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David v. Goliath: The Gay Games, the Olympics, and the Ownership of Language

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ABSTRACT

The Gay Games is firmly established on the contemporary global sports calendar, but is seldom canvassed in mainstream sports media, or considered a model for sports administrators. This is regrettable, as the Games' ethos offers many clues into the relationships between individual and communal empowerment for homosexual and heterosexual participants alike, while providing a site of resistance against entrenched norms of elitism, nationalism, victory and record-breaking indicative of the modern Olympic movement. Credit for this inclusive ethos rests with the vision of inaugural Gay Games organiser Dr. Tom Waddell. Drawing on Games archives, this paper outlines Waddell's vision, then discusses the impact of a protracted legal dispute instigated by the United States Olympic Committee in 1982 over the use of the term 'Olympics' in association with Gay Games I and II. Four United States Federal court rulings are examined, with particular reference to the contrasting hierarchy of private intellectual property and public civil rights considered under United States law of the time. Domestic and international legacies of the dispute are also briefly examined, focusing on the inherent tensions between the state-sanctioned protection of Olympic terminology, the ideals of free speech, the ownership of common sporting terms, and the potential discriminatory effects of selective trademark enforcement. The paper concludes with a brief discussion of how Waddell's vision superseded each of these legal technicalities to ensure the Games

continues to provide a viable model for inclusive and engaged participation for all people.

DR TOM WADDELL'S OLYMPIC VISION

Like many global multi-sports events the Gay Games have been significantly influenced by the mystique, hype and ritual of the modern Olympic Games (MacAloon, 1984, pp. 249-251). Just recall any past international sports championships such as a world athletic championship or Commonwealth Games. Practically all have an opening ceremony with a parade of athletes, a formal oath sworn by officials and competitors, speeches by various dignitaries, a torch or baton relay culminating at the main venue and various other symbolic gestures. These rituals and ceremonial trappings are all derived from the Olympic model. The Olympics, as well as the *Fédération Internationale de Football Association* (FIFA) football World Cup, have become the most known, watched, romanticised, revered, commercialised, mediatised, nationalistic, passionately followed, and critiqued mega sporting events (Real, 1996). 1

The power of this Olympic 'dreaming' was evident from the inception of the Gay Olympic Games, when Tom Waddell, Paul Mart and Mark Brown formed the United States Gay Olympic Committee in the late 1970s (Waddell and Schaap, 1996, p. 146). A medical professional by trade and decathlete for the United States (US) at the Mexico Olympics, Waddell was the key 'inventor, architect and all-year worker for the Gay Olympics' (*IOC et al v. SFAA et al # 1*, 1982, p. 24). Waddell's intention to mirror the Olympic dream was evident in the naming, ceremonies and rituals planned for this alternative event. The Gay Olympic Committee, later reconstituted as San Francisco Arts and Athletics (SFAA), wore ceremonial suits and ties of blue, white and red that looked very similar to those of the United States Olympic Committee (USOC). There was also a parade of athletes, a Games oath, and the singing of the US national anthem planned for the inaugural event. Organisers even arranged a 4,000-mile torch relay originating from the Stonewall Inn, New York, carried by over 2,000 runners, walkers and cyclists through over 50 cities in the US, culminating with the lighting of the Gay Games flame at the opening ceremony (Ayer Wood, 1982, p. 32). Waddell sought to bring to the gay and lesbian communities of the world what he saw as the health promoting powers of sports participation and community building associated with a major event accessible to all, while proving to mainstream society that gay people played sport 'like everybody else'. 2

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For Waddell, enjoying and excelling in sport was not incompatible with being gay. In fact, sports participation was an important forum for gay men to demonstrate their masculine identity. Waddell apparently developed the idea for a Gay Olympics after viewing televised coverage of a gay men's bowling tournament in 1980. He was impressed because 'the competitors were strong and skilful athletes, clearly bowlers first and gay second', representing the everyday middle class professional who 'voted, ate out, bowled and played softball and rooted for the 49ers. They were not flamboyantly lusting for attention' (Waddell and Schaap, 1996, pp. 145-149). In the promotional brochures of the first Gay Olympic Games, Waddell wrote:

It is an opportunity to expand beyond a falsely tainted image. It is an opportunity to show that gay men and women, like all other responsible citizens of the United States, participate in the same ideal (Waddell and Schaap, 1996, p. 147).

4
Leading organiser of the first two Gay Games, Sara Lewinstein, was also concerned with the 'flamboyant' stereotype of gay people, and in particular drag queens. Lewinstein envisaged the Games were 'about people having a go at their sport. They are not a playground for dressing up, dressing weird, undressing' (Personal Interview, 1996).¹ For most of these early Gay Olympics organisers, displays of sexuality and 'gender bending' had no place at their 'healthy and wholesome' sports event. Sport was seen as the ideal vehicle for mainstream gay and lesbian people to prove their 'normalcy' to the broader sporting public, and secure community respect and integration through a well-organised, inclusive and international Gay Olympic Games.

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Organisers of Gay Games I valued sports participation for its focus in the lives of all people regardless of sexual orientation. A major global sports event would also enable participants to meet others and form lasting friendships, while providing validation through an accepted avenue for personal achievement. Organisers were concerned to break down various forms of segregation and prejudice alive within gay and lesbian communities at the time, through a unifying sports event emphasising inclusiveness and participation instead of winning. Waddell believed that by bringing people of diverse backgrounds together to compete in an environment informed by principles of inclusion and celebrating diversity, the resulting processes of interpersonal discovery could erode barriers of difference and foster mutual understanding within and beyond gay

communities. The common focus of sport, as well as various ceremonies and social events during the week of the Games, would also provide significant opportunities for people to interact. According to an interview with Waddell reproduced by Michael Messner and Don Sabo (1994, p. 119), the Gay Olympic Games were to provide an exemplary sports model by eliminating sexism, racism, ageism, homophobia and nationalism from the event's program, practices and ethos.

