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Brian Lee Pelanda

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Ambush Marketing: Dissecting the Discourse^{*}

by
BRIAN LEE PELANDA^{*}

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I. Introduction

In preparation for the 2012 Olympic Games in London (“Games”), the British government took drastic measures to preempt the perceived threat of ambush marketing, which the International Olympic Committee (“IOC”) persistently alleged was a major concern for its official sponsors in the past. The government has criminalized nearly all unauthorized commercial marketing activities during the Games, such as skywriting, the use of fliers, posters, billboards, and any other advertising activity within specifically designated “event zones” around Olympic venues.¹ These zones

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^{*} J.D., Whittier Law School; M.A., University of Akron; B.A., Capital University. Brian Pelanda can be reached at bpelanda@gmail.com.

1. London Olympic Games and Paralympic Games Act, 2006, c. 12, §§ 19–24 (Eng.); The London Olympic Games and Paralympic Games Advertising and Trading Regulations, 2011, c. 2898, §§ 5–11 (Eng.); See Jacquelin Magnay, *Games Ban on Ambush Marketing: London 2012 Government Plans to Stop Companies Cashing in on London Olympics and to Improve Security at Venues*, DAILY TEL., Mar. 8, 2011, at 13.

encompass all surrounding public roads, sidewalks, railway stations, and even private property, as well as the airspace above.² Anyone who violates these prohibitions faces penalties of up to £20,000.³ These anti-ambush marketing restrictions even threaten criminal sanctions against fans at Olympic events who so much as don promotional garb from unaffiliated companies, such as the group of female fans at the 2010 World Cup whom officials ejected from the stands for wearing orange dresses that advertised a Dutch brewery company.⁴ Where has this category of strict prohibitions on speech evolved from, and is the blanket silencing of all unauthorized commercial speech during sponsored athletic events good policy?

In the marketing context, the Olympics have become nearly synonymous with the practice of “ambush marketing,” an advertising strategy that the International Olympic Committee and its sponsors have complained about for nearly thirty years. One of the particularly notable examples of the practice occurred in 1984 when, after Fujifilm secured the exclusive official sponsorship rights to that year’s Olympic Games, rival Kodak cleverly secured sponsorship both of the ABC telecast of those Games and of the U.S.A. track and field team.⁵ Along similar lines, while McDonald’s was an official sponsor of the 1994 Winter Olympic Games, rival fast food company and non-sponsor Wendy’s aired television commercials during the broadcast of those Games with its recognizable spokesman and founder, Dave Thomas, participating in traditional winter Olympic sports.⁶ Commentators and critics have dubbed Kodak’s ad campaign during the 1984 Games and the Wendy’s ads during the 1994 Games—as well as a host of similar commercial marketing strategies employed during other high profile athletic events—as “ambush marketing.”⁷ Yet those who have persistently complained about

2. The London Olympic Games and Paralympic Games Advertising and Trading Regulations, 2011, c. 2898, §§ 5–6 (Eng.).

3. London Olympic Games and Paralympic Games Act, 2006, c. 12, § 21(3) (Eng.).

4. Magnay, *supra* note 1; Emine Saner, *G2: Gotcha! A Guerrilla Marketing Campaign at the World Cup This Week Ended Up With the Perpetrators Being Arrested*, GUARDIAN, June 17, 2010, at 4; Tariq Panja and Maud van Gaal, *FIFA Detains Dress-Clad ‘Fans’ Marketing Brew-haha*, TORONTO STAR, June 16, 2010, at B4.

5. Dean Crow & Janet Hoek, *Ambush Marketing: A Critical Review and Some Practical Advice*, 14 MKTG. BULLETIN 1 (2003).

6. Patrick Donahue Sheridan, *An Olympic Solution to Ambush Marketing: How the London Olympics Show the Way to More Effective Trademark Law*, 17 SPORTS L. J. 27, 28 (2010); Bob Garfield, *Olympian Dave Thomas? Now That’s Tough Sledding*, ADVERT. AGE 52 (Feb. 7, 1994); Michael Hiestand, *Ambushers Cut Into Sponsors’ Ground*, USA TODAY, June 16, 1993, at 9C.

7. Crow, *supra* note 5, at 2; Sheridan, *supra* note 6, at 28.

ambush marketing over the past few decades have wielded the term far too liberally, and thus a great deal of confusion exists between the generally accepted definition of ambush marketing and the reality of the circumstances surrounding the numerous advertising strategies that the term is commonly used to describe.

The literature on ambush marketing typically defines the practice as “a company’s attempt to capitalize on the goodwill, reputation, and popularity of a particular event by creating an association without the authorization or consent of the necessary parties.”⁸ On its face, this definition describes the practice of false association, which is explicitly prohibited in the United States under the Lanham Act, and for which a substantial body of case law exists. Yet, despite the innumerable cited instances of alleged ambush marketing over the last thirty years, “there is almost no ambush marketing case law in the United States.”⁹ Clearly, there must be a disconnect between the all-too-frequent allegations of “ambush marketing” as defined above, and the reality surrounding the marketing strategies that are often alleged to be “ambushes.”

