

# #JoinTheConversation: The Evolving Legal Landscape of Using Hashtags in Sport

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As sport properties and brands leverage the use of hashtags to expand their share of voice and audiences, they also face a host of emerging legal issues at the nexus of social media and intellectual property laws. This article examines the current potential conflict between the courts and the United States Patent and Trademark Office (USPTO) regarding the legal status of hashtags as trademarks, which provides the backdrop discussion of sport properties' approaches to potentially infringing use of hashtags in the context of ambush marketing. The Federal Trade Commission has also initiated regulatory efforts aimed at hashtag-based promotions. Analysis of significant cases and application of a typology of hashtags to sport industry examples provides guidance to sport organizations. While typically favoring strict enforcement in matters involving intellectual property, the risk in stifling conversations stimulated by hashtags may call for more innovative tactics to achieve brand protection and consumer protection goals.

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From Twitter, Facebook, and Pinterest to Instagram, YouTube, and Vine, the use of hashtags on social media platforms has become a central ingredient in the marketing communications mix. Although hashtags have most commonly been used to identify trending topics and alert the public to breaking news, they are also increasingly being used by sports leagues, teams, and broadcasters to generate viewership; by official sponsors and nonsponsors alike to align with sports properties; and by sports properties, events, and brands seeking to promote contests and advertising campaigns. Yet, while sport properties and brands are leveraging hashtags to expand their share of voice and fan base, they are also grappling with growing concerns over the legal implications of their hashtag usage. Under the umbrella of brand protection, this has included applying for federal trademark protection of

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their hashtags and, in some cases, threatening to sue companies that seek to create a false association with their property or event through the use of hashtags.

A hashtag is defined as “a word or phrase preceded by the symbol # that classifies or categorizes the accompanying text (such as a tweet)” (Hashtag, n.d.). For example, fans of the Washington Redskins often include #HTTR in all of their social media posts, a reference to the motto “Hail to the Redskins.” Additionally, a hashtag is a type of metadata, a common technology term meaning data that describes other data (*Eksouzian v. Albanese*, 2015). A hashtag functions similarly to a hyperlink and is defined as “a highlighted word or picture in a document or Web page that you can click with a computer mouse to go to another place in the same or a different document of Web page” (Hyperlink, n.d.), leading users to other similarly related content.

While hashtag usage in sport was initially dominated not by sport properties and brands but by casual fans seeking to generate conversations around an event, sport organizations and events soon began to recognize the power of the hashtag to “disseminate information and creat[e] conversations using an event created hashtag” (Blaszka, Frederick, Pegoraro, & Newman, 2016). As recently as the 2012 London Summer Olympics, for example, a study found that of 18 identified sponsor brands, 50% chose to use an Olympic-themed hashtag, and of those 50%, three brands (Adidas, British Airways, and Visa) garnered 93.5% share of the Olympic hashtag voice (Wood, 2012). Total mentions of brand hashtags was about 160,000, which equated to 2% of the share of voice when compared with the #London2012 and #TeamGB hashtags (Wood, 2012). Fast-forward just 4 short years—an eternity in social media advancement—and it did not take long for the ubiquitous use of hashtags by brands, as well as sport properties, to become an integral part of the global conversation. In advance of the 2016 Summer Olympic Games in Rio de Janeiro, the United States Olympic Committee (USOC) took the unprecedented step of warning brands that were not affiliated with the Olympics in an official sponsorship capacity that using Olympic-related word and symbol hashtags in social media posts was prohibited (Rovell, 2016), perhaps reflective of the expectation for hashtags to be used to dominate the conversation surrounding the Olympics.

Hashtags tell only part of the larger story about shifting technological preferences of sports consumers that now demand closer legal scrutiny. The global reach and power of social media is undeniable and sport properties are finding new and innovative ways to use laws in each host country of upcoming global sporting events to garner new audiences. Hashtags serve as both a “conversation starter” around global sport events in the digital space and a tool to drive fan engagement with sponsor brands for the duration of an event, such as the World Cup, which occurs over 32 days. Aptly described as “the ignition keys to a social media keyword search, hashtags can be a powerful tool for marketers to drive viral conversations with and reactions to their brands” (Brooke, 2016). With rapid technological changes and widespread adoption, the need to better understand how to adequately protect a sport property or event’s growing portfolio of intellectual property rights, including hashtags, remains a top priority.

Yet, while sports properties and brands have proven eager to encourage consumers to “#JoinTheConversation,” they are increasingly seeking to control who (including competitors and ambush marketers) can join this conversation. One

outcome of this effort has been an escalating race to the United States Patent and Trademark Office (USPTO). In 2010, four years after the launch of Twitter, only seven companies had applied to trademark their hashtag (Marshall, 2016). However, as of 2015, the United States led all countries with the most applications for registering hashtags as trademarks (1,042), followed by Brazil, France, and the United Kingdom (Marshall, 2016).

