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## International Olympic Committee Rule 40: Reasonable Protection for the IOC or Unfair Restriction to the Athletes?

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## International Olympic Committee Rule 40: Reasonable Protection for the IOC or Unfair Restriction to the Athletes?

### Cover Page Footnote

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# International Olympic Committee Rule 40: Reasonable Protection for the IOC or Unfair Restriction to the Athletes?

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**Abstract** □ This paper explores the history, legality and ethical perspectives of the International Olympic Committee Rule #40 that was put into effect starting with the 2016 Olympic Games. Rule 40 was established to protect official Olympic sponsors from marketing campaign dilution and ambush marketing attempts from non-official brand sponsors. It was designed to prevent over-commercialization of the Olympic brand and to protect official Olympic sponsors' substantial investment for exclusive marketing rights during the Games. It also however effectively prevents athletes from recognizing their own individual company sponsors and goes so far as to limit an athlete's apparel during the Games, their freedom of speech, and freedom of expression on social media. While the rule places a ban on the use of any reference to the Olympic Games and a series of words and logos associated both before, during and after the games on all media, it may place an unfair restriction on the athletes themselves.

**Keywords** □ Rule 40, Olympics, Olympic Games, Sponsorship, Trademark, International Olympic Committee

**Relevance to Marketing Educators, Researchers and Practitioners** □ This paper has multiple implications for trade mark and reverse trademark infringement restrictions and policy making regarding freedom of speech, fair use and right of publicity. It further provides a-priori considerations to for-profit companies considering endorsing amateur athletes with Olympic aspirations. Finally this paper provides case study material for the marketing educator when teaching business ethics.

## Introduction

“I want to tell you about the Big Event in the Southern Hemisphere. It's in a city that rhymes with Neo Bee Sin Arrow and involves a series of contests in the season after spring. Winners receive awards made of a metal Californians sought in the late 1840s, while second and third-place

finishers get prizes carved from less precious substances. Oh, and it's all happening in August of MMXVI" says Sally Bergesen, proprietor of Oiselle, a Seattle based women's athletic apparel retailer and a proud sponsor to several athletes who ultimately made it to the USA Olympic team. Sally is trying to make a point (albeit sarcastically) about Rule 40 of the International Charter developed by the International Olympic Committee (IOC) (Calkins, 2016) after being issued a cease and desist order for using the following protected words according to the IOC Rule 40 in her social media: Olympics, Games, Rio de Janeiro, Metals, Gold, Silver, Bronze, and 2016.

## Literature Review

The 1978 Ted Stevens Amateur Sports Act gives copyright permission to the United States Olympic Committee (USOC) to use the word "Olympics" and its intellectual property exclusively. The revenue from the sale of these copyrights is said to raise funding for the USOC. Official Olympic sponsor mega conglomerates like Coca-Cola and McDonald's have paid upwards of \$100 million each for exclusive athlete advertising rights during the Games. The problem is that often Olympic sponsors only feature a small percentage of the athletes who compete leaving the rest with virtually no opportunity individually or through their own pre-Olympic and non-official sponsors to capitalize on their good fortune. Some of the athletes and smaller sponsors view this rule as exploitative as they are essentially being shut out while at the same time the USOC is not compensating the athletes. The Olympic Charter further designates in Rule number 40 the parameters of the agreement an athlete enters into with the IOC and establishes a "blackout" period of a specified number of days preceding and following the Olympic Games and the Paralympic Games whereby an athlete's name or image cannot be used by any non-official Olympic sponsor of the Games. Heavy penalties can be levied against the athlete found in violation of Rule 40 to include barred participation or even stripping of any metals and records won. As a result, athletes are powerless to take advantage of their marketability during what is most likely the most high-profile time in their sport and their careers.

