

## **I. Introduction**

While the big four team sports, NFL football, Major League Baseball, NBA basketball, and NHL hockey, receive much of the attention paid by the media and fans of American sports, there are many other sports, featuring individual sports performers (“ISPs”), that also attract great attention from the media and fans. These individual participant sports offer athletes many playing and marketing opportunities, and may, in the case of the Olympics, offer athletes an opportunity to represent their respective countries.

While both team sports performers (“TSPs”) and ISPs may compete professionally as athletes, there are numerous legal and business issues that differentiate the two. Accordingly, representatives must be intimately familiar with these differences and address these differences when forming branding strategies on behalf of an ISP, negotiating and drafting sponsorship agreements on behalf of an ISP, and in every other aspect of ISP representation.

This presentation will provide you with some background as to what defines an ISP. Additionally, it will explore many of the different legal and business considerations that exist between a TSP and an ISP. The presentation will then examine how these differences affect the representation of an ISP. Finally, the presentation will look at several key sample clauses in a typical ISP sponsorship agreement and discuss negotiation points and strategies to be used in the formation of these agreements.

## **II. What is an Individual Sports Performer**

Individual Sports Performers are athletes who participate in sports featuring individuals, not teams. Traditional individual sports include golf, singles tennis, bowling, swimming, boxing and many of the Olympic sports, like downhill skiing. More recently, there is been an exponential growth in non-traditional individual sports like x-game sports such as boardercross, motocross, snowboarding, and skateboarding, as well as, non x-game sports like, auto racing, poker, triathlon, pool, cycling, running, and even darts. Many of these sports have seen unprecedented growth in the past decade and are even passing some of the more traditionally followed team sports, like baseball, in the way of television ratings.

Further, just as athletes participate in team sports, ISPs can participate in individual sports on an amateur (i.e. Olympics or college) and/or professional level. Representing amateur ISPs is much more involved, as detailed knowledge of the rules and regulations of the sport’s governing body is imperative to preserve the athlete’s amateur status.

### **III. Differences Between Team Sport Performers and ISPs**

#### **A. ISPs Do Not Contract With A Team or A League, but With Sponsors**

Perhaps the most significant difference between ISPs and TSPs is that ISPs do not play for a team or a league, they are not paid by a team or a league, and therefore they do not contract with a league or a team. Rather, ISPs are typically compensated by contracting with sponsors to use, endorse, and market the sponsor's goods.

#### **B. The Entire Focus Is On the Individual Athlete**

Unlike many TSPs, ISPs must carry the entire burden of winning and losing on their shoulders. Further, injuries play a major part in many ISPs earning potential. Because much of an ISPs compensation is based on event participation, overall rankings in their sport, and media and marketing appearances, ISPs must stay healthy to perform consistently, hold their rankings, appear in and finish a requisite number of events, and provide the sponsor with adequate media exposure.

#### **C. Exposure to Many Different Markets**

A key marketing advantage possessed by ISPs is that they often participate in international events. Unlike the big four American team sport leagues, whose teams typically only perform in the United States, outside of a couple special events per year, golfers, tennis players, Olympians, swimmers, and triathletes regularly perform outside of the United States. The increased exposure leads to many more marketing opportunities for the athletes and their respective sponsors.

#### **D. ISPs Protect Their Own Rights**

In the big four team sports, the player associations often establish marketing opportunities and oversee the regulation of those opportunities through group licensing programs. Further, athletes in the big four sports often assign the exclusive right to license their name, signature, facsimile, voice, picture, photograph, likeness and biographical information to the players association for use in group licensing programs.

ISPs, however, must develop an appreciation and understanding for the value of their intellectual property and publicity rights. These rights are the basis of their livelihood and, for the most part, the individual athlete is responsible for seeking marketing opportunities, not a union or players association. Further, ISPs must constantly consider how their actions and performance will affect their sponsorships. Because their sponsors are their primary source of compensation, and because the burden of marketing the sponsor is solely on the ISP, the ISP must always be cognizant of his actions and performance.