Given the ever-growing influence of social media within the sport sponsorship space, sport properties and brands have only recently begun to navigate the legal landscape that has emerged with regard to hashtags and are in need of guidance as to what contexts might call for legal protection of their marketing-driven hashtags. For instance, under what circumstances can a hashtag be trademarked? Does it make business sense to apply for trademark registration? Even if granted trademark registration, how effective and practical is it to enforce these types of trademarks? Last, but not least, what are the legal parameters and potential pitfalls of conducting ambush marketing campaigns or consumer promotions via hashtags? This article seeks to answer these questions in such a way that provides sport organization practitioners as well as scholars with some initial guidance to navigate this emerging area of law and practice based on a body of law that is still in its infancy.

This paper examines the current legal issues that surround the use of hashtags and explores that use in the context of sport. In part I, we lay the groundwork for the emerging legal issues by discussing the evolution of hashtags and focusing on a typology of hashtags proposed by Roberts (2016). In part II, we provide analysis of the recently reported court cases that have sought to consider hashtags as trademarks. These cases, when viewed alongside the USPTO's review and registration procedures, reveal potentially conflicting legal positions at the nexus of hashtag usage and trademark law. Putting this analysis into practice, parts III and IV focus on two important areas of hashtag usage that more specifically relate to sport properties: hashtags as a vehicle for ambush marketing (part III) and hashtags as a consumer promotion tool (part IV), which entails discussion of the Federal Trade Commission's (FTC) regulatory role in consumer protection. Part V concludes by providing general observations and recommendations to aid sport properties' and brands' decision making regarding use of hashtags.

## **Part I—Evolution and Typology of Hashtags**

A brief overview of the evolution of hashtags and their various usages provides background for the legal issues to be further examined. "Hashtags began their reign on social media as metatags that facilitate searching and enable users to organize content" (Roberts, 2015, para. 8). As the creation and use of hashtags has expanded to serve different purposes, however, legal issues have begun to emerge regarding how these uses would be perceived by consumers in the marketplace, making the legal status of hashtags as trademarks "somewhat of a grey area" (Glenday, 2015). A typology proposed by Roberts (2016) helps to sort out some of the budding legal issues that courts have only recently begun to consider. This typology distinguishes hashtags by who created or deployed the hashtag and suggests four types: producer-selected, marketer-deployed, consumer-generated, and citizen-created (Roberts, 2016). Each type of hashtag, then, triggers different legal possibilities and outcomes, resulting in potentially different (legal) strategies for managing hashtag use.

Hashtag use in sport contexts reflects the Roberts (2016) typology, and examples commonly seen in sport help illuminate the legal debate as to when and in what context, if ever, a hashtag can serve the function of a trademark. Producer-selected hashtags, the first type, refer to companies and brands whereby the hashtags “serve as trademarks first and hashtags later, usually well after they have acquired commercial strength . . . Producers rarely seek to register these hashtags as marks . . . [because] such hashtags are no different from their existing marks” (Roberts, 2016, p. 11). In other words, #Nike is not legally different from their registered trademark NIKE so there is no legal justification to seek a separate trademark registration for the tag mark (i.e., the hashtag trademark).

The second category consists of marketer-deployed hashtags (Roberts, 2016), which “serve as slogans or denote marketing campaigns” and are “designed by trademark owners or their advertising agencies to disseminate information about brands, goods, or services and foster discussion among consumers on social media” (pp. 12–13). These types of hashtags typically include registered phrases, such as Adidas’s “#TakeTheStage” campaign designed for the 2012 Summer Games in London (see <http://theinspirationroom.com/daily/2012/adidas-take-the-stage-at-2012-olympics>), as well as registered marketing slogans of brands (e.g., #NBAThisIsWhyWePlay). The legal strategy here would be similar to that of producer-selected hashtags: registering the tag mark separately is arguably unnecessary given that the hashtag includes an already-registered trademark.

Consumer-generated (or user-generated) hashtags, Roberts’s (2016) third category, enable users to express their fandom (#PatriotsNation) and their emotions, and to “discuss or respond to a producer’s goods or services, with or without incorporating the producer’s mark into the hashtag” (Roberts, 2016, p. 16). Consumer-generated hashtags offer the most variability in terms of style and purpose, providing consumers the ability to engage directly with brands and allowing them to comment positively or negatively about a product or service. Recent sport-related examples include #NBCFail, used by viewers of the 2012 London Olympic Games to complain about tape-delayed coverage of marquee events (Bark, 2012), and #SochiProblems, used by athletes and journalists to describe the conditions of unfinished hotel rooms during the Sochi 2014 Winter Olympics (Laird, 2014).

