



The Pledge to Brand Loyalty: A Gold Medal Approach to Rule 40

James Schwabe*

“[A]dvertising can in itself create prestige, differentiation, or association that may change the utility a consumer obtains from consuming a product.”¹

“I pledge allegiance to [the] Swoosh of the United States of Nike, and to the Republic for which it stands, one Nation under Phil Knight, indivisible, with liberty and justice for Michael Jordan, FuelBrands, and cute running shorts.”²

INTRODUCTION

Every four years, elite athletes from around the world come together to compete in a tradition that started over one hundred and fifty years ago. Over that time period, competition in the arenas has spurred furious battles

* J.D., University of Notre Dame Law School, 2017; B.A., Butler University, 2014. I would like to thank Associate Dean Ed Edmonds for his invaluable guidance and inspiration throughout the research and writing process of this Note. I would also like to thank my friends and family for their continuous support.

¹ Kevin YC Chung, Timothy P Derdenger & Kannan Srinivasan, *Economic Value of Celebrity Endorsements: Tiger Woods' Impact on Sales of Nike Golf Balls*, 1, 3 (Apr. 25, 2012), <http://www.econ.ucla.edu/workshops/papers/io/celebrityendorsements.pdf>, [<https://perma.cc/EDG7-348Y>] (quoting Daniel A Ackerberg, *Empirically Distinguishing Informative and Prestige Effects of Advertising*, 32 RAND J. OF ECON. 32 (2001)).

² Jill K. Ingels, *Do Not Pass Go and Do Not Collect \$200: Nike's Monopoly on USATF Violates Antitrust Laws and Prevents Athletes From Living at Park Place*, 27 MARQ. SPORTS L. REV. 171, 171 (2016) (citing *United States of Nike: USATF Sponsorship Has Failed Our Athletes, and Our Support, An Athlete's Body* (Aug. 13, 2015), <http://anathletesbody.com/2015/08/13/united-states-of-nike-usatf-sponsorship-has-failed-our-athletes-and-our-sport/>, [<https://perma.cc/YT9M-ZKSM>]).

in the boardrooms. The opportunity to capitalize off of the goodwill and prestige associated with the Olympic Games is a goal worth chasing. Unfortunately, such competition has also produced a winning-at-all-costs attitude. Ambush marketing has diluted the Olympics Games' intellectual property and has hindered the official sponsors' ability to benefit from their investments. Due to the changing marketing model that emphasizes brand loyalty over consumer confusion, companies are having trouble working around the constraints of the out-of-touch law. It is time the Olympic community takes a stronger stance on this issue by revamping how it addresses the balancing act between a corporation's freedom of speech against free-riders' dilution of the Olympic Games. The revisions to Rule 40 have not done enough.

Rule 40 has provided a competitive arena for sponsorship dollars and the top athletes. Rule 40, a by-law of the official Olympic charter, states, "Except as permitted by the [International Olympic Committee] 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."³ "Rule 40 was established to preserve the unique nature of the Olympic games by preventing over-commercialization."⁴ Although the rule has good intentions, its purpose has not been achieved. The Games are no longer just about the goodwill of the athletes, creating peace and celebrating countries coming together. Nowadays, it is all about the money and money talks.

³ Daniel Roberts, *Why the Biggest Story of the Rio Olympics is the Marketing Change*, Yahoo Finance (Aug. 3, 2016), <http://finance.yahoo.com/news/rio-olympics-rule-40-changes-marketing-summer-games-200732935.html>, [https://perma.cc/AE9E-B9GJ]; see generally AP, *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>, [https://perma.cc/257J-J8WQ] ("For Sochi, the rule applied from nine days before the opening ceremony until three days after closing – Jan. 30 to Feb. 26"); see also John Grady & Steve McKelvey, *The IOC's Rule 40 Changes and the Forecast for Rio 2016*, SPORTSBUSINESSDAILY (May 18, 2015), www.sportsbusinessdaily.com/journal/Issues/2015/05/18/Opinion/Grady-McKelvey.aspx, [https://perma.cc/5M7B-Y395].

⁴ Chris Chavez, *What is Rule 40? The IOC's Rule on Non-Olympic Sponsors, Explained*, SI.COM (July 25, 2016), <http://www.si.com/olympics/2016/07/27/rule-40-explained-2016-olympic-sponsorship-blackout-controversy>, [https://perma.cc/66VF-HDSG]; see generally Team USA, *Policy Guidelines Updated USOC Rio Games Participant Advertising Guidance*, TEAMUSA (Oct. 1, 2015), <http://www.teamusa.org/Athlete-Resources/Athlete-Marketing/Rule-40-Guidance>, [https://perma.cc/N7YT-6JN7].

Following protests by athletes and sponsors,⁵ Rule 40 was relaxed to allow non-Olympic “generic” advertising during the Rio Games and to allow athletes to post on social media about non-official sponsors as long as they did not make any reference to the Games.⁶ This modification prevents non-official sponsors from using specific marketing phrases, including: “2016 Rio; Rio de Janeiro; Gold; Silver; Bronze; Medal; Effort; Performance; Challenge; Summer; Games; Sponsors; Victory; Olympia; Olympic; Olympics; Olympic Games; Olympiad; Olympiads, and the Olympic motto ‘Citius – Altius – Fortius.’”⁷ Athletes face serious consequences, possibly even being stripped of their medals, if they violate Rule 40.⁸

These changes illustrate the growing impact of celebrity endorsements. According to a 2008 study, 14% to 19% of United States advertisements featured celebrity endorsements and in 2016, as many as 38 celebrities filled the screens during Super Bowl commercials.⁹ An even more astounding figure that illuminates the power of endorsements is that the top 100 highest-paid athlete endorsers in 2016 reportedly made \$924 million in 2016, while Roger Federer, LeBron James and Phil Mickelson raked in \$60 million, \$54 million and \$50 million respectively.¹⁰ The play off the field has become just as important as the play on the field.

The commercialization of sports, namely basketball, arguably emerged when Sonny Vaccaro found a way to use Nike to promote the sport of bas-

⁵ See Megan Ormond, #WeDemandChange: Amending International Olympic Committee Rule 40 for the Modern Olympic Games, 5 CASE W. RESERVE J.L. TECH & INTERNET 179 (2014) (citing Ken Belson, *Olympians Take to Twitter to Protest Endorsement Rule*, N.Y. TIMES (July 31, 2012), <http://www.nytimes.com/2012/07/31/sports/olympics/athletes-at-olympics-protest-sponsorship-rule-on-twitter.html> [<http://perma.cc/75ZK-NLQM>] (Describing the movement started by Olympic gold medalist Sanya Richards-Ross against the constraints of Rule 40)).

⁶ See Chavez, *supra* note 4.

⁷ *Id.*

⁸ See *id.*

⁹ See Anita Elberse & Jeron Verleun, *The Economic Value of Celebrity Endorsements*, J. OF ADVERT. RES. (June 2012) (quoting Julie Creswell, *Nothing Sells Like a Celebrity*, N.Y. TIMES (June 22, 2008), <http://www.nytimes.com/2008/06/22/business/world-business/22iht-22celeb.13876488.html>, [<https://perma.cc/8BYW-HW9L>]); see Charisse Jones, *Super Bowl Ads Loaded with Celebrity Star Power*, USATODAY (Feb. 8, 2016), <https://www.usatoday.com/story/money/2016/02/08/super-bowl-ads-loaded-celebrity-star-power/79757632/>.