### **IV. How Do These Differences Affect Representation of ISPs**

## **A. ISPs Do Not Contract With A Team or A League, but With Sponsors**

Because ISPs do not contract with a team or a league like TSPs, ISPs do not have the protection of a union that will negotiate a collective bargaining agreement on their behalf. Further, ISPs are most often not viewed or treated as employees, and therefore do not receive employee benefits such as worker's compensation, pension plans, or health care. Further, they are not offered the benefits of a group licensing program, like athletes in each of the four major sports are offered.

While ISPs do not have these advantages, they do possess the benefits of contracting for themselves. Their compensation, unlike most TSPs, is not limited by draft position, seniority, free agency regulations, or salary caps. Rather, they may negotiate for as much as the market will bear. Further, they are not assigned to play with athletes or for a coach whom they dislike. Rather, each athlete can select his own coaching staff or management, as the case may be.

Another implication of being an ISP is that marketing opportunities are often responsible for as much of the athlete's livelihood as is actual participation in a sport. Presenting an image with appeal, staying out of trouble, and performing on a high level, essentially enhancing his marketability is imperative to an athlete who relies on compensation from sponsorships.

Moreover, injury prevention must be emphasized. Unlike team sports in which athletes may get paid for a whole season regardless of injury, an ISP must stay injury free to preserve his rankings, make required appearances, and continue to make himself marketable to retain his sponsorships.

With these considerations in mind, a representative of ISPs should have a firm understanding of marketing principles and branding strategies. Further, indemnity clauses, narrowly drafted territory clauses, and provisions protecting the athlete's intellectual property and publicity rights should be included in the sponsorship agreement.

## **B. The Focus is Entirely On the Individual Athlete**

Unlike in a team sport situation, the entire focus is on the individual athlete. This can be a positive or a negative factor for the athlete. Individual participation results in much more audience and media exposure for the athlete. Additionally, while the athlete has to bear the full burden for a loss or unsuccessful season, the athlete may receive all of the praise if he has a very successful season.

Likewise, this increased attention may help or hurt an athlete's marketing efforts. Therefore, a representative should adjust his negotiating strategy accordingly. If the client appears to be an athlete who is just starting his career but who has a very bright

future, the representative may want to draft escalating incentive provisions in the sponsorship agreement. The representative may also choose to negotiate a short term contract, anticipating re-negotiation when the athlete has proven himself. On the other hand, if the client has been successful and is nearing the end of his career, the representative may want to ensure that the athlete receives compensation commensurate with his past successes for as long as possible. The representative in that case should also make efforts to capitalize on the brand loyalty and reputation the athlete has created over his athletic career.

### **C. Exposure to Many Different Markets**

One significant advantage most ISPs have over TSPs is their exposure to international markets. ISPs, like golfers, tennis players, triathletes, and swimmers, all have immediate access through competition to international markets.

As a result, representatives should include a narrowly drafted territory clause in the sponsorship agreement, specifically stating the intended territory for sponsorship purposes. Drafting a clause that is too broad, may preclude athletes from receiving, other, more lucrative sponsorships. Drafting a clause that is too narrow, however, may reduce the athlete's ability to take advantage of his international exposure.

Additionally, representatives should focus on the athlete's branding goals and image. If part of the athlete's brand is national or local appeal, a mixed message sent by marketing goods outside of his region may confuse consumers and tarnish his image.

### **D. ISPs Protect Their Own Rights**

ISPs do not assign their publicity rights or other intellectual property rights to a league nor are they offered, for the most part, already established opportunities through group licensing programs, as are TSPs. Additionally, the most valuable assets an ISP possesses are his intellectual property and publicity rights. Licensing his name, likeness, photographs, images, and voice, via sponsorship agreements, is how many ISPs earn a living.