Citizen-created hashtags, the last category as described by Roberts (2016), typically serve as rallying cries for social justice campaigns soliciting reaction to current events. While perhaps overlapping in purpose with consumer-generated hashtags, the purpose of these types of hashtags typically has more of a focus on social advocacy or is a form of online protest. For example, shortly after the Boston Marathon bombing in 2013, two local college students created the phrase #BostonStrong to serve as a rallying cry for the strength and resilience of supporting the victims (Rovell, 2014). While creators of these types of tags typically do not seek trademark protection (fear of public reprisals for appearing to capitalize on a tragedy certainly helps explain this), this category of hashtags is perhaps most representative of the free speech opportunities and heightened concerns in over-regulating this type of hashtag usage. In the case of #BostonStrong, the USPTO refused registration, so its continuous use remains free to all (Rovell, 2014). As noted by Chander and Le (2015), this type of hashtag serves as “a democratizer of speech, allowing anyone to have her thoughts echoed around the world. . . . No one can un-hashtag someone else’s speech. The hashtag is free and open” (pp. 547–548).

For the sport industry, we propose an additional hashtag category—namely, event-related hashtags, which are used to spur conversation about a specific game or match (typically televised). This hashtag category not only allows fans to more easily find the conversation, but it also helps generate “buzz” and increased interest in the event. During the 2016 UEFA Euro Cup, for example, each match was given its own hashtag on the UEFA Euro Cup Twitter page and in posts about the match (Stewart, 2016). Here, the hashtag, while technically producer-generated, is primarily used for communication purposes. When a fan tags their favorite team, a “hashflag” is created (the flag of that country’s team), which helps add to fans’ excitement when posting a comment about their team or their rival. There are not typically trademark issues with these type of marks because they are informational in nature, using shorthand for team names, such as ENG and FRA; they are predominantly used to spur fan engagement and interest by global online fan communities during these tournaments.

After gaining an understanding of how hashtags have been used and the initial legal concerns raised by their use, it is necessary to more closely examine the increasing role of trademark law to protect this new form of intellectual property. Hashtags as trademarks is as body of law that is still in its infancy; as such, the use of traditional concepts and rationales for protecting intellectual property may provide myriad organizations, including sport organizations, with some of the best options for protection in managing this new communication tool.

## Part II—The Nexus of Hashtags and Trademark Law

As with any new technology widely adopted by the public, the application of the laws regulating it tends to lag behind. Sorting through the legal status of hashtags as trademarks has proven no different, as evidenced by the current legal landscape in which the USPTO continues to register trademarks while the courts have yet to definitively hold that hashtags *function* as trademarks.

The primary purpose of a trademark is to identify the source of a good or service. The federal law covering trademarks in the United States, the Lanham Act, defines a trademark as “a word, phrase, slogan, symbol, or design, or combination thereof, that identifies the source of the goods and services of one owner” and thus distinguishes them from the goods and services of others (Lanham Act § 43). In other words, to secure federal trademark registration, a word or phrase must be either distinctive on its face (i.e., it has the ability to distinguish a mark’s owner from those of competitors) or have attained distinctiveness through acquiring secondary meaning (a process by which the source of an otherwise nondistinctive mark or phrase has become immediately recognizable to the relevant consumer). As such, trademarks assist consumers in organizing information, alleviating search costs, assuring a level of quality, and easing purchase decision making (McKenna, 2007). The Lanham Act empowers the USPTO with the authority to oversee the federal trademark registration applications process.

### Hashtags and the USPTO

The USPTO is responsible for examining applications and ensuring that registered terms and phrases actually function as trademarks. In 2013, the USPTO amended its guide for examiners, the Trademark Manual for Examining Procedure (TMEP),

to specify that the inclusion of a hash symbol at the front of a mark does not render the mark more distinctive than it would without it (TMEP § 1202.19, 2015). However, it also recognized, for the first time, that a term containing a hash symbol or the term *hashtag* may be registered as a trademark, but “only if it functions as an identifier of the source of the applicant’s goods or services” (Kiedrowski & Murphy, 2016, para. 4). Since then, the USPTO has approved the registration of several hundred trademarks that contain hashtags, effectively assigning exclusive rights to the trademark owners of those hashtags (Marshall, 2016). Noteworthy sport-related examples include #LetsBowl for bowling balls and #MyChaseNation for motorsports racing events (Kiedrowski & Murphy, 2016). However, extensive research of trademarked hashtags conducted by Roberts (2016) provides strong evidence that USPTO examiners have been widely inconsistent in determining which hashtags they have chosen to register, particularly with regard to either finding or allowing a showing of secondary meaning. In addition, as Roberts (2016) points out, “in practice, examining attorneys have perhaps found it difficult to filter out the hashtag and view the mark itself in isolation (p. 29).

