Sports sponsorship - protecting your brand when your endorser goes rogue

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Sports sponsorship is big business. Brand owners use sponsorship deals to connect with their target market. Sports organisations and teams use the sums raised to focus on the development and promotion of their sport or team. It is a mutually beneficial arrangement that has led to a booming industry.

The core principle of sponsorship is to benefit from a positive brand association. These days, many sponsors go beyond simply using the endorser as a platform for displaying its logo, looking instead to align themselves closely with the competition, team or athlete they are sponsoring.

When a sponsorship goes well, the rewards for the brand owner can be considerable. But, just as a close association can substantially benefit a brand, so can adverse publicity arising from the relationship be damaging. Sponsors bank on both the performance and image of their endorsers. As such, conduct on and off the pitch can severely impact their return on investment.

There have been a number of press reports recently, where high profile athletes and organisations have been publicly dropped by their sponsors. Nike suspended Maria Sharapova, and it was reported that Adidas and Nestlé ended their relationship with the IAAF following doping allegations; Nike terminated its agreement with Manny Pacquiao as a consequence of his homophobic slurs; and Pepsi reportedly ended its deal with the Indian Premier League citing issues with governance.

In each case, the sponsor has been keen to distance itself from the bad publicity to minimise damage to its brand. The risk the sponsor faces is that the public associate the sponsor with (potentially even as condoning) the acts of the endorser. With "social media backlashes" now commonplace, brand owners need to be even more careful that they are in a strong position when things go wrong.

Making your sponsorship work for you

Although a formal, written sponsorship agreement is a major tool in safeguarding any brand from the acts of an endorser, there are other steps that brand owners can take to ensure that they retain as much control as possible during the relationship.

Have a game plan

Having a carefully considered sponsorship strategy is key to protecting a brand.

First, sponsors should precisely identify what their brand stands for and means.

The next task is identifying an individual, team, organisation or event that reflects those characteristics. It's not just about securing the best team, or the highest profile event or athlete. If the brand emulates family values, selecting a controversial personality is not likely to be a good fit!

Red Bull is a striking example of how to excel in this approach. It has connected with its target audience by making itself synonymous with extreme sports. As well as a long list of sponsorships that appeal to its target market, such as ESPN's X Games, it also owns a Formula 1 team. Further, it projects an image of mentoring talent by sponsoring fledgling extreme sports athletes. Red Bull has also gone beyond the usual sponsorship platforms, by creating several of its own extreme sporting events, such as the Red Bull Air Race and the Red Bull Cliff Diving World Series.

The pinnacle of these events was the Red Bull Stratos project, when in 2012 an Austrian skydiver, Felix Baumgartner, leapt from a balloon out of a capsule 39km up in the stratosphere. He set a number of records, including the greatest freefall distance, the first human to break the sound barrier in freefall and the highest vertical speed in freefall. This was eagerly watched by more than 8 million people via live-streaming on YouTube - another world record.
Red Bull communicates to its target market that it loves extreme sports as much as they do. And crucially, selecting extreme sport athletes and events in association with Red Bull's own thrill-seeking image protects against the likelihood of its brand values being eroded.

Do your homework

Carrying out due diligence prior to entering into a sponsorship is crucial. The sponsor needs to be aware of the risks that the sponsorship may present, so as to avoid being blindsided. For example, the risks associated with sponsoring an individual may be higher than with sponsoring an event, or the governing body of a sport, as the brand owner is buying into the individual's public and private persona.

With this in mind, carrying out background checks is critical. In the world of football, banking on the wholesome, family-friendly image of a celebrity like David Beckham carries far less risk than an association with a more unpredictable character (for example Luis Suárez). Beckham reportedly secured a lifetime deal with Adidas in 2003 of in excess of $160 million. Suárez, on the other hand was dropped by 888poker.com a month after entering into the deal, after he bit Giorgio Chiellini during a group stage fixture of the Brazil World Cup 2014.

Whilst naming rights deals are generally considered safe, carrying out research can also save against backlash from sports fans. Certainly Sports Direct's deal in 2011 with Newcastle United to rename its stadium from St James' Park (a long established and much-loved name among the club's fans) to the Sports Direct Arena, proved controversial, with fans reportedly removing Sports Direct signs at the stadium in protest at the change. By contrast, Emirates Airline capitalised on obtaining the naming rights to Arsenal FC's new stadium before it had opened to the public.

Keep your finger on the pulse

Brand usage guidelines are par for the course when safeguarding a brand. Similarly, sponsors should, as far as possible, exercise complete control over the message associated with their brand.