This article discusses who controls the discourse on “ambush marketing” and why the discourse is flawed, the marketing strategies commonly alleged to be “ambushes,” and the applicability of American law to the subject. Although some have considered it to be too lenient,¹⁰ American trademark and unfair competition law adequately balances the competing interests at stake in alleged

8. Stephen McKelvey, *Atlanta 96: Olympic Countdown to Ambush Armageddon?*, 4 SETON HALL J. SPORT L. 397, 401 (1994); Jason K. Schmitz, *Ambush Marketing: The Off-Field Competition at the Olympic Games*, 3 NW. J. OF TECH. & INTELL. PROP. 203, 205 (2005); Noelle K. Nish, *How Far Have We Come? A Look at the Olympic and Amateur Sports Act of 1998, The United States Olympic Committee, and the Winter Olympic Games of 2002*, 13 SETON HALL J. SPORT L. 53, 65 (2003); Sheridan, *supra* note 6, at 28 (ambush marketing is a practice whereby companies attempt to make the consumer think their product or service is somehow affiliated with a popular sporting event or league); Jennifer Donatuti, *Can China Protect the Olympics, or Should the Olympics Be Protected from China?*, 15 J. INTELL. PROP. L. 203, 209 (2007) (“Ambush marketing occurs each time a non-Olympic sponsor portrays itself as an official Olympic sponsor in an effort to ‘capitalize on the goodwill, reputation, and popularity’ of the Olympics.”); *See also* USOC v. AMI, 156 F. Supp. 2d 1200, 1203 (D. Colo. 2001) (the USOC characterized AMI’s magazine as ambush marketing, i.e., an attempt to suggest association with the “Olympic Movement”); MATTHEW BENDER, THE LAW OF ADVERT. § 10.07.01 (2010).

9. Sheridan, *supra* note 6, at 29. “[I]n the last twenty years . . . few ambush marketing cases have gone to trial.” *Id.* at 33.

10. *Id.* at 29; Jamie Bischoff, Jeffery P. Curry & Ingrida Berzins, *Dispatch from the Trademark Wars: Ambush Marketing and the Arena of Sports*, METRO. CORP. COUNCIL, Feb. 2005, at 19 (referring to the U.S. legal framework under the Lanham Act as a comparatively “tolerant legal regime”).

ambush marketing cases and should serve as a model for the rest of the world to follow.

II. The “Ambush Marketing” Discourse

Event sponsors, corporate stakeholders, and commentators have discussed the issue of so-called “ambush marketing”—which is most often alleged to occur during high profile international athletic events such as the Olympics—primarily under the premise that the practice transgresses ethical boundaries, regardless of whether governments legally permit or prohibit certain forms of it.¹¹ The International Olympic Committee and many others have applied the term to a myriad of different corporate advertising strategies employed during such events, all of which to varying degrees purportedly interfere with or dilute “official” corporate sponsorships. The pervasive liberal use of the term “ambush marketing” is problematic because it cloaks an overly broad range of marketing practices with a presumed shroud of negativity and illegality. Generalizing all commercial speech that seeks to capitalize on the occurrence of high-profile athletic events without authorization from event organizers as “ambush marketing” suggests a definitive conclusion about the legality and/or the ethicality of the practice. The pertinent question thus concerns the scope of practices that should be confined to the label of “ambush marketing,” and whether sufficient legal protections currently exist in the United States to contain it.

The power to define ambush marketing and the categories of activities it encompasses is important because it includes the ability to influence the formation of law. For example, the IOC requires national organizing committees of potential host countries to secure protection of the Olympic marks and to enact special—event legislation designed to curtail ambush marketing.¹² Several countries such as South Africa, China, and England have responded to the issue by legislating severe criminal penalties for a host of commercial

11. See Michael Payne, *Ambush Marketing: The Undeserved Advantage*, 15 *PSYCHOLOGY & MKTG.* 323 (1998); John A. Tripodi & Max Sutherland, *Ambush Marketing—An Olympic Event*, 7 *J. OF BRAND MGMT.* 412, 414 (2000); Sheridan, *supra* note 6, at 48 (“Beyond purely monetary concerns, though, there is the basic unfairness of ambush marketing . . .”).

12. See *Olympic Charter*, www.olympic.org/documents/olympic_charter_en.pdf (July 8, 2011); *Host City Contract: Games of the XXX Olympiad in 2012*, www.gamesmonitor.org.uk/files/HostCityContract.pdf (July 6, 2005); Doris Estelle Long, *Trademarks and the Beijing Olympics: Gold Medal Challenges*, 7 *J. MARSHALL REV. INTELL. PROP. L.* 433, 436 (Spring 2008); Stephen McKelvey, *As Games Approach, Time to Reconsider Ambush Marketing*, *SPORTS BUS. J.*, Jan. 18, 2010, at 23.

activities carried on during high-profile international events that they categorize as ambush marketing.¹³ Although Congress granted the United States Olympic Committee (“USOC”) unprecedented statutory protection over its registered trademarks through the Amateur Sports Act in 1978,¹⁴ many analysts have still described the United States as a comparatively “tolerant legal regime”¹⁵ that is “currently underequipped to counter ambush marketing effectively.”¹⁶ However, despite such assessments, the concept of ambush marketing does *not* expose any shortcoming in the existing American legal framework of trademark and unfair competition law, and any additional legislation specifically targeted toward ambush marketing is unwarranted.

Words matter. Legal commentators, event organizers, and corporate sponsors have used the term “ambush marketing” far too loosely. As stated above, the literature typically defines ambush marketing as “a company’s attempt to capitalize on the goodwill, reputation, and popularity of a particular event by creating an association without the authorization or consent of the necessary parties.”¹⁷ The alleged unauthorized “creation of association” with an event is the most problematic aspect of this definition and use of the term because, as will be discussed below, the Lanham Act clearly prohibits advertising that is “likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association . . . or as to the origin, sponsorship, or approval of . . . goods, services, or commercial activities.”¹⁸ The fact that few purported “ambush” cases have ever been litigated through to a final judgment indicates that what event organizers and corporate sponsors typically allege to be “ambushes” which supposedly create consumer confusion as to official sponsorships and endorsements in fact do not create any likelihood of confusion.

Despite the glaring contradictions between the accepted definition of ambush marketing and the term’s frequent application,

13. Bischoff, *supra* note 10; see *supra* note 1.

14. *San Francisco Arts and Athletics, Inc. v. USOC*, 483 U.S. 522, 531 (1987) (Unlike traditional claims under the Lanham Act, under the Amateur Sports Act, “the USOC need not prove that a contested use [of its registered marks] is likely to cause confusion, and an unauthorized user of the [marks] does not have available the normal statutory defenses.”).

