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SYMPOSIUM 2012: AMATEUR ATHLETICS, PROFESSIONAL IP: SYMPOSIUM: CARDOZO JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW: Transcript of 20th Anniversary Symposium, March 8, 2012: II. Panel Two: Brand Promotion and Protection at the London 2012 Olympics

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II. Panel Two: Brand Promotion and Protection at the London 2012 Olympics

A. Introductions by Mr. Wells Crandall

MR. CRANDALL: Welcome to the second half of the Cardozo Journal of International and Comparative Law Symposium. We have six panelists today. I will go through them in the order prescribed by the Romans, that is alphabetical.

And we have - on our left, we have Brett Goodman. He is the Senior Vice President of Strategic Partnerships and Business Affairs for the NBC Sports Group.

Actually I'll just go from left to right. We have Ben Sturner, he is the CEO and President of the Leverage Agency. He has worked at six Olympic -

MR. BEN STURNER: Been to six Olympics, yeah.

MR. CRANDALL: Been to six Olympics and was on the Sydney - I have it here, the Sydney -

MR. STURNER: Sydney Olympic - Sydney Organizing Committee for the Olympic Games, was there for a year.

MR. CRANDALL: Sydney Organizing Committee for the Olympic Games, excuse me, thank you. And he has a wealth of experience to share.

We have Professor Michael McCann, he is a professor at the University of Vermont, School of Law, and he is the Director of the Sports Law Institute.

We have Dr. Harvey W. Schiller, he is the Chairman of the [*602] Board and CEO of Global Options Group and was on the United - was the Executive Director and Secretary General of the United States Olympic Committee as well as several other positions in international sports.

We have Mr. Michael Kuh, he is an Associate at Latham & Watkins, who has done - who has worked on the bid packages for the New York Olympics bid in 2005 as well as the FIFA bid in -

MR. MICHAEL KUH: Last year. Last year's bid, right.

MR. CRANDALL: In the last year. And we have Mr. Scott Schleifstein who is a Partner at -

MR. SCOTT SCHLEIFSTEIN: Cohen Silverman Rowan.

MR. CRANDALL: Cohen Silverman Rowan, thank you very much, and he is an attorney in the field of sports marketing.

And without further ado, Scott Schleifstein will kick us off with introduction to the legal issues behind sports marketing. Thank you.

B. Panel Two: Discussion

1. Remarks by Mr. Scott Schleifstein

MR. SCHLEIFSTEIN: Thanks a lot, Wells. I don't know if I need the mic but let me know. Okay, so just getting started here.

The first thing is, and this may be a little bit basic and perhaps unnecessary, but maybe not. It's always good, I think, to go back to the fundamentals before you get involved in the nuances and details, and I think this is one of the better definitions of a trademark.

One of the things to bear in mind about what a trademark is, is especially now with social media and the whole virtual world out there, almost anything that can serve as a source identifier is really a trademark. There were questions earlier, a point earlier on in the history of branding. Could a color be a trademark? Could a sound be a trademark? And we've sort of blown totally through those barriers, and just a couple of examples here.

The New York Yankees, that name is trademarked, actually Yankee Stadium is also a trademark as well as the famous hitter logo, and it just sort of occurs to me, I don't know how many people out there in the crowd were watching the game last night, the Clippers and the Nets? I won't ask for a show of hands, I know it could be a little bit embarrassing to say you watch the Nets these days.

[*603] But it's very funny, the two announcers were going back and forth saying, "the big finish." Well, that's my patent, that's my copyright. So these terms, once you get outside of the law school and [our] environment, people generally mix them up, and so it's not - I don't know how much commonology it really is actually, but food for thought. Always good to plug the Nets, they need it.

Okay, so trademark protection. This is, again, this is something that just gives you a little bit of background here. You can file a trademark application in the U.S. based on intent to use or which is your future planned use of a trademark in commerce as opposed to actually using it. And the circle R, that's really the Holy Grail here. Once you get a circle R you're putting aside a supplemental registration which is probably a little bit too of an - too much of a nuance for this discussion, not really relevant. You have really pretty strong rights with the circle R and once you have the circle R, if you get a registration on Principal Registrar. And not only that, if you maintain it, filing your affidavit of use between the fifth and sixth years and filing the renewal documents 10 years after the original registration, you can pretty much lock up those rights and prevent other people from using that name for anything similar.

International registration, with the big Madrid Protocol that's also the European Community trademark process, and so it's - and I think that's important to note because obviously we live in a very - as everyone who was here for the previous session saw, we live in a global community where we're all linked anyway. So international registration, I haven't seen it in my practice really take off. I don't know if that experience is matched by anybody else but I would think more and more people would want to go for taking their U.S. trademark registration and trying to, if you will, export it that way.

And just a little more background here. As we're at the School of Law, I felt the need to throw in the Lanham Act reference, you can look it up. As Casey Stengel once said, and the various classes of trademark, the way to think about of trademarks from weak or strong, you can think of it as a continuum, generic being the weakest and in fact, really no trademark protection, and a good example would be what happened to the Xerox trademark, where everybody said, oh, I'm going to Xerox this as opposed to make a copy. They even ceased using the word "Xerox" as an adjective and became like a verb or a noun. Make me a Xerox or I'm going to go Xerox something, and that led to the word [*604] becoming generic and loss of trademark rights. And then you can just sort of follow the line, descriptive, with secondary meaning, you can have exclusive rights to a trademark once you prove secondary meaning, suggestive all the way to arbitrary, and in arbitrary I don't want to date myself, but Polaroid is an example of an arbitrary mark.

Okay, moving on. There are really two major prongs here when it comes to trademark protection, trademark theory. One is infringement, and that's the classic I would say, where there is likelihood of confusion between two trademarks that are either identical or closely similar and they're used for services that are identical or closely similar. And I don't know, I'll throw another pop culture reference in there since I'm on a roll.

I don't know if you remember the film with Eddie Murphy, Coming To America. Guess not, not too many fans. But basically, the female lead in that film worked for a restaurant called McDowell's. And the big joke there with the famous actor, John Amos, playing the owner of McDowell's is that it was not McDonald's. And they had the logo with their own "M" and everything, so I think it's a wonderful example because if there was in actuality a McDowell's offering services similar those of McDonald's, that would be - it would be a case of infringement or there'd be an infringement question raised because the goods were similar - the services were similar and the names were similar.

However, if I were to use McDonald's in a totally different capacity, suppose I wanted to put out there McDonald's - and McDonald's is a bad example, but maybe I wanted to put out there McDonald's fire extinguishers, say. Well, there's no likelihood of confusion, McDonald's is not in the fire extinguisher business. But they could claim under the theory of dilution that since their mark is famous, has a lot of notoriety, maybe this lessens or whittles away the value of the McDonald's trademark. Maybe they don't want their trademark to be associated with fire extinguishers, so.

All right, now moving on to our bread and butter here and queuing it up. This is sort of a skeletal outline of what we're going to be talking about in terms of ambush - what is ambush marketing? And you can see I'd sort of mapped it out here.

This is sort of the basics and this great panel here is going to flesh it out and give you a lot of different directions and drill down a little bit on that, but this is sort of where it all comes from. You have a company that wants to associate itself with an event, and let's since it's March and everyone

knows what that means, I'll go [*605] and risk upsetting the NCAA by saying March Madness, and that would be an example of an event. And suppose my company wanted to associate itself with March Madness but did not want to go through the NCAA and host communications to set up any kind of licensing deal because, I think we can all appreciate this, it would be probably pretty expensive to do that and there's always the possibility that the NCAA could say no, they don't have to agree to anything in terms of rights.

So what the company might - my company would want to do then is ambush, that's the word for it, or allude to, a softer way of saying it, the famous March Madness Basketball Tournament without actually coming out and saying March Madness. And that would, in effect, we'd be able to ride on the coattails of the NCAA's March Madness without actually going through the pretty hefty cost of getting a license.

Now the problem with that is that in all likelihood, the NCAA has already struck a deal of some kind with either a direct or indirect competitor of my company. And according to that deal, that arrangement, the NCAA is going to try to stop me from doing that. Because if I go and do this for free, if you will, without paying the NCAA a license fee, well, that doesn't mean - my competitor has really paid a whole lot for nothing in effect.

So it's a bit - and again, I know I'm sort of boiling this down maybe a little bit, maybe I'm slicing it a little bit too thin but I'm just trying to give the free mark here.

So that's the sort of the cat and mouse between the ambusher, so to speak, the company that has not sought to get rights and the rights holder in the actual event, the sponsor. So now I know that's a little bit dry, a little bit vague, so let me give you a couple of examples of how this sort of played out.

One example, which Michael is going to talk about a little bit later, is the Bavaria Babes at the 2010 World Cup in South Africa. And actually, the World Cup sponsor was not this Bavaria beer but the World Cup sponsor for malt beverages was not Bavaria but Budweiser, Anheuser-Busch.

