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# GOLD MEDDLING: HOW THE U.S. OLYMPIC COMMITTEE OVERPROTECTS THE OLYMPICS BRAND

## I. INTRODUCTION

Few events are as well known and understood as the Olympic Games. The very word has nearly universal recognition; it evokes images of the highest level of competition and images of the greatest athletes in the world completely devoting themselves to a contest with their peers. In the contest to host the 2016 Summer Olympic Games, though, the city of Chicago is discovering that it does not enjoy this kind of all-encompassing competition. Instead, Chicago faces strict limits on how it can use Olympic-related words and images, including the word “Olympics” itself.

A federal statute grants the United States Olympic Committee (“U.S.O.C.”) an exclusive right to use all Olympic-related words and images.<sup>1</sup> In contrast, the rights to use most other words and images are governed by the federal trademark registration process.<sup>2</sup> This is not a difference of mere semantics; the U.S.O.C. actually has far more protection than a typical trademark holder. In theory, this is to give the U.S.O.C. a greater ability to raise funds for the U.S. Olympic team. In practice, though, this has overprotected the U.S.O.C.’s fundraising interests. The protection gives the U.S.O.C. effective control over all aspects of the Olympic “brand”. This control may be necessary in terms of Chicago’s Olympic bid, but it has proven to be a major hindrance for the country as a whole.

Chicago is only realizing this standard now that the U.S.O.C. has begun to enforce its rights in the city. In 2005, the committee forced the Improv Olympic Theater to change its name to the I.O. Theater.<sup>3</sup> In 2007, the U.S.O.C. forced the city to abandon a logo it had been using because the logo resembled the “Olympic torch” mark.<sup>4</sup> In both cases, it was unclear if the U.S.O.C.’s fundraising interests were actually threatened, but the committee still forced the theater and the city to stop using the Olympic “brand”. The U.S.O.C. did not actually sue either entity, but it did not have to; the U.S.O.C.’s political and finan-

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1. *Amateur Sports Act of 1978*, 36 U.S.C. § 220506.

2. *Lanham Act*, 15 U.S.C. §§ 1041-1141.

3. Emily Bryson York, *No Joke: Olympics Muscle Theater Crain’s Chicago Business* (2005).

4. Phil Hersh and Mark Caro, *Torch on Chicago logo gets scorched*, *Chicago Tribune* (2007).

cial power, combined with its certainty of success in any legal action, was enough to convince the theater and the city to give in.

For the country as a whole, we may have little problem with some of this. The “torch” and “ring” marks of the Olympics, for example, are strong, iconic images with obvious creative and promotional value. It seems proper- if not necessary- that they somehow be protected. Moreover, the U.S.O.C. seems like the obvious beneficiary of such protection, given that it is responsible for fielding the country’s Olympic team and thus has a very definite fundraising interest.

However, we may not be so comfortable with limiting the use of a single word, especially one as well known and evocative as “Olympics”. In terms of free speech, it seems unfair to put strict rules on where, when, and how that word can be used. Even if those rules are needed, though, it is not at all clear that the U.S.O.C. deserves the protection of exclusive use of the word. It is unclear how broader usage of “Olympics” could possibly hurt the U.S.O.C.’s fundraising. Also, while the U.S.O.C. generally guards its fundraising interests jealously, it has not always been vigilant about protecting its right to the word “Olympics”. For example, the theater kept its original name for 20 years before the U.S.O.C. contacted it.<sup>5</sup> In this time, the theater built up its own goodwill in the “Improv Olympics” name, but that goodwill meant nothing in the face of the U.S.O.C.’s exclusive rights. These exclusive rights, then, have created important concerns in terms of free speech and trademark equity.

This article will first examine the U.S.O.C.’s exclusive rights under federal law. The Amateur Sports Act of 1978 (“A.S.A.”) granted the U.S.O.C. these rights.<sup>6</sup> However, the Lanham Act’s trademark registration process governs most other exclusive rights to use words and images. Thus, the U.S.O.C.’s rights are obviously distinct from those of a typical trademark holder. According to litigation under the A.S.A., the U.S.O.C. actually has far more power than any typical trademark holder. However, while the U.S.O.C. may have legitimate fundraising interests that lead to the passage of the A.S.A., the statute actually goes too far. This article will show that in many cases, the A.S.A. overprotects the U.S.O.C.’s interests and does a disservice to the country as a whole.

