

# Sports Litigation Alert

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## On Your Marks, Get Set.... Ambush!

By **Ben Mulcahy**

The image of Michael Phelps “swimming” across a Midwestern wheat field toward Vancouver recently raised the ire of the United States Olympic Committee (“USOC”), which characterized the image as “crossing the line.” But is the USOC’s position legally warranted, or is the image nothing more than a lawful and effective ambush marketing campaign?

If you’re not familiar with the image, it’s from a television commercial for Subway, the QSR that stood by Phelps when he came under scrutiny a little over a year ago for the now infamous “bong hit” photo. The Subway spot opens with Phelps diving off the starting block, and instead of doing a flip turn at the end of the pool, the heralded gold medalist crashes through the outside wall of the natatorium, churns up concrete as he swims through the parking lot and continues across the wheat field while a map shows his trajectory being bound for Vancouver and a voiceover narration explains that Phelps fuels up on Subway sandwiches “so he can get to where the action is this winter.” McDonald’s is, and has long been, the Official Sponsor of the Olympics in the QSR category and pays handsomely for the privilege. McDonald’s reportedly complained that Subway was trying to pass itself off as the official fast-food sponsor of the Vancouver Winter Olympics, even though McDonald’s had bought those rights. In response to hearing that McDonald’s was upset about the spot, Subway’s CMO reportedly announced, “I’m Lovin’ It!”

Ambushers can legitimately claim that no one holds exclusive rights over the excitement that comes from a major sports event, and tying into that excitement using complimentary imagery and other popular

techniques is just good business. But the Olympics deserve special handling when it comes to pulling off an ambush marketing campaign. First, if a non-sponsor is using an Olympic athlete in the campaign, care must be taken not to jeopardize the athlete’s status, and the rule of thumb is that campaigns featuring Olympic athletes need to be continuous rather than concentrated during the Games in which the athlete competes. Subway’s campaign meets that test because it has featured Phelps in several different campaigns, some coinciding with an Olympics and some not.

But even if an Olympic athlete isn’t involved, the Olympic symbol of five interlocking rings is granted extraordinary protection against unauthorized use. Under the Amateur Sports Act, even the word “Olympics” has essentially been removed from the vocabulary of marketers unless they are official sponsors of the USOC. 36 U.S.C. § 220506. Moreover, the Act grants the USOC exclusive use of the word “Olympic” in certain contexts without requiring the USOC to prove that the unauthorized use was confusing and without regard to the defenses typically available to a defendant that is sued for a trademark violation under the Lanham Act. *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 531 107 S.Ct. 2971, 2978 (1987) (affirming an injunction against a nonprofit group’s use of the “Gay Olympics” as the name of its athletic competition). Recognizing this special protection, the Subway campaign carefully avoided using either the term Olympics or the Olympic rings. Indeed, some knowledge of geography is needed to fully understand the Subway spot, because the map that’s depicted doesn’t even identify Vancouver as the city that Phelps is “swimming” toward.

Finally, beyond the legal exposure is the public pressure that can be brought to bear if the Olympics wants to embarrass the ambusher, as the USOC has sought to do with Subway through public statements that ambush campaigns undermine the ability of the Olympic movement to raise revenue for the athletes who compete.



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But what about other major sporting events? The most-watched Super Bowl in history just passed us by, March Madness is nearly upon us, and the FIFA World Cup is coming up in June. The rules of the road for tying into the excitement surrounding those events without authorization are defined in the United States primarily by federal trademark infringement law, which prohibits the unauthorized use of a third party's registered trademark in connection with the sale, offering for sale, distribution, or advertising of the ambusher's goods or services if such use is likely to cause consumer confusion or likely to deceive as to affiliation, connection, association or origin (i.e. likely to cause viewers to think that the unauthorized campaign is endorsed by or affiliated with the event being ambushed). Relatedly, the federal Trademark Dilution Act prohibits the unauthorized commercial use of a famous mark that tarnishes or dilutes the distinctiveness and ability of such mark to identify the source of the goods associated with it, even though there is no confusion as to the source.

The First Circuit, in *Boston Athletic Ass'n v. Sullivan*, 867 F.2d 22 (1st Cir. 1989) made key determinations in the sports-related trademark infringement arena regarding the weight courts should place on the defendant's intent to infringe and the plaintiff's burden of proof. The court framed the infringement issue in terms of whether the purchasing public is likely to believe that the sponsor of the event produces, licenses or endorses defendant's use of the trademark. *Id.* at 32. Further, the court held that a defendant may be enjoined from referring to the name of a well-known event regardless of whether the public is likely to be confused into believing that the defendant's goods or services are officially connected with the event. *Id.* at 32-35. Most importantly, the court held that when a defendant "intentionally uses another's mark as a means of establishing a link in consumers' minds with the other's enterprise, and directly profits from that link, there is an unmistakable aura of deception. . . . Unless the defendant can show that there is in fact no likelihood of such confusion or deception about the [product's] connection to the [plaintiff], such use can be enjoined." *Id.* at 34.

