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Athletes & Social Media : What constitutes Ambush Marketing in the Digital Age ? The Case of Rule 40 of the Olympic Charter

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Introduction

Many professional athletes not only excel in their sports disciplines : they also stand out in the promotion and marketing of their activities and achievements which in turn support and increase their fame and their commercial value. They can particularly do so by a strong and intensive activity on social media which can generate important revenues and convert them into true digital champions and leading social media influencers.¹

In view of the importance of social media for professional athletes and of the legal challenges that this raises, the goal of this short article is to discuss certain legal issues arising from social media communications made by professional athletes (and/or their individual sponsors) in the light of the still on-going debate relating to the rules that apply to Olympic Games (the so-called Rule 40) with a focus on ambush marketing.

Athletes have a strong interest in being in a position to communicate actively during or in the periods immediately before or after major international sports events to which they participate, particularly in order to report about their own performance and training activities. This is specifically the case for athletes taking part to the Olympic Games. This may however conflict with the interests of the organizers of such events to control the communications that are made by the athletes in order to maintain a sufficient degree of exclusivity for the benefit of the official sponsors of the events. On this basis, specific regulations have been adopted in order to balance these competing interests.² It is worth noting that these regulations generally do not apply only to athletes but more broadly to all accredited persons which include coaches, officials, personnel of National

¹ See GIRANDOLA, CHRIS, available at: <https://www.stadiumtalk.com/s/most-influential-athletes-social-media-bc2ed1ff709e4daa> ; based on recent rankings, the most popular athlete on social media is the Portuguese soccer player Cristiano Ronaldo with a Facebook fanbase of 122.5 million and a Twitter fanbase of 76.4 million followers, see SOURAV, DAS, 10 Most Popular Athletes on Social Media - 2019 Rankings, February 2, 2019, available at : <https://sporteology.net/10-most-popular-athletes-on-social-media>.

² See e.g. the IOC Social and Digital Media Guidelines for persons accredited to the XXIII Olympic Winter Games PyeongChang 2018, available at : <https://stillmed.olympic.org/media/Document/Library/OlympicOrg/Games/Winter-Games/Games-PyeongChang-2018-inter-Olympic-Games/IOC-Social-and-Digital-Media-Guidelines/PyeongChang-2018-Social-Media-Guidelines-eng.pdf> starting by stating that the "*International Olympic Committee (the "IOC") encourages accredited persons at the XXIII Olympic Winter Games PyeongChang 2018 (the "Games")*" to share their experiences with their friends, family and supporters via social and digital media. These guidelines (the "*Guidelines*") are designed to ensure that these activities respect the Olympic values and the rights of others".

Olympic Committees and of International Federations and members of accredited media.³

The key provision is the so-called Rule 40 which has attracted a lot of attention and on which we will focus.⁴ We will do so by first analyzing the Rule 40 and the way how it has been implemented locally (see I below). We will then turn to the challenges against the Rule 40 that have been raised in Germany (see II below) before analyzing selected legal issues that these developments have generated (see III below).

I. Rule 40 of the Olympic Charter and its implementation

A. Rule 40 and the Rule 40 Guidelines

The scope and limits of the rights of athletes to communicate in the context of the Olympic Games are defined in Bye-law 3 to Rule 40⁵ of the Olympic Charter (which is generally referred to as "Rule 40").⁶ It provides that "no competitor, team official or other team personnel 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".

The rationale of this rule lies essentially in the protection of the official sponsors of the Olympic Games (and specifically of the TOP partners⁷) against ambush marketing campaigns that may be initiated by unofficial sponsors of athletes participating to the Olympic Games that could unduly benefit from the image and reputation of the Olympic Games without being officially associated to the event (and without paying for this). On this basis, Rule 40 created an exclusivity

³ See IOC Social and Digital Media Guidelines for persons accredited to the XXIII Olympic Winter Games Pyeong Chang 2018 (footnote 2).

⁴ See (among various legal articles) EPSTEIN, ADAM, available at : <https://repository.jmls.edu/ripl/vol16/iss4/1/> ; SCHWABE, JAMES, available at : https://harvardjssel.com/wp-content/uploads/sites/9/2018/02/9-1_JamesSchwabe.pdf.

⁵ Rule 40 provides among others obligations that in order to participate in the Olympic Games "a competitor, team official or other team personnel must respect and comply with the Olympic Charter and World Anti-Doping Code (...)".

⁶ Olympic Charter in force as from 9 October 2018, available at: <https://stillmed.olympic.org/media/Document/Library/OlympicOrg/General/EN-Olympic-Charter.pdf>.

⁷ <https://www.olympic.org/partners>.

(‘blackout’) period for the benefit of Olympic TOP partners / sponsors that was heavily criticized by athletes in the wake of the 2012 London Olympic Games.⁸

As a result of the pressure of athletes⁹ (and of their non-official sponsors¹⁰) who considered that the application of Rule 40 restricted excessively their freedom and personal marketing activities which culminated in a social media (!) campaign under the hashtag “#wedemandchange”,¹¹ the IOC issued guidelines for the Rio Olympic Games in order to make it possible for athletes and their non-official sponsors to engage into certain limited communication campaigns in a controlled manner. This was done in newly issued Guidelines on Rule 40 (“the Rule 40 Guidelines”)¹² which defined how and when such communications could be made¹³ and to which reference is made in the IOC Social and Digital Media Guidelines adopted for the Rio Olympic Games.¹⁴ These guidelines have been reused (with slight amendments) for the 2018 PyeongChang Winter Olympic Games.¹⁵

The Rule 40 Guidelines provide that the relevant period during which the communication activities are regulated begins nine days prior to the Opening Ceremony and concludes at the end of the third day after the Closing Ceremony (the so-called “Period of the Olympic Games”). The Rule 40 Guidelines authorize the use of an athlete’s person, name, picture or sports performances for

⁸ See GRADY, JOHN, p. 1 ss, available at : <https://doi.org/10.16997/eslj.199>.

