
THE IMPACT OF THE OLYMPICS ON AMBUSH MARKETING LAWS OF A HOST-NATION

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ABSTRACT

This essay deals with the impact of the Olympics on the framework of ambush marketing laws of a Host Nation. The essay discusses the concept of ambush marketing from a commercial perspective and then analyses the legal structure provided by the International Olympic Committee to tackle it. The legal framework till now has mostly been governed by legal protection afforded to sponsors and marketing partners of the Olympic Games through agreements and the enactment of specific legislation. This essay aims to discuss the objective and nature of such legislation in brief, and analyses the provisions of legal contracts and documents governing the Olympic Games. To conclude, the essay shall discuss how the framework has impacted the commercial aspects of the Olympic Games as well as the legal structure of Host Nations, amongst other things.

KEYWORDS

Olympics, Ambush Marketing, Host Nation, Marketing.

1. INTRODUCTION

The selection criteria for host cities require several legal guarantees for the efficient delivery of the Olympic Games ('Games'). They fall into several different functional categories, such as financial, environmental, technological, security, and marketing.¹ The Games represent one of the most significant opportunities for companies to increase the exposure of their brands to

¹ Stephen A. Stuart & Teresa Scassa, *Legal Guarantees for Olympic Legacy*, 9(1) THE ENT. & SPORTS L. J. 3, (2011).

consumers on a global scale over a concentrated period. The London 2012 Games, for example, marked a record broadcast audience of 3.6 billion people across 220 countries and territories around the world.²

Companies can market their products or services during the Games by becoming an official sponsor or licensee. Official partners are granted the rights to specific intellectual property and marketing opportunities in exchange for financial support and, goods and services contributions.³ However, becoming a marketing partner of the Games comes at a hefty cost. In an attempt to undercut such fees, some companies seek to exploit the popularity of the Games to market their brands through ambush marketing. Ambush marketing may be defined as an attempt by a company to capitalise on the popularity of a significant event as a ‘free-rider’. It does so, by associating itself or its products or services with the event without having paid the fees to become an official sponsor or partner.⁴ Ambush marketing is said to be of two types; *by association* and *through intrusion*. Ambush marketing by association can be defined as when a company/brand that is not an official marketing-partner of an event/organisation/entity associates itself with such event/organisation/entity either explicitly or implicitly.⁵ Whereas, ambush marketing by intrusion can be defined as when a company/brand places their intellectual property marks (such as logos) in the same physical space as the event organised by an entity of which it is not an official marketing-partner to gain exposure in the media (through broadcasting) or to be seen by the public attending the event itself.⁶ One of the prime reasons for the existence of legal guarantees is the continued protection of the International Olympic Committee’s (IOC) extremely valuable Games-related intellectual property rights against ambush marketing.⁷

² International Olympic Committee, *Marketing Report*, London 2012, https://stillmed.olympic.org/Documents/IOC_Marketing/London_2012/LR_IOC_MarketingReport_medium_res1.pdf

³ *Olympic Marketing Fact File* 2020, https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/IOC-Marketing-and-Broadcasting-General-Files/Olympic-Marketing-Fact-File.pdf#_ga=2.27957884.1393418787.1584322238-1007037092.1583646203

⁴ *Playing by the rules - Ambush marketing and the Olympic Games*, SMART & BIGGAR, <https://www.lexology.com/library/detail.aspx?g=0c0d8999-abe3-4a39-a55e-7381fd56cb87>

⁵ *Id.*

⁶ *Id.*

⁷ TERESA SCASSA ET AL., INTELLECTUAL PROPERTY FOR THE 21ST CENTURY: INTERDISCIPLINARY APPROACHES 500-520 (B Courtney Doagoo et al. eds. Irwin Law 2014).

2. LEGAL FRAMEWORK PROVIDED BY THE IOC

The host city provides legal guarantees by enacting legislations as well as entering into legally binding agreements. This section will deal with provisions of the Host City Contract (HCC) (2.1), the Olympic Charter (2.2), and specific legislation enacted by Host Nations in pursuance of such agreements (2.3).

