



#Congratulations but #SeeYouInCourt: Olympic Hashtag Restrictions Raise Concerns Over Trademark Rights and Free Speech

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During the summer of 2016, in the lead up to the Rio 2016 Summer Olympic Games, the United States Olympic Committee (“USOC”) made headlines¹ with its not-so-subtle warning to brands who might be thinking about creating an association with the Olympic Games without becoming an official sponsor: Leave the hashtags behind! The USOC had published brand guidelines months earlier which specifically warned commercial entities (*i.e.*, competing brands to official sponsors) about prohibitions on posting about the Olympic Trials or Olympic Games on their corporate social media accounts.² The warning letter further stipulated that “a company whose primary mission is not media-related cannot reference any Olympic

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¹ See Darren Rovell, *USOC sends letter warning non-Olympic sponsor companies*, ESPN (July 21, 2016), http://www.espn.com/olympics/story/_/id/17120510/united-states-olympic-committee-battle-athletes-companies-sponsor-not-olympics, [<http://perma.cc/UGK5-GK4X>]; Eric Chemi and Nick Wells, *Olympic committee on the prowl — for misuse of hashtags*, CNBC (July 28, 2016), <https://www.cnbc.com/2016/07/28/olympic-committee-on-the-prowl—for-misuse-of-hashtags.html>, [<http://perma.cc/3HBL-EG27>]; Olivia Solon, *US Olympic Committee bullying unofficial sponsors who use hashtags*, THE GUARDIAN, July 22, 2016, <https://www.theguardian.com/sport/2016/jul/22/us-olympic-committee-bullying-unofficial-sponsors-hashtags>, [<http://perma.cc/EHY8-BTFR>].

² See Rovell, *supra* note 1.

results, cannot share or repost anything from the official Olympic account and cannot use any pictures taken at the Olympics.”³ While the announcement seemed consistent with aggressive “brand policing” efforts⁴ displayed at both the London 2012 and Sochi 2014 Olympic Games by the International Olympic Committee (“IOC”) and the USOC in order to protect official sponsors’ exclusive marketing rights as well as curb the ongoing problem of ambush marketing,⁵ what was legally distinct from past business practices was the USOC was now asserting legal rights in their protected word marks, specifically *when used as hashtags* in advertising messages related their event, most notably as it pertained to the #Rio2016 and #TeamUSA marks. By asserting “new” rights in these traditionally protected words (*i.e.*, the words that non-sponsors are prohibited from using in marketing during the Olympics), the USOC was upholding its notoriously strict brand policing efforts, a practice which can be described as hyper-protection of Olympic intellectual property.

The new USOC warning about not using protected hashtags is legally significant for two reasons. First, the legal status of registering hashtags as trademarks is still very much in flux, with few courts⁶ weighing whether hashtags perform the required trademark function of source identification (and even fewer concluding they do).⁷ Second, by threatening non-sponsor

³ *Id.*

⁴ See Esther Addley, *Olympics 2012: branding ‘police’ to protect sponsors’ exclusive rights*, THE GUARDIAN, April 13, 2012, <https://www.theguardian.com/sport/2012/apr/13/olympics-2012-branding-police-sponsors>, [http://perma.cc/BUQ3-SH7Q].

⁵ Dennis M. Sandler and David Shani were among the first scholars to define ambush marketing, which occurs when a non-sponsor of an event attempts to pass itself off as an official sponsor. See generally *Olympic Sponsorship vs “Ambush” Marketing: Who Gets the Gold?* 29 J. ADVER. RESEARCH (1989). Tony Meenaghan added to this definition, noting ambush marketing as “the practice whereby another company, often a competitor, intrudes upon public attention surrounding the event, thereby deflecting attention toward themselves and away from the sponsor.” *Point of View: Ambush Marketing: Immoral or Imaginative Practice?* 34 J. ADVER. RESEARCH 77, 79 (1994). More recent scholarship, focused on defining the practice in terms of sponsorship rights, described it as “the deliberate attempt, by a non-sponsor firm, to falsely suggest an association with an event . . . for the purpose of deriving a commercial benefit from that association, without incurring the costs of the acquisition of sponsorship rights in relation to that event . . .” Marc Mazodier, Pascale Quester & Jean Louis Chandon, *Unmasking the Ambushers: Conceptual Framework and Empirical Evidence*, 46 EUR. J. OF MKTG. 192, 194 (2012).

⁶ See generally *Elksouzian v. Albanese*, No. CV 13-00728-PSG-MAN, 2015 WL 4720478 (C.D. Cal. Aug. 7, 2015); *Fraternity Collection, LLC. v. Fargnoli*, No. 3:13-CV-664-CWR-FKB, 2015 WL 1486375 (S.D. Miss. Mar. 31, 2015).

⁷ *Elksouzian v. Albanese* concluded that hashtags are merely descriptive devices, not trademarks. *Cf. Fraternity Collection, LLC. v. Fargnoli supra* note 6 (declining

companies that were intent on using these hashtags in their marketing and promotion of competing Olympic athletes and asserting trademark rights perhaps beyond what actually exist, the USOC opened itself to accusations of trademark bullying, loosely defined as exerting legal rights beyond what actually exist. Brands that were not official Olympic sponsors, but that had sponsorship deals with Rio 2016 Olympic athletes, immediately began to cry foul about the new hashtag restrictions imposed by the USOC for the Rio 2016 Games. A leading voice was Sally Bergen, CEO of women's athletic brand Oiselle⁸ and a vocal advocate for athletes' rights, who stated that "the heavy-handed brand policing was 'ridiculous,'" and that the rules "hurt athletes."⁹ "Companies like Oiselle can't afford to sponsor athletes if they can't leverage the relationship in their [social media] communications," she added.¹⁰ Ultimately, the USOC's restrictions would be challenged based on infringement of the commercial free speech right to comment on the Olympics or congratulate competing athletes by brands who were not official Olympic sponsors.

To understand the legal significance of the "no hashtags" policy in the evolution of Olympic brand protection, it is first necessary to appreciate the substantial level of financial support that sponsors contribute to the Olympic funding model, and why protecting those sponsors remains an increasing priority, especially as social media begins to expand the thematic space surrounding the Olympics. These sponsors are commonly referred to today as TOP sponsors, which stands for "The Olympic Partners," a semantic reinforcement of official sponsors' importance to the continued financial success of the Olympic movement. The TOP sponsorship model serves as the financial underpinning of staging the Olympic Games, having generated more than \$950 million for the IOC from 2009 to 2012.¹¹ Protecting sponsors, therefore, requires innovative brand protection strategies to close legal loopholes¹² as they pop up using all means necessary, such as with the evolu-

to dismiss a trademark infringement claim involving a hashtag). *See generally* Alexandra J. Roberts, *Hashtags are not Trademarks—Elksouzian v. Albanese*. TECH. & MARKETING L. BLOG (Aug. 26, 2015), <http://blog.ericgoldman.org/archives/2015/08/hashtags-are-not-trademarks-eksouzian-v-albanese-guest-blog-post-2.htm>, [http://perma.cc/Y72U-9FXZ].

⁸ Solon, *supra* note 1.

⁹ *Id.* *See also* E. Chemi and N. Wells, *supra* note 1.

¹⁰ Solon, *supra* note 1.

¹¹ INTERNATIONAL OLYMPIC COMMITTEE, OLYMPIC MARKETING FACT FILE 2016 EDITION (2016), https://stillmed.olympic.org/Documents/IOC_Marketing/olympic_marketing_fact_file_2016.pdf, [http://perma.cc/SSV4-938F].

¹² *See generally* Stephen McKelvey & John Grady, *Sponsorship program protection strategies for special sport events: Are event organizers outmaneuvering ambush marketers?* 22

tion of ambush marketing via social media.¹³ Thus, the hashtag warnings for Rio 2016 arguably provided the USOC with an additional layer of legal protection for their existing marks that have long been vigorously protected, when those marks are used as hashtags by non-official sponsor brands. While clearly serving as a deterrent to those companies who had planned marketing messages featuring athletes, could the hashtag policy survive legal scrutiny, as well as the natural marketing creativity of social media savvy domestic global brands that are typically rivals to the TOP sponsors and always jump at the chance to find ways around quirky Olympic marketing rules?

One such Minnesota-based company, Zerorez LLC, challenged the USOC's restrictions,¹⁴ arguing that the warnings stemming from the policy infringed upon the company's First Amendment rights to congratulate Olympic-bound athletes from Minnesota, as well as exceeded the authority provided to the USOC in the Ted Stevens Olympic and Amateur Sports Act¹⁵ ("OASA") to exclusively control marketing of the Olympic Games within the United States. The legal arguments scrutinizing the policy were still-unsettled law and the vagueness of the policy's directives and ultimate enforcement left many unanswered questions. Namely, can "event-related hashtags" be registered as trademarks, when used in the context of marketing messages and who, if anyone, besides official Olympic sponsors has the legal "right" to say "congratulations" using event-related hashtags when these athletes succeed on the world's biggest stage? The purpose of this paper, therefore, is to analyze the complex legal issues surrounding event-related hashtags in the context of Zerorez's challenge to USOC's hashtag policy.

In Part I, we examine in greater detail the USOC's proffered restrictions on social media activities by companies that are not official sponsors of the Olympic Games, and then provide the details and disposition of Zerorez's lawsuit. In Part II, we briefly examine the history of USOC lawsuits predicated primarily on First Amendment claims, as these cases provide pre-

J. SPORT MGMT., at 550, (2008). ("An often relied upon loophole by ambush marketers has been the commercial use of athletes with whom the companies have individual endorsement deals.") *Id.* at 570.

