

Legal and regulatory update

Fighting for what is left of exclusivity: Strategies to protect the exclusivity of sponsors in the sports industry

Christopher R. Chase* and Rick Kurnit

Received (in revised form): 8th April, 2010

*Frankfurt Kurnit Klein & Selz PC, 488 Madison Avenue, 10th Floor, New York, NY 10022, USA

Tel: +1 (212) 826 5568; Fax: +1 (347) 438 2124; E-mail: cchase@fkks.com

Christopher R. Chase is a senior associate with Frankfurt Kurnit Klein & Selz, where he practises intellectual property, entertainment and advertising law. He counsels individuals and entities in the sports, entertainment and advertising industries on all aspects of their businesses, specifically focusing on trademark, copyright and right of publicity matters. His diversified practice includes structuring and negotiating sponsorship, licensing and endorsement agreements, and advising on promotional and branded entertainment matters.

Rick Kurnit is a senior partner with Frankfurt Kurnit Klein & Selz. He has over 30 years' experience in advising the advertising and marketing industry, representing advertisers, advertising agencies, public relations and promotion companies. He has been selected by Best Lawyers in America in both Advertising Law and Media Law; ranked in Band 1 by Chambers USA; ranked first by Legal 500; and selected by Law and Politics magazine as one of New York's 'Super Lawyers' in First Amendment, media, advertising, and intellectual property. Rick is also Vice Chairman of the American Bar Association Committee on private advertising litigation.

ABSTRACT

In a tighter spending environment, and during

the year of two of the world's largest sporting events (the 2010 Winter Olympics and the 2010 World Cup), marketers are looking for creative ways to associate themselves with high-profile properties and events, in both official and unofficial capacities. To ensure that a marketer receives the benefit of an official sponsorship with exclusive rights, sports properties must take steps to protect against ambush marketing and other unofficial competitive marketing efforts that dilute the value of the official sponsor's rights. For example, sports properties may consider purchasing all advertising space at or near an event location, require event hosts to work with local governments to establish 'clean zones', or pursue litigation against 'ambush' marketers. At the same time, official sponsors must protect themselves when negotiating the sponsorship agreement to ensure that their rights will be protected. Moreover, sponsors should leverage the rights received in an official sponsorship to make their marketing stand out. This paper demonstrates that if both parties act in concert the sponsorship relationship can be fruitful.

Keywords: sponsor, sponsorship, exclusivity, ambush marketing, sponsorship agreements, sports marketing



INTRODUCTION

Each year, brands spend hundreds of millions of dollars on sports sponsorships,¹ designed to tap into the excitement and passion of sports fans by leveraging the association with sports properties. With a sponsorship in the sports industry, brands are able to expand consumer recognition and align themselves with key demographics. The target audiences that sports properties retain are often the same audiences that brands covet.

As reflected in the amount of money spent on sports sponsorships, brands value the affiliation with sports properties, whether an event, a league, a team or an individual performer (throughout this paper, these rights holders will be referred to as the 'property' or 'properties'). The properties see the value as well, and rely on sponsors to help fund and further the commercial goals of the property.

Because of this incredible amount of spending, properties should protect the value of their sponsors' rights. One of the most valuable rights for a sponsor is exclusivity — the ability to be one of the few, if not the only, brand to align itself with a property. Such exclusivity is a primary selling point for properties when seeking sponsorships, and with sponsors paying millions of dollars a year to be associated with a property, protecting this exclusivity is key. Otherwise the properties' value proposition to sponsors will be damaged and sponsorship dollars may go elsewhere. Especially now, in a tightened spending environment, properties must vigorously defend their sponsors in order to protect the value of the sponsorship.

This paper will focus on strategies for properties to protect sponsors' exclusivity, primarily from attacks by 'ambush' marketers. It also offers steps that sponsors can take to help secure the benefit of their bargain. While sponsors often believe that it is the property's responsibility to protect

sponsors' exclusivity, sponsors cannot always rely solely on the properties and must themselves take action to protect their rights.

PROPERTIES SHOULD DEVELOP EFFECTIVE STRATEGIES TO PROTECT SPONSORS' EXCLUSIVITY

In order for a property to maintain the value of what it can offer to sponsors, it must protect the rights granted to sponsors through official sponsorships, primarily the exclusivity offered through such sponsorship. Sponsors pay top dollar to maintain overall or category exclusivity in connection with sponsorship of a property. One of the main problems that leads to an erosion of sponsor exclusivity, and thus the value of a sponsorship, is ambush marketing.²

'Ambush marketing' generally refers to marketing and promotional activities by third parties unaffiliated with a property that seek to misappropriate or take advantage of the goodwill, excitement and popularity generated by the property.³ Ambush marketing can be categorised in two general forms: ambush marketing where an unaffiliated party seeks to capitalise on the goodwill or popularity of a particular property by association without obtaining the authorisation of or rights from the property, and the more offensive type, where an unaffiliated party seeks to weaken a sponsor's official association with a property, by confusing the consuming public as to which party is the official sponsor.

