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# AMBUSH MARKETING: IS IT DECEITFUL OR A PROBABLE STRATEGIC TACTIC IN THE OLYMPIC GAMES?

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## I. INTRODUCTION

Ambush marketing is deceitful, unethical, and dilutes the Olympic trademark interest, but others think it is a creative and necessary tool for advertising. The Olympics is an event where the most talented athletes in the world compete against one another, which prompts millions of spectators to either attend or watch on television around the world. Needless to say, sponsorships for the event are sought vigorously with limited available spots. As a result, individuals and companies tactically divulge in ambush marketing to get their hands on the advertising gains from the Olympics, which may or may not be legal under the Amateur Sports Act<sup>1</sup> and the Lanham Act.<sup>2</sup> Ambush marketing is defined as “all intentional and unintentional attempts to create a false or unauthorised commercial association” to market, advertise, and promote public relations to capitalize on the Olympics.<sup>3</sup>

This Comment will discuss two different kinds of ambush marketing tactics. The first is when corporations or organizations buy commercial time during or prior to the Olympic Games and use those avenues for advertising campaigns to associate themselves with the Olympic Games without permission.<sup>4</sup> For example, Nike, an unofficial sponsor in the 1984 Los Angeles Olympics, advertised commercials with the slogan “I Love L.A.” during the Olympic Games period to associate itself with the Olympic Games.<sup>5</sup> I will refer to this type of ambush marketing as “deceitful ambush marketing.” The second tactic

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1. *See generally* Amateur Sports Act, 36 U.S.C. § 220506 (2016).

2. *See generally* Lanham Act, 15 U.S.C. § 1125 (2016).

3. ANDRE M. LOUW, AMBUSH MARKETING AND THE MEGA-EVENT MONOPOLY: HOW LAWS ARE ABUSED TO PROTECT COMMERCIAL RIGHTS TO MAJOR SPORTING EVENTS 96 (2012).

4. Lori L. Bean, Note, *Ambush Marketing: Sports Sponsorship Confusion and the Lanham Act*, 75 B.U. L. REV. 1099, 1103–04 (1995).

5. *Id.* at 1104.

of ambush marketing is promotional advertising at the actual event.<sup>6</sup> This type of ambush marketing includes employees of a business handing out flyers to spectators; athletes going to a certain local restaurant after competition; or athletes wearing Nike apparel during the Olympic Games when Nike is not an official sponsor.<sup>7</sup> Both of these ambush marketing tactics are extremely common during the Olympic Games, and while the first may clearly be deceitful, the second tactic leaves room for debate.

In general, ambush marketing is not legal and is the basis for few trademark infringement lawsuits; however, it raises large concerns for the United States Olympic Committee (USOC). On one side, the USOC argues ambush marketing should be illegal when other companies profit from the Olympic trademarks, even when they refrain from using the exact word or symbols associated with the Olympic Games. On the other side, companies argue that ambush marketing tactics should remain legal because it would otherwise violate their First Amendment rights, and sponsorship bids are too expensive and exclusive for most companies to compete for.

The overall issue discussed throughout this Comment is whether ambush marketing should be illegal when associated with the Olympic Games because it inherently violates trademark laws, or if ambush marketing should remain legal because it is a strategic business tactic used to get around unfair restrictions imposed by the USOC. This Comment will demonstrate how ambush marketing should be illegal when marketing tactics are used to profit off of the Olympic Games under deceitful ambush marketing, but this Comment will also show that local companies surrounding the Olympic Games should have a right to some sponsorship opportunities. The Olympic Games is one of the most sought after marketing opportunities in the world, and while the International Olympic Committee (IOC) and USOC should allow for more local sponsorship opportunities, there should also be consequences for those who attempt to unethically profit from the Olympic Games.

## II. HISTORICAL BACKGROUND

As a brief historical overview, the Olympic Games allowed companies to advertise for provided revenue in 1896.<sup>8</sup> In order to protect the improper use of the Olympic name from other organizations, the Amateur Sports Act of 1978

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6. *See id.*

7. *Id.* at 1104–05.

8. *Fun Facts About Olympic Sponsorship*, slide 1, FORBES, <http://www.forbes.com/pictures/efkk45jdje/the-first-time-in-companies-provided-revenue-through-advertising-during-the-olympic-games-was-in-athens-in-1896/#3ba699fb4a6b> (last visited Dec. 15, 2016) [hereinafter *Fun Facts About Olympic Sponsorship*].

(Amateur Sports Act) established the USOC, giving the USOC power and monopoly status to protect the Olympic name and exclusive words relating to the Olympic Games.<sup>9</sup> The Amateur Sports Act lowered the standard of general trademark infringement under the Lanham Act of 1946 (Lanham Act), changing the “likely to confuse consumer” standard to a “tends to cause confusion or mistake” standard.<sup>10</sup> However, it was not until the 1984 Los Angeles Olympics that corporations recognized the concept of ambush marketing.<sup>11</sup>

Prior to the 1984 Olympic Games, the IOC allowed any number of companies to be official sponsors, and it had a right to do so for a conservative price.<sup>12</sup> For example, there were 628 official sponsors in the 1976 Montreal Olympics.<sup>13</sup> The IOC implemented a new sponsorship platform in the 1980s because it felt the large number of sponsorships diluted the Olympic brand with sponsors only getting a small product impact or awareness to consumers.<sup>14</sup> Since the restructured sponsorship plan, the IOC extremely limits the amount of official sponsors selected for the Olympic Games, and these sponsorships come at an extreme cost, but also have extreme benefits. For example, the 1988 Olympics yielded \$338 million in sponsorships, and in the 1992 Olympics, the revenue generated from only a few sponsors was \$700 million.<sup>15</sup> As time went on, marketing sponsorships grew astronomically; the 1994 Olympic Games broke its marketing record when it generated \$500 million in broadcast and marketing programs revenue.<sup>16</sup> Today, the sponsorship deals are very lucrative, confidential, and extensively enforced.<sup>17</sup> Because of the giant boom to access Olympic sponsorships and marketing opportunities, the USOC

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9. Esther Addley, *Olympics 2012: Branding ‘Police’ to Protect Sponsors’ Exclusive Rights*, *GUARDIAN* (Apr. 13, 2012), <https://www.theguardian.com/sport/2012/apr/13/olympics-2012-branding-police-sponsors>.