However, the scene was really stolen, if you will, by the appearance of a sizable number of - I'm going to ask you to back stop me on this, very attractive ladies wearing orange dresses, and they were promptly escorted out of the venue. Orange being the color of this Bavaria beer, one of their trademark colors.

That's one example, second example, and I won't actually do this for you because I don't want to turn this into slapstick. But [*606] the Philadelphia Eagles' wide receiver, Brent Celek, actually did the Captain Morgan pose in the end zone after scoring a touchdown, very interesting take on the touchdown dance. We've come a long way since Billy "White Shoes" Johnson, and if you - I hope you get that reference, you can Google it. But basically, Captain Morgan, the whole captain standing there and such and it was very funny. NFL, however, was not amused.

And finally, and this is probably the most directly on point here, is how Nike who were not the apparel sponsor of the 1996 Atlanta Olympic Games, set up their own "village" and really flooded the market with their swoosh so that to the average consumer, it appeared that Nike, not Reebok, was actually an authorized sponsor. And there were studies done after the Olympics to the effect that, I believe and I'm just throwing a number out, it was some high percentage, maybe 25%, 30% of the people, thought Nike was the actual sponsor of the Olympics when in fact, they weren't.

Now wanted to give you a little bit of case law here, just to give you a sense, and these cases are in the materials, so you can certainly look them up there.

But the NFL, the Governor of Delaware, that was a case back in 1977 where the Delaware State Lottery was actually put out a game, which was in effect trading off a Pick Them game, if you will, involving NFL teams. So instead of saying the Philadelphia Eagles versus the Dallas Cowboys, it would say Philadelphia versus Dallas, and you'd have to pick your team and if you picked a certain number of teams correctly, you'd a win a lottery prize, I believe. And basically, the NFL said, hey, well wait a minute. You didn't get rights from us, you shouldn't be doing that.

In this case, the interesting thing was that the State of Delaware did not use any of the NFL trademarks as I said and they were willing to out a trademark disclaimer on the tickets that the NFL was not a sponsor, the NFL did not want them to do that. So the court basically found no - sort of boiling it down here again, but no harm, no foul. No trademark usage, no suggestion that there was authorization when there wasn't, therefore, no violation of rights.

And the MasterCard International-Sprint case goes back to the World Cup, and that might be something where I might leave that to you, Michael, because I believe Latham & Watkins was counsel for - I think they were counsel for Sprint on that, so.

But basically that was a case of who was the rightful user of, [*607] with the respect to the 1994 World Cup, who was the rightful user of the - or rightful licensee, I should say, of the World Cup logo in conjunction with telephone calling cards. And very interesting, the court ultimately found for MasterCard and that the World Cup Licensing Committee did not have the rights to give to Sprint having first - since they first reached a deal with MasterCard.

Now a final note here just to give you a sense again of sort of the raised ante of the Olympics so to speak, is there's actually federal law in this beyond the Lanham Act. And basically, this code section reserves to the U.S. Olympic Committee and the International Olympic Committee the right to use the Olympic rings, the Olympic name and other insignia. So just another source of protection for that right, and pretty much, those are my introductory comments. And I guess at this point I don't know if - since I mentioned that example of the Bavaria Babes, I think that might be a great place to start with you, Michael, if you want.

2. Remarks by Mr. Michael Kuh

MR. KUH: Sure, I can - I don't know if people remember this incident, but - although Scott, it's good to note that Budweiser, Anheuser-Busch was the official sponsor of the 2010 World Cup, I can guarantee that if you went out there and polled people on the 2010 World Cup, what beer maker do you most associate it with, most people, 99% of people would associate it with Bavaria.

And the reason is because, I believe it was the Denmark versus the Netherlands game, a number of young, attractive, I think mostly South African women as I recall, showed up to root for Denmark, and at some point in the game, suddenly stripped off all of their Denmark regalia to show up in these form-fitting orange dresses, orange being a bright color and also the color of the Netherlands.

I think 30 of them, 40 of them got a huge amount of attention, and it's unclear to me, I was not at the game, but it's unclear to me who mandated but these women were essentially arrested at that point.

And initially criminal charges were brought against them, which was, I will say - and I was there in South Africa at the time and I actually spent a tremendous amount of time, at the time I was representing the U.S. bid to host the World Cup and was spending my days with FIFA attorneys prior to going to games or going to games with them and discussing issues. And I said to [*608] them at the time that I thought this was exactly the wrong thing to do. Because what would have been a one-day news story spread out over weeks as people followed the legal travails of these 40 or whatever it is South African models.

You can imagine that websites loved to be able to run this story because they could show a picture of this incident on the front of the - their opening page. It became a major story. As I recall, you could start to buy the orange dresses in stores in South Africa, people started producing them quickly.

And it was an interesting response. It was, as I said, I think it was the wrong response. It is an example of a type of ambush marketing where again, Bavaria was not a sponsor, they're too small, I think, to buy an official sponsorship. They therefore, were able to get tickets for the event and made their announcement at the event, getting their beer a tremendous amount of attention.

I personally think the right response might have been different, at least in the U.S., where I'm not familiar with South African law. I think the right response in that incident might have been simply to have regulated what people could do with their tickets. Tickets, remember again, this is the law side of it, are a revocable license to view an event. There are all kinds of restrictions on what you can do with a ticket or ticket back restrictions, which have, I think, virtually always been upheld.

Now the response typically with a ticket back restriction is to simply revoke the license, in other words, to kick people out. There is, to my knowledge, and this was - I admit my knowledge is probably current only through about 2010 on this, but to my knowledge, there's probably a strong argument to be made that ticket back restrictions could be much stronger, that one could seek liquidated damages to the extent that event sponsors are having their rights infringed upon, I think an event could argue that its value has been decreased, its ability to market itself has been decreased, and it could include, in the U.S. anyway, I think ticket back restrictions that include liquidated damages, which would make for an ambush marketer like Bavaria theoretically make this event actually very expensive.

They don't need to go the - jail the women and make it a multi-day news story. Instead they could simply say to Bavaria beer or to these women, theoretically, but really to Bavaria beer, you now owe us treble damages or whatever the number is, you'd have to come up with some number. But that could theoretically have been a response, and that was certainly at the time what we [*609] were trying to explain to FIFA, we thought we would be able to do in the United States.

MR. SCHLEIFSTEIN: I just have a couple of quick questions and then we'll move on to Dr. Schiller. The first question I had is, how did FIFA respond when you were telling them it was absolutely the wrong thing to do? And did you say it exactly that way?

MR. KUH: Yeah, I look - I, at this point, had a pretty strong relationship having worked with FIFA attorneys for a while, and they knew the angle I was coming at it from, which was here is why you guys should want to come to the United States.

You'll ultimately know because of the upcoming 2022 World Cup in the United States just how effective I was at that. But in any event, I'd like to think that my clear words to FIFA attorneys were not what killed our bid, but I can't guarantee that either.

But look, I think they were - look, they were interested, it's - as you can understand in the bidding process, there is a little bit of sort of a theater to it. I, of course, was touting how great the U.S. would be to protect FIFA's rights and their sponsors' rights. FIFA of course asked a lot of questions, expressed great interest, but given that the attorneys were not voting, it was in fact the Executive Committee that'd be voting, they were always non-committal, so they wanted the information but they rarely tipped their hand.

MR. SCHLEIFSTEIN: But if I can ask a follow-up, doesn't that put the U.S. at a distinctive disadvantage because in other countries there isn't the protection of individual rights that you have here? And it wouldn't even be a question about the ticket being a revocable license, I don't want to be melodramatic, but there could be much harsher penalties for people for violating rights, and it could be more of a question of -

MR. KUH: So you're proposing that some countries could have sat with those same attorneys and said, in our country we would have cut off their hands?

MR. SCHLEIFSTEIN: Maybe not, but -

MR. KUH: But no, look, I think that's a very good question and by the way that is a struggle that we deal with in the U.S., that our legal system is frankly a system of laws, and as I say, law is not of men or of people, the expression is of men.

But in any event, the problem we deal with is that there are a lot of countries out there that could simply say, the crown prince or whoever it is, could simply say that nobody aside from the [*610] official sponsors will be allowed into this country to market to do or we will personally approve everybody's event here and we will bring the full weight of the law against anybody who violates those rights.

We can't do that in the U.S. because we, after all, we do have the like the First Amendment, for example, that really limits what we can do to protect rights. We cannot, on behalf of Coca-Cola, simply say to Pepsi, you may not advertise in our cities during the Olympic Games.

