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Kali Murray, *Competitor Regulation of Sponsored Content in the New Sports Content Media Economy*, 25 Marq. Sports L. Rev. 253 (2014)
Available at: <http://scholarship.law.marquette.edu/sportslaw/vol25/iss1/11>

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COMPETITOR REGULATION OF SPONSORED CONTENT IN THE NEW SPORTS CONTENT MEDIA ECONOMY

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ABSTRACT

Sports advertising formats, like all other types of advertising strategy and campaigns, are becoming increasingly diverse. Sponsored content, in which advertising content is integrated specifically into editorial content, has become a new way to generate revenue in a diverse media sport content economy. Part II examines the spectrum of sponsored content in sports media. Part III analyzes how the types of claims might arise under the Lanham Act of 1946 for sponsored content. I conclude that sponsored content demonstrates how the regulation of competition through intellectual property challenges may face challenges in the new media sport content economy.

I. INTRODUCTION

Sports media in the twenty-first century, no longer consigned to standard print media, such as newspapers and magazines or standard broadcast media, has achieved startling diversity. Independent sports blogs, such as Deadspin¹ and Bleacher Report,² cover a range of general sports issues, while other sports blogs, such as American Soccer Now³ and Saturday Down South,⁴ cover niche subjects, like soccer and college football, respectively. Micro-blogs, such as Twitter and Facebook, permit sports figures, like LeBron James, to comment on sports-related events directly to their followers.⁵ Sports information is also generated through sport fantasy leagues⁶ and visual media, such as YouTube and

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¹ See generally DEADSPIN, <http://www.deadspin.com> (last visited Dec. 2, 2014).

² See generally BLEACHER REPORT, <http://bleacherreport.com> (last visited Dec. 2, 2014).

³ See generally Am. Soccer Now, <http://www.americansoccernow.com> (last visited Dec. 2, 2014).

⁴ See generally Saturday Down S., <http://www.saturdaydownsouth.com> (last visited Dec. 2, 2014).

⁵ See generally *LeBron James*, TWITTER, <https://twitter.com/KingJames> (last visited Dec. 2, 2014).

⁶ Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates Its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 11–25 (2012) (outlining the types of fantasy games and the various stakeholders).

video games. This new, sports-related diverse media is multi-platform, spanning digital, desktop, and mobile devices,⁷ and includes both traditional media owners, like ESPN or CBS Sports,⁸ as well as independent owners, like Gawker Media and Vox Media.⁹

Brett Hutchins and David Rowe identified the emergence of this range of sports media as a key shift in what they term “the media sport content economy.”¹⁰ Hutchins and Rowe note that the preexisting order of sports media was based on a traditional broadcast model, which was based on “guaranteeing a ‘scarcity’ of distribution channels for high-quality, popular content—only a limited number of television networks possessed the production and distribution capacity and capital to broadcast major sporting competitions and events.”¹¹ Hutchins and Rowe contend, however, that the “architecture” of this media sports content economy has shifted within the advent of digital networks such as the Internet.¹²

The diversity of new sports media has also led to the emergence of new advertising formats. Diverse advertising formats include product placement, advergames, banner ads, interactive digital formats, and sponsored content.¹³ These advertising formats, according to Patrick de Pelsmacker and Peter C. Neijens, share one key characteristic, that is, “they try to conceal the persuasive intent of the commercial messages embedded in them. . . . by means of developing pleasurable, flow-inducing and less intrusive formats.”¹⁴ While the relevant scholarly literature has had an impact on the new advertising format of

⁷ Gian Fulgoni & Andrew Lipsman, *Digital Game Changers: How Social Media Will Help Usher in the Era of Mobile and Multi-Platform Campaign-Effectiveness Measurement*, 54 J. ADVERTISING RES. 11, 11–12 (2014).

⁸ See generally CBSSPORTS, <http://www.cbssports.com> (last visited Dec. 2, 2014); ESPN, <http://espn.go.com> (last visited Dec. 2, 2014).

⁹ See generally GAWKER, <http://gawker.com> (last visited Dec. 2, 2014); VOX MEDIA, <http://www.voxmedia.com> (last visited Dec. 2, 2014).

¹⁰ Brett Hutchins & David Rowe, *From Broadcast Scarcity to Digital Plenitude: The Changing Dynamics of the Media Sport Content Economy*, 10 TELEVISION & NEW MEDIA 354, 355 (2009).

¹¹ *Id.* at 355–56.

¹² *Id.* at 355.

¹³ See Patrick de Pelsmacker & Peter C. Neijens, *New Advertising Formats: How Persuasion Knowledge Affects Consumer Responses*, 18 J. MARKETING COMM. 1, 1 (2012).

¹⁴ *Id.* (citation omitted).

sports law—such as athlete endorsements in social media like Twitter and Facebook,¹⁵ as well as the impact of banner advertisements¹⁶—this paper considers how to address the increasing importance of one type of advertising: sponsored content and its impact in sports-related media.

