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What's in a Word: Olympic

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The Olympic spirit is neither the property of one race nor of one age.

— Baron Pierre de Coubertin

Introduction: The Commercial Olympics

The Olympic spirit may not belong to anyone in particular, but almost everything else about the Olympic Games is legally owned and carefully managed today.

As the Baron's vision of amateurism has given way to professionalism, and winning has replaced "taking part [as] the most important thing," the Olympic Games have become a very big business. During the interview process, candidate cities must guarantee that they will be able to fund their Games. Only 44 cities in 23 countries have ever hosted the Games.

The most valuable asset available to the international Olympic movement to generate revenue to mount these Games is its brand. The Olympic brand covers many things, both internationally, associated with the movement, and with the Games at each location. These include the five intertwined rings and flag, the flame and torch, fanfare, creed, poster, Charter, theme, anthem and the Olympic motto Citius, Altius, Fortius, Latin for "Faster, Higher, Stronger".

Vancouver's 55,000 staff and 25,000 volunteers will welcome about 7,000 athletes and team officials from 80 countries for a total of 144 Olympic and Paralympic medal events, covered by 10,000 media personnel to 3 billion worldwide television viewers. Capital costs to build venues for the 2010 Winter Olympics in Vancouver are close to \$1 billion. The tab for security will be another \$1 billion. Operating costs alone for the Games will approach \$2 billion, raised primarily through private sponsorships and rights. Moreover, these are the less expensive Winter Games, staged during one of the deepest recessions in modern history.

Sponsorship Financing

Marketing the Olympic brand has been controversial. Some say the Olympic Games are now like all other large over-commercialized sport events. Others say that local and national governments invest and risk much in competing for and hosting the Games. The International Olympic Committee (IOC) spurned corporate sponsorship until about 40 years ago. But the modern Olympics are expensive. The arrival of television and lucrative advertising markets opened the field to international sponsors seeking to associate themselves with the upbeat Olympic brand. The 1984 Summer Olympics in Los Angeles generated a record surplus of U.S.\$225 million by selling exclusive sponsorship rights. The IOC moved in to develop the Olympic brand and control these international sponsorships with The Olympic Program (TOP) in 1985. TOP sponsorship costs U.S.\$50 million for four years. International and domestic tiers of Olympic sponsorship have developed. The IOC negotiates and manages broadcast rights and the TOP worldwide sponsorship program. It distributes most of this marketing revenue, up to a \$1 billion per year, to national organizations in its network to support staging the Games and promoting sport generally. The IOC assigns to the various National (Canadian Olympic Association) and Local Organizing Committees (VANOC) rights to exploit the symbols, the "Olympic" name and overall brand in order to sell domestic sponsorship, partnership and licensing within the host country. The economic value of the effort depends on how strictly it is enforced so that the benefits of the Olympic

A form of freeloading, “ambush marketing” is generally a way for companies to promote and advertise themselves to suggest that they are officially sponsoring the Olympics or specific events, when they are not.

sponsorship accrue only to those who pay for it. Sponsors get exclusive global rights to use Olympic symbols for their product category in their promotional material.

The IOC remains the central permanent administrative authority for the Games, which holds the copyrights, trademarks and other intangible property of the Olympic movement. The most valuable asset available to the international Olympic movement to generate revenue to mount these Games is its brand. The Olympic brand covers many things, both internationally, associated with the movement, and nationally with the Games at each location. These include the five intertwined rings and flag, the flame and torch, fanfare, creed, poster, Charter, theme, anthem and the Olympic motto *Citius, Altius, Fortius*, Latin for “Faster, Higher, Stronger”.

Each Olympic Games has its own Olympic emblem or mascot, which is an animal or human figure distinctive to the host culture and integrated with the Olympic rings. Vancouver has four mascots (*Miga, Quatchi, Sumi* and *Mukmuk*) and the Inukshuk logo called *Ilanaaq* (friend). All such emblems are the exclusive property of the IOC and cannot be used without its authorization.

Many entities would like to have their wares and services publicly associated with the popular Olympics. Since the brand comprises a revenue stream too important to slide into the public domain, the Olympic movement assiduously protects its symbols and usage of the word “Olympic.” It has succeeded in changing names of a rock band (The Olympic Hopefuls), non-profit groups who used the term for their competitive games, and a theatre (Improv Olympic). The “Olympics of the Mind” was forced to change to “Odyssey of the Mind,” and a card game “Legend of the Five Rings” was renamed.