To establish trademark infringement under the Lanham Act, the plaintiff must prove that (1) the mark is valid and protectable, (2) the plaintiff owns the mark, and (3) the defendant’s use of the mark is likely to cause consumer confusion (Lanham Act § 43; *A&H Sportswear, Inc. v. Victoria’s Secret Stores, Inc.*, 2000). The burden lies with the plaintiff to establish the requisite level of consumer confusion. Although federal registration is not needed to file a claim for trademark infringement, registration through the USPTO provides trademark owners with a much stronger level of national trademark protection, including the legal presumption of a valid trademark and ability to file trademark infringement suits in federal court.

## Hashtags and the Courts

U.S. courts have only recently begun to address the issue of whether hashtags, including those that incorporate registered marks, can actually function as trademarks, given their wide range of uses among the public. Analysis of two recent court cases illustrates the current trademark issues raised by hashtag usage, including the potential for conflicting decisions in the future. In *Fraternity Collection, LLC v. Fargnoli* (2015), the plaintiff filed suit against former employee and designer Elise Fargnoli for her use of the terms #fratcollection and #fraternitycollection in her social media accounts to promote her designs for a competitor of the plaintiff. Both parties filed motions to dismiss, with the defendant claiming that the plaintiff had failed to state a claim for infringement. In March 2015, the Mississippi federal district court declined to dismiss the infringement claims, stating: “Hashtagging a competitor’s name or product in social media posts could, in certain circumstances, deceive consumers” (*Fraternity Collection*, 2015, p. 4). However, in June 2015, the parties agreed to a settlement, thus failing to provide any further judicial insight into this issue.

Conversely, in March 2015, the U.S. District Court for the Central District of California became the first court to address and adjudicate the question of whether hashtags can function as trademarks (*Eksouzian v. Albanese*, 2015). This case evolved out of a settlement agreement between former business partners involving federal trademark infringement claims that restricted both parties’ trademark use of



the word *cloud* in connection with the words *pen* or *penz* (*Eksouzian*, 2015, p. 7). Shortly thereafter, the defendant accused the plaintiff of violating the agreement by using #cloudpen and #cloudpenz on social media (Roberts, 2015). The California federal district court held that the plaintiff's use of #cloudpen on social media was "merely a functional tool to direct the location of Plaintiff's promotion so that it [was] viewed by a group of consumers, not an actual trademark" (*Eksouzian*, 2015, p. 8). Perhaps most legally significant to further understanding the issue at hand, the court elaborated in dicta about hashtags in general: "Defendant's argument fails because . . . hashtags are merely descriptive devices, not trademarks . . . in and of themselves" (*Eksouzian*, 2015, p. 8). Although this reasoning was at first interpreted by many legal scholars and practitioners to serve as the death knell for hashtags as trademarks, a closer analysis suggests that the court "intended to opine that the use of a hashtag *as a hashtag* (emphasis added) on social media is not an actionable trademark use, not that a phrase preceded by a hash symbol can never be a trademark" (Roberts, 2016, p. 54).

Given that the U.S. courts have yet to determine whether, and under what circumstances, hashtagged words and phrases can actually function as trademarks, the continued registration of such words and phrases by the USPTO (coupled with its arguably inconsistent approach examining applications) points to a potential conflict at the nexus of trademark law and hashtags. Legal scholars have recently sought to tackle this quandary, positing compelling arguments for why "even a highly distinctive trademark used in a hashtag still does not function as a trademark in the eyes of the consumer . . . . [T]he inability to function as a source identifier necessarily means the hashtag is not entitled to trademark protection" (Falconer, 2016, pp. 31–32; Roberts, 2016). As elaborated by Falconer (2016), a hashtag is incapable of identifying a single, particular source because the very purpose of hashtags is to categorize multiple sources across various media and outlets: "Because anyone can include any hashtag in any post, consumers understand that a hashtag containing a trademark does not necessarily mean the post came from the owner of said trademark; posts can originate from anyone" (p. 33). Moreover, because there is no way for consumers to distinguish among the various sources (or creators) of a hashtag, it cannot function in a way that denotes originating from a single source. In this sense, a hashtag serves as a "merely descriptive device," as stated in dicta by the court in *Eksouzian* (p. 8), denoting a topic, not an original source. Roberts (2016) further posits that "[m]ost tagmarks simply fail to function as marks, suggesting that current USPTO policies and practices are not adequately aligned with consumer perception" (p. 57).

The second argument advanced for why hashtags should not receive trademark protection is that trademark law serves first and foremost to protect consumers. One can argue that, even when used by a competitor, hashtags will not cause the requisite consumer confusion. To the contrary, consumers are simply being directed to join an online dialogue about a competing brand (Falconer, 2016). Consider, for example, the terms #PumaRocks or #NBARules. It is unlikely that, given the current function of a hashtag as perceived by consumers, a consumer utilizing either of these hashtags would readily or consciously expect that the sole source of these hashtags was Puma or the National Basketball Association (even if, in fact, they were). To the contrary, consumers utilizing these hashtags would likely be expecting to join a conversation about Puma or the NBA.

