

# #WEDEMANDCHANGE: AMENDING INTERNATIONAL OLYMPIC COMMITTEE RULE 40 FOR THE MODERN OLYMPIC GAMES

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Abstract: The emergence of social media such as Twitter has presented a new challenge for the International Olympic Committee and official Olympic sponsors: how to limit what athletes may Tweet throughout the Games. IOC Rule 40 prohibits athletes from associating with non-official Olympic sponsors immediately before, during, and immediately after the Games for advertising purposes. With the legitimate interests of the IOC, Olympic athletes, and the official Olympic sponsors at stake, the IOC should amend Rule 40 to reflect these competing legitimate interests while protecting the underlying goals of the IOC and official Olympic sponsors.

## INTRODUCTION

Many commentators dubbed the 2012 London Summer Olympic Games (“London Games”) the “Twitter Games.”<sup>1</sup> With over 150 million Olympic-related Tweets in just sixteen days, the International Olympic Committee (“IOC”) basked in the glow of free advertising.<sup>2</sup> Olympic athletes, however, have a bone to pick with the IOC: specifically, IOC Rule 40 (“Rule 40”). Rule 40 states the following:

Except as permitted by the IOC Executive Board, no competitor, coach, trainer or official who participates in the Olympic Games may allow his person, name, picture or sports performances to be used for advertising purposes during the Olympic Games.<sup>3</sup>

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1. Nick Mulvenney, *No Regrets Over ‘Twitter Games’ for IOC*, REUTERS, (July 31, 2012, 9:05 AM), <http://www.reuters.com/article/2012/07/31/us-oly-twitter-day-idUSBRE86U0PA20120731> (“The International Olympic Committee (IOC) has no regrets about embracing social media for what some are calling the first ‘Twitter Games’ . . .”).
2. Lewis Wiltshire, *The Olympics on Twitter*, UK BLOG (Aug. 13, 2012, 2:42 AM), <http://blog.uk.twitter.com/2012/08/the-olympics-on-twitter.html> (“We have seen well over 150 million Tweets about the Olympics over the past 16 days . . .”).
3. LONDON ORGANIZING COMMITTEE OF THE OLYMPIC GAMES AND PARALYMPIC GAMES LTD., RULE 40 GUIDELINES 7 (July 2012), <http://www.britishhandball.com/wp-content/uploads/downloads/2012/06/rule-40-guidelines-branding.pdf> [hereinafter “LONDON, RULE 40 GUIDELINES”] (quoting Rule 40 as provided in the official Olympic Guidelines).

The United States Olympic Committee (“USOC”) has the authority to sanction any athlete that fails to comply Rule 40, including “disqualification from the Games and/or withdrawal of the Participant’s accreditation.”<sup>4</sup> As seen during the London Games, an act such as posting a photograph of a non-official sponsor’s shoe on Twitter is enough to jeopardize an athlete’s participation in the Games.<sup>5</sup>

In light of the fact that Olympic athletes are not monetarily compensated for participating in the Games, many argue that Rule 40 serves to prohibit Olympic athletes from capitalizing on their success at the peak of their exposure: the Olympic Games.<sup>6</sup> Olympic athletes are thus limited in their ability to promote their sponsors, many of whom are largely responsible for funding the athletes’ year-round training.<sup>7</sup> As U.S. 20-kilometer race walker Maria Mitcha noted, “[B]ecause of rules like Rule 40 and others I could not use the image of myself at Olympic Trials or the title U.S. Olympian in any pictures, posts or Tweets to fundraise money to help pay for my travel expenses....”<sup>8</sup> U.S. javelin thrower Kara Patterson

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4. UNITED STATES OLYMPIC COMMITTEE, 2012 INFORMATION FOR ATHLETES, THEIR AGENTS, AND NGBS 1, 4 (Nov. 2011), [http://www.usatf.org/events/2012/OlympicTrials-TF/athleteInfo/Rule40\\_Pamphlet\\_4.pdf](http://www.usatf.org/events/2012/OlympicTrials-TF/athleteInfo/Rule40_Pamphlet_4.pdf) (“Participants who do not comply with Rule 40 may be sanctioned . . . including, ultimately, disqualification from the Games and/or withdrawal of the Participant’s accreditation.”).
  5. Martin Rogers, *American Athletes Lead Revolt Against Ban on IOC Ban on Social Media Use to Promote Sponsors*, YAHOO! SPORTS (July 30, 2012, 11:43AM), <http://sports.yahoo.com/news/olympics--u-s--leads-revolt-against-ioc-ban-against-social-media-use-to-promote-sponsors.html> (“The campaign seemed to be gathering pace throughout Monday, with American middle distance runner Leo Manzano complaining about being ordered to remove a photograph of his shoes from his social media page.”).
  6. Lesa Ukman, *The IOC’s Big Blunders (And How to Fix Them)*, SPONSORSHIP BLOG (Aug. 3, 2012, 2:33 PM), [http://www.sponsorship.com/About-IEG/Sponsorship-Blogs/Lesa-Ukman/August-2012/The-IOC-s-Big-Blunders-\(And-How-to-Fix-Them\).aspx](http://www.sponsorship.com/About-IEG/Sponsorship-Blogs/Lesa-Ukman/August-2012/The-IOC-s-Big-Blunders-(And-How-to-Fix-Them).aspx) (“And, Rule 40 of the Olympic Charter severely limits athletes’ ability to market themselves in the weeks before, during and after the Olympic Games, and cuts off athletes from their own sponsors when they are most marketable.”).
  7. Chris Smith, *London Olympics’ Unpaid Athletes Fight for Rich Medal Bonuses*, FORBES (July 31, 2012, 1:13 PM), <http://www.forbes.com/sites/chris-smith/2012/07/31/london-olympics-unpaid-athletes-fight-for-rich-medal-bonuses/> (“The vast majority of Olympic athletes are lucky to make a fraction of that amount, and one survey suggests that half of the American track and field athletes who rank in the top ten of their events make less than \$15,000 per year.”).
  8. Martin Rogers, *American Athletes Lead Revolt Against IOC Ban on Social Media Use to Promote Sponsors*, YAHOO! SPORTS (July 30, 2012, 11:43 AM), <http://sports.yahoo.com/news/olympics--u-s--leads-revolt-against-ioc-ban-against-social-media-use-to-promote-sponsors.html> (“[B]ecause of rules like Rule 40 and others I could not use the image of myself at Olympic Trials or the title U.S. Olympian in any pictures, posts or tweets to fundraise money to help pay for my travel expenses . . .”).

added, “I am honored to be an Olympian . . . but I can’t Tweet about my only sponsor.”<sup>9</sup> U.S. 100-meter hurdler Dawn Harper went so far as to Tweet an image of herself with duct tape covering her mouth that read “Rule 40,” making her opinion of Rule 40 shockingly clear.<sup>10</sup>

Unsurprisingly, Rule 40 has become the subject of criticism from athletes and commentators alike.<sup>11</sup> Olympic gold medalist Sanya Richards-Ross spearheaded the movement against Rule 40 with one strongly worded Tweet: #WeDemandChange.<sup>12</sup> As the backlash from Rule 40 continues, the IOC faces the task of either amending Rule 40 or risking continued criticism from athletes that, in turn, may affect the success of the Games.<sup>13</sup> In the age of social media, specifically, the increased use of Twitter, the time to amend Rule 40 is now, before it undoubtedly generates even more controversy.