¹⁰ See Sam Weber, *Top 100 Highest-Paid Athlete Endorsers of 2016*, OPENDORSE (Jun 29, 2016), <http://opendorse.com/blog/2016-highest-paid-athlete-endorsers/>, [<https://perma.cc/QP3R-QXGN>].

ketball to kids.¹¹ On September 12, 1984, Michael Jordan signed his first professional basketball contract with the Chicago Bulls for six million dollars over five years.¹² With the help of Vaccaro, Nike signed Jordan to a five-year deal that was worth seven million dollars after factoring in stock options and other benefits.¹³ The deal allowed Nike to build its brand in the basketball industry and one month after the “Air Jordan Is” shoe hit the market at \$65 a pair in March 1985, Nike had sold \$70 million of the shoe.¹⁴ In 2012, “the Jordan brand sold \$2.5 billion worth of shoes at retail. Air Jordans made up 58 percent of all basketball shoes bought in the U.S. and 77 percent of all kids’ basketball shoes.”¹⁵ The Jordan effect led to a marketing phenomenon that is now forcing apparel companies into *lifetime* deals with elite athletes. Within the last five years, Nike signed NBA star LeBron James to a lifetime deal and adidas added NBA point guard Derrick Rose and soccer superstar David Beckham to its lifetime payroll.¹⁶

This movement has had a major impact on the commercialization of the Olympics. Levels of sponsorship range from Worldwide Olympic Partner to Official Supplier. Each comes with different terms dictating how Olympic-related logos, names, images and other intellectual property can be used in advertising, on uniforms, in apps and on social media.¹⁷ The real question is, what is at stake? Adidas America, Inc. bought its title as the “Official Sportswear Partner” of the London 2012 Olympic Games and the London 2012 Paralympic Games for a price between \$127 million and \$156

¹¹ See generally ESPN Films, *Sole Man*, ESPN.COM (last visited Oct.13, 2017), <http://www.espn.com/30for30/film?page=soleman>, [https://perma.cc/ST3L-WG3T].

¹² See *The 1984 NBA Draft: Drafting Jordan-Not a Done Deal*, THE HISTORY RAT (last visited Oct. 13, 2017), <https://historyrat.wordpress.com/2013/01/19/the-1984-nba-draft-drafting-jordan-not-a-done-deal/>, [https://perma.cc/37AC-NEGF].

¹³ See Darren Rovell, *How Nike Landed Michael Jordan*, ESPN.COM (Feb. 15, 2013), http://www.espn.com/blog/playbook/dollars/post/_id/2918/how-nike-landed-michael-jordan, [https://perma.cc/ED4U-4M9U] (“[T]he previous highest contract was James Worthy’s deal with New Balance, an eight-year deal worth \$150,000 a year.”).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See SI Wire, *Report: LeBron James Signs Lifetime Contract With Nike*, SI.COM (Dec. 7, 2015), <https://www.si.com/nba/2015/12/07/nike-lebron-james-signs-lifetime-contract> [https://perma.cc/5P5D-LT93] (on file with the Harvard Law School Library) (James’ deal is reportedly worth more than \$1 billion).

¹⁷ See Denise Lee Yohn, *Olympics Advertisers Are Wasting Their Sponsorship Dollars*, FORBES (Aug. 3, 2016), <http://www.forbes.com/sites/deniseyohn/2016/08/03/olympics-advertisers-are-wasting-their-sponsorship-dollars/#7d246dbf2070> (on file with the Harvard Law School Library).

million.¹⁸ The Olympic Partners (TOP) program, the highest level of Olympic sponsorship, can cost over \$200 million and has not always produced commercially successful campaigns.¹⁹ Although these companies are investing millions of dollars into strategic plans to capitalize on the goodwill that comes from a sponsorship with the Olympic Games, the new marketing model and the failed state of the law has diminished the sponsors' success.

Although the International Olympic Committee ("IOC") meant well by taking action on Rule 40, its brand security measures did not achieve the goal of preventing unauthorized sponsors from reaping the benefits of the Olympic Games' goodwill and, furthermore, have created more confusion for companies that are attempting to utilize their athletes prior to and during the Olympics. In addition, the changes to Rule 40 have not been able to close the gap on what current intellectual property law is trying to achieve. As this paper will discuss, the current law focused on consumer confusion is lagging behind how consumers in the athletic apparel industry are interacting with the current business model: brand loyalty. It is no longer about preventing companies from trading off of the goodwill of one another and confusing consumers into thinking a company is different from what they say they are. Instead, the new game is making a consumer infatuated with the brand at a young age and building that loyalty throughout their lifetime. A study on Nike golf balls indicated that "not only does celebrity endorsement take customers away from [Nike's] competitors, but also attracts customers from the outside who would have otherwise not purchased the product in the absence of celebrity endorsements."²⁰ This is the marketing model that companies are working with and until Rule 40 can establish itself within this model, it will not be able to achieve its goals.

This paper will analyze the need for an updated legal framework that is more aligned with the brand loyalty business model and will use the changes to Olympic Rule 40 to parse out what more can be done. Part I of this paper will detail the history of trademark law protection and introduce the theories relevant to the IOC's brand protection. Part II will describe the governing structure that is unique to the Olympics and will analyze the former sponsorship rules before the Rule 40 modifications. Part II will also detail the changes that modified Rule 40 and the failed state of the law in relation to current business models. Part III will highlight literature that analyzes the impact an endorser can have on a marketing platform and how

¹⁸ *See id.*

¹⁹ *See id.*

²⁰ Chung, *supra* note 1, at 5.

brand loyalty has taken the place of consumer confusion in business strategies. Part III will also provide a case study of the impact Tiger Woods had on the Nike brand before and after his scandal. Finally, Part IV will use the 2016 Rio Games to form a basis for the analysis of whether Rule 40 is successful or needs to be changed.

I. HISTORY OF TRADEMARK PROTECTION

Trademark law was developed for the purpose of preventing consumer confusion regarding the source of a good and also to encourage manufacturers to produce quality goods.²¹ Trademark scholars identify common principles of fraud and deceit as the motivations for creating a subset of the law to protect consumers from these torts.²² The Lanham Act of 1946 was implemented to allow individuals and corporations to raise a claim against infringers. The Lanham Act protects “any word, name, symbol, or device” that is used by a producer to “identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.”²³ With this goal in mind, courts have used various theories of trademark law to prevent infringement from becoming more widespread.

Trademark law is governed by the “likelihood of confusion” test.²⁴ Traditional trademark protection was meant to police producers’ attempts to steal away customers in competitive markets.²⁵ In short, trademark law attempted to prevent manufacturers from passing off their goods as those of another or trading on the goodwill of a company that had established itself

²¹ See 1 J. THOMAS MCCARTHY, *TRADEMARKS AND UNFAIR COMPETITION* § 5:2 (2d ed. 1984) (discussing the history of trademark law in Anglo-American common law and the expansion of trademark law into the twentieth century); see generally Landes & Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265 (1987) (discussing how the value of a trademark consists of consumers’ ability to recognize the source of a product or service without a high search cost and commonly deemed to bring a specific quality).

²² See MCCARTHY, *supra* note 21, at 134.

²³ 15 U.S.C. § 1127 (2012).

²⁴ See MCCARTHY, *supra* note 21.

²⁵ See Mark McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1845 (2007) (“Trademark law. . . aims to promote more competitive markets by improving the quality of information in those markets.”) (quoting Stacy L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?*, 54 EMORY L.J. 461, 467 (2005)).

with a clientele in the marketplace.²⁶ Trademark law seeks to minimize trademarks that deceive consumers into purchasing goods that they believe are associated with another brand.²⁷ Therefore, plaintiffs must show that the use of an allegedly infringing mark was likely to cause confusion, mistake, or deceit.²⁸

In addition to traditional theories of consumer confusion, courts have relied on two theories of trademark law that allow a plaintiff to recover damages or force an injunction even when no consumer confusion is likely. For example, one theory of protecting trademarks is the theory of dilution. Dilution occurs when a trademark could be devalued by use of similar marks that impact the package of information associated with a product.²⁹ The Ninth Circuit characterized dilution as very similar to creating rights in gross in a trademark.³⁰ The two traditional types of dilution are blurring and tarnishment. Blurring is the use of a mark in any manner likely to cause an unintended association, which would reduce the famous mark's distinctiveness.³¹ Tarnishment is often described as an association that is likely to disparage a mark owner's goods or services or tarnish the image or reputation associated with another's mark.³² The Fifth Circuit enjoined a manufacturer of insecticide floor wax from using the slogan "Where There's Life

²⁶ See *id.* at 1861. (quoting JAMES LOVE HOPKING, *THE LAW OF TRADEMARKS, TRADENAMES AND UNFAIR COMPETITION* § 1 (2d ed. 1905) ("Unfair competition consists of passing off one's goods as the goods of another, or in otherwise securing patronage that should go to another, by false representations that lead the patron to believe that his is patronizing the other person").

²⁷ See Robert N. Kravitz, *Trademarks, Speech, and the Gay Olympics Case*, 69 B.U. L. REV. 131, 135 (1989) (citing Robert Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 WIS. L. REV. 158, 162–63 (1982)).

²⁸ 15 U.S.C. § 1114(1) (2005); see, e.g., *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1307 (2015) (likelihood of confusion standards were ruled the same in trademark registration and infringement suits).

