SAN FRANCISCO ARTS & ATHLETICS, INC. v. UNITED STATES OLYMPIC COMMITTEE

438 U.S. 522 (1987)

Justice POWELL delivered the opinion of the Court.

In this case, we consider the scope and constitutionality of a provision of the Amateur Sports Act of 1978, 36 U.S.C. §§ 371–396, that authorizes the United States Olympic Committee to prohibit certain commercial and promotional uses of the word "Olympic."

I

Petitioner San Francisco Arts & Athletics, Inc. (SFAA), is a nonprofit California corporation.[1] The SFAA originally sought to incorporate under the name "Golden Gate Olympic Association," but was told by the California Department of Corporations that the word "Olympic" could not appear in a corporate title. App. 95. After its incorporation in 1981, the SFAA nevertheless began to promote the "Gay Olympic Games," using those words on its letterheads and mailings and in local newspapers. *Ibid.* The games were to be a 9–day event to begin in August 1982, in San Francisco, California. The SFAA expected athletes from hundreds of cities in this country and from cities all over the world. *Id.,* at 402. The Games were to open with a ceremony "which will rival the traditional Olympic Games." *Id.,* at 354. See *id.,* at 402, 406, 425. A relay of over 2,000 runners would carry a torch from New York City across the country to Kezar Stadium in San Francisco. *Id.,* at 98, 355, 357, 432. The final runner would enter the stadium with the "Gay Olympic Torch" and light the "Gay Olympic Flame." *Id.,* at 357. The ceremony would continue with the athletes marching in uniform into the stadium behind their respective city flags. *Id.,* at 354, 357, 402, 404, 414. Competition was to occur in 18 different contests, with the winners receiving gold, silver, and bronze medals. *Id.,* at 354–355, 359, 407, 410. To cover the cost of the planned Games, the SFAA sold T-shirts, buttons, bumper stickers, and other merchandise bearing the title "Gay Olympic Games." *Id.,* at 67, 94, 107, 113–114, 167, 360, 362, 427–428.[2]

Section 110 of the Amateur Sports Act (Act), 92 Stat. 3048, 36 U.S.C. § 380, grants respondent United States Olympic Committee (USOC)[3] the right to

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[1] The SFAA's president, Dr. Thomas F. Waddell, is also a petitioner.

[2] The 1982 athletic event ultimately was held under the name "Gay Games I." App. 473. A total of 1,300 men and women from 12 countries, 27 States, and 179 cities participated. *Id.,* at 475. The "Gay Games II" were held in 1986 with approximately 3,400 athletes participating from 17 countries. Brief for Respondents 8. The 1990 "Gay Games" are scheduled to occur in Vancouver, B.C. *Ibid.*

[3] The International Olympic Committee is also a respondent.

prohibit certain commercial and promotional uses of the word "Olympic" and various Olympic symbols.[4] In late December 1981, the executive director of the USOC wrote to the SFAA, informing it of the existence of the Amateur Sports Act, and requesting that the SFAA immediately terminate use of the word "Olympic" in its description of the planned Games. The SFAA at first agreed to substitute the word "Athletic" for the word "Olympic," but, one month later, resumed use of the term. The USOC became aware that the SFAA was still advertising its Games as "Olympic" through a newspaper article in May 1982. In August, the USOC brought suit in the Federal District Court for the Northern District of California to enjoin the SFAA's use of the word "Olympic." The District Court granted a temporary restraining order and then a preliminary injunction. The Court of

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[4] Section 110 of the Act, as set forth in 36 U.S.C. § 380, provides:

"Without the consent of the [USOC], any person who uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition—

"(1) the symbol of the International Olympic Committee, consisting of 5 interlocking rings;

"(2) the emblem of the [USOC], consisting of an escutcheon having a blue chief and vertically extending red and white bars on the base with 5 interlocking rings displayed on the chief;

"(3) any trademark, trade name, sign, symbol, or insignia falsely representing association with, or authorization by, the International Olympic Committee or the [USOC]; or

"(4) the words 'Olympic', 'Olympiad', 'Citius Altius Fortius', or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the [USOC] or any Olympic activity;

"shall be subject to suit in a civil action by the [USOC] for the remedies provided in the Act of July 5, 1946 (60 Stat. 427; popularly known as the Trademark Act of 1946 [Lanham Act]) [15 U.S.C. § 1051 *et seq.*]. However, any person who actually used the emblem in subsection (a)(2) of this section, or the words, or any combination thereof, in subsection (a)(4) of this section for any lawful purpose prior to September 21, 1950, shall not be prohibited by this section from continuing such lawful use for the same purpose and for the same goods or services. In addition, any person who actually used, or whose assignor actually used, any other trademark, trade name, sign, symbol, or insignia described in subsections (a)(3) and (4) of this section for any lawful purpose prior to September 21, 1950 shall not be prohibited by this section from continuing such lawful use for the same purpose and for the same goods or services.

"(b) The [USOC] may authorize contributors and suppliers of goods or services to use the trade name of the [USOC] as well as any trademark, symbol, insignia, or emblem of the International Olympic Committee or of the [USOC] in advertising that the contributions, goods, or services were donated, supplied, or furnished to or for the use of, approved, selected, or used by the [USOC] or United States Olympic or Pan-American team or team members.

"(c) The [USOC] shall have exclusive right to use the name 'United States Olympic Committee'; the symbol described in subsection (a)(1) of this section; the emblem described in subsection (a)(2) of this section; and the words 'Olympic', 'Olympiad', 'Citius Altius Fortius' or any combination thereof subject to the preexisting rights described in subsection (a) of this section."

Appeals for the Ninth Circuit affirmed. After further proceedings, the District Court granted the USOC summary judgment and a permanent injunction.

