for the games and several Olympics were cancelled due to World Wars I and II.[31] The games became increasingly political while still positioning them as fun, amateur competition and in the 1980s the games almost reached their demise.[32] The United States boycotted the 1980 Moscow Summer games which led to the Soviet Union boycott of the games being hosted in Los Angeles several years later in 1984 and the entire movement was on the verge of bankruptcy.[33]

C. Olympic Organization Structure

There are many organizations involved in the modern Olympics hierarchy, all of whom are subject to the Olympic Charter.[34] At the top, is the IOC, which owns the rights to the Olympic images, emblems and anthem and is the final authority in regards to the Olympic movement.[35] The executives of the IOC assume various legislative functions including adding rules and regulations in furtherance of the Olympic Charter.[36] Then there are National Olympic Committees (NOC) and Organizing Committees of the Olympic Games (OCOG).[37] Each country that participates in the IOC has its own NOC, which is

---

27 *Id.*

28 *1896 First modern Olympics is Held*, HISTORY (Nov. 2, 2016), http://www.history.com/this-day-in-history/first-modern-olympics-is-held.

29 *Id.*

30 *The Modern Olympic Games, supra* note 24.

31 *Id.*

32 Tom Peck, *Father of Olympic Branding: My Rules are Being Abused*, INDEPENDENT (Nov. 1, 2016), http://www.independent.co.uk/sport/olympics/news/father-of-olympic-branding-my-rules-are-being-abused-7962593.html.

33 *Id.*

34 Olympic Charter, INTERNATIONAL OLYMPIC COMMITTEE (Nov. 2, 2016), https://stillmed.olympic.org/Documents/olympic_charter_en.pdf.

35 *Olympics and International Sports Law Research Guide*, GEO. L. LIBR. (Nov. 2, 2016), http://guides.ll.georgetown.edu/c.php?g=364665&p=2463479.

36 *Id.*

37 *Id.*

responsible for selecting and developing the athletes within their respective country and for nominating host cities where the games will take place.[38] When a host city is selected, the NOC from that city will develop an OCOG that will oversee the organization of the games for that year in compliance with the Olympic Charter, their contract with the IOC and the IOC executive board's instructions.[39]

The OCOG is responsible for controlling marketing activities within the host country and must receive approval from the IOC for all steps taken to combat ambush marketing and false associations forged with the Olympic movement.[40] The IOC allocates some of its revenue to the NOCs and OCOG, letting the local countries' organizations spend their budget how they see fit.[41]

II. Sponsorship and Ambush Marketing

A. *The TOP Sponsorship Program*

In 1983 the IOC hired Michael Payne, in 1983 a British marketing executive, at the height of the games troubles.[42] Payne introduced a novel plan, the TOP programme, which was geared towards bringing in large corporate sponsors, the revenue generated from the sponsors was to be split amongst the host city and countries competing in the games to offset the costs of sending competitors to the games.[43] Beginning in 1985 with nine partners and total revenue of $96 million, the TOP program guarantees its partners exclusive global usage rights of all Olympic assets in exchange for multi-million dollar fees, which then in turn get divided among the IOC, the NOCs and the OCOG.[44] The TOP sponsorship program has grown since then, to eleven commercial partners in 2012 generating revenue of $950 million. To become a TOP sponsor today, companies will have to shell out approximately $200 million and may still lose out on their association due to ambush

38 *Id.*

39 *Id.*

40 *Brand Protection: Olympic Marketing Ambush Prevention and Clean Venue Guidelines,* INTERNATIONAL OLYMPIC COMMITTEE (Nov. 2, 2016), http://www.gamesmonitor.org.uk/files/Technical_Manual_on_Brand_Protection.pdf.

41 Olympic Charter, *supra* note 34.

42 Tom Peck, supra note 32.

43 *Id.*

44 *Olympic Marketing Fact File*, INTERNATIONAL OLYMPIC COMMITTEE 2014 EIDTION, (Nov. 2, 2016), https://stillmed.olympic.org/Documents/IOC_Marketing/OLYMPIC_MARKETING_FACT_%20 FILE_2014.pdf.

marketing efforts.[45]

B. Ambush Marketing

Ambush marketing has been defined as, "a marketing technique in which advertisers work to connect their product with a particular event in the minds of potential customers, without having to pay sponsorship expenses for the event."[46] Ambush marketing is one of the biggest concerns companies have before ponying up fees to become sponsors. This fear is not unfounded. In 2009 alone, US Customs agent seized over $260 million worth of counterfeit goods, 60% of which were related to sports organizations.[47] Counterfeit goods are products that feature a mark that is "identical to, or substantially indistinguishable from, a registered mark."[48] Counterfeit goods are illegal while ambush marketing may fall into a "grey area."

While most sport spectacle organizers rely on traditional intellectual property laws, the short duration of Olympic presence in host cities has made it more difficult for the Olympic movement to combat ambush marketing; in response, the IOC has requested that each host city propose special legislation in preparation for hosting the Olympic Games.[49]

In an effort to deter present and future ambushers at its 2010 World Cup, FIFA caused local authorities to arrest two women attendees who were wearing orange Bavaria beer dresses.[50] The dresses were violation of the Second 2010 FIFA World Cup South Africa Special Measures Act of 2006.[51] Ironically this gave heightened publicity to the ambush brand and made FIFA look bad.[52] Countries like the United Kingdom and United States have enacted legislation that goes beyond their

---

45 Denise Lee Yohn, *Olympics Advertisers Are Wasting Their Sponsorship Dollars*, FORBES, (Nov. 1, 2016), http://www.forbes.com/sites/deniselyohn/2016/08/03/olympics-advertisers-are-wasting-their-sponsorship-dollars/#766ba43c6c65.

46 *Ambush Marketing*, BUSINESS DICTIONARY, http://www.businessdictionary.com/definition/ambush-marketing.html.