²⁹ See generally Karen Loudon & Tiffany Fonseca, *Does the Federal Trademark Dilution Act Provide a Right Without a Remedy? The Supreme Court's First Foray Into Trademark Dilution: Moseley v. V Secret Catalogue*, 7 DEL. L. REV. 31, 34 (2004).

³⁰ See Jeremy M. Roe, *The Current State of Antidilution Law: The Trademark Dilution Revision Act and the Identical Mark Presumption*, 57 DEPAUL L. REV. 571, 572 (2008) (citing *Avery Dennison Corp. v. Sumption*, 189 F.3d 868, 875 (9th Cir. 1999); accord *TCPIP Holding Co. v. Haar Commc'ns*, 244 F.3d 88, 95 (2d Cir. 2001)).

³¹ See Roe *supra* note 30 (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 25(1)(a) (1995)).

³² *Id.* (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 25(1)(b) (1995); see, e.g. *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183, 1189–90 (E.D.N.Y. 1972) (concluding that a poster associating the word "Cocaine" substi-

. . . There's Bugs" because it mimicked "Where's There's Life . . . There's Bud" and was likely to negatively influence consumers impression of Budweiser.³³

Another theory that courts have relied on to prevent consumer confusion that is applicable to the Olympics' sponsorship issues is the theory of misappropriation. Misappropriation is often described as free-riding on the commercial value or reputation of another.³⁴ One rationale for this theory is that a "trademark owner is entitled to exploit all possible uses of the mark; since the owner's labor created the mark's 'commercial magnetism,'" and it is wrong to allow others to profit off of the hard work of another.³⁵ It is of no relevance "whether consumers are confused or even whether the defendant's use diverts business from the plaintiff. Nor does it matter whether the plaintiff's goodwill is impaired or diminished in any way."³⁶ Trademark law is a very powerful force to incentivize creative designs and to protect the hard work associated with brand integrity.

These theories of trademark law protection have set the stage for how individuals and corporations protect their intellectual property, but they are also the foundation by which the IOC has policed its sponsors. The question of whether trademark law infringes one's freedom of speech is a lively debate and will impact how Rule 40 will be used in the future.

tuted for Coca-Cola was likely to injure Coca-Cola's business reputation and impact customer choices).

³³ See *Chemical Corp. of America v. Anheuser-Busch, Inc.*, 306 F.2d 433 (5th Cir. 1962), cert. denied, 372 U.S. 965 (1963).

³⁴ See Tim W. Dornis, *Trademarks, Comparative Advertising, and Product Imitations: An Untold Story of Law and Economics*, 121 PENN ST. L. REV. 421, 429 (2016) (citing David J. Franklyn, *DeBunking Dilution Doctrine: Toward a Coherent Theory of the Anti-Free Rider Principle in American Trademark Law*, 56 HASTINGS L.J. 117, 137-43 (2004) (describing *Times Mirror Magazines, Inc. v. Las Vegas Sports News*, 212 F.3d 157 (3d Cir. 2000), which found that the defendant, a publisher of a gambling magazine in Las Vegas, traded on a sufficiently famous mark in a niche market to gain superior notoriety and a good reputation of quality).

³⁵ See Kravitz, *supra* note 27, at 138-39 (citing "Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresage Co.", 316 U.S. 203, 205 (1942) (holding that to recover lost profits under the Trade-Mark Act of 1905, plaintiff need not prove that infringer's mark actually induced or deceived consumers into buying infringer's product. . . "[T]he wrongdoer who makes profits from the sales of goods bearing a mark belonging to another was enabled to do so because he was drawing upon the good will generated by that mark. And one who makes profits derived from the unlawful appropriation of a mark belonging to another [must therefore] restore the profits to their rightful owner").

³⁶ Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547, 550-51 (2006).

II. THE OLYMPIC MOVEMENT

The 2016 Olympic Games in Rio were a fantastic demonstration of athletic ability and national pride as 11,178 athletes from 205 countries descended upon Rio to compete in a great event.³⁷ The competition off the field turned up a notch after the changes to Rule 40 redefined what it meant to advertise during the Olympic Games.

Sponsors of the 2016 Olympic Games in Rio included Coca-Cola, McDonalds, Visa, Bridgestone, Samsung, Panasonic, Omega, Procter & Gamble (P&G), General Electric (GE), Dow, and Atos.³⁸ Each of these companies paid an estimated 100 million euros to the IOC to advertise directly with the games from 2013 to 2016.³⁹ What is concerning is that these sponsors that have paid for the exclusive right to market their goods and services in association with the Olympic Games are expecting a monetary benefit. However, if consumers are being confused as to what exactly the corporation's role is in the international market, these marketing campaigns dilute the Olympic Games' intellectual property and allow others to trade off of their goodwill. How has this happened over the last several decades amidst a strong presence of regulation?

A. *Governing Structure*

Unlike in traditional American sports, Olympic athletes must be aware of rules set forth by several governing bodies. The Olympic movement was founded on the principle of amateurism and the sponsorship restrictions imposed on athletes are meant to ensure that the Olympics stay true to that tradition. These governing bodies include: The International Olympic Committee ("IOC"), the United States Olympic Committee ("USOC"), and National Governing Bodies ("NGBs").⁴⁰ In 1974, the word *amateur* was

³⁷ See generally 2016 Summer Olympic Participating Countries, MAPS OF WORLD, Sept. 6, 2016, <http://www.mapsofworld.com/sports/olympics/summer-olympics/participating-nations.html> (on file with the Harvard Law School Library).

³⁸ See Lars Becker, *Sponsors at the Olympics: The Multi-Billion Dollar Business of the IOC*, ISPO (July 29, 2016), http://www.ispo.com/en/markets/id_7844462/tid_pdf_0/2-billion-what-the-sponsors-at-the-2016-olympics.html [<https://perma.cc/KKZ5-FZDD>].

³⁹ See *id.*

⁴⁰ See Leigh Augustine-Schlossinger, *Legal Considerations for Sponsorship Contract of Olympic Athletes*, 10 VILL. SPORTS & ENT. L.J. 281, 282–84 (2003) (citing Int'l Olympic Comm. Charter R. 1, 3 (2001) https://stillmed.olympic.org/Documents/olympic_charter_en.pdf, [<https://perma.cc/LX94-VNNS>]) (IOC is the supreme au-

removed from the Olympic Charter.⁴¹ Fifteen years later, the Olympic amateur movement took another turn when the International Basketball Federation opened the door for National Basketball Association players to participate in the 1992 Olympics.⁴² This movement along with the introduction of elite athletes across numerous sports has prompted apparel companies in particular to fight for ways to market themselves in connection with the Olympic Games.⁴³ Has the desire for a spirit of amateurism been destroyed?

On the other hand, the USOC has attempted to stay true to the Olympics' amateur principles by keeping the word "amateur" in its charter.⁴⁴ An amateur athlete was defined as "any athlete who meets the eligibility standards established by the NGB or Paralympic Sports Organization for the sport in which the athletes competes."⁴⁵ This concept is often controversial when athletes such as LeBron James, who gets paid millions of dollars to

thority); *U.S. Olympic Comm. Constitution art III § 1* (USOC recognizes eligible sports organizations as national governing bodies).

⁴¹ See *id.* at 283 (The only mention of the word amateur was linked to the International Boxing Association).

⁴² See Phil Hersh, *NBA Players Eligible to Play in The Olympics*, CHI. TRIB. (Apr. 08, 1989), available at http://articles.chicagotribune.com/1989-04-08/sports/8904020812_1_granik-nba-finals-nba-owners [<https://perma.cc/758D-57DU>].

⁴³ See Ken Roberts, *Nike vs. Under Armour: Olympics Advertising Edition*, PATHMATICS (July 27, 2016), <https://blog.pathmatics.com/nike-vs-under-armour-olympics-advertising-edition>, [<https://perma.cc/6S3Y-59MT>] (analyzing Nike and Under Armour's digital advertising, consumer targeting strategies and Olympic sponsorship deals to gain a competitive advantage in the marketing race) (on file with the Harvard Law School Library).

⁴⁴ See Augustine, *supra* note 40, at 284 (citing USOC Constitution art 1 § 2(A)-(C) (using language such as: amateur athlete, amateur athletic competition, and amateur sports organization)).

