

# Ambush Marketing and the Right of Association: Clamping Down on References to That Big Event With All the Athletes in a Couple of Years

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Ambush marketing activities—such as advertisements that obliquely reference a major event—have frustrated major sport event organizers and sponsors for years. Nevertheless, these activities, so long as they stopped short of trademark infringement or false advertising, have been perfectly legal. In the last decade, major sport event organizers such as the International Olympic Committee and the Fédération Internationale de Football Association have pressured national governments to pass legislation prohibiting ambush marketing as a condition of a successful bid to host an event. Such legislation has already been enacted in the United Kingdom, Canada, South Africa, Australia, and New Zealand, and the statutes in these jurisdictions reveal an emerging *right of association*. In this paper, the author surveys the evolution of this right and its key features. She offers a critique of this right, and argues that the need for it has never been properly established, and that the legislation is overly broad, does not reflect an appropriate balancing of interests, and may infringe upon the freedom of expression.

Organizers of major events—particularly sport events—have come to rely heavily upon high priced commercial sponsorships as a source of funding. For sponsors, there is value in being associated with such public and high profile events. Yet the high cost of sponsorships and the exclusivity of many such arrangements mean that only an elite few are in a position to acquire sponsorship rights. It is not surprising, therefore, that many businesses, large and small, that are not sponsors also seek to reference these public events in marketing campaigns or other ads and promotions. When they do so, they are called ambushers, and the practice of ambush marketing has found itself the target of a growing international movement to eradicate it.

Although ambush marketing is hardly a household word, the last decade has seen the spread of antiambush marketing legislation from one jurisdiction to another. The proliferation of such legislation is due in large part to pressure by the International Olympic Committee (IOC), and by a few other select major international sport event organizations, perhaps most notable among these, the Fédération Internationale de Football Association (FIFA). From its more circumspect origins as a part of an effort to protect specific marks, symbols, and emblems from appropriation, antiambush marketing legislation has rapidly evolved to create a new *right of association* with major events. Recent legislative incarnations of the right

of association are cast extremely broadly, and capture a wide range of activity.

The paper begins by exploring the definitions from the marketing literature of the key concepts of ambush marketing and sponsorship. It then examines existing legal recourses and their ability to address ambush marketing. This is followed by an analysis of recent antiambush marketing laws enacted in Canada, the United Kingdom, South Africa and New Zealand to identify their commonalities. The paper argues that a new ‘right of association’ is beginning to take shape. It offers a critique of the emergent ‘right of association’ with major events, and considers the scope and implications of this right. The paper questions whether the creation of the ‘right of association’ is necessary or justifiable, particularly in light of its impact on the freedom of expression.

## Ambush Marketing and Sponsorship

Ambush marketing is a term coined in business circles to describe a certain kind of marketing practice. Some place the inception of ambush marketing in 1984, with it becoming much more widespread by the time of the 1988 Olympic Games in Seoul, South Korea (Meenaghan, 1996; Sandler & Shani, 1989). Definitions of ambush marketing drawn from this context include: “a planned effort (campaign) by an organization to associate themselves indirectly with an event in order to gain at least some of the recognition and benefits that are associated with being an official sponsor” (Sandler & Shani, 1989,

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p. 11). Another common definition is from Meenaghan, to the effect that ambush marketing “involves a company seeking to associate with an event without making payment to the event owner and often in direct conflict with a competitor who is a legitimate and paying sponsor” (Meenaghan, 1998, p. 314). Both definitions emphasize a planned and deliberate campaign. Meenaghan emphasizes association without payment which suggests an element of unfair competition with the legitimate sponsors.

Sandler and Shani (1989) argue that the true ambush marketer has, as an objective, some form of consumer confusion that is aimed at undermining a competitor that has been successful in obtaining exclusive sponsorship rights. Meenaghan (1996) also stresses that the ambush marketer is typically a direct competitor of the sponsor. Nevertheless, the term appears to capture a broad range of conduct in which head-to-head competition and moral culpability are possible but not necessary (Meenaghan, 1996). Meenaghan distinguishes, at an ethical level, between those ambush marketers who have paid for legitimate marketing opportunities (such as team sponsorships) and those who are seeking to associate with an event without having paid for rights to do so. Thus, the fact that someone has not paid event organizers for a right of association is not determinative of the ethical question.

Ambush marketing typically occurs in relation to major sport events. These events tend to reach very large audiences, they are often international if not global in nature, and the competitions manage to cross cultural and linguistic barriers (O’Sullivan & Murphy, 1998, p. 350). The Olympic Games have been a target of ambush marketing, but such marketing practices are also common in relation to the World Cups of cricket and soccer, the Super Bowl (National Football League), the Stanley Cup Playoffs (National Hockey League), and other such events.

A few well-known examples of ambush marketing include the marketing campaign launched by American Express in the face of advertising by VISA, an official sponsor of the Barcelona Olympic Games. One television ad proclaimed “And remember, to visit Spain, you don’t need a visa,” while another stated, “Obviously, we’re here for more than just the fun and games.” In another example, Lufthansa, which was not an official sponsor of the 2006 FIFA World Cup of Soccer held in Germany, painted a soccer ball pattern on the nose cones of its airplanes, angering the official sponsor, Air Emirates. In the 1992 Barcelona Olympic Games, sponsored by Reebok, basketball athletes Michael Jordan and Charles Barkley covered the Reebok logo on their tracksuits with carefully draped American flags when they stepped on the podium to receive their medals. Both players had individual sponsorship arrangements with Nike. This is considered to be ambush marketing because, by obscuring Reebok’s logo, Nike ostensibly took away from Reebok some of the value of its sponsorship rights. Each of these examples, which recur in the marketing literature, involved major corporations in competition with one another and equally placed to bid on costly sponsorship rights to the event.