⁹ See TAYLOR, JEROME, available at: <https://www.independent.co.uk/sport/olympics/news/london-2012-american-athletes-launch-protest-against-strict-sponsorship-rules-forbidding-them-7987182.html>.

¹⁰ See BAKER, LIANA B., available at : <https://www.reuters.com/article/us-olympics-rio-under-armour-insight-idUSKCN0ZF1NI>.

¹¹ See ORMOND, MEGAN, p. 179 ss, available at: <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1069&context=jolti>; see also SHERGOLD, ADAM, US athletes launch 'gag' protest against Olympic rule that bans them from promoting their own sponsors, Daily Mail (July 31, 2012), available at: <https://www.dailymail.co.uk/news/article-2181501/London-2012-US-athletes-launch-gag-protest-Olympic-rule-bans-promoting-sponsors.html>.

¹² Rio 2016 Olympic Games – Rule 40 Guidelines, available at : <https://www.olympic.org/athlete365/dl.php?url=https://d2g8uwgn11fzhj.cloudfront.net/wp-content/uploads/2015/11/18162145/NOCnet-Annexes-Rule-40-Guidelines-ENG-.pdf>.

¹³ See GRADY, JOHN, p. 1 ss, available at : <http://doi.org/10.16997/eslj.205>.

¹⁴ IOC Social and Digital Media Guidelines for persons accredited to the Games of the XXXI Olympiad Rio 2016, available at : <https://stillmed.olympic.org/media/Document/20/Library/OlympicOrg/Games/Summer-Games/Games-Rio-2016-Olympic-Games/Social-Media-Blogging-Internet-Guidelines-and-News-Access-Rules/IOC-Social-and-Digital-Media-Guidelines-Rio-2016.pdf>.

¹⁵ See the Rule 40 Guidelines, XXIII Olympic Winter Games PyeongChang 2018 available at : <https://www.olympic.si/datoteke/PyeongChang%202018%20-%20Rule%2040%20Guidelines%20-%20ENG.pdf>.

advertising purposes provided that it does not “create, whether directly or indirectly, the impression of a commercial connection between, on the one hand, the company or brand and, on the other hand, the Olympic Games, the IOC, the Olympic Movement, the Organising Committee of the Olympic Games (“OCOG”), or the Participant’s National Olympic Committee (“NOC”) or National Olympic Team”.¹⁶

The Rule 40 Guidelines give a list of so-called “inadmissible practices” by non-Olympic Commercial Partners that shall be prohibited, including during the Period of the Olympic Games. These inadmissible practices include “(a)ny use of the Olympic properties or any NOC related symbol or design protected under national legislation, trademark or copyright law, or of any symbol, design or terminology or expression creating a risk of confusion with these properties” and “(a)ny use of the “Olympic listed terms or expressions” alongside the Participant’s name or image”, whereby the “Olympic listed terms or expressions” include “Olympic”, “Olympics” and the Olympic motto “Citius – Altius – Fortius”.¹⁷

B. The Rule 40 waiver system

The Rule 40 Guidelines provide for the right to obtain a “waiver” by which athletes (and their non-official sponsors, i.e. the “Non-Olympic Commercial Partners”¹⁸) can obtain the right to use “a Participant’s person, name, picture or sports performance during the Period of the Olympic Games”. Depending on the geographic scope of the contemplated use, the application for a waiver must be made to the IOC “in cases of applications for international use” ; and “in cases of applications for national use (i.e. in one territory), to the Participant’s NOC and, should the use be in the territory of an NOC other than the Participant’s NOC, to such other NOC”.¹⁹

¹⁶ See the Rule 40 Guidelines, under A General Principles (i).

¹⁷ The Rule 40 Guidelines further prohibit the use of other so-called “Olympic-related terms” in such a way as to imply an association with the Olympic Games, whereby such terms include Rio/Rio de Janeiro, Gold, Silver, Bronze, Medal, Effort and Performance.

¹⁸ The “Non-Olympic Commercial Partners” are not defined as such in the Rule 40 Guidelines. The definition can however be negatively inferred from the definition of Olympic Commercial Partners, which covers “Olympic sponsors and Olympic Broadcasting Rights Holders” (which are not defined either in the Rule 40 Guidelines).

¹⁹ Rule 40 Guidelines, section B.

The athletes must sign a form identifying their sponsor(s)²⁰ that they shall submit to the relevant authority (depending on the geographic scope of the contemplated use).²¹

Based on the system of the Rule 40 Guidelines, the non-Olympic Commercial Partners could not launch an advertising campaign during the period of the Rio 2016 Olympic Games “as the advertising campaign would then be seen as benefiting from the appeal of the Olympic Games”.²² The non-Olympic Commercial Partners could however continue running an existing campaign during the period of the Rio 2016 Olympic Games, subject to the conditions that such campaign shall not create any impression of a commercial connection with any Olympic property and in particular the Olympic Game and that the NOCs may decide to restrict or prohibit advertising subject to the territory’s applicable laws and regulations.²³ Applications by athletes to advertise subject to these conditions had to be submitted for approval to the NOC or IOC pursuant to the procedure of the Rule 40 Guidelines.