Second, this article will examine how the U.S.O.C. has tried to enforce its rights in light of Chicago’s bid to host the 2016 Summer Olympic Games. While it is unclear if the U.S.O.C.’s fundraising in-

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5. York, 2005.

6. 36 U.S.C. § 220506.

terests were actually at risk, the committee still used its political influence, financial largesse and legal advantages to stop the use of any Olympic-related words and images in the city. Interestingly, the U.S.O.C. managed to do all of this without resorting to any litigation. These incidents, then, are the most recent- and the most telling- illustrations of how the U.S.O.C. controls the Olympic "brand", even when its financial interests are not at stake.

Finally, this article will propose an alternative to the U.S.O.C.'s exclusive rights under the A.S.A. A simple trademark, as governed by the Lanham Act<sup>7</sup>, would still protect the U.S.O.C.'s fundraising interests, but it would not inhibit anyone else as the A.S.A. has. The very factors that determine trademark infringement would also determine if the U.S.O.C.'s fundraising interests are at risk. Thus, the U.S.O.C. would be able to concentrate on actual threats, and everyone else would be able to use these very evocative words and images. A simple trademark, then, would successfully balance the interests of the U.S.O.C. and the general population.

## II. THE AMATUER SPORTS ACT

### A. *Statutory Law*

The U.S.O.C.'s control over the Olympic "brand" comes from the Amateur Sports Act of 1978.<sup>8</sup> The A.S.A. gives the U.S.O.C. an "exclusive right to use" the words "Olympiad", "Olympian", "Pan-America", and even "Olympics" itself.<sup>9</sup> It also gives the U.S.O.C. the exclusive right to use several images, including the "five interlocking rings" mark of the Olympic games and the "torch" mark of the Pan-American Sports Organization.<sup>10</sup> Finally, the A.S.A. gave the U.S.O.C. the exclusive right to use any combination of these words and images.<sup>11</sup> Under the A.S.A., the U.S.O.C. can authorize anyone else to use these words and images.<sup>12</sup> This is most commonly seen in the many promotions for the "official sponsors of the U.S. Olympic team", and has proven to be a potent fundraising tool for the U.S.O.C.<sup>13</sup> However, if anyone uses any of these words or images without permission, the U.S.O.C. can successfully sue them for in-

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7. 15 U.S.C. §§ 1051-1141.

8. 36 U.S.C. § 220506.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Stop the Olympic Prison v. U.S. Olympic Committee*, 489 F.Supp. 1112, 1114 (S.D.N.Y. 1980).

fringement simply by showing that the words or images were used.<sup>14</sup> The only exception to this is that several businesses using "Olympic" before the A.S.A. was passed were allowed to continue using it, even without the U.S.O.C.'s permission.<sup>15</sup> In other words, the A.S.A. gives the U.S.O.C. an effective monopoly over all Olympic-related words and images, and complete control over how they can be used.

Congress was willing to give the U.S.O.C. this advantage because without it, the U.S.O.C. was in danger of falling behind other national Olympic organizations. This is because unlike most countries, the U.S. does not fund its Olympic team with public money.<sup>16</sup> Thus, the U.S.O.C. is completely dependent on private donations. Congress still wanted a successful Olympic program, though, so it wanted to make it easier for the U.S.O.C. to solicit those donations.<sup>17</sup> Congress ultimately decided that the best way to do this was to give the U.S.O.C. complete control over Olympic-related words and images so that the U.S.O.C. would not have to compete with anyone else using the Olympic "brand."<sup>18</sup>

To fully understand the significance of the A.S.A., it is important to understand the differences between the U.S.O.C.'s exclusive rights and typical trademark rights. Trademarks are governed by the Lanham Act, which requires that a potential holder register their mark before they can enjoy the benefits of exclusive use.<sup>19</sup> These marks can include words, images, or combinations of the two, but they must identify and distinguish the holder's goods or products.<sup>20</sup> After the mark is registered, the Lanham Act protects the holder against "fraud by the use of reproductions, copies, counterfeits, or colorable imitations of registered trademarks."<sup>21</sup> To succeed on a claim under the Lanham Act, a plaintiff must show that their mark is protected and that the defendant's use of the mark is likely to cause confusion.<sup>22</sup>

Proving confusion has often been difficult, but courts have identified eight factors that help decide that issue. No factor is determinative; instead, these factors act as a sort of common sense "balancing test."<sup>23</sup> The first factor is the strength of the mark.<sup>24</sup> A generic mark

14. *San Francisco Arts and Athletics v. U.S. Olympic Committee*, 483 U.S. 522, 528 (1987).