## I. IOC RULE 40 & SOCIAL MEDIA GUIDELINES

### A. *The Purpose of Rule 40*

Although Rule 40 is no new addition to the Olympic Charter, social media such as Twitter and Facebook has re-defined its scope and application. Traditionally, Rule 40 protected official Olympic sponsors by safeguarding against ambush marketing, i.e., the practice of non-official Olympic sponsors engaging in unauthorized association and

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9. *Id.* (quoting U.S. javelin thrower Kara Patterson, “I am honored to be an Olympian . . . But I can’t tweet about my only sponsor.”).
  10. Adam Shergold, *U.S. Athletes Launch ‘Gag’ Protest Against Olympic Rule that Bans Them from Promoting Their Sponsors*, UK DAILY MAIL (July 31, 2012, 12:03 PM), <http://www.dailymail.co.uk/news/article-2181501/London-2012-US-athletes-launch-gag-protest-Olympic-rule-bans-promoting-sponsors.html> (“The 100m hurdler Dawn Harper even posted a photograph on Twitter of her mouth gagged with duct tape with ‘Rule 40’ written on it.”).
  11. Dave Smith, *Rule 40 And The 2012 Olympics: Should Athletes Be Free to Tweet*, INT’L BUS. TIMES (Aug. 2, 2012, 4:45 PM), <http://www.ibtimes.com/rule-40-and-2012-london-olympics-should-athletes-be-free-tweet-737406> (“The general consensus between experts and viewers seems to be this: The IOC needs to address social media in a more realistic way, and it needs to figure out how individual and IOC sponsors can get along (as they have to, apparently).”).
  12. Ken Belson, *Olympians Take to Twitter to Protest Endorsement Rule*, N.Y. TIMES, July 31, 2012, at B11 (“On Sunday, Sanya Richards-Ross . . . and other Olympians sponsored by Nike took to Twitter to criticize Rule 40 . . . [w]riting under the hashtags #wedemandchange and #rule40, the athletes wanted to raise awareness of the restriction . . .”).
  13. Kelly Whiteside, *After London, Athletes Still Pushing for Rule 40 Change*, USA TODAY (Aug. 23, 2012, 11:43 AM), <http://usatoday30.usatoday.com/sports/olympics/london/story/2012-08-23/olympics-rule-40-michael-phelpso-lashinda-demus/57225924/1> (“Lashinda Demus . . . tweeted Wednesday about the #WeDemandChange movement that gained momentum in London . . . members have been encouraged to keep the issue alive in social media.”).

commercialization of the Games.<sup>14</sup> Accordingly, the IOC maintains that Rule 40 serves “to protect against ambush marketing; prevent unauthorized commercialization of the Games; and to protect the integrity of the athletes’ performance at the Games . . . .”<sup>15</sup> While preventing athletes from appearing in television or print advertisements during the Games is a legitimate interest of the IOC, many argue that Rule 40 overreaches its boundaries by significantly limiting what athletes may post on their personal Twitter accounts.

### B. *Social Media Guidelines*

In an effort to ensure that athletes fully appreciate the parameters of Rule 40, the IOC provides athletes with Social Media Guidelines (“Guidelines”) that detail the scope and application of Rule 40.<sup>16</sup> In general, “the IOC encourages all social media activity . . . provided that it is not for commercial and/or advertising purposes . . . .”<sup>17</sup> The Guidelines make clear that any Tweets must be in first-person and conform to the Olympic spirit.<sup>18</sup> The Guidelines further state that athletes are prohibited from allowing their “picture or sports performance to be used for advertising purposes during the blackout period of the Olympic Games.”<sup>19</sup> But advertising purposes in this context stretches beyond traditional notions of advertising and limits what an athlete may post on his or her personal Twitter account.

### C. *Deemed Consent: An Exception to Rule 40*

The 2012 IOC Rules set forth an exception to Rule 40 in instances of “deemed consent.”<sup>20</sup> This exception permits an athlete’s personal website to “carry advertising for [the athlete’s] personal sponsors, provided that the adverts on the sites comply with these guidelines and any references to the Games are only within biographical details of the Participant’s achievements.”<sup>21</sup> But under the blogging guidelines, an athlete’s blog

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14. LONDON, RULE 40 GUIDELINES, *supra* note 3, at 6 (“[The IOC places these restrictions] to protect against ambush marketing; prevent unauthorized commercialization of the Games; and to protect the integrity of athletes’ performance at the Games . . . .”).

15. UNITED STATES OLYMPIC COMMITTEE, *supra* note 4, at 3 (paraphrasing the official LONDON, RULE 40 GUIDELINES).

16. *Id.* at 7 (listing all Rule 40 restrictions and standards).

17. *Id.*

18. *Id.*

19. *Id.* at 10.

20. LONDON, RULE 40 GUIDELINES, *supra* note 3, at 9 (listing examples of “deemed consent”).

21. *Id.* at 11 (discussing procedures for blogs and the exceptions for blogging under “deemed consent”).

“should not mention [his or her] sponsors . . . .”<sup>22</sup> These blogging guidelines provide the following:

[T]he IOC encourages all social media and blogging activity at the Olympic Games provided that it is not for commercial and/or advertising purposes and that it does not create or imply an unauthorized association of a third party with the IOC, the Olympic Games or the Olympic movement.<sup>23</sup>

Furthermore, “participants and other accredited persons are not permitted to promote any brand, product or service within a posting, blog or tweet or otherwise on any social media platforms or on any websites.”<sup>24</sup> Interestingly, however, the IOC “encourages participants and other accredited persons to ‘link’ their blogs, websites, or other social media platforms to the official site of the Olympic Movement . . . the official site of the Olympic Games . . . and the official site of the relevant NOC.”<sup>25</sup> These guidelines, especially the encouragement to ‘link’ social-media platforms to official websites, suggest that the IOC undoubtedly understands the potential value of social media. But these guidelines also suggest that this is a one-way street; the IOC wishes to exclusively benefit from the athletes’ use of social media while preventing them from doing the same.

The current version of Rule 40 indicates that the IOC fears athletes will exploit Twitter as a personal-marketing tool to the detriment of official sponsors.<sup>26</sup> Despite this concern, some argue that Rule 40 is an overly zealous rule that is not “sustainable in today’s open-source world.”<sup>27</sup> An examination of the plain language of Rule 40, however, is insufficient to grasp the scope of its applicability.

#### *D. Rule 40’s Scope: Beyond Traditional Advertising*

##### 1. Traditional Advertising

Rule 40 specifically states that it applies to “advertising purposes.” The IOC’s definition of “advertising purposes,” however, ventures beyond traditional advertising. In this respect, traditional advertising is often defined as “messages or commercials communicated through historically

22. *Id.*

23. INTERNATIONAL OLYMPIC COMMITTEE, IOC SOCIAL MEDIA, BLOGGING AND INTERNET GUIDELINES FOR PARTICIPANTS AND OTHER ACCREDITED PERSONS AT THE LONDON 2012 OLYMPIC GAMES 1, 1 (Aug. 31, 2011), [http://www.olympic.org/Documents/Games\\_London\\_2012/IOC\\_Social\\_Media\\_Blogging\\_and\\_Internet\\_Guidelines-London.pdf](http://www.olympic.org/Documents/Games_London_2012/IOC_Social_Media_Blogging_and_Internet_Guidelines-London.pdf) (discussing permissible social-media activity by athletes during the Games).

24. *Id.* at 2 (discussing athletes’ promotional social-media activity during the Games).

25. *Id.* at 3 (discussing linking social-media sites to the Games).

26. Smith, *supra* note 11 (“The existence of Rule 40 tells [sic] the IOC thinks that Twitter is solely a marketing tool, and not a tool for communication and storytelling.”).