According to the Rule 40 Guidelines, the NOCs had to “monitor and enforce compliance with Rule 40 and these guidelines by Participants”²⁴ and could take sanctions against the infringing participants (anf specifically the athletes).²⁵

C. The national implementation of the Rule 40 system

Given the margin of freedom left to NOCs by the Rule 40 Guidelines which make it possible for them to decide to restrict or prohibit advertising beyond the rules set forth in the Rule 40 Guidelines, different national rules have emerged. As a result, the Rule 40 Guidelines do not create a uniform global system to the extent that NOCs can adopt more restrictive practices for non-Olympic Commercial

²⁰ Athlete’s Submission Form Rule 40 Olympic Charter Rio 2016 Olympic Games (for Third-Party Companies & Brands, ie Non-Olympic Partners) available at : <https://www.olympic.org/athlete365/dl.php?url=https://d2g8uwgn11fzhj.cloudfront.net/wp-content/uploads/2015/11/18162152/Rule-40-Rio-2016-Application-form-for-Athletes.pdf>.

²¹ The IOC has made available a Q&A document explaining the system to athletes, see the document “Use of a Participant’s image for advertising purposes during the Rio 2016 Olympic Games - Rule 40 of the Olympic Charter : What you need to know as a Participant” (the “Rio Rule 40 Q&A”), available at : <https://www.olympic.org/athlete365/dl.php?url=https://d2g8uwgn11fzhj.cloudfront.net/wp-content/uploads/2015/11/18162151/Rule-40-Rio-2016-QA-for-Athletes.pdf>.

²² See the Rio Rule 40 Q&A, question 4.

²³ See the Rio Rule 40 Q&A, question 5.

²⁴ Rule 40 Guidelines, section F.

²⁵ See the Rio Rule 40 Q&A, question 11.

Partners.²⁶ This can be challenging and complex for partners wishing to engage into international marketing and communication campaigns and which consequently have to comply with different sets of rules.²⁷

National rules particularly define when the application for waiver must be submitted (a few months before the beginning of the Olympic Games) and the details about the advertising campaign for which a waiver can be requested. By way of illustration, the Canadian Olympic Committee ("COC")²⁸ issued Athlete Advertising (Rule 40) Guidelines for PyeongChang 2018 which define how sponsors can apply for Rule 40 waivers to enable the continuation of in-market, generic (i.e. non-Olympic themed) advertising featuring athletes during the Olympic Games Period.²⁹

According to these rules, the sponsors had to apply for a waiver until September 1, 2017 (knowing that the Games Period ran from February 1 to February 28, 2018) and had to submit (by using an online application platform³⁰), with respect to social media communications, "all proposed social content (e.g. template posts) as well as a schedule outlining the dates of proposed activity during the Games Period". By exception, "in recognition of the important role Non-Olympic Sponsors play in athletes' careers, the sponsors had the right (subject to receipt a "Rule 40 waiver") to "post one congratulatory message about their sponsored athlete where Sponsor regularly posts about their athlete's accomplishment and the post has been pre-approved by the COC" or to "share a "thank-you" message posted by their sponsored athlete where the athlete message complies with COC's Athlete Social Media Guidelines".³¹ Other NOCs have adopted and implemented other national Rule 40 guidelines that are not identical to those adopted in Canada (by the COC), for instance with respect to the deadline for application of the waiver.³² Interestingly, a company has (unsuccessfully) initiated court

²⁶ See Part. E.

²⁷ See KELHAM, ALEX, available at: <https://www.lawinsport.com/topics/features/item/navigating-olympic-advertising-rule-40-a-global-perspective> ("The different approaches taken by NOCs also creates a real practical challenge for sponsors of athletes undertaking international campaigns").

²⁸ <https://olympic.ca/brand-use/>.

²⁹ https://cdnolympic.files.wordpress.com/2011/08/athlete-advertising-rule-40-guidelines_pyeongchang2018.pdf.

³⁰ <http://athletewaiver.olympic.ca/>; see the similar platform set up for Team USA: <https://athleteadreview.usoc.org/>.

³¹ https://cdnolympic.files.wordpress.com/2011/08/athlete-advertising-rule-40-guidelines_pyeongchang2018.pdf, p. 8.

³² For instance, for Team GB, the deadline for application of a Rule 40 waiver was 9 October 2017, see www.teamgb.com/%2Fdocs/%2Fdefault-source/%2Fboa-legal/%2Frule-40-guideli

proceedings in the US in order to clarify its right to communicate about the Olympic Games on social media.³³

Some Rule 40 guidelines expressly address the risk of abusive conduct by applicants for waivers, which may lead to the revocation of the consent and to other consequences (e.g. withdrawal of the advertising).³⁴

II. Challenges against Rule 40 in Germany

A. The administrative antitrust proceedings

In spite of the changes made in order to liberalize the application of Rule 40, the control over the communications of the athletes (and their non-official sponsors) resulting from its application remained under attack because of its negative impact on athletes participating to the Olympic Games.