15. *O-M Bread, Inc. v. U.S.O.C.*, 65 F.3d 933, 1995 U.S. App. LEXIS 25188.

16. *U.S. Olympic Committee v. Intelicense Corp.*, 737 F.2d 263, 266 (C.A. 2 1984).

17. *Id.*

18. *Id.*

19. 15 U.S.C. § 1501.

20. *Packman v. Chicago Tribune Company*, 267 F.3d 628, 638 (C.A. 7 2001).

21. *Id.*

22. *Jordache Enterprises v. Levi Strauss & Co.*, 841 F.Supp. 506, 514 (S.D.N.Y. 1993).

23. *Id.* at 515.

that only describes the product is weaker than a more creative or fanciful mark. The second factor is the degree of similarity between the original mark and the defendant's mark.<sup>25</sup> The more similarities between the two marks, the more likely they are to cause confusion. The third factor is the proximity of the products.<sup>26</sup> If the products the holder and the defendant put out are also similar, then there is a greater chance of confusion, and thus infringement. The fourth factor is the likelihood of "bridging the gap".<sup>27</sup> If the holder or the defendant plans enter the other's market (if they are even in separate markets at all), then there is a greater chance of confusion. The fifth factor is actual confusion.<sup>28</sup> Actual confusion can mean either anecdotal or statistical evidence that consumers have confused the two marks and products. The sixth factor is good faith.<sup>29</sup> If the defendant is not trying to "cash in" on the holder's reputation by using the mark, there is a lesser chance of confusion and infringement. The seventh factor is the quality of the defendant's product.<sup>30</sup> If it is actually a well-made product that could survive in the market without the holder's mark, there is a lesser chance of confusion. The final factor is the sophistication of potential customers.<sup>31</sup> If the customers are savvy enough to tell the products apart even with the similar marks, then there is obviously a lesser chance of confusion and infringement. Taken together, these factors determine the likelihood of confusion and even the likelihood of an actual threat to the trademark holder. However, this extensive analysis is not used in A.S.A. claims because the A.S.A. does not require a plaintiff to prove a likelihood of confusion.<sup>32</sup>

Congress passed the Lanham Act and the A.S.A. with very different motivations. Congress did not pass the Lanham Act to benefit anyone in particular, but to make business practices and advertising fairer. Specifically, Congress intended the Lanham Act to eliminate deception and unfair competition in marketing goods and services.<sup>33</sup> Congress also hoped that the act would protect the trademark holder's creativity and goodwill by prohibiting the use of confusingly similar

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24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *San Francisco*, 483 U.S. at 530.

33. *Jordache*, 841 F.Supp at 514.

marks.<sup>34</sup> Thus, the differences between the U.S.O.C.'s rights and typical trademark rights stem from the very ideas behind the A.S.A. and the Lanham Act.

### B. Case Law

These differences do not end at statutory structure or legislative intent, though. In fact, the case law following the A.S.A. shows that it actually grants the U.S.O.C. far more protection than any trademark would. *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee* was the first case to show just how much more protection the U.S.O.C. had under the A.S.A.<sup>35</sup> In *San Francisco*, San Francisco Arts and Athletics, Inc. (SFAA) was planning to host an event it called the "Gay Olympic Games".<sup>36</sup> To raise funds for this event, it sold t-shirts, buttons and bumper stickers with "Gay Olympic Games" printed on them.<sup>37</sup> There was no indication that anyone thought these "Gay Olympic Games" were connected to the U.S. Olympic team, or that anyone donating to the "Gay Olympic Games" would also have donated to the U.S.O.C.<sup>38</sup> Nonetheless, the U.S.O.C. asked SFAA to change the name, and sued when the organization refused.<sup>39</sup>

The Supreme Court ruled that SFAA had infringed the U.S.O.C.'s rights.<sup>40</sup> The Court reasoned that because the U.S.O.C. did not actually hold a trademark, but rather specific, exclusive rights under the A.S.A., the analysis for trademark infringement did not apply.<sup>41</sup> Specifically, the Court found that confusion was irrelevant to any action under the A.S.A.<sup>42</sup> Thus, even if it was unlikely that anyone would confuse the "Gay Olympic Games" with the actual Olympics, SFAA still infringed the U.S.O.C.'s rights.<sup>43</sup> It also found that because the U.S.O.C. did not hold a Lanham Act trademark, the statutory defenses enumerated in the Lanham Act were not available.<sup>44</sup> Finally, the Court found that even though the U.S.O.C. chooses when and where to enforce the Amateur Sports Act and that it sometimes does so inconsistently, that is no indication of discriminatory enforce-

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34. *Id.*

35. *San Francisco*, 483 US at 529-30.

