

Sports Litigation Alert

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Abolition of Rule 40 Will Help Athletes Competing in the Olympics, But It Will Require A Collective Effort for a Complete Victory

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With news that the Tokyo 2020 Olympics has raised \$3.1bn in sponsorship from Japanese firms alone, it's clear that the Olympic Games mean big business.

The IOC has historically sought to protect its advertising revenue through the use of Rule 40, by-law paragraph 3 of the IOC charter, which states that: "except as permitted by the IOC Executive Board, no competitor, coach, trainer or official who participates in the Olympic Games may allow his person, name, picture or sports performances to be used for advertising purposes during the Olympic Games." A major practical effect of this is that athletes are prevented from aligning themselves with their personal sponsors in the period preceding, during and immediately after the Games, key times at which they and their sponsors would otherwise be seeking to capitalise upon their sporting successes.

The validity of the Rule 40 restriction was thrown into doubt when the German Competition Authority found, in February 2019, that the restrictions imposed by Rule 40 were too far-reaching and an abuse of a dominant position. To conclude proceedings, the International Olympic Committee (IOC) and German Olympic Sports Confederation reached an agreement with the German Authority to dilute the scope of Rule 40.

As a result, German athlete advertising activities during the Games will no longer have to be cleared by the German Olympic Sports Confederation and terms such as 'medal', 'gold', 'silver', 'bronze', 'Summer Games' and 'Winter Games' will be allowed to be used by German athletes and their sponsors. Athletes will also be allowed to use social media more freely and

post pictures of themselves competing at the Olympics, provided that no Olympic symbols are visible. However, commitments to loosen the restrictions were only made in respect of German athletes and their sponsors.

It is clear from the German decision that, in the imposition of their restrictions, the IOC failed to protect their solidarity model in a proportionate manner, to the detriment of athlete freedoms. Solidarity is a core principle of the IOC to support all athletes from all countries, big or small, and from all sports, so as to give everyone an equal opportunity. The IOC has claimed that Rule 40 is the basis for the model, ensuring the stability of the financing of the Olympic movement. As a result of the German finding that the restrictions of advertising opportunities arising from the application of Rule 40 were too far-reaching, there was much speculation around whether the spectre of further possible claims and adverse findings against the IOC would lead to a wholesale change to Rule 40.

The answer clearly came in the negative in April when IOC president Thomas Bach said that there was 'no one size fits all solution' to the issue. Addressing athlete representatives, he said that "my recommendation to you as athlete representatives is that you approach your NOCs or federations and enter into a binding agreement of what are the rights and responsibilities of an athlete". The IOC reiterated that stance again in May.



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Despite this position, the IOC appeared to reconsider when, in June, a charter change was presented in Lausanne which to some extent may relax Rule 40. The amendment permits athletes and other participants to allow their person, name, picture or sports performances to be used ‘for advertising purposes during the Olympic Games in accordance with the principles determined by the IOC Executive Board’. Although the principles have yet to be made public, soon after the amendment was made, the Australian Olympic Committee announced that it had approved changes to its guidelines to allow for campaigns to continue and for athletes to thank their personal sponsors. Other NOCs are yet to follow suit.

The suggestion that there is ‘no one size fits all solution’ seems somewhat at odds with the assertion by an IOC spokesperson who was quoted following the German ruling as saying that “Rule 40 is the fundamental basis for the solidarity model of the Olympic Games”. However, what is clear is that the amendment to Rule 40 and athlete call to action represents an opportunity for athletes to shape their freedoms. But how best to achieve this?

Any individual approach would seem to ring hollow in light of the clear emphasis on solidarity. Instead, collective action seems like the most effective way for athletes to secure enhanced advertising rights and freedoms, which will work for them and their sponsors.

The benefits of collective action can be seen in the recent action for equal pay brought by 28 members the US women’s football team against the US Soccer Federation. Pressure placed on the Soccer Federation by the players has led to the Federation agreeing to voluntary mediation to try to find a way to settle the action brought against them. Athletes joining together are likely to hold more clout than one individual athlete speaking out, which could be viewed as simply looking after their own individual interests, which do not necessarily represent the interests of Olympic athletes as a whole.

But, the opportunity for enhanced athlete rights doesn’t need to end with a mere relaxation of Rule 40. Why couldn’t there be a total removal of advertising restrictions for athletes?

The argument of the IOC would be that abolition of

Rule 40 would undermine the IOC’s TOP partner programme (the TOP programme being the highest level of Olympic sponsorship, granting category-exclusive marketing rights to the Summer, Winter and Youth Olympic Games to a select group of global partners such as Coca-Cola) which would be to the potential detriment of athlete funding.

However, it is by no means clear that TOP partners would wish to be associated with a regime that has been found by a regulatory agency to be abusive. In contrast, allowing athletes to benefit from their personal (as opposed to collective) commercial value seems entirely fair and consistent with the spirit of the Games. In any event, there are currently unexploited commercial opportunities available to the TOP partners that could be provided by the IOC as part of a fairer rebalancing of the marketing opportunities available during the Games. For example, perimeter board advertising could be permitted in Olympic venues. This is not currently permitted by the IOC’s ‘clean-venue’ policy, even for TOP partners. The possibility of opening up new avenues of exposure to sponsors in the face of a dilution of Rule 40 was mooted recently by Timo Lumme, managing director, IOC television and marketing services. The fact that he raised this as a potential option, even hypothetically, shows that the IOC has not ruled out alternative options to maintain and enhance sponsorship income. This would require change at an IOC, rather than NOC, level, but there does not seem to be an obvious reason why this could not happen.

The abolition of Rule 40 could be the finish line in athletes going for gold, but to get there, it’s clearly going to require a collective effort.

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