The Court of Appeals affirmed the judgment of the District Court. 781 F.2d 733 (1986). It found that the Act granted the USOC exclusive use of the word "Olympic" without requiring the USOC to prove that the unauthorized use was confusing and without regard to the defenses available to an entity sued for a trademark violation under the Lanham Act, 60 Stat. 427, as amended, 15 U.S.C. § 1051 *et seq*. It did not reach the SFAA's contention that the USOC enforced its rights in a discriminatory manner, because the court found that the USOC is not a state actor bound by the constraints of the Constitution. The court also found that the USOC's "property righ[t] [in the word 'Olympic' and its associated symbols and slogans] can be protected without violating the First Amendment." 781 F.2d, at 737. The court denied the SFAA's petition for rehearing en banc. Three judges dissented, finding that the panel's interpretation of the Act raised serious First Amendment issues. 789 F.2d 1319, 1326 (1986).

We granted certiorari, 479 U.S. 913, 107 S.Ct. 312, 93 L.Ed.2d 286 (1986), to review the issues of statutory and constitutional interpretation decided by the Court of Appeals. We now affirm.

II

The SFAA contends that the Court of Appeals erred in interpreting the Act as granting the USOC anything more than a normal trademark in the word "Olympic." "[T]he 'starting point in every case involving construction of a statute is the language itself.' " *Kelly v. Robinson,* 479 U.S. 36, 43, 107 S.Ct. 353, 357, 93 L.Ed.2d 216 (1986) (quoting *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 756, 95 S.Ct. 1917, 1935, 44 L.Ed.2d 539 (1975) (POWELL, J., concurring)). Section 110 of the Act provides:

> "Without the consent of the [USOC], any person who uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition—
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> . . .
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> "(4) the words 'Olympic', 'Olympiad', 'Citius Altius Fortius', or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the [USOC] or any Olympic activity;
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> "shall be subject to suit in a civil action by the [USOC] for the remedies provided in the [Lanham] Act." 36 U.S.C. § 380(a).

The SFAA argues that the clause "tending to cause confusion" is properly read to apply to the word "Olympic." But because there is no comma after "thereof,"

the more natural reading of the section is that "tending to cause confusion" modifies only "any combination or simulation thereof." Nevertheless, we do not regard this language as conclusive. We therefore examine the legislative history of this section.

Before Congress passed § 110 of the Act, unauthorized use of the word "Olympic" was punishable criminally. The relevant statute, in force since 1950, did not require the use to be confusing. Instead, it made it a crime for:

> "*any person* ... other than [the USOC] ... for the purpose of trade, theatrical exhibition, athletic performance, and competition or as an advertisement to induce the sale of any article whatsoever or attendance at any theatrical exhibition, athletic performance, and competition or for any business or charitable purpose *to use ... the words 'Olympic', 'Olympiad', or 'Citius Altius Fortius' or any combination of these words.*" 64 Stat. 901, as amended, 36 U.S.C. § 379 (1976 ed.) (emphasis added).

The House Judiciary Committee drafted the language of § 110 that was ultimately adopted. The Committee explained that the previous "criminal penalty has been found to be unworkable as it requires the proof of a criminal intent." H.R.Rep. No. 95–1627, p. 15 (1978) (House Report), U.S.Code Cong. & Admin.News 1978, pp. 7478, 7488. The changes from the criminal statute "were made in response to a letter from the Patent and Trademark Office of the Department of Commerce," *ibid.,* that the Committee appended to the end of its Report. This letter explained:

> "Section 110(a)(4) makes actionable not only use of the words 'Olympic', 'Olympiad', 'Citius Altius Fortius', and any combination thereof, but also any simulation or confusingly similar derivation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the [USOC] or any Olympic activity....
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> "Section 110 *carries forward some prohibitions from the existing statute enacted in 1950 and adds some new prohibitions, e.g. words described in section (a)(4) tending to cause confusion,* to cause mistake, or to deceive with respect to the [USOC] or any Olympic activity." *Id.,* at 38 (emphasis added).

This legislative history demonstrates that Congress intended to provide the USOC with exclusive control of the use of the word "Olympic" without regard to whether an unauthorized use of the word tends to cause confusion.

The SFAA further argues that the reference in § 110 to Lanham Act *remedies* should be read as incorporating the traditional trademark *defenses* as well. See 15

U.S.C. § 1115(b).[5] This argument ignores the clear language of the section. Also, this shorthand reference to remedies replaced an earlier draft's specific list of remedies typically available for trademark infringement, *e.g.,* injunctive relief, recovery of profits, damages, costs, and attorney's fees. See Lanham Act §§ 34, 35, 15 U.S.C. §§ 1116, 1117. This list contained no reference to trademark defenses. 124 Cong.Rec. 12865, 12866 (1978) (proposed § 110(c)). Moreover, the USOC already held a trademark in the word "Olympic." App. 378–382. Under the SFAA's interpretation, the Act would be largely superfluous. In sum, the language and legislative history of § 110 indicate clearly that Congress intended to grant the USOC exclusive use of the word "Olympic" without regard to whether use of the word tends to cause confusion, and that § 110 does not incorporate defenses available under the Lanham Act.

III

This Court has recognized that "[n]ational protection of trademarks is desirable ... because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation." *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.,* 469 U.S. 189, 198, 105 S.Ct. 658, 663, 83 L.Ed.2d 582 (1985). In the Lanham Act, 15 U.S.C. § 1051 *et seq.,* Congress established a system for protecting such trademarks. Section 45 of the Lanham Act defines a trademark as "any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify and distinguish his goods, including a unique product, from those manufactured or sold by others." 15 U.S.C. § 1127 (1982 ed., Supp. III). Under § 32 of the Lanham Act, the owner of a trademark is protected from unauthorized uses that are "likely to cause confusion, or to cause mistake, or to deceive." § 1114(1)(a). Section 33 of the Lanham Act grants several statutory defenses to an alleged trademark infringer. § 1115.