This led to the launch of administrative antitrust proceedings in Germany in April 2017 against the German Olympic Sports Confederation (Deutscher Olympischer Sportbund, "DOSB") and the IOC on the ground that the application of Rule 40 for athletes and sponsors in Germany would restrict competition and that DOSB and IOC would abuse their dominant position.³⁵ This challenged the application

nes-final.pdf ; for Team USA (see the dedicated website: <https://www.teamusa.org/Athlete-Resources/Athlete-Marketing/Rule-40-Guidance>), the deadline for application of a Rule 40 waiver was August 1, 2017, whereby "[i]nitial submissions may be in conceptual form") and "need not include all proposed tactics; however, each and every final tactic will require a Rule 40 waiver".

³³ HSK, LLC d/b/a Zerorez MN v. U.S. Olympic Committee, 248 F.Supp.3d 938 (2017), available at : <https://www.leagle.com/decision/infdc020170405f74> (the claimant Zerorez initiated the lawsuit the day before the beginning of the Rio 2016 Olympic Games and sought a declaration that it may use its corporate social media accounts to discuss the Olympic Games without violating USOC's trademark rights ; the motion to dismiss raised by USOC was granted in this court decision).

³⁴ <https://www.teamgb.com/docs/default-source/boa-legal/rule-40-guidelines-final.pdf> (Team GB), p. 16.

³⁵ See media release of the German competition authority (Bundeskartellamt), Market test on commitments of DOSB and IOC, December 21, 2017, available at : https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/21_12_2017_DOSB_IOC.html?nn=3591568.

of the implementing Guidelines that the DOSB adopted for Germany (“the 2016 DOSB Guidelines”)³⁶.

In the course of the proceedings, the DOSB and the IOC offered to liberalize the restrictions on advertising activities exclusively targeted at Germany. They did so by proposing commitments reflected in various amendments to the 2016 DOSB Guidelines. These commitments included the following changes : the deadline for application was significantly reduced and did not constitute a cut-off period anymore ; the notions of “Olympic” and other prohibited Olympic-related terms were defined more narrowly ; generic advertising, as well as greetings or congratulatory messages from the sponsors to athletes were also permitted during the “frozen period” under certain conditions and athletes were able to share or retweet content from the IOC / OCOG / DOSB / Team Germany and also link it with greetings or acknowledgments to the sponsors.³⁷

The Bundeskartellamt carried out a market test on the proposed commitments offered by the DOSB by means of surveys addressed to associations, athletes and sponsors (especially the sporting goods industry). Based on this survey conducted in early 2018, the Bundeskartellamt came to the conclusion that the initial commitments did not adequately eliminate the advertising restrictions. As a result, the Bundeskartellamt initiated further investigations in April 2018 and negotiated with the IOC and the DOSB on how to improve and specify its commitments.

B. The Commitment Decision of the Bundeskartellamt of February 25, 2019

On February 21, 2019, the DOSB and the IOC submitted new commitments to the Bundeskartellamt according to which they agreed to amend further the existing regulatory framework for the benefit of German athletes taking part to the Olympic Games. These commitments were accepted by the Bundeskartellamt in its decision of February 25, 2019 (the “Commitment Decision”) by which the

³⁶ “REGEL 40 Leitfaden der Deutschen Olympiamannschaft für die Olympischen Spiele Rio 2016”, available at : https://cdn.dosb.de/alter_Datenbestand/Bilder_allgemein/Veranstaltungen/Rio_2016/Regel_40_OlympischeCharta_Rio2016.pdf.

³⁷ See the media release of the German competition authority (Bundeskartellamt), Market test on commitments of DOSB and IOC, December 21, 2017, available at : https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/21_12_2017_DOSB_IOC.html?nn=3591568.

Bundeskartellamt declared the commitments as binding³⁸ (it being noted that the decision could be challenged before the Oberlandesgericht Düsseldorf). The Bundeskartellamt has the mission to monitor the compliance with the commitments and their relevance for the term of application of the Commitment Decision,³⁹ which extends over approximately 8 years, i.e. it shall apply for the next four Olympic Games 2020, 2022, 2024 and 2026 (two winter games and two summer games).

In the Commitment Decision, the Bundeskartellamt made a preliminary⁴⁰ assessment of the case under German competition law.⁴¹ Among the numerous interesting legal developments made in the 69 page long Commitment Decision, the Bundeskartellamt has analysed whether the measures adopted in order to prevent ambush marketing and other communications by athletes and other persons subject to Rule 40 were proportionate.⁴²

In this context, the Bundeskartellamt has defined narrowly the concept of ambush marketing (which is at the core of the challenged Rule 40 Guidelines and of the 2016 DOSB Guidelines) by stating that the protection against ambush marketing shall be granted only against advertising campaigns which violate legal obligations (trademark law, copyright law and unfair competition law) or which violate existing contractual obligations (obligation to take care and to cooperate) as defined under German law.⁴³

In the Commitment Decision, the Bundeskartellamt has also taken a hard stance against any attempt to prevent the use of common language generic terms. These uses shall consequently be authorized, including the independent use of the name of the city hosting the Olympic Games, e.g. “Rio” (i.e. separately from a joint use of the name together with the year of the Olympic Games which remain protected,

³⁸ Bundeskartellamt Commitment Decision (case B226/17) : <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2019/B2-26-17.html>.

