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SAN FRANCISCO ARTS & ATHLETICS, INC. v. UNITED STATES OLYMPIC COMMITTEE: USOC MAY ENFORCE ITS RIGHTS IN OLYMPIC WITHOUT PROOF OF CONFUSION

In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*¹ the United States Supreme Court held that the United States Olympic Committee (USOC) could enforce its statutory rights in the mark OLYMPIC without proving likelihood of customer confusion.² Because this holding extended the USOC's trademark rights beyond those engendered by the Lanham Act, the Court was compelled to subject those rights to constitutional scrutiny.³ The Court's holding prevented San Francisco Arts & Athletics, Inc. (SFAA) from using the word OLYMPIC to promote the "Gay Olympic Games."⁴

The *SFAA* decision⁵ will probably affect future analyses of trademark rights⁶ and constitutional issues. The Supreme Court⁷ not only construed the Amateur Sports Act⁸ in such a way that the USOC need not show confusion as to SFAA's use, but also held that the USOC's enforcement of its trademark right against SFAA did not violate the first amendment.⁹

¹ 107 S. Ct. 2971 (1987).

² *Id.* at 2977. Under federal law, the Trademark Act of 1946, commonly known as the Lanham Act, contains comprehensive registration and enforcement provisions. 15 U.S.C. § 1051-1127 (1976). The fundamental basis of federal trademark law is the concept of customer confusion, often known as likelihood of confusion. *See, Mushroom Makers, Inc. v. R. G. Barry Corp.*, 441 F. Supp. 1220, 1225 (S.D.N.Y., 1977) *aff'd*, 580 F.2d 44 (2d Cir. 1978), *cert denied*, 439 U.S. 1116 (1979). The critical issue is "whether a substantial number of ordinarily prudent purchasers are likely to be misled or confused as to the source of the different products." The Lanham Act authorizes a civil remedy for any unauthorized use which "is likely to cause confusion, or to cause mistake or to deceive." 15 U.S.C. § 1117 (1976).

³ *San Francisco Arts & Athletics*, 107 S. Ct. at 2977.

⁴ *Id.* The "Gay Olympic Games" were to take place from August 28 to September 15, 1982 in San Francisco, California. The Games were expected to draw hundreds of athletes from cities all over the world. They were to closely parallel the traditional Olympic Games, including many of the same events: a torch carrying ceremony, athlete procession, and the awarding of gold, silver and bronze medals to the winning athletes. The 1982 event was ultimately held under the name "Gay Games I" and a total of 1300 men and women from twelve countries, twenty-seven states, and 139 cities participated. Additionally, the "Gay Games II" were held in 1986 with approximately 3,400 athletes from seventeen countries participating.

⁵ *Id.*

⁶ The term "trademark" includes any word, name, symbol or device or any combination thereof adopted and used by manufacturers or merchants to distinguish their goods from those manufactured or sold by others. 15 U.S.C. § 1127 (1976). Trademarks may be enforced under theories of common, state or federal law. *See, J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION* § 5.2 (1984); Model State Trademark Bill Section II (1964); Lanham Act, 15 U.S.C. § 1051-1127 (1976).

According to McCarthy, trademarks generally perform four functions and confusion may occur as to each function. The four functions are: (1) to identify one seller's goods and distinguish them from goods sold by others; (2) to indicate the source of origin of the goods, which may be anonymous; (3) to signify that all goods bearing the mark are of an equal level of quality; and (4) to advertise and sell goods. *See J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION*, § 3:1-3:3 (1984).

⁷ Justice Powell delivered the majority opinion in which Chief Justices Rhenquist, White, Stevens, and Scalia joined. Justice O'Connor filed an opinion concurring in part and dissenting in part in which Justice Blackmun joined. Justice Brennan filed a dissenting opinion in which Justice Marshall joined.

⁸ 36 U.S.C. § 380 (1988).

⁹ *San Francisco Arts & Athletics, Inc.*, 107 S. Ct. at 2971.

Finally, since the court did not consider the USOC to be a government entity, it held that enforcing USOC's OLYMPIC mark rights did not violate the fifth amendment.¹⁰

FACTS

The United States Olympic Committee (USOC) and the International Olympic Committee (IOC) sued San Francisco Arts & Athletics, Inc. (SFAA) to enjoin SFAA's use of the word OLYMPIC to promote the "Gay Olympics."¹¹ The plaintiffs originally sought relief on a variety of theories, but the Court only considered their claim that SFAA violated the Amateur Sports Act of 1978.¹²

In mid-1981, SFAA¹³ originally sought to incorporate in California under the name "Golden Gate Olympic Association."¹⁴ The California Department of Corporations informed SFAA that the word "Olympic" could not be used in a corporate title.¹⁵ On November 4, 1981, SFAA filed for incorporation under its present name of San Francisco Arts & Athletics.¹⁶ Thereafter, SFAA began to promote the "Gay Olympic Games."¹⁷ SFAA utilized the words "Gay Olympic Games" on its letterheads, mailings, and in local newspapers.¹⁸ SFAA sold T-shirts, buttons, bumper stickers, and other merchandise bearing the title "Gay Olympic Games" to cover costs of the event.¹⁹

As early as September, 1981, SFAA's president was indirectly informed of the USOC's²⁰ concern over the potential trademark infringement of the OLYMPIC mark.²¹ Thereafter, the USOC communicated its position directly to SFAA and demanded that SFAA terminate its use of the OLYMPIC mark.²² The USOC based its position on the Amateur Sports Act of 1978.²³ On January 18, 1982, SFAA

¹⁰ *Id.* at 2986. Only five members of the Court supported this holding. Justices Marshall, Brennan, O'Connor and Blackmun dissented.