¹³ N. Chanavat & M. Desbordes, *Towards the regulation and restriction of ambush marketing? The first truly social and digital mega sport event: Olympic Games, London 2012*. 15 INT'L. J. OF SPORTS MKTG. & SPONSORSHIP 150, 151 (2014).

¹⁴ See Complaint, HSK LLC, d.b.a. Zerorez vs. United States Olympic Committee, No: 16-civ-02641-WMW-KMM, (D. Minn. Aug. 4, 2016).

¹⁵ Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 22051 et seq. (2012).

cedent and guidance for our further examination of *Zerorez*. In Part III, we analyze Zerorez’s First Amendment claim. After briefly discussing the evolution of relevant case law, we apply the current law to the Zerorez tweets to determine if they would rise to the level of commercial speech. In Part IV, we predict the likely outcome of the case based on analysis of the applicability of federal trademark law,¹⁶ considering the status of hashtags as trademarks by incorporating the United States Patent and Trademark Office (“USPTO”) current rules on hashtag mark registration. We then briefly discuss that the jury remains out as to whether hashtags even serve (or can serve) the traditional trademark function of source identification, especially in the context of Olympic sponsorship. We contend that hashtags cannot serve this function as currently used to generate online conversations on social media. However, assuming *arguendo* that the USOC has valid trademark rights, we next turn to assessing Zerorez’s proposed tweets using a likelihood of consumer confusion analysis. In Part V, we examine the Zerorez case from the applicability of the OASA.¹⁷ The application of the OASA, with its lower standard of “tending to cause confusion” and with legislative intent in broad support for the USOC, provides, in our view, the steepest hurdle for Zerorez. We conclude in Part VI with the overall results of our analysis, which legally supports Zerorez and other companies like it that may wish to congratulate Olympic athletes at future Olympics within the parameters of the law.

I. SETTING THE STAGE: *ZEROREZ V. USOC*

Prior to the start of the 2016 Summer Olympic Games, the USOC published its policy on social media activities by non-sponsors as part of its Olympic and Paralympic Brand Usage Guidelines for the Rio 2016 Games.¹⁸ The guidelines included, *inter alia*:

- a. “The USOC . . . owns many federal trademark registrations of word marks including, but not limited to: Olympic, Olympian, Team USA, Future Olympian, Gateway to Gold, Go For The

¹⁶ See Lanham Act, 15 USC § 1125 (2012).

¹⁷ See Ted Stevens Olympic and Amateur Sports Act, *supra* note 15.

¹⁸ See Complaint, *supra* note 14. The U.S. Olympic and Paralympic Brand Usage Guidelines were updated for the 2018 Games (<https://www.teamusa.org/brand-usage-guidelines>). For 2018, this includes the following directive: “The USOC has outlined guidance for those wishing to use USOC IP in social media, whether in hashtags or by posting images of the Games, etc.” This seems unchanged from the policy and guidelines in place for Rio 2016.

Gold, Going for the Gold, Let The Games Begin, . . . Road to Rio [and] . . . RIO 2016 . . .”

- c. “. . . commercial entities may not post about the Games on their corporate social media accounts. This includes the use of USOC trademarks in hashtags such as #RIO2016 or #TeamUSA . . .”
- d. “. . . any use of USOC trademarks on a non-media company’s website or social media site is viewed as commercial in nature and consequently is prohibited. . . .”
- e. Do not use any USOC trademarks in any form of advertising (e.g., on a website, in social media, etc)”
- f. “Do not create social media posts that are Olympic themed, that feature Olympic trademarks, that contain Games imagery or congratulate Olympic performance unless you are an official sponsor”
- g. “. . . companies must avoid using Olympic and Paralympic athletes in advertisements or even wishing them good luck on social media. . . .”¹⁹

Soon after the USOC began sending warning letters to non-sponsor brands in late July 2016²⁰ about what could and could not be posted during the Games, media outlets began reporting that brands that were not official sponsors began pushing back against the social media restrictions.²¹ In August 2016, Zerorez, a Minnesota-based carpet cleaning company, filed suit against the United States Olympic Committee, seeking a declaratory judgment that its planned congratulatory messages would not infringe the

¹⁹ Complaint, *supra* note 14 at 3–4. Given these restrictions, it is nearly impossible to envision any scenario in which a non-sponsor or non-media outlet could conduct any form of speech via its social media platforms. These restrictions also presume, as a matter of law, that any post on a corporate social media platform, regardless of content, is automatically commercial in nature.

²⁰ Rovell, *supra* note 1.

²¹ See Patrick Kulp, *The Olympic Committee wants to ban non-sponsors from tweeting about the games*, MASHABLE (July 28, 2016), <http://mashable.com/2016/07/28/ioc-bans-social-media-olympics-brands/#RMfafXHyPaqb>, [<http://perma.cc/KHS3-6YDK>]; Solon, *supra* note 1. Written communications to non-sponsor businesses included the following “advice” from the USOC’s Chief Marketing Officer: “[U]nless you are a news agency or an official USOC partner, I would ask that you refrain from posting about the U.S. Olympic Team Trials or the Rio 2016 Olympic Games from your corporate social media accounts. Instead, we encourage you to show your support for the U.S. Olympic and Paralympic Teams by following Team USA on social media and posting about the Team and the Games from your individual or personal social media accounts. Thank you in advance for your support.” Complaint, *supra* note 14 at 5 (alteration in original). The “requesting” versus demanding tone of these letters is interesting.

USOC's protected marks.²² In response to the USOC's announcement of its social media restrictions on non-sponsors, and its "clear threat to businesses,"²³ Zerorez sought to ascertain its rights with regard to its specific plan to post content on its Twitter and Facebook accounts. As stated in its complaint, Zerorez "contemplated the following social media posts:"²⁴

- a. Congrats to the 11 Minnesotans competing in 10 different sports at the Rio 2016 Olympics! #rioready;
- b. Are any Minnesotans heading to #Rio to watch the #Olympics? #RoadtoRio;
- c. There is no substitute for hard work. –Thomas Edison #TeamUSA is a great example of hard work paying off;
- d. Let the rumble in Rio begin! From badminton to BMX , Minnesotan Olympians are at the #Rio216 Olympics. Go #TeamUSA!;
- e. St. Cloud native Alise Post is an #Olympian competing in the #Olympic BMX events today. Follow here at @alisepost11; and
- f. Good luck to our 11 Minnesota Olympians competing in #RIO2016.²⁵

In its complaint, Zerorez argued that the "USOC's Actions, Policies, and threats violate the First and Fourteenth Amendments to the United States Constitution by preventing Zerorez from discussing the Olympics on social media."²⁶ This, in effect, results in chilling the First Amendment rights of sponsors and athletes who want to discuss the connection between the sponsors and athletes who are competing at the Olympic Games. In addition to its First Amendment claims, based on the premise that "[s]peech is not commercial in nature merely because it is on a business's social media account,"²⁷ Zerorez also challenged the USOC's trademark claims under both the Lanham Act²⁸ and the Ted Stevens Olympic and Amateur Sports Act,²⁹ asserting that (1) the USOC's trademark rights in hashtags such as #TeamUSA, #Olympics and #Rio2016 "do not categorically prohibit businesses from using those hashtags to accurately reference these Olympic topics,"³⁰ and (2) if the Ted Stevens Act "were interpreted so broadly as to prohibit all businesses from non-commercial speech regarding

²² Complaint, *supra* note 14.

²³ *Id.* at 3.

²⁴ *Id.* at 2.

²⁵ *Id.* at 2–3.

²⁶ *Id.* at 5.

²⁷ *Id.* at 8.

²⁸ Lanham Act, *supra* note 16.

²⁹ Ted Stevens Olympic and Amateur Sports Act, *supra* note 15.

³⁰ Complaint, *supra* note 14 at 7.

the Olympics, the Act would be unconstitutional because it would restrict First Amendment rights.”³¹

In September 2016,³² the USOC filed a motion to dismiss the case, arguing, ultimately successfully, that there was no actual, concrete dispute between the parties,³³ and that Zerorez failed to seek “specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.”³⁴ Although Zerorez made strong procedural arguments in opposition to the USOC’s motion to dismiss,³⁵ the case was ultimately dismissed on April 4, 2017.³⁶

³¹ *Id.* at 8.

³² See Defendant Motion to Dismiss, HSK LLC, d.b.a. Zerorez vs. United States Olympic Committee, No: 16-civ-02641-WMW-KMM, (D. Minn. Aug. 26, 2016). The Rio Games had by this time concluded, making Zerorez’s desires moot. *Rio Olympics 2016: Spectacular closing ceremony as Olympic flag goes to Tokyo*, BRITISH BROADCASTING CORPORATION (August 22, 2016), <http://www.bbc.com/sport/olympics/37150572>, [<http://perma.cc/JL9U-PTCB>].

³³ See Defendant Motion to Dismiss, HSK LLC, d.b.a. Zerorez vs. United States Olympic Committee, *supra* note 32 at 2. This argument was premised on the fact that the plaintiff admittedly never made any of its proposed statements, nor was it ever threatened with litigation or sent a cease and desist order. Responding to the plaintiff’s statement in its complaint that the USOC “has a track record of commencing litigation,” HSK LLC, d.b.a. Zerorez vs. United States Olympic Committee Complaint, *supra* note 14, at 5, defendants argued: “Courts are in general agreement . . . that the mere fact that a company (here, the USOC) regularly enforces its intellectual property rights in the marketplace is not, without more, sufficient to confer declaratory judgment jurisdiction on every party that wishes to obtain judicial guidance as to whether its proposed actions would infringe.” Defendant Motion to Dismiss, HSK LLC, d.b.a. Zerorez vs. United States Olympic Committee, *supra* note 32 at 3.