³⁹ Which is thus limited in time, whereby the ability to limit the duration of such decisions is provided for in § 32b para. 1 last sentence of the German Act against Restraints of Competition, Gesetz gegen Wettbewerbsbeschränkungen (GWB) ; see Commitment Decision, para. 151.

⁴⁰ The Commitment decision rendered by the Bundeskartellamt does not constitute a decision on the merits of the case, but rather a decision by which it declares the commitments as binding and by which it interrupts the proceedings subject to the possibility to reopen them (under § 32b GWB).

⁴¹ That we cannot analyze fully here, in view of the limited space offered for this article.

⁴² Commitment Decision, para. 106 and followings.

⁴³ Commitment Decision, para. 109.

e.g. “Rio 2016”)⁴⁴ and the independent use of the year of the Olympic Games.⁴⁵ It can also be noted in this context that the German Bundesgerichtshof has recently defined narrowly the scope of protection of Olympic terms in another unrelated case,⁴⁶ which shows that German law and German legal institutions seem to adopt a restrictive approach with respect to the protection of Olympic institutions and symbols.

The Bundeskartellamt also considered that the prohibition of all individual marketing campaigns by athletes on their social media accounts was disproportionate to the extent that such campaigns would not use protected Olympic signs or protected content.⁴⁷

The Commitment Decision further contains interesting developments with respect to the jurisdictional aspects of the case. It held indeed that the submission to the jurisdiction of the Court of Arbitration for Sport (CAS) is not adequate for German athletes because CAS arbitration proceedings would generally be more expensive and lengthier by comparison to litigation before German courts. In addition, it is uncertain whether sports sanctions that could be imposed on an athlete in CAS arbitration proceedings could be scrutinized under EU competition law because of the restrictive approach adopted by the Swiss Federal Court according to which competition law does not constitute a part of public policy the breach of which can be invoked in set aside proceeding before the Swiss Federal Court against an award rendered by the Court of Arbitration for Sport.⁴⁸

On this basis, the Bundeskartellamt held that given that the disputes about the application of the Rule 40 Guidelines are of a commercial nature (and not of a sporting nature) a decisive element is to ensure that decisions taken for such disputes are subject to EU competition law and that questions can be submitted by the relevant court to the CJEU for interpretation.⁴⁹

⁴⁴ Commitment Decision, para. 115.

⁴⁵ Commitment Decision, para. 117.

⁴⁶ Decision of the Federal Court (Bundesgerichtshof) of March 7, 2019 (reference I ZR 225/17), see press release, “Bundesgerichtshof zur Werbung für Sportbekleidung als ‘olympiaverdächtig’”, of March 7, 2019, available at: <https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2019/2019028.html>.

⁴⁷ Commitment Decision, para. 120.

⁴⁸ Commitment Decision, para. 124; the decision of the Swiss Federal Court confirming this approach is published in ATF 132 III 389 (to which reference is made in the Commitment Decision, footnote 69, in its unpublished version ref. 4P.278/2005) which discusses the concept of public policy under Art. 190 para. 2 lit. e of the Swiss Federal Act on Private International Law of December 18, 1987.

⁴⁹ Commitment Decision, para. 125 ; the Bundeskartellamt refers in this respect to the decision of the CJEU in the Eco Swiss case, C-126/97.

The new commitments validated in the Commitment Decision provide for various changes (“the German Rule 40 Principles”).⁵⁰

From a procedural and chronological perspective, there shall be no obligation anymore to obtain a waiver in advance : the contemplated activities for which a waiver had to be applied for under the pre-existing 2016 DOSB Guidelines (in compliance with the Rule 40 Guidelines) no longer have to be submitted for approval to the DOSB and cleared by it in advance. Such submission to the DOSB can however still be made by the athlete / the non-official sponsor in the interest of legal clarity. If such submission is made at the latest 21 days before the beginning of the Olympic Games (i.e. the opening ceremony), the DOSB will notify whether the advertisement is admissible or not at least one day before the start of the Olympic Games.⁵¹ In terms of the nature of the advertising communications, the Commitment Decision provides that not only ongoing communications (i.e. communications made as part of a campaign launched well before the Olympic Games), but also new advertising communications will be admissible, whereby this shall also apply to messages of greeting and congratulations.⁵² The use of generic terms like “medal, gold, silver, bronze, winter or summer games” shall further be authorized so that the catalogue of Olympic terms that cannot be used shall be narrower and shall further be limitatively defined.⁵³

With respect to the use of photographs of competing athletes, it shall be permitted to use certain competition pictures and non-competition pictures taken during the Olympic Games under certain conditions.⁵⁴ Among other measures, pictures of competitions not showing any Olympic symbols may be used. Social media communications by athletes shall also be facilitated in the sense that athletes shall be allowed to use social media more freely during the Olympic Games so that they can share content and combine it with messages of greeting or thanks to their sponsors.⁵⁵

⁵⁰ See also the press release of the Bundeskartellamt, German Athletes and their sponsors obtain further advertising opportunities during the Olympic Games following Bundeskartellamt action - IOC and DOSB undertake to change the advertising guidelines, February 27, 2019, available at : https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/27_02_2019_DOSB_IOC.html?nn=3591568.

⁵¹ Commitment Decision, para. 136.

⁵² Commitment Decision, para. 137 and press release of February 27, 2019.

⁵³ Commitment Decision, para. 138 and press release of February 27, 2019.