27. Ukman, *supra* note 6 (discussing the impracticability of Rule 40).

established media such as television, radio, outdoor (billboards), print, and direct mail.”<sup>28</sup> According to the IOC, advertising includes athletes’ personal use of their social-networking accounts.<sup>29</sup> This broad scope leads some to suggest that if Rule 40 is not amended to better serve athletes’ interests, Rule 40 could eventually backfire on the IOC.<sup>30</sup>

## 2. Negative Sentiments

Interestingly, the IOC’s approach of protecting official sponsors may result in negative sentiments toward official sponsors.<sup>31</sup> As one commentator noted, many of the remarks made about official Olympic sponsors at the London Games were negative, including criticism of McDonald’s “French Fry Monopoly” and the inconvenience associated with Visa ATMs being the only ones available around the Olympic venues.<sup>32</sup> With such negative sentiments from athletes and the public swirling, the IOC is in a position to amend Rule 40 to better serve athletes and comply with the Olympic spirit.

As previously noted, Rule 40 is intended to protect official Olympic sponsors from ambush marketing.<sup>33</sup> Official sponsors pay upwards of \$60,000,000 to secure their positions at the Games and in related advertisements.<sup>34</sup> McDonald’s, for example, was the only vendor at the

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28. Jay Ehret, *Traditional Advertising Is Not Dead, It’s Just Changing*, THE MARKETING BLOG (June 5, 2008), <http://themarketingspot.com/2008/06/traditional-advertising-not-dead-its-just-changing.html> (defining “traditional” advertising).
  29. UNITED STATES OLYMPIC COMMITTEE, *supra* note 4, at 9 (discussing restrictions on athletes’ promotion of any brand, product or service through a posting, blog, tweet or any other social media platform).
  30. Smith, *supra* note 11 (arguing that Twitter is both a communication and marketing tool).
  31. Ukman, *supra* note 6 (noting that Pepsi and Nike saw a spike in Internet traffic in response to negative perceptions of official sponsors such as Coca Cola and Adidas, and that predominantly negative comments were made about official sponsors).
  32. *Id.* (noting that customers responded negatively to having their options, such as fast food and ATMs, limited to only official sponsors like McDonald’s and Visa); see also *McDonald’s Takes Heat for Olympic Sponsorship*, MSN MONEY (Jan. 13, 2012, 11:24 AM), <http://money.msn.com/top-stocks/post.aspx?post=81ca9d06-d9ed-4942-b41f-f699d5122e5e> (discussing the “hypocrisy” of the McDonald’s sponsorship deal).
  33. UNITED STATES OLYMPIC COMMITTEE, *supra* note 4, at 2 (discussing limitations on the athletes during the Games Period to prevent ambush marketing).
  34. Robert Passikoff, *Ambush Marketing: An Olympic Competition. And Nike Goes for Gold*, FORBES (Aug. 7, 2012, 7:42 AM), <http://www.forbes.com/sites/marketshare/2012/08/07/ambush-marketing-an-olympic-competition-and-nike-goes-for-gold/> (discussing that, despite the high price paid to become an official sponsor, non-sponsors such as Nike use creative advertising to associate themselves with the Olympics); see generally INTERNATIONAL OLYMPIC COMMITTEE, *IOC Marketing: Media Guide* (2012), [http://www.olympic.org/Documents/IOC\\_Marketing/London\\_2012/IOC\\_Marketi](http://www.olympic.org/Documents/IOC_Marketing/London_2012/IOC_Marketi)

London Games permitted to sell French fries.<sup>35</sup> As one commentator noted, “McDonald’s has such an ironclad sponsorship deal . . . that the fast-food ogre insists that none of the other 800 vendors . . . can sell fries – despite the fact that good greasy chips . . . have been part of British gastronomy for over 150 years.”<sup>36</sup> This, in part, demonstrates the subservient role that the IOC often plays to official Olympic sponsors.

### 3. Creative Attempts to Circumvent Rule 40

Instead of Rule 40 effectively preventing ambush marketing, these efforts have led to creative attempts by non-official sponsors to ensure their presence at the Games. For example, on the eve of the London Games, Nike ran its “Find Your Greatness” advertisement that featured everyday athletes competing in sports in places fictitiously named London.<sup>37</sup> In a similar attempt to circumvent the IOC’s rules, American rapper and headphone entrepreneur Dr. Dre sent several British athletes special versions of his Beats headphones adorned with union jack colors.<sup>38</sup> Some athletes Tweeted their appreciation for the headphones, including British football goalkeeper Jack Butland, whose Tweet: “[I]ove my GB Beats by Dre,” was almost immediately removed from Twitter.<sup>39</sup>

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ng\_Media\_Guide\_2012.pdf (discussing marketing strategy, licensing, ticketing, and revenue distribution among sponsors and profiling all Olympic sponsors, including McDonald’s).

35. Carey Polis, *McDonald’s Olympics French Fry Monopoly: Sponsorship Deal Bans Other Vendors From Selling Fries*, HUFFINGTON POST (July 12, 2012, 10:12 AM), [http://www.huffingtonpost.com/2012/07/12/mcdonalds-olympics-french-fries\\_n\\_1667809.html](http://www.huffingtonpost.com/2012/07/12/mcdonalds-olympics-french-fries_n_1667809.html) (discussing the extent of McDonald’s monopoly at the Olympics, including requiring the London Organizing Committee of the Olympics and the Paralympics Games to receive permission from McDonald’s to sell fish and chips).
36. Tim Carman, *McDonald’s Olympian Achievement in London: A French Fry Monopoly and Largest Fast-Food Restaurant*, WASH. POST (July 18, 2012), [http://articles.washingtonpost.com/2012-07-18/lifestyle/35486355\\_1\\_french-fries-london-olympics-british-government](http://articles.washingtonpost.com/2012-07-18/lifestyle/35486355_1_french-fries-london-olympics-british-government) (discussing McDonald’s monopoly over other vendors, and likening it to “corporate Darwinism” in which McDonald’s is the fittest and has eliminated all other vendors).
37. NIKE, *Find Your Greatness*, [https://www.youtube.com/watch?v=\\_hEzW1WRFTg](https://www.youtube.com/watch?v=_hEzW1WRFTg) (July 25, 2012), (showing amateur athletes competing in an Olympic setting all around the world in cities named London).
38. Mark Sweney, *Dr. Dre Beats Olympic Brand Police by Sending Headphones to Team GB*, THE GUARDIAN (July 31, 2012), <http://www.guardian.co.uk/media/2012/jul/31/dr-dre-beats-olympic-brand-police> (discussing Dr. Dre’s ambush marketing at the London Games).
39. *Id.* (noting that athletes who received Beats by Dre, including tennis player Laura Robson and soccer goalkeeper Jack Butland, immediately tweeted about the headphones).

*E. The Enforcement of Rule 40*

The concern over ambush marketing has led to strict enforcement of Rule 40 that, in turn, has received harsh criticism from Olympic athletes.<sup>40</sup> The Olympic Delivery Authority (“ODA”), a publicly funded body, is charged with the task of policing ambush marketing.<sup>41</sup> The ODA’s officers are permitted to “take down temporary advertising structures, stop mass giveaways of items such as umbrellas or T-shirts, or remove counterfeit goods from sale.”<sup>42</sup> While policing the promotion of non-official sponsors around the venues presents its own challenges, the challenge of policing the athletes’ Tweets has proven equally problematic.