Therefore, the representative must protect these rights through various contract provisions. Additionally, the representative must ensure that the contractual provisions are properly administered. The representative must also fully educate his client on the importance of using trademarks correctly, the concepts of brand awareness, and the value of a brand. The representative should also ensure that the athlete adheres to the contractual provisions of the sponsorship agreement, including making appearances, competing in a sufficient number of events, and maintaining his image.

## **V. Negotiating and Drafting Sponsorship Agreements for ISPs**

## **A. Sponsorship Agreement Basics**

As mentioned above, the primary source of compensation for ISPs is derived from sponsorship agreements. The basic formula for an ISP's compensation is Base (salary) + Incentives + Product. This formula can vary greatly, however, depending upon the athlete's marketability, the sport in which the athlete participates, and the relevant market for sponsorships.

Sponsorship agreements revolve around the concept of branding. A brand is a collection of feelings toward an organization or an entity; more specifically, it refers to the concrete symbols for the entity, such as a name and design scheme. Branding is the act of associating a face, feeling, image, or personality with an entity or a product in an effort to create a connection between the entity or product and consumers.

It is through this connection that feelings are created, within consumers, by an accumulation of experiences with the brand, both directly relating to its use, and through the influence of advertising, design, and publicity.

Athlete branding, in particular, refers to the use of athletes as the face or spokesperson of a product. Athlete branding has been an increasingly popular trend over the past decade. Athletes such as Michael Jordan, Tiger Woods, LeBron James, Tony Hawk, and Lance Armstrong are all examples of athletes who have not only served as spokespersons for businesses, helping build their brands, but who have also built brands in themselves.

Michael Jordan's sponsorship of Nike epitomizes the appeal of athlete branding. Michael Jordan agreed to use Nike's products when he performed on the basketball court. In exchange, Nike agreed to compensate Michael Jordan. As consumers watched Jordan's extraordinary talents and abilities displayed on the court in awe, they also saw that he was executing his dazzling moves and winning NBA championships using Nike shoes and apparel. Almost immediately, consumers associated Jordan's extraordinary talents with Nike's products. Not only did Nike's brand awareness build from the frequent exposure of its products, but Jordan's values of winning, determination, and competitiveness were quickly associated with the Nike brand. In return for the compensation paid to Jordan, Nike became the king of athletic apparel and shoes based on the brand associations that Jordan helped create.

More and more businesses are looking for the next special athlete with whom they can contract to promote their brand and create the level of brand awareness that Jordan created for Nike. However, before a representative can sell his client as that next special athlete, he must have a firm grasp and understanding of his client's marketability and the sponsorship market within his client's sport.

## **B. Evaluating An Athlete's Marketability**

The first step in representing an ISP is to evaluate the client's marketability. Though this is merely a subjective evaluation, it is very important for several reasons. First, not every athlete is marketable. Second, businesses are being more selective in choosing sponsors for their brands. Third, athletes have recently faced growing competition from celebrities and other marketing vehicles for sponsorship dollars.

An athlete's marketability should be assessed by weighing numerous factors. The three most critical factors, I believe, to an athlete's marketability are: (1) Talent; (2) Personality, Charisma, Looks; (3) Character.

### ***i. Success On the Playing Field***

Of course, the key characteristic businesses look for in a marketable athlete is success or talent on the field-of-play. Businesses do not want their products and equipment associated with mediocrity or, worse, failure. They want their brand to be associated with winning.

### ***ii. Personality, Charisma, Looks***

Further, an athlete must have a winning personality, a special charisma, and/or looks. Having all three is a winning combination. Some athletes, however, can be highly marketable based on either charisma or looks alone. Anna Kournikova is an example of an athlete who did not necessarily possess a winning personality or even extraordinary talent on the tennis court (though she performed respectably on the professional level), but did possess extraordinary beauty. Because of her looks, she earned more through endorsements than either Venus or Serena Williams did when they were playing at the top of their respective games.

Other factors, such as non athletic achievements and background stories can also be quite valuable to an athlete's marketability. Athletes who began as the underdog or perhaps who fought for their country in the military before participating in professional sports may add special appeal and intrigue in the eyes of consumers.