Marketers continue to look for cost-effective ways to tie into prominent properties. With ambush marketing, marketers attempt to associate themselves with a property without the expense of paying a sponsorship fee. This undermines the value of the investments made by official sponsors. Additionally, ambush marketing harms a property's bargaining position for sponsorships: if potential sponsors know

that their exclusive sponsorship rights will be diluted, they may find that there is less value in the sponsorship.⁴ It is therefore imperative for a property to protect its sponsors, and thus, the value of the sponsorship itself.⁵

EXAMPLES OF AMBUSH MARKETING OF SPORTS PROPERTIES

There are a number of ways in which marketers will seek to associate themselves with a property or ambush an official sponsor of a property, including the following:

Broadcast advertising

Marketers that are not official sponsors of a property can still purchase broadcast advertising time before, during and after the broadcast of an event. A common form of marketing, such purchases may be simply made by marketers seeking high visibility during an event but could also be made to imply a connection to the event, in order to undermine and devalue the rights of the official sponsor of the event. A non-sponsor of the property may even be able to use a designation such as: 'X Company is a proud sponsor of Y Network's broadcast of Z event', which, depending on the number of television viewers, may even be more valuable than sponsoring the event itself. One of the first examples of this type of marketing was by Kodak at the 1984 Summer Olympics, where, due to its sponsorship of a range of media channels and the US track team, many perceived Kodak to be the official sponsor rather than Fujifilm, which actually purchased the official Olympic sponsorship rights after Kodak turned them down.⁶

Advertising at or near the event location

Marketers seeking to capitalise on the high visibility of messaging near the event loca-

tion will advertise on billboards, buses, subway platforms, telephone booths and other out-of-home media near or outside of a stadium, along a race route, or anywhere else in the host city of a high-profile event.⁷ More aggressive manoeuvres include skywriting and flying airborne banners or huge inflatable objects over the location of the event. Such advertising will be seen by the multitudes of event attendees, and may even be picked up on the television broadcast of the event. Advertising at or near the event location can be very successful, as non-sponsor Nike showed at the 1996 Olympics, where it plastered Atlanta in billboards, handed out banners at the competitions and erected an enormous Nike-themed tent near the main stadium.⁸ Following these Olympics, many consumers thought that Nike was an official sponsor of the games.

Unofficial promotional items

Marketers may offer free or low-priced goods such as t-shirts, banners, flags or hats near the event so that those inside the arena are wearing or waving the logos or advertising message of that marketer, which may end up on the television broadcast of the event. For example, during the 2006 World Cup in Germany, non-sponsor Bavaria Brewery distributed lederhosen to fans of Holland's national team.⁹ While these goods used the national team's primary orange colour, they also exhibited the logo of Bavaria Brewery. In order to protect its official beer sponsor Anheuser-Busch, FIFA officials at the stadium where Holland was playing made all fans entering the stadium remove their Bavaria lederhosen, leading to thousands of Dutch fans watching the match in their underwear.¹⁰

A high-profile event is also an excellent location in which to offer samples of goods, which could conflict with official sponsors of a property.¹¹

Use of generic names or themes in advertising

Marketers may create promotional materials that reference the property in generic terms in order to avoid liability for trademark infringement. Common examples include the use of the 'big game' or the 'championship' to refer to a major sporting event like the Super Bowl.

Savvy marketers will also use a generic theme that may associate the marketer with the property without an explicit use of the property's rights. The Olympics are fertile ground for this type of marketing. For example, during the 2008 Summer Olympics broadcast on NBC, Vizio ran television advertisements promoting its HDTVs by showing an athlete diving into a pool against the backdrop of a large American flag while a family watches on a Vizio HDTV, much to the ire of Panasonic, the official worldwide audio and video partner for the Olympics.¹² Additionally, prior to and during the 2010 Winter Olympics, both Subway and Verizon Wireless ran advertisements showing their association with certain Olympic stakeholders rather than the official US Olympic Committee (USOC), upsetting official USOC partners McDonald's and AT&T, respectively.¹³ In Subway's case, it ran a television advertisement featuring Olympic gold medalist Michael Phelps swimming his way towards Vancouver, 'where the action is this Winter'. Verizon's television advertisements touted the company's sponsorships of the US speed skating team by showing a US speed skater being pulled to victory by the power of Verizon's 3G wireless network.¹⁴ The USOC contacted both Subway and Verizon Wireless and, without specifically naming either, publicly admonished both companies by issuing a statement that ambush marketers 'damage official Olympic sponsors and undermine

the USOC's financial means to ensure that America's athletes are given the best chance to perform to their best potential on the field of play'.¹⁵

A further example of 'generically' themed advertising was the distribution of 'Fan Cans' by Anheuser-Busch prior to the 2009 college football season.¹⁶ This campaign featured Bud Light beer cans adorned with local schools' team colours. For example, Anheuser-Busch offered purple and gold cans in Louisiana and maize and blue cans in Michigan, mimicking the school colours of Louisiana State University's and the University of Michigan, respectively. Although the cans did not specifically use the schools' names or trade marks,¹⁷ the intent of the campaign appeared to be to associate the brand with the schools' fans.¹⁸

Use of a city or country name

Seeking to capitalise on the location of a high-profile event, marketers will create materials using the name of the event's host city or country. Again, the Olympics also attracts this type of marketing. For example, in 1984, Nike blanketed the Olympics host city Los Angeles with the marketing message 'I Love LA', at the expense of the official sponsor Converse. Perhaps more notably, American Express challenged Visa's exclusive rights at the 1992 Summer and 1994 Winter Olympics by running advertisements stating: 'And remember, to visit Spain, you don't need a visa' and 'So if you're travelling to Norway, you'll need a passport but you don't need a visa'.¹⁹

Marketers' use of the location name plus the year of the event could veer into trademark infringement, particularly with Olympic host cities.²⁰

Such marketing is not, however, limited to the Olympics. For example, in advance of the 2010 Boston Marathon, non-sponsor New Balance covered the

city of Boston with billboards featuring the slogan 'Run Faster Boston', where the 'N' in the word 'Boston' was the same as that featured on a New Balance sneaker.²¹