Nationalism and chauvinism often accompanies major international sports events including the Olympic Games. These elements of global competition were to be proactively muted at the Gay Olympic Games through various strategies. Participants were to represent their cities rather than nations of origin. There were no medal tallies or records of athletic feats to be collected and displayed. Medal ceremonies emphasised individual effort rather than national pride and success, thus seeking to recast the very notion of international sports competition. Waddell aptly captures the inclusive participation and amicable competitive philosophies promoted in official speeches and Games literature:

You don't win by beating someone else. We defined winning as doing your very best. That way, everyone is a winner ... I don't know that it's possible that this kind of attitude will prevail. It's revolutionary. And it's certainly not what the NFL owners or the United States Olympic Committee wants to hear, where winning is essential. So this is not going to be a popular attitude unless we make it a popular attitude (Messner and Sabo, 1994, p. 126).

According to this philosophy competition and winning is not about triumph or defeating opponents and exulting in victory. Emphasis is placed on the healthy challenges and self-fulfilment achievable through sport, where individuals are focused on self-improvement and strive to realise their full potential. This inclusive and mutually supportive ethos sought to redefine sporting excellence, yet ironically captured and built upon the original Olympic Creed:

The most important thing in the Olympics is not to win but to take part, just as the most important thing in life is not the triumph but the struggle. The essential thing is not to have conquered but to have fought well (*IOC et al. v. SFAA et al. # 1, 1982,*

One additional long-term goal was 'to sever the Games from their direct connection with the gay community altogether' (*IOC et al. v. SFAA et al. # 1*, 1982, p. 14), by promoting 'a more realistic image of homosexual men and women in all societies', and eroding all stereotypes based on sexual preference. As well as providing meaningful recreational, social and sporting activities legitimised by the broader community, a structural agenda of cultural normalisation was at play:

I don't like labels. A great many of us want gay returned to its dictionary meaning – keenly alive and exuberant, having high spirits, being happily excited. But it is difficult to change an impression of the Gay Olympics. I'd like to change it to People's Olympics. Please believe that it will be an athletic competition and a means of self-fulfilment (sic) for everyday people doing everyday things (*IOC et al. v. SFAA et al. # 1*, 1982, p. 14).

This combination of factors highlights Waddell's deliberate strategy to invoke the term Gay Olympic Games with the aim of removing discrimination against same-sex cultures and customs in broader social life. As the only major global athletics competition in existence at the time, organisers of the first Gay Games had little choice but to use the modern Olympics as their inspirational model. However, the inherent tension between the idealised, nationalistic, competitive, and mainstream visions of conventional Olympic culture, and the alternative communitarian notions behind the Gay Games, became the source of a protracted legal rift ultimately threatening the viability of Waddell's dream. A 'David and Goliath' battle over intellectual property ownership and rights to use Olympic insignia, language and customs, generated a branding war contested over a five-year period in the US federal court system, with many ongoing implications for the ownership of sports language. Several works examine the legal specifics of this dispute (Brown, 1988; Beckloff, 1989; Kravitz, 1989; Chalk, 2001; Pendras, 2002), but few are informed by an understanding of Waddell's inclusive vision and the contrasting power of the International Olympic Committee (IOC) and its national affiliates to influence the culture of global sport through legislative policy.

THE AMATEUR SPORTS ACT, 1978

After over a decade of lobbying by IOC President Avery Brundage commencing in the mid-1960s

(*Herald*, 1965, p. 37), US Congress passed the *Amateur Sports Act* in 1978 as a means of preserving the Committee's trademark, copyright and branding rights. A primary rationale for the law was to provide additional revenue to fund USOC athlete development programs and produce world-class competitors at summer and winter Olympic Games. In theory, the USOC would become less reliant on government subsidies through the enhanced commercial protection of Olympic insignia, phrases and related intellectual property (*IOC et al. v. SFAA et al. # 1*, 1982; *IOC & USOC v. SFAA #3*, 1986, p. 1324). The 1978 Act replaced previous criminal penalties for unauthorised uses of the terms 'Olympic', 'Olympiad', 'Citius Altius Fortius', the Olympic rings, or any associated USOC insignia, with civil remedies under existing trademark provisions of the *Lanham Act*, 1946.

Section 380 provided the USOC with exclusive 11 rights and the enforcement discretion over these terms 'for the purposes of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance or competition'. Standard *Lanham Act* defences such as proof of any tendency 'to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with' a USOC sanctioned logo or activity were also excluded. In short, the combination of injunctions to prevent continued unauthorised use of protected terms and civil damages provided a strong economic incentive for vigilant enforcement of the 1978 reforms, despite obvious concerns over rights to free speech and the potential for discriminatory or targeted enforcement contrary to equal protection clauses under the US Constitution.