The Olympic Games are the biggest, world-wide, and most recognized event of all sporting events with a hefty sponsorship price tag that is simply not affordable to most companies. Few opportunities exist for this kind of exposure for brands in both the domestic and international arena. While Rule 40 was meant to be a protective measure for the corporate sponsors, many athletes and companies feel the IOC has gone too far with Rule 40 and may be in fact harmful to the athlete (Loney, 2016; Herbert, 2014). This paper explores Rule 40 from a historical, branding, legal (intellectual property versus freedom of speech), and ethical perspective and serves to give insight into this multifaceted, complex and controversial rule.

## From Bankruptcy to Olympic Gold

The gold medals given at the Olympics today are not the only thing golden. In fact, running the Olympic Games was anything far from earning your weight in gold for many years. Baron Pierre de Coubertin is thought to be the founder of what is considered today as the modern Olympic Games with the establishment of the IOC in 1892. He not only focused on reviving the spirit of the Olympic Games by promoting moral qualities in athletes, building international goodwill and promoting education through sport but he was also the first to develop the framework to run the Games. From the concept of the IOC stemmed the National Olympic

Committees (NOCs) which were responsible for administering the Games and Olympic matters in the host nation.

Prior to the 1970s, the Olympics were considered a successful and competitively robust yet peaceful athletic competition however the reputation quickly changed following in the 1972 Munich Olympics when eleven Israeli athletes were killed by Palestinian terrorists. By 1980, the IOC was near bankruptcy with boycotts from the Montreal Olympics followed by the Moscow Olympic boycotts. Governments began to withdraw their support to help fund athletes getting to the Games leaving many NOCs with no other source of funding. Hosting the 1976 Montreal Olympic Games was originally estimated to cost \$310 million but was later thought to have left the city with more than \$1 billion of debt. By 1984, the Olympics was slated to be hosted by the city of Los Angeles even though 83% of the city residents had voted against financially supporting the Games. For the first time, a private commercial group rather than a civic government would stage the Games. The anticipated differentiated success factor was based on the promise of income from television advertising. Historically, commercial sponsorships accounted for as little as 2% of the total receipts of some games and the IOC found itself faced with lawsuits from companies who felt cheated. Clearly a new model for funding was a daunting but an absolute necessity if the games were to survive (Payne, 2008).

For twenty years beginning in 1980, the new IOC president focused on developing a new plan to secure the future of the Olympic Games. This three part plan called for solid financial reform enabling the host cities to be able to afford the Games, a minimization of political risk by opening dialogs with world leaders in an effort to anticipate and avoid political events jeopardizing the Olympic Games, and building a sense of unity and teamwork as an Olympic Movement bigger than any individual nation or government. The Olympic brand was slated to become the brand denominator that exemplified everyone's aspirations. This Olympic Movement took shape with the 84 day relay-rally carrying the Olympic flame from Olympia to the host nation, repositioning the Games themselves as a major international tourism event, the recognition of the five rings as the official brand logo of the Olympic Games, and the renegotiation of television rights.

Prior to the mid-1980s the Olympic Rings were probably the most unexploited and undervalued internationally recognized trademark in existence and it was time to leverage this brand like it had never been done before. Initially the IOC could grant marketing rights to organizations but these rights could not extend beyond the host country without the approval of all the other NOCs which controlled the rights for their particular territories. This forced each corporate sponsor wishing to roll out a global campaign to form agreements with each of the other separate NOCs for the countries in which its product would be sold. What should have been a simplified process for gaining corporate sponsorships became long and complicated. Prior to the 1988 Seoul Games, a bold effort was made to get the NOCs to agree on a centrally coordinated marketing program with a globalized structure known as "TOP". Despite its slow adoption, with TOP (which actually stands for nothing) the IOC was finally able to offer its corporate sponsors a powerful, unified global platform with which they could exclusively communicate with their customers. By 2008, broadcast revenues saw increases 30 times over to the tune of more than \$3 billion dollars. Olympic Game coverage saw a dramatic increase becoming the single largest broadcast event the world had ever seen (Payne, 2008). These significant revenue increases allowed the IOC to dramatically increase their financial support for NOCs and other international sports programs across the globe. To further support and protect these revenues, Rule 40 came

into existence. The IOC claims to reinvest up to 94% of its revenue back into sports and is simply trying to protect the revenue stream with Rule 40, however athletes may see it as an unfair restriction (Reynolds, 2012).