Further, the IOC monitors online activity and encourages participants to report any unauthorized content.<sup>43</sup> American middle-distance runner Leo Manzano was just one athlete affected by Rule 40 during the London Games when the IOC ordered him to remove a picture of his running shoes from his personal Twitter account.<sup>44</sup> Manzano expressed his distaste of Rule 40 through his Facebook page, posting: “I am very disappointed in Rule 40 of the USOC . . . [t]his rule is very distracting to us athletes, and it takes away from our Olympic experience and training.”<sup>45</sup>

With such rigid monitoring in place, many wonder if the IOC will in fact enforce its strictest form of penalty: disqualification from the Games.<sup>46</sup> As one author noted, “[I]t’s hard to imagine how the I.O.C., or a country’s Olympic oversight body, would actually punish a social media offender.

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40. Martin Rogers, *American Athletes Lead Revolt Against IOC Ban on Social Media Use to Promote Sponsors*, YAHOO! SPORTS (July 30, 2012, 11:43AM), <http://sports.yahoo.com/news/olympics--u-s--leads-revolt-against-ioc-ban-against-social-media-use-to-promote-sponsors.html> (discussing the #WeDemandChange movement).
  41. Kevin Peachey, *Olympics: Tackling Ambush Marketing at London 2012*, BBC NEWS (July 18, 2012, 7:04 AM), <http://www.bbc.co.uk/news/business-18628635> (analyzing Olympic authorities’ willingness to enforce Rule 40).
  42. *Id.* (discussing the enforcement of Rule 40).
  43. UNITED STATES OLYMPIC COMMITTEE, *supra* note 4, at 8 (discussing guidelines for athletes to ensure compliance with Rule 40).
  44. Rogers, *supra* note 40 (discussing Rule 40’s negative impact on athletes, especially Olympians without high-profile sponsors).
  45. *Athlete Tweet Demands for Change to IOC Rule*, USA TODAY (July 30, 2012, 1:20PM), <http://usatoday30.usatoday.com/sports/olympics/london/story/2012-07-29/olympic-athletes-tweet-demand-for-change/56581574/1> (discussing Olympic athletes’ discontent with Rule 40).
  46. *Michael Phelps’ Agent: No Violation*, ESPN (Aug. 17, 2012, 7:19 PM), [http://espn.go.com/olympics/swimming/story/\\_/id/8278841/michael-phelps-agent-says-leaked-pics-not-ioc-violation](http://espn.go.com/olympics/swimming/story/_/id/8278841/michael-phelps-agent-says-leaked-pics-not-ioc-violation) (discussing Michael Phelps’ potential Rule 40 violation for appearing in a Louis Vuitton advertisement).

Stripping medals or blocking someone from competing seems an excessive punishment for a few Twitter posts.”<sup>47</sup>

While not related to his personal use of Twitter, American gold medalist Michael Phelps got caught in the Rule 40 crosshairs during the London Games.<sup>48</sup> When his picture appeared in a Louis Vuitton advertisement prior to the end of the blackout period, many wondered if a Rule 40 sanction would strip him of his numerous medals. Since Phelps had no involvement in precipitating the leak, the IOC did not impose sanctions.<sup>49</sup> The seriousness of the situation, however, demonstrates the extent to which the USOC and the IOC is prepared to handle potential violations.

In the 2012 London Games, the London Organizing Committee of the Olympic and Paralympic Games, along with the British Parliament, drafted the broadest ambush marketing rules seen to date.<sup>50</sup> With the IOC’s strict enforcement of Rule 40, athletes face what one commentator has dubbed “Endorsement Deal Hurdles.”<sup>51</sup> The increased media coverage over the #WeDemandChange movement leaves two questions unanswered: (1) What change is needed?; and (2) How do athletes succeed in achieving that change?

#### F. Rule 40: A Restrictive Covenant

Rule 40, in effect, is a noncompete agreement restricting athletes from affiliating with non-official Olympic sponsors during the blackout period in consideration for participating in the Games. Noncompete agreements are commonly used in the employee-employer context.<sup>52</sup> Of initial importance,

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47. David Segal, *Brand Police Are on the Prowl for Ambush Marketers*, N.Y. TIMES, July 25, 2012, at B11 (discussing Nike’s ambush-marketing campaign and possible consequences for athletes who use social media).
  48. Kelly Whiteside, *After London, Athletes Still Pushing for Rule 40 Change*, USA TODAY (Aug. 23, 2012, 11:43 AM), <http://usatoday30.usatoday.com/sports/olympics/london/story/2012-08-23/olympics-rule-40-michael-phelpos-lashinda-demus/57225924/1> (discussing continued tension between Olympic athletes and the International Olympic Committee regarding Rule 40).
  49. ESPN, *supra* note 46 (discussing the possibility of gold medal winner Michael Phelps violating Rule 40).
  50. David Segal, *supra* note 47 (discussing the London Organizing Committee’s increased strictness and its potential effect against former successful ambush marketer Nike).
  51. Jacquelyn Smith, *Olympic Hurdled for Advertisers: The Games’ Unique Rule And Restrictions*, FORBES (July 24, 2012, 11:02 AM), <http://www.forbes.com/sites/jacquelynsmith/2012/07/24/olympic-hurdles-for-advertisers-the-games-unique-rules-and-restrictions/> (discussing Olympic athletes’ difficulty in promoting their sponsors during the Olympics and the International Olympic Committee’s rationale for its strict approach).
  52. See generally Kenneth R. Swift, *Void Agreements, Knocked-Out Terms, and Blue Pencils: Judicial and Legislative Handling of Unreasonable Terms in*

the IOC does not employ the Olympic athletes. Instead, Olympic athletes are analogous to independent contractors. But this does not solve the athletes' problem; courts consistently enforce noncompete agreements against independent contractors.<sup>53</sup>

While U.S. state laws vary, noncompete agreements are typically enforced to the extent they are "reasonable."<sup>54</sup> Ohio courts, for example, consider whether the noncompete agreement at issue: (1) is no greater than is required for the protection of the employer; (2) does not impose undue hardship of the employee; and (3) is not injurious to the public.<sup>55</sup> Further, Ohio courts apply a reasonableness test that "permits court[s] to determine, on the basis of all available evidence, what restrictions would be reasonable to the parties."<sup>56</sup> Other states utilize similar tests.<sup>57</sup> For example, Alabama courts utilize a four-pronged test.<sup>58</sup> In order for an Alabama court to enforce a noncompete, (1) the employer must have a protectable interest; (2) the restriction must be reasonably related to that interest; (3) the restriction must be reasonable in time and place; and (4) the restriction must not impose undue hardship on the employee.<sup>59</sup> A protectable interest is defined as "a substantial right in its business sufficiently unique to warrant the type of protection contemplated by [a] non-competition agreement."<sup>60</sup> Additionally, many European courts, including Swiss courts

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*Noncompete Agreements*, 24 HOFSTRA LAB. & EMP. L. J. 223 (2007) (providing an overview of noncompete agreements).

53. See, e.g., *Buckley v. Seymour*, 679 So. 2d 220, 226 (1996); see also *Caring Heart Pers. Home Serv., Inc. v. Hobley*, 35 Kan. App. 2d 345 (Kan. 2006) (holding that a noncompete agreement is enforceable against independent contractors).
54. See, e.g., FLA. STAT. § 542.335 (2012) ("[E]nforcement of contracts that restrict or prohibit competition during or after the term of restrictive covenants, so long as such contracts are reasonable in time, area, and line of business, is not prohibited"); MICH. COMP. LAWS ANN. § 445.774(a) (West 2012) ("An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests . . .").
55. *Chi. Title Ins. Corp. v. Magnuson*, 487 F.3d 985, 991 (6th Cir. 2007) (upholding the reasonableness of a noncompete agreement).
56. *Raimonde v. Van Vlerah*, 325 N.E.2d 544, 546-47 (1975) (upholding the reasonableness of a three-year noncompete agreement with certain radius restrictions).
57. See, e.g., *Cobb v. Cave Publ'g Grp. Inc.*, 322 S.W.3d 780, 784 (Tex. App. 2010) (defining reasonable limitations in terms of time, geographical area, and scope of activity that is no more than necessary to protect the goodwill or business interest of the promisee).
58. *Nationwide Mut. Ins. Co. v. Cornutt*, 907 F.2d 1085, 1087 (11th Cir. 1990) (determining that a twenty-six mile radius restriction did not cause an undue hardship on a former employee).
59. *Id.* (providing the Alabama standard for analyzing the reasonableness of noncompete agreements).
60. *Id.* (analyzing Alabama's "protectable interest" standard for noncompete agreements).

