1996

Ambushing the Olympic Games

Robert N. Davis

Follow this and additional works at: http://digitalcommons.law.villanova.edu/mslj

Part of the Entertainment, Arts, and Sports Law Commons, and the Intellectual Property Law Commons

Recommended Citation

Available at: http://digitalcommons.law.villanova.edu/mslj/vol3/iss2/5

This Symposium is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Jeffrey S. Moorad Sports Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository. For more information, please contact Benjamin.Carlson@law.villanova.edu.
AMBUSHING THE OLYMPIC GAMES

ROBERT N. DAVIS

I. INTRODUCTION

"Ambush" or "parasite" marketing may not be illegal, but many Olympic sponsors believe that companies engaged in the practice should be punished. Both of these terms have been used in the marketing industry to describe a company that is not an official sponsor of an event but, because its advertising campaign is centered around the event, appears to be one of the official sponsors. While the non-sponsoring company may not use official logos and other trademarks associated with the sporting event, nothing prohibits the company from airing a commercial featuring former Olympians endorsing its product and saying, "We will see you in Atlanta at game time."

Ambush is defined as "a lying in wait to attack by surprise," "a surprise attack made from a concealed position" and "to hide in the bushes." Parasite is defined as "any organism that grows, feeds, and is sheltered on or in a different organism while contributing nothing to the survival of its host" and "a person who habitually takes advantage of the generosity of others without making any useful return."

Whether these definitions befit the practice is debatable. Many industry executives say it is not ambush marketing at all, but rather corrective advertising. Others say that the prices for sponsorships are exorbitant and ambush marketing is creative advertising for those companies who cannot or will not pay excessive prices for exclusive rights packages.

1. Sponsorship has been defined to include things which indicate approval, permission or authorization. John J. Voortman, Trademark Licensing of Names, Insignia, Characters and Designs: The Current Status of the Boston Pro Hockey Per Se Infringement Rule, 22 J. MARSHALL L. REV. 567, 569 n.12 (1989). Mr. Voortman further noted that "[t]he purpose of trademark protection is to convey accurate information to consumers as to the source or sponsorship of products." Id. at 569 (footnote omitted).


3. Id. at 953.


5. Id. (stating that "[a]mbushers figure they can identify themselves with an event without having to shell out exorbitant fees").

(423)
The purpose of this Article is to explore the practice of ambush marketing and its impact on the Olympic Games. Part II of the Article discusses particular examples of ambush marketing. Part III discusses *National Hockey League (NHL) v. Pepsi-Cola Canada Ltd.*, the only legal decision to squarely address the practice of ambush marketing. Part IV of the Article examines the Amateur Sports Act of 1978 which gives the United States Olympic Committee (USOC) exclusive control over the use of Olympic symbols, emblems and names. Part IV also discusses the Sponsor Protection Program (SPP) of the Atlanta Centennial Olympic Properties (ACOP). Part V of the Article concludes with an evaluation of the efforts of the Sponsor Protection Program in light of the current law.

II. AMBUSH MARKETING OR AGGRESSIVE PROMOTION?

The cost of sponsorships have skyrocketed, particularly since the 1984 Los Angeles Olympic Games. In 1992, corporate sponsors in the United States paid an estimated $3.2 billion for sponsorships. This figure reflected an increase from $2.8 billion in 1991 and $1 billion in 1986. In 1980, the organizers for the Lake Placid Winter Olympics signed up 300 commercial sponsors, but together these sponsors provided less than $10 million in cash. Peter Ueberroth, President of the 1984 Los Angeles Olympic Organizing Committee (LAOOC), and his assistant Joel Rubenstein decided to maintain only thirty Olympic sponsorships and require a $4 million minimum payment. Currently, companies will pay as

6. For a discussion of various examples of ambush marketing, see infra notes 18-58 and accompanying text.
8. For a discussion of *NHL v. Pepsi-Cola Canada Ltd.*, see infra notes 63-82 and accompanying text.
10. For a discussion of Sponsor Protection Program (SPP), see infra notes 100-117 and accompanying text.
11. For an evaluation of the SPP, see infra Part V.
12. Brewer, supra note 4, at 68.
13. *Id.* United States corporations spent approximately two-thirds of the $3.2 billion on sponsoring sporting events, teams, or athletic leagues. *Id.*
14. *Id.*
15. PETER UEIBERROTH, MADE IN AMERICA 61 (1985).
16. *Id.* The City of Los Angeles refused to finance the 1984 Olympic Games after the City of Montreal lost more than $1 billion hosting the 1976 Summer Olympics. Frederick H. Lowe, *Team Players - Firms Seek High Profile At Low Cost*, Chi. SUN-TIMES, July 24, 1994, (Moneylife), at 1. As a result of Montreal's experience, Ueberroth and Rubenstein designed their plan to increase the value of being an
much as $40 million to become an official sponsor of the 1996 Summer Olympics.\textsuperscript{17} Ironically, as the Olympic sponsorship program has become more financially productive, the temptation to ambush a competitor increases.

A. 1992 Barcelona Summer Olympics

1. \textit{Visa and American Express}

In 1992, Visa paid approximately $20 million to sponsor the Summer Olympics in Barcelona, Spain and the Winter Olympics in Albertville, France.\textsuperscript{18} In addition, Visa spent millions on a marketing campaign designating itself as the official credit card of the 1992 Olympics.\textsuperscript{19} One of Visa's television campaigns made a frontal assault on one of its competitors, American Express (AmEx), by stating "'[t]he Olympics don't take American Express[.]'"\textsuperscript{20}

In response to the Visa commercial, AmEx aired an ad with winter sports athletes telling viewers that "to enjoy the 'fun and games' they 'don't need a Visa.'"\textsuperscript{21} AmEx intended the commercial to show that many stores, restaurants and hotels in Albertville, France accepted the AmEx card.\textsuperscript{22} After this ad aired, Visa claimed that AmEx carried out an ambush marketing strategy.\textsuperscript{23} AmEx countered by saying that this charge was unfounded because Visa initiated the confrontation and it was merely setting the record straight.\textsuperscript{24}

\textsuperscript{17} Brewer, supra note 4, at 68. In 1994, companies paid approximately $9.5 million to officially sponsor the Winter Olympics. \textit{Id.}

\textsuperscript{18} \textit{Id.} at 67.