10. Compare David Muradyan, *Likelihood of Confusion Analysis Under the Lanham Act*, *IP L. BLOG* (Aug. 15, 2012), <http://www.theiplawblog.com/2012/08/articles/trademark-law/likelihood-of-confusion-analysis-under-the-lanham-act/>, with Po Yi, Jessica S. Borowick & Kristin Adams, *Golden Rules: Lowering the Uneven Bars on Likelihood of Confusion*, *ALL ABOUT ADVERT. L.* (July 12, 2016), <http://www.allaboutadvertisinglaw.com/2016/07/lowering-the-bar-on-likelihood-of-confusion-an-other-reason-for-brands-to-beware-of-using-olympic-trademarks.html>.

11. James Emmett, *Rise of the Pseudo-sponsors: A History of Ambush Marketing*, *SPORTSPRO MEDIA* (June 16, 2010), [http://www.sportspromedia.com/notes\\_and\\_insights/rise\\_of\\_the\\_pseudo-sponsors\\_a\\_history\\_of\\_ambush\\_marketing](http://www.sportspromedia.com/notes_and_insights/rise_of_the_pseudo-sponsors_a_history_of_ambush_marketing).

12. *Id.*

13. *Id.*

14. *Id.*

15. Russell H. Falconer, *Ambush Marketing and How to Avoid It*, *BAKER BOTTS LLC* (Jan. 1996), <http://www.bakerbotts.com/ideas/publications/1996/01/ambush-marketing-and-how-to-avoid-it>.

16. *Fun Facts About Olympic Sponsorship*, *supra* note 8, at slide 4.

17. *Id.* at slide 7, 10.

pursued further trademark protection through the Amateur Sports Act<sup>18</sup> and the Lanham Act.<sup>19</sup>

### III. PRIOR LEGAL HISTORY/ARGUMENTS

The USOC is the committee dedicated to overseeing American athletes who dream to compete in the Olympics. It is responsible for training, funding, and sending Team USA to the host country for the Olympic Games, and Congress granted it with such powers.<sup>20</sup> Congress believed that the USOC was necessary to control Olympic sports in the United States in order to protect and control against commercial use of Olympic trademarks, imagery, and Olympic terminology in the United States. Federal regulation also protects against “any other word or symbol that suggests an association with the USOC, [the United States Olympic team] for the Games, or the Games themselves.”<sup>21</sup>

It is important to remember that the trademark statutes mentioned here protect only the trademarks, imagery, and terminology in the United States for the USOC and IOC, but does not control trademarks and the like for the National Governing Bodies (NGBs) of each specific sport or trademarks at the international level.<sup>22</sup> Regulations at the international level against ambush marketing are developed at each Olympic venue by committees set up by the IOC, that enact more specific branding protection regulations for each Olympic Games, along with the host country’s own trademark laws and previously enacted international trademark laws for the Olympic Games. For the purposes of this Comment, the statutes governing the USOC in the United States will primarily be discussed.

Specifically, there are two statutes that protect the Olympic name along with the Olympic Games’ marks. The Amateur Sports Act states that the USOC has exclusive rights to the five-ring symbol, the words “Olympic,” “Paralympic,” and “Pan-American,” and only the USOC has the authority to “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.”<sup>23</sup> Further, the Lanham Act states the USOC can file for civil liability of the trademark when the use

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18. *See generally* Amateur Sports Act, 36 U.S.C. § 220506 (2016).

19. *See generally* Lanham Act, 15 U.S.C. § 1125 (2016).

20. *Brand Usage Guidelines*, TEAM USA, <http://www.teamusa.org/brand-usage-guidelines> (last visited Dec. 15, 2016).

21. *Id.*

22. *Id.*

23. 36 U.S.C. § 220506(a)(2), a(4), (b).

is likely to cause confusion, or to cause mistake, 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, or [] in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action.<sup>24</sup>

The USOC catches ambush marketers when they violate the above statutes; however, companies have found loopholes to pursue ambush marketing without infringing upon these statutes. Since companies are strategically acting strategically the law, one may suggest ambush marketing is perfectly legal, and they have a constitutional right to do so. But, this Comment will also prove that ambush marketers should be held accountable for deceiving and confusing consumers, which should result in violations of the Amateur Sports Act.