³⁴ Defendant’s Memorandum in Support of Motion to Dismiss at 4, HSK LLC, d.b.a. Zerorez vs. United States Olympic Committee, No: 16-civ-02641-WMW-KMM, (D. Minn. Sept. 6, 2016), (citing *Maytag Corp. v. International Union*, 687 F.3d 1076, 1081 (8th Cir. 2012) (quoting *Aetna Life Ins. Com. v. Haworth*, 300 U.S. 227, 241 (1937))).

³⁵ See Plaintiff’s Memorandum of Law in Opposition to Defendant’s Motion to Dismiss, HSK LLC, d.b.a. Zerorez vs. United States Olympic Committee, No: 16-civ-02641-WMW-KMM (D. Minn. Oct 21, 2016). In addition to jurisdiction-based arguments, the plaintiff contended, albeit unsuccessfully, that “the chilling of [its] First Amendment free speech rights is sufficient injury to support a finding of ‘controversy’” (at 1): “The Policies [of the USOC] include specific restrictions on businesses that do not apply to individuals. Written communications from the USOC, which appeared to be a template sent to many business owners and published in the media, repeatedly asserted the USOC’s ban on business speech while encouraging such posting on ‘individual or personal social media accounts.’ The law is unambiguous: businesses have First Amendment free speech rights” (citations

II. THE USOC AND FIRST AMENDMENT CASES

Courts have had several opportunities to examine the USOC's rights at the intersection of trademark law and the First Amendment. In the first case, *Stop the Olympic Prison v. United States Olympic Committee*,³⁷ plaintiff, after receiving a cease and desist order, sued the USOC seeking declaratory relief for the right to publish a poster (which included drawings of the Olympic rings) in public opposition to plans to convert the Olympic Village in Lake Placid, N.Y. into a prison. The plaintiff organization (S.T.O.P.) argued that the production and dissemination of a poster were within its First Amendment rights,³⁸ and that its use of the word "Olympic" and the interlocking rings did not violate the USOC's trademark rights under either the Lanham Act or the Amateur Sports Act of 1978.³⁹ The district court noted that the Amateur Sports Act (hereinafter AMA) was intended to provide strong protection for the Olympic symbols in order to ensure their market value. However, in strictly applying the language of the statute, the court held that the poster was not used "for the purpose of trade" or "to induce the sales of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition" as required within the Act.⁴⁰

Turning to the Lanham Act and its touchstone "likelihood of confusion" requirement, the court noted that the USOC had offered no evidence of public confusion as to the source or origin of the poster, or as to sponsorship, endorsement or any other affiliation between S.T.O.P and the USOC. In granting judgment in favor of S.T.O.P, the court concluded: The defendant has proven no improper intent on the part of the plaintiff to 'palm off' its poster, to confuse or deceive anyone, to misappropriate the defendant's marks for its own profit, or even to impugn the defendant. Nor has the defendant shown an actual injury of any sort."⁴¹

The First Amendment was also at the heart of the issue in *United States Olympic Committee v. American Media, Inc.*,⁴² which relied heavily on the U.S.

omitted). *Id.* at 12 (citing *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 315 (2010)).

³⁶ See Order Granting Defendant's Motion to Dismiss and Granting Plaintiff's Motion for an Extension of Time, HSK LLC, d.b.a. Zerorez vs. United States Olympic Committee, No: 16-civ-02641-WMW-KMM, (D. Minn. April 4, 2017).

³⁷ 489 F.Supp. 1112 (S.D.N.Y. 1980).

³⁸ The court's decision turned on trademark law analysis, rather than First Amendment analysis.

³⁹ See *Stop the Olympic Prison*, 489 F.Supp. at 1116.

⁴⁰ *Id.* at 1121.

⁴¹ *Id.* at 1123.

⁴² 156 F.Supp.2d 1200 (D. Colo. 2001).

Supreme Court's ruling in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*.⁴³ While only a federal district court holding, and involving a media outlet, the court's analysis of what constitutes non-commercial speech in potential violation of the OASA sheds some legal light on how courts might view social media posts. In this case, the USOC sued a publishing company for its use of Olympics USA for the name of the magazine, and the defendants filed a motion to dismiss for failure to state a claim.⁴⁴ The USOC argued that the title of the magazine and its content was an attempt to "pass off Olympics USA as if it were authorized by the USOC, in a manner calculated to deceive the USOC's customers and members of the general public."⁴⁵

The court relied on the Supreme Court's ruling in *San Francisco Arts & Athletics* in noting, "[T]o the extent that [the Amateur Sports Act] applies to uses 'for the purpose of trade [or] to induce the sales of any goods or services,' . . . its application is to *commercial speech*."⁴⁶ Following a comprehensive analysis of the commercial speech doctrine, including the *Bolger* test, the court concluded:

[T]o characterize all or any part of OLYMPICS USA as commercial speech would go against nearly every attempt to define commercial speech.

⁴³ 483 U.S. 522 (1987). The Supreme Court, in affirming the lower court's grant of injunction, closely examined the OASA language and legislative intent designed to broadly promote the business interests of the USOC. It is important to emphasize that the Court's First Amendment analysis was based, given the language of the Act, on "uses for the purposes of trade . . . or to promote any theatrical exhibition, athletic performance, or competition . . ." which are *commercial* uses. *Id.* at 528 (quoting 36 U. S. C. § 380(a)). The Court held that the First Amendment did not prohibit Congress from granting exclusive use of the word "Olympic": ". . . [T]he Act's application to commercial speech is not broader than necessary to protect the legitimate congressional interests . . . The mere fact that [San Francisco Arts and Athletics] claims an expressive, as opposed to a purely commercial, purpose does not give it a First Amendment right to appropriate the value which the USOC's efforts have given to the word." *Id.* at 524 (internal citation omitted). The Court also confirmed that the USOC need not prove that a contested use of the word "Olympic" was likely to cause confusion, and that the normal statutory defenses under the Lanham Act (including fair use) did not apply. *See id.* at 531.

⁴⁴ FED. R. CIV. P. 12(b)(6).

⁴⁵ U.S. Olympic Comm., 156 F.Supp.2d at 1203. In its complaint the USOC characterized the defendant publisher's use of its marks as "ambush marketing." *Id.* (citation omitted). The USOC also acknowledged that the magazine contained a disclaimer denying any affiliation with or sanction by the USOC on its table of contents page (which the USOC argued was too small). *Id.*

⁴⁶ *San Francisco Arts & Athletics, Inc.*, 483 U.S. at 535 (quoting 36 U. S. C. § 380(a))(emphasis added).

OLYMPICS USA does not ‘propose a commercial transaction,’ and its content goes beyond the ‘economic interests of the speaker and its audience.’ More importantly, though, to apply the commercial speech doctrine in this context would unduly broaden the limited definition of commercial speech, and would raise serious concerns about the status of news media organizations’ presumed First Amendment protection . . . Moreover, . . . [t]o extend the Act to give the USOC authority over speech that clearly is not commercial under established First Amendment doctrine would violate this principle.⁴⁷

III. ANALYSIS OF ZEROREZ’S FIRST AMENDMENT CLAIM

Before addressing the issue of how to distinguish between noncommercial and commercial speech, we need to dispense with the notion that any speech by a corporation regardless of the platform (including Twitter) amounts to commercial speech. In *First National Bank of Boston v. Bellotti*,⁴⁸ the U.S. Supreme Court’s first decision focusing on corporate political speech in the context of campaign finance reform, the Court found “no support . . . for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation.”⁴⁹ More recently, in 2010, the Court confirmed, in *Citizens United v Federal Election Commission*, that corporations (like individuals) have First Amendment free speech rights.⁵⁰ These U.S. Supreme Court decisions support the proposition that speech by corporations is not automatically “commercial” speech.⁵¹ This legal proposition holds regardless of

⁴⁷ U.S. Olympic Comm., 156 F.Supp.2d at 1209.

⁴⁸ 435 U.S. 765, 784 (1978).

⁴⁹ *Id.* For a contrary view, see Tom Bennisson, *Nike Revisited: Can Commercial Corporations Engage in Non-Commercial Speech?* 39 CONN. L. REV. 379 (2006). While acknowledging the current state of the law, Bennisson argues that all speech by commercial corporations, regardless of content, should be classified as commercial speech because 1) corporations do not speak as individuals and 2) all commercial corporations are inherently profit-motivated.

⁵⁰ See *Citizens United v. FEC*, 558 U.S. 310, 312–13 (2010).

⁵¹ Some legal scholars have argued that all commercial speech, including that intended to bolster corporate image, should receive full First Amendment protection. See Deberah J. LaFetra, *Nike v. Kasky and the Modern Commercial Speech Doctrine: Kick it Up a Notch: First Amendment Protection for Commercial Speech*, 54 CASE W. RES. L. REV. 1205 (2004). “Corporate communications intended to reflect well on the company, highlighting either its internal functions or the way it interacts with the local, national and global communities of which it is a part, should be protected under the First Amendment. This type of communication does not propose a transaction, even though it can certainly be construed to set the stage for future transactions.” *Id.* at 1239.

the medium (including social media platforms) on which the speech is communicated.