\textsuperscript{19} \textit{Id.}

\textsuperscript{20} \textit{Id.} This claim was technically true because part of the Visa sponsorship package provided that official Olympic ticket and merchandise vendors were authorized to accept only Visa credit cards. \textit{Id.}

\textsuperscript{21} \textit{Id.}

\textsuperscript{22} Brewer, supra note 4, at 67.

\textsuperscript{23} \textit{Id.} at 68. Although the American Express commercial focused on winter sporting events, it never used the word Olympics. \textit{Id.} John Bennett, a Senior Vice President for Visa USA, stated that American Express commercials portrayed the "look, feel, and implication of the Olympics[.]") \textit{Id.} Visa thus claimed that such portrayal confused consumers into thinking that AmEx helped sponsor the Olympics. \textit{Id.}

\textsuperscript{24} \textit{Id.} Warner J. Canto, a Senior Vice President of Marketing Communications for American Express Travel Related Services, stated that "'[t]his wasn't parasite marketing. It was corrective advertising. We'll do whatever it takes to correct any misleading impressions Visa creates." \textit{Id.}
2. Nike, Inc. and Reebok International, Ltd.

Another example of ambush marketing or aggressive promotion occurred at the 1992 Barcelona Olympic Games between two sports apparel manufacturers, Nike, Inc. (Nike) and Reebok International, Ltd. (Reebok). At the 1992 Olympic medal ceremonies, athletes wore jackets made by Reebok, an official Olympic sponsor. Nike, however, conducted a highly visible advertising campaign without "paying a penny in [Olympic] sponsorship fees." Nike held press conferences for Olympic athletes under contract with Nike and additionally displayed large murals of U.S.A. basketball team members on the side of Barcelona buildings. In support of its advertising campaign, Nike Divisional Manager Mark Pilkenton stated "[w]e feel like in any major sporting event, we have the right to come in and give our message as long as we don’t interfere with the official proceedings."

B. Major Sports Leagues

All of the major sports leagues prohibit non-sponsors from using league logos, official team uniforms, hats and insignia in advertisements, but nothing prohibits them from sponsoring individual teams. Most recently, National Football League Properties (NFLP) sued the Dallas Cowboys for $300 million because Jerry Jones, the team owner, independently negotiated a ten-year, $25 million deal with Pepsi-Cola to replace Coca-Cola, an NFLP sponsor, at the Dallas Cowboys stadium.

Much to the National Football League's (NFL) dismay, Mr. Jones does not want to do business through NFLP but would rather each team negotiate deals independently. That is the last thing the NFL wants to see happen. In the lawsuit filed in a United States District Court, the NFL argued that Mr. Jones engaged in a scheme to destroy the structure of NFLP in order to gain a "more than

25. Id. at 69.
26. Id.
27. Brewer, supra note 4, at 69. The Nike murals and the Nike press conferences involved Michael Jordan, an American basketball star. Id.
28. Id. Reebok maintained the position that "[w]e proceed with our game plan regardless of what Nike does." Id.
29. Richard Sandomir, Dollars and Dallas: League of Their Own?, N.Y. TIMES, Sept. 24, 1995, § 3, at 1. In September 1995, Jones negotiated a deal with Nike, a non-NFLP sponsor, for $2.5 million to paint its trademark "Swoosh" on the Cowboys' stadium, develop a theme park and provide Cowboys personnel with Nike clothing. Id. Additionally, Jones was rumored to be negotiating with American Express and AT&T, the competitors of two NFLP sponsors, Visa USA and GTE. Id.
30. Id.
equal share of licensing revenue.' "31 Jones maintained that he did not violate any NFL restriction because the Nike and Pepsi-Cola agreements are with the stadium, not the Dallas Cowboys.32

Paul Tagliabue, the NFL Commissioner, and Sara Levinson, the NFLP President, believe that Mr. Jones' actions are contrary to the best interests of the NFL and the other NFL teams.33 The Dallas Cowboys, of course, are a great asset to the NFLP. Dallas Cowboys merchandise accounted for 20.3 percent of the NFLP's retail sales.34 Mr. Jones maintained that if his team only had a two percent share of the sales, he would still prefer to negotiate deals independently.35

If the NFL/Cowboys' lawsuit goes to trial, the "focus will be on the [NFL]'s inner operations and could examine the antitrust implications of a partnership whose members cooperate by sharing their gate receipts, television fees and [NFLP] revenues."36 Professor Paul Weiler of Harvard Law School stated that two possible issues emerging at trial would be "whether the [NFLP's] exclusive contract can be extended to cover stadium licenses . . . [and] whether the [NFLP] contract violates antitrust law as a restraint of trade."37

Within the National Basketball Association (NBA), no rules exist to prevent companies from signing NBA players to advertising contracts.38 In the past, Pepsi-Cola signed Shaquille O'Neal to endorse its soft drink even though Coca-Cola was the official NBA sponsor.39 Even though O'Neal did not wear a NBA uniform during his Pepsi commercial, one must ask whether the Pepsi-Cola

31. Id. (quoting NFL's complaint filed in United States District Court).
32. Id. (quoting Jones as stating "[i]n my mind, there is no issue of the rules not being followed").
33. Id. Currently, NFLP has experienced a 400 percent revenue growth since 1988 and it encompasses 325 licensees and 35 corporate sponsors. Id. Tagliabue and Levinson foresee the value of NFLP sponsorships decreasing if Jones' actions are deemed acceptable, thereby destroying the essential purpose of the NFLP, to promote the NFL. Id.
34. Sandomir, supra note 29, at 1. The San Francisco 49ers, the NFL team accounting for the second highest retail sales, maintains an 11.3 percent share. Id.
35. Id. In 1990, when its record stood at 1-15, the Dallas Cowboys' retail sales accounted for a mere two percent of NFLP's retail sales. Id.
36. Id. Apparently, Mr. Jones does not mind sharing television and gate revenues. Id.
37. Id. Professor Weiler further opined that "[l]acking an antitrust exemption to market on a league wide basis, 'the [NFL] clearly does not have the right to control stadium deals.'" Id.
38. Brewer, supra note 4, at 70.
39. Id.
advertising undermined Coca-Cola’s NBA sponsorship?\textsuperscript{40} David Schreff, NBA Properties Vice President of Media and Sponsor Programs, stated that “[t]hat’s close to an ambush, ... [b]ut we respect the rights of our players to go out and secure endorsement.”\textsuperscript{41}