Colonel F. Don Miller was Executive Director of the 12 USOC at the time, and took an extremely hard line towards any suspected breaches of these expanded monopoly powers. Amongst a wealth of litigation immediately before and after the first Gay Olympics verdict, two cases highlight Miller's enforcement vigilance. The first involved a non-profit, community-based protest group named Stop The Olympic Prison (STOP). The group lobbied against the proposed conversion of the Lake Placid Winter Olympics village into a medium security prison for young offenders, and designed posters with a hand clutching an ignited torch penetrating through five steel bars and the five interlocking Olympic rings. Miller wrote to STOP requesting protesters to cease using the word 'Olympic' and the Olympic rings, as both were protected under the *Amateur Sports Act*, the *Lanham Act*, and IOC Rule 6. STOP refused and sought a declaration from the New York Southern District Court that their unauthorised use was protected by the first amendment right to free speech. The court

supported this argument, emphasising STOP's goal was not to 'induce the sale of goods or services', 'promote any theatrical exhibition, athletic performance, or competition', 'confuse the public' or to misappropriate the trademarks for commercial gain, but rather to convey public opposition towards the prison development:

... the Court finds it extremely unlikely that anyone would presume it (the poster) to have been produced, sponsored or in any way authorized by the USOC. While at a fleeting glance, someone might conceivably mistake it for a poster advertising the Olympics, nobody could conceivably retain such a misconception long enough to do any harm ... (*STOP v. USOC*, 1980, p. 1123).

In contrast, an action filed by the USOC against the International Federation of Bodybuilders (IFBB), which post-dated the first Gay Olympics case by four months, examined the use of Olympic terminology to promote a sporting event not sanctioned by the IOC or the USOC. The court found the registration of IFBB trademarks for the Mr Olympia bodybuilding title, and various health and fitness products endorsed by the IFBB, breached the *Amateur Sports Act*. Confusing similarities between the USOC's and IFBB's promotional activities were crucial to this decision (*USOC v. IFBB*, 1982). A permanent injunction to prevent further misuse of USOC trademarks was granted, thereby forcing the IFBB to seek alternative promotional names for their event within the US. 13

Both of these disputes contain elements of the rift between Waddell and Miller over the use of the term 'Olympics' to promote the Gay Games. 14 However, an additional factor involved Waddell's persistent and unsuccessful attempts to obtain Miller's approval to use the term as required under the *Amateur Sports Act*. Neither STOP nor the IFBB viewed this as necessary, whereas Waddell continually emphasised the positive social and political purposes of co-opting 'Olympic' terminology to promote his inclusive vision:

... Our outreach and emphasis differs widely from the traditional Olympic Games in that we, openly gay people around the world, are struggling to produce an image that more closely resembles the facts rather than some libidinous stereotype generated over decades of misunderstanding and intolerance ... We feel strongly that

the term 'Olympics' is integral to what we intend to achieve. Our eight days of cultural events and sport will be a testament to our wholesomeness (Waddell and Schaap, 1996, pp. 150-151).

The first sign of potential litigation emerged when 15 SFAA attempted to incorporate on 4 November 1981 as the 'Golden Gate Olympic Association'. This was opposed by Californian corporate regulators in light of the provisions in the *Amateur Sports Act*, and suggests state administrative agencies were conscious of the new intellectual property law. Nevertheless, Waddell maintained the term 'Olympic' was vital to legitimise an event otherwise confined to the margins of society. Indeed, this was not the first dispute between Miller and Waddell. When competing in Mexico, Waddell was an enlisted army officer, while Miller was military liaison to army personnel on the 1968 US Olympic team. Waddell received international press coverage for his support of the civil rights protests of African-American athletes Tommie Smith and John Carlos. Such was Miller's anger towards this public stance that Waddell was threatened with court-martial (Waddell and Schaap, 1996, pp. 106-108).

GAY GAMES I, 1982

A trail of written and phone correspondence 16 between Waddell and Miller commenced in September 1981 and continued throughout the first half of 1982 to form the basis of the legal dispute. Miller issued two express written requests, and several demands by telephone, insisting Waddell and SFAA remove the word 'Olympic' from all Gay Games promotional material, and emphasised the provisions of the *Amateur Sports Act (IOC et al. v. SFAA et al. # 1, 1982, Lexis p. 4)*. In a letter dated 18 January 1982, Waddell stated organisers would 'block out he [sic] term 'Olympic' in all advertising and promotion associated with the Gay Games, and supplant the term 'Athletic'. However, according to Waddell's evidence in *SFAA #1*, this was considered an 'interim compromise' pending further negotiations with the USOC.

Waddell then received legal advice suggesting 'the 17 USOC was acting in a discriminatory and unconstitutional manner', and again sought written permission from Miller. USOC legal representatives suggested the matter was closed, with the two parties coming to a final agreement in previous correspondence during December 1981 and January 1982. The American Civil Liberties Union (ACLU) advised Waddell on 2 February 1982 to avoid court action, but agreed to defend the case if the USOC commenced proceedings under the

Amateur Sports Act (IOC et al. v. SFAA et al. # 1, 1982, Lexis p. 6). Waddell then decided to use the term without Miller's consent, firm in the belief SFAA had the same rights as other organisations invoking Olympic terminology without the USOC's permission.

In May 1982, an article appeared in the *San Francisco Examiner and Chronicle* titled 'A very serious Gay Olympics'. Miller then discovered SFAA had decided to resume using the unauthorised term, and sought advice from the USOC Administrative Committee and the IOC in London. Further correspondence from Waddell to Miller emphasised the importance of the word 'Olympic' to the philosophy of the Gay Games, with various organisations invoking the term without the USOC's sanction. Waddell's list included the 'Armchair Olympics', 'Special Olympics', 'Handicapped Olympics', 'Police Olympics', 'Dog Olympics' (Waddell and Schaap, 1996, p. 151), and several more questionable examples such as the 'Xerox Olympics', 'Diaper Olympics', 'Rat Olympics', and 'Crab Cooking Olympics'. Nevertheless, Miller insisted SFAA had no authorisation to use the term, and threatened legal action to recover any profits made by SFAA (Coe, 1986, p. 9). This contrasted with the USOC's approach to 'the Special Olympics, the Explorer Olympics', and 'the Junior Olympics', which received express approval to use Olympic terminology, or the tacit approval for 'The International Police Olympics', where there was no suggestion of legal proceedings (*IOC & USOC v. SFAA #3, 1986, p. 1323*). Waddell again wrote to Miller alleging the USOC's stance was discriminatory. Nevertheless, the USOC responded two weeks before the scheduled commencement of the first Gay Games on 9 August 1982 with a writ for a temporary restraining order under the *Amateur Sports Act*. 18