The flipside of that, and this is an argument that we made for both the Olympic Games as well as for the World Cup, is that just as we can't do that, they're also not going - we thought that FIFA and IOC should understand that they would not be subject to the potential capriciousness that comes with having a system run by a royal family, a dictator, what have you. That a crown prince, again, could promise the world today, and as you get closer and closer to the event, could simply say, screw the IOC, they're forced to come to my country now because they've committed to it and I will now change the laws, I will do what I need to do.

We simply said in the U.S., when we make our commitments, when we pass legislation, these things - sure, laws can be repealed but this is not an easy process here. And we tried to, again, market ourselves as a more consistent and constant system in that regard, although perhaps at the outset, not quite as favorable as the IOC or FIFA might like.

MR. SCHLEIFSTEIN Okay, great. So I think now maybe do you want to - to give your comments, Dr. Schiller?

3. Remarks by Dr. Harvey Schiller

DR. HARVEY SCHILLER: Well, it's hard to know where to jump in.

MR. SCHLEIFSTEIN: I'm sorry.

DR. SCHILLER: But just listening to some people speak, I was thinking of the most innovative ambushing I have ever seen in my career was at the 1992 Olympic Games in Barcelona.

Visa was the credit card sponsor of the games and of the IOC under their TOP program, The Olympic Program, who had exclusivity. The keys that were - the key cards that were at the headquarters' hotel, where all the IOC and NOC people were was actually an American Express card. So every single IOC member had in their pocket the room key which looked like an American [*611] Express card, carrying an advertisement. Which again, the innovation - the innovative parts of people around the world to try to ambush is something you will face on a day-to-day basis wherever you go. And it could start at the airport and it could finish in the venue.

I thought I would focus a little bit on some of the history that I was associated with or inherited through the USOC and some of the challenges that they made.

And the first that I knew about was the Special Olympics. And when the Kennedy family got behind the Special Olympics, the USOC, which actually was right about the time of - or just prior to the Amateur Sports Act of 1978, I was going to move forward to file to stop them from using the Olympic term, the Special Olympics.

Robert Kennedy was the Attorney General, as you might remember during his brother's short term. He said that if they ever walk into a courtroom, there will be no U.S. Olympic movement. So you now you have the Special Olympics which is continued on and on.

Move forward in around 1982, a former Olympic athlete started the Gay Olympic Games. And if you ever look up the story about it, the USOC took action and actually won the case. Tom Whittle or something like that was his name, I don't remember exactly. n1 He was a gay athlete and the USOC prevailed and then went further to file for damages and for the legal fees and so forth, and moved in to take possession of his home in San Francisco.

At the time, Tom was dying of AIDS and it didn't reflect very well on the USOC. It's now the Gay Games, it's not the Gay Olympics, but it took a long time to fix that relationship with the gay community and the USOC.

The Senior Games wanted to use the Senior Olympic Games. And one of the first places that they were going to use the title was during my tenure and it was at Saint Louis University. By the way, most of you probably don't know that the first Olympic Games in [*612] the United States were in St. Louis in 1904. And the only way you will ever know that is on the gate to the Saint Louis University, there is a plaque that says the games were held here in 1904, it was part of the St. Louis acquisition, but again, it was - preceded Los Angeles and everyone else.

The President of Saint Louis University, last name was Stanford. He happened to have a brother who was a senator at the time, which meant we were called in for a hearing at the Congress, and guess who prevailed in terms of the use of the Senior Olympics? We lost that one too.

The point I'm trying to make is that there's often some things that will be on the courtroom that everybody should be thinking about in terms of sensitivity, where that's going to go.

If you sue the local Olympic restaurant here in New York City - by the way, you'd have to sue about 200 of them, you're probably not going to win that case. And it's often if you're driving around and you see Olympic transportation in front of the taxi cab in front of you or something else. And there are some, "grandfathering" of some of these things. If you happen to live near an Olympic Mountain or the Olympia range, you can use Olympia and get away with it. But in general, it's the big things that you're really going after. And my experience has been that it really turns up more in the licensing of products than it does in the overall sponsorship.

And sometimes your worst enemy, and I was speaking to one of the other panelists, is actually our partner. The IOC has ambushed the United States Olympic Committee at every turn. They've stolen sponsors, like in the insurance category, John Hancock was the USOC sponsor, guess who got it? And once you have Coca-Cola, you have every kind of refreshing beverage you can think about - I used to accuse them of wanting intravenous liquids as well. But in any event, NBC only cares about selling advertising, you'll have a chance to respond to that.

MR. GOODMAN: There's an advantage to being at the end.

DR. SCHILLER: Hey, I was in the television business. Television people only care about two things, one is your eyeballs. They don't you want you out playing, they don't want you in the library, they don't want you playing games, they don't want you doing anything else, reading, they want you watching television, that's their game, that's what they live for.

And second, they want to sell advertising to you, and they'll sell anything they can. And we're tired of seeing the Wall Street [*613] Journal every five seconds on channels and so forth. But in any event, so they will do a deal with McDonald's because McDonald's is an Olympic sponsor and buy a bunch of time. Then they'll do a deal with Subway, and guess who's the spokesperson for Subway? Michael Phelps. Subway is not an Olympic sponsor, they're not in the fast food category but they don't care. So again, however, who is the beverage provider to Subway? Coca-Cola. So you have this mixed world of Coca-Cola is a sponsor, Coca-Cola would like to sell more subway, everybody seems to be a winner. The end, it really doesn't matter.

The last - I want to take one other thing from my career, when I was at Turner Broadcasting, we bought a hockey team - we bought an NHL team, we were an expansion team. And we were - this was around 1998, and we wanted to run a contest in the school system to name the hockey team. So we put out these fliers, we were going to do it in the third, fourth, fifth, and sixth grades in elementary school.

I was walking through another restaurant in CNN Center with the attorney for the sports group and Ted Turner yells out, hey Harvey, we're going to call the team, The Thrashers. And I said, why? He said, well, it's the State bird. And I said, well, we're running a contest in the school, he said, I don't care. So I turned to the attorney, go register "Thrashers." So what happens? We get sued.

That turns out to - we did a study and we found that the only Thrasher we could find in a product were French fries in the Baltimore area. But it turns out that a thrasher, which some of you may know because you're that age, most of you, is a skateboarder who goes into your empty pool and backyard, and government buildings, and thrashes you, runs his skateboard wherever he goes. And two former skateboarders started a company called Thrashers and they were out in San Francisco. And they had a Thrasher magazine and they had Thrasher items and so forth and so forth, and they sued us. And we fought them and we fought them until they got a couple of hundred skateboarders

to start picketing CNN Center, not letting people in the building. And guess who paid \$ 200,000 to the Thrashers? So anyway, last story.

4. Remarks by Professor Michael McCann

PROFESSOR MICHAEL MCCANN: And so my take on [*614] these issues is really about "clean zones," I've written about clean zones. And they're apparent in the London Olympics but my writing is focused mostly on those in the United States, and specifically during Super Bowls.

So when you go to the Super Bowl, obviously, the NFL controls what you see inside the stadium, and there's no controversy about that. But what about outside the stadium? What about miles away from the stadium? Should private businesses have to pay the NFL and pay the city government to license their - to sell their products and engage in any kind of commercial activity? And increasingly in Super Bowls there have been implementation of these clean zones, which are passed by local ordinance and they require businesses that want to capitalize in any way off of football during a Super Bowl to pay a fee to the city and also get permission from the NFL.

And they're controversial for a whole bunch of reasons, right, because you could be on your own private property and wanting to sell something on your own property and yet you have to pay a separate fee in order to do so if it relates to the Super Bowl.

The most expansive clean zone was in this past Super Bowl. And I was at the Super Bowl doing empirical work, I wanted to check to make sure it was being enforced and it seemed to be. And basically if you're - Prop 188 was passed in Indianapolis, where if you're within an area that the license administrator, who is a government official, decided was part of the clean zone, you had to pay \$ 75 to the city. So in other words, if you wanted to sell hotdogs that had something to do with football or put up a sign that had a football in it, you'd have to pay. Otherwise, your stuff could be forfeited, destroyed, and you'd end up paying heavy fines.

A lot of people thought, well, this isn't really fair, right? Because we have private property, we're on public streets, why is the NFL - what is the NFL's stake? Why do they have a voice in deciding what happens outside the stadium where they have no ownership of the property? Basically though, it was passed and no lawsuits have been filed.

Just looking at this issue from afar though, the reason why we have clean zones because they ensure - some of the issues that General Schiller and Michael mentioned, they go out ensuring that counterfeit products are not sold, right, because you have to get permission from the NFL. So you ensure that the NFL can control the types of products that are being sold. In addition, there is the safety issue. The fact that the NFL wants to make sure that not [*615] too many products are being sold right around the Super Bowl.