Two general categories of ambush marketing have emerged, and both are relevant to the right of association. The first, ambush marketing by association, is the classic form of this practice, in which an ambusher seeks to create an association between itself and the event (Meenaghan, 1998; Sandler & Shani, 1989). The second, called ambush marketing by intrusion, involves merely placing one’s trademarks or other indicia in event spaces where they will be captured by television cameras, or seen by those attending the event (Bartlett, 2007).

The concept of sponsorship is at the heart of many definitions of ambush marketing, as ambush marketers often seek to create the impression that they are sponsors of a major event. Major sport events rely upon commercial sponsorship to substantially offset the costs associated with the event (Hoek & Gendall, 2002; Sandler & Shani, 1989; Meenaghan, 1983). From an event organizer’s point of view, sponsors are typically those who have entered into contracts and paid stipulated sums of money for the right to call themselves a ‘sponsor’ of the event. Often the sponsorship possibilities are highly structured. Sponsorships may be exclusive within specified categories of wares or services (e.g., an official bank, an official petroleum supplier, an official soft drink) and there may be lower level opportunities for association such as ‘official supplier’ of specified wares or services to the event (FIFA, 2010; IOC, 2010; Séguin, Richelieu, & O’Reilly, 2008). Sandler and Shani have noted that the definitions of sponsorship “are ones of convenience and reflect what a specific organization prefers to consider as sponsorship” (Sandler & Shani, 1989, p. 11).

Sponsorship must be distinguished from actual advertising, although advertising is one of the main ways in which a sponsor capitalizes on its investment (Amis & Cornwell, 2005). A sponsor typically pays a sum of money or provides some other form of support to a team, athlete, or event. The primary commercial benefit they receive is the right to indicate their status as a sponsor. Significant commercial benefits can usually only be realized if the sponsor takes additional steps and spends considerable amounts of money on advertising that identifies the relationship between the sponsor and the event so as to take advantage of the benefits that flow from associating with the event (Kent & Campbell 2007; Howard & Crompton, 2005; Meenaghan, 1996; Sandler & Shani, 1989). A sponsorship is a purchased opportunity that must be acted upon. Its value will depend on the extent and manner in which it is exploited (Séguin et al., 2008; Hoek, 2005; Meenaghan, 1996; Sandler & Shani, 1993).

It is not uncommon for there to be multiple sponsorships associated with a particular sport, and these sponsorships may conflict when major events take place. To use the Olympic Games as an illustration, the event organizers will depend upon sponsorship arrangements to help offset the cost of the event. At the same time, independent of event organizers, national teams which compete in the games will seek their own sponsors. Such teams may depend on sponsorship dollars to support their training and qualifying activities on an ongoing basis and

not just at the time of the event. Individual athletes may also have their own sponsors. In some cases, these may be local businesses that support a rising star within the community. In other cases, elite athletes in high profile competitions may be sponsored by larger companies operating on a national scale. Since the IOC opened the doors to the participation of highly paid professional athletes, such athletes who participate in the Olympic Games also carry with them their own independent, equally lucrative, and often long-standing commercial endorsements. Sponsors do not expect to have their relationship with the athlete squelched for the period of his or her competition in the Olympic Games (Orr, 1997). National sport organizations may also have their own commercial sponsors which support, on an ongoing basis, the amateur sport activities carried out under the umbrella of the organization. Thus, in any sport, there can be many layers of sponsorship, and many different legitimate commercial interests at play. The diversity of sponsorship arrangements may mean that consumers are also less aware of the precise sponsorship arrangements behind any event (Séguin & O'Reilly, 2008).

Some marketing experts have considered the acquisition and exercise of sponsorship rights by sponsors of teams or athletes to be ambush marketing *vis à vis* the sponsors of major events such as the Olympic Games (Sandler & Shani, 1989). O'Sullivan and Murphy (1998, p. 352) note that the practice of sponsoring teams, athletes, or organizations instead of events "was once regarded as illicit and a deliberate sabotage." Nevertheless, such conduct is now widespread. It is possible that in some cases, a major corporation chooses to sponsor a team to gain profile that allows an unpaid-for sponsorship opportunity during the Olympic Games. Sandler and Shani (1989) offer the example of Fuji, which was beaten out by Kodak for sponsorship rights at the 1988 Olympic Games, and which then associated itself with the U.S. swim team and various athletes. It is also typically the case that broadcast advertisers will describe themselves as proud sponsors of event telecasts, thus allowing an elliptical connection to be made between themselves, the word *sponsor*, and the event (O'Sullivan & Murphy, 1998; Meenaghan, 1996). There has been some debate about the ethics of such conduct (Crompton, 2004; O'Sullivan & Murphy, 1998); nevertheless, both teams and broadcasts need sponsors, and it can be argued that these commercial relationships are fundamentally important to the different actors involved.

It is clear, then, that the *association* sought to be created by ambush marketers—that of sponsorship—is difficult to precisely define, and some sponsorships (e.g., of teams or individual athletes) may themselves be considered to be a form of ambush marketing. There is also no consensus as to the range of activities captured by the term ambush marketing. Such activities occupy a spectrum, with highly questionable conduct on one end, and much less objectionable practices on the other. The sponsor of an athlete who seeks to benefit from the spotlight on that individual's participation in the event is on a different ethical plane from the company that has supported

neither the event nor its participants. It therefore does not follow that all ambush marketing is ethically or legally problematic. Further, there is no clear consensus on *which* acts are ethically questionable. Even Meenaghan (1996, p. 111) notes that "hermetically sealing off all potential competitive ploys is both expensive and impossible, and may itself raise legal and ethical issues."

## Legal Landscape Before Ambush Marketing Laws

The insufficiency of existing legal recourses to address ambush marketing is one of the justifications for enacting specific legislation to target this activity. In this section, the basic legal remedies that predate ambush marketing legislation are considered. Specific laws and legal tests vary from jurisdiction to jurisdiction. This paper considers, in general terms, the main recourses available in major commonwealth jurisdictions.