⁴⁵ See Augustine, *supra* note 40, at 284 (citing USOC Constitution, art 1 § 2(A)) (The USOC recognizes the following thirty-nine national governing bodies: National Archery Association, U.S.A. Badminton, U.S.A. Baseball, U.S.A. Basketball, U.S. Biathlon Association, U.S. Bobsled and Skeleton Federation, U.S.A. Boxing, U.S.A. Canoe/Kayak, U.S.A. Curling, U.S.A. Cycling, Inc., United States Diving, Inc., U.S.A. Equestrian, U.S. Fencing Association, U.S. Field Hockey Association, U.S. Figure Skating Association, U.S.A. Gymnastics, U.S.A. Hockey, Inc., U.S.A. Judo, U.S. Luge Association U.S. Modern Pentathlon Association, United States Rowing Association, United States Sailing Association, U.S.A. Shooting, U.S. Ski and Snowboard Association, U.S. Soccer Federation, Amateur Softball Association, U.S. Speed Skating, U.S.A. Swimming, U.S. Synchronized Swimming Inc., U.S.A. Table Tennis, U.S. Taekwondo Union, U.S. Team Handball Federation, U.S. Tennis Association, U.S.A. Track & Field, U.S.A. Triathlon, U.S.A. Volleyball, United States Water Polo, U.S.A. Weightlifting, and U.S.A. Wrestling).

play in the National Basketball Association, are competing in the Olympic Games. Although controversial, that topic has been discussed in numerous other articles and will not be explored further in this paper.⁴⁶

B. *The Rise of Sponsorships*

The Olympic Games provide an opportunity to compensate successful athletes. U.S. athletes that win Gold medals receive payment through “Operation Gold” which is often paid for through corporate sponsorships that the USOC signs.⁴⁷ Sponsorships are a lucrative enterprise, depending on how well a sponsor can market itself in connection with an athlete and the Olympic movement and how well it can draft its sponsorship agreement. Generally, a USOC corporate sponsor receives the license to use the USOC logo (five colored Olympic rings) on its products and advertising.⁴⁸ In addition to USOC guidelines, each NGB is empowered to create its own guidelines to regulate its athletes and sponsors.⁴⁹ Within these parameters, how do sponsors effectively market their athletes and ultimately their products?

The world of Olympic sponsorships is quite different from the typical marketing associated with sporting events.⁵⁰ The Games prohibit market-

⁴⁶ See Chris Chase, *The Olympics Would Be Better Off Without NBA Players*, FOX SPORTS (June 8, 2016), available at <http://www.foxsports.com/olympics/story/no-more-nba-players-in-olympics-team-usa-lebron-curry-dream-team-060816>, [https://perma.cc/U57L-2BVE]; cf. Scott Davis, *Shaquille O’Neal Explains Why NBA Players Shouldn’t Skip Rio Olympics*, BUSINESS INSIDER (June 7, 2016), <http://www.businessinsider.com/shaquille-oneal-nba-players-shouldnt-skip-olympics-2016-6>, [https://perma.cc/AED3-DLNS] (on file with the Harvard Law School Library (featuring Shaquille O’Neal explaining how sports are one of the few things that bring people together and “settle people down”).

⁴⁷ See Braden Keith, *USOC Increases ‘Operation Gold’ Payouts by 25% Beginning in 2017*, SWIMSWAM (Dec. 13, 2016) (Players that win Gold medals for the Olympics will be paid \$37,500 and will be paid \$6,250 for the first and second years of non-Olympic years and \$7,500 for the third year), <https://swimswam.com/usoc-increases-operation-gold-payouts-by-25-beginning-in-2017/>, [https://perma.cc/X6P8-2J3J]; see also Rachel Axon, *Breaking Down What Some Countries Pay Olympians for Earning Medals*, USATODAY (Aug. 21, 2016), <http://www.usatoday.com/story/sports/olympics/rio-2016/2016/08/21/gold-medal-team-usa-simone-biles-michael-phelps-katie-ledecky/89055568/>, [https://perma.cc/2PNY-DC8B].

⁴⁸ See *Salt Lake 2002 OPUS Sponsorship Programme*, https://web.archive.org/web/20030608005937/http://multimedia.olympic.org/pdf/en_report_103.pdf (last visited Nov. 7, 2013) (stating over \$840 million was raised for 2002 Olympic Games).

⁴⁹ See *id.*

⁵⁰ See generally Lori Shontz, *Olympic Rule Leaves Non-Sponsors With Few Words*, RUNNER’SWORLD (July 27, 2016), <http://www.runnersworld.com/olympics/olympic-rule-leaves-non-sponsors-with-few-words>, [https://perma.cc/2SGX-97A8].

ing traditionally seen within athletic event venues, yet more than forty percent of Olympic revenues come from corporate sponsors.⁵¹ The tug and pull between marketers and individual athletes has become a center-stage discussion.

I understand and I am empathetic to athletes and their individual deals and what they're trying to do. . . But it is not a minor piece of this to protect the value of IOC rights. That money flows back to IOC member nations. That money flows back to local organizing committees so that they can build the venues. It's an important revenue stream for the entire ecosystem.⁵²

In 1896 the Olympic Games began allowing companies to advertise.⁵³ Originally sponsorship opportunities were open to all companies, but after 1984, the competition moved from the tracks to the board rooms. For example, the 1988 Olympics produced \$338 million in sponsorships, and by 1992 that figure had jumped to \$700 million.⁵⁴ These numbers became exciting for the parties involved, but with the increase in revenue came a need for an increase in trademark protection that would regulate this new "business."

Within the governing structure discussed above, Congress gave the USOC the power to regulate the Games and the sports within its control to ensure that the USOC was responsible for protecting its brand from commercial exploitation. At the same time, the Lanham Act generally governs trademark infringement related to the Olympic Games. Under the Lanham Act, the standard for infringement changed from "likely to confuse consumer" to "tends to cause confusion or mistake."⁵⁵ The Lanham Act gives

⁵¹ *Id.*

⁵² *Id.* (comment by Director of Oregon's Warsaw Sports Marketing Center, Whitney Wagoner).

⁵³ *100 Years of Olympic Marketing*, OLYMPIC.ORG, <https://www.olympic.org/sponsors/100-years-of-olympic-marketing>, [https://perma.cc/4D7K-HK4M] (last visited Nov. 7, 2017) (on file with the Harvard Law School Library).

⁵⁴ See Russell H. Falconer, *Ambush Marketing and How to Avoid It*, BAKER BOTTS LLC, Jan. 1996, <http://www.bakerbotts.com/ideas/publications/1996/01/ambush-marketing-and-how-to-avoid-it>, [https://perma.cc/74US-F4NT] (on file with the Harvard Law School Library).

⁵⁵ Katelynn Hill, *Ambush Marketing: Is it Deceitful or a Probable Strategic Tactic in the Olympic Games?*, 27 MARQ. SPORTS L. REV. 197, 199 (2016) (first quoting David Muradyan, *Likelihood of Confusion Analysis Under the Lanham Act*, THE IP L. BLOG, Aug. 15, 2012, <http://www.theiplawblog.com/2012/08/articles/trademark-law/likelihood-of-confusion-analysis-under-the-lanham-act/>, [https://perma.cc/6H3R-W6WX] (on file with the Harvard Law School Library); then quoting Po Yi, Jessica S. Borowick & Kristin Adams, *Golden Rules: Lowering the Uneven Bars on Likelihood of*

the USOC support to prevent infringement by providing a legal cause of action when the use of its trademark is likely to cause confusion or may deceive consumers into mistaking the affiliation, connection, or association of a sponsorship.⁵⁶ In addition to the USOC regulations, there are federal statutes that protect against any word or symbol that suggests an association with the USOC, the Olympics Games or the United States Olympic teams.⁵⁷ These regulations are meant to deter unauthorized corporate sponsors from using the Olympic Games' intellectual property and likeness. However, these rules and regulations are specific to the Olympic Games generally, not for the trademarks and other intellectual property connected to the NGBs of each specific sport at the international level.