47 James L. Bikoff, *From the gridiron to gold medals: enforcing sports trademarks*, WORLD TRADEMARK REV. (Nov. 1, 2016), http://www.sgbdc.com/WTR_26_Sports_trademarks.pdf.

48 *Id*. (citing 15 U.S.C. §1127).

49 Chanel L. Lattimer, *Lord of the Rings: The Olympic Committee's Trademark Protection*, IPWATCHDOG (Nov. 22, 2016), http://www.ipwatchdog.com/2016/06/07/olympic-committee-trademark-protection/id=69739/; Jacquelyn Smith, *Olympic Hurdles For Advertisers: The Games' Unique Rules And Restrictions*, FORBES (Nov. 22, 2016), http://www.forbes.com/sites/jacquelynsmith/2012/07/24/olympic-hurdles-for-advertisers-the-games-unique-rules-and-restrictions/#2a7677d87a55.

50 *Id*.

51 *Id*.

52 *Id*.

traditional intellectual property law when the Olympics is concerned.[53] Some organizations, such as the 1996 Atlanta Olympic committee have resorted to a "name and shame" campaign, which purported to forge a distasteful image with those who tried to ambush the event as well as cease and desist letters for entities with smaller pockets.[54]

Prior to hosting the 2012 Olympics, British Parliament enacted the London Olympic Games and Paralympic Games Act of 2006 that governed which entities could represent an association with the London Games and in what manner.[55]

Small businesses such as a butcher shop that displayed their meat cuts in the shape of the Olympic rings and a local café that featured a "flaming torch baguette" on their menu received cease and desist letters threatening with fines of up to 20,000 pounds.[56] Out of fear and intimidation many small businesses in London forwent the opportunity to celebrate and communicate about the London Games.[57] Top Sponsorship program founder, Michael Payne states this has led to the adverse effect the very restrictions were set out to accomplish.[58] By going too far in restricting any and all usage of anything somewhat Olympic related, the IOC can be hurting its own brand by lessening public notice of and interest in the Games. Small entities lacking legal representation are likely to comply while the larger entities the legislation set out to curtail have found innovative ways to get around the restrictions.

Adidas was the official sportswear partner of the 2012 Olympics in London and supplied a vast majority of the Olympic competitors equipment and apparel.[59] However, social media analytics firm Socialbakers reported that during the two weeks of Olympic competition in London 2012, Nike Facebook fan base grew more than double than Adidas', even though Nike was not an official sponsor.[60] Nike was able to successfully skirt both intellectual property laws and Olympic specific legislation through creative advertisements on television, billboards and social media featuring athletics taglines and imagery without explicitly mentioning the Olympics or their marks.[61] Nike also took direct aim at the Olympics and the overprotection of its

---

53 *Id.*

54 *Id.*

55 *Id.*

56 Tom Peck, *supra* note 32.

57 *Id.*

58 *Id.*

59 Thomas J. Ryan, *Olympics Boost for Adidas, Nike Wins Social Draw,* SGB MEDIA (Aug. 17, 2002), https://sgbonline.com/olympics-boost-for-adidas-nike-wins-social-draw/.

60 *Id.*

61 Mark Sweeney, *Olympics 2012: Nike Plots Ambush Ad Campaign*, THE GUARDIAN (Jul. 25, 2012), https://www.theguardian.com/media/2012/jul/25/olympics-2012-nike-ambush-ad.

registered marks by showing athletes in other cities named London throughout the world such as London as well as advertising slogans "Greatness doesn't need its own anthem" and "greatness doesn't need a stadium".[62] Through creative and inspiring content, Nike was able to take advantage the popularity of the Olympics while simultaneously poking fun at the overprotective nature of the IOC. While the London Olympic Games and Paralympic Games Act of 2006 did not eliminate sportswear giant Nike from successfully cashing in on the Olympic Games, it did have a detrimental effect on smaller entities that likely may never have taken away any revenue from the games. The Olympics makes the lion share of its revenue from sponsorship which is successful through strong public perception, however, when the public is not engaged in talking about or discussing the games due to fear of litigation, then the adverse effect can be achieved.

Even with stringent restrictions, large companies like Nike are able to successfully cash in on the emotions elicited by the Olympics rather than focusing solely on the games itself. The guaranteed high returns afforded to sports marketers for years may have created complacency for official sponsors while their enforcement efforts have spurred highly creative responses from competitors. While the large companies continue to exploit the Olympics, smaller entities are completely shut out of the conversation. It is no longer enough to pay for the right to use the Olympic marks and slap their logos on products and advertisements. The IOC and sponsoring brands must continue to evolve and generate desired content in order to see a return on their investment.

C. Sponsorship and the Athlete

While sponsorship is undoubtedly imperative to the success and continuance of the modern Olympic movement, sponsorship is also a key component of funding for the athletes as well.[63] Dating back to Greece's classical era, athletes' have been dependent upon financial compensation for an association with their athletic prowess.[64] Today world famous athletes like Michael Phelps and Usain Bolt have become very rich primarily due to lucrative sponsorship endeavors, however, many lesser-known athletes have difficulty affording the expenses associated with training for and traveling to the Olympic games.[65]

---

62 *Id.*

63 Sarah Bond, *Yes, Ancient Olympic Athletes Had Sponsorship Deals, Too*, FORBES (Nov. 2, 2016), http://www.forbes.com/sites/drsarahbond/2016/08/10/how-athletes-have-made-money-off-the-olympics-from-ancient-athens-to-rio/#5c77bca2360d.

64 *Id.*

65 *Id.*

However, the same cannot be said for the average Olympic athlete.