### Unfair Competition

Unfair competition is a broad category of activity in the marketplace that exceeds the boundaries of what is considered fair. Yet 'unfair competition' is not an independent cause of action. That which is considered actionable unfair competition must fall into one of the other recognized torts or statutory recourses. These include trademark infringement, passing off, false advertising, anticompetitive activities, and so on. Thus, while ambush marketing might be considered in lay terms to be an unfair form of competition, it is not necessarily unfair competition in the eyes of the law (*New Zealand Olympic and Commonwealth Games Association Inc. v. Telecom New Zealand*, 1996; *National Hockey League v. Pepsi Cola Canada Ltd.*, 1992). The reasons for this will be discussed below.

### Trademark Infringement

Most countries permit the registration of trademarks, and offer protection against the infringement of registered marks. Trademark owners are protected against the use of their marks as trademarks by others, as well as against the confusing use of their trademarks (Lanham Act, § 1114; Trade Marks Act of 1994, s. 10(2); Trade-marks Act of 1985, ss. 19, 20). The type of confusion that is relevant in trademark law is confusion as to the *source* of the wares and services (Morcom, Roughton, Graham, & Malynicz, 2005; Gill & Jolliffe, 2004; Epstein, 2000). In other words, courts will consider whether consumers have been confused into thinking the wares or services of the defendant are those of the plaintiff. The focus on consumer confusion has an impact on the effectiveness of such recourses in addressing ambush marketing. Research suggests that consumers are indifferent to issues of sponsorship when making consumption choice (Séguin & O'Reilly, 2008; Lyberger, 2001). Whether the objection is to use of the actual mark or a confusing use of a

similar mark, the mark must be used as a 'trademark' or 'in the course of trade' to infringe (Morcom et al., 2005; Gill & Jolliffe, 2004:). A party that uses the trademark of another for some other purpose, such as critical comment or fair comparison, generally does not infringe. In the ambush marketing context, both the sponsor and the event organizer will have trademarks that they wish to protect. Yet trademark law is frequently ineffective quite simply because the ambush marketing activity does not make use of the trademarks of either party (e.g., "We support our athletes in 2010!").

### Tort of Passing Off

Common law jurisdictions offer recourse at common law where one trader passes off his wares or services as those of another. The tort of passing-off generally requires the plaintiff to show that he/she has goodwill in the trademark at issue, that there has been a misrepresentation likely to lead to confusion, and that he/she has suffered or is likely to suffer some damage as a result (Gervais & Judge, 2005; Morcom et al., 2005).

The tort of passing off has been used in attempts to address instances of alleged ambush marketing, but with little success. The Canadian case of *National Hockey League v. Pepsi Cola Canada Ltd.* (1992) demonstrated that the likelihood of confusion required for a finding of passing off sets a threshold that is too high to capture some ambush marketing activities. In that case, the event organizer sued a competitor of its major sponsor. Pepsi had managed to obtain advertising rights for broadcasts of the ice hockey playoffs, and ran an advertising campaign that was alleged to create the impression that Pepsi was the official sponsor of the event. However, the confusion that is actionable in passing off is as to the *source* of the wares or services. The court found that viewers would not be confused into thinking that the NHL was the source of the defendant's soft drinks (*National Hockey League v. Pepsi Cola Canada Ltd.*, 1992).

### False or Misleading Representations

Other aspects of 'unfair competition,' including the making of false or misleading representations, may also be prohibited by law, and may provide a basis for legal action against ambush marketers (Fair Trading Act of 1986, s. 13(e); Competition Act of 1985, s. 52; Trade Practices Act of 1974, s. 53). For example, New Zealand's Fair Trading Act of 1986 prohibits, among other things, making "a false or misleading representation that goods or services have any sponsorship, approval, endorsement" (Fair Trading Act of 1986, s. 13(e)). In *The New Zealand Olympic and Commonwealth Games Association Inc. v. Telecom New Zealand* (1996), the High Court of New Zealand considered an ad by Telecom which used the word RING set out in the same pattern and colors as Olympic rings, combined with the slogan "With Telecom mobile you can take your own mobile phone to the Olympics." The court found that the ad "could lead at least some

readers to an appreciation the word 'ring' was arranged as a play, so to speak, on the Olympic symbol" (*New Zealand Olympic and Commonwealth Games Association Inc. v. Telecom New Zealand*, 1996, p. 760). However, the court was not persuaded that there was "a significant likelihood of association by readers that Telecom is connected with or a sponsor of the Olympics" (*New Zealand Olympic and Commonwealth Games Association Inc. v. Telecom New Zealand*, 1996, p. 763).

### False Advertising

Most jurisdictions have laws that address false advertising. These laws are typically aimed at protecting the public. For example, in Canada, the Competition Act prohibits false or misleading advertising in these terms:

52. (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect. (Competition Act of 1985)

While this language might seem to capture advertisements that create the false or misleading impression that the advertiser is a sponsor of a major event, it would not be considered a satisfactory means of addressing ambush marketing. The fact that false advertising is an offense, and not a tort action also means that it is the relevant authorities and not the injured business or organizer who will decide whether resources should be expended on a prosecution. A further challenge might be finding that misrepresentation as to sponsorship status is misleading in a 'material respect,' as it is not an issue that goes to the safety of the product, its qualities, or trade source.

### Disclaimers

Several courts that have heard claims of passing off or false or misleading representations have considered the effect of disclaimers in reducing or eliminating confusion with respect to endorsement or sponsorship. While these decisions are from different national courts, they are based on comparable legal principles. In *National Hockey League v. Pepsi Cola Canada Ltd.* (1992), a Canadian court found the presence of a prominent disclaimer in Pepsi's advertising materials to be relevant in diminishing any likelihood of confusion. Similarly, a U.S. court in *National Football League v. Governor of Delaware* (1977) found that a disclaimer used in advertising could effectively address issues of consumer confusion as to sponsorship or endorsement. While disclaimers have been found to reduce the likelihood of confusion, the absence of one does not necessarily raise it. In *New Zealand Olympic and Commonwealth Games Association Inc. v. Telecom New Zealand* (1996), the New Zealand court found that the absence of a disclaimer in the defendant's ad was not significant.