Congratulatory, good luck or other support advertisements

Marketers will also run advertisements offering good wishes to a team or athlete, or even a country, in an attempt to associate with a high-profile property. This can occur before an event in the form of a good luck message, or after an event in the form of a congratulatory message.²²

Use of event tickets for promotional purposes

Non-sponsors will often use event tickets in sweepstakes, contests or other consumer giveaways to promote themselves. The non-sponsor will be likely to avoid using the official trade mark of the property or the specific event when advertising the giveaway (such as 'the Big Game' rather than 'the Super Bowl') or will include a disclaimer as to the company behind the promotion in order to avoid a trademark claim. Despite the fact that the licence language on the ticket back generally prohibits such marketing use, this type of ambush marketing often occurs.

Sponsorship of individual teams or athletes

Another common marketing tactic is to sponsor an individual team or athlete, rather than the league or the team as a whole. Such tactics can be quite effective. For example, according to the Vice President for Marketing of AirTran Airways, the airline's endorsement deals with individual players on the Atlanta Falcons in 2008 convinced many people that the Falcons were aligned with AirTran, rather than the team's official sponsor at that time, Delta Airlines.²³

WAYS FOR PROPERTIES TO MONITOR AND PREVENT AMBUSH MARKETING

To protect their sponsors, and justify the high costs of the sponsorship, properties should take action to prevent ambush marketing before it happens or stop it when it does happen. There are a number of ways for the property to combat ambush marketing, including the following:

The purchase of all advertising space and media time

To control the marketing messages near an event location, the property can purchase all advertising space around and near the venues where the events will take place.²⁴ The property could then offer that advertising space to official sponsors, or at least not offer it to competing sponsors. Additionally, if the property has control over advertising during the broadcast, it could require that no advertising competitive to that of its official sponsors be shown during the coverage of the event, or require that the broadcaster give a right of first refusal for the purchase of advertising time to the property's official sponsors. The property itself could even purchase all of the broadcasting advertising space and offer it to its official sponsors. For example, the Union of European Football Associations purchases and controls all advertising time during its sanctioned football matches, and then allots that time to official sponsors.²⁵ Of course purchasing advertising space, whether on television, in print, or in out-of-home form is an expensive proposition, but one that may be covered by including such costs within the official sponsorship fee. The control over advertising offers great advantages to the properties, however; not only would such action clear up potential ambushers, but it also offers official sponsors the

opportunity to better leverage their sponsorship through such controlled advertising media.

Require event host locations to establish 'clean zones'

Properties should work with the governments of event host locations to establish a 'clean zone' near the location of the event leading up to and during the time of the event. Such clean zones could be established by the passage of temporary local ordinances, and would restrict unauthorised commercial advertising and the sale of unauthorised merchandise near the event location.²⁶ However, for events with dates and locations that are unknown until a few days before such events begin, such as the World Series or Stanley Cup playoffs, passing temporary ordinances is not feasible, and in those circumstances properties should work with local, state and/or federal law enforcement in each event market to enforce whatever combination of anti-counterfeiting, vending/permit or trespassing laws suits the properties' purposes in that event market.

Public relations activities

Properties can create a public education campaign to emphasise the relationship between the sponsorship fees paid to the property and how such fees benefit the event and the participating athletes. This is effective in the Olympic context, where funding for US athletes often comes from corporate sponsors. Creating a public education campaign is a non-legal and non-contractual way for properties to remind consumers that they should avoid or ignore ambush marketing tactics.

'Reminder' letters

Similar to the public relations activities noted above, properties can send advance warning letters to non-sponsor marketers,

reminding such entities of the properties' rights and the exclusivity granted to official sponsors. These letters often warn potential ambush marketers to respect official sponsors by not using the properties' trade marks in marketing materials or stating or implying that their goods or services are associated with the properties. Both the NFL and FIFA are known to send these types of letter to non-sponsors in order to protect their rights in such properties' marquee events, namely the Super Bowl and the World Cup.²⁷

Maintain strict control over event ticketing

By maintaining strict control over event tickets, properties can prevent non-sponsors from using tickets as promotional prizes or giveaways. Properties can do so by using ticket licence language prohibiting such unauthorised uses.

Legal action

Finally, properties can take legal action against ambush marketers. To assuage the concerns of both current and future sponsors, properties should do as much as they can to demonstrate a harsh stance against ambush marketers. By enforcing their rights regularly, properties can show ambush marketers that they take such issues seriously.

Although most ambush marketing campaigns exist in a legal grey area, there are several legal claims under US law that properties can make against ambush marketers. First, properties can bring a trademark infringement claim under the Lanham (Trademark) Act for the unauthorised use of a property's registered trade marks;²⁸ however, such a claim is unlikely to be available as ambush marketers are often savvy enough not to use the official trade marks or other intellectual property rights of a property. Properties can also bring unfair competition claims for false

association, false authorisation, or false advertising under the Lanham (Trademark) Act.²⁹ All such claims under the Lanham Trademark Act involve claims of confusing or misleading the public.³⁰ Additionally, properties can bring unfair competition claims under state law,³¹ such as unfair competition laws similar to the federal Lanham (Trademark) Act and claims for breaches of those laws established to create a clean zone as noted above.