Discussion then turned to suggestions of discrimination against SFAA organisers and the gay community more generally. When asked why the Police Olympics and the Armenian Olympics were acceptable, while Gay Olympics organisers were taken to court, USOC attorney Vaughan Walker replied, 'They are not a suitable group'. Walker later argued in court that granting permission to use the term in this case would cause public confusion and jeopardise the \$40,000,000 budget of the 1984 Los Angeles Olympics. The use of 'Gay' in front of Olympics seemed to be of particular concern for the USOC (Primavera, 1982). The US edition of *Sports Illustrated* dated 16 August 1982 demonstrated even IOC officials questioned the breadth of the *Amateur Sports Act* and the power of US Congress 'to give away something that belongs to the IOC': 19

Interestingly, International Olympic Committee Director Monique Berlioux says that the IOC now accepts that the word Olympic is generic and consequently no longer seeks to control its use. She also says that the IOC was not consulted about the 1978 Congressional Act ... (*Sports Illustrated*, 1982, p. 8).

This article highlighted the hypocrisy of the USOC's 20 legal claim given the history of unauthorised usages of IOC symbols, and pointed to the flourishing male homosexuality in ancient Greece when the ancient Olympics were founded. Waddell commented: 'The bottom line is that if I'm a rat, a crab, a copying machine or an Armenian I can have my own Olympics. If I'm gay, I can't' (*Sports Illustrated*, 1982, p. 8). Despite considerable public opposition to the USOC's position, legal proceedings focused on the immediate rift between Waddell and Miller, evidenced by their stream of mail and telephone communications:

Due to the fact that a number of letters were sent between plaintiffs and defendants during this period, many of them crossing paths 'like ships in the night', the court finds it likely that each party was under the impression that it had forced its wishes upon the other party and that each had achieved its respective goals (*IOC et al. v. SFAA et al. # 1*, 1982, Lexis p. 7)

The USOC raised six arguments based primarily on 21 its failure to approve the use of the term 'Olympic' in association with Gay Games I. First, it was claimed SFAA breached the *International Convention for the Protection of Intellectual Property* and allied federal unfair competition laws. Second, the claim drew specifically on the expanded trademark protections of the *Amateur Sports Act*. Third, a general claim of trademark infringement under the *Lanham Act* included allegations the Gay Olympics constituted a false designation of origin or false representation. Fourth, the extensive written and verbal communications between Miller and Waddell were claimed to have resulted in a legally enforceable contract breached by SFAA's use of the term 'Olympic'. Finally, the commercial distinctiveness of USOC's marks was allegedly diluted under provisions of the Californian *Business and Professions Code*, drawing on the department's policy to deny registration of the trading name 'Golden Gate Olympic Association'.

The court's characterisation of each organisation is 22

interesting. The IOC and USOC are both described as non-profit organisations formed to promote the Olympic ethos throughout the US and internationally. By contrast, SFAA was considered a corporate entity under the laws of California primarily engaged in interstate and foreign commercial activity (*IOC et al. v. SFAA et al. # 1*, 1982, Lexis p. 2). The inferences associated with these technically correct legal designations established a clear yet somewhat false demarcation line between the rival organisations. Contemporary sports literature widely criticises the non-profit character of the IOC and its national affiliates (Jennings, 1996), while SFAA was characterised as a truly profit-making organisation despite operating at a highly localised, community-based level.

The pivotal legal issue in *SFAA #1*, as with the IFBB 23 litigation, involved the level of similarity between the rival events. Both were international in scope, even though the IOC had the imprimatur of virtually all recognised nations, whereas the Gay Games attracted athletes from only eleven countries. Some activities including 'billiards, bowling, softball, golf, powerlifting, physique and rugby' were particular to the Gay Games, while 'basketball, volleyball, boxing, cycling, wrestling, track and field, marathon, swimming, diving, soccer and tennis' were common to both events. Other points of similarity included the 'Olympic ceremonial events', 'the carrying of a torch', 'an opening parade', and 'closing ceremonies'. The court drew on these features to uphold the USOC's claim for a temporary injunction, by emphasising SFAA's unauthorised use of the word 'Olympic' was likely to 'cause confusion and mistake' leading to a false 'connection between their athletic games and those of the USOC'. This would have been less apparent had the Gay Games not been 'modeled so closely in both events and ceremonies to the Olympic Games' (*IOC et al. v. SFAA et al. # 1*, 1982, Lexis pp. 16-17).

It is hereby Ordered that defendants, their employees, agents, officers, attorneys and representatives, all persons participating with or acting in concert with them, and each of them, shall immediately cease, desist and refrain from further use of 'Olympic' or 'Olympiad' or any confusingly similar word, term, name, trade name or any symbol, emblem, trademark or insignia of the International Olympic Committee or the United States Olympic Committee, or, any combinations or simulations thereof, for the purpose of trade, to induce the sale of any goods or services, or in

connection with any advertising, promotion, publicity or production of any theatrical exhibition, athletic performance, competition or event pursuant to 36 USC §380 (*IOC et al. v. SFAA et al. # 1*, 1982, Lexis p. 24).

