

UNAUTHORIZED USE OF THE TERM "OLYMPIC"; MUCH ADO ABOUT NOTHING?

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In a story entitled "Use of Word 'Olympic' Reserved for USOC Only," the July 1984 edition of Dateline: NRPA contained the following admonition:

Use of the word "Olympic" when associated with a competitive sport or other recreation event is reserved exclusively for the U.S. Olympic Committee. Under federal law, no athletic performance or competition can be promoted with words "Olympic," "Olympaid" or "Citius Altius Fortius," including such games as "Senior Olympics" or "Olympics."

Public park and recreation agencies which use such terms could be subject to civil court action.

The National Recreation and Park Association inadvertently used the term "Olympics" in several of its programming suggestions for the celebration of National Recreation and Parks Month. The U.S. Olympic Committee brought the violation to NRPA's attention and asked that all park and recreation organizations be notified of the federal law governing use of such wording.

The alleged violation was contained among programming suggestions entitled "Get a Taste of the Olympic Season." One reference stated: "Everyone Can Be An Olympian." Another advised agencies to stage "your own neighborhood Olympics," including recommendations for a "Golden Age Olympics" or "Corporate Olympics." In addition, the U.S. Olympic Committee was listed as a contact following a suggestion to stage "The Under-Age Olympics as though it were the real thing."

Understandably, recreation and park professionals may be under the impression that any use of the term "Olympics" such as "Senior Olympics" or similar terminology used to promote public recreation programs necessarily violates the exclusive use rights of the United States Olympic Committee (USOC) in "Olympic" terms and symbols. The following discussion of pertinent case law will hopefully clarify the issue and provide some insight into the legal analysis applied by federal courts in determining the scope of these USOC rights in "Olympic" terms and symbols.

In pertinent part, the federal law referred to above (36 U.S.C. § 380) prohibits the unauthorized use of Olympic symbols, emblems, trademarks, and names "for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition . . . [using] the words 'Olympic', 'Olympiad', 'Citius Altius Fortius', or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation [U.S. Olympic Committee] or any Olympic activity..." Arguably, this statute would not prohibit every use of Olympic terminology, unless such unauthorized use suggests a connection with the U.S. Olympic Committee for trade, sales, or promotional purposes.

It is doubtful whether NRPA's programming tips suggest a false connection between the U.S. Olympic Committee and the association's promotion of National Recreation and Parks Month. Certainly, these NRPA programming recommendations were in no way commercial in nature. Further, the association did not espouse any commercial use of the term "Olympic." It is, therefore, my opinion that NRPA's use of the term "Olympic" in its promotion of National Recreation and Parks Month did not violate the applicable federal law. The following discussion of relevant case law seems to support my narrower construction of the statute than that described in *Dateline: NRPA*.

JAILHOUSE ROCK

In the case of *Stop The Olympic Prison v. United States Olympic Committee* 489 F.Supp. 1112 (1980), a federal district court considered the scope of protection to be afforded to the United States Olympic Committee (USOC) for Olympic symbols and terms registered as trade and service marks. This particular suit was prompted by a poster published by STOP (Stop The Olympic Prison), a non-profit group opposed to the planned conversion of the Olympic Village in Lake Placid (N.Y.) into a federal prison after the 1980 Winter Olympics. The court provided the following description of the poster:

The top half of the poster consists of the words "STOP THE OLYMPIC PRISON" in large striking letters. Immediately below is a drawing of five vertical steel-grey bars upon which are superimposed five interlocking rings in an arrangement universally recognized as a symbol of the Olympic Games. Thrusting through the bars and the rings is a silhouetted forearm clutching a flaming torch. Beneath the drawing, in 3/16-inch lettering, is the following legend: STOP (Stop The Olympic Prison)

STOP admitted to "having sold some of the posters for one dollar apiece." The court, however, noted that these sales appeared "to have been largely a means of soliciting contributions for its cause, since most of the posters were given away free." In addition, none of the posters were "sold or distributed by commercial outlets such as bookstores." STOP maintained that the "purpose in designing, printing, and distributing the poster is and has always has been to publicize and marshal public opposition to current plans to convert the Olympic Village in Lake Placid into a prison after the Winter Games."

The executive director of the USOC wrote to STOP requesting that "it immediately cease and desist from using the word 'Olympic' as well as the Olympic rings on any material under STOP's control. In its letter, USOC issued the following warning: "Rest assured this office will take all steps that are necessary to insure compliance with the Law."

According to the USOC, the poster violated federal law (36 U.S.C. § 379 et seq.). Specifically, the Amateur Sports Act of 1978 had provided the USOC with trademark law protection for use of Olympic symbols and terms. Subsection (a) of 36 U.S.C. § 380 provided the following:

Without the consent of the Corporation [USOC], any person who uses for the purpose of trade to induce the sale of any goods, or to promote any theatrical

exhibition, athletic performance, or competition-(1) the symbol of the International Olympic Committee, consisting of five interlocking rings; (2) the emblem of the Corporation, consisting of an escutcheon having a blue chief and vertically extending red and white bars on the base with five interlocking rings displayed on the chief; (3) any trademark, trade name, sign, symbol, or insignia falsely representing association with, or authorization by, the International Olympic Committee or the Corporation; or (4) the words "Olympic", "Olympiad", "Citius Altius Fortius", or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity; shall be subject to suit in a civil action by the Corporation for the remedies provided in... the Trademark Act of 1946.