Finally, properties can bring a claim against ambush marketers for breach of contract where an ambush marketer uses event tickets in an unauthorised way.³²

But there is a reluctance to take legal action against ambush marketers, for a number of reasons. Ambush marketers have increasingly launched more sophisticated campaigns that blur the lines between legal marketing activity and marketing that constitutes trademark infringement or false association. Because ambushers rarely use the actual trade marks of the property, a pure trademark infringement claim is often unavailable, thus leaving the ambush campaign in a legal grey area. Additionally, many ambush campaigns last only for a short period of time, which makes the time and cost of litigation to prevent such a campaign prohibitive. Further, ambush marketers can take the simple step of including a disclaimer in their marketing campaigns and, while not a foolproof defence, there is some judicial support around the use of disclaimers as a valid defence.³³ Because litigation can bring uncertain results, is very costly and the ambush marketer may welcome the extra publicity that it receives, properties are hesitant to sue over ambush marketing.

Recently, however, two high-profile properties brought suits against alleged ambush marketers. First, in December 2009, Major League Soccer (MLS) and its

exclusive marketing agency Soccer United Marketing (SUM) sued Black & Decker (B&D) for a long-running campaign by B&D's DeWalt line of power tools targeting Hispanic Americans in order to protect the rights of MLS and SUM's exclusive power-tool sponsor Makita.³⁴ DeWalt's campaign allegedly included giving away tickets to MLS matches and matches featuring the Mexican national soccer team (which is represented in the USA by SUM) for purchases of DeWalt tools, setting up product display tents near such matches, offering sweepstakes with prizes related to such matches, and using MLS and Mexican national soccer team trade marks and colours in promotions. MLS and SUM brought claims for trademark infringement, false designation of origin, false advertising, breach of contract based on the ticket language, fraud and deceptive marketing claims.

Also in December 2009, NBA great Michael Jordan sued two Chicago-area grocery stores for placing advertisements in a *Sports Illustrated* commemorative issue celebrating Jordan's induction into the Basketball Hall of Fame where such advertisements offered congratulations to Jordan and featured his name, his number 23 jersey from his playing career and images of basketball shoes meant to resemble his branded 'Air Jordans'.³⁵ Both advertisements tied the congratulatory message into marketing slogans for each grocery store.³⁶ Jordan brought claims for, among other things, violations of his right of publicity under Illinois state law, trademark infringement, false endorsement and deceptive business practices.

Although lawsuits targeting ambush marketing campaigns are risky, nevertheless there have been a few circumstances where a property successfully sued an ambush marketer in the USA over the wrongful taking of the property's goodwill. For example, in *University of Georgia Athletic*

Association v. Laite,³⁷ the Eleventh Circuit Court of Appeals upheld an injunction against a wholesaler of novelty beers, preventing the wholesaler from selling cans of 'Battlin' Bulldog Beer' featuring a logo of a cartoon snarling bulldog with a sweater emblazoned with the letter 'G' that the University claimed was too similar to its bulldog mascot and logo. Although the logos were not exactly the same, the total context of the use, which included the University's official colours, was found to be too similar. The court further found that the wholesaler intended to capitalise on the goodwill of the university's football team.³⁸

Similarly, in *National Football League v. Coors Brewing Company*, the Second Circuit Court of Appeals upheld the NFL's injunction against Coors for its use of the phrase 'Official Beer of NFL Players' in marketing materials because the court found that Coors' intent was to capitalise on the goodwill of the NFL trade mark.³⁹ The court determined that Coors' use of the NFL trade mark went beyond merely descriptive use.

Further, in *Board of Supervisors for LSU v. Smack Apparel Co.*,⁴⁰ Louisiana State University and other schools prevailed in a trademark infringement action against an apparel maker that sold unauthorised t-shirts with school colours and other identifying information (such as the geographic location of the schools or the specific football bowl game, the names of specific football bowl games and the number of victories the particular school had). The Fifth Circuit Court of Appeals found that the schools' team colours were protectable as unregistered trade marks, as the schools were able to show secondary meaning for their colours.⁴¹ The court determined that the defendant's use of the schools' colours and other indicia was designed to create the illusion of affiliation with these schools and essentially obtain a 'free ride' by profiting from confusion

among the fans of the schools' football teams who desired to show support for and affiliation with those teams.⁴²

Even where a property does not obtain a court decision, simply taking action may still lead to success. For example, in *United States Olympic Committee v. Asics America Corporation*,⁴³ the USOC sued Asics for running multiple print and internet advertisements supporting its endorsed athletes' accomplishments in connection with the 2008 Olympics. As mentioned previously, these advertisements included a print advertisement featuring a photograph of Asics-endorsed marathoner Ryan Hall that stated: 'Good luck in the 2008 Summer Olympic Games. From all your fans at Asics', as well as congratulatory messages on Asics' website for its endorsers making the US Olympic team. Although the USOC voluntarily dismissed its complaint, the parties apparently settled their differences, as Asics subsequently entered into a multi-year agreement with USA Field Hockey, the national governing body for field hockey affiliated with the USOC, to become the 'Official Partner and Exclusive Sponsor of footwear, apparel, and accessories'.⁴⁴

All in all, properties should seek to, and often do,⁴⁵ protect their sponsors, whether such protection is through the purchase of advertising space, policing the area around an event, or through litigation, in order to signal to ambush marketers that the properties take their sponsors' exclusive rights seriously.