Now there are critics that say, well, okay, that's true in some cases but there are sometimes legitimate businesses that just want to sell stuff near the Super Bowl, why do they have to pay a fee? In addition, there are concerns - and I trust concerns, if the NFL has a stake in limiting the number of sellers, that could impact prices because the quantity of suppliers and vendors has been reduced.

All this has come to a head in a lawsuit. A guy by the name of Eric Williams, last year at the Super Bowl in Dallas, he wanted to host a videogame tournament. Eric Williams is an anti-bullying advocate and he teamed up with Best Buy, where he went to Best Buy's store right near Dallas Stadium - Cowboys Stadium, excuse me, and he would charge participants to play in this videogame

tournament, and they would play John Madden Football. I'm sure some of you have played John Madden Football or at least aware of what I'm talking about. So it's commercial activity and that's important, right? This isn't political speech, this is commercial speech.

So his bus on Best Buy's lot and a police officer comes over and says, you're going to have to move your bus and shut this down. He said, what are you talking about? I'm on Best Buy's property, I have a deal with Best Buy where I can do this videogame tournament. I'm on private property for Best Buy. And they said, if you don't move it, you're going to be arrested. And they got into an argument and tensions escalated, he eventually moved his bus. He was very embarrassed and he filed a lawsuit against the National Football League, against the Cowboys, against other parties connected to this saying, [firstly], it's an infringement upon his free speech to sell items on private property.

And secondly, there's a race issue in this case because he's African-American and he noted that his bus seemed to be picked as opposed to other vendors. His bus has pictures of African Americans on the outside of the bus, and in fact, according to the judge, almost everyone ticketed was either African-American or Hispanic. And also no businesses were ticketed for violating this clean ordinance. So it's currently in litigation now.

But I just want you to be aware of this issue, it's interesting, right? Because it gets out - not what happens in the stadium but what happens outside the stadium, this whole other area of law that's implicated because of commercial activity going outside the [*616] stadium. And I will note, London has a similar law. And the law in London allows the London Olympic Committee to seize any products that are not - that do not have the permission of the London Olympics to be sold and fines of up to £ 20,000 can be instituted, and the London Olympics can also get injunctive relief.

So I don't know if this is going to come up in the London Olympics, but I just wanted to note that this is sort of an interesting issue that I've been following.

MR. SCHLEIFSTEIN: If I could ask a couple of quick questions before we go to Ben. The first question I have is one of the tenets of commercial speech in the - or the notions for restricting commercial speech is government's interest in making sure it's not deceptive in any way. Now if Eric Williams' bus didn't say anything about him being an NFL sponsor or making any kind of suggestion in that way, is it fair to say that the Texas authorities were relying solely on their clean zone ordinance to bust him?

PROFESSOR MCCANN: I think that's a fair point, Scott. I think and Eric Williams has said - I've talked to him, that he believes this has nothing to do with the Super Bowl, that he believes it's motivated by race, to be honest. That he was hosting a videogame tournament that never said NFL-sponsored that didn't give the illusion, in his view, of being sponsored by the NFL.

Now the NFL, bringing the other side, the NFL has said, [firstly], this is untrue, we're not the ones who detained him. Secondly, we're not the government. The government of Arlington is the party that is - that's done anything, and the NFL has argued something called the Noerr-Pennington doctrine, which is a doctrine that assures that private entities can lobby for the passage of laws and then not be held responsible if later on the law is deemed illegal or unconstitutional in any way.

MR. SCHLEIFSTEIN: That's a great point, Professor, but the only thing I would just sort of throw out there is, isn't it true though that - isn't it a little bit stickier than that in that the NFL made it a condition that this clean zone ordinance be passed in order to award the crown jewel, the Super Bowl, to the City of Dallas? And isn't it - so, isn't there sort of a -

PROFESSOR MCCANN: Pervasive and -

MR. SCHLEIFSTEIN: - undue influence there, they're not just - that can't be what was intended when that doctrine was first enacted.

PROFESSOR MCCANN: I'm sure that's right. And it is true, Scott, that in order to get a Super Bowl, you have to pass a [*617] clean zone ordinance. And Eric Williams has said, well, this is - you're claiming the government has a choice but it's a false choice. The choice is either we don't get the Super Bowl or we do with the clean zone.

MR. SCHLEIFSTEIN: So all right, great. So I guess we'll pass it on now to Ben.

5. Remarks by Mr. Ben Sturner

MR. STURNER: Sure, and I would like to talk about the branding and marketing side of the Olympics and how, if you're a brand, how are you going to get associated with the Olympic Games this summer in London? And there's one of maybe five ways.

One is become a top partner, McDonald's of the world, the Coca-Colas, they're spending over \$ 50 million for those rights to use the rings, use the likeness and be associated.

Two, you could become an USOC sponsor and be able to use the USOC marks and be associated with the U.S. Olympic team. A lot of brands are doing that as well.

And another way is you can be the official sponsor, U.S.A. volleyball. And it could be Neutrogena, a sun care company could be sunscreen, be the official U.S.A. volleyball, and you can use that at retail and U.S.A. volleyball and carry Misty, and together, that's an effective way, too.

And then also an athlete. So I had to use an athlete in marketing the Olympics. Puma has Usain Bolt, and is Puma an official Olympic sponsor? No, but they're definitely going to be using Usain Bolt during the Olympic Games, before the Olympic Games, leading up to the Olympic Games.

Harvey mentioned - Dr. Schiller mentioned - about Subway. And everybody saw Michael Phelps and the commercials on NBC and everybody confuses Subway as an Olympic sponsor.

I remember a few years ago, Mary Lou Retton did summersaults and did Sprint. And was Sprint anywhere paying those rights for \$ 50 million? No. I don't think they were paying the USOC rights but they used an athlete.

And how to you use athletes to market your brand, and you have to be very careful of the rights and they have changed different rights too. And we're working with Meb Keflezighi, who is the number one marathoner in the U.S., he just won the U.S. Olympic trials at age 36. He was the first marathoner from the [*618] U.S. to win the New York City in 2009, worked with him and Skechers, which is another client of ours.

How do we use Meb and the association with Skechers to have some kind of marketing rub off with the London Olympics? And we've been thinking of different ways around it. Go Meb, go run, go Skechers, go London. And are we using games, are we saying Olympics during that time? No. You know, there's some - you have to really know the rules and regulations behind that and figure out different ways to market the athletes.

And Brett and I were talking recently, IOC has a rule now, which you're not allowed to market an athlete during the Olympics, three days before, three days after. And so that kind of says, Puma,

what are you going to do with Usain Bolt? What is Skechers could do with Meb Keflezghi and that kind of puts a halt on some of the ideas we have for marketing.

So you really have to know those rules and regulations but there's ways around it, and you have to be creative. Some examples that we've done before, Dunkin' Donuts has been a client of ours. And Dunkin' Donuts said, Leverage, we'd love to do something around basketball. And we're not going to become an official NCAA partner and spend tens of millions of dollars but we want to do something around Dunkin', Dunkin' basketball, Basketball, March Madness, and we created a program called Dunkin' Madness. And they were trying to force us to halt, you can't do that because it's March Madness.

So we came up with the program called Dunkin' Mania. And what we did at the time was we brought in students and hired models to put on their forehead "Dunkin' Donuts," and we went into the NCAA Basketball games at the Fleet Center. We had about eight students wearing Dunkin' Donuts all together, and we alerted the Boston Globe and they took pictures in the front page of the Boston Globe, the new type of advertising, head advertising during these games, and it was Dunkin' Donuts as the sponsor.

Now and if you - NCAA's basketball you'll see there's no dashboards or science there, similar to the Olympic Games where it's very clean. But there's ways around it, you know, if you know how to play kind of within the rules and be creative. Dunkin' -

DR. SCHILLER: So you're an ambusher?

MR. STURNER: I have done some ambushing based on - based on marketing and I've also done some protection ambushing.

Dunkin' Donuts also asked us how can we do something [*619] around the US Open? And you know we're about everyday Joes. We said, okay, let's sponsor the players who are playing the top players and put patches on them that say Dunkin' Donuts.

So the who guy is playing Roger Federer who's getting a million dollars plus - multimillions from Nike, Vince Spadea will be wearing a Dunkin' Donuts' patch. And then the coaches will wear Dunkin' Donuts' hats. And so during the three hours of tennis at the US Open at Arthur Ashe Stadium, you're only watching two players. You see Dunkin' Donut on his sleeve and is Dunkin' Donuts spending a million dollars to be an official sponsor of the US Open? No, they're spending five figures to do this deal with these patch players.

And - but it's a way to be effective and creative and you know constantly seeing your message. You know, not everybody has to do that top level of an Olympic sponsor. Not every company has the resources, but how do you become creative and also stay within the rules? I think that's very important. And the US Open is a great example, who do you guys think is the official camera for the US Open? Any guesses?

MR. SCHILLER: Nikon.