Rule 40 of the Olympic charter institutes a "blackout period" barring athletes set to compete in the Olympics from using their own name, image or sporting performance in any advertisements leading up to and during the games without IOC approval.[66] In response to athlete protest in 2012, the IOC altered Rule 40 slightly prior to the 2016 games in Rio.[67] The change allowed for NOCs to take a country-by-country approach allowing for some flexibility in athlete advertisements however, many NOC changes have been minimal or confusing.[68] Athletes have turned to the general public for financial support in order to prepare and even attend the games. According to the popular internet crowd-funding website GoFundMe, over $750,000 had been raised by the public to help support athletes attending the 2016 Rio Games, potentially opening a door for non-sponsors to support athletes which would generate positive press for the non-sponsor at the expense of the IOC's image.[69] Athletes also have been helped by local clubs and organizations that allow then to train by providing them gym access and materials necessary. This was the case for Ibtihaj Muhammad who made history as the first Olympic Muslim athlete to wear a hijab at the Rio Games in 2016.[70] Muhammad credits her ability to train for and attend the Rio games to her local fencing gym that has supported her efforts throughout her career.[71] Even with the United States Olympic Committee's stipend and some corporate sponsorship deals, Mohammad still needed to create a crowd-sharing platform in order to compete in the Olympics.[72] It is ironic that her gym and support group cannot claim an association to Mohammad during the "blackout period" pursuant to Rule 40 so that only sponsors can benefit from her competition even though the competition would not have been possible had it not been for the support of local organizations.[73]

---

66 Alex Kelham, *Navigating Olympic Advertising: Rule 40 – A Global Perspective*, LAWINSPORT (Feb. 16, 2016), http://www.lawinsport.com/features/item/navigating-olympic-advertising-rule-40-a-global-perspective.

67 *Id.*

68 *Id.*

69 *New Data: Over $750,000 Raised On GoFundMe For Rio Athletes' Training And Travel Expenses*, GOFUNDME (Nov. 1, 2016), https://www.gofundme.com/blog/2016/08/04/new-data-over-750000-raised-on-gofundme-for-rio-athletes-training-and-travel-expenses/.

70 Ahiza Garcia, *U.S. Olympic athletes sure aren't paid like champions*, CNN MONEY (Nov. 2, 2016), http://money.cnn.com/2016/07/07/news/olympics-rio-us-athletes-finances/.

71 *Id.*

72 Anne Peterson, *Crowdfunding Olympic dreams has its limits*, ASSOCIATED PRESS (Jun. 29, 2016), http://bigstory.ap.org/article/708fc297f3604c6581a5a96a16789971/crowdfunding-olympic-dreams-has-its-limits.

73 Daniel Miller, *How talent agencies help athletes who 'transcent sports' cash in on Olympic heroics*, LOS ANGELES TIMES,(Aug. 16, 2016), http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-olympics-rio-talent-agencies-20160816-snap-story.html.

III. OLYMPICS AND LEGISLATION:

A. Trademark Infringement and The Lanham Act:

Trademark Law in the United States is governed by the Lanham Act. "The touchstone of trademark infringement under the Lanham Act . . . is 'likelihood of confusion.'"[74] Confusion in the trademark infringement context traditionally meant confusion as to the source of a good or service, but courts have come to accept confusion as to sponsorship, endorsement, or some other affiliation as satisfying the confusion requirement.[75] The Lanham Act proscribes false advertising and deceptive use of trademarks as a means of a cause of action as well; meaning a cause of action may proceed lacking confusion or a likelihood of confusion.[76] It is important to note that the legislative intent behind the Lanham Act was not to prohibit all uses of a trademark by non-rights holders.[77] Section 32 of the Lanham Act lays out the consumer confusion aspect of trademark law, which generally does not apply to ambush marketing[78] as many of the non-licensed outlets do not actually use Olympic words or insignias, yet may create a false association with the games themselves. Furthermore, consumer survey data may be difficult to obtain due to the short lifespan of Olympic events as well as the fact that consumers may not be concerned with the actual sponsors of the event.

Section 43(a) of the Lanham Act would be the tool most effective for protection of corporate sponsorship.[79] In *MasterCard International, Inc. v. Sprint Communications Co.* courts have shown their willingness

---

74 *See* Mushroom Makers, Inc. v. R. G. Barry Corp., 441 F.Supp. 1220, 1225 (S.D.N.Y.1977), *aff'd*, 580 F.2d 44 (2d Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979).

75 *See* Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 204-05 (2d Cir. 1979); James Burrough Ltd. v. Sign of the Beefeater, Inc., 540 F.2d 266, 274 (7th Cir. 1976); Prof'l Golfers Ass'n v. Bankers Life & Casualty Co., 514 F.2d 665, 670 (5th Cir. 1975).

76 *See* 15 U.S.C. §§1114(1)(a), 1125(a); *see* American Home Prod. Corp. v. Johnson & Johnson, 577 F.2d 160, 164-65 (2d Cir. 1978).

77 For example, several sources suggest that registered trademarks may legally be used without the consent of the owner in comparative advertising. *See* R.G. Smith v. Chanel, Inc., 402 F.2d 562, 565-66 (9th Cir. 1968); Societe Comptoir De L'Industrie Cotonniere Etablissements Boussac v. Alexander's Dep't Stores, Inc., 299 F.2d 33, 36 (2d Cir. 1962); Ringling Bros.-Barnum & Bailey Comb. Shows, Inc. v. Chandris America Lines, Inc., 321 F. Supp. 707, 711-12 (S.D.N.Y.1971); *see generally Comparative Advertising*, 67 TRADEMARK REP. 351-418 (1977) (collection of articles).

78 15 U.S.C. §1114 (§32) ("(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").