While the Court has long held that commercial speech is entitled to some level of constitutional protection (albeit at a lower tier than political or religious speech),⁵² how to distinguish between non-commercial and commercial speech remains an ongoing source of confusion amongst the courts. The Supreme Court's first effort at delineating non-commercial from commercial speech came in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.⁵³ In that case, the Court defined commercial speech as an "expression related solely to the economic interests of the speaker and its audience."⁵⁴

In 1983, the U.S. Supreme Court, in *Bolger v. Youngs Drug Corp.*,⁵⁵ provided further guidance for distinguishing between commercial and non-commercial speech. In *Bolger*, a manufacturer and distributor of contraceptives brought an action challenging a federal statute prohibiting unsolicited mailing of contraceptive advertisements.⁵⁶ The primary issue was whether the manufacturer's pamphlets contained commercial speech, i.e., "speech

⁵² See generally *Va. State Bd. Of Pharmacy v. Va. Citizens Consumers Council*, 425 U.S. 748 (1976). The U.S. Supreme Court first enunciated the concept of commercial speech in *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975) (holding that even speech that appears as paid commercial advertisements "is not stripped of First Amendment protection merely because it appears in that form.").

⁵³ 447 U.S. 557 (1980) (holding held the defendant state's prohibition on the Public Service Commission's right to advertise its services, despite its "commercial speech" nature, was unconstitutional). Subsequent to its decision in *Central Hudson*, the Supreme Court has offered further interpretations of the commercial speech doctrine in *Edenfield v. Fane*, 507 U.S. 761 (1993) (holding that it was not sufficient for the government merely to point to a considerable governmental interest; additionally the government must demonstrate that the regulation advanced the interest in a direct and material way), and *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (holding that there was even less reason to start from the strict scrutiny review that the First Amendment generally required when a state entirely banned the dissemination of truthful, non-misleading commercial messages for reasons not associated with the protection of a fair bargaining process).

⁵⁴ *Id.* at 561. After setting forth this definition, the court then created a four-part test to determine whether the commercial speech in question is protected by the First Amendment. The four-part test examines: (1) whether the expression is protected by the First Amendment, meaning that it concerns lawful activity that is not misleading; (2) whether the asserted governmental interest is substantial; (3) whether the regulation directly advances the governmental interest asserted; and (4) whether it is more extensive than is necessary to serve that interest. *Id.* at 566.

⁵⁵ 463 U.S. 60 (1983).

⁵⁶ See *id.* at 61–64.

which does ‘no more than propose a commercial transaction.’”⁵⁷ The Court noted that the manufacturer’s informational pamphlets cannot be characterized merely as proposals to engage in commercial transactions, and that their proper classification as commercial or non-commercial speech presented a closer question.⁵⁸ The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech.⁵⁹ Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech.⁶⁰ And finally, the fact that the manufacturer has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech.⁶¹ Thus, the Court identified specific factors that have evolved, through subsequent interpretations and applications by lower courts, into the accepted test to assist in analyzing speech as commercial or noncommercial: 1) whether the communication is an advertisement, 2) whether the communication makes reference to a specific product or service, and 3) whether the speaker has an economic motivation for the communication.⁶²

In fashioning what has become the well-known and often-utilized *Bolger* test, the Court expressly cautioned that the presence of all three characteristics is neither necessary nor sufficient for a given instance of speech to be commercial.⁶³ This caveat only served to exacerbate the confusion over what constitutes commercial speech, particularly in circumstances in which the challenged communication contains elements of both commercial and noncommercial speech. One of the most high profile cases to address this issue was *Kasky v. Nike, Inc.*⁶⁴ Nike argued that advertisements placed in newspapers, the distribution of press releases, and the mailing of letters to athletic directors at major universities—all in response to a number of unfavorable media reports regarding labor conditions in its Asian operations—did not amount to commercial speech and hence were fully protected under the First Amendment free speech provisions of the U.S. and California constitutions.⁶⁵ Noting that the U.S. Supreme Court “has not adopted an all-purpose test to distinguish commercial from noncommercial speech under

⁵⁷ *Id.* at 66 (internal citation omitted).

⁵⁸ *See id.* at 66.

⁵⁹ *See id.*

⁶⁰ *See id.* at 67.

⁶¹ *See id.*

⁶² *See Id.* at 66–67.

⁶³ *See id.* at 67.

⁶⁴ 45 P.3d 243 (Cal. 2002), *cert. denied*, 123 S. Ct. 2554 (2003).

⁶⁵ A determination that Nike’s communications were noncommercial speech would bar the claims of unfair competition and false advertising brought by plaintiff Kasky, a private California citizen.

the First Amendment,⁶⁶ the California Supreme Court likewise declined to do so. Instead, the California court created a limited-purpose test as to whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception; the test consisted of three elements: the speaker, the intended audience, and the content of the message.⁶⁷

In holding for the plaintiff, the court concluded that in situations where there is a commercial speaker, an intended commercial audience, and commercial content in the message, the speech should be deemed to be commercial in nature.⁶⁸ The court was also challenged with how to handle commercial speech that was intermingled with what would otherwise be constitutionally protected noncommercial speech.⁶⁹ Relying on *Bolger*, the court held that Nike could not immunize itself simply by including references to public issues, especially where the alleged false advertising and misleading statements all related to the commercial portions of the speech in question.⁷⁰ The court further held that, because modern public relations campaigns are often designed to increase sales and profits by enhancing the image of the speaker, the press release amounted to commercial speech. The court thus concluded that speech is not necessarily entitled to full First Amendment protection based solely on the fact that it incorporates elements of both commercial and noncommercial speech.⁷¹

⁶⁶ Kasky, 45 P.3d at 256. See generally, David C. Vladeck, *Lessons from a Story Untold: Nike v. Kasky Reconsidered*. 54 CASE W. RES. L. REV. 1049 (2004).

⁶⁷ See Kasky, 45 P.3d at 256.

⁶⁸ *Id.* at 256–58. The court specifically held that Nike’s statements constituted commercial speech because: 1) Nike, being engaged in commerce, is a commercial speaker; 2) its statements were addressed directly to actual and potential purchasers of its products (a commercial audience), and 3) its representations of fact were of a commercial nature because it described its own labor policies and the practices and working conditions in factories where its products were made. *Id.* at 258.

⁶⁹ See *id.* at 253. Nike, relying on *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 474 (1989), argued that because its commercial speech was “inextricably intertwined” with the noncommercial communications, its communications should be deemed noncommercial in their entirety. Kasky, 45 P.3d at 260 (internal quotations omitted). The court stated that “[n]o law required Nike to combine factual representations about its own labor practices with expressions of opinion about economic globalization . . .” *Id.* at 260.

⁷⁰ See *id.* at 260.

⁷¹ See *id.* at 251. The Supreme Court’s decision to withdraw its writ of certiorari in Kasky spoiled an ideal opportunity to address a critical issue related to commercial speech: whether statements made by commercial enterprises which do not directly promote a product or service, but instead comment on social issues and general business practices, are commercial speech. See Robert M. O’Neil, *Nike v.*

While the three-part *Bolger* test remains the “law of the land,” in 2014 the Seventh Circuit expanded the scope of what constitutes commercial speech beyond *Bolger’s* product-specific messaging to also include “image advertising” in holding that drugstore chain Jewel-Osco’s congratulatory advertisement amounted to commercial speech.⁷² Albeit dealing with right of publicity (versus trademark rights) and with print advertising (versus social media posts), *Jordan v. Jewel-Osco, Inc.*⁷³ involved the type of speech contemplated by *Zerorez* (i.e., congratulatory messages), thus creating an interesting prism through which to analyze its proposed tweets.

The Seventh Circuit’s decision turned on two issues: 1) how to define the scope of commercial speech and 2) how to handle advertising that contains elements of both commercial and noncommercial speech. Regarding the first issue, the court first acknowledged the accepted definition of commercial speech: “speech that does *no more than* propose a commercial transaction fall[s] within the core notion of commercial speech.”⁷⁴ However, as the court continued, other communications may also represent commercial speech despite the fact that “they contain discussions of important public issues.”⁷⁵

The Seventh Circuit was specifically challenged with how to classify speech that contained both commercial and noncommercial elements.⁷⁶ The

Kasky—What Might Have Been, 54 CASE W. RES. L. REV. 1259, 1259–60 (2004) (contending that *Kasky* provided the Supreme Court an opportunity to clarify the “increasingly confusing” commercial speech doctrine).

⁷² See Stephen McKelvey, Jonathan Goins & Frederick Krauss, *The Air Jordan Rules: Image Advertising Adds New Dimension to Right of Publicity-First Amendment Tension*. 26 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 945, 978–79 (2016).

⁷³ 743 F.3d 509 (7th Cir. 2014). The Seventh Circuit acknowledged that the issue before it was simply whether the advertisement in question should be classified as commercial or noncommercial speech. The Seventh Circuit elaborated, however, that even if it is held the ad to be noncommercial speech, “it is far from clear that *Jordan’s* trademark and right-of-publicity claims fail without further ado.” *Id.* at 514. Citing to renowned trademark expert Thomas McCarthy and the fact that the Supreme Court has yet to address this issue, the Seventh Circuit added that “there is a no judicial consensus on how to resolve conflicts between intellectual-property rights and free-speech rights; instead the courts have offered ‘a buffet of various legal approaches to [choose] from[.]’” *Id.* at 514. (citing J. Thomas McCarthy, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 31.139 (6th ed. 2013)).

⁷⁴ *Id.* at 516.

⁷⁵ *Id.* (internal quotation marks omitted) (quoting *Bolger v. Youngs Drug Products Corp.* 463 U.S. 60, 66 (1983)).