(noteworthy because the Court of Arbitration for Sport is based in Switzerland), apply similar tests for evaluating the enforceability of noncompete agreements.<sup>61</sup>

Indeed, the IOC has a legitimate interest in both restricting what an athlete may Tweet and protecting official Olympic sponsors from ambush marketing. The broad scope of Rule 40 and the IOC's unfettered ability to impose sanctions, including stripping athletes of medals, supports the argument that Rule 40 is unreasonable and, therefore, unenforceable. Further, preventing athletes from so much as mentioning a non-official sponsor may constitute an undue hardship on athletes to the extent that they rely on funding from non-official sponsors to finance their training. Challenging Rule 40 through the U.S. court system, however, is unlikely to resolve in the athletes' favor.

## II. LITIGATION: AN OLYMPIC-SIZED HURDLE

The limitations Rule 40 imposes on athletes may lead one to ask: "Does this violate the First Amendment?" or even, "What about U.S. anti-trust laws?" Additionally, challenging the IOC, an international organization, raises a choice-of-law issue.<sup>62</sup> As fully explained below, a constitutional or statutory challenge to Rule 40 would likely resolve in the IOC's favor.<sup>63</sup>

### A. *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*

In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, the USOC and the IOC brought suit against San Francisco Arts & Athletics, Inc. ("SFAA") under the Amateur Sports Act of 1978 ("Act") to prevent SFAA's use of the term "Olympics" in the "Gay Olympic Games."<sup>64</sup> In its defense, SFAA alleged that the USOC enforced its rights under the Act in a discriminatory manner in violation of the Fifth Amendment.<sup>65</sup> While a Fifth Amendment argument does not readily apply

61. LUS LABORIS, *Non-Compete Clauses: An International Guide*, [http://www.iuslaboris.com/files/documents/Public%20Files/Publications/2010\\_Publications/non-compete-clauses-an-international-guide.pdf](http://www.iuslaboris.com/files/documents/Public%20Files/Publications/2010_Publications/non-compete-clauses-an-international-guide.pdf) (2010) (describing the differing noncompete laws in forty-two countries).

62. See Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 10 (1959) ("When each of two states has a legitimate interest in the application of its law and policy, a problem is presented which cannot be rationally solved by any method of conflict of laws . . .").

63. See generally James G. Goettal, *Is the International Olympic Committee Amenable to Suit in a United States Court?*, 7 FORDHAM INT'L L.J. 61 (1984) (discussing the IOC's legal capacity to be sued).

64. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 525 (1987).

65. *Id.* at 523 (stating "The SFAA's claim that the USOC has enforced its § 110 rights in a discriminatory manner in violation of the Fifth Amendment fails,

to the Olympic athletes' objections to Rule 40, the court's holding remains significant. In this respect, the court held that SFAA's Fifth Amendment claim failed because "the USOC is not a governmental actor to whom the Fifth Amendment applies."<sup>66</sup>

In reaching its conclusion, the court first determined that "the fundamental inquiry is whether the USOC is a governmental actor to whom the prohibitions of the Constitution apply."<sup>67</sup> While the USOC is chartered by Congress, the court held that a "corporate charter does not render the USOC a Government agent."<sup>68</sup> This conclusion is significant insofar as it limits the scope of actions that may be successfully brought against the USOC. Unless the USOC acts as a government agent, a constitutional challenge, such as one under the First Amendment, will likely fail. Rule 40 undoubtedly limits what athletes may say, but, as the IOC argues, it ensures the success of the Games by protecting the official sponsors' interests. This purpose is constitutionally permissible. Just as with any sport, some may argue, the athletes must follow all rules as a prerequisite for the privilege of participating in the Games.

### B. *Martin v. International Olympic Committee*

A factually distinct – but legally pertinent – situation also arose in the 1984 Los Angeles Summer Olympic Games. In *Martin v. International Olympic Committee*, eighty-two female long-distance track runners from twenty-seven countries and two runners' organizations brought claims under the Fifth and Fourteenth Amendments of the U.S. Constitution as well as California's Unruh Civil Rights Act against the organizers of the 1984 Los Angeles Summer Olympic Games.<sup>69</sup> The athletes' and runners' organizations sought a preliminary injunction to require the Games to include the 5,000 and 10,000-meter track events for women, which had never been included in the Games.<sup>70</sup>

The *Martin* court faced the challenge of addressing both state law and constitutional claims. In holding that there was no violation of California's Unruh Civil Rights Act, the court noted that courts should be "wary of applying a state statute to alter the content of the Olympic Games" since they are "organized and conducted under the terms of an international agreement – the Olympic Charter."<sup>71</sup> Again, this holding is significant

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because the USOC is not a governmental actor to whom the Fifth Amendment applies.").

66. *Id.*

67. *Id.* at 542.

68. *Id.* at 543.

69. *Martin v. Int'l Olympic Comm.*, 740 F.2d 670 (9th Cir. 1984) ("According to the women runners, the process used to select new Olympic events has resulted in the continuation of an historical pattern against women participants in the Olympic Games.").

70. *Id.* at 673.

71. *Id.* at 677.

insofar as it limits the manner in which claims may be brought against the USOC or the IOC. *Martin* suggests that, if a remedy is obtainable, it should come from the IOC.

C. *Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*

The 2010 Winter Olympic Games in Vancouver brought yet another challenge. In *Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*, the female plaintiffs asserted that the exclusion of women's ski jumping from the Games violated their equality rights under the Canadian Charter of Rights and Freedoms ("Charter").<sup>72</sup> Their challenge presented the threshold question of whether the Charter even applied to the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games ("VANOC").<sup>73</sup> Because the VANOC, like the USOC, is a private entity, the court applied two separate tests to determine whether the VANOC was subject to the Charter: (1) the "control test;" and (2) the "ascribed activity test".<sup>74</sup> The "control test" required the court to look at whether the government subjected the VANOC to "routine or regular control."<sup>75</sup> Meanwhile, the "ascribed activity test" required the court to also determine whether the VANOC was "carrying out a government program or policy with respect to a particular activity."<sup>76</sup> The court held that the VANOC was indeed not subject to the Charter on either grounds and that it therefore could not provide a remedy to the plaintiffs.<sup>77</sup> Further, the court held that only the IOC could provide the remedy that the plaintiffs sought.<sup>78</sup>

The case law therefore suggests that challenging Rule 40 through a domestic court system is not likely to resolve the Rule 40 issue in the athletes' favor. As explained in Section IV, *infra*, this is not to suggest that athletes are without any possibility of successfully challenging Rule 40.

### III. THE COURT OF ARBITRATION FOR SPORT & CHOICE OF LAW

#### A. *The Court of Arbitration for Sport*

The Court of Arbitration for Sport ("CAS") may provide the best avenue for challenging Rule 40. The CAS is an "arbitration institution

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72. *Sagen v. Vancouver Organizing Comm. for the 2010 Olympic and Paralympic Winter Games*, 2009 BCSC 942 (Can. B.C.).