The Amateur Sports Act also provides protection against infringement of the Olympics' intellectual property.⁵⁸ The Act, often nicknamed the Ted Stevens Olympic and Amateur Sports Act, gave the USOC authority in defining its principles and its concept of amateurism.⁵⁹ It also protects the five-ring symbol and the word "Olympic" and supports the exclusive rights granted by the USOC. The Act provides in relevant part, "the corporation has the exclusive right to use (1) the name 'United States Olympic Committee,' (2) the symbol of the International Olympics Committee, consisting of the 5 interlocking rings. . . (3) the emblem of the corporation. . . and (4) the words 'Olympic', 'Olympiad',. . . or any combination of those words."⁶⁰ The

Confusion, ALL ABOUT ADVERT. L., July 12, 2016, <https://www.allaboutadvertisinglaw.com/2016/07/lowering-the-bar-on-likelihood-of-confusion-another-reason-for-brands-to-beware-of-using-olympic-trademarks.html>, [https://perma.cc/2DUR-5AAT] (on file with the Harvard Law School Library)).

⁵⁶ See Lanham Act, 15 U.S.C. § 1125 (2012) ("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, or [] in commercial advertising 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").

⁵⁷ See *U.S. Olympic and Paralympic Brand Usage Guidelines*, TEAMUSA.ORG, <http://www.teamusa.org/brand-usage-guidelines>, [https://perma.cc/ZWZ3-NW6J] (last visited Nov. 1, 2017) (on file with the Harvard Law School Library).

⁵⁸ See Amateur Sports Act, 36 U.S.C. § 220506 (2012).

⁵⁹ See Nicholas Gary Schlereth & Evan Frederick, *Going for Gold: Social Media and the USOC*, 27 J. LEGAL ASPECTS SPORT 19, 21 (2017).

⁶⁰ Amateur Sports Act, 36 U.S.C. § 220506(a) (2012).

USOC and all NGBs must comply with the Act to serve the purpose of protecting the athlete and to govern the Olympic system.⁶¹

This legal support gave the USOC and IOC the opportunity to further extend its protection, but creative marketing has begun to cut against these protections.

C. *The Impact of Ambush Marketing*

One of the biggest loopholes that has hurt the integrity of the Olympic Games' sponsorships comes in the form of ambush marketing. Ambush marketing in this context is defined as "all intentional and unintentional attempts to create a false or authorized commercial association" to capitalize on the Olympics.⁶² Given the goals of the Olympic Games and the policies put in place to protect the integrity of its brand, why has ambush marketing become so effective?

Ambush marketing has become so prevalent that a marketing report from the 2014 Sochi Olympics found that two of the top four finishers from a marketing standpoint at the Sochi Olympics were in-fact non-sponsor companies.⁶³ In 2012, adidas fell victim to this tactic. In a stream of commercial advertisements, adidas attempted to capitalize on its role as an official Olympic sponsor of the 2012 Games through a series of "Take the Stage" advertisements that focused on elite British athletes.⁶⁴ However, it was Nike's "Find Your Greatness" campaign featuring a teenager persevering on a tough run that resonated more strongly with consumers and ultimately led consumers to believe that Nike was an Olympic sponsor.⁶⁵ When polled, 37% of consumers incorrectly said that Nike was an Olympic

⁶¹ See Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 92-93 (2008).

⁶² See Hill, *supra* note 55 (quoting Andre M. Louw, *AMBUSH MARKETING & THE MEGA-EVENT MONOPOLY: HOW LAWS ARE ABUSED TO PROTECT COMMERCIAL RIGHTS TO MAJOR SPORTING EVENTS* 96 (2012)).

⁶³ See Emily Goddard, *Exclusive: Red Bull Wins Sochi 2014 "Ambush Marketing" Gold, Says Report*, INSIDE THE GAMES, Mar. 5, 2014, <https://www.insidethegames.biz/articles/1018733/exclusive-red-bull-wins-sochi-2014-ambush-marketing-gold-says-report>, [<https://perma.cc/U62B-DVP8>] (on file with the Harvard Law School Library).

⁶⁴ See Laurel Wentz, *Consumers Don't Really Know Who Sponsors the Olympics*, AD-AGE, July 27, 2012, <http://adage.com/article/global-news/consumers-sponsors-olympics/236367/>, [<https://perma.cc/72NN-25WT>] (on file with the Harvard Law School Library).

⁶⁵ See *id.*

sponsor while only 24% correctly stated that adidas was an Olympic sponsor; meanwhile, Coca-Cola was cited by 47% of respondents as an Olympic sponsor, but 28% incorrectly selected Coca-Cola's rival, Pepsi, as a sponsor as well.⁶⁶ This evidence indicates that consumers are being tricked by creative marketing strategies that find loopholes in the current regulations meant to protect the Olympic Games and their sponsors.

Ambush marketing threatens the exclusivity the USOC offers sponsors, which jeopardizes the sponsorship revenues the USOC receives to fund the Olympic Games.⁶⁷ Others see this practice as a necessary advertising tool that rewards creative marketing strategies. Are companies profiting from Olympic trademarks and diluting the work those with "proper" sponsorship agreements have produced? Should the USOC or IOC stop companies from marketing strategies that connect to the Olympics, even if they do not use the "unauthorized wording" or the Olympics' intellectual property? Is this illegal or simply an exercise of First Amendment rights and creating marketing strategies? These questions have shaped the protections and policies currently in place.

D. *Shaping the Protection of Olympic Marks*

Federal regulations and Olympic governing body rules are in place to prevent unauthorized sponsors from using the Olympics' intellectual property. However, it is over the last several decades that the prevention of unauthorized sponsors has been extended too far.

One of the most alarming examples of the Olympics overreaching its trademark protection occurred in *San Francisco Arts & Athletes, Inc. v. USOC*.⁶⁸ That case pitted a nonprofit California corporation against the USOC and the IOC. The San Francisco Arts & Athletes, Inc. ("SFAA") promoted an event entitled the "Gay Olympic Games" using the words on marketing materials.⁶⁹ The SFAA claimed that it was making a political statement and should be protected from an infringement claim under the First Amendment.⁷⁰ The Court's reasoning rested not on an outright refusal

⁶⁶ See *id.* (Noting that 16,020 tweets associated the word "Nike" with the Olympics while just 9,300 tweets associated adidas with the Olympics.)

⁶⁷ See *U.S. Olympic and Paralympic Brand Usage Guidelines*, TEAMUSA.ORG, <http://www.teamusa.org/brand-usage-guidelines>, [https://perma.cc/ZWZ3-NW6J] (last visited Nov. 1, 2017) (on file with the Harvard Law School Library).

⁶⁸ 483 U.S. 522 (1987).

⁶⁹ *Id.* at 525.

⁷⁰ See *id.* at 535 ("[T]he SFAA claims that its use in the word 'Olympic' was intended to convey a political statement about the status of homosexuals in society. Thus, the SFAA claims that in this case § 110 suppresses political speech.").

of freedom of speech rights, but rather focused on the consumer confusion that could have been caused and how such confusion could have adverse effects on the USOC's interest and reputation with the Olympic Games. Against a vigorous dissent,⁷¹ the Court found that the "SFAA sought to sell T-Shirts, buttons, bumper stickers, and other items, all emblazoned with the title 'Gay Olympic Games.' The possibility for consumer confusion as to the sponsorship is obvious. Moreover, it is clear that the SFAA sought to exploit the 'commercial magnetism' of the word given value by the USOC."⁷²

The reason this case is so important is because it puts other corporations on notice as to how ambush marketing is viewed by the courts. The Court chose to protect the USOC's reputation and desire to prevent its name from being associated with words, symbols, organizations or events that it does not believe aligns with its mission and would ultimately harm its reputation. On the other hand, although the USOC has the right to bring a civil claim against a person or corporation that is infringing its intellectual property, it may not be beneficial to do so from a professional relations standpoint or from a legal standpoint. For example, what if a circuit court distinguishes the *San Francisco Arts* case on different grounds or based on different facts? This could hinder the USOC's position in preventing trademark infringement and ultimately could diminish its negotiating power when working with corporations on sponsorship agreements. There are many "attack" advertisements that may air during an Olympics that do not imply that a company is an official sponsor of the Olympics, but may confuse consumers as to its relationship to the Games. This occurred during the 1992 Barcelona Olympic Games when American Express ran a commercial that countered Visa's advertisement, an official sponsor of the Olympic Games.⁷³ What is significant about this example is that Visa did not have a cause of action that could prevent American Express from running such advertisements during the Olympic Games and ultimately gave notice to other

⁷¹ See *id.* at 571–72 (Brennan, J. and Marshall, J., dissenting) ("In the absence of § 110(a)(4), the USOC would have authority under the Lanham Act to enforce its "Olympic" trademark against commercial uses of the word that might cause consumer confusion and a loss of the mark's distinctiveness. There is no evidence in the record that this authority is insufficient to protect the USOC from economic harm. The record and the legislative history are barren of proof or conclusion that noncommercial, nonconfusing, and nontrademark use of 'Olympic' in any way dilutes or weakens the USOC's trademark.").