C. 1994 World Cup

The 1994 World Cup fell victim not only to ambush marketing in its purest sense, but also to counterfeiting.\textsuperscript{42} Ambush marketing does not come close to the kind of legal violation caused by direct counterfeiting. In 1994, the World Cup was held in the United States for the first time.\textsuperscript{43} More than 300 companies were given rights to sell official products throughout the world and at least nineteen companies paid as much as $75 million each to be major sponsors.\textsuperscript{44} Many sponsorships sold for between $10 and $20 million.\textsuperscript{45} However, unlicensed products bearing the World Cup mascot, such as T-shirts, hats and posters, appeared in the weeks prior to the tournament.\textsuperscript{46} Unlike the situations previously discussed, the following are examples of outright trademark violations which can be legally prosecuted.

In 1994, the United States District Court for the Southern District of New York enjoined Sprint Communications (Sprint) from issuing cards bearing the World Cup mark.\textsuperscript{47} In March 1991, the International Soccer League (ISL) entered into an agreement with Mastercard International (Mastercard) which allowed Mastercard to be an official sponsor of the 1994 World Cup.\textsuperscript{48} The sponsorship agreement granted Mastercard the exclusive right to use the World

\textsuperscript{40} Id.
\textsuperscript{41} Id. (citation omitted).
\textsuperscript{42} Mitch Gelman, Fits Over Fakes World Cup Sponsors Target Knock-offs, Newsday, May 26, 1994, at A4. The World Cup, a soccer tournament held every five years, is the largest single-sport event in the world. Id.
\textsuperscript{43} Id.
\textsuperscript{44} Id.; Ronald Grover & Greg Burns, The World Cup of Ambush Marketing, Bus. Wk., May 2, 1994, at 97.
\textsuperscript{45} Lowe, supra note 16, at 1.
\textsuperscript{46} Gelman, supra note 42 at A4. Experts predicted that the sale of unlicensed World Cup products would reach nearly $150 million world-wide and $45 million within the United States. Id.
\textsuperscript{48} Id. at *1.
Cup '94 trademarks on "'[a]ll card-based payment and account access devices.'"49

Subsequently, in May 1992, Sprint entered into an agreement to become an Official Partner of the 1994 World Cup.50 This agreement was restrictive and expressly limited Official Partners' rights to not "infringe upon the rights of Official Sponsors."51 Sprint interpreted its Official Partner status to permit the issuance of 100,000 telephone cards bearing the World Cup mark.52 The district court addressed the issue of contract interpretation, not ambush marketing.53 The court held that the Sprint cards fell under the definition of card-based payment and account access devices and prohibited Sprint from using the World Cup logo.54 Furthermore, the court determined that "extrinsic evidence demonstrate[d] that both Mastercard and ISL intended that Mastercard should have the exclusive right to use the World Cup marks for telephone calling cards."55

49. Id. (quoting agreement between ISL and Mastercard). In essence, Mastercard could place the World Cup trademark on all plastic services cards including, but not limited to, credit cards, check guarantee cards and charge cards. Id.

50. Id. In May 1991, ISL entered into an agreement with the Local Organizing Committee (LOC) for the 1994 World Cup Games. Id. This agreement allowed the LOC the "right to contract with corporations which would serve as official partners" to the 1994 World Cup. Id. Sprint subsequently entered into its agreement with the LOC. Id.

51. Id. The agreement between ISL and the LOC further provided that "'official partners shall not have the right to use the marks on any card-based payment and account access devices.'" Id. (quoting agreement between ISL and LOC). However, Sprint had permission to use World Cup logos and marks in promotions, advertising and marketing. Id.

52. Mastercard Int'l Inc., 1994 WL 97097 at *1. Sprint's cards did not contain the magnetic stripe that the Mastercard cards contained, which prevented them from being "scanned by a cardreader." Id. Mastercard sought preliminary and permanent injunction against Sprint to prevent any further issuance of the cards or other activities which would infringe upon their rights guaranteed under the ISL/Mastercard agreement. Id.

53. Id. at *2. The court asked specifically whether Mastercard was "granted by ISL an exclusive license for the World Cup marks which precludes Sprint from using those marks on the payment cards which it has issued and plans to issue in connection with its World Cup promotion?" Id.

54. Id. (holding that "on the basis of the contract language alone, the Court finds that Mastercard's interpretation of the language is correct and Sprint's use of the World Cup marks is prohibited").

55. Id. This intent was demonstrated by a telephone call to ISL from the LOC. Id. During the Sprint negotiations, a LOC representative called the ISL to ask whether it could license Sprint to use World Cup marks on telephone calling cards. Id. Stephen Dixon, Managing Director of ISL, responded in a memorandum, stating:

I am sorry to say that you cannot allow U.S. Sprint to use the 1994 World Cup emblem on calling cards in any manner whatsoever. At the time of
Time Warner Sports Merchandising, the company that licensed official products for the World Cup, took legal action against more than 105 manufacturers, wholesalers and retailers to prevent the sale of counterfeit products.\footnote{Gelman, supra note 42, at A4. Some of the counterfeit or unlicensed World Cup merchandise was smuggled into the United States from various countries, including South Korea, Pakistan, Taiwan, China, Mexico and Columbia. \textit{Id.}} Numerous stories exist detailing the problem of counterfeit goods making their way into the United States, including soccer ball decorations in a New York deli\footnote{Id.} and sweatshirts in Miami.\footnote{Id.} These examples are legally actionable because many of the products are copies of protected trademarks. A true ambusher, however, is not engaged in such direct counterfeiting.