¹¹ *International Olympic Committee v. San Francisco Arts & Athletics*, 781 F.2d 733, 735 (9th Cir. 1983).

¹² *Amateur Sports Act of 1978* (codified at 36 U.S.C. § 371-96 (1982)).

¹³ SFAA is a corporation organized and existing under the laws of California. SFAA was the principal sponsor and organizer of the "Gay Olympic Games." Various individuals associated with SFAA were also named as defendants, including its president, Thomas F. Waddell, who also served as Chairman of the proposed "Gay Olympic Games."

¹⁴ *San Francisco Arts & Athletics, Inc.*, 107 S. Ct. at 2975.

¹⁵ *Id.*

¹⁶ *International Olympic Committee v. San Francisco Arts*, 219 U.S.P.Q. 982, 983 (N.D. Cal 1982).

¹⁷ *San Francisco Arts & Athletics, Inc.*, 107 S. Ct. at 2975.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ The USOC is a private, nonprofit corporation duly chartered and existing under the laws of the United States *viz.* 36 U.S.C. § 371-396 (1988). The USOC was first incorporated and granted a federal charter in 1950. Pub. L. No. 81-805, 64 Stat. 899 (1950). USOC's predecessors have existed since 1896.

²¹ *International Olympic Committee*, 212 U.S.P.Q. at 983.

²² *Id.* at 982.

²³ In particular, USOC's claim came under Section 110 of the Act, set forth in 36 U.S.C. § 380 (1988), which provides

agreed to discontinue use of the mark OLYMPIC and substituted the term "Athletic."²⁴ But SFAA subsequently resumed use of the mark OLYMPIC, contending that the USOC was acting in a discriminatory and unconstitutional manner.²⁵ The USOC filed suit in the Federal District Court for the Northern District of California on August 9, 1982.²⁶ On the same day, the USOC sought a temporary restraining order which Judge Conti granted.²⁷

The district court issued a preliminary injunction,²⁸ which the Court of Appeals for the Ninth Circuit affirmed.²⁹ Eventually, the district court granted summary judgment, awarded a permanent injunction to the USOC, and entered an award of attorney fees to USOC.³⁰ The court of appeals affirmed the summary

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- (a) Without consent of the [USOC], any person who uses for the purpose of trade, to induce the sale of any goods or services, or to induce the sale of any goods or services to promote any theatrical exhibition, athletic performance, or competition —
- (1) the symbol of the [IOC], consisting of five interlocking rings;
 - (2) the emblem of the [USOC], consisting of an escutcheon having a blue chief and vertically extending red and white bars on the base with 5 interlocking rings displayed on the chief;
 - (3) any trademark, trade name, sign, symbol, or insignia falsely representing association by, the [IOC] or the [USOC]; or
 - (4) the words "Olympic," "Olympiad," "Citius Altius Fortius," or any combination thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the [USOC] or any Olympic activity shall be subject to suit in a civil action by the [USOC] for the remedies provided in the Act of July 5, 1946 (60 Stat. 427; popularly known as the Trademark Act of 1946 [Lanham Act]) [15 U.S.C. § 1051 (1976)]. However, any person who actually used the emblem in subsection (a)(2) of this section, or the words, or any combination thereof, in subsection (a)(4) of this section for any lawful purpose prior to September 21, 1950, shall not be prohibited by this section from continuing such lawful use for the same purpose and for the same goods or services. In addition, any person who actually used or whose assignor actually used, any other trademark, trade name, sign, symbol or insignia described in subsections (a)(3) and (4) of this section for any lawful purpose prior to September 21, 1950 shall not be prohibited by this section from continuing such lawful use for the same purpose and for the same goods or services.
- (b) The [USOC] may authorize contributors and suppliers of goods or services to use the trade name of the [USOC] as well as any trademark, symbol, insignia, or emblem of the [IOC] or of the [USOC] in advertising that the contributions, goods, or services were donated, supplied, or furnished to or for the use of, approved, selected, or used by the [USOC] or United States Olympic or Pan-American team or team members.
- (c) The [USOC] shall have exclusive right to use the name "United States Olympic Committee;" the symbol described in subsection (a)(1) of this section; and the words "Olympic," "Olympiad," "Citius Altius Fortius" or any combination thereof subject to the preexisting rights described in subsection (a) of this section.

²⁴ *San Francisco Arts & Athletics, Inc.*, 107 S. Ct. at 2976.

²⁵ SFAA also contacted the Northern California chapter of the American Civil Liberties Union (ACLU). *International Olympic Committee*, 219 U.S.P.Q. at 983. The ACLU confirmed SFAA's contention regarding discriminatory action and offered to defend SFAA should the USOC bring suit against it. *Id.*

²⁶ The USOC and IOC originally brought claims under the International Convention for the Protection of Intellectual Property and for unfair competition (15 U.S.C. § 1126(h) (1976)), for violation of the Amateur Sports Act of 1978 (36 U.S.C. § 371 (1988)), for federal trademark infringement (15 U.S.C. § 1114 (1976)), for false designation of origin, false description or representation (15 U.S.C. § 1125(a) (1976)), for breach of contract between the parties, and for dilution of plaintiff's distinctive marks (Cal. Bus. & Prof. Code § 14330).