In this “pay to play” environment, few have escaped use of the Olympic name without legal consequences. Exceptions include Olympic Meats and Olympic Paint, which even has a paintbrush in the form of a torch as its logo. The Special Olympics, an international event for people with mental disabilities held every four years in the year after the Olympics, is also unsanctioned.

Some of its rules are contradictory. For example, corporate sponsorship is welcome, but is not allowed to name a specific Olympic venue (GM Place will be renamed Canada Hockey Place for the duration of the Games). The commercialization of the Games in the last 25 years may have given cause to the now regular reports of bribery and under-the-table dealing for the Games and even medal outcomes.

Let’s examine the Canadian legal experience.

Legal Protection of the Olympic Trademark in Canada

The word “Olympic” has uncertain origins. Some say it relates to Olympus, a mountain of Thessaly, fabled as the seat of the gods. Others say it refers to Olympia, a small plain in Elis, also in Greece. The word has no trade in Canada, other than in relation to these well-known quadrennial sporting events, and in particular, because Canada will have served as host of the event three times in 34 years. Most of our Olympic trademark law developed after the 1976 Montreal Olympic Games because the engine of commercialization did not start revving up until 1984. The legacy of public debt from the Montreal Games provides painful evidence of that fact.

From the early 1980s, the Canadian Olympic Association (COA) began to use the *Trade Marks Act* and the courts to protect its family of marks. It challenged several companies for infringing the Olympic trademark in the lead-up to the Calgary Winter Olympics in 1988. Today COA, and its local proxies, such as the Vancouver Olympic Committee (VANOC), enjoy legal status as public authorities. Here are some of the principal cases as well as other initiatives taken to legally fortify the Olympic trademark.

A. Judicial Decisions

Konica v. COA

The beer maker and record book publisher, Guinness, had for decades published its Book of Olympic Records describing athletic achievements and milestones in the Olympic Games. In 1987, camera and film company Konica Canada Inc. licensed the rights to publish and distribute its own “premium edition” of the Guinness Book of Olympic Records in the run-up to the Calgary Olympics. Many other companies had used the Guinness Book in similar promotions for over a decade. Konica used promotional packaging including a free copy of the book and three rolls of Konica film shrink-wrapped together, with both the large, prominent title of the book and the film’s label displayed outward.

In Canada, Official Marks in the *Trade Marks Act* are granted a higher level of trade-mark protection than a regular trade-mark. These super trademarks secure the work and reputation of “public authorities” such as governments, the military, the Red Cross, the United Nations, the Queen, and others by setting apart their marks from trade and business. These public authorities can merely use and give notice of the adoption of an Official Mark, thereby pre-empting any access by private parties for any purpose without proof of injury.

If COA could establish its public authority status, it would obtain an advantage to protect its marks and derive maximum economic benefit from them. In 1980 it gave public notice of the adoption and use of the word “Olympic” as an Official Mark.

The Court found COA to be a public authority on the three-part test:

- it had a duty to the public;
- there was a significant degree of government control; and
- its profits benefited the public.

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COA obtained an injunction against Konica shortly before the 1988 Olympics in Calgary. The publication and distribution of the book with “Olympic” in its title constituted the unauthorized use of the Official Mark. Even operating in good faith under licence with Guinness, who had long produced the books, could not overcome COA’s intervening rights to this Official Mark. Konica was using “Olympic” under licence from Guinness, but without permission from COA. Konica had ordered 125,000 books. It cancelled some of the order, gave away many and was left with a surplus of 22,000 books.

“See You In Vancouver”

The SYI Fund is a non-profit organization that assists athletes in raising funds to attend the Olympics worldwide. Since their founding in 1997, it has run campaigns with “See You in Sydney” and “See You in Salt Lake” messaging. The SYI Fund sought to benefit Olympic athletes and wanted to use a name and marks that would associate it with the Olympics. In 2003, the SYI Fund filed for trademarks for upcoming Olympics. These included the “See you in ...” for Athens, Torino, Beijing and Vancouver.

In August 2004, the COA gave public notice opposing the use of the phrases “See you in Torino”, “See you in Beijing” and “See you in Vancouver.” However, since it could not show it had adopted and used these Official Marks prior to the public notice, the court refused COA’s claim of priority.