#### IV. AMBUSH MARKETING SHOULD BE ILLEGAL BECAUSE IT DECEIVES, DILUTES, AND CAUSES CONSUMER CONFUSION

Corporations are forbidden to use the Olympic terms or symbols without USOC permission because it would jeopardize the exclusive significance of the Olympic Games and its athletes; and it would dilute the extravagance of what it means to be an Olympic sponsor. When exercising the above statutes, the protection of Olympic words and symbols is different than a general trademark infringement under the Lanham Act because “the USOC need not prove that a contested use is likely to cause confusion, and an unauthorized user of the word does not have available the normal statutory defenses.”<sup>25</sup> This means the USOC just needs to show that the use may or tend to cause confusion. An example of deceit, confusion, and false impression found in the international sports world is *Mastercard International Inc. v. Sprint Communications Co.* Mastercard was an official sponsor for the 1994 World Cup, where it was using the World Cup logo on its credit cards, and Sprint manufactured call cards with the World Cup logo on them as well, very similar to Mastercard’s cards.<sup>26</sup> Since Mastercard

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24. 15 U.S.C. § 1125(a)(1)(A)–(B).

25. *S.F. Arts & Athletics, Inc. v. USOC*, 483 U.S. 522, 531 (1987).

26. *Mastercard Int’l Inc. v. Sprint Commc’ns Co.*, No. 94 CIV. 1051 (JSM), 1994 WL 97097, at \*1 (S.D.N.Y. 1994).

had exclusive rights to issue cards with the World Cup logo and paid a high price to do so, Sprint's call cards diluted the advertising effect of Mastercard's exclusive right.<sup>27</sup> The court ruled under the Lanham Act "only a likelihood of confusion or deception need be shown in order to obtain equitable relief."<sup>28</sup>

Even though this is a non-Olympic example, it is still an international example that shows how ambush marketing dilutes exclusive trademarks that companies pay millions to use. As in *Mastercard International Inc.*, ambush marketing causes companies to lose their exclusive sponsorships when they pay hundreds of millions of dollars to become an Olympic sponsor. When companies pay for exclusiveness, they expect major benefits for their payments, especially for an event as large as the Olympic Games. For example, if McDonald's is a primary sponsor of the Olympic Games, but Burger King comes along, without permission from the USOC, and makes a very similar advertising campaign during the Olympic Games' period, public consumers will be confused as to who the official sponsor is. This is why the federal regulations were enacted, and since ambush marketing causes major confusion and deceit to consumers in the sporting industry, it should especially be illegal for the Olympic Games.

For example, a corporation is not allowed to use the term "Olympic" to confuse consumers in promoting or representing a non-Olympic event. In *San Francisco Arts & Athletics, Inc. v. USOC*, a nonprofit California corporation, San Francisco Arts & Athletics (SFAA), wanted to name its sponsored event the "Gay Olympics" and use the term in mailings, advertising, and merchandise.<sup>29</sup> SFAA was told the use of the word "Olympics" in their title violated the Amateur Sports Act.<sup>30</sup> However, SFAA stated its intent to use the word "Olympic" was a political statement for the "Gay Olympics," and not being able to do so would violate free speech.<sup>31</sup> However, the Court found that even if that was SFAA's intent, the word still caused confusion over who sponsored the event by having an adverse effect on the USOC's interests.<sup>32</sup>

This case demonstrates how ambush marketing confuses consumers and deteriorates the value of legitimate sponsors who pay for the rights to use trademarked terms. If any company or organization could use USOC words or symbols, consumers could get confused on which events are actually sponsored by the USOC to promote the athletic competition at the Olympic level. In *San*

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27. *Id.* at \*3.

28. *Id.*

29. *S.F. Arts & Athletics, Inc.*, 483 U.S. at 525.

30. *Id.*

31. *Id.* at 535–36.

32. *Id.* at 539.

*San Francisco Arts & Athletics, Inc.*, the Court found that the USOC was not enacted to promote gay rights, but to promote elite athletic competition. The USOC does not want its name, words, or symbols associated with activities, organizations, or campaigns it does not see fits its meaning of how it wants its trademarks represented to the general public. The USOC needs to control who can use Olympic terms and symbols in order to protect the true meaning of the word “Olympic,” and giving it full exclusive control is the only way to keep the Olympic name prestigious and respected. It is in the best interests of the USOC to protect the integrity of those who are authorized to use words and symbols provided by the USOC.<sup>33</sup> Further, if courts instead rule in favor of similar events like in *San Francisco Arts & Athletics, Inc.*, “ambush marketing ultimately [will jeopardize] the financial vitality of sporting events.”<sup>34</sup>

Although *San Francisco Arts & Athletics, Inc.* shows how a court can rule against ambush marketing, most ambush marketing schemes are surprisingly never brought to court. Sport entities like the USOC, in general, do not bring lawsuits for trademark infringement because it is fearful a court could rule in favor of a company or corporation. However, if the USOC decided to bring ambush marketers to court, a court should find the ambush marketers’ actions violate the Amateur Sports Act or Lanham Act and should be subject to civil liability. Ambush marketers would be found liable because corporations, in their ambush marketing advertising campaigns, intend to confuse and deceive others, which causes potentially serious consequences, not only to the USOC, but also to all athletes and spectators of future Olympic Games.

There are many examples of consumer confusion in regard to ambush marketing that never made it to a courtroom. For example, ambush marketing is deceitful when a rival company or individual of an official sponsor tries to gain market share from an Olympic sponsor by confusing consumers to whom the actual sponsor is.<sup>35</sup> In the 1992 Barcelona Olympics, Visa was a primary official sponsor of the Olympic Games as the official credit card.<sup>36</sup> In response to an ad where Visa attacked American Express, American Express countered with an ad airing during the Olympic Games showing that many businesses, such as restaurants and hotels, accept American Express, which resulted in ambush marketing without directly using Olympic trademarks.<sup>37</sup> Therefore, there was no legal claim because American Express never violated the terms

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33. See Bean, *supra* note 4, at 1100.

34. *Id.* at 1101.