STOP refused to comply with the USOC request. Instead, STOP brought suit in federal district court seeking a declaratory judgment from the court to the effect that STOP's "use of word 'Olympic' and the interlocking rings does not violate any trademark rights of the USOC and does not violate [the above-cited provisions of the Amateur Sports Act of 1978]."

As described by the federal district court it was "necessary to determine the range of uses to which the USOC may properly claim exclusive right under section 380." Subsection (c) of 36 U.S.C. § 380 provided the following:

The Corporation [USOC] shall have the exclusive right to use the name "United States Olympic Committee"; the symbol described [in section 380] . . . the emblem described [in section 380] and the words "Olympic", "Olympiad", "Citius Altius Fortius" or any combination thereof subject to the preexisting rights . . . (The law permitted the continued use of any similar olympic words and symbols used lawfully before September 21, 1950)

According to the federal court, the "broad wording" of subsection (c) "cannot be interpreted to mean that only the defendant and its licensees may use the word 'olympic' and the enumerated symbols for any purpose whatsoever." On the contrary, the federal court found 'Congress' objective in establishing federally chartered corporations like the USOC] has been to prevent the deceptive or confusing use of these corporations' mottoes, emblems, and the like by unauthorized persons." In the opinion of the court, there was "no indication that Congress [in the Amateur Sports Act of 1978] meant to treat the USOC and its protected symbols any differently."

[S]ection 380, read as a whole, evidences a legislative intent to establish strong protection for the Olympic symbols, in part to ensure the market value of licenses for their use. Recent experience has shown such licensing to be a substantial inducement for contributions from a wide variety of commercial corporations, and the drafters of...[this law] appear to have had this clearly in mind.

In this setting ... [the law] appears to have been designed to prevent all persons other than the USOC from registering the Olympic words and symbols as trademarks or service marks in connection with any types of goods or services whatsoever, rather than as a blanket prohibition of all uses whether commercial or

not. What little legislative history there is about... [this law] supports this conclusion.

As a result, the federal court concluded that STOP's poster did not violate 36 U.S.C. §380.

The poster was not used "for the purpose of trade," or "to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance or competition." None of the posters have been sold or distributed commercially, and they are available free of charge. Only a relative few were sold by STOP, and the money paid for each appears to have been more in the nature of a contribution to STOP than a purchase price.

The federal district court also considered whether STOP's use of the olympic term and symbols constituted infringement of the USOC's rights under federal trademark law known as the "Lanham Act" (15 U.S.C. §§ 1114, 1125). According to the court, "the touchstone of trademark infringement under the Lanham Act is likelihood of confusion." As described by the court, "confusion" within this context "has traditionally meant confusion as to the source or origin of goods or services in connection with which a trademark is used." On the other hand, "courts have come to accept confusion as to sponsorship, endorsement, or some other affiliation as satisfying the requirement." In addition, the Lanham Act prohibits false advertising, deceptive use of trademarks, and trademark dilution of disparagement.

The court noted, however, that "the Lanham Act was not intended to prohibit all uses of a trademark by persons other than the owner." Applying these principles to the facts of the case, the federal district court concluded that the USOC had "failed to establish its entitlement to an injunction [prohibiting STOP's use of the olympic term and symbol], since it has proven no injury of any of the types catalogued [i.e. confusion, false advertising, deception, dilution, or disparagement in the use of a trademark]"

The defendant [USOC] has offered no evidence whatsoever of public confusion as to source or origin, or as to sponsorship, endorsement, or any other affiliation. Defendant [USOC] has produced no affidavits, letters, or other communications from any person who believed the poster to have been sponsored or endorsed by, or in any way connected with, the USOC...or any other organization or persons associated with the Olympics. Nor has the defendant [USOC] undertaken to produce any surveys of public perception of plaintiff's poster. In fact, defendant [USOC] has described not even one incident from which confusion might be inferred.

USOC maintained that "proof of actual confusion is unnecessary to establish trademark infringement, as long as such confusion is the likely result of the infringing activities." Noting that "the poster itself contains a legend indicating its sponsors," the court rejected this argument. "[T]he defendant [USOC] has proven no improper intent on the part of plaintiff [STOP] to 'pass off' its poster, to confuse or deceive anyone, to misappropriate the defendant's marks for its own profit, or even to impugn the defendant." Further, the court found that USOC had not shown an actual injury of any sort.

On the basis of its own examination of the poster, the Court finds it extremely unlikely that anyone would presume it to have been produced, sponsored or in any way authorized by the USOC. While at a fleeting glance, some one might conceivably mistake it for a poster advertising the Olympics, nobody could conceivably retain such a misconception long enough to do any harm; for example, there is no danger that anyone would purchase or display it as such.