⁷⁶ See *id.* The Seventh Circuit, citing *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 637 n.7 (1985), added that the Supreme Court has “made clear that advertising that links a product to a current public

court first turned to the 3-part test of *Bolger*.⁷⁷ As the court, however, elaborated, “This is just a general framework, however; no one factor is sufficient, and *Bolger* strongly implied that all are not necessary.”⁷⁸ However, the core of the court’s analysis focused on element two of the *Bolger* test. Although Jewel-Osco argued that its advertisement did not propose a commercial transaction because it did not promote a specific product or service, the Seventh Circuit took an entirely different view:

The notion that an advertisement counts as “commercial” only if it makes an appeal to purchase a particular product makes no sense today, and we doubt that it ever did. An advertisement is no less “commercial” because it promotes brand awareness or loyalty rather than explicitly proposing a transaction in a specific product or service. Applying the “core” definition of commercial speech too rigidly ignores this reality. Very often the commercial message is general and implicit rather than specific and explicit.⁷⁹

The Seventh Circuit held that it was clear that the text of the advertisement was indeed “a congratulatory salute to Jordan.”⁸⁰ However, the court determined that the context of the advertisement, which included Jewel’s own graphic logo and slogan, served to promote Jewel-Osco’s retail stores: “[I]f the literal import of the words [in the ad] were all that mattered, this celebratory tribute would be noncommercial. But evaluating the text requires consideration of the context . . . Modern commercial advertising is enormously varied in form and style . . .”⁸¹ Thus, in adopting a broader

debate is not thereby entitled to the constitutional protection afforded noncommercial speech.” *Id.*

⁷⁷ *Id.* The Seventh Circuit used the *Jordan* case as an opportunity to clarify the proper use of the “inextricably intertwined” doctrine, which the district court had relied upon in holding for Jewel-Osco. *Id.* at 520 (internal quotation and citation omitted). That doctrine holds that when commercial speech and noncommercial speech are inextricably intertwined, the speech is classified by reference to the whole; a higher degree of scrutiny may be applied if the relevant speech “taken as a whole” is properly deemed noncommercial. *Id.* at 520 (internal quotation and citation omitted). The court went on to suggest that it is nearly impossible to identify a scenario in which both commercial and noncommercial speech could be “inextricably intertwined”: “No law of man or nature compelled Jewel to combine commercial and noncommercial messages as it did here.” *Id.* at 522.

⁷⁸ *Id.* at 517.

⁷⁹ *Id.* at 518.

⁸⁰ *Id.* at 517. The court rejected Jewel-Osco’s argument that this advertisement was similar to others that Jewel-Osco had released in the past which celebrated the work of local civic groups.

⁸¹ *Id.* at 518.

interpretation of the term “commercial,” the court held that, “an advertisement is no less ‘commercial’ because it promotes brand awareness or loyalty rather than explicitly proposing a transaction in a specific product or service.”⁸²

The Seventh Circuit acknowledged that while proposing specific commercial transactions lies at the “core” of commercial speech, such propositions do not demarcate the outer limits of what is commercial speech. Rather, even if speech does something more than (or in addition to) proposing a commercial transaction, it can still be commercial. Jewel-Osco’s advertisement, the court stated, served two functions: (1) to congratulate Jordan, and (2) to enhance Jewel’s brand by associating itself with Jordan in the minds of basketball fans and Chicago consumers.⁸³ Given that a “common-sense distinction” between commercial and noncommercial speech was proper, in this context, one had to account for the varied, often subtle forms of modern advertising.⁸⁴ Thus, an ad’s failure to refer to a specific product was held to be relevant, but not dispositive, according to the Seventh Circuit. The court had no trouble answering the question, “What does [the ad] invite the readers to buy?” The answer: “Whatever they need from a grocery store.”⁸⁵ Hence, the Seventh Circuit ruled that this type of brand advertising is no less commercial than product advertising, since its “commercial nature is readily apparent” and it was “aimed at promoting goodwill for the Jewel-Osco brand by exploiting public affection for Jordan.”⁸⁶ However sincere its congratulations, the court reasoned, Jewel still “had something to gain” from the ad:⁸⁷ “. . . considered in context, and without the rose-colored glasses, Jewel’s ad has an unmistakable commercial function: enhancing the Jewel-Osco brand in the minds of consumers. This commercial

⁸² *Id.*

⁸³ *See id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 519.

⁸⁷ *Id.* at 520. The court also noted the fact that the trade deal between Jewel-Osco and Sports Illustrated, in which the former received a free full-page advertisement in exchange for selling the magazine in its stores, provided clear economic benefit for Jewel-Osco. *See id.* The Seventh Circuit decision found particular significance in the characteristics and relevance of the logo and slogan as presented in the advertisement: “Jewel-Osco’s graphic logo and slogan appear just below the textual salute to Jordan. The bold red logo is prominently featured in the center of the ad and in a font size larger than any other on the page. Both the logo and the slogan are styled in their trademarked ways. Their style, size, and color set them off from the congratulatory text, drawing attention to Jewel-Osco’s sponsorship of the tribute.” *Id.* at 518.

message is implicit but easily inferred, and is the dominant one.”⁸⁸ Hence, the court remanded the case, providing Jordan the green light to resume pursuit of his right of publicity claim in which he sought \$5 million in damages,⁸⁹ and the parties eventually settled.⁹⁰

The Court’s holding in *Bolger* concerned the advertisement of specific products or services.⁹¹ Some legal scholars have argued (and the Seventh Circuit essentially confirmed) that this prong of the *Bolger* test has failed keep up with the modern advertising age that has expanded to encompass the notion of “brand image” advertising.⁹² The U.S. Supreme Court has yet to rule that any speech conveyed by a company on its social media accounts automatically constitutes commercial speech; nor has it ruled on whether speech that is purely “brand image building” automatically amounts to commercial speech.

Of course, one can argue on behalf of the USOC that Zerorez’s proposed tweets have a purpose that is more commercial than altruistic. Arguably, the messages posted on social media platforms are intended to promote the company brand, engender goodwill, and leverage the popularity of the Olympic Games. Furthermore, today’s savvy consumers can, as USOC would no doubt argue, connect the dots between Zerorez and “some association” with the Games. Supporting these arguments legally is, however, a slippery

⁸⁸ *Id.* In remanding the case back to the district court, the Seventh Circuit also clarified the district court’s misapplication of the “inextricably intertwined” doctrine. Jordan argued that the “inextricably intertwined” doctrine was not applicable to this case. Specifically, Jordan argued that the district court had erroneously concluded that *any* advertisement that has a combination of both commercial and non-commercial speech should be deemed noncommercial speech because they are “inextricably intertwined” and cannot be separated out. *Id.* at 520.

⁸⁹ See Darren Rovell, *Jordan Ruling Could Set Precedent*, ESPN (Feb. 20, 2014), http://www.espn.com/chicago/nba/story/_id/10491664/michael-jordan-wins-appeal-endorsement-case-jewel-food-stores [https://perma.cc/V7NQ-2N7B].

⁹⁰ See Jon Seidel, *Michael Jordan Settles with Jewel, Dominick’s*, CHI. SUN TIMES, Nov. 22, 2014, <https://chicago.suntimes.com/news/michael-jordan-settles-with-jewel-dominicks/> [https://perma.cc/9U2W-RSUH].

⁹¹ *Bolger*, *supra* note 55.

⁹² For an article that discusses the challenges of classifying commercial speech within today’s modern marketing strategies and recent technological developments, see Robert Sprague, *Business Blogs and Commercial Speech: A New Analytical Framework for the 21st Century*, 44 AM. BUS. L. J. 127 (2007). Sprague proposes, in the context of blogs, a framework that separate commercial speech into three categories: 1) traditional advertising, 2) public relations, and 3) social commentary, the latter of which would automatically classify as noncommercial speech. *Id.* We view congratulatory messages and other statements of fact proposed by Zerorez as falling most accurately within the social commentary category.

slope necessitating, among other steps, a peek into the mind of the company to determine what its “real” motive is. We thus provide legal analysis of the parties’ arguments under the First Amendment claim, applying in turn the *Bolger* test and the Seventh Circuit’s rationale in *Jordan* that focuses on the content and context of the advertisement.⁹³ Our assessment of the case, should it have been litigated on the merits, is best illustrated through use of two tweets, the first being among Zerorez’s proposed tweets,⁹⁴ and the second being a hypothetical tweet:⁹⁵

- Tweet #1: Congrats to the 11 Minnesotans competing in 10 different sports at the Rio 2016 Olympics! #rioready;
- Tweet #2: From your clean-up experts, congrats to the 11 Minnesotans who’ll be looking to “clean up” in 10 different sports at the Rio 2016 Olympics! #rioready #cleanup!

We commence with the legal proposition, counter to the USOC’s claim, that neither Tweet #1 (“T1”) nor #2 (“T2”) is commercial speech simply because it is mentioned on Zerorez’s corporate social media account. Hence, the threshold inquiry is whether, under application of the *Bolger* 3-part test⁹⁶ or the Seventh Circuit rationale in *Jordan*, Zerorez’s proposed tweets rise to the level of commercial speech. If the proposed Zerorez speech is deemed noncommercial, then Zerorez would be a clear-cut victor on its First Amendment claim. If the proposed tweets are deemed commercial speech, we could then turn to whether the USOC’s trademark rights supersede Zerorez’s commercial speech rights.⁹⁷

⁹³ Given the limited jurisdictional authority of the *Kasky v. Nike, Inc.* decision, the authors have decided to forego applying the decision to this particular analysis of the *Zerorez v. U.S. Olympic Comm.* case.