SPONSORS' WAYS TO PROTECT THEIR EXCLUSIVE RIGHTS

Although sponsors will rely on properties to protect their exclusive rights from ambush marketers, sponsors should anticipate having to police ambush marketing when negotiating an agreement. When negotiating a sponsorship agreement, the

sponsor should first determine what rights the property controls and what rights the sponsor is receiving. A sponsor does not want to finalise an agreement with a team, only to find out that the stadium in which the team plays controls its own marketing rights and has offered similar sponsorship rights to the sponsor's competitor. The sponsor should also focus on the defined terms in the agreement to determine how 'exclusive' and 'competitor' are defined. Properties often slice the 'competitor' pie thinly, which allows for more sponsors (and more sponsorship fees), but could also dilute a sponsor's exclusivity.⁴⁶ The number of sponsorships offered alone may clutter the marketplace and dilute a sponsor's rights. At the end of the day, a sponsor should be cognisant of what rights it is actually buying and what rights other sponsors are receiving.

The sponsor should also insert specific contractual provisions to protect its exclusive rights under a sponsorship agreement. For example, the sponsor should contractually obligate the property to include it as the (or an) official sponsor in all advertising by the property where sponsors are listed, and should include a most favoured nations clause so that it receives as many rights as other sponsors at the same or similar sponsorship level. In order to prevent the devaluation of its exclusive rights, a sponsor should seek a right of first refusal for exclusivity in other categories from that initially agreed with the sponsor, and should seek language granting a fee reduction if the property enters into an arrangement with another sponsor that diminishes the sponsor's rights. Further, the sponsor should contractually require the property to protect the sponsor's exclusive sponsorship by policing all advertising related to the event and actively pursuing any ambush marketer.

In addition to having the property protect against ambush marketing, the sponsor

itself can protect its exclusive rights from ambush campaigns. For example, by buying up assets outside of the sponsor's official rights to supplement the association between the sponsor and the property, or purchasing product or service category exclusivity from the broadcaster of the event, although both actions are expensive propositions.

Perhaps most importantly, sponsors should come up with creative marketing campaigns to out-market potential ambushers. There may be no airtight way to obtain complete exclusivity, so sponsors should leverage their official assets to maintain control of the sponsorship and maximise the value of their investment. The sponsor could make it easy for the public to remember its association with the property, rather than that of an ambushing competitor, as the sponsor has the best ability to leverage its association with the property as it can capitalise on the assets the property has offered through the official sponsorship, such as marketing rights, rights to the property's trade marks and logos, access to tickets and VIP events, etc. A sponsor should clearly identify itself as the 'official sponsor of X' and go out of its way to incorporate the property's official trade marks and logos so that consumers recognise the sponsor as being officially affiliated with the property.⁴⁷ With strong marketing activation and creativity, consumers should remember the sponsor's campaign and not that of an ambush marketer.

CONCLUSION

In a tighter spending environment, and during the year of two of the world's largest sporting events,⁴⁸ marketers are looking for creative ways in which to associate themselves with high-profile properties, whether authorised or not. To protect the value of the sponsorship and to set the

stage for future sponsors, properties must protect an official sponsor's exclusive rights by preventing or stopping ambush marketing. At the same time, official sponsors should leverage the rights received in an official sponsorship to make their marketing stand out. If both parties act in concert, they can maximise the value of the official sponsorship.

© Christopher R. Chase and Rick Kurnit, 2010

REFERENCES

- (1) For example, the banking industry spent US\$900m on sports sponsorship rights fees in 2008, and an additional US\$122m on sports advertising that same year; see Lefton, T. and Mickle, T. (2009) 'Beaten-up banks', *Sports Business Journal*, Vol. 11, No. 44, p. 1. Home Depot spent between US\$60–65m on sports sponsorships in 2007; see Tobin Ramos, R. (2008) 'Home Depot weighs its Olympic role', *The Atlanta Journal-Constitution*, 11th May Section C, p. Anheuser-Busch spends US\$300m annually on sports sponsorships around the world; see *Sports Business Daily* (2008) 15th July 'InBev's \$52B takeover of A-B could impact sports sponsorships', available at: <http://www.sportsbusinessdaily.com/article/12235> (accessed 1st October, 2009). see also *Sports Business Daily* (2007) 19th September, 'Marketplace round-up', available at: <http://www.sportsbusinessdaily.com/article/115056> (accessed 1st October, 2009).
- (2) Another issue, which will not be explored in detail in this paper, is sponsorship clutter — essentially properties ambushing their own sponsors by over-selling sponsorships. For example, research by Seguin and O'Reilly suggests that executives from companies with Olympic Partner status are less concerned about ambush marketing than they are about the increasingly cluttered sponsorship environment resulting from the various Olympic properties' aggressive, revenue-driven slicing of sponsorship categories and levels. See: Seguin, B. and O'Reilly, N. J. (2008) 'The Olympic brand, ambush marketing and clutter', *International Journal of Sport Management and Marketing*, Vol. 4, Nos. 1–2, pp. 62–84.
- (3) Farrelly, F., Quester, P. and Greyser, S. A. (2005) 'Defending the co-branding benefits of sponsorship B2B partnerships: The case of ambush marketing', *Journal of Advertising Research*, September, pp. 339–348.
- (4) Seguin and O'Reilly, ref. 2 above, p. 66: 'Rights holders of valuable sport properties are concerned as ambush marketing diminishes the value of their properties.' In this day and age, however, it is hard for any property to sell complete exclusivity, not only due to the complex layering of sports related assets (such as league, teams and players' rights) but because a property cannot claim to own the generic value associated with a sport — 'as a result, there will always be opportunity for some degree of ambush to occur'. See: Farrelly *et al.*, ref. 3 above, p. 342.
- (5) 'To provide value for their sponsor, properties must be at the front line, fending off ambushers by all possible means at their disposal, be it law enforcement, provision of exclusive and naming rights, or even by their deliberate exclusion of sponsors' competitors at any level of the sponsorship to avoid possible confusion.' See: Farrelly *et al.*, ref. 3 above, p. 344.
- (6) Norris, D. (2010) 'At least Dick Turpin wore a mask ... the threat of ambush marketing', *FC Business*, No. 41, January, p. 40; Sauer, A. (2002) 'Ambush marketing steals the show', *Brand Channel*, 27th May, available at: http://www.brandchannel.com/features_effect.asp?pf_id=98 (accessed 29th October, 2009).
- (7) This is a very popular type of ambush