Moving beyond the debate as to whether (at least in the current environment) hashtags can or should legally function as trademarks, we now turn to two areas within the sport marketing arena where hashtags have continued to raise legal concerns for sport properties, event organizers, and brands. The first involves the use of hashtags within the context of ambush marketing; the second involves the promotional use of hashtags in sweepstakes and contests.

### **Part III—Ambush Marketing and Hashtag Usage**

From an event organizers' perspective, hashtags have become, as noted earlier, a primary means of generating fan awareness, conversation, and buzz around their events. For example, during the 2014 World Cup in Brazil, Twitter enabled fans to "join the global viewing party" by using hashflags and by providing fans with a "Match Timeline" to give fans real-time information and updates for matches as they were happening (Li, 2014). The resulting Twitter usage was phenomenal, with over 10 million hashflags used by fans in the United States alone (Levine, 2014).

For the Euro Cup 2016, in France, Twitter raised the stakes: whenever someone used #EURO2016, a bespoke emoji appeared in the tweet, featuring an icon of the competition trophy (Stewart, 2016). Twitter also customized the experience for fans of all competing nations—for example, when an England fan used #ENGLAND or #TogetherForEngland, a specialized St. George's cross icon would appear (Stewart, 2016). Finally, at the end of each day of the Euro Cup competition, the team's fans that generated the most activity that day using their team's hashtag would have the Eiffel Tower briefly lit up in their team's colors (Stewart, 2016). These high-tech steps "put Twitter at the heart of the #EURO2016 fan experience" and helped foster an online sense of community around the tournament (Stewart, 2016, para. 9).

In addition to the campaigns of sport event organizers, the IOC and national governing bodies' official sponsors—each of whom has invested tens of millions of dollars for the exclusive sponsorship rights—have also constructed hashtag-driven campaigns designed to leverage and activate their sponsorship on social media. For instance, in advance of the 2012 Sochi Winter Games, official sponsor McDonald's launched a promotion inviting fans from around the world to support their favorite athletes with personalized messages by using the hashtag #CheersToSochi (Pegoraro, Burch, Frederick, & Vincent, 2014). Almost immediately, however, this hashtag was "hijacked" by LGBT activists criticizing Russia's discriminatory policies on sexual orientation, resulting in McDonald's quickly ceasing this well-meaning social media campaign at some financial, and arguably reputational, expense (Pegoraro et al., 2014). Given McDonald's financial investment as an Olympic sponsor, and the impact of official sponsors such as McDonald's on the financial feasibility of the IOC, one can appreciate the importance of providing trademark protection for hashtag marks such as #CheersToSochi. This situation, however, not only reveals the challenges of maintaining control of one's hashtag marks (trademarked or not), but it also illustrates, as previously discussed, the broader legal issues in trying to adapt traditional trademark law principles (i.e., source identification) to use of hashtags.

In addition to the hashtag activities of sport organizers, official sponsors, and general sports fans, it is not surprising that, given the extraordinary amount of social media chatter around sporting events, businesses that are not official sponsors want to be a part of this chatter. However, attempts to join the conversation by



companies that have not secured official sponsorship rights raise ambush marketing concerns. Ambush marketing is a practice whereby companies seek to associate or align themselves, in the mind of the public, with high-profile sports events and properties without paying the fees required to obtain official sponsor status (McKelvey & Grady, 2008). Social media, and the use of hashtags in particular, has arguably made ambush marketing much easier for companies to employ and more challenging for sport properties to monitor given its real-time nature. A nonsponsor that includes, within a post, a hashtag that relates to a third-party event (e.g., #NFLSuperBowl) creates an obvious ambush marketing scenario. But to what extent can such activity be legally actionable as a violation of trademark law? As has been well documented with each mega sport event, the legal line with respect to ambush marketing is not easily drawn, as ambush marketing often operates in the gray areas (McKelvey & Grady, 2008), with ambushers often skirting any actual trademark violations.

Nowhere has this issue of brand protection been more prominent than in the context of the Olympics. The Olympic Games have become “the premium event in terms of attractiveness for sponsorship and ambush marketing” (Chanavat & Desbordes, 2014, p. 155). The Olympic Partners (TOP) program, referred to as TOP sponsorship, serves as the financial underpinning of staging the Olympic Games, having generated more than \$950 million for the IOC from 2009 to 2012 (IOC, 2013). Official sponsorship remains a vital source of financial funding for the IOC and its respective national governing bodies, such that protecting sponsors from ambush marketing is a paramount concern (if not *the* paramount concern) for the IOC and local organizing committees, alongside the broader goal of protecting the Olympic brand itself. Thus, legal and brand protection strategies have quickly evolved to keep pace with rapid technological changes in the dynamic sponsorship landscape, with hashtags only adding additional layers of legal complexity.