79 15 U.S.C. §1125(a) (citing §43(a)).

to acknowledge and protect corporate sponsorship and licensing endeavors under the Lanham Act, even while lacking evidence of actual consumer confusion.[80] In 1994 MasterCard purchased the exclusive rights to use World Cup intellectual property in relation to "card-based payment and account access devices."[81] The court granted MasterCards enjoinment of Sprint's use of the words "World Cup '94" on its products, even though the court believed that the consumer public was likely not confused[82]; it has been opined that the average consumer likely did not care whether or not Sprint was official sponsor of the World Cup.[83]

B. *The USOC and its Legislative Weapons:*

Created by Congress, through the passing of the Amateur Sports Act of 1978[84] and then re-codified and renamed in 1998 as the Ted Stevens Olympic and Amateur Sports Act of 1998,[85] the Act has granted the United States Olympic Committee (USOC) the exclusive rights to determine how any and all Olympic related symbols, images and words may be used within the United States.[86] The USOC became the

---

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

81 *Id.*

82 *Id.*

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

84 15 U.S.C. §383 (1964).

85 36 U.S.C. §220506 (2000).

86 *Id.*

> Exclusive right to name, seals, emblems, and badges, provides that:
>
> (a) Exclusive right of corporation. – Except as provided in subsection (d) of this section, the corporation has the exclusive right to use –
>
> (1) the name "United States Olympic Committee";
>
> (2) the symbol of the International Olympic Committee, consisting of 5 interlocking rings, the symbol of the International Paralympic Committee, consisting of 3 TaiGeuks, or the symbol of the Pan-American Sports Organization, consisting of a torch surrounded by concentric rings;
>
> (3) the emblem of the corporation, consisting of an escutcheon having a blue chief and vertically extending red and white bars on the base with 5 interlocking rings displayed on the chief; and
>
> (4) the words "Olympic", "Olympiad"; "Citius Altius Fortius", "Paralympic", "Paralympiad", "Pan-American", "American Espirito Sport Fraternite", or any combination of those words.
>
> (b) Contributors and Suppliers. –
>
> The corporation may authorize contributors and suppliers of goods or services to use the trade name of the corporation or any trademark, symbol, insignia, or emblem of the International Olympic Committee, International Paralympic Committee, the Pan-

permanent governing body for the Olympics movement in the United States and the USOC was granted the power to govern amateur athletics in the United States as they pertained to the Olympic movement an granted the USOC the right to "exercise exclusive jurisdiction over all matters."[87]

The United States Court of Appeals for the Second Circuit in its decision in *USOC v. Intelicense Corp.* determined that "it is clear that the Congressional intent in enacting §380 was to promote the United States Olympic effort by entrusting the USOC with unfettered control over the commercial use of Olympic-related designations.[88] This would facilitate the USOC's ability to raise those financial resources from the

> American Sports Organization, or of the corporation to advertise that the contributions, foods, or services were donated or supplied to, or approved, selected, or used by, the corporation, the United States Olympic team, the Paralympic team, the Pan-American team, or team members.

87 San Francisco Arts & Athletics v. United States Olympic Comm., 438 U.S. 522, 529 (1987) [hereinafter SFAA]. (In this decision, the Supreme Court, *citing* 36 U.S.C. §374, enumerated the purposes and objectives of the USOC:

> (1) establish national goals for amateur athletic activities and encourage the attainment of those goals; (2) coordinate and develop amateur athletic activity in the United States directly relating to international amateur athletic competition, so as to foster productive working relationship among sports-related organizations; (3) exercise exclusive jurisdiction, either directly or through its constituent members of committees, over matters pertaining to the participation of the United States in the Olympic Games and the Pan-American Games, including the representation of the United States in such games, and over the organization of the Olympic Games and the Pan-American Games when held in the United States; (4) obtain from the United States, either directly or by delegation to the appropriate national governing body, the most competent amateur representation possible in each competition and event of the Olympic Games and of the Pan-American Games; (5) promote and support amateur athletic activities involving the United States and foreign nations; (6) promote and encourage physical fitness and public participation in amateur athletic activities; (7) assist organizations and persons concerned with sports in the development of amateur athletic programs for amateur athletes; (8) provide for a swift resolution of conflicts and disputes involving amateur athletes, national governing bodies, and amateur sports organizations, and protect the opportunity of any amateur athlete, coach, trainer, manager, administrator, or official to participate in amateur athletic competition; (9) foster the development of amateur athletic facilities for use by amateur athletes and assist in making existing amateur athletic facilities available for use by amateur athletes; (10) provide and coordinate technical information on physical training, equipment design, coaching, and performance analysis; (11) encourage and support research, development, and dissemination of information in the areas of sports medicine and sports safety; (12) encourage and provide assistance to amateur athletic activities for women; (13) encourage and provide assistance to amateur athletic programs and competition for handicapped individuals, including, where feasible, the expansion of opportunities for meaningful participation by handicapped individuals in programs of athletic competition for able-bodied individuals; and (14) encourage and provide assistance to amateur athletes of racial and ethnic minorities for the purpose of eliciting the participation of such minorities in amateur athletic activities in which they are underrepresented."

88 U.S. Olympic Comm. v. Intelicense Corp., S.A., 737 F.2d 263, 266 (2d Cir. 1984).

private sector that are needed to fund the United States Olympic Movement."[89] The amended act provided for a civil cause of action for use of Olympic marks within the United States without the consent of the USOC compared to the previous codification, which only provided for criminal penalties.[90] The 1978 Act provided for protections of Olympic words and symbols that go beyond traditional trademark protections.[91]

C. *San Fransisco Arts & Athletics, Inc. v. United States Olympic Committee:*

In 1981, the San Francisco Arts and Athletics, Inc. (SFAA) organized and promoted a "Gay Olympic Games" to parodize the Olympic games as well as draw attention to issues plaguing the LGBT community with events such as the passing of the "Gay Olympic Torch" and the lighting of the "Gay Olympic Flame."[92] The organization used their title "Gay Olympic Games" on promotional materials and merchandise for sale.

