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**AMBUSH MARKETING:
DISSECTING THE DISCOURSE**

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ABSTRACT

This article discusses the problematic discourse in which scholars and corporate complainants such as the International Olympic Committee have discussed the issue of ambush marketing. It argues that those who persistently complain about ambush marketing 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 marketing strategies that the term is commonly used to describe. While much of the current literature on the subject concludes that the existing state of the law in the United States is not equipped to handle the alleged problems that ambush marketing poses, this article concludes that American trademark and unfair competition law adequately balances the competing interests at stake in ambush marketing cases and should serve as a model for the rest of the world to follow.

This is a relatively short article that exposes the fundamental flaw that pervades most analyses of the alleged threat posed by ambush marketing: that while critics argue that so-called ambush marketing tactics are particularly threatening because they cause consumer confusion as to a non-sponsoring company's association with an event, few ambush cases have ever been litigated primarily because complainants have not even been able to meet the Lanham Act's low-threshold of proving any such likelihood of consumer confusion.

AMBUSH MARKETING: DISSECTING THE DISCOURSE

BRIAN PELANDA

In preparation for the 2012 Olympic Games in London, the British government has taken drastic measures to preempt the perceived threat of ambush marketing which the International Olympic Committee has persistently alleged to be a major concern for its official sponsors during past Olympiads. The government has banned nearly all unauthorized commercial marketing activities during the Games such as skywriting, the use of fliers, posters, billboards, and any advertising within 200 meters of any Olympic venue.¹ Anyone who violates these prohibitions will face the harsh penalty of £20,000.² This anti-ambush marketing legislation might also apply to fans in attendance at Olympic events who so much as merely don promotional garb from unaffiliated companies, such as the group of female fans at the 2010 World Cup that officials ejected from the stands for wearing orange dresses that advertised a Dutch brewery company.³ 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

1. 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 TELEGRAPH, Mar. 8, 2011, at 13.

2. *Id.*

3. *Id.*; Emine Saner, *G2: Gotcha!: A Guerrilla Marketing Campaign at the World Cup this Week Ended Up With the Perpetrators Being Arrested*, THE GUARDIAN, June 17, 2010, at 4; *FIFA Detains Dress-Clad 'Fans' Marketing Brew-haha*, TORONTO STAR, June 16, 2010, at B4.

notable examples of the practice was when after Fujifilm secured the exclusive official sponsorship rights to the 1984 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.⁴ 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.⁵ 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.”⁶ Yet those who have persistently complained about 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.”⁷ On its face, this

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

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

6. Crow, *supra* note 4, at 2; Sheridan, *supra* note 5, at 28.

7. 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. AND INTELL. PROP.* 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 5, 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. OF 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

definition describes the practice of false association which is explicitly prohibited in the United States under the Lanham Act, 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.”⁸ 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 paper 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,⁹ American trademark and unfair competition law adequately balances the competing interests at stake in alleged ambush marketing cases and should serve as a model for the rest of the world to follow, despite the insistence for stronger protections by large corporate sponsors of athletic events and the International Olympic Committee.

I. 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 or at least skirts some, albeit unidentified, ethical boundaries, regardless of whether governments legally permit or prohibit certain forms of it.¹⁰ The International Olympic Committee

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 ADVERTISING § 10.07.01 (2010).

8. Sheridan, *supra* note 5, at 29. “[I]n the last few twenty years . . . few ambush marketing cases have gone to trial. *Id.* at 33.

9. Sheridan, *supra* note 5, at 29; Jamie Bischoff, Jeffery P. Curry & Ingrida Berzins, *Dispatch from the Trademark Wars: Ambush Marketing and the Arena of Sports*, METROPOLITAN CORP. COUNCIL 19 (February 2005) (referring to the U.S. legal framework under the Lanham Act as a comparatively “tolerant legal regime”).

