

## Athletes: what can you do if sponsor-provided kit lags behind the rivals...?

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Every now and then, technological innovation revolutionises a sport and leads to a wave of new records. At the 2008 Beijing Olympics for instance, athletes wearing Speedo's LZR Racer swimsuit accounted for 98% of all swim medals. So good was Speedo's technology that the regulator, FINA, felt compelled to change the rules.

Right now, road-running is experiencing its technological revolution. The spark was Nike's Vaporfly running shoes, which combined a super-thick energy returning foam sole with a rigid carbon fibre plate. So good (apparently) is Nike's technology, that critics have accused it of enabling "technological doping" and complain that Nike-sponsored athletes have an unfair advantage. Critics also point to the five fastest marathon times in history, all of which have been set recently by athletes wearing Nike Vaporfly / Alphafly shoes.

The resulting battleground has largely been occupied by Nike on one-side and its rivals on the other, with World Athletics stuck in the middle (see our previous articles [Why banning Nike's ZoomX Vaporfly Next% would be a mistake](#) and [World Athletics allow Nike's Vaporfly Next% shoes, but fail to stem controversy](#)). Away from the frontline however, non-Nike-sponsored athletes are grappling with the implications on them personally...should they stay faithful to their sponsor and wear an inferior shoe, try to negotiate a way out, terminate their sponsorship agreement, or ignore their obligations and compete in the Nike shoes anyway?

It's a complicated dilemma with inherent legal consequences. An athlete's ability to lawfully use a rival brand's kit will hinge on how their sponsorship contract was engineered. Sponsorship contracts usually require the athlete to provide support and loyalty in exchange for money. In accepting the financial benefit, the athlete ordinarily commits to using the sponsor's kit exclusively. In effect, it is the price of waiving the freedom to choose which kit to use. The athlete may therefore be stuck with an express or implied duty of allegiance to the brand in good times and bad for the duration of the term.

Finding a 'way-out' without incurring liability or early termination charges is sometimes possible, but only with careful planning and precise execution. One strategy is to terminate for cause; perhaps because the athlete has been deprived of substantially the whole benefit of the sponsorship contract, or because the contract imposes a burden that is radically different from that contemplated at the time of contracting. Such options are most likely to be viable where an athlete's remuneration is heavily or exclusively linked to performance related bonuses, which effectively become impossible to achieve when using the sponsor's kit. Other strategies exist too, but must be tailored to the athlete's specific circumstances.

As the development of new technologies in sport accelerates, athletes (and their agents / advisors) should consider – at the time the contract is entered / renewed – the possible escape route if the technology used in the sponsor's kit fails behind the market leader. Otherwise, athletes may find themselves facing a difficult decision: risk a legal battle with their sponsor, or risk harming their prospects of athletic success by using inferior kit.

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