Sponsored content, which is also referred to as native advertising, is broadly defined as “the integration of commercial content into editorial content.”¹⁷ Joseph Dean Moore has identified four common elements specific to sponsored content that distinguishes it from traditional advertising:

The placement is paid for by a third party who is not the publisher; it is often created by the host publication’s advertising or marketing staff, and sometime [sic] even its editorial staff, in consultation with the sponsor; it appears within the content/editorial stream of the host publication’s site (hence the “native” part); and it is clearly distinguishable from traditional display advertising.¹⁸

Examples of sponsored content include:¹⁹ video-content series on specific topics identified by the advertiser;²⁰ content embedded into streaming material on micro-blogs such as Facebook;²¹ and content placed in news articles that resembles products produced by the advertiser.²² Eva van Reijmersdal and Karolina Tutaj note that sponsored content has significant persuasive value to consumers, noting that the sponsored content, as compared to other types of

¹⁵ Natasha Brison et al., *Tweets and Crumpets: Examining U.K. and U.S. Regulation of Athlete Endorsements and Social Media Marketing*, 23 J. LEGAL ASPECTS SPORT 55, 58, 62–69 (2013). See generally Steve McKelvey & James T. Masteralexis, *This Tweet Sponsored by . . . : The Application of the New FTC Guides to the Social Media World of Professional Athletes*, 11 VA. SPORTS & ENT. L.J. 222 (2011).

¹⁶ Jack F. Williams, *The Coming Revenue Revolution in Sports*, 42 WILLAMETTE L. REV. 669, 688–89 (2006) (analyzing the use of ads on different playing fields).

¹⁷ Karolina Tutaj & Eva A. van Reijmersdal, *Effects of Online Advertising Format and Persuasion Knowledge on Audience Reactions*, 18 J. MARKETING COMM. 5, 7 (2012).

¹⁸ Joseph Dean Moore, *News Goes Native: An Examination of Online Media’s Disclosure Practices for Sponsored Content*, DIGITAL COMMONS@U. NEB. – LINCOLN (Apr. 2014), digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1044&context=journalismdis.

¹⁹ The examples are taken from FEDERAL TRADE COMMISSION, *BLURRED LINES: ADVERTISING OR CONTENT? AN FTC WORKSHOP ON NATIVE ADVERTISING* (2013), available at www.ftc.gov/system/files/documents/public_events/171321/final_transcript_1.pdf.

²⁰ *Id.* at 43–44.

²¹ *Id.* at 46–47.

²² *Id.* at 48–49.

advertising formats such as banner advertising, “does affect perceived advertising value: the subtle sponsored content item was found to be more informative, more amusing, and less irritating than the prominent banner ad. Internet users seem to enjoy reading sponsored content more than encountering banner ads on informational websites.”²³

Sponsored content, given its blurring of the legal lines between editorials and advertising within the context of journalism and its accompanying persuasive value, raises a key legal risk, namely the inability of consumers to perceive that what is presented content is actually sponsored content. This is particularly a problem within sports media, as a result of its innovation in the area of sponsored content, as discussed *supra*. Given its increased importance, this paper considers the relationship of sponsored content within sports-related media. Part II examines the types of sponsored content that have appeared within the context of sports media on a spectrum. Part III examines the type of harm posed by sponsored content and contends that it is best resolved through a false affiliation claim under Section 43(a) of the Lanham Act. I conclude that the emergence of false affiliation claims suggests the difficulties in regulation of sponsored content in intellectual property law.

II. THE SPECTRUM OF SPONSORED CONTENT IN THE NEWS SPORTS MEDIA ECONOMY

Simone Murray contends,

At the core of the contemporary phenomenon of media branding lies the abstraction of content from the constraints of any specific analogue media format. Content has come to be conceptualized in a disembodied, almost Platonic, form: any media brand which successfully gains consumer loyalty can be translated across formats to create a raft of interrelated products, which then work in aggregate to drive further consumer awareness of the media brand.²⁴

In many respects, sponsored content is a logical outcome of making content the focus of branding efforts, insofar as it makes advertisements another type of

²³ Tutaj & van Reijmersdal, *supra* note 17, at 15.

²⁴ Simone Murray, *Brand Loyalties: Rethinking Content Within Global Corporate Media*, 27 MEDIA CULTURE & SOC'Y 415, 417 (2005).

content. This section considers the spectrum of sponsored content available within the current media environment. Analyzing sponsored content within a spectrum is helpful to examine the ways in which different organizational choices might prompt distinct legal risks. Understanding this axis—the current media environment—is helpful, inasmuch as it helps to categorize the range of sponsored content within a spectrum.²⁵

Three factors are determinative in my selection of where sports-related sponsor-content should be placed on a given spectrum: platform media, advertising vehicles, and cross-platform analysis. First, platform describes the media in which the sponsored content is placed.²⁶ Platforms include live experiences, such as lectures, sporting events, and conferences; print media, such as newspapers, magazines, books, and brochures; digital media, such as websites, blogs, micro-blogs, Internet search engines, and social networks; and mobile platforms, such as phones, tablets, and video game devices. Second, advertising vehicles are the ways that the sponsored content is delivered.²⁷ Advertising vehicles can include text, visual presentations, such as film or video clips, or a type of live performance, such as sports events. Finally, cross-media platform analyzes the ways in which platform and advertising vehicles can be used together to enhance the contribution of all other media.²⁸ Based on a number of these categories, sponsored content within sports media can be considered on a spectrum with three primary categories: legacy-sponsored content, originator-sponsored content, and seamless sponsored content (see Figure 1).

