

ARTICLES

Caught in the Web?: The Communication of Trademark Rights and Licensing Policy on University Official Athletic Websites

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INTRODUCTION

In 2007, global sports marketing icon International Management Group (IMG) acquired Collegiate Licensing Corporation (CLC) and Host Communications—both major players in the collegiate sport marketing and licensing industry—and subsequently created IMG College Sports (Smith, 2007a). This bold strategic move by IMG was one in a long line of recent transactions validating the commercial viability of the collegiate sport marketing and licensing industry. In response, two long-time competitors, Texas-based Learfield Sports and North Carolina-based ISP Sports aligned and subsequently, acquired Action Sports Media, which holds the licensing rights for 10 universities and 22 collegiate venues (Smith, 2008a). These industry developments were preceded by the creation of several other relative newcomers to the collegiate marketing and licensing sphere, including ESPN College, CBS Collegiate Sports Properties, and Fenway Sports Group.

The rush to capitalize on the perceived underdeveloped and, in comparison to the professional sport industry, untapped assets of the collegiate sport industry most likely stems from the industry's exponential revenue growth over the past decade or so. For instance, during the 2007-2008 school

year, the University of Texas Longhorns topped CLC's rankings by earning \$8.2 million in gross royalties, followed by Michigan, Florida, LSU and Notre Dame (Smith, 2008b). By 2009 annual retail sales of collegiate licensed merchandise reached \$4.3 billion (Berkowitz, 2009); this figure does not include the additional billions in revenues generated through the collegiate institutions' sale of media rights, advertising and sponsorships.

The potential revenues to be derived from the collegiate marketplace continue to drive a "land-grab" mentality in which major competitors in the collegiate marketing and licensing industry are locked in record-setting bidding wars for the right to represent individual colleges and universities. In June 2009, ISP Sports reached an eight-year, \$92.2 million agreement to serve as the exclusive multimedia rights marketer for the University of Georgia (Weiszer, 2009). This agreement topped the \$11 million annual deal signed between Ohio State and IMG College only three months earlier (Smith, 2009). In touting its new 10-year relationship with Ohio State, Pat Battle, IMG College's senior corporate vice president, stated: "Our aggressiveness comes from the belief in the collegiate marketplace. It's part of our strategy for IMG to represent the best brands in college sports" (Smith, 2009, p. 1). Including the recent University of Georgia-ISP agreement, the top 15 college marketing & multimedia rights deals total over one billion dollars in guaranteed rights payments, over an average of 10.6 years, from four of the major competitors in the collegiate marketing landscape (IMG College alone has the exclusive rights for nine of the 15 colleges) (Smith, 2009).

Such is the collegiate marketing and licensing landscape that provided the backdrop for this study of collegiate athletics websites, which was framed by three primary factors: 1) the increasingly proactive stance of collegiate institutions toward trademark protection and enforcement; 2) a literature review of articles by collegiate trademark and licensing practitioners identifying the increased challenges of intellectual property protection and the need for a strategic approach; and 3) recognition of growing impact and importance of the Internet (i.e., websites) as a tool for communicating information to internal and external publics.

This study sought to investigate the overall approach by which collegiate athletic departments communicate trademark rights and licensing policy to stakeholders via their official athletic website. This entailed not only a content analysis of what information was provided, but as importantly an examination of where this information was located on official athletic websites and the path to accessing it. The article first discusses the growing emphasis on trademark protection and enforcement within the collegiate athletics industry, followed by a review of prior literature that has called for more strategic approaches to

trademark protection at the institutional level. The materials in these sections strongly suggest a need for more effective communication of trademark rights and licensing policy within the collegiate marketing and licensing industry. A discussion of the importance of websites as communication tools, the study method and the results are followed by a discussion of the findings and the implications for sport managers.

The Growing Emphasis on Trademark Protection and Enforcement

Coinciding with the financial boom in the collegiate licensing marketplace, and as noted by the General Counsel of one of the country's leading collegiate licensing firms, "there is no doubt that collegiate institutions have become more knowledgeable and sophisticated in the area of trademark protection and enforcement" (B. Siegal, personal communication, October 21, 2009). As a result, collegiate institutions have adopted a more aggressive stance against commercial entities alleged to be infringing their trademark rights, with the intention of not only solidifying, but arguably even broadening the scope of trademark protections afforded to collegiate institutions (Grady & McKelvey, 2008). As the General Counsel of one of the country's leading collegiate licensing agencies remarked:

Over the past 10 years, colleges and universities have conducted more in the way of trademark protection and enforcement actions. No doubt about that. Many of the actions . . . involve enforcement under seizure orders or state counterfeiting statutes at game-day events or championship events such as the NCAA Final Four or the BCS National Championship game. . . . Collegiate institutions have also been more vigilant in opposing applications for trademarks that conflict with their respective rights (B. Siegal, personal communication, October 21, 2009).

The Associate General Counsel for the NCAA further remarked on this trend as follows:

With respect to NCAA Championship trademarks, I think it's a fair characterization that the NCAA has been more vigilant in our protection efforts since the beginning of the decade. In support of that position, I would cite the following:

- a. New technology has made ambush marketing, trademark infringement, and copyright infringement much more frequent, easier and available to the public;

- b. Companies with sponsorship/marketing rights have elevated expectations about what sports entities must do to protect against unauthorized use of trademarks;
- c. The NCAA has registered more trademarks and domain names to place us in a better position to defend our intellectual property;
- d. Technology also has put trademark owners on notice of infringements that might otherwise have been under the radar;
- e. The record would not show the NCAA to have been more litigious in the IP area. We do regularly seek resolution of domain disputes through the UDRP [Uniform Domain-Name Dispute-Resolution Policy]. The number of cease and desist letters and notices would have increased dramatically from ten years ago, although the number has been fairly consistent in the last few years (S. Bearby, personal communication, October 19, 2009).