36. *Id.* at 525-526.

37. *Id.*

38. *Id.* at 526.

39. *Id.* at 527.

40. *Id.*

41. *Id.* at 530.

42. *Id.*

43. *Id.*

44. *Id.*

ment.<sup>45</sup> Put simply, if someone used an Olympic-related word or image, then they violated the U.S.O.C.'s rights, even if they did not threaten the U.S.O.C.'s fundraising. With this ruling, the Court made it clear that the U.S.O.C. had far more power than any mere trademark holder.

The U.S.O.C. was not shy about exercising this power. In *U.S.O.C. v. Intelicense Corp.*, it sued a marketing firm for publishing pictograms using the "rings" mark.<sup>46</sup> The firm had permission from the International Olympic Committee (I.O.C.) and only published the pictograms to promote the U.S. presence in the Olympic Games.<sup>47</sup> In effect, then, the U.S.O.C. created a rift with a natural ally. The firm, like the U.S.O.C., was simply trying to promote the Olympic games and the U.S. role in them. However, because the firm was also contacting corporate sponsors to support its efforts, it probably posed a threat to the U.S.O.C.'s fundraising interests.<sup>48</sup>

The Second Circuit Court of Appeals certainly thought so, and it ruled that the firm had violated the U.S.O.C.'s exclusive rights.<sup>49</sup> The court held that the fact that the firm used the "rings" mark was enough to prove that it had violated the U.S.O.C.'s rights.<sup>50</sup> The fact that the I.O.C. had given the firm permission was irrelevant; the U.S.O.C. held the rights, so the I.O.C. had no authority in this area.<sup>51</sup> This case, then, made it clear that the U.S.O.C. was the ultimate authority on how Olympic-related words and images could be used in the U.S. Moreover, the U.S.O.C. showed that it would not spare someone simply because they were also trying to promote U.S. participation in the Olympics.

In *O-M Bread, Inc. v. U.S.O.C.*, the U.S.O.C. sued a bread company for using the word "Olympic".<sup>52</sup> The bread company began using "Olympic" to promote its products before the A.S.A., so it had a "grandfather" right to use the word.<sup>53</sup> The company was now trying to expand its business to include a new line of products called "Olympic Kids".<sup>54</sup> Once again, it was unclear if the bread company actually affected the U.S.O.C.'s fundraising. The Court of Appeals

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45. *Id.* at 523.

46. *U.S.O.C.*, 737 F2d at 265.

47. *Id.*

48. *Id.*

49. *Id.* at 269.

50. *Id.* at 267.

51. *Id.* at 269.

52. *O-M Bread*, 1995 U.S. App. LEXIS 25188.

53. *Id.* at 936.

54. *Id.*

for the Federal Circuit ruled that this expansion violated the U.S.O.C.'s rights.<sup>55</sup> The court reasoned that the company's "grandfather" right did not include any new products.<sup>56</sup> This was an important limitation on the "grandfather" right, which was one of the few exceptions to the U.S.O.C.'s total control of the "Olympic" brand. Also, this case is yet another example of the U.S.O.C. defending its rights to the Olympic "brand" even when its fundraising interests are not threatened.

Finally, in *Stop the Olympic Prison v. U.S.O.C.*, the U.S.O.C. sued an organization that protested converting the Lake Placid Olympic village into a prison.<sup>57</sup> The Stop the Olympic Prison organization (S.T.O.P.) used the word "Olympic" in all of its materials, and even distributed posters to promote its cause.<sup>58</sup> However, there was no evidence that these sales affected the U.S.O.C.'s donations. The federal court for the southern district of New York ruled that S.T.O.P. did not infringe the U.S.O.C.'s rights.<sup>59</sup> The court affirmed certain fair uses of even the U.S.O.C.'s heavily protected images and words, including news reports and political discourse.<sup>60</sup> Thus, S.T.O.P. could use the word "Olympic" because the word was central to the political issue they were advocating. It would have been very hard indeed to debate the proper uses of the former Olympic village if the competing sides in the debate could not use the word "Olympic". Nonetheless, the U.S.O.C. was willing to sue over the use of that very word, even when its fundraising interests were not at risk. It may have only been trying to protect its rights, but it was still willing to shut down a very important political debate just to protect its ability to easily raise money.