The protection granted to the USOC's use of the Olympic words and symbols differs from the normal trademark protection in two respects: the USOC need not prove that a contested use is likely to cause confusion, and an unauthorized user of the word does not have available the normal statutory defenses.[6] The SFAA argues, in effect, that the differences between the Lanham Act and § 110 are of constitutional dimension. First, the SFAA contends that the word "Olympic" is a generic[7] word that could not gain trademark protection under the Lanham Act.

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[5] Specifically, the SFAA argues that the USOC should not be able to prohibit its use of the word "Olympic" because its use "is descriptive of and used fairly and in good faith only to describe to users the goods or services." 15 U.S.C. § 1115(b)(4).

[6] The user may, however, raise traditional equitable defenses, such as laches. See Brief for Respondents 20, n. 17.

[7] A common descriptive name of a product or service is generic. Because a generic name by definition does not *distinguish* the identity of a particular product, it cannot be registered as a trademark under the Lanham Act. See §§ 2, 14(c), 15 U.S.C. §§ 1052,

The SFAA argues that this prohibition is constitutionally required and thus that the First Amendment prohibits Congress from granting a trademark in the word "Olympic." Second, the SFAA argues that the First Amendment prohibits Congress from granting exclusive use of a word absent a requirement that the authorized user prove that an unauthorized use is likely to cause confusion. We address these contentions in turn.

A

This Court has recognized that words are not always fungible, and that the suppression of particular words "run[s] a substantial risk of suppressing ideas in the process." *Cohen v. California,* 403 U.S. 15, 26, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284 (1971). The SFAA argues that this principle prohibits Congress from granting the USOC exclusive control of uses of the word "Olympic," a word that the SFAA views as generic.[8] Yet this recognition always has been balanced against the principle that when a word acquires value "as the result of organization and the expenditure of labor, skill, and money" by an entity, that entity constitutionally may obtain a limited property right in the word. *International News Service v. Associated Press,* 248 U.S. 215, 239, 39 S.Ct. 68, 72, 63 L.Ed. 211 (1918). See *Trade-Mark Cases,* 100 U.S. (10 Otto) 82, 92, 25 L.Ed. 550 (1879).

There is no need in this case to decide whether Congress ever could grant a private entity exclusive use of a generic word. Congress reasonably could conclude that the commercial and promotional value of the word "Olympic" was the product of the USOC's "own talents and energy, the end result of much time, effort, and expense." *Zacchini v. Scripps-Howard Broadcasting Co.,* 433 U.S. 562, 575, 97 S.Ct. 2849, 2857, 53 L.Ed.2d 965 (1977). The USOC, together with respondent International Olympic Committee (IOC), have used the word "Olympic" at least since 1896, when the modern Olympic Games began. App. 348. Baron Pierre de Coubertin of France, acting pursuant to a government commission, then proposed the revival of the ancient Olympic Games to promote international understanding. D. Chester, The Olympic Games Handbook 13 (1975). De Coubertin sought to identify the "spirit" of the ancient Olympic Games that had been corrupted by the influence of money and politics. See M. Finley &

1064(c). See also 1 J. McCarthy, Trademarks and Unfair Competition § 12:1, p. 520 (1984).

[8] This grant by statute of exclusive use of distinctive words and symbols by Congress is not unique. Violation of some of these statutes may result in criminal penalties. See, *e.g.,* 18 U.S.C. § 705 (veterans' organizations); § 706 (American National Red Cross); § 707 (4–H Club); § 711 ("Smokey Bear"); § 711a ("Woodsy Owl"). See also *FTC v. A.P.W. Paper Co.,* 328 U.S. 193, 66 S.Ct. 932, 90 L.Ed. 1165 (1946) (reviewing application of Red Cross statute). Others, like the USOC statute, provide for civil enforcement. See, *e.g.,* 36 U.S.C. § 18c (Daughters of the American Revolution); § 27 (Boy Scouts); § 36 (Girl Scouts); § 1086 (Little League Baseball); § 3305 (1982 ed., Supp. III) (American National Theater and Academy).

H. Pleket, The Olympic Games: The First Thousand Years 4 (1976).[9] De Coubertin thus formed the IOC, that has established elaborate rules and procedures for the conduct of the modern Olympics. See Olympic Charter, Rules 26–69 (1985). In addition, these rules direct every national committee to protect the use of the Olympic flag, symbol, flame, and motto from unauthorized use. *Id.,* Bye-laws to Rules 6 and 53.[10] Under the IOC Charter, the USOC is the national olympic committee for the United States with the sole authority to represent the United States at the Olympic Games.[11] Pursuant to this authority, the USOC has used the Olympic words and symbols extensively in this country to fulfill its object under the Olympic Charter of "ensur[ing] the development and safeguarding of the Olympic Movement and sport." *Id.,* Rule 24.

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." Lanham Act, § 2(f), 15 U.S.C. § 1052(f). See *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.,* 469 U.S., at 194, 105 S.Ct., at 661. The right to adopt and use such a word "to distinguish the goods or property [of] the person whose mark it is, to the exclusion of use by all other persons, has been long recognized." *Trade-Mark Cases, supra,* 100 U.S. (10 Otto), at 92. Because Congress reasonably could

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[9] The ancient Olympic Games were held from 776 B.C. until A.D. 393, when they were abolished by the Roman Emperor Theodosius I. The Olympic Games were the most important in a "circuit" of sporting festivals. The "circuit" also included the Pythian Games at Delphi, the Nemean Games at Nemea, and the Isthmian Games at Corinth. As these sporting festivals grew in importance, athletes turned from amateurs to true professionals, training all year and receiving substantial gifts and money from individuals and from their home cities. See M. Finley & H. Pleket, The Olympic Games: The First Thousand Years 68–82 (1976); 25 Encyc. Brit. 198 (15th ed. 1984).