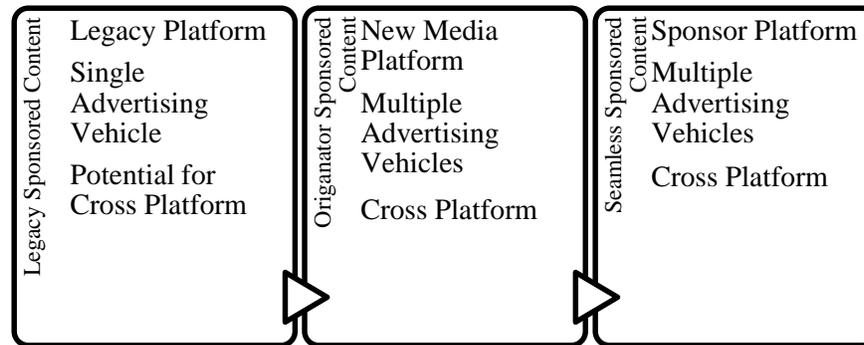
²⁵ See, e.g., Rachel L. Stroude, *Complimentary Creation: Protecting Fan Fiction as Fair Use*, 14 MARQ. INTELL. PROP. L. REV. 191, 193–98 (2010) (analyzing fan-fiction employing a spectrum analysis).

²⁶ See Jennifer Taylor et al., *Is the Multi-Platform Whole More Powerful Than Its Separate Parts? Measuring the Sales Effects of Cross-Media Advertising*, 53 J. ADVERTISING RES. 200, 200 (2013) (analyzing the different types of platforms involved in advertisement).

²⁷ See John Turner et al., *Scheduling of Dynamic In-Game Advertising*, 59 OPERATIONS RES. 1, 2 (2011).

²⁸ See Taylor et al., *supra* note 26, at 200–01.

FIGURE 1



Legacy-sponsored content emerges from pre-existing media players, often uses a single advertising vehicle, and has not typically been integrated into every form of media. Several examples of legacy-sponsored content exist within the current landscape:

- In April 2013, *ESPN the Magazine* incorporated sponsored content advertisement by Coors Light as an illustrated sidebar of a magazine article.²⁹
- *USA Today* has established a website entitled FTW (“For the Win”) that displays sponsored content integrated into the editorial news stream. These materials are both video- and text-based sponsored content.³⁰
- *Sports Illustrated* incorporated an advertisement for SAP into a filmed video presentation by children that were acting as journalists.³¹

Legacy-sponsored content derives its persuasive value from the name recognition generated by pre-existing media brands.³² The persuasive value of

²⁹ Emma Bazilian, *ESPN: The Magazine Puts a Print Spin on Sponsored Content*, ADWEEK (Apr. 29, 2013), <http://www.adweek.com/news/advertising-branding/espn-magazine-puts-print-spin-sponsored-content-148990>.

³⁰ Clair Lorell, *FTW: How USA Today Mastered Viral Sports Content*, DIGIDAY (Jan. 29, 2014), <http://digiday.com/publishers/usa-today-ftw/>.

³¹ *Sponsored Content: GENYOUth Kid Journalists Interview Athletes, Execs at SAP Sapphire Now Conference*, SPORTS ILLUSTRATED KIDS (Aug. 12, 2014), <http://www.sikids.com/sikidstv/sponsored-content-genyouth-kid-journalists-interview-athletes-execs-at-sap-sapphire-now-con>.

³² Dan Levy, *Building a Digital Legacy: Q&A with The Atlantic’s Kimberly Lau*, SPARKSHEET (Jan.

legacy-sponsored sports content was amplified to the extent that media brands, such as *Sports Illustrated* and *ESPN the Magazine*, operated within a closed media ecosystem.

The second type of sponsored content, originator-sponsored content, has emerged from new digital brands, whether in blogs, websites, micro-blogs, or other social networks. This type of sponsored content differs significantly from legacy advertising media insofar as sponsored content is often undertaken in multiple advertising vehicles and is deliberately cross-platform, incorporating methods through video and text-based strategies. Examples of originator-sponsored content include the following:

- The blog *BuzzFeed* has posted an article, *Meet Ben Jackson: The 21-Year-Old Athlete with Cerebral Palsy Who Defied All Odds*, that integrates a commercial of Jackson produced by Gatorade with an associated text that references the commercial. A Gatorade trademark is super-imposed on the video. The term Gatorade is also imposed at the bottom of each video. Otherwise, the ad appears to be similar to other types of *BuzzFeed* content.³³
- The blog *SB Nation* has posted an article entitled *Video: Brian Stann Embodies the Marines' Mental and Physical Fitness* that integrates text that describes the activities of Brian Stann, an Ultimate Fighting Champion, with an advertisement prepared by the United States Marine Corps. The text appears as an article by author Mark Ufford, with a subtle acknowledgement to the sponsor, the Marine Corps of Sports, written at the top of the page.³⁴
- The Massachusetts Institute of Technology Sloan Sports Analytics Conference permitted sponsors to submit a televised speech presentation that was then distributed on the Internet.³⁵

The emergence of originator-sponsored content reflects what Brett Hutchins and David Rowe have referred to as the “digital plenitude” in the new media

20, 2014), <http://sparksheet.com/building-a-digital-legacy-qa-with-the-atlantics-kimberly-lau/>.

³³ Brian Truong, *Meet Ben Jackson: The 21-Year-Old Athlete with Cerebral Palsy Who Defied All Odds*, BUZZFEED (July 22, 2014 4:03 PM), <http://www.buzzfeed.com/briantron/meet-ben-jackson>.

