
INTERVENTION

Analyzing Rule 40's Restrictions on Using Athletes in Olympic Sponsorship at Rio 2016

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This intervention considers changes to Rule 40 of the Olympic Charter during the 2016 Summer Games. It compares predictions made prior to the Games relating to legal issues in Olympic sponsorship and ambush marketing with what was observed on-site and what occurred online pertaining to legal issues in sponsorship at Rio 2016. Using examples from the United States and efforts by the USOC to enforce Rule 40, the author considers how Olympic officials have shifted their emphasis toward regulatory efforts aimed at athletes, such as through a relaxed Rule 40, rather than via traditional brand-protection efforts. The implications of this change are suggested in the context of the Olympic legal and business environment.

Keywords: Olympic Games; ambush marketing; Rule 40; social media regulation; athlete issues; intellectual property

Prior to the start of the 2016 Summer Olympic Games in Rio de Janeiro, one of the issues of greatest legal uncertainty was how Olympic officials would manage the application and enforcement of Rule 40 of the Olympic Charter. Bye-law 3 to Rule 40 restricts how Olympic athletes can be used for advertising purposes during the Olympic Games when their personal sponsor is not also an Olympic sponsor (IOC n.d.). Rule 40 also creates an Olympic 'blackout' period in which advertisements by non-affiliated brands cannot use the name, picture (image), or sports performance of participating athletes and broadly restricts the use of Olympic-related terms by non-Olympic sponsors, including 'Rio', '2016', 'Victory', and 'Summer' (IOC n.d.). For Rio 2016, the controversial rule was relaxed to allow the continuation of in-market generic advertising featuring participants so long as no direct or indirect association with the Olympics was created (IOC n.d.). Each National Olympic Committee (NOC) was also instructed to develop a waiver process to pre-approve advertising campaigns by non-affiliated brands that featured competing athletes.

When the relaxation of Rule 40 was announced (Mackay 2015) by the International Olympic Committee (IOC) in February 2015, many questioned how such a drastic change would alter the legal and business complexities of the Olympic sponsorship model at the upcoming Games. This intervention considers the impact of possible changes by comparing predictions made prior to the Games relating to legal issues in sponsorship, ambush marketing, and social media by the author (see Grady 2016a) with what was observed on-site and what occurred online regarding the legal and sponsorship environment at Rio 2016. While this piece focuses on examples from the United States and efforts by the United States Olympic Committee (USOC) to enforce Rule 40, other NOCs faced similar challenges in applying the revised rule. Before considering the rule change in depth, it is necessary to first understand how Rule 40 now 'fits' within the comprehensive brand-protection plan that is fundamental to each Games' sponsorship-protection efforts.

Evolution of the Legal Battle against Olympic Ambush Marketing

As noted by Ellis, Scassa, and Seguin (2011), ambush marketing has long been part of the dialogue around sponsorship, yet it has been framed primarily as a business issue rather than as a legal issue. According to these authors, a paradigm shift is occurring whereby legal intervention and the enactment of event-specific laws are now seen as expected ways for local organizing committees to manage the practice of ambush marketing. Nowhere has this paradigm shift played out more dramatically than in the Olympic sponsorship space. Potential host cities are now expected to propose special legislation to address ambush marketing as part of the bidding process (McKelvey & Grady 2008), while such legislation rarely, if ever, gets tested in court once the Games begin. Yet, as social media became a dominant vehicle for conducting ambush marketing (Chavanat & Desbordes 2014), a new regulatory tool was needed.

Regulatory efforts, by way of Rule 40, were soon aimed at athletes featured in advertisements by non-affiliated brands (those brands that are not official Olympic sponsors). Perhaps plagued from the start by an approach that considers the actions of the athletes related to personal sponsorship within the historically pejorative connotation of ambush

marketing (McKelvey & Burton 2016), industry veterans in global sponsorship began to express concerns about how Rule 40 would be implemented during Rio 2016. As noted by Cole (2015) well ahead of the Games, 'continued ambiguity on Rule 40 in particular is creating much uncertainty, and sadly will open the doors further to ambush marketing. This will become detrimental to the interests of sponsors and ultimately, with the added commercial stress, the interests of the athletes'. Moreover, and specific to the legal concerns involving athletes' personal sponsorships, Cole (2015) noted that providing clear guidance to sponsors on the application of Rule 40 had become 'more a case for the legal profession rather than the marketing experts'.