Additionally, an athlete's image can be improved for purposes of marketability through an arrangement of appearances, community service, press releases, or public speaking classes. Sometime the background story of overcoming an initially poor image is more appealing than having a sparkling clean image from the beginning. A representative should have a very good understanding of how to create and improve an athlete's image.

### ***iii. Character***

Finally, and perhaps most importantly, the athlete's character must be evaluated. Even if an athlete has talent and a marketable image, one misstep on the athlete's part could chase potential sponsors away. Breaking the law, abusing drugs, especially performance enhancing drugs, acting unprofessionally on the field or in front of the

media, or being the subject of exposed personal issues could all tarnish an athlete's otherwise marketable qualities.

#### ***iv. Other Factors***

The representative should also consider the sport in which the athlete participates. Often, ISPs will be more marketable because they compete with fewer athletes for audience attention while they play than do TSPs. Golfers, tennis players, skiers, bowlers and the like all benefit from frequent camera shots of only the athlete and/or the opposing athletes during games, matches, or events. Additionally, some sports are more marketable than others. For example, generally speaking, many more marketing dollars are spent on NASCAR drivers than swimmers.

Moreover, many individual sports have instant access to international markets. Exposure to markets outside of the United States adds great value to an athlete's marketability. Businesses are likely to spend more on sponsorships if their product or service or brand is exposed to several different markets.

### **C. The Values Behind the Brand**

After evaluating the client's marketability, the representative should evaluate the athlete's values. The representative should speak with the client about his values, personality, his strengths and weaknesses, and his likes and dislikes.

It is crucial for both the athlete and the business to represent the same values. Because the athlete is going to be the face and image associated with the business's brand, the two should not conflict. For example, a manufacturer of heavy-duty trucks is not likely to sponsor a teenage, female figure skater. The truck manufacturer most likely wants its brand to be associated with toughness, ruggedness, and durability while the figure skater most likely wants to be associated with products that are graceful or beautiful. However, these roles should never be assumed. For example, perhaps the figure skater earned a gold medal in the Olympics after falling and breaking her leg; then she may fit perfectly with the truck manufacturer's rugged brand.

Unless both the sponsor and athlete represent the same values to consumers, consumers are likely to be confused by a mixed message and the advertising campaign and sponsorship is not likely to be successful.

### **D. Keep An Eye On the Market**

The next step in the sponsorship process is to evaluate the market. The representative should apply what he has learned about the qualities, likes and dislikes, image and values of the athlete, and should begin to look for a product category and brand that would best match the athlete's image and appeal.

Athletes in sports like triathlon, who use a variety of products like bicycles, wetsuits, goggles, running shoes, bicycle shoes, helmets, caps, specialized apparel, watches, and heart rate monitors possess a far better chance of finding a sponsor due to the number of product categories from which to choose, than do swimmers, for example.

In any event, the representative should compile an exhaustive list of businesses that manufacture goods or offer services that fit the athlete's sport and appeal.

After identifying potential sponsors, the list should be narrowed down to those businesses that are known to spend money on athlete endorsements. This information can be found by reading trade publications such as Ad Age, Advertising Week, USA Today, or sports business publications.

Once the list of potential sponsors is narrowed down even more, then the representative should study the businesses' annual reports, sample their products, and study their past advertising campaigns.

#### **E. Assess the Athlete's Market Value**

Next, the representative should determine the athlete's market value. Assessing an athlete's market value is to attempt to put a dollar figure on an athlete. This task is much more difficult than determining whether the athlete can sell or not, as a representative would do in assessing an athlete's marketability. To determine market value, a representative should study the athlete's marketability, image, and other qualities mentioned above. In addition, the representative should study the sport in which the athlete participates, a businesses' need for an athlete sponsor, and sponsorship deals the athlete's competitors may have received.

#### **F. Make Your Pitch**

Next, the representative should contact potential sponsors and determine if there is any interest in sponsoring his client. If there is interest, the representative should draft a brief proposal with a brief athlete biography and perhaps a picture. If the proposal is accepted, then the negotiation and drafting of a contract can begin.