While the NCAA itself may not have been “more litigious” in recent years, the same may not hold true at the institutional level, as evidenced by a litany of lawsuits filed (often in conjunction with their respective licensing agency) over the past several years. This sampling of the more high-profile cases, brought based on theories of trademark infringement, unfair competition and/or trademark dilution, serves to illustrate the variety of claims that have recently been raised by collegiate institutions. These include: use of university marketing slogans (*Texas A&M University v. Seattle Seahawks, Inc.*, 2006); use of parody causing trademark dilution (*Board of Regents of University of Texas, et al. v. Kalcop Enterprises, Inc.*, 2006), use of altered trademarks (*Board of Regents, The University of Texas System v. KST Electric, Ltd.*, 2008); use of university trademarks, including color schemes, in artwork (*University of Alabama Board of Trustees v. New Life Art, Inc.*, 2009); use of team nicknames (*Georgia Athletic Association, Inc. v. Bulldog Movers, Inc.* (2006); and use of university color schemes on products offered for sale (*Board of Supervisors of the Louisiana State University and Agricultural and Mechanical College, et al. vs. Smack Apparel Company, et al.*, 2008); *University of Kansas and Kansas Athletics, Inc. vs. Sinks et al.*, 2008; *University of Tennessee v. Action Sports Media, Inc., et al.*, 2009). In sum, it is evident that collegiate institutions have become, if not literally more litigious, at the very least more proactive over the past several years in seeking to protect and enforce their trademark rights.

The Call for Trademark Protection Strategies

Dating back to the mid-1990s – a time of tremendous revenue growth within the collegiate industry – practitioners have recognized the need for increased trademark protection and policing of collegiate marks both in the context of licensing and ambush marketing. In a 1996 article that served as one of the seminal “primers” on collegiate licensing, Lattinville was among the first practitioners to anticipate the pending growth of the collegiate licensing industry and espoused the need for colleges and universities to adopt sounder processes and procedures for “cultivat[ing] the growth of this business” (Lattinville, 1996, p. 91). The process of educating the collegiate sport industry on trademark and ambush marketing issues continued in 2002 with a pair of articles authored or co-authored by Scott Bearby, an in-house attorney for the National Collegiate Athletic Association (“NCAA”). In one article, Bearby (2002) espoused the importance of individual colleges and universities, as well as the NCAA as a whole, taking aggressive measures to protect their intellectual property rights (including both trademarks and copyrights) in all forms, including on the Internet. Bearby also discussed the importance of proactively preventing the unauthorized use of student-athlete names or photos in connection with commercial ventures, as well as various forms of ambush marketing tactics including the unauthorized use of championship event tickets. As Bearby concluded:

Increasingly sophisticated ambush marketing and technology will continue to challenge existing intellectual property law. Even as new law is developed and existing law is applied, the significant increase in the number of information, media, and marketing platforms makes an intellectual property owner’s task far more daunting in protecting against infringement. An organization’s limited resources and the increasing number of ways for infringement to occur require a strategic plan with respect to all information, media and marketing platforms (p. 555).

Another article stressed the need for educating the public:

Collegiate institutions . . . have an obligation to shield their marks from unauthorized use and to protect their licensees against competition by sellers of unlicensed products. . . . At the outset, education [emphasis added] of marketplace vendors regarding the institution’s trademark rights and licensing requirements can be an effective method of deterring the sale of infringing merchandise before such sales occur (Bearby & Siegal, 2002, p. 9).

In addition to the importance of external communication, the outside counsel for one major university, in a paper published in 2003, noted with regard to internal communication of trademark policy:

[E]stablishing a successful [licensing] program requires careful planning, implementation and management. A university has a significant interest in protecting its name and public reputation. In order to facilitate successful licensing, and to avoid awkward situations, the employees of a university should become familiar with the fundamentals of trademark and licensing law. In particular, they should become aware of certain measures that every university should take to protect its trademarks (Bacal & Johnson, 2003).

Clearly, there has been a recognition, especially among practitioners within the collegiate marketing and licensing field, of the growing need for collegiate institutions to better protect and enforce their trademark rights; educating both internal and external publics is seen as an important means of achieving this objective.

The Importance of the Internet as a Communications Tool

Given the increasing reliance on the internet in modern communication, internet home pages today serve as the front door to communication from the organization to the user (Paul, 2001). Previous research on sport related websites has suggested the need for strategic use of such websites to enhance consumer attitudes towards the event or sport property (Brown, 2003; Filo, Funk & Hornby, 2009; Seo & Green, 2008). This research emphasizes the need for organizations to understand and view their websites as an effective marketing and communications tool (Brown, 2003; Filo et al., 2009).

The headers and tabs located on the home site are generally designed to indicate various website content; users navigate through the home site to find content on internal pages based on the information that they are seeking (Paul, 2001). Heeter (1989) has suggested that a key determinant of satisfaction of the users experience with a website is in the amount of effort it takes the user to find the information that they desire. As previously discussed, trademark and licensing issues have become of increasingly critical importance to collegiate institutions and their athletics departments. Hence, one would expect that the athletics department home pages would have a link (hyperlink or click through) to topics that the department believe are valuable and important to communicate to internal and external publics.

METHOD

Previous research has identified “big-time” athletic programs as those programs with the 75 largest intercollegiate athletic budgets (Putler & Wolfe, 1999; Smart & Wolfe, 2000). Thus, the sample used for this study comprised the top 75 revenue producing athletic departments as reported by the U.S. Department of Education (2008). The U.S. Department of Education provides detailed data each year on the athletic budgets of every U.S. college and university that participates in intercollegiate athletics. The authors used data from the 2007-2008 academic year; the most recent data available at the time of analysis. After the data set was downloaded the authors sorted the institutions based on their athletic department’s grand total revenues and subsequently analyzed the highest 75 revenue producing institutions. As “big-time” athletic programs, these institutions are arguably more likely to attract a wide range of internal and external publics interested in securing an association with the institution (be it legitimately or illegitimately). One would thus expect that these “big-time” athletics institutions would have a stronger need and incentive for communicating information regarding trademark rights and licensing policy to internal and external constituents.

Content analysis was deemed an appropriate method for analyzing the presence of items on the athletic departments’ websites. This method enabled the authors to explore the content and structure of the trademark and licensing information that the athletic departments communicated via their websites (Rubin, Rubin, & Piele, 2004). Each of the three authors worked independently to code the website content. The authors then conferred to test for inter-coder reliability.