⁹⁴ HSK LLC, d.b.a. Zerorez vs. United States Olympic Comm., *supra* note 14.

⁹⁵ We use the congratulatory message as a proxy for all of Zerorez’s proposed tweets, if only because it provides the closest analogy to the *Jordan* case. This legal analysis applies equally to each of Zerorez’s other proposed tweets, given that they either congratulate Minnesotans or provide other statements of pure fact, and do not propose a commercial transaction of any kind.

⁹⁶ *Bolger*, *supra* note 55.

⁹⁷ The authors save for another day the equally vexing analysis and debate over the balancing of First Amendment versus trademark rights. See generally Rebecca Tushnet, *Trademark Law as Commercial Speech Regulations*, 58 S.C. L. REV. 737 (2007). In challenging the current validity of San Francisco Arts & Athletics, Tushnet states that “[l]ower courts have consistently followed the same cursory analysis with respect to traditional trademark infringement: confusing uses are misleading and therefore may be enjoyed without consideration of First Amendment interests.” *Id.* at 747. In arguing that the current overprotection of trademark rights leads to a chilling effect on speech, Tushnet concludes: “When we decide to allow consumer protection to trump freedom of commercial speech, we must do more

The application of *Bolger* to Zerorez's proposed tweets would arguably appear a straightforward victory for Zerorez. T1 is not close to an advertisement in the traditional sense, it does not reference a specific product or service, and as such there is no clear-cut economic motivation on Zerorez's part.⁹⁸ Hypothetical T2 certainly adopts a more traditional advertising tone, and one can insinuate more of an economic motivation; however, it is tougher to ascertain how, even given its added level of verbal "creativity," it would be sufficient to trigger *Bolger's* second element: reference to a specific product or service.⁹⁹ Granted, the *Bolger* test does not require all three elements to be present in order to find commercial speech. However, given how the *Bolger* court explained these elements, it is highly unlikely that even T2 would be deemed commercial speech. If, indeed, commercial speech is "speech which does 'no more than propose a commercial transaction,'" ¹⁰⁰ none of Zerorez's proposed tweets would appear to meet this threshold requirement.

As discussed above, the Seventh Circuit in *Jordan* expanded the manner in which commercial speech could be defined in the modern era of advertising. In sum, if a company too closely aligns its brand messaging with its alleged noncommercial messages, it can rise to the level of commercial speech. The increasing dominance of digital media as a platform for image advertising only portends, as suggested by Gervais and Holmes, escalating challenges.¹⁰¹

than simply declare 'false and misleading' commercial speech outside the boundaries of the First Amendment." *Id.* at 756.

⁹⁸ While some may espouse the view that any communication by a corporation is by its very nature economically motivated, the law suggests otherwise. As set forth in *Bolger*: ". . . the fact that Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech." *Bolger*, *supra* note 55, at 67. "The economic motivation of a speaker [should not] qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward" (Central Hudson, *supra* note 53, at 580 (Stevens, J. concurring in the judgment). See generally Sprague, *supra* note 92.

⁹⁹ Allowing for some latitude in creative messaging is at the core of ensuring that we do not chill free speech. Of course, as seen below, application of the Seventh Circuit's rationale in *Jordan* provides a more confounding result.

¹⁰⁰ Va. State Bd. Of Pharmacy v. Va. Citizens Consumer Council, Inc., *supra* note 53 at 762.

¹⁰¹ See Daniel Gervais & Martin L. Holmes, *Fame, Property, and Identity: The Scope and Purpose of the Right of Publicity*, 25 *FORDAM INTELL. PROP., MEDIA, & ENT. L. J.* 181 (2014). Indeed, as is particularly germane to the Zerorez case, one wonders if the outcome in *Jordan* would have been different had Jewel-Osco's creative message been communicated on its Twitter or Facebook account as opposed to in the pages

Although the tension in the Zerorez scenario is primarily between the First Amendment and trademark law, we can draw analogies from the *Jordan* case that spotlighted the tension between the First Amendment and the right of publicity. The *Jordan* case involved a congratulations message, albeit in a print ad format. Although the Seventh Circuit’s content-specific analysis of the Jewel-Osco’s advertisement arguably creates many gray areas for such future messaging, *Jordan* proposed a roadmap to congratulatory messaging that would pass legal muster:

If Jewel and Supervalu merely wanted to congratulate Jordan as they claim, they easily could have done so. They could have privately congratulated Jordan. If they wanted to publicly congratulate Jordan, they could have done so without identifying themselves as speakers. And if they wanted to publicly congratulate Jordan and identify themselves as the speakers, they could have done so using their corporate names (Jewel Food Stores, Inc. and Supervalu).¹⁰²

In other words, if Jewel-Osco had not prominently featured its brand logo and company slogan larger than its congratulatory messaging, had not cleverly married its slogan with Michael Jordan as (“Good things. . .just around the corner”), and had not espoused their shared geography (“fellow Chicagoans”), arguably Jordan could have been publicly congratulated within the parameters of the law. One can argue, alternatively, that the guidance for future congratulatory advertising boils down to this: creativity may kill.¹⁰³

Our hypothetical T2 is created specifically to illustrate the application of the Seventh Circuit “brand/image advertising” rationale and guidance to our Zerorez scenario. To begin the analysis, both communications entail congratulatory messages.¹⁰⁴ One can immediately see how the hypothetical T2 is more analogous, content-wise, to the Jewel-Osco advertising copy; the multiple references to “clean up,” aligning with Zerorez’s core cleaning services business, is analogous to Jewel-Osco’s use of phrases such as “good things. . .just around the corner.” Although not referencing a specific prod-

of Sports Illustrated? Would the delivery vehicle, notably the ephemeral nature of social media posts, matter?

¹⁰² Plaintiff-Appellant Michael Jordan’s Opening Brief and Required Short Appendix. *Jordan v. Jewel Foods, Inc.*, No. 12-1992 (7th Cir., Jul. 9, 2012), at 30.

¹⁰³ Indeed, one can argue, from the corporate marketer’s standpoint, that the fatal flaw in the Jewel-Osco’s congratulatory ad was simply the advertising copywriters’ desire to be clever and creative.

¹⁰⁴ Again, granted one is communicated through a print ad, the other through a social media post. We begin with the premise that the former would be far more susceptible to rising to the level of commercial speech.

uct or service, the question asked by the Seventh Circuit—what is the communication asking the consumer to buy? – could be similarly answered in assessing T2 as: any cleaning services or supplies that Zerorez sells. It is clear that T2 was designed to more closely align Zerorez’s business interests with the congratulation of Minnesota athletes, as well as to bolster the company’s image.¹⁰⁵

It is with a purpose that, in applying the Seventh Circuit rationale, we assess the hypothetical T2 first to determine, in applying the Seventh Circuit’s roadmap, what *would* have been acceptable communication by Jewel-Osco. T1, by avoiding any intertwining of Zerorez business purpose, imagery or slogans, would precisely adhere to the manner that the Seventh Circuit suggested Jewel-Osco “easily could have”¹⁰⁶ congratulated Jordan. Hence, even were the Zerorez case to have been brought in the Seventh Circuit, and based upon its proposed social media messages, the Seventh Circuit’s roadmap on how to properly congratulate someone would suggest a clear victory for Zerorez.

IV. ANALYSIS OF ZEROREZ’S LANHAM ACT CLAIMS

Determining the legal status of hashtags as trademarks has proven challenging as the law often lags behind advances in technology.¹⁰⁷ “The current legal landscape [finds] the USPTO continues to register trademarks while the courts have yet to definitely hold that hashtags function as trademarks.”¹⁰⁸ More specifically, Section 43 of the Lanham Act,¹⁰⁹ the federal trademark law within the United States, requires a valid trademark to perform the trademark function of identifying the source of the goods they refer to, as well as distinguishing them from the goods and services of others. However, it is acknowledged within the legal scholarship and beginning to be acknowledged by courts tackling these emerging issues, that hashtags, especially when used by the average person or consumer, primarily serve as

¹⁰⁵ The authors do not concede that T2 *would* rise to the level of commercial speech other than, perhaps, in the Seventh Circuit. For an article that proposes that such “image advertising” should nonetheless receive full First Amendment protection, see Deborah J. La Fetra, *Kick It up a Notch: First Amendment Protection for Commercial Speech*, 54 CASE W. RES. L. REV. 1205 (2004). Clearly, as La Fetra argues, failure to protect speech merely intended to bolster a company’s image can have a chilling effect.

¹⁰⁶ See *Jordan v. Jewel-Osco, Inc.*, supra note 74

¹⁰⁷ See Stephen McKelvey & John Grady, #JoinTheConversation: *The Evolving Legal Landscape of Using Hashtags in Sport*. 27 J. LEGAL ASPECTS OF SPORT 90, 94 (2017).

¹⁰⁸ *Id.*

¹⁰⁹ 15 U.S.C § 1125 (2012).

“conversation starters” and to aggregate conversations around a particular topic.¹¹⁰ Thus, the “source identification” and “distinctiveness” requirements become more difficult for plaintiffs to articulate when considering marks that also contain hashtags.¹¹¹

The basis of a Lanham Act claim is (1) the trademark serves as a specific indicator of source and that (2) consumers are likely to be confused or deceived as to the origin or sponsorship of the goods or services.¹¹² Therefore, in analyzing the application of the Lanham Act to Zerorez’s proposed tweet (T1) as well as to the hypothetical tweet (T2), one must first consider whether these are valid marks, and then determine whether the Lanham Act’s requirement to show a likelihood of confusion can be met. The relevant regulatory guidance and case law provide some initial answers, while leaving some questions still unresolved.