While event-related hashtags provide opportunities for consumers to develop brand awareness and generate consumer engagement surrounding an upcoming event, they also provide unique opportunities for nonaffiliated brands to develop unauthorized associations with the event using the same or similar event-related hashtags. Stronger legal protections and enforcement become necessary to also restrict attempts by nonsponsor brands to create hashtags that are clever enough to conjure up the event described without using the protected Olympic word marks, further enabling this phenomenon.

Consider, for example, the phrase RoadToRio, which had been widely used by Team USA across all social media platforms to market athletes as they qualified for the 2016 Rio Summer Olympic Games. The USOC registered this phrase as a trademark, and the hashtag #RoadToRio was used on Olympic Trials race bibs (Bushnell, 2016). In sending out cease and desist letters to brands that posted photos of athletes displaying the protected phrase, such as was done related to an Instagram post by women’s running brand Oiselle (see <http://www.dispatchradio.com/wp-content/uploads/2016/07/Kate-Grace.jpg>), the USOC insisted that this is standard marks protection necessary to protect the value of its trademark rights, which are reserved exclusively for official sponsors (Bushnell, 2016). Yet, there was pushback from brands that felt (and still feel) the USOC’s tactics are too strict and over-reaching. Thus, there still exist rights enforcement challenges and legitimate confusion among brands as to whether the USOC (or other similar

sport properties) has the proper legal authority to restrict a competing business to an official sponsor from including (or displaying) a hashtag within a tweet or Instagram post.

This recent example also illuminates the legal complexity raised in the introduction to this paper. Increased reliance on hashtags as a form of sport sponsorship activation has allowed consumers to join the online conversation surrounding an event, in effect “altering the traditional model of one-way communication that once existed” (Pegoraro et al., 2014). As use of hashtags becomes an integral part of greater social media engagement, this has enabled enhanced sponsorship activation efforts in digital, mobile, and online mediums, and provided new opportunities to create and strengthen brand associations for consumers (Santomier, 2008). Yet, while use of hashtags can help achieve sponsorship activation objectives and help create associations between sponsors and the event, unauthorized use of an event-related hashtag or sponsor’s campaign hashtag, known as “hijacking” the conversation, often by advocacy groups or competing brands, has created unique challenges for event organizers and sponsor brands. This was clear with the #CheersToSochi McDonald’s campaign, discussed earlier. Moreover, there is a lack of guidance in the sponsorship literature, with few scholars addressing how brands respond when other individuals’ or groups’ actions potentially harm positive brand associations created with an event (see Pegoraro et al., 2014), and even fewer scholars examining whether the organization’s response can and should include a legal component.

We analyze the Olympic Movement’s stance with respect to ambush marketing in the digital space for illustrative purposes of how the legal issues may best be managed going forward. However, similar reasoning applies to other high-profile (mega) sport events. Fundamentally, answering the question of whether Olympic words, phrases, and mottos that have been granted existing trademark protection (via event-specific legislation or national Olympic laws) need additional protection as registered hashtag marks remains an open question. Notably, these decisions are made in advance of the mega sport event, in anticipation of having to vigorously enforce trademark rights in the run-up to and during the event. While seemingly redundant on its face (i.e., that the word *Olympics* would *not* need legal protection in multiple overlapping ways), this has *not* been the Olympic approach thus far for protecting intellectual property. In fact, Olympic intellectual property is routinely addressed by multiple, overlapping legal protections—including the event’s host country intellectual property legislation, event-specific legislation for that particular mega sport event, and national-level special event legislation in other countries—which gives national Olympic committees rights protection and enforcement authority. Furthermore, examining the scant extant (non-sport-related) case law makes it apparent that the legal analysis of whether a mega sport event’s popular hashtags need to be registered as their own trademarks (as opposed to only registering a phrase such as RoadToRio) is not a straightforward one.

In the context of sport-event hashtags, factors to be considered include whether the event’s already registered word marks are being used within the new hashtag, the purpose for which the hashtag is being used (e.g., to sell products, to create awareness, or for social commentary), and who is posting using the hashtag at issue. The latter questions become more a matter of enforcement, as it likely would be futile to try to stifle conversation around an event, even if the conversation is critical

of the organizers, media, or official sponsors. Depending on how the hashtag is being used, by whom, and for what purpose, the trademark purpose of designating the source or origin of goods or services may not be achieved. In this case, no enforceable legal objective would be achieved by seeking separate legal protection for the hashtag mark itself (Kiedrowski & Murphy, 2016).