\section*{III. The Law of Ambush Marketing}

The difficulty with ambush marketing is that the law is on the side of the ambushers.\footnote{See Steve McKelvey, \textit{Sans Legal Restraint, No Stopping Brash, Creative Ambush Marketers}, \textit{Brandweek}, Apr. 18, 1994, at 20 (stating that "[c]ompanies engaged in ambush marketing have a key element in their favor: the law").} Purely defined, ambush marketing does not involve counterfeiting or the illegal use of trademarks, tradenames or symbols. Companies simply develop a creative advertising campaign around the event, never use the event logo, trademark or tradename and capitalize by association with the event without paying for official sponsor status.\footnote{One commentator has defined ambush marketing, in its most offensive form, to mean the "intentional efforts of one company to weaken, or 'ambush,' a competitor's official association with a sports organization, which has been acquired through the payment of sponsorship fees." Stephen M. McKelvey, \textit{Atlanta '96: Olympic Countdown to Ambush Armageddon?}, 4 \textit{Seton Hall J. Sports L.} 397, 401 (1994) (footnote omitted) [hereinafter McKelvey, \textit{Atlanta '96}]. In more general terminology, ambush marketing may refer to an attempt by a company to "capital-}

signature of the Mastercard agreement, we had a long and heated debate over this particular topic and we lost the argument. \textit{Id.} Thus, Mastercard and ISL clearly viewed telephone credit cards as coming within the terms of its agreement and Mastercard did not wish to sublicense those rights to any other company. \textit{Id.}

56. Gelman, \textit{supra} note 42, at A4. Some of the counterfeit or unlicensed World Cup merchandise was smuggled into the United States from various countries, including South Korea, Pakistan, Taiwan, China, Mexico and Columbia. \textit{Id.}

57. \textit{Id.} The manager of the Fiesta Mexico purchased several strings of soccer ball lanterns to sell in his New York City deli. \textit{Id.} The lanterns contained the phrase "USA '94 - World Cup" and a replica of the World Cup trophy. \textit{Id.} When asked where he purchased the merchandise, the manager stated he purchased the lanterns from a Pakistani distributor for $4.50 and he sells them for $6.99. \textit{Id.} United States Customs officials seized 7,000 of the colorful soccer ball lanterns in Kennedy Airport and 3,800 in Los Angeles. \textit{Id.} It was estimated that the merchandise sold for $6.99 in New York City cost less than 50 cents to produce in Pakistan. \textit{Id.}

58. \textit{Id.} In April 1995, United States Customs officials "seized a shipment of sweatshirts and T-shirts featuring the ball-and-flag logo and tags depicting Striker with 'World Cup USA '94 - Official Licensed Product' printed below." \textit{Id.}

59. \textit{Id.} In April 1995, United States Customs officials seized a shipment of sweatshirts and T-shirts featuring the ball-and-flag logo and tags depicting Striker with 'World Cup USA '94 - Official Licensed Product' printed below." \textit{Id.}
ple complain that this practice involves a question of business ethics, others say it is simply aggressive advertising.\textsuperscript{61} Thus, smart lawyers can devise strategies for corporate clients that stay on the legal side of the trademark rights dispute.\textsuperscript{62}

The only case to directly address the contours of ambush marketing is \textit{NHL v. Pepsi-Cola Canada Ltd.}\textsuperscript{63} This case arose out of

\begin{footnote}
61. McKelvey, \textit{Atlanta '96, supra} note 60, at 402 (stating that "the typical response of sports organizers has been a cry for 'business ethics' and a verbal flogging of the ambusher. But those so-called public embarrassment campaigns have proven largely ineffective").

62. \textit{Id.} (stating "corporations have become increasingly more sophisticated . . . in their ability to blur the lines between legal marketing activity protected by the commercial and free speech provisions of the First Amendment and the fair-use defense, and promotion and advertising that constitutes trademark infringement and/or unfair competition") (footnotes omitted); McKelvey, \textit{supra} note 59, at 20 (stating that "[w]ith a little creativity and legal guidance, there's very little that can be done to stop ambush marketing").

63. 92 D.L.R.4th 349 (B.C. 1992). While this is the only decision to squarely address ambush marketing, there have been a number of decisions in the trademark infringement area that are worth reading. In \textit{Host Communications, Inc. v. Kellogg Co.}, Civ. Action No. 94-26 (E.D. Ky. 1994) (unpublished) the district court granted a preliminary injunction initially, then a permanent injunction, against Kellogg Company for trademark infringement. The court held that Kellogg's unauthorized use of the NCAA marks and the references to the Tournament were likely to cause confusion regarding whether Kellogg's products were approved by the NCAA. The court discussed Kellogg's misrepresentation of its affiliation with the NCAA Tournament and the resultant prospect of the diminution in value of Host Communications rights granted by the NCAA.

In \textit{The New Kids on the Block v. News Am. Publishing, Inc.}, 971 F.2d 302 (9th Cir. 1992), \textit{USA Today} and \textit{The Star} conducted public opinion polls regarding the popular music group The New Kids on the Block. \textit{Id.} at 304. The polls asked which of the five members was the reader's favorite. \textit{Id.} Readers could call in their votes. \textit{Id.} The New Kids filed a complaint raising ten claims, most focusing on concern that the newspaper's use of their name implied that The New Kids sponsored the polls. \textit{Id.} at 304-05. The Court held that the newspapers were entitled to nominative fair use, that is, the words New Kids on the Block could be used for descriptive purposes, and there was no implicit or explicit sponsorship by The New Kids on the Block. \textit{Id.} at 309.

Similarly, in \textit{WCNB-TV v. Boston Athletic Ass'n}, 926 F.2d 42 (1st Cir. 1991), the United States Court of Appeals for the First Circuit affirmed the district court's refusal to enjoin a television broadcast of the Boston marathon. \textit{Id.} at 44. The court held that Channel 5's use of the words "Boston Marathon" was not likely to cause confusion because Channel 5 used the words merely to describe the event and was not conducting its own marathon. \textit{Id.} at 46.