## Ambush Marketing

Rule 40 was designed by the IOC to protect official Olympic sponsors from “ambush marketing” efforts of non-sponsoring companies trying to imply an association with the Games when they did not pay for the rights of such affiliations. Sandler and Shani (1989) define ambush marketing as “a planned effort by an organization to associate themselves indirectly with an event in order to gain at least some of the recognition and benefits that are associated with being an official sponsor”. When brands use certain images, symbols, or phrases in their advertising that could lead a viewer to believe there is some sort of association with the Olympic Games when in fact there is not; it is thought to dilute the effect of sponsorship from companies that did pay for that right. This practice of “ambush marketing” can be considered a type of trademark infringement whereby companies attempt to have their names affiliated with the prestige of the Olympic Games through suggestion rather than official affiliation (Simmons, 2016).

The problem with Rule 40 is that it really extends beyond the intended target, i.e., other non-official sponsor companies purposefully attempting to affiliate themselves with the games. It also captures and restricts the athlete who is trying to benefit from their own personal athletic success via publicity or thanking their own pre-Olympic sponsors. Ambush marketing is also known as vigilante marketing, guerrilla marketing and parasite marketing (Harland and Williams-Burnett, 2012) suggesting the sneaky and purposeful attempt at capitalizing from this unauthorized association. For example, in the 1996 Atlanta games, Nike (a non-official sponsor) displayed a massive swoosh logo on a building opposite the Olympic stadium not on the Olympic premises. In the 2000 Sydney games, Adidas bodysuits were worn by the Australian swim team prominently showing the Adidas logos in every shot of the athletes. Due to the publicity surrounding the team, Adidas was ranked seventh as the most recognized games sponsor yet they were not an actual Olympic sponsor of the games.

Numerous legal battles have emerged over the years and a plethora of different national laws and acts have been enacted, all designed in an attempt to restrict or recover from such ambush activities by other non-official organizations (Hartland and Williams-Burnett, 2012). What is generally not seen however, is the athletes themselves purposefully trying to present their own brand image or the companies that have been sponsoring them over the years (pre-Olympic) as an Olympic sponsor. What we generally see is athletes thanking their sponsors who were gained before the Olympic trials for their continued support. Some of these companies have been supporting these low profile athletes for more than a decade prior to the Olympics.

## What is the Scope of Rule 40?

Essentially Rule 40 limits the use of the Olympic intellectual property by non-official Olympic sponsors by establishing a blackout period days both before and after the event during which non-sponsor companies are not allowed to use athletes participating in the Olympic games, or even mentioning their names, in any type of advertisement or marketing activities also including any and all social media. This rule also applies to the athlete as well barring them from endorsing (officially or unofficially), or even mentioning the name or displaying logos on their apparel, of any non-sponsoring brand or company.

Companies that had been sponsoring specific athletes well before the Olympic trials are also barred from even tweeting out messages of encouragement or congratulations to their athletes with messages like “Good luck in Pyeong Chang 2018”. The restrictiveness of Rule 40 really came to public light when dark horse, Kate Grace, won the Olympic trial 800 meter race wearing an Oiselle race jersey in the 2016 summer Olympics. Oiselle, a women’s athletic apparel company, had invested more than \$300,000 in her training and support as her sponsor in return for her product endorsement. Following the unanticipated win, Oiselle posted a picture of Kate in her jersey with a caption “She’s going to Rio”. Other pictures on Instagram were posted with Kate displaying an American Flag with a caption that read “@fastkate, now an Olympian with all the heart in the world right now.” Shortly after the posting, Oiselle was contacted by the USOC informing her that she was in trademark violation of the USOC and that all pictures of Kate and references to the Olympics or Olympic trials were to be removed immediately (Calkins, 2016). While this may not have been formally thought of as advertising, it was in violation of Rule 40 due to the timing of the posting and terminology associating Kate, thus Oiselle, with the Olympic Games without paying for official sponsorship.