The USOC sent the SFAA a cease and desist which they did not comply with. After the SFAA did not cease using the term "Olympic" for their games, the USOC filed suit in federal court requesting that the SFAA be enjoined from using the term "Olympic" in association with their event.[93] The Federal Court granted a preliminary injunction, finding that under the Amateur Sport Act of 1978, consumer confusion did not need to proven as a result of the unauthorized use of the word "Olympic."[94] The court went on to state that an unauthorized user of the word "Olympic" may not rely on traditional statutory defenses that one might use a defense when accused of infringement under the Lanham Act.[95]

D. *Power, Not Absolute Power:*

The court's ruling in *SFAA*, demonstrated the USOC's ability to

---

89 *Id.*

90 *See* 36 U.S.C. §379 (1976) (The Supreme Court in SFAA provides the House Judiciary Committee's reasoning behind the shift in the 1978 statue from criminal to civil penalties was that "criminal penalty has been found to be unworkable as it requires the proof of criminal intent."); *SFAA*, 483 U.S. 522, at 529 (citing H.R. Rep. No. 95-1627, p. 15 (1978) (House Report), U.S. Code Cng. & Admin. News 1978, pp. 7478, 7488.

91 36 U.S.C. §380 (1997).

92 *SFAA*, 438 U.S. 522, 529.

93 *Id.*

94 *Id.*

95 *Id.*

curb use of its intellectual property without a showing of confusion and the lack of statutory defenses for the accused infringer and made it seem as any reference to the Olympic Games at all absent official sponsorship would be restricted entirely. In large part this may be true, however there are exceptions and not all courts agree on the level of power Congress intended the USOC to wield.

In *Stop the Olympic Prison v. United States Olympic Committee*, the plaintiff, Stop the Olympic Prison (STOP), created, printed, and distributed flyers prior to the 1980 Winter Olympic Games in Lake Placid.[96] The posters featured the words "STOP THE OLYMPIC PRISON" in large block letters and also featured a depiction of the five Olympic rings altered to appear as large steel bars with an arm protruding through the bars holding a flaming torch.[97] The purpose of STOP's movement was to protest the government's plan to convert the Lake Placid Olympic village into a correctional facility after the games were completed.[98] STOP did not comply when the USOC issued an injunction and later the USOC filed suit.[99] STOP countered claiming that they had a protected First Amendment right to protest the usage of the land and that their use does not violate either trademark law or the Amateur Sport Act.[100] The court found for STOP, stating that the broad language contained in the Amateur Sports Act's exclusive use provision could not be interpreted to mean that the USOC has exclusive control over the words and symbols "for any purpose whatsoever".[101] The STOP court along with several others court went on to interpret the actual intent and scope of the act and determined that the exclusive use provision was intended not to be used to prohibit every instance of usage whether commercial in nature or not, but to prevent trademark registration in any Olympic marks, names or insignias by anyone other than the USOC.[102]

96 Stop the Olympic Prison v. United States Olympic Comm., 489 F. Supp. 1112, 1120 (S.D.N.Y. 1980).

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.* (Other courts agreeing as to the intent of the statue include: Int'l Sports Mktg., Inc. v. Int'l Olympic Comm., and United States Olympic Comm., No. 83-44 (D. Vt. 1983); 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)).

IV. BROADCASTING RIGHTS AND SOCIAL MEDIA:

A. Exclusive Rights; Now What?:

Announced in May 2014, NBC Universal (NBC) acquired the exclusive broadcast rights in the Olympics in the USA from 2021 through 2032, valued at $7.65 billion in conjunction with a $100 million signing bonus allocating NBCU promotion rights of the Olympics and Olympic values from 2015 through 2020.[103] NBCU's rights extend across all media platforms including free-to-air television, subscription television, Internet and mobile.[104]

NBCU may be concerned to have purchased such an expensive and lengthy contract after ratings from the 2016 Rio Games were reported to have plunged fifteen percent from the previous games in London.[105] Social media's influence has been a huge fear for event organizers and broadcast rights holders alike and preemptive and reactive action across a wide array of leagues and organizations including the English Premier League, Ultimate Fighting Championship, National Football League, the NCAA and the IOC.[106] The IOC's guidelines states that "The use of Olympic Material transformed into graphic animated formats such as animated GIFs (ie GIFV), GFY, WebM, or short video formats such as Vines and others, is expressly prohibited."[107] The IOC also issued specific restrictions geared towards non-media entities in a letter sent out to many non-sponsoring companies stating, "[d]o not create social media posts that are Olympic themed, that feature Olympic trademarks, that contain Games imagery or congratulate Olympic performance unless you are an official sponsor as specified in the Social Media Section."[108]

---

103 Olympics, *IOC AWARDS OLYMPIC GAMES BROADCAST RIGHTS TO NBCUNIVERSAL THROUGH TO 2032*, OLYMPICS (Nov. 15, 2016), https://www.olympic.org/news/ioc-awards-olympic-games-broadcast-rights-to-nbcuniversal-through-to-2032.

104 *Id.*

105 Anthony Crupi, *'Nightmare' in Rio: NBC's Olympics Ratings Down 15% From London*, ADAGE (Nov. 15, 2016), http://adage.com/article/special-report-the-olympics/nightmare-rio/305594/.

106 Mazin Sidahmed, *Olympics ban on gifs and Vines disappoints social media sports fans*, THE GUARDIAN (Aug. 16, 2016), https://www.theguardian.com/sport/2016/aug/05/rio-olympics-ban-gifs-vines-social-media.

107 *Id.*

108 Christine Birkner, *Here Are the Many, Many Ways Your Business Can Get in Trouble for Tweeting the Olympics*, ADWEEK (Nov. 15, 2016), http://www.adweek.com/news/advertising-branding/here-are-many-many-ways-your-business-can-get-trouble-tweeting-olympics-172699.