## Summary

The existing forms of legal protection described above share a common feature: they have a strong consumer protection dimension. While trademark owners may certainly use trademark law to protect their own investment in their marks, the law also serves the public policy goal of protecting consumers from being deceived (Morcom et al., 2005; Gill & Jolliffe, 2004). The harm being remedied by the law is, in part, a public harm. Because of this, consumer perceptions have typically been at the heart of these laws. Standards such as the likelihood of confusion make certain forms of competition actionable when, and only when, the consumer is likely to be deceived.

These laws have been found wanting when it comes to addressing ambush marketing. Trademark law protects against the illegitimate or confusing use of trademarks, but ambush marketers typically avoid using the trademarks of others in an infringing manner. The tort of passing off, because it focuses on a misrepresentation that is likely to lead to confusion, has been relied upon more heavily, but it is also problematic because confusion is so difficult to establish in ambush marketing cases. The ambush marketer is not trying to pass off his wares or services as those of a competitor, and there is no confusion as to source in this respect. Any confusion will be as to the ambusher's status as a commercial sponsor of the event, yet it is much more difficult to establish confusion in this regard. In the same vein, actions for false or misleading advertising have not been of much use, in large part because it is difficult to demonstrate that consumers are being misled in any way that is material to their own interests.

These legal recourses have therefore proven unsatisfactory to most sponsors and event organizers in curtailing ambush marketing. Instead, event organizers have sought new rules that are more clearly tailored to address the perceived harms of ambush marketing. As will be discussed in the next section, the antiambush marketing legislation that has now been enacted in some jurisdictions, in attempting to protect the value of sponsorships, has created a new set of challenges. Such legislation does not resolve the difficulties of identifying core ambush marketing practices, it is more difficult to justify on a public policy level, and its application may raise issues of fairness, accountability, and freedom of expression.

## Ambush Marketing Legislation

Since the first real incarnation of antiambush marketing provisions in relation to the Sydney Olympic Games, antiambush marketing legislation has been rapidly evolving in jurisdictions around the world. Such legislation is now required as a condition for a successful bid for an Olympic Games (Scassa 2008; Padley, 2006). New Zealand's *Major Event Management Act* (MEMA)(2007) is evidence that antiambush marketing legislation is becoming a key component in any successful bid for a major international sport event. The Preamble to the Second

FIFA World Cup South Africa Special Measures Act of 2006 also makes it patently clear that its enactment was a condition of a successful bid. The discussion below considers three event-specific statutes: legislation enacted for the Sydney Olympic Games, and the laws in relation to the 2010 Vancouver Olympic Winter Games and the 2012 London Olympic Games. Two examples of legislation that are not specific to any one event are also considered: one from South Africa and one from New Zealand.

The discussion that follows will survey the gradual evolution of the right of association and its distancing both from actual trademark use and from trademark and passing off standards of consumer confusion. In the analysis, the laws are considered in chronological order. From the Sydney Act (1996) to New Zealand's MEMA (2007), one will see a focus on protected words and images expand to the protection of 'any representation' that is 'likely to suggest' an association. One will also note the expanding scope of the right, both temporally and spatially, and the expansion of liability beyond the ambusher to the party who provides the advertising space.

### Sydney 2000 Games (Indicia and Images Protection) Act of 1996

The Sydney 2000 Olympic Games marked the first formal enactment of antiambush marketing legislation in the context of a single major sport event. The Sydney 2000 Games (Indicia and Images Protection) Act of 1996 (Sydney Act) set out specific protected words and indicia related to the Sydney Games. In addition, the Sydney Act defined protected images as including "any visual or aural representation that, to a reasonable person, in the circumstances of the presentation, would suggest a connection with" either the Sydney 2000 Olympic Games or the Sydney 2000 Paralympic Games (Sydney 2000 Games (Indicia and Images Protection) Act of 1996, s. 9). Further, the Act defined the use of protected images as occurring where, *inter alia*, the use of the images: "would suggest that the first person is or was a sponsor of, or is or was provider of other support for [emphasis added]" the Sydney Olympic or Paralympic Games, the IOC, or the relevant organizing committees or federations (Sydney 2000 Games (Indicia and Images Protection) Act of 1996, s. 11). The use of any image, defined as a visual or aural representation suggesting a connection with the Games, that would imply a sponsorship or other supporting relationship with the Games, was made actionable under the law. The Act established lists of common words (such as 'gold,' 'silver,' 'bronze,' 'spirit,' '2000,' 'medals,' and so on) that could, if used in combination, constitute an indicia suggesting a sponsorship relationship.

The Sydney Act (1996) marked an early attempt to articulate a new right. It did so in a manner that focused on the use of 'protected images,' which gave the law the appearance of an extension of traditional trademark law. Nevertheless, the definition of images and indicia in the Sydney Act was broad enough to include anything that suggested a connection with the Games. The legislation

was different from trademark law in that it created a cause of action based not on the likelihood of confusion that would flow from the use of a mark, but rather on whether the use of a mark would ‘suggest’ a sponsorship relationship. A right of action lay with the event organizers, although licensed users of marks could, with permission, take direct actions in certain circumstances. The Act allowed for the blocking and seizure of imports, injunctions, and damages. Section 48 of the Act provided for a limited recourse for anyone against whom a groundless threat of legal proceedings under the Act was made.

### Trade Practices Act, 1976 and Merchandise Marks Amendment Act, 2002 (South Africa)

If the Sydney Act (1996) represented the first real antiambush marketing legislation in relation to a *specific* event, 2001 amendments to South Africa’s Trade Practices Act, 1976 (Trade Practices Amendment Bill, 2001) mark the first attempt at legislating against ambush marketing in relation to *any* designated event. This is significant in its own right as it removes the enactment of such legislation on an event-by-event basis from public debate by the legislature. The pressure to designate events touted as promoting some public interest will likely be high, and the opportunities for public input are diminished.