For Chief Justice Peckham, the non-profit character 24 of SFAA's 'educational, political, and cultural' activities had a significant commercial element, even though this might have provided SFAA with only a meagre economic return (*IOC et al. v. SFAA et al. # 1*, 1982, Lexis p. 20). Further, it was unlikely the interim injunction would contradict freedom of speech provisions under the first amendment of the US Constitution:

... section 380 (of the *Amateur Sports Act*) does not establish a per se rule against the use of Olympic words and symbols, but only grants the USOC their exclusive use within 'a range of uses'. Our analysis above has shown how the athletic events defendants seek to put on clearly fall within the ambit of section 380. Accordingly, defendants' argument of unconstitutionality does not detract from our previous assessment of plaintiff's probable success on the merits (*IOC et al. v. SFAA et al. # 1*, 1982, Lexis p. 21).

SFAA's counter claims of unlawful and 25 discriminatory targeting by the USOC were also rejected. The court emphasised the limited time for the USOC to instigate claims against other unauthorised users of Olympic terminology since the *Amateur Sports Act* amendments, and indicated similarities between the Gay Games and the IOC/USOC Games amounted to 'a greater infringement' of intellectual property rights. The USOC also expressed willingness to enforce its legal rights against other organisations where pre-trial negotiations failed to reach an acceptable outcome, including opposition to the 'Golden Age Olympics Inc', the 'Olympic Trails Bus Company Inc' and the National Amateur Sports Foundation (*IOC et al. v. SFAA et al. # 1*, 1982, Lexis pp. 22-23). The outcome in STOP was expressly distinguished as a desirable act of civil protest, rather than an attempt to enhance business competitiveness or to promote a rival sporting event. The court also found the extensive communications between Waddell and Miller had contractual force despite various points of disagreement throughout the paper trail. Ultimately, a loose combination of contractual, legislative and intellectual property grounds was sufficient to offset any suggestion of

The verdict in *SFAA #1* was handed down eight 26 days prior to the scheduled commencement of the inaugural Gay Games, and cost organisers \$30,000, as well as hundreds of volunteer labour hours to remove the offending word from all the Games posters, pins, T-shirts, programs, banners, flags, information and fund-raising mementos (Coe, 1986, pp. 9-11). Participants were given the impression the event had been cancelled (Waddell and Schaap, 1996, p. 158), while phone operators and media representatives were instructed to avoid using the offending term (*SFAA et al. v. USOC et al.*, 1987, p. 567, per Brennan J). Waddell and several gay and lesbian US Olympians wrote a joint letter to the USOC emphasising the 'hurt and damage' the litigation had caused. The emotional, legal and organisational costs for SFAA, and Waddell especially, were considerable. In May 1984 the USOC commenced action to recover legal costs amounting to \$96,600. Judge John Vukasin granted the claim, and prevented oral testimony from attorney Mary Dunlap acting in SFAA's defence (Coe, 1986, pp. 9-11). A lien was subsequently placed on Waddell's house, and was only removed at the time of his funeral in 1987. Others close to the case were also affected, with the dispute simultaneously galvanising and demoralising those fighting the cause directly (Personal Interview, Sheehan, 1996).

Games organisers and San Francisco City officials 27 responded with dignity and humour, and briefly adopted a new title: 'The Gay *bleep* Games'. Despite the verdict, the San Francisco Board of Supervisors expressed support for the Gay Games as 'consistent with the highest principles of the Olympic tradition' (Britt, 1982), and speeches by dignitaries during the official Games ceremonies continued to use the term 'Gay Olympics'. The collective sense of unfairness galvanised the gay and lesbian community, prompting international press interest in the event. Ironically, without the publicity surrounding the verdict, interest in Gay Games I may have been confined to local and international gay media.

The first Gay Games proceeded in the first week of 28 September 1982, and attracted 1,350 participants from eleven nations. This was the first international gay and lesbian event, and numerous participants reported its success in engendering feelings of enjoyment, achievement and belonging (Symons, unpub). The Masters Sport Movement had yet to stage a World Games, even though regular swimming and track events had been held in the US throughout the 1970s. This ensured Gay Games I participants were pioneers in conducting a large-scale multi-sport event open to all adult age

groups. The ceremonies modelled on other prestigious global events also made participants feel special.

When the teams entered the stadium [at the opening ceremony] the crowd was swept with the startling realisation of the event. It was the first time in history that gays and lesbians had been in one place from around the world. Leading the march onto the field, the Australian team, resplendent in their dark green and yellow uniforms, marched proudly around the track, displaying a huge Australian flag. As one hardy and seasoned reporter was heard to blurt out ... 'it's a mental enema' (Carlson, 1982).

Another reporter summed up the friendly and supportive atmosphere of the Games with slightly different emphases: 29

The commercial, nationalistic, competitiveness of the major Olympics was nowhere evident. In its place was a supportive, loving atmosphere in which the athletes were encouraged to do their personal best for self-fulfilment. The result was phenomenal. Participants coached and applauded each other even while competing in the same event ... Many of the non-gay referees and umpires were overwhelmed and remarked on the outpouring of encouragement and affection offered by athletes and fans (Potvin, 1982, pp. 1 and 12).

These sentiments highlight the importance of the Games to both participants and spectators, and at the closing ceremony SFAA announced a second event would be held in 1986, with San Francisco the most likely venue. The dispute with the USOC subsided between mid-1982 and 1985, but the proposed location of Gay Games II, combined with Waddell's continued involvement in SFAA, ensured the legal fight over the Gay Olympic Games was by no means over. 30

GAY GAMES II, 1986

SFAA's first planning meeting for Gay Games II was in November 1983, with the primary goals of demonstrating 'homosexuals are not different' (SFAA, 1983), and promoting an ethic of normalisation, assimilation and participation over victory. The aim was to develop a welcoming and inclusive sports and cultural event to foster pride 31

amongst 'contestants and spectators in the total community'. New goals included promoting 'positive lifestyles and health', an emphasis on 'lesbians and gay men as family', co-operation between 'gays and straights', participation amongst all age groups and 'Third World Countries', and the 'focus of sport and culture'. These far ranging, ambitious goals suggest Gay Games II was conceived as a multi-faceted sport and cultural event with a strong commitment to social justice and affirmation for lesbian and gay communities.