B. National Basketball Association v. Motorola:

In *National Basketball Association v. Motorola*, Motorola produced and sold hand held pagers that distributed real time NBA stats and scores.[109] The NBA filed suit alleging copyright infringement, commercial misappropriation under New York law, false advertising and false designation of origin under Lanham Act, and violations of Communications Act. The court goes on to outline the copyrightability of live events as follows.[110]

Prior to 1976, federal copyright law did not touch or concern the copyrightabiliy of live events and broadcasts.[111] However, in 1976 Congress passed legislation affording broadcasts of live performance, including sports events, to be within the realm of copyright law; however, under 17 U.S.C. §101, such protection was only in the recording of the performance and not extended to the underlying event.[112] The pinnacle of work subject for copyright protection is works that constitute "original works of authorship".[113] The court concludes that athletic events are not "authored" in any way and contrasts them drastically from plays, movies, operas and television programs where the entire work is scripted and predictable time in and time out. The court decides that granting copyrights in athletic events would likely diminish fan interest and open up the possibility for joint authorship including coaches, cameramen referees, equipment managers and fans who all contribute to the "work" in some way or another.

While the underlying games themselves cannot be copyrighted, Section 101 of the Copyright Act was amended to state that "A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission."[114] Congress went on to explicitly include live sporting events through 17 U.S.C. §101 by stating, "[T]he bill seeks to resolve, through the definition of "fixation" in section 101, the status of live broadcasts—sports, news coverage, live performances of music, etc.—that are reaching the public in unfixed form but that are simultaneously being recorded."[115]

The court concluded that Motorola did not infringe the NBA's copyright in the broadcast of their games because Motorola only reproduced facts from the broadcasts, not descriptions or expressions of

---

109 Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir. 1997).
110 *Id.*
111 *Id.*
112 *Id.*
113 *Id.*
114 17 U.S.C. §102(a).
115 *Nat'l Basketball Ass'n*., 105 F.3d 841, 845 (citing 17 U.S.C. §101).

the game that would constitute the broadcast. "Because the [defendants] reproduce only factual information culled from the broadcasts and none of the copyrightable expression of the games, appellants did not infringe the copyright of the broadcasts."[116] While this case law is in the realm of the Copyright Act and not the Amateur Sports Act, it would seem illogical to allow someone to report a score without reporting where the score came from.

C. Social Media

Prior to the internet boom and the rise in social media, the distinction between marketing and media was quite clear.[117] Traditionally media companies created content that was engaging which marketers would in turn fork over large sums of their budget to acquire.[118] However, now due to the rapid rise in technology and lowered cost of creating content, marketing companies have begun to develop their own content, some of which is longer and more engaging than what is being put out by media companies.[119] As lines continue to blur further, it can be difficult to distinguish whether companies are producing media, or whether companies themselves have become members of the media as well. Over ninety percent of brands have begun to use one or two more social media platforms to engage with consumers, and it is not so easy to discern whether the content being employed by these brands is used to entertain the consumer or to engage in a business relationship with its consumers.[120]

Brands have become expected to take a stance on current issues and events through the media. This can be seen with the current "#deleteuber" viral hashtag. On January 28, 2017, after US President, Donald Trump, issued an executive order ceasing travel from seven majorly Islamic nations, large protests erupted at John F. Kennedy Airport in New York.[121] As a protest to the executive order, the New York Taxi Workers union called for a one hour work stoppage to and

---

116 *Id.*

117 Adam Fridman, *Blurring The Lines: When Marketing And Media Overlap*, INC. (Jan. 15, 2016), http://www.inc.com/adam-fridman/blurring-the-lines-when-marketing-and-media-overlap.html.

118 *Id.*

119 *Id.* ("As media technology becomes increasingly accessible, the defining lines begin to blur. Take Nestle for example. 'In 2014, the food and beverage giant created more hours of content than all of Hollywood combined,' says Brad Hunstable, CEO of Ustream, a popular video streaming and hosting service.").

120 *Id.*

121 German Lopez, *Why People Are Deleting Uber from Their Phones After Trump's Executive Order*, VOX (Jan. 29, 2017), http://www.vox.com/policy-and-politics/2017/1/29/14431246/uber-trump-muslim-ban.

from the airport and posted this boycott to their official Twitter account.[122] The ride sharing behemoth and a competitor of New York City taxis, Uber, took a different approach. Uber continued to pick up passengers from JFK and lowered their surge pricing in the area leading to more passengers hailing their service.[123] Ubers' response was seen by many as a rejection of the protest and a means to disperse the crowds.[124] Moments following Ubers' actions, a hashtag "#deleteuber" began trending on Twitter, resulting in extremely poor publicity for the company.[125]

The #deleteuber phenomena is one of many examples of how companies today are not solely responsible for providing goods or services but are expected to behave like media companies and voice popular opinions and sentiments. The harsh media restrictions placed on entities during and in concern with the Olympic games make this exceptionally hard and can also be detrimental to the very cause the Olympics has set out to accomplish.

V. THE PROPOSAL

A. Fair Use: General Law vs. Ted Stevens:

Fair use is a legal doctrine that allows for the use of otherwise copyrighted material when certain conditions are met such as for parody purposes or to give commentary on a subject matter.[126] Fair use is premised on several legal theories, arguably most importantly of which is the First Amendment guarantee of free speech.[127] It is important to note that free speech and commercial speech differ, however, commercial speech also is afforded many protections under the First Amendment.[128] According to Thomas Emerson, a leading First Amendment scholar, "Without free and unimpaired dissemination and discussion of ideas, self-government is but a hollow fantasy . . . . The link between the people and their government is maintained through debate. Free speech, then, is the tool by which democracy is maintained

---

122 *Id.*

123 *Id.*

124 *Id.*

125 *Id.*

126 Rich Stim, *What Is Fair Use*, STAN. UNIVERSITY LIBR. (Oct. 2010), http://fairuse.stanford.edu/overview/fair-use/what-is-fair-use/.