Section 9 of the Trade Practices Act (1976) was amended by the 2001 legislation, making it an offense to:

(d) in connection with a sponsored event, make, publish or display any false or misleading statement, communication or advertisement *which represents, implies or suggests a contractual or other connection or association between that person and the event, or the person sponsoring the event* [emphasis added], or cause such statement, communication or advertisement to be made, published or displayed (Trade Practices Amendment Act, s. 9, as amended).

A ‘sponsored event’ is one that has sponsors and that is designated as a protected event. Although the provision uses the words ‘false or misleading statement,’ the meaning of these terms is potentially very broad. A statement need only ‘imply or suggest’ an association to be false or misleading. Further, there is no need for the statement to suggest a contractual relationship such as a sponsorship—it could be a “contractual or other connection or association between that person and the event.” These terms give the provision an open-ended reach. It is conceivable that a true statement might fall afoul of this provision (which requires only that a statement be false or misleading). For example, the statement: “Company X is proud to support Jane Doe in her quest for Olympic gold” might be true, but it might also be found to mislead by suggesting an association between Company X and the Olympic Games. The suggested connection may be either with the event itself or with its sponsors. The law extends to those who “cause such statement, communication or advertisement to be made, published or displayed”

(Trade Practices Act, 1976, s. 9(d)), which would include the publisher or broadcaster of ads that are suggestive of such an association and not just the person who placed the advertisement. Anyone contravening this provision of the Trade Practices Act (1976) is liable to a fine or imprisonment.

In spite of their apparent breadth, the amendments to the Trade Practices Act (1976) were criticized by proponents of antiambush marketing legislation. In the first place, the law relies primarily on prosecutions, effectively criminalizing such conduct (duToit, 2006). In addition, the amendments were criticized for not addressing ambush marketing by intrusion (duToit, 2006). Ambush marketing by intrusion was subsequently addressed in South Africa by amendments to the Merchandise Marks Act of 1941 (Merchandise Marks Amendment Act of 2002). Under these amendments, once the Minister has designated an event as a ‘protected event’ (Merchandise Marks Amendment Act of 2002, s. 15A), significant limits are placed on the ability of companies to use their own trademarks. These limits last for the duration of the period during which the event is protected (Merchandise Marks Amendment Act of 2002, s. 15A(2)). During this period, a trademark owner may not use his mark in relation to the protected event “in a manner which is calculated to achieve publicity for that trade-mark and thereby to derive special promotional benefit from the event, without the prior authority of the organizer of such event” (Merchandise Marks Amendment Act, of 2002, s. 15A(2)). Since most uses of a trademark by a trademark owner are calculated to achieve publicity for the mark, the focus would likely be on whether the defendant sought to derive “special promotional benefit from the event.” This would seem to be a relatively low threshold to meet. The cause of action is triggered by the manner in which the defendant uses its *own* trademark, and not the trademark of a competitor or of the event organizer. According to s. 15A(3) of the Merchandise Marks Amendment Act (2002), “use” of a mark includes its use on the wares or in association with the delivery of services, in “promotional activities” in any medium. The use must be one that “in any way, directly or indirectly, is intended to be brought into association with or to allude to an event” (Merchandise Marks Amendment Act of 2002). The language used seems to be deliberately open-ended, as if it aims to catch a wide range of activities that might create an association with a protected event. The Merchandise Marks Amendment Act (2002) uses the term “association,” although it does not explicitly create a ‘right of association.’

The South African legislation differed from the Sydney Act (1996) in that it applied to any ‘protected event.’ Unlike the Sydney Act, the South African amendments focused not on how a party used indicia or images associated with the event, but on how it used its own trademarks to associate itself in some way with the protected event. These were significant developments in the evolution of antiambush marketing legislation. Yet those who had pushed for antiambush marketing legislation in South Africa were not entirely satisfied with the results.

Concerns were expressed that the legislative amendments permitted civil recourse that could, for the most part, only be exercised after the event had taken place (duToit, 2006). Further, in the case of the *Trade Practices Act* (1976), the enforcement of criminal provisions would depend entirely upon police priorities (duToit, 2006). The concern for expedient remedies to accompany the new norms can be seen to inform subsequent legislative developments elsewhere.

In 2006, the South African government enacted the *Second 2010 FIFA World Cup South Africa Special Measures Act* (2006). This statute enhanced the protection against ambush marketing available under the earlier nonevent specific laws with provisions tailored for a specific event. It includes a list of FIFA trademarks, as well as ordinary words that are protected under the Act. The words include 2010, World Cup, South Africa 2010, Johannesburg 2010, and many other place names followed by 2010. The protection for these words is cast so broadly that one critic noted that the effect of the Act would be to criminalize the promotion in South Africa of a world cup event in any other sport (Wheeldon, 2007).

In practical terms, combating ambush marketing was a high priority during the World Cup 2010. A special World Cup Court was created to deal with crime related to the event, including ambush marketing (DiManno, 2010, July 1; Bearak, 2010, July 6). The most notorious case brought before the court involved a group of women sponsored by a Dutch brewery who wore orange dresses, with no other visible branding, to a match. The international media furor over the case may have led to the charges being dropped (Gifford, 2010, June 22).