The official athletic department home page of each university was analyzed primarily for the presence of content relating to trademark rights and licensing policy information. Given the study’s focus on how athletic departments communicate trademark rights and licensing information, it was pertinent to not only ascertain what information was conveyed, but also precisely where this content was housed on the athletic department websites. The overall effectiveness of the athletics website as a communications tool is compromised if the information to be disseminated is not easily and logically accessible. Therefore, the click-through sequence used to locate the information on trademark rights and licensing policy was recorded for each of the 75 websites. In all cases, any information provided regarding trademark rights and/or licensing policy was located together within the same area of the athletics website.

Based upon an analysis of the existing literature on collegiate marketing and licensing, and from interviews with key industry practitioners who are concerned with the trademark rights and licensing policy, the authors constructed an initial inventory of 16 items that one would expect an athletic department to communicate to its internal and external publics regarding trademark rights and licensing policy. An initial content analysis of the websites led to an additional eight items relating to trademark protection and licensing policy, resulting in a list of 24 items. This list was reviewed by a panel of sport law faculty (3) and practitioners (3) and was subsequently revised to reduce redundancy and vagueness, resulting in a final inventory of 18 items (see Table 1).

TABLE 1: CONTENT ANALYSIS CHECKLIST

General Trademark Information
1 Overview/history of licensing program
2 What is a trademark?
3 Statement of purpose of trademarks for the University
4 Statement of legal purpose of TMs (to prevent consumer confusion)
5 Inclusion of specific federal and/or state Trademark Laws (i.e., Lanham Act, state Anti Counterfeiting Acts, etc)
6 List of registered athletics trademarks
7 List of products/services that will NOT be licensed
8 Statement of what is deemed “commercial use”
9 FAQ (frequently asked questions)
Licensing Process & Procedure
10 Contact information for TM & Licensing issues
11 Description of Process for securing license
12 Link to License Application Form
Guidance for Specific Trademark Usages
13 Policies and Guidelines for University (in-house) use (ie., student organizations, residence halls)
14 Policies and Guidelines for non-University use (donors, individuals, commercial use)
15 Statement on use of University marks by political office candidates, policy/legislative issues
16 Policy on use of University-licensed merchandise in a giveaway promotion
17 Internet use of University trademarks
Repercussions
18 Penalties for unauthorized use of University marks

A coding sheet was developed which was used to assess the presence or absence of information on each item (Ju-Pak, 1999). The authors then worked independently to check for the presence or absence of the final 18 items. For any cases where the authors had inconsistent results, the authors subsequently reviewed these websites together and subsequently unanimity was achieved.

For the purposes of clarity in conducting the content analysis, the authors assigned the 18 items to four general categories, or themes. These included: 1) General Trademark Information; 2) Licensing process and procedures; 3) Guidance for specific trademark usages; and 4) Repercussions.

RESULTS

This section begins with a review of the findings with respect to the presence of and paths to content regarding trademark rights and licensing policy. Following the results of the content analysis with respect to the four general categories, or themes, the authors provide insight into the absence of content on the websites.

Presence of and Paths to Content

As discussed above, the purpose of this study was to examine the extent to which, and how, collegiate athletic departments communicate issues relating to trademark rights and licensing policy to internal and external publics. Hypothetically, a website could contain highly informative content; however, if this content is difficult to find on the website (through confusing titles or counter-intuitive paths), then it is not going to be as effective a communications vehicle. As a result, this study also examined the paths to this content.

Of the 75 collegiate athletics websites assessed, 42 (56%) contained no information on or even reference to trademark rights and licensing policy, whatsoever. Of the 33 websites that did contain a link to trademark rights and licensing policy information, two were found to be inaccessible (on one website, the content was for some reason not viewable; on the other, a password was required to access this information). As a result, the remainder of the Results section focuses on the 31 athletic department websites that included accessible content on trademark rights and licensing policy. Of these 31 websites, 18 housed the information internally (on the actual official athletics website). The remaining 13 redirected users to a website external to the official athletics website (12 links lead to the respective university's

TABLE 2: NAVIGATION PATHS TO TRADEMARK RIGHTS
LICENSING POLICY INFORMATION

Internal			
University	Homepage Tab	Tab 2	Tab 3
Arkansas	The Department	Licensing	
Colorado	Athletics	Licensing	
East Carolina	Inside Athletics	Licensing	
Florida	Athletic Association	Trademark & Licensing	
Georgia	Athletics	Promotions/Marketing	Licensing Information
Iowa	UI Athletics	Licensing	
Kansas	Inside Athletics	Licensing	
Kansas State	Athletics Department	Licensing	
Kentucky	Athletic Dept.	Licensing	
Michigan	Department	Trademark and Licensing	
Nebraska	Athletics	Licensing	
Nevada-Las Vegas	Athletic Dept.	Licensing	
Northwestern	Athletics	Corporate Partners	Exclusivity and Logo Rights
Oklahoma	Promotions	Licensing Department	
Pittsburgh	Inside Athletics	Licensing	
Southern Methodist	Inside Athletics	Marketing, Licensing, & Sales	SMU Licensing Site
Texas Tech	Athletic Dept.	Licensing	
Wake Forest	Athletic Department	Marketing	Trademarks & Licensing
External			
Alabama	Promotions	CLC Website	
Arizona	Inside Athletics	Trademarks and Licensing	
Baylor	Inside Athletics	Licensing	
Florida State	Athletic Department	Licensing	
Illinois	Inside Illinois	Illinois Licensing Policy	
Iowa State	Inside Athletics	Trademarks & Licensing	
Louisiana State	Links	Licensing	
Maryland	Inside Athletics	Licensing	
Miami (Fl.)	Inside Athletics	Licensing	
Oklahoma State	Athletic Department	Licensing	
Oregon State	Athletics	Trademarks and Licensing	
Rutgers	Marketing/Promotions	Trademark Licensing	
Texas	Athletic Department	Trademark Licensing	

General Trademark Information

The majority of the 31 websites (22, or 71%) included information providing an overview and history of the institution's licensing program. Sixteen (52%) of the websites further provided a more detailed overview of the purpose of their respective trademark rights and licensing program. Among the most comprehensive was that found on the University of Kansas athletic website, which stated that its licensing program has four major objectives:

1. Protection of all Marks that relate to the University (or have come to be associated with the University), and to ensure that the marks are used in a manner that is consistent with the mission of the University and reflects favorably on the University.
2. Promote the University in a consistent and uniform manner to protect the University's reputation, name, and image.
3. Produce revenue to pay for the expense of operating the program and for programs and scholarships at the University and in the University of Kansas Athletics Department.
4. Protect the consumer from deception or from faulty or inferior products and services bearing the University's Marks (University of Kansas, 2009).