MR. STURNER: Nikon. Anybody else with a guess? Canon, okay. My class at NYU when I was teaching I asked that question and 19 out of 20 people would said Canon. Why? You would see Maria Sharapova, but really the official camera of the US Open is Olympus. Not only the official camera, they are the Olympus US Open Series, but no one notices that because you see Maria Sharapova and Canon, you know, creating this advertising - advertisement with tennis balls and the dog

and it's creative and bravo to Canon, a great Fortune 500 company who's able to use that to have that association.

But at the same time you have to - as a marketer, you have to be very careful of the rules, regulations, like you say Dunkin' Madness and you're advertising them, you find it's - it's not right. You say Olympic Games. No, maybe it's win a trip to London or something along those lines.

There's rules that you can do as marketers that can come close to what you can do and what you can't do. And if you're not and you want to stay on the sidelines and do nothing around the Olympics without that association, I understand that, but if you want to play a little bit aggressive but smart and tactical, there's another way too. So I wanted to kind of approach it from that side.

[*620] MR. SCHLEIFSTEIN: Before we go to Brett, and I know he's probably jumping at the bit now, but I just had a quick question about sponsoring athletes.

This upcoming Olympic Games, there's going to be - you know, as you know soccer is going to be one of the sports, and a lot of these - and a lot of the soccer players are already licensed to other companies in their normal - in their normal careers. So how is that going to work? For example, some of the star players who are playing for their Olympic teams and would there be sort of a conflict between their sort of regular sponsorships? I'm thinking like a Wayne Rooney, say, or anybody of that ilk, Cristiano Ronaldo?

MR. STURNER: I'm going to take that kind of question. So with the athletes, we're working in the U.S.A. volleyball and the beach volleyball, it's a great example, and talking to brands that want to sponsor the athletes but they can't - to be on the podium and everything else. It all depends on what the team is. If you saw Spain and their basketball team, you know, Gasol has I think a Nike deal, but he was wearing Li-Ning, because it's an official sponsor of the team.

MR. SCHLEIFSTEIN: Yeah, so that trumps it.

DR. SCHILLER: There is - if I may.

MR. STURNER: Yeah.

DR. SCHILLER: There's also one other area of sponsorship and that's competitive equipment. What - at least in the United States, you can't dictate to an athlete what competitive equipment they use. So for example, in baseball you can't tell a player which - you can't keep them from picking any particular baseball glove or their shoes. Every sport has a different group of rules. I'm not sure kind of what it is in luge, you know, who knows, it's probably the sled, I don't know.

But in swimming, for example, most people wouldn't get - what's the competitive equipment? It's not the suit, it's the cap. And in hockey - in sports you get - and especially in professional sports and college sports you get this conflict about wearing the same team colors but you can't dictate to a hockey player - certainly the stick, but you can't dictate the gloves, and for a goalie you can't dictate almost anything that they wear. So the team actually pays the sponsor, believe it or not, to make the equipment in the color and design of the team, and they've had a lot of conflicts because once the gloves are done, who owns the gloves?

The teams have said now they own the gloves and a lot of [*621] teams will sell them as part of their auctions and charity and so forth. And he's better - Ben's better at this than I am but in the NFL, if I'm right, even if you watch a game you'll see the number of shoes that are taped over, right,

because there's a limited number of advertisers that you're allowed to use in the shoes, and I think the same thing is true for caps?

MR. STURNER: Yeah. And there was - there was a lot with Speedo in the Olympics, but even in tennis you see James Blake who's sponsored by Dunlop. He was having a Prince racket because he played better with Prince and he was - he took out the signage behind it for some time. So that happens frequently with equipment. It's a great - that's actually a very good point.

6. Remarks by Mr. Brett Goodman

MR. GOODMAN: So thanks, I'm Brett Goodman from NBC. Thank you for having me. It's a pleasure to be here and I - let me try to crystallize a lot of what I've heard from a media perspective and try to indicate where I think the rubber meets the road on some of these issues, because I think we've sort of danced around why there is no resolution and why there seems to be a lot of opinion and debate.

So from a media perspective, just - at least with respect to the Olympics, it's important I'll tell you a few ground rules. The IOC sells its rights territorially. So we have rights in the U.S. and no place else and our counterparts around the world have rights in their territories and no place else. Therefore, we have nothing to do with what goes - what goes on, on the ground in an Olympic city.

When the games come to the U.S. there are slight nuances to that, but essentially the media rights holder in the Olympic world has nothing to do with the presentation of the games themselves, so we have nothing to do with what happens in London for these particular games.

Instead there are voluminous sales rules in our contracts and basically what they say is as follows. We must present an opportunity to buy media advertising and other enhancements to the official sponsors, whether they be IOC or USOC it makes no difference. And when I use the word "Sponsor", and I think we all mean it the same way, it's capital "S". Someone that is paid for the intellectual property of the particular committee we're talking about.

[*622] So we must give them a first opportunity in their category, then you know, we get to set the price, a negotiation ensues, we either have a deal or we don't.

We are allowed in negotiations with the Sponsor to determine if that deal is exclusive or not. So for example, Coca-Cola is the only non-alcoholic beverage that we will allow as part of the Olympics, that's quite frankly because they pay enough, right?

So in addition to the sponsorship fees that they're paying the IOC, and perhaps others, they're paying us enough money, in our judgment, that we will go forward without another non-alcoholic beverage partner.

However, McDonald's, for example, historically has been a very strong advertising partner of ours, but they refuse to buy or I should say they decline to buy what we - the price that we set for the exclusive category which is QSR, right? Quick Service Restaurants, which is the category by the way that we don't set, that the IOC in this case sets.

So QSR would include any restaurant that you go in and buy your own food without someone coming to your table and taking your order. So you know, look around the U.S., that includes Subway, that includes pizzas, that includes check-in, I mean that includes all of those kinds of restaurants. So the price we set, as you might imagine, is extremely high.

So McDonald's declines to buy that package, we negotiate for a certain type of exclusivity with them. So we'll say well, we'll take fewer dollars of course and we will block out certain other companies but not all other companies, and we negotiate with McDonald's on that basis. And then we go to any third party that we are allowed to based on what I just said.

So in a particular case reference, Subway and many others were on our air in Vancouver in every game really because McDonald's and we have this pattern in practice.

So I would say a couple of things in reaction to what's been said already. Number one, I disagree with Harvey in one sense, although it's all nuance, we love Sponsors. We love Sponsors more than anyone else in the world because we need Sponsors, capital "S" Sponsors to defray as much as our - as much of our rights investment as possible.

So when McDonald's declines to buy the category, it is not a good day, it is actually a bad day. And we have to soldier on because we have to make our money back but - and by the way it's a rights fee that was gladly accepted by the same organization that [*623] then goes out and gets the Sponsors. So you know, we feel like look, you could take a couple of hundred million dollars less and we wouldn't have these issues, but our rights fee in London is 1.18 billion, so we are going to do what is within our rights to get as much money of that back as possible.

We are allowed to sell to anybody - at least in the Olympics, I mean for instance, the NFL has certain regulations or certain categories you can't sell, but you're essentially allowed to sell to anybody but for the deals you have in place.

Okay, so here is where the rubber hits the road. What's an acceptable ad or a campaign and what's not? And I'll give you a tennis example just because I think it's easier to think about than some of this Olympic stuff.

So let's take Wimbledon which is difficult for me to describe because after 40 years we've been closed out of those rights by ESPN and the All England Club. But anyway that said, well ironically enough we'll be at Wimbledon this summer for the Olympics, but we're not going to be there for the tournament.

But take Wimbledon, you're at home watching our coverage of Wimbledon and there is an ad from an allergy company, you know, someone who makes you sneeze less. And the ad is a mom and her daughter playing tennis recreationally and the daughter's having lots of trouble and then oh my God, she takes the medicine and now she's fine, right? These before and after commercials we all know what they look like.

And it's just - what I will say is it's generic, it's two people playing tennis, hitting a ball back and forth on a nondescript court and it's the allergy commercial.

I don't think there's a soul in this room or hopefully anywhere else that would say that that's an ambush. That's smart marketing, right? You assume that tennis fans are watching Wimbledon coverage, so you're going to have a motif of a commercial that is tennis. That commercial could run anywhere but it would be probably very effective running in tennis competition, right?

So whether or not - I mean and this of course - I guess what I'm suggesting here is the advertiser is not an official sponsor, right? It's just an allergy medicine maker.

Okay, so that's one end of the spectrum. The other end of the spectrum is that same company decides to do an ad, same idea but they are using, you know, the actors in the commercial have the

official Wimbledon "W" in purple and green on their shirt and there's actually pictures of Center Court, you know, actual still [*624] images in the ad, et cetera, et cetera. Okay, I think we probably all can agree that that's the other end of the spectrum where you're actually using registered, trademarked intellectual property and no broadcaster, none would ever accept that ad.