Sponsors should also keep monitoring the public's perception of their brand throughout the sponsorship period. Social media analytics tools can track online activity, so that sponsors can evaluate traffic relating to their brand and react quickly when things go wrong.

Although FIFA has avoided the negative publicity that the IAAF has faced in having high profile sponsors publicly terminate their contracts, its relationship with its sponsors has suffered over the past few years. Sony, Emirates, Johnson & Johnson, Continental and Castrol all chose not to renew their existing contracts with FIFA, and there have been corruption allegations against senior FIFA personnel, resulting in several FIFA officials being charged with offences, including racketeering, wire fraud and money laundering.

Given the direct brand association with the football World Cup that these sponsors have been cultivating, this is not surprising. Some of the reaction on social media to the awarding of the 2022 FIFA World Cup to Qatar has also been negative. When, in addition to the media attention surrounding the corruption allegations, "anti-advertisements" also start trending on social media, featuring doctored corporate logos of major sponsors depicting blood or slavery (many with the slogan, "proudly supporting the human rights abuses of World Cup 2022"), there is much for a sponsor to consider.

Be one step ahead

Sponsors can look weak when they don't act fast - they should think ahead and have a planned course of action for when things go wrong. Forecasting potential areas of risk and simulating how they might play out (for example, on social media), is one way to ensure that the sponsor is on the ball. It means the sponsor has a game plan for damage limitation, which can give them a head start when a quick reaction is needed.

Contract is king

It is important to remember that the sponsorship contract (and what it says) dictates the legal relationship between the parties. Its contents need to provide the sponsor with all the protection it may need for the duration of the sponsorship - especially in the event that things go wrong.

Moral Dilemmas

'Morals' clauses originated in Hollywood in the 1920s, in order to protect the interests of film studios from the private lives of their actors. Since then, they became commonplace in athletes' sponsorship contracts.

A morals clause is a contractual provision that gives the sponsor the right to terminate the agreement, in the event that the endorser engages in conduct that might negatively impact on the sponsor's image, goodwill and reputation.

In addition to offering a way out to sponsors, they also act as a deterrent against misconduct, criminal and unethical behaviour. Social media means that news travels fast. This clause enables sponsors to protect their interests - by quickly (and usually publicly) severing the connection.

Although sponsors should ensure that their morals clauses are broadly drafted (to give them as much flexibility as possible), they should also make sure that any
concerns relating to the endorser that are raised during the due diligence process are specifically dealt with. For example, due to rumours of past doping, the United States Postal Service's contract with Lance Armstrong and his professional cycling team reportedly included language in its morals clause that targeted the use of performance-enhancing drugs.

The content of a morals clause will largely depend on the parties and their respective bargaining powers. Sponsors sign particular athletes to endorse their brands because they represent an idea, image, or concept that the sponsor wants to associate with their brand. The sponsor should construct its morals clause to address the particular conduct that could tarnish that idea, image or concept. For example, while a doping scandal directly erodes Lance Armstrong's image of hard work, perseverance, and overcoming the odds (on which Nike wished to capitalise), other moral issues (for example, Tiger Woods' extramarital affairs), may not.

Sponsors should also make sure that they have the exclusive authority to determine whether conduct has violated the morals clause. The clause should also cover past conduct, which may later come to light, and both intentional and unintentional actions.

The right to terminate the contract should not be limited to where criminal convictions arise - it is likely that behaviour that falls short of a criminal conviction may still cause public outrage or a scandal which may damage the sponsor's brand.

Having a morals clause in a contract does not mean that the Sponsor has to use it. The Sponsor will usually balance the benefit of enforcing the morals clause - distancing the company from the endorser's actions - against the potential that the sponsor's actions may be perceived as desertion. The decision whether or not to terminate will depend on the severity of the transgression and its impact on the target market. The sponsor will also need to consider the investment it has made in the sponsorship, its options to replace the endorser, as well any risk of litigation should it be held to have wrongly terminated the contract.

Adidas's reported decision to terminate its eleven-year sponsorship deal with the IAAF three years early contrasts with its stance with FIFA. This may be because FIFA's corruption does not have a direct impact on the integrity of athletics events, whereas doping affects the integrity of athletics events.