Twenty-one of the 31 websites included a definition of the term "trademark," although there were some noticeable differences in the scope and breadth of these definitions. The University of Florida's official athletics website stated: "Any mark, logo, symbol, nickname, letter(s), word(s) or combination of these that can be associated with the University qualifies as a trademark" (University of Florida, 2009). By way of comparison, the University of Michigan website stated: "A trademark is any name, word, symbol or device used to identify the goodwill and/or services of the University of Michigan. They include, but are not limited to artwork and/or graphic representations" (University of Michigan, 2009). Another website provided: "Limited term agreements may be granted to those private artisans engaged in the limited production and distribution of arts and crafts items (including, but not limited to fabric, leather work, glass, ceramics and paintings)" (University of Kansas, 2009). Only 3 of the 31 websites included "color" in their definition of trademark.

The inclusion of artwork is noteworthy, particularly given that the *University of Alabama Board of Trustees v. New Life Art, Inc.* (2009) lawsuit was not decided until November 2009 and further, was decided in favor of the sport artist (Sander, 2009). This case involved a prominent local artist whose paintings depicted notable University of Alabama football scenes. The university claimed that the artist violated the Lanham Act in connection with the sales of products bearing the university's trade dress, specifically the university's crimson and white colors and football team uniforms (*University of Alabama Board of Trustees*, 2009). The judge found that the artist's defenses of artistic freedom, First Amendment and Fair Use trumped the university's potential trademark claims with respect to its colors and uniforms as trade dress (*University of Alabama Board of Trustees*, 2009). However, the

judge's decision, if upheld, could impact the way that artwork is discussed on websites; the court held that the artist had "no right to manufacture, sell, distribute, or otherwise deals in mugs, cups, calendars, mini-prints or any other products which include the plaintiff's marks and are not paintings and/or prints of the same or larger size and of equal or greater quality than the limited edition paintings and prints that defendants have heretofore created and produced" (p. 45). This ruling creates new precedent (albeit limited, as a state court decision) with respect to the mediums that artists can use to convey their original artwork.

Seven websites included a statement specifically addressing the *legal* purpose of trademarks. Among the best examples was the following:

The primary purpose of the trademark laws is to prevent unfair competition by applying a test of consumer confusion and providing rights and remedies to the owner of the trademark.

The test for consumer confusion is to assure that the consumer can be confident that when buying a product or service bearing a particular trademark the product or service expected is actually delivered. In other words, the consumer relies on a standard of quality established by the association of the trademark in the marketplace with the owner's product or service.

If the owner of a trademark has spent time and money in presenting a service or product to the consumer, the owner should be able to protect this investment by being allowed to prevent others from using the trademark and profiting from the owners investment. The value of the trademark is determined by the strength, or goodwill, of the association between the trademark and its source, and it is the consumer who determines this value.

Although the trademark identifies the source of the product or service, that source can be the manufacturing source, the selling source, or in case of universities, the source of sponsorship or authorization. (Iowa State University, 2009).

Another example read as follows:

The primary purpose of marks is to prevent consumers from becoming confused about the source or origin of a product or service. Marks help consumers answer the questions: "Who makes the product? And "Who provides this service?" As consumers become familiar with particular marks and the goods or services they represent, marks can acquire a secondary meaning as indicators of quality (University of Georgia, 2009).

Finally, only three websites included reference to specific federal or state trademark laws. For example, Oklahoma State's website stated: "Merchandise produced without written authorization may be considered 'counterfeit' and subject to all available legal remedies, including seizure of the merchandise, in accordance with the Trademark Anti-Counterfeiting Act, Title 21, Section 1990 of the Oklahoma Statutes (Oklahoma State University, 2009). Only one website provided a link to the Lanham Act, which governs the protection and enforcement of trademarks.

Twenty-four of the 31 websites (77%) contained a comprehensive list of registered athletics trademarks. In addition, 17 websites specifically identified those products and services for which the athletics department would not grant a license. For example, the University of Texas athletics' website provided a comprehensive list of items that would not be licensed, including stationery, alcoholic beverages, inherently dangerous products, obscene or disparaging products, sexually suggestive products, health/beauty related products, staple foods, meats and natural agricultural products, business names and/or logos and services (University of Texas, 2009). Finally, only seven of the 31 websites reviewed contained a statement of what the university considered to be "commercial use" of its trademarks. For example, the University of Pittsburgh's athletics website concisely stated: "Commercial use is any attempt to utilize University identity marks for promotional or financial gain" (University of Pittsburgh, 2009).

Licensing Process & Procedures

One would expect that, at the very least, websites would include information on the process of securing trademark rights and licenses so that those who were interested in legally acquiring such licenses could follow procedure. Indeed, 29 of the 31 websites (94%) had a contact person listed to acquire information for use of athletic trademarks and logos. Additionally, 10 websites incorporated a direct link to a license application form. A description of the process for securing a license was present on sixteen websites. For example, one official athletic website stated:

Anyone who wishes to obtain a license to produce merchandise must submit a license application. This application informs the University of how it's [sic] marks will be used, what type of product the applicant makes, how the University is going to be represented, etc. Applications can be obtained by contacting...The Collegiate Licensing Company (University of Florida, 2009).

Guidance for Specific Trademark Usages

The items in the “specific usage” category assessed the degree to which the website communicated the manner in which trademarks could be used in various situations. Policies and guidelines for in-house (internal university) use were present on 15 of the 31 websites (48%). For example:

All Oregon State University departments and recognized student groups are required to obtain prior approval to use the university’s name, marks, logos, seals or symbols in any commercial or non-commercial uses. OSU department and student groups are required to purchase emblematic merchandise from Officially Licensed vendors of the university. Items that will be used internally, such as by members of an office, group or as giveaways, are exempt from royalties (Oregon State University, 2009).