More specifically, to address the questions considered above with an Olympic-related hashtag such as #RoadToRio, would the IOC have needed to seek the additional protection by trademarking Rio 2016 as a hashtag to better enforce its rights? Under analysis of the existing U.S. trademark case law and current guidance in the United States (applying U.S. laws), the current best answer is no! Based on recent interpretations, trademarking the hashtag for the same existing registered mark (Olympics, Rio2016, etc.) seems superfluous and has little enforceable value as all the same rights and benefits of trademark registration exist for the hashtagged word or phrase in question. In other words, assuming Adidas trademarked its global marketing campaign phrase “Take the Stage,” which they also used as a hashtag in all advertising as an official sponsor during London 2012 (see <http://theinspiration-room.com/daily/2012/adidas-take-the-stage-at-2012-olympics>), there would seem to be little legal benefit for Adidas to protect that same phrase as a hashtag mark. Later posts were amended to #StageTaken at the conclusion of the Games, based on the success of Adidas’ athlete endorsers.

Would the legal conclusion be different, however, if the event’s trademarked words and phrases were used as hashtags by nonsponsor brands, in what could be perceived as ambush marketing? For example, as Under Armour (UA) prepared to send several UA athletes to Rio, including Olympic phenom Michael Phelps, using the tag line “Rule Yourself,” there seemed to be no legal necessity to separately register this phrase as a hashtag mark, presumably if the underlying phrase (for a global marketing campaign) is already registered as a trademark. While Under Armour has pushed the envelope by using athletes’ performances at Olympic trials featuring their marketing campaign themes (see <https://twitter.com/UnderArmour/status/749437205119135744>), would they also use the event’s clearly protected words and phrases (e.g., #Rio2016) if they are not an official sponsor? Likely not worth the legal risk. Competitor brands such as Under Armour might opt instead for using a more ambiguous reference such as “the Big Event” or “the race this summer.”

Through tweet, Instagram post, or YouTube advertisement, a nonsponsor brand is trying to drive attention toward its brand message and content while also attempting to dilute the value of the official sponsorship paid for by its competitors. If the brand’s fans begin to retweet the nonofficial brand’s posts and marketing messages, they essentially become virtual ambassadors carrying the ambusher’s message. Thus, the need to consider additional legal protection for the event’s protected words as hashtags seems more salient as well, given potential infringing use of the event’s hashtags by nonsponsor brands.

Fans now also create additional legal uncertainty by posting user-generated (fan-created) content that includes nonsponsor brands’ hashtags or by creating their own hashtags that include a brand’s name or slogans during mega sport events. This leaves event organizers (and their legal teams) scratching their heads as to how best to legally respond, if at all, while not wanting to alienate die-hard fans who, despite supporting a rival (nonsponsor) brand, are still engaged in supporting the event itself.

## Part IV—Come Win: FTC Regulation of Hashtags

In addition to the legal uncertainty of whether hashtags truly function as trademarks within the scope of the Lanham Act, the escalating hashtag use in social media promotions conducted by sport properties and brands has drawn increasing scrutiny from the Federal Trade Commission (FTC). Specifically, the FTC has heightened its concern over the extent to which the use of hashtags to enter sweepstakes and contests results in a form of deceptive endorsement.

The FTC is empowered to protect consumers from unfair methods of competition or deceptive acts or practices in or affecting commerce; the purpose of the Federal Trade Commission Act is to protect the public and the public interest, not specifically to punish a wrongdoer. The FTC has the authority to declare unlawful an act or practice it deems to be unfair if the act or practice causes or is likely to cause “substantial injury to consumers which is not reasonably avoidable by consumers themselves” and “not outweighed by countervailing benefits to consumers or to competition” (15 U.S.C. §45(n) (2010)). To enforce provisions of the Act, the FTC may issue a cease and desist order and seek civil fines against a person or company committing an unfair or deceptive practice (15 U.S.C. § 45 (b) (2010)).

To better inform the public and the business community as to what practices may and may not be deemed deceptive and unfair, the FTC periodically publishes administrative guidelines that serve as a basis for voluntary compliance. Of particular relevance to this article are the FTC’s Guides Concerning the Use of Endorsements and Testimonials in Advertising (Godell, 2010). Originally published in 1980, the FTC proffered its first update of the Guides in December 2009 (FTC, 2009). In its much-belated acknowledgment that the technological world had changed dramatically in the 29 years since its original guidance, the FTC admitted that “the recent developments of a variety of consumer-generated media poses new questions about how to distinguish between communications that are considered ‘endorsements’ within the meaning of the Guides and those that are not” (FTC, 2009). Under the 2009 Guides, an endorsement is defined as

any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser. (“Guidance concerning use of endorsements . . . ,” 16 C. F. R. §255.0 (b) (2010))

To determine if a statement is an endorsement, the fundamental question is whether, when viewed objectively, “the relationship between the advertiser and the speaker is such that the speaker’s statement can be considered ‘sponsored’ by the advertiser and therefore an ‘advertising message’” (“Notice of Adoption . . . ,” 2009, p. 53126). If an endorsement relationship is deemed to exist—that is, defined by the existence of a “material connection” between the company and the endorser—both have a responsibility to disclose that relationship. The 2009 Guides were in large part focused on ensuring that celebrities, social media bloggers, and others deemed to be product or service “endorsers” disclosed this fact to the consuming public. However, the growth of consumer promotions delivered via

social media platforms, and, in particular, the use of hashtags as a critical launching point for these promotions, has quickly created an entirely new set of regulatory challenges for the FTC.