35. LOUW, *supra* note 3, at 98.

36. Robert N. Davis, *Ambushing the Olympic Games*, 3 VILL. SPORTS & ENT. L.J. 423, 425 (1996).

37. *Id.*



under the Amateur Sports Act or the Lanham Act.<sup>38</sup> This instance demonstrates how companies use retaliation as a form of ambush marketing to deceive and confuse consumers into thinking they are a sponsor of the Olympics. These acts should be prohibited. Since these acts are not yet technically illegal, the USOC has taken many precautions to decrease the amount of ambush marketing by creating blackout periods during the Olympics Games, obtaining extra policing, and enacting new regulations at specific Olympic events.<sup>39</sup>

Lastly, to prove that ambush marketing is diluting the exclusivity of official Olympic sponsors, a marketing report from the 2014 Sochi Olympics measured the Brand Affiliation Index of the top marketing companies at the Sochi Olympics.<sup>40</sup> Two of the top four finishers were non-sponsored companies.<sup>41</sup> The winner, in fact, was Red Bull, which is a non-Olympic sponsored company.<sup>42</sup> Both Proctor & Gamble and Samsung, official sponsors, came in second and third place, respectively, and Subway, a non-Olympic sponsor, came in fourth place.<sup>43</sup> The rest of the list is a mix between Olympic and non-Olympic sponsors. Even though not all of these companies had the intention of taking attention away from legitimate Olympic sponsors, the list still shows that no matter how many actual official sponsors paid to display Olympic terms and symbols for advertising/propaganda, ambush marketers still proved to be on top of the marketing chain at the Sochi Olympics. Because of this realization, the cost of Olympic sponsorships could decrease, and, therefore, the revenue from those sponsorships could decrease, meaning U.S. athletes will not be able to adequately afford to attend the Olympics. In order to keep our athletes in attendance at the Olympics, deceitful ambush marketing should be illegal.

Deceitful ambush marketing violates the Amateur Sports Act because corporations intend to deceive others into thinking they are official sponsors. If the USOC does not start challenging these corporations, athletes may be at risk and left without a place to compete. The USOC is completely funded by its chosen sponsors who pay hundreds of millions of dollars. In the 2012 London

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38. *See generally id.*

39. Hergüner Bilgen Özeke, "Ambush Marketing": A Marketing Practice That Catches Legislators Off Guard, MONDAQ, <http://www.mondaq.com/turkey/x/210908/advertising+marketing+branding/Ambush+Marketing+A+Marketing+Practice+That+Catches+Legislators+Off+Guard> (last updated Dec. 12, 2012); Jacquelyn Smith, *Olympic Hurdles for Advertisers: The Games' Unique Rules and Restrictions*, FORBES (July 24, 2012), <http://www.forbes.com/sites/jacquelynsmith/2012/07/24/olympic-hurdles-for-advertisers-the-games-unique-rules-and-restrictions/>.

40. Emily Goddard, *Exclusive: Red Bull Wins Sochi 2014 "Ambush Marketing" Gold, Says Report*, INSIDE THE GAMES (Mar. 5, 2014), <http://www.insidethegames.biz/articles/1018733/exclusive-red-bull-wins-sochi-2014-ambush-marketing-gold-says-report>.

41. *Id.*

42. *Id.*

43. *Id.*

Olympics, the IOC generated \$1 billion in sponsorship revenue, with sponsorship prices only increasing in passing years.<sup>44</sup> Since no government funding supports U.S. athletes, it is important to get sponsors who want to make considerable donations to the USOC.<sup>45</sup> In exchange for sponsorships, companies gain permission from the USOC to use the Olympic trademarks and symbols in their advertising and marketing campaigns throughout the Olympic Games.<sup>46</sup> Ambush marketing threatens the exclusivity the USOC offers sponsors, which jeopardizes the sponsorship revenues the USOC receives to fund the Olympic Games.<sup>47</sup>

The exclusivity factor is the reason sponsors are willing to pay so much for the ability to use the Olympic name and symbols, and ambush marketing dilutes the exclusivity of the Olympic name. With the effects of social media and the creative marketing and advertising teams that are able to find loopholes in federal regulations, any large company that can afford the advertising or broadcast space can reap the benefits the Olympics provide. Since ambush companies pay zero dollars to the USOC and benefit from the Olympic Games, why should other companies want to pay the millions of dollars to the USOC to sponsor U.S. athletes when other companies get the same benefits for free? Decreased sponsorship revenues means the funding for the Olympic Games would instead come from U.S. tax dollars from the general public, if not enough sponsors are willing to cover the costs, or athletes would have to fund their own way to the Olympic Games. Even though the deceitful companies do not use the exact words or symbols stated in the Amateur Sports Act, they are still intending to deceive, confuse, and misrepresent the Olympic name to consumers, which is exactly what the Amateur Sports Act is supposed to prevent. If the USOC challenged these corporations, courts should find that the actions of deceitful ambush marketing are illegal.

However, not all ambush marketing is as deceitful as stated above. Some ambush marketing that occurs within the Olympic venue may be prevented if the Olympic committees did not have such heavy branding protection and regulation at the venue. Heavy regulations at the venue prohibit promoting or advertising by small or local businesses that cannot compete or afford to be an official sponsor of the Olympic Games. The unfairness to small and local companies surrounding the Olympic venue could show that allowing more local

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44. Tara Clarke, *The Companies Spending the Most on 2014 Sochi Olympics – And What They Really Gain*, MONEY MORNING (Feb. 14, 2014), <http://moneymorning.com/2014/02/14/companies-spending-2014-sochi-olympics-really-gain/>.