I mean I just sort of made it up fictitiously, but there's no way we're airing that. Our standards people would catch it, our legal people would catch it, there's no way.

Okay, but the issue is what about the middle, right? So these two actors are now - they're not wearing the "W" and there are certainly no photos of Center Court in the ad, but they're wearing purple and green, subtly, and they are on a grass court and they have British accents, or any combination of those facts.

Okay, what's the answer? The answer is no one has any idea whether that's an ambush or not because no federal district court judge has ever said so one way or the other. And the reason why is because no one sues anybody.

So in the McDonald's-Subway example where you did have a lot of screaming and yelling among NBC, McDonald's, Subway, the IOC and the USOC, and by the way I would - I should have started with this. We're quite good partners with all of these people, I mean this is one of those things where you know, you are brothers and sisters and you love them to death and then once in a while you have a fight. This is not a bad relationship, this was a bad moment in a very good relationship.

And I won't get into the facts partly because I don't feel it's appropriate probably because I'm aware of the time, but there were probably lots of mistakes made on a lot of different sides in that particular example, but the point of it is that big companies like this are usually not going to resolve their differences in court.

One, because there is a timeliness issue, right? I mean one could argue that as soon as the closing ceremony is completed, you know, there is a lot less on the line, and you know, to sue for monetary damages is not something you relish. And no one's going to really enjoin anybody else in the middle of it. So you have this like arm wrestle where you know you are negotiating literally every hour, every day about what's going on, and in fact if someone ever examines what happened, a lot of changes and concessions were made throughout the process.

But I want to end with the Nike example which to me is the best anecdote from the past hour. Nike was a famous ambusher, although I hate to use the word "ambush" because I don't know what it means. But Nike was a famous ambusher that decided - [*625] that came to its senses and realized you know, it's better to beat them - I mean it's better to join them than beat them, okay?

And they became a Sponsor and Nike has been a Sponsor now for the past two Olympic cycles. And they are a fantastic Sponsor, and they internally feel like it is a much better place for them to be than not being a Sponsor.

My point is, is that a lot of the hand wringing in all of these cases - like I think about the World Cup, and my first reaction is the heck is Anheuser-Busch? What are their marketing efforts? To let this silly little thing of 40 women with orange dresses ruin a multiyear, multimillion, ten - hundred million dollar investment.

And you know, that is - that is often, I think, my perspective, which is you know, there is an offensive-defensive discussion that we might not have a lot of time for, but if you're a Sponsor, capital

"S' Sponsor, and you're going to buy into a property because the CEO wants to bring his family to the event, then you have a problem from day one. You can't be defensive when you have these big time sports sponsorships. They cost way too much, and if you don't have a rationale and a plan of attack and a real strategy to activate in a really robust way, in other words if you don't have a plan to be offensive, to keep your competitors out of - you know, to dissuade people from doing the ambush-type activities, then you've got a problem.

It might still happen anyway, but I would just say that I would - you know, I'm going to make this up, that 7 out of 10 you know alleged ambushes are exacerbated because the Sponsor hasn't done enough to proactively monetize its rights.

MR. KUH: And I would actually just jump in on that to say just taking a step back, and I say this as somebody who doesn't represent sponsors, it may be worth thinking about in that vein, what is really wrong with so called ambushing?

Now there are some types of ambushing that clearly there's something wrong, right? You - as Brett mentioned, you take - you take the - you know, you take the insignia of Wimbledon and you use it when you don't have the right to, well that's clearly wrong, and it does create confusion. But at the end of the day, there's a lot of types so called ambushing that doesn't qualify as - that I think arguably isn't ambushing. You have sponsors who are buying very specific rights, and as lawyers, right, we all know this, right? The contracts states what rights you're purchasing.

You don't get to buy the aura around an event. During the Stanley Cup, you don't get to buy the aura of hockey. So when [*626] you have a sponsor out there - when you have - when you have a marketer out there who starts running ads with a lot of generic hockey players in generic uniforms and talking about the big game, that may not in fact be an infringement. I'm - you know, I'm not coming down one way or the other, but they are - you know, you haven't bought the aura around hockey generally.

There are also a lot of players out there, whether they be Subway or Sprint or whomever, who are eager to spend a lot of money on events, on players and on teams. And if you take the position that any type of marketing that in anyway may diminish the official sponsor slightly is, therefore, ambush marketing and needs to be stopped. What you're really doing is you're excluding those players, those teams, those leagues, those events from theoretically having more money thrown at them.

There's a lot of money out there that is eager to get associated but there are only so many exclusive sponsorships out there. And so as lawyers I would do exactly what NBC is doing, and that is you give somebody the opportunity to say we will protect you as the exclusive sponsor in these 40 different categories, but if you're not willing to pay for it we're not going to be out there protecting you.

And the - I guess the one other piece is, look, and I think Scott set it up really well, you know, the idea behind a lot of these protections is you're trying - you know, what is infringement? You're trying to stop confusion, but I would say that the - whether it's the example of the mother and daughter playing tennis or you know, there are countless other examples out there, are consumers really that confused by this?

And then the next step, and this is where you start to get underground, even if they are a little confused, who is - you know, the consumers - and a lot of this is for consumer protection too, are

consumers truly being harmed? Now I know the marketers are being harmed and so that's a separate issue.

And then I said last but this is the final piece, is the other thing is a lot of this type of marketing allows insurgent brands. The brands that can't become the official sponsor but can certainly setup a mile from the US Open and hand out t-shirts or can certainly buy billboards near the subway station or the airport because they can afford to do that but they can't afford to become the official sponsor. And so it's a way frankly of theoretically increasing competition, increasing players in the market-place.

MR. STURNER: That's actually what happened this year's [*627] US Open. Heineken is the official beer and as you got out of the subway you know, all the billboards were Stella Artois and you know, I think it was a smart move but - and they had a tennis ball. So it's - you know, you have to know also you know, clean zone.

MR. KUH: Yes, with the clean zone that's not allowed, right?

MR. STURNER: But it wasn't necessarily the clean zone because it wasn't when you - it's like when you get off the subway at US Open you have that whole walkway through -

DR. SCHILLER: Right. You know the argument - there have been a lot of good arguments. One of the things that the Olympic brand has tried to promote is the quality of the brand.

MR. STURNER: Yes.

DR. SCHILLER: Whereas more of the things we've been talking about are really the point-of-sales and the activation and so forth, so typically people try to get in that exclusivity for the Olympic movement because it supposedly has some quality associated with the brand. It's also interesting that you use the wing clip from the New York Athletic Club and they have a license on that. I just thought I'd bring it up.

MR. GOODMAN: And one thing I would -

DR. SCHILLER: I have a few good lawyers here.

MR. GOODMAN: Go ahead, go ahead.

DR. SCHILLER: But Brett, I have one question.

MR. GOODMAN: Okay.

DR. SCHILLER: You didn't mention and how you get ambushed yourself by the non - your affiliates that aren't owned and operated on the times around the games selling ambush spots - I mean time and so forth.

MR. GOODMAN: Well, you mean like - I mean not competition. You mean our actual stations?

DR. SCHILLER: Stations, yeah.

MR. GOODMAN: But that doesn't bother -

DR. SCHILLER: Other than those that are owned and operated you can -

MR. GOODMAN: Right. No, it doesn't bother me just so everyone understands the way it works. The rules that I outlined govern the network and any platform we own. So that would now - so that includes our cable networks where we have coverage, it includes our stations which we own,

there are 10 of them. The other 220 stations are literally from day one free to do anything they want. And it - it's you know, look, they helped defray the cost of our rights fee. So -

[*628] DR. SCHILLER: So if I'm the station that you don't own and operate and the games are on, now it's the break, I put on a Pepsi ad, you have no control over that?

MR. GOODMAN: Correct, and it doesn't bother Coke at all because the sponsors would have rebelled to the IOC and USOC if they thought that was a big problem. The one thing I would say, just another nuance that you all can think about before questions is you know, the - and I want to be careful here because all these people are going to - are my partners, but the perspective of the actual license or you know, so the IOC, the USOC, those organizations in this, is a little strange to me sometimes. So we were referring to this rule, it's now Rule 40 in the Olympic Charter. It was Rule 41, they keep changing the charter and rule keeps moving, but it's Rule 40.

And Rule 40 simply says, and it's written in the passive voice, in this - in this only way that like Swiss people can write in English.

It says that an athlete - I mean I won't get it exactly right, but it's written from the point of view of the athlete. It says an athlete must ensure that his or her image likeness, blah, blah, blah, is not used in a commercial way, okay, so it puts the onus on the athlete because at the end of the day, although I'm not sure this has ever been done for years, they can theoretically take your credential away and kick you out of the game. So they put the onus on the athlete.