This issue came to the forefront with the investigation into Cole Haan's "Wandering Sole" promotion (Morgan, 2014). The promotion encouraged consumers to create Pinterest boards titled "Wandering Sole" using photos of Cole Haan shoes along with pictures of their favorite places to wander. The contest rules required contestants to use #WanderingSole with their photos for an opportunity to a \$1,000 Cole Haan shopping spree (Morgan, 2014).

In investigating the matter, the FTC stated in its closing letter that it believes "that participants' pins featuring Cole Haan products were endorsements of the Cole Haan products, and the fact that the pins were incentivized by the opportunity to win a \$1,000 prize would not reasonably be expected by consumers who saw the pins" (Federal Trade Commission, 2014). The FTC further found that "Cole Haan did not instruct contestants to label their pins and Pinterest boards to make it clear that they had pinned Cole Haan products as part of a contest" and that the WanderingSole hashtag did not adequately communicate "the financial incentive—a material connection—between contestants and Cole Haan" (Federal Trade Commission, 2014).

The FTC decided against recommending enforcement action in the case, in part because the FTC had "not previously publicly addressed whether entry into a contest is a form of material connection," nor had it previously "explicitly addressed whether a pin on Pinterest may constitute an endorsement" (Federal Trade Commission, 2014). The ambiguities evidenced by the Cole Haan case provided an incentive for the FTC, in May 2015, to update its Endorsement Guides Frequently Asked Questions to address social media sweepstakes and contests that require consumers to use a designated hashtag to enter a sweepstakes or contest (Federal Trade Commission, 2015). This recent new guidance is significant to businesses seeking to promote their products and services by requiring consumers to reference brand-specific hashtags in return for discounts or the chance to win prizes. Although the FTC does not mandate the specific wording of disclosures, "the same general principle—that people get the information they need to evaluate sponsored statements—applies across the board, regardless of the advertising medium" (Federal Trade Commission, 2015). The update to the Guides also provides examples of how, and how not, to use hashtags for social media promotions. For example, making the words *contest* or *sweepstakes* part of the hashtag (e.g., #NikeGearSweepstakes) is deemed effective; however, shortening the words *contest* or *sweepstakes* in a way that people might not understand (e.g., #NikeGearSweeps) is deemed less effective.

As sport properties and brands seek to engage consumers through social media-based promotions, it is essential that they provide transparency with respect to who is endorsing these promotions so as to not run afoul of the FTC's concerns over consumer deception.

## Part V—The Road Ahead

In this paper, we have examined several of the current legal and practice issues that face sport properties and brands as they endeavor to leverage the use of hashtags for both commercial and noncommercial purposes. With respect to

the larger issue of whether a hashtag functions as a trademark, it is neither our intent nor our place to choose sides. Ultimately, it will be for the courts or the U.S. Congress (by amending the Lanham Act) to tackle the dichotomy between consumers' perceived function of a hashtag (to research, opine, and categorize conversation) and the main function of a trademark (to serve as a single source identifier). Highlighting the fact that "[h]ashtag jurisprudence is in its budding infancy, with federal courts, federal agencies, corporate practices, and consumer perception pointing in seemingly disparate directions" (Roberts, 2015, para. 13), examples from sport contexts will likely help shape further development of this issue. At the very least, the future path of this potential conflict raises legal and practical business implications for sport properties and brands with regard to the future creation, use, and protection of hashtags, particularly within the context of ambush marketing and social media promotions.

A more immediate concern for the sport industry is the real-time monitoring and trademark enforcement procedures surrounding hashtags. While monitoring hashtag use may now be included as part of standard marks protection, there exist real challenges with sport properties' rights enforcement that cannot be easily resolved in the digital age. A hashtag is what allows this social interaction to occur. Trying to over-regulate the use of hashtags may produce unintended consequences. These are questions without clear answers given the current legal status of hashtags.

The use of hashtags is now such an integral part of brand building that it requires careful legal consideration, just like any other traditional marketing strategy. However, while efforts to restrict a hashtag's use on social media by seeking trademark registration may serve laudable brand protection goals, the end result may be difficult to achieve. Despite the sport industry's reliance on heavily policing trademarks as the norm in contemporary rights protection, an open question remains whether the benefits of using hashtags as "conversation starters" and as a way to reinforce product and event brand messaging greatly outweigh *any* legal efforts to stifle their use, whether by seeking trademark protection or through digital brand policing. While other industries may benefit from restricting the use of hashtags, when considering their pervasive use in the sport industry, hashtags may best be viewed in the eyes of the law as a "democratizer of speech" (Chandler & Le, 2015, p. 547) for all to use and share in joining a larger conversation.

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