15. Bischoff, *supra* note 10, at 19.

16. Sheridan, *supra* note 6, at 31.

17. Schmitz, *supra* note 8.

18. Lanham (Trademark) Act § 43(a)(1) (2006), 15 U.S.C. § 1125(a)(1)(A) (2006).

the parties that stand to benefit from the overly broad use of the term nevertheless control the discourse. These parties are event organizers such as national Olympic committees in need of securing sponsorship contracts, and companies willing to invest in expensive sponsorship agreements. Although these parties claim that they are concerned with the consumer confusion supposedly caused by the marketing practices they label as “ambushes,” what they actually seem to be concerned with is attaining the power to quell all unauthorized speech relating to the high-profile athletic events that they promote. The controversy over ambush marketing has produced the unrealistic expectation of event organizers and corporate sponsors that sponsorship contracts should be able to restrict the speech of third parties.¹⁹

The issues that allegations of ambush marketing raise essentially pertain to trademark infringement in the context of promotional goods and false association, for which there is an extensive body of case law. This article argues that United States law serves as an appropriate international model for prohibiting deceptive marketing practices because it properly balances free speech and consumer interests with sufficient protection for official corporate sponsors of high-profile athletic events, and that corporate sponsors and event organizers have no legitimate reason to expect any additional protection.

19. Crow & Hoek point out that:

the normal commercial protections provided by trademark, copyright and passing off laws need to be supplemented by tighter contractual provisions between all of the parties involved in the sponsorship of an event. If event owners and sponsors develop tighter sponsorship contracts, they could foster more pragmatic expectations about what sponsorship can achieve.

Crow, *supra* note 5, at 11. Sheridan similarly notes that “one possible solution [to ambush marketing] is for companies and their sponsorees to address ambush marketing when they first negotiate their sponsorship agreement.” Sheridan, *supra* note 6, at 40. McKelvey also suggests that one solution to resolving the controversy “is for the Olympic Movement to stop selling official sponsors the promise of an ambush-free environment.” Stephen McKelvey, *As Games Approach, Time to Reconsider Ambush Marketing*, SPORTS BUS. J., Jan. 18, 2010, at 23.

III. What Marketing Tactics Are Alleged to Be “Ambushes”?

A. General Allegations of Ambush Marketing

Patrick Sheridan has listed what he and others allege are the four most prevalent forms of ambush marketing techniques:

(1) purchasing advertising time around an event in order to associate a nonsponsoring company as a sponsor of the event; (2) negotiating with individual players or teams, who are participating in a larger sponsored event or league, to have them endorse a nonsponsoring company; (3) using event tickets in a promotional contest to tie a nonsponsoring company to that event; and (4) [aggressive] marketing [by] a nonsponsoring company around the location of an event.²⁰ In a slightly more specific context, one company’s event management guide warns event organizers that. . . . Planes flying low over an event trailing banners advertising competitive products, signs erected without permission, and unauthorized distribution of flyers and merchandise are all examples of ambush marketing.²¹

The problem with labeling all of the marketing techniques listed above as “ambush marketing” is that all of them can be practiced without creating any likelihood that consumers will be confused into thinking that there is an association between the event and the party employing the technique. And if no likelihood of confusion as to association with the event exists, then event organizers and sponsors will not be harmed and thus have no legitimate basis to complain. But if a company’s use of any of the marketing techniques listed above does create a likelihood that consumers will be confused as to the company’s association with an event, the event organizers and sponsors have a valid, well-recognized claim in the United States under the Lanham Act.

20. Sheridan, *supra* note 6, at 32. John Tripodi & Max Sutherland similarly list these four techniques as ambush marketing. Tripodi & Sutherland, *supra* note 11, at 417.

21. Graham Medcalf, *Bang, You’re Dead!: Ambush Marketing Steps Over the Line of Guerrilla Marketing’s Legitimacy*, N.Z. MKTG. MAG. May, 2005 available at <http://business.highbeam.com/6504/article-1G1-132723009/bang-youre-dead-ambush-marketing-steps-over-line-guerrilla>.

B. Specific Ambush Allegations

Specific allegations of ambush marketing made during past Olympic Games highlight some of the problematic gaps in the discourse and demonstrate that event organizers and sponsors often allege that non-sponsoring companies have engaged in ambush marketing merely because those companies advertised in relation to the event. Event organizers such as the IOC and its corporate sponsors have demonstrated that they operate under the brazen assumption that they are entitled to a niche of the market free of any commercial competition whatsoever. They presume that no activity done in relation to their events, or even the mere use of terminology evocative of the existence of their events, could ever be fair or permissible without their authorization.

During the summer of 2000, leading up to the Olympic Games in Sydney, non-sponsor Nabisco launched an advertisement for its Fig Newton cookies that depicted an ancient Olympic athlete throwing a discus.²² The ad's accompanying text read: "The ancient Olympians worshipped the fig and used it for energy during training."²³ The Nabisco campaign also truthfully stated that the Fig Newton was the "Official Energy Food of USA Cycling."²⁴ Nabisco ran this ad in several sports publications.²⁵ PowerBar Inc., an official Olympic sponsor, complained to the USOC that Nabisco's ad campaign constituted ambush marketing that infringed upon its official sponsorship status, and the USOC subsequently brought suit in federal court, alleging that Nabisco had wrongfully tried to create an association between its product and the USOC and the Olympic Movement.²⁶ Nabisco decided to discontinue its ad campaign and the case settled out of court, so there was no judicial evaluation of whether Nabisco's ads violated either the Olympic Amateur Sports Act or the Lanham Act. However, even a cursory consideration of Nabisco's ad—which claimed only that ancient Olympians ate figs—suggests that, as long as the claim is true, it was most likely permissible under the Lanham Act because it is unlikely to have caused consumer confusion about Nabisco's relationship to the 2000 Olympic Games. Without the use of the iconic Olympic rings or a

22. Anne M. Wall, *The Game Behind the Games*, 91 TRADEMARK REP. 1243, 1261 (2001).

23. *Id.*

24. *Id.*

25. *Id.*

26. USOC v. Nabisco, Inc., Case No. C-00-3086, 10–11 (N.D. Cal., Aug. 25, 2000).

direct reference to the Summer Games, it would be a stretch to argue that consumers would likely have thought that Nabisco was an official sponsor or was somehow associated with the Games just because it mentioned that ancient Olympians ate figs.