Ten websites analyzed provided information regarding internet use of university trademarks. One such example is offered below:

Every use of the University’s trademarks requires permission from the Trademark Licensing Office. The World Wide Web has made it easy for alumni, fans and supporters to build web pages with the University’s name and logos, and the University appreciates this support. However, federal trademark laws require the University control its name and marks; therefore, the University must be very selective in granting permission in these and all instances (University of Florida, 2009).

Eleven websites included a Frequently Asked Questions (FAQ’s) section. The most comprehensive of these provided answers to key questions such as: Why have a licensing program? What qualifies as a trademark? What if you do not get a license? and What about using the university’s name or logo on a web site?

Ten websites contained information explicitly stating their policy regarding the use of university marks by political office candidates. For example, the University of Pittsburgh’s website stated: “The University prohibits the use of any of its identity marks in any form in connection with partisan political activity of any kind, and the endorsement, support, or promotion of political candidates or legislative initiatives” (University of Pittsburgh, 2009). Nine websites included specific information regarding non-university related use of trademarks. Among the most comprehensive was that found on Texas Tech’s athletics website (see Appendix).

Finally, eight websites stated that using university-licensed merchandise in a giveaway promotion without university approval was prohibited. For example, Texas Tech University's website stated: "Private and/or corporate businesses may not produce merchandise for resale or give-away that utilizes the University's trademarks and its name and/or logo without written permission from the Director of Licensing" (Texas Tech University, 2009).

Repercussions

This section looked at the extent to which the universities identified repercussions, legal or otherwise, for the unauthorized use of university marks. Eight websites provided information on the potential ramifications of trademark infringements and violations of licensing policy. As an example, Texas Tech's official athletic website stated:

Any use of University marks that does not comply with the University's licensing and approval requirements will be considered unauthorized and may violate Federal and/or state laws. The University reserves the right to take appropriate action when confronted with unauthorized uses of its marks. Depending on facts, such action may include confiscation of goods and issuance of a cease and desist letter. It can also result in jail time and numerous fines if convicted (Texas Tech University, 2009).

One particular athletics website not only provided a link to the Lanham Act, but provided specific information on fines (located within its FAQ's section), as follows:

What are the laws pertaining to licensed trademarks and products?

North Carolina state laws and United States federal laws prohibit the use, reproduction and counterfeiting of licensed trademarks and infringement of these policies is punishable in varying degrees, depending on the type and severity of the infringement.

Some possible penalties for trademark infringement include:

Class 2 misdemeanor: possessing items with retail sales value (RSV) under \$3,000

Class 1 felony: possessing items with RSV between \$3,000 and \$10,000

Class H felony: possessing items with RSV exceeding \$10,000

Class H felony: knowingly producing/reproducing counterfeit items

Additionally, the plaintiff may be entitled to:

Triple the damages the plaintiff sustained, OR

Triple the profits the defendant made. (East Carolina University, 2009).

The inclusion of repercussions serves to put “teeth” into the trademark and licensing policy guidelines by putting potential infringers on notice of legal repercussions and ultimately serves to deter unauthorized activity.

Absence of Content on Website

The researchers sought to better understand some of the possible reasons for the absence of information pertaining to trademark rights and licensing policy information. An e-mail was sent to a sample set of 15 of the athletic departments whose websites did not include any information on trademarks and licensing policy. The e-mail was sent directly to the individual identified on the website as overseeing the athletic department’s marketing operations. This person was chosen based on the fact that, with respect to the 31 websites that did contain trademark rights and licensing information, in almost all instances the stated contact for these matters was the person directly affiliated with the athletic department’s marketing operations). The e-mail stated that the researchers were reviewing college athletic websites for information pertaining to trademark and licensing information and were unable to find this information on their respective websites. The e-mail then asked where this information could be found. The researchers received six responses for a 40% response rate. The six responses were consistent in that each directed the researchers to the respective universities’ Office of Trademark and Licensing. Additionally, one respondent stated: “Athletics doesn’t manage the university licensing program, so they [the athletics department] wouldn’t have any information on their site.” Granted, all 75 collegiate institutions in the study have a department that oversees trademarks and licensing for the entire university; however, given the reality that many if not most of the legal issues involving trademarks and licensing often arise in the context of the athletics program, it would seem a solid communications and risk management strategy to make such information easily accessible on the athletics homepage as well.

DISCUSSION AND RECOMMENDATIONS

Given the importance of trademark protection for collegiate athletics programs, the financial impact of licensing programs, and the emergence of the Internet as a primary tool for controlled communications to internal and external publics, one would expect that the websites of the nation’s top

athletics programs would be proactive in their use of the Internet to communicate this important information.

However, the results were that of the 75 athletics websites under initial review, over half (42) contained no information for or even reference to trademark rights and licensing policy (this does not include the additional two websites for which there were links to such information that was subsequently found to be inaccessible). For the 31 athletics websites that did include accessible information, equally instructive was how little information the majority of these included: only four included as many as 14 of the 18 items analyzed in this study, while the majority (25, or 81%) of these athletics websites included ten or fewer items.

One can speculate as to what might attribute to this general lack of trademark rights and licensing policy information on athletics websites. The first reason may be a lack of personnel and resources within the athletic department, and specifically individuals with legal training or expertise in matters relating to trademark law and licensing. The second reason may be a general lack of concern regarding such legally-oriented issues, given athletic departments' day-to-day challenges of program promotion and revenue-generation. The third reason could stem from a lack of internal communication between the athletic department and the university's overall trademark and licensing department. The fourth reason may be that, because the majority of these athletics programs have outsourced their licensing program, there is an expectation that their respective licensing agency is or would be responsible for issues relating to trademark rights and licensing policy.

In addressing the lack of consistency in the communication of trademark rights and licensing policy, the General Counsel of one of the leading collegiate licensing agencies suggested:

The mission of colleges and universities is education. To the extent that there are such discrepancies between the [General Counsel] office and Athletics [department], CLC has sought to bridge this gap by providing regular updates and reports on ongoing trademark issues. Since universities make individual determinations as to which trademark causes to pursue, it is not surprising that there are different approaches. We certainly see a trend towards increased awareness of the protection of trademarks by all applicable departments on campus, and intend to continue to foster this process (B. Siegel, personal communication, October 21, 2009).