[10] The Olympic flag was presented by Baron De Coubertin at the Congress of Paris in 1914. It has a white background with five interlocking rings in the center. The rings, in the colors blue, yellow, black, green, and red, in that order, "symbolize the union of the five continents and the meeting of athletes from all over the world at the Olympic Games in a spirit of fair and frank competition and good friendship, the ideal preached by Baron De Coubertin." Olympic Charter, Rule 6 (1985). The Olympic rings alone are the Olympic symbol. *Ibid.* The Olympic flame is formally lit in Olympia under the auspices of the IOC. The Olympic motto is "Citius, Altius, Fortius," meaning "Faster, Higher, Stronger," and "expresses the aspirations of the Olympic Movement." *Ibid.* The motto originated at an international conference on the principles of amateurism in sports organized by De Coubertin and held in 1894 at the Sorbonne in Paris. A French delegate, Père Henri-Martin Didon suggested as a motto the words engraved on the entrance to his lycée (school), Albert le Grand. Shortly thereafter, De Coubertin founded the IOC, which adopted this motto. A. Guttmann, The Games Must Go On 13–14 (1984).

[11] The USOC was formally organized in 1921, replacing the more informally organized American Olympic Committee. The USOC received its first corporate charter in 1950.

conclude that the USOC has distinguished the word "Olympic" through its own efforts, 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.

B

Congress also acted reasonably when it concluded that the USOC should not be required to prove that an unauthorized use of the word "Olympic" is likely to confuse the public.[12] To the extent that § 110 applies to uses "for the purpose of trade [or] to induce the sale of any goods or services," 36 U.S.C. § 380(a), its application is to commercial speech. Commercial speech "receives a limited form of First Amendment protection." *Posadas de Puerto Rico Assoc. v. Tourism Company of Puerto Rico,* 478 U.S. 328, 340, 106 S.Ct. 2968, 2976, 92 L.Ed.2d 266 (1986); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York,* 447 U.S. 557, 562–563, 100 S.Ct. 2343, 2349–2350, 65 L.Ed.2d 341 (1980). Section 110 also allows the USOC to prohibit the use of "Olympic" for promotion of theatrical and athletic events. Although many of these promotional uses will be commercial speech, some uses may go beyond the "strictly business" context. See *Friedman v. Rogers,* 440 U.S. 1, 11, 99 S.Ct. 887, 895, 59 L.Ed.2d 100 (1979). In this case, the SFAA claims that its use of the word "Olympic" was intended to convey a political statement about the status of homosexuals in society.[13] Thus, the SFAA claims that in this case § 110 suppresses political speech.

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[12] To the extent that § 110 regulates confusing uses, it is within normal trademark bounds. The Government constitutionally may regulate "deceptive or misleading" commercial speech. *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976); *Friedman v. Rogers,* 440 U.S. 1, 9–10, 99 S.Ct. 887, 893–894, 59 L.Ed.2d 100 (1979).

[13] According to the SFAA's president, the Gay Olympic Games would have offered three "very important opportunities":

"1) To provide a healthy recreational alternative to a suppressed minority.

"2) To educate the public at large towards a more reasonable characterization of gay men and women.

"3) To attempt, through athletics, to bring about a positive and gradual assimilation of gay men and women, as well as gays and non-gays, and to diminish the ageist, sexist and racist divisiveness existing in all communities regardless of sexual orientation." App. 93.

His expectations "were that people of all persuasions would be drawn to the event because of its Olympic format and that its nature of 'serious fun' would create a climate of friendship and co-operation[;] false images and misconceptions about gay people would decline as a result of a participatory [*sic*] educational process, and benefit ALL communities." *Id.,* at 93–94. He thought "[t]he term 'Olympic' best describe[d] [the SFAA's] undertaking" because it embodied the concepts of "peace, friendship and positive social interaction." *Id.,* at 99.

By prohibiting the use of one word for particular purposes, neither Congress nor the USOC has prohibited the SFAA from conveying its message. The SFAA held its athletic event in its planned format under the names "Gay Games I" and "Gay Games II" in 1982 and 1986, respectively. See n. 2, *supra*. Nor is it clear that § 110 restricts purely expressive uses of the word "Olympic."[14] Section 110 restricts only the manner in which the SFAA may convey its message. The restrictions on expressive speech properly are characterized as incidental to the primary congressional purpose of encouraging and rewarding the USOC's activities.[15] The appropriate inquiry is thus whether the incidental restrictions on First Amendment freedoms are greater than necessary to further a substantial governmental interest. *United States v. O'Brien,* 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968).[16]

One reason for Congress to grant the USOC exclusive control of the word "Olympic," as with other trademarks, is to ensure that the USOC receives the benefit of its own efforts so that the USOC will have an incentive to continue to produce a "quality product," that, in turn, benefits the public. See 1 J. McCarthy, Trademarks and Unfair Competition § 2:1, pp. 44–47 (1984). But in the special circumstance of the USOC, Congress has a broader public interest in promoting, through the activities of the USOC, the participation of amateur athletes from the

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[14] One court has found that § 110 does not prohibit the use of the Olympic logo of five interlocking rings and the Olympic torch on a poster expressing opposition to the planned conversion of the Olympic Village at Lake Placid, New York, into a prison. The court found that the use of the symbols did not fit the commercial or promotional definition of uses in § 110. *Stop the Olympic Prison v. United States Olympic Committee,* 489 F.Supp. 1112, 1118–1121 (SDNY 1980).

[15] Justice BRENNAN finds the Act unconstitutionally overbroad. But on its face, it applies primarily to commercial speech, to which the application of the overbreadth doctrine is highly questionable. See *Ohralik v. Ohio State Bar Assn.,* 436 U.S. 447, 462, n. 20, 98 S.Ct. 1912, 1921, n. 20, 56 L.Ed.2d 444 (1978) (citing *Bates v. State Bar of Arizona,* 433 U.S. 350, 380, 97 S.Ct. 2691, 2707, 53 L.Ed.2d 810 (1977)). There is no basis in the record to believe that the Act will be interpreted or applied to infringe significantly on noncommercial speech rights. The application of the Act to the SFAA is well within constitutional bounds, and the extent to which the Act may be read to apply to noncommercial speech is limited. We find no "realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 801, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772 (1984). Accordingly, we decline to apply the overbreadth doctrine to this case.