This case was an example of COA overplaying its hand in its pursuit to control all aspects of the Olympic brand in Canada, even to the point of opposing other charitable efforts. SYI Fund’s income directly benefit Canadian athletes, also a COA objective. Some of that income was squandered by the COA litigation, not to mention goodwill in the cause.

Olympus Optical v. COA

In 1983 Olympus applied to register “Olympus”, based on use in Canada for one year. The company retailed tape cassettes, recorders, televisions, cameras and other electronics. COA opposed on the basis that the proposed mark started with the letters “OLYM.” There were 89 other non-COA registrations beginning with these letters. COA’s opposition failed.

Allied v. COA

In 1989 Allied sought to register the trade mark “OLYMPIAN,” having claimed to have adopted it in 1977. COA opposed due to its public notice of adoption in 1980. Although Allied was first to adopt the mark in Canada, the Federal Court of Appeal found that COA’s Official Mark priority applied retroactively. Allied lost access to the word.

Once a public authority such as COA has given public notice of the adoption of a particular trademark no other entity may register or adopt that trademark, or a similar confusing one.

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The Olympic and Paralympic Marks Act provides indefinite protection for 32 marks and temporary protection for another 34 Vancouver-specific marks and expressions, and any possible translations, until December 31, 2010. Some of the protected words and slogans include: gold, silver, bronze, medals, sponsor, Games, 2010, Sea to Sky Games, “faster, higher, stronger”, Vancouver and “Spirit in Motion”.

Olymel v. COA

Olymel, a Quebec meat processing company, applied in 1991 to register the trademarks “Olymel” and “Olymel & Design” for the meats and other related industry services the company provided. COA opposed. The “imperfect recollection” test was applied. It asked “whether a person who, on a first impression, knowing one mark only and having an imperfect recollection of it, would likely be deceived or confused.”

Olymel’s marks were not identical or even resembling COA’s Official Marks. Someone with imperfect recollection of COA’s Olympic marks, upon seeing Olymel’s mark applied to its meat industry would not infer Olymel’s meat and services were associated with COA. The letters “OLYM” did not refer exclusively to COA’s family of marks because there were 143 other cases where these four letters had been incorporated into a mark. The Olymel registration was permitted.

Hipson

Between 1980 and 1986, COA gave public notification of many Official Marks, including: Winter Games, Games 1988, ‘88, Calgary 88, Hidy, Howdy and the Olympic Torch and Flame. It did not claim “Winter “ ‘88.”

In 1985, Hipson, President of Calgary Souvenir Imports Ltd., commissioned the design and manufacture of six different lapel pins representing the Calgary Olympics. In January 1985, COA sent an application to Hipson for a licence under the XV Olympic Winter Games merchandise licence program. They did not receive a reply. COA sent Hipson a letter asking him to stop distributing and selling the lapel pins. All were sold by October. All of the pins had a flame or torch, a white polar bear, the word Calgary, the number ‘88, or the word “Winter”. Hipson said the word “Winter” and the number ‘88 were so common that they were public property beyond the ownership of any authority.

Would someone attending the Games and buying souvenirs be confused between Hipson’s wares and those manufactured under COA licence? The court agreed with COA that apostrophizing 1988 created a symbol of the precise XV Winter Olympics event. Although Hipson did not use the word “Olympic” on his pins, the conjunction of symbols and words infringed by too closely resembling the Official Marks. One could not distinguish between Hipson’s pins and official pins manufactured under licence.

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A permanent injunction was granted to restrain Hipson from making and selling the pins. Since the pins were all sold before the decision, the outcome only ensured that no more pins were made and sold, including by other companies who might have joined Hipson in the unlicensed business.

Techniquip v. COA

COA claims a family of some 40 Official Marks, including representations of athletes and more than 250 trademark registrations of various fanciful pictorial representations of people. Human stick figures are widely found in telephone business directories, magazines, newspapers, public signs and advertising. Techniquip proposed using stick figures of people on its lifeline connectors, safety belts and hooks, harnesses, cable grips, anchors, and other fall protection equipment. COA opposed on the basis that their marks consisted of similar white stick men on a black background, participating in various sporting events.

The Federal Court found several differences and similarities between the stick figures of Techniquip and COA. Both marks were white figures on black backgrounds, with detached body parts. However, the COA background is squared, its figures are in motion, and there are lines and other drawings to indicate movement as well as a particular sport. Techniquip figures are on a rounded background and are motionless. The particular elements in COA's marks, using human figures engaged in sporting activities, were not ascribed to the Techniquip design which showed an erect, motionless human figure, wearing what is obviously a harness. Accordingly, Techniquip's stick figures were allowed registration as trademarks.

B. Ambush Marketing

A world sporting event offers exclusive sponsorship opportunities amid unlimited marketing possibilities. Expensive sponsorship demands enforcement action to protect exclusivity. Policing the marketplace is increasingly difficult given ingenuity and the many, modern, non-stop marketing channels.

The cases we have reviewed invoked the Olympic brand specifically and directly. Yet there are countless imaginative ways to deliberately create a subtle marketing association with the Olympics without paying for a COA licence. A form of freeloading, "ambush marketing" is generally a way for companies to promote and advertise themselves to suggest that they are officially sponsoring the Olympics or specific events, when they are not. Their inventive wording or imaging does not violate trademark law; yet timely invocation of the Olympic Games enhances their own business profile and sales. Therefore, ambush marketing can be used by competitors of an official sponsor to garner positive commercial attention for themselves. They try to associate with the Olympics without making the significant financial investment in sponsorship.

This unfair business practice dilutes the value of what the sponsors are paying for, misleads consumers and over-saturates the official brand. Examples would be a non-sponsor advertising "I love Vancouver" during the Winter Olympics;

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purchasing broadcast times immediately before or after Games events; sponsoring broadcasts without officially sponsoring events; sponsoring an individual athlete; and showcasing Olympic giveaways, posters, and good luck advertisements to athletes. It is difficult to know who is an official sponsor and who is not when all businesses allude to the Games.

The IOC mandated COA to protect its Olympic brand in Canada and the financial investment of official sponsors. To address ambush marketing, a federal statute was enacted in 2007 to deal specifically with the Olympic marks. The Olympic and Paralympic Marks Act provides indefinite protection for 32 marks and temporary protection for another 34 Vancouver-specific marks and expressions, and any possible translations, until December 31, 2010. Some of the protected words and slogans include: gold, silver, bronze, medals, sponsor, Games, 2010, Sea to Sky Games, “faster, higher, stronger”, Vancouver and “Spirit in Motion”.

The Act empowers COA and VANOC to oppose marketing that undermines official sponsorship. Any promotional activity that has the effect of misleading the public into thinking that the activity is approved or licensed by the COA is illegal. An injunction can issue without proof of harm. Since this legislation potentially constrains corporate expression relating to a matter of public interest, it could be subject to challenge under the Charter. Until then, it represents another attempt by Canadian law to facilitate COA control over the Olympic brand.

C. Trademarking the National Anthem

In late 2008 VANOC claimed “With glowing hearts” (*Des plus brillants exploits* in French), lyrics from the national anthem, as trademarked mottos for the 2010 Olympics. It stated that it would only challenge usage of the lines in ambush marketing contexts. Our national anthem can be generally used by anyone as it is in the public domain.

D. Other Special Olympic Legislation

In October 2009, the Government of British Columbia proposed to give municipalities the power to enter private property to seize signs thought to be “anti-Olympic” during the 2010 Games. The Vancouver Charter was amended to allow fines of up to \$10,000 and imprisonment for up to six months for sign and bylaw violations.

Conclusion

A lesser known principle of the Olympic movement is to “oppose any commercial abuse of sport and athletes.” The Winter Olympic Games in Vancouver 2010, and the Paralympic Games during the month following, are major events for private business interests. With the speed and reach of modern telecommunications, and the national scope of the host effort, infringements anywhere in the country are as serious as those next door to the venues. This is why VANOC maintains a prominent section on the Games’ official website entitled “Protecting the Brand” and why it

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challenges unauthorized business affiliations with the Games. It has a legal duty to protect the exclusive rights it has been entrusted with by the IOC and that it has granted to its marketing partners.

The Olympic Games have had to adapt to the changing social, economic, political and technological realities of the modern era. The growth of the mass media and the Internet has created both an opportunity and a challenge for the commercialization of the Games. The law goes a long way to help the IOC, COA and Official Sponsors. Nevertheless, the law and its enforcement are cumbersome and COA will find it time-consuming and costly to monitor and litigate every incident of infringement and ambush marketing.

Michael Phelps, the most decorated Olympian, famously understated, “I always thought, it would be neat to make the Olympic team.” Businesses can also make the Olympic team. But to accept that important “take part” invitation in the Creed, business must play under Olympic rules.

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