The Winter and Summer Olympic Games of 1992 both shared the stage with a hotly contested battle between the International Olympic Committee and American Express over the latter's alleged use of ambush marketing tactics during the Games. Visa had paid \$20 million to be one of twelve official sponsors of the Games that year, while rival credit card company American Express had not paid to become an official sponsor.²⁷ During the Winter Games that took place in France, American Express ran television ads that referred generally to "winter fun and games" and depicted the French Alps.²⁸ The ads did not use any registered Olympic symbols or the word "Olympic."²⁹ The IOC nevertheless threatened suit, and Richard Pound, the Olympic Committee's marketing official, claimed that the ads sought to confuse consumers into believing American Express was an Olympic sponsor,³⁰ and later preposterously asserted that such practices were "unethical" and constituted "stealing."³¹ Apparently, the IOC determined that the argument that American Express's ads created confusion was much weaker than Pound had proclaimed, because the case never went to court.³² Furthermore, the American Express commercials may have been somewhat justified by the fact that Visa's initial ads during the Games had taken a direct shot at its rival, telling viewers that "The Olympics Don't Take American Express."³³

During the Summer Games of 1992 in Barcelona, American Express ran several more television commercials that the IOC and its sponsor Visa criticized as harmful ambush marketing. The ads used language that evoked the Summer Olympics, with one concluding "And remember, to visit Spain, you don't need a visa," and another telling viewers that "Obviously, we're here for more than just the fun

27. Martha T. Moore, *Plastic War: IOC to Sue AmEx Over Ads*, USA TODAY, Feb. 6, 1992, at 1A.

28. Sheridan, *supra* note 6, at 32.

29. *Id.*

30. Stuart Elliot, *American Express Replies to Criticism*, N.Y. TIMES, Feb. 7, 1992, at D18.

31. Stuart Elliot, *Jousting by Mass Marketers is the Newest Olympic Sport*, N.Y. TIMES, July 15, 1992, at D1.

32. Schmitz, *supra* note 8, at 205 n.15.

33. Moore, *supra* note 27.

and games.”³⁴ At least the first of these ads was highly unlikely to have confused consumers because it was an obvious shot at the official sponsorship status of Visa through a play on words. The pun essentially prevented both the possibility of confusion between the two companies, as well as any confusion over who, between them, was the official sponsor of the event. And although there is little doubt that the other ad’s reference to “fun and games” directed viewers’ minds to the Olympics, it would be a stretch to suggest that it somehow confused consumers as to whether American Express was associated with the Olympics.

The ability to prevent a company from even referencing the existence of the Olympics in a way that does not cause confusion would be a dramatic departure from trademark law’s primary rationale of preventing consumer confusion as to source of origin or sponsorship. The American Express ads during the 1992 Games might have disrupted Visa’s desire to be the only credit card company that could advertise with content that was in any way related to the Olympics, but trademark law is only intended to prohibit commercial competition that is unfair, i.e., practices that are likely to confuse consumers.³⁵ Trademark law is not intended to provide a competition-free commercial environment. It appears as though it would have been difficult to argue that American Express’s marketing somehow unfairly or unethically associated itself with the 1992 Olympics, but if the IOC had actually believed that there was a real possibility of consumer confusion as to American Express’s association with the 1992 Games and that such confusion had caused any harm, it would unquestionably have had a valid claim under the Lanham Act.³⁶

An excellent example of an overly broad ambush claim that actually made it to court is *USOC v. American Media, Inc.*³⁷ In this case, the United States Olympic Committee filed suit against American Media Inc. (“AMI”) for allegedly “ambushing” the 2000 Olympic Games in Sydney by publishing a magazine prior to those

34. Elliot, *supra* note 31.

35. *Two Pesos v. Taco Cabana*, 505 U.S. 763, 767–68 (1992) (The Lanham Act was intended to make “actionable the deceptive and misleading use of marks” and “to protect persons engaged in . . . commerce against unfair competition” (citing § 45, 15 U.S.C. § 1127)); *Mattel Inc. v. MCA Records Inc.*, 296 F.3d 894, 904 (9th Cir. 2002) (“[T]rademark law grants relief only against uses that are likely to confuse.”).

36. See 505 U.S. at 780 (quoting *New West Corp. v. NYM Co. of California, Inc.*, 595 F.2d 1194, 1201 (9th Cir. 1979)).

37. *USOC v. Am. Media, Inc.*, 156 F. Supp. 2d 1200 (D. Colo. 2001).