\textit{See also National Football League v. Governor of State of Delaware}, 435 F. Supp. 1372 (D. Del. 1977). In that case, the district court held that the state of Delaware's football lottery did not constitute a misappropriation of league property even though the lottery was based on regularly scheduled NFL games. \textit{Id.} at 1378. Further, the lottery did not use the NFL name or any registered service marks for the purpose of identification, but only to describe the lottery. \textit{Id.} at 1380. The district court ordered limited relief in the form of a required disclaimer because the court
a Pepsi-Cola (Pepsi) advertising campaign during the Spring of 1990 called the “Diet Pepsi $4,000,000 Pro Hockey Playoff Pool.”

This campaign was centered around the National Hockey League (NHL) play off games and the Stanley Cup, but Pepsi was neither an NHL sponsor, nor did it use any NHL official logos.

National Hockey League Services (NHLS), the licensing arm of the NHL, entered into an agreement with Coca-Cola Ltd. (Coke) as an official sponsor of the NHL for approximately $2.6 million in the Spring of 1989. Coke obtained the rights to use NHL symbols for its promotional programs in Canada and the United States. Through this agreement, however, Coke did not obtain “any right to advertise during the broadcast in Canada of any televised [NHL] games.” The NHL, not the NHLS, controlled such television rights and it sold them to Molson Breweries of Canada Ltd. (Molson) in 1988 for a five year period.

By contract with Molson, the Canadian Broadcasting Corporation (CBC) televises what is called Hockey Night in Canada (HNIC), which includes at least one NHL game every Saturday night during the regular season, many of the post-season playoff games and the final Stanley Cup playoff games. Molson sold found that the Delaware lottery created an impression of sponsorship by the NFL. Id. at 1381.

64. NHL v. Pepsi-Cola, 92 D.L.R.4th at 352. Pepsi also conducted a second contest entitled “Pepsi’s Shoot & Score Hockey Draft.” Id. But the playoff pool was the focus of the trial. Id.

65. Id. at 354-56. The contest involved collecting bottle cap liners or scratch cards that contained predictions that certain teams may win in four, five, six or seven games. Id. at 354. If you were the holder of the team who won on that number, you won the grand prize. Id. at 354-55. The Pepsi-Cola bottles also contained hang tags which contained the contest rules and a disclaimer which stated “Diet Pepsi’s $4,000,000 Pro Hockey Playoff Pool is neither associated with nor sponsored by the [NHL] or any of its member teams or other affiliates.” Id. at 355 (quotations omitted). The NHL’s registered marks “include its name, a logo emblazoned with its initials, the names and logos . . . of its member teams, and the words ‘Stanley Cup.’ The names and logos of the member teams of the NHL are also registered.” Id. at 353.

The contest was promoted through television commercials and the print media. Id. at 355-56. For a description of Pepsi’s advertising campaign, see id. at 354-55.

66. Id. at 353.

67. Id.

68. Id.


70. Id. at 353-54. Thus, Molson, as licensee of all the broadcast rights in Canada, controlled the television broadcasts. Id. at 354.
Pepsi the “right to be the exclusive advertiser of soft drinks during the broadcast of all ‘Hockey Night in Canada’ games.”

In bringing its cause of action, the NHL argued that the Pepsi contest, particularly the television commercials, conveyed a false impression to the public that the NHL, in some form, approved or was associated with the contest. Because there was no breach of the agreement between the NHL and Coke, the NHL sought to establish that Pepsi had interfered with that business relationship. Conversely, Pepsi argued that the contest was “an aggressive but legitimate marketing campaign.”

In deciding the issue, the court first described the tort of passing-off as a misrepresentation that “one’s business is that of the plaintiff, or connected with that of the plaintiff in any way likely to cause damage.” The court then enumerated the elements of the tort of passing off. Applying these elements to the case, the court

71. Id. Even though Coke was the “‘official Soft Drink of the [NHL],’ it had no right to advertise its products during the ‘Hockey Night in Canada’ broadcasts.”

72. Id. at 356. The NHL claimed that the use of various cities and states with NHL teams inevitably would lead the public to the false impression. Id.

73. Id. at 369.

74. NHL v. Pepsi-Cola, 92 D.L.R.4th at 357. Pepsi “acknowledged that the Contest was geared toward obtaining the greatest commercial advantage from the publicity [Pepsi’s] products would receive during the Stanley Cup play-offs.”

75. Id. (quoting CHRISTOPHER WADLOW, THE LAW OF PASSING OFF 224 (1990)). Passing off “consists in a false representation tending to induce buyers to believe that the defendant’s product is that of the plaintiff, usually but not always because the plaintiff’s product is better known or has a better reputation.” W. PAGE KEE-TON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 130, at 1015 (5th ed. 1984) (footnotes omitted).

Additionally, the tort of passing off was defined through the following illustration:

This may be accomplished directly, as where a retailer fills orders for Brand X by supplying Brand Y, but it is very commonly done by imitating the plaintiff’s trademarks, or names, wrappers, labels or containers, or his vehicles, employee uniforms or the appearance of his place of business. The same thing may be accomplished by using the plaintiff’s name with literal accuracy in connection with the defendant’s product but in a way that nevertheless suggests that the product is the plaintiff’s or that he had a role in it. The test laid down in such cases has been whether the resemblance is so great as to deceive the ordinary customer acting with the caution usually exercised in such transactions, so that he may mistake one for the other.

Id. at 1015-16 (footnotes omitted).