10. *See* Michael Payne, *Ambush Marketing: The Undeserved Advantage*, 15 PSYCHOL. AND MARKETING 323 (1998); John A. Tripodi and Max Sutherland, *Ambush Marketing – ‘An Olympic Event*, 7 J. OF BRAND MGMT. 412, 414 (2000); Sheridan,

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 any commercial activity that seeks to capitalize on the occurrence of high-profile sporting 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 “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 carries with it the ability to influence the formation of law. For example, the International Olympic Committee (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.¹¹ Several countries such as South Africa and China have responded to the issue by legislating severe criminal penalties for a host of commercial activities carried on during high-profile international events that they categorize as ambush marketing.¹² Although Congress granted the United States Olympic Committee (USOC) unprecedented statutory protection over its registered trademarks through the Amateur Sports Act,¹³ many analysts have still described the United States as a comparatively “tolerant legal regime”¹⁴ that is “currently underequipped to counter ambush marketing

supra note 5, at 48 (“Beyond purely monetary concerns, though, there is the basic unfairness of ambush marketing. . .”).

11. Doris Estelle Long, *Trademarks and the Beijing Olympics: Gold Medal Challenges*, 7 J. MARSHALL REV. OF INTELL. PROP. L. 433, 436 (2008); Steve McKelvey, *As Games Approach, Time to Reconsider Ambush Marketing*, Sports Business Journal 23 (Jan. 18, 2010).

12. Bischoff, *supra* note 9.

13. *San Francisco Arts and Athletics, Inc. v. U.S. Olympic Committee*, 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.”)

14. Bischoff, *supra* note 9, at 19.

effectively.”¹⁵ 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. And 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.”¹⁶ The alleged unauthorized “creation of association” with an event is the most problematic aspect of the 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.”¹⁷ The fact that few purported “ambush” cases have ever been litigated through to a final judgment despite the numerous allegations of “ambush marketing” over the past several decades 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 such confusion at all.

Despite the glaring contradiction between the accepted definition of ambush marketing and the term’s frequent application, 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 seem to actually be concerned with is attaining the power to quell all unauthorized speech relating to the high profile athletic events that they promote, regardless of the likelihood of any such confusion. The controversy over ambush

15. Sheridan, *supra* note 5, at 31.

16. Schmitz, *supra* note 7.

17. Lanham Act § 43(a)(1) (15 U.S.C. § 1125(a)(1)(A)).

marketing has simply been manifested by the unrealistic expectation of being able to restrict the speech of third parties that event organizers and corporate sponsors have for the sponsorship contracts that they have negotiated.¹⁸

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 paper 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.

II. 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.”¹⁹ In a

18. Crow and 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 4, 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 5, 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.” Steve McKelvey, *As Games Approach, Time to Reconsider Ambush Marketing*, SPORTS BUS. J. 23 (Jan. 18, 2010).

19. Sheridan, *supra* note 5, at 32. John Tripodi and Max Sutherland similarly list these four techniques as ambush marketing. John A. Tripodi & Max Sutherland, *Ambush Marketing – ‘An Olympic Event*, 7 J. OF BRAND MGMT. 412, 417 (2000).

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."²⁰

The problem with generally 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 under the Lanham Act.

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 did any advertising at all 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, and 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.²¹ The ad's accompanying text read: "The ancient Olympians

20. Graham Medcalf, *AMBUSH MARKETING Bang, You're Dead!: Ambush Marketing Steps Over the Line of Guerrilla Marketing's Legitimacy*, N.Z. MARKETING MAG. (May, 2005).

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

worshipped the fig and used it for energy during training.”²² The Nabisco campaign also truthfully stated that the Fig Newton was the “Official Energy Food of USA Cycling.”²³ Nabisco ran this ad in several sports publications.²⁴ 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.²⁵ Nabisco decided to discontinue its ad campaign and the case settled out of court, so there was no evaluation of whether Nabisco’s ads violated either the Olympic Amateur Sports Act or the Lanham Act. The case law on trademark infringement will be discussed below, but even a cursory consideration of Nabisco’s ad that claimed only that ancient Olympians ate figs suggests that such a claim, so long as it was true, was most likely permissible claim under the Lanham Act because it was probably unlikely to have caused consumer confusion about Nabisco’s relationship to the 2000 Olympic Games in Sydney. Without the use of the iconic Olympic rings or a 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 (AmEx) had not paid to become an official sponsor.²⁶ 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.²⁷

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* USOC v. Nabisco, Inc., Case No. C 00 3086 (N.D. Cal., Aug. 25, 2000).