Relaxing the Rule and Pre-Games Early Insights

In relaxing Rule 40, Olympic officials and NOCs had laudable goals in mind, such as creating new sponsorship opportunities for athletes as well as not wanting to disrupt ongoing marketing campaigns that were unrelated to the Games. The relaxation of the rule was seen as a 'victory for American athletes' (Mackay 2015) as the changes 'address[ed] the dissatisfaction of athletes but also protect[ed] the rights of the Olympic rights holders' (Costa 2016). Despite this rosy outlook, however, there were legitimate legal and financial risks if the contractually promised exclusivity to the Olympic Partner (TOP) sponsors programme began to erode as a result of the rule change (Grady and McKelvey 2015). Prior to the start of the Rio Games, John Lewicki, who oversees global Olympic sponsorship deals for McDonald's, commented: 'If we find Rule 40 impacts the value of our sponsorship, we could always go back and renegotiate for the future' (Baker 2016). Notably, the changes to Rule 40 created new legally permissible avenues for brands to conduct sponsorship activities around the Games that would otherwise have been prohibited during Rule 40's strict 'blackout' period. Relaxing the rule was an Olympic-sized gamble, to say the least.

A key rationale for relaxing the rule was to support athletes' rights and to serve 'as a way to help athletes potentially generate additional financial support' through increased sponsorship opportunities (Penny 2015). Yet, the relaxed rule did not create the kinds of opportunities that the IOC may have envisioned and ultimately blunted the wider impacts of the relaxed rule. Instead of creating 'new' sponsorship opportunities, particularly for lesser-known athletes in need of sponsors, the practical reality of satisfying the strict waiver criteria created a confusing process, which included submitting plans eight months in advance for a nationwide or even global marketing campaign for an athlete who may not even have qualified for Rio 2016. This precluded almost all but the most powerful global brands from taking full advantage of the ability to feature Olympic athletes during the Games. Prominently led by Under Armour's video advert featuring Michael Phelps, these early campaigns foretold more aggressive marketing efforts to come featuring athletes because of the rule change. Still, in the United States, while the majority of brands (which were often the direct competitors to official sponsors) seeking Rule 40 waivers were approved (Baker 2016), not all brands chose to run their campaigns or they ran scaled-back efforts.

Additionally, although there was not the vocal activism by athletes seen during London 2012, there was still notable frustration by athletes prior to the start of the Games about what they could post related to their personal sponsors. For example, athletes tweeted about it being the last day they could say 'thanks' to their sponsors before the Rule 40 blackout began (Li 2016). Thus, while relaxing Rule 40 promised new flexibility so long as no Olympic connection was made to a non-Olympic sponsor, participating athletes still seemed resistant to efforts to regulate their social media posts. This response is generally consistent with the stiff resistance to social media regulation of athletes as seen at London 2012 (Grady, Ballouli, Pressley, & Moorman 2013). As the blackout period officially began on 27 July, athletes soon shifted to tweeting about their personal sponsors, sometimes in cryptic ways (Chavez 2016), to avoid contravening Rule 40's prohibition on creating an unauthorized Olympic connection. Cynicism aimed at the unfairness of Rule 40 still persisted, and the sentiment behind #WeDemandChange seemed renewed, albeit on a lesser scale (Shergold 2016).

Games-Time Observations and Legal Implications

Based on observational research by Grady and Carson (2016) conducted in Brazil and discussed below, once the Games were underway and the Games period blackout was in full effect, approaches for traditional advertising media and new media diverged. Official sponsors began to exploit the exclusive marketing space reserved to them as per their rights agreements while non-affiliated brands sought to exploit their new-found freedom their freedom via their Rule 40 waivers.