76. NHL v. Pepsi-Cola, 92 D.L.R.4th at 358. The five elements of passing off are as follows:

(1) a misrepresentation, (2) made by a trader in the course of trade, (3) to prospective customers of his or ultimate consumers of goods or services supplied by him, (4) which is calculated to injure the business or goodwill of another trader ... and (5) which causes actual damage to a
concluded that there is “nothing that would constitute direct inter-
ference by the defendant with the due performance of the
[NHLS]’s contractual relationship with Coke.”77 The court contin-
ued, stating that although “the [NHLS]-Coke agreement obligates
[NHLS], so far as it is able, to protect the rights of Coke from
‘ambush marketing,’ ”78 such an obligation cannot impose a duty
upon a third party to refrain from advertising in a manner which,
“although aggressive, is not, by the law of Canada, unlawful.”79

Thus, the court found that Pepsi was not in violation of Coke’s
contract nor did its aggressive advertising campaign amount to the
tort of passing-off under Canadian law or infringe on registered
trademarks.80 To date, this has been the only judicial decision di-
rectly addressing the question of ambush marketing.81 Because this
is a Canadian case, it is not at all certain that its rationale will be
adopted by American courts. However, it is an understatement to
say that this decision supports those seeking to ambush, because it
widely opens the doors for ambushers so long as trademark and
tradename infringement is not a part of the campaign.82 The NHL
v. Pepsi-Cola Canada Ltd. decision poses problems for the 1996
Olympic Games in Atlanta.

A possible method of attacking the practice of ambush market-
ing in the United States may be found in a false advertising claim

---

business or goodwill of the trader by whom the action is brought or . . . 
will probably do so.
Id. (quoting Erven Warnink Besloten Vennootschap v. J. Townend & Sons (Hull)
Ltd., [1979] A.C. 731 (H.L.)).

77. Id. at 369. The court reached this conclusion notwithstanding considera-
able evidence indicating why the agreement was entered into with Coke rather than
the defendant (which also had sought the contract), and the fact that Coke was,
understandably, not pleased by the Pepsi contest. Id.
78. Id.
79. Id. Additionally, the court reasoned:
It may be that, due to the failure of Coke to secure the right to advertise
its products during the television broadcasts of [HNIC] and the securing
of such rights by the defendant, the commercial value to Coke of the
right to describe its product as the “official soft drink of the [NHL]” has
less commercial value than would have been the case if Coke had also
obtained the right to advertise on [HNIC]. But that cannot diminish the
defendant’s rights.
Id.
80. Id. at 371-72.
81. McKelvey, supra note 59, at 20 (stating that “only [NHL v. Pepsi-Cola Can-
adra Ltd.] begins to address the intangibles of ambush marketing”).
82. Id. In response to NHL v. Pepsi-Cola Canada Ltd., Mr. McKelvey stated that
“the bottom line should be clear: unless and until a U.S. court creates a legal
cause of action against ambush marketing, such marketing will continue to be a
viable and legal tactic for those with fortitude and imagination to engage in it.” Id.
under section 43(a) of the Lanham Act. The elements of a prima facie case for an injunction under section 43(a) are that the defendant:

1. uses a false or misleading description of fact or representation of fact;
2. in interstate commerce;
3. and in connection with goods or services;
4. in commercial advertising or promotion;
5. when the description or representation misrepresents the nature, qualities, or geographic origin of the defendant's goods, services or commercial activities or the goods, services or commercial activities of another person;
6. and plaintiff has been or is likely to be damaged by these acts.

Thus, under this statute, all a plaintiff need prove, in addition to the above-listed elements, is likelihood of damage, because the Lanham Act was designed to protect consumers as well as businesses from the effects of false advertising. While there is no American case on point, at least one scholar argues that ambush advertising which creates a misleading impression of official sponsorship can trigger a violation of section 43(a).

IV. THE 1996 OLYMPIC GAMES

The United States Olympic Committee (USOC) is armed with all of the powers of the Amateur Sports Act of 1978 (Act). This Act was passed after recommendations were made in the Final Report of the President's Commission on Olympic Sports. The United States Olympic program was in a state of disarray prior to

84. 3 J. THOMAS McCARTHY, McCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27.04[1][a] (3d ed. 1995) (footnote omitted).
85. See, e.g., Johnson & Johnson v. Carter-Wallace, Inc., 631 F.2d 186, 190-92 (2d Cir. 1980) ("Baby Oil" case is leading case holding that proof of impact from lost sales is sufficient to support false advertising claim).
86. McCARTHY, supra note 84, § 27.07[2][i].
the passage of the 1978 Act. During a Senate debate in an earlier attempt at congressional legislation, Senator Pearson from Kansas detailed the problems with United States athletes in international competition.

The Act had the primary effect of reforming the USOC and coordinating the development of international amateur athletic competition. The real weapon, however, is found in section 380 of the Act, which gave the USOC the exclusive right to commercially use Olympic symbols, emblems, trademarks and names. Section 380 and section 375 were critical to the financial survival of the USOC. As the United States Court of Appeals for the Second


90. 93 CONG. REC. S15896-97 (1974) (statement of Sen. Pearson). These problems culminated at the 1972 Munich Olympics when (1) an American swimmer had to surrender a gold medal because a USOC doctor did not report that an asthmatic condition required amphetamine treatment; (2) two track athletes could not participate in the 100-meter dash because their coach gave them the incorrect time of the event; (3) the United States Olympic basketball team lost the gold medal to Russia in a controversial play involving resetting the clock in the final seconds of the game; and (4) during the May 1973 Commerce Committee hearing, athletes complained that Olympic officials received first class accommodations while the athletes were relegated to lesser accommodations. 93 CONG. REC. S15896 (1974) (statement of Sen. Pearson).


92. 36 U.S.C. § 380 (1988). Section 380 provides, in part, the following: Without the consent of the Corporation, any person who uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition—

(1) the symbol of the International Olympic Committee, consisting of 5 interlocking rings;

(2) the emblem of the Corporation, consisting of an escutcheon having a blue chief and vertically extending red and white bars on the base with 5 interlocking rings displayed on the chief;

(3) any trademark, trade name, sign, symbol, or insignia falsely representing association with, or authorization by, the International Olympic Committee or the Corporation; or

(4) the words “Olympic”, “Olympiad”, “Citius Altius Fortius”, or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity;

shall be subject to suit in a civil action by the Corporation for the remedies provided in [the Trademark Act of 1946].