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

27. Sheridan, *supra* note 5, at 32.

The ads did not use any registered Olympic symbols or the word “Olympic.”²⁸ 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,²⁹ and he later preposterously asserted that such practices were “unethical” and constituted “stealing.”³⁰ Ultimately, the IOC apparently determined that the argument that AmEx’s ads created confusion was much weaker than Pound had proclaimed because the case never went to court. Furthermore, AmEx’s 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.”³¹

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 and games.”³² 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 American Express’s rival Visa through a play on words. The comparison and pun essentially prevented both the possibility of confusion between the two companies, and confusion over who in fact among 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

28. *Id.*

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

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

31. Moore, *supra* note 26.

32. Elliot, *supra* note 30.

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,³³ not to provide a competition-free commercial environment. It appears as though it would have been difficult to argue that AmEx'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 AmEx'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.³⁴

An excellent example of an overly broad ambush claim that actually made it into court is the case *USOC v. American Media, Inc.*³⁵ In this case, the United States Olympic Committee filed suit against American Media Inc. (AMI) for allegedly "ambushing" the 2001 Olympic Games in Sydney by publishing a magazine prior to those games entitled "OLYMPICS USA" that contained unauthorized uses both of the Olympic symbol and the word "Olympic."³⁶ The magazine contained several layouts describing thirty-two different Olympic events with photographs of athletes participating in each event.³⁷ AMI's publication also included profiles of featured American athletes and an event and broadcast schedule of the upcoming Sydney Olympics.³⁸ The magazine contained a disclaimer on the table of contents page that denied any affiliation with or sanction by the USOC.³⁹

33. *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) ("trademark law grants relief only against uses that are likely to confuse").

34. *See id.*

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

36. *Id.* at 1203.

37. *Id.*

38. *Id.*

39. *Id.* A violation of the Lanham Act would have required proof of a likelihood of consumer confusion.

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 does because “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.”⁴⁰ Curiously, the USOC did not also allege a violation of the Lanham Act.⁴¹ 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 to do so.⁴² 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.⁴³ 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,⁴⁴ and that therefore the ASA did not apply.⁴⁵

The District Court for the District of Colorado agreed with AMI and held that the ASA does not apply to the use of the USOC’s marks in non-commercial speech and that AMI’s magazine was non-commercial speech.⁴⁶ 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 non-commercial use of the USOC’s marks suggested official endorsement, authorization, or involvement by the USOC in publishing its magazine.⁴⁷ But because 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 a likelihood that consumers would have been

40. *Id.* (citing *S.F. Arts and Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522, 531 (1987)).

41. *Id.* at 1210.

42. *Id.* at 1203.

43. *Id.*

44. *Id.* at 1204.

45. *Id.*

46. *Id.*

47. *Id.* at 1209.

confused as to whether AMI was affiliated with or endorsed by the USOC.⁴⁸ The court granted the USOC leave to amend its complaint to allege a violation of the Lanham Act,⁴⁹ but the USOC chose not to do so, likely because it determined it could not prove its ambush claim that consumers were likely to be confused in to 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.”⁵⁰ The threat is often described to have the direst of 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.”⁵¹ On an even more alarming note, John Tripodi and Max Sutherland state that “ambush marketing poses a serious threat to the longevity of sponsorship as a cost-effective promotional tool,”⁵² and that it “risks devaluing official, corporate sponsorships and could conceivably threaten the financial viability of sporting events . . . like the Olympics.”⁵³ Noelle Nish asserts “why would PowerBar, Inc. pay millions of dollars for the privilege of becoming the official nutrition bar of the 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.”⁵⁴ 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.⁵⁵

In response to such “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.