73. *Id.* at ¶ 6, 10.

74. *Id.* at ¶ 11.

75. *Id.* at ¶ 12.

76. *Id.* at ¶ 11.

77. *Id.* at ¶ 121.

78. *Id.* at ¶ 131.

whose mission is to secure the settlement of sports-related disputes.”<sup>79</sup> CAS decisions contribute to the growing body of sports law deemed “*lex sportiva*.”<sup>80</sup> Based in Switzerland, Chapter 12 of the Swiss Private International Law Act (“PIL Act”) governs CAS arbitration proceedings.<sup>81</sup> The PIL Act “applies to arbitration as a result of the express choice of law contained in Article 17 of the [Arbitration Rules for the Olympic Games], and as a result of the choice of Lausanne, Switzerland as the seat of the ad hoc Division . . . .”<sup>82</sup> Article 116 of the PIL Act provides that contracts “shall be governed by the law chosen by the parties.”<sup>83</sup> Furthermore, Article 115 governs employment contracts, which may provide a useful tool for athletes challenging the enforceability of Rule 40 as a noncompete agreement.<sup>84</sup>

Under the Olympic Charter, “any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport (CAS), in accordance with the Code of Sports-Related Arbitration.”<sup>85</sup> The CAS is comprised of two divisions: (1)

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79. COURT OF ARBITRATION FOR SPORT, *Guide to Arbitration*, 6, <http://www.sportrecht.org/EU-Recht/CASguideArbitration.pdf>; see also Annie Bersagel, *Is There a Stare Decisis Doctrine in the Court of Arbitration for Sport? An Analysis of Published Awards for Anti-Doping Disputes in Track and Field*, 12 PEPP. DISP. RESOL. L.J. 189 (2012) (providing an overview of the CAS’s history and procedure).
  80. See Ken Foster, *Lex Sportiva and Lex Ludica, the Court of Arbitration for Sport’s Jurisprudence*, 3 ENT. & SPORTS L.J. 1, 2 (2005) (arguing that the CAS’s “work could fit various models of adjudication.”); see also Rachelle Downie, *Improving the Performance of Sport’s Ultimate Umpire: Reforming the Governance of the Court of Arbitration for Sport*, 12 MELB. J. INT’L L. 315, 315-19 (2011) (discussing the origins, structure, and governance of the CAS).
  81. COURT OF ARBITRATION FOR SPORT, *Arbitration Rules for the Olympic Games*, art. 7 (July, 10, 2012), [http://www.tas-cas.org/d2wfiles/document/422/5048/0/RULES20OG20FOR20LONDON20201220\\_ENG\\_.pdf](http://www.tas-cas.org/d2wfiles/document/422/5048/0/RULES20OG20FOR20LONDON20201220_ENG_.pdf). See Bundesgesetz über das Internationale Privatrecht [IPRG], [Federal Code on Private International Law] Dec. 18, 1987, RS 291, art. 176 (Switz.); see generally Adam Samuel, *The New Swiss Private International Law Act*, 37 INT’L & COMP. L.Q. 681, 686 (1988) (stating that “[a]n express or implied choice of law will be honoured and in the absence of such a choice, the contract will be governed by the law of the State with which it is most closely connected.”).
  82. Richard H. McLaren, *Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games*, 12 MARQ. SPORTS L. REV. 515, 521 (2002).
  83. Bundesgesetz über das Internationale Privatrecht [IPRG], [Federal Code on Private International Law] Dec. 18, 1987, RS 291, art. 116 (Switz.).
  84. *Id.* at art. 115; see also Adam Samuel, *The New Swiss Private International Law Act*, 37 INT’L & COMP. L.Q. 681, 687 (1988) (stating that the “Act stipulates that the Swiss courts of the defendant’s domicile and where the work is habitually done have jurisdiction, but that the employee can also sue in the court of his domicile of habitual residence.”).
  85. INTERNATIONAL OLYMPIC COMMITTEE, *Olympic Charter*, 105 (Sept. 9, 2013), available at [http://www.olympic.org/Documents/olympic\\_charter\\_en.pdf](http://www.olympic.org/Documents/olympic_charter_en.pdf).

the Ordinary Arbitration Division whose task is to “resolves all disputes subject to the ordinary arbitration procedures” and (2) the Appeals Arbitration Division whose task is to “resolve disputes subject to the appeals arbitration procedure.”<sup>86</sup>

### B. *The Ad Hoc Division of the CAS*

The CAS establishes the ad hoc Division of the CAS (“AHD”) to resolve disputes that arise during the Olympic Games or during the ten days preceding the Opening Ceremony.<sup>87</sup> The AHD provides “for the resolution by arbitration of the disputes” and consists of arbitrators, a President, and a Court Office located on the site of the Olympic Games.<sup>88</sup> The parties may be represented by counsel and are required to submit a written application that bears similarities to a traditional complaint. The application, among other requirements, must include a statement of the facts, the claimant’s request for relief, and “where applicable, an application for a stay of the effects of the decision being challenged or for any other preliminary relief of an extremely urgent nature.”<sup>89</sup> In determining whether to award preliminary relief, the panel must consider “whether the relief is necessary to protect the applicant from irreparable harm . . . and whether the interests of the applicant outweigh those of the opponent . . . .”<sup>90</sup>

A panel of three arbitrators is established to hear a claim unless the President of the AHD decides to appoint a sole arbitrator.<sup>91</sup> Article 12 of the Arbitration Rules for the Olympic Games (“Arbitration Rules”) states that the “arbitrators must have legal training and . . . be independent of the parties and disclose immediately any circumstance likely to compromise their independence.”<sup>92</sup>

Article 1 of the Arbitration Rules limits the time within which an athlete may bring a claim.<sup>93</sup> Article 1 provides for resolution of disputes that “arise *during* the Olympic Games or during a *period of ten days preceding* the Opening Ceremony of the Olympic Games.”<sup>94</sup> Notably, the ten days preceding the Games falls within Rule 40’s blackout period.<sup>95</sup>

86. COURT OF ARBITRATION FOR SPORT, *supra* note 79, at 3.

87. COURT OF ARBITRATION FOR SPORT, *supra* note 81, at art. 1.

88. *Id.* at art. 2, 5.

89. *Id.* at art. 10.

90. *Id.* at art. 14.

91. *Id.* at art. 11.

92. *Id.* at art. 12.

93. *Id.* at art. 1 (restricting the ability of athletes to bring a claim to immediately before, or during the Games).

94. *Id.* (emphasis added).

95. UNITED STATES OLYMPIC COMMITTEE, *supra* note 4, at 4 (defining the duration of the “Games Period” in which athletes may not appear in advertisements).

Other procedural devices within the Arbitration Rules may also provide relief. Recall that Article 14 of the Arbitration Rules provides the AHD discretion to award preliminary relief by staying the effects of a challenged decision.<sup>96</sup> An athlete is therefore permitted to bring a claim within the preceding ten days prior to the Opening Ceremony and petition for a stay of the effects of the challenged decision, i.e., the enforcement of Rule 40. If Olympic athletes successfully establish that the enforcement of Rule 40 will result in irreparable harm and that their interests outweigh those of the IOC, the AHD may award a stay of the enforcement of Rule 40.<sup>97</sup>

It would be idealistic, to say the least, to presume that the AHD would stay the enforcement of Rule 40 without an exceptionally strong argument for doing so.<sup>98</sup> But Olympic athletes have several arguments that may persuade the AHD panel to rule that Rule 40, as applied to social media such as Twitter, inflicts irreparable harm and imposes an undue hardship on the athletes.