⁷² *Id.* at 539.

⁷³ See Robert Davis, *Ambushing the Olympic Games*, 3 VILL. SPORTS & ENT. L.J. 423, 425 (1996).

companies that ambush marketing, if structured creatively, could effectively counter an official sponsor's position in the marketplace.

The way the Court handled these situations should prompt companies to rethink their marketing campaigns and how they are going to promote their goods and services. Creativity counts, but under the new business model, the law has fallen behind.

III. THE BRAND LOYALTY BUSINESS MODEL

Academic literature and business studies have furiously debated the impact a celebrity endorsement can have on a company. Thus far, this paper has emphasized the current state of the law, but what the law fails to do at this point, is truly work within the new business model that will be explained in this section. Nowadays, companies pay athletes millions of dollars to use their likenesses in advertisements with the goal of generating *brand loyalty* among consumers. According to CNN Money, Nike spent a staggering total of \$8 billion from 2002 to 2015 on sports sponsorships to grow their brand awareness.⁷⁴ The thought is, "if my favorite player wears a particular brand, I will want to wear the same brand to be like him or her." What companies are factoring in when determining the effect of a celebrity endorsement is not clear. For example, some judge the success of an endorsement off of the visibility and exposure the endorser gives the company and its product while others believe it is possible to determine the success of the endorsement by the increase in total sales or stock price.⁷⁵

This section will detail current studies that illustrate the impact a celebrity endorsement can have on a company. Existing literature is divided into three streams of study: "some measure the contemporaneous effect of endorsement announcements on stock returns; others examine how changes in an endorser's status, performance, or reputation affect stock returns over time"⁷⁶ and others solely focus on the number of products sold. Is it possible to quantify the goodwill an endorser brings a company?

⁷⁴ See Chris Isidore, *How Nike Became King of Endorsements*, CNN MONEY, June 5, 2015, <http://money.cnn.com/2015/06/05/news/companies/nike-endorsement-dollars/>, [https://perma.cc/WC2Q-UP3N] (on file with the Harvard Law School Library).

⁷⁵ See generally Chung, *supra* note 1.

⁷⁶ Elberse, *supra* note 9, at 150 (highlighting Figure 1: A Typology of Existing Research on the Economic Value of Endorsements).

A. *How Valuable Are Endorsers?*

Harvard Business School Professor Anita Elberse and Barclays Capital Analyst Jeron Verleun's study on the economic value of celebrity endorsements claims there is a positive pay-off to a firm's decision to sign an endorser, and that endorsements are associated with increasing sales in an absolute sense and relative to competing brands.⁷⁷ In making this claim, these authors structured their approach on three basic strategies: (a) assessing the impact of endorsement announcements and endorser achievements on sales, (b) the impact of both events on stock returns, and (c) the association between both metrics and their respective drivers.⁷⁸

Many studies work to analyze the impact an endorser's achievements can have on the sales and stock returns of a company. According to Professor Elberse's study, a firm's decision to hire an endorser generally has a positive impact on the firm's focal brands sales.⁷⁹ As the athlete continues to succeed by securing championships and awards, weekly sales are expected to increase with an additional \$70,000 per week.⁸⁰ Furthermore, the study reveals that competitors' sales are not noticeably affected by the endorsement of another company. This claim will be distinguished later in the case study of Nike golf balls. Other studies focus on the fluctuation of stock prices during the life of the endorsement.⁸¹

In addition to an increase in sales, many companies seek endorsers with the goal of driving up stock returns in two ways: on the announcement day

⁷⁷ See *id.* at 163.

⁷⁸ See *id.* at 152–54.

⁷⁹ See *id.* at 157 (references Model I in Table 2 detailing the equation used to make this claim. For example, the Table details that the “estimates average value, .20, indicates that weekly sales increases with just over \$200,000 over the course of the duration of the endorsement (not that sales are measured in millions of dollars) as compared with what was to be expected based on historical sales, even after controlling for any changes in advertising and pricing strategies. That corresponds with over \$10 million in added sales annually. The increase reflects around 4% of the average weekly sales for the brands in [their] sample.”).

⁸⁰ See *id.* at 159.

⁸¹ See Chung, *supra* note 1, at 2 (“Specifically, Agrawal and Kamakura (1995) study 110 celebrity endorsement contracts and find that, on average, the market reacts positively on the announcement of celebrity endorsement contracts . . . More recently, Knittel and Stango (2009) study the negative impact of Tiger Woods' scandal. By looking at the stock prices of the firm that Tiger Woods endorses, they estimate that, after the event in November 2009, shareholders of Tiger Woods' sponsors lost \$5-12 billion relative to those firms that Woods did not endorse. Furthermore, they find that sports related sponsors suffered more than his other sponsors.”).

and throughout the duration of the endorsement. Professor Elberse's study showed across 341 endorsements that an event is quickly incorporated into the stock price with an average abnormal return (AR) of .23% on the announcement day.⁸² The studies claim that if a company can sign the "right endorser," there is a potential to generate on average a 4% increase in sales—which corresponded to around \$10 million in additional annual sales.⁸³ Furthermore, this study indicates that the impact of endorsers' athletic achievements "significantly and positively impact" the endorsed firms' stock prices throughout the duration of the endorsement.⁸⁴ For example, in 2015 Under Armour's stock price surged 26.31% off the success of golfer Jordan Spieth. On April 2nd, 2015, one week before Spieth won his first major championship at The Masters, the Under Armour (UAA) stock was trading at \$41.55 on the New York Stock Exchange.⁸⁵ Nearly four months later, the stock jumped up to \$52.48 after Spieth won The Masters and the 2015 U.S. Open,⁸⁶ became the number one ranked golfer in the world, and was heading into The Open Championship. This staggering example shows that one major success story can alter the course of a company. What if that success is tainted? What if that endorser falls from greatness? Tiger Woods and Nike recently worked through that question.

B. *Case Study on Tiger Woods and Nike Golf Balls*

In order to gain a deeper appreciation for how a celebrity endorsement can positively impact a company's bottom line, this section will detail the study put forth by Kevin YC Chung, Timothy P. Derdenger and Kannan Srinivasan.⁸⁷ Their chief finding was that the "celebrity endorsement effect on consumers can create product differentiation and generate shifts in market share."⁸⁸ In order to make this claim, these authors studied the effect Tiger Woods had on Nike's golf ball sales and brand integrity as a whole.

⁸² See Elberse, *supra* note 9, at 159.

⁸³ See *id.* at 157.

⁸⁴ *Id.* at 159.

⁸⁵ See *UAA Historical Stock Prices*, NASDAQ.COM, <http://www.nasdaq.com/symbol/uaa/historical> (last visited Nov. 2, 2017).

⁸⁶ Spieth became only the sixth player ever to win The Masters and the U.S. Open back to back, and the first since Tiger Woods in 2002. The other four golfers include Hall of Fame members: Craig Wood, Ben Hogan, Arnold Palmer, and Jack Nicklaus.

⁸⁷ See Chung, *supra* note 1, at 1–5 (analyzing monthly golf ball sales and professional golfer (celebrity) quality levels, specifically detailing the impact Tiger Woods had on the sales of Nike golf balls).

⁸⁸ *Id.* at 4.

There was an approximate increase of 1,416,000 Nike golf balls sold each month when Tiger Woods was under a Nike endorsement contract and Nike profited \$103 million off of 9.9 million new customers from 2000-2010.⁸⁹ One great athlete can truly make a difference. However, companies cannot overlook the fact that some athletes, no matter how great they are, can fall from greatness and negatively impact a history of goodwill.