Put them on ice

When the endorser's actions hit the headlines, acting fast is important to prevent harm to the brand. But why be forced into making an impulse decision when you can kick it into the long grass? Sponsors often choose to have a suspension clause in the contract, linked with the terms of the morals clause. This will release the sponsor of the obligation to pay the endorser (or provide any other benefits), or use them in any marketing campaigns, until the sponsor chooses to resume the relationship. This way, sponsors can defer making a definite decision on the future of the relationship until they are sure that termination is the best option. When exercising this provision, the sponsor may also choose to make a press release on the suspension and publicly denounce the endorser's actions.

Nike has, in the past, used this option to suspend, to give itself time to evaluate its valuable relationships.

Olympic sprinter, Justin Gatlin, was suspended by Nike, after testing positive for steroids in 2006. After going undefeated in 2014, Gatlin was brought back into the Nike fold, when he was offered a new sponsorship deal in 2015.

Oscar Pistorius was suspended by Nike within a week of being accused of murdering his girlfriend Reeva Steenkamp, which allowed Nike to pull adverts featuring the strapline "I am the bullet in the chamber". Pistorius terminated the contract the following year, after Pistorius was found guilty of culpable homicide.

More recently, Maria Sharapova was suspended within 24 hours of being provisionally banned, following a failed drugs test.

Protecting your investment

It is one thing to safeguard the brand, but what about protecting the vast sums given in sponsorship payments and bonuses?

Sponsors should, where possible, try to avoid front-loaded payments and instead opt for a payment schedule over the duration of the sponsorship. This means that when a contract is terminated or suspended, the issue of recovering lump sum payments through legal proceedings does not arise. It also incentivises the endorser, as the payments are conditional on their continued compliant behaviour.

Sponsors may also wish to include liquidated damages provisions in the sponsorship contract. Such clauses act as a deterrent, as they focus the mind of the endorser, by equating the endorser's conduct with a set financial value. For example, an athlete would know in advance that their being caught in public using the product of one of its sponsor's competitors would amount to a loss of x amount of sponsorship revenue. These damages could then be set-off against the next set of sponsorship fees due to be paid to the endorser. The aim is to compensate the Sponsor for the losses it is likely to suffer in relation to a particular infraction (e.g. the projected cost of pulling a marketing campaign or co-branded products). They will be unenforceable if deemed to be a penalty clause intended to punish the endorser. Liquidated damages clauses, if drafted well, can provide a sponsor with a mechanism to claim back compensation, without having to sue for actual
But what about the sponsorship payments already paid under the contract? Increasingly, clawback provisions have crept into sponsorship contracts. They allow the sponsor to claw back payments in the event of a breach. The negotiation process for these types of clauses can reveal whether the endorser is the right fit for the brand - would a sponsor want to enter into a relationship with an athlete who is scared off by a clawback provision relating to their using performance-enhancing drugs?

**Reputation management**

Sponsors should also consider including provisions in the sponsorship contract that allow them to publicly criticise their endorser, where they engage in reprehensible conduct, as well as an obligation that they co-operate in minimising brand damage, whether by participating in press conferences, or issuing apologies.

Also, including a confidential arbitration clause in the sponsorship contract will keep disputes and settlements out of the public eye.

**Manage expectations**

Sponsors should always make their endorsers aware of the high standards expected of them, as well as the consequences of not meeting such expectations. Although the sponsorship contract sets the legal parameters, the parties need to be on the same page before the relationship is documented - the most successful sponsorships are those where there is a true partnership, with aligned goals and expectations.

**Always exercise control**

The common thread to be taken away is that the sponsor needs to be in control. By actively engaging, both prior to and during the life of the sponsorship, sponsors can make sure the ball is always in their court.

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**Sponsors - making your contract work for you**

Aside from protecting against negative publicity, here are other contractual ways to strengthen your position:

- **Exclusive sponsorship** - where possible, be the only sponsor. Alternatively, you should require that the endorser seeks your approval before entering into other sponsorships.
- **If exclusivity is not possible, negotiate a broad “product category exclusivity”. This secures your position as the only sponsor for a defined market (e.g. the finance sector or the soft drinks market).**
- **Secure protection against ambush marketing by contractually obliging the endorser to operate a prevention strategy, to include a combination of registering and enforcing its intellectual property rights; securing media space; prescribing ticketing conditions to events; and carrying out sponsor awareness campaigns.**
- **When it comes to renewal, protect the brand association you have generated during the life of the sponsorship by insisting on a “matching-rights” clause. Although the endorser has the right to negotiate with third parties towards the end of the term, you would be given an opportunity to match the best offer made to the endorser, and thereby continue your existing relationship.**