

Examining The Legal Intersection Of Ambush Marketing Prevention And Olympic Hashtag Usage

McKelvey, Steve M.; Grady, John

University of Massachusetts Amherst, USA

E-mail: mckelvey@isenberg.umass.edu

Aim of the project

In the ardent efforts to prevent ambush marketing in the Olympic marketing space, the United States Olympic Committee (“UOC”) has been amongst the most proactive national governing bodies in seeking to curtail unauthorized use of hashtags in social media designed to create an association with the Games. Prior to the 2016 Summer Olympic Games in Rio de Janeiro, for instance, the USOC sent letters to non-sponsor companies warning they would infringe the USOC’s rights if they incorporated into social media posts any of the USOC’s protected marks, including #Rio2016 and #TeamUSA, regardless of the content of the social media messaging. The letter further prohibited the sharing of any Olympic results or retweeting from official Olympic accounts by any non-media outlets. Similarly, the Canadian Olympic Committee notified non-sponsors that, even if a Rule 40 waiver has been granted, it is severely restricted in its use of hashtags on social media. For instance, as stipulated in its published Guides on Brand Use, the following would not be permitted: *Congrats to @Xathlete as she goes for gold today at #Rio2016! #Team Canada* (Sie & Gray, 2016). Great Britain explicitly stated in its Rule 40 Guidebook that non-sponsors will not be allowed to “create an association” with the Games by, among other things, re-tweeting any Team GB tweets at any time, or re-tweeting athletes’ posts which relate to the Games. But, on what *legal* basis can these NGB’s make such sweeping declarations that arguably chill free speech?

Objectives

This presentation will examine the legal and business challenges for sport properties and brands with regard to future anti-ambush marketing strategies involving restrictions on the use of hashtags. Such actions, described by some as “trademark bullying,” raise legal issues at the nexus of free speech and trademark law and warrant further scholarly exploration as countries continue to craft their anti-ambush marketing strategies within the context of hashtag usage.

The constitutionality of the USOC’s efforts was challenged in a lawsuit filed in a U.S. federal court days prior to start of the 2016 Summer Olympics by a small carpet cleaning business called Zerorez (HSK, LLC. v. United States Olympic Committee, 2016). Zerorez communicates with customers through Facebook and Twitter and anticipated discussing the Olympics, contemplating social media posts such as “Are any Minnesotans heading to #Rio to watch the #Olympics? #RoadToRio”. Zerorez requested declaratory relief from the court, arguing that “[s]peech is not commercial in nature merely because it is on a business’s social media account” (HSK v. USOC, p. 8). This was in response to the USOC’s broad assertion that every social media post from a corporate account constituted commercial speech and was therefore prohibited.

Literature review

Although the U.S. Supreme Court has long grappled with how to define commercial speech, it provided insight as to what is not considered commercial speech in *Virginia State Bd of Pharmacy v. Virginia Citizens Consumer Council* (1976): “Speech is ... not necessarily commercial just because money was spent to project it” (p. 761). Additionally, although the 7th Circuit’s decision in a right of publicity case involving former NBA star Michael Jordan broadened the scope of commercial speech, the USOC’s assertion that every social media post from a corporate account constitutes commercial speech is arguably over-reaching (McKelvey & Grady, 2017).

The second legal issue raised in the Zerorez lawsuit turns on the application of statutory trademark law. Within the U.S., this requires application and analysis of the federal trademark protections found in the Lanham Act, and would require similar legal trademark analysis within other countries. The Lanham Act makes liable anyone who uses a registered mark in commerce “in connection with the sale ... or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive.” Trademark law, however, also recognizes that there are other ways to use another’s mark without misleading consumers or infringing the owner’s rights.

Implications

One can argue that the use of trademarked hashtags in social media posts that do not directly incorporate selling messages is not necessarily commercial, such as in cases of congratulatory messages involving the Olympics. These posts are not likely to confuse or mislead the public as to the company’s affiliation with the

Olympic Games (with regard to sponsorship), or lack thereof. Resolution of the *Zerorez* case will shed light on the legal viability of the USOC's policies for using hashtags and provide valuable guidance for future Olympic organizers.

References

- HSK LLC, dba Zerorez v. United States Olympic Committee, U.S. Dist. Court (MN), No. 0:16-cv-0641 (filed August 4, 2016).
- McKelvey, S., & Grady, J., (2017, 1 March). *#FreeSpeech? Analyzing USOC's Hashtag Enforcement at Rio 2016*. Paper presented at the 30th Annual Conference of the Sport and Recreation Law Association (SRLA), Las Vegas.
- Renzetti, J. (2016, August 5). Carpet cleaner Zerorez sues U.S. Olympic Committee over social media ban. *Minneapolis-St.Paul Business Journal*. Retrieved from <http://www.bizjournals.com/twincities/news/2016/08/05/carpet-cleaner-zerorez-sues-u-s-olympic-committee.html>
- Roberts, A. (2015, August 26). Hashtags are not trademarks [Blog post]. *Technology & Marketing Law Blog*. Retrieved from <http://blog.ericgoldman.org/archives/2015/08/hashtags-are-not-trademarks-eksouzian-v-albanese-guest-blog-post-2.htm>
- Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).