With respect to inconsistency in how collegiate institutions place the public on notice of their trademark rights and licensing policy, the NCAA's Associate General Counsel suggested the following reasons:

- a. The trademark licensing program is not consistently housed within the same department.
- b. Management and enforcement of trademark rights may be fragmented on a campus: different departments may be responsible for trademarks when it comes to 1) merchandise; 2) external media; 3) internal communications; 4) athletics/sponsorships.
- c. Some trademarks are owned by the university's [athletics] foundation and not by the institution itself.
- d. Departments may not have a common set of best practices.
- e. University counsel have a varying degree of involvement in trademark enforcement. Some are involved in the formulation of policy, some are involved in all cease and desist matters, and some may only become involved if there is the need to litigate. (S. Bearby, personal communication, October 19, 2009).

A discussion of the findings in this study lead to a number of overarching recommendations that collegiate athletics departments may wish to consider in the future. These are discussed below.

Website prominence and navigation issues

Given the importance of trademark rights and licensing policy, athletics websites should be designed to more effectively communicate this information. The authors would ideally recommend that there be a separate tab on the athletics website homepage that clearly and specifically directs visitors to trademark rights and licensing policy information (e.g., "Trademarks and Licensing"). This information is arguably important enough to both internal and external publics that it should not be hidden under general tabs such as "Athletics," or "Inside Athletics." Athletic departments should strive to use tabs and terminology that ensures a clear and logical path to information on trademark rights and licensing policy, with as few click-through steps as possible. This study has illuminated the need for greater consistency in the use of terminology related to this issue, as well as the process for locating this information on athletic department websites. While acknowledging the fact that each university has its own web design, architecture and procedures for making substantive content changes, such consistency could nonetheless be more easily achieved through the dissemination of recommendations and best

practices either by the NCAA (to all of its member institutions) or by the major licensing agencies (to all of their clients).

Location of Trademark Rights and Licensing Policy Information

The vast majority of universities have a website component of their “Office of Trademarks” department where one can find information relating to proper usage of university marks (such information is in no way specific to the university’s athletic program). However, it is extremely unlikely that a local company is going to seek to utilize the university’s trademarks without approval in an effort to create a false association with the chemistry or music department. The reality is that the majority of potential unauthorized and unlicensed uses of a university’s trademarks will emanate from the success and popularity of its athletic program. Furthermore, there are numerous potential infringement issues that are specific to the athletics realm that extend beyond the university’s normal course of business. As evidenced by the litany of lawsuits cited earlier, these include the use of specific athletic team nicknames, colors, mascots, game-day imagery, game-day tickets in promotion, games schedules in sponsored promotional materials, sports artwork, and congratulatory/exhortatory messages. Given both the omnipresence and effectiveness of the internet as a communications tool in today’s world, it is recommended that information on trademark rights and licensing policy be specifically housed on the athletics website. At the very least, athletics department official websites should clearly link to the university’s Office of Trademarks website.

Delineating trademark rights and licensing policy

The findings revealed that, for the majority of the websites with accessible information, the focus was primarily on the process of licensing university marks, with less emphasis on issues relating to trademark rights, protection and enforcement. Trademark law and licensing are, however, two distinct disciplines. Trademark law encompasses the registration, protection and enforcement of the university’s portfolio of indicia (marks, nicknames, logos, etc.). Licensing is the process through which the rights to this indicia are contractually transferred to third parties for the promotion or sale of products and services in exchange for royalty payments. Hence, issues relating to trademark rights, protection and enforcement should be clearly delineated from issues relating to the licensing policy. The former should ideally encompass, among other things, a statement of the purpose of trademark law, a legal definition of what constitutes a trademark, and a reference to specific

federal and local trademark laws and statutes. Of the websites reviewed, few provided what the authors would deem to be a comprehensive communication of the institution's trademark rights. One website provided a most thorough and comprehensive overview of trademark law; under a tab entitled "Trademark Basics," information provided included the purpose of trademarks, what types of marks receive trademark protection, how trademarks differ from copyrights and trade names, and the how trademarks are protected (Iowa State University, 2009). Once trademark rights, protection and enforcement issues have been addressed, athletics websites should then elaborate on licensing policy and process. This approach raises the feasibility of communicating this delineation by providing two separate tabs: "Trademark Rights" and "Licensing Policy."

The issue of color and color schemes

The issue of an institution's color and color schemes as protectable trademarks is one that the vast majority of institutions have overlooked; as noted above, for those websites that did define "trademark," only three definitions included reference to color. This finding is interesting in light of the recent highly-publicized decision in the *Smack Apparel* case in which a federal court held that the plaintiff universities' color schemes had acquired the requisite secondary meaning to afford trademark protection (*Board of Supervisors of the Louisiana State University and Agricultural and Mechanical College, et al. v. Smack Apparel*, 2008). Having found a protectable trademark interest, the court held that the defendant's use of color schemes on laudatory tee-shirts was likely to cause confusion among consumers as to the source or sponsorship of the products (*Board of Supervisors of the Louisiana State University and Agricultural and Mechanical College, et al.*, 2008; *see also*, Grady & McKelvey, 2008). Given the Supreme Court's denial of certiorari in the *Smack Apparel* case (hence providing closure to the case), one can argue that institutions should be doing more on their websites, particularly within their definition of trademarks and within specific trademark usage guidelines, to communicate the fact that school colors and color schemes are subject to trademark protection.

Importance of Specificity on Trademark Usage

One can assume that all universities and their respective athletics programs have some level of guidelines in place that cover a broad range of potential trademark usages. The most obvious of these would include: use of trademarks by on-campus versus off-campus organizations; use by local

politicians and political candidates; use in a charitable versus a commercial context; and use on websites, among others. The more that an athletic department can do to anticipate potential issues and areas of trademark infringement, and the better it can educate its internal and external publics, the more likely it is to avoid the potential public relations and legal pitfalls of having to address trademark infringements after the fact. Again, as noted earlier, the Appendix provides a solid example of an athletic website that anticipated and then communicated, in specific detail, its rules and regulations regarding a variety of uses of its trademarks. One of the most effective ways of communicating specific trademark rights and licensing policy would be through a link to Frequently Asked Questions (FAQ's). Interestingly, of the 31 websites analyzed, only 11 included a section specifically labeled "FAQ's." Given the popularity of FAQ sections on websites in general, it is strongly recommend that, at the very least, all athletics websites should incorporate a link to FAQ's that serves as a "user-friendly" format for more effectively communicating and educating the public on key issues relating to trademark protection and licensing policy.