The golf ball industry is a very complex market with seasonality issues that keep some companies from wanting to engage in the marketplace. Amongst roughly 1,051 models of golf balls listed on the United States Golf Association list, golf balls are estimated to generate nearly \$500 million in annual sales.⁹⁰ Toward the end of the twentieth century, Titleist and Spalding were battling over which golf ball was the most effective for its players. Titleist insisted that “golfers agree no other ball comes close to the Titleist 384 DT for distance, feel and control.”⁹¹ In 2000, Titleist, Top Flite, Pinnacle, and Precept led the industry as having the top golf ball as indicated by their market share.⁹² Titleist and Top-Flite owned 23.51 and 22.74 percent of the market share respectively in 2000 while Nike was ranked thirtieth with only 1.59 percent of the market.⁹³ Ten years later, the Woods impact on Nike was realized as Nike climbed to the number four rank and claimed ten percent of the market.⁹⁴ Another major factor that illustrates the impact Woods had on Nike golf balls can be tracked by the shift in the share of Nike golf balls after Tiger Woods switched to using the Nike golf ball in June of 2000. Before the switch, Nike’s share was roughly 1.5%, but that figure jumped to a staggering 6.6%⁹⁵ in only 18 months.⁹⁶

On the other hand, although there are many positives to signing an endorser to help increase market share, stock price and total sales, companies

⁸⁹ See *id.*

⁹⁰ See *id.* at 5 (quoting Davide Dukcevic, *Nike Golf: Off the Ball?*, FORBES.COM, Mar. 5, 2002, <https://www.forbes.com/2002/03/05/0305nike.html>, [<https://perma.cc/6EVY-YA78>] (on file with the Harvard Law School Library)).

⁹¹ N.R. Kleinfield, *In Pursuit of the Perfect Golf Ball*, NYTIMES, Feb. 16, 1986, available at <http://www.nytimes.com/1986/02/16/business/in-pursuit-of-the-perfect-golf-ball.html?pagewanted=all>, [<https://perma.cc/MKM2-PHTP>].

⁹² See Chung, *supra* note 1, at 10 (comparing various golf ball brands based on (1) market share, (2) average price, (3) max price, (4) min price and (5) number of products).

⁹³ See *id.*

⁹⁴ See *id.* at 10 (showing that the top four companies by market share in 2010 were: Titleist (23.08%), Callway (11.75%), Bridgestone (10.57%) and Nike (10.00%)).

⁹⁵ And decreased Titleist’s share from 24.9% to 21.8%.

⁹⁶ See Chung, *supra* note 1, at 12.

must be aware of the negative effects that can come from signing a premier athlete that subsequently suffers reputational harm. For example, after NFL superstar Michael Vick revealed he “bankrolled gambling on dogfighting and helped kill some dogs,” Nike suspended Vick’s deal without pay and stopped marketing the products associated with Vick.⁹⁷ Nike suffered similar adverse effects following Tiger Woods’ marital infidelities scandal in 2009 in which he reportedly confessed to having sexual relations with 120 women.⁹⁸ It is estimated that the negative effect of his actions resulted in a loss of approximately \$1.4 million in profit and 136,000 customers switching away from Nike.⁹⁹ Chung and his partners engaged in an interesting study that analyzed the counterfactual where Nike elected to terminate its ties with Woods to assess the effect the decision to stay with Woods following the scandal had on the company. Their finding was that Nike would have lost even more had it ended its relationship with the golfer immediately the way Accenture, AT&T and Gatorade did.¹⁰⁰ This will not always be the case, and it is not an easy decision that can be made without proper due diligence.

One of the most effective ways to neutralize the reputational harm an endorser can bring a brand is to implement a morals clause. A morals clause¹⁰¹ provides advertisers the opportunity to suspend or terminate an agreement if the athlete’s conduct falls within the purview of the clause—commonly defined as behavior that is criminal, scandalous or otherwise pub-

⁹⁷ *Cut Loose: Nike Formally Drops Vick From Endorsement Roster*, SPORTSBUSINESS-DAILY, Aug. 27, 2007, <http://www.sportsbusinessdaily.com/Daily/Issues/2007/08/Issue-232/Sponsorships-Advertising-Marketing/Cut-Loose-Nike-Formally-Drops-Vick-From-Endorsement-Roster.aspx>, [https://perma.cc/KB3M-4Y9K] (on file with the Harvard Law School Library).

⁹⁸ See Maureen Callahan, *The Night Tiger Woods Was Exposed as a Cheater*, N.Y. POST, Nov. 24, 2013, available at <http://nypost.com/2013/11/24/the-night-tiger-woods-was-exposed-as-a-serial-cheater/>, [https://perma.cc/F2XQ-7AW7].

⁹⁹ See Chung, *supra* note 1, at 4.

¹⁰⁰ See *id.* at 33.

¹⁰¹ See generally Lauren Rosenbaum, *140 Characters or Less: A Look at Morals Clauses in Athlete Endorsement Agreements*, 11 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 129 (2015) (giving an example of Reebok’s morals clause, which reads, “[t]he commercial value of the Endorsement is impaired by Athlete’s commission of any act or involvement in any occurrence which violates widely-held principles of public morality or decency, is a felony or crime of moral turpitude in the jurisdiction in which it is committed or reflects unfavorable on Athlete, Reebok or Reebok Products”) (citing Sarah D. Katz, *Reputations. . . A Lifetime to Build, Seconds to Destroy: Maximizing the Mutually Protective Value of Morals Clauses in Talent Agreements*, 20 CARDOZO J. INT’L & CONTEMP. L. 185, 210 (2011)).

licly reprehensible.¹⁰² In some cases, depending on how the language of the clause is structured, endorsements may be terminated on “allegations” or “suspicion of misconduct.”¹⁰³ These provisions provide companies with a roadmap on how to handle complex situations when an endorser of their products engages in a manner that is contrary to the beliefs or values of the company. Endorsement contracts are inherently a high-risk, high-reward business venture. Although there is no way to eliminate risk, these clauses are crucial to companies engaging in endorsement deals.

This small example shows the impact a premier athlete can have on a brand. Furthermore, this example shows the importance of structuring an endorsement contract in a way that attempts to limit the negative effects a company will face in the event their endorser suffers reputational harm.¹⁰⁴ At the end of the day, it appears that a successful athlete is an extremely valuable resource to a company even if there are issues that arise at a later date or if that athlete cannot sustain success during that latter part of the endorsement. Therefore, the end game is to focus advertising dollars on the “right athlete” or celebrity that will fit the goals and the needs of the company. With this current business model in place, it is no surprise that Olympic athletes are being paid top dollar for their likenesses. Unfortunately, the law is lagging behind this new business model and both the company and the athlete are suffering from the stagnant nature of the law.

IV. DID RULE 40 ACCOMPLISH ITS GOALS?

The Olympic Games allow athletes from around the world an opportunity to compete at the highest level. The Games also provide athletes a global platform to market themselves. As stated throughout this paper, companies are trying to work within the parameters of the law and their current business models to achieve commercial success and to build a brand loyalty relationship with their customers. Rule 40 was implemented to ensure that sponsors have a better opportunity to benefit off of the goodwill of

¹⁰² See Christopher R. Chase, *A Moral Dilemma: Morals Clauses in Endorsement Contracts*, FRANKFURT KURNIT KLEIN + SELZ PC, Apr. 10, 2009, <http://fkks.com/news/a-moral-dilemma-morals-clauses-in-endorsement-contracts>, [<https://perma.cc/2M2K-CAX2>] (on file with the Harvard Law School Library).

¹⁰³ Rosenbaum, *supra* note 101, at 133 (citing Fernando M. Pinguelo & Timothy D. Cendrone, *Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, 19 SETON HALL J. SPORTS & ENT. L. 347 (2009)).

¹⁰⁴ See Chase, *supra* note 102 (citing *Nader v. ABC Television, Inc.*, 150 Fed.Appx. 54, 56 (2d Cir. 2005) (stating that morals clauses have long been held valid and enforceable, specifically in the context of criminal activity)).

the Games. Unfortunately, after examining the 2016 Rio Olympics, it is apparent that the changes were not enough.

A. *Rule 40 and the Failed State of the Law*

In brief, Rule 40, a by-law of the official Olympic charter states “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” without the express consent of the IOC.¹⁰⁵ The original rule prohibited non-sponsors from using any advertisement involving their athletes during the official blackout period (this year was from July 27 to August 24) even if the advertisement allegedly had nothing to do with the Olympics.¹⁰⁶ The goal of this rule was to prohibit non-sponsors from reaping the benefits of the goodwill of the Olympics Games and to protect the reputation and monetary value of being an “official sponsor” of the Games.