⁵⁴ See the detailed conditions of use of the relevant content made in para. 139 to 146 of the Commitment Decision.

⁵⁵ Commitment Decision, para. 14.

Quite importantly, the Commitment Decision provides that a violation of the German Rule 40 Principles cannot lead to sporting sanctions (such as the exclusion of the athlete from the Olympic Games) and that only economic sanctions under German law – contractual penalties or damages – can be imposed. In the event of disputes about whether an advertisement is admissible or not under the German Rule 40 Principles and on whether an advertisement falls under the German Rule 40 Principles, such disputes must be submitted to German civil courts and not to sports arbitration (i.e. the CAS).⁵⁶

Unsurprisingly, the Commitment Decision created a momentum at the international level in order to change Rule 40 beyond Germany. The international athlete community has indeed issued an official statement on June 3, 2019 by which it calls “for National Olympic Committees” to follow Germany's lead in relaxing restrictive 'Rule 40'”.⁵⁷ It remains to be seen whether this call will be heard around the globe and whether this may lead to other changes to Rule 40 and/or to its implementation.

III. Analysis of the Evolution of Rule 40 and of the German Rule 40 Principles

What can we learn from the evolution of Rule 40 and from the German Rule 40 Principles with respect to the regulatory framework that shall govern communications made by athletes on social media ?

A. The growing importance of social media communication for athletes

Even if Rule 40 and the German Rule 40 Principles are not limited to social media communications by athletes, these rules show the growing importance of social media communications for athletes taking part to Olympic Games and the ambition of the athletes and of their sponsors to be in a position to actively communicate online during the relevant period (and particularly during the

⁵⁶ Commitment Decision, para. 148.

⁵⁷ See press release : “International Athlete Community calls for National Olympic Committees to follow Germany's lead in relaxing restrictive 'Rule 40'” (June 3, 2019), http://aroundtherings.com/site/A_76895/Title__International-Athlete-Community-calls-for-National-Olympic-Committees-to-follow-Germanys-lead-in-relaxing-restrictive-Rule-40/292/Articles.

Olympic Games themselves). This means that all major sports institutions cannot ignore this trend and must consequently assess the types of social media communications that shall be possible for participating athletes in order to prevent unfair activities which would be detrimental to the (financial) sustainability of these events, whereby quite diverging approaches have been suggested.⁵⁸ This is a challenging task because of the fast and continuous development of digital communication tools and digital marketing strategies which make it difficult to adopt long-term static and inflexible regulatory solutions.⁵⁹

B. The challenges of defining the legal concept of ambush marketing

The legal definition of what shall constitute prohibited ambush marketing activities is complex. For the sake of legal certainty and also in support of free competition, the Commitment Decision adopts a narrow definition which relies on a list of exhaustively enumerated terms, which thus moves away from a broad open-ended approach to ambush marketing. Defining ambush marketing activities is a challenging task because it is supposed to cover a wide variety of conducts. It is also challenging because ambush marketing cannot only be committed by third party outsiders (i.e. in the context of this discussion about Rule 40, Non-Olympic Sponsors and other third parties), but can also be committed or at least facilitated by insiders, i.e. athletes participating to the Olympic Games. This significantly changes and complexifies the analysis given that such insiders, and specifically athletes, as official and fully legitimate participants to the Olympic Games can invoke other (stronger) arguments in order to justify their online presence and online marketing activities, including in light of their right to freedom of expression and the protection of their economic and personal interests.

⁵⁸ See the quite radical proposals made by Adam Epstein (footnote 4), at p. 378-379, who suggests to "1. *[i]gnore all enforcement efforts on Facebook, Instagram, Twitter, YouTube and the like for both commercial entities and individual athletes, including GIFs and live-streaming*" and to "2. *Require a minimal but standard disclaimer prepared by the IOC or USOC, on all social media postings by unofficial commercial entities and individual participant athletes*" (among other proposals).

⁵⁹ Commitment Decision, para. 151.

C. The risks of geographic fragmentation

The Commitment Decision defines the geographic connecting factors with Germany that must be satisfied in order for the newly approved German Rule 40 Principles to apply. If the advertising campaign is international and not focused on Germany, it shall not be governed by the German Rule 40 Principles but rather by the standard Rule 40 and the Rule 40 Guidelines. In this respect, the Commitment Decision provides (among various alternative factors) that if the advertising targets the German public or Germany as a country in a recognizable way in social media communications, this shall be sufficient to trigger the application of the German Rule 40 Principles⁶⁰ This may prove difficult to apply in practice (also because it cannot be excluded that some might try to abusively create a German connection in order to benefit from the privileged German Rule 40 Principles) and may lead to disputes, which is what the Commitment Decision somehow anticipates given that it indicates that disputes about the issue whether a given advertisement falls under the German regime or not should also be submitted to German courts – and not to sports arbitration.⁶¹ The creation of a special regime for Germany creates in any event a geographic fragmentation of the rules that makes it difficult to apply in the on-line digital environment and is hardly compatible with the global essence of social media communications. This emphasises the importance of creating uniform ambush marketing standards that would apply globally on all digital media platforms.

