

# Three Point Shot

## Newsletter

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Welcome to *Three Point Shot*, a newsletter brought to you by the Sports Law Practice Group at Proskauer Rose LLP. In *Three Point Shot*, we will attempt to both inform and entertain you by highlighting three sports law-related items and providing you with links to related materials. Any feedback, thoughts or comments you may have are both encouraged and welcome.

### Where Have You Gone Carl Lewis?

With another Olympic year upon us, it seems that a day does not go by without another story of an athlete's fall from grace due to doping. For those unfamiliar with the term, doping refers to an athlete's use of drugs to enhance performance. One of the earliest recorded instances of doping at the Olympics was in 1904, when [Thomas Hicks](#), the marathon winner at that year's Summer Games, allegedly ingested brandy and a pesticide called strychnine during the race to improve his performance. Apparently, if it does not kill you first, strychnine can act as a stimulant. Today, the doping drug of choice is no longer brandy or pesticides, but rather steroids or human growth hormone. Among the more recent Olympic stars to fall are Marion Jones, who fell off the gold medal awards podium and into a jail cell for lying to federal agents about her use of a steroid referred to as "The Clear" (more scientifically labeled THG, or tetrahydrogestrinone) during the [BALCO steroid investigation](#).

Most recently, [Justin Gatlin](#), the 2006 100m Gold Medalist and a former 100m world record holder, was denied perhaps his final chance to run in the Olympics when the [11<sup>th</sup> Circuit ruled](#) that Gatlin failed to meet the legal standard for the issuance of an injunction that would have allowed him to compete at the U.S. trials. In 2006, Gatlin was suspended from competition for four years (through July 2010) when he was found to have excessive levels of testosterone in his body at the [2006 Kansas Relays](#). This was Gatlin's second false start – he previously had tested positive for amphetamines at the 2001 U.S. Junior Nationals – and under the [strict liability](#) policies of the current anti-doping regime, Gatlin actually could have faced a life-time ban from the sport. Gatlin's initial appeal was to the [Court of Arbitration for Sport \(CAS\)](#), where in early June a three-person panel unanimously [upheld Gatlin's four-year ban](#). Perhaps recognizing that in the 24-years of the CAS's existence only one athlete had [successfully challenged CAS](#) in a Swiss court (which has jurisdiction

because CAS is based in Switzerland), Gatlin ran instead to the U.S. District Court for the Northern District of Florida and filed a [Complaint](#) against the U.S. Anti-Doping Agency, USA Track and Field (USATF), the United States Olympic Committee (USOC) and the International Association of Athletics Federations (IAAF). Gatlin alleged *inter alia* that his 2001 violation should have been disregarded because the positive test was the result of taking a medication prescribed to treat his Attention Deficit Disorder and that he was being discriminated against in violation of the Americans with Disabilities Act. The district court – Judge Lacey A. Collier – empathized with Gatlin and initially [granted a temporary restraining order](#) that would have allowed Gatlin to compete in the U.S. Olympic trials. But, ultimately, the court found that it [lacked jurisdiction](#) to determine who was or was not eligible to compete in the Olympics. In his final appeal to the 11<sup>th</sup> Circuit, Gatlin again tripped before hitting the victory tape when the court summarily ruled that Gatlin [did not meet the applicable standard](#) to be granted an injunction.

The Gatlin case is perhaps less clear-cut than some of the other doping cases that have come before. Indeed, although Judge Collier denied Gatlin’s request for an injunction for jurisdictional reasons, he acknowledged in his 7-page order that he felt Gatlin was “being wronged.” Sadly, however, the seeming prevalence of doping in sports has caused many of us to believe that what we see on the field of play is as much the result of weird science as au naturel.

## **All’s Fair in Love and War ... But What About in (Ambush) Marketing**

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If you’re in the military, you might consider dressing up like a tree in order to “ambush” an enemy. And, if you’ve ever been the target of such an ambush, you might have a sense of what VISA, one of only twelve official [Olympic sponsors](#) with worldwide marketing rights, must feel like each Olympic year when companies such as [American Express](#) run Olympic-themed advertising across every platform on which it can buy time. Ambush marketing attacks, in which one company seeks to weaken or “ambush” a competitor’s official association with a sports property or event through a variety of tactics, are particularly ferocious during Olympic years.

Typical ambush marketing tactics include running ads during a sponsored event’s broadcast, displaying promotional advertising in or around the location of an event, sponsoring individual teams or athletes, or running event “themed” advertising prior to, during and after the date(s) of the event. Already, despite [Adidas](#) being the official sportswear partner of the upcoming Beijing Games, [Nike](#) has announced endorsement and sponsorship deals with high-profile Olympic athletes and groups, including 2004 Olympic gold medalist Liu Xiang and the United States Olympic Committee, in clothing and apparel deals. So, although U.S. athletes will be required to wear Adidas apparel during podium ceremonies, images of Nike-sponsored athletes in competition will indirectly promote Nike’s product without Nike having to spend the money for an official Olympic sponsorship.

If you're an official sponsor, what can you do? From a legal perspective, the answer appears to be ... not much. Ambush marketing campaigns that go too far in associating a non-sponsored product with an event may give rise to a number of legal claims, including trademark infringement, unfair competition, breach of contract, and tortious interference with contractual relations and prospective business advantage. And, Olympic trademarks do have heightened protection under the [Ted Stevens Olympic and Amateur Sports Act of 1998](#), codified at 36 U.S.C. § 220501 et seq. Generally speaking, however, ambush marketers are rarely sloppy enough to give the ambushed party much to rely on in support of a legal cause of action. Indeed, despite the controversial nature of the practice, there have been very few reported opinions, and thus there is little judicial guidance, regarding the boundaries and limitations of ambush marketing tactics.