marketing. In May 2010, New Balance, at the expense of official sponsor Adidas, planned to cover the city of Boston with multiple forms of advertising before and during the Boston Marathon, claiming that this would be its biggest promotion ever. The company was plastering bus shelters, taking over a transit stop, wrapping trolley cars, and handing out grab bags and spectator guides mapping out the marathon course. Although New Balance is taking steps to prevent infringement by not actually referring to the event, according to a New Balance spokesperson: 'If people walk away [from the Boston Marathon] thinking New Balance, and not Adidas, then we've done our job'. See: Abelson, J. (2010) 'Picking up its pace', *Boston Globe*, 2nd April, p. 7.

- (8) Sauer, ref. 6 above.
- (9) Fans who purchased 12 cans of Bavaria beer could buy the trousers for just €7.95. See: Harding, L. and Cuff, A. (2006) 'The new World Cup rule: Take off your trousers, they're offending our sponsor', *The Guardian*, 19th June.
- (10) FIFA now bans 'commercially-branded clothing or accessories which are mass-distributed prior to the matches by commercial entities clearly targeting FIFA World Cup fans'. See Harding and Cuff, ref. 9 above; Mullman, J. (2010) 'World Cup kicks off marketing games on epic scale', *Advertising Age*, Vol. 81, No. 20, p. 4.
- (11) During the 2007 US Open, the US Tennis Association prohibited Arizona Iced Tea from distributing free samples of its isotonic beverage on the event grounds, as this beverage conflicted with the official isotonic beverage of the US Open — Gatorade. See Kaplan, D. (2007) 'USTA blocks marketers looking to ambush Open', *Sports Business Journal*, Vol. 10, No. 20, p. 6.
- (12) Panasonic, the International Olympic Committee and the US Olympic Committee (USOC) spoke to NBC about the advertisement. According to the USOC's chief marketing officer: 'we have an obligation to protect Panasonic'. See: Mickle, T. (2008) 'USOC, Panasonic upset with Vizio ad airing during NBC's coverage', *Sports Business Journal*, Vol. 11, No. 7.
- (13) Mickle, T. (2010) 'Revival of Olympic ambush marketing shows power of Games', *Sports Business Journal*, Vol. 12, No. 39.
- (14) Like any potentially conflicting sponsorship deal with a national governing body, which does not extend to the Olympic games according to the USOC, the deal of Verizon Wireless with the US speed skating team poses a challenge to the USOC, because the national governing bodies are autonomous and therefore can seek non-USOC sponsors to help fund their operations. See: Mickle, ref. 13 above.
- (15) Mickle, T. (2010) 'USOC scolds companies for alleged ambush marketing efforts', *Sports Business Daily*, 27th January, available at: <http://www.sportsbusinessdaily.com/article/136544> (accessed 30th January, 2010).
- (16) Hechinger, J. (2009) 'Team-color Bud cans leave colleges flat', *The Wall Street Journal*, 21st August, Section A, p.1.
- (17) Some schools, such as the University of Michigan, Oklahoma State University and Boston College, threatened legal action or otherwise told Anheuser-Busch to stop distribution of the cans near their campuses, while others, such as Louisiana State University and the University of Texas, did not. For the schools that complained, each cited trademark issues and concerns about alcohol abuse. When a school complained, Anheuser-Busch discontinued distribution in the area of that school. Further, aside from potential trademark issues, an attorney for the Federal Trade Commission criticised the campaign, finding that it could encourage underage and binge drinking on college campuses. See Hechinger, ref. 16 above; Hechinger, J. (2009) 'FTC criticizes college-themed cans in Anheuser-Busch marketing efforts', *The*