45. *Brand Usage Guidelines*, *supra* note 20.

46. *Id.*

47. *Id.*

advertisement at the Olympic Games could be beneficial. It could reduce the amount of ambush marketing at the Olympics and reduce extra costs incurred by the IOC/USOC for extensive brand protection regulation and extra brand policing at the Olympic venue.

#### V. SOME AMBUSH MARKETING SHOULD REMAIN LEGAL

To start, some ambush marketing schemes should remain legal under the First Amendment. Individuals and companies do not infringe on trademarks of the USOC when the use is non-commercial.<sup>48</sup> In *USOC v. American Media, Inc.*, the USOC claimed American Media Inc. (AMI) infringed on the Amateur Sports Act when it published a magazine called *OLYMPICS USA*, which composed layouts of Olympic events and pictures of Olympic athletes.<sup>49</sup> The USOC claimed AMI engaged in ambush marketing and violated the Amateur Sports Act “for the purpose of trade and to induce the sale of goods.”<sup>50</sup> However, the court ruled in favor of AMI when it stated its intent of using the word Olympic and other Olympic symbols was not for trade or economic gain because the magazine was not an advertisement and did not refer to a specific product.<sup>51</sup> Even though the magazine itself was sold for profit, it did not need authorized consent from the USOC to print words and symbols because the First Amendment protects the expression used in magazines, newspapers, books, etc.<sup>52</sup> Therefore, AMI’s magazine was protected as non-commercial free speech, and it could use the *OLYMPICS USA* magazine for profit as much as it liked.

*American Media, Inc.* shows that in some cases, ambush marketing should remain legal, otherwise the USOC violates First Amendment rights. Since the ruling of *American Media, Inc.*, companies, writers, and those working in the entertainment industry are allowed to make textual references to the Olympic Games as long as they are not endorsing the Olympic trademarks.<sup>53</sup> However, they are only granted this right if they remain truthful by accurately depicting factual information, and they are not allowed to reflect poorly on the Olympic Games as a whole.<sup>54</sup> Editorial use of trademarks is completely appropriate as well, but a source cannot promote any one particular news outlet.<sup>55</sup> First

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48. *USOC v. Am. Media, Inc.*, 156 F. Supp. 2d 1200, 1209 (D. Colo. 2001).

49. *Id.* at 1203.

50. *Id.*

51. *Id.* at 1207.

52. *Id.*

53. *Brand Usage Guidelines*, *supra* note 20.

54. *Id.*

55. *Id.*

Amendment claims, while not always successful, do exist to allow for some ambush marketing, particularly in the entertainment industry. However, in past Olympic Games, other outlets, such as the small business industry at the local level, do not have the same First Amendment rights as the industries mentioned above.

Ambush marketing at a local level at the Olympic venue should be legal if it complies with federal regulations. Currently, the Olympics has limited sponsorship opportunities, which almost all go to major corporations. In Sochi, there were only ten companies as general partners, ten companies as official partners, and up to fifteen companies as official suppliers.<sup>56</sup> If a business was not one of those sponsors, it was not allowed to use Olympic trademarks to advertise the Olympic Games occurring in their own cities. For example, pub landlords at the London Games were banned from even posting signs reading, “Come and watch the London Games from our big screen!”<sup>57</sup> Local businesses are fearful to do anything because they do not have the resources to understand what is and what is not permissible conduct.<sup>58</sup> It is a problem that these types of businesses cannot gain at all from the biggest sporting event in the world, and the IOC should take into account these businesses and reform their own regulations to allow these types of businesses to advertise. If the IOC chooses not to, then ambush marketing should be allowed for those businesses at the Olympic venue similar to that of the London Pub at the London Games.<sup>59</sup>

Since the London and Sochi Games, community organizations are still not allowed to advertise using Olympic trademarks.<sup>60</sup> They are not allowed to use the trademarks to promote their place of business, sell Olympic merchandise, use the trademarks in accordance with the name of the business, or “promote the [business] that is hosting an event honoring an Olympian.”<sup>61</sup> With these strict guidelines, it is almost impossible for local companies to advertise their business for the Olympics, so engaging in ambush marketing while still complying with federal and/or Olympic regulations should be allowed to give small businesses the chance to benefit economically from the Olympics near their home cities. Not only are strict restrictions affecting small businesses, they are starting to affect individual athletes as well.

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56. David Wu, *TV Rights, Sponsoring, Ambush Marketing at the Olympic Games*, slide 9, 57TH UIA CONGRESS, MACAO – SPORT L. SESSION, [http://www.uanet.org/sites/default/files/safe\\_uploads/clients/30197/rappports/PRESENTATION%20-%20WU,%20David%20-%20081013.pdf](http://www.uanet.org/sites/default/files/safe_uploads/clients/30197/rappports/PRESENTATION%20-%20WU,%20David%20-%20081013.pdf) (last visited Dec. 15, 2016).

57. Addley, *supra* note 9.

58. *Id.*

59. *Id.*

60. *Brand Usage Guidelines*, *supra* note 20.