On-site in Rio, official sponsors had maximum opportunities for sponsorship activation and were afforded the contractually promised exclusivity within and surrounding Olympic Park (i.e., the traditional 'clean' zones). Official sponsor activation also occurred at the international airport and at major fan hubs that were designed to attract local residents as well as global fans, similar to what was present during the World Cup 2014. Non-affiliated brands activated in less direct ways—for instance, by featuring their sponsored athletes in beach workouts with fans and setting up temporary gyms along the beaches—but fan engagement was left mainly to social media. Thus, no clear impact of the Rule 40 change was observed through on-site advertising.

On social media, there was more variety in terms of approach and non-official brands were more aggressive in pushing Rule 40's boundaries (Grady & Carson 2016). Tweets and Instagram posts began originating from brands rather than from the athletes themselves, indicating that athletes were perhaps wary of what content they could still post within the newly interpreted rule. Major global brands posted Games-time tweets (@UnderArmour 2016a) before every gold

medal swim by Michael Phelps or top tennis match by Great Britain's Andy Murray using global campaign hashtags, such as Under Armour's #RuleYourself (@UnderArmour 2016b). These brands strayed closer to the edge of the line of what was allowed, while still steering clear of using any of the Olympics' 'protected' words or the restricted trademarks. Lesser-known brands with smaller advertising budgets, such as women's sportswear brand Oiselle, went down a more creative route by using legally ambiguous event-related hashtags referencing 'the big event in Brazil' and Oiselle's CEO, a vocal critic of Rule 40 and the USOC's enforcement approach, recommended ways (Bergesen 2016) for brands to show support for their sponsored athletes within Rule 40's restrictions. For these smaller brands, at least on social media, there was more of the creativity often seen with traditional Olympic ambush marketing tactics, with brands exploiting any loopholes in the new rule.

The 'Social' Evolution of Olympic Brand Protection and the Increasing Role of Rule 40

Brand protection must necessarily evolve with each Games as well as adjust to the legal setting within the host country and to changes impacting the marketing and sponsorship landscape. Based on the initial findings of Grady and Carson (2016), some initial insights can be gleaned from what was seen on-site and online during Rio 2016 with regard to whether the relaxed Rule 40 had its primary intended effect: to give athletes more opportunities for sponsorship by removing restrictions on how athletes could be used in advertising during the Games period. The notably different (and more aggressive) approach in marketing athletes online versus on the ground provides context so that Rule 40 can be better understood. On-site in Rio, well-established advertising restrictions and 'clean zone' policies provided official sponsors with the necessary barrier to conduct their sponsorship activation involving athletes without much intrusion from rival brands. This was not unexpected as this space is traditionally controlled by official sponsors, through buying up prime advertising space in the host city or through sponsor pavilions within Rio's Olympic Park. Meanwhile, non-affiliated brands were left looking for new ways to develop a commercial presence surrounding the event and turned their engagement efforts toward social media. Non-affiliated brands shifted their focus toward social media heavily during Rio 2016, encroaching on the digital media space surrounding the Games. Thus, as Olympic brand-protection efforts evolve to address such digital challenges, Rule 40 has now seemingly become the Olympics' primary legal roadblock to one common ambush avenue: advertising on digital and social media featuring athletes by non-affiliated brands. Yet, any strategy that relies upon regulating athletes' sponsorship activity on social media may need to be delicately managed to balance competing stakeholder interests as examples from Rio 2016 clearly demonstrated.

Enforcing Rule 40

Defining the scope of Rule 40 and understanding its nuances is a process that evolves with each iteration of the Games. However, Rule 40 enforcement proves to be a challenge and still offers non-affiliated brands sufficient legal 'grey area' in which to operate. Because Rule 40 is policed by each NOC, which is responsible for ensuring its athletes' compliance with all rules of the Olympic charter (IOC n.d.), and as each NOC's guidance about Rule 40 was slightly different for Rio 2016, it becomes harder to observe and assess how athletes were being used in sponsorship and whether such use violates Rule 40. While there were no official statements reporting that any Rio 2016 athletes were being investigated or sanctioned for Rule 40 violations by their NOCs, this is not surprising given Rule 40's narrow jurisdiction. That is, only the athletes themselves (or other accredited persons) are subject to Rule 40 and could possibly violate it, not the personal brands they endorse, which are more likely to be the source of any unauthorized advertising.

