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### Venturing into Ambush Marketing and Protecting Sponsorships Requires Careful Planning

As football fans turn their attention to the Super Bowl, companies big and small look to grab the attention of these fans by associating themselves with the big game. For the NFL, teams, and television partners this means big business by selling sponsorships and licensing use of their intellectual property.

Marketing and advertising of sporting events such as the Super Bowl, the NCAA's Basketball Tournaments, the NBA's Championship, NHL's Stanley Cup Tournament, FIFA's World Cup, and the Olympics offer huge potential benefits for companies, and large companies pay millions of dollars a year to associate themselves with prominent sporting events and movie and television award ceremonies.

For companies (including charities) that venture into this area of advertising and marketing, there are significant inherent legal risks in associating your company with third-party trademarks and slogans and other entities without permission. Companies entering this arena will want to take proper steps to ensure they are adequately protected. Companies that operate outside the rules could find themselves on the wrong end of a legal action.

In fact, major sports leagues such as the NFL, the NCAA, NBA, NHL, and FIFA all have taken aggressive efforts to police their respective brands. For example, in 2010, South Africa implemented new intellectual property laws designed to protect promoters and protect the value of World Cup sponsorships.

Most people may be aware that the U.S. Olympic Committee ("USOC") and the International Olympic Committee ("IOC"), sells sponsorships and licenses use of their intellectual property, which is big business for these Olympic Committees. While most of the headlines about Olympic marketing and advertising are focused on the impact of these large sponsorships on company bottom lines and in advancing the events, what has received less coverage has been that behind the Games, many well-known companies have tussled with the USOC regarding gorilla marketing techniques.

Every two years, many companies that seek to associate themselves with Olympic trademarks to advertise their products and services find out the hard way that if Olympic indicia are used, both the advertiser and product or service provider may face statutory liability from the USOC, which is granted the rights to such marks in the United States.

Since the 1950s, a special act of the U.S. Congress gives the USOC the exclusive rights to any symbol consisting of five interlocking rings as well as other "Olympic" mark rights. The law grants the USOC the ability to seek an injunction and treble damages in a civil action for any "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" of the above terms and emblems without the consent of the Committee.

Unlike typical infringement claims, a claim of likelihood of confusion is not necessary for the USOC to prevail. In addition, the Trademark Counterfeiting Act of 1984 includes special provisions for counterfeit uses of the Olympic trademarks. These provisions include criminal penalties, right of seizure by ex parte application, and award of attorneys' fees and wrongful profits. In addition, there may be liability under other federal and state statutes and exposure for lost profits and attorneys' fees depending upon the cause of action. Further, other rights holders may be able to assert claims depending on the alleged infringement.

In years of policing its marks, the USOC, along with affiliated local host committees and the IOC, has

sent out hundreds of cease and desist orders and has filed lawsuits alleging trademark infringement of Olympic symbols. In light of the aggressive position taken by the USOC to protect its statutorily-protected marks and other related marks, the key to minimizing risk in this area is to understand the protection afforded Olympic indicia and to steer clear of potential uses unless authorized.

When specially-protected marks are not involved, basic principles of trademark and promotion law apply. There are important rules of the road, however, that anyone involved in the campaign should know and follow. Would-be ambush marketers should be mindful that trademark owners have available to them remedies under laws that protect against infringement (based on a likelihood of confusion) and trademark dilution, as well as various other protections afforded by statute and common law.

Celebrity endorsement and implied affiliations or sponsorship by celebrities is another area of potential legal pitfalls and reputation risk. Uber-celebrities, talk show hosts with built in audiences and loyal followings and sports stars may mention or use a product or routine that a company might find attractive to mention in its advertising. Rights of Publicity actions and other legal avenues, however, offer protections to these celebrities and their endorsement value. Celebrities vigilantly police the market for mere mentions of their name, which may inflict on the careless marketer unexpected legal expenses.

There are many ways, however, to utilize third-party references without running afoul of the legal protections afforded the owner, particularly if the marketplace is not taken up entirely by the rights holder.

Here are some tips to help minimize legal risks when marketing in this area:

- Implement a full and comprehensive advertising and marketing review process prior to any use of advertisements, scripts, emails, websites, social media posts, and the like.
- Obtain permission, disclaim affiliations, and ensure proper use of third-party intellectual property. Always accurately depict third-party marks and avoid expressing or implying an affiliation or sponsorship if it does not exist.
- Review relevant law and regulations. For sporting events, big entertainment spectacles and the like, check to see if there are specific laws enacted that address the use of certain brands, slogans or logos.
- Educate employees on trademark and advertising do's and don'ts. Employee misuse of intellectual property and overly aggressive advertising can be devastating to a company, both legally and from a public relations perspective.
- Recognize that some names, logos and comparisons may be off limits or severely limited due to statutory protection, general brand vigilance (and quality control), and independent marketing plans.
- Ensure that all advertising and marketing is truthful, can be substantiated, and is not misleading. Maintain a file of your claim support materials.
- Identify and analyze any specific laws and regulations relevant to the underlying product or service being advertised and ensure that the advertisement is appropriately tailored.
- Obtain proper permits, approvals and any other third-party consents before engaging in "in-person" advertising.
- Beware of "associative" advertising imagery and language, and know when to have it reviewed.
- Understand affiliate and other relationships of the rights holder with third-party vendors and potential business affiliates.
- Obtain appropriate comprehensive advertising and marketing insurance.
- Continually ensure that advertising and marketing is up-to-date and that claim support files are updated accordingly.

While no list of suggestions can cover every detail and legal pitfall, the above recommendations, if followed, should help minimize the risk of engaging in unlawful marketing and advertising when creating an association with another.

For those seeking to protect their sponsorship or brands, there are options. For those licensing rights, ensure that sponsorships include rights to block competitors, and include business terms that address the impact of third-party ambush marketing. Moreover, rights holders may have actionable false advertising claims based on the federal Lanham Act (15 U.S.C. § 1125(a)) if the marketing creates a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the product.

A basic understanding of the legal parameters of ambush marketing and the use or association with someone else's trademarks or activities in advertising will assist you in conveying your marketing

message, while minimizing your company's exposure to liability risks.

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