³⁴ Matt Ufford, *Brian Stann Embodies the Marines' Mental and Physical Fitness*, SBINATION (Apr. 17, 2012), <http://www.sbnation.com/2012/4/17/2955134/video-brian-stann-marine-core-of-sports-mental-physical-fitness>.

³⁵ *Content & Videos*, MIT SLOAN SPORTS ANALYTICS CONF., http://www.sloansportsconference.com/?page_id=481&sort_cate=Sponsored%20Presentation (last visited Dec. 2, 2014).

sports economy.³⁶ Hutchins and Rowe contend that, “[o]nline sport content [distribution] mechanisms, particularly video streaming and download technologies, are restructuring the media sport content economy by creating ‘digital plenitude’ where once there was comparative scarcity in terms of quality content and channels of communication.”³⁷ In many respects, the sponsored content in these new forms of digital media might be more persuasive than in legacy content because a consumer’s expectations as to a distinct relationship between advertising and editorial content may not be as fully formed in the new digital environment.³⁸

The last category within the new media environment is seamless sponsored content. Seamless sponsored content differs from the two previous categories of sponsored content in sports media since the advertiser itself generates sports-related advertising vehicles across a number of media platforms, including live sport events. Examples of seamless sports content include the following:

- Mountain Dew (a brand of PepsiCo) now sponsors a website entitled Green Label. Green Label resembles a blog with independently drafted material on different subject matter. Covered subject matter includes sound, action, art, style, places, and gaming. Green Label also covers its sports-related Dew Tour. Mountain Dew’s sponsorship is noted on the page as a Mountain Dew Venture, and the title of the blog is Green Label, which may be alluding to the trade dress associated with Mountain Dew products.³⁹
- International Business Machines (IBM) generates televisual information on a variety of sports-related activities through its broader branding effort, Smarter Planet.⁴⁰

Seamless sponsored content is a major shift within the sports media econ-

³⁶ See generally Hutchins & Rowe, *supra* note 10.

³⁷ *Id.* at 356.

³⁸ See Patrick Howe & Brady Teufel, *Native Advertising and Digital Natives: The Effects of Age and Advertisement Format on News Website Credibility Judgments*, 4 INT’L SYMP. ON ONLINE JOURNALISM 78, 86 (2014) (showing study determined that subjects were not able to distinguish advertisement on sponsored website page).

³⁹ See Stuart Elliott, *Brought to You by Mountain Dew*, NYTimes (Apr. 25, 2013), <http://www.nytimes.com/2013/04/26/business/media/mountain-dew-to-introduce-a-sponsored-web-site.html>. See generally Green Label, <http://green-label.com> (last visited Nov. 24, 2014).

⁴⁰ See generally IBM SPORTS, <http://www.ibm.com/smarterplanet/us/en/sports/> (last visited Dec. 2, 2014).

omy for two basic reasons. First, the content is neutral information that is generated by the advertiser. Second, the content is linked across platforms to specific live sporting events. Both of these features are intended to intensify affinity between advertisers and their audience, sports consumers, based upon their social identity choices. Recent research into sports sponsorship suggests that social identity and sporting events offer a particularly powerful type of sponsorship because of their ability to connect to cognitive, normative, and affective social identity components.⁴¹ Indeed, George Deitz, Susan Myers, and Marla Stafford have noted that “persuasion in response to sponsorship information may occur through multiple routes, with social [identification] acting as the key exogenous variable.”⁴²

Analyzing the platform on a spectrum-analysis helps to identify and characterize the legal risk associated with sponsored content within a media sports economy. A simple way to characterize the legal risk associated with the spectrum of sponsored content is that a consumer may be misled or deceived about the relationship of the advertiser to the sponsored content, diverting the consumer away from other competitive products. Thus, a straightforward way to resolve the legal risk is to disclose the relationship of the parties to one another, typically through the phrase “sponsored content,” or a surrounding visual depiction that differentiates the sponsored content from other forms of editorial content. This has typically been the approach of legacy-sponsored platforms: for example, in its sponsored content contained within *ESPN the Magazine*, ESPN notes its relationship with Coors Light with the language “COLD HARD FACTS, PRESENTED by Coors LIGHT.”⁴³ The sponsorship is further clarified in the ESPN sponsored content because the trademark associated with Coors Light accompanies the material.⁴⁴ The disclosure of sponsorship by the advertiser is apparent to all; therefore, the legal risk is apparently resolved.

The legal risk in sponsored content, however, is not resolved through simple disclosure of the sponsorship. First, as the above example illustrates, even simple disclosure is not so simple: the term used to indicate the relationship between Coors Light and ESPN is *presented as* opposed to the more direct term *sponsor*. A textual failure to distinguish between the advertiser and the content

⁴¹ George D. Deitz et al., *Understanding Consumer Response to Sponsorship Information: A Resource-Matching Approach*, 29 PSYCHOL. & MARKETING 226, 229 (2012). See also Kevin Gwinner & Gregg Bennett, *The Impact of Brand Cohesiveness and Sport Identification on Brand Fit in a Sponsorship Context*, 22 J. SPORT MGMT. 410, 421 (2008) (“The results of this study provide evidence that fit is positively influenced by sport identification and brand cohesiveness, in this case among those attending an action sports event.”).

⁴² Deitz et al., *supra* note 41, at 229.

⁴³ See Bazilian, *supra* note 29.