### London Olympic Games and Paralympic Games Act (2006)

The London Olympic Games and Paralympic Games Act (London Act) is explicit in creating a specific new right labeled the “association right” (*London Olympic Games and Paralympic Games Act*, Schedule 4, s. 1(1)) to combat ambush marketing in relation to a specific event. The law gives event organizers “exclusive rights in relation to the use of any representation (of any kind) in a manner likely to suggest to the public that there is an association [emphasis added] between the London Olympics” and between any goods or services or the person who provides them. (London Olympic Games and Paralympic Games Act of 2006, Schedule 4, s.1(1)). The right applies to any representation of any kind. The representation need only “suggest” to the public that there is an association between the event and a person or his or her goods or services. The public does not need to be confused (the trademark standard) or even be likely to be misled. The kinds of suggested associations that are actionable include contractual or commercial relationships of any kind, corporate or structural relationships, or a sponsorship relationship (London Olympic Games and Paralympic Games Act of 2006, Schedule 4, s. 1(2) (a)). While this right is already extremely broad in scope, the Bill in its original form contained a presumption

of infringement which was removed after opposition from the Institute of Practitioners in Advertising and the Advertisers’ Association (Padley, 2006).

Like other antiambush marketing statutes, the London Act contains lists of words that are presumptively considered to create an association. There are two groups of expressions. Evidence of an association may be created by use of a combination of words from the first group (games, “two thousand and twelve”, 2012, “twenty twelve”) or by the use of a word from the first group with a word or words from the second group (gold, silver, bronze, London, medals, sponsor and summer; London Olympic Games and Paralympic Games Act of 2006, Schedule 4, s. 3). The London ‘right of association’ is exercised by the London Organizing Committee of the Olympic Games and Paralympic Games (LOGOC, 2010), and remedies for infringement include damages, injunctions, an accounting of profits, and the delivery to the plaintiff or destruction of offending wares.

The London Act contains a limitation on the right of association. It deems that an association is not suggested “only [emphasis added] by making a statement” which:

- (i) accords with honest practices in industrial or commercial matters, and
- (ii) does not make promotional or other commercial use of a representation relating to the London Olympics by incorporating it in a context to which the London Olympics are substantively irrelevant (London Olympic Games and Paralympic Games Act of 2006, Schedule 4, s. 1(2)(b)).

It is not entirely clear what is intended to be captured by the second part of this exception—particularly as it is difficult to understand what is meant by a ‘substantively irrelevant’ context. As an exception intended to perhaps leave room for some expression, it is highly ambiguous. Until there has been time for case law to emerge that interprets this language, it will remain difficult to predict its reach.

The breadth of the association right could have a chilling effect. Padley (2006, p. 590) states “it is unclear how the courts will interpret the vague provisions – brand owners would be wise to exercise caution in using prohibited combinations of words.” Nevertheless, like the Sydney Act (1996), the London Act contains a provision giving recourse to individuals who feel they have been subject to groundless threats of legal proceedings for infringement of the right of association (London Olympic Games and Paralympic Games Act of 2006, s. 16). This would seem to be recognition of the potential overbreadth of the right.

### Olympic and Paralympic Marks Act of 2007 (Canada)

The Olympic and Paralympic Marks Act of 2007 (OPMA) is event-specific antiambush marketing legislation that was enacted in preparation for the Vancouver 2010

Olympic Winter Games. Although it contains provisions which specifically protect Olympic-related marks generally, as well as those created for use in relation to the Vancouver Games, the statute also addresses ambush marketing by association. The antiambush marketing provision applies within a period of time prescribed by regulations covering the lead up to, and the aftermath of, the Games. During this period, persons may not “in association with a trademark or other mark, *promote or otherwise direct public attention to their business, wares or services in a manner that misleads or is likely to mislead the public* [emphasis added]” into believing the following:

- (a) the person’s business, wares or services are approved, authorized or endorsed by an organizing committee, the COC or the CPC; or
- (b) a business association exists between the person’s business and the Olympic Games, the Paralympic Games, an organizing committee, the COC or the CPC. (Olympic and Paralympic Marks Act of 2007, s. 4)

Unlike trademark law or passing off, the public need not be confused as to the source of the defendant’s wares or services. Instead, they must only be misled (or be likely to be misled) into a belief that there is either official endorsement of the product or that there is some form of *association* with the Games or its organizers.

To determine whether rights under s. 4 of the Act have been infringed, s. 4(2) directs judges to consider the defendant’s use of words contained in schedules to the Act. The use of these words, alone or in combination, may be evidence of ambush marketing. The words include: Games, 2010, Tenth, 21st, Medals, Winter, Gold, Silver, Bronze, Vancouver and Whistler. A phrase in an advertisement such as “Spend your winter vacation in Vancouver” might therefore be considered evidence of ambush marketing.

The rights under s. 4 lie with event organizers. The Canadian legislation addresses certain procedural concerns of event organizers. Since major events take place within a fairly concentrated period of time, the ability to obtain expeditious remedies is considered very important. The OPMA (2007) makes it easier to get an interlocutory injunction against suspected ambush marketers by removing the requirement for a plaintiff to demonstrate irreparable harm during the designated protected period (Olympic and Paralympic Marks Act of 2007, s. 6). In addition to injunctive relief, the act provides for a full range of remedies including damages, an accounting of profits, and destruction or delivery up of offending wares (Olympic and Paralympic Marks Act of 2007, s. 5(1)).

The combination of a lowered threshold for injunctions and the uncertainty over what conduct might infringe the right in s. 4 gives rise to some distinct issues of fairness. The new law creates an environment where very few cases may ever be heard on the merits, as the issues will become moot once an interlocutory injunction has been granted for the period of the event (Scassa,

2008). An alleged ambusher would have to really wish to stand on principle to proceed with the costs of litigation to justify an advertising campaign whose time has long since come and gone.

## Major Events Management Act (2007)

Like the South African legislation, New Zealand’s Major Events Management Act of 2007 (MEMA) is not event-specific; instead, it applies to any event designated as a major event by Order in Council. To be designated as a major event, the event organizers must demonstrate that they have taken “all practicable measures under the existing law to prevent unauthorized commercial exploitation of the event and to protect its intellectual property and other legal rights” (Major Events Management Act of 2007, s. 7(3)(c)(ii)). Thus, MEMA pays lip service to this need for organizers and sponsors to properly manage their affairs by making it a criterion for the designation of an event as a major event by the Economic Development Minister.