While the intent of Rule 40 may be understood from a trademark infringement perspective trying to protect the brands of the licensed sponsors, it may well put the athletes themselves in an awkward and precarious position. Many athletes have potential not realized by huge billion dollar sponsoring companies like Nike or Visa and these athletes are lucky to find smaller, perhaps local, companies willing to invest in their training, development, and general support for marginal publicity. Some athletes have already proven themselves but in sporting events that are not as marketable to the masses. These companies are taking a risk investing in the athletes of unproven or little known talent and hope to reap the rewards with product endorsement on winning game days. If these businesses that invested in these athletes years prior to the Olympic Games are then prevented from capitalizing on their success when it actually happens, what would be the incentive for these non-USOC sponsors to continue to fund athletes? Due to the limited time frame of the Olympics, only two weeks every four years, as compared to other sports such as soccer or gymnastics which continue over long seasons each year, it may minimize the value of the Olympic athlete in terms of product endorsement.

Rule 40 first came into the spotlight and hence under fire during and after the Games in London in 2012 where athletes were memorializing their accomplishments and experiences at the Games through social media. Facebook, Instagram and Twitter seemed the perfect public forum for athletes to acknowledge and thank their personal corporate sponsors who were largely non-official Olympic sponsors. While admirable on behalf of the athlete, this was a clear unintentional violation of Rule 40 leaving the athletes perplexed in this catch 22. How could they acknowledge the companies that had been investing in them for years making it possible to compete in the Olympic Games if they could not publicly affiliate themselves with their own corporate sponsors? For many of these athletes, the opportunity to capitalize on their success is fleeting. They need to strike when the iron is hot, after all, who wants to listen to the summer silver medalist tell their product story in January?

## Protecting the Olympic Brand

Exclusivity rights for official corporate sponsors is a slippery slope; they are worthless without a broad scope, difficult to explain and even more challenging to protect. Rules for the 2012 Olympics have been thought to be some of the most rigid dealing with intellectual property protection in sporting history. Yet even with such protection mechanisms in place, ambush

marketing campaigns were still escaping sanctions, official sponsors were still displeased, and athletes were privately and publicly disgruntled. Rule 40 was relaxed somewhat for the 2016 Rio Games allowing brands to apply for a rule waiver whereby the athletes could continue to endorse the company products and be brand ambassadors provided the ad campaign did not associate the brand with the Olympics in any way. This relaxation of rule 40 was an IOC compromise to allow non-sponsored brands the right to maintain a legitimate presence with their brands and brand ambassadors during the Games but not affiliate themselves with the Games (Simmons, 2016). One problem with the amended rule is that it requires the waiver application to designate the nature, content and strategy of the ad to be submitted long before athletes are named to Team USA. Further the ad campaign must run continuously for almost six months before the Games begin which is cost prohibitive for many smaller companies.

While some applaud the IOC for responding to the plight of the athlete, some still say it does not go far enough to alleviate the burden and disadvantage placed upon the athletes themselves. One problem largely ignored by the IOC is that the interpretation and enforcement of Rule 40 defers to each NOC which can choose to enforce or not enforce the rule and to what extent. Several athletes have publicly argued that profits gained from the Games fail to trickle down to the athletes whose costs for training are considerable. The rules restrict their ability or opportunity to cultivate private sponsors who know they will not be allowed to capitalize on the success of the athlete once they make the Olympic team. The IOC is said to raise more than 40% of their budget from official sponsorships but that will decline if they are not allowed to provide their sponsors with exclusivity (Pilon, 2012) albeit at the athletes' expense.