#### IV. A MUTUALLY BENEFICIAL APPROACH: PROTECTING THE INTERESTS OF ATHLETES, THE IOC & THE OFFICIAL OLYMPIC SPONSORS

##### A. *Proposed Compromise*

Athletes may be best served by striking a compromise with the IOC: allowing the IOC to continue to prohibit athletes from appearing in traditional television and print advertisements, but allowing athletes to use their personal Twitter accounts so long as Tweets conform with an amended version of the Rule 40 Guidelines. An amended version of Rule 40, for example, could allow an athlete to Tweet a picture of a non-official sponsor's running shoe. Inappropriate or controversial Tweets, however, would remain prohibited. Both Switzerland and Greece removed their own athletes from the London Games after their athletes posted offensive and

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96. COURT OF ARBITRATION FOR SPORT, *supra* note 81, at art. 14 (stating that the panel “may rule on an application for a stay of the effects of the challenged decision or for any other preliminary relief without hearing the respondent first.”).

97. *See id.* (stating the panel should consider whether to award relief by determining “whether the relief is necessary to protect the applicant from irreparable harm, the likelihood of success on the merits of the claim, and whether the interests of the applicant outweigh those of the opponent or of other members of the Olympic Community.”).

98. *See* UNITED STATES OLYMPIC COMMITTEE, *supra* note 4, at 2 (explaining that the “International Olympic Committee (IOC) has traditionally only allowed limited exceptions to Rule 40.”).

racially charged Tweets.<sup>99</sup> These Tweets do not conform to the Olympic spirit and, therefore, the IOC is entitled to demand their removal.<sup>100</sup>

An amended version of the Rule 40 Guidelines could also retain the requirement that all Tweets be written in first-person, diary-type fashion.<sup>101</sup> For example, an amended version would allow an athlete to Tweet, “I love running in my Nike shoes!” In contrast, an athlete would be prohibited from Tweeting, “Nike shoes perform better than Adidas.” A further limitation would prevent an athlete’s Tweets from derogating an official sponsor in any way, such as “I like Nike shoes better than any other shoes.” While not a direct derogation of an official sponsor, one can draw an inference that the poster believes Nike shoes perform better than Adidas. This requirement ensures that the public perceives these Tweets as being personal to the athlete, which may alleviate some of the official sponsors’ concerns.

### *B. Competing Interests*

This balance is best understood by examining the legitimate interests of both the IOC and the Olympic athletes. As previously discussed, Rule 40 serves to protect the official Olympic sponsors from ambush marketing that would potentially dilute their advertising value.<sup>102</sup> The athletes, who are not monetarily compensated for participating in the Olympics,<sup>103</sup> stand to gain lucrative endorsement deals that would aid in funding their training. As one commentator aptly noted, “[t]he IOC says without sponsors, there wouldn’t be the games. Well, there wouldn’t be the games without athletes either . . . the IOC needs to tread very softly here.”<sup>104</sup> This is not to suggest that future athletes would forego the opportunity to participate in the Games because of Tweeting restrictions. But criticism of Rule 40 is not likely to subside as athletes will likely remain vocal about this controversial issue. In this respect, the IOC stands to lose credibility with viewers who care less about the money being placed in the hands of the IOC and more about the treatment of Olympic athletes.

### *C. Embracing Social Media: Benefits of its Use*

While allowing athletes to Tweet about their non-official sponsors seems to conflict with IOC’s interests, an increase in overall Tweets may prove more beneficial than harmful. Major league soccer and baseball, as

99. Ken Belson, *Swiss Athlete Is Sent Home For Insults Posted Online*, N.Y. TIMES, July 31, 2012, at B13.

100. *Id.* (quoting the head of the Swiss Olympic delegation as stating: “We condemn these remarks [that] . . . contradict the Olympic Charter.”).

101. UNITED STATES OLYMPIC COMMITTEE, *supra* note 4, at 7 (specifying that “blogs or tweets must be in a first person, diary-type format”).

102. *Id.* at 2 (explaining a purpose of Rule 40 as preventing “ambush marketing”).

103. *Id.* at 3 (discussing the purpose of Rule 40 as preserving the status of Olympic athletes as amateurs).

104. Smith, *supra* note 11.

well as the national football, basketball, and hockey teams, have all adopted social media policies that regulate Tweeting to some extent.<sup>105</sup>

### 1. The National Basketball Association

Most notably, the National Basketball Association (“NBA”) has used social media to its advantage.<sup>106</sup> The NBA’s senior vice president of marketing noted, “having the penetration that we do on Twitter, people see NBA teams and players and other terminology in the top 10 trending topics and *it is nothing short of beneficial.*”<sup>107</sup>

The NBA’s status as a top-trending topic comes as no surprise considering its Twitter and Facebook fan base of over 185 million.<sup>108</sup> Individual players, including Jeremy Lin and LeBron James, are largely responsible for this increased online fan base.<sup>109</sup> Importantly, many believe that the NBA’s presence on social media directly contributed a recent increase in television ratings, which undoubtedly keeps NBA sponsors satisfied with their investment.<sup>110</sup>

The NBA also experienced an increase in youth viewership that some attribute to its presence on social media.<sup>111</sup> Notably, these younger viewers are often targets of NBA sponsors, such as Sprite.<sup>112</sup> Coca-Cola’s senior vice president of sports and entertainment for North America stated that the “NBA targets an avid fan that Sprite wants to connect to. It’s a younger fan, a multicultural fan, very tech-savvy.”<sup>113</sup> Further, Commissioner David Sterns stated that the NBA’s sponsors “are very happy with the way the

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105. Maria B. Ortiz, *Guide to Leagues’ Social Media Policies*, [http://espn.go.com/espn/page2/story/\\_/id/7026246/examining-sports-leagues-social-media-policies-offenders](http://espn.go.com/espn/page2/story/_/id/7026246/examining-sports-leagues-social-media-policies-offenders) (last visited Oct. 29, 2013) (“[E]very sport, league and team has embraced -- or, at the very least, has accepted the role of social media and fan engagement. However, different sports are taking different approaches when it comes to regulating tweet times and status updates.”).

106. Lucas Shaw, *How Social Media Is Giving NBA Rating a Slam Dunk*, REUTERS (Feb. 24, 2012, 12:56 PM), <http://www.reuters.com/article/2012/02/24/idUS140846563820120224> (explaining how athletes tweeting gives the NBA an advantage over other sports).

107. *Id.* (emphasis added).

108. *Id.*

109. *See id.* (“The ‘Linsanity’ surrounding the emergence of the New York Knicks’ young star has been fueled in large part by social media.”).

110. *Id.* (“Fueled by the meteoric rise of Jeremy Lin, the NBA has rocketed its way to social media dominance in American sports, driving soaring television ratings in a season many thought would be lost to a lockout.”).

111. *Younger Viewers Tuning into NBA This Season*, NBA (May 10, 2012, 7:33 PM), <http://www.nba.com/2012/news/05/10/nba-younger-viewers.ap/index.html> (suggesting that “Griffin’s status as a young, engaging, Twitter--savvy NBA star” has increased viewership).