### III. THE U.S.O.C. AND CHICAGO

The U.S.O.C. has continued to jealously protect its fundraising interests, even when someone else has built up their own brand. The Improv Olympic Theater opened on the north side of Chicago in 1980.<sup>61</sup> In 1997, the theater added a second location in Los Angeles.<sup>62</sup> It is unclear if anyone actually thought the theater was connected to the U.S. Olympic team, and it seems unlikely that the theater hurt the U.S.O.C.'s fundraising efforts; someone could both patronize the the-

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55. *Id.* at 938.

56. *Id.*

57. *Stop the Olympic Prison v. U.S.O.C.*, 489 F.Supp. 1112 (S.D.N.Y. 1980).

58. *Id.* at 1114.

59. *Id.* at 1118.

60. *Id.*

61. York, 2005.

62. *Id.*

ater and donate to the U.S.O.C., but the two are hardly in direct competition. Nonetheless, in 2001, the U.S.O.C. contacted the theater and asked it to change its name.<sup>63</sup>

At first, the theater was reluctant to do so.<sup>64</sup> After all, it had held its name for 20 years and built up a considerable reputation with it. However, the U.S.O.C. threatened to sue, and it was no empty threat.<sup>65</sup> The U.S.O.C. had the resources to carry out any suit, especially compared to the theater. The U.S.O.C. had \$240 million in revenue, while the theater had only \$1.3 million.<sup>66</sup> Moreover, based on A.S.A. case law, the U.S.O.C. was almost certain to prevail in the suit. After all, the U.S.O.C. would not have had to prove the typical trademark analysis factors, so it did not matter that there was little chance of confusion or direct competition. A court would find that the theater violated the U.S.O.C.'s rights simply because the theater used the word "Olympics". Given all of this, the theater had little choice but to agree to the U.S.O.C.'s demands. In 2005, the theater changed its name to the I.O. Theater.<sup>67</sup>

The U.S.O.C. has continued to enforce its rights, even in light of Chicago's campaign to host the 2016 Summer Olympic Games. The city began its campaign in 2006.<sup>68</sup> Part of the campaign involved soliciting private donations to fund the city's efforts.<sup>69</sup> To promote the campaign, Chicago used a logo consisting of a torch superimposed over the city's skyline.<sup>70</sup> This logo may have posed a threat to the U.S.O.C.'s fundraising interests. While there was no evidence of confusion, it is certainly possible that Chicago was competing with the U.S.O.C. for donations. Both, after all, were trying to fund Olympic campaigns. That being the case, it was even possible that someone might have thought that the two were connected, though the U.S.O.C. never showed that that was the case.

In April of 2007, the U.S.O.C. chose Chicago as the single city in the U.S. that could enter the international competition to host the games.<sup>71</sup> In May, the U.S.O.C. informed Chicago that the city could not use the "torch" logo.<sup>72</sup> Chicago voluntarily changed the logo,

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63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Hersh and Caro, 2007.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

though it probably had little choice.<sup>73</sup> Because Chicago did use a torch in its logo, the U.S.O.C. would have succeeded in any suit. In fact, the U.S.O.C. probably could have succeeded even if it held only a typical copyright because there was a possibility of confusion and competition. Perhaps more importantly, Chicago's campaign to host the Olympics could hardly afford the bad publicity of a feud with the U.S.O.C. Chicago, then, was practically forced to abandon its logo, although it can bring it back if the city becomes a finalist in the competition.<sup>74</sup>

It is important to note that the U.S.O.C. did not need to resort to a lawsuit in either case. Its financial, political, and legal advantages were more than enough to convince the theater and the city to meet the committee's demands. Nonetheless, these situations once again expose some of the flaws of the U.S.O.C.'s exclusive rights. It seems unfair to make the theater change its name. The theater, after all, had been operating under its name for 20 years. It had even added a second location under that name. Obviously, it had built up tremendous goodwill with the word "Olympic" in its name. Moreover, the theater hardly seemed like a threat to the U.S.O.C.'s fundraising. Again, the two entities were not in direct competition, and their revenues bare that out; the theater's \$1.3 million in revenue is a drop in the bucket compared to the U.S.O.C.'s \$240 million. Chicago, though, may actually have been competing with the U.S.O.C. in some way, as both were soliciting private donations for the Olympics.