²⁷ *International Olympic Committee v. San Francisco Arts & Athletics, Inc.*, 219 U.S.P.Q. 982, 984 (N.D. Cal. 1982).

²⁸ *Id.*

²⁹ *International Olympic Committee v. San Francisco Arts & Athletics.*, 707 F.2d 517 (9th Cir. 1983).

³⁰ 219 U.S.P.Q. 982. The district court awarded attorney fees to the USOC under the Amateur Sports Act, 36 U.S.C. § 380(a) (1988), which subjects a violator "to suit in a civil action [by USOC] for the remedies pro-

judgment and permanent injunction, but reversed and remanded the award of attorney fees.³¹

The appellate court found that the Amateur Sports Act granted the USOC exclusive use of the word OLYMPIC without requiring that the USOC prove the unauthorized use was confusing.³² Further, the court found that SFAA was not entitled to defenses available to an entity sued for a trademark violation under the Lanham Act.³³ The court did not address SFAA's contention that the USOC enforced its rights in a discriminatory manner, because the court found that the USOC was not a state actor.³⁴ Finally, the appellate court rejected SFAA's first amendment challenge, because it found that SFAA had satisfactory alternative means for expressing its opinion and had no first amendment right to use OLYMPIC or the Olympic symbols to promote its games or products.³⁵

The court of appeals denied SFAA's petition for rehearing and suggestion for rehearing en banc.³⁶ Three judges dissented from the denial for rehearing, finding that the panel's interpretation of the Amateur Sports Act raised serious first amendment issues.³⁷

vided in the Trademark Act." Under the Trademark Act, or Lanham Act, the court "in exceptional cases may award reasonable attorney fees to the prevailing party." 15 U.S.C. § 1117 (1982). The district court awarded attorney fees on the theory that SFAA had intentionally used the mark OLYMPIC in a manner that violated the statute knowing that it risked such a violation.

³¹ *International Olympic Committee v. San Francisco Arts & Athletics, Inc.*, 781 F.2d 733 (9th Cir. 1986). As to the issue of attorney fees, the Court found the word "may" in the Lanham Act provision regarding attorney fees had generally been construed as giving the court discretionary authority as to attorney fees even when the violator's conduct fits within the statutory definition of exceptional circumstances. *Id.* at 738. The Court then found that although Local Rule 270 of the Northern District of California requiring discussions between the parties and declarations by the movant as to attorney fees had not been complied with, SFAA's failure to cooperate required that the district court's ruling be regarded as an implicit finding that the local rule had been waived. *Id.* at 739. Nonetheless, the Court of Appeals remanded the issue of attorney fees to the District Court to determine how much of USOC's counsels work was reasonably necessary under the controlling precedent. *Id.*

³² *Id.* at 736.

³³ *Id.*

³⁴ *Id.* at 736-37.

³⁵ *Id.* at 737.

³⁶ *International Olympic Committee v. San Francisco Arts & Athletics*, 789 F.2d 1319, 1319-20 (9th Cir. 1986).

³⁷ *Id.* Judge Kozinski filed the dissenting opinion in which Judges Pregerson and Norris joined. Particularly, the dissenters found troubling SFAA's challenge to the power of Congress to privatize the word OLYMPIC, thereby making it unutterable by others in connection with any product, public event or to promote a cause. Judge Kozinski queried, "If Congress has the power to grant a crown monopoly in the word Olympic, one wonders how many other words or concepts can be similarly enclosed, and the extent to which our public discourse can thereby be impoverished." *Id.* at 1323. Judge Kozinski's first amendment concerns were enhanced by the way in which the USOC allegedly exercised its "stewardship over the word Olympic." He stated:

[I]t seems that the USOC is using its control over the term Olympic to promote the very image of homosexuals that the SFAA seeks to combat: handicapped, juniors, police, Explorers, even dogs are allowed to carry the Olympic torch, but homosexuals are not. Troublesome as would be a total withdrawal of the term from public discourse, an exclusion that is invoked pursuant to a subjective assessment of the wholesomeness of the proposed speaker or proprietary of the proposed message is more troublesome still.

Id.

When petitioning for certiorari, SFAA claimed that the Ninth Circuit ignored the Amateur Sports Act's "plain language and history."³⁸ SFAA contended, "The language employed by Congress in Section 380, and its ordinary meaning under the Lanham Act dictates the simple conclusion that Congress bestowed an OLYMPIC trademark upon USOC enforceable under terms of pre-existing trademark law."³⁹ SFAA argued that the court of appeals should have adopted a narrower view of the Act to avoid first and fourteenth amendment problems.⁴⁰

When opposing certiorari, the USOC claimed that SFAA "artificially [sought] to force the rights provided by Section 380 into the framework of a traditional 'trademark' and then attack[ed] those rights because they fail to fit that framework."⁴¹ The USOC contended that Section 380 "does not duplicate the trademark laws; it stands on its own."⁴² The USOC maintained that the Ninth Circuit's interpretation of Section 380 did not impinge on first amendment rights, because the decision did not prevent SFAA "from commenting upon or protesting against the Olympics."⁴³ The Supreme Court granted certiorari to review the Ninth Circuit's interpretation of the statutory and constitutional issues.⁴⁴