The build-up to Gay Games II from late 1984 32 onwards was clouded by the fatalism and gloom of the HIV/AIDS crisis, which had widespread effects on gay and lesbian communities in San Francisco. The vibrant, party atmosphere of the famous Castro precinct, the city's gay and lesbian hub, was consumed with death and mourning. Many businesses closed because their gay owners or clients had died, and funerals became one of the main community gatherings. Men under the age of forty were worst affected, with nearly two-thirds of an estimated 75,000 gay men living in San Francisco being infected or diagnosed with HIV, or succumbing to AIDS between the early 1980s and 1998 (Andriote, 1999, p. 333). Key organisers of Gay Games II, including new SFAA Executive Director Shawn Kelly, Secretary Larry Sheehan, and Tom Waddell as Honorary President (Symons, unpub, pp. 186-188), experienced considerable opposition to the event (Personal Interviews with Sheehan, 1996 and Kelly, 1996). There were fears within the gay community that donations and volunteer support for vital medical services would be syphoned into Games budgets. Some viewed the event as an affront to the dead and dying, and many feared bringing gay men from around the world to San Francisco could spread the disease further. However, Gay Games II organisers held a different view, with Waddell commenting the event provided 'an opportunity to elevate consciousness about AIDS' (Waddell, August 1986, p. 8) through education on prevention, care programs, and the city's response to the crisis.

Education on safe-sex practices and tackling the 33 condition was central to the new inclusiveness program. Condoms and information pamphlets were provided to all Games registrants, and Persons With AIDS (PWA) were encouraged to become involved with the Gay Games as athletes, volunteers and spectators (Personal Interview with Kelly, 1986; Coe, 1986, p. 14). Waddell also distributed a very personal letter written by Christen Haren, a gay man who had taken up bodybuilding and intended to compete at Gay Games II after being diagnosed with AIDS, which indicated that joining a gym and working out enabled him to reconnect with his body after a

period of severe illness where even walking across a room became an ordeal. Haren believed the Games could offer many important benefits to other PWAs to counter the pain, isolation, depression, debilitation, stigmatisation, and failing of youthful bodies the incurable disease was causing:

I fought my way out of the closet some years ago, and I'm not willing to be put into another closet just because I have AIDS. What's important here is not that Christen is entering the Games, but that Christen Haren, a PWA, is participating to the best of his ability. Dr. Waddell, by working together, we can assist in instilling pride in those who have had it taken away. Maybe we can even strengthen the resolve to fight and live, in those who have given up in their pain and isolation (Haren quoted in Waddell, August 1986, p. 8).

For Haren, the Games offered a means of reconnecting with others through training, preparation and the promise of competitive involvement, and provided a context for gay people to express their mutual concern while sharing their 'strength and hope for each other'. Maintaining a positive body image and bolstering self-esteem were extremely important (Gilbert, 1999, p. 51). Waddell envisaged the Gay Games would promote 'positive lifestyles and health', and provide a vehicle for gay men and lesbian women to display their multi-faceted, productive, creative, and *healthy* culture (Pedersen, 1999, p. 31), whilst demonstrating their resilience, resourcefulness and courage during a period of immense stress for the community. These themes now had personal resonance, as Waddell developed AIDS a month before Gay Games II. He was hospitalised with pneumocystis two weeks before its commencement, and discharged himself to formally open the event as well as compete and win the javelin competition (Waddell and Schaap, 1996, pp. 194-196).

Gay Games II was held over the second week of August 1986 and included seventeen sports and an extensive Cultural Festival (Symons, unpub, pp. 184-185 and 190-191). Kelly formed a committee structure with SFAA Board approval, and recruited 1,200 volunteers to assist with the event. Men and women from all age groups over 18 were offered the same competition program, and the event attracted competitors from Australia, Brazil, Canada, England, France, Greece, Guam, Ireland, Israel, Italy, Japan, Mexico, the Netherlands, Nicaragua, New Zealand, Samoa, the Virgin Islands

and West Germany, as well as two hundred and twenty US cities (SFAA *Official Program*, 1986, p. 64). The Opening Ceremony consisted of a parade of athletes, an oath ceremony for athletes and officials, the lighting of the Gay Games torch, speeches by city dignitaries and the singing of the US national anthem. The Closing Ceremony began at the completion of the marathon in Kezar stadium, and was marked with the extinguishment of the torch (SFAA *Official Program*, 1986, pp. 20-21), and the transfer of the Gay Games flag to representatives from Metropolitan Vancouver Arts and Athletics as hosts for Gay Games III in 1990. This indicated the Games had become a viable, ongoing global event.

However, in June 1985 it became apparent SFAA 36 intended to resume use of the Olympic moniker without informing the USOC. The IOC and USOC instigated further court action to obtain a second temporary injunction, drawing on arguments affirmed in the first reported ruling. In a brief verdict, Circuit Judge Goodman willingly endorsed the district court's interpretation of the relevant legal issues, and most importantly the 'undisputed' factual background behind the USOC's enforcement action. Namely, SFAA's unauthorised use of the term 'Olympics' would 'tend to cause confusion' under §380 (a) (4) of the *Amateur Sports Act*, with no need for the USOC to establish proof of actual confusion. The verdict provided strong endorsement for the USOC's expansive licensing and enforcement powers well beyond conventional trademark provisions, while stymieing SFAA's free speech argument:

Because SFAA had satisfactory alternative means for expressing its opposition to the Olympics, it has no First Amendment right to use 'Olympics' or the Olympic symbols to promote its games or products (*IOC & USOC v. SFAA and Waddell # 2*, 1986, p. 737).