All in all, though, the U.S.O.C.'s zealous enforcement has taken a toll in Chicago. Even the committee itself may have been hurt. After all, if potential donors see the committee as petty enough to go after theater names and city logos, its credibility- and thus, its ability to raise funds- will surely suffer. If that happens, even the advantages of the A.S.A. may not be enough to bail out the U.S.O.C.

#### IV. AN ALTERNATIVE: THE LANHAM ACT

It is obvious, then, that we need a better way to balance the U.S.O.C.'s fundraising interests with everyone else's interests in using these very evocative words and images. Fortunately, there is already a framework to do just that- the Lanham Act itself. In fact, the very analysis used to determine confusion under the Lanham Act would also effectively determine when the U.S.O.C. actually needs legal protection.

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73. *Id.*

74. *Id.*

A. *How the Lanham Act would work for the U.S.O.C.*

Any confusion involving the Olympic “brand” would almost certainly hurt the U.S.O.C.’s fundraising interests. After all, if someone actually thought that a product or another event was related to the Olympics, they may be more willing to spend money on that product or event, or even donate to it. This would of course mean that they had less money to donate to the U.S.O.C. It would also force the U.S.O.C. to spend resources clarifying the relationship and making sure potential donors know how to actually support the committee. However, if a use of the Olympic “brand” was not likely to cause any confusion, the U.S.O.C.’s interests would not be threatened in this way. The U.S.O.C.’s fundraising interests would not need any legal protection, and it would actually be unfair to make the other entity give up the use. The Lanham Act’s eight-factor confusion analysis would effectively determine when the U.S.O.C.’s fundraising interests are at risk. Moreover, it would determine when it would be unfair to enforce the U.S.O.C.’s rights against someone else.

*Jordache Enterprises, Inc. v. Levi Strauss & Co.* illustrates how the confusion analysis could also analyze potential threats.<sup>75</sup> In *Jordache*, Jordache Enterprises, Inc. (“Jordache”) sought a declaration that it had not infringed Levi Strauss & Co.’s trademark (“Levi”).<sup>76</sup> Jordache had introduced a line of jeans called “Jordache Basics 101”, while Levi held a trademark for its line of “501” jeans.<sup>77</sup> The federal court in the southern district of New York refused to declare that Jordache did not infringe Levi’s trademark.<sup>78</sup> The court reasoned that it could not determine if Jordache’s mark caused confusion or a threat to Levi.<sup>79</sup> The strength of Levi’s mark, the poor quality of Jordache’s product, and the high sophistication of the customers indicated that Jordache’s use of the mark unfairly threatened Levi, but there was not enough evidence to determine the other five factors.<sup>80</sup> The court, then, could not make a decision because doing so on only this evidence would have been unfair to Jordache.<sup>81</sup> If the U.S.O.C. held a trademark for the elements of the Olympic “brand”, the analysis would be very similar. If the confusion factors showed that the U.S.O.C.’s fundraising interests were actually at risk, the committee

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75. *Jordache*, 841 F.Supp. 506.

76. *Id.* at 510.

77. *Id.*

78. *Id.* at 521.

79. *Id.*

80. *Id.* at 520-21

81. *Id.*

would no doubt succeed on an infringement suit. If, however, it was unclear that there was a real danger to the U.S.O.C., the defendant, out of fairness, would prevail.

This is not the only benefit of the Lanham Act for anyone else who wants to use the Olympic "brand". Trademark law has a broader concept of fair use, so any other user would have another important, but hardly unwarranted, protection. *Packman v. Chicago Tribune Company* illustrates fair use under the Lanham Act.<sup>82</sup> In *Packman*, a woman sued the Chicago Tribune for infringing her trademark over the phrase "The Joy of Six."<sup>83</sup> The trademark referred to "entertainment services in the nature of basketball games."<sup>84</sup> The Tribune used it in a headline referring to the Chicago Bulls' sixth championship.<sup>85</sup> The Tribune then printed and sold t-shirts with the headline printed on them.<sup>86</sup>

The federal district court in the northern district of Illinois ruled that the Tribune did not infringe the woman's copyright.<sup>87</sup> The court reasoned that the paper used the phrase in a journalistic enterprise; thus, it was a non-trademark "fair" use.<sup>88</sup> Moreover, the paper used the phrase descriptively and did not act in bad faith, so there was little chance of confusion.<sup>89</sup> The court, then, protected the paper's interest in using the phrase, even though the paper eventually used it for commercial purposes. If the U.S.O.C. also held a trademark, courts would probably find a similarly broad sweep of fair use. Someone could thus use the U.S.O.C.'s marks for non-trademark purposes or even for commercial purposes so long as there was no chance of confusion. This again seems fair, so it still seems like the Lanham Act would correctly balance everyone's interests.