In its brief on the merits, SFAA argued that the Ninth Circuit's decision sanctioned a "logically unconscionable outcome" because it permitted the USOC to silence only those uses of OLYMPIC which were offensive to the USOC "without regard to traditional trademark or constitutional considerations."⁴⁵ SFAA advanced both statutory and constitutional positions. It argued that Congress never meant to give the USOC such "unbridled and dangerous powers."⁴⁶ SFAA stated that had Congress given the USOC such broad powers, Section 380 would violate first amendment and equal protection rights.⁴⁷

The USOC countered that a "clearer violation of [Section 380] was difficult to imagine."⁴⁸ The USOC relied on Section 380's construction and legislative history to support its positions.⁴⁹ The USOC contended that the phrase "or any combination or simulation thereof tending to cause confusion," appearing in paragraph (a)(4) of the statute does not require the USOC to prove confusion in all cases, but only in cases involving any combination or simulation of the Olympic

³⁸ 33 Pat. Trademark & Copyright J. (BNA) 228, 338 (1987).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 338-39.

⁴³ *Id.* at 339.

⁴⁴ *San Francisco Arts & Athletics, Inc.*, 107 S. Ct. at 312-13.

⁴⁵ 33 Pat. Trademark & Copyright J. (BNA) 338, 339 (1987).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

marks.⁵⁰ The USOC insisted that SFAA's interpretation ignored usual punctuation rules, saying that the legislature would have placed a comma after "thereof," had it expected the USOC to prove likelihood of confusion in all cases.⁵¹ The USOC insisted that SFAA's interpretation contraindicated paragraph (c) of the statute, which gave the USOC the exclusive right to use the mark OLYMPIC.⁵²

The USOC argued that Section 380's legislative history clearly indicated that the confusion provision referred only to the prohibition added to the prior criminal statute, which applied only to the direct use of the Olympic marks and made no provision for trademark infringement defenses.⁵³

The Supreme Court affirmed the Ninth Circuit's opinion.⁵⁴

HOLDING AND OPINION

At the outset of the majority opinion, the Court noted that "the starting point in every case involving construction of a statute is the language itself."⁵⁵ The Court found that the language of Section 380(a)⁵⁶ indicated that the confusion language modified only "any combination or simulation thereof" and did not apply to the word OLYMPIC itself.⁵⁷ The Court also found that the legislative history of the section supported this interpretation.⁵⁸ The Court felt that Section 380's reference to Lanham Act remedies did not incorporate the traditional trademark defenses and would render the statute superfluous, considering the USOC's existing trademark in OLYMPIC.⁵⁹ Therefore, the Court concluded that the protection afforded the USOC's use of their Olympic words and symbols differed from nor-

⁵⁰ *Id.*

⁵¹ *Id.*; See *supra* note 23.

⁵² *Id.*

⁵³ *Id.* The prior criminal statute, in force since 1950, did not require the use to be confusing. Instead the statute made it a crime for "any person . . . other than [the USOC] . . . for the purpose of trade, theatrical exhibition, athletic performance, and competition . . . or for any business or charitable purpose to use . . . the words 'Olympic,' 'Olympiad,' or 'Citius Altius Fortius' or any combination of these words." 64 Stat. 901, 36 U.S.C. § 379 (1976).

⁵⁴ See 33 Pat. Trademark & Copyright J. (BNA) 587, 588-89 (1987).

⁵⁵ *San Francisco Arts & Athletics, Inc.*, 107 S. Ct. at 2976 (quoting *Kelly v. Robinson*, 497 U.S. 36 (1986), (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)).

⁵⁶ See *supra* note 23.

⁵⁷ *San Francisco Arts & Athletics, Inc.*, 107 S. Ct. at 2977.

⁵⁸ *Id.* In particular, the Court found that the changes incorporated into Section 380 as compared to its predecessor criminal statute, (see, e.g., *supra* note 42), were largely in response to a letter from the United States Patent and Trademark Office. The letter explained:

Section 110(a)(4) makes actionable not only use of the words "Olympic," "Olympiad," "Citius Altius Fortius," and any combinations thereof, but also any simulation or confusingly similar derivation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the [USOC] or any Olympic activity. . . .

Section 110 carries forward some prohibitions from the existing statute enacted in 1950 and adds some new prohibitions, e.g. words described in section (a)(4) tending to cause confusion, to cause mistake, or to deceive with respect to the [USOC] or any Olympic activity.

Id.

mal trademarks in two respects: first, the USOC need not prove that a contested use is likely to cause confusion; and second, an unauthorized user does not have the normal statutory defenses available.⁶⁰

The Court rejected SFAA's argument that the word OLYMPIC was generic and therefore incapable of trademark protection.⁶¹ The Court explained that Congress could have reasonably found that the commercial and promotional value of the word OLYMPIC was the product of the USOC's "own talents and energy, the end result of much time, effort, and expense," and concluded that the USOC could constitutionally obtain a limited property right in the word.⁶²

The Court rejected SFAA's argument that the first amendment prohibited Congress from granting exclusive use of a word absent a requirement that the authorized user prove confusion.⁶³ Considering that the first amendment provides only a limited form of protection for commercial speech, the Court felt that Congress was reasonable in deciding not to require that the USOC to prove confusion.⁶⁴

The Court noted that neither Congress, nor the USOC prohibited SFAA from conveying its message by prohibiting the use of one word for particular purposes.⁶⁵ The Court characterized the Act's restrictions on expressive speech as incidental to the primary Congressional purpose of encouraging and rewarding the USOC's activities, and therefore only required that the incidental restrictions not be greater than necessary to further a substantial governmental interest.⁶⁶

The Court found a substantial governmental interest existed, since the USOC promotes the participation of United States amateur athletes in the "great four-yearly sports festival, the Olympic Games."⁶⁷ The Court concluded that the Act's restrictions were not broader than necessary to further those governmental interests.⁶⁸

⁶⁰ *Id.* at 2978.