Considering the less rigid enforcement approach that was used when compared to London 2012 and recognizing that brands which received waivers weren't likely to do anything that clearly violated the terms of their Rule 40 waiver, one can question whether Rule 40 is now a rule without legal 'teeth'. Softening the rule for Rio 2016 to benefit athletes was clearly a strategic move to avoid a repeat performance by disgruntled athletes similar to that which occurred during London 2012 (Grady 2016b). But did Rule 40 in its relaxed form sufficiently close the blatant ambush marketing loophole that had existed whereby athletes can promote non-sponsor brands during the Games without much distinction, regardless of whether they are official sponsors? Alternatively, did the new process implemented open new undiscovered loopholes, such as the use of clever hashtags to easily create an Olympic connection? These still remain open questions, likely to be debated in future scholarly work. Early results paint an interesting picture of how event-specific legislation may be insufficient given changes in technology and call for more nuanced legal approaches in managing sponsorship issues going forward. Reliance on supplemental regulatory efforts such as Rule 40 and the cooperation of brands through the waiver process becomes necessary in order to achieve the Olympics' brand-protection goals.

The nature of social media may also reveal a potential shift in brands' willingness to test Rule 40's boundaries, even if they seek to avoid putting their athletes' eligibility in jeopardy. Any enforcement for infringing content will likely prove to be little deterrent to brands intent on reinforcing an Olympic connection online. This is because an offending tweet can simply be removed whereas traditional Olympic advertising campaigns displayed on billboards throughout the host city, such as Nike's 'Find Your Greatness' campaign (Sweney 2016) found throughout underground stations and online during London 2012, become much harder to scale back if deemed to be infringing.

In analyzing the campaigns that resulted from the relaxation of Rule 40, it becomes apparent that there is much less risk exposure in pushing out digital content that may be on the fringe of what is allowed, such as an Olympic-themed hashtag, than enduring both the legal and financial risk involved in designing a global campaign that purposely

skirts the rules. In this way, relaxing Rule 40 and the requirements of the waiver process were effective. Campaigns by non-affiliated brands had to be approved in advance and notably provided each NOC with the chance to work cooperatively with non-affiliated brands through the waiver process, a notable contrast from the current Olympics sponsorship model. By vetting campaigns by non-affiliated brands, this also provided the Rio 2016 brand-protection team with a preview of content likely to be seen by brands without waivers, giving them more lead time to respond to unauthorized marketing activity. Similarly, from the perspective of the NOC, keen to protect the rights of official domestic sponsors, relaxing the rule not only preempted criticism in the media of overly strict brand policing aimed at athletes, it also foreclosed the need for traditional-style Olympic ambush marketing, where organizers must typically 'wait and see' what brands roll out once the Games are underway and which thus becomes much harder to stop.

Conclusion

With just a few months having passed since the conclusion of the 2016 Games, some lingering questions remain. Rule 40 was strategically applied well in advance of Rio 2016, with unified support from the IOC and NOCs, and there has been little resistance publicly to the changes by official sponsors since the Games ended. Thus, will Rio's Games signal the end of the traditional concept of 'ambush marketing' and local organizing committees' high-profile brand protection efforts, which have traditionally been grounded in intellectual property laws? Along those lines, have social and digital media so transformed the Olympic marketing space that officials must look to new legal remedies, such as Rule 40, to close any new gaps that exist? Alternatively, by relaxing Rule 40, did the IOC frame the conversation of Olympic ambush marketing in such a way that it relies less on overtly legal prohibitions, which historically have produced the most criticism? This allowed the Olympics to be seen as a dynamic operation, responsive to the changing sponsorship needs of athletes as well as being attentive to the burgeoning social media landscape that now surrounds the Games. Perhaps the answers to these complex questions cannot be found on the beautiful beaches of Rio de Janeiro but instead at the next Games in Tokyo in 2020.

Competing Interests

The author has no competing interests to declare.

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