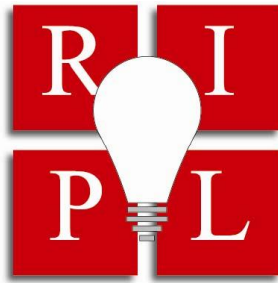


# THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



## THE AMBUSH AT RIO

ADAM EPSTEIN

### ABSTRACT

The purpose of this article is to explore the role of the International Olympic Committee's (IOC) codified marketing policy known as Rule 40 which emerged to prevent ambush marketing of its biennial events. Rule 40 has quickly evolved into a controversial rule for athletes, coaches and sponsors alike who are involved in the Olympic Movement. The IOC believes that social media is a ubiquitous threat to its intellectual property during the Olympic Games akin to traditional print and television ambush marketing campaigns. As a result, the 2016 Rio De Janeiro (Rio) Summer Olympic Games represented the most intense clash between individual, virtual free speech, expression and association versus this multi-billion-dollar enterprise's attempt to protect its commercialized international sports monopoly from the most minute of rascallions with a cell phone. Part I explores the fundamentals of both Rule 40 and ambush marketing, including a broad discussion of the Lanham Act and the United States Olympic Committee (USOC). Part II provides an historical perspective on ambush marketing and Rule 40 with respect to the Olympic Games. Part III focuses on the IOC's Rule 40 and examines its effect, impact and enforcement leading up to and including the Rio Games. Finally, Part IV provides examples of how Rule 40 invited push back from unofficial sponsors seeking relief from the courts. Whether relaxing Rule 40 further might be more practical is addressed as well particularly given that the Olympic Movement has other issues that may threaten its brand and undermine credibility in the first place, and a few suggestions are proffered as well.

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## THE AMBUSH AT RIO

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## I. INTRODUCTION

The purpose of this Article is to explore the role of the International Olympic Committee's ("IOC") codified marketing policy, known as Rule 40, which emerged to prevent ambush marketing of its biennial events. Rule 40 has quickly evolved into a controversial rule for athletes, coaches, and sponsors alike who are involved in the Olympic Movement. The IOC believes that social media is a ubiquitous threat to its intellectual property during the Olympic Games akin to traditional print and television ambush marketing campaigns. As a result, the 2016 Rio De Janeiro ("Rio") Summer Olympic Games represented the most intense clash between individual, virtual free speech, expression and association versus this multi-billion-dollar enterprise's attempt to protect its commercialized international sports monopoly from the most minute of rapsallions with a cell phone.

Part I and its subsections explore the fundamentals of both Rule 40 and ambush marketing, including a broad discussion of the legal framework around the federal trademark law—the Lanham Act—and its relationship to the United States Olympic Committee ("USOC"). Part II provides a historical perspective on ambush marketing and Rule 40 with respect to the Olympic Games. Part III focuses on the IOC's Rule 40 and examines its effect, impact and enforcement leading up to and including the Rio Games. Finally, Part IV provides examples of how Rule 40 invited push back from unofficial sponsors seeking relief from the courts. Whether relaxing Rule 40 further might be more practical is addressed as well particularly given that the Olympic Movement has other issues that may threaten its brand and undermine credibility in the first place. A few suggestions are proffered as well.

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## II. PART I: RULE 40, AMBUSH MARKETING AND THE OLYMPIC MOVEMENT

## A. Rule 40

Rule 40 (“Participation in the Olympic Games”) of the Olympic Charter states in its subsection “Bye-law 3,” sometimes referred to as “paragraph 3” or “Rule 40.3” but more commonly referred to as simply “Rule 40”:

Except as permitted by the IOC Executive Board, no competitor, coach, trainer or official who participates in the Olympic Games may allow his person, name, picture or sports performances to be used for advertising purposes during the Olympic Games.<sup>1</sup>

A stated reason for requiring and enforcing Rule 40 during the Games is to “protect against ambush marketing; prevent unauthorized commercialization of the Games; and to protect the integrity of athletes’ performances of the Games.”<sup>2</sup> Rule 40 does not spell out punishment for those who violate it, but rather the Olympic Charter’s Rule 59 (“Measures and sanctions”) offers disciplinary procedures for any violations to include loss of Olympic credentials, disqualification, or medals revoked.<sup>3</sup>

Key to understanding Rule 40, however, is appreciating the motivation behind it in the first place: to protect the financial interests of its most prominent first-tier, four-year official sponsors known as *The Worldwide Olympic Partners* (often abbreviated just “TOP”), which include multi-national organizations Coca-Cola, Atos, Bridgestone, DOW, GE, McDonald’s, Omega, Panasonic, P&G, Samsung, and Visa.<sup>4</sup> Protecting

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<sup>1</sup> See Olympic Charter, *Rule 40*, OLYMPIC.ORG (Aug. 2, 2016), [https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf#\\_ga=1.165750334.1661404243.1482776731](https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf#_ga=1.165750334.1661404243.1482776731) (providing entire Olympic Charter in force from August 2, 2016).

<sup>2</sup> See UNITED STATES OLYMPIC COMMITTEE, *2012 Information for Athletes, Their Agents and NGBs*, USATF.ORG (Nov. 2011), [https://www.usatf.org/events/2012/OlympicTrials-TF/athleteInfo/Rule40\\_Pamphlet\\_4.pdf](https://www.usatf.org/events/2012/OlympicTrials-TF/athleteInfo/Rule40_Pamphlet_4.pdf); see also generally Adam Epstein, *The Olympics, Ambush Marketing and Sochi Media*, 3 ARIZ. ST. UNIV. SPORTS & ENTMT’ L.J. 110 (2013).

<sup>3</sup> See Olympic Charter, *Rule 59*, *supra* note 1, at 99-101 (listing possible punishment for violations of “the Olympic Charter, the World Anti-Doping Code, or any other regulation” related to the Olympic Movement).

<sup>4</sup> See, e.g., Denise Lee Yohn, *Olympics Advertisers Are Wasting Their Sponsorship Dollars*, FORBES.COM (Aug. 3, 2016), <http://www.forbes.com/sites/deniseleeyohn/2016/08/03/olympics-advertisers-are-wasting-their-sponsorship-dollars/#17c030266c65>; see also Jessica Neville, *The Realities of Rule 40 during the Games*, DAGGER BLOG (Aug. 4, 2016), <http://dagger.agency/blog/rule-40/> (“Established to prevent commercialization of the Olympics, Rule 40 prohibited athletes from mentioning sponsors not officially associated with the games. Additionally, for companies that are not official sponsors, “inadmissible practices” are forbidden, including 20 words and phrases like Olympics, gold, silver, bronze, medal, effort, performance, victory, and hashtags like #Rio2016 and #TeamUSA”); see also Jaime Miettinen, *How the IOC’s Rule 40.3 Guidelines Changed the Advertising Game for Rio 2016*, SPORTSLAWBLONDES.COM (July 6, 2016), <http://www.sportslawblondes.com/blog/2016/7/6/how-the-iocs-rule-403-guidelines-changed-the-advertising-game-for-rio-2016>. In 2017, the IOC signed a partnership with Chinese company Alibaba through 2028 making it a TOP partner and to launch the Olympic Channel in China. See Kim Hjelmgaard & Elizabeth Weise, *Davos: With*

financial interests also extends to second-tier sponsors, those who pay for the one event itself and who can then declare themselves *Official Sponsors of the 2016 Rio Olympic Games*, including Nissan and mostly Brazilian companies Embratel, Bradesco, Claro, Net, and Correios.<sup>5</sup> Third-tier sponsors may be referred to as *Official Supporters of the Rio 2016 Olympic Games* and included Cisco, Globo, and Latam Airlines.<sup>6</sup> Finally, another thirty companies are *Official Suppliers of the Rio 2016 Olympic Games* including Nike, Microsoft, Airbnb, Eventim, and C&A.<sup>7</sup>

When added up, these sponsors as a whole generated several billions of dollars for the IOC, second only to the fees that television rights holders paid.<sup>8</sup> Given the huge sums of money generated by its sponsors, it is natural to accept that the IOC, the host Games' venue, National Olympic Committees ("NOC") such as the USOC, and International Federations ("Ifs") do what is necessary to ensure that its official sponsors, suppliers and supporters are not ambushed by unofficial endorsements.<sup>9</sup>

### B. Ambush Marketing Generally

Ambush marketing is also known as *guerilla marketing*, *parasitic marketing*, or simply the *unofficial games*, and has a negative connotation.<sup>10</sup> In sum, it is an attempt by an advertiser to associate itself with a prominent event though it did not pay for the right to be associated with it in the first place.<sup>11</sup> Thus, the organization is not an

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*Olympics Deal, Alibaba Burnishes China's Global Credentials*, USA TODAY (Jan. 19, 2017), <http://www.usatoday.com/story/tech/news/2017/01/19/alibaba-olympic-games-sponsorhip/96762366/>.

<sup>5</sup> See Lars Becker, *Sponsors at the 2016 Olympics: The Multi-Billion Dollar Business*, ISPO.COM (July 29, 2016), [http://www.ispo.com/en/markets/id\\_78544462/2-billion-what-the-sponsors-are-paying-at-the-2016-olympics.html](http://www.ispo.com/en/markets/id_78544462/2-billion-what-the-sponsors-are-paying-at-the-2016-olympics.html).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* It should also be noted that the USOC has its own share of Olympic sponsors and partners including United Airlines, AT&T, Citi, DeVry University, Budweiser, BMW, Chobani, Hilton, Kellogg's, Smucker's, Hershey, NBC and Nike. See Phil Rosenthal, *Tweets Citing Rio, Summer or Games Could Cost Olympians if IOC Isn't Paid*, CHI. TRIB. (Aug. 4, 2016), <http://www.chicagotribune.com/business/columnists/ct-rosenthal-olympics-tweeting-0805-biz-20160804-column.html> (offering, "Free speech isn't among the Olympics vaunted values...").

<sup>8</sup> See Becker, *supra* note 5.

<sup>9</sup> See INT'L OLYMPIC COMM., *Rule 40 of the Olympic Charter: What You Need to Know as a Participant*, [https://stillmed.olympic.org/Documents/Athletes\\_Information/Rule\\_40-Rio\\_2016-QA\\_for\\_Athletes.pdf](https://stillmed.olympic.org/Documents/Athletes_Information/Rule_40-Rio_2016-QA_for_Athletes.pdf) (stating, "Rule 40 is in place for various reasons, including: To preserve the unique nature of the Olympic Games by preventing over commercialization. To allow the focus to remain on the athletes' performance. To preserve sources of funding, as 90 per cent of the revenues generated by the IOC are distributed to the wider sporting movement. This means that USD 3.25 million every day goes to the development of athletes and sports organizations at all levels around the world.").

<sup>10</sup> See Epstein, *supra* note 2; see also ADAM EPSTEIN, *SPORTS LAW* 397-99 (2013) (discussing ambush marketing generally and noting that while ambush marketing may not be, per se, a violation of the Lanham Act, it could still be considered unfair competition under §43 of the Act).

<sup>11</sup> *Id.*; see also John Grady & Steve McKelvey, *Ambush Marketing Lessons from the London Olympic Games*, SPORTS BUS. J. (Oct. 22, 2012), <http://www.sportsbusinessdaily.com/Journal/Issues/2012/10/22/Opinion/Grady-McKelvey.aspx> (offering that ambush marketing is a "controversial practice whereby businesses that are not official sponsors conduct advertising and promotional activities that seek to capitalize on the event's good will, reputation and popularity." The authors also observe that rarely, however, do ambush marketers actually infringe on the trademarks of the sport organization or event, though they do associate themselves with the event).

*official sponsor* of an event though a viewer or consumer might believe that it is based upon the advertising campaign.<sup>12</sup> Frequently cited events where ambush marketing occurs include the Olympic Games, the Super Bowl, the FIFA World Cup, the Daytona 500, Kentucky Derby, and so on.<sup>13</sup>

### *C. Lanham Act: The U.S. Federal Trademark Law*

In the United States, the foundation for discussion of the legal environment surrounding ambush marketing begins with the most relevant federal law, the Lanham Act.<sup>14</sup> This 1946 law prohibits the unauthorized use of a registered trademark in connection with the sale, offering for sale, distribution, or advertising of the ambusher's goods or services, if such use is likely to cause consumer confusion or likely to deceive as to the mark's affiliation, connection, association or origin.<sup>15</sup> The

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<sup>12</sup> See EPSTEIN, *supra* note 10, at 398 (citing similar examples and noting that MasterCard obtained an injunction against Sprint from issuing credit cards with World Cup '94 trademarks in *MasterCard Int'l, Inc. v. Sprint Commc'ns Co.*, 1994 WL 97097 (S.D.N.Y. 1994); see also Katherine Levy & Daniel Farey-Jones, *FIFA Cracks Down after World Cup Ambush Marketing Stunt*, MKTG. MAGAZINE (June 18, 2010), <http://www.marketingmagazine.co.uk/article/1010807/fifa-cracks-down-world-cup-ambush-marketing-stunt> (noting that FIFA filed a civil case against Bavaria as well as filing criminal charges against the two Dutch women alleged to have organized the stunt and were charged with contravening the South African Merchandise Marks Act as a result of their actions during the Holland-Denmark game in which it is against FIFA regulations to promote any brands other than official sponsors during the World Cup games).

<sup>13</sup> See Epstein, *supra* note 2, at 111; see also EPSTEIN, *supra* note 10, at 398. *But see* Dickerson M. Downing, Rodrigo Azevedo & Mary R. Bram, *Ambush Marketing: Coming Soon to a Stadium Near You*, ASS'N CORPORATE COUNSEL (Jan. 22, 2013), <http://www.acc.com/legalresources/quickcounsel/amcstasny.cfm> (discussing the impact that ambush marketing might have related to Brazil's 2014 FIFA World Cup Brazil™ and the 2016 Summer Olympic and Paralympic Games in Rio de Janeiro relative to the Brazilian Industrial Property Act, the Copyright Act, the Sports Act and even the Civil Code. However, the article also mentions how attempts by South Africa to penalize the Dutch beer company Bavaria actually brought more attention to the brewery and in essence gave it free worldwide publicity). Based upon a Lexis.com search, only three published decisions (both federal and state) have ever used the phrase "ambush marketing" in any context and include *Sturgis Area Chamber of Commerce v. Little Sturgis Rally & Races for Charity, Inc.*, 2008 U.S. Dist. LEXIS 125605 (D.S.D. Dec. 19, 2008); *Mastercard Int'l Inc. v. Fed'n Internationale De Football Ass'n*, 464 F. Supp. 2d 246 (S.D.N.Y. 2006); *U.S. Olympic Comm. v. Am. Media, Inc.*, 156 F. Supp. 2d 1200 (D. Colo. 2001).

<sup>14</sup> See Epstein, *supra* note 2, at 112; see also 15 U.S.C.A. § 1051, *et seq.* (2016) (prohibiting trademark infringement, trademark dilution, and false advertising).

<sup>15</sup> See Epstein, *supra* note 2, at 112; see also 15 U.S.C.A. § 1125(a) (False Designations of Origin, False Descriptions, and Dilution Forbidden). Note that Subchapter III of the Lanham Act, codified in section 1125, prohibits the use of a false designation of origin or a false or misleading description or representation of fact thereby avoiding a *likelihood of confusion* among consumers. However, courts might refer to this section as § 43(a) of the Lanham Act which prohibits the use of a false designation of origin or a false or misleading description or representation of fact, though it is today codified as 15 U.S.C.A. § 1125(a):

Civil action (1) Any 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, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—(A) 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,

Lanham Act has prohibited the registration of a mark, such as a trademark or service mark, which is determined to be immoral, deceptive or scandalous.<sup>16</sup>

An often-cited example of trademark infringement includes association with the National Collegiate Athletic Association's ("NCAA") *March Madness* basketball tournament held each spring.<sup>17</sup> In 2001, the NCAA sued Coors Brewing over trademark infringement because the brewer had "Coors Light Tourney Time Sweepstakes" in its advertisements and giving away four 2001 Final Four tickets.<sup>18</sup> After a legal battle, Coors paid the NCAA \$75,000 to settle the case in 2003.<sup>19</sup>

#### D. "Olympic" and the United States Olympic Committee (USOC)

When exploring ambush marketing related to the Olympic Movement, under federal law the USOC has the exclusive rights to use the word "Olympic" and "Olympiad" in conjunction with advertising and promotions, including simulations such as "Olympik," with few exceptions.<sup>20</sup> The USOC today governs eligibility,

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or (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

<sup>16</sup> For example, this is the heart of the issue related to whether or not the name Washington REDSKINS violates federal law and continues to be the subject of lawsuits to enjoin its use. See Ian Botnick, *Honoring Trademarks: The Battle to Preserve Native American Imagery in the National Collegiate Athletic Association*, 7 J. MARSHALL REV. INTELL. PROP. L. 735, 743-44 (mentioning the line of cases in which a group of Native Americans petitioned the U.S. Patent and Trademark Office to cancel six trademarks including the Washington Redskins on the grounds that it was disparaging to Native Americans); see also EPSTEIN, *supra* note 10, at 386-87 (exploring the case Pro-Football, Inc. v. Harjo, 415 F.3d 44 (D.C. Cir. 2005) and other potential "immoral, deceptive, or scandalous" matters involving trademarks and Native American nicknames and connotations); *id.* at 390 (discussing the National Collegiate Athletic Association and ethnic-based mascot issues). *But see* Lee v. Tam, 2016 U.S. LEXIS 4462, *cert. granted to In re Tam*, 808 F.3d 1321 (Fed. Cir., 2015) (vacating the U.S. Patent and Trademark Office, Trademark Trial and Appeal Board's ("TTAB's") decision to refuse to register under § 2(a) of the Lanham Act, 15 U.S.C.S. § 1052(a), the mark THE SLANTS because the mark likely referred to people of Asian descent in a disparaging way since § 2(a) violated the First Amendment to the U.S. Constitution); see also Sam Hananel, *Redskins May Feel Impact of Band's Trademark Dispute*, WASH. TIMES (Sept. 29, 2016), <http://www.washingtontimes.com/news/2016/sep/29/bands-trademark-dispute-may-impact-redskins/> ("In the Slants case, front man Simon Tam tried to trademark the name in 2011, but the U.S. Patent and Trademark Office denied the request on the ground that it disparages people of Asian descent. He sued, and a federal appeals court ruled last year that the law barring offensive trademarks violates free speech rights.").

<sup>17</sup> Epstein, *supra* note 2, at 113; see also EPSTEIN, *supra* note 10, at 389-90.

<sup>18</sup> Epstein, *supra* note 2, at 113; see also EPSTEIN, *supra* note 10, at 398 (referencing Nat'l Collegiate Athletic Ass'n v. Coors Brewing Co., No. IP01-1768 (S.D. Ind. filed Nov. 27, 2001); see also Rick Callahan, *NCAA Sues Coors for Final Four Promotion*, USA TODAY (Nov. 28, 2001), <http://usatoday30.usatoday.com/sports/college/basketball/men/2001-11-28-finalfour-promo.htm>.

<sup>19</sup> Epstein, *supra* note 2, at 113; see also EPSTEIN, *supra* note 10, at 398; see also Steve McKelvey, *Jury's Still Out On Ticket Promotions*, SPORTS BUS. DAILY (May 19, 2003), <http://m.sportsbusinessdaily.com/Journal/Issues/2003/05/20030519/Opinion/Jurys-Still-Out-On-Ticket-Promotions.aspx>.

<sup>20</sup> See Epstein, *supra* note 2, at 113-14. The term *simulations* refer to alternate or similar spellings of *Olympic*. See, e.g., United States Olympic Comm. v. Tobyhanna Camp Corp., 2010 U.S. Dist. LEXIS 117650 (M.D. Pa. Nov. 4, 2010) (issuing a permanent injunction to stop using "Olympik" and the Olympic rings).

selection and participation in the Olympic Games, the Paralympic Games, and Pan American Games.<sup>21</sup> The organization was federally chartered by the U.S. Congress and remains a private, non-profit organization.<sup>22</sup>

Still, the USOC has certain exclusive rights in accordance with authority granted to it by the Amateur Sports Act (1978) and as amended twenty years later by the Ted Stevens Olympic and Amateur Sports Act (1998) (“TSOASA”).<sup>23</sup> More specifically, under federal law the USOC has the exclusive right to use:

- 1) The name “United States Olympic Committee”;
- 2) The symbol of the International Olympic Committee, consisting of 5 interlocking rings, the symbol of the International Paralympic Committee, consisting of 3 TaiGeuks, or the symbol of the Pan-American Sports Organization, consisting of a torch surrounded by concentric rings;
- 3) The emblem of the corporation, consisting of an escutcheon having a blue chief and vertically extending red and white bars on the base with 5 interlocking rings displayed on the chief; and
- 4) The words “Olympic,” “Olympiad,” “Citius Altius Fortius,” “Paralympic,” “Paralympiad,” “Pan-American,” “America Espirito Sport Fraternite,” or any combination of those words.<sup>24</sup>

However, the commercial use of the word “Olympic” has a “grandfather clause” for those businesses or organizations who used “Olympic” prior to September 21, 1950.<sup>25</sup> There is also an exemption for the use of the word “Olympic” when it refers to the naturally occurring mountains or geographical region of the same name that were named prior to February 6, 1998, as long as such business, goods, or services are

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<sup>21</sup> Epstein, *supra* note 2, at 114; *see also* TED STEVENS OLYMPIC AND AMATEUR SPORTS ACT OF 1998 (“TSOASA”), 36 U.S.C. § 220521 (2016); *see also* Adam Epstein, *Go for the Gold by Utilizing the Olympics*, 29 J. LEGAL STUD. EDUC. 313 (2012) (offering in the pedagogical piece that both the Winter and Summer Olympics were held during the same year through 1992. Then, beginning in 1994, the Winter and Summer Olympics alternate in even numbered years).

<sup>22</sup> EPSTEIN, *supra* note 10, at 315 (offering that the USOC was established as a federally chartered organization in 1950 though it had survived under different names until becoming the USOC in 1961). Epstein offers that the authority of the federal government to create a private corporation to carry out a public purpose emanates from the Necessary and Proper Clause of the Constitution, U.S. CONST., art. I, § 8, cl. 18 (Congress shall have the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”), and the Supreme Court decision in *McCulloch v. Maryland*, 17 U.S. 316, 325-26 (1819)). *Id.* at 316.

<sup>23</sup> *Id.*; *see also* the AMATEUR SPORTS ACT OF 1978 was codified at 36 U.S.C. §§ 371-396. It has since been re-codified, renamed and modified by the TED STEVENS OLYMPIC AND SPORTS ACT OF 1998 (sometimes referred to as the TSOASA or just OASA by courts and authors), 36 U.S.C. § 220521; Noelle K. Nish, *How Far Have We Come? A Look at the Olympic and Amateur Sports Act of 1998, the United States Olympic Committee, and the Winter Olympic Games of 2002*, 13 SETON HALL J. SPORTS L. 53 (2003).

<sup>24</sup> Epstein, *supra* note 2, at 114-115; 36 U.S.C. § 220506 (a) (2016).

<sup>25</sup> Epstein, *supra* note 2, at 115; 36 U.S.C. § 220506 (d)(1) (2016).



operated, sold, and marketed in the State of Washington west of the Cascade Mountain range and operations, sales, and marketing outside of this area are not *substantial*.<sup>26</sup>

The USOC has been proactive in protecting its exclusive rights and marks, and it protects its intellectual property rights over the exclusive *commercial* use of the word “Olympic” by sending cease and desist letters to alleged violators.<sup>27</sup> In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, the Supreme Court of the United States affirmed an injunction against the use of the word “Olympic” as part of the Gay Olympic Games.<sup>28</sup> San Francisco Arts & Athletics, Inc., a nonprofit California corporation, had promoted the Gay Olympic Games in 1982 by using Olympics on its letterheads and mailings and on merchandise.<sup>29</sup> However, the USOC brought suit in federal district court, where they sought and received a permanent injunction.<sup>30</sup> The U.S. Supreme Court held that Congress granted the USOC exclusive use of the word “Olympic,” and the USOC’s property rights in the word, and its associated symbols, and slogans can be protected.<sup>31</sup> As a result, this event is known today as the *Gay Games*.<sup>32</sup>

In recent years, the USOC appears to have increased its efforts to protect its intellectual property rights and prevent the unauthorized use of its marks, particularly anything using the word “Olympic.” It has been demonstrated that Oregon’s *Ferret Olympics* (2005),<sup>33</sup> the rock band *Olympic Hopefuls* (2005),<sup>34</sup> and a comedy club in Chicago called the *ImprovOlympic*<sup>35</sup> were all forced to change their name.<sup>36</sup> The city of Seattle no longer has an *Oyster Olympics* (2007)<sup>37</sup> eating contest, nor are there *RobOlympics* in San Francisco (a robotics competition),<sup>38</sup> or the *Redneck Olympics*.<sup>39</sup>

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<sup>26</sup> Epstein, *supra* note 2, at 115; 36 U.S.C. § 220506 (d)(3)(B), (C) (2016).

<sup>27</sup> *Id.* at 117; *see also* EPSTEIN, *supra* note 21, at 330 n.75; *compare* United States Olympic Comm. v. Intelicense Corp., S.A., 737 F.2d 263 (2nd Cir. 1984) (affirming a permanent injunction against Intelicense, a Swiss corporation, and its sublicensee, International Sports Marketing, Inc. (“ISM”), a Vermont corporation, to use, market, and sublicense within the United States the official pictograms of the IOC without the consent of the USOC); *with* Stop the Olympic Prison v. United States Olympic Comm., 489 F. Supp. 1112 (S.D.N.Y. 1980) (holding that plaintiffs who designed and distributed a poster without charge in order to oppose state plans to convert the Olympic Village in Lake Placid into a prison after the winter games did not violate USOC’s trademark rights because it was not used for the purpose of trade, or to induce the sale of goods and services).

<sup>28</sup> San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987).

<sup>29</sup> *Id.*

<sup>30</sup> Epstein, *supra* note 2, at 118.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*; *see also* EPSTEIN, *supra* note 21, at 331.

<sup>33</sup> EPSTEIN, *supra* note 21, at 331-32.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> EPSTEIN, *supra* note 21, at 331-32.

*E. IOC's Exclusive Rights and Rule 40's "Dirty Words" Leading Up to Rio*

At the international level, the IOC has exclusive rights to the five interlocking rings under the Nairobi Treaty of 1981.<sup>40</sup> This treaty allows the IOC to have exclusive rights to the Olympic symbol, flag, motto, anthem and the games themselves.<sup>41</sup> Associating oneself with The Olympic Partners program ("TOP") grants exclusive marketing rights for summer and winter Olympic Games for an enormous fee upwards of \$200 million.<sup>42</sup> Today, the IOC requires host countries and cities to enact temporary special-event legislation to curtail ambush marketing and illusory association with the Games.<sup>43</sup>

The IOC, in conjunction with other NOCs such as the USOC, has been very aggressive in recent years in order to protect its intellectual property via Rule 40.<sup>44</sup> Unless you are an Olympic sponsor, certain words and phrases cannot even be used by commercial entities, coaches, Olympic athletes and trainers and other Olympic-related officials beginning nine days before the start of the Olympic Games until three days thereafter known as the *blackout period*.<sup>45</sup> Given that the IOC's largest sponsors pay around \$200 million to reach that top-tier status, one cannot help but be sympathetic to the IOC's concern-and right-to protect its Games and its sponsors' brands.<sup>46</sup>

However, the idea that the IOC, through its NOC's, IFs and so on, has a monopoly over humanity governing the use of certain words and expressions during a few weeks of the year every two years certainly seems hardly enforceable, at least from a legal point of view.<sup>47</sup> At the 2016 Rio Olympics, July 27 to August 24 was the blackout

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<sup>40</sup> *Id.* at 119; *see also* EPSTEIN, *supra* note 10, at 391.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*; *see also* Yohn, *supra* note 4.

<sup>43</sup> *Id.*; *see also* Isabel Boardman, *Ambush Marketing in the Olympic Games in Brazil*, INT'L BAR ASS'N (July 7, 2016), <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=bae895cf-7a7d-48cc-8ebf-7d2c8b099b38> ("Brazilian authorities were led to enact special legislation in cooperation with the International Olympic Committee (IOC), the International Paralympic Committee (IPC), the Rio 2016 Organising Committee (ROC) and the Brazilian Trademark Office (BTO."); *see also* Steve McKelvey, *As Games Approach, Time to Reconsider Ambush Marketing*, SPORTS BUS. J. (Jan. 18, 2010), <http://www.sportsbusinessdaily.com/Journal/Issues/2010/01/20100118/Opinion/As-Games-Approach-Time-To-Reconsider-Ambush-Marketing.aspx> (discussing how the ambush marketing "orgy" that took place in Atlanta's 1996 Olympic Games led to subsequent Olympic host sites, in this instance the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games (VANOC), and questioning how extreme and obsessive measures to attempt to prevent ambush marketing might do more harm than good).

<sup>44</sup> *See, e.g.*, Daniel Roberts, *Why the Biggest Business Story of the Rio Olympics is This Marketing Rule Change*, YAHOO! SPORTS (Aug. 3, 2016), [http://finance.yahoo.com/news/rio-olympics-rule-40-changes-marketing-summer-games-200732935.html?soc\\_src=mediacontentsharebuttons&soc\\_trk=tw](http://finance.yahoo.com/news/rio-olympics-rule-40-changes-marketing-summer-games-200732935.html?soc_src=mediacontentsharebuttons&soc_trk=tw) (discussing "an obscure Olympics rule," providing video of Michael Phelps Under Armour commercial and discussing ways by athletes and non-official Olympic sponsors to skirt a restrictive and "infamous" Olympic Rule 40).

<sup>45</sup> *Id.*; *see also* Miettinen, *supra* note 4.

<sup>46</sup> *Id.*

<sup>47</sup> *See, e.g.*, Brian Cristiano, *Rule 40 Olympic Dirty Words*, OUT OF SCOPE (Aug. 5, 2016), [https://twitter.com/brian\\_cristiano/status/761636063022419968](https://twitter.com/brian_cristiano/status/761636063022419968) (offering a 4:11 video review of Rule 40 via Twitter and stating, "Rule 40 was created to protect official Olympic sponsors who spend tens of millions of dollars for exclusive marketing rights.").

period for Rule 40 which prevented the use of various trademarked words or phrases<sup>48</sup> including references to the Olympic sites, future sites and venues themselves.<sup>49</sup>

Additionally, the USOC outlined parameters and admonished non-official sponsors that during the Games, particularly with regard to the use of social media:

- You must not use words that incorporate the word “Olympic,” such as Mathlympics, Aqualympics, Chicagolympics, Radiolympics, etc.
- You cannot use hashtags that include Olympics trademarks such as #TeamUSA or #Rio2016.
- You cannot use any official Olympics logos.
- You cannot post any photos taken at the Olympics.
- You cannot feature Olympic athletes in your social posts.
- You cannot even wish them luck.
- Do not post any Olympics results.
- You cannot share anything from official Olympics social media accounts. Even retweets are prohibited.
- No creating your own version of Olympic symbols, “whether made from your own logo, triangles, hexagons, soda bottle tops, onion rings, car tires, drink coasters, basketballs, etc.”
- “Do not host an Olympic- or Paralympic-themed contest or team-building event for employees.”<sup>50</sup>

In sum, so comprehensive was the list of what non-official sponsors could say or tweet or post online or in their advertising that Brian Cristiano, CEO of Bold Worldwide, characterized the Rio campaign via a Twitter video as a list of “Dirty Words.”<sup>51</sup> In order to avoid a penalty (of some sort) from the IOC or USOC for a Rule 40 violation, Cristiano offered the various creative ways that some companies attempted to skirt the rule itself, including tweets by companies such as Brooks running shoes and Oiselle sportswear which used attempts at humor.<sup>52</sup> Finally, Cristiano asserted that the USOC uses scare tactics against unofficial sponsors to force

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<sup>48</sup> See Christine Birkner, *Here Are the Many, Many Ways Your Business Can Get in Trouble for Tweeting the Olympics*, ADWEEK.COM (July 29, 2016), <http://www.adweek.com/news/advertising-branding/here-are-many-many-ways-your-business-can-get-trouble-tweeting-olympics-172699>

(offering that during the Games, businesses cannot use any of the Olympics’ trademarked words or phrases including Olympic, Olympian, Team USA, Future Olympian, Gateway to gold, Go for the gold, Let the games begin, Paralympic, Pan Am Games, Olympiad, Paralympiad and Pan-American).

<sup>49</sup> *Id.* (including Road to Rio, Road to Pyeongchang, Road to Tokyo, Rio 2016, Pyeongchang 2018, and Tokyo 2020).

<sup>50</sup> *Id.*

<sup>51</sup> See Brian Cristiano, *supra* note 47; see also Eric Goldman, *Handicapping the Olympic Committee’s Quest to Control Tweeting*, TECH. & MKTG. LAW BLOG (Aug. 25, 2016), <http://blog.ericgoldman.org/archives/2016/08/handicapping-the-olympic-committees-quest-to-control-tweeting-guest-post.htm> (offering that “Olympic organizers are already planning to set new world records for ridiculously tendentious legal positions for the PyeongChang 2018 Winter Olympics and beyond.”).

<sup>52</sup> *Id.* (displaying in the video @brooksrunning’s tweet, “Good luck to @des\_linden while wearing our shoes 4 over 26 consecutive miles in South America’s largest and most Portuguese-speaking country #Rule40” and @oiselle\_team’s tweet, “Good luck @fastk8! Writing this tweet without breaking Rule 40 was harder than avoiding the Zika virus! #Rule40”).

compliance with Rule 40.<sup>53</sup> Based upon my research, no Olympic athlete, trainer or coach has yet to be penalized for a violation of Rule 40, though at least two Olympic-caliber athletes have been denied from participation in the Olympic Games for otherwise inappropriate “racist” tweets in 2012.<sup>54</sup>

### III. PART II: OLYMPICS AND AMBUSH MARKETING: A HISTORICAL PERSPECTIVE

#### A. Classical Examples

For decades, and far before the arrival of the Internet and social media, non-official sponsors of the Olympic Games used the Olympics to generate interest in promoting their own products or services. Ambush marketing and its relationship to the Olympics appears to have emerged from the 1984 Los Angeles Olympics.<sup>55</sup> For example, Fujifilm won the rights to be an official sponsor, but competitor Kodak purchased “extensive advertising” during the television broadcast of the Games which gave the impression that Kodak was indeed affiliated with the Games.<sup>56</sup> Additionally, Nike aired television ads during the same Olympics with prominent athletes in the ads and even used the Randy Newman song *I Love L.A.*<sup>57</sup> Subsequent marketing research found more consumers thought Nike was the official sponsor than Converse, the actual sponsor of the Los Angeles Olympic Games.<sup>58</sup>

In 1988, Visa was the paid sponsor of the Seoul, Korea Olympic Games, but American Express used the Olympic stadium in its advertising and Visa accused

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<sup>53</sup> *Id.* (stating that “[t]his is an archaic rule that doesn’t belong in this decade, especially with social media, and does nothing but frustrate athletes, smaller sponsors and hold back sports like track and field.”).

<sup>54</sup> See Jon Saraceno, *Swiss Soccer Player Banned from Olympics for Racist Tweet*, USA TODAY (July 30, 2012), <http://usatoday30.usatoday.com/sports/olympics/london/soccer/story/2012-07-30/swiss-athlete-banned-michel-morganella-olympics/56591966/1> (discussing inappropriate tweets by Swiss soccer player Michel Morganello a week after Greek triple jumper Voula Papachristou was expelled by Greek athletic officials for mocking African immigrants); see also Jasimine Henry, *Top 5 Twitter Scandals from the Olympics*, INBOUNDMARKETINGAGENTS.COM (Aug. 3, 2012), <http://www.inboundmarketingagents.com/inbound-marketing-agents-blog/bid/199289/Top-5-Twitter-Scandals-from-the-Olympics>.

<sup>55</sup> See Epstein, *supra* note 2, at 120.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*; see also Tony Kornheiser, *Those TV Fitness Ads Are Mostly Junk Food*, WASH. POST (July 3, 1984), <https://www.washingtonpost.com/archive/sports/1984/07/03/those-tv-fitness-ads-are-mostly-junk-food/46d66f40-b6d1-4cac-9a50-9faa7559908f/> (stating that “[a]s Newman drives on he passes billboards of Alberto Salazar and the Lakers’ Michael Cooper. Then you see live shots of Mary Decker running past Mann’s Chinese Theatre; Moses Malone shooting baskets with kids in Watts; some L.A. Raiders in a convertible outside the L.A. Coliseum; Carl Lewis long-jumping on Santa Monica beach; Pedro Guerrero in downtown L.A.”); Michael Hiestand, *Nike, Famed for Ambush Marketing, Tries New Track*, USA TODAY (July 25, 2012), <http://content.usatoday.com/communities/gameon/post/2012/07/nike-famed-for-olympic-ambush-marketing-tries-new-tack/1#.UpInWcRwq6U>; Robert Passikoff, *Ambush Marketing: An Olympic Competition. And Nike Goes for Gold*, FORBES.COM (Aug. 7, 2012), <http://www.forbes.com/sites/marketshare/2012/08/07/ambush-marketing-an-olympic-competition-and-nike-goes-for-gold/#a0f663ef8778>.

<sup>58</sup> See Passikoff, *supra* note 57.

American Express of ambush marketing.<sup>59</sup> The 1992 Barcelona, Spain Olympics saw NBA star Michael Jordan cover up official apparel sponsor Reebok with an American flag during the gold medal ceremony since he had a personal endorsement deal with Nike.<sup>60</sup> In 1996, Reebok paid \$40 million to be the official sponsor of the Atlanta Games, but Nike bought up billboards around Atlanta which became known as the “ambush of all ambushes.”<sup>61</sup>

Then, in 2010, Verizon and Subway television commercials appeared to show official sponsorship of Vancouver Olympic Games, but in fact neither were official sponsors.<sup>62</sup> In the Subway commercial, Michael Phelps swims all the way to an unnamed city in Western Canada which appears to be exactly where Vancouver is located and was characterized as ambush marketing.<sup>63</sup>

Meanwhile, American snowboarder Shaun White had to have his image changed to a mere blacked-out silhouette after a huge Target corporation advertisement appeared in Times Square just before the Vancouver Games and just read, “Gone to Vancouver.”<sup>64</sup> Thus, from Los Angeles in 1984 to Vancouver in 2010, there appeared to be an ultra-competitive game unto itself: how to win at the “sport” of Olympic ambush marketing.

### *B. The Ambush at London (2012)*

In order to crack down on years of ambush marketing during the Olympics, special legislation was enacted by the British government as part of its bid requirement to host the Games entitled *The London Olympic Games and Paralympic Games Act 2006* and contained provisions to attempt to restrict ambush advertising at the 2012

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<sup>59</sup> See Epstein, *supra* note 2; see also Tripp Mickle, *Visa Goes for Gold: Behind the Company's Acclaimed Program*, SPORTS BUS. J. (July 23, 2012), <http://www.sportsbusinessdaily.com/SB-Blogs/Olympics/London-Olympics/2012/07/visaJuly23.aspx>. (offering that the 1988 Olympics (both the Winter Games in Calgary, Alberta and the Summer Games in Seoul, Korea) also paid off nicely for Visa with its advertising campaign, “bring your Visa card, because the Olympics don’t take American Express.”); see also Rebecca Hobson, *Seven Best Olympic Ambush Marketing Ploys*, LONDON LOVES BUS. (July 5, 2012), <http://www.londonlovesbusiness.com/business-news/london-2012-olympics/seven-best-olympic-ambush-marketing-ploys/2884.article> (offering that after American Express (Amex) lost its rights to Visa beginning in 1984, an all-out war began between the two companies that carried over to Barcelona (1992) and Lillehammer, Norway (1994) in which Amex fought back in its advertising by offering that Americans did not need visas to travel to Spain and Norway).

<sup>60</sup> See Epstein, *supra* note 2, at 121; see also Jared Wade, *How the Dream Team Foreshadowed the Olympics' Sponsorship Controversy*, RISK MGMT. (Aug. 22, 2012), <http://www.rmmagazine.com/2012/08/22/how-the-dream-team-foreshadowed-the-london-olympics-sponsorship-controversy/>.

<sup>61</sup> *Id.*; See Abram Sauer, *Ambush Marketing: Steals the Show*, BRAND CHANNEL (May 27, 2002), [http://www.brandchannel.com/features\\_effect.asp?pf\\_id=98](http://www.brandchannel.com/features_effect.asp?pf_id=98).

<sup>62</sup> *Id.*; see also Stuart Elliott, *Subway Takes Ambush Marketing Complaints in Stride*, N.Y. TIMES (Feb. 11, 2010), [http://mediadecoder.blogs.nytimes.com/2010/02/11/subway-takes-ambush-marketing-complaints-in-stride/?\\_r=0](http://mediadecoder.blogs.nytimes.com/2010/02/11/subway-takes-ambush-marketing-complaints-in-stride/?_r=0).

<sup>63</sup> *Id.* One wonders if consumers were confused as to whether or not swimming is a summer or winter Olympic event.

<sup>64</sup> See Matt Higgins, *Post No Bills*, ESPN.COM (Feb. 18, 2010), <http://www.espn.com/action/news/story?id=4921916>.

Summer Olympics through the efforts of the London Organising Committee of the Olympic and Paralympic Games (LOCOG).<sup>65</sup>

For example, this led to the removal of advertisements for the betting company Paddy Power which announced that it was “The Official sponsor of the largest athletics event in London this year! There you go, we said it (ahem, London France that is),” referring to an egg-and-spoon race in London, a village in France.<sup>66</sup> LOCOG later changed its mind on Paddy Power’s campaign.<sup>67</sup> Still, LOCOG “police” did force a real estate agency to remove a window display from simulating Olympic rings, and also a butcher’s sausages that were shaped in the form of the Olympic rings had to be removed as part of their enforcement campaign as well.<sup>68</sup>

However, in 2012, Nike utilized an effective television video advertisement campaign *Find Your Greatness* which praised the efforts of anonymous athletes in other towns named London around the world, thereby associating Nike with towns called London even though Nike had no sponsorship with the London Games.<sup>69</sup> Meanwhile, Adidas paid millions for its official status for the London Games.<sup>70</sup> Nike’s ambush marketing advertising campaign in London proved to be a success.<sup>71</sup>

At the London Games, concerns over ambush marketing picked up momentum far beyond billboards, television and print advertisements. The discussion of the role and enforcement of the Olympic Charter’s Rule 40 appeared to gain considerable traction given the prominence of social media in the context of Facebook, Twitter and Instagram, for example.<sup>72</sup> In fact, concerns over social media-related ambush

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<sup>65</sup> See Esther Addley, *Olympics 2012: Branding ‘Police’ to Protect Sponsors’ Exclusive Rights*, THE GUARDIAN (Apr. 3, 2012), <http://www.theguardian.com/sport/2012/apr/13/olympics-2012-branding-police-sponsors>.

<sup>66</sup> *Id.*; see also Grady & McKelvey, *supra* note 11.

<sup>67</sup> *Id.*; see also Maisie McCabe, *LOCOG U-turns Over Paddy Power ‘London’ Ads*, CAMPAIGN MAG. (July 25, 2012), <http://www.marketingmagazine.co.uk/article/1142903/locog-u-turns-paddy-power-london-ads>.

<sup>68</sup> *Id.*; see also Grady & McKelvey, *supra* note 11; see also Jeré Longman, *Where Even Sausage Rings are Put on the Chopping Block*, N.Y. TIMES (July 24, 2012), [http://www.nytimes.com/2012/07/25/sports/olympics/2012-london-games-even-sausage-rings-alarm-marketing-police.html?\\_r=0](http://www.nytimes.com/2012/07/25/sports/olympics/2012-london-games-even-sausage-rings-alarm-marketing-police.html?_r=0) (offering that the small business butcher shop owner faced a fine up to \$39,000 if he did not take his sign down).

<sup>69</sup> *Id.* at 122; see also Mark Sweney, *Olympics 2012: Nike Plots Ambush Campaign*, GUARDIAN (July 25, 2012), <http://www.theguardian.com/media/2012/jul/25/olympics-2012-nike-ambush-ad>.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*; see also Mallory Russell, *Nike Ambushes Adidas on World Stage . . . Again*, ADAGE.COM (July 21, 2012), <http://adage.com/article/the-viral-video-chart/nike-ambushes-adidas-world-stage/236400/> (demonstrating that the Nike advertisement led the online video views).

<sup>72</sup> See UNITED STATES OLYMPIC COMMITTEE, *supra* note 2 (providing the comprehensive “Rule 40 Guidelines” and “IOC Social Media Guidelines leading up to the London Olympics and noting that prior to July 2011, Rule 40 was actually known as Rule 41 of the Olympic Charter. The guidelines also expound on Rule 50 (Advertising, demonstrations, propaganda) of the Olympic Charter, formerly known as Rule 53, dealing with a variety of things including clothing, equipment and uniforms during the Games themselves in addition to the prohibition of political and religious protests and propaganda). For the Rio Games, the IOC published its *Guidelines Regarding Authorised Identifications* for each sport with regard to Rule 50 of the Olympic Charter compliance, dictating number and size of logo use for athletes by manufacturers for all clothing and accessories for each sport, including footwear and swim caps available at [https://www.dosb.de/fileadmin/Bilder\\_allgemein/Veranstaltungen/Rio\\_2016/Rio\\_2016\\_-\\_Guidelines\\_regarding\\_Authorised\\_Identifications\\_-\\_EN\\_FINAL\\_VERSION.pdf](https://www.dosb.de/fileadmin/Bilder_allgemein/Veranstaltungen/Rio_2016/Rio_2016_-_Guidelines_regarding_Authorised_Identifications_-_EN_FINAL_VERSION.pdf).

marketing were in their infancy with apparently no restrictions on their use via this medium at the 2008 Beijing Olympic Games and merely rudimentary restrictions at Vancouver in 2012.<sup>73</sup>

Leading up to the London Games, things changed considerably from the traditional on-the-ground, television and print-media enforcement, discussed above, to now include strict social media guidelines to prevent ambush marketing in the virtual, online world.<sup>74</sup> So restrictive were these new social media guidelines that the London Games themselves became characterized both as the “Social Olympics”<sup>75</sup> and the “Twitter Olympics.”<sup>76</sup>

As a result of these new restrictions,<sup>77</sup> dozens of Olympic athletes waged an activist-type Twitter campaign at the 2012 London Games, using the hashtags #WeDemandChange2012 and #Rule40.<sup>78</sup> The Rule 40 prohibition was in effect from July 18 until three days after the closing ceremony on August 15.<sup>79</sup>

### C. *The Ambush at Sochi (2014)*

The 2014 Sochi Winter Olympics had ten Worldwide Olympic Partners including Atos, Coca-Cola, Dow Chemical, General Electric (“GE”), McDonald’s, Omega, Panasonic, Procter & Gamble (“P&G”), Samsung, and Visa, and justifiable concerns over ambush marketing and Rule 40’s application continued.<sup>80</sup>

Leading up to the Sochi Games, in October 2013, the Pennsylvania-based lighter company Zippo became involved in the ambush marketing controversy after it was revealed that it had to remove an image from its Facebook page in which a picture of a Zippo product was shown being used to reignite the Olympic Flame for Sochi 2014

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<sup>73</sup> See Carlos Victor, *Social Media and Online Reputation Crisis in the London Olympics: Lessons Learned*, MELISSAAGNES.COM (Aug. 15, 2012), <http://melissaagnes.com/social-media-and-online-reputation-crisis-in-the-london-olympics-lessons-learned/>.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See John Grady, Khalid Ballouli, Andrew Pressley & Anita M. Moorman, *Regulating “The Twitter Olympics:” Analyzing Efforts to Regulate Social Media and Ambush Marketing at the London 2012 Olympics*, NORTH AM. SOC’Y FOR SPORT MGMT. CONFERENCE (May 31, 2013), [https://www.nassm.com/files/conf\\_abstracts/2013-135.pdf](https://www.nassm.com/files/conf_abstracts/2013-135.pdf) (displaying abstract of oral presentation for the Austin, Texas conference, and stating, “The evolution of social media, however, confounds contemporary sponsorship protection and defies traditional legal remedies.”).

<sup>77</sup> See UNITED STATES OLYMPIC COMMITTEE, *supra* note 2.

<sup>78</sup> See Ken Belson, *Olympians Take to Twitter to Protest Endorsement Rule*, N.Y. TIMES (July 30, 2012), <http://www.nytimes.com/2012/07/31/sports/olympics/athletes-at-olympics-protest-sponsorship-rule-on-twitter.html>; see also Tim Reynolds, *Some Olympians Want Marketing Rules Changed*, NORTHJERSEY.COM (July 30, 2012), <http://archive.northjersey.com/sports/some-olympians-want-marketing-rules-changed-1.355893?page=all> (discussing the passionate plea against Rule 40 by U.S. track star Sanya Richards-Ross).

<sup>79</sup> *Id.*

<sup>80</sup> See *The Ambush Marketing Race to the Sochi Olympics is On!*, GLOBAL LANGUAGE MONITOR (Aug. 30, 2013), <http://www.languagemonitor.com/olympics/the-ambush-marketing-race-to-the-sochi-olympics-is-on/>.

after it went out in Russia.<sup>81</sup> Zippo was warned by Sochi officials that this violated IOC ambush marketing rules.<sup>82</sup>

Discussion of Rule 40 among Olympic athletes in relation to social media seemed to wane somewhat in comparison to the London Games, though restrictions related to non-official sponsorship related to coaches, trainers, athletes remained in force and everyone was put on notice.<sup>83</sup> The lack of anti-Rule 40 activist inertia following the London Games may have been due to the nature of the Winter Games themselves given the vast difference among the shorter time-frame of the competition, the lesser number of competitors, countries, and sports, or it may simply have been due to a much more chilled group of athlete-activists.

However, a relatively mild Twitter campaign did emerge utilizing #upyourrings and #upyourringwithrule40 after the Australian Olympic Committee (“AOC”) asked a ski resort to take down a tweet because the congratulatory tweet by the ski resort used the hashtag of Greta Small (#gretasmall), the name of an Australian alpine skier, in addition to #GoAUS and #Olympics.<sup>84</sup> Nonetheless, the outcry by Olympic athletes and sponsors alike following the London and Sochi Olympic Games did have an impact on the IOC.<sup>85</sup>

#### IV. PART III: RULE 40 AND THE AMBUSH LEADING UP TO AND INCLUDING RIO (2016)

The Rule 40 advertising blackout dates applied from July 27, 2016, until August 24 (nine days prior to the Opening Ceremony until three days after the closing ceremony).<sup>86</sup> Each country or territory’s NOC (the USOC, for example) was also charged with enforcing Rule 40, including the Rio 2016 Olympic Games Organizing Committee (“ROGOC”).<sup>87</sup>

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<sup>81</sup> See Epstein, *supra* note 2, at 126-27; see also Duncan Mackay, *Zippo Drop Cheeky Olympic Torch Facebook Campaign after Accused of Ambush Marketing*, INSIDE THE GAMES (Oct. 8, 2013), <http://www.insidethegames.biz/olympics/winter-olympics/2014/1016390-zippo-drop-cheeky-olympic-torch-facebook-campaign-after-accused-of-ambush-marketing>.

<sup>82</sup> *Id.* (noting that Zippo apparently also started #ZippoSavesOlympics on Twitter as well).

<sup>83</sup> See UNITED STATES OLYMPIC COMMITTEE, 2014 Information for Athletes, Their Agents and NGBS, (Jan. 2014) (on file with the author); see also Jason Blevins, *Olympic Athletes Adjust to Rules Forbidding Them from Open Sponsorship*, DENVER POST (Jan. 27, 2014), <http://www.denverpost.com/2014/01/27/olympic-athletes-adjust-to-rules-forbidding-them-from-open-sponsorship/> (offering that “[b]asically, the rule prohibits athletes from doing what they always do.”); Blevins also states, “During the London Olympics, Red Bull removed athlete pages from its website. The company will help its athletes follow Olympic rules this time around.” *Id.*

<sup>84</sup> See Rachael Oakes-Ash, *Aussie Ski Resorts Silenced by the AOC*, SNOWBEST.COM (Feb. 12, 2014), <http://www.snowbest.com/aussie-ski-resorts-silenced-by-the-aoc/> (including a video mocking Rule 40 and ending #upyourringwithRule40. The concerned author states that “[t]his means no ski resort in Australia can congratulate an athlete, retweet a tweet from an athlete, share any media stories about athletes. Nothing. No Instagram, no Facebook, no Twitter.”).

<sup>85</sup> See, e.g., Associated Press, *Olympians Tiptoe around Sponsorship Ban*, FOXNEWS.COM (Feb. 18, 2014), <http://www.foxnews.com/sports/2014/02/18/in-sochi-athletes-tiptoe-around-olympics-sponsorship-ban-ioc-says-open-to.html> (offering that consideration of modification of Rule 40 was “up for discussion and debate” and “an open issue at the games,” quoting IOC spokesman Mark Adams).

<sup>86</sup> The applicable period for the Rio Paralympic Games was August 30-September 21, 2016.

<sup>87</sup> See INT’L OLYMPIC COMMITTEE, *supra* note 9.



The IOC also established that domain names, URLs and social media handles including the word “Olympic” or “Olympics” or other Olympic-related terms (including their equivalents in languages other than English) were not allowed unless approved by the IOC beforehand.<sup>88</sup> However, the IOC softened its stance a bit from its monopolistic control over social media completely by adopting a new policy in 2015 which, to some, seemed to be reasonable at the time.<sup>89</sup>

#### A. The 2015 Modified Rule 40 and Waivers

The year before Rio, Rule 40 was “relaxed” to allow Olympic athletes to appear in generic advertising that did not explicitly mention the games or use any Olympic terms such as “Rio”, “medal,” “performance,” “victory” and “gold.”<sup>90</sup> The IOC created an approval system in which companies could seek a waiver from Rule 40 even if they “did not have an official relationship to run ads during the Games so long as those ads started running in March and ran continuously through the Games.”<sup>91</sup> Prominent companies that received waivers included Under Armour (Michael Phelps and the *Rule Yourself* campaign), and Gatorade (its *Love of Sport* campaign featuring Serena Williams and Usain Bolt).<sup>92</sup>

While seemingly gracious, the IOC’s waiver policy created a variety of new problems.<sup>93</sup> For example, initial campaign submissions had to be submitted to the USOC six months in advance of the applicable period (January 27, 2016 with respect to the Rio Summer Olympic Games, and March 1, 2016 with respect to the Paralympic Games) in order for the USOC to approve it and required any changes before the waiver would be granted.<sup>94</sup> The USOC also required that the unofficial sponsor’s

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<sup>88</sup> See *Rio Olympics 2016: Athletes Could Face Sanctions over Controversial Rule 40*, BBC.COM (July 26, 2016), <http://www.bbc.com/sport/olympics/36909409> (offering that according to the IOC, “Olympic-related terms” include the following, depending upon context: 2016 Rio/Rio de Janeiro, Gold, Silver, Bronze, Medal, Effort, Performance, Challenge, Summer Games, Sponsors, Victory, Olympian).

<sup>89</sup> See INT’L OLYMPIC COMMITTEE, *IOC Executive Board Meeting Kicks Off with Report on Sochi 2014 Operational Profit*, OLYMPIC.ORG (Feb. 26, 2015), <https://www.olympic.org/news/ioc-executive-board-meeting-kicks-off-with-report-on-sochi-2014-operational-profit>; see also Duncan Mackay, *Victory for American Athletes as IOC Agree to Relax Rule 40 for Rio 2016*, INSIDETHEGAMES.BIZ (Feb. 26, 2015), <http://www.insidethegames.biz/articles/1025851/victory-for-american-athletes-as-ioc-agree-to-relax-rule-40> (stating that “[t]he most prominent campaigners for the change were Sanya Richards-Ross, winner of the 400 metres at London 2012, and Lashinda Demus, the silver medallist in the 400m hurdles, who tweeted regularly about the subject during the Games using the hash-tag #WeDemandChange.”).

<sup>90</sup> *Id.*

<sup>91</sup> See Darren Rovell, *USOC Sends Letter Warning Non-Olympic Sponsor Companies*, ESPN.COM (July 21, 2016), [http://www.espn.com/olympics/story/\\_/id/17120510/united-states-olympic-committee-battle-athletes-companies-sponsor-not-olympics](http://www.espn.com/olympics/story/_/id/17120510/united-states-olympic-committee-battle-athletes-companies-sponsor-not-olympics) (noting that unofficial Olympic athlete sponsors such as New Balance running shoes had more than 70 of its athletes qualify for the Games and working within the Rule 40 framework is frustrating and challenging for such sponsorships).

<sup>92</sup> See Ben Fischer, *Ringling Endorsement: Olympic Blackout Period for Non Sponsors Goes into Effect Today*, SPORTS BUS. DAILY (July 27, 2016), <http://m.sportsbusinessdaily.com/Daily/Issues/2016/07/27/Marketing-and-Sponsorship/Oly-Rule-40.aspx>.

<sup>93</sup> See Miettinen, *supra* note 4.

<sup>94</sup> See INT’L OLYMPIC COMMITTEE, *supra* note 9.

advertising campaign run continuously starting no later than four months in advance of the applicable period (March 27, 2016 and May 1, respectively).<sup>95</sup>

Additionally, and possibly more importantly, the policy did not take into account smaller sponsors who had smaller budgets to create television or print advertisements as opposed to internationally iconic companies such as Nike.<sup>96</sup> Also, many companies that sponsored Olympic hopefuls leading up to the Games had to hope that the sponsored-athlete actually made the Olympic team in the first place, in some cases qualifying for the team within a small window (e.g., a month or less) before the actual Olympic Games.<sup>97</sup>

In sum, no one was assured of making that team that far out from the Games, not even the great U.S. swimmer Michael Phelps who still had to qualify to make the team. Having an advertising campaign for a not-yet-selected or qualified athlete involved huge risk for the sponsor, though no financial risk for the IOC or a NOC such as the USOC.<sup>98</sup>

### *B. The 2016 U.S. Olympic Track & Field Trial: Controversial Sponsorship*

The U.S. Track and Field Olympic trials were held from Thursday, June 30, through July 10, 2016.<sup>99</sup> By that time, as mentioned, all non-official sponsor campaigns had to have been approved by the USOC. On July 7, Kate Grace won the 800 meter at the U.S. Olympic Trials and her Seattle-based women's apparel sponsor Oiselle congratulated her on Instagram, "She's heading to RIO!" along with a picture of her with her Oiselle race top while competing at the Trials in Eugene, Oregon.<sup>100</sup> The congratulatory post on Instagram was immediately met with a demand by the

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<sup>95</sup> See Miettinen, *supra* note 4 (providing the Under Armour video and discussing the Rule 40.3 change and that the Phelps video would never "have been made had the International Olympic Committee (IOC) decided not to change a longstanding rule that limited Olympics-related marketing to official sponsors like Nike and McDonald's").

<sup>96</sup> See, e.g., Christine Birkner, *How the Olympics' New Advertising Rules Will Impact Athletes and Brands in Rio*, ADWEEK.COM (July 5, 2016), <http://www.adweek.com/news/advertising-branding/how-olympics-new-advertising-rules-will-impact-athletes-and-brands-rio-172372> (discussing how Under Armour, an unofficial sponsor, has benefitted from the relax Rule 40, but other companies, such as Oiselle, do not share in the enthusiasm over the change including Sally Bergesen, founder and CEO of Oiselle, an athletic apparel company that sponsors 15 Olympic hopefuls, stating that "[t]he relaxed Rule 40 is a joke. You had to have submitted your campaign in January, before anybody's qualified for anything. Then, you need to start running your campaign in March, so you don't get any timing benefit with the Olympics. For small businesses, running an ad campaign from March through August is really expensive.").

<sup>97</sup> See USA TRACK & FIELD, Schedule, USATF.ORG (June 26, 2016), <http://www.usatf.org/Events--Calendar/2016/U-S--Olympic-Team-Trials---Track--Field/Schedule.aspx> (displaying the 2016 U.S. Olympic Team Trials for track and field trial schedule from Thursday, June 30-July 10, just weeks before the Olympic Games).

<sup>98</sup> *Id.* (characterizing the waiver opportunities as beneficial for some unofficial sponsors to reach an international audience (such as Under Armour), but at the same time for others the impact on smaller sponsors that committed to pre-approved advertising campaigns is risky and "acts like a barrier to entry.").

<sup>99</sup> See USA TRACK & FIELD, *supra* note 97.

<sup>100</sup> See Sarah Barker, *U.S. Olympic Committee Tells Oiselle to Delete Social Media Posts, Ignores Others*, DEADSPIN (July 7, 2016), <http://deadspin.com/u-s-olympic-committee-tells-oiselle-to-delete-social-m-1783304825>.

USOC to cease all “Olympic-related advertising.”<sup>101</sup> The USOC sent the following to non-sponsor companies: “Commercial entities may not post about the Trials or Games on their corporate social media accounts. . . This restriction includes the use of USOC’s trademarks in hashtags such as #Rio2016 or #TeamUSA.”<sup>102</sup>

The USOC claimed that, other than media companies, no company could reference Olympic results, share or repost anything from the official Olympic social media account or use any pictures taken at the Olympics.<sup>103</sup> In essence, by congratulating Grace on Instagram, the USOC’s position was that this was akin to commercial advertising, no different than intentional, ambush marketing via traditional print or television promotion and could result in legal action from the USOC if the brand owners did not heed the warning.<sup>104</sup> In response, Oiselle changed references to the Olympics to “The Big Event in the Southern Hemisphere.”<sup>105</sup> Additionally, Oiselle said it would alter or remove inappropriate references or photos on its website, social media posts and its blog as well.<sup>106</sup>

Brooks, a running shoe company, another Seattle-based unofficial sponsor of the Olympics or the USOC, supported many track athletes leading up to Rio, took a much more aggressive stand against the IOC’s Rule 40: it created a stealth war against Rule 40 on Instagram and Twitter.<sup>107</sup> Brooks created a website, rule40.com, that sought to educate the world about Rule 40 restrictions while at the same time mock the rule.<sup>108</sup> Also, Brooks enlisted the help of hired mobile billboard trucks that drove around Eugene, Oregon with messages in bold yellow alongside the vehicle stating, for example, “Good luck, you know who you are, on making it you know where,” and referring to the Olympics as a “generic worldwide quadrennial sporting event” advertisement.<sup>109</sup>

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<sup>101</sup> See Saul Perloff, *Social Media Risks During the Rio Games*, BRAND PROTECTION BLOG (Aug. 1, 2016), <http://www.thebrandprotectionblog.com/3144-2/>.

<sup>102</sup> *Id.* The USOC went further by dictating that non-official sponsors could not even retweet the official @Olympics Twitter account, which had 4.3 million followers. See, e.g., Alexandra J. Roberts, *Why the US Olympic Committee is not Actually a Trademark Bully*, YAHOO! FINANCE (Aug. 27, 2106), <http://finance.yahoo.com/news/why-us-olympic-committee-not-000000073.html>.

<sup>103</sup> *Id.*

<sup>104</sup> See Perloff, *supra* note 101.

<sup>105</sup> See Sinead Mulhern, *U.S. Olympic Committee Angry over Women’s Brand Oiselle’s Social Media Photos*, CANADIAN RUNNING (July 8, 2016), <http://runningmagazine.ca/u-s-olympic-committee-angry-over-womens-brand-oiselles-social-media-photos/> (also noting that Oiselle changed all references of the U.S. Track & Field Olympic Trials to the “Big Event in Eugene” [Oregon]).

<sup>106</sup> See Sally Bergesen, *Update: The Big Event in Eugene*, OISELLE.COM (July 6, 2016), <http://www.oiselle.com/blog/update-big-event-eugene>. Interestingly, Oiselle chose not to renew its contract with Grace in 2017. See Oiselle, *Fly-Kate Full of Grace*, OISELLE.COM (Jan. 18, 2017), [http://www.oiselle.com/blog/fly-kate-full-grace?utm\\_source=twitter&utm\\_medium=unpaid&utm\\_campaign=kate%20grace&utm\\_term=base&utm\\_content=011817](http://www.oiselle.com/blog/fly-kate-full-grace?utm_source=twitter&utm_medium=unpaid&utm_campaign=kate%20grace&utm_term=base&utm_content=011817).

<sup>107</sup> See Leo Burnett Chicago, *Behind the Brooks #Rule40’ Olympics Campaign*, LEO BURNETT (Nov. 7, 2016), <http://leoburnett.us/chicago/article/behind-the-brooks-rule40-olympics-campaign/> (confiding that Brooks contact the advertising agency to “[m]ake the world aware of athletes’ sacrifices and struggles and encourage the public to stand up for their rights by joining the fight against rule 40, a certain IOC rule that restricts their ability to market themselves and profit during the most high-profile two weeks of their careers-the Olympics.”).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*; see also Shan Li, *Olympics Bans Most Brands from Saying ‘Olympics’ or ‘Rio,’ Even on Twitter. Snark Ensues*, L.A. TIMES (Aug. 11, 2016), <http://www.latimes.com/business/la-fi-olympics->

Thus, though Rule 40 was modified in 2015 to include waivers, the change created huge challenges for Olympic athletes and their sponsors alike, leading up to the Rio Games since there were no guarantees of making the team. With examples such as Oiselle and Brooks, the USOC made it clear prior to the Games that it would attempt to enforce Olympic-related intellectual property in a sincere manner. So much, in fact, that some have characterized the USOC's stance as a form of mean-spirited trademark bullying, enabled by the wide latitude it is afforded to protect against trademark infringement under the TSOASA.<sup>110</sup>

So, what would happen at the Games themselves? Reminiscent of the decades of successful Olympic ambush marketing campaigns by Nike, were there ways around Rule 40 in 2016? These questions lingered, but it was readily apparent that the games had already begun and that the ambush at Rio began far before the opening ceremony on Friday, August 5, 2016.

### *C. The 2016 Rio Summer Games: GIFs, Live-streaming and "Hashjacking"*

The IOC was cognizant of the concern over social media as a medium for what it deemed to be unacceptable communication to the world of the events related to and from Rio. It had already upped its game by establishing new rules, which now applied to unofficial yet legitimate journalists, between August 5 and August 21, 2016, to include:

2. Internet and Mobile Platforms Notwithstanding any other applicable limitation included in these NARs, Olympic Material must not be broadcast on interactive services such as "news active" or "sports active" or any other related Video on Demand services, which would allow the viewer to make a viewing choice within a channel and to thereby view Olympic Material at times and programs other than when broadcast as part of a News Program as set out in Clause 1 above. Additionally, the use of Olympic Material transformed into graphic animated formats such as animated GIFs (i.e.

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rule-40-20160802-snap-story.html (quoting Bergesen: "It's like dress codes at school. People are going to find a way to push the envelope." Li also offers the example of a tweet by British discus thrower Jade Lally, "How amazing is this! . . . It's for that thing [winking face emoji] I'm doing this summer [winking face] in South America [winking face] #Rule40".)

<sup>110</sup> See *United States Olympic Committee v. Xclusive Leisure & Hospitality Ltd.*, 2009 U.S. Dist. LEXIS 12698, \*12 (N.D. Cal. Feb. 19, 2009) ("The statute establishes that the protection afforded to Olympic symbols is broader than the rights provided under the Lanham Act, effectively providing the [USOC] with an exclusive right in the Olympic words and symbols."); see also Daniel Roberts, *How a Federal Statute Allows the Olympics to be a Trademark Bully*, YAHOO! FINANCE (Aug. 11, 2016), <http://finance.yahoo.com/news/rio-olympics-2016-rule-40-000000525.html>; Olivia Solon, *US Olympic Committee Bullying Unofficial Sponsors Who Use Hashtags*, GUARDIAN (July 22, 2016), <https://www.theguardian.com/sport/2016/jul/22/us-olympic-committee-bullying-unofficial-sponsors-hashtags>. The USPTO provides a description of a trademark bully on its website as "a trademark owner that uses its trademark rights to harass and intimidate another business beyond what the law might be reasonably interpreted to allow." See U.S. PATENT AND TRADEMARK OFFICE, Request for Comments: Trademark Litigation Tactics, USPTO.GOV, [https://www.uspto.gov/trademarks/litigation\\_study.jspctics](https://www.uspto.gov/trademarks/litigation_study.jspctics) (website no longer maintained).

GIFV), GFY, WebM, or short video formats such as Vines and others, is expressly prohibited.<sup>111</sup>

So serious was the IOC about its intellectual property that the IOC caused Twitter to disable a tweet by Ian Schafer, a private individual, who tweeted on August 14, 2016 containing a video of U.S. Olympic swimmer Katie Ledecky winning the gold medal in the women's 800 meter freestyle final.<sup>112</sup> According to Schafer, he found a GIF of the NBC video on Reddit.com and converted it to a video before sharing it on his personal account and it was retweeted more than 3,000 times until it was removed by Twitter itself.<sup>113</sup> Twitter forwarded Schafer the email they received from the IOC:

Your unauthorised display of the Material over the internet . . . constitutes a clear infringement of the IOC's rights, in particular, intellectual property rights, and causes prejudice to the IOC and to the rights-holding broadcasters who have received exclusive authorization from the IOC to broadcast moving images of the Games.<sup>114</sup>

Schafer commented that the IOC's aggressive action reminded him of the Napster era in which the Recording Industry Association of America ("RIAA") was so intent on stopping the unauthorized downloading of music that it went after 12-year-olds and dead grandmothers for copyright violations.<sup>115</sup>

The IOC had previously unsuccessfully attempted to ban unofficial media at the London 2012 Games from posting GIFs (Graphics Interchange Format) and from sharing "sound or moving" images or content from the Games.<sup>116</sup> At Rio, the IOC's war against spectators and others who, including unauthorized journalists, continued beyond Twitter to include Periscope users who live-streamed Olympic events via

<sup>111</sup> See Chris Plante, *The International Olympics Committee Prohibits Press from Making GIFs*, VERGE (Aug. 4, 2016), <http://www.theverge.com/2016/8/4/12379224/olympics-rio-2016-gifs-rules-policy> (providing the "NEWS ACCESS RULES APPLICABLE FOR THE BROADCAST OF THE GAMES OF THE XXXI OLYMPIAD, RIO DE JANEIRO, 5-21 AUGUST 2016.").

<sup>112</sup> See Bethany Biron, *Posting a GIF Gets Agency Exec a Smackdown by Olympics Brand Police*, DIGIDAY.COM (Aug. 15, 2016), <http://digiday.com/brands/ioc-gets-aggressive-rule-40-violations/> (offering that Ledecky beats her competitors by 11.4 seconds, and the tweet had been retweeted more than 3,000 times (including by former U.S. Olympic gymnast Shannon Miller) before Twitter disabled the video and ordered the content be removed).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* Note that Twitter's Terms of Service and the Twitter User Agreement can be found online and do address copyright issues in which it reserves the right to remove content. See TWITTER TERMS OF SERVICE, *Content on the Services*, <https://twitter.com/tos?lang=en> (last visited Jan. 4, 2017) ("Twitter respects the intellectual property rights of others and expects users of the Services to do the same. We reserve the right to remove Content alleged to be infringing without prior notice, at our sole discretion, and without liability to you. We will respond to notices of alleged copyright infringement that comply with applicable law and are properly provided to us, as described in our Copyright policy (<https://support.twitter.com/articles/15795>).").

<sup>115</sup> *Id.*

<sup>116</sup> See, e.g., Seb Joseph, *Olympic Bosses Ban Unofficial Media from Using GIFs of the Games*, DRUM (Aug. 5, 2016), <http://www.thedrum.com/news/2016/08/05/olympic-bosses-ban-unofficial-media-using-gifs-games>. Apparently, this including memes as well. For a discussion of the subtle difference between a GIF and a meme, see Dustin W. Stout, *Online Image Terminology That You Need to Know*, DUSTN.TV (Jan. 23, 2014), <https://dustn.tv/online-image-terminology/>.

Twitter.<sup>117</sup> In fact, the IOC issued over 1,000 Digital Millennium Copyright Act (“DMCA”) takedown requests to Periscope for posting infringing Rio footage.<sup>118</sup> One rapscaillon’s account was suspended entirely for non-compliance after he retweeted a GIF of U.S. gymnast Aly Raisman and did not take it down immediately.<sup>119</sup>

Thus, in addition to the new Rule 40 prohibitions, now the IOC turned its attention to prevention of the broadcast of any Olympic video and the like by anyone in the world, unless they were approved broadcasting sponsors or journalists. The IOC and USOC went even further and prohibited unofficial commercial entity retweets of official sponsors.<sup>120</sup> According to the USOC’s brand usage guidelines:

Unless a company or organization’s primary business is disseminating news and information, social media platforms (e.g., Facebook, Twitter, Instagram, etc.) serve to promote the company/brand; to raise the brand’s profile and public opinion about the company/organization; and/or to increase sales, membership or donations. Thus, any use of USOC trademarks on a non-media company’s website or social media site is viewed as commercial in nature and consequently is prohibited . . . .<sup>121</sup>

The motivation behind it was, of course, to protect the IOC’s intellectual property and prevent ambush marketing.<sup>122</sup> However, expanding the umbrella of Rule 40 to include GIFs, tweets, retweets, live-streaming and the like, including disappearing Snapchat photos was extremely unpopular among the athletes themselves and in the court of public opinion.<sup>123</sup>

<sup>117</sup> See Todd Spangler, *Rio Olympics Piracy: Hyper-Vigilant IOC Blocks Illegal Live Streams-But How Big Is the Threat?*, VARIETY (Aug. 19, 2016), <http://variety.com/2016/digital/news/rio-olympics-piracy-live-streams-1201841050/>.

<sup>118</sup> *Id.* (noting that it also included requests from Facebook and YouTube as well); see also DIGITAL MILLENNIUM COPYRIGHT ACT, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (amending the 1976 Copyright Act in various sections of 17 and 28 U.S.C.).

<sup>119</sup> See Madison Malone Kircher, *Did Twitter Kick This Guy Off Because He Tweeted an Aly Raisman GIF?*, N.Y.MAG (Aug. 24, 2016), <http://nymag.com/selectall/2016/08/twitter-user-banned-for-olympics-gifs.html> (providing that Twitter user Jim Weber, who had almost 100,000 followers and 69,000 tweets, “received a DMCA takedown notice from Twitter via email, which included a letter from the IOC director of legal affairs.” Further, “Weber had ten minutes to reply to the IOC and comply with their request to “immediately and permanently remove the material.” But three minutes later, he received a second email informing him that his account had been suspended.” Finally, “four days later, Weber says he received another email from Twitter, this one informing him that he had been permanently banned from using the micro-blogging platform under the handle @JimMWeber.”).

<sup>120</sup> See Danny Goodwin, *Businesses: Tweet Carefully During the Olympics*, SEARCHENGINEJOURNAL.COM (Aug. 4, 2016), <https://www.searchenginejournal.com/social-media-donts-businesses-olympics/170052/>.

<sup>121</sup> *Id.* (referencing the complete list at U.S. Olympic and Paralympic Brand Usage Guidelines, TEAMUSA.ORG, <http://www.teamusa.org/brand-usage-guidelines>).

<sup>122</sup> See Kate Lambie, *Who can’t tweet about #Rio2016?*, BBC.COM (July 31, 2016), <http://www.bbc.com/news/blogs-trending-36915565>.

<sup>123</sup> *Id.* (referencing the plight of U.S. middle distance runner and Olympian Nick Symmonds, sponsored by Brooks, who has actively protested the reach of Rule 40). *But see* Nick Martin, *NBC Strikes Deal with Snapchat to Share Olympics Coverage for First Time Ever*, WASH. POST (Apr. 29, 2016), <https://www.washingtonpost.com/news/early-lead/wp/2016/04/29/nbc-strikes-deal-with-snapchat-to-share-olympics-coverage-for-first-time-ever/> (offering that NBC, and the IOC agreed to a contract to broadcast the Olympics through 2032 for \$7.75 billion and that the partnership with Snap

If that was not enough, the USOC prohibited the use of “official hashtags” by non-official sponsors just prior to and including the Games such trademarked hashtags #Rio2016<sup>124</sup> and #TeamUSA, referred to as “hashjacking.”<sup>125</sup> It has been possible to trademark hashtags in the U.S. since 2013 through the U.S. Patent and Trademark Office (“USPTO”).<sup>126</sup> However, whether or not it constitutes trademark infringement when anyone uses a hashtag on social media is an open question, particularly since a hashtag is the method behind how members communicate on Twitter in the first place.

As the Olympic Games continued, the social media games battled over hashtags, GIFs, memes, words, phrases, photos, and live-streaming. Twitter suspended an account which claimed to enforce the Olympics’ Rule 40, but in fact was run by Michael Corcoran, the head of social & content at the Dublin-based agency eightytwenty.<sup>127</sup> Corcoran created the @Official\_Rule 40 account on Twitter, a parody Twitter bot that was set up to provide “automated alerts for infringement of Rio 2016 guidelines.”<sup>128</sup> Corcoran tweeted 47 times to businesses, personalities, and brands, some of which deleted their posts and sent an apology Tweet, and those contacted by Corcoran’s bot included the Pope and Donald Trump.<sup>129</sup> These social media games, apparently an event unto itself, served as a distraction and had indeed risen to an all-time low.

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Chat would require the latter to share any further advertising revenue it generated in conjunction with NBC’s coverage, and that the partnership would allow highlights and behind-the-scenes video from the Rio Games “in an attempt to reach young viewers.”)

<sup>124</sup> In fact, #Rio2016 was the number one Twitter trend in 2016 worldwide. See Arjun Kharpal, *Rio 2016, US Election and Pokemon Go: Twitter’s Top Trends in 2016*, CNBC.COM (Dec. 6, 2016), <http://www.cnbc.com/2016/12/06/rio-olympics-2016-us-election-pokemon-go-twitter-top-trends-in-2016.html>.

<sup>125</sup> See Eric Chemi, *Olympic Hashjacking*, CNBC.COM (Aug. 1, 2016), <http://video.cnbc.com/gallery/?video=3000539477> (offering that companies that are not official sponsors cannot use particular hashtags by commercial entities since it would draw attention to their own businesses and companies such as WWE, Girl Scouts, Jamba Juice, Bank of the West used such hashtags and were told to stop by the USOC); see also KARE Staff, *Hashtags, Trademarks and the Rio Olympics*, KARE11.COM (Aug. 4, 2016), <http://www.kare11.com/sports/olympics/hashtags-trademarks-and-the-rio-olympics/283581035> (offering that the hashtags can be trademarked just as the USOC has trademarked the words and phrases “Olympic,” “Olympian,” “Team USA,” “Future Olympian,” “Going for the gold,” “Go for the gold,” and even “let the games begin” among others as well).

<sup>126</sup> See Lamble, *supra* note 122. According to the Trademark Manual of Examining Procedure (“TMEP”), a hashtag mark (consisting of the pound/hash sign or the term “HASHTAG”) is registrable as a trademark or service mark if it “functions as an identifier of the source of the [trademark] applicant’s goods or services.” Mayura Noordyke, *Can You Trademark a Hashtag?*, SOCIALMEDIALLAWBULLETIN.COM (July 11, 2016), <http://www.socialmedialawbulletin.com/2016/07/can-you-trademark-a-hashtag/>.

<sup>127</sup> See Michael Corcoran, *@OFFICIAL\_RULE40 – I AM THE #RIOBOT*, EIGHTYTWENTY (Aug. 10, 2016), [http://eightytwenty.ie/official\\_rule40-i-am-the-riobot/](http://eightytwenty.ie/official_rule40-i-am-the-riobot/) (stating with regard to his colleagues that “[w]e were debating whether the brands would get caught, and ideating how infringements would be monitored by the powers on social media. At this stage, a question popped into my head: how on earth can the USOC and IOC monitor and act on all accounts breaking the guidelines. Can they really send a cease and desist message through social like they would by letter to ensure compliance to large brands, well before legal proceedings?”).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

## V. PART IV: RULE 40 PUSH BACK, OTHER OLYMPIC CONCERNS AND SUGGESTIONS

The Olympics have changed over time, but the idea that the Olympic Games represents the purist ideal of the unpaid amateur who participates for the love of sport was relinquished long ago.<sup>130</sup> Controversy surrounding the Olympic Games is so common that it should be expected, including athlete-activists who have used the Olympic platform to express their political and social views on matters that matter to them.<sup>131</sup> In the 1970s, U.S. runner Steve Prefontaine, a former NCAA champion, and others discontent with regard to the amateurism rules, which disallowed sponsorships and appearance fees, turned to public protests.<sup>132</sup>

Today, athletes can be professionals, but for most of the participants having a private financial sponsor is vital to remain in the sport in the first place, especially in sports such as track and field in which “runners, throwers and jumpers who are ranked among the top 10 nationally earn less than \$15,000 annually as athletes.”<sup>133</sup> Those fortunate enough to have a private sponsor are expected to wear their sponsor’s logo, clothing or equipment, and thoughtfully thanking the sponsor (and vice-versa) via social media such as Twitter and Instagram is natural, to be expected, and in some cases creative in light of Rule 40.<sup>134</sup>

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<sup>130</sup> See Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> (offering that “The International Olympic Committee expunged the word amateur from its charter in 1986”).

<sup>131</sup> See David Davis, *Olympic Athletes Who Took a Stand*, SMITHSONIAN.COM (Aug. 2008), <http://www.smithsonianmag.com/people-places/olympic-athletes-who-took-a-stand-593920/?no-ist> (discussing the 1968 Mexico City Summer Olympics black power fist protest on the medal stand by U.S. runners John Carlos and Tommie Smith, who won the gold and bronze medals respectively in the 200m dash, but were then ejected from U.S. Olympic Team and sent home).

<sup>132</sup> See Mary Pilon, *Steve Prefontaine’s Last Run*, GRANTLAND (May 29, 2015), <http://grantland.com/features/steve-prefontaine-death/>; see also Steve Bence, *College Football Needs a Prefontaine, Says Ex-Oregon Runner Who Defied NCAA*, OREGONLIVE.COM (May 2, 2011), [http://www.oregonlive.com/ducks/index.ssf/2011/05/college\\_football\\_needs\\_its\\_own.html](http://www.oregonlive.com/ducks/index.ssf/2011/05/college_football_needs_its_own.html).

<sup>133</sup> See, e.g., Jeré Longman, *Nick Symmonds, a Sidelined Track Star, Continues to Break From the Pack*, N.Y. TIMES (Aug. 14, 2015), <http://www.nytimes.com/2015/08/15/sports/olympics/nick-symmonds-a-sidelined-track-star-continues-to-break-from-the-pack.html> (discussing the plight of U.S. Olympic runner Nick Symmonds who is sponsored by Brooks but was told to wear Nike, even in his free time, by U.S.A. Track & Field, the sport’s national governing body if he wanted to represent the U.S. at the 2015 World Championships. Symmonds refused and was summarily left off the 2015 team); see also Tim Layden, *Nick Symmonds vs. USA Track and Field is Far Bigger Than Just One Runner*, SI.COM (Aug. 11, 2015), <http://www.si.com/olympics/2015/08/11/nick-symmonds-usa-track-and-field-team-usa-nike-olympics> (having won the right to represent the U.S. in the Beijing World Championships in 2015, Symmonds refused to sign the vague “Statement of Conditions” which stated “I will dress appropriately and respectfully for all Team functions, wearing the designated Team uniforms provided by USATF.” Symmonds had signed the declaration at least six times previously, but being sponsored by Brooks presented a legal challenge for Symmonds to accept the Statement of Conditions which would have required him to wear Nike products for Team USA. Accordingly, Symmonds refused and was left off the team.). At least one federal court has held that USATF does not violate antitrust laws by requiring athletes to wear a certain brand or uniform. See *Gold Medal LLC v. USA Track & Field*, No. 6:16-cv-00092-MC, 2016 U.S. Dist. LEXIS 62703 (D. Or. May 11, 2016) (stating that “[u]nder the Amateur Sports Act, USOC and USATF are impliedly immune from Run Gum’s challenge to their regulations.”). Nick Symmonds is a co-founder of Run Gum. See RUN GUM, *Nick Symmonds*, <https://getrungle.com/pages/nick-symmonds>.

<sup>134</sup> See Taylor Dutch, *During Rule 40 Blackout, Emma Coburn Showcases New Balance on Olympic Stage*, FLO TRACK (Aug. 15, 2016), <http://www.flotrack.org/article/45103-during-rule-40->



### A. Push Back via Legal Challenges

However, Rule 40 and its prohibitions, despite it being characterized as “relaxed” since the 2015 modification, has been met with considerable push back not just by Olympic athletes but also by sponsors such as Brooks, Oiselle, and others. After all, there is no union that represents the interests of athletes who have to seek sponsorship on their own, and the controversy over athlete-rights (or a lack thereof) is a hot topic particularly since the Internet, social media and smartphones have given both amateur and professional athletes immediate access to voice their opinion over matters important to them, including perceived injustice.<sup>135</sup> Still, no U.S. court has definitely ruled on the legitimacy of the parameters and reach of Rule 40 and its application.

However, a Minnesota carpet-cleaning company, Zerorez, though it refrained from posting about the Olympics on social media, decided to sue the USOC in federal court seeking a declaratory judgment for the right to tweet congratulatory remarks to Minnesota-based Olympians.<sup>136</sup> In fact, Zerorez never actually tweeted from its account to cheer on the eleven Minnesotans competing in ten different sports at the Rio 2016 Olympics, but felt that the USOC’s position to weed out Rule 40 violators amounted to censorship, bullying, and a violation of corporate free speech rights via social media.<sup>137</sup> As of this writing, the case has been dismissed.<sup>138</sup>

Additionally, though not Rule 40 specific, Australia’s largest telephone company, Telstra, was sued in federal court by the Australian Olympic Committee (“AOC”) for ambush marketing after Telstra released a series of TV commercials via Seven, the official Australian broadcaster of the Olympic Games, in June, 2016, as “Official

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blackout-emma-coburn-showcases-new-balance-on-olympic-stage (featuring her July 26, 2016 pre-Olympic tweet to New Balance, an unofficial sponsor of the steeplechase competitor from her account @emmajcoburn, “#Rule40 starts tomorrow so I won’t be able to say Thank You to my sponsor. THANK YOU FOR EVERYTHING @newbalance” and offering after her third place performance at the Rio Games, “Coburn immediately removed her New Balance spikes and draped them over her shoulder before carrying the American flag. As a result of the bold move, thousands of photos snapped during her victory lap included her sponsor, New Balance, which otherwise would not have been featured.”).

<sup>135</sup> See generally Adam Epstein & Kathryn Kisska-Schulze, *Northwestern University, the University of Missouri and the “Student-Athlete”: Mobilization Efforts and the Future*, 26 J. LEGAL ASPECTS OF SPORT 69 (2016) (discussing the Northwestern University football team’s unsuccessful yet valiant attempt to form a union, the University of Missouri football team’s protest over its president, for example, over civil rights issues on that campus); see also Frank Schwab, *Joe Theismann Rips 49ers for Giving Colin Kaepernick an Award, Says All Players Should Stand for Anthem*, YAHOO! SPORTS (Jan. 4, 2017), <https://sports.yahoo.com/news/joe-theismann-rips-49ers-for-giving-colin-kaepernick-an-award-says-all-players-should-stand-for-anthem-195424075.html>.

<sup>136</sup> See JUX LAW FIRM, *Zerorez v. U.S. Olympic Committee-A Social Media Free Speech Case*, JUX LAW (Aug. 4, 2016), <http://jux.law/usoc/> (chronicling the lawsuit with updated pdf files of the filed legal documents by the parties in addition to links to press articles on the lawsuit and FAQ question and answer at the end of the webpage); see also Eric Goldman, *supra* note 51 (discussing the Zerorez litigation and trademark bullying).

<sup>137</sup> HSK, LLC v. United States Olympic Comm., No. 16-cv-2641, 2017 U.S. Dist. LEXIS 51453, at \*13 (D. Minn. Apr. 4, 2017) (holding, “[b]ecause the totality of the circumstances alleged does not establish that an actual controversy exists between Zerorez and USOC, the Court grants USOC’s motion to dismiss for lack of subject-matter jurisdiction.”).

<sup>138</sup> See Jux Law Firm, *Zerorez v. U.S. Olympic Committee-A Social Media Free Speech Case*, Jux Law (Aug. 4, 2016), <http://jux.law/usoc/> (displaying HSK LLC, d.b.a. ZEROREZ v. United States Olympic Committee, Court file number: 0:16-cv-02641 HSK LLC v. United States Olympic Committee, United States District Court, District of Minnesota, Filed on August 4, 2016).

Technology Partner of Seven’s Olympic Games Coverage” even though Telstra’s official sponsorship of AOC ended in 2012.<sup>139</sup> The advertising never mentioned an Olympics association with the AOC, and the court focused on whether a reasonable person would have believed that there was.<sup>140</sup> In fact, the words suggested that the relationship was with Seven Network, not the Olympics.<sup>141</sup> The court stated,

While there is a degree of ambiguity concerning Telstra’s connection to the broadcast rights, it cannot be considered, on the balance of probabilities, that the use of the Olympic expression would suggest to a reasonable person that Telstra was a sponsor, or was the provider of sponsor-like support to any Olympic body.<sup>142</sup>

After the AOC contacted Telstra about the concern, the companies made revisions that included a disclaimer making it clear that Telstra was not an official sponsor of the AOC.<sup>143</sup> The court stated that it was unlikely, despite arguments by the AOC, that a reasonable person would believe that Telstra had some other type of unofficial sponsorship with the AOC either.<sup>144</sup> Thus, Telstra contravened the Olympic Insignia Protection Act 1987 (“OIP Act”) nor the Australian Consumer Law (“ACL”).<sup>145</sup>

Though the Zerorez litigation was dismissed in early 2017, it remains to be seen whether or not the USOC is acting as a trademark bully. Though the USOC is exercising the authority to protect its intellectual property interest under its perceived afforded latitude under the interpretation of Amateur Sports Act of 1978 (ASA)<sup>146</sup> (amended in 1998 by the TSOASA) along with its trademarks of #Rio2016 and #TeamUSA, courts have allowed uses of Olympic trademarks as long as they were noncommercial.<sup>147</sup> Whether posting congratulatory statements and pictures on

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<sup>139</sup> See Mary Still & Sumer Dayal, *Australian Olympic Committee Unable to Stop Telstra’s Ads from “going to Rio”*, ClaytonNutz.com (Aug. 10, 2016), <https://www.claytonutz.com/knowledge/2016/august/australian-olympic-committee-unable-to-stop-telstra-s-ads-from-going-to-rio> (providing a link to the decision *Australian Olympic Committee, Inc. v Telstra Corporation Limited* [2016] FCA 857).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> See IP@ashurst, *Telstra’s Olympic Glory*, ASHURST.COM (Oct. 11, 2016), <https://www.ashurst.com/en/news-and-insights/insights/ip-at-ashurst-october-2016-3-telstras-olympic-glory/>.

<sup>146</sup> *United States Olympic Comm. v. Intelicense Corp., S.A.*, 737 F.2d 263, 266 (2d Cir. 1984) (“It is clear that the Congressional intent in enacting § 380 was to promote the United States Olympic effort by entrusting the USOC with unfettered control over the commercial use of Olympic-related designations. This would facilitate the USOC’s ability to raise those financial resources from the private sector that are needed to fund the United States Olympic Movement.”).

<sup>147</sup> See, e.g., *Stop the Olympic Prison v. U.S. Olympic Comm.*, 489 F. Supp. 1112 (S.D.N.Y. 1980) (holding that there was no trademark infringement involving the use of a poster that was mostly given away for free which used the word “Olympic” with the Olympic rings behind vertical steel bars, to express discontent with turning of the athlete’s housing in the 1980 Lake Placid Olympics into a prison, and that the poster was not used for the purpose of trade, or to induce the sale of goods and services); see also *U.S. Olympic Comm. v. Am. Media, Inc.*, 156 F. Supp. 2d 1200 (D. Colo. 2001) (ruling on a motion to dismiss and allowing the publication of a magazine entitled OLYMPICS USA, just before the 2000 Sydney Olympics, in that the magazine did not rise to the level of commercial speech).

Instagram, Facebook or Twitter (including retweets) constitutes a clear violation of the TSOASA<sup>148</sup> or the Lanham Act,<sup>149</sup> however, is far from certain, as the law continues to evolve to catch up with changes in technology and communication while the rights to hundreds of millions of dollars are on the line.<sup>150</sup>

### B. Other Olympic Concerns

Not all is bad with the Olympics, and Rule 40 does not rule the action at the Games. In some cases, the Olympics serve as a model example for other sports. After all, at the 2016 Rio Olympics, an act of sportsmanship demonstrated by Abbey D'Agostino (USA) and Nikki Hamblin (New Zealand) demonstrated during the second heat for the Women's 5,000 meters garnered international praise after D'Agostino decided to stop and attend to the fallen Hamblin after they both collided during the race in which neither advanced to the final.<sup>151</sup>

A few weeks later, both were awarded the International Fair Play Committee Award by the IOC for epitomising the Olympic values of fair play and sportsmanship.<sup>152</sup> However, the Olympic Movement and the Olympic Games themselves have so many other issues which undermine its credibility at each biennial event that one wonders whether or not the assault on social media postings and retweets is severely misplaced.

#### 1. Doping

For example, Russian Vitaly Stepanov, along with his wife, Yulia Stepanova, blew the whistle and exposed systemic performance enhancing drug use (i.e. "doping") in Russia.<sup>153</sup> The two claimed that 80 percent of coaches in Russian track used doping to prepare athletes for London's Olympics in 2012, including the use of performance-enhancing drugs by four Russian gold-medalists at the 2014 Sochi Games.<sup>154</sup>

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However, use caution in that the ruling did allow the USOC to amend its complaint to include potential violations of the Lanham Act).

<sup>148</sup> 36 U.S.C. § 220501 (2016).

<sup>149</sup> 15 U.S.C. § 1051 (2016).

<sup>150</sup> See Anandashankar Mazumdar, *For Olympics, Much at Stake in Trademark Enforcement*, BNA.COM (July 21, 2016), <http://www.bna.com/olympics-stake-trademark-n73014445224/>.

<sup>151</sup> See Helene Elliott, *Runners Abbey D'Agostino, Nikki Hamblin are The Real Winners in Rio*, L.A. TIMES (Aug. 27, 2016), <http://www.latimes.com/sports/olympics/la-sp-oly-rio-2016-runners-abbey-d-agostino-nikki-hamblin-1471369602-htmstory.html> (providing video of the incident and injury yet tremendous display of sportsmanship).

<sup>152</sup> See Guardian Staff, *New Zealand and US runners awarded for sportsmanship*, GUARDIAN (Aug. 21, 2016), <https://www.theguardian.com/sport/2016/aug/21/new-zealand-and-us-runners-awarded-for-sportsmanship>.

<sup>153</sup> See Rachel Axon, *Russian Olympic Ban is Bittersweet for Whistleblower Who Provided Doping Evidence*, USA TODAY (June 17, 2016), <http://www.usatoday.com/story/sports/olympics/rio-2016/2016/06/17/iaaf-decision-opens-door-russian-whistleblower-compete/86070268/>.

<sup>154</sup> See Associated Press, *Whistleblower: Changes in Russian System 'Just Fake' So Far*, DAILYMAIL.COM (May 11, 2016), <http://www.dailymail.co.uk/wires/ap/article-3585513/Whistleblower-Changes-Russian-just-fake-far.html>.

As a result of Russia's state-sponsored drug program, the International Association of Athletics Federations ("IAAF"), The International Federation for Athletics (a.k.a. Track & Field), suspended Russian track and field athletes from the 2016 Rio Olympics.<sup>155</sup> Grigory Rodchenkov, the director of Russia's anti-doping laboratory at the time, detailed how Russia's state-run program was able to swap out urine samples with clean ones to assure the eligibility of dozens of Russian athletes at night literally through a hole in the wall.<sup>156</sup> Not a single Russian athlete was caught doping in Sochi, and Russia won the most medals, 33, and the most gold medals, 13.<sup>157</sup>

On November 29, 2016, the World Anti-Doping Agency ("WADA") enacted a formal whistle-blowing policy, effective in 2017, that will formalize the process for protecting and offering assurance of confidentiality to whistleblowers and will encourage athletes, administrators and others to raise concerns and incentivize those individuals that come forward with valuable information.<sup>158</sup> On December 9, 2016, a comprehensive, independent report by Canadian Richard H. McLaren (for the second time) revealed over-the-top and systemic cheating by Russia at many summer and winter sport events for so many years that the drug testing cheating was characterized as a "carefully orchestrated conspiracy" whose forensic testing is based upon "immutable facts."<sup>159</sup> Outrage over ineffective drug testing and institutional corruption by Russian officials has caused some to call for an end to Russian participation in any international competition.<sup>160</sup>

## 2. Tanking

Eight female badminton doubles players were disqualified from the 2012 London Olympics after intentionally trying to lose matches (i.e., tanking) in order to receive a

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<sup>155</sup> See Rebecca R. Ruiz & Michael Schwirtz, *Russian Insider Says State-Run Doping Fueled Olympic Gold*, N.Y. TIMES (May 12, 2016), <http://www.nytimes.com/2016/05/13/sports/russia-doping-sochi-olympics-2014.html>.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> See WORLD ANTI-DOPING AGENCY, *The Role of Governments in Addressing Emerging Challenges in the Fight against Doping in Sport* (Nov. 29, 2016), [https://wada-mailing-list.s3.amazonaws.com/holidays/img/2016-11-29-Sir%20Craig%20Reedie%20\\_Speech\\_14th%20Council%20of%20Europe\\_Ministers%20responsible%20for%20Sport.pdf](https://wada-mailing-list.s3.amazonaws.com/holidays/img/2016-11-29-Sir%20Craig%20Reedie%20_Speech_14th%20Council%20of%20Europe_Ministers%20responsible%20for%20Sport.pdf).

<sup>159</sup> See Richard H. McLaren, *The Independent Person 2<sup>nd</sup> Report* (Dec. 9, 2016), [https://www.wada-ama.org/sites/default/files/resources/files/mclaren\\_report\\_part\\_ii\\_2.pdf](https://www.wada-ama.org/sites/default/files/resources/files/mclaren_report_part_ii_2.pdf) ("The entire system operated with the precision of a Swiss watch."); see also Victor Mather & Rebecca R. Ruiz, *Here are the Key Findings in the Russian Doping Report*, N.Y. TIMES (Dec. 9, 2016), <http://www.nytimes.com/2016/12/09/sports/olympics/mclaren-report-russian-doping.html?partner=rss&emc=rss> (implicating more than 1,000 athletes in at least 30 sports); Rebecca R. Ruiz, *Report Shows Vast Reach of Russian Doping: 1,000 Athletes, 30 Sports*, N.Y. TIMES (Dec. 9, 2016), <http://www.nytimes.com/2016/12/09/sports/russia-doping-mclaren-report.html?smid=tw-nytimes&smtyp=cur>.

<sup>160</sup> See Bonnie D. Ford, *McLaren Report Further Exposes Inaction, Russian Corruption*, ESPN.COM (Dec. 9, 2016), [http://www.espn.com/olympics/story/\\_id/18244371/mclaren-report-latest-unravels-even-more-russian-doping-corruption](http://www.espn.com/olympics/story/_id/18244371/mclaren-report-latest-unravels-even-more-russian-doping-corruption).

more favorable place in the tournament.<sup>161</sup> The Badminton World Federation ruled that two teams from South Korea and one each from China and Indonesia were punished for “not using one’s best efforts to win a match” and “conducting oneself in a manner that is clearly abusive or detrimental to the sport.”<sup>162</sup>

Also in London, Algerian middle-distance runner Taoufik Makhloufi was initially kicked out of for not trying hard enough in an 800 meter preliminary heat.<sup>163</sup> Makhloufi stopped running in the first lap of the 800 meter, had already qualified for the 1,500 meter final, and he appeared to be saving energy for that race.<sup>164</sup> The IAAF supported the referee who found the 24-year-old African champion guilty of “failure to compete honestly with bona fide effort.”<sup>165</sup> IAAF rules state that “an athlete shall be excluded from participation in all further events in the competition,” but he was later reinstated for the 1,500 meter final after the Algerian officials convinced the powers with evidence that he had a knee issue.<sup>166</sup> He won the gold medal in the 1,500 meter the next day, though many claimed he used performance-enhancing drugs.<sup>167</sup>

### 3. Judging

At the 2016 Rio Olympic Games, the first time that professional boxers were allowed to compete at the Games,<sup>168</sup> the International Boxing Federation (“AIBA”) removed several boxing judges during the competition for irregularities in outcomes of decisions and allegations of corruption.<sup>169</sup> In particular, the outcome of the victorious Russian Vladimir Nikitin over Ireland’s Michael John Conlan in the men’s bantam

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<sup>161</sup> See K.C. Johnson & David Wharton, *London Olympics Badminton Scandal: Is It Always Wrong to Lose on Purpose?*, L.A. TIMES (Aug. 1, 2012), <http://articles.latimes.com/2012/aug/01/sports/la-sp-oly-spirit-of-games-20120802>.

<sup>162</sup> *Id.*; see also Greg Wyshynski, *Disgraced Badminton Olympians Put Match-throwing Behind Them in Rio*, YAHOO! SPORTS (Aug. 16, 2016), <http://sports.yahoo.com/news/disgraced-badminton-olympians-put-match-throwing-behind-them-in-rio-175329325.html> (referring to the London incident as the “lowest point in badminton’s 24-year history as an Olympic sport, an embarrassing scandal that earned it global ridicule.” The authors mention, however, that four of the eight women’s doubles players involved in the London match throwing incident were competing in the Rio 2016 Games.)

<sup>163</sup> See Jeré Longman, *After a Runner Stops, the Questioning Starts*, N.Y. TIMES (Aug. 6, 2012), <http://www.nytimes.com/2012/08/07/sports/olympics/algerian-runner-makhloufi-expelled-then-reinstated-at-olympics.html>.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> See Simon Turnbull, *Makhloufi’s Miracle 1500m Win Met with Growing Skepticism*, INDEPENDENT (Aug. 8, 2012), <http://www.independent.co.uk/sport/olympics/athletics/makhloufis-miracle-1500m-win-met-with-growing-scepticism-8022817.html>.

<sup>168</sup> See Press Association, *Professional Boxers Will Be Allowed to Compete at Rio Olympics*, GUARDIAN (June 1, 2016), <https://www.theguardian.com/sport/2016/jun/01/professional-boxers-allowed-compete-at-rio-olympics>.

<sup>169</sup> See A.J. Perez, *Boxing Judges Sent Home from Rio Olympics After Review of Decisions*, USA TODAY (Aug. 17, 2016), [http://www.usatoday.com/story/sports/olympics/rio-2016/2016/08/17/aiba-boxing-judges-sent-home-rio-olympics/88892072/?utm\\_source=feedblitz&utm\\_medium=FeedBlitzRss&utm\\_campaign=usatodaycomsports-topstories](http://www.usatoday.com/story/sports/olympics/rio-2016/2016/08/17/aiba-boxing-judges-sent-home-rio-olympics/88892072/?utm_source=feedblitz&utm_medium=FeedBlitzRss&utm_campaign=usatodaycomsports-topstories); see also Ken Belson & Scott Blumenthal, *Dismissal of Rio Boxing Judges Robed in Secrecy*, N.Y. TIMES (Aug. 20, 2016), <http://www.nytimes.com/2016/08/21/sports/olympics/boxing-judges-dismissal-robed-in-secrecy.html?smid=tw-nytsports&smtyp=cur&r=0>.

weight (56 kilogram) quarterfinals brought individual outrage<sup>170</sup> and worldwide scrutiny.<sup>171</sup>

Similarly, Evgeny Tishchenko of Russia celebrated the gold medal in the men's heavyweight (91 kilogram) over Vassiliy Levit of Kazakhstan in what many observers, including this author, regarded as a clear-cut decision for Levit.<sup>172</sup> The boxing judging at Rio called into question—once again—the integrity of the sport.<sup>173</sup>

### C. Suggestions

Protecting the IOC's brand and ensuring that its TOP sponsors receive the benefit from their huge financial support against ambush marketing and trademark infringement makes sense.<sup>174</sup> However, the rigid manner in which Rule 40 is enforced could be modified.

Aside from the various other credibility issues that the Olympic Movement entertains, as sampled above, what follows are ten specific suggestions as alternatives to the current method of Rule 40 compliance for unofficial sponsors and athletes. This assumes that the IOC and USOC wish to maintain a blackout period under Rule 40 but are open to other opportunities to address trademark infringement and ambush marketing concerns via social media during the respective blackout period surrounding the Olympic and Paralympic Games.

1. **Ignore all enforcement efforts on Facebook, Instagram, Twitter, YouTube and the like for both commercial entities and individual athletes, including GIFs and live-streaming.** *This would be the most extreme departure from the current Rule 40, other than eliminating removal of a blackout altogether. However, it could generate much more global interest and interaction with the Games and less controversy. It might also afford the IOC to focus on other more pressing issues that threaten its credibility in the first place such as corruption in judging and doping.*

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<sup>170</sup> See Kevin Iole, *Irish Boxer Robbed Against Russian, Tweets Vladimir Putin: 'How much did they charge you bro?'*, YAHOO! SPORTS (Aug. 16, 2016), <http://sports.yahoo.com/news/irish-boxer-tweets-vladimir-putin-000000944.html> (showing screen shot of Conlan's tweet and stating, "Conlan raised his arms up in a double middle finger salute to let the judges know what he thought of them." Iole also references the 1988 Seoul, South Korea Olympics in which U.S. boxer Roy Jones, Jr., was so outrageously robbed of his gold medal by the judges in his match against South Korea's Park Si-hun that boxing instituted a computerized scoring system immediately thereafter).

<sup>171</sup> See Laura Wagner, *Are Olympic Boxing Judges Corrupt, Incompetent, or Both?*, SLATE (Aug. 17, 2016), [http://www.slate.com/blogs/five\\_ring\\_circus/2016/08/17/are\\_olympic\\_boxing\\_judges\\_incompetent\\_corrupt\\_or\\_both.html?utm\\_content=buffercbdc&utm\\_medium=social&utm\\_source=twitter.com&utm\\_campaign=buffer](http://www.slate.com/blogs/five_ring_circus/2016/08/17/are_olympic_boxing_judges_incompetent_corrupt_or_both.html?utm_content=buffercbdc&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer).

<sup>172</sup> *Id.*

<sup>173</sup> See Ryan Bailey, *Rio Report: Boxing Threatens the Integrity of the Olympic Games Once Again*, BLEACHER REPORT (Aug. 17, 2016), <http://bleacherreport.com/articles/2658325-rio-report-boxing-threatens-the-integrity-of-the-olympic-games-once-again>.

<sup>174</sup> See, e.g., Michael Pavitt, *Study Claims Nike Achieved Best Ambush Marketing Campaign at Rio 2016*, INSIDE THE GAMES (Aug. 28, 2106), <http://www.insidethegames.biz/articles/1041052/study-claims-nike-achieved-best-ambush-marketing-campaign-at-rio-2016> (demonstrating worldwide that Nike, not a TOP sponsor, had the second highest perceived affiliation with the Rio Games behind Samsung, a TOP sponsor).

2. **Require a minimal but standard disclaimer prepared by the IOC or USOC, on all social media postings by unofficial commercial entities and individual participant athletes.** *Rather than sending cease and desist letters and emails, the effect would be to manage the postings not eradicate them. It would also minimize negative publicity already established for its protectionist practices.*
3. **Amend the TSOASA to specifically exclude (exempt) social media as exempt from trademark infringement if the primary purpose is to congratulate, inform, or to gain no commercial advantage.** *The TSOASA was amended almost twenty years ago and that had amended the statutes twenty years before that. It is time that the federal statute be brought into the 21<sup>st</sup> century.*
4. **Amend the TSOASA to include social media as form of trademark infringement, but only as long as there is a clear commercial purpose with the intent to confuse or mislead consumers as to official sponsorship affiliation.** *Similar to above, but not an outright exception to social media and rather an inclusive clarification. Not all retweets are commercial in nature or a form of advertising just because the account belongs to a corporation.*
5. **Amend the TSOASA to allow for “fair use” of Olympic terms and trademarks as long as it is not primarily for a commercial purpose.** *Simple and straight-forward. Might allow USOC to define and publish what is and what is not fair use.<sup>175</sup> If still too restrictive, allows courts to decide, if necessary, what is fair and what is not.*
6. **Require all NOC’s to pay a \$1 annual, blanket licensing fee to the IOC as a means to demonstrate protection against trademark infringement.** *Affords trademark protection to mark holders and similar to music industry approach of a blanket, all-encompassing license.*
7. **Allow athletes to have one exempt individual “primary sponsor” for social media, approved in advance by the NOC, other than an official team supplier or sponsor, is exempt from the TSOASA and can promote the athlete (and vice-versa) during the Rule 40 blackout period.** *This allows leeway for the premier athlete whose income, in many cases, is derived from that primary sponsor in the first place. It also quells the concern a bit for athletes who believe they should be paid by the Games themselves as employees.*

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<sup>175</sup> See Alexandra Jane Roberts, *Handicapping the Olympic Committee’s Quest to Control Tweeting*, TECH. & MARKETING. L. BLOG (Aug. 25, 2016), <http://blog.ericgoldman.org/archives/2016/08/handicapping-the-olympic-committees-quest-to-control-tweeting-guest-post.htm>. (discussing descriptive fair use and nominative fair use as protections, for example, against trademark infringement).

8. **Create its own social media platform during the blackout period in which all athlete sponsors and others are free to comment and show pictures and video, but monitored by the IOC itself and displaying “official” sponsors on all webpages.** *A centralized webpage owned and operated by the IOC which drives traffic to it and allows athletes and sponsors and the general public to interact with each other. It would also make clear on the web pages what the real, official sponsorships are with those logos, links, etc.*
9. **Work with Facebook, Instagram, Twitter, YouTube, etc., to monitor Olympic-related usage to place an automatic disclaimer on a non-official or commercial post that the information does not constitute an official affiliation or sponsorship with the Olympic Games.** *Essentially outsource monitoring to these platforms, possibly for a fee, but automatic disclaimers would be added to posts without interrupting the speech, pictures, etc.*
10. **Create its own authorized *Social Media Olympics* during the blackout period in which athletes are encouraged to generate as much interest and interaction as possible and award virtual medals for athletes or countries, similar to fantasy sports.** *This is not as far-fetched as one might think and it could be fun to see who has the most social media clout. It might invite illegitimate voting by automatic bots, however, leading to more allegations of unethical behavior, undue influence or the failure to appropriately monitor its own website. On the other hand, an IOC-sponsored Olympic Fantasy Sports competition during the Games could supply an engaging alternative to following the events on broadcast television especially for Millennials.<sup>176</sup> Consider that electronic sports (e-Sports) could become an Olympic competition category in the near future.<sup>177</sup>*

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<sup>176</sup> See Eric Levitz, *Millennials Recognize That the Olympics Are Boring*, N.Y. MAG (Aug. 19, 2016), <http://nymag.com/daily/intelligencer/2016/08/millennials-recognize-that-the-olympics-are-boring.html> (stating that “[i]n other words, millennials’ mastery of technology has made them disproportionately aware that the Olympics are, in truth, boring and lame.”); see also Rolling Stone, *2016 Rio Olympics Aftermath: NBC Blames Millennials for Low Ratings*, ROLLINGSTONE.COM (Aug. 23, 2016), <http://www.rollingstone.com/sports/news/rio-olympics-aftermath-nbc-blames-millennials-for-low-ratings-w435784> (offering, “primetime viewers dropped 17 percent, and the highly coveted 18-to-49-year-old age group, the viewers advertisers love the most, dropped a full quarter, 25 percent less than 2012.”).

<sup>177</sup> See Jacob Wolf, *Esports in the Olympics by 2020? It Could Happen*, ESPN.COM (Apr. 18, 2016), [http://www.espn.com/esports/story/\\_/id/15232682/esports-olympics-2020-happen](http://www.espn.com/esports/story/_/id/15232682/esports-olympics-2020-happen) (stating that “[t]he International e-Sports Federation (IeSF), a South Korean organization, has received a response from the International Olympic Committee (IOC) outlining the process and next steps to allow esports to be recognized as an Olympic sport.”).



## VI. CONCLUSION

The IOC's Rule 40 emerged to prevent or at least minimize ambush marketing of its biennial Olympics. However, Rule 40 has become so controversial among the athletes and private, general social media participants that it does not seem plausible that the policy will remain viable without some changes. Indeed, protection of intellectual property is noteworthy and legitimate, but offering congratulatory posts, retweeting of results, GIFs and utilizing hashtags is already part of social media culture despite the IOC's wishes to monopolize them over a few weeks every two years.

The world has moved far from traditional print and television broadcasts of the Olympics, and the 2016 Rio Summer Olympic Games represented a generational and social clash between intellectual property rights vis-à-vis free speech, expression and association. As discussed, the Lanham Act coupled with the Ted Stevens Olympic and Amateur Sports Act has given the U.S. Olympic Committee ostensibly the exclusive authority to commercially use virtually anything Olympic in nature particularly during the nine days before until three weeks after the Games. However, today's legal framework seems ill-prepared to rationally deal with the reality of social media in this context. In fact, the USOC's efforts have been so aggressive to protect its marks that its actions have been characterized as browbeating.

In sum, from the L.A. Games in 1984 to the Rio Games in 2016, ambush marketing has been a concern for the Olympic Movement and host venues, but it also has drawn great attention away from the Games themselves. It might be prudent and practical to modify the Rule 40 approach to regulation of Olympic intellectual property or the entire Movement risks losing interest by a younger generation. Corporate sponsorship investments of hundreds of millions of dollars certainly cannot be not impressed with declining viewership or interest.

Though it might take the courts, rather than legislators, to interpret the law with regard to rights relating to blogging, texting, tweeting and using hashtags, this Article offered a few suggestions to deal with the new virtual reality. Besides, the reality is that the IOC and its members must address corrupt judges and drugged-up participants that are already eating away at the credibility of the competition and the brand itself. Addressing those concerns might be far more valuable in the long run to this international enterprise than Rule 40 and its restrictions over rascallions with access to a cell phone who have been brought up capable of voicing and streaming their thoughts and opinions, and engaging the entire world in an instant with just a few clicks.