[16] A restriction on nonmisleading commercial speech may be justified if the government's interest in the restriction is substantial, directly advances the government's asserted interest, and is no more extensive than necessary to serve the interest. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York,* 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980). Both this test and the test for a time, place, or manner restriction under *O'Brien* require a balance between the governmental interest and the magnitude of the speech restriction. Because their application to these facts is substantially similar, they will be discussed together.

United States in "the great four-yearly sport festival, the Olympic Games." Olympic Charter, Rule 1 (1985). The USOC's goal under the Olympic Charter, Rule 24(B), is to further the Olympic movement, that has as its aims: "to promote the development of those physical and moral qualities which are the basis of sport"; "to educate young people through sport in a spirit of better understanding between each other and of friendship, thereby helping to build a better and more peaceful world"; and "to spread the Olympic principles throughout the world, thereby creating international goodwill." *Id.,* Rule 1. See also *id.,* Rule 11 (aims of the IOC). Congress' interests in promoting the USOC's activities include these purposes as well as those specifically enumerated in the USOC's charter.[17] Section

[17] The objects and purposes of the USOC are to:

"(1) establish national goals for amateur athletic activities and encourage the attainment of those goals;

"(2) coordinate and develop amateur athletic activity in the United States directly relating to international amateur athletic competition, so as to foster productive working relationships among sports-related organizations;

"(3) exercise exclusive jurisdiction, either directly or through its constituent members of committees, over matters pertaining to the participation of the United States in the Olympic Games and the Pan-American Games, including the representation of the United States in such games, and over the organization of the Olympic Games and the Pan-American Games when held in the United States;

"(4) obtain for the United States, either directly or by delegation to the appropriate national governing body, the most competent amateur representation possible in each competition and event of the Olympic Games and of the Pan-American Games;

"(5) promote and support amateur athletic activities involving the United States and foreign nations;

"(6) promote and encourage physical fitness and public participation in amateur athletic activities;

"(7) assist organizations and persons concerned with sports in the development of amateur athletic programs for amateur athletes;

"(8) provide for the swift resolution of conflicts and disputes involving amateur athletes, national governing bodies, and amateur sports organizations, and protect the opportunity of any amateur athlete, coach, trainer, manager, administrator, or official to participate in amateur athletic competition;

"(9) foster the development of amateur athletic facilities for use by amateur athletes and assist in making existing amateur athletic facilities available for use by amateur athletes;

"(10) provide and coordinate technical information on physical training, equipment design, coaching, and performance analysis;

"(11) encourage and support research, development, and dissemination of information in the areas of sports medicine and sports safety;

"(12) encourage and provide assistance to amateur athletic activities for women;

"(13) encourage and provide assistance to amateur athletic programs and competition for handicapped individuals, including, where feasible, the expansion of opportunities for meaningful participation by handicapped individuals in programs of athletic competition for able-bodied individuals; and

110 directly advances these governmental interests by supplying the USOC with the means to raise money to support the Olympics and encourages the USOC's activities by ensuring that it will receive the benefits of its efforts.

The restrictions of § 110 are not broader than Congress reasonably could have determined to be necessary to further these interests. Section 110 primarily applies to all uses of the word "Olympic" to induce the sale of goods or services. Although the Lanham Act protects only against confusing uses, Congress' judgment respecting a certain word is not so limited. Congress reasonably could conclude that most commercial uses of the Olympic words and symbols are likely to be confusing. It also could determine that unauthorized uses, even if not confusing, nevertheless may harm the USOC by lessening the distinctiveness and thus the commercial value of the marks. See Schechter, The Rational Basis of Trademark Protection, 40 Harv.L.Rev. 813, 825 (1927) (one injury to a trademark owner may be "the gradual whittling away or dispersion of the identity and hold upon the public mind of the mark or name" by nonconfusing uses).

In this case, the SFAA sought to sell T-shirts, buttons, bumper stickers, and other items, all emblazoned with the title "Gay Olympic Games." The possibility for confusion as to sponsorship is obvious. Moreover, it is clear that the SFAA sought to exploit the "commercial magnetism," see *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.,* 316 U.S. 203, 205, 62 S.Ct. 1022, 1024, 86 L.Ed. 1381 (1942), of the word given value by the USOC. There is no question that this unauthorized use could undercut the USOC's efforts to use, and sell the right to use, the word in the future, since much of the word's value comes from its limited use. Such an adverse effect on the USOC's activities is directly contrary to Congress' interest. Even though this protection may exceed the traditional rights of a trademark owner in certain circumstances, the application of the Act to this commercial speech is not broader than necessary to protect the legitimate congressional interest and therefore does not violate the First Amendment.

Section 110 also extends to promotional uses of the word "Olympic," even if the promotion is not to induce the sale of goods. Under § 110, the USOC may prohibit purely promotional uses of the word only when the promotion relates to an athletic or theatrical event. The USOC created the value of the word by using it in connection with an athletic event. Congress reasonably could find that use of the word by other entities to promote an athletic event would directly impinge on the USOC's legitimate right of exclusive use. The SFAA's proposed use of the word is an excellent example. The "Gay Olympic Games" were to take place over a 9–day period and were to be held in different locations around the world. They were to include a torch relay, a parade with uniformed athletes of both sexes divided by city, an "Olympic anthem" and "Olympic Committee," and the award

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"(14) encourage and provide assistance to amateur athletes of racial and ethnic minorities for the purpose of eliciting the participation of such minorities in amateur athletic activities in which they are underrepresented." 36 U.S.C. § 374.