The MEMA (2007) defines and addresses both ambush marketing by association and ambush marketing by intrusion. As regards the right of association, MEMA provides that:

10(1) No person may, during a major event’s protection period, make any representation in a way likely to suggest to a reasonable person that there is an association between the major event and –

- (a) goods or services; or
- (b) a brand of goods or services; or
- (c) a person who provides goods or services

The person who is considered to have made the representation can be either the person who has paid for, commissioned, or authorized the representation, or the person who is paid for the location or placement of the representation (Major Events Management Act of 2007, s. 10(2)). As is the case with the London Act (2006), MEMA relies upon a ‘likely to suggest’ standard, which sets a lower threshold than ‘likely to mislead.’ Something that is ‘likely to mislead’ must be demonstrated to create a likelihood that consumers will be misled by the statement, whereas a statement that is ‘likely to suggest’ will be assessed on its degree of suggestiveness, regardless of whether it is likely to actually mislead.

Like the OPMA (2007) and the London Act (2006), MEMA (2007) permits the designation of words, the use of which can result in a finding that this right of association has been violated. Under MEMA, “major event words” include any word declared by Order in Council to be a major event word (Major Events Management Act of 2007, s. 4). The use of such words does not automatically lead to a finding of infringement, but they are a factor for consideration by a court in determining whether the required association has been implied.



MEMA (2007) prohibits ambush marketing by intrusion by establishing “clean zones,” “clean transport routes,” and “clean periods.” Clean zones consist of:

- (i) the venue of a major event activity; and
- (ii) areas that are directly proximate to the area in subparagraph (i) (for example the adjacent footpath, road, or other thoroughfare); and
- (iii) areas that are otherwise necessary to enable the major activity to occur (Major Events Management Act of 2007, s. 16(3)(a)).

The clean zone is active during the “clean period” which includes the time in which the event takes place and “the times before and after the major event activity that are reasonable in the circumstances” (Major Events Management Act of 2007, s. 16(3)(c)). “Clean transport routes” extend for “no more than 5 kilometres from the closest point of the boundary of a clean zone” (Major Events Management Act of 2007, s. 16(4)(a)), and can consist of highways, motorways, or railway lines so long as they are “likely to be used by a substantial number of people to travel to or from a clean zone ... during the clean period” (Major Events Management Act of 2007, s. 16(4)(d)). Private property is excluded from clean zone regulation, even if it is found within the clean zone, but billboards, event venues, and public land are not so excluded. Within clean zones, unauthorized street trading or advertising are prohibited. A person who is just outside the border of a clean zone may not trade with persons inside the clean zone. In addition, s. 19 provides:

19. No person may advertise in a manner that is clearly visible from anywhere within a clean zone during a clean period without the written authorization of the major event organizer.

Under the law, a person who advertises is one who either pays for an ad to be placed, or who is paid for advertising space (Major Events Management Act of 2007, s. 21). Thus, for every piece of advertising, therefore, there are two ‘advertisers’ under the law. Typically, in trademark law or passing off, recourse is available only against the party who has infringed by illegitimately using the protected mark. Under the MEMA, organizers can choose either to pursue the ambusher or the party with whom the objectionable advertisement was placed. They may also pursue both (Major Events Management Act of 2007, s. 10(2)). The ability to pursue the host of the advertising content offers significant advantages. The host, depending on their level of resources, may be much more willing to pull an advertisement when faced with a potential law suit, as their stake in the matter may be relatively small compared with that of the advertiser.

MEMA creates certain exceptions for advertising that are worthy of note. For example, advertising “by an existing organization continuing to carry out its ordinary activities” is excepted (Major Events Management Act of 2007, s. 22(a)). Presumably, this allows businesses

within a ‘clean zone’ to maintain their signage during ‘clean periods,’ although they may not alter it in any way that would infringe the Act. An exception is also created for persons wearing clothes or carrying personal items, presumably bearing visible logos or brands (Major Events Management Act of 2007, s. 22(b)). However, this exception does not apply to participants or those officiating at the event, nor does it apply to volunteers associated with the event. Further, it does not apply where “that item is being worn, carried, or used in co-ordination with other persons with the intention that the advertising intrude on a major event activity or the attention of the associated audience” (Major Events Management Act of 2007, s. 22(b)(i)). These bans apply in a clean zone for a clean period, and a person who contravenes the ban violates the law, and is liable, on summary conviction to a fine of up to \$150,000 (Major Events Management Act of 2007, s. 23).

In MEMA, legislators have created a broad virtual space delimited by temporal and physical boundaries in which no one, regardless of their other relationships to teams, athletes, or organizations, may create any form of association with the event. If an organization is associated with an athlete, who in turn is associated with the event, the organization effectively risks liability by association.

Recourse under the MEMA can be exercised by the event organizer, who may in turn authorize sponsors to take proceedings in certain circumstances. Civil proceedings under the Act can lead to the full range of remedies, including damages, injunctions, and an accounting of profits.

## Anti-Ambush Marketing Legislation and Disclaimers

It is interesting to note that none of the antiambush marketing statutes specifically address the effect that disclaimers might have where a suggestion of association is alleged to be made. As noted above, courts in actions under the traditional recourses have found statements in advertisements that expressly disclaim any association with the event to be effective in reducing or eliminating a likelihood of confusion (*National Hockey League v. Pepsi Cola Canada Ltd.*, 1992; *National Football League v. Governor of Delaware*, 1977). It is an interesting question whether a disclaimer can be used to eliminate a ‘suggestion’ of association, or whether such suggestions are still actionable even if disclaimed.