93. Hay, supra note 92, at 462-63 & n.15. See generally, 36 U.S.C. § 380(a) (1988) (providing for exclusive right to use Olympic symbols, emblems, trade-
Circuit held in *United States Olympic Committee v. Intelicense Corp.*, in enacting section 380, Congress clearly intended "to promote the United States Olympic effort by entrusting the USOC with un fet tered control over the commercial use of Olympic-related designa tions." The court reasoned that "[t]his would facilitate the USOC's ability to raise those financial resources from the private sector that are needed to fund the United States Olympic Movement."96

Thus, the market value of USOC licenses was important.97 Moreover, the express language of section 380 "tending to cause confusion" lessens the burden of proving a traditional trademark infringement claim, which requires proof of "likelihood of confusion."98

The keystone of common law and statutory trademark infringement is "likelihood of confusion."99 This term has been interpreted to mean probability of confusion and proof of actual confusion is marks and names commercially); 36 U.S.C. § 375(a)(13) (1988) (providing power to "adopt and alter a corporate seal"); 36 U.S.C. § 375(a)(6) (1988) (providing power to "sue and be sued").

95. Id. at 266.
96. Id.
97. Stop the Olympic Prison v. United States Olympic Comm., 489 F. Supp. 1112, 1120 (S.D.N.Y. 1980) (asserting that "section 380 ... evidences a legislative intent to establish strong protection for Olympic symbols, in part to ensure the market value of licenses for their use").
98. Intelicense, 737 F.2d at 267 (stating that "Congress must have meant to place less of a burden on a plaintiff under a section 380 cause of action than that placed upon a plaintiff acting under the Trademark Act alone") (quoting International Olympic Comm. v. San Francisco Arts & Athletics, 219 U.S.P.Q. 982, 986 (N.D. Cal. 1982), aff'd, 707 F.2d 517 (9th Cir. 1983)).

In *San Francisco Arts & Athletics v. United States Olympic Comm.*, a nonprofit corporation in California attempted to make a political statement about the status of homosexuals in society by conducting the "Gay Olympic Games." 483 U.S. 522, 525 (1987). The USOC sued the corporation to prevent it from using the word "Olympic." *Id.* at 527. In affirming the district court's entry of a summary judgment and permanent injunction against *San Francisco Arts & Athletics Association*, the United States Supreme Court held the following:

The protection granted to the USOC's use of the Olympic words and symbols differs from the normal trademark protection in two respects: the USOC need not prove that a contested use is likely to cause confusion, and an unauthorized user of the word does not have available the normal statutory defenses [under the Lanham Act].

*Id.* at 531 (citing Respondents' Brief at 20, n.17).

99. McCarthy, *supra* note 84, § 23.01[1] ("'Likelihood of confusion' is the basic test of both common-law trademark infringement and federal statutory trademark infringement.") (footnotes omitted).
not required. The modern Restatement of Unfair Competition lists eight factors to be considered in reaching a decision on the issue of likelihood of confusion and no one issue is determinative.

Section 380 of the Amateur Sports Act and recent case law interpreting that provision have given the USOC much more power to prevent misuse of its protected names and symbols. In addition, 18 U.S.C. § 2320(d) makes it a crime to intentionally use marks “identical with or substantially indistinguishable from” Olympic symbols.

A. The USOC Flexes its Muscles

Because of the authority given the USOC under section 380 of the Amateur Sports Act, and as a result of the impact that ambush marketers have had at the world’s major sporting events, Atlanta Centennial Olympic Properties has embarked on an aggressive campaign to discourage would-be ambushers during the Summer Games in Atlanta. The strategy in the Sponsor Protection Program (SPP) is designed to achieve the following:

100. Id. at § 23.01[3][a] (asserting that “[l]ikelihood of confusion has been said to be synonymous with ‘probable’ confusion it is not sufficient if confusion is merely ‘possible’”).

101. The eight factors provided by §§ 20 through 23 of the Restatement (Third) of Unfair Competition are summarized as follows:

1. The degree of resemblance between the conflicting designations;
2. The similarity of the marketing methods and channels of distribution;
3. The characteristics of the prospective purchasers and the degree of care they exercise;
4. The degree of distinctiveness of the senior user’s mark;
5. Where the goods or services are not competitive, the likelihood that prospective buyers would expect the senior user to expand into the field of the junior user;
6. Where the goods or services are sold in different territories, the extent to which the senior user’s designation is known in the junior user’s territory;
7. The intent of the junior user; and
8. Evidence of actual confusion.


104. McKelvey, Atlanta ’96, supra note 60, at 432.
[1.] To preserve the value of sponsor investment in the Olympic Movement;

[2.] To create, implement and manage a program with pre-emptive, pro-active, and reactive capabilities regarding pre-Olympic Games, Olympic Games, and post-Olympic Games environments;

[3.] To reposition ambush marketing in the advertising industry and among the general public as an unethical, dangerous and illegitimate business practice;

[4.] To increase public awareness that ambush marketing takes money from U.S. athletes and in effect diminishes their opportunity to realize Olympic dreams;

[5.] To create an intolerance of ambush marketing; and

[6.] To maintain the value of corporate sponsor involvement in the Olympic Movement.105

In order to accomplish some of the above-stated goals, last spring, Billy Payne, President of the Atlanta Committee for the Olympic Games (ACOG), mailed approximately 900 letters to “leading advertising, public relations and marketing communications executives across the United States... explaining the dangers that ‘ambush’ marketing... poses to the Olympic Movement.”106 While the public relations campaign is in full swing, one may wonder whether the Olympic Movement can fight ambush marketers successfully in light of the 1992 NHL v. Pepsi-Cola Canada Ltd. decision in Canada.