The essential question for the U.S.O.C., though, is what it could actually trademark. The committee could easily trademark the "torch" and "rings" images. These images have become so well known that they certainly identify and distinguish the Olympic Games from any other event. Moreover, these images are so distinctive and creative that they would be considered very strong marks and garner more protection. The U.S.O.C., then, could almost certainly trade-

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82. *Packman*, 267 F.3d 628

83. *Id.* at 633.

84. *Id.*

85. *Id.* at 634.

86. *Id.*

87. *Id.* at 647.

88. *Id.*

89. *Id.*

mark these images, and would start out in a strong position in any infringement case.

The word “Olympics” and all of its permutations are a bit more complicated, but the U.S.O.C. could still probably trademark them. The words easily identify and distinguish the event, but they are also incredibly common words. Some have argued that the words are actually too common to trademark because removing them from general usage would be unfair to anyone besides the U.S.O.C.<sup>90</sup> Also, the U.S.O.C. did not create the words; in fact, they predate the U.S.O.C. by centuries.<sup>91</sup> Even if the words could be trademarked, then, there is no indication that the U.S.O.C. (or anyone else, for that matter) deserves the protection of such a trademark.

The Supreme Court has rejected these arguments, though. In *San Francisco*, the Court flatly said that the word “Olympics” was not too common to be trademarked.<sup>92</sup> The Court also said that the U.S.O.C. could logically hold that trademark because the U.S.O.C. is at least partially responsible for establishing the words’ distinctive values and goodwill.<sup>93</sup> Thus, the U.S.O.C. could probably trademark these words. The U.S.O.C., then, could trademark all of the major elements of the Olympic “brand”.

### B. *Applying the Lanham Act to Chicago*

This does not mean, though, that the U.S.O.C. would retain absolute control over these words and images. Other entities like the I.O. Theater would have significantly more opportunities to use the Olympic “brand”. In the theater’s situation, there would logically seem to be little chance of confusion and little risk to the U.S.O.C.’s fundraising interests. The Lanham factors bear this out. First, the word “Olympics” would be a weak mark because it only describes the event. Second, the marks would be only somewhat similar. While both use the word “Olympics”, the theater adds a whole extra word in front of it. This would not make it a completely different mark, but it would mitigate the similarities. Third, the products- a team competing in international sporting events and comedy shows at a local theater- are not proximate at all. Fourth, there is obviously little chance that the U.S.O.C. is going to “bridge the gap” into the theater market. The fifth factor, actual confusion, would be hard to prove either way, but it seems unlikely that anyone actually thought a small theater on the

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90. *San Francisco*, 483 U.S. at 531.

91. *Id.*

92. *Id.*

93. *Id.* at 537

north side of Chicago was actually connected to the U.S. Olympic team. The sixth factor, the theater's good faith, would also be hard to determine. However, it is at least possible that the theater used the word "Olympics" because of its widespread recognition, not to take advantage of the U.S.O.C.'s goodwill. Seventh, the quality of the theater's product is obviously subjective. It is also quite different from the U.S.O.C.'s product, so there seems to be no fair way to measure this factor. Finally, the potential customers- in this case, patrons of the theater and donors to the U.S.O.C.- are likely to be sophisticated, or at least sophisticated enough to tell the difference between a theater and a sporting event.

The first, third, fourth, and eighth factors strongly indicate that there is no confusion, while the fifth and sixth factors weakly point to the same conclusion. The seventh factor seems impossible to determine, and the second factor indicates confusion, albeit weakly. Overall, this analysis would probably show that there is no confusion, and thus, no threat to the U.S.O.C.'s fundraising interests. More importantly, it shows that it would be unfair and unnecessary to make the theater change its name.