⁴⁴ *Id.*

producer might create significant confusion over the source of the material. Indeed, recent scholarship indicates that consumers of sponsored media, particularly older viewers, have difficulty in distinguishing between sponsored content and editorial content, even where disclosure may be apparent.⁴⁵

Second, analyzing sponsored content within a spectrum indicates other legal risks besides confusion over the relationship between the sponsor and the advertiser. Specifically, seamless sponsored content media contemplates, at its core, the method of “disguise,” that is the consumer may not be able to distinguish between the advertiser and the creator at all. Green Label, on its face, looks like legacy and originator media. Green Label creates its own original commentary, some of which is related to the brand Mountain Dew, and some of which is independent of the brand Mountain Dew. Sponsorship, therefore, is disguised from the consumer through the blurring of the lines of what constitutes a creator in advertisement. This blurring is intensified within the context of sports sponsorship because of the heightened way consumers experience live sporting events. In particular, attendance at a live sporting event is accompanied by heightened social identification that might increase the risk that the consumer would fail to distinguish between the advertiser and the sponsor. Thus, sponsored content creates a significant legal risk by blurring the lines between advertiser, content creator, and consumer. This blurring is intensified significantly, depending on the type of sponsored content at issue.

III. PRIVATE REGULATION OF SPORTS-SPONSORED CONTENT THROUGH THE LANHAM ACT OF 1946

How, then, do we address the legal risks that accompany the emergence of sponsored content within the new media sports content economy? A key element of the harm of sponsored content is that the parties fail to disclose the relationship between the parties, the parties misrepresent the relationship between the parties, or the parties disclose the relationship in a confusing manner. This risk, as discussed *infra*, is intensified within the context of sport-sponsored content because of social identification that accompanies sports-related content.

One key method of regulation may be through a claim of federal unfair competition law under Section 43 of the Lanham Act of 1946. Section 43 of the Lanham Act of 1946 is understood to be the primary source of the federal law of unfair competition, a flexible term that encompasses a range of harms related to the misrepresentations of the nature, quality, or source of a good or service.⁴⁶

⁴⁵ See Howe & Teufel, *supra* note 38, at 85.

⁴⁶ Joseph P. Bauer, *A Federal Law of Unfair Competition: What Should be the Reach of Section 43(a) of the Lanham Act?*, 31 UCLA L. REV. 671, 673 (1984) (defining the term unfair competition).

Three categories of unfair competition are available under Section 43(a)(1) of the Lanham Act. First, Section 43(a)(1)(A) of the Lanham Act contemplates that the deceptive and misleading use of a trademark is a form of federal unfair competition.⁴⁷ Second, Section 43(a)(1)(A) of the Lanham Act contemplates that a false association claim is available for a range of claims related to the false, deceptive, or misleading relationship between business parties. Third, Section 43(a)(1)(B), typically referred to as a false advertising claim, contemplates any description or representation of fact in a commercial advertisement or promotion that misrepresents the nature, qualities, or geographic origin of the defendant's or another person's goods, services, or commercial activities.⁴⁸ A civil claim is likely to be possible for a harm caused by sponsored content across the spectrum. Figure 2 depicts the potential claims that might be raised under Section 43(a) as to sponsored content claims.

The term is also referred to as unfair trade practice. 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §4.11 (4th ed. 2014).

In an attempt to find a term that embraces all aspects of trademark infringement, unfair competition, misappropriation, dilution of marks, false advertising, etc., some have used the designation "Unfair Trade Practices". Such a broad term as "unfair trade practices" recognizes that illegal practices are not limited to cases where the parties are in actual competition.

Id. (footnote omitted).

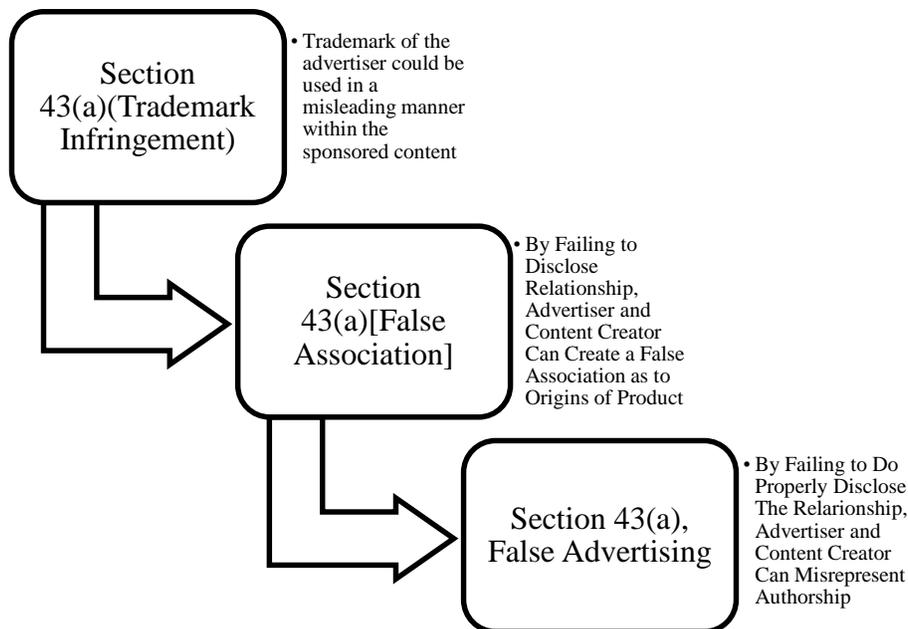
⁴⁷ *Two Pesos Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 767–68 (1992). *See also* 15 U.S.C. § 1125(a)(1) (2006). A civil remedy is available for:

[a]ny person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof . . . which . . . 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 . . .