⁶¹ *Id.* at 2979.

⁶² *Id.* (citing *Zacchini v. Scripps-Howard Broad Casting Co.*, 433 U.S. 562, 575 (1977)).

⁶³ *Id.* at 2980.

⁶⁴ *Id.* at 2980-82. (citing *Posadas de Puerto Rico Ass'n v. Tourism Co. of Puerto Rico*, 106 S. Ct. 2968, 2976 (1986)); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 562-63 (1980).

⁶⁵ *Id.* at 2980-81. The Court noted that SFAA held its athletic event in its planned format under the names "Gay Games I" and "Gay Games II" in 1982 and 1986 respectively. *Id.* at 2981; International Olympic Committee, 781 F.2d at 736.

⁶⁶ *Id.* (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

⁶⁷ *Id.* at 2981-82.

⁶⁸ *Id.* at 2982. Justice Brennan joined by Justice Marshall disagreed with the Court's interpretation of Section 380, and insisted that the statute was overbroad on its face, and therefore incapable of withstanding first amendment analysis. *Id.* at 2994 (Brennan, J., dissenting). Justice Brennan contended because the Court's construction of Section 380 prohibited even non-confusing uses of OLYMPIC it regulated an "extraordinary amount of noncommercial speech." *Id.* at 2996. Justice Brennan added the absence of statutory defenses under Section 380, as interpreted by the Court, leads to the regulation of a substantial amount of noncommercial speech. *Id.* In view of this substantial regulation, Justice Brennan insisted that the statute violated the first amendment by prohibiting the dissemination of a message for which there was no adequate translation. *Id.*

SFAA argued that the USOC had enforced its rights in a discriminatory fashion in violation of the fifth amendment.⁶⁹ The Court did not reach the merits of this claim because it found that the USOC was neither a governmental actor itself, nor was it acting in a symbiotic relationship with the government.⁷⁰

The Court indicated that the facts in this case simply were not sufficiently dispositive to establish governmental action, notwithstanding the fact that Congress had granted the USOC's charter, that Congress extensively regulated the USOC's activities, and that Congress had granted the USOC's exclusive use of the mark OLYMPIC for the purported purpose of aiding the USOC in obtaining funding.⁷¹ The Court acknowledged that governmental action had traditionally been found when the challenged entity performed functions that were "traditionally the *exclusive* prerogative" of the federal government.⁷² However, the Court found that "neither the conduct nor the coordination of amateur sports has been a traditional governmental function."⁷³ While the activities of the USOC certainly served a viable national interest, the Court felt that governmental action was not established merely when a private entity performed a function which served the public.⁷⁴

at 2998. Moreover, Justice Brennan found that the governmental interest in providing a subsidy to the USOC was such that the statute's incidental restrictions on first amendment freedoms were greater than necessary to further that interest. *Id.* at 2999.

⁶⁹ *Id.* at 2984. The Court noted in a footnote that although SFAA had invoked the fourteenth amendment for its discriminatory enforcement claim, it did not apply as the claimed association was between the USOC and the federal government. Finding that the fifth amendment would apply, that SFAA had raised the issue of discriminatory enforcement in its petition for certiorari, and that both parties had fully briefed the issue, the Court addressed the claim as one under the fifth amendment. *Id.* at 2984 & n.21.

⁷⁰ *Id.* at 2984. While not reaching the merits of SFAA's discriminatory claim, the Court noted that the claim was "far from compelling." *Id.* at 2984 & n.22. The Court noted that as of 1982 the USOC had brought twenty-two opposition to trademark applications and one petition to cancel, as well as a number of additional suits against various businesses. Further, the Court noted that the USOC authorized uses of OLYMPIC directly related to the purposes of the USOC as established by its charter. In particular, the Court noted sections (7) and (13) of 36 U.S.C. § 374 (1988). 36 U.S.C. § 374(7) provides that one of the objects and purposes of the USOC is to:

[A]ssist organizations and persons concerned with sports in the development of amateur athletic programs for amateur athletes. 36 U.S.C. § 374(13) provides that another purpose of the USOC is to [E]ncourage and provide assistance to amateur athletic programs and competition for handicapped individuals, including, where feasible, the expansion of opportunities for meaningful participation by handicapped individuals in programs of athletic competition for able-bodied individuals.

The authorized uses included the "Special Olympics" for handicapped persons, the "Junior Olympics" and "Explorer Olympics" for youths.

⁷¹ *Id.* at 2985. Particularly, the Court stated that the fact that Congress granted USOC's charter did not render it a government agent, since the government grants all corporate charters; that extensive regulation of the USOC did not transform USOC's actions into those of the government, (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974)); and that government subsidies to trademark owners, whose actions were private, did not impart to the government constitutional responsibility for the entity's actions, (citing *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982)).

⁷² *Id.* (citing *Rendell-Baker*, 457 U.S. at 842 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974))).

⁷³ *San Francisco Arts & Athletics, Inc.*, 107 S. Ct. 2971 (1987), (quoting *Rendell-Baker*, 457 U.S. 830, 842 (1982)).