Games entitled “OLYMPICS USA” that contained unauthorized uses both of the Olympic symbol and the word “Olympic.”³⁸ The magazine contained several layouts describing thirty-two different Olympic events with photographs of athletes participating in each event.³⁹ AMI’s publication also included profiles of featured American athletes and an event and broadcast schedule of the upcoming Sydney Olympics.⁴⁰ The magazine contained a disclaimer on the table of contents page that denied any affiliation with or sanction by the USOC.⁴¹

The USOC brought suit against AMI under the Amateur Sports Act of 1978 (“ASA”), which provides the USOC with far greater protection over its marks than traditional trademark law under the Lanham Act. Under the ASA “the USOC need not prove that a contested use [of its marks] is likely to cause confusion, and an unauthorized user of the [marks] does not have available the normal statutory defenses.”⁴² Curiously, the USOC did not also allege a violation of the Lanham Act.⁴³ The USOC claimed that AMI had violated the ASA by using the USOC’s marks “for the purpose of trade and to induce the sale of goods,” and to pass off its magazine as if it were authorized by the USOC.⁴⁴ The USOC drew particular attention to the fact that AMI’s magazine used the word “Olympic” on its cover, that it contained “Olympic 2000” at least thirty-five times, and that it made various other unauthorized uses of Olympic marks and terminology such as depictions of medals, the Olympic torch and flame, and silhouettes referring to various Olympic events.⁴⁵ AMI moved to dismiss the case, arguing that the USOC had failed to state a valid claim because its magazine was an editorial publication that was non-commercial in nature,⁴⁶ and therefore the ASA did not apply.⁴⁷

The District Court for the District of Colorado agreed with AMI that its magazine was noncommercial speech and held that the ASA

38. *Id.* at 1203.

39. *Id.*

40. *Id.*

41. *Id.* (a violation of the Lanham Act would have required proof of a likelihood of consumer confusion).

42. *Id.* (citing *S.F. Arts and Athletics, Inc. v. USOC*, 483 U.S. 522, 531 (1987)).

43. *Id.* at 1210.

44. *Id.* at 1203.

45. *Id.*

46. *Id.* at 1204.

47. *Id.*

does not apply to the use of the USOC's marks in non-commercial speech.⁴⁸ The court went on to state that although the ASA does not provide the USOC with protection over its marks used in non-commercial speech, the Lanham Act could nevertheless provide protection if AMI's noncommercial use of the USOC's marks suggested official endorsement, authorization, or involvement by the USOC in publishing its magazine.⁴⁹ However, since the USOC had not alleged or proved a Lanham Act violation, the court could not address such a claim. If the USOC had alleged a Lanham violation, it would have had to prove that there was a likelihood that consumers would have been confused as to whether AMI was affiliated with or endorsed by the USOC.⁵⁰ The court granted the USOC leave to amend its complaint to allege a violation of the Lanham Act,⁵¹ but the USOC chose not to do so, likely because it determined it could not prove that consumers were likely to be confused into thinking that AMI's magazine was authorized or endorsed by the USOC.

C. What Really Lies at Stake in Ambush Marketing?

Many have argued that the so-called ambush marketing tactics described above "threaten the USOC's ability to raise financial resources."⁵² The threat is often portrayed as having the most dire consequences for high-profile athletic event organizers such as the USOC. Patrick Sheridan argues that "the danger of ambush marketing is not only consumer confusion, but also the potential loss of millions of dollars in future sponsorship fees."⁵³ On an even more alarming note, John Tripodi and Max Sutherland stated that "ambush marketing poses a serious threat to the longevity of sponsorship as a cost-effective promotional tool,"⁵⁴ and that it "risks devaluing official, corporate sponsorships and could conceivably threaten the financial viability of sporting events... like the Olympics."⁵⁵ Noelle Nish asserts:

Why would PowerBar, Inc. pay millions of dollars for the privilege of becoming the official nutrition bar of the

48. *Id.*

49. *Id.* at 1209.

50. *Id.* at 1210.

51. *Id.*

52. Nish, *supra* note 8, at 54.

53. Sheridan, *supra* note 6, at 32.

54. Tripodi, *supra* note 11, at 420.

55. *Id.*

Olympics if Nabisco, Inc. could step in with the Fig Newton and create the impression that it was the official sponsor? The answer probably is, that it wouldn't.⁵⁶

And the USOC itself warned in its complaint against AMI that an adverse ruling would threaten its contractual relationships with official sponsors, broadcasters, and licensees.⁵⁷

In response to “the sky is falling” hysterics over ambush marketing, Steve McKelvey makes the important point that “the Olympic Movement has historically argued that ambush marketing will result in the demise of its official sponsorship program and revenue. And yet, despite the continuance of ambush marketing, Olympic sponsorship fees escalate each quadrennial.”⁵⁸ The fact is that the IOC collected more than \$1.4 billion from all corporate sponsorships between 2001 and 2004.⁵⁹ Under The Olympic Partner Program (“TOP”) alone, the IOC’s highest tier of sponsorship, “revenue has exploded in recent years, growing from nine TOP sponsors contributing \$96 million in the 1985–1988 period to eleven sponsors contributing \$866 million for the 2005–2008 period.”⁶⁰ Despite their alleged fear that the prevalence of ambush marketing threatens their potential to secure future sponsorships,⁶¹ Olympic organizers nevertheless estimate that the TOP sponsorship revenue for the London Games in 2012 could increase to record levels as high as \$1.5 billion.⁶²

It appears that the most serious threat posed by ambush marketing is the indiscriminate use of the term itself. Event organizers such as the IOC and its official sponsors often seek to quell speech by non-Olympic sponsors that capitalizes on the mere occurrence of the Games—which are enjoyed and cherished by the world public at-large—even when there is no threat that such speech is likely to confuse consumers as to the speaker’s relationship to the Olympic Movement. Because the IOC requires national organizing committees of potential host countries to secure protection of the Olympic marks and to enact special-event legislation designed to

56. Nish, *supra* note 8, at 71.

57. *USOC v. Am. Media, Inc.*, 156 F. Supp. 2d 1200, 1210 (D. Colo., 2001).

58. McKelvey, *supra* note 19.

59. Jenifer Donatuti, *Can China Protect the Olympics, or Should the Olympics be Protected From China?*, 15 J. OF INTELL.PROP. L. 203, 207 (2007).

60. *Id.*

61. *See USOC v Am. Media Inc.*, 156 F. Supp. 2d at 1210.