61. *Id.*

New developments in Olympic regulations highly restrict athletes when it comes to social media to prevent ambush marketing. New technology and social media created a whole new area for ambush marketing, so the USOC and the IOC have taken extra precautions, particularly against athletes, on what they can post on social media websites.<sup>62</sup> Particularly starting at the 2012 London Olympics, the London Olympics Organising Committee of the Olympic and Paralympic Games (LOCOG) put together a detailed policy for social media that athletes had to abide by.<sup>63</sup> During the “Games period,” athletes were not allowed to post anything about a brand that was not an Olympic sponsor.<sup>64</sup> Many times this ban excluded athletes from posting anything about their own individual sponsors. Further, restrictions on social media restrict athletes from posting any video or audio of themselves or other athletes at the Olympics Games.<sup>65</sup> The restrictions went as far as not allowing athletes to post about what type of food they were eating.<sup>66</sup> These types of insanely strict policies on athletes are too over the top if the goal is merely to deter ambush marketing.

It is inconceivable to enforce these restrictions for a couple of reasons. First, it is next to impossible for Olympic enforcement to know about every single post that is posted by an athlete at the Olympic Games.<sup>67</sup> There are thousands of athletes, and regulating each and every post would most likely be a waste of time and resources. Second, if an athlete was caught violating a regulation and posted a video of himself practicing, for example, what could his punishment really be? A high quality athlete in contention for a medal will never get disqualified from his event for an innocent post resulting in ambush marketing.<sup>68</sup> The worst punishment would be a warning or scolding telling the athlete to delete the post.<sup>69</sup> Finally, athletes would not be allowed to give their individual sponsors credit if they win a medal in their sport.<sup>70</sup> Most athletes are extremely thankful to their sponsors for the equipment/clothing they provide, and because of the strict restrictions on social media, athletes are not allowed to post to Nike, for example, to thank them for the support on their Olympic journey.<sup>71</sup> It is instances like these where ambush marketing could occur and not be intentional

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62. Addley, *supra* note 9.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *See id.*

70. *Id.*

71. *See id.*

or deceitful. Since this type of innocent ambush marketing is not deceitful, the USOC and IOC should be more respectful to their athletes and allow this type of innocent ambush marketing.

However, if the USOC does attempt to pursue a civil liability claim against a company for ambush marketing, no matter if the instance is innocent or deceitful, it is important that accused companies or individuals know their defenses. The first defense is a claim that the USOC violated a company's or individual's First Amendment rights. As previously stated, the First Amendment claim under commercial free speech protects ambushers when using generic words or symbols that are not specifically trademarked.<sup>72</sup> However, commercial free speech is not protected when a right to the trademark is held under intellectual property by the USOC under the Amateur Sports Act and the Lanham Act.<sup>73</sup> It is important to note that First Amendment defense claims can only be brought in the United States for deceitful ambush marketing and not abroad. This defense will not work when the Olympic Games is held in a different host country. In those instances, organizations must comply by the host country's rules and regulations along with regulations set forth by the Olympic organizing committees.<sup>74</sup>

Another defense is that the USOC violates the Sherman Act when its exclusive use of its trademark constitutes monopolization.<sup>75</sup> However this defense is not likely to win when using it against the USOC in a civil suit. This is because when Congress enacted the Amateur Sports Act, it intended to allow the USOC to have monopolization on the rights for the Olympics.<sup>76</sup> Congress gave USOC the power to have the exclusive right to give permission to whichever organizations it chooses to use the trademark symbols and terms of the Olympic Games. If the USOC does not give a corporation or business permission to use those trademarks, then a defense using the Sherman Act will not hold up in court.

An accused ambusher could also challenge the evidence that the infringement caused no consumer confusion.<sup>77</sup> However, this defense is difficult because a court has declared, "the USOC need not prove that a contested use is likely to cause confusion."<sup>78</sup> Since the Amateur Sports Act is a

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72. Bean, *supra* note 4, at 1101–02.

73. *Id.* at 1121.

74. Addley, *supra* note 9.

75. Bean, *supra* note 4, at 1121–22.

76. See *USOC - General Information*, TEAM USA, <http://www.teamusa.org/about-the-usoc/inside-the-USOC/History> (last visited Dec. 15, 2016).

77. Bean, *supra* note 4, at 1122.

78. *USOC v. Am. Media, Inc.*, 156 F. Supp. 2d 1200, 1202 (D. Colo. 2001).

lower standard than the Lanham Act when it comes to the confusion standard, defendants against the USOC do not have a winnable defense by claiming there is no evidence of confusion.<sup>79</sup> The USOC would only need to show a defendant company's actions misrepresent the Olympic name and tend to cause consumer confusion, compared to a likely to cause consumer confusion standard in the Lanham Act.<sup>80</sup> Lastly, the best way to avoid civil suit against the USOC is for a corporation to use an effective disclaimer on its advertisements or broadcasts, stating the company is not an official sponsor of the Olympic Games and is not affiliated with the USOC.<sup>81</sup> This is the easiest way for companies to avoid any sort of liability to the USOC, and they can use it as their defense since the disclaimer shows they did not intend to confuse, deceive, or misrepresent the USOC to consumers.

Even though these defenses are not always successful, they show that sports entities, including the USOC, do not always hold all the power when it comes to ambush marketing in the courtroom. In *Federation Internationale de Football Ass'n v. Nike, Inc.*,<sup>82</sup> Nike sought to use the phrase "USA 03" on their clothing for the Women's 2003 FIFA World Cup.<sup>83</sup> The organizers of the World Cup brought suit for trademark infringement against Nike for the use of that phrase, since Nike was not an official sponsor.<sup>84</sup> The court found the claim had no merit because the meaning of the phrase "USA 03" in connection with FIFA's World Cup did not confuse the public.<sup>85</sup> Even though the USOC standard on confusion is lower and the same outcome may not be as likely if the USOC brought suit instead of FIFA, this example shows that corporations do succeed in ambush marketing, and as long as they comply by federal regulations and do not cause confusion and deceit to consumers, ambush marketing can be done legally.