2.1.HOST CITY CONTRACTS

The HCC drafted by the IOC for the 2024 Summer Olympics states that:

- i. The Organising Committee of the Olympic Games (OCOG) shall join, and become a full party to, the Joint Marketing Programme Agreement (JMPA) executed between the Host City and the Host National Olympics Committee (Host NOC) before the execution of the HCC and which combines all of the marketing and commercial rights of the OCOG and the Host NOC for the period commencing on 1st January 2019 and ending on 31st December 2024.⁸
- ii. No commercial activity concerning the Games may be commenced by the Host City, the Host NOC or the OCOG before the execution of the JMPA. The Host City, the Host NOC and the OCOG agree not to participate in or allow any marketing or commercial activities relating directly or indirectly to the Games, other than as expressly permitted by the JMPA.⁹
- iii. The Host City, the Host NOC and the OCOG undertake to procure all relevant rights, to assist the IOC Marketing Partners in achieving their goals and commercial objectives in the Host Country. In particular, each of the OCOG, the Host City, and the Host NOC undertakes to satisfy its Games-related requirements for products and services falling into the product/service categories of IOC Marketing Partners from the respective IOC Marketing Partners as more fully detailed in the JMPA.¹⁰

⁸ International Olympic Committee, *2024 Host City Contract* (2017), art. 24.1.

⁹ *Id.*, art. 24.4.

¹⁰ *Id.*, art. 24.7.

2.2. THE OLYMPIC CHARTER

The IOC in the Olympic Charter provides that: competitors, team officials or other team personnel may allow their person, name, and a picture or sports performances to be used for advertising purposes during the Games in accordance with the principles determined by the IOC Executive Board.¹¹ Before 2020, the Olympic Charter required that competitors, team officials, and other personnel take prior consent of the IOC Executive Board to do so.¹²

The IOC established the abovementioned rule to prevent over-commercialisation of the Games and, more importantly, to protect the investment of Olympic sponsors.¹³ Since the Games provide a platform for companies to advertise and market their products, it is crucial to allow exclusivity and restrict free-loaders. Not only must non-sponsors refrain from using the IOC's trademarked words or phrases,¹⁴ but they must also not associate with the Olympics on social media sites such as Twitter, Instagram, Facebook, and Snapchat.¹⁵ Further, non-sponsors may not use any "hashtags" that include Olympic trademarks, cannot feature any Olympic athletes in social media posts, and may not share anything from official Olympics social media accounts, including "retweets".¹⁶

Companies have often used athletes' social media presence to market their products during the Games without being official sponsors. Although, the previous version of Rule 40 restricted athletes from posting content on social media featuring unofficial sponsors during the "blackout" period (lasting from nine days before and three days after the Games), it was not followed in practice.¹⁷ A study on one hundred randomly selected US Olympic athletes' social media posts during the "blackout" period for the 2016 Rio Games showed that over 19% of all

¹¹ International Olympic Committee, *Olympic Charter*, rule 40.3 (2020).

¹² International Olympic Committee, *Olympic Charter*, rule 40.3 (2015).

¹³ Chris Chavez, *What is Rule 40? The IOC's rule on non-Olympic sponsors, explained*, SPORTS ILLUSTRATED (July 25, 2016), <https://www.si.com/olympics/2016/07/27/rule-40-explained-2016-olympic-sponsorship-blackout-controversy> as cited in Bryce M. Nakamura, *Is Olympic Ambush Marketing here to stay? Examining the issues surrounding Ambush Marketing as they relate to Olympic sponsors, athletes, and other stakeholders*, 35 ARIZ. J. INT'L & COMP. L. 500, 500-530 (2018).

¹⁴ Christine Birkner, *Here Are the Many, Many Ways Your Business Can Get in Trouble for Tweeting the Olympics*, ADWEEK (July 29, 2016), <http://www.adweek.com/brand-marketing/here-are-many-many-ways-your-business-can-get-trouble-tweeting-olympics-172699/> as cited in Bryce M. Nakamura, *Is Olympic Ambush Marketing here to stay? Examining the issues surrounding Ambush Marketing as they relate to Olympic sponsors, athletes, and other stakeholders*, 35 ARIZ. J. INT'L & COMP. L. 500, 500-530 (2018).

¹⁵ CHAVEZ, *supra* note 13.

¹⁶ BIRKNER, *supra* note 14.

¹⁷ Andrea N. Geurin & Erin L. McNary, *Athletes as ambush marketers? An examination of Rule 40 and athletes' social media use during the 2016 Rio Olympic Games*, EUR. SPORT MGMT. Q., 2 (2020).

relevant posts violated Rule 40.¹⁸ Apart from exemplifying that ambush marketing via athletes is a prevalent practice, this study also points towards the loopholes in enforcing Rule 40.