In at least one case, however, MasterCard did successfully invoke Section 43(a) of the Lanham Act to obtain an injunction against an ambush by Sprint during the 1994 World Cup soccer tournament. *MasterCard Int'l, Inc. v. Sprint Communications Co.*, 1994 U.S. Dist. LEXIS 3398 (S.D.N.Y. 1994), aff'd, 23 F.3d 397 (2d Cir. 1994). Sprint had made the fatal error of placing the World Cup logo (which it had obtained the right to use in its advertising and marketing campaigns) on its telephone calling cards; this, MasterCard claimed (and the court agreed) conflicted with MasterCard's exclusive right to use the World Cup logo on "all card-based payment and account access devices." But, more often than not, ambushers are careful to avoid any use of the applicable property's trademarks. More recently, in a case involving NASCAR, an [event sponsor alleged](#) that a competitor's attempts to change the logos on a sponsored car to reflect a change in ownership of the competitor, constituted a "scheme of 'ambush marketing.'" The dispute giving rise to allegations of an ambush, however, was settled without any judicial opinion being issued on the topic.

Given the lack of legal protection, properties such as the Olympics have taken a more proactive and practical approach to the problem. For example, this summer, the [Beijing Organizing Committee for the Olympic Games](#) (BOCOG), in connection with the China Advertising Association, has advised the media not to carry ads of non-Olympic partners and has issued warnings that companies will be monitored for illegal advertising and serious action will be taken against violators. [Chen Feng](#), the deputy marketing director for BOCOG, has stated that, "all prominent advertising space in Beijing, including at the airport and on subway lines, will be controlled [by the Chinese government], giving official sponsors priority."

Although some might consider an absolute government prohibition against all advertising by non-sponsors downright un-American, all event organizers can get ahead of the game through preemptive purchases of advertising space. New York City's unsuccessful bid for the 2012 games included a proposal for [an advance deal](#) between the organizing committee and outdoor advertisers that would have effectively tied up the most sought after advertising space for official event sponsors. So, as in the military, when seeking to defend against an ambush, the best tactic may be to launch a preemptive strike.

## Putting the Genie Back in the Bottle – Can Live Sports Content be Controlled?

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Life used to be simple. Until recently, the only place you could get your daily fix of live sports content was through “old school” mediums like the radio (what?) or something known as a TV (huh?). In this digital age, new distribution means such as video-on-demand, blogs, [Twitter](#)® micro-blogging, and viral video transmissions have left many sports properties a twitter (pun intended) as they scramble to take advantage of the multitude of new distribution platforms, while at the same time protecting the jewels in the crown: their live content.

On the legal side of the ledger, the NBA was among the first sports properties to wrestle with this issue. In [NBA v. Motorola, Inc.](#), the NBA sought to enjoin Motorola from transmitting, via its handheld pager system, scores and other data flowing out of live NBA games. The NBA argued, *inter alia*, that such transmissions violated New York “hot-news” misappropriation law. Although the [lower court](#) issued a preliminary injunction preventing Motorola from providing the “STATS” service, on appeal, the Second Circuit ruled, *inter alia*, that the NBA’s state law claims were preempted by the Copyright Act, that sporting events themselves are not copyrightable (as distinguished from broadcasts or reports about the event which are protected by copyright), and that Motorola did not infringe NBA’s copyright because they reproduced only facts from the broadcasts, not the expression or description of the game that constitutes the broadcast.

In a [more recent case](#), the PGA Tour successfully employed credentialing requirements to prevent third parties from on-selling ‘real-time’ golf score information that had been compiled using the PGA’s proprietary on-site system. Prior to gaining access to the PGA’s media center, the PGA required all parties to agree to certain terms and conditions, including that they would not syndicate such information without first obtaining a license from the PGA. Plaintiff Morris Communications claimed that the credentialing requirements were illegal under US antitrust laws and filed a suit against the PGA. The District Court in the *Morris Communications* case ruled that the PGA had a valid business justification for imposing its restrictions and that the PGA had not violated the antitrust laws even if it operated a monopoly and refused to deal with Morris. In affirming the lower court’s judgment, the 11<sup>th</sup> Circuit distinguished *Motorola* and found that the PGA was justified in preventing third parties from free-riding on PGA’s technology, which enabled the PGA to collect ‘real-time’ golf scores from its golf tournaments.

Since *Morris Communications*, sports properties appear to have stepped up their efforts to protect the rights (and associated revenues) that flow out of live events using strategies similar to that of the PGA. For example, in 2006, through the use of credentialing requirements, FIFA [sought to limit the number of images](#) from live World Cup matches that could be used online by the media. Similarly, in 2007, a [blogging ban](#) was instituted at the Pan Am Games for all athletes and team personnel. And, last summer, the NCAA [removed a newspaper reporter](#) from the press box due to his unauthorized blogging of real-time information from a college baseball game. Later, the NCAA codified its [blogging policy](#)

for the credentialed media, which placed further restrictions on what the media could and could not do during live games. Most recently, the NFL [imposed limitations](#) on the amount of online video per day a media organization may use, and how long such material may remain posted. Finally, with the Beijing Games looming, both NBC and the IOC [have implemented restrictions](#) on the use of their live content and have issued [blogging guidelines](#) to all “accredited persons” preventing bloggers, including members of the non-rights-holding media, from posting certain photos, audio or video of sporting action, interviews with athletes, or Opening or Closing ceremonies.

The foregoing contract-oriented strategies for controlling the distribution of content may not be absolute preventative measures. However, at least based on current law, they do appear to give sports properties a legal weapon to limit the flow of content coming from their live events.

## Sports Law Group

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