Justice Brennan, in his dissenting opinion,⁷⁵ contended that the challenged action constituted government action.⁷⁶ He insisted that the USOC itself was a governmental actor because Congress had endowed the USOC with governmental powers to enable it to perform a traditional governmental function.⁷⁷ The USOC represents the United States to the world community.⁷⁸ While Olympic participation is avowedly nonpolitical, Justice Brennan argued it was “inescapably nationalist.”⁷⁹ The Court disagreed, and explained that the USOC’s role in representing the nation to the world community could not be termed “traditionally governmental” because it was not subject to government control.⁸⁰

Justice Brennan referred to the sequence of events leading to the United States’ boycott of the 1980 Summer Olympic Games in Moscow to illustrate USOC’s governmental role.⁸¹ Again, the Court disagreed, and insisted that governmental influence on that decision was “hardly representative in view of the absence of such influence on the vast majority of decisions.”⁸² Moreover, the Court pointed out that even in the course of those events a district court had found that there was no governmental action.⁸³

The court acknowledged that governmental action could normally be found in cases where the government exercised coercive power, or such significant encouragement over a decision that the decision, as a matter of law, had to be deemed that of the government.⁸⁴ However, in this case, the Court found no evidence of such governmental conduct, and therefore concluded that the USOC’s enforcement of its exclusive OLYMPIC rights was simply not a governmental decision.⁸⁵

Justice Brennan disagreed, and insisted that apart from USOC’s role as a governmental actor, the Court could find government action because the “USOC and

⁷⁵ *Id.* at 2987. Justice Marshall also signed Justice Brennan’s dissenting opinion, and on this point Justice O’Connor, joined by Justice Blackmun, concurred.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 2988.

⁷⁹ *Id.*

⁸⁰ *Id.* at 2985 & n.27.

⁸¹ *Id.* at 2989. The United States boycott stemmed from the Soviet invasion of Afghanistan. Justice Brennan characterized the sequence of events prior to the making of the ultimate decision: first, the President publicly opposed American participation in his State of the Union Address; second, Congress voiced opposition to American participation; and, finally, the President threatened legal action to enforce the administration’s position. Justice Brennan characterized the USOC’s ultimate decision to boycott as follows:

Shortly, thereafter, with national and international stakes of the USOC’s decision set forth by the President and Congress, and with reports in the press of possible cuts in federal aid to the USOC, the USOC announced that the United States would not participate in the 1980 Olympic Games.

Id.

⁸² *Id.* at 2985-86 & n.27.

⁸³ *Id.* at 2986 (citing *DeFrantz v. United States Olympic Committee*, 492 F. Supp. 1181, 1194 (D.D.C.) *aff’d mem.*, 226 U.S. App. D.C. 210, 710 F.2d 221 (1980) (holding that mere Presidential, administrative, or political pressure could not be equated with control)).

⁸⁴ *Id.* at 2986 (citing *Blum*, 457 U.S. at 1004; *Rendell-Baker*, 457 U.S. at 840).

federal government exist in a symbiotic relationship sufficient to provide a nexus between the USOC's challenged action and the government."⁸⁶ To illustrate this relationship, Justice Brennan cited the mutual benefits the relationship conferred on each party, the profound connection between the United States and the USOC in the public eye,⁸⁷ the close financial link between the USOC's alleged discriminatory exercise of its word use authority, and the financial success of both the USOC and the government.⁸⁸ Justice Brennan felt this close connection compelled a finding of government action.⁸⁹ Still, the Court found that the USOC was not a governmental actor, and reasoned that SFAA's discrimination claim "must fail."⁹⁰

ANALYSIS

The Court's interpretation of Section 380 appears correct.⁹¹ Section 380's statutory construction and legislative history support the proposition that the USOC is entitled to enforce its exclusive statutory rights in OLYMPIC without proving likelihood of confusion.⁹² Consequently, the USOC's statutory rights to its Olympic marks are broader than the rights afforded to the holders of traditional trademarks. It is a well accepted tenet of the Supreme Court's censorship cases that the prohibition of particular words runs the substantial risk of suppressing ideas.⁹³ Yet, the Court properly balanced the restrictions which the statute imposed on first amendment freedoms to determine whether they were greater than necessary to further a substantial government interest.

Prior cases dealing with the Amateur Sports Act had characterized its primary purpose, and therefore the government's primary interest, as being financial, namely to "ensure the market value of license."⁹⁴ Justice Brennan adopted this

⁸⁶ *Id.* at 2991-92.

⁸⁷ In particular, Justice Brennan noted that the United States President has served as Honorary President of the USOC, that the national flag flies "figuratively and literally" over the Olympic Team, and that the athletes' devotion was to the nation and not the the USOC. *San Francisco Art & Athletics, Inc.*, 107 S. Ct. at 2992.

⁸⁸ *Id.*

⁸⁹ *Id.* at 2993. To Justice Brennan the fact that Congress had reshaped the USOC in 1978, purportedly under Section 380, in part to fill a role which no private party had ever held illustrated USOC's governmental role. This role was that of exclusive national coordinator for all amateur athletes related to international competition. Justice Brennan concluded that because Congress had bestowed upon the USOC these "inherently public powers and responsibilities" the USOC's actions should be subject to constitutional restraints. *Id.* at 2991.