Policing of Potential Licensing Violations

Given athletic departments' concerns over the quality of unlicensed merchandise, one would expect that institutions would seek to use their consumers as a resource for identifying unauthorized licensing activity. Although it was not among the specific content items, the authors did find of interest that only two websites included an on-line procedure enabling consumers to report possible licensing violations. One site linked to the CLC website and an on-line "Infringer Report" Form. The other site, in addition to providing consumers with a link to an "Unlicensed Product Endorsement Form," included information on "signs of unlicensed merchandise" which included: "No [official licensee] label on the product; product appears to be very LOW quality; or LSU images and logos are distorted or manipulated, sometimes in a distasteful manner" (Louisiana State University, 2009).

Implications Regarding the Practice of Ambush Marketing

While this study focused on the relatively "black and white" issues of trademark rights and licensing policy, the findings provoke some thoughts with regard to the practice of ambush marketing, which has been defined as:

... the set of activities that companies use to create the impression of an association with a given event or sport property. Typically, these activities are aimed at creating the impression, in the minds of

consumers, that a company is a paying sponsor of an event or an official partner with the sport property (i.e., collegiate athletic department) (Kent & Campbell, 2007, p. 118).

Some researchers have identified a subset of ambush marketing that has been termed “free-loading,” a practice particularly commonplace in collegiate athletics (Kent & Campbell, 2007). Free-loading has been defined, in the context of collegiate athletics, as those on-going activities by local businesses who “attempt to gain the benefit of an association with a school’s athletic department without paying sponsorship fees, *and* [with the] school administrator’s willingness to tolerate these activities on the basis of the publicity that these activities create” (Kent & Campbell, 2007, p. 119). Such activities commonly include displaying banners and posters in store windows, decorating the store using the local university’s color schemes, and painting their storefronts with the school mascot.

Ambush marketing (as well as “free-loading”) is not illegal per se, since ambush marketers typically engage in activities that either avoid the use of registered trademarks or, alternatively, find legal protection under the free speech provisions of the First Amendment (Lyberger & McCarthy, 2001; Moorman & Greenwell, 2005). Typical ambush marketing tactics within the collegiate sports realm environment include: the printing and distribution of game schedules by local companies; the promotional use of event tickets as prizes in contests and sweepstakes; and the use of congratulatory (or exhortatory) messages in advertising by local companies.

Addressing the practice of ambush marketing entails the navigation of legal and practical gray areas that provide challenges in the way that the issue can or should be addressed on athletics websites. Hence, it was not surprising that of the 31 websites analyzed, not one included any specific reference to the practice of “ambush marketing.”

However, the few athletics websites that did address some of the ambush marketing tactics described above provide examples of best practices that other institutions should consider adopting. One of the more popular tactics—the printing and distribution of sports schedules by local companies lacking an official affiliation with the university – can be used to create such an impression of affiliation. Interestingly, only one website specifically addressed this tactic (while also acknowledging the First Amendment issue):

These sports schedules, in and of themselves on the basis of their informational content, are not covered by LSU’s Trademark Licensing Program so long as the way they are presented is purely informational and does not otherwise represent a use of LUS indicia. Over the years,

there have been promotional sports schedules with trademark infringement issues that have required University action. (Louisiana State University, 2009).

As an added measure of protection, this website also offered a procedure for reviewing corporate-sponsored sports schedules in advance of publication to avoid trademark infringement issues.

Another popular form of ambush marketing is the use of congratulatory (or exhortatory) messages in corporate advertising. Although they can be interpreted as ambush marketing by an institution, such messages have typically been held to be legal under the First Amendment provided they are not specifically tied to the selling of a product or service (McKelvey & Grady, 2008). Here again, the researchers found few websites that included guidelines on this practice (one website included a tab specifically identified as “Congratulatory Messages”). There were a variety of approaches to the use of the institution’s indicia in congratulatory (or exhortatory) messages. Examples included the following:

Companies or individuals wishing to extend congratulatory messages (or statements of support) not meeting the criteria [of the Policy Guidelines] must submit for approval and receive authorization from the Office of Trademarks & Licensing to use prescribed trademarked verbiage (e.g., GO CATS® or Congratulations Wildcats™). Such messages must be clearly separate from the sale or promotion of any products, and may not include a reference or any implied association between the business and the University of Arizona (i.e., University of Arizona Team). (University of Arizona, 2009a).

All uses of University Marks by non-University commercial entities require prior approval even if the proposed uses do not involve the sale of a product, e.g., exhortatory announcements in newspapers or athletic programs. (University of Maryland, 2009).

Two institutions specifically allowed for the use of the school name and nicknames in congratulatory or exhortatory messages, as long as the entity did not use the institution’s logos and symbols.

Another popular ambush marketing tactic is the unauthorized use of game tickets in promotions (giveaways with purchase, raffles, and sweepstakes/contests). This practice has been vigorously opposed with respect to the unauthorized use of NCAA championship tickets (Bearby, 2002; McKelvey, 2003), and was the subject of a highly-publicized lawsuit brought by the NCAA against Coors Brewing (*National Collegiate Athletic Association and Host Communications, Inc. v. Coors Brewing Company*,

2002). Tickets to high-profile regular-season “marquee match-up” football and basketball games can often be of equal or greater appeal for unauthorized use in promotions within the local marketplace (e.g., “Win Free Tickets to the Big Brawl,” to capitalize on the popularity of the annual “Backyard Brawl” football game between the University of West Virginia and the University of Pittsburgh). Granted, the law regarding the unauthorized use of sporting event tickets in sponsored promotions remains unsettled (McKelvey, 2003). However, this should not prevent institutions from communicating a general policy with respect to the unauthorized promotional use of its game-day tickets if only as a means of putting potential ambush marketers on notice of possible legal ramifications. One popular practice, as adopted by the NCAA with respect to its Championship events, is simply to notify internal and external publics that language on ticket-backs prohibit a variety of unauthorized promotional uses. Only one of the 31 websites analyzed specifically addressed the use of sporting event tickets in unauthorized promotions; however, given the potential of this ambush marketing tactic to infringe promotional rights granted exclusively to official sponsors, athletic departments should give greater thought to how to communicate policy with respect to this practice.