#### **G. Negotiating**

When a representative is negotiating a contract for an ISP, there are several important things the representative should remember.

First, there is an advantage to being the original drafter. By being the original drafter, the representative will be most familiar with all of the provisions of the proposal. He will be able to include those provisions that are necessary and those that offer the greatest benefit to for his client.

If the representative is not the one to draft the first proposal, he should be sure to become intimately familiar with the document and include those provisions that he determines are necessary to his client's needs. Additionally, the representative should read even boiler plate provisions in great detail. While these clauses may look innocuous, they can be easily altered to favor one side.

Further, the representative should be sure to select the proper negotiation mechanism. He should evaluate whether it is best to meet in person or over the phone and whether his client will be present for the negotiations. Depending on the athlete, it may be best if the athlete does not attend the session due to his inability to hide his emotions. Further, it may be beneficial, if the athlete will be present at the meeting, to coach him about the importance of a poker face in negotiations.

A representative should also always keep his client informed and never put his needs ahead of his client's. Furthermore, a representative should never let his ego or pride get in the way of closing a deal that is in his client's best interest.

A representative should never make idle threats, backing himself into a corner. He should be open-minded and show good will. The best strategy is to develop a good long term relationship with a sponsor rather than pushing to get a great short term deal and be miserable.

Perhaps most importantly, a representative should always know the other side's position better than they do. Finally, the representative should be intimately familiar with the rules and regulations of all applicable governing bodies.

## **VI. Drafting A Sponsorship Agreement**

### **A. Sample Clauses**

In addition to the general provisions that one might see in an ordinary contract, endorsement contracts, especially those for ISPs, should contain some provisions specifically applicable to the ISP. Though a variety of clauses may be beneficial for a particular athlete or sponsor in a particular situation, the following clauses are often widely applicable and crucial to have in a sponsorship agreement.<sup>1</sup>

**Territory** – Territory size for ISPs will be determined as much by the experience and success of the athlete as by the sport's local, national, or international appeal. Generally speaking, the greater the marketing territory, the more compensation the athlete is likely to be paid.

However, not every athlete is marketable in a wide range of markets. For example, if the athlete is a local triathlete who is well known for his success in the sport within his

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<sup>1</sup> Many of the clauses and commentary in Section VI of this presentation are based on the materials in Law of Professional and Amateur Sports, Vol. 3, Ch. 27, by Gary A. Uberstine.

home state but is unknown everywhere else, his appeal may be limited to a local market. However, if the athlete is a USTA tennis star who plays internationally and has had a successful five year career, then the territory may include both national and international markets.

It is important to remember, however, that if the athlete's brand is based on an aspect of national pride or if he or she is particular to one area of the nation or world, then it is important not to expand into a territory simply because the athlete could be successful there. If it would tarnish his or her brand and perhaps future endorsement or branding opportunities, then such a move is unwise. Additionally, it is important to narrowly define the contract territory so as to not preclude other, perhaps more lucrative opportunities. Be very clear about the contract territory.

**Quality** – It is imperative that the athlete be given the right of prior written consent of all marketing materials, including advertising and promotional materials, prior to their exposure to consumers. The proposed advertisement could be in bad taste and tarnish the athlete's image. Further, it may cause the athlete to breach certain provisions of his sponsorship agreements.

Moreover, if the athlete is licensing any of his intellectual property, he will want to have audit rights to the use of that intellectual property. He does not want any of his trademarks or other works tarnished in any way as to affect future marketing opportunities.

**Appearances** –Appearances are very important to the sponsor, however, a representative also needs to be aware of his client's strengths, weaknesses, likes and dislikes. If the representative knows that the athlete does not plan to live up to a certain amount of appearances, it may be necessary to negotiate more realistically on this item. The duration of each appearance should also be carefully negotiated. Due to training and media schedules of premier athletes, each of these appearances will probably be wedged into an already full schedule.