62. *Id.* at 208.

curtail ambush marketing,⁶³ there is legitimate reason to fear that freedom of speech will be at least one casualty in its campaign to kill ambush marketing. For example, Canada passed special-event legislation for the 2010 Winter Olympic Games in Vancouver that “so infringed upon the commercial speech rights of local businesses and constitutional rights of local citizens that the Vancouver-based British Columbia Civil Liberties Association and others successfully sued the city for less restrictive measures.”⁶⁴

IV. U.S. Trademark and Unfair Competition Law

An examination of the applicable provisions of the Lanham Act and unfair competition case law in the United States will help demonstrate that the typical allegations of ambush marketing are usually much ado about nothing. Again, ambush marketing is predominantly defined as “a company’s attempt to capitalize on the goodwill, reputation, and popularity of a particular event by creating an association without the authorization or consent of the necessary parties.”⁶⁵ As will be discussed below, the Lanham Act and the existing case law clearly prohibit advertising that is confusing or misleading as to sponsorship or association. The important point to make here is that marketing that capitalizes on the *occurrence* of an athletic event does not ipso facto create a wrongful *association* with that event or indicate an attempt to create a wrongful association with that event. If there is no likelihood that a particular marketing tactic has created a wrongful association with an event in the minds of consumers, then no problem exists and that tactic cannot fall into the category of ambush marketing as defined above. The real issue underlying most allegations of ambush marketing is the desire to prohibit *all* unpaid-for speech by competitors of official sponsors that in any way occurs during or references a sponsored athletic event, regardless of whether it creates any confusion as to association or sponsorship status.

The concept of ambush marketing, if accurately defined, is essentially no different from the concept of false association, for which there is an extensive body of case law under the Lanham Act. Section 43(a)(1)(A) of the Lanham Act states:

63. Long, *supra* note 12, at 436.

64. McKelvey, *supra* note 19.

65. See *supra* text accompanying note 8.

Any person who . . . uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false misleading description of fact, or false or misleading representation of fact, which . . . (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, shall be liable in a civil action. . . .⁶⁶

The following are examples of only a few of the many cases that analyze false association under the Lanham Act and are applicable to the factual circumstances of most allegations of ambush marketing: *Boston Athletic Ass'n v. Sullivan*,⁶⁷ *Pirone v. MacMillan, Inc.*,⁶⁸ and *Warner Bros., Inc. v. Gay Toys, Inc.*⁶⁹ The crux of a false association analysis under these cases lies in the likelihood of consumer confusion, and confusion as to a non-sponsor's association with an athletic event is the primary issue in any ambush marketing allegation.

A. *Boston Athletic Ass'n v. Sullivan*

In *Boston Athletic Ass'n v. Sullivan*, defendant Sullivan was an apparel retailer and defendant Beau Tease, Inc. was an apparel distributor.⁷⁰ The defendants had been imprinting and selling shirts with the name "Boston Marathon" and other terms including the years of the races since 1978.⁷¹ The Boston Athletic Association ("BAA"), the organization that annually conducts the Boston Marathon, registered its marks "Boston Marathon" and "BAA Marathon" in 1983 and subsequently began licensing those marks to defray the costs of the race.⁷² A retailer named Image Impact had entered into an exclusive license with the BAA to use its registered marks on shirts beginning in 1986.⁷³ Defendants had not secured licenses from the BAA to use its marks. Instead, the defendants

66. Lanham (Trademark) Act, § 43(a)(1)(A) (2006), (15 U.S.C. § 1125(a)(1)(A)) (2006).

67. *Boston Athletic Ass'n v. Sullivan*, 867 F.2d 22 (1st Cir. 1989).

68. *Pirone v. Macmillan, Inc.*, 894 F.2d 579 (2d Cir. 1990).

69. *Warner Bros., Inc. v. Gay Toys, Inc.*, 658 F.2d 76 (2d Cir. 1981).

70. *Boston Athletic Ass'n*, 867 F.2d at 24.

71. *Id.* at 25.

72. *Id.* at 24–25.

73. *Id.* at 25.

began producing and selling shirts in the Boston area imprinted with “1986 Marathon” and a picture of runners above the words “Hopkinton-Boston.”⁷⁴ Thus, the defendants had carefully avoided copying any of the BAA’s marks on their shirts. However, the BAA nevertheless filed suit in federal court, alleging confusion as to sponsorship in violation of the Lanham Act.⁷⁵

The District Court held that the BAA’s rights did not extend beyond the use of the exact marks it had registered, and that there was no confusion between the defendants’ and plaintiffs’ shirts, and therefore ruled in favor of the defendants.⁷⁶ The BAA appealed, and the Court of Appeals for the First Circuit reversed. The First Circuit stated that the central issue was a likelihood of confusion under the Lanham Act.⁷⁷ The court noted that the case was not a typical trademark infringement case in respect to the BAA’s claim because the defendants were using the Boston Marathon, sponsored and operated by the BAA, “to promote the sale of goods which are adorned so as to capitalize on the race.”⁷⁸ The court thus determined that the “likelihood of confusion” inquiry should focus upon “whether the purchasing public is likely to believe that the sponsor of the Boston Marathon produces, licenses, or otherwise endorses defendants’ shirts.”⁷⁹ This states precisely the problem that the IOC and others allege to be at issue with ambush marketing.

The First Circuit stated that the BAA had the burden of showing that prospective purchasers were in fact likely to be confused or misled into thinking that the defendants’ shirts were produced, licensed, or sponsored by the plaintiff.⁸⁰ The court held that even though the defendants had not used the plaintiff’s marks, “there can be no doubt that the language and design on defendants’ shirts intentionally calls attention to an event that has long been sponsored and supported by the BAA,” and that the shirts were “clearly designed to take advantage of the Boston Marathon and to benefit from the good will associated with its promotion by [the BAA].”⁸¹ The court even lowered the BAA’s burden of proving likelihood of confusion by stating that the BAA was not required to prove that

74. *Id.* (The Boston Marathon race route begins in Hopkinton and ends in Boston.)