According to the court, "injunctive relief cannot be granted on pure speculation." As a result, the court concluded that the USOC had "failed to meet its burden of proving trademark infringement."

Similarly, the federal district court rejected the USOC's contention that STOP's use of the olympic tenn and symbol constituted "trademark dilution." Within this context, "dilution" refers to "a loss of distinctiveness, a weakening of a mark's propensity to bring to mind a particular product, service, or source of either.

Since the poster is not likely to be viewed as a commercial advertisement, there is no danger that it will induce anyone to associate the word "olympic" or the Olympic symbols with any goods or services not provided, sponsored or endorsed by the USOC. Nor does it appear likely that it will induce viewers to associate them with STOP or its constituent members in such a way that it weakens their propensity to bring to mind the Olympic Games or the USOC.

The federal district court also considered whether STOP's use of the olympic term and symbol constituted "deception" under the Lanham Act. According to the court, "the burden remains on the party making the claim to prove the tendency to mislead or deceive." Under the circumstances of this case, the court found the USOC had failed to prove that the STOP's poster was false or misleading, or in any way impugned the USOC.

As described by the court, the Lanham Act "encompasses more than literal falsehoods and protects against sophisticated deception as well." However, the "crucial question" in determining deception under the Act was "what would a person viewing the poster find to be the message?" In the opinion of the court, the USOC in this case had presented no proof of deception. In other words, a person viewing the poster would not be deceived, through the use of the Olympic symbols and the word "olympic," into thinking that STOP was in any way involved with the USOC.

As characterized by the court, the USOC's "real concern here is that the poster will cause the public to associate the Olympic Games and the USOC with a federal prison." The court doubted that the Lanham Act applied to this type of alleged deception. In the opinion of the court, the USOC's trademark rights had to be balanced against STOP's right of free speech.

[T]here is no suggestion that the alleged deception was in connection with any goods or services ... [M]ore important, the Lanham Act should not be construed in a manner that would bring it into conflict with first amendment interests ... While

Congress may limit first amendment rights to prevent fraud, copyright infringement or palming off, such limitations must be drawn narrowly, so as to meet the perceived evil, without unnecessary impingement on the right of free speech.

The federal district court, therefore, found STOP entitled to a declaratory judgment "declaring that its poster does not violate section 380 of Title 36, United States Code, or infringe any of the defendants trademark rights."

A SECOND OPINION

In a 1984 decision, *United States Olympic Committee v. Intelicense* 737 F.2d 263, the United States Court of Appeals, Second Circuit described the purpose of the Amateur Sports Act of 1978 (36 U.S.C. §§ 371-96) as follows: "The fundamental purpose of that Act was to safeguard the USOC's ability to raise the financial resources that are a critical component of America's capacity to send world-class amateur athletes into international competition without the massive governmental subsidies enjoyed by competitors from other nations." As stated by the federal appeals court, "the Congressional intent in enacting § 380 [prohibiting use of olympic terms or symbols Without USOC authorization] was to promote the United States Olympic effort by entrusting the USOC with unfettered control over the *commercial use* of Olympic-related designations." (*Emphasis added.*) According to the Court, this law "would facilitate the USOC's ability to raise those financial resources from the private sector that are needed to fund the United States Olympic Movement."

This statute, enacted in 1978, empowers the USOC to exercise exclusive jurisdiction over all matters pertaining to the participation of the United States in the Olympic Games. The Act further vests the USOC with the responsibility of financing the participation of the United States in the Olympic Movement.

Because the USOC is the only NOC [National Olympic Committee] that does not receive formal financial assistance from the Government, financing the United States Olympic team poses unique obstacles. Consequently, the marketing of the Olympic symbol in the United States assumes great importance. Protecting the value of the Olympic symbol was, therefore, a significant factor that led to the passage of the Act.

The appeals court noted that the USOC in 1980-1982 received 45% of its income from its 44 corporate sponsors. Consequently, the federal trial court in this case had concluded "if the USOC could not grant exclusive rights to market the Olympic symbol, the number of corporate participants would greatly be reduced and the USOC would find itself unable to raise the funds required for participation in the Olympic movement." Citing *Stop The Olympic Prison v. USOC* described above, the appeals court found "a primary purpose of § 380 was to insure the market value of licensees. (*Emphasis added*) According to the appeals court, every court which has considered the intent of § 380 (including the trial court in this particular case) has reached a similar conclusion.

THE BOTTOM LINE

Based upon the preceding discussion, would every use of the term "Olympic" by public recreation departments violate rights granted to the USOC under the Amateur Sports Act of 1978? Although reasonable minds may differ, I think it is certainly arguable that a term like "Senior Olympics" would not have any adverse impact on the market value of USOC licenses. Consequently, I think the federal courts would probably allow public recreation agencies to use terms like "Senior Olympics" absent a showing by the USOC that such use was commercial in nature and/or falsely suggested a connection with the U.S. Olympic Committee.

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