Finally, with respect to tactics that could be more precisely identified as “free-loading,” again there were very few who provided guidance to internal and external publics as to policy. One such example, however, provided as follows: “Businesses may use the University trademarks in a non-permanent fixture (i.e., window painting, removable lettering on marquees) . . . supporting University events” (Florida State University, 2009).

Communication of Copyright Issues

With the advent of new technologies and social networking, it has become easier for individuals and business entities to gain access to a wide range of copyrighted material, including for instance team media guides, information posted on athletics websites, student-athlete action photos, internet broadcasts, and game footage. While the focus of this study was on athletic websites’ communication of trademark rights and licensing policy, it was nonetheless noted by the researchers that only two of the websites analyzed included any information regarding policies on copyright protection and infringement. Both websites simply provided general information with links to contact information for the licensing of school video and still photos. Below is one such example:

Collegiate Images

If you are interested in becoming a licensed vendor that utilizes still or motion pictures that are associated with the University of Arizona, please submit a licensing request form through the Collegiate Images [link] site. Collegiate Images is a partner of the Collegiate Licensing Company and manages the distribution of copyrighted intellectual property content of the University of Arizona. Collegiate Images [link] also distributes still and moving images for media purposes. Please visit Collegiate Images for more information.

Replay Photos

If you are interested in purchasing still or moving images that are associated with the University of Arizona as a fan or consumer, please contact Replay Photos [link] for more information (University of Arizona, 2009b).

The researchers found this to be another area that athletic departments should give further thought to in terms of the educational and risk management value of communicating this information on their athletic websites.

CONCLUSION

This study examined the communication of trademark rights and licensing policy on the official athletic websites of Division I colleges and universities. The researchers found that the majority of the institutions in the study had no trademark rights and licensing policy information accessible on their official athletics website. The study further revealed that, of those that did include such information, there was a large measure of inconsistency in terms of both the accessibility and the nature of the content. This was especially remarkable given the increasingly proactive stance of the collegiate athletics industry toward the protection and enforcement of their respective trademark rights, and the prominence of websites as a primary communications and information search tool.

One can argue that individuals, businesses or organizations that wittingly or unwittingly seek to capitalize on the popularity or to trade off the goodwill of their local university athletics program would be unlikely to first visit the university's official athletic website to determine what they can and cannot do with respect to the university's trademark rights and licensing policy. Conversely, one can argue that including such information serves not only to educate internal and external constituents but also to put potential infringers on notice. As such, the incorporation of such information serves to more

effectively and efficiently manage the risks of potential legal issues that typically result in negative publicity and costly legal bills.

The findings in this study shed light not only on the current state of athletics websites' communication of trademark rights and licensing policy, but as importantly should serve to stimulate dialogue between athletics departments and their respective university's Office of Trademarks regarding how to more proactively and effectively communicate trademark rights and licensing policy to internal and external publics as a means of limiting potential infringements and lawsuits. This process should include an examination of the institution's organizational structure and inter-communications process; an assessment of the responsibilities of the various departments that are impacted by trademark and licensing issues; and the development and implementation of a common set of best practices between institutions. In this respect, the issue of using the athletics website more effectively as a means of risk management extends the dialogue – and responsibility – well beyond merely the athletic department.

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APPENDIX

Policies and Guidelines for non-Texas Tech Use
Reproduction of all registered marks, which identify Texas Tech, may not be used without the prior expressed written approval of the University.

- Private and/or corporate businesses may not use Texas Tech's registered trademarks on company vehicles. Placing Texas Tech's registered trademarks near company information on company vehicles is prohibited, as there will be a likelihood of confusion that the company is a representative of, or sponsored by, Texas Tech (e.g. paint, decals).
- Private and/or corporate businesses may not use Texas Tech's registered trademarks in their company name.
- Private and/or corporate businesses may not use Texas Tech's registered trademarks in the sale of commercial products or advertising. University indicia cannot be incorporated into off-campus business telephone numbers, internet addresses, or internet domain names.
- The University does not permit the use of its identifying graphics by any other institution or business.
- Private and/or corporate businesses may not establish a permanent statue, mural or icon that includes the University trademarks or likeness without written permission from the Director of Licensing.
- Private and/or corporate businesses or organizations may not use the trademarks of the University in any type of advertisements, on web sites or on banners, etc., without written permission from the Director of Licensing.
- Private and/or corporate businesses may not produce merchandise for resale or give-away that utilizes the University's trademarks and its name and/or logo without written permission from the Director of Licensing.
- Private and/or corporate businesses may not use University trademarks to promote their products or services in print advertising, radio or television without a promotional contract in place or written permission from the Director of Licensing.
- Individuals or private and/or corporate businesses may not use University trademarks on a website without written permission

from the Director of Licensing. If approved, the University will provide a disclaimer that must be used on the site.

- Individuals or organizations may not utilize the University's trademarks in conjunction with a candidate for political office or policy/legislative issue without written permission from the Director of Licensing.
- Texas Tech registered trademarks cannot be used in any design that infringes on another entity (e.g. Harley Davidson, Jim Beam)
- The University recognizes that there are many groups that support the institution from academics to athletics. However, any group wanting to use University trademarks on product, regardless of use, must purchase the product from a current University licensee. By supporting the University's licensing initiatives, organizations can assist the University by ensuring that products bearing a Texas Tech mark are of the highest quality and meet all insurance and contractual requirements. The licensee is responsible for getting the design approved by the Director of Licensing and remitting the University's royalty on the product to CLC.
- If a donor wishes to utilize one of Texas Tech University's trademarks in some manner, written permission must be obtained from the Director of Licensing. The verbiage "supporting Texas Tech University ", "supporting XXX at Texas Tech University", or "supporting Texas Tech Athletics" must be included. All materials using University marks must be submitted for approval before production and must be purchased from a current University licensee.
- Booster clubs may use sponsor names on merchandise only with written approval from the Director of Licensing. The organization's name must be included in the design to communicate that the relationship is a partnership with the organization and not the University. Based on the scope of the program, a rights fee, in addition to royalties, may be assessed.
- Rights fees and royalties for the use of the University trademarks in all instances may be assessed (Texas Tech University, 2009).