75. *Id.* at 25–26.

76. *Id.* at 27.

77. *Id.* at 28.

78. *Id.*

79. *Id.* at 28–29.

80. *Id.* at 32.

81. *Id.* at 33.

members of the public would conclude that the defendants' shirts were *officially* sponsored by the BAA.⁸² The court ruled in favor of the BAA, holding that purchasers were likely to be confused about the source or sponsorship of defendants' shirts, and that the defendants had thus violated the Lanham Act.⁸³

B. *Pirone v. MacMillan, Inc.*

In *Pirone v. MacMillan, Inc.*, defendant MacMillan published "The 1988 MacMillan Baseball Engagement Calendar," which contained photos of several baseball players, among them three photos of Babe Ruth.⁸⁴ The calendar's title, its back cover, the title page, and the copyright page all prominently referred to the MacMillan Publishing Company, and the words "Babe Ruth" did not appear on the cover.⁸⁵ Ruth had received compensation for the use of his name or his picture in the promotion of various products when he was alive, and after his death his daughters Dorothy Ruth Pirone and Julia Ruth Stevens registered the words "Babe Ruth" as a trademark.⁸⁶ Pirone and Stevens had subsequently granted an amateur baseball league a license to use the "Babe Ruth" mark to promote itself and sell various products.⁸⁷ As a result of MacMillan's use of Ruth's images in the calendar, Pirone filed suit in federal court alleging trademark infringement and unfair competition alongside other state law claims.⁸⁸

The District Court for the Southern District of New York granted MacMillan's motion for summary judgment on Pirone's trademark and unfair competition claims, and the Second Circuit affirmed.⁸⁹ It held that, while Pirone had established a valid trademark in the words "Babe Ruth," she was incorrect in believing that her rights in those marks also included every photo ever taken of Ruth.⁹⁰ Because MacMillan's calendar used the name and image of Babe Ruth to identify a great baseball player rather than as a trademark to identify

82. *Id.*

83. *Id.* at 34.

84. *Pirone v. Macmillan, Inc.*, 894 F.2d 579, 581 (2d Cir. 1990).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 581, 585.

90. *Id.* at 582 (2d Cir. 1990).

the source of the calendar, the court held that the use did not constitute trademark infringement.⁹¹

Under Pirone's unfair competition claim, the court stated that Section 43(a) of the Lanham Act "is violated by the use of any 'symbol' as a 'false designation of origin' or as any 'false representation,' whether or not a trademark is involved."⁹² This rule deals specifically with any use of symbols that may be misleading as to sponsorship, and is thus directly applicable to any allegation of ambush marketing described earlier in this article. In this case, the court held that pictures of Ruth were symbols, but that they did not indicate the origin or represent sponsorship of MacMillan's calendar.⁹³

The Second Circuit went on to state that "the crucial determinant in an action for trademark infringement or unfair competition is 'whether there is any likelihood that an appreciable number of ordinary prudent purchasers are likely to be misled, or indeed simply confused, as to the source of the goods in question.'"⁹⁴ The court further clarified that "the public's belief that the mark's owner sponsored or otherwise approved the use of the trademark satisfies the confusion requirement."⁹⁵ Because the source of publication was clearly indicated with numerous and prominent references to MacMillan,⁹⁶ and because the photos of Ruth were among photos of many others featured in MacMillan's calendar, the court reasoned that "an ordinary prudent purchaser would have no difficulty discerning that these photos... do not in any way indicate sponsorship. No reasonable jury could find likelihood of confusion."⁹⁷

C. *Warner Bros., Inc. v. Gay Toys, Inc.*

In *Warner Bros., Inc. v. Gay Toys, Inc.*, Warner Brothers sued Gay Toys over the latter's manufacture of a toy car similar to the 1969 Dodge Charger, known as the "General Lee" and driven by the main characters in Warner Brothers' popular television series "The Dukes of Hazzard."⁹⁸ Warner Brothers had refused to grant Gay Toys a license to use its "Dukes of Hazzard" trademarks, so Gay Toys

91. *Id.* at 584.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 585.

98. *Warner Bros., Inc. v. Gay Toys, Inc.*, 658 F.2d 76, 78 (2d Cir. 1981).

labeled its toy as the “Dixie Racer,” reversed the door numerals from the “01” that appeared on the “General Lee” to “10” and refrained from calling its toy car the “General Lee.”⁹⁹ However, the toy car was identical to the Warner Brothers’ “General Lee” in most other respects.¹⁰⁰ Warner Brothers contended that the defendant’s toy violated Section 43(a) of the Lanham Act because the “Dixie Racer” caused consumer confusion in the public’s mind as to the manufacture and sponsorship of the toy car.¹⁰¹ Warner Brothers also contended that the defendant’s car “[gave] rise to the assumption by the public that Gay Toys’ ‘Dixie Racer’ [was] an authorized reproduction of the ‘General Lee.’”¹⁰²

The District Court for the Southern District of New York ruled in favor of Gay Toys on Warner Brothers’ motion for a preliminary injunction, holding that there could be no proof of confusion because Warner Brothers was not in the business of manufacturing toy cars.¹⁰³ The issue on appeal before the Second Circuit was whether the District Court erred in finding that Warner Brothers failed to show a likelihood of confusion as to the source or sponsorship of the defendant’s “Dixie Racer.”¹⁰⁴ The Second Circuit reversed the lower court, finding that there was a sufficient likelihood of confusion as to the source and sponsorship of the “Dixie Racer.”¹⁰⁵ The court stated that “the basic inquiry in an unfair competition action is whether the public is likely to be misled into believing that the defendant is distributing products manufactured or vouched for by the plaintiff,” and that only proof of a *likelihood of* confusion or deception as opposed to proof of *actual* confusion need be shown to obtain equitable relief.¹⁰⁶ Under this standard, the court assessed Warner Brothers’ evidence of a survey that showed eighty percent of children had identified the “Dixie Racer” as the “General Lee” or as “The Dukes of Hazzard Car,” and had thus assumed that Warner Brothers had sponsored the toy car.¹⁰⁷ As such, the court held that Warner Brothers had proved a likelihood of confusion as to the sponsorship

99. *Id.*

100. *Id.*

101. *Id.* at 77.