Id.

⁴⁸ The Supreme Court has recently recognized that "[s]ection 1125(a) thus creates two distinct bases of liability: false association, § 1125(a)(1)(A), and false advertising, § 1125(a)(1)(B)." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, No. 12-873 U.S. slip op. at 3 (U.S. 2014) (citation omitted).

FIGURE 2



Section 43(a), therefore, can potentially serve as a locus for the type of harms that may arise within the context of false advertising claims. A closer look, however, suggests that there may be significant limits associated with these claims under Section 43(a) of the Lanham Act as to the spectrum of sponsored content.

All three claims may confront an initial hurdle insofar as sponsored content may not be actionable under the Lanham Act because the advertiser and the generator of the content are in a legitimate business relationship, and therefore, the use of the trademarks, the sponsorship, or affiliation relationship is a legitimate one. While the precedent as to this claim is relatively thin, courts and administrative bodies have been reluctant to permit a claim of trademark infringement where the parties are already engaged in a legitimate relationship. For example, in *Official Airline Guides, Inc. v. Churchfield Publications*,⁴⁹ a

⁴⁹ 756 F. Supp. 1393 (D. Or. 1990). The WIPO Mediation and Arbitration Center, in its resolution of disputes over domain name, requires that the parties share no legitimate business relationship to allege domain name infringement. See, e.g., *Aktieselskabet af 21. November 2001 A/S v. Jun Li aka Li Jun*, Case No. D2011-1219, at 3 (WIPO Admin. Panel 2011), <http://www.wipo.int/amc/en/domains/decisions/text/2011/d2011-1219.html> (“The Complainant contends that it has not licensed or

district court held that a deliberate misrepresentation under Section 43(a) of the Lanham Act could not be invoked where the defendants produced evidence of a legitimate business relationship with advertisers through the existence of a sponsorship contract.⁵⁰

This question of a pre-existing legitimate business relationship is likely to limit the ability to raise a trademark infringement claim. Sponsored content is likely to utilize multiple trademarks⁵¹ that may generate consumer confusion as to the source of the good in question (the article). Consumers might be confused as to use of one mark (the content generator) to generate positive identification of another's mark (the advertiser). Sponsored content, however, presumes the existence of a binary contractual relationship between the two relevant parties, thus offering each party no incentive to bring a claim against another party. These pre-existing agreements are likely to limit trademark infringement litigation as to sponsored content. Such limits of the kind of trademark infringement suggest the ways in which utilizing competitive private regulators can prove to be ineffective within an overall scheme of regulation.

Notwithstanding this potential hurdle, the claims under Section 43(a) related to claims of false advertising and false association are likely to be more successful. A potential response to this particular claim may stress that, while a legitimate business relationship might exist between the parties in relationship to the use of the trade works, the fact that the parties jointly create the inaccurate content prompts the possibility that the resulting content will violate either the false advertising or false association prongs of Section 43(a). The false advertising claim under Section 43(a)(1)(B), in many respects, is a relatively straightforward claim that is likely to be directed to the actual content contained within the sponsored content. Section 43(a)(1)(B) is directed specifically to statements that are made in commercial advertising or promotion directed towards, what

otherwise permitted the Respondent to use its ONLY trade mark or register domain names incorporating its trade marks. There is no business relationship between the parties.”); *Avon Prod., Inc. v. Simon Lee / Domains by Proxy, Inc.*, Case No. D2010-0668, at 2 (WIPO Admin. Panel 2010), <http://www.wipo.int/amc/en/domains/decisions/text/2010/d2010-0668.html> (“Further, the Complainant has not given any license, permission or other right by which the Respondent could own or use any domain name incorporating the Complainant's AVON trademark, and there is no business relationship whatsoever between the Respondent and Complainant.”); *Dr. Ing. h.c.F. Porsche AG v. Michel Galarneau*, Case No. 2001-1448, at 4 (WIPO Admin. Panel 2002), <http://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-1448.html> (“At no time has the Respondent been authorized or licensed by the Complainant to utilize the Complainant's trade name or trademark. There is no business relationship between Complainant and the Respondent.”).

⁵⁰ *Official Airline Guides, Inc.*, 756 F.Supp. 2d at 1405-06.

⁵¹ For instance, BuzzFeed and Gatorade, in their advertorial, integrate BuzzFeed's trademark with the super-imposed term Gatorade in the video and on the bottom of the page.

Thomas Williams⁵² notes, are two actionable categories of analysis: (1) an actionable misrepresentation as to “the nature, characteristics, qualities, or geographic origin” that it is applied to, and (2) “goods, services, or commercial activities.”⁵³ Thus, false advertising claims are likely to be relevant to the content, such as factual representation, that is contained within the sponsored content. The claims, however, are unlikely to apply to what is potentially disturbing in sponsored content—that is, the affiliation between the advertiser and the content generator in creating the new communicative product.