## Summary

From Sydney in 2000 to New Zealand in 2007, one sees a progression from a fairly narrow right still focused on trademarks or indicia to a fully-fledged ‘right of association,’ along with its specially tailored remedies. This new right of association is broader than traditional rights associated with the protection of trademarks, as it protects against association with the event regardless of whether the defendant makes use of the event organizer’s marks. An association can be created by implication, and such laws

typically enumerate lists of rather ordinary words which, if present, might serve to suggest just such an association.

The ‘right of association’ has emerged as a means of attacking any unauthorized association with a major event. This right has grown from a prohibition on misleading consumers into believing there is an association, to a prohibition on merely suggesting an association. It is not just ambush marketing by association that may be targeted; New Zealand’s MEMA (2007) prohibits ambush marketing by intrusion, and creates a regimen designed to create clean zones delimited both spatially and temporally.

Although the Olympic Movement has led the way with its push for event-specific antiambush marketing legislation, an emerging phenomenon is antiambush marketing legislation that applies to any event designated as a protected event, as is seen in both South Africa and New Zealand. In the case of South Africa, generic legislation has been supplemented with an event-specific enactment.

## The Right of Association: A Critique

The rights of association created by the legislation discussed above are in addition to existing protections available in national law. Antiambush marketing legislation reaches into areas once untouched by state law, and left largely to private ordering and market forces. In this part of the paper, the right of association is critically considered. The section begins with an examination of the public policy principles that justify prior levels of protection. The need for additional measures to address ambush marketing is considered next. The paper argues that antiambush marketing legislation has resulted in the emergence of a kind of property right in events. The critique concludes with a discussion of the impact of the new right on the freedom of expression.

## Public Policy and Ambush Marketing

Existing laws, such as trademark law, the common law of passing off, or recourse against false or misleading advertising, have proven ineffective against much ambush marketing largely because these recourses have been crafted to serve different public policy objectives. The law of passing off and trademark law, as well as the law surrounding false and misleading advertising, have strong public policy goals of protecting consumers from deception. Further, the deception from which consumers are protected is one that would have a direct and immediate negative impact on them (Gervais & Judge, 2005). For example, passing off might lead a consumer to purchase goods that they would not otherwise have chosen. With false advertising, consumers are similarly misled into choosing a product based on false or misleading claims about its properties. These are direct harms to the consumer. While the law of passing off will also protect a trademark owner’s goodwill in their marks, use of the trademark of another is generally only actionable where consumers are likely to be misled.

By contrast, ambush marketing creates confusion about a company’s association with an event. The impact on the consumer is less evident. Thus preventing confusion as to sponsorship status does not so obviously protect consumers. Some research suggests (Moorman & Greenwell, 2005; Lyberger & McCarty, 2001; Sandler & Shani, 1989) that consumers are indifferent to, or unaware of, the identity of the official sponsors of major events. This research indicates that the identity of a sponsor may not play a significant role in a consumer’s choice of product or service. Antiambush marketing legislation protects a relationship to which many consumers may be largely indifferent, especially when it comes to making choices between products unrelated to sports (e.g., banking services, hardware items, gasoline). While trademark law protects a trademark owner’s investment in their mark, consumer protection remains an important part of the public policy underlying the law. Antiambush marketing legislation lacks this substantial consumer protection dimension. Instead, it protects investments by sponsors, and by extension, protects event organizers. It does so by seeking to prevent certain impressions or associations being created in consumer minds—quite distinct from any subsequent actions that they may or may not be influenced to take. While it is clear that the harm sought to be addressed by this legislation is different from that addressed by other legal recourses, the law ultimately targets influences on the thoughts of consumers, and not necessarily on their actions. This is a difficult and dangerous target for legislation.

## Need for Protection

Sponsors of major sport events pay very large sums of money for the opportunity to associate themselves directly with the goodwill generated by the event. Event organizers are also hungry for these revenue dollars—in fact they may rely on them substantially to offset the cost of the event. Ambush marketing is often an attempt to obtain the benefits of association without having to pay the large amounts of money required to become an official sponsor. The argument supporting antiambush marketing legislation is that the event organizers own any goodwill in the event, and that they alone should control the rights of other entities to associate themselves with it. Any unpaid association is an appropriation of this goodwill (O’Sullivan & Murphy, 1998). Yet even if ambush marketing has the potential to undercut the value of sponsorships, it is not necessarily the case that ambush marketing is a problem that requires a legislative solution—or that all of its manifestations are equally problematic. Hoek and Gendall (2002, p. 75), for example, describe a range of conduct considered to be ambush marketing by sponsors or event organizers and argue that much of it “seems part of the cut and thrust of a normal competitive environment.”

As noted earlier, the debate over the ethics of ambush marketing is far from resolved (O’Sullivan & Murphy, 1998). Crompton (2004, p. 11) notes that “a sponsor’s

investment does not operate in a vacuum, free of the competitive pressures that are inherent in the economic system." He argues that competitors of sponsors bear no ethical obligation to support their rival's sponsorships. Some also argue that corporations owe an obligation to their shareholders to exploit important marketing opportunities, and that ambush marketing strategies can fulfill these obligations (Crompton, 2004; O'Sullivan & Murphy, 1998). Any evaluation of the ethics of such conduct is necessarily subjective. Recent antiambush marketing legislation goes well beyond prohibiting head-to-head competition between rivals in the marketplace and captures a very broad range of activity. What is captured by the law may go well beyond what is generally considered unethical. It may also stifle legitimate (and beneficial) competition.

It is not always easy to determine whether ambush marketing actually causes harm, or, if there is harm, to quantify it. O'Sullivan and Murphy (1998, p. 355) conclude that such harm must exist and that "the effects of ambushing represent a significant weakening of official sponsor impact." Indeed, this is a common assertion by proponents of antiambush marketing legislation (*House of Commons Debate* (Canada), 16 May 2007; Government of New Zealand, 2006). Yet actual harm is difficult to assess. Marketing research yields ambivalent evidence about whether ambush marketing causes consumer confusion regarding sponsorship of events (Hoek & Gendