

**IS OLYMPIC AMBUSH MARKETING HERE TO STAY?  
EXAMINING THE ISSUES SURROUNDING AMBUSH MARKETING  
AS THEY RELATE TO OLYMPIC SPONSORS, ATHLETES, AND  
OTHER STAKEHOLDERS**

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**I. INTRODUCTION**

At the 1992 Barcelona Olympics, Michael Jordan and other members of the United States Basketball “Dream Team” were faced with the issue of whether allegiance to Nike outweighed the allegiance they had to the United States.<sup>1</sup> Due to Reebok’s Olympic sponsorship affiliation, basketball players were required to wear Reebok-branded jackets on the medal stand.<sup>2</sup> This posed a problem for many players on the team, as nearly half the team was sponsored by Reebok’s main competitor, Nike, and did not want to be seen in front of millions of viewers donning a competitor’s products.<sup>3</sup> The United States Olympic Committee (USOC) threatened the team, declaring that anyone not wearing the Reebok uniform would not be allowed to get on the medal stand.<sup>4</sup> After much deliberation, all the members

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<sup>1</sup> Alec Banks, *The Time Michael Jordan was Forced to Wear Reebok*, HIGHSNOBIETY (Aug. 18, 2016), <https://www.highsnobiety.com/2016/08/18/michael-jordan-reebok/>.

<sup>2</sup> *Id.* (“Reebok secured the rights to the warm-ups that athletes would wear before games and if they should appear on a medal podium for \$4 million USD.”).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* (“The first athlete who says he’s not wearing it will be the first athlete who ever said that. To me, that would be an act of arrogance that backfires on any player that does it. Anyone not wearing the uniform won’t get on the award stand.”).

of the 1992 team walked up to the podium wearing Reebok tracksuits.<sup>5</sup> However, Michael Jordan, Charles Barkley, and Magic Johnson “draped American flags over their right shoulders to obscure the Reebok name,” and to maintain loyalty and integrity to their sponsor, Nike.<sup>6</sup>

Olympic sponsorships are a multi-billion-dollar business,<sup>7</sup> and in the 2013–2016 Olympic cycle, the International Olympic Committee’s (IOC) top two sponsorship levels contributed more than \$3 billion in revenue, which was nearly 39% of the Olympics’ entire marketing revenue.<sup>8</sup> Due to the incredible value of Olympic sponsorships, it is no surprise that the IOC and the respective National Olympic Committees (NOCs) will go to extreme lengths to protect the integrity of their sponsorship deals and relationships with their sponsors.<sup>9</sup> However, with individual Olympic sponsorship deals now approaching the billion-dollar mark, many companies are instead using a variety of media to creatively market their brands.<sup>10</sup> Through social-media, television, and on-site activation,<sup>11</sup> brands are finding strategic loopholes around Olympic brand protection measures that protect the sponsorship value of the IOC’s partnership base.<sup>12</sup>

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<sup>5</sup> Banks, *supra* note 1.

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

<sup>7</sup> See Tariq Panja et al., *Alibaba Olympics Sponsorship Deal Said to Be Worth \$800 Million*, BLOOMBERG TECH. (Jan. 19, 2017, 12:06 PM), <https://www.bloomberg.com/news/articles/2017-01-19/alibaba-will-put-its-technology-to-the-test-on-an-olympian-stage>; *Toyota drives onto Olympic stage in record deal*, USA TODAY, Mar. 13, 2015, <https://www.usatoday.com/story/sports/olympics/2015/03/13/toyota-drives-onto-olympic-stage-in-record-sponsorship-deal/70258812/> (“Toyota Motor Corp. signed on as a global Olympic sponsor Friday in a landmark deal reportedly worth nearly \$1 billion”); Ben Fischer, *Intel’s Olympics sponsorship deal is worth about \$400 million through 2024*, SILICON VALLEY BUS. J. (June 21, 2017, 1:48 PM), <https://www.bizjournals.com/sanjose/news/2017/06/21/intel-olympics-2024-sponsorship-deal-value.html>.

<sup>8</sup> See INT’L OLYMPIC COMM., OLYMPIC MARKETING FACT FILE 6 (2017) [hereinafter IOC, OLYMPIC MARKETING FACT FILE].

<sup>9</sup> See Banks, *supra* note 1.

<sup>10</sup> See USA TODAY, *supra* note 7.

<sup>11</sup> Jack Simpson, *What is brand activation & why do you need it?*, ECONSULTANCY (Feb. 16, 2016), <https://www.econsultancy.com/blog/67525-what-is-brand-activation-why-do-you-need-it> (defining brand activation as the process of increasing awareness and engagement through some kind of brand experience. Brand activation may include product sampling campaigns, experiential marketing campaigns, or a combination of both).

<sup>12</sup> See Steve McKelvey, *Memos reveal advent of ambush marketing around ’84 Games*, SPORTS BUS. J. (Feb. 17, 2014), <http://www.sportsbusinessdaily.com/Journal/Issues/2014/02/17/Opinion/From-the-Field-of-Marketing.aspx> (“The gist of what has been found does, however, reflect Kodak’s strategic efforts to counter Fuji’s official sponsorship of the 1984 Games and the 1986 World Cup”); Robert Klara, *How Nike Brilliantly Ruined Olympic Marketing Forever*, ADWEEK (Aug. 10, 2016), <http://www.adweek.com/brand-marketing/how-nike-brilliantly-ruined-olympic-marketing-forever-172899/> (noting Nike’s ambush marketing efforts in the 1996 Olympics); Mark Sweeney, *Olympics 2012: Nike plots ambush ad campaign*, THE GUARDIAN (July 25, 2012, 6:27 AM),

This Note examines many of the issues related to ambush marketing in the Olympic context. Specifically, this Note discusses the problems ambush marketing creates for the IOC and Olympic sponsors, along with how brand protection laws and the IOC's strict advertising guidelines inhibit some forms of creative advertising. There is no right or wrong answer to whether ambush marketing provides a net economic benefit. Rather, it is all about context and perspective. On one hand, ambush marketing limits the value of Olympic sponsorships.<sup>13</sup> On the other, it is creative advertising that allows for non-sponsor brands to enter the marketing scene.<sup>14</sup> This Note helps to illustrate the split between the rigid Olympic sponsorship program and creative advertising.

The remaining sections of this Note discuss various subtopics related to ambush marketing in the Olympic context. Part II provides a background on ambush marketing and more specifically, how it has impacted the Olympics over time. Part III provides an overview of the Olympic sponsorship program. Part IV highlights the IOC's rules on advertising and how they have affected both sponsor and non-sponsor brands. Part V delves into the comparative legal analysis of brand protection laws across three jurisdictions: the United States, South Korea, and Japan. Further, it provides an overview of the laws enacted to protect against ambush marketing, including trademark and unfair competition laws. Part VI examines how these brand protection laws came into play for the 2018 Winter Olympics and how they will come into play in the 2020 Summer Olympics. Further, it discusses whether such laws have been or will be effective in combating ambush marketing. Finally, Part VII discusses the future of Olympic ambush marketing and suggests ideas to further decrease the presence of Olympic ambush marketing, while taking into account Olympic athlete well-being and creative advertising.

## **II. THE HISTORY OF AMBUSH MARKETING AND ITS IMPACT ON THE OLYMPICS**

### **A. Ambush Marketing Overview**

The purpose of ambush marketing is to utilize the benefits of a sports sponsorship without taking on any of the financial burdens of an official sponsor.<sup>15</sup> More specifically, ambush marketing is the practice of non-sponsors using their own marketing communications activities (e.g., social-media, on-site activation) to

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<https://www.theguardian.com/media/2012/jul/25/olympics-2012-nike-ambush-ad> (discussing Nike's 2012 Olympic ambush marketing campaign).

<sup>13</sup> See *infra* Part II, Section B.

<sup>14</sup> See *infra* Part VI, Section B.

<sup>15</sup> Gerd Nufer, *Ambush Marketing in Sports: An Attack on Sponsorship or Innovative Marketing*, 6 *SPORT, BUS. & MGMT.: INT'L J.* 476, 478 (2016).

give an impression of an association with an event, although these non-sponsors have no legal or exclusive right to advertise for such an event.<sup>16</sup>

In the Olympic context, countries have split ambush marketing into two categories: ambush marketing by intrusion and ambush marketing by association.<sup>17</sup> In the 2016 Summer Olympics, Brazil defined ambush marketing by association as:

[P]romoting brands, products, or services, in order to achieve economic advantage, through claiming direct or indirect association with the games, without permission from the entities organizing the games or their delegates, and inducing others to believe that such brands, products or services are approved, authorized, or endorsed by the organizers.<sup>18</sup>

However, ambush marketing by intrusion involves the “exhibition of brands, businesses, establishments, products, services, or the performance of promotional activities, without permission from the entities organizing the games, in a way that attracts public attention in official locations (such as stadiums, sports centers, training facilities, etc.).”<sup>19</sup>

## **B. The Growth of Ambush Marketing**

### 1. The 1984 Olympics: Los Angeles

One of the first recorded instances of ambush marketing occurred in the lead-up to the 1984 Los Angeles Olympics.<sup>20</sup> In an internal memo sent by a high-ranking Kodak official, the company acknowledged that it could not stop its main competitor, Fuji, from purchasing sports sponsorships, but it did recognize that it could minimize the mileage that Fuji would gain from its substantial sports investments.<sup>21</sup> Additionally, in a separate memo sent by an executive of global marketing agency, IMG, the agency provided several options to its client to “blunt” Fuji’s worldwide sports marketing efforts.<sup>22</sup> Specifically, the memo advised Kodak to purchase television advertising in key countries and sponsor track and field

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<sup>16</sup> Nufer, *supra* note 15, at 477.

<sup>17</sup> Eduardo Soares, *Laws Behind the Rio Olympics*, LIBR. OF CONG. (Aug. 3, 2016), <https://blogs.loc.gov/law/2016/08/laws-behind-the-rio-olympics/> (citing Lei No. 12.035, de 1 de Outubro de 2009).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See McKelvey, *supra* note 12.

<sup>21</sup> *Id.* (“We cannot stop Fuji from spending excessive amounts of money to buy certain sponsorships. We can preempt them from sponsorships that Kodak considers key and we can make it difficult, and expensive, for Fuji to buy major sponsorships . . .”).

<sup>22</sup> *Id.*

events leading up to the 1984 Olympics.<sup>23</sup> IMG then negotiated a deal for Kodak to be the photographic category sponsor of the 1984 Los Angeles Times International Track Meet, as well as a major sponsor for the 1984 Olympic trials in Los Angeles.<sup>24</sup> Through its sponsorship of the 1984 US Olympic Track and Field Trials, Kodak filled the Los Angeles Memorial Coliseum with its yellow and red signage, blunting Fuji's future Olympic sponsorship activation.<sup>25</sup> Kodak's creative and innovative strategy to work around sponsorship affiliations and showcase its brand ultimately led to the advent of what many industry professionals now consider "ambush marketing."<sup>26</sup>

## 2. The 1996 Olympics: Atlanta

In 1996, Nike's ambush marketing efforts during the Atlanta Olympics took center stage.<sup>27</sup> In the 400-meter dash, US sprinter Michael Johnson won a gold medal while wearing a \$30,000 pair of gold-colored Nike racing spikes.<sup>28</sup> Not only did millions of television viewers catch a glimpse of Johnson's shoes adorned with the brand's iconic swoosh logo, but millions of Americans also saw them draped around his neck on the cover of Time Magazine a few days later.<sup>29</sup> In addition to the ambush that profited from the fame of Michael Johnson, Nike also distributed swoosh-branded flags to fans throughout various Olympic venues and opened a "Nike Centre" behind the Olympic village that was open to both athletes and fans.<sup>30</sup> Instead of matching the \$50 million fee that its main competitor, Reebok, paid to sponsor the Games, Nike instead decided to ambush the Olympics to effectively reallocate its costs, while still maximizing its brand exposure.<sup>31</sup> Through its creative marketing strategy, Nike helped change the landscape of the global sponsorship industry forever.<sup>32</sup>

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<sup>23</sup> McKelvey, *supra* note 12 ("Kodak is therefore faced with several options: (a) to attempt to blunt the Fuji effort worldwide . . . (c) to purchase television advertising in key countries . . .").

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* ("Kodak achieved perhaps its greatest measure of "blunt marketing" success through sponsorship of the 1984 U.S. Olympic Track & Field Trials, which found the Los Angeles Memorial Coliseum awash in a sea of yellow-and-red banners and Kodak signage when the Fuji representatives arrived for the event.").

<sup>26</sup> *Id.* (noting that Kodak's "blunt marketing" success served as a wake-up call for sports event organizers to develop measures against ambush marketing).

<sup>27</sup> *See* Klara, *supra* note 12.

<sup>28</sup> *Id.*

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

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* ("Reebok . . . ponied up a reported \$50 million to become an official sponsor . . .").

<sup>32</sup> *See* Klara, *supra* note 12 (noting that the IOC has placed a greater emphasis on trademark protection after the 1996 Summer Olympics).

### 3. The 2012 Olympics: London

Nike followed up its marketing success in 1996 with another strong ambush marketing effort in London during the 2012 Summer Olympics.<sup>33</sup> While its competitor, adidas, decided to purchase a global sponsorship for the 2012 Games that cost the company between \$127 million and \$156 million, Nike used its advertising budget to purchase a lower-tier sponsorship<sup>34</sup> and also create a noteworthy television and social-media campaign.<sup>35</sup> Nike timed the release of its “Find Your Greatness” campaign with the opening ceremony of the London Olympics, finding a way to skirt the IOC’s strict marketing and licensing guidelines.<sup>36</sup> In the first week of the 2012 Olympics, Nike’s “Find Your Greatness” ad gained 4.5 million viral views, while its competitor and global Olympic Sponsor, adidas, accumulated 2.9 million views for its similar “Take the Stage” campaign.<sup>37</sup> In an online survey of US consumers, 37% of those surveyed viewed Nike as a sponsor of the Olympics, compared to 24% for global Olympic sponsor, adidas.<sup>38</sup> Further, Nike gained more reach and exposure on social-media than adidas.<sup>39</sup> However, Nike’s effective ambush was not only limited to digital marketing, as it also used its athletes to showcase the brand.<sup>40</sup> Borrowing from its 1996 Atlanta Olympics playbook,<sup>41</sup> the brand outfitted hundreds of its athlete endorsers in its Volt-colored Flyknit shoes in an attempt to draw attention to its brand by using bright, eye-catching colors.<sup>42</sup> Nike succeeded, as it used its signature color to

<sup>33</sup> See Shareen Pathak, *Meet the Man Behind Nike’s Neon-Shoe Ambush*, ADAGE (Aug. 20, 2012), <http://adage.com/article/news/olympics-meet-man-nike-s-neon-shoe-ambush/236756/>.

<sup>34</sup> Denise Lee Yohn, *Olympics Advertisers Are Wasting Their Sponsorship Dollars*, FORBES (Aug. 3, 2016, 5:17 AM), <https://www.forbes.com/sites/deniselejohn/2016/08/03/olympics-advertisers-are-wasting-their-sponsorship-dollars/#7c4ed6bd2070> (noting that Nike’s “tier-three” sponsorship allowed it to outfit most Brazilian national teams for the 2012 London Olympics and the 2016 Rio Olympics).

<sup>35</sup> See Sweney, *supra* note 12 (“Locations for the TV ad include East London in South Africa, Little London in Jamaica, London Ohio in the US and a health club called London Gym.”).

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

<sup>37</sup> Mallory Russell, *Nike Ambushes Adidas on World Stage...Again*, ADAGE (July 31, 2012), <http://adage.com/article/the-viral-video-chart/nike-ambushes-adidas-world-stage/236400/>.

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

<sup>39</sup> Lee Yohn, *supra* note 34 (noting that during the Olympic period on Twitter, 16,020 tweets associated Nike and the Olympics, while only 9,300 tweets associated adidas and the Olympics).

<sup>40</sup> See Pathak, *supra* note 33.

<sup>41</sup> See Klara, *supra* note 12 (discussing Nike’s use of gold-colored shoes to ambush Reebok’s sponsorship).

<sup>42</sup> Pathak, *supra* note 33 (“Painting Nike’s Flyknit shoe Volt, as that vivid neon-green-meets-highlighter-yellow color . . .”).

associate itself with the Games without running afoul of Olympic ambush marketing rules.<sup>43</sup>

#### 4. The 2016 Olympics: Rio de Janeiro

Before the 2016 Rio Olympics, IOC officials revised Rule 40, the Committee's highly criticized marketing rule that generally prohibits unofficial Olympic sponsors from using their athlete endorsers in advertisements.<sup>44</sup> The revised rule now allows unofficial sponsors to create generic advertisements using their respective athlete endorsers, provided that they do not use protected Olympic trademarks.<sup>45</sup> In 2016, Under Armour took advantage of the new rule by airing an ad that centered on Michael Phelps's training regimen as he prepared for his final Olympic games.<sup>46</sup> Shortly after the Olympics, Under Armour's "Rule Yourself" campaign obtained more than eleven million views, with over 44,000 likes on YouTube.<sup>47</sup> Through its popular ad, Under Armour leveraged its partnership with an Olympic icon and established a model for advertisers and brands to operate in the relaxed Rule 40 era.<sup>48</sup>

Puma, another apparel company and non-sponsor of the Olympics, performed its best Nike impersonation<sup>49</sup> and used one of its star athlete endorsers to further push its brand to consumers.<sup>50</sup> Puma outfitted Jamaican sprinter, Usain Bolt, in a pair of gold-colored racing spikes for one of the premier events in the Summer Olympics: the 100-meter dash.<sup>51</sup> After Bolt won the race in 9.81 seconds, he carried them triumphantly around the stadium, showcasing the brand in front of

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<sup>43</sup> Pathak, *supra* note 33 ("Nike's move was really clever. They used marketing assets that belonged to them alone, and those assets gave them a pretty unique opportunity to take advantage of the Olympic rules.")

<sup>44</sup> See *infra* Part IV (discusses Rule 40).

<sup>45</sup> Christine Birkner, *How the Olympics' New Advertising Rules Will Impact Athletes and Brands in Rio*, ADWEEK (July 5, 2016), <http://www.adweek.com/brand-marketing/how-olympics-new-advertising-rules-will-impact-athletes-and-brands-rio-172372/>.

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

<sup>47</sup> Wally Peterson, *Medal Winning Social Media Campaigns from the Olympics*, SENDIBLE INSIGHTS (Sept. 2, 2016), <http://sendible.com/insights/winning-olympics-social-media-campaigns>.

<sup>48</sup> See Birkner, *supra* note 45 (discussing that Under Armour's Michael Phelps commercial will force brands to come up with great concepts and properly leverage their use of Olympic athletes to capture consumers' attention).

<sup>49</sup> See Klara, *supra* note 12 (discussing Nike's use of gold-colored shoes in its ambush marketing effort); see Pathak, *supra* note 33 (discussing Nike's use of neon green running shoes in another marketing effort).

<sup>50</sup> See Joscha Thieringer, *Usain Bolt and Puma outsmart the IOC with a Pair of Golden Shoes*, ISPO (Aug. 16, 2016), [http://www.ispo.com/en/companies/id\\_78704878/usain-bolt-and-puma-outsmart-the-ioc-ambush-marketing.html](http://www.ispo.com/en/companies/id_78704878/usain-bolt-and-puma-outsmart-the-ioc-ambush-marketing.html).

<sup>51</sup> *Id.*



thousands in the stands and millions more at home.<sup>52</sup> In hope of capitalizing on an important marketing opportunity, Puma indirectly congratulated Bolt through social-media by highlighting the gold-colored racing spikes he used to win the race, coupled with the hashtag #ForeverFastest.<sup>53</sup> Puma's resourceful social-media team cleverly illustrated that there is a fine line that exists between creative ambush marketing, and infringing upon Olympic intellectual property (IP).<sup>54</sup>

### III. THE OLYMPIC SPONSORSHIP PROGRAM

Besides providing valuable financial support for the staging of each Olympic Games, Olympic sponsorship programs provide direct support for the training and development of Olympic athletes and hopefuls throughout the world, enhance the overall on-site Olympic experience for spectators, and help to promote Olympic ideals.<sup>55</sup> The Olympic sponsorship program is divided into three main categories: The Olympic Partner (TOP) Programme, domestic sponsorships through each Organizing Committee for the Olympic Games (OCOG), and team sponsorships through each country's NOC.<sup>56</sup>

#### A. Overview: The Olympic Partner Programme

Among its many other duties, the IOC manages the TOP Programme, created in 1985 to "develop a diversified revenue base for the Olympic Games and to establish long-term corporate partnerships that would benefit the Olympic Movement as a whole."<sup>57</sup> The TOP Programme began with nine partners and \$96 million in revenue in 1985 and has now grown to twelve partners and gained over \$1 billion in revenue during the 2013–2016 Winter and Summer Olympic cycle.<sup>58</sup> Unlike the other sponsorship levels, the TOP programme provides its sponsors with global marketing rights and opportunities within a designated product or service category.<sup>59</sup>

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<sup>52</sup> Thieringer, *supra* note 50.

<sup>53</sup> *Id.* ("The PUMA Running Facebook page shared a picture of Usain Bolt's golden shoes and wrote: 'WHO FASTER? Usain Bolt and #ForeverFastest.'").

<sup>54</sup> *Id.* (noting that Puma engaged in a classic ambush marketing campaign).

<sup>55</sup> IOC, OLYMPIC MARKETING FACT FILE, *supra* note 8, at 10.

<sup>56</sup> *See id.* at 6.

<sup>57</sup> *Id.* at 11.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 11.

## **B. Overview: Domestic Sponsorship Programs**

The Olympic Games' domestic sponsorship program is managed by the OCOG within each host country or territory and is overseen by the IOC.<sup>60</sup> Unlike the TOP Programme, domestic sponsors are provided marketing rights only within the host country or territory.<sup>61</sup> The domestic sponsorship program is aimed at providing valuable funds for the planning and operation of the Games, enhancing the Olympic brand, and further advancing Olympic movements.<sup>62</sup> During the 2013–2016 Olympic cycle, the OCOG Sponsorship Program brought in \$2.037 billion in revenue from nearly 100 partners.<sup>63</sup>

The PyeongChang 2018 domestic sponsorship program was divided into four levels: Official Partner, Official Sponsor, Official Supplier, and Official Supporter.<sup>64</sup> In contrast, Japan's domestic sponsorship program for the 2020 Games is divided into three levels: Gold Partner, Official Partner, and Official Supporter.<sup>65</sup> The Tokyo 2020 Sponsorship Program commenced on January 1, 2015, and will run until December 31, 2020.<sup>66</sup>

Finally, each Olympic-participating country has its own NOC that generates its own sponsorship revenue through its own domestic commercial program.<sup>67</sup>

## **IV. RULE 40 EXPLAINED AND WHAT IT MEANS FOR BRANDS**

### **A. Overview: IOC Rule 40**

Rule 40 of the IOC bylaws has caused many headaches for companies with Olympic athletes as endorsers.<sup>68</sup> Specifically, Rule 40.3 of the IOC bylaws states that: “[e]xcept as permitted by the IOC Executive Board, no competitor, team

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<sup>60</sup> IOC, OLYMPIC MARKETING FACT FILE, *supra* note 8, at 15.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 10.

<sup>63</sup> *Id.* at 15. (noting that OCOG's brought in \$848 million revenue in the 2016 Rio Olympics and brought in \$1.189 billion revenue in the 2014 Sochi Olympics).

<sup>64</sup> *The Worldwide Olympic Partners*, PYEONGCHANG 2018, <https://www.pyeongchang2018.com/en/partners> (last visited Oct. 4, 2017).

<sup>65</sup> *Purpose of the Sponsorship Programme*, THE TOKYO ORGANISING COMM. OF THE OLYMPIC AND PARALYMPIC GAMES, <https://tokyo2020.jp/en/organising-committee/marketing/sponsorship/> (last visited Oct. 4, 2017).

<sup>66</sup> *Id.*

<sup>67</sup> IOC, OLYMPIC MARKETING FACT FILE, *supra* note 8, at 6.

<sup>68</sup> See generally Chris Chavez, *What is Rule 40? The IOC's rule on non-Olympic sponsors, explained*, SPORTS ILLUSTRATED (July 25, 2016), <https://www.si.com/olympics/2016/07/27/rule-40-explained-2016-olympic-sponsorship-blackout-controversy> (explaining that many small non-Olympic brands along with their athlete endorsers have struggled to follow the rigid Rule 40 restrictions).

official or other team personnel 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>69</sup>

During each Olympic year, Rule 40’s relevant period begins at the date of the opening of the Olympic Village (nine days before the opening ceremony) and concludes at the end of the third day after the date of the closing ceremony.<sup>70</sup> For the 2018 PyeongChang Olympic Games, the sponsorship blackout period began on February 1, 2018, and ended on February 28, 2018.<sup>71</sup> During the blackout period, non-Olympic sponsors are prohibited from using the names, likenesses, and images of their athlete endorsers to sell products or to promote their brand or company.<sup>72</sup>

## **B. The Revised Rule 40**

The IOC established Rule 40 to prevent over-commercialization of the Games and, more importantly, to protect the investment of Olympic sponsors.<sup>73</sup> Not only must non-sponsors refrain from using the IOC’s trademarked words or phrases,<sup>74</sup> but they must also not associate with the Olympics on social-media sites such as Twitter, Instagram, Facebook, and Snapchat.<sup>75</sup> Particularly, non-sponsors may not use any hashtags that include Olympic trademarks, cannot feature any Olympic athletes in social-media posts, and may not share anything from official Olympics social-media accounts, including retweets.<sup>76</sup> However, in February 2015, the IOC lightened up on its Rule 40 guidelines, now allowing generic or non-Olympic advertising during the Olympic Games.<sup>77</sup> Under the updated guidelines, companies must submit waivers to the IOC six months before the start of the blackout period, and the advertisement must be in market within two months after that (and must remain in market until after the conclusion of the Games).<sup>78</sup> For the

<sup>69</sup> IOC, *Olympic Charter*, Rule 40.3 (Aug. 2, 2015) [hereinafter Rule 40].

<sup>70</sup> *Rule 40 Guidelines, XXIII Olympic Winter Games PyeongChang 2018*, IOC, <https://www.olympic.si/datoteke/PyeongChang%202018%20-%20Rule%2040%20Guidelines%20-%20ENG.pdf> (last visited Oct. 4, 2017).

<sup>71</sup> *Id.*

<sup>72</sup> See Chavez, *supra* note 68.

<sup>73</sup> *Id.*

<sup>74</sup> Christine Birkner, *Here Are the Many, Many Ways Your Business Can Get in Trouble for Tweeting the Olympics*, ADWEEK (July 29, 2016), <http://www.adweek.com/brand-marketing/here-are-many-many-ways-your-business-can-get-trouble-tweeting-olympics-172699/> (citing that non-sponsors may not use words or phrases such as: Olympics, Olympian, Future Olympian, Road to PyeongChang, and Road to Tokyo).

<sup>75</sup> Chavez, *supra* note 68.

<sup>76</sup> Birkner, *supra* note 74.

<sup>77</sup> Chavez, *supra* note 68.

<sup>78</sup> See Ben Fischer, *Rule 40 waivers in play for '18 Winter Games*, SPORTS BUS. J. (Mar. 27, 2017), <http://m.sportsbusinessdaily.com/Journal/Issues/2017/03/27/Olympics/Rule-40-Winter-Games.aspx>.

2018 Games, the IOC required brands to have their generic advertisements available for review by August 1, 2017, and to have the ads remain in-market from October 1, 2017, until the end of the Winter Olympics on February 25, 2018.<sup>79</sup>

## V. LEGAL OVERVIEW: BRAND PROTECTION LAWS IN THE UNITED STATES, SOUTH KOREA, AND JAPAN

### A. United States Brand Protection Overview

In the United States, the Lanham Act and the Ted Stevens Olympic and Amateur Sports Act, codified under federal law, protect the USOC and its sponsors against various ambush marketing practices.<sup>80</sup>

#### 1. The Lanham Act

The Lanham Act provides trademark rights to those who have a federally registered trademark<sup>81</sup> and to those who do not.<sup>82</sup> Particularly, the Lanham Act prohibits the use of any word, name, symbol, or device used in commerce, that is likely to cause confusion, mistake, or to deceive, without the consent of the registered mark holder.<sup>83</sup> The Lanham Act also prohibits use of any word, name, symbol, or device used in commerce that is likely to cause confusion, mistake, or to deceive as to the affiliation with another brand in relation to the origin or sponsorship of various goods or services.<sup>84</sup> Both registrants and non-registrants may hold bad actors liable in civil action if they are in violation of either statute.<sup>85</sup> However, famous mark holders<sup>86</sup> may still obtain injunctive and monetary relief even without establishing a likelihood of confusion.<sup>87</sup> Specifically, the Lanham Act

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<sup>79</sup> Fischer, *supra* note 78.

<sup>80</sup> See generally Lanham Act, 15 U.S.C. § 1051 et seq (2005); see generally Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220501 et seq (2006).

<sup>81</sup> See 15 U.S.C. § 1114 (2005).

<sup>82</sup> See 15 U.S.C. § 1125(a) (2012).

<sup>83</sup> 15 U.S.C. § 1114(1)(a).

<sup>84</sup> 15 U.S.C. § 1125(a)(1)(A).

<sup>85</sup> *Id.* § 1125(a); 15 U.S.C. § 1114(1).

<sup>86</sup> 15 U.S.C. § 1125(c)(2)(A) (“A mark is famous if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark’s owner.”).

<sup>87</sup> *Id.* § 1125(c)(1); 15 U.S.C. § 1117(a) (2008).

protects these famous mark holders from bad actors who attempt to dilute their marks by blurring<sup>88</sup> or by tarnishment.<sup>89</sup>

## 2. The Ted Stevens Olympic and Amateur Sports Act

The Ted Stevens Olympic and Amateur Sports Act provides the USOC with the exclusive right to use:

the name “United States Olympic Committee”;  
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;  
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  
the words “Olympic,” “Olympiad,” “Citius Altius Fortius,” “Paralympic,” “Paralympiad,” “Pan-American,” “America Espirito Sport Fraternite,” or any combination of those words.<sup>90</sup>

The Act provides certain exceptions, such as for businesses who used the Olympic emblems or trademarked phrases for a lawful purpose before September 21, 1950, or businesses who are using the “Olympic” phrase to refer to geographical regions of the same name that were named before February 6, 1998.<sup>91</sup> Other than its few exceptions, the Ted Stevens Olympic and Amateur Sports Act allows for the USOC to enforce its rights and pursue remedies under the Lanham Act by seeking injunctive relief, monetary damages, defendant’s profits, and attorney’s fees.<sup>92</sup>

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<sup>88</sup> 15 U.S.C. § 1125(c)(2)(B) (“Dilution by blurring is association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark.”).

<sup>89</sup> *Id.* § 1125(c)(2)(C) (“Dilution by tarnishment is association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.”).

<sup>90</sup> 36 U.S.C. § 220506(a)(1–4).

<sup>91</sup> *Id.* § 220506(d).

<sup>92</sup> *See id.* § 220506(c) (stating that the USOC may file a civil action against a person for remedies provided in the Lanham Act); 15 U.S.C. § 1116(a) (2008) (injunctive relief); 15 U.S.C. § 1117(a) (monetary damages, defendant’s profits, and attorney fees).

### 3. Relevant Case Law Overview

The USOC has taken an active approach in protecting its trademark rights.<sup>93</sup> In 1987, the USOC went to the US Supreme Court to prohibit San Francisco Arts & Athletics, Inc. (SFAA) from promoting the “Gay Olympic Games” in advertisements and merchandise.<sup>94</sup> There, SFAA argued, *inter alia*, that the Amateur Sports Act merely grants the USOC the right to use the word “Olympic” and that it must also prove likelihood of confusion under the Lanham Act.<sup>95</sup> The Court ultimately rejected this argument and held that the legislative history associated with the Amateur Sports Act demonstrated that Congress intended to provide the USOC with exclusive control of the word “Olympic” and that the use of the word was not required to cause confusion.<sup>96</sup>

In *Gold Medal LLC v. USA Track and Field*, the US District Court for the District of Oregon provided some reasoning as to why the USOC can exclude others from using Olympic-themed marks.<sup>97</sup> There, the plaintiff brought an antitrust suit against the USOC and USA Track and Field (USATF), alleging that “the Defendants’ policy forbidding athletes from competing at the 2016 Olympic Trials in apparel bearing individual sponsorship is an illegal restraint of trade under section 1 of the Sherman Act.”<sup>98</sup> The court held that the USOC and USATF had implied immunity under the Amateur Sports Act and that Congress passed the federal law to secure financing for the US Olympic Team.<sup>99</sup> Further, the court stated that the United States is “the only nation that does not provide its Olympic team with federal funding or subsidies,” and that the United States must instead rely on the marketing and licensing revenue of the USOC to obtain the necessary financial resources “to organize Team USA and to compete in the Olympic Games.”<sup>100</sup>

The lower standard of confusion<sup>101</sup> associated with Olympic trademark infringement allows the USOC to have broad protections on its Olympic IP and further allows it to strictly enforce its marks throughout various forms of media.

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<sup>93</sup> See Darren Rovell, *USOC sends letter warning non-Olympic sponsor companies*, ESPN (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) (explains that the USOC and the IOC frequently send cease and desist letters to those who sponsor athletes but don’t have any sponsorship delegation with the IOC or USOC).

<sup>94</sup> *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 522 (1987).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 530.

<sup>97</sup> See 187 F. Supp. 3d 1219, 1228 (D. Or. 2016).

<sup>98</sup> *Id.* at 1221–1222.

<sup>99</sup> *Gold Medal LLC*, 187 F. Supp. 3d. at 1228.

<sup>100</sup> *Id.* (“As the only nation that does not provide its Olympic team with federal funding or subsidies, the United States instead relies on the USOC to raise the financial resources necessary to organize Team USA and to compete in the Olympic Games.”).

<sup>101</sup> See *S.F. Arts & Athletics*, 483 U.S. at 530 (“Congress intended to provide the USOC with exclusive control of the use of the word “Olympic” without regard to whether an unauthorized use of the word tends to cause confusion.”).

While the USOC has not often litigated against potential trademark infringers, it often sends cease-and-desist letters to many brands who it fears are infringing on Olympic marks and phrases.<sup>102</sup> However, some believe that the USOC has gone too far in the protection of its IP and has reduced online conversation associated with the Games.<sup>103</sup> In 2012, the USOC created controversy when it sent a cease-and-desist letter to a knitting website, Ravelry.com, for using the phrase “Ravelympics” in association with a knitting event held during the Olympics.<sup>104</sup> After receiving substantial backlash from the online knitting community, the USOC apologized for the tone of the cease-and-desist letter and decided not to take further legal action against the website.<sup>105</sup> With the USOC’s strict enforcement of its Olympic IP, many brands are fearful of engaging online during the Games because not only are Olympic-themed tweets, posts, and the use of certain hashtags banned, but retweets are also prohibited.<sup>106</sup>

## **B. South Korea Brand Protection Overview**

### **1. The Special Act**

Before the start of each Olympic Games, the IOC requires that each host city implement a system guarding against the misuse or infringement of its Olympic marks.<sup>107</sup> Particularly, the IOC requires that each host city enact comprehensive legislation that provides protection against ambush marketing and other marketing rights offenses.<sup>108</sup> In 2012, the Korean legislature enacted the Special Act in support of the 2018 PyeongChang Olympic Games.<sup>109</sup> The Special Act specifically

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<sup>102</sup> Rovell, *supra* note 93.

<sup>103</sup> Sharon Lin, *The Summer Olympics Are Not Winning Gold on Social Media*, ADWEEK (Aug. 11, 2016), <http://www.adweek.com/digital/sharon-lin-glassview-guest-post-olympics/> (noting that the IOC’s strict enforcement of its trademarks created a lack of social media conversations during the 2016 Summer Olympics).

<sup>104</sup> Mark Memmott, *After Knitters Get In a Twist, USOC Apologizes for ‘Cease and Desist’ Letter*, NPR (June 21, 2012, 1:55 PM), <http://www.npr.org/sections/thetwo-way/2012/06/21/155508908/after-knitters-get-in-a-twist-usoc-apologizes-for-cess-and-desist-letter>.

<sup>105</sup> *Id.*

<sup>106</sup> Birkner, *supra* note 74 (“You can’t share anything from official Olympic social media accounts. Even retweets are prohibited.”).

<sup>107</sup> Int’l Olympic Comm. [IOC], *Host City Contract: Operational Requirements*, at 193 (Dec. 2016), <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/Host-City-Elections/XXXIII-Olympiad-2024/Host-City-Contract-2024-Operational-Requirements.pdf> [hereinafter IOC, *Host City Contract*].

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

<sup>109</sup> Special Act on Support for the 2018 PyeongChang Olympic and Paralympic Winter Games, Act No. 11226, Jan. 26, 2012, *amended by* Act No. 14198, May 29, 2016, art. 1 (S. Kor.), *translated in* Korea Legislation Research Institute online database,

states that only the Organizing Committee shall use the title “the PyeongChang Organizing Committee for the 2018 Olympic and Paralympic Winter Games”<sup>110</sup> and that any entity that intends to use Olympic-related symbols, such as insignias and mascots, must obtain approval from the Organizing Committee in advance.<sup>111</sup> Anyone in violation of either of these two articles may be subject to imprisonment or an administrative fine up to fifty million won (approximately \$44,900).<sup>112</sup>

## 2. The Korean Trademark Act

Besides the protections that the Special Act provides, Korea’s Trademark Act also helps to provide legal protections for the IOC and its sponsors.<sup>113</sup> Under the Korean Trademark Act, one infringes if one uses a trademark that is identical or similar to another person’s registered trademark on goods that are identical or similar to the designated goods.<sup>114</sup> Additionally, one may also infringe if one delivers, sells, counterfeits, imitates, or possesses a trademark that is identical or similar to the registered trademark of another person for the purpose of causing a third party to use the trademark on goods that are identical or similar to the designated goods.<sup>115</sup> Trademark infringers in South Korea are subject to an injunction,<sup>116</sup> payment of damages,<sup>117</sup> and also potential imprisonment.<sup>118</sup> Specifically, a person who has infringed on a trademark right or exclusive license may be imprisoned for up to seven years or receive a maximum fine of 100 million won (approximately \$90,000).<sup>119</sup>

## 3. Korean Unfair Competition Prevention Act

The Korean Unfair Competition Prevention Act, together with the country’s Trademark Act, helps to protect brands against ambush marketing.

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[https://elaw.klri.re.kr/eng\\_mobile/viewer.do?hseq=38905&type=part&key=16](https://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=38905&type=part&key=16) [hereinafter Special Act].

<sup>110</sup> Special Act, art. 24.

<sup>111</sup> *Id.* art. 25.

<sup>112</sup> *Id.* art. 92 (administrative fine not to exceed five million won); Special Act, art. 89. (imprisonment with labor up to five years or a fine not to exceed 50 million won).

<sup>113</sup> See Republic of Korea Trademark Act, Act No. 71, Nov. 28, 1949, *amended by* Act No. 9678, May 21, 2009, *translated in* World Intellectual Property Organization online database, [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=214472](http://www.wipo.int/wipolex/en/text.jsp?file_id=214472) [hereinafter Korean Trademark Act].

<sup>114</sup> *Id.* art. 66(1)(i).

<sup>115</sup> *Id.* art. 66(1)(ii).

<sup>116</sup> *Id.* art. 65.

<sup>117</sup> *Id.* art. 67.

<sup>118</sup> See Korean Trademark Act, art. 93.

<sup>119</sup> *Id.* art. 93.



Specifically, the Unfair Competition Prevention Act protects sponsors against other brands that use the same or similar name, trade name, or emblem to cause confusion with a sponsor's commercial facilities or activities.<sup>120</sup> Additionally, the Act also prohibits individuals or businesses from using identical or similar marks that are used by international organizations, such as the IOC.<sup>121</sup> Any person that infringes on another's rights will be liable for up to three years of imprisonment or a maximum fine of thirty million won (approximately \$26,800).<sup>122</sup>

#### 4. Relevant Case Law Overview

While various trademark infringement cases have been litigated in South Korean courts, ambush marketing cases have yet to make an appearance.<sup>123</sup> As such, the IOC primarily relied on the civil and criminal penalties provided in South Korea's Special Act, the Trademark Act, and the Unfair Competition Prevention Act to limit the amount of ambush marketing in the 2018 PyeongChang Games.<sup>124</sup> In most instances, establishing a likelihood of confusion is important for proving trademark infringement; as such, South Korean courts consider the defendant's bad faith, evidence of actual confusion on the market, and the level of sophistication of consumers in its rulings.<sup>125</sup>

In *Dae Gyo Co., Ltd. v. Scholastic Inc.*, the Seoul Central District Court rejected a trademark infringement action brought by plaintiff, Dae Gyo Co., Ltd.<sup>126</sup> In the suit, the plaintiff alleged that Scholastic Inc. and its Korean distributor of its children's books, Biryongso Co., Ltd., infringed on the right of its registered trademark, "School Bus," by selling the popular American picture book, "The Magic School Bus."<sup>127</sup> First, the court determined that even if a trademark is a

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<sup>120</sup> Republic of Korea Unfair Competition Prevention and Trade Secret Protection Act, Act No. 911, Dec. 30, 1961, *amended by* Act No. 9537, Mar. 25, 2009, art. 2(1)(a-b), *translated in* World Intellectual Property Organization online database, [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=188269#LinkTarget\\_480](http://www.wipo.int/wipolex/en/text.jsp?file_id=188269#LinkTarget_480) [hereinafter Korean Unfair Competition Prevention Act].

<sup>121</sup> *Id.* art. 3.

<sup>122</sup> *Id.* art. 18(3).

<sup>123</sup> AM. BAR ASS'N, PROTECTING INTELLECTUAL PROPERTY AGAINST AMBUSH MARKETING, GREY MARKET AND COUNTERFEITING: KOREAN PERSPECTIVE 1 (2015), [https://www.americanbar.org/content/dam/aba/events/international\\_law/2015/03/2015%20Asia%20Forum/protecting4.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/events/international_law/2015/03/2015%20Asia%20Forum/protecting4.authcheckdam.pdf).

<sup>124</sup> *Id.*

<sup>125</sup> Angela Kim et al., *Trademark Litigation in South Korea: Overview*, THOMSON REUTERS (Oct. 1, 2017), [https://uk.practicallaw.thomsonreuters.com/w-010-7120?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/w-010-7120?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1).

<sup>126</sup> Kyung Jae Park, *Frizzled Trademark in Korea*, LIKELIHOOD OF CONFUSION (Nov. 28, 2012), <http://www.likelihoodofconfusion.com/frizzled-trademark-korea/>.

<sup>127</sup> *Id.*

foreign one, it shall be acknowledged if it is well-known in Korea.<sup>128</sup> It then concluded that the defendant's trademark should be viewed as a whole and be compared with the plaintiff's "School Bus" mark as to its similarity, and that the "School Bus" portion of "The Magic School Bus" should not be separated from the rest of the mark.<sup>129</sup> Under this analysis, the Seoul Central District Court ultimately rejected the trademark infringement claim because the plaintiff's "School Bus" mark was not similar to the defendant's "The Magic School Bus" mark based on appearance, pronunciation, and meaning.<sup>130</sup>

### **C. Japan Brand Protection Overview**

#### **1. The Japan Trademark Act**

The Tokyo Olympic Organizing Committee defines ambush marketing as the "unauthorized use, abuse, or misappropriation of marks associated with the Olympic and Paralympic Games and other IP."<sup>131</sup> Although the Japanese government has enacted special Olympic legislation, such legislation does not provide any solutions for eliminating or decreasing the amount of ambush marketing that occurs during the Games. Rather, the Japanese government aims to protect the IP interests of both the IOC and its sponsors through its Trademark Act and Unfair Competition Prevention Act (UPCA).<sup>132</sup> Any brand that uses a trademark that is identical or similar to a registered trademark for goods or services that are identical or similar to the designated goods or services is deemed an act of infringement of a trademark right.<sup>133</sup> As such, non-sponsors are restricted from using protected terms such as: Tokyo 2020 Games, Tokyo 2020, Games of the XXXII Olympiad, Olympian, and Olympiad.<sup>134</sup> Any person infringing on a protected trademark right or an exclusive right to use shall be punished by

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<sup>128</sup> Park, *supra* note 126 ("By 2007, defendant SCHOLASTIC INC. had sold approximately 53,000,000 million copies of books in *The Magic School Bus* series worldwide since it was first published . . .").

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

<sup>130</sup> *Id.*

<sup>131</sup> THE TOKYO ORG. COMM. OF THE OLYMPIC AND PARALYMPIC GAMES, BRAND PROTECTION: TOKYO 2020 GAMES 11 (2017), <https://tokyo2020.org/en/copyright/data/brand-protection-EN.pdf> [hereinafter TOKYO ORG. COMM.].

<sup>132</sup> See generally Shōhyō-hō [Trademark Act], Act No. 127 of 1959, translated in World Intellectual Property Organization online database, [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=188401](http://www.wipo.int/wipolex/en/text.jsp?file_id=188401) (Japan) [hereinafter Japan Trademark Act]; Fusei kyōsō bōshi-hō [Unfair Competition Prevention Act], Act No. 47 of 1993, translated in World Intellectual Property Organization online database, <http://www.wipo.int/wipolex/en/details.jsp?id=16034> (Japan) [hereinafter Japan Unfair Competition Prevention Act].

<sup>133</sup> Japan Trademark Act, art. 37(i).

<sup>134</sup> TOKYO ORG. COMM., *supra* note 131, at 8.

imprisonment not to exceed five years or receive a maximum fine of five million yen (approximately \$44,900).<sup>135</sup>

## 2. The Japan Unfair Competition Prevention Act

Like South Korea, Japan's UCPA protects brands and the IOC against ambush marketing.<sup>136</sup> Particularly, Japan's UCPA prohibits the commercial use of a mark of an international organization.<sup>137</sup> As the IOC is an international organization, brands may not use any protected Olympic marks without authorization from the IOC.<sup>138</sup> Any person in violation of the IOC's trademark rights is subject to punishment by imprisonment not to exceed five years or a maximum fine of five million yen (approximately \$44,900).<sup>139</sup> According to Article 2(1)(i) of the UCPA, one may also be liable for infringement if one creates confusion with another person's goods or business by using an indication of goods or business that is identical or similar to the other person's indication of goods or business that is well-known among consumers.<sup>140</sup> To establish confusion under Article 2(1)(i), the two parties at issue must be in competition.<sup>141</sup> However, under Article 2(1)(ii), Japan's unofficial dilution statute, the confusion standard is eliminated and a party need only have a famous mark to establish trademark infringement.<sup>142</sup> Additionally, under Article 2(1)(ii), a party need not be in competition with a third party to enforce its trademark rights.<sup>143</sup> The punishment for trademark infringement of a well-known or famous good is also a maximum of five years of imprisonment or a maximum fine of five million yen (approximately \$44,900).<sup>144</sup>

## 3. Relevant Case Law Overview

Due in part to the vague wording in Japan's UCPA, there have been very few Japanese cases on trademark infringement or dilution.<sup>145</sup> Through a limited amount of trademark cases, Japanese courts have attempted to speak on the

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<sup>135</sup> Japan Trademark Act, art. 78-2.

<sup>136</sup> See Japan Unfair Competition Prevention Act, art. 17.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* art. 21(2)(vii).

<sup>140</sup> *Id.* art. 2(1)(i).

<sup>141</sup> Kenneth L. Port, *Trademark Dilution in Japan*, 4 NW. J. TECH. & INTELL. PROP. 228, 233 (2006).

<sup>142</sup> Japan Unfair Competition Prevention Act, art. 2(1)(ii).

<sup>143</sup> Port, *supra* note 141, at 233.

<sup>144</sup> Japan Unfair Competition Prevention Act, art. 21(2)(i).

<sup>145</sup> Port, *supra* note 141, at 247.

differences between Articles 2(1)(i) and 2(1)(ii) of the UCPA. In *Levi Strauss & Co. v. K.K. Edwin Mfg.*, the Tokyo High Court held that the stitching in the defendant's jeans resembled the stitching of a particular model of jeans made by Levi Strauss & Co.<sup>146</sup> Before that holding, the Tokyo District Court, one of Japan's lower courts, found that the plaintiff's stitching was famous because 18.3% of national respondents could correctly identify the unique stitching as belonging to the plaintiff.<sup>147</sup> However, in *Advance Magazine Publishers, Inc. v. Puropasuto*, the Tokyo District Court held that *Vogue*, a magazine published by the plaintiff, was well-known but not famous.<sup>148</sup> There, the court noted that the term "vogue" was a rather distinctive name in Japan and therefore was a well-known mark under Article 2(1)(i).<sup>149</sup> However, the court concluded that the term was not famous under Article 2(1)(ii) because it was limited to only those who read fashion magazines.<sup>150</sup>

The limited case law and different standards of review under Articles 2(1)(i) and 2(1)(ii) can pose various issues for brands, and especially Olympic sponsors. The rather subjective and unclear line between what is well-known versus what is famous will no doubt have an effect on any potential ambush marketing litigation.

## VI. THE IMPACT OF BRAND PROTECTION LAWS IN THE 2018 AND 2020 OLYMPICS

### A. Brand Protection Laws: A Comparative Analysis

As the only country that does not receive direct government funding for its Olympic teams, the United States is heavily focused on protecting the IP rights of its sponsors.<sup>151</sup> While both South Korea and Japan enacted Olympic-specific legislation for the 2018 Winter Olympics and the upcoming 2020 Summer Olympics, respectively, the United States has had Olympic-specific legislation in place since 1978.<sup>152</sup> Unlike South Korea and Japan, who both rely primarily on their respective trademark and unfair competition prevention acts to protect against ambush marketing, the United States' Olympic and Amateur Sports Act supplements the Lanham Act, providing for lower standards of confusion in matters

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<sup>146</sup> Port, *supra* note 141, at 244 (citing 1788 HANREI JIHO 103 (Tokyo High Ct., Dec. 26, 2001)).

<sup>147</sup> *Id.* at 235 (citing 1032 HANREI TAIMUZU 281 (Tokyo Dist. Ct., Dec. 6, 2000)).

<sup>148</sup> *Id.* at 246 (citing 1890 HANREI JIHO 127 (Tokyo Dist. Ct., July 2, 2004)).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 246.

<sup>151</sup> *Gold Medal LLC*, 187 F. Supp. 3d. at 1228.

<sup>152</sup> *See generally* 36 U.S.C. § 220501 et seq.

concerning the USOC.<sup>153</sup> Additionally, and similar to the dilution statute in the Lanham Act, Japan's UCPA also provides that brands with famous marks need not necessarily establish a likelihood of confusion to obtain relief.<sup>154</sup> On the other hand, South Korea's Trademark and Unfair Competition Prevention acts do not discuss trademark dilution of famous marks (e.g. Olympic marks).<sup>155</sup> While international organizations such as the IOC may receive statutory protection of their marks,<sup>156</sup> other famous brands in South Korea may not be so fortunate. Due to South Korea's lack of a dilution statute, it may be more difficult for famous mark-holders to win on a trademark infringement suit.

Besides varying likelihood of confusion standards, brand protection laws in the United States, South Korea, and Japan also provide different liabilities and damages standards. While the Lanham Act only provides criminal liability related to the trafficking of counterfeit goods or services<sup>157</sup> and cybersquatting actions,<sup>158</sup> South Korean and Japanese brand protection laws state that any type of trademark infringement may result in criminal liability.<sup>159</sup> Other than in specific counterfeit and cybersquatting actions, plaintiffs in US trademark infringement suits may only obtain injunctive relief and monetary damages.<sup>160</sup> Plaintiffs in trademark infringement suits in both South Korea and Japan may also receive civil remedies, similar to those a plaintiff might receive in the US.<sup>161</sup>

## **B. Non-Sponsor Brands Continue their Ambush**

While the Rio Olympics did not see the overt, on-site ambush marketing campaigns that plagued previous Olympic Games,<sup>162</sup> ambush marketing through media outlets and other social channels made an appearance.<sup>163</sup> Companies such as Under Armour and Puma skirted Rio's strict ambush marketing laws through an

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<sup>153</sup> See *S.F. Arts & Athletics, Inc.*, 483 U.S. at 522 (noting that the USOC is not required to show a likelihood of confusion in matters where its control of the mark, "Olympic," are at issue).

<sup>154</sup> See Japan Unfair Competition Prevention Act, art. 2(1)(ii).

<sup>155</sup> See Korean Trademark Act, art. 66; see Korean Unfair Competition Prevention Act, art. 2(1).

<sup>156</sup> Korean Unfair Competition Prevention Act, art. 3.

<sup>157</sup> 18 U.S.C. § 2320 (a)–(b) (2016).

<sup>158</sup> 15 U.S.C. § 1117(d).

<sup>159</sup> See Korean Trademark Act, art. 93; see Japan Trademark Act, art. 78–2.

<sup>160</sup> See 15 U.S.C. § 1125(a)(1) (no trademark registration required); see 15 U.S.C. § 1114(1)(a) (trademark registration required).

<sup>161</sup> *Id.*

<sup>162</sup> See McKelvey, *supra* note 12 (noting that Kodak turned the Los Angeles Memorial Coliseum into a sea of yellow and red banners and Kodak signage); see Klara, *supra* note 12 ("Nike also distributed flags to fans, guaranteeing that its swoosh logo would be in full view all over the property.").

<sup>163</sup> See Thieringer, *supra* note 50; see Birkner, *supra* note 45.

effective implementation of television and social-media ads that leveraged their well-known endorsers.<sup>164</sup> The Australian Federal Court recently resolved a high-profile ambush marketing case that originated in the lead-up to the 2016 Rio Games.<sup>165</sup> There, the Australian Olympic Committee (AOC) lost on appeal to an Australian telecommunications company, Telstra, alleging that the company used ambush marketing campaigns that violated Australia's Olympic Insignia Protection Act (OIPA) and Australian Consumer Law (ACL).<sup>166</sup> The AOC argued that Telstra leveraged its former Olympic sponsorship<sup>167</sup> and used its partnership with official Australian Olympic broadcaster, Seven Network, to deceive consumers into thinking it was still an official Olympic sponsor.<sup>168</sup> However, this argument failed, for the court found that "[t]he marketing material [did] not clearly show an intention on the part of Telstra to suggest that it had a sponsorship-like relationship with the Olympics."<sup>169</sup>

Ambush marketing continued to frustrate Olympic organizers in the months leading up to the 2018 PyeongChang Games. In December 2017, the South Korean OCOG sent Korean telecom company, SK Telecom, two cease-and-desist letters, alleging that the telecommunications company engaged in ambush marketing tactics.<sup>170</sup> SK Telecom, Korea's largest mobile carrier, had recently unveiled various clips of Korean figure skater, Kim Yu-na, and skeleton racer, Yun Sung-bin, to promote South Korea's first winter games.<sup>171</sup> The telecommunications company then aired the clips in three campaigns on local news stations.<sup>172</sup> Fearing the campaign would adversely affect the sponsorship rights of KT, Korea's largest fixed-line operator and the only official telecom sponsor of the PyeongChang Games, the South Korean OCOG asked the two Korean broadcast stations to stop airing the clips.<sup>173</sup>

In January 2018, the South Korean OCOG ordered South Korean entertainment company, FNC Entertainment, to delete articles that associated one

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<sup>164</sup> Thieringer, *supra* note 50 (explaining how Puma utilized Usain Bolt's victory in the 100-meter dash to ambush the 2016 Olympics); Birkner, *supra* note 45 (noting how Under Armour used the expanded Rule 40 guidelines to its advertising advantage).

<sup>165</sup> Corinne Reichart, *AOC loses court battle over Telstra Olympics ads*, ZDNET (Oct. 24, 2017, 11:13 PM), <http://www.zdnet.com/article/aoc-loses-court-battle-over-telstra-olympics-ads/>.

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

<sup>167</sup> *Id.* (noting that Telstra was an Olympic sponsor from 1990-2012, until it was replaced by Optus).

<sup>168</sup> *Id.* (noting that Telstra used its partnership with Seven Network as a backdoor channel to associate itself with the Games).

<sup>169</sup> *Id.*

<sup>170</sup> Kang Seung-woo, *Olympics hit by ambush marketing*, THE KOREA TIMES (Dec. 7, 2017, 8:01 PM), [http://www.koreatimes.co.kr/www/tech/2017/12/133\\_240550.html](http://www.koreatimes.co.kr/www/tech/2017/12/133_240550.html).

<sup>171</sup> *Id.* (noting that the ads ended with the phrase, "SEE YOU in PyeongChang").

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

<sup>173</sup> Seung-woo, *supra* note 170 (it is unclear as to whether SK Telecom cooperated with the South Korean OCOG).

of its clients with the 2018 PyeongChang Olympics.<sup>174</sup> On January 3, South Korean band, N.Flying, notably said that they hoped their new song entitled, *Hot Potato*, “gives strength to everyone working hard for the PyeongChang Olympics, and [that] we want it to be used as a cheer song.”<sup>175</sup> Concerned that the song could become the official cheer song for the Olympics, the South Korean OCOG declared that FNC Entertainment engaged in illegal ambush marketing by associating itself with the Olympics even though it was not a sanctioned sponsor.<sup>176</sup>

During the PyeongChang Olympics, a few brands used ad campaigns on social-media and television to ambush the Games. Most notably, Planet Fitness angered the USOC with its ad campaign that featured everyday “Olympians” from Olympia, Washington.<sup>177</sup> After the USOC requested that the initial video be removed, Planet Fitness replaced it with another similar ad that depicted a mock press conference explaining why they needed to take the video down.<sup>178</sup> Unlike Planet Fitness, California Almonds played it a little safer with their ad campaign.<sup>179</sup> In an ad entitled “You and Almonds vs. Chore-Time Boredom,” California Almonds depicted a mother and her children cleaning a floor, in an act that resembled Olympic curling.<sup>180</sup> Finally, Under Armour built on its “Unlike Any” campaign to highlight US Olympic Skier, Lindsey Vonn.<sup>181</sup> Under Armour was again not an Olympic sponsor, but took advantage of the Rule 40 waiver process to incorporate its ad into the Olympic conversation and highlight the perseverance of the Olympic skier.<sup>182</sup>

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<sup>174</sup> *FNC Entertainment ordered by Olympic Committee to delete ambush marketing articles featuring N.Flying*, ALLKPOP (Jan. 10, 2018), <https://www.allkpop.com/article/2018/01/fnc-entertainment-ordered-by-olympic-committee-to-delete-ambush-marketing-articles-featuring-nflying>.

<sup>175</sup> *Id.* (it is unclear as to whether FNC Entertainment cooperated with the South Korean OCOG’s cease and desist request).

<sup>176</sup> *Id.* (noting that PyeongChang is located in the Gangwon-do Province of South Korea and that the province is renowned for its agricultural products, including potatoes).

<sup>177</sup> Rolf Boone, *Planet Fitness video about ‘Olympians’ runs afoul of U.S. Olympic Committee*, THE OLYMPIAN (Feb. 16, 2018, 7:00 PM), <http://www.theolympian.com/news/local/article200393459.html>.

<sup>178</sup> Mike O’Brien, *Who gets the gold? The best marketing from the PyeongChang Winter Olympics*, CLICKZ (Feb. 26, 2018), <https://www.clickz.com/best-marketing-pyeongchang-olympics/210673/> (the ad shows the sharp contrast between trademark law and creative advertising).

<sup>179</sup> *See California Almonds TV Commercial: ‘You and Almonds vs. Chore-Time Boredom.’* ISPOT.TV, <https://www.ispot.tv/ad/wJyJ/california-almonds-you-and-almonds-vs-chore-time-boredom?autoplay=1> (last visited Mar. 1, 2018).

<sup>180</sup> *Id.* (noting that the ad aired 771 times nationally, most recently on Mar. 27, 2018).

<sup>181</sup> Alexandra Jardine, *Lindsey Vonn Gets Poetic About Her Injuries In Under Armour’s Winter Olympics Spot*, ADAGE (Feb. 6, 2018), <http://creativity-online.com/work/under-armour-lindsey-vonnunlike-any/53841>.

<sup>182</sup> *See Team USA Sponsors*, UNITED STATES OLYMPIC COMMITTEE, <https://www.teamusa.org/sponsors> (last visited Mar. 1, 2018) (Under Armour is not listed as a USOC sponsor).

The presence of high-profile ambush marketing cases in both the Rio and PyeongChang Olympics showcases a potentially concerning trend for sponsors. The ability for companies to sponsor local broadcast networks that have exclusive rights to broadcast the Olympics may become a less expensive alternative than an actual Olympic sponsorship.<sup>183</sup> With the absence of strict ambush marketing laws in Japan, and no Olympic-specific legislation barring ambush marketing, it is likely that both ambush marketing by association and ambush marketing by intrusion will yet again make a comeback in the upcoming 2020 Games.<sup>184</sup> With the current rules and laws in place, brands will continue to test the IOC's and NOC's abilities to enforce their trademark rights. For many brands, spending millions of dollars on an Olympic sponsorship is simply not worth it.<sup>185</sup> With so few ambush marketing cases being litigated,<sup>186</sup> it appears that for many brands, it is more worthwhile to create a risky advertisement and deal with the effects of a cease-and-desist letter than it is to spend millions of dollars on an Olympic sponsorship.<sup>187</sup> While trademark and unfair competition prevention laws may provide the IOC and other country-specific Olympic entities with necessary protections to litigate against infringers, they will likely not be enough to eliminate or even decrease ambush marketing on-site or through social channels. Ambush marketing is likely here to stay, so it is up to the IOC and other country-specific Olympic entities to develop solutions to limit it.

### **C. The Impact of the Revised Rule 40**

#### **1. Updated Rule 40's Impact on Brands Large and Small**

For some brands, the changes made to Rule 40 had a positive impact on their marketing strategies.<sup>188</sup> For others, the changes perpetuated a lack of advertising exposure.<sup>189</sup> Under Armour proved to be one of the biggest winners

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<sup>183</sup> Reichart, *supra* note 165 (noting that Telstra used Australia's Olympic broadcast station to air its ads); Seung-woo, *supra* note 170 (noting that SK Telecom used local news stations to air potential ambush marketing ads).

<sup>184</sup> See *supra* Part V, Section C.

<sup>185</sup> See, e.g., Liana B. Baker & Karolos Grohmann, *McDonald's ends Olympic sponsorship deal early*, REUTERS (June 16, 2017, 4:49 AM), <https://www.reuters.com/article/us-olympics-mcdonalds/mcdonalds-ends-olympics-sponsorship-deal-early-idUSKBN1971HB> (noting that many restaurant industry executives believed that McDonald's return on its Olympic sponsorship investment was one of the main reasons for the early termination of its agreement).

<sup>186</sup> See generally *supra* Part V.

<sup>187</sup> See, e.g., Boone, *supra* note 177.

<sup>188</sup> See Birkner, *supra* note 45 (discussing that Under Armour benefitted from Rule 40's new waiver requirements).

<sup>189</sup> See Rovell, *supra* note 93.



from the relaxed Rule 40 with the release of its “Rule Yourself” campaign.<sup>190</sup> The ad centered on Michael Phelps, the most decorated Olympic athlete, training for his final Olympics.<sup>191</sup> Besides creating one of the most viewed ad campaigns during the 2016 Rio Games,<sup>192</sup> Under Armour reported a 2.3% increase in stock growth and a 28% increase in revenue during the second quarter of 2016.<sup>193</sup> However, smaller companies, like athletic apparel company Oiselle, felt that the new Rule 40 amendments remained too restrictive when viewed against the limited resources of small businesses.<sup>194</sup> Oiselle’s owner and CEO, Sally Bergesen, noted that the timing associated with the submittal of ads was too constricting on her small business and that running an ad campaign months in advance of the Olympics was cost prohibitive.<sup>195</sup> For Oiselle, the waiver process continues to be burdensome and tends to favor larger companies over smaller ones.<sup>196</sup> Smaller brands generally endorse lower-profile athletes and do not have the luxury of knowing if their athlete endorsers will even qualify for an event six to eight months before the Olympic Games.<sup>197</sup> On the other hand, larger companies like Under Armour generally have larger marketing budgets and a greater collection of marquee Olympics athletes that it can rely on to qualify for the Games.<sup>198</sup>

## 2. Updated Rule 40’s Impact on Athletes

The expanded Rule 40 has the potential to improve the welfare of Olympic athletes, as it may provide many Olympians with an additional revenue stream.<sup>199</sup>

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<sup>190</sup> Birkner, *supra* note 45.

<sup>191</sup> *Id.*

<sup>192</sup> See Wally Peterson, *Medal Winning Social Media Campaigns from the Olympics*, SENDIBLE INSIGHTS (Sept. 2, 2016), <http://sendible.com/insights/winning-olympics-social-media-campaigns>.

<sup>193</sup> Victoria Craw, *Rio changes the game for Olympic sponsorship with controversial exemption for athletes*, NEWS.COM.AU (Aug. 17, 2016, 3:01 PM), <http://www.news.com.au/sport/olympics/team-sports/rio-changes-the-game-for-olympic-sponsorship-with-controversial-exemption-for-athletes/news-story/ddc43e49d85c90048751783fbb7957f7>.

<sup>194</sup> Birkner, *supra* note 45.

<sup>195</sup> *Id.* (“The 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>196</sup> *Id.* (noting that Oiselle sponsored 15 Olympic hopefuls during the 2016 Rio Olympics).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* (“A company like Under Armour can do that because they know that Michael Phelps is going to be in the Games.”).

<sup>199</sup> Zach Schonbrun, *Olympics Ease an Ad Blackout and Brands Flood the Field*, N.Y. TIMES, July 3, 2016, <https://www.nytimes.com/2016/07/04/business/media/olympics-ease-an-ad-blackout-and-brands-flood-the-field.html?mcubz=0>; Marty Swant, *5 U.S. Olympians*

For Team USA athletes, such as Olympic beach volleyball player Kerri Walsh Jennings, sponsorships are essential to earning a livable wage.<sup>200</sup> The costs of sending an athlete to the Olympics are in the hundreds of thousands of dollars, so any additional monetary support is both welcomed and encouraged.<sup>201</sup> However, even with the relaxation of Rule 40, it is still difficult for many athletes to acknowledge sponsors that have provided them with gear and monetary capital to make their trip to the Olympics special and worthwhile.<sup>202</sup> Before the non-sponsor blackout in the 2016 Rio Olympics, many athletes took to social-media to thank their sponsors one last time before they could no longer communicate online.<sup>203</sup> Among these athletes included US steeplechaser, Emma Colburn, who tweeted: “#Rule40 starts tomorrow so I won’t be able to say Thank You to my sponsor. THANK YOU FOR EVERYTHING @newbalance.”<sup>204</sup> After the blackout period, US Olympian Jeff Porter posted a photo with Nike shoes on his Instagram account and, with his caption, thanked his sponsor without explicitly referencing the shoe company: “Now I’m ready to head to Rio! Because of #rule40 I can’t say much more than that but thanks \*\*\*\* for sending these to me.”<sup>205</sup>

### 3. Updated Rule 40’s Impact on Olympic Sponsors

As much as athletes and non-Olympic sponsors are affected by Rule 40, the rule serves to protect the value of sponsorships and, more importantly, Olympic IP.<sup>206</sup> With the addition of the waiver process, the IOC is sanctioning various forms

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*You Should Follow on Social Media During the Summer Games*, ADWEEK (June 28, 2016), <http://www.adweek.com/brand-marketing/5-us-olympians-you-should-follow-social-media-during-summer-games-172239/> (“As the most decorated Olympian of all time, Phelps’ six Instagram posts for Under Armour have generated \$278,000 in marketing value for the company . . .”).

<sup>200</sup> See Schonbrun, *supra* note 199 (“Not everyone can be an N.B.A. athlete . . . . Our partnerships are essential to what we do.”).

<sup>201</sup> Rovell, *supra* note 93 (noting that it can cost about \$300,000 to send an Olympic athlete to the Games, and that the USOC will only reimburse some athletes about 1% of those costs).

<sup>202</sup> Susan Krashinsky, *Brooks launches ad campaign protesting Olympics advertising rules*, THE GLOBE AND MAIL (Aug. 4, 2016), <https://beta.theglobeandmail.com/report-on-business/industry-news/marketing/brooks-launches-ad-campaign-protesting-olympic-advertising-rules/article31284773/?ref=http://www.theglobeandmail.com>.

<sup>203</sup> See Chavez, *supra* note 68.

<sup>204</sup> *Id.* (citing Emma Coburn (@emmajcoburn), TWITTER (July 26, 2016, 10:49 AM), <https://twitter.com/emmajcoburn/status/757996240152002560>).

<sup>205</sup> Krashinsky, *supra* note 202 (citing Jeff Porter (@jeffporter1), INSTAGRAM (Aug. 4, 2016), <https://www.instagram.com/p/BIsfaalhKue/>).

<sup>206</sup> See Rovell, *supra* note 93 (“United States Olympic Committee sent letters to those who sponsor athletes but don’t have any sponsorship designation with the USOC or International Olympic Committee, warning them about stealing intellectual property”).

of ambush marketing and making it easier for non-sponsor brands to enter into the Olympic conversation.<sup>207</sup> Although Olympic sponsors have an advantage over non-sponsors, in that they can advertise using Olympic IP, consumers will no longer be able to distinguish a sponsor from a non-sponsor because of the cluttered sponsorship landscape.<sup>208</sup> While the use of Olympic logos still offers great value to sponsors, ordinary consumers will generally not be able to tell the difference between what ad is for an Olympic sponsor and what is not.<sup>209</sup> Some sponsors, such as former Team USA sponsor, Citigroup, have exclusive rights to buy ads from NBC that may also exclude other advertisers from certain categories for the entire Games.<sup>210</sup> However, even with network-exclusive advertising deals, Olympic sponsors are still threatened by social-media platforms, especially with the expanded Rule 40.<sup>211</sup> With Under Armour's "Rule Yourself" ad becoming the second-most shared Olympic spot of 2016, and the fifth-most shared Olympics ad of all time, sponsors have reason to worry about the value of their sponsorships and the long-term effects of the updated Rule 40.<sup>212</sup>

#### 4. Could Another Change be Coming to Rule 40?

In December 2017, Germany's Federal Cartel Office, the *Bundeskartellamt*, warned the IOC that Rule 40 violated its antitrust laws by prohibiting athletes from licensing their names and likenesses for advertising during competition.<sup>213</sup> The office noted that the IOC's advertising restrictions could amount to an abuse of power and that it would consider whether a loosening of the rules would fix such a problem.<sup>214</sup> Particularly, the IOC agreed to limit the application of Rule 40 to German athletes, allowing non-official sponsors to congratulate German athletes for their performances and for German athletes to post

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<sup>207</sup> Schonbrun, *supra* note 199 (citing John Grady, associate professor of sports law the University of South Carolina).

<sup>208</sup> *Id.*

<sup>209</sup> Birkner, *supra* note 45.

<sup>210</sup> Schonbrun, *supra* note 199 ("We believe in the power of the Olympic rings, and we believe in our exclusive buy with NBC."); Reuters, *NBC Has Already Sold \$1 Billion in Ads for the Rio Olympics*, FORTUNE (Mar. 29, 2016), <http://fortune.com/2016/03/29/nbc-rio-ads-olympics/>.

<sup>211</sup> See Schonbrun, *supra* note 199.

<sup>212</sup> Katie Richards, *Why Under Armour's Michael Phelps Ad is One of the Most Shared Olympics Spots Ever*, ADWEEK (Aug. 11, 2016), <http://www.adweek.com/brand-marketing/why-under-armours-michael-phelps-ad-one-most-shared-olympics-spots-ever-172931/>.

<sup>213</sup> Adam Rhodes, *German Watchdog Eyes IOC Plan to Loosen Athlete Ad Rules*, LAW 360 (Dec. 21, 2017, 5:19 PM), <https://www.law360.com/articles/997330/german-watchdog-eyes-ioc-plan-to-loosen-athlete-ad-rules>.

<sup>214</sup> *Id.*

“thank you” messages to their sponsors.<sup>215</sup> Additionally, if the IOC, Germany’s NOC, or the South Korean OCOG tweets about a German success, “the athlete will be able to retweet and put a ‘thank you’ post in it or a message for their sponsors.”<sup>216</sup> The IOC’s loosening of Rule 40 for Germany is a small win for other Olympic athletes and their sponsors, as it provides some hope that a less-restrictive Rule 40 may be on the horizon.

## VII. WHAT’S NEXT? EXAMINING POSSIBLE SOLUTIONS TO THE OLYMPIC AMBUSH MARKETING PROBLEM

### A. Model Ambush Marketing Law that Governs Each Olympic-Participating Country

As companies become more creative with content and ways with which they deliver that content, Olympic stakeholders and governing bodies need to find ways to respond to protect the integrity of current Olympic sponsorships. Through social-media and the revised Rule 40, which allows for sanctioned ambush marketing, the value and exclusivity of Olympic sponsorships has decreased.<sup>217</sup> Although the IOC requires that each host city implement a system guarding against the misuse or infringement of its Olympic marks, this requirement is vague and may allow too much autonomy for competing and host countries.<sup>218</sup> Rather, the IOC should require that each host city and all participants enact a model law that explicitly outlaws ambush marketing by both intrusion and association. This will provide a set of baseline laws that will no longer require that participating countries completely rely on their respective trademark or unfair competition prevention laws, which are in most cases vague and do not specifically address ambush marketing.<sup>219</sup> While countries may choose to offer more than the minimum amount of protection set forth in a model ambush marketing law, such an adoption will likely provide more consistency to both brands and countries alike.

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<sup>215</sup> Associated Press, *Hold that tweet: Athletes tiptoe around Olympic do’s, don’ts*, USA TODAY, Feb. 10, 2018, 5:12 AM, <https://www.usatoday.com/story/sports/olympics/2018/02/10/hold-that-tweet-athletes-tiptoe-around-olympic-dos-donts/110288478/> [hereinafter Associated Press, *Hold that tweet*].

<sup>216</sup> Associated Press, *Hold that tweet*, *supra* note 215.

<sup>217</sup> Birkner, *supra* note 45.

<sup>218</sup> IOC, *Host City Contract*, *supra* note 107.

<sup>219</sup> *See generally* Japan Trademark Act; *see generally* Japan Unfair Competition Prevention Act; *see generally* Korean Trademark Act; *see generally* Korean Unfair Competition Prevention Act.

## **B. Social-Media-Only Sponsorships**

Social-media continues to pose problems for Olympic sponsors and the IOC. Non-sponsors often use social networking sites such as Twitter, Facebook, Instagram, and Snapchat to interact with potential customers and broaden their reach by associating the Olympics with their respective brands.<sup>220</sup> Instead of developing ways to combat the use of non-sponsor social-media posts, the IOC and Olympic-participating countries should embrace social-media and develop another sponsorship category. Social-media-only sponsorships will allow the IOC to broaden its sponsorship base, limit social-media-based ambush marketing campaigns, and regulate a growing problem. Priced significantly lower than a normal TOP or NOC-based sponsorship, social-media-only sponsorships will allow for these sponsors to only use Olympic IP for social-media posts.

Such a sponsorship has the ability to provide the IOC and NOC's with a variety of opportunities for revenue in one sponsorship package. First, a social-media-only sponsor will need to purchase a social-media sponsorship that will act as a license to use Olympic IP<sup>221</sup> exclusively on social-media. This will likely be a flat fee that all social-media-only sponsors must purchase. Second, prior to each Olympics, social-media-only sponsors will need to purchase social-media slots that will provide them with a set number of posts to use Olympic IP on Twitter, Facebook, Instagram, or Snapchat. For example, a company that purchases five social-media slots will be allowed to post a total of five updates that include Olympic IP, on any sanctioned social-media outlet. Companies will only have one opportunity to purchase ad slots,<sup>222</sup> and any company that exceeds its purchased limit will be fined and be required to take down any posts in excess of its limit.

Social-media-only sponsorships will help regulate ambush marketing across social-media channels by sanctioning ambush marketing in limited amounts. Such a sponsorship will allow the IOC and NOCs to continue to protect the IOC's marks while also allowing it to shift some of its focus away from social-media enforcement. Additionally, companies that do not wish to invest large amounts of capital into a TOP or high-valued NOC sponsorship still have the opportunity to enter the social-media conversation without risk of infringement. In sum, a social-media-only sponsorship will allow the IOC and NOC's to add an additional marketing revenue stream, regulate the use of the IOC's marks on social-media, and also create a livelier and more diverse social-media conversation.

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<sup>220</sup> See *supra* Part II; Boone, *supra* note 177.

<sup>221</sup> To limit association with Olympic IP, it will likely be in the best interest for the IOC and NOC's to allow social-media only sponsors to exclusively use Olympic word marks, and not Olympic insignia, on such posts.

<sup>222</sup> This will help the IOC to signal to its TOP sponsors that it still values their sponsorships, but at the same time will allow social-media-only sponsors to be more strategic in how they use their posts.

### **C. A More Limited Interpretation of Rule 40**

Another viable option would be to limit the interpretation of Rule 40 by eliminating the waiver process. Although the IOC may have intended for the expanded Rule 40 to benefit the athletes, while also keeping sponsorship exclusivity, it has not managed to do that.<sup>223</sup> The waiver process has allowed larger companies, with a large stable of Olympic endorsers, to legally ambush the Games, while also creating a barrier to entry for smaller brands with much fewer Olympic endorsers.<sup>224</sup> Instead, the IOC should level the marketing playing field and only allow sanctioned Olympic sponsors to advertise during the Games using the likeness of their endorsers.

However, an exact shift back to the pre-2016 interpretation of Rule 40 may result in the same pre-2016 ambush marketing issues. As such, and with a model law, the IOC should dis-incentivize the practice of ambush marketing by imposing harsher penalties (civil and criminal) on brands that do not adhere to enacted ambush marketing laws. Furthermore, and in an effort to provide greater benefits to athletes, the IOC should encourage countries to increase their government funding<sup>225</sup> to Olympic athletes so that they are less reliant on endorsement deals. With increased stipends, Olympic athletes may use endorsement deals as a source of extra income instead of income necessary for survival. As such, non-sanctioned Olympic sponsors and their athlete endorsers will be less inclined to use ambush marketing as a means to illegally join the Olympic conversation.

### **D. An Expanded Interpretation of Rule 40**

Instead of limiting the interpretation of Rule 40, another option would be to expand it. Before the start of the 2018 Winter Olympics in PyeongChang, the IOC relaxed the interpretation of Rule 40 for German athletes.<sup>226</sup> Most notably, German athletes were able to generically advertise for their sponsors, greet their sponsors on social-media, and retweet content<sup>227</sup> as long as they steered clear of using Olympic terminology, symbols, and hashtags.<sup>228</sup>

The relaxed restrictions for German athletes essentially acted as a fair-use exception for congratulatory athlete and sponsor posts on social-media. As such, the IOC should consider adopting the relaxed Rule 40 interpretations it had for

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<sup>223</sup> See Rovell, *supra* note 93.

<sup>224</sup> *Id.*; Associated Press, *Hold that tweet*, *supra* note 215.

<sup>225</sup> See, e.g., *Gold Medal LLC*, 187 F. Supp. 3d. at 1228 (“As the only nation that does not provide its Olympic team with federal funding or subsidies, the United States instead relies on the USOC to raise the financial resources necessary to organize Team USA and to compete in the Olympic Games.”).

<sup>226</sup> See *supra* Part VI, Section C.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* (Use of Terminology such as “Olympics,” “Gold/Silver/Bronze medals,” and “#PyeongChang2018” was still prohibited).

Germany for the rest of the Olympic-participating countries. While providing a more liberal interpretation of Rule 40 may not help the IOC's relationships with its main sponsors, it will provide its athletes with more advertising opportunities, and in turn a higher level of income. Allowing for generic congratulatory posts and providing athletes and their sponsors the ability to retweet achievements may not help with sponsorship exclusivity, but it can help to limit ambush marketing and provide greater benefits for the athletes.

## VII. CONCLUSION

Social-media has allowed many brands to take their marketing and ambush marketing efforts to new heights. Although on-site ambush marketing by intrusion has made appearances in recent Olympics, it is being overshadowed by the opportunistic nature of many brands who insert themselves into the Olympics conversation. With the widespread reach of the internet, the IOC, Olympic sponsors, and participating countries are facing an uphill battle for sponsorship exclusivity. The differences in both principle and function between creative advertising and the Olympic sponsorship program is currently so vast. If the IOC and other Olympic governing bodies are able to lessen that gap between these two schools of thought—whether it be through more sanctioned ambush marketing, fair use exceptions, or expanded sponsorship categories—they will likely help limit ambush marketing to a negligible level. While more laws and regulations are some options to help eliminate ambush marketing, they are not necessarily worthwhile ones. Creative advertisers will find a way to skirt around laws and maximize brand exposure, so it is up to Olympic governing bodies to accept this as a fact and adapt to the dynamic nature of marketing.