of gold, silver, and bronze medals, and were advertised under a logo of three overlapping rings. All of these features directly parallel the modern-day Olympics, not the Olympic Games that occurred in ancient Greece.[18] The image the SFAA sought to invoke was exactly the image carefully cultivated by the USOC. The SFAA's expressive use of the word cannot be divorced from the value the USOC's efforts have given to it. The mere fact that the SFAA claims an expressive, as opposed to a purely commercial, purpose does not give it a First Amendment right to "appropriat[e] to itself the harvest of those who have sown." *International News Service v. Associated Press,* 248 U.S., at 239–240, 39 S.Ct., at 72.[19] The USOC's right to prohibit use of the word "Olympic" in the promotion of athletic events is at the core of its legitimate property right.[20]

IV

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[18] The ancient Olympic Games lasted 5 days, whereas the modern Olympics last for 10 days. The ancient Games always took place in Olympia in southern Greece; the modern Olympic Games normally move from city to city every four years. (As an effort to reduce nationalism, cities, as opposed to countries, host the modern Olympic Games.) In ancient Greece there may have been a burning fire for religious sacrifice, since the Olympic Games were part of a religious festival. See The Odes of Pindar, Olympia 8, ll. 1–9, p. 25 (R. Lattimore transl., 2d ed. 1976). The torch relay, however, was an innovation of the modern Olympic Committee. The closest parallel to the modern opening parade was the opening of the ancient Games with the chariot race. As the chariots entered the arena and passed the judges, a herald called out the names of the owner, his father, and his city. See Finley & Pleket, *supra* n. 9, at 27. There was no general parade of athletes by locality, as in the modern Games, and the athletes were naked, not uniformed. Athletes were eligible only if they were male, freeborn Greeks. There is no indication that the ancient Olympics included an "Olympic anthem" or were organized by an entity called an "Olympic Committee." The awards in ancient Greece were wreaths of wild olive, rather than the gold, silver, and bronze medals presented at the modern Olympics. The logo of overlapping rings was created by the International Olympic Committee. See n. 10, *supra*. See generally The Olympics: A Book of Lists 10–13 (J. Beilenson & N. Beilenson eds. 1984); Finley & Pleket, *supra* n. 8; 25 Encyc. Brit. 197–201 (15th ed. 1984).

[19] The SFAA claims a superior right to the use of the word "Olympic" because it is a nonprofit corporation and its athletic event was not organized for the primary purpose of commercial gain. But when the question is the scope of a legitimate property right in a word, the SFAA's distinction is inapposite. As this Court has noted in the analogous context of "fair use" under the Copyright Act:

"The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the [protected] material without paying the customary price." *Harper & Row Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539, 562, 105 S.Ct. 2218, 2231, 85 L.Ed.2d 588 (1985).

Here, the SFAA's proposed use of the word "Olympic" was a clear attempt to exploit the imagery and goodwill created by the USOC.

[20] Although a theatrical production is not as closely related to the primary use of the word by the USOC as is an athletic event, Congress reasonably could have found that when the word "Olympic" is used to promote such a production, it would implicate the value given to the word by the USOC.

The SFAA argues that even if the exclusive use granted by § 110 does not violate the First Amendment, the USOC's enforcement of that right is discriminatory in violation of the Fifth Amendment.[21] The fundamental inquiry is whether the USOC is a governmental actor to whom the prohibitions of the Constitution apply.[2222] The USOC is a "private corporation established under Federal law." 36 U.S.C. § 1101(46).[23] In the Act, Congress granted the USOC a

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[21] The SFAA invokes the Fourteenth Amendment for its discriminatory enforcement claim. The Fourteenth Amendment applies to actions by a State. The claimed association in this case is between the USOC and the Federal Government. Therefore, the Fourteenth Amendment does not apply. The Fifth Amendment, however, does apply to the Federal Government and contains an equal protection component. *Bolling v. Sharpe,* 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954). "This Court's approach to Fifth Amendment equal protection claims has ... been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger v. Wiesenfeld,* 420 U.S. 636, 638, n. 2, 95 S.Ct. 1225, 1228, n. 2, 43 L.Ed.2d 514 (1975). See *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (*per curiam*). The Petitioners raised the issue of discriminatory enforcement in their petition for certiorari, and both petitioners and respondents have briefed the issue fully. Accordingly, we address the claim as one under the Fifth Amendment.

[22] Because we find no governmental action, we need not address the merits of the SFAA's discriminatory enforcement claim. We note, however, that the SFAA's claim of discriminatory enforcement is far from compelling. As of 1982 when this suit began, the USOC had brought 22 oppositions to trademark applications and one petition to cancel. App. 61. For example, the USOC successfully prohibited registration of the mark "Golden Age Olympics." *Id.,* at 383. The USOC also litigated numerous suits prior to bringing this action, prohibiting use of the Olympic words and symbols by such entities as the National Amateur Sports Foundation, *id.,* at 392, a shoe company, *id.,* at 395, the International Federation of Body Builders, *id.,* at 443, and a bus company, *id.,* at 439. Since 1982, the USOC has brought a number of additional suits against various companies and the March of Dimes Birth Defects Foundation, *id.,* at 437, and Brief for Respondents 41, n. 58. The USOC has authorized the use of the word "Olympic" to organizations that sponsor athletic competitions and events for handicapped persons ("Special Olympics") and for youth ("Junior Olympics" and "Explorer Olympics"). App. 33, 181. Both of these uses directly relate to a purpose of the USOC established by its charter. See 36 U.S.C. §§ 374(7), (13), reprinted *supra,* at 2981, n. 17. The USOC has not consented to any other uses of the word in connection with athletic competitions or events. App. 33.

The USOC necessarily has discretion as to when and against whom it files opposition to trademark applications, and when and against whom it institutes suits. The record before us strongly indicates that the USOC has acted strictly in accord with its charter and that there has been no actionable discrimination.