In 2013, the USPTO¹¹³ amended its guide for examiners, known as the Trademark Manual for Examining Procedure (“TMEP”), to specify that the inclusion of a hashtag symbol in front of the mark does not render it more distinctive than it would be without it.¹¹⁴ However, the TMEP also cautioned for the first time that a mark preceded by the hash symbol “*only* may be registered as a trademark if it functions as an identifier of the source of the applicant’s goods or services.”¹¹⁵ Thus, considering the general purpose and context in which companies or brands who post congratulatory messages involving Olympic athletes utilize protected marks, the Olympics clearly has valid marks, *when used as hashtags*.¹¹⁶ But this does not end the legal analysis.

¹¹⁰ See Elizabeth A. Falconer, *#CanHashtagsBeTrademarked: Trademark law and the development of hashtags*, 17 N.C. J. OF L. & TECH. ONLINE 1 (2016); McKelvey & Grady, *supra* note 107, at 91. See also Carrie L. Kiedrowski & Charlotte K. Murphy, *Are Hashtags Capable of Trademark Protection Under U.S. Law?* INTABULLETIN (Feb 1, 2016), <https://www.inta.org/INTABulletin/Pages/AreHashtagsCapableofTMProtectionunderUSLaw-.aspx>, [<https://perma.cc/N49B-2RBS>].

¹¹¹ See Alexandra J. Roberts, *Tagmarks*, 105 CALIF. L. REV. 599 (2017).

¹¹² See 15 U.S.C. § 1125(a)(1) (2012) (Any person who . . . uses in commerce any . . . name, symbol, or device . . . which—(A) is likely to cause confusion, or to cause mistake, or to deceive . . . as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . . shall be liable . . .).

¹¹³ The USPTO is empowered within the Lanham Act to oversee the registration process for trademarks within the United States.

¹¹⁴ TMEP § 1202.18 (2015).

¹¹⁵ Kiedrowski & Murphy, *supra* note 110.

¹¹⁶ This distinction is notable because the USOC never claimed to have registered #Rio2016 or #TeamUSA as marks (“tagmarks”) separate from the already well-established protected word marks Rio 2016 and Team USA. A search of the current trademarks registered under “Team USA” reveal none that also include

Turning to the likelihood of confusion, the allegedly infringing user (which would typically be a brand that is not a direct competitor to any TOP sponsor since direct competitors to official sponsor brands likely are not taking the legal risk by using Olympic intellectual property) is arguably not making any claim of (unauthorized) affiliation with the Olympic Games by using the hashtag mark (such as #Rio2016) or in order to induce consumers to buy goods or services. Thus, showing a likelihood of confusion (as to affiliation with or sponsorship of the Olympics) in the minds of consumers would be a high hurdle for plaintiffs to meet, which is the plaintiff's burden under the Lanham Act.¹¹⁷ According to McKelvey and Grady,¹¹⁸ it is more plausible that the uses of hashtags in these kinds of social media marketing messages (i.e., congratulatory tweets) surrounding a global sporting event, even when posted by companies on corporate social media accounts, are more focused on civic pride and starting conversations about the upcoming event,¹¹⁹ such as congratulating home-state athletes who are heading to compete at the Olympics. Moreover, given the nature of these types of messages, this would still arguably be protected speech under the First Amendment.

Turning to an analysis of our two tweets (T1, and hypothetical T2), it is clear now that Zerorez's planned Olympic-themed posts would stand a good chance of success in being found to not infringe the USOC's trademark rights. T1 makes no mention of any of Zerorez's products or services as part of its congratulations of Minnesota-based athletes heading to Rio. Furthermore, the #rioready hashtag it had planned is not one of the typically protected marks asserted by USOC (such as #Rio2016), making the legal determination of potential infringement somewhat more challenging. Yet, while the Rio 2016 Olympics is mentioned and is protected in the tweet, this could be considered a factual description about where the athletes are competing and therefore fair use, despite the USOC's explicit warnings to avoid referencing the Olympic Games in corporate social media posts by non-sponsors. In other words, just because the USOC says it has such rights and companies should avoid doing something does not mean the USOC

hashtags as the actual registered mark. The USOC warnings left this issue seemingly unresolved by asserting broad and all-encompassing rights when their existing marks were used as hashtags by non-sponsors. Official sponsors, on the other hand, are authorized to use *all* the protected word marks (and hashtags) in advertising and sponsorship messages as part of the official sponsorship rights agreement they enter into with the USOC.

¹¹⁷ 15 U.S.C. § 1125 (2012).

¹¹⁸ See McKelvey & Grady, *supra* note 108.

¹¹⁹ See *id.*

actually has the rights it has asserted. There is also a tenuous connection at best between the services offered by Zerorez and any perceived Olympic sponsorship that may or may not exist. Thus, Zerorez's proposed tweet would likely seem to not infringe the USOC's marks under a Lanham Act analysis.

Turning into the hypothetical tweet (T2), it is a closer call as to unauthorized affiliation or sponsorship with the Olympics, as there is a more direct sales proposition being made and allusion to the services offered by Zerorez. Furthermore, the connection between its cleaning services and athletes' "cleaning up" in Rio, alluding to a high medal count achieved by these athletes at Rio 2016 makes some Olympic connection more apparent for the consumer, yet still makes no assertion that it is an official sponsor of Team USA or the Olympics. In fact, the inclusion of additional hashtags like #cleanup probably weigh in Zerorez's favor as consumers would see this more related to its cleaning service business than the Olympics and athletes' performances there. The #rioready hashtag again provides some allusion to the Games, but seems focused on the athletes' performance and wishing them good luck, as opposed to trying to make a connection between Zerorez and any potential sponsorship with the USOC or Team USA that may exist. Moreover, T2 does not seem to suggest a motivation to "piggyback" off the Games, akin to an ambush marketing motive. Alternatively, if T2 also incorporated a #TeamUSA reference, such as "Congratulations to the 11 Minnesotans, part of #TeamUSA," one could make the argument that this creates a stronger likelihood of confusion amongst consumers. However, even then, such confusion would ultimately need to be sufficiently demonstrated through surveying of the relevant consumer base (a tactic that has in the majority of cases proven a high hurdle for trademark holders to overcome).

The Lanham Act analysis and the scant existing federal case law involving trademarks when used with hashtags demonstrates that marks containing hashtags (*i.e.*, tagmarks),¹²⁰ when used in the specific context of congratulatory messages, do not neatly "fit" within the traditional likelihood of confusion analysis needed to prove infringement and contain significant First Amendment issues that must be balanced against the rights of the trademark owner. It remains for future courts to provide not only a clearer roadmap for how to analyze trademark infringement claims involving hashtags but, more importantly, whether hashtags even function as trademarks.

¹²⁰ See Roberts, *supra* note 111. This term is used to refer to brands using hashtags as trademarks, such as KFC's use of #HowDoYouKFC.

V. ANALYSIS OF ZEROREZ'S OASA CLAIMS

In analyzing Zerorez's claims against the USOC under the Olympic and Amateur Sports Act,¹²¹ one has to recognize the exclusive jurisdiction and broad conferral of rights provided to the USOC within the framework of the OASA, and consider what this means for controlling (*i.e.*, restricting) marketing messages proposed by those who are not official sponsors of Team USA.¹²² Zerorez asserted two main claims with regard to the OASA through USOC's brand usage policies and warnings to businesses regarding potential marketing messages during the Rio 2016 Games. First, "The USOC has misrepresented and exaggerated the authority granted to it under the Ted Stevens Olympic and Amateur Sports Act," and second, "If the Ted Stevens Olympic and Amateur Sports Act were interpreted so broadly as to prohibit all businesses from non-commercial speech regarding the Olympics, the Act would be unconstitutional because it would restrict First Amendment rights."¹²³ There is legal support for both of these propositions, yet still some significant legal hurdles that Zerorez would face.

In *San Francisco Arts & Athletics*,¹²⁴ the Supreme Court recognized that the OASA's language and legislative intent were both broadly construed to promote the business interests of the USOC.¹²⁵ This not only gives the USOC rights in controlling how the word "Olympics" is used but also controls how the word Olympics and other "protected" words is used "for the purposes of trade . . . or to promote any theatrical exhibition, athletic performance, or competition . . ." ¹²⁶ The focus on describing commercial uses seems consistent with the congressional intent behind the OASA.¹²⁷ Consid-

¹²¹ Ted Stevens Olympic and Amateur Sports Act, *supra* note 15.

¹²² See *infra* note 126 for discussion about the broad language and legislative intent of the OASA.

¹²³ Complaint, HSK LLC, d.b.a. Zerorez vs. United States Olympic Committee, No: 16-civ-02641-WMW-KMM, (D. Minn. Aug. 4, 2016), *supra* note 14.

¹²⁴ *San Francisco Arts & Athletics, Inc. v. USOC*, *supra* note 43.

¹²⁵ "Section 110 [of the OASA] language and legislative history indicate that Congress intended to grant the USOC exclusive use of the word "Olympic" without regard to whether use of the word tends to cause confusion, and that § 110 does not incorporate defenses available under the Lanham Act." *Id.* at 528–30.

¹²⁶ 36 U.S.C. § 380(a) (2012).