D. The dispute resolution mechanism

The Commitment Decision holds that disputes should be submitted to German courts (also because this should ensure the application of German and EU competition law which would not necessarily be the case if the dispute were submitted to the sports arbitration system of the Court of Arbitration for Sport).⁶² Interestingly, the Commitment Decision seems to focus the mission of sports arbitration on doping related disputes for which it admits that sports arbitration offers key advantages which include expertise of the arbitrators, speed, uniform application of the law and global enforceability of the decisions (as arbitral

⁶⁰ Commitment Decision, para. 132 (mentioning the examples of German-related identifiers/hashtags such as @athletXYforGermany or #Germanfans).

⁶¹ Commitment Decision, para. 148.

⁶² Commitment Decision, para. 124.

awards) that are duly recognized by the Bundeskartellamt in the Commitment Decision.⁶³

One can however note that these advantages of sports arbitration could precisely play a critical role for disputes arising about Rule 40. Sports disputes and sport arbitration cases are indeed not only about doping. They can deal with commercial disputes covering a variety of rights and interests of multiple stakeholders, including sponsors, sports teams, broadcasting channels, athletes, agents, etc. The expertise of arbitrators could thus be of key value also for commercial disputes relating to the application of Rule 40.

The speed of arbitration proceedings could also be of key advantage. In this respect, one could think about innovative (online) dispute resolution mechanisms for Rule 40 disputes which calls for very quick decisions.⁶⁴ It is obvious that digital advertising campaigns are (and must be) launched very quickly and that disputes about digital advertising campaigns must consequently also be solved quickly. It should be reminded that the Commitment Decision provides that submissions of advertisement to the DOSB (for clearance) can be filed in order to ensure legal certainty (even if such submissions are not mandatory anymore) and that if such submission is made at least 21 days before the start of the Olympic Games, a decision will be rendered at the latest on the eve of the start of the Olympic Games.⁶⁵ What now if the decision turns out to be negative for the applicant so that the applicant cannot launch its advertising campaign without incurring legal risks ? How could the applicant challenge the decision and still try to get the green light in order to benefit from the Olympic Games in spite of the high time sensitivity of the dispute ?

From this perspective, it would seem adequate to conceive very fast dispute resolution mechanisms in order to solve this type of disputes in an efficient and speedy manner. It could thus be considered whether this type of disputes could fall within the jurisdiction of the CAS ad hoc division for the Olympic Games which shall resolve "any disputes covered by Rule 61 of the Olympic Charter, insofar as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games."⁶⁶ The submission to

⁶³ Commitment Decision, para. 126.

⁶⁴ The possibility of managing CAS arbitration proceeding in the course of an expedited procedure is provided for in Article R44.4 of the Procedural Rules of CAS (available at: <https://www.tas-cas.org/en/arbitration/code-procedural-rules.html>).

⁶⁵ Commitment Decision, para. 136 ; the submission of the request to the DOSB for clearance could include an arbitration clause for the CAS.

⁶⁶ Art. 1 of the Arbitration Rules applicable to the CAS ad hoc division for the Olympic Games, available at : <https://www.tas-cas.org/en/arbitration/ad-hoc-division.html> ; rule 61 para. 2 of

national courts (and specifically to German courts) as reflected in the Commitment Decision would not appear to offer key advantages over such ad hoc arbitration system in terms of speed⁶⁷ and cost⁶⁸. The submission to the CAS ad hoc division for the Olympic Games could also offer consistency and a framework of uniform application of the law, which would appear of key importance in order to ensure a uniform application of ambush marketing principles.

With respect to the need to submit to EU (and German) competition law expressed in the Commitment Decision and justifying the submission of Rule 40 disputes to German courts, one should be aware that, with all due respect to EU and German competition law and to its importance for the application of Rule 40 (and more generally its importance for regulating professional sports), it remains that the legal assessment of ambush marketing is at its very core not primarily a matter of competition law but rather a matter of intellectual property and of unfair competition law, it being noted that (international) commercial arbitration can efficiently be used for solving IP disputes⁶⁹.

E. The sanctions

The Commitment Decision further provides that no sporting sanctions shall be imposed in case of breach of Rule 40 and that only German law based economic sanctions could be imposed (i.e. contractual penalties and damages). It will be interesting to see how this shall be implemented. This approach may further raise complex issues of private international law to the extent that German law may not necessarily govern every facet of a Germany-related Rule 40 dispute. It is well conceivable indeed that German athletes have non Germany-based (non-official) sponsors for which they could make digital advertising communications that could be found to be infringing Rule 40 and for which it will not be obvious why German law should apply.

the Olympic Charter provides that "(a)ny dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration".

⁶⁷ Decisions are rendered within 24 hours of the lodging of the application (subject to exceptions), pursuant to Art. 18 of the Arbitration Rules applicable to the CAS ad hoc division for the Olympic Games.

⁶⁸ The arbitration proceedings are free of charge under Art. 22 of the Arbitration Rules applicable to the CAS ad hoc division for the Olympic Games.

⁶⁹ For the benefits and conditions of arbitrating IP disputes, see e.g. DE WERRA, JACQUES, p. 299-317, available at : <http://archive-ouverte.unige.ch/unige:55676>.

What should be the most adequate sanctions in case of violation of Rule 40? Shall it necessarily be to impose economic sanctions on the athletes and / or on sponsors and, in the affirmative, on which ground (knowing that the Commitment Decision refers to contractual penalties that shall be assessed under German (contract) law) and for which breach of contract (shall the compliance with German Rule 40 Principles be part of a contract and how could this be imposed on a third-party which would not be an official sponsor)⁷⁰?