[23] As such, the USOC is listed with 69 other federally created private corporations such as the American Legion, Big Brothers—Big Sisters of America, Daughters of the American Revolution, Veterans of Foreign Wars of the United States, the National Academy of Sciences, and the National Ski Patrol System, Inc. 36 U.S.C. § 1101. It hardly need be said that if federally created private corporations were to be viewed as governmental rather than private actors, the consequences would be far reaching. Apart from subjecting these private entities to suits under the equal protection component of

corporate charter, § 371, imposed certain requirements on the USOC,[24] and provided for some USOC funding through exclusive use of the Olympic words and symbols, § 380, and through direct grants.[25]

The fact that Congress granted it a corporate charter does not render the USOC a Government agent. All corporations act under charters granted by a government, usually by a State. They do not thereby lose their essentially private character. Even extensive regulation by the government does not transform the actions of the regulated entity into those of the government. See *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974). Nor is the fact that Congress has granted the USOC exclusive use of the word "Olympic" dispositive. All enforceable rights in trademarks are created by some governmental act, usually pursuant to a statute or the common law. The actions of the trademark owners nevertheless remain private. Moreover, the intent on the part of Congress to help the USOC obtain funding does not change the analysis. The Government may subsidize private entities without assuming constitutional responsibility for their actions. *Blum v. Yaretsky,* 457 U.S. 991, 1011, 102 S.Ct. 2777, 2789, 73 L.Ed.2d 534 (1982); *Rendell-Baker v. Kohn,* 457 U.S. 830, 840, 102 S.Ct. 2764, 2770, 73 L.Ed.2d 418 (1982).

This Court also has found action to be governmental action when the challenged entity performs functions that have been " 'traditionally the *exclusive* prerogative' " of the Federal Government. *Id.,* at 842, 102 S.Ct., at 2772 (quoting *Jackson v. Metropolitan Edison Co., supra,* 419 U.S., at 353, 95 S.Ct., at 454; quoted in *Blum v. Yaretsky, supra,* 457 U.S., at 1011, 102 S.Ct., at 2777) (emphasis added by the *Rendell-Baker* Court). Certainly the activities performed by the USOC serve a national interest, as its objects and purposes of incorporation indicate. See n. 17, *supra.* The fact "[t]hat a private entity performs a function which serves the public does not make its acts [governmental] action." *Rendell-Baker v. Kohn, supra,* 457 U.S., at 842, 102 S.Ct. at 2772. The Amateur Sports Act was enacted "to correct the disorganization and the serious factional

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the Due Process Clause of the Fifth Amendment, presumably—by analogy—similar types of nonprofit corporations established under state law could be viewed as governmental actors subject to such suits under the Equal Protection Clause of the Fourteenth Amendment.

[24] For example, the USOC may amend its constitution only after providing an opportunity for notice and hearing, § 375(b); the USOC must allow for reasonable representation in its membership of certain groups, § 376(b); the USOC must remain nonpolitical, § 377; and the USOC must report on its operations and expenditures of grant moneys to Congress each year, § 382a.

[25] The USOC may apply to the Secretary of Commerce for yearly grants not to exceed a total of $16 million, § 384(a), but it has never done so. See Brief for Respondents 46. The only direct federal funding that the USOC has received is a $10 million grant in 1980, characterized by Congress as "a form of disaster payment" to help the USOC recover from the losses resulting from the boycott of the Moscow Olympics. See S. Rep. No. 96–829, p. 241 (1980); Act of July 8, 1980, 94 Stat. 857, 898.

disputes that seemed to plague amateur sports in the United States." House Report, at 8. See *Oldfield v. Athletic Congress,* 779 F.2d 505 (CA9 1985) (citing S.Rep. No. 95–770, pp. 2–3 (1978)). The Act merely authorized the USOC to coordinate activities that always have been performed by private entities.[26] Neither the conduct nor the coordination of amateur sports has been a traditional governmental function.[27]

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[26] The Commission that recommended the current USOC powers "made it clear that it did not want the Federal Government directing amateur athletics in this country." House Report, at 9, U.S.Code Cong. & Admin.News 1978, 7482.

[27] The dissent does not rely on the fact that the USOC is chartered by Congress to find governmental action in this case. *Post,* at ––––. Justice BRENNAN attempts to distinguish the USOC from other private corporations that are chartered by Congress on the ground that the USOC performs the "distinctive, traditional governmental function" of "represent[ing] this Nation to the world community." *Post,* at ––––. But absent the additional element of governmental control, this representational function can hardly be called traditionally governmental. All sorts of private organizations send "national representatives" to participate in world competitions. Although many are of interest only to a select group, others, like the Davis Cup Competition, the America's Cup, and the Miss Universe Pageant, are widely viewed as involving representation of our country. The organizations that sponsor United States participation in these events all perform "national ... representational" as well as "administrative [and] adjudicative role[s]," see *post,* at ––––, in selecting and presenting the national representatives.

As with the corporate charter, the dissent acknowledges that the representational role of the USOC is not dispositive. *Post,* at ––––. According to the dissent, the Olympic Games are "unique [because] at stake are significant national interests that stem not only from pageantry but from politics." *Ibid.* The dissent then relies primarily on the sequence of events preceding the USOC's decision not to send athletes to the 1980 summer Olympics as demonstrating "the impact and interrelationship of USOC decisions on the definition and pursuit of the national interest." *Post,* at ––––. But the governmental influence on that particular decision of the USOC is hardly representative in view of the absence of such influence on the vast majority of USOC decisions. Moreover, even the unique sequence of events in 1980 confirms that the USOC cannot properly be considered a governmental agency. Although the President and Congress indicated their view that United States athletes should not go to the Moscow Olympics, this was not the end of the matter. The President thought it would be necessary to take "legal actions [if] necessary" to prevent the USOC from sending a team to Moscow. See 1 Public Papers of the Presidents, Jimmy Carter 1980–1981, p. 636 (1981). Previously, the Attorney General had indicated that the President believed that he had the power under the Emergency Powers Act, 50 U.S.C. § 1701 et seq., to bar travel to an area that he considered to pose a threat of national emergency. See Washington Post, Apr. 11, 1980, p. A1. The President's statement indicated a clear recognition that neither he nor Congress could control the USOC's actions directly. A District Court, confronted with the question whether the decision not to send athletes to the 1980 Olympics was state action, noted:

