

# HAYNES BOONE



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## ON YOUR MARK, GET SET, GO!

Why marketing loves sporting events so much, and how legal can set up for a “yes” rather than a “no.”

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**ANA Advertising Law 1-Day Conference**

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# Why does marketing love sports events?



# Why does marketing love sports events?



# What potential advertising issues can come up when marketing at sporting events?

## Issues relating to:

- Sponsorship and Endorsements
  - Influencer Campaigns
- Trademark Infringement
- Ambush Marketing

# How brands can leverage sporting events for marketing purposes: Sponsorships and Engagements

- Benefits of Sponsorships:
  - Reach new audiences
  - Engage in strategic partnerships
  - Improve name recognition
- Sponsorship Opportunities
  - Brands can engage in partnerships with any of the following:
    - The team/league (e.g.: the NBA or the New York Knicks)
    - The event (e.g.: NBA Finals)
    - The venue (e.g.: Madison Square Garden)
    - The players themselves (e.g.: Jalen Brunson)



# How brands can leverage sporting events for marketing purposes: Influencer Campaigns

- Some athletes and their family members double as influencers!



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# How brands can leverage sporting events for marketing purposes: Influencer Campaigns

- Basics of Influencer Marketing
  - FTC is cracking down! What are the basics?
    - BRANDS are responsible for what their influencers say:
      - They can't say anything you can't say;
      - They have to disclose (in a way that can't be missed) when there's a material connection to you:
        - Paying them
        - Free tickets
        - Free swag
    - “Ambush Influencers” can still cause problems.

# How brands can leverage sporting events for marketing purposes: Influencer Campaigns – Best Practices

## ■ Best Practices

- Have agreements in place.
- VET THE INFLUENCERS!
  - Fake followers?
  - Problematic content?
- Monitor the space – be aware of what’s happening.
  - Act quickly if you see an influencer failing to adhere to the guidelines
- Be proactive
  - Provide the influencers with sufficient guidance for them to easily comply with the requirements





*Major League Baseball Props. v. Webb*, 2018 TTAB LEXIS 267 (Trademark Trial & App. Bd. July 18, 2018)

## Trademark Infringement

- Trademark Infringement = unauthorized use of a mark that is **likely to cause confusion**, deception, or mistake about the source of the goods and/or services
- Key “likelihood of confusion” considerations:
  - **Similarity of marks** (sight, sound, meaning, connotation); does not have to be identical!
  - **Similarity of products/services** (trade channels, customer sophistication); does not have to be competitive!
  - **Strength of the mark** (inherent distinctiveness, “crowded field”)
  - **Actual confusion**
  - **Intent**

# Trademark Infringement

- Aurora Prod. Corp. v. Schisgall Enterprises Inc.

- American Broadcasting Companies, Inc. (“ABC”) obtained an injunction against Defendant, Schisgall Enterprises, Inc., regarding their trademark for the phrase MONDAY NITE FOOTBALL used in connection with a football game and toys based on ABC’s registration for MONDAY NIGHT FOOTBAL for football games.

- Penn. State Univ. v. Vintage Brand, LLC

- In 2021, several universities sued Vintage Brand for making and selling apparel with school team branding



- Vintage Brand has gone of the offensive, arguing that school team logos on merchandise is merely “ornamental” and fails to function as “source identifying” trademarks. In July 2022, the Judge in one case dismissed Penn. State’s motion to dismiss Vintage Brand’s counterclaim, stating:
  - “The modern collegiate trademark - and licensing - regime has grown into a multibillion-dollar industry. But that a house is large is of little matter if it’s been built on sand.”

# How to talk to the marketing team about ambush marketing

- What is ambush marketing?
  - A company who is **not an official sponsor** of a sports event takes advantage of the event's high-profile attention by launching marketing activities that **create an association with the event**.
- Ambush marketing can generally appear in two forms:
  - Ambush by association – A company attempts to use a promotional campaign to imply an official connection with the sports event, its organizer(s), or a participating athlete.
  - Ambush by intrusion – A company attempts to market their brand at or near the event's location.

# Examples of Ambush Marketing

## World Cup 2010, South Africa – *Bavaria Beer* [Ambush by Intrusion]

- A Dutch brewing company, Bavaria, sent a group of 36 Dutch models wearing orange mini-dresses with company logos into the stands of Netherlands' first-round World Cup match.
- The same dresses were being used in an ongoing ad campaign across Europe by Bavaria.
- The models were arrested and charged with breach of South Africa ambush marketing laws put into effect in preparation for the 2010 World Cup.



# Examples of Ambush Marketing

## 1992 Olympics, Barcelona – *AmEx versus Visa* [Ambush by Association]

- In 1985, AmEx turned down an opportunity to be the Olympics' global credit card sponsor. When the ultimate official sponsor, Visa, launched ads targeting AmEx during the 1992 Olympic games, AmEx fired back.
- They launched a direct ad campaign in Barcelona and Spain that paralleled Visa's ads and disrupted the Olympics' audience.
  - Market research firms found that many viewers did not know whether the AmEx or Visa was the official credit card sponsor.
- The International Olympics Committee (IOC) attempted to negotiate with AmEx to drop their ambush campaign. Ultimately, IOC took legal action in a Paris court, receiving a ruling to enjoin the “unfair competition” conduct by AmEx.

# Examples of Ambush Marketing

## 1996 Olympics, Atlanta – *Nike versus Reebok* [Ambush by Intrusion]

- Reebok paid \$50 million to be the official sponsor of the 1996 Olympics.
- Nike, instead of paying the sponsorship fees, erected a massive billboard over Olympic Park in Atlanta (the main location of the 1996 Olympics).
- Additionally, Nike paid Michael Johnson and gave him golden spikes to run in his championship race.
  - Michael Johnson won the gold medal and stood on the victory podium in his Nike “Just Do It” spikes. Reebok and many other sponsors called on the IOC to come up with stricter rules for athletes being used by non-sponsors.



# Ambush Marketing in Context: 2024 Paris Olympics

- Ambush marketing is **not necessarily unlawful**, however companies deploying this marketing technique do so with **risk** of retaliation from variety of sources:
  - (1) event owners,
  - (2) official sponsors, and
  - (3) government agencies enforcing special legislation.
- Law Governing Ambush Marketing at the 2024 Paris Olympics:
  - Rule 40
    - (Updated by International Olympic Committee in June 2019)
  - International Olympic Committee Social and Digital Media Guidelines 2024
  - Lanham Act
  - The Olympic Symbol Protection Act of 1995 (UK)

# How to combat/avoid ambush marketing

- How to avoid ambush marketing
  - Make sure you have adequate licensure and agreements in place prior to promoting an advertisement in connection with a sports event
  - If you are not associated with an event – try to avoid express or implied claims that may lead a consumer to believe you are in a partnership with the event
- How to react to an ambush marketing attack
  - Adequately prepare
    - Ensure your marketing is clear – consumers can easily tell that you are in fact the sponsor
    - Purchase sufficient advertising space minimize encroachment by competitors
  - Respond proportionately
    - Try and make your reaction as minimal as possible as to try and avoid bringing more attention to the issue
  - Consider pursuing litigation



# Discussion