⁹⁰ *Id.* at 2986-87. The Court noted that SFAA also contended that governmental action could be found in the District Court's entry of the injunction under the doctrine of *Shelley v. Kraemer*, 344 U.S. 1 (1948). However, because SFAA had not raised this contention in its petition for certiorari, the Court concluded that the issue was not properly before the Court under Supreme Court Rule 21.1(a). *Id.* at 2987 & n.30.

⁹¹ See *supra* notes 55-60.

⁹² The text of the statute clearly supports the interpretation advanced by the USOC and adopted by the Court. See *supra* note 50. Further, the letter from the United States Patent and Trademark Office, also supports this interpretation. See *supra* note 58.

⁹³ See, e.g., *Cohen v. California*, 403 U.S. 15, 26 (1971): "We cannot indulge the facile assumption that one can forbid particular words without running a substantial risk of suppressing ideas in the process."

⁹⁴ *Stop the Olympic Prison v. United States Olympic Committee*, 489 F. Supp. 1112 (S.D.N.Y. 1980); See also, *United States Olympic Committee v. Interlicense Corporation, S.A.*, 737 F.2d 263 (2d Cir. 1984) and cases

position in his dissent, and argued that the traditional Lanham Act rights were sufficient to promote this interest.⁹⁵

The Court recognized USOC's financial interest, but indicated that it was but one of the governmental interests advanced by the statute and urged that there were broader public issues at stake.⁹⁶ The Court concluded that Congress' determination as to the scope of the statute's restrictions was reasonable.⁹⁷ To support this belief the Court stated:

Congress reasonably could conclude that most commercial uses of Olympic words and symbols are likely to be confusing. It also could determine that unauthorized uses, even if not confusing, nevertheless may harm the distinctiveness and thus the commercial value of the marks.⁹⁸

Interestingly, the Court used the likelihood of confusion and the dilution doctrines⁹⁹ to conclude that the restrictions of Section 380 are not unnecessarily overbroad to further the government's interest.¹⁰⁰ The Court appears to argue that Congress has a legitimate interest in protecting the OLYMPIC symbol, through the USOC, in whatever manner Congress determines. Ostensibly, this is the fundamental basis of Justice Brennan's dissent contending that the statute is constitutionally overbroad.¹⁰¹ The Court's only response to Justice Brennan's concerns is, "we find no 'realistic danger that the statute itself will significantly compromise recognized First Amendment protection of parties not before the Court' . . . Accordingly, we decline to apply the overbreadth doctrine to this case."¹⁰² The Court's analysis fails to explain why this danger is not realistic in view of Congress' alleged unbridled power.¹⁰³ However, considering SFAA's commercialization of goods bearing the mark, as well as its clear attempt to exploit the imagery and goodwill in OLYMPIC, the Court's result appears appropriate.

Considering the inadequacy of the Court's opinion on this point, Section 380 has probably not been purged of all first amendment concerns, and first amendment problems may arise if litigants show their rights are being, or have been, compromised. First amendment claims based on the denial of expressionary speech would also appear to remain viable.¹⁰⁴

⁹⁵ *San Francisco Arts & Athletics, Inc.*, 107 S. Ct. at 2999-3000.

⁹⁶ *Id.* at 2981; see *supra* note 68.

⁹⁷ *San Francisco Arts & Athletics, Inc.*, 107 S. Ct. at 2982.

⁹⁸ *Id.*

⁹⁹ The dilution doctrine is essentially set out in the second sentence of the Court's language, *viz.* the statement that unauthorized use harms [dilutes] the distinctiveness and commercial value of the mark. *Id.*

¹⁰⁰ *San Francisco Arts & Athletics, Inc.*, 107 S. Ct. at 2982.

¹⁰¹ *Id.* at 2987; see *supra* note 68.

¹⁰² *San Francisco Arts & Athletics, Inc.*, 107 S. Ct. at 2981 & n.15 (citing *Central Hudson Gas & Electric Corp. v. Public Service Comm'n.*, 447 U.S. 557, 566 (1980)).

¹⁰³ See *supra* notes 37, 46 and accompanying text.

¹⁰⁴ See *supra* note 90 and accompanying text.

Finally, the Court's holding on the fifth amendment issue, and in particular, in regard to the question of governmental action, also appears correct, absent consideration of the Court's enforcement of a putative discriminatory injunction under the doctrine of *Shelley v. Kraemer*.¹⁰⁵ Despite Justice Brennan's persuasive reasoning to the contrary, the actions of the USOC are sufficiently independent of the government.¹⁰⁶ One might wonder, however, if the Court failed to find government action to avoid the merits of SFAA's discrimination claim.¹⁰⁷

IMPLICATIONS

Trademark Law

Because Section 380 is unique to the USOC and its OLYMPIC symbols and marks, the impact of the Court's decision would appear to be limited to cases in which the USOC seeks to enforce its exclusive rights. In this regard, however, the Court's purported determinative test may render many first amendment issues under Section 380 viable and unanswered.¹⁰⁸ Particularly, inasmuch as the Court's opinion does not expressly prohibit expressionary uses of Olympic marks,¹⁰⁹ as well it probably should not, it is likely that future litigation under Section 380 will be replete with the unauthorized user claiming first amendment rights to freedom of expression.