"The USOC is an independent body, and nothing in its chartering statute gives the federal government the right to control that body or its officers. Furthermore, the facts here do not indicate that the federal government was able to exercise any type of '*de facto*' control over the USOC. The USOC decided by a secret ballot of its House of Delegates. The federal government may have had the power to prevent the athletes from

Most fundamentally, this Court has held that a government "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." *Blum v. Yaretsky, supra,* 457 U.S., at 1004, 102 S.Ct., at 2786; *Rendell-Baker v. Kohn, supra,* 457 U.S. at 840, 102 S.Ct., at 2771. See *Flagg Bros., Inc. v. Brooks,* 436 U.S. 149, 166, 98 S.Ct. 1729, 1738, 56 L.Ed.2d 185 (1978); *Jackson v. Metropolitan Edison Co., supra,* 419 U.S., at 357, 95 S.Ct., at 456; *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 173, 92 S.Ct. 1965, 1971, 32 L.Ed.2d 627 (1972); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 170, 90 S.Ct. 1598, 1615, 26 L.Ed.2d 142 (1970). The USOC's choice of how to enforce its exclusive right to use the word "Olympic" simply is not a governmental decision.[28] There is no evidence that the Federal Government coerced or encouraged the USOC in the exercise of its right. At most, the Federal Government, by failing to supervise the USOC's use of its rights, can be said to exercise "[m]ere approval of or acquiescence in the initiatives" of the USOC. *Blum v. Yaretsky,* 457 U.S., at 1004–1005, 102 S.Ct., at 2785–2786. This is not enough to make the USOC's actions those of the Government. *Ibid.* See *Flagg Bros., Inc. v. Brooks, supra,* 436 U.S., at 164–165, 98 S.Ct., at 1737–1738; *Jackson v. Metropolitan Edison Co.,* 419 U.S., at 357, 95 S.Ct., at 456.[29] Because the USOC is not a governmental actor, the SFAA's claim that the USOC has enforced its rights in a discriminatory manner must fail.[30]

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participating in the Olympics even if the USOC had voted to allow them to participate, but it did not have the power to make them vote in a certain way. All it had was the power of persuasion. We cannot equate this with control. To do so in cases of this type would be to open the door and usher the courts into what we believe is a largely nonjusticiable realm, where they would find themselves in the untenable position of determining whether a certain level, intensity, or type of 'Presidential' or 'Administrative' or 'political' pressure amounts to sufficient control over a private entity so as to invoke federal jurisdiction." *DeFrantz v. United States Olympic Committee,* 492 F.Supp. 1181, 1194 (DC), aff'd mem., 226 U.S.App.D.C. 210, 701 F.2d 221 (1980).

In sum, we remain unconvinced that the functions that the USOC performs can be viewed as "governmental" action.

[28] In fact, the Olympic Charter provides that the USOC "must be autonomous and must resist all pressures of any kind whatsoever, whether of a political, religious or economic nature." Rule 24.

[29] For all of the same reasons indicated above, we reject the SFAA's argument that the United States Government should be viewed as a "joint participant" in the USOC's efforts to enforce its right to use the word "Olympic." See *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 725, 81 S.Ct. 856, 861, 6 L.Ed.2d 45 (1961). The SFAA has failed to demonstrate that the Federal Government can or does exert any influence over the exercise of the USOC's enforcement decisions. Absent proof of this type of "close nexus between the [Government] and the challenged action of the [USOC]," the challenged action may not be "fairly treated as that of the [Government] itself." *Jackson v. Metropolitan Edison Co.,* 419 U.S., at 351, 95 S.Ct., at 453.

[30] In their petition for certiorari, petitioners argued only that because the USOC is a "state actor" it is prohibited from "selecting among diverse potential users of the word

V

Accordingly, we affirm the judgment of the Court of Appeals for the Ninth Circuit.

It is so ordered.

Justice O'CONNOR, with whom Justice BLACKMUN joins, concurring in part and dissenting in part.

I agree with the Court's construction of § 110 of the Amateur Sports Act, 92 Stat. 3048, 36 U.S.C. § 380, and with its holding that the statute is "within constitutional bounds." *Ante,* at 2980. Therefore, I join Parts I through III of the Court's opinion. But largely for the reasons explained by Justice BRENNAN in Part I–B of his dissenting opinion, I believe the United States Olympic Committee and the United States are joint participants in the challenged activity and as such are subject to the equal protection provisions of the Fifth Amendment. Accordingly, I would reverse the Court of Appeals' finding of no Government action and remand the case for determination of petitioners' claim of discriminatory enforcement.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

The Court wholly fails to appreciate both the congressionally created interdependence between the United States Olympic Committee (USOC) and the United States, and the significant extent to which § 110 of the Amateur Sports Act of 1978, 36 U.S.C. § 380, infringes on noncommercial speech. I would find that the action of the USOC challenged here is Government action, and that § 110 is both substantially overbroad and discriminates on the basis of content. I therefore dissent. . . . .

'Olympic', based upon speech-suppressing and invidiously discriminatory motives." Pet. for Cert. i. The SFAA now argues that under *Shelley v. Kraemer,* 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948), the District Court's entry of the injunction prohibiting the SFAA's use of the word "Olympic" constitutes governmental action sufficient to require a constitutional inquiry into the USOC's motivation in seeking the injunction. This new theory of governmental action is not fairly encompassed within the questions presented and thus is not properly before the Court. See this Court's Rule 21.1(a).