It could make sense to think about more tailored remedies that could perhaps be better adapted to the digital environment, such as the obligation to post a rectifying message on the same digital channels / the same social media as the ones used for the original communication that was found to be infringing Rule 40.⁷¹ This could be achieved by analogy to other sanctions for unfair commercial communications made on social media.⁷²

⁷⁰ One could think about various contractual (or other obligations law related) remedies including the disgorgement of the profits generated by the athlete under the endorsement agreement with his or her sponsor or the part of the profit that would relate to the disputed advertising communications (which would be found in violation of Rule 40) provided that this could be identifiable ; see, by analogy, the decision in *Raymond Weil SA v Theron*, 585 F.Supp.2d 473 (2008), which constituted an (unsuccessfull) attempt to recover the monies paid to a celebrity (the actress Charlize Theron) under an exclusive endorsement agreement with a Swiss watch maker (Raymond Weil) because of a breach of such agreement by the celebrity. The question however remains to identify how such contractual sanctions (or more precisely contractual remedies) could be imposed by the NGO or the IOC on an athlete or a sponsor.

⁷¹ This could also apply to other online infringing activities, such as copyright infringement, see DE WERRA, JACQUES, *Défis du droit d'auteur*, p. 202-203, available at : <http://archive-ouverte.unige.ch/unige:36864>.

⁷² See the sanction imposed by the US Federal Drug Administration (FDA) against the company Duchesnay that had sponsored the celebrity Kim Kardashian for posting on social media (Instagram) positive comments about their drug Diclegis® against morning sickness ; the FDA requested that a corrective message shall be distributed ideally by using the same media, for the same duration of time and with the same frequency that the violative promotional material was disseminated, which was done by Kim Kardashian in a corrective post on her Instagram account, see Norton Rose Fulbright (September 15, 2015), *Kim Kardashian Posts Corrective Ad on Instagram*, www.lexisnexis.com%2Flegalnewsroom%2Fprivacy%2Fb%2Fconsumer-protection-privacy-blog%2Fposts%2Fkim-kardashian-posts-corrective-ad-on-instagram&usg=AOvVaw3U9wmrsQ49cQvX_bNt9Mdk.

Conclusion

The global professional sports industry needs clear and predictable rules that shall make it possible for all stakeholders to develop their activities and their careers (specifically for professional athletes) in the online environment where social media play a key role.

Fair play and fairness among competitors are values that shall apply beyond the sporting arenas : competition exists not only between athletes, teams and nations. Competition also exists between companies that support athletes and teams which can, but must not necessarily, be associated with the sporting events in which the athletes and the teams compete. This can create a complex legal environment in which the law must find ways to balance equitably the competing and diverging interests of the various stakeholders.

To be sure, this is not something that has been generated by digital communication and social media.⁷³ It is however clearly a phenomenon that has gained a lot of traction and that has become much more intricate as a result of intensified social media communications. Competition further exists in the digital environment and on social media where – as we all know and experience - the competition is fierce between digital platforms and digital influencers in order to attract and to keep the Internet users' attention.⁷⁴

As reflected in this paper with respect to the evolution of Rule 40, there appears to be a growing need to harmonize the standards of ambush marketing in the digital age in which digital marketing campaigns are launched and propagate at the speed of light and benefit from the viral impact of global social media platforms.⁷⁵ The rules shall thus ensure that fair play and fairness do also apply in

⁷³ Reference can be made here to the interesting CAS award in which the contract law issue was whether a sponsoring contract with an individual athlete could be terminated for just cause as a result of an alleged breach of such contract resulting from the enrollment of the athlete in a sports team that was sponsored by another (competing) company, see CAS arbitral award 91/45 (1992), published in : *Recueil des sentences du TAS 1986-1998* (Matthieu Reeb ed.), 1998, p. 19 ss ; conflicts between different categories of sponsors of athletes are consequently not new.

⁷⁴ See the seminal book of Tim Wu, *The Attention Merchants : The Epic Scramble to Get Inside Our Heads*, New York 2016.

⁷⁵ Also pleading for global harmonization, see PARDO AMÉZQUITA, DIEGO, p. 5, available at : https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2821703; this may not necessarily imply new regulations to the extent that harmonization can also be achieved by other means (e.g. harmonized application of general unfair competition law principles), see also the general report of the League of International Competition law (www.ligue.org) " International

this dynamic digital environment. This is what competition law but also unfair competition law should help to do in order to shape fair rules and fair dispute resolution mechanisms for the global sports industry.

This is precisely what our esteemed friend and colleague Prof. Henry Peter has contributed to do in his career both as a legal scholar and as a leading sports law practitioner. Rules of fair play and of fairness must apply to the entire sports ecosystem and must also regulate efficiently ambush marketing activities in the digital age. These rules shall equitably balance the respective rights and interests of all stakeholders including those of global sports institutions for their unique intangible assets and those of athletes who deserve to be visible in the digital space, as long as they do not commit “digital ambush marketing”.

Report on Question B : Ambush Marketing Too Smart to Be Good ? Should Certain Ambush Marketing Practices Be Declared Illegal and If Yes, Which Ones and Under What Conditions?” (Catania - September 2007), available at : http://www.ligue.org/uploads/documents/rapport_international_-_question_b.doc (concluding the report at p. 59 by stating that the need for legislative intervention against ambush marketing practices is not established”).

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