- Wall Street Journal*, 25th August, Section B, p.1.
- (18) According to an Anheuser-Busch spokesperson, the school colours campaign aimed to use 'color schemes to connect with fans of legal drinking age in fun ways in select markets across a variety of sports'. See: Hechinger, ref. 16 above.
 - (19) *Time* (1992) 'Who's the loser', *Time*, 27th July. According to an IOC executive board member: 'this is the fifth successive Olympic Games in which American Express has falsely implied such [an official] connection'. See: *Los Angeles Times* (1994) 'Credit card war erupts at Olympics', *Los Angeles Times*, 19th February, Business section, p. 1.
 - (20) Within the USA, for example, terms such as 'VANCOUVER 2010' and 'LONDON 2012' are registered trade marks of the USOC.
 - (21) The billboards also feature famous locations in Boston, such as the Back Bay and the Charles River with the Prudential Tower in the background. See: Abelson, ref. 7 above.
 - (22) Asics ran multiple print and internet advertisements supporting its endorsed athletes' accomplishments in connection with the 2008 Olympics. For example, a print advertisement featuring a photograph of Asics-endorsed marathoner Ryan Hall stated: 'Good luck in the 2008 Summer Olympic Games. From all your fans at Asics'. See: *United States Olympic Committee v Asics America Corporation*, No. 08-CV-00522, Complaint (C.D. Cal. 9th May, 2008). In another example, Fuller's London Pride Ale ran print advertisements during the 2009 Six Nations rugby tournament featuring a rugby goal post with the text 'Support English Rugby' beneath the image. See Advertising Standards Agency (2009) 'ASA Adjudications', 1st July. (Notably, the UK's Advertising Standards Agency, in response to a complaint filed by England's Rugby Football Union, found that, although Fuller's was not a sponsor of the Rugby Football Union, consumers would not be confused as to the company's sponsorship status.) Also note the recent lawsuits brought by Michael Jordan against two Chicago-area grocery stores discussed below. See: *Jordan v. Jewel Food Stores, Inc.*, 2009-L-015549, Complaint (Ill. Cir. Court 21st December, 2009), removed to the US District Court for the Northern District of Illinois, No. 10-CV-00340 (N.D. Ill. 19th January, 2010); and *Jordan and Jump 23, Inc. v. Dominick's Finer Foods, LLC*, No. 2009-L-015548, Complaint (Ill. Cir. Court 21st December, 2009), removed to the US District Court for the Northern District of Illinois, No. 10-CV-00407 (N.D. Ill. 20th January, 2010).
 - (23) Manasso, J. (2009) 'AirTran gaining yardage from Falcons players', *Atlanta Business Chronicle*, 2nd January. At that time, AirTran's marketing materials featured the players in generic colours and clothing, because the company did not have rights to the National Football League's (NFL's) official trade marks and logos. In late 2009, however, AirTran became the official sponsor of the Falcons and was able to use the team's official trade marks and logos. See: Yamanouchi, K. (2009) 'AirTran's Falcon's sponsorship takes off', *The Atlanta Journal-Constitution*, 13th October, News section, p. A9.
 - (24) The Athens Olympic Organising Committee reportedly spent €750,000 to clear 10,000 billboards from buildings and rooftops around Athens 'in an effort to stop the habitual ambush marketing that usually surrounds' the Olympic games. With a similar goal in mind, the US Tennis Association went as far as booking the New York region's only skywriting service during the two weeks surrounding the US Open, in part to keep non-official marketers from advertising in the airspace over the event location. See: Gibson, O. (2004) 'Olympic battles against "ambush marketing"', *The Guardian*, 22nd July;

- Kaplan, ref. 11 above.
- (25) Burton, N. and Chadwick, S. (2009) 'A Typology of Ambush Marketing: The Methods and Strategies of Ambushing in Sport', CIBS Working Paper No. 10, available at: http://www.coventry.ac.uk/researchnet/external/content/1/c4/53/26/v1245765660/user/CIBS_WP10.pdf (accessed 1st October, 3009).
- (26) For example, the Vancouver Olympic Organizing Committee (VANOC) worked with Vancouver City Council to pass local ordinances to restrict unauthorised commercial advertising on city streets surrounding the time of the 2010 Olympics. According to its spokeswoman: 'VANOC's efforts are focused on reducing ambush marketing and protecting the \$1B investment that sponsors have made towards the success and legacy of the Games'. See: Lee, J. (2009) 'Council passes watered-down Olympics bylaws package', *Vancouver Sun*, 24th July. Additionally, during the 2008 NCAA 'Final Four' men's basketball championships, San Antonio designated several blocks near the event location as a clean zone ('NCAA sponsors pay heavily for the right to have their names associated with the spectacle, and they don't want other advertisers to dilute the marketing opportunity'). See: Pack, W. (2008) 'A zone defense', *San Antonio Express-News*, 26th March, Business section, p. 1. Further, the NBA required the city of Arlington, Texas to pass an 'anti-ambush' marketing ordinance in advance of the 2010 NBA All-Star Game, which would temporarily restrict advertising near the location of the game. See: Schrock, S. (2009) 'Arlington to consider advertising rules to protect NBA All-Star game from rivals', *Star-Telegram*, 29th November.
- (27) Gardner, E. (2007) 'Protecting the Super Bowl trademark remains a battle', *The Hollywood Reporter*, 2nd February. In addition, the authors have such a 'reminder' letter on file.
- (28) 15 U.S.C. § 1114.
- (29) 15 U.S.C. § 1125.
- (30) It should be noted, however, that the USOC does not need to prove a likelihood of confusion, which is the hallmark under the Lanham (Trademark Act), for uses of certain Olympic trade marks, because of the 'super' trademark rights given to it under the Ted Stevens Olympic and Amateur Sports Act. See 36 U.S.C. §§ 220501 *et seq.* Rather, the USOC just needs to prove that a defendant used those specific Olympic marks for a commercial purpose without its authorisation.
- (31) See, eg The State of Georgia's Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 *et seq.*
- (32) See, eg *NCAA v. Coors Brewing Co.*, 02-CV-01325, Complaint (S.D. Ind. 26th August, 2002). Here, the NCAA sued Coors Brewing Co. after Coors allegedly gave away tickets to the NCAA men's basketball championships as a promotional prize in the Coors Light 'Tourney Time Sweepstakes'. NCAA tickets expressly prohibit this practice, which is stated on the ticket-back. The parties settled the case without an admission of wrongdoing by Coors. More recently, the NFL's Philadelphia Eagles brought a breach of contract claim, among others, against a radio station offering tickets to Eagles games through contests and other promotional giveaways in breach of the ticket-back language. See: *Philadelphia Eagles, LLC v. Equity Communications LP*, 09-CV-04968, Complaint (D. N. J. 25th September, 2009). The lawsuit was settled shortly after the complaint was filed on very favourable terms for the Eagles, including an injunction prohibiting the radio station from using Eagles and NFL trade marks for promotional purposes and from representing that the station's promotions were affiliated with the NFL. See: *Philadelphia Eagles, LLC v. Equity Communications LP*, Final Order and Judgment on Consent (1st December, 2009). The station also had to return all NFL tickets that it intended