## Freedom of Speech

In the United States, Rule 40 has come under fire claiming it violates every American's 1<sup>st</sup> Amendment right—the freedom of speech. Athletes sponsored by non-official Olympic sponsors are prohibited from expressing their gratitude to their corporate sponsors in any kind of a public manner. Even a 'thank you' message on social media is prohibited with severe sanctions including disqualification imposed on the athlete for violations. The rule further prevents athletes from using their own names or likeness for any type of advertising during the blackout period. Athletes are prohibited from mentioning their sponsors and vice-a-versa during this blackout. In other words, the athletes and non-official sponsors can conduct business as usual except during the month of the Olympic Games during which time they should act as if they don't know each other. Athletes are beginning to challenge Rule 40, both individually and as groups in an effort to protect their freedom of speech. An athlete's inability to express gratitude to their own personal company sponsors' rewarding them for investing in their potential infringes on their right to freedom of speech. However the IOC argues that it is the investment from official sponsors that should be rewarded and protected and that those are the only brands that should be associated with the Olympics (Androich, 2012).

## Right of Publicity

Rights of publicity issues (Loney, 2016) have been appearing more often in court cases as everyone and everything seems to have an image of financial potential and worthy of protecting. In several countries, the right to publicity and freedom of speech are protected by law and governed by some sort of regulation but there are not necessarily laws specifically pertaining to the protection of both in such instances. Jurisdictions often reflect regional differences in their approach to protection of these rights. In the United States, courts have traditionally ruled in

favor of the protection of freedom of speech and artistic expression. The right to publicity is generally in favor of protecting a person's identity from another's commercial use or at least trying to balance which party is profiting from the situation. Generally we have seen the right of publicity being used to protect celebrities and sports and entertainment figures whose identities and fame is the source of their livelihood. Denying the right to publicity at the time of the Olympic Games may also be denying the athlete the ability to capitalize on their fame at the time of its greatest value since athletes generally have such a short career.

## Trademarks

A trademark is any word, symbol, or phrase, or combinations that are used to identify a particular manufacturer or entity's products or services that distinctly distinguish them from others. In essence, your brand is a source identifier and says this offering is from your company and not any other company. Trademarks make it easy for customers to identify the source or affiliation of a product with a given source.

Trademark infringement means that the likelihood of confusion standard has been challenged such that a party may be likely to believe there is an affiliation between an offering and company when in fact there is not (Feldman, 2003). The problem with trademark infringement in the context of Rule 40 is that there actually *is* an affiliation between the athlete and the Olympic Games. The IOC is trying to artificially restrict an association between the athlete and the non-paying sponsors while trying to build an association between the athlete and the paying official sponsor when actually this would only be an indirect association at best. In a media content analysis study conducted by Hartland and Williams-Burnett (2012), more than 2 million matches of protected words from the London Olympic and Paralympic Games Act 2006 were found one year before the 2012 games and was expected to rise as the games got closer. They further found the majority of the infringing enterprises were small and medium companies and/or non-profit organizations; not the large multi-national organizations one might expect. Tripodi and Hiron (2009) examined recognition of sports apparel sponsorships for the Sydney 2000 games looking at Nike (an official sponsor), Adidas and Reebok (non-Olympic sponsors). They found Nike maintained the highest recognition of sponsorship over the others both before, during and after the Olympics however both before and after the games, the non-sponsors had improved and somewhat similar perceived Olympic sponsorship recognition at the expense of Nike.

Interestingly, a case could be made by the athlete to bring a suit against the IOC for reverse trademark infringement. Reverse confusion says a junior user (meaning a secondary and generally larger company) uses a mark that is already being used by a senior user (the first user and generally smaller company). The junior user being large often dwarfs the senior's use or promotion of the brand usually in terms of advertising expenses thus creating a strong association between the brand and the junior user that is not likely or easily broken. This in effect prevents the original senior user the right or ability to promote their own brand in an independent way separate from the junior user (Feldman, 2003). In this context, a lesser known athlete before qualifying for the Olympics may have been working to establish his or her own brand name and image working with or without a non-official sponsor. After qualifying for the Olympics, due to Rule 40, that athlete is essentially denied the opportunity to control, capitalize, or even continue to build his or her own brand image, and/or continue to endorse other previously associated brand sponsors and is essentially required to allow only the senior infringer (the Olympics) the right to publicly affiliate the athletes image with its own brand (the Olympic Games).