So I'm an athlete and I have sponsors - sorry. Well yeah, I have companies, entities that are not official sponsors but have supported me forever, all right? And now the games come. And I have to make sure that I'm not associated with them during that time. Now in one hand that's perfectly sensible, right? Because one of the things you buy if you're Coke or Visa or McDonald's is the right, exclusively in your category, to associate with Olympic athletes, so you get it at some point.

But the IOC keeps on expanding the time in which the rule is relevant. It used to be opening ceremony to closing ceremony. Well for the - for Vancouver and now London it's nine days before and three days after. And the grounds they're using is well, that's when the village is open. Okay, having nothing to do with the fact that certain athletes don't stay in the village, certain athletes aren't even there, I mean the track athletes might not even be there till the second week, I mean there's all kinds of nuance, but - and I guess where I sort of question this one is, well, [*629] who are you helping exactly, right?

In theory you're creating a buffer to help the sponsors, but what if the sponsors then say yeah, but I'm not going to go sign up athletes, which many of them do. Some are great, Visa and P&G, I will mention. A lot of them aren't good at all at doing that. So who are you helping, right?

DR. SCHILLER: Isn't it even further the - you can take the likeness of the athlete during the games?

MR. GOODMAN: No. No non-sponsor can - well, unless there is a waiver which is a long -

DR. SCHILLER: No. I'm talking about a sponsor. McDonald's -

MR. GOODMAN: No, the sponsor - the athletes still have rights of publicity.

DR. SCHILLER: In a - for a specific event, the athlete - that - let me say a large assembly of athletes you can use that likeness in an advertisement -

MR. STURNER: Like Team U.S.A. or something.

DR. SCHILLER: Yeah.

MR. GOODMAN: Well yeah, I mean if it's literally a highlight montage thing, but I mean that gets into a whole other area of the law. I guess my point simply is to say that sometimes these rules that are created in the name of preventing ambush have - I don't even know if it's unintended consequences, I just think it's consequences that don't make a lot of sense.

And I will just say my last little soapbox point for the athlete is that many of these people, you know, toil in anonymity and obscurity and need the money that is being given to them by non-sponsors, smaller companies that cannot afford to be a sponsor. And now it comes to the moment of truth and they cannot continue to work - I mean they can continue to work with them, but you know, they can't do commercials, they can't pay off the investment. Even in a thank you, even in a good luck, even if you are not in category of an official sponsor, so some of it to me, you know, has - identifies the wrong problem and has a bad solution.

DR. SCHILLER: Well you know the point that Michael [Kuh] made has another play to it, and that is that with a 40-some-odd Olympic sports, excepting for a small group of them, the sports like to see their sport used because it helps to bring athletes into their sport. I'll use luge again. Luge would be happy to have every single person ambushing and using Pepsi Cola with luge athletes and showing more and more luge and luge and luge to get [*630] more people participating in their sport.

C. Panel Two: Questions and Answers

MR. SCHLEIFSTEIN: Okay well I guess it's time to open it up to questions right? Right Wells?

MR. CRANDALL: Yes, thank you to all our panelists. We're going to have some time for questions, I hope you all don't mind staying just a few minutes over because we got started a little late. I will take any questions anyone has.

QUESTION [Female Voice]: In the absence of clear judicial precedent for ambush marketing and other kinds of confusing factors and very stealth marketing techniques such as the tennis ball example, do you see any kind of potential for IP awareness building and educational fronts that could take place to reduce such kind of technique, protect IP value?

And my second question is do you foresee any other kind of stealth marketing techniques besides ambush marketing coming up in the future that - and also what other methods are you taking to protect IP value for both?

MR. KUH: Yeah I can start to answer that, I'll just jump in. First of all, I'll answer the second question first. I think ambush marketing as we've sort of indicated is such a broad term that it's very tough to think of another marketing technique other than ambush marketing because it'll always be ambush marketing.

I mean there are going to be - there may be new variations on ambush marketing. But the first question, I think you're dead on accurate. And in fact in the '96 Atlanta games, a big - a big piece of that, and General Schiller I'm sure can speak to this, was that they did a lot on educating law enforcement and consumers and retail stores in the area, et cetera, about intellectual property rights. And it was - it was seen as a great opportunity to educate.

So consumers knew whether or not they were buying actual Olympic goods, you know, Olympic-sponsored goods or not. It was done again in Salt Lake in 2002. It was part of both the New York bids and the Chicago bids, was a big piece of it. And so it is - it is - it's a - you know it's not resorting to you know, hauling people into court but it is - it's a significant piece of all of our bids, I think at this point it will always be a significant piece of the U.S. bids.

But I also think you make a good point, that look, it is - there's not a lot of precedent out there on this. As I think it was - [*631] I think Brett made the point that like you - pulling people into court is also not a very good solution because (a), it's risky, you don't know how the outcome, (b) is it's invariably going to be after the fact, the games will have long since ended by the time you finally get a court date. It's very expensive to pull people into court. And there's a risk of backfiring.

I mean it was as you saw with the Bavaria beer, right? You end up getting more publicity for the ambusher than you do for the sponsors, so there's a lot - there's a lot of reasons to try to think of non-traditionally legal solutions to reduce ambushing.

And then the other piece - what I mean - the other piece of this, right, is a lot of these people are ultimately your friends. Do you - do you really want to be in a position of suing Pepsi, because they may not be your official exclusive sponsor of the event but maybe they're a sponsor of the team.

DR. SCHILLER: You know in Atlanta with all the education, worst ambusher were the city themselves. They were selling to non-Olympic sponsors street signs in the City of Atlanta. But that - but that's the nature of America, I mean that's who we are. If you call up an operator for long distance and you say - and she says or he says who do you want as your carrier? And you say I don't care, guess what, there's an "I don't care" carrier.

[Male Voice]: It's the most expensive carrier, right. It's true.

QUESTION [Female Voice]: Right, I have a question. For the - probably more for the lawyers in group, but I'm curious as to whether you foresee any challenges to the IOC's increasing attempts to control the use of their intellectual property rights, including the requirement that countries who are hosting the games implement more rigorous trademark legislation.

For example, in London the U.K. already had an Olympic Symbol Protection Act but then amended that statute in 2006 after they were awarded the games, so not only are the rings and the word "Olympic" and other symbols protected, but companies are prevented from using - basically there are two columns. A column - you know, in column A you've got games and 2012 and then column B you have London medals, sponsor, gold, silver, bronze, and you can't use any word from A in connection with B, which is a pretty serious restriction on companies who might not be official sponsors but who are wanting to, like some of Ben's clients, have some kind of association with the games.

So do you see - foresee any challenges to that increasingly restrictive legislation that we're seeing in countries who are [*632] hosting the games?

PROFESSOR MCCANN: Yeah, I think it's a great question. I think one possible response could be the bidders getting together and saying let's just not capitulate, right? I mean that's - they're the ones who have the leverage in this situation. I just think the problem there is - like we see in the Super Bowl context, where it just takes one city to say no, we won't capitulate because we really want it.

And I don't know, as a pragmatic point how effective collusive activity among bidders can be when they clearly want to get the bid, so.

MR. KUH: You it also may be worth - and I can't speak to the other legal systems, but it may also be worth a little bit of history on why the Olympic marks in particular are so strongly protected in the U.S.

It started with as General Schiller mentioned the I think it was the Olympic and Amateur Sports Act of '78 which was then the Ted Stevens Act in '98, I believe. But the history is virtually every other country, their Olympic program is state-sponsored, government-sponsored. The money is put in by the government.

In the U.S. it's, for the most part, not true. And the compromise that was given was that for the USOC, was that it had stronger mark protection than just about any other entity out there. And by the way - and the penalty for violating those marks was not criminal, but that they could sue, and as - as was mentioned before, they could sue not just for damages but for treble damages and they could get legal costs, court costs, et cetera.

So to the USOC it had a real ability to protect its rights and to get damages so that the government didn't need to sponsor. And that's why - and I just thought that would be useful since we are lawyers here to just think a little bit about the background here. That's why the Olympic and Amateur Sports Act goes so far beyond the Lanham Act, right, in the Lanham Act has to be in a commercial purpose, you have to show likelihood of confusion. I think on, you know, the USOC I think merely needs to show - was it a tendency towards confusion, I forget the exact language.

[Female Voice]: [Too far from mic to hear.]

MR. KUH: And they have to show use, I know, and that's it. They just have - and so - so it's easy.

DR. SCHILLER: That's a good point, that's a good point. The USOC is a quasigovernment, it doesn't get any aid as you [*633] suggested. Although there are State licensing programs and sort of things like that, but it's interesting if you try to pick the place in government where the U.S. Olympic Committee finds itself, it's under State Department, under all organizations, which is sort of crazy.