The Court's opinion will probably have minimal effect on first amendment issues under the traditional likelihood of confusion doctrine. When the likelihood of confusion doctrine is employed as the primary basis of liability for unauthorized use, trademark protection generally does not raise constitutional problems. This is because the government has a legitimate interest in curtailing deceptive or misleading communications.¹¹⁰ Therefore, the first amendment does not operate

¹⁰⁵ The Court noted, apparently with approval, that in *Stop the Olympic Prison*, 489 F. Supp. at 1118-21, the district court found that the Act did not prohibit the use of the Olympic logo of five interlocking rings and the Olympic torch in a poster expressing opposition to the planned conversion of the Olympic village at Lake Placid, New York into a prison. *San Francisco Arts & Athletics, Inc.*, 107 S. Ct. at 2981 & n.14.

¹⁰⁶ Moreover, the Court's holding is consistent with those of other courts considering the same issue. For example, in *DeFrantz v. United States Olympic Committee*, 492 F. Supp. 1181, 1194 (1980), relied upon by the majority, *supra* note 83, the district court arrived at the same result. In so doing, the district court relied on the circuit court's test which had been consistently applied to determine when federal jurisdiction attached in nondiscrimination cases. Under the circuit court's test, the focus is on the quantum of government involvement with a private entity which is necessary to indicate that the private entity is sufficiently entangled with governmental functions to be considered a governmental actor. The circuit court had advanced the following notion as a principal evolved from its prior cases: "At least where race is not involved, it is necessary to show that the government exercises some form of control over the actions of the private party." *Spark v. Catholic Univ. of America*, 520 F.2d 1277, 1282 (D.C. Cir. 1975). Because the USOC is an independent body with no provisions in its charter giving the government control, the district court had found that such control was lacking. See *DeFrantz*, 492 F.Supp. at 1194.

¹⁰⁷ See *supra* note 70 and accompanying text. It would appear that for a future party to successfully raise a discrimination claim not only would they have to show that the USOC was a governmental actor, but also that their use fell within the purview of one of the USOC's stated purposes. See 36 U.S.C. § 374 (1988).

¹⁰⁸ See *supra* notes 63-68 and 94-103 and accompanying text.

¹⁰⁹ See *Stop the Olympic Prison*, 489 F. Supp. at 1120; See *supra* note 105.

¹¹⁰ *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976):

as a restriction on trademark rights under the confusion theory.

The Court's opinion will probably indirectly effect other cases as well. The decision may affect trademark parody cases which often raise first amendment concerns, as well as trademark infringement cases involving the application of the misappropriation doctrine and/or the dilution doctrine.¹¹¹

Constitutional Law

The Supreme Court's rejection of government action on behalf of the USOC is likely to have a significant effect on future civil rights cases brought under either the fifth or fourteenth amendments. In *Stevens v. New York Racing Association*,¹¹² a recent civil rights case the New York District Court distinguished the *SFAA* decision. The *Stevens* court found a symbiotic relationship between the state and the private entity, saying the state was sufficiently involved with the private entity's activities and significantly encouraged their actions.¹¹³ The *Stevens* court concluded that "the facts in *USOC* are not as suggestive of a symbiotic relationship as those in the instant case."¹¹⁴ The *Stevens* court distinguished the *SFAA* decision on three bases: (1) the defendant in that case [New York Racing Association (NYRA)] transferred monies to the state, whereas the USOC does not provide Congress with any monies; (2) the state could exert influence over NYRA's decisions concerning press credentials and the challenged action, whereas neither Congress, nor the President possessed power to control the USOC's actions; and, (3) while nothing in the Supreme Court's decision indicated that Congress could approve or remove USOC's directors or that USOC's assets would be transferred by a public official to a federal agency on dissolution of the USOC, the state possessed the power to do both to the NYRA.¹¹⁵

Future courts will probably use the USOC's relationship to the federal government as a standard for comparing other government-private entity relationships. Under this standard courts will likely require a significant level of involvement between the private entity and the government before treating the private entity as a governmental actor.

"Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The first amendment, as we construe it today, does not prohibit the state from insuring that the streams of commercial information flow cleanly as well as freely."

¹¹¹ See, e.g., Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 WIS. L. REV. 158 (1982). Denicola contends that emerging rationales, such as the misappropriation rationale and the dilution rationale, implicate first amendment problems because when these rationales are utilized where the traditional confusion rationale is not applicable. The putative problems, Denicola suggests, are most prevalent when the trademark serves as a vehicle for the communication of ideas. See also, Shaughnessy, *Trademark Parody: A Fair Use and First Amendment Analysis*, 72 VA. L. REV. 1078, 1117 (1986) (contending J. Koszinski's analysis is pertinent to the problem of trademark parody and first amendment rights).

¹¹² 665 F. Supp. 164, 174-75 (E.D.N.Y. 1987).

¹¹³ *Id.*

¹¹⁴ *Id.* at 175.

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¹¹⁵ *Id.* at 174-75.

CONCLUSION

In *SFAA*, the United States Supreme Court held that the USOC could enforce its statutory rights in the mark OLYMPIC without needing to prove the likelihood of customer confusion, and that its enforcement against SFAA did not violate the first amendment.¹¹⁶ Hence, SFAA could not use the word OLYMPIC to promote its "Gay Olympic Games." This holding is likely to have little impact on trademark law in general, because the USOC's statutory rights are bestowed by a statute which is unique to the USOC.

The Court also held, over Justice Brennan's strong dissent, that the USOC's enforcement of its OLYMPIC trademark rights did not violate the fifth amendment, because the USOC was not a governmental actor.¹¹⁷ This relatively narrow state action view will undoubtedly affect future civil rights litigation.

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¹¹⁶ *San Francisco Arts & Athletics, Inc.*, 107 S. Ct. at 1971.