¹²⁷ *San Francisco Arts & Athletics*, *supra* note 43 at 539. "[San Francisco Arts & Athletics] sought to sell T-shirts, buttons, bumper stickers, and other items, all emblazoned with the title 'Gay Olympic Games.' The possibility for confusion as to sponsorship is obvious. Moreover, it is clear that [San Francisco Arts & Athletics] sought to exploit the "commercial magnetism" of the word given value by the USOC. There is no question that this unauthorized use could undercut the USOC's efforts to use, and sell the right to use, the word in the future, since much of the

ering further the commercial free speech concerns in restricting the use of the word “Olympics” to certain uses by specific users (i.e. the athletes or official sponsors), the high Court found that “[e]ven though this protection may exceed the traditional rights of a trademark owner in certain circumstances, the application of the [OASA] to this commercial speech is not broader than necessary to protect the legitimate congressional interest, and therefore does not violate the First Amendment.”¹²⁸ This language strongly favoring the USOC would seem to foreclose many of Zerorez’s First Amendment claims.

Perhaps the context of how the marks were planned to be used on social media or the fact that the USOC was asserting legal rights beyond what it actually owned—a registered trademark in the actual “tagmarks” “#Rio2016” or “#TeamUSA”—would have some legal significance. Along these lines, Zerorez argued that the USOC, through its threats and warnings related to the brand use policies specific to social media, was essentially engaged in “trademark bullying.”¹²⁹

While the Supreme Court’s holding in *San Francisco Arts & Athletics* seems to grant the USOC the broad and over-arching rights to control *all* marketing activities surrounding the Olympic Games (with the ultimate goal being to preserve future sponsors’ investment in the Olympic movement within the United States), what are more prone to legal challenge perhaps are the nuances in the proposed planned tweets as well as how the hashtags were being used in the tweets (i.e., as conversation starters about the Rio 2016 Games), specifically whether these statements could be found to satisfy the OASA’s legal standard for violation: “tending to cause confusion, to cause mistake, to deceive, or to *falsely suggest a connection with the {USOC} or any Olympic activity.*”¹³⁰

While this is a lower standard than the Lanham Act’s well-enshrined likelihood of confusion test, it seems Zerorez’s planned congratulatory tweet (T1) could be found to be within the First Amendment protections for non-

word’s value comes from its limited use. Such an adverse effect on the USOC’s activities is directly contrary to Congress’ interest.” (internal citation omitted).

¹²⁸ *Id.* at 540.

¹²⁹ Timothy Geigner, *Dear US Olympic Committee: Tweeting About The Olympics Is Never Trademark Infringement*. TECH DIRT, (July 22, 2016), <https://www.techdirt.com/articles/20160722/07140335039/dear-us-olympic-committee-tweeting-about-olympics-is-never-trademark-infringement.shtml>, [<https://perma.cc/N9YW-E9E4>].

¹³⁰ *San Francisco Arts & Athletics*, *supra* note 43 at 529–30 (*emphasis added*). “This legislative history demonstrates that Congress intended to provide the USOC with exclusive control of the use of the word ‘Olympic’ without regard to whether an unauthorized use of the word tends to cause confusion.” *Id.* at 530.

commercial speech. The dissent by Justice Brennan, joined by Justice Marshall, is instructive regarding over-breadth concerns:

The [OASA] is overbroad on its face because it is susceptible of application to a substantial amount of noncommercial speech, and vests the USOC with unguided discretion to approve and disapprove others' non-commercial use of "Olympic." Moreover, by eliminating even noncommercial uses of a particular word, it unconstitutionally infringes on [San Francisco Arts & Athletics'] right to freedom of expression.¹³¹

A strong case can be made, based on prior First Amendment cases involving the USOC as discussed in Part II, that Zerorez *could* prevail under an analysis of the applicability of the OASA, based on the premise that corporate free speech rights should outweigh trademark rights claims absent blatant trademark infringement. With regard to the hypothetical tweet (T2) with a more direct connection to Zerorez's products and services, Zerorez would have a more difficult time arguing that the First Amendment allows it to refer to the Olympics "in connection with" its products and services, without being an official sponsor. The inclusion of a reference to "clean up" in terms of medals at the Olympics is likely sufficient to "tend to cause confusion" in the minds of consumers if, indeed, Zerorez has *some* connection to Team USA or its athletes, aside from sharing the geographical fact of being from Minnesota where several Olympians also resided. Thus, the OASA's burden for violation would be easier for the USOC to meet if the hypothetical tweet (T2) were at issue.

VI. CONCLUSION

The USOC, like other global sport properties, faces a confluence of shifting marketing and media factors that could greatly impact its current sponsorship model. While the USOC's efforts to restrict the use of hashtags during the Rio 2016 Olympic Games proved effective in a practical sense (by serving as a deterrent to non-sponsor brands who may have been considering creating Olympic-themed hashtags in marketing campaigns), it also emboldened some brands to become more creative with their tweets or Facebook posts, in order to skirt the existing rules and laws in order to make

¹³¹ *Id.* at 561. In further arguing that the terms of the Lanham Act should apply to infringement analysis, Justice Brennan added: ". . . while the USOC's trademark of 'Olympic' allows the USOC to regulate use of the word in the 'strictly business' context, the USOC's authority under [the Act] to regulate non-confusing and good-faith descriptive uses of the word 'Olympic' grants the USOC discretion to prohibit a substantial amount of noncommercial speech." *Id.* at 566.

a connection with Olympic fans. This ultimately enabled ambush marketers to thrive in the gray areas of the law¹³² and prompted brands like Zerorez to seek legal recourse for their proposed marketing plans.

Had the Zerorez case gone to trial and been fully litigated, we are highly skeptical as to whether the USOC's restrictive hashtag policies would have withstood judicial muster, especially under our analysis of T1 (which was one of the actual tweets proposed by Zerorez). Our application and analysis of current commercial versus noncommercial speech doctrine strongly suggests that the social media posts proposed by Zerorez would have been entitled to First Amendment free speech protections (this conclusion is only strengthened when one considers that even hypothetical T2 would most likely be deemed acceptable). Our analysis of the Lanham Act claim also portends an uphill battle for the USOC on two grounds. First, demonstrating evidence to meet the legal standard that Zerorez's proposed tweets are likely to confuse consumers as to the source or origin of its messaging, or to confuse consumers as to Zerorez's association, affiliation or sponsorship of the Olympic Games, is a high hurdle for the USOC; typically, these types of claims collapse under the weight of insufficient survey instruments and tactics. Second, the jury remains out regarding the issue of whether hashtags are even capable of serving in the trademark function as legislatively mandated by the Lanham Act, versus serving merely as aggregators of conversations, thus deserving of First Amendment protection; indeed, this is an issue that the courts will eventually need to resolve. Finally, although our analysis of the OASA claim would appear to provide the USOC's strongest legal footing, we argue that an enlightened court would view its hashtag policies as overly-broad, chilling otherwise protected freedom of expression and resulting in, as predicted by the dissent in *San Francisco Arts & Athletics*, a scenario whereby the USOC becomes the final arbiter of what corporations can and cannot say.

Why Zerorez's legal challenge is perhaps the best predictor of the forthcoming legal challenges facing the USOC and other sport organizations trying to regulate the social media space surrounding their events is there now exist multiple legal avenues by which to challenge the USOC's legal positions. As suggested throughout this article, individuals and brands now ubiquitously engage with and through social media in ways that do not communicate "endorsements" of the content or convey "sponsorship affilia-

¹³² See generally McKelvey and Grady, *supra* note 12 at 552. ("The complexity of rights issues within sponsorship contracts and the legal gray areas of ambush marketing, coupled with the creativity and ingenuity of ambush marketers, make it virtually impossible for event organizers to insure an ambush-marketing-free event").

tions” between a brand and a sport property. Using traditional trademark law analysis, therefore, might fall short of the legal impetus needed to establish infringement when used in an online context. Retweets have become so commonplace (indeed, expected) that one can barely imagine how a corporation’s retweet (even a retweet from the UOSC’s official twitter account) could be viewed as suggesting an endorsement of the athletes or event mentioned and therefore off limits. Instead, it is more likely for fans to expect to see corporations engaging with athletes and with events surrounding competition and congratulating them when they win without the chilling specter of a lawsuit hanging over them.

The guidance conferred by the Seventh Circuit regarding how congratulatory messages could legally be conveyed (albeit in the context of a print ad) is a solid predictor of how future legal challenges could be handled. First, it is clear that congratulatory messages and other fact-based statements that do not directly or even cleverly indirectly align the message with the brand should be protected under the First Amendment’s free speech provisions. Second, the legal and practical distinctions between traditional advertising and social media posts will continue to meld as consumers expect to see congratulatory messages related to athletes during the period of the Olympics; conversely, consumers would not (nor should they) expect such content and conversations to be reserved exclusively for a handful of elite global sponsor brands. By being more open to how their trademarks, when used as hashtags, can be utilized to spread the Olympic message to a wider and younger audience via social media, the USOC will begin to effect a legal position that can assure an adequate level of trademark protections for its sponsorship program while eliminating the chilling effect on the First Amendment rights of non-sponsors.

Ultimately, the USOC and its global counterparts should consider relying less on their legal arsenal in a punitive way, but instead develop policies on hashtag use that allow non-sponsors their full free expression and free speech rights (while also tacitly acknowledging the benefits of having their events ultimately “promoted” by non-sponsors). While this may seem anathema to the current brand use guidelines and would cause concern for the chief marketing officers at each TOP sponsors’ headquarters, it would signal a paradigm shift in a new social media era while also recognizing that future legal challenges could very well weaken the USOC’s existing legal position, both in the court of law and in the court of public opinion.