You know, one of the points has been mentioned, but in respect of NBC and Brett's presence, NBC is the largest sponsor of the Olympic movement, not just here in the United States, but on a global basis, so.

MR. GOODMAN: By a lot.

MR. KUH: And now you've got YouTube, right?

MR. STURNER: Yeah, talk about YouTube.

MR. GOODMAN: Do we have to do that today? No, it's okay. One of the - I think part of the problem is that there is a bidding process. It creates a set of incentives among bidders to not do what's in the best interest of all of them, right? Sort of like the reason why we have the National Football League is that the league knows that teams are going to have certain incentives to maximize their interests that would hurt the league unless they all agree to do certain things. And maybe that's true in the case of bidders that bidding cities have to join hands in order to prevent themselves from acting on their own best interests.

MR. STURNER: The exclusivity is just so important. I mean what Coca-Cola's doing blocking out everybody in the broadcast in addition to the worldwide rights, and you know, they're going to go big or go home. I mean I think that's their motto and to do you know, Olympic Games, you know, a brand like Coca-Cola, they don't want to see anybody, they don't want to see you, and I think that's very key in sponsorship in general, is you know, how do you lock up exclusivity and what does exclusivity actually mean? And how, you know, if I'm on this side of a brand, I'm going to be talking to the rights holders about all of the ways in which there's not going to be any other brands even associated anywhere close, and it's - so that's - that's also very important too, is understanding the rights, where you can use your brand logos, where you can activate and where your competitors can be blocked.

MR. CRANDALL: I think we have time for one more question. Anybody has a question?

QUESTION [Female Voice]: Thanks. First the situation with Kennedy, he was against calling it Special Olympics? He was for?

DR. SCHILLER: No, the Kennedy family was for the Special [*634] Olympics.

[Female Voice]: Okay, I - because of the sister.

DR. SCHILLER: And he was - Robert was a member of the family and his sister effectively was the one who pushed him on to do that.

[Female Voice]: Okay, and then can you also - you kind of shrugged or I don't know what the movement you made when the gentleman was talking about Dunkin' Donuts and Dunkin' Madness and you said you were an ambusher. I'm just curious to hear you further elucidate how you interpreted the creativity. Because it seems to those of us who have no familiarity with your area of law that the ambushers are reinventing - they're jumping on what the original sponsor has created. So if the original sponsor is the product, then there may be like the counterfeiter, and that maybe from a very, very childlike perspective it goes to their being clever as opposed as to being fair with that wink, wink. So I'd like to hear what you -

DR. SCHILLER: Right. I was sort of picking on him, to tell you the truth. I would rather he answered the question in a different way, but since the product, Dunkin' Donuts, I don't think it's considered a QSR anyway, but -

MR. STURNER: Coffee, some people. Do guys consider it now as a - ?

DR. SCHILLER: But the US Open doesn't have that category, I don't think. Do they?

MR. STURNER: No, they don't.

DR. SCHILLER: So effectively they're not really ambushing anything, they're ambushing the event, not the - there's no sponsor that - am I right. There's no -

MR. STURNER: Yeah, what we're doing - what we're doing with in terms of tennis is sponsoring the players. And you know, just knowing where you can sponsor, it's like okay, Dunkin' likes the average Joes or the average Joe is the Dunkin' model.

And so the average Joes are competing against Agassi, Federer, the Williams sisters, and that was kind of the whole - the whole mantra behind it. And if you see any other sport, there's sponsors of players all the time, in you know, patches and other different ways too. I mean if you look at

golf, it's like how can you say SAP is not the official sponsor of the PGA, but Ernie Els is winning the championship?

So it's just kind of, I think, realizing where you can play and where you can't play from marketing standpoint, and if it works [*635] well for Dunkin' to be the official coffee of the US Open and we're advising them and you know, there's a way in which there's business back and everybody who comes to the US Open has you know, they are able to buy Dunkin' Donuts and it makes sense for them at the right time. It makes - you go for it.

But if you're not, there's ways around that to make it interesting. You know, we were referring to Dunkin' Madness, we changed it to Dunkin' Mania and it was a whole college program around this.

[Female Voice]: So I was hoping they're - - for the everyday average Joe and it just - I mean I like the idea - - doesn't that counteract with the whole idea of luxury - - ?

MR. GOODMAN: Ben, can I just jump in. We're lawyers, right? Then sue.

MR. STURNER: Yeah.

MR. GOODMAN: Okay, I mean I'm not trying to be snarky. I mean I'm trying - but you know, in the great - in the great tradition of law school we can end on a rhetorical question, right? As someone - I think Michael [Kuh] said before, like what's wrong with all of that.

You know, I'm not - I can make a good argument if there is stuff wrong with that, but we all can. But at the end of the day, the people who - you know, the people who would be aggrieved have to stand up and take action. And they can either take action by bringing lawsuits, which by the way, I mean I talk to the USOC every day about the fact that I wish someone would sue somebody, because - I mean I wish I'm not the guy being sued, but you know, I kind of want an answer from somebody. And you know or - and there's some articles written about this periodically, or you know, why don't the rights holders stop promising, this is an interesting question, stop promising the scope of exclusivity that they do, right?

I mean it's sort of rhetorical, it's like well the reason why I'm going to tell Coke, if I'm the IOC, that they get everything under the sun is because I want their sponsorship. But what if I said you know what, around the margins here the few things I can't protect for you, because I can't. Well, all right, so maybe the price goes down, but it doesn't go away, I would argue, I mean it, you know. And maybe that's the kind of thinking that the people need to see. That I mean, I know this is highly - you know, ivory tower, it's not very practical. But no one has really gotten to the bottom of what's really wrong with any of this. Not to say that there's [*636] nothing wrong, it's just no one's really demonstrated it.

DR. SCHILLER: It - there have been lots of discussions about how to get around this in terms of funding and other things, but I think that the biggest challenges are still ahead because the rest of the world is beginning to mimic.

You know they have one - it used to be because so many broadcasters around the world were government-owned, they had no advertising as we have here, and signage was the big issue. And now as they move into the traditional methods of advertising and promotion and licensing and so forth, you're going to see more and more and especially we're in a global economy, so it's going to come - you know, the biggest returns that we had at the Olympic Committee in terms of taking ac-

tion against someone was seizing items and goods that came into the country illegally with Olympic marks, everything from juicers to golf clubs and so forth.

So I think we haven't yet seen how strong it's going to get. I'm not the lawyer here. The rest of these guys are going to make money off of it, but I think that -

MR. KUH: So please do sue. Sue a lot. Sue everybody.

MR. STURNER: We had discussed also social media, in having a social media and how marketers are using social media in the Olympic campaigns this summer. It will be very interesting to see that as you know, an additional element to television by you know, multi-platform marketing approach, and you know, how do you police social media?

[Female Voice]: Well, the IOC has a policy like what happens - - [too far from mic to hear].

MR. STURNER: Yes.

DR. SCHILLER: The largest country - the third largest country in the world right now is Facebook, with 800 million people, right, who use it. Look out, I mean it's coming. And it's going to be impossible to control that environment. It's just not going to be possible. It's too diffused.

PROFESSOR MCCANN: There's not enough time to do anything, right, because it's instant. It's like, I think Michael [Kuh] - you mentioned earlier, by the time the wrong has happened it's too late.

MR. STURNER: Yeah, and the interesting thing about Facebook, when I was working at Lycos, an internet company, it was in 2000 and we actually after I left SOCOG in Sydney I went back to Lycos and we did sponsorship of the Sydney Olympic Games.

[*637] And Lycos was - also had specialized in communities, so the 202 countries we developed community for each one of the countries. So we did the blogs, chats, message boards, videos and pictures, and it was kind of before Facebook came, but so you know people from Kenya and Spain were talking with the different people from Canada, and you know, you can root for your country and really post pictures and chat and message boards, and I think that's - the interesting thing about the Olympics, as Cameron [Myler] n2 knows, being an athlete, you know, meeting so many people from around the world and the best and the best come together, and it's such a special thing.

You know, through the internet, you know, connecting communities and connecting the world it's part of the whole movement, I think, is bringing the world together and if you can - Facebook you said is the number three country and if there's a way in which they can take the country so they're rooting for their countries, you know, you have a U.S. club and you have a club from Egypt and a club from X country, and how do you create a community behind that exchange.

MR. SCHLEIFSTEIN: Yes, not to throw another monkey wrench in because I know we've got to finish up in a minute, but then you have the whole issue of user-generated content and how that affects trademark rights. And just somebody -

DR. SCHILLER: Everybody here is an amateur, Kate Upton, was - she won it all.

MR. STURNER: Yes.

DR. SCHILLER: Right?

MR. STURNER: To put her on the cover.

DR. SCHILLER: One year ago she did a little dance on YouTube and now she was on the front cover of Sports Illustrated. That's marketing.