**Endorsed Products** – Be very precise with the language stating what the athlete will endorse. Language, which is too broad, may obligate the athlete to endorse products he had not otherwise anticipated endorsing. For example, a triathlete who is to endorse a wetsuit would not want to use the term "triathlon products" in this clause. The effect may also preclude the athlete from signing other endorsement agreements for related products.

**Logo Placement** – Many sponsors, especially the primary sponsor, will want key placement areas for their logo. If it is the primary sponsor, it will typically, depending on the sport, want the front center or back center of a shirt with type size larger than other sponsors. This is where flexibility and knowledge of the sport matter. A sponsor of a swimmer would most likely want the logo placement on the swim cap. The sponsor of a triathlete would most likely want placement on the back of the athlete's triathlon jersey, as the athlete's chest is facing down on the longest portion of the race, the bike ride.

Other considerations, such as patch size and placement restrictions by the respective sport's governing body must also be considered.

**Right of Publicity** - It is important to have the company participate in the protection of the athlete's name and rights of publicity. The clause might indicate that the company has the right to use the athlete's name, likeness, drawings, photographs and any other likeness, quotes, remarks, signatures, or other intangible associated with the endorsement, promotion, marketing, advertising and sale of the sponsor's products. Unless the sponsor is willing to pay the athlete more than the athlete would ever demand, this license should be non-exclusive, allowing the athlete to obtain more sponsorships and receive greater compensation. Even if one sponsor is willing to pay an unimaginable sum of money, an athlete should try to diversify his sponsorships. The athlete does not want to lose all of his sponsor related compensation due to being dropped by one sponsor.

**Indemnity and Insurance** – This clause should make clear that the athlete is not involved in or responsible for any defects in the manufacturing process. Rather, the athlete is simply licensing the use of his name and image to the production of a good. Further, because indemnity is often not sufficient to an athlete because the athlete is often more financially solvent than the company, the athlete may want to be listed as an additional insured on the company's product liability insurance policy.

## **B. Administering the Contract**

Administering the contract is one of the most crucial steps in the process. This is especially true when representing athletes who may not have the extensive business background that many typical business clients do. The representative will be responsible for approving advertising materials, scheduling personal appearances, ensuring timely and accurate quantities of product are delivered to the athlete, and making sure that payments are invoiced and received. The representative must also protect the athlete's intellectual property and publicity rights under the contract.

The representative will also want to ensure that the athlete does not inadvertently run afoul of his contractual obligations. If an athlete's sponsor is a competitor with an event sponsor, chances are the sponsor will not want its athlete to appear in photos with the event sponsor's name and logo in the background, or even worse, in the foreground, for example, on a trophy or a prize.

For example, in 1992, when playing for the Dream Team, Michael Jordan experienced a situation in which he was forced to think quickly to protect his sponsor. As Jordan took the medal stand to accept his gold medal, he realized that his uniform, made by Reebok, clearly showed the Reebok trademark. Rather than cause harm to his relationship with Nike, Jordan draped an American flag over his shoulder and hid the Reebok mark.

It is essential that the representative remind his athletes to keep a good relationship with the sponsor. Not only is it good business, but it may lead to future deals and longer team agreements with the sponsor. Athletes should not compete, using a product or product that are made by his sponsor's competitors or even wear a sponsor's competitor's clothing when in public.

## **VII. Conclusion**

While both TSPs and ISPs compete professionally as athletes, there are many differences between them. From the way the athletes earn a living, to their branding strategies, to their protection of intellectual property and publicity rights, the athletes face different legal and business challenges that affect their livelihoods as career athletes.

When representing ISPs, all of these legal and business considerations should be addressed in each phase of representation. It is especially important when negotiating and drafting sponsorship agreements for the client, as sponsorships are an ISPs primary source of income, that the representative know his client well, know the market well, and the other side's position intimately.

With this knowledge in mind, the best agreement possible should be forged between the athlete and the sponsor with the goal of building a solid, long-term relationship between the two parties.