48. *Id.* at 1210.

49. *Id.*

50. Nish, *supra* note 7, at 54.

51. Sheridan, *supra* note 5, at 32.

52. Tripodi, *supra* note 10, at 420.

53. *Id.*

54. Nish, *supra* note 7, at 71.

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

And yet, despite the continuance of ambush marketing, Olympic sponsorship fees escalate each quadrennial.”⁵⁶ The fact is that the IOC collected more than \$1.4 billion from all corporate sponsorships between 2001 and 2004.⁵⁷ 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.”⁵⁸ Despite their alleged fear that the prevalence of ambush marketing threatens their potential to secure future sponsorships,⁵⁹ 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.⁶⁰

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 curtail ambush marketing,⁶¹ there is a 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.”⁶²

56. McKelvey, *supra* note 18.

57. Jenifer Donatuti, *Can China Protect the Olympics, Or Should the Olympics Be Protected from China?*, 15 J. OF INTELL.PROP. L. 203, 207 (2007).

58. *Id.*

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

60. *Id.* at 208.

61. Long, *supra* note 11, at 436.

62. McKelvey, *supra* note 18.

III. 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.”⁶³ 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* non-paid-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 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:

“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”⁶⁴

63. *Supra* note 7.

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

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*,⁶⁵ *Pirone v. MacMillan, Inc.*,⁶⁶ and *Warner Bros., Inc. v. Gay Toys, Inc.*⁶⁷ The crux of a false association analysis under these cases lies in a 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*, the defendants Sullivan and Beau Tease, Inc. were an apparel retailer and an apparel distributor.⁶⁸ The defendants had been imprinting and selling shirts with the name "Boston Marathon" and other terms including the years of the races since 1978.⁶⁹ 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.⁷⁰ Image Impact entered into an exclusive license with the BAA to use its registered marks on shirts beginning in 1986.⁷¹ Defendants had not secured licenses from the BAA to use its marks. Instead, the defendants in turn began producing and selling in the Boston area shirts imprinted with "1986 Marathon" and a picture of runners above the words "Hopkinton-Boston."⁷² Thus, 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.⁷³

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

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

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

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

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

69. *Id.* at 25.

70. *Id.* at 24-25.

71. *Id.* at 25.

72. *Id.* The Boston Marathon race route begins in Hopkinton and ends in Boston.

73. *Id.* at 25-26.

therefore ruled in favor of the defendants.⁷⁴ 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.⁷⁵ 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."⁷⁶ 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."⁷⁷ This states *exactly* the problem alleged to be at issue in ambush marketing.

The First Circuit stated that for the BAA to prevail, it 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.⁷⁸ Under the facts of the case, 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]."⁷⁹ The court even lowered the BAA's burden of proving likelihood of confusion by stating that the BAA was not required to prove that members of the public would conclude that the defendants' shirts were *officially* sponsored by the BAA.⁸⁰ 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.⁸¹

74. *Id.* at 27.

75. *Id.* at 28.

76. *Id.*

77. *Id.* at 28-29.

78. *Id.* at 32.

79. *Id.* at 33.

80. *Id.*

81. *Id.* at 34.

B. PIRONE V. MACMILLAN, INC.

In *Pirone v. MacMillan, Inc.*, defendant MacMillan had published “The 1988 MacMillan Baseball Engagement Calendar” that contained photos of several baseball players, among them three photos of Babe Ruth.⁸² 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.⁸³ When Ruth was alive he had received compensation for the use of his name or his picture in the promotion of various products, and after his death his daughters Dorothy Ruth Pirone and Julia Ruth Stevens registered the words “Babe Ruth” as a trademark.⁸⁴ 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.⁸⁵ 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.⁸⁶

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 Court of Appeals for the Second Circuit affirmed.⁸⁷ The court of appeals held that while Pirone had established a valid trademark in the words “Babe Ruth,” she was incorrect in believing that her rights in those word marks also included every photo ever taken of Ruth.⁸⁸ 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 the source of the calendar, the court held the use did not constitute trademark infringement.⁸⁹

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.”⁹⁰ This rule

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

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 581, 585.