The court rejected any suggestion the USOC was 37 unlawfully targeting homosexual groups by pursuing litigation against SFAA. Even though the USOC had failed to enforce its intellectual property rights against 'other competitive games advertised as 'Olympics'', the majority held the equal protection clause of the fifth amendment does not apply to the 'state enforcement of private rights' to constitute requisite 'state action'. Any private dimensions of USOC enforcement discretion were subsumed by its general public mandate, thus precluding any claim of direct and discriminatory targeting.

To say that the word Olympic is property begs the question. What appellants challenge is the power of Congress to privatize the word Olympic, rendering it unutterable by anyone else in connection with any product or public event, whether for profit or, as in this case, to promote a cause (*IOC & USOC v. SFAA and Waddell #3*, 1986, p. 1321).

USOC then obtained a permanent injunction 38
against SFAA. However, this chapter of the saga represents the first sign US Federal courts were prepared to question the USOC's monopoly under the *Amateur Sports Act*. The minority opinion accepted Waddell's strategic choice to invoke the term 'Olympic', which sought to foster 'a wholesome, normal image of homosexuals' against a legislatively enshrined 'intellectual property fiefdom' (*IOC & USOC v. SFAA #3*, 1986, p. 1321). Further, the USOC's enforcement discretion had potentially arbitrary and discriminatory effects, 'unconstrained by principles of equal protection and due process' and with inadequate 'safeguards ... against arbitrary exclusion of certain groups because they wish to communicate ideas some may find offensive' (*IOC & USOC v. SFAA #3*, 1986, p. 1323). The words of Albert Lee Stephens Jr. neatly summarise the minority's opposition to the USOC's expansive powers under the US constitution:

What appellants propose to do ... lies at the very heart of the first amendment: they wish to hold a public event to promote socio-political views some may find offensive. They claim that calling their event the Gay Olympic Games is essential to the message they wish to convey ... By contrast, the panel here approves a permanent injunction that significantly blunts rights to public expression without the slightest showing that the enjoined use would harm anyone (*IOC & USOC v. SFAA #3*, 1986, p. 1325).

The common usage argument appears compelling. 39
After listing 'over 140 businesses' with names commencing with or containing the word 'Olympic', many located in Olympic Boulevard, Los Angeles, the following registered business names added to the plethora of organisations using the restricted term, yet not subject to USOC criticism under the *Amateur Sports Act*:

Olympic Bar B Que Restaurant;
Olympic Donuts; the Olympic Married

Matching Service; the Olympic Tae Kwon-Do Karate Studio; Olympic Trailer Movers; the Olympic Memorial Funeral Home; Olympic Unpainted Furniture; Olympic Wall Street Services; and the Olympic Headwear Novelty Company (*IOC & USOC v. SFAA #3*, 1986, p. 1323).

Delays in the appeal process ensured the successes of Gay Games II were realised before the US Supreme Court could finally determine SFAA's rights. However, by the time of the final ruling Waddell's health had rapidly deteriorated and he only had a few weeks to live (Waddell and Schaap, 1996, pp. 208-211 and 221-222). 40

THE FINAL VERDICT AND ITS LEGACIES

SFAA's Supreme Court appeal reiterated concerns the *Amateur Sports Act* provided an unlawful restriction on freedom of speech, and questioned the power of US Congress to confer expansive intellectual property rights over common language terms. However, the majority verdict rejected these arguments, indicating Congress had well-established powers to legislate in this area, while recognising the 'ownership' of 'Olympic' insignia and terms commenced at the very least with the first modern Games of 1896: 41

The history of the origins and associations of the word 'Olympic' demonstrates the meritlessness of the SFAA's contention that Congress simply plucked a generic word out of the English vocabulary and granted its exclusive use to the USOC. Congress reasonably could find that since 1896, the word 'Olympic' has acquired what in trademark law is known as a secondary meaning - it 'has become distinctive of [the USOC's] goods in commerce ... Congress' decision to grant the USOC a limited property right in the word 'Olympic' falls within the scope of trademark law protections, and thus certainly within constitutional bounds (*SFAA et al. v. USOC et al.*, 1987, p. 534-535). 42

Other terms protected through similar legislation included the titles of certain 'veterans' organisations', the American National Red Cross, Smokey Bear and Woodsy Owl, 'Daughters of the American Revolution, the Boy Scouts, the Girl Scouts, Little League baseball, and the American National Theater and Academy' (*SFAA et al. v. USOC et al.*, 1987, p. 532). IOC rules also directed 'every national (Olympic) committee to protect the use of 43

the Olympic flag, symbol, flame, and motto from unauthorised use' (*SFAA et al. v. USOC et al.*, 1987, p. 533). This combination of factors helped support the constitutionality of the 1978 *Amateur Sports Act*, despite SFAA's intention to 'carefully' employ an image of inclusive participation by replicating, with some adaptations, the rituals, practices and ethos of the IOC Olympic Games. In other words, SFAA's rival games were built on the illegal commercial exploitation of Olympic terminology, protected under public law on behalf of a private entity.