127 Thomas Emerson, Address at Conference on College Composition & Communication (Aug. 1998).

128 *Id.*

and improved."[129]

As mentioned earlier, the Ted Stevens Olympic Act provides further protection than the Lanham Act in the trademark context and limits the available defenses to an alleged infringer. Under the Lanham Act, "the Fair Use Doctrine protects certain uses of registered trademarks from infringement claims when the use of the name, term, or device is a use, otherwise than as a mark, of a term or device that is descriptive of and used fairly and in good faith only to describe goods or services of [a] party, or their geographic origin."[130] The Fair Use Doctrine, and more specifically, nominative fair use, allows the non-trademark holder to use the protected trademark for purposes such as news reporting, commentary, parody, and comparative advertising.[131]

In *New Kids on the Block v. News Am. Publishing, Inc.*, a website hosted a contest asking consumers who their favorite member of the band was while using the popular band's trademarked name in its advertisements.[132] The band sued for trademark infringement, however the use by the website was deemed to be fair use, and thus non-infringing.[133] The court reasoned that the website could not effectively hold this contest in reference to the band without using the band's name.[134] The holding is also conditioned on the fact that the non-trademark holder may not suggest sponsorship or endorsement and held that simply discussing a trademarked mark did not imply an endorsement or sponsorship.[135] The latter part of the decision regarding endorsement is likely the most important aspect as related to the Olympics and the protection of their marks. The main concern driving Olympic intellectual property law and policing, is the vast sums of money corporations pay for exclusive sponsorship and endorsement rights, which has led to the passing of Olympic specific legislation. However, that exact concern is already included in trademark law jurisprudence.

Fair use does have its limits, as seen in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, where the court held that fair use was not a valid defense for the defendants usage of a copyrighted work.[136] In *Harper and Row*, the media entity, Nation Enterprises, published a large portion of excerpts of Gerald Ford's biography before the novel was published and before Time Magazine could publish their

---

129 *Id.*

130 15 U.S.C. §1115(b)(5)(A) - (C) (2006) (emphasis added).

131 Louis S. Ederer, *Nominative Fair Use: Legitimate Advertising or Trademark Infringement*, ARNOLD & PORTER LLP, http://files.arnoldporter.com/nominative%20fair%20use.pdf.

132 New Kids on the Block v. News Am. Publ'g, Inc., 971 F.2d 302 (9th Cir. 1992).

133 *Id.*

134 *Id.* at 309.

135 *Id.* at 306.

136 Harper & Row v. Nation Enter., 471 U.S. 539 (1985).

account of the novel, which they had contracted with Nation Enterprises for the rights to publish.[137] The court found that Nation Enterprises' practices were not valid fair use, large in part because they served as a substitute for the copyrighted material.[138] The court went further to state that "the Framers intended copyright itself to be the engine of free expression."[139] Also, importantly, the court stated that facts are not copyrightable, which means that entities or persons should be permitted to transmit facts related to the games without fear of repercussion.[140] This holding is highly relevant to the Olympic context. One of the main concerns the IOC has is that unofficial usage of their marks and events may divert traffic from their broadcast and official sponsors' content. The holding here would deny usages that would have such effect, while allowing for usages that actually promote the games and allow for others to share in the excitement of the event and display pride for their nation.

This is also of significant importance in relation to social media and news reporting surrounding the games. As mentioned above, virtually all companies and entities have taken on some form of a media role in present times.[141] Therefore, their consumers likely expect them to share their voice at all times, and especially during a worldwide spectacle such as the Olympic Games, where national pride and political issues often intersect. This can be especially challenging for non-accredited entities due to the large intellectual property portfolio the IOC enforces and the vigilant enforcement mechanisms that the IOC employs.

The past summer Olympics in Rio saw lackluster social media results.[142] This may be partially attributable to the restrictive measure employed by the IOC and the social media warning letters sent out to many major companies prior to the games.[143] Prior to the games, the IOC sent letters to companies without an official relationship with the games warning them to not use any of the protected Olympic marks or

---

137 *Id.*

138 *Id.*

139 *Id.*

140 *Id.* ("(c) In view of the First Amendment's protections embodied in the Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, there is no warrant for expanding, as respondents contend should be done, the fair use doctrine to what amounts to a public figure exception to copyright. Whether verbatim copying from a public figure's manuscript in a given case is or is not fair must be judged according to the traditional equities of fair use.").

141 *Id.*

142 Guest, *The Summer Olympics Are Not Winning Gold on Social Media*, ADWEEK (Aug. 11, 2016), http://www.adweek.com/digital/sharon-lin-glassview-guest-post-olympics/.

143 Olivia Solon, *US Olympic Committee Bullying Unofficial Sponsors Who Use Hashtags*, THE GUARDIAN (Jul. 22, 2016), https://www.theguardian.com/sport/2016/jul/22/us-olympic-committee-bullying-unofficial-sponsors-hashtags.

intellectual property as well as hashtags related to the games.[144]

On Twitter, hashtags are used to facilitate conversations surrounding an event or phenomena.[145] By searching a specific hashtag, a social media user can effectively filter the social media universe to specifically show them that they are looking for, and in turn, actively participate worldwide in discussion regarding their interests.[146] By using hashtags, a social media user can provide commentary on a specific topic, while allowing users to locate their message. This is largely responsible for viral content and can be the backbone of successful marketing campaigns. By over policing hashtags, the IOC may have shot themselves in the foot. The staggering low social media numbers, may be due to the fact that many social media users were scared about participating in the conversation, leading to low publicity and worldwide discussion. Also, the hashtag is used as a search tool, and not necessarily as an endorsement, therefore possibly qualifying as fair use under the Lanham Act, but not under the Ted Stevens Act.