Not all ambush marketing is meant to deceive the public, especially when small companies or local businesses do not have other opportunities to benefit from the Olympics due to high costs and competition with large corporations for sponsorship deals. Also, corporations that sponsor individual athletes deserve to get recognition from their athletes during the Olympic Games. This type of ambush marketing does not harm or intend to deceive the public. However, deceitful ambush marketing that dilutes the Olympic name is

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79. Compare Muradyan, *supra* note 10, with Yi, Borowick & Adams, *supra* note 10.

80. *Id.*

81. Bean, *supra* note 4, at 1122.

82. *FIFA v. Nike, Inc.*, 285 F. Supp. 2d 64 (D.C. Cir. 2003).

83. *Id.* at 66.

84. *Id.*

85. *Id.* at 69–70, 74.

growing, and there needs to be stronger solutions to counteract deceitful advertising campaigns.

## VI. CURRENT SOLUTIONS AND PREDICTED SOLUTIONS

Ambush marketing is increasing for the Olympic Games, which could diminish official sponsors of Olympic Games.<sup>86</sup> The IOC has developed a few key solutions over recent years to decrease the amount of ambush marketing attempts, but it still does not completely prevent the attacks. These current solutions include media blackouts, extra police enforcement at the Olympic venue, press conference shaming, and enacting further anti-ambush marketing regulations, whichever proves to be the most effective. However, interests could be served better for both Olympic committees and local businesses if the IOC were to start challenging the legality of deceitful ambush marketing through the media under the Amateur Sports Act, while also relaxing its current sponsor restrictions to allow more local sponsors to advertise at the Olympic venue, which would decrease the amount of ambush marketing surrounding local businesses.

The first solution mentioned is a three-week blackout for all non-Olympic sponsors. Governed by Rule 40 of Olympic regulations, the regulation “prevents athletes from advertising for non-Olympic sponsors just before and during the Games.”<sup>87</sup> Also, Rule 45 prevents athletes from making commercial appearances during the Olympic Games in order to prevent non-sponsors from gaining access to the athletes for commercial exploitation.<sup>88</sup> However, these rules cause controversy among the athletes because many athletes have equipment from their individual sponsors who are not one of the few selected Olympic sponsors. Particularly, athletes resent the rule for social media purposes when they cannot thank their sponsors for their support. Prior to the 2016 Rio Olympics, the IOC forecasted an amendment of Rule 40 to resolve the dilemma of individual athlete sponsorships by allowing athletes to give credit to their sponsors through their Olympic story, particularly through using social media.<sup>89</sup>

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86. Jean-Michel Marmayou, *Major Sports Events: How to Prevent Ambush Marketing?*, AFRICAN SPORTS L. & BUS. BULL. 39, 41 (Jan. 2013), [http://www.africansportslawjournal.com/Bulletin%201\\_2013\\_Marmayou.pdf](http://www.africansportslawjournal.com/Bulletin%201_2013_Marmayou.pdf).

87. Duncan Mackay, *End of Olympic Blackout Period Marked by High Profile Advertising Campaigns*, INSIDE THE GAMES (Aug. 16, 2012), <http://www.insidethegames.biz/articles/18269/end-of-olympic-blackout-period-marked-by-high-profile-advertising-campaigns>.

88. Anne M. Wall, *The Game Behind the Games*, 12 MARQ. SPORTS L. REV. 557, 570–71 (2002).

89. John Grady & Steve McKelvey, *The IOC's Rule 40 Changes and the Forecast for Rio 2016*, SPORTSBUSINESS DAILY (May 18, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/05/18/Opinion/Grady-McKelvey.aspx>.



Two more solutions to deter ambush marketing are through excessive Olympic police enforcement and shaming press conferences. As an example, in London in 2012 to prevent ambush marketing at the Olympic venue, the LOCOG employed 270 Olympic Delivery Authorities (ODA) workers, who were trained to spot ambush culprits up to 200 meters outside and above the Olympic venue.<sup>90</sup> Further, to deter corporations from ambushing through the media, the LOCOG chose to engage in shaming techniques through press conferences to shame ambush marketers publicly, which gave those companies bad reputations for being deceitful.<sup>91</sup> However, this technique could be risky with threats of defamation and trade libel suits.<sup>92</sup>

The last possible solution to deter culprits of ambush marketing is to create new laws and regulations that protect against ambush marketers. In 2012, the LOCOG took strides in adding new regulations to prevent ambush marketers at the Olympic Games. The LOCOG developed strict and comprehensive rules backed by statutory law.<sup>93</sup> Other than the normal copyright protections and registered trademarks, the U.K. passed special laws for extra protections of “Games marks” to further prevent ambush marketing at the Olympic Games and through broadcast advertising.<sup>94</sup> This “prevent[ed] the creation of any unauthorized association between people, goods[,] or services.”<sup>95</sup> Any use of “Games marks” needed to be approved by the LOCOG, which only went to official sponsors.<sup>96</sup> The LOCOG listed all current sponsors in the statutory register, which was maintained for authorities to know who had the right to use Olympic symbols and marks.<sup>97</sup> However, as these solutions are helpful for the Olympic committees and deter deceitful ambush marketing, none of the above solutions fixes the problem of unfair treatment to local businesses or companies that should get a chance to sponsor the Olympic Games.

## VII. PREDICTIONS FOR BETTER SOLUTIONS FOR LOCAL COMPANIES

In addition to increasing regulations to deter deceitful ambush marketing,

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90. Kevin Peachey, *Olympics: Tackling Ambush Marketing at London 2012*, BBC NEWS (July 19, 2012), <http://www.bbc.com/news/business-18628635>.