Participants in the three sponsorship levels at the 1996 Atlanta Olympic Games have the most to lose. The International Olympic Committee (IOC) grants the first level, TOP III Sponsors, exclusive rights to “market themselves worldwide” using Olympic symbols and trademarks.107 The second level sponsorships are the Centennial Olympic Games Partners.108 The ACOG grants these sponsors exclusive domestic marketing rights from the local organizing com-

105. Id. at 433-34 (quoting ATLANTA CENTENNIAL OLYMPIC PROPERTIES, ACOP MANUAL § 3, at 2).
107. Skip Rozin, Olympic Partnership, SPORTS ILLUSTRATED, July 24, 1995, (Special Advertising Section - Insert), at 3. TOP stands for “The Olympic Programme.” Id. TOP III Sponsors include Bausch & Lomb for eye care product advertising, Coca-Cola for soft drinks, IBM for information systems, Eastman Kodak for imaging, Time Inc./Sports Illustrated for publishing and Visa International for credit cards. Id.
108. Id.
mittee in specific product categories. The third level sponsorships are the Centennial Olympic Games Sponsors. These sponsors have similar rights to the Partners but ACOG defines them more narrowly.

The effectiveness of ambush marketing is a cause for Olympic concern. Take, for example, the advertising statistics from the 1994 Winter Olympics. When asked to identify the restaurant that sponsored the 1994 Winter Olympics, fifty-seven percent of those responding said Wendy’s. Only thirty-seven percent of respondents named McDonald’s, the actual Olympic sponsor. Wendy’s conducted the classic ambush campaign, one that did not involve a violation of the Amateur Sports Act or the federal trademark laws.

B. May the Punishment Fit the Crime?

Bill Ferguson, Director of the ACOG Sponsorship Protection Program (SPP) explained that his office pursues a variety of methods in its aggressive attempt to stop ambusing. If necessary, the ACOG will directly confront an alleged ambusher with telephone calls from SPP lawyers, letters, television ads and ultimately lawsuits. Ferguson operates with a $10 million budget and vows to patrol Atlanta streets looking for ambushers. He stated that:

Parasite marketing devalues the interest in sponsoring, leaving little incentive for official sponsors. It jeopardizes the ability to stage the Games and get the athletes there. In the end, it’s not the Jackie Joyner-Kersees and the Carl Lewises who get hurt, but the grass-roots programs helping the athletes down the street, the kid next door.

109. Id. Examples of the 10 Centennial Olympic Game Partners include Anheuser-Busch, AT&T, Delta Airlines, The Home Depot, McDonald’s, Motorola, Swatch and Champion. Id.
110. Id.
111. Id. Examples of Centennial Olympic Games Sponsors include Avon, BMW, General Motors, BellSouth, Nissan and Holiday Inn. Id.
112. Rozin, supra note 107, at 16.
113. Id.
114. Id. Wendy’s ran a creative television ad campaign set in Olympic locations with former Olympic stars. Id. (citing Darren Coker, ACOG Communications Director).
115. Telephone Interview with Bill Ferguson, ACOG Director of Sponsorship Protection (Sept. 15, 1995).
117. Ferguson, supra note 115.
118. Rozin, supra note 107, at 16.
Several Atlanta businesses have learned first hand exactly how aggressive the SPP can be. Mailing cease-and-desist letters to potential ambushers has become commonplace as more than 1000 such notices have reached potential ambushers. For example, the entertainment complex run by Dave and Busters, Inc., was required to take down a billboard that read "Olympic-sized fun." The "Olympic Restaurant," established in 1983 and approved by the State at that time, was recently advised to change the restaurant's name. The owner complied, at a cost of $1000 and his restaurant is now called Olympia Restaurant & Pizza. Further, church groups have been warned not to sponsor "Christian Olympic Games" and environmental groups have been advised that they cannot sponsor events with names such as "Trees for Olympic Atlanta Project."

In light of the *NHL v. Pepsi-Cola Canada Ltd.* decision, a true ambusher presently is immune from legal attack in Canada. As the cases demonstrate, violations of the law exist where companies are caught marketing counterfeit items or using Olympic markings. The ambusher does no such thing. Strategies used by Ferguson and others to counter ambushing in its pure form may only discourage the few, but the present status of the law in this area can be said to encourage the many.

Pressuring event owners to fully protect sponsors by offering exclusive category sponsorship packages, controlling broadcast and photographic images, using licensing packages, public embarrassment and legal action will all assist the SPP in achieving its mission. Other options include buying broadcast sponsorship as well as event sponsorship, anticipating potential competitive promotions and using the sponsorship rights purchased fully. Many of these ambush problems can be cured by good lawyering during


120. *Id*. The company defended their billboard as referring to "local pride" in the '96 Games. *Id*. In fact, after a sporting goods convention in Atlanta, SPP filed lawsuits against five companies for selling unauthorized paraphernalia. *Id*.

121. *Id*.

122. *Id*. Olympic officials attributed their aggressive behavior to the threat of outside companies attempting to profit on the Olympics. *Id*.


124. For a discussion of the *NHL v. Pepsi-Cola Canada Ltd.* decision and the apparent immunity for ambushers from legal attack, see *supra* notes 63-82 & accompanying text.


126. *Id*.
contract negotiations. However, ambushing in its pure form is not a crime and may not be legally punishable.

V. CONCLUSION

ACOP is aggressively going after ambush marketers, but it is not clear that what the ambushers are doing is unethical. After *NHL v. Pepsi-Cola Canada, Ltd.* it is very clear that what ambushers are doing is legal in Canada. While American courts are not bound by this decision, it will probably be reviewed for guidance when and if the issue is presented. In fact, some say ambushers are engaged in creative and aggressive advertising. However, millions of dollars are on the line. Sporting event managers complain about lost sponsorship revenues and the confusion between paying sponsor products and ambush marketers. The 1996 Atlanta Summer Olympic Games promise to not only be an historic event in the context of the games, but also in the context of the marketplace. The Olympic officials are perhaps going overboard as they seek to protect the value of paid sponsorships. It is not at all certain that a false advertising claim would be successful against a non-sponsoring business that is merely advertising a product around a major sporting event. Whether the Sponsorship Protection Program is or will be successful remains to be seen. The question of whether it should be successful depends on whether your vantage point is ambusher or sponsor! Given the current state of the law, I would bet on the ambusher.