Therefore, the most potentially relevant claim that could be applied to sponsored content is a false association claim under Section 43(a)(1)(A) of the Lanham Act. False association under Section 43(a)(1)(A) of the Lanham Act is tied to the statutory language that permits recovery when a person utilizes a trademark, a false designation or origin, or false or misleading description or representation of fact that causes confusion, mistake, or description as to either “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.”⁵⁴ Although this distinction is not always clearly made within the relevant case law,⁵⁵ false association appears to encompass three primary types of claims: (1) false affiliation claims, in which a claim is made that any symbol, device, or product made by one person is mistakenly affiliated with another person;⁵⁶ (2) false endorsement claims, in which a claim

⁵² See generally THOMAS M. WILLIAMS, FALSE ADVERTISING AND THE LANHAM ACT: LITIGATING SECTION 43(A)(1)(B) 2 (2012) (citing 15 U.S.C. § 1125(a)(1)(B)).

⁵³ *Id.* at 2, 4 (citing 15 U.S.C. § 1125(a)(1)(B)).

⁵⁴ 15 U.S.C. § 1125(a)(1)(A) (2006).

⁵⁵ The primary confusion appears to be the conflation of the first clause of 15 U.S.C. § 1125(a) with the second clause of 15 U.S.C. § 1125(a). See *id.* at 1125(a). The text of the clause, through its use of the term “or” appears to suggest that two types of claims are potentially available for a claim under § 1125. *Id.*

⁵⁶ *Faulkner Literary Rights, LLC v. Sony Pictures Classics Inc.*, 953 F. Supp. 2d 701, 712 (N.D. Miss. 2013) (analyzing an affiliation claim under the Lanham Act); *Cohen v. Facebook, Inc.*, 798 F. Supp. 2d 1090, 1097–98 (N.D. Cal. 2011) (recognizing a false affiliation claim under Section 43(a)(1) made in relationship to material placed on Facebook). False affiliation claims are primarily raised within the content of Section 43(a)(1)(A) but can also be raised within the context of Section 43(a)(1)(B), as well. See, e.g., *Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1273 (10th Cir. 2000).

It is therefore apparent, in the context of the Act's broad purpose of proscribing unfair competition and the 1988 amendment of § 43(a), that Congress did not intend to narrowly limit the term “commercial activities,” but rather intended to encompass those activities which do not solely involve the provision of services or the production of goods. Properly construed, the term “commercial activities” in § 43(a) encompasses P & G's use of the profits from the sale of its goods. The district court's grant of summary judgment to defendants-appellees on the ground that the subject message did not directly implicate “goods” or “services” was improvident because P & G has shown a genuine issue of material fact exists as to whether the subject message is actionable under the “commercial activities” prong of §

is made where there was a use of any symbol or device which is likely to deceive consumers as to the association, sponsorship, or approval of goods or services by another person;⁵⁷ and (3) false attribution claims, where a claim is made that there is a product that misleads or deceives as to the claim of authorship.⁵⁸

Of the claims available under Section 43(a)(1)(A) of the Lanham Act, false affiliation claims are most likely to capture the primary harms incurred by sponsored content, which arise from a misuse or misrepresentation of the relationship between the two parties that generate the sponsored content. False affiliation claims are commonly tied to the improper use of a trademark,⁵⁹ but false affiliation claims can also be tied to the failure to disclose an affiliation between parties. For instance, a district court in *Paul v. Judicial Watch, Inc.*,⁶⁰ addressed a false affiliation claim where the plaintiff had alleged that the parties shared an attorney-client relationship that was no longer in force.⁶¹ One primary issue, however, may impact a claim under false affiliation: a false affiliation claim is relatively under-theorized in relation to false endorsement and false attribution claims, thus confusing their relationship to Lanham Act claims generally. Thus, precedent remains relatively sparse in this area of law.

False endorsement claims are tied specifically to the improper use of another's persona, such as trade name, name, or persona characteristic, in such a manner to cause consumer confusion. As the Ninth Circuit noted in *Waits v. Frito-Lay, Inc.*,

A false endorsement claim based on the unauthorized use of a

43(a)(1)(B).

Id.

⁵⁷ *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1110 (9th Cir. 1992). *See also* *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1239 (9th Cir. 2013).

Although claims under § 43(a) generally relate to the use of trademarks or trade dress to cause consumer confusion over affiliation or endorsement, we have held that claims can also be brought under § 43(a) relating to the use of a public figure's persona, likeness, or other uniquely distinguishing characteristic to cause such confusion.

Id.

⁵⁸ *See, e.g.*, *Cleary v. News Corp.*, 30 F.3d 1255, 1260 (9th Cir. 1994) (“[T]he case law does suggest that the Lanham Act does not create a duty of express attribution, but does protect against misattribution.”).

⁵⁹ *U-Haul Int'l, Inc. v. Kresch*, 943 F. Supp. 802, 811 (E.D. Mich. 1996) (examining a false affiliation claim in which the plaintiff failed to show that defendant had failed to use the mark). *See also* *Parks v. LaFace Records*, 329 F.3d 437, 445–46 (6th Cir. 2003) (outlining cases that involve marks).

⁶⁰ *See generally* 543 F. Supp. 2d 1 (D.D.C. 2008).

⁶¹ *Id.* at 8–9.

celebrity's identity is a type of false association claim, for it alleges the misuse of a trademark, *i.e.*, a symbol or device such as a visual likeness, vocal imitation, or other uniquely distinguishing characteristic, which is likely to confuse consumers as to the plaintiff's sponsorship or approval of the product.⁶²

Thus, false endorsement protects against misuse of a *persona* within the context of advertisement.⁶³ The harm, however, in sponsored content derives from the potentially misleading nature of the *relationship* between the advertiser and the content generator as to the communicative product that is being created.