The U.S.O.C. would still be able to act when its fundraising interests are actually at risk, though. It could, for example, still stop the city of Chicago from using the "torch" logo. In this situation, it logically seems like there is a much greater chance of confusion and harm to the U.S.O.C. Again, the confusion factors prove this to be the case. First, the "torch" mark is very strong. Second, the marks are somewhat similar. Once again, Chicago's additions could mitigate this similarity, but not completely undo it. Third, the products are actually somewhat proximate. The U.S.O.C. is trying to send a team to the Olympics, while Chicago is trying to host the Olympics. Both solicit private donations to reach their goals. These similarities are not overwhelming, but they are not ignorable, either. Fourth, the U.S.O.C. may not have any plans to bridge the gap into the Olympic hosting market, but it is already heavily involved in the process. It did choose Chicago to be the U.S. representative to the competition, after all. Fifth, actual confusion seems possible. It is very reasonable to assume that Chicago and the U.S.O.C. are working together. The U.S.O.C. would have to present some evidence of this, though. Sixth, it would once again be hard to determine good faith. However, Chicago might have been trying to promote its bid by using an iconic image, not by taking advantage of the U.S.O.C.'s goodwill. Seventh, the quality of Chicago's bid remains to be seen, but there is no reason to think that it would be particularly poor. Finally, donors to Olympic teams and

civic programs are likely to be very savvy. They are, after all, contributing huge sums of money, so many of them would try to understand where their money is going.

The first five factors heavily indicate confusion. The sixth and seventh factors could indicate that there is no confusion, but it would depend on the exact evidence presented. The final factor probably indicates that there is no confusion. Overall, though, it seems clear that Chicago's use of a "torch" logo would probably cause confusion and harm to the U.S.O.C.'s interests. In this case, then, it would be fair to stop Chicago from using the logo. In fact, it would be unfair to the U.S.O.C. if it could not stop the city.

It is worth noting that the U.S.O.C.'s most powerful fundraising tool is its ability to designate corporate sponsors as "official sponsors of the U.S. Olympic Team."<sup>94</sup> One only need only to look at the number of products that advertise this distinction to realize how coveted it is.<sup>95</sup> The Lanham Act would have no effect on the U.S.O.C.'s power in this respect; the U.S.O.C. could still give others permission to use its marks. Even though the U.S.O.C. would generally have less power under a trademark, it would still have its most important tool.

It is clear, then, that the Lanham Act could balance all of the competing interests far better than the A.S.A. has. The confusion analysis would show when the U.S.O.C.'s fundraising interests are at risk and when it would be unfair to stop someone else from using the Olympic "brand". The general population would have more opportunities to use these important words and images, while the U.S.O.C. would still have no trouble raising funds for the U.S. Olympic Team. In a way, the A.S.A. only protects the U.S.O.C. The Lanham Act, however, could protect everyone.

## V. CONCLUSION

It is tempting to dismiss the problems with the U.S.O.C.'s exclusive rights as unimportant. Even though it is unfair, the use of a handful of words and images seems like only a minor concern in the legal world and the sports world. The city of Chicago and the I.O. Theater apparently did not think the issue was worth going to court over, after all. Then again, the A.S.A. grants the U.S.O.C. absolute control over the Olympic "brand", so they probably had no choice.

To dismiss these concerns, then, we would have to ignore the many concrete and disturbing effects of the A.S.A. Theaters and bread com-

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94. *Stop the Olympic Prison*, 489 F.Supp. at 1114.

95. *Id.*

panies have had to change names. Grassroots political organizations have had to go to court just to defend their right to debate. And none of these groups have actually posed a threat to the U.S.O.C.'s ability to field and fund an Olympic Team.

The inequity of the A.S.A. is clear. A solution is also obvious; the Lanham Act, with its focus on confusion and actual harm, would effectively and efficiently determine when the U.S.O.C. needs legal protection. It would also determine when such protection would be unfair to another party using the Olympic "brand". The U.S.O.C., of course, would fiercely lobby against any change in its exclusive rights. It would argue that a change would force it to compete for attention and engage in lengthy legal proceedings to defend its fundraising interests. This argument falls flat, though. Anyone who actually threatened those interests would still be guilty of infringement under the Lanham Act and could be sued accordingly. Anyone who did not pose such a threat should probably not be sued in the first place.

Moreover, the U.S.O.C. funds the U.S. Olympic team. It is the single organization charged with finding the best athletes in the country and sending them to the world's premiere athletic event. That being the case, perhaps the U.S.O.C. should not be so afraid of a little competition.

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