The strong dissent of Justice Brennan referred to 44 the insufficient 'balance between the governmental interest and the magnitude of the speech restriction' to justify the USOC's trademark monopoly. For Brennan J., section 380 directly advanced federal government interests by allowing the USOC to raise money to support various Olympic endeavours. As such, constitutional guarantees of free speech and equal protection could not be contravened. Many USOC functions involved Congressional sanction through legislation, which in turn defined the organisation as a state instrumentality. Congress thus enabled the USOC to be 'endowed ... with traditional governmental powers' to perform its essential functions on behalf of the IOC throughout the US:

Every aspect of the Olympic pageant, from the procession of athletes costumed in national uniform, to the raising of national flags and the playing of national anthems at the medal ceremony, to the official tally of medals won by each national team, reinforces the national significance of Olympic participation. Indeed, it was the perception of shortcomings in the *Nation's* performance that led to the *Amateur Sports Act* of 1978. In the words of the President's Commission, 'the fact is that *we* are competing less well and *other nations* competing more successfully because other nations have established excellence in international athletics as a national priority' (*SFAA et al. v. USOC et al.*, 1987, p. 551).

Brennan J expressed concern over the regulation 45 of a term 'with a deep history in the English language and Western culture'. The trail of USOC litigation highlighted how the legislative control of language could be viewed as a 'guise for banning the expression of unpopular views'. To restrict or privatise the use of terms with a universal linguistic meaning could ridiculously dilute popular speech, with the greatest effect 'on those groups that may

benefit most' from their connotations:

... so a title as 'The Best and Most Accomplished Amateur Gay Athletics Competition' would not serve as an adequate translation of petitioners' message (*SFAA et al. v. USOC et al.*, 1987, p. 569).

When combined with SFAA's essentially 46
'*noncommercial* or expressive' motive, and the exemption of standard trademark defences from the Act, Brennan J had no hesitation in declaring the USOC's language monopoly 'substantially overbroad' (*SFAA et al. v. USOC et al.*, 1987, p. 562). The 'extraordinary range of noncommercial speech' protected by the *Amateur Sports Act* was in effect a blanket prohibition qualified only by the USOC's enforcement discretion. With no express requirement to prove actual public confusion, 'unfettered' discretionary enforcement powers, and a substantial level of 'Government interest', the reforms appeared to enhance the USOC's revenue raising power at the expense of the right to dissent. Nevertheless, 1982 and 1986 Gay Games were ultimately promoted without reference to any Olympic terms, and established an independent reputation as 'Gay Games I' and 'Gay Games II' (*SFAA et al. v. USOC et al.*, 1987, p. 536). The growth in size, budget and popularity had sufficient commercial and sporting dimensions to close the dispute in the USOC's favour.

In the short term, the SFAA litigation had a 47
significant personal toll on Waddell. In striving to cope with the effects of HIV/AIDS, the additional anxiety and concern attributable to the litigation was immense (Waddell and Schaap, 1996, p. 183 and 220-221). The failure of the USOC and SFAA to reach a compromise is particularly regrettable given subsequent events. The lien placed on Waddell's home to satisfy the USOC's legal costs was finally removed by order of USOC President Robert Helmick just in time for Waddell's funeral (Waddell and Schaap, 1996, p. 212). Relations between the USOC and the Federation of Gay Games (FGG), an international organisation established by key leaders of SFFA to oversee the event, improved significantly during the lead up to Gay Games IV, held in New York in 1994. The USOC assisted the FGG in their efforts to make Gay Games IV a special event, and helped obtain an official immigration waiver for people with HIV and AIDS to encourage their participation and facilitate their entry into the US. In return the FGG exchanged information on how to best cater for Olympic athletes who were HIV positive, with the USOC considering the Gay Games exemplified best practice in this area (Symons, unpub, p. 210)

The tenuous balance between free speech and the ownership of popular language remains under the *Amateur Sports Act*. Drawing on comparative developments in England, France, Canada, Australia and New Zealand, each with Olympic protection legislation currently in force, Pendras (2002) advocates a dilution of this trademark monopoly, highlighting the USOC's 'arbitrary' and 'broad' enforcement discretion continues to produce inconsistent and discriminatory outcomes. The economic benefits to the USOC are unclear, and could be offset by the costs of pursuing legal claims against small commercial enterprises. Notably, recent experience demonstrates Australian trademark regulators are reluctant to support Australian Olympic Committee objections levelled at small businesses using Olympic-related terms and insignia, particularly where there appears to be little commercial benefit, or the offending logo is used in a non-sporting context (see *Australian Olympic Committee v. Courier Luggage Pty Ltd* [2002] ATMO 2; *Australian Olympic Committee and Sydney Organising Committee for the Olympic Games v. Alan Archibald Calder* [2000] ATMO 35; *Australian Olympic Committee v. Hugh Thompson* [2000] ATMO 78).

The litmus test for small commercial entities and sporting groups is their ability to continue their activities 'despite the law'. Gunn and Omerod (2000) illustrate professional boxing has a lengthy history of resistance against English criminal law, and the annual Mr. Olympia bodybuilding pageant remains known under its offending title (DeMilia, undated). The Gay Games is no longer dependent on 'Olympic' support for its legitimacy, and Waddell's legacy is an inclusive global hallmark event of growing popularity, incorporating sport, culture and human rights programs. Since the Gay Olympics saga and Waddell's death in 1987, the Gay Games has been hosted in Vancouver (1990), New York (1994), Amsterdam (1998), Sydney (2002) and will be held in Chicago in July 2006. Gay and lesbian sports organisations and events at the local and national level throughout many western nations, along with the international Gay Games movement, have undoubtedly flourished since Waddell's initial vision. Such a fruitful legacy belies the spirit of the USOC's legal conquest, and its impact on those involved with the Gay Games during the event's formative years.

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