The issue with the former Rule 40 regime was that non-sponsors, who had invested a great deal of time and money in the likeness of premier Olympic athletes, lost a seat at the table and an opportunity to commercialize their partnerships. The blackout period would force sponsors to lose out on opportunities that would greatly benefit their brands and build further brand loyalty relationships with customers. In addition, athletes were not afforded the proper opportunity to use social media to thank their sponsors and abide by certain contractual obligations. First, many athletes want the opportunity to recognize their sponsors for all of their hard work prior to the event, especially because many of them cannot wear their sponsors’ apparel at the Games.¹⁰⁷ Second, some athletes may have contractual obligations to promote the sponsor on social media a specific amount of times throughout the year. For example, skeleton racer Noelle Pikus-Pace had deals with

¹⁰⁵ Daniel Roberts, *Why the Biggest Story of the Rio Olympics is this Marketing Rule Change*, YAHOO FINANCE, Aug. 3, 2016, <http://finance.yahoo.com/news/rio-olympics-rule-40-changes-marketing-summer-games-200732935.html>, [<https://perma.cc/JYC9-WYPX>] (on file with the Harvard Law School Library).

¹⁰⁶ *See id.*

¹⁰⁷ *See generally* Eric Strout, *Judge Dismisses Run Gum Lawsuit*, RUNNER’S WORLD, May 12, 2016, <http://www.runnersworld.com/elite-runners/judge-dismisses-run-gum-lawsuit>, [<https://perma.cc/YS6F-UNAC>] (“A U.S. District Court judge in Oregon dismissed an antitrust lawsuit . . . brought by Nick Symmonds’s company Gun Gum against USA Track & Field and the U.S. Olympic Committee.”) (on file with the Harvard Law School Library).

sponsors such as Deloitte, Kellogg's, TD Ameritrade, and Under Armour.¹⁰⁸ Several of her sponsorship agreements required her to mention the brand a "minimum of 25 times on Twitter and six times on Facebook before the 2014 Games." Under the old Rule 40, these contractual obligations were much harder to fulfill.

However, in February 2015, Rule 40 was relaxed to allow non-Olympic advertising during the Rio Games and to allow athletes to post on social media about non-official sponsors as long as they did not make any references to the Games.¹⁰⁹ This change allowed two strategies to emerge. First, smaller companies, such as Seattle-based women's apparel company Oiselle, began implementing strategies that played on words, such as "Big Event in the Southern Hemisphere" to achieve their goal.¹¹⁰ Second, larger companies, such as Under Armour, had the resources to try a more strategic approach. In March of 2016, they began showing advertisements of Olympic swimming superstar, Michael Phelps, training in the pool with the caption "Rule Yourself."¹¹¹ Although there was no direct connection to the Olympics, all viewers knew what Phelps was training for.

On the other hand, it can be argued that Rule 40 opened the floodgates to creative marketing teams. As mentioned previously, Under Armour's "Rule Yourself" advertisement featuring Michael Phelps was not an "Olympic advertisement" nor was Under Armour an official sponsor of the 2016 Rio Games. However, "data from Unruly shows that Phelps' Under Armour spot [was] the second most shared Olympics ad for 2016—behind Channel 4's incredible Paralympics sport 'We're The Superhumans,'—and the fifth most shared Olympics spot of all time."¹¹² For the IOC, this statistic could be alarming or could point to a flaw in the purpose and structure of the current rule. If Under Armour's advertisement is truly ranked among the greatest "Olympic advertisements," what goal did the changes to Rule 40 achieve? One could argue that Rule 40 is creating bigger headaches for

¹⁰⁸ See Tripp Mickle, *Athletes See Rising Social Media Demands*, SPORTSBUSINESS-DAILY, Oct. 21, 2013, <http://www.sportsbusinessdaily.com/Journal/Issues/2013/10/21/Olympics/Endorsements.aspx>, [https://perma.cc/7PQL-56LE] (on file with the Harvard Law School Library).

¹⁰⁹ See Chavez, *supra* note 4.

¹¹⁰ *Id.* (Owner of Oiselle, Sally Bergesen is also known to have used the phrase "city that rhymes with Neo Bee Sin Arrow" to make the connection to the games).

¹¹¹ *Id.*

¹¹² Katie Richards, *Why Under Armour 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/>, [https://perma.cc/QG82-LTUA] (on file with the Harvard Law School Library).

companies that have established strong brand loyalty with their customers while others could argue that Rule 40 is not doing enough to protect official sponsors. Should Rule 40 protect official sponsors, or simply police unauthorized advertisements? Where is the line drawn between stifling creativity and enforcing rules? How can Rule 40 be altered to recognize that brand loyalty is the foundation by which companies are advertising rather than attempting to appear as an official sponsor?

Furthermore, Rule 40 is not structured in a way that is relevant to today's industry and thereby causes more confusion for sponsors. What are they truly paying for and what is Rule 40 achieving? The blackout period makes sense because it tries to emphasize the relationship the Games have with its official sponsors. However, Rule 40, much like current trademark law, seems to be focused on consumer confusion rather than what the current business model on consumers emphasizes: brand loyalty. As the studies have shown throughout this paper, consumers are attached to their favorite athletes and they will be drawn to the brands that their favorite player endorses. Under Armour tapped into a loyalty base regardless of whether it is an official sponsor. Consumers are not always worried about who the official sponsor of the Olympics are; they often care more about what brand their favorite Olympic athlete endorses. Sponsorship can aid in targeting consumers on the fringe or without loyalty to a company. If Rule 40 is going to have a real effect on the current business model, more needs to be done to revamp how the Olympic governing body views its partnerships and the goodwill of the Games.

B. Where Do Companies Go From Here?

With the current state of the law in flux and the new changes to Rule 40 failing to tap into the current business model, companies are left with the question: what do we do now? How are companies supposed to act when they do not know how the Olympics will respond, and whether it is worth the investment to purchase rights to be an official sponsor of the Olympic Games? Companies with powerful marketing teams have learned how to work within Rule 40 to make indirect connections to the Games and others have succeeded with ambush marketing techniques. Given this success, creative marketing seems to be the most effective way to exploit a successful endorsement relationship. On the other hand, there is no guarantee that these "indirect advertisements" will be successful or connect with the consumers. Is it worth the headache or is it better to have the opportunity to use the goodwill and intellectual property associated with the Games? There is no simple way to answer this question and companies

must continue to conduct individual research to determine what is best for their company and their consumer base. Furthermore, companies must remain flexible to future changes as the IOC and USOC conclude their review of the most recent Summer Games.

Finally, if companies decide to move forward with an endorsement opportunity, it is important to be mindful of how to select the “right athlete.” There are some that believe there are only two major factors to consider when selecting an endorser: “1) the attractiveness of the celebrity—a more attractive/prominent endorser leads to a greater impact on sales—and 2) the credibility of the celebrity—expertise and trustworthiness must be credible.”¹¹³ In considering that checklist, companies should be aware of previous findings that state: 1) the help of celebrity endorsers pays off, 2) endorsement strategies fit a marketing campaign aimed at increasing market share, 3) paying a premium for top athletes appears worthwhile in terms of both sales and stock returns, 4) positive but decreasing returns to sales should impact how companies structure contract, and 5) there were will trade-offs in maximizing sales and stock-return performance.¹¹⁴ Given the current state of the law and the blueprint advertising strategy put forth by Under Armour’s Rule Yourself advertisement, the smart play seems to be: (1) find the best and most popular athlete in the Games, (2) find an athlete that is durable enough to participate in several Olympic Games, (3) pay that athlete a premium to endorse your products, and (4) provide a marketing team with the resources to make “generic” advertisements with the hope of creating a valuable relationship with the consumer.

V. CONCLUSION

The state of Olympic regulation appears to be in flux as companies try to adapt to the changes of Rule 40. New marketing strategies have pushed more competition into the boardrooms as companies fight over the top athletes. Unfortunately, the policies put forth by the Olympic governing bodies are lagging behind the new brand loyalty business model. This has forced companies to use creative solutions, oftentimes being accused of “ambush marketing” to promote their sponsored athletes. It is imperative that new regulations are proposed to ensure that the goodwill associated with the Olympic Games is utilized in a way that best serves this new marketing model. In the meantime, it appears advisable that companies follow the Under Armour blueprint of creating a “generic” marketing campaign that

¹¹³ Chung, *supra* note 1, at 7.

¹¹⁴ See Elberse, *supra* note 9, at 163–64.

provides them a seat at the Olympic table. After all, consumers are ready to pledge their allegiance to the “Swoosh” or to “Protect This House.” It all depends on who gets there first.

