

On Your Mark, Get Set, Go! – ANA – 1 Day Conference (link)

Outline:

- WHY marketing loves sporting events so much, and how legal can set up for a “yes” rather than a “no.”
- How brands can leverage sporting events for marketing purposes. To cover official sponsorships and engagements, as well as more end-rounds like influencer campaigns.
- The fine line between fair use and infringement / how to talk to the marketing team about ambush marketing.

Section 1. Why marketing loves sporting events so much, and how legal can set up for a “yes” rather than a “no.”

Sports events provide big opportunities for brands to market their goods and services to hundreds of thousands of viewers. For reference, this past Super Bowl (Super Bowl LVIII), was the most watched telecast in all of U.S. history – with over 123 million people tuned in, in comparison, there are about 330 million people total in the US.¹ Consumers are not only accustomed to seeing their favorite brands advertise at said events, but they actually really look forward to it.

What advertising issues often come up when marketing at sporting events?

Advertising at sporting events triggers common advertising issues such as implied versus express claims, puffery, comparative claims, and environmental claims. However, advertising at sporting

¹ NPR, *Sunday's Super Bowl was the most watched telecast in U.S. TV history*, February 13, 2024
<https://www.npr.org/2024/02/13/1231221287/sundays-super-bowl-was-the-most-watched-telecast-in-u-s-tv-history#:~:text=An%20average%20of%20more%20than,figures%20from%20Nielsen%20and%20CBS.>

events also brings some unique issues in the advertising space including endorsements and sponsorships, influencer campaigns, trademark infringement, and ambush marketing.

Sporting events provide a huge opportunity for a return on investment. P&G initiated a campaign in connection with the 2010 Olympics called “Thank You, Mom.” Through their advertisements they showed how P&G products help parents behind the scenes in championing their children to become world class athletes. It was reported that P&G obtained \$500 million in global incremental sales, 76 billion global media impressions, and over 74 million global views making it the most successful campaign since their founding 175 years prior.²

Section 2. How to leverage sporting events for marketing purposes

Sponsorships and Engagements:

Sponsorships allow for brands to reach new audiences, engage in strategic partnerships, and improve their name recognition. Sponsorships also mean a wide range of possible collaborations including partnering with teams or leagues, individual events, venues, or even the players themselves.

Influencer Campaigns:

Influencers in relation to sports and sporting events doesn't just include the social media spectators who observe the games, but the athletes themselves. Athletes have also been including their family members in their social media personalities, allowing for additional partnerships. For example, Krisitin Juszczuk, the wife of Kyle Juszczuk (a fullback for the 49ers) recently

² Tegna, *The Best Olympic Ads of All Time*, July 20, 2023 <https://www.tegna.com/advertise/best-olympic-ads>

partnered with the NFL. She quickly went viral on social media for her fashion designs in which she repurposed vintage NFL merchandise into trendy creations that stars including Taylor Swift were purchasing and wearing to NFL games. She obtained a licensing deal with the NFL and is now permitted to use their logos on her designs.³

Basics of Influencer Marketing:

It is important to note that brands are responsible for what their influencers say. If a brand is not permitted to say something, then neither is the influencer promoting their goods. Additionally, influencers need to disclose (in a clear manner) when there is a material connection to the brand, for example, if the brand is paying them or providing them free tickets or merchandise.

Additionally, it is important to look out for “Ambush Influencers” – influencers who are not actually sponsored but are purporting to be.

Section 3. Trademark Infringement

What is trademark infringement?

Trademark infringement is the unauthorized use of a mark that is likely to cause confusion, deception, or mistake about the source of the goods and/or services. The main considerations in determining whether there is trademark infringement depends on whether there is a likelihood of confusion. A likelihood of confusion is determined by evaluating the following factors: (1) similarity of marks (sight, sound, meaning, connotation); (2) similarity of products/services

³Shanna McCarriston, *Designer Kristin Juszcyk reaches licensing agreement with NFL, wears original look for 2024 Super Bowl*, CBS Sports, February 11, 2024 <https://www.cbssports.com/nfl/news/designer-kristin-juszcyk-reaches-licensing-agreement-with-nfl-wears-original-look-for-2024-super-bowl/#:~:text=Juszcyk%20gained%20notoriety%2C%20and%20hundreds,the%20deal%20are%20not%20public>.

(trade channels, customer sophistication); (3) strength of the mark (inherent distinctiveness, “crowded field”); (4) actual confusion; and (5) intent.⁴

Examples of Trademark Infringement:

Major League Baseball Props. v. Webb

In *Major League Baseball Props. v. Webb*, Major League Baseball Props. (Petitioner) petitioned to cancel the trademark registration owned by Christopher Webb (Respondent) for the mark: MAJOR LEAGUE ZOMBIE HUNTER in Class 25, registered on the Supplemental Register. The Respondent’s mark covered “*clothing, namely, short and long sleeve t-shirts.*” Petitioner, at the time, had registrations for clothing, namely, shirts. The court found that the term “Major League” when used in connection with baseball related services had acquired distinctiveness, their reasoning was as follows. First, the court found that Petitioner’s marks were famous: (i) they had used variations of the term MAJOR LEAGUE for almost 100 years and variations of the logo for almost 50; (ii) they had accumulated billions of dollars in sales; and (iii) the marks had been licensed in connection with local and national sponsorship programs (e.g.: Bank of America, Budweiser, Coca-Cola, Gatorade, etc.). The court found the products, as purchasers familiar with the Petitioner’s trademarks as used in connection with various “MAJOR LEAGUE” t-shirts who then encounter Respondent’s t-shirts, would believe the goods came from the same source. The court reasoned that the parties’ products, namely t-shirts, would be presumed to be sold in the same channels of trade since they are identical. Last, the court found

⁴ 15 U.S.C. §§1114, 1116-1118

the marks have the same commercial impression (sight, sound, and meaning) and ruled that there was a likelihood of confusion.⁵

Aurora Prod. Corp. v. Schisgall Enterprises Inc.