88. *Id.* at 582.

89. *Id.* at 584.

90. *Id.* at 584.

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 in no way did they indicate the origin or represent sponsorship of MacMillan's calendar.⁹¹

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.'" ⁹² 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."⁹³ Because the source of publication was clearly indicated with numerous and prominent references to MacMillan,⁹⁴ 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."⁹⁵

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 in likeness to the 1969 Dodge Charger known as the "General Lee" driven by the main characters in Warner Brothers' popular television series "The Dukes of Hazard."⁹⁶ Warner Brothers had refused granting Gay Toys a license to use its "Dukes of Hazard" trademarks, so Gay Toys labeled its toy as the "Dixie Racer," reversed the door numerals from the "01" that appeared on the "General Lee" to "10" instead, and refrained from calling its toy car the "General Lee."⁹⁷ However, the toy car was identical to the Warner Brothers' "General Lee" in most other

91. *Id.* at 584.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 585.

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

97. *Id.* at 78.

respects.⁹⁸ Warner Brothers contended that the defendant's toy violated Section 43(a) of the Lanham Act because the "Dixie Racer" caused confusion in the public's mind as to the manufacture and sponsorship of the toy car.⁹⁹ 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."¹⁰⁰

The District Court for the Southern District of New York had 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.¹⁰¹ 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."¹⁰² 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."¹⁰³ 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.¹⁰⁴ 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 Hazard Car," and had thus assumed that the car was sponsored by Warner Brothers.¹⁰⁵ As such, the court held that Warner Bros. had proved a likelihood of confusion as to the sponsorship of the defendant's "Dixie Racer" and reversed the District Court's order denying Warner Brothers' request for an injunction.¹⁰⁶

98. *Id.*

99. *Id.* at 77.

100. *Id.*

101. *Id.* at 78.

102. *Id.*

103. *Id.*

104. *Id.* at 79.

105. *Id.*

106. *Id.* at 79-80.

IV. 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. And 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.¹⁰⁷

In *Boston Athletic Ass'n* the First Circuit held that the public was likely to be confused by 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.¹⁰⁸ Similarly, in *Warner Bros.* the Second Circuit held that the public was likely to be confused by the defendant's "Dixie Racer" toy 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.¹⁰⁹ 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.¹¹⁰

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."¹¹¹ 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 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,

107. *Id.* at 79; Kellie L. Pendras, *Revisiting San Francisco Arts & Athletics v. U.S. Olympic Committee: Why It is Time to Narrow Protection of the Word "Olympic"*, 24 HAW. L. REV. 729, 731-732 (2002).

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

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

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

111. *Supra* note 7.

few ambush cases have ever gone to trial,¹¹² 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. 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.¹¹³ However, his proposed solution to combat the practice 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.¹¹⁴ Thus, according to Sheridan, 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 to exist that they have not even attempted to take their claims into court. Drawing the obvious conclusion from his dangerous proposal to lower our unfair competition law standards to the point where plaintiffs would not even have to prove that a form of advertising is somehow 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."¹¹⁵

V. 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 for the event organizers and its sponsors because it deals specifically with consumer confusion

112. Sheridan, *supra* note 5, at 29.

113. *Id.* at 32.

114. *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 Shmitz similarly concludes that "the 'likelihood of confusion' analysis often does not apply to the facts of ambush cases." Schmitz, *supra* note 7, at 207.

115. Sheridan, *supra* note 5, at 30.

in that regard. Under the Lanham Act, event organizers are even spared the burden of having to prove that a particular marketing practice or advertisement *actually* confuses consumers as to association with the event, and are required only to prove that there is a probability that consumers would be confused.¹¹⁶ This is a more than reasonable standard that both protects event organizers and sponsors and free speech in the competitive free market.

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

116. Pendras, *supra* note 107, at 731-732.