

It's an ambush! When is it not ok to reference the Olympics in advertising? (Hint: most of the time)

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Every four years you are guaranteed a few things: an extra day to enjoy, a US presidential election with a highly entertaining accompanying media circus and of course, the Summer Olympic Games. You can also bet your bottom dollar that our feelings of patriotic pride in the green and gold mean a ton of value is added to brands linked with the Games, and brands (and agencies) know this well. Some brands are linked (like sponsors), while others wish they were (i.e. everyone else). The exercise of cashing in on the Games without actually being a sponsor goes by a few names, including "ambush marketing", and it is a legal minefield that invariably leads to certain questions from advertisers every four years. We've answered a few of them below.

Our target market loves the Olympics and we love our teams! How can my brand get in on the fun?

Well let's start with the obvious and say that the only way to enjoy the full benefits of an Olympic association is to be an official sponsor. The famous Olympic rings logo as well as all other Olympic designs are protected by trademark and copyright and can only be used with permission. Further, each host country is also required to have special legislation in place to enforce ownership of all Olympic owned designs including the rings logo, mascots and designs of the torch. The laws also protect certain expressions from being used without permission, namely the words "Olympic", "Olympics", "Olympic Games", "Olympiad" and "Olympiads". These are "protected expressions" and specifically cannot be used for commercial purposes or in association with any goods or services without the express permission of the International Olympic Committee (IOC). In Australia, the relevant legislation is the *Olympic Insignia Protection Act 1987 (Cth.)*. The Act applies to both Summer and Winter Olympic Games (including the upcoming Rio 2016 Games) and is the way in which the IOC can enforce its rights in Australia, through its Australian arm, the Australian Olympic Committee (AOC). So, there are a few things to consider.

Ok, but what if my brand can't be an official sponsor? Surely I can talk about the Olympics or use Olympic imagery in an obviously factual/non-official capacity?

Well, no not really. The IOC are generally extremely protective, as is the AOC when acting on its behalf, both of their intellectual property and their sponsorship deals. Therefore, attempting to reference the Olympics in any way in advertising can be a risk for non-sponsors. Even tickets to the Olympic Games events must only be given away (as prizes in a competition for example) with permission from the AOC in writing. Therefore if an advertiser refers to the Olympics in a meaningful way or places a significant focus on it in its advertising, whether through specific mentions or visual cues and imagery, it implies that the advertiser is linked (i.e. has paid for the privilege) to the Olympic Games in an official capacity. If no such relationship exists, and the mentions of the Olympic Games are solely for the purpose of taking a "free ride" off the reputation, this opens the advertiser up to attracting a legal claim that they are "passing off" on the reputation of the Olympic Games, as well as other legal causes of action.

But what if I am only mentioning the Olympics offhand? Isn't a one-off mention of the Olympics harmless? After all, everyone will be watching and talking about the 100m sprint finals on social media. Why can't we?

Again, brands talking about the Olympic Games online is very different to the average Jane/Joe doing so. Like a lot of legal problems with advertising, the context in which statements are made is very important, whether we're talking about the 100m sprint finals or some other event with Australian teams participating. For instance, Sally Smith, a student from South Yarra posting a photo of basketballer Patty Mills during a game to her 1,200 followers on Twitter and saying "*I love Patty Mills! How great are the Boomers playing? The Olympics are the best aren't they?! #goAussies*" is generally harmless and encouraged social media interaction. On the other hand, a non-sponsor like ABC Electronics posting the same photo and saying "*ABC Electronics loves Patty Mills! How great are the Boomers playing? The Olympics are the best aren't they?! #goAussies*" is probably a very different matter as any use by a brand of its social media channels is always going to be inherently self-promotional and therefore commercial in nature. That said, even the above example might be acceptable provided the specific mention of the Olympics was removed, and the focus was on the local team or players only. Again, context is king and tweaks to the language could make all the difference.

Can I just be really REALLY clever about it, and not specifically mention the "Olympics" or any of the above, but just leverage the "spirit" of the games?

Well now that you've read the above, you're probably starting to understand why a lot of brands do exactly this sort of thing. The simple answer to this question is "Yes", with the caveat that you have to be very careful, and many brands get this wrong. Expressions similar to those above are still caught by the Act, and using imagery or other copy that implies a commercial/sponsorship connection will also be a legal risk. For instance, clear references to "the games" could still run the risk of attracting a passing off claim. However, the legislation cannot comprehensively outlaw all possible forms of ambush marketing. For example if a company has a direct sponsorship arrangement with a past Olympic athlete but is not an official Olympic Games sponsor, they may be able to promote their association with that athlete without mentioning the Olympics or any other prohibited expressions, and this may not necessarily breach the Act. Note that restrictions apply to athletes participating in the Games appearing in advertising during, and for set time frames around, the Games. Additionally, subtle references to expressions that are inherently linked to the "spirit" of the Olympic Games, such as "gold" or "glory" or "Aussies" could be employed at low risk, but ultimately the context is key, and a careful assessment of risk should be undertaken to ensure that in the event of a challenge, a clear defence is available. Further, care would need to be taken to ensure no other misleading representations are made, such as implying an official endorsement of a particular athlete or team where this was not the case.

So what should advertisers bear in mind when considering getting "into the spirit" of the Olympic Games?

Hopefully we've given you a good grounding in the complexity that exists in this space, and the complexity sort of sucks the fun out of it all really. But there are ways for brands to show their support and engage with their market at the same time without tripping up – it is just a matter of knowing the risks, and doing things well so that they avoid trouble. A few pointers below should assist:

1. Use of any Olympic designs are clearly a no-go without permission, and attempts to recreate the same, whether partially or not, must still consider the implications of trademark, copyright and passing off.
2. Express references to the Olympics are also prohibited and should be avoided.
3. Any references to the "spirit" of the games should still be carefully assessed and legal advice sought to ensure the level of risk with regards to attracting any legal issues is low.

Contact us

If you would like further information on the legal risks surrounding the use of Olympic expressions, or assistance in assessing the risk of an advertisement, please contact one of our experts below. We can provide tailored legal and practical advice to assist you with reviewing or clearing advertising material.

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