As with false endorsement claims, false attribution claims seem to be responsive to the harms that may occur where the originator of the work, the advertiser, is not sufficiently disclosed by the content generator. A false attribution claim, however, faces significant legal risks in the face of the Supreme Court's decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.*⁶⁴ In the *Dastar* majority opinion, authored by Justice Scalia, the Supreme Court considered whether a claim for false attribution could be raised under Section 43(a)(1)(A) of the Lanham Act, when one company relabeled and sold a video series (in which the copyright had expired) that had been previously sold by another company.⁶⁵ The Supreme Court held that the failure to list the original copyright owner on the video series was not a false attribution under Section 43(a)(1)(A) of the Lanham Act.⁶⁶ Specifically, the Court concluded the phrase "origin of goods" was intended to refer to the trademark holder as a "producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods."⁶⁷ In doing so, the Supreme Court stressed that the purpose of trademark law is to protect consumer's perception of the brand and to extend attribution to the creator of the brand would prove too over-inclusive in covering communicative products that would likely be the subject of an alternative claim in copyright or patent law.⁶⁸

The Supreme Court's holding in *Dastar*, then, is likely to be preclusive for

⁶² *Waits*, 978 F.2d at 1110.

⁶³ False endorsement claims related to athlete persona have also been raised. *See Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1239-40 (9th Cir. 2013) (outlining Jim Brown's athletic career). *See also Unique Sports Prods. Inc. v. Wilson Sporting Goods Co.*, 512 F. Supp. 2d 1318, 1324 (N.D. Ga. 2007) (false endorsement claim raised by license of athletic endorser).

⁶⁴ 539 U.S. 23 (2003).

⁶⁵ *Id.* at 25-27.

⁶⁶ *Id.* at 37-38.

⁶⁷ *Id.* at 37.

⁶⁸ *Id.* at 32-34.

claims of sponsored content. First, it is not entirely clear whether advertisers use sponsored content to convey the claim as to a specific set of tangible goods. Rather, sponsored content is designed for the purpose of communicating a set of ideas about the brand itself. For generators of seamless, sports-sponsored content, such as Mountain Dew's Green Label, the goal is to generate new information—that may or may not be information about the product itself—that serves to facilitate intense social identification with the overall brand. Second, sponsored content is creative content, material that is likely to be communicative in nature (i.e., a copyrighted video, a copyrighted article, a copyrighted collection of images). Thus, sponsored content violates the binary relationship detailed in *Dastar* as to what the Supreme Court deems the doctrinal content of trademark law (the product), as opposed to content of copyright law and patent law, which is designed to protect the creators. Instead, sponsored content is simultaneously a product and a creative communication. In many respects, this suggests that the way in which the Supreme Court held in *Dastar* fails to anticipate the impact of a changing media environment.

IV. CONCLUSION

The regulation of sponsored content is bound by two key choices: what is the type of information that should be regulated and who should regulate the relevant information. First, regulation of sponsored content falls within a broad category of regulated information that Michael Grynberg refers to as consumer information law, which regulates “the production and dissemination of information relevant to consumers in making purchasing decisions.”⁶⁹ Categories of consumer information, according to Grynberg, can include trademark law, false advertising law, state tort and contract law, and administrative regulation of unfair and deceptive advertising.⁷⁰ Second, which entity should regulate sponsored content is an ongoing question. Consumer information regulation is a complex combination of public regulation, through entities such as the Federal Trade Commission or the state attorney general, and private regulation, through the intellectual property regulation of trademarks, false advertising, and false affiliation litigation within the Section 43(a) of the Lanham Act. Thus, consumer information law is an area in which there is a “systematic deployment of private power in controlling what are regarded as public activities.”⁷¹

To date, the primary deployment of regulation of sponsored content has

⁶⁹ Michael Grynberg, *More Than IP: Trademark Among the Consumer Information Laws*, 55 WM. & MARY L. REV. 1429, 1433–34 (2014).

⁷⁰ *Id.* at 1434–35, 1437–39.

⁷¹ Colin Scott, *Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance*, 29 J. L. & SOC'Y 56, 73 (2002).

been public. For instance, in December 2013, the Federal Trade Commission sponsored a workshop, *Blurred Lines: Advertising or Content? An FTC Workshop on Native Advertising*, to discuss the impact of consumers on false advertisement.⁷² The Federal Trade Commission identified that its pre-existing regulatory structure would likely prove to be flexible in regulating sponsored content.⁷³

This article has contemplated what may be the best vehicle for private regulation of sports-related, sponsored content by evaluating the ways in which harm could be experienced under the Lanham Act of 1946. My analysis concludes that private regulation within this arena might be insufficient, given the difficulty of capturing the harms at risk within the spectrum of sports-sponsored content. Recovery under Section 43(a) of the Lanham Act through trademark law or false advertising law may insufficiently capture the ways in which the advertiser and the content generator may work together to create content. False advertising law may offer a way to regulate the content of the ad itself but might be insufficient to capture the potentially complicated relationships that might need to be disclosed to consumers. The most potentially valid claim, false association, suffers from competing theories of recovery that are insufficiently theorized with each other, and thus may not be usable in everyday litigation. A serious question remains: Whether our regulatory model is sufficient for addressing the harms caused by sponsored content, an issue that is particularly compelling within the sports media context.

⁷² See generally FEDERAL TRADE COMMISSION, *supra* note 19.

⁷³ *Id.*