91. Ian Blackshaw, ‘Ambush Marketing’ and the 2012 London Olympics, WORLD SPORTS L. REP. BLOG (Feb. 13, 2012, 8:55 PM), [http://www.e-comlaw.com/sportslawblog/template\\_permalink.asp?id=483](http://www.e-comlaw.com/sportslawblog/template_permalink.asp?id=483).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

the IOC should contemplate opening a small sector of sponsorship opportunities to local businesses around the Olympic venue so they can benefit from the biggest sporting event in the world. These types of businesses may include local restaurants, boutiques, or tourist attractions. Allowing these types of businesses to advertise in some form at the Olympic venue would greatly decrease the amount of brand police employed at the Olympic venue and would save Olympic committees from enforcing stricter regulations that end up hindering Olympic athletes.

First Amendment claims under commercial free speech should protect individuals and companies that engage in ambush marketing after the selection process to become a USOC sponsor are denied or becomes too expensive for small or local businesses. Official sponsors of the Olympic Games spend billions to advertise during the Olympics, which leaves local businesses in the surrounding venue area no chance to market their products to athletes or, more importantly, spectators.<sup>98</sup> It is only fair that local businesses be allowed to capitalize on the Olympic Games alongside the big names, such as McDonald's.<sup>99</sup> However, the IOC ensures that is not possible because it employs hundreds of officers to patrol the venue and restricts ambush marketing by local businesses.<sup>100</sup>

This should be a violation of the First Amendment (when the Olympic Games are held in the U.S.) because local businesses who legally engage in ambush marketing by “us[ing] unprotected generic words or images that may be associated with a particular sports event” should be able to do so when a specific word or symbol is not restricted by the USOC.<sup>101</sup> When these types of businesses cannot afford exuberant prices for sponsorships, they should be able to engage in legal creative advertising in a form of ambush marketing as long as they are not intending to deceive others.<sup>102</sup> Not allowing them to do so infringes on their First Amendment rights.<sup>103</sup> In order to give fair treatment to local businesses, since sponsorship deals are so expensive and unattainable for local businesses to obtain, the best overall solution is to allow a few spots for small local businesses around the venue to advertise near the Olympic site. Whether allowing local restaurants to hand out pamphlets, flyers, or other forms of advertisements, or allowing the local restaurants to hang banners with the Olympic symbol on them would create better equal treatment.

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98. Smith, *supra* note 39.

99. *Id.*

100. *Id.*

101. Özeke, *supra* note 39; *see* Smith, *supra* note 39.

102. Davis, *supra* note 36, at 425.

103. *See generally* Özeke, *supra* note 39.

Another way to help accomplish this is to go back to the pre-1980 sponsorship days when the IOC allowed any sponsor to pay a non-excessive price to be a sponsor. As previously stated, the 1976 Montreal Olympics had 628 different sponsors.<sup>104</sup> However, this solution, too, has its downfalls. With 628 sponsors or more, it will be extremely difficult for any one sponsor to get any advertising value from consumers when there are hundreds of other advertisers doing the same thing.

Overall, sports organizations such as the USOC should challenge deceitful ambush marketing in court. A challenge in court gives sports organizations, like the USOC or IOC, the ability to make deceitful ambush marketing illegal. If deceitful ambush marketing is considered illegal, then the organizations will not have to endure so much struggle to pay for blackouts on television broadcasts, spend extra time forming extra regulations at each Olympic site, or worry about any other extra cautionary protections geared towards preventing ambush marketing. To avoid challenging minor and innocent ambush marketing suits, the IOC should relax its sponsorship exclusivity to allow the local businesses around the Olympic venue to advertise and sponsor their products at and around the Olympic Games. With this solution, local business interests are met at the Olympic venue, and IOC interests are met when it does not have to employ extra police enforcement to restrain ambush marketing.

### VIII. CONCLUSION

Overall, courts should deem deceitful ambush marketing illegal for those companies that find loopholes in the Lanham Act and Amateur Sports Act, especially when large corporations look to deceive and confuse consumers away from chosen official Olympic sponsors. The examples stated above show how non-sponsored companies could take advantage of official sponsors who pay large amounts of money to lawfully achieve Olympic sponsor status. The USOC attempts to find solutions to ambush marketing and attempts to keep ambushers of this nature out of the Olympics. To further avoid ambush marketing at the Olympic venue, the IOC should allow for more local sponsorship opportunities—which would decrease extra policing and decrease regulations instituted on the Olympic grounds—which in the long run would only benefit the IOC and USOC.

Allowing those small businesses to cater to athletes and spectators at the Olympic Games, while outlawing deceitful ambush marketing through the media, is the best solution for both Olympic interests and local company interest. If the USOC files civil suits against those deceitful ambush marketers

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104. Emmett, *supra* note 11.

who intend to deceive and confuse consumers while diluting the Olympic name, then deceitful ambush marketing could be found illegal, which would make Olympic sponsors content to spend more money on future sponsorships. Adding more local sponsors at the Olympic venue would also be beneficial to the IOC because the local sponsors would decrease costs used for branding police and trademark protection. Finally, strict social media regulations, particularly for athletes, also cause unnecessary enforcement, and athletes should have a right to post about their individual sponsors without having to worry about sanctions from Olympic committees. Overall, deceitful ambush marketing needs to be stopped; otherwise, the exclusivity of Olympic sponsorship will be endangered, which could negatively affect our athletes in the future.