- to give away and pay US\$10,000 towards the Eagles' attorneys' fees.
- (33) *National Football League v. Delaware*, 435 F. Supp. 1372, 1381 (D. Del. 1977).
- (34) *Soccer United Marketing, LLC and Major League Soccer, LLC v. The Black & Decker Corp.*, 09-CV-10378, Complaint (S.D.N.Y. 22nd December, 2009), Second Amended Complaint (S.D.N.Y. 3rd March, 2010). According to the complaint, 'the confusion created by B&D's promotions is directly impacting SUM's relationship with Makita, which is the exclusive power tool sponsor of MLS and FMF since 2005'. *Ibid.* at ¶ 37.
- (35) *Jordan v. Jewel Food Stores, Inc.*, 2009-L-015549, Complaint (Ill. Cir. Court 21st December, 2009), removed to the US District Court for the Northern District of Illinois, No. 10-CV-00340 (N.D. Ill. 19th January, 2010); and *Jordan and Jump 23, Inc. v. Dominick's Finer Foods, LLC*, No. 2009-L-015548, Complaint (Ill. Cir. Court 21st December, 2009), removed to the US District Court for the Northern District of Illinois, No. 10-CV-00407 (N.D. Ill. 20th January, 2010).
- (36) The Dominick's advertisement used the phrase 'You're a cut above' and featured a coupon for steak, while the Jewel-Osco advertisement stated: 'Jewel-Osco salutes #23 on his many accomplishments as we honor a fellow Chicagoan who was "just around the corner" for so many years'. The 'just around the corner' phrase being a Jewel-Osco marketing slogan.
- (37) 756 F.2d 1535 (11th Cir. 1985).
- (38) Interestingly, the defendant used a disclaimer to obviate any confusion between the parties' logos, but the court found that the disclaimer on the can was too inconspicuous to prevent consumer confusion.
- (39) 205 F.3d 1324 (2d Cir. 1999). Coors entered into an agreement with the NFL Players Association (the professional football players' union) in order to call itself the 'Official Beer of NFL Players', which here the NFL argued infringed its NFL trade mark.
- (40) 550 F.3d 465 (5th Cir. 2008).
- (41) Such factors of secondary meaning for the school colours included use of them for over 100 years, a large amount of licensing income from goods featuring them and nationwide exposure of them. *Ibid.* at 476.
- (42) *Ibid.* at 483–484.
- (43) No. CV-08-00522 Complaint (C.D. Cal. 9th May, 2008).
- (44) USA Field Hockey (2009) Press release, 24th March, available at: <http://www.usfieldhockey.com/news/article.php?newsID=128> (accessed 1 October 2009). The agreement is 'the largest corporate partnership in USA Field Hockey's history'.
- (45) The NFL has intervened on its official sponsors' behalf on many occasions. For example, when electrolyte strip maker Enlyten attempted to sign a sponsorship deal with an individual team, the NFL sent a letter to the team, and all other teams in the league, forbidding them from accepting Enlyten as a sponsor, due to the conflict with the official electrolyte provider Gatorade (the letter stated that 'Gatorade is one of our most important corporate sponsors, and have the rights to [Enlyten's] business category'). See: Williams, F. O. (2007) 'Enlyten goes on offensive against Gatorade, PepsiCo', *The Buffalo News*, 31st October, p. B7. The NFL also fined star linebacker Brian Urlacher US\$100,000 for wearing a cap during Super Bowl media day that promoted an unauthorised sponsor — the Urlacher-endorsed Vitaminwater. Again, the NFL was protecting the rights of its official sponsor Gatorade. See: Associated Press (2007) 'NFL fines Urlacher \$100K for Super Bowl hat', 20th April. NASCAR also goes to great lengths to protect its official sponsors. For example, NASCAR took a lawsuit brought by a team sponsor up to the Eleventh Circuit Court of Appeals in order to protect its title sponsor Sprint Nextel (reversing the district court's decision that allowed

AT&T Mobility to switch the branding on its team car sponsorship, which NASCAR contended violated the exclusivity of sponsor Sprint Nextel).

See: *AT&T Mobility LLC v. Nat'l Association for Stock Car Auto Racing, Inc.*, 494 F.3d 1356 (11th Cir. 2007).

- (46) For example, one sponsor may have exclusive rights for bottled water products, while another has exclusive rights for soft drinks. The two sponsors could be overall competitors in the beverage business, therefore the exclusivity may be diluted.
- (47) Unless, of course, the sponsor wants to activate its sponsorship stealthfully. For example, McDonald's launched an

Olympic-themed 'alternate reality game' called 'The Lost Ring' as part of its build up to the 2008 Summer Olympics, which initially featured no sponsor or official Olympic branding. See: Clifford, S. (2008) 'An online game so mysterious its famous sponsor is hidden', *The New York Times*, 1st April, Section C, p. 5.

- (48) Notably, a recent *Advertising Age* article described the World Cup as being the undisputed pinnacle of ambush marketing. According to FIFA, the 2006 World Cup in Germany featured 3,300 'rights violations' in 84 countries. See: Mullman, J. (2010) 'World Cup kicks off marketing games on epic scale', *Advertising Age*, 17th May.