Perhaps the difference lies in the associations themselves. Companies that have supported the aspiring athletes are aligning themselves with a specific athlete, that athlete is then associated with the Olympics thereby creating an indirect association between the original athlete non-official sponsoring company and the Olympic Games. This is different from the direct association created between the official Olympic brand sponsorship companies and the Olympic Games which are not necessarily tied to a specific athlete.

## Generic Words

It also looks as though the IOC is taking liberties by attempting to restrict the use of otherwise generic terms in both advertising and on social media (Sier, 2016). A word is considered “generic” if the word denotes a broad type of product or offering and does not suggest a particular company or source, for example “milk”. Generic words are not subject to trademark protection however some previously generic words are also incorporated into the ban. Rule 40 goes on to designate a series of words, names and images and hashtags that are forbidden to be used in any advertisement or social media. For example, for the 2016 Olympic Games in Rio de Janeiro, only official sponsors secured the rights to use seemingly generic words like “Rio”, “games” “2016”, “gold” , “victory” or even “summer” in any advertisement or in conjunction with any Olympic athlete (Schultz, 2016). Effectively, the city and national tourism department for Rio de Janeiro would not be allowed to promote the city by name during this black out period.

## Fair Use

So what defenses are there for the athletes? One avenue that may be available for the athletes might be to turn to “fair use” laws whereby a descriptive mark (the unofficial athlete sponsor) is used in good faith by the athlete for its primary meaning of rewarding the sponsor of that athlete. Another similar defense maybe for athletes to refer to their sponsors in a normative use. Normative use happens when an athlete is attempting to identify another producer by name and there is no other way to refer to that producer other than to use their name. The premise is that the use of that trademark may be necessary to talk about another party’s products or services (the unofficial sponsor). The athlete should not be expected to pretend their non-official Olympic sponsors suddenly cease to exist simply because they made the Olympic team.

Perhaps parodies of trademarks should be allowed if they are not directly tied to commercial use and also protecting freedom of speech. The question of whether athletes should be allowed to accept, deny, or continue to publicize any sponsorship or paid endorsement will likely be given further consideration as the next Olympic Games approaches. Because they are not being paid by a league such as with the case of professional athletes, this situation begs the question if the IOC does or should have the legal or moral authority to restrict the athletes’ financial gain in favor of their own?

## Conclusion

It is not the goal of this paper to suggest that attempts from the IOC to protect their trademark should be abandoned however efforts to protect the athletes’ freedom of speech and freedom to acknowledge previous sponsorships may need to be reexamined. Perhaps the measures in place are still too restrictive on the athlete and thus suggests separate rules for companies attempting to promote their brands from athletes attempting to acknowledge personal and pre-Olympic sponsors. Rules differentiating between athlete sponsors prior to the Olympic

trials and sponsors picked up after the trials may need to be examined. Message content could also be examined differentiating between the athletes endorsing a non-official sponsor brand versus thanking the company for their prior support. Brand placement may also be considered, for example is the non-sponsoring brand the focus of the message or is it simply in the picture with the athlete as with product placement. Finally, issues of freedom of speech, fair use and right of publicity will likely need to be addressed within the context of Rule 40 before class action law suits become the norm.

Future research tracking law suits and other legal actions, content analysis of promotional materials using potential Olympic terms and symbols, and surveys of public opinion regarding actual confusion may be warranted. It is also suggested that given that the media environment is generally saturated with Olympic focused advertisements just prior and during the games, official sponsors might attempt to preempt the effects of ambush marketers by employing a full array of different communications using a variety of media platforms in an attempt to lesson any diluting effects while simultaneously increasing their own reach and frequency.

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