The lines become further blurred when copyright law is added to the mix. As mentioned above, in *Motorola*, copyrights may be obtained for sporting event broadcasts.[147] However, the copyright only extends to the broadcast itself and not the underlying event. Traditionally this would mean that the scores, results and particulars of the event are fair game to comment on. However, due to the warnings issued by the IOC and the unpredictability of the application of the Ted Stevens Act, many are unsure of whether or not this is allowed. This is also further complicated by the trademark restrictions, because even if the result reporting is allowed, it is very difficult to use any language or reference to the games that the results are tied to.

B. Establish a Fair Use Board

At the moment, there is no approval process or procedure in place for entities wishing to engage in discussion regarding the Olympic Games to obtain approval or clearance for their usage of Olympic related terminology, event results, or figures. Entities must either consult with attorneys and/or take the risk and wait to see if a cease and desist or litigation will follow. Rather than the "wait and see" approach resulting in a post facto analysis, which is both risky and costly for all parties involved, I propose an ex ante solution. I propose the IOC

---

144 *Id.*

145 Rebecca Hiscott, *The Beginner's Guide To The Hashtag*, MASHABLE (Oct. 8, 2013), http://mashable.com/2013/10/08/what-is-hashtag/#kyuIx9s4VPq0.

146 *Id.*

147 *See Nat'l Basketball Ass'n*, 105 F.3d 841, 845.

institutes a fair use board where entities may submit their proposed usage for a modest fee that can either be cleared by the IOC or denied, providing for more transparency and lower barriers to entry. This will allow more people to engage in the conversation, boosting the overall excitement and success of the games.

As mentioned above, at the moment the best option for entities to engage in before communicating about the Olympics is to consult with an attorney regarding whether or not their usage is considered fair use. However fair use is not a cut and dry concept and much uncertainty surrounds its usage.[148] Created in 2004 by the enacting of the Copyright Royalty and Distribution Reform Act of 2004, Congress formed the Copyright Royalty Board.[149] The board is comprised of three judges whom are appointed by the Liberian of Congress and serve six-year staggered terms. The role of the board is to determine the rate services pay for statutory licenses.[150] The Fair Use board would function differently, however the Copyright Royalty Board shows Congress' willingness to make intellectual property laws more upfront and efficient.

The Fair Use board should be comprised of a combination of judges, intellectual property scholars and IOC officials. Potential infringers would submit petitions to the board composed of highly descriptive imagery and descriptions of their proposed use to the board and pay a modest fee for the petition. It is likely many petitions would be filed, and many fees would be collected, allowing for the board to be funded and additional remaining funds can be allocated to the athletes that cannot afford to attend the games due to restrictive endorsement policies. Then the board would evaluate the proposed usage and ultimately give a ruling on whether or not the proposed usage is considered fair use and acceptable or runs afoul of what is permitted. A refusal by the board could then be used as *prima facie* evidence of infringement, making litigation easier for the IOC and enforcement agencies. However, a ruling by the board deeming the usage fair use, would grant the potential infringer immunity from future suit, so long as the usage is identical to the one proposed to the board and within the scope of the board's determination. This would provide more clarity in an otherwise ambiguous world and would greatly reduce costs for all.

The board should also publish all of its decisions online for all to see. This will allow for more transparency on what is acceptable and

---

148 17 U.S.C. §107 (2000).

149 Ed Christman, *Copyright Royalty Board? Statutory, Mechanical Performance? A Primer For the World of Music Licensing and Its Pricing*, BILLBOARD (Aug. 18, 2016), http://www.billboard.com/articles/business/7476929/music-licensing-pricing-primer-copyright-royalty-board-statutory-mechanical-performance.

150 *Id.*

what is not. There is some litigation surrounding how and when Olympic marks may be used as mentioned above, however, many small businesses immediately comply with cease and desist letters received by the IOC so much case law has not been developed and the examples of acceptable use are slim, especially with the ever-changing Olympic legislation and rules. This will also allow for more conversation surrounding the Olympics, leading to a more successful event for the IOC, without the risk of harming their core sponsors and financial backing.

C. Amend Ted Stevens Act to Allow for Fair Use Statutory Defense

As mentioned above, the Ted Stevens Act limits the statutory defenses available when using Olympic terminology and protected marks, and of those defenses is fair use.[151] I propose the Ted Stevens Act be amended to include fair use. Parody, another statutory defense to fair use, is less important in this context and more potentially obstructive to the Olympic brand. Allowing for nominative fair use in conjunction with the ex-ante functionality of the fair use board, entities will be able to communicate about the Olympic games in a regulated and lawful manner, while promoting the games as well. This will create more certainty and clarity for all parties involved while creating a win-win scenario for everyone.

Section 6: Conclusion:

Both the Olympics, entities desiring to discuss the Olympics and social media platforms appear to be here to stay. The IOC's strict legislation may have been successful in deterring ambush marketers prior to the formation and boom of social media, but as the ratings and social media analytics from the Rio 2016 games show, this strategy is not the most effective at providing the best opportunity for their exclusive sponsors while also promoting the games as much as possible. While it is evident that the IOC and the Olympic Games face obstacles from ambush marketers to receive funding from their sponsors to host the games, it is evident that more of a balance needs to be struck between enforcing the Olympic marks and insignias, and allowing for the free exchange of ideas and social conversation. The addition of the fair use board in conjunction with the proposed amending of the Ted Stevens Act will allow for a more excitement and publicity for future games while minimizing risk and creating more certainty. This will allow smaller entities to use the pride emanating from the games

151 *See* 36 U.S.C. §220506 (2000).

without fear of litigation and will also allow the IOC to ensure that all communication regarding the games are proper and in accordance with their guidelines and the law.