American Broadcasting Companies, Inc. (“ABC”) obtained an injunction against Defendant Schisgall Enterprises, Inc. in connection with 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.⁶

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.”⁷

Section 4. Ambush Marketing

What is it?

⁵ *Major League Baseball Props. v. Webb*, 2018 TTAB LEXIS 267 (Trademark Trial & App. Bd. July 18, 2018)

⁶ *Aurora Prod. Corp. v. Schisgall Enterprises Inc.*, No. 72 CIV. 765, 1972 WL 17673 (S.D.N.Y. May 1, 1972)

⁷ *Pennsylvania State Univ. v. Vintage Brand, LLC*, No. 4:21-CV-01091, 2024 WL 456139 (M.D. Pa. Feb. 6, 2024), clarified on denial of reconsideration, No. 4:21-CV-01091, 2024 WL 1416505 (M.D. Pa. Apr. 2, 2024)

When a company who is not an official sponsor (i.e. has no permission, and paid no sponsorship or licensing fee) 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: (1) 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; and (2) ambush by intrusion – A company attempts to market their brand at or near the event's location.⁸

Ambush Marketing Examples

1. World Cup 2010, South Africa – *Bavaria Beer* [Ambush by Intrusion]
 - a. A Dutch brewing company, Bavaria, sent a group of 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 breaches of South Africa ambush marketing laws put into effect in preparation for the 2010 World Cup.⁹
2. 1992 Olympics, Barcelona – *AmEx versus Visa* [Ambush by Association]
 - a. 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

⁸ Conor Griffin, Duncan Grehan, Dublin, *Ambush marketing – pushing the boundaries or a legitimate sales tactic?* Global Advertising Lawyers Alliance, Sept. 15, 2014, <https://www.galalaw.com/files/AmbMktgPush.pdf>

⁹ *Id.*

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.^{10 11}

3. 1996 Olympics, Atlanta – *Nike versus Reebok* [Ambush by Intrusion]

- a. Reebok paid \$50 million to be the official sponsor of the 1996 Olympics. Its biggest competitor, 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.¹²

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.

¹⁰ Chris Smith, *Solving AmEx vs. Visa and putting an end to ambush marketing*, Sports Business Journal, June 12, 2023, <https://www.sportsbusinessjournal.com/Journal/Issues/2023/06/12/Champions/ambush-marketing.aspx>

¹¹ Christine Brennan, Doug Cress, *American Express Sued Over Olympic Credit Card Ads*, Washington Post, Feb. 5, 1992, <https://www.washingtonpost.com/archive/business/1992/02/06/american-express-sued-over-olympic-credit-card-ads/8b555e8e-0e4a-4ad7-b3f6-c0f27447f78d/>

¹² Charlie Minato, *Ingenious Ambush Campaigns From Nike, Samsung and BMW Make Official Sponsorships Look Like A Waste*, Business Insider, June 14, 2012, <https://www.businessinsider.com/best-ambush-marketing-campaigns-2012-6#nike-takes-over-south-africa-8>

Rule 40 – In June 2019, the IOC updated *Rule 40* of the Olympic Charter establishing guidelines on how participants are allowed to engage in and benefit from commercial activities related to the Olympics.¹³

International Olympic Committee Social and Digital Media Guidelines 2024 – the IOC guidelines for social and digital media advertising will be important especially in the social media age to safeguarding the rights of official sponsors and preserving market value throughout the games.¹⁴

Lanham Act – US Companies can be held liable for violations of federal trademark law for ambush marketing activities undertaken in violation of Rule 40 and IOC regulations, and infringement of the United States Olympic Committee’s exclusive intellectual property rights granted to it by the Amateur Sports Act of 1978 and the Ted Stevens Olympic and Amateur Sports Act of 1998.¹⁵

The Olympic Symbol Protection Act of 1995 – The Olympic Symbol (Protection) Act was an act passed by UK Parliament in 1995. The Act specifically protects unauthorized use of any Olympic intellectual property used as a source identifier, including: (1) the Olympic and Paralympic

¹³ Olympic Games Paris 2024, *Rule 40 Resources for Paris 2024*, <https://olympics.com/athlete365/rule-40/>

¹⁴ Olympic Games Paris 2024, IOC Social and Digital Media Guidelines for Paris 2024, <https://olympics.com/athlete365/paris-2024/#id-659fed3290af1>

¹⁵ Adam Epstein, *The Ambush at Rio*, 16 J. Marshall Rev. Intell. Prop. L. 350 (2017), <https://repository.law.uic.edu/cgi/viewcontent.cgi?article=1415&context=ripl>

symbols and mottos, (2) the words: ‘Olympic’, ‘Paralympic’, ‘Olympian’, ‘Paralympian’, ‘Olympiad’, and ‘Paralympiad’ and (3) any similar words and/or symbols.¹⁶

¹⁶ Olympic Symbol etc. (Protection) Act 1995.