102. *Id.*

103. *Id.* at 78.

104. *Id.*

105. *Id.*

106. *Id.* at 79.

107. *Id.*

of the defendant's "Dixie Racer" and reversed the District Court's order denying Warner Brothers' request for an injunction.¹⁰⁸

V. Case Law Summary and Ambush Allegation Analysis

The three cases discussed in the previous section are only a few examples of an exhaustive body of case law on unfair competition and trademark infringement under the Lanham Act. All three cases demonstrate that the United States has a legal framework in place designed specifically to deal with any activity that is deceptive or likely to cause confusion in the marketplace as to association or sponsorship. To receive injunctive relief against an allegedly deceptive or confusing practice, a plaintiff must only prove a *likelihood* of confusion as to association or sponsorship, not *actual* confusion.¹⁰⁹

In *Boston Athletic Ass'n* the First Circuit held that the public was likely to be confused by the defendants' shirts as to their association with the organizer of the Boston Marathon, even though the defendants had not used any of the plaintiff's trademarks.¹¹⁰ Similarly, in *Warner Bros.* the Second Circuit held that the defendant's "Dixie Racer" toy car was likely to confuse the public as to its association with the Warner Brothers television series "The Dukes of Hazard," even though the toy did not copy any of Warner Brothers' trademarks.¹¹¹ However, in *Pirone* the plaintiff was unable to provide any evidence that consumers were likely to have been confused as to whether the owners of the "Babe Ruth" mark sponsored or endorsed the defendant's baseball calendar.¹¹²

Ambush marketing strategies allegedly attempt to "capitalize on the goodwill, reputation, and popularity of a particular event by creating an association without the authorization or consent of the necessary parties."¹¹³ If marketing tactics alleged to be "ambushes" are in fact likely to cause consumer confusion as to a company's association with an event such as the Olympics, then under the Lanham Act case law discussed above, event organizers and official event sponsors would undoubtedly have recognizable claims in

108. *Id.* at 79–80.

109. *Id.* at 79; Kellie L. Pendras, *Revisiting San Francisco Arts & Athletics v. USOC: Why It is Time to Narrow Protection of the Word "Olympic,"* 24 HAW. L. REV. 729, 731–32 (2002).

110. *Boston Athletic Ass'n v. Sullivan*, 867 F.2d 22, 33 (1st Cir. 1989).

111. *Warner Bros., Inc.*, 658 F.2d at 78.

112. *Pirone v. Macmillan, Inc.*, 894 F.2d 579, 585 (2d Cir. 1990).

113. *See supra* text accompanying note 8.

federal court. Yet, for all of the past allegations of ambush marketing during high profile athletic events such as the Olympics over the last three decades, few ambush cases have ever gone to trial,¹¹⁴ which begs the question as to why.

Patrick Sheridan answers that question in a way that unintentionally dispels the controversy over ambush marketing and demonstrates the glaring contradictions inherent in the all-too-frequent allegations of the practice.¹¹⁵ Like most who complain about the constant threat of ambush marketing, Sheridan argues that the practice poses the serious danger of consumer confusion as to association with an athletic event.¹¹⁶ However, his proposed solution is to do away with the plaintiff's traditional burden under the Lanham Act of having to prove a "likelihood of confusion" with an alleged ambush marketer's tactics because, according to him, that threshold is too difficult to meet in most ambush cases.¹¹⁷ Thus, Sheridan believes that the definitive problem with so-called ambush marketing tactics is that they supposedly confuse consumers, but most complainants have been so far from being able to prove that confusion is likely that they have not even attempted to take their claims into court. Drawing the obvious conclusion from his proposal to lower our unfair competition law standards to the point where plaintiffs would not have to prove that the advertising is unfair, Sheridan asserts "If sports organizations did not have to meet the current likelihood of confusion burden, they would likely litigate more ambush marketing claims using trademark law and receive successful results."¹¹⁸

VI. Conclusion

If any of the practices that are typically categorized as ambush marketing during a high-profile athletic event are likely to cause confusion as to the alleged ambusher's association with the event, then the Lanham Act provides adequate protection. Under the Lanham Act, event organizers are even spared the burden of proving that a particular marketing practice or advertisement *actually*

114. Sheridan, *supra* note 6, at 29.

115. *Id.*

116. *Id.* at 32.

117. *Id.* at 29–30. "[P]erhaps the most significant impediment to ambush marketing litigation, at least under the Lanham Act, is the requirement to show consumer confusion in an unfair competition claim." *Id.* at 37. Jason Schmitz similarly concludes that "the 'likelihood of confusion' analysis often does not apply to the facts of ambush cases." Schmitz, *supra* note 8, at 207.

118. Sheridan, *supra* note 6, at 30.

confuses consumers as to association with the event, and are required only to prove that there is a *likelihood* that consumers would be confused.¹¹⁹ This is a reasonable standard that both protects official sponsorship agreements and free speech in the competitive free market.

Because United States trademark law adequately balances free speech interests with consumer confusion, and because it protects markholders and businesses from actions by competitors designed to deceive consumers, it should serve as a model for the international community to follow when dealing with ambush marketing. The British government especially should reevaluate its strict anti-ambush marketing legislation prior to the 2012 Summer Olympic Games in London. In the United States, corporate sponsors and event organizers such as the United States Olympic Committee should wield their allegations of ambush marketing more precisely and more sincerely if they wish to be taken seriously by the American legal community and the marketing departments of non-sponsoring companies.

119. Pendras, *supra* note 110, at 731–32.