112. *Id.*

113. *Id.*

league has charged back”<sup>114</sup> after the 2011 lockout and acknowledged that the NBA’s presence on social media likely contributed to this result.<sup>115</sup>

Therefore, the IOC would likely benefit from the athletes’ increased use of Twitter, irrespective of whether they Tweet about non-official sponsors. The ultimate goal of the Games, from one perspective, is to attract as many viewers as possible.<sup>116</sup> One commentator noted, “[t]he moment the IOC set restrictions that limited the voice of the athletes, they made the Olympics less relevant to the Millennials . . . they have taken a large influential group out of the equation.”<sup>117</sup> This suggests that the athletes’ increased use of Twitter would attract younger individuals to the Games, thus potentially increasing television ratings. In turn, this would keep the official sponsors pleased with their investment in the Games and would thus contribute to their continued sponsorship.

## 2. The Ultimate Fighting Championship

The Ultimate Fighting Championship (“UFC”) has also used Twitter to its advantage.<sup>118</sup> During the 2011 UFC Summit in Las Vegas, over 300 fighters were required to attend “Digital Royalty University” to familiarize themselves with social media such as Twitter.<sup>119</sup> The UFC’s goal for the incentive program was to “encourage the athletes to embrace these new communication tools and increase fan engagement.”<sup>120</sup> Not only were the fighters required to attend, they stood to gain substantial monetary benefits relative to the impact their personal Twitter accounts made.<sup>121</sup> Both the NBA and UFC’s embracement of Twitter suggests what the IOC fails to understand: an increased presence on Twitter will benefit the Games as a whole.

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114. *Id.*

115. *Id.* (“Our fan response across everything we do has been terrific -- from television to attendance to social media.”).

116. INTERNATIONAL OLYMPIC COMMITTEE, *supra* note 85, at 17 (Sept. 9, 2013), available at [http://www.olympic.org/Documents/olympic\\_charter\\_en.pdf](http://www.olympic.org/Documents/olympic_charter_en.pdf) (stating that one of the missions of the Olympics is “to encourage and support the development of sport for all.”).

117. Adriana Lopez, *A New Social Media Strategy for the Olympics, Future Sporting Events*, FORBES (Aug. 3, 2012, 10:01 AM), <http://www.forbes.com/sites/adrianalopez/2012/08/03/a-new-social-media-strategy-the-olympics-future-sporting-events-can-adopt-today/>.

118. Britt Johnson, *First Social Media Incentive Program for Athletes*, DIGITAL ROYALTY (May 14, 2011), <http://www.thedigitalroyalty.com/2011/first-social-media-incentive-program-for-athletes/#> (discussing an incentive program intended “to encourage the athletes to embrace these new communication tools and increase fan engagement.”).

119. *Id.*

120. *Id.*

121. *Id.* (stating that the UFC would be “handing out the cash—\$240,000 annually to be exact.”).

The Olympic Games undoubtedly already appeal to youth; the athletes become their heroes and inspire them to achieve their own athletic successes. Twitter users are primarily young individuals.<sup>122</sup> Regardless of what athletes Tweet, whether it is about their favorite food, or a thank you Tweet one of their sponsors, the athletes' presence on Twitter will not go unnoticed by their many followers. One can argue, therefore, that an increased use of Twitter may in turn lead to an increase in television ratings – one of the IOC's and the official Olympic sponsors' ultimate goals.

## V. AMENDING RULE 40

As expressly stated in the IOC Social Media Guidelines, “[t]he IOC reserves the right to amend these Guidelines, as it deems appropriate.”<sup>123</sup> The time to amend is now. The language of Rule 40 is undoubtedly broad in scope in that it restricts what athletes may post on their personal Twitter accounts. This is not to suggest that the IOC should amend Rule 40 to allow athletes to Tweet about whatever they so choose during the Games, regardless of its appropriateness. Rather, the IOC should amend Rule 40 to account for the legitimate interests of both the IOC and Olympic athletes.

To be clear, the IOC has a legitimate interest in prohibiting athletes from appearing in television and print advertisements for non-official sponsors. While many of the IOC's fears of ambush marketing and the effect that perpetrators may have on the Games is likely exaggerated, other companies should not be able to freely capitalize on the goodwill of the Games. Rule 40, however, overreaches into the athletes' personal use of Twitter by preventing them from so much as posting a picture of a non-official sponsor's shoe. Thus, narrowing the scope of Rule 40 will serve the interests of both the IOC and athletes.

The text of Rule 40 itself would not need to be amended in order to effectuate the change that the athletes desire. Instead, the IOC should amend the Rule 40 Guidelines to reflect a narrower scope of what constitutes “advertising purposes” and to delineate appropriate uses of non-official-sponsor references on social media. The Rule 40 Guidelines state that the IOC “wants[s] to ensure that Rule 40 is applied only as necessary to protect the purposes for which it exists.”<sup>124</sup> Narrowing the scope of Rule 40 would ensure that it is only being applied as necessary to prevent ambush marketing.

Therefore, the IOC should remove the terms “social networking sites” and “blogs” from the Rule 40 Guidelines under “Advertising Purposes” and instead include them in a separate section delineating their proper use. The

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122. Aaron Smith & Joanna Brenner, *Twitter Use 2012*, PEW RESEARCH CENTER (May 31, 2012), <http://pewinternet.org/Reports/2012/Twitter-Use-2012.aspx> (citing a study that found the number of Twitter users aged 18-29 was nearly twice that of Twitter users aged 30-49).

123. UNITED STATES OLYMPIC COMMITTEE, *supra* note 4, at 9.

124. *Id.*

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“Advertising Purposes” section of the Rule 40 Guidelines would therefore read as follows:

‘Advertising purposes’ encompasses commercial promotion, including: traditional advertising in paid-for space, including press advertisements, billboards, television, and radio and online advertising; direct mail advertising (electronically or by post); PR, including personal appearances and press releases; on-product promotions and advertising; in-store promotions; and corporate websites and viral advertising.<sup>125</sup>

The IOC could then draft a separate guideline to set forth the proper uses of social media, such as Twitter, with respect to references to non-official sponsors. These guidelines could include provisions that limit what an athlete may Tweet instead of the current absolute ban on referencing non-official sponsors. For example, a provision could require that all references to non-official sponsor be in first-person, diary-type fashion. Further, the IOC could demand that all Tweets that incorporate a non-official sponsor contain a standard disclaimer such as “[Insert Company] is not an official sponsor of the Olympic Games.”

### CONCLUSION

The IOC should amend Rule 40 to account for both the IOC’s and the athletes’ legitimate interests. Social media such as Twitter has undoubtedly changed the way fans connect with the Olympic Games and the athletes themselves. The IOC should amend Rule 40 to encourage, rather than restrict, this connection.

By retaining many of the restrictions currently in place, such as prohibiting inappropriate or offensive Tweets, an amended version of the Rule 40 Guidelines allowing athletes to Tweet about their sponsors would better serve the interests of both the IOC and athletes. An amended version of the Rule 40 Guidelines that narrows the scope of “advertising purposes” will serve both the IOC and the athletes’ interests by attracting more attention to the athletes, and thus to the Games themselves. Therefore, amending Rule 40 would not only benefit the IOC and athletes, it would benefit official Olympic sponsors.

The Olympic athletes could present these arguments to the CAS prior to the Opening Ceremony of the Games. By demonstrating that the athletes’ interests outweigh those of the IOC and/or that Rule 40 imposes an undue hardship with respect to their personal use of social media, athletes may be able to obtain preliminary relief via a stay of the enforcement of Rule 40. The athletes’ best chance of permanently changing Rule 40 may lie in demonstrating to the IOC that permitting athletes to Tweet about their sponsors not only will aid them in funding their training, but also will result in increased attention to the Games – an

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125. *Id.* (deleting “all forms of commercial promotion, including (but not limited to) . . . social networking sites, [and] blogs . . .”).

outcome that will undoubtedly benefit the IOC, the official Olympic sponsors, and the athletes.