But as strong as the Boston Athletic opinion seems to be in favor of the event organizers, there is case law that is just as strong in favor of some popular ambush techniques, like using team schedules or other statistics in an unauthorized campaign and using disclaimers to minimize the risk of consumer confusion arising

out of an unauthorized campaign.

The line of cases addressing the use of schedules and other statistics has gained more traction in just the past three years as fantasy sports leagues push the boundaries of what type of information can be used without permission, but the case law laying the foundation for those decisions is older. For example, in *National Football League vs. Governor of the State of Delaware*, 435 F.Supp. 1372 (D.Del. 1977), the National Football League ("NFL") sought a preliminary injunction to prevent the defendants from conducting a lottery game that utilized NFL game schedules and statistics. The NFL argued that defendant's use of NFL scores and game schedules in connection with the Delaware Lottery constituted a misappropriation of the NFL's efforts and that defendants were "endeavoring to reap where [they had] not sown" *Id.* at 1377. The court denied the NFL's request for injunctive relief, stating that "the only tangible product of plaintiff's labor which defendants utilize in the Delaware Lottery are the schedules of NFL games and the scores" and that the use of information that another party has made voluntarily public at large cannot constitute actionable "misappropriation" under common law of unfair competition. *Id.* at 1377.

Similarly, in *National Basketball Association vs. Motorola, Inc.*, 105 F.3d 841 (2d. Cir. 1997), the National Basketball Association ("NBA") brought an action against Motorola for providing real-time information and statistics regarding NBA games, alleging copyright infringement, commercial misappropriation and false advertising and false designation under the Lanham Act. The District Court granted the NBA's motion for a preliminary injunction and enjoined Motorola from providing its customers with any real time data from NBA games. The Second Circuit overturned the ruling and lifted the injunction, stating that Motorola's transmission of game scores and other real-time facts was merely the "collection and transmission of factual data" and that there was no copyright infringement because Motorola obtained its information by expending "its own resources to collect purely factual information generated by the NBA." *Id.* at 853-854; see also *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 823 (8th Cir. 2007) (affirming the district court's decision allowing CBC to use names and playing records of major-league baseball players without a license,

stating that “the information used in CBC’s fantasy baseball games is all readily available in the public domain, and it would be strange law that a person would not have a First Amendment right to use information that is available to everyone.”); *CBS Interactive Inc., v. National Football League Players Association, Inc.*, 259 F.R.D. 398, 419 (D. Minn. 2009) (same, granting summary judgment in favor of CBS based on the finding that the Eighth Circuit’s decision in *C.B.C.* was controlling).

On the disclaimer issue, courts have held that when worded correctly and placed conspicuously within an advertisement, non-affiliation disclaimers can protect a user against a likelihood of confusion claim under the Lanham Act. Again from the case of *National Football League vs. Governor of the State of Delaware*, 435 F.Supp. 1372 (D.Del. 1977), the court legitimized the use of disclaimers as a way for defendants to avoid liability for claims based upon the likelihood of confusion. In that particular case of a weekly sports lottery tied to the outcome of NFL games, the court held that the state of Delaware was simply required to include a disclaimer on its lottery tickets and advertising materials stating that the lottery was not associated with the NFL. See also *A & H Sportswear Co., Inc. v. Victoria’s Secret Stores, Inc.*, 57 F.Supp. 2d 155, 169 (E.D. Pa. 1999) (holding that there was no likelihood of confusion between the plaintiff’s MIRACLESUIT mark for swimwear and Victoria’s Secret’s use of the MIRACLE BRA mark for swimwear, because among other things Victoria’s Secret used the disclaimer “The Miracle Bra swimwear collection is exclusive to Victoria’s Secret and not associated with MIRACLESUIT by Swim Shaper.”).

Although the use of a non-affiliation disclaimer has been held to protect the user from a finding of likelihood of confusion, the level of protection offered by the disclaimer depends on the facts and the phrasing and placement of the disclaimer itself. The lesson from the disclaimer line of cases is that using a disclaimer has been recognized as a legitimate way to reduce, or eliminate, consumer confusion (and the corresponding risk of a Lanham Act claim), as long as the disclaimer is conspicuously placed and uses language that actually addresses the type of confusion that a plaintiff is likely to complain about.

The federal Lanham Act and state unfair competition laws provide event organizers (and in some instances their licensees) with powerful recourse against ambush marketers who do “cross the line,” but “the line” is less black and white than it is a grey range of activity. As a result, in evaluating those popular ambush techniques that present little or no risk when used in isolation, care should be taken to evaluate the cumulative effect of each campaign element so that a campaign that legitimately ties into the excitement of the event does not also expose the ambusher to undue risk of liability.

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