In 2020, the IOC significantly amended Rule 40 of the Olympic Charter.¹⁹ It now states that competitors, team officials and other team personnel may be allowed to use their performance, picture and identity for advertising purposes in “accordance with principles of determined by the IOC Executive Board”.²⁰ The recent amendment is different from the previous version wherein a complete prohibition was imposed unless an exception was made by submitting to the IOC Executive Board.²¹

According to the IOC, the amendment is said to be more flexible and open and shall be looked at positively.²² This change could benefit Olympic athletes, especially those savvy with social media, which has allowed athletes to build their brands and expand their commercial opportunities.²³ However, its impact cannot be entirely determined until the IOC Executive Board clarifies the scope of the principles which form the basis of the new provision.²⁴ Currently, the IOC Athletes’ Commission intends to conduct consultations with the IOC Executive Board to determine the scope of the new Rule 40.²⁵ Till then, the question regarding Athletes’ ability to advertise their brands during the Games, hangs in the balance.

2.3.LEGISLATIONS ENACTED BY HOST NATIONS

The IOC requires that host nations implement a system safeguarding the interests of sponsors and marketing partners. Since this requires protection against the misuse or infringement of its intellectual property rights, the IOC requires that host nations enact comprehensive legislation that provides appropriate and timely protection against ambush marketing, unauthorised ticket

¹⁸ *Id.*, 11.

¹⁹ International Olympic Committee, *Olympic Charter*, rule 40.3 (2020).

²⁰ International Olympic Committee, *Olympic Charter*, rule 40.3 (2020).

²¹ International Olympic Committee, *Olympic Charter*, rule 40.3 (2015).

²² Kunal Dhyani, *IOC reforms commercial opportunities for athletes, bidding process*, INSIDE-SPORT (June 27, 2019), <https://www.insidesport.co/ioc-reforms-commercial-opportunities-for-athletes-bidding-process/>.

²³ John Grady & Steve McKelvey, *The IOC’s Rule 40 changes and the forecast for Rio 2016*, SPORTS BUSINESS JOURNAL (May 18, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/05/18/Opinion/Grady-McKelvey.aspx?hl=grady20and20mckelvey&sc=0>.

²⁴ Christopher Chase, *And the gold goes to...the amendment to Rule 40!*, LEXOLOGY (July 2, 2019), <https://www.lexology.com/library/detail.aspx?g=25066583-7daa-4ce1-8e44-afb5346cef76>.

²⁵ *IOC Athletes’ Commission to conduct consultation on Rule 40*, OLYMPIC (Feb. 27, 2020), <https://www.olympic.org/athlete365/voice/ioc-ac-consult-rule-40/>.

sales, and marketing rights offences.²⁶ In furtherance of this requirement, host nations in the past have enacted legislation against ambush marketing. This sub-section will discuss the legislations enacted in South Korea, Japan and Brazil.

2.3.1. SOUTH KOREA

In 2012, South Korea enacted the Special Act on Support for the 2018 PyeongChang Olympic and Paralympic Winter Games ('Special Act').²⁷ The Special Act states that only the Organizing Committee, i.e. the OCOG shall use the title of the Olympics and that any entity that intends to use Games-related symbols, logos, mascots, insignias, etc. shall obtain approval from the OCOG in advance.²⁸ Anyone violating this provision is subject to imprisonment or an administrative fine up to fifty-two million won.²⁹

2.3.2. JAPAN

For the upcoming 2020 Tokyo Summer Olympic Games, the Tokyo OCOG states that ambush marketing is the unauthorised use, abuse, or misappropriation of marks associated with the Olympic Games and other intellectual property.³⁰ The Tokyo OCOG relies on Japan's Unfair Competition Prevention Act (UPCA) to protect brands and the IOC against ambush marketing.³¹ Article 17, of the UPCA, prohibits the commercial use of markings of international organisations.³² Since the IOC is an international organisation, brands may not use any protected Olympic Games marks without authorisation from the IOC.³³ A person who violates such law may be punished by imprisonment with work for not more than five years or a fine of not more than five million yen, or both.³⁴ Further, the UCPA also provides that one

²⁶ International Olympic Committee, Host City Contract: Operational Requirements, *Chapter 29 – Rights Protection* (2018), at 134, <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Games/Host-City-Contract/HCC-Operational-Requirements.pdf>.

²⁷ Special Act on Support for the 2018 Pyeongchang Olympic and Paralympic Winter Games, Act No. 11226, Jan. 26, 2012 amended by Act No. 14198, May 29, 2016, art. 1 (S. Kor.), translated in Korea Legislation Research Institute online database, https://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=38905&type=part&key=16.

²⁸ *Id.*, art. 25.

²⁹ *Id.*, arts. 89 & 92.

³⁰ The Tokyo Organising Committee of the Olympic and Paralympic Games, Brand Protection: Tokyo 2020 Games 11 (2017), <https://tokyo2020.org/en/copyright/data/brand-protection-EN.pdf>.

³¹ Bryce M. Nakamura, *Is Olympic Ambush Marketing here to stay? Examining the issues surrounding Ambush Marketing as they relate to Olympic sponsors, athletes, and other stakeholders*, 35 ARIZ. J. INT'L & COMP. L. 500, 500-530 (2018).

³² Fusei Kyōshū Bōshi Hō (Japan Unfair Competition Prevention Act), Act No. 47 of 1993, as amended up to Act No. 54 of 2015 (Ministry of Economy, Trade and Industry), art. 17, translated in (Japanese Law Translation ULT DSI), <http://www.japaneselawtranslation.go.jp/law/detail/?id=2803&vm=02&re=02> (Japan).

³³ NAKAMURA, *supra* note 31.

³⁴ FUSEI, *supra* note 32, Article 21(2).

may be liable for infringement if one creates confusion with another person's goods or business by using an indication of goods or business that is identical or similar to the other person's indication of goods or business that is well-known among consumers.³⁵

2.3.3. Brazil

On 10th May 2016, Brazil enacted Law No. 13,284³⁶ which provides for measures related to the 2016 Olympic and Paralympic Games and related events, to be held in Brazil. The law prohibits ambush marketing *by association*³⁷ and *by the intrusion*.³⁸ Further, unauthorised use of official symbols including the reproduction of, copying of, falsifying of, or modifying improperly any official symbols that belong to the entities organising the games.³⁹ This law subjects offenders to imprisonment ranging from three months to one year in both cases. Interestingly, however, these provisions of the law remained in effect only till 31st December 2016.⁴⁰ Therefore, it served a particular purpose, i.e., to protect the investors/sponsors from other companies unjustly using the Games to gain an economic or advertising advantage.

3. CONCLUSION: ANALYSING THE IMPACT OF THE LEGAL FRAMEWORK

As seen above, the IOC facilitates the enactment of new legislation in the Host Nations to protect the IOC and the Olympic brand from any ambush marketing. Today, the Olympic brand is undoubtedly the most recognisable and valuable brands in international sport. It cannot be denied that the value associated with the Olympic brand is credited to the legal framework, which protects sponsors.

As more attention and scrutiny is provided to this framework, amendments also take place. The IOC's Rule 40 of the Olympic Charter was revised in 2015 and subsequently in 2020, to become slightly lenient. The 2015 amendment allowed for generic and non-Olympic advertising during the Games.⁴¹ This has been permitted by allowing companies to submit waivers to IOC six months before the IOC begins imposing restrictions on advertisements,

³⁵ *Id.* at Article 2(1) (i).

³⁶ Lei No. 13.284, de 10 de Maio de 2016, COL. LEIS REP. FED. BRAZIL, http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2016/Lei/L13284.htm (Brazil).

³⁷ *Id.*, art. 19.

³⁸ *Id.*, art. 20.

³⁹ *Id.*, art. 6, section 7.

⁴⁰ *Id.*, art. 23.

⁴¹ CHAVEZ, *supra* note 13.

known as the ‘blackout period’. While some companies have benefitted from the amendment, smaller companies and brands continue to view the current framework as restrictive. Nonetheless, over the years, companies have ingeniously found loopholes in the framework to promote their brand, primarily through social media platforms. The recent 2020 amendment to the Olympic Charter similarly aims at liberalising Rule 40 to make it easier for athletes to advertise their brands; however, the IOC is yet to disclose the scope of the new rule and its powers of discretion regarding it.

While due credit must be given to the legal framework, several problems can be identified with it as well. The multiple legislations mentioned above, create a new form of intellectual property, i.e. the right of association.⁴² This right is, of course, subjective and can be interpreted in varying degrees. Most often, the IOC benefits from a broad interpretation that allows for maximum benefit to its limited marketing-partners. However, such interpretation raises issues relating to the freedom of expression and often prevents small businesses from realising any benefit from significant international events that take place in their community. Therefore, while governments across the world bid for the Games by stating an increase in development, tourism and “soft-power”, the legal framework discussed in this article attempts to merely benefit large corporations that pay hefty sums to be associated with the IOC. As such the “Unfair Competition” legislations seem counterproductive to their objective or perhaps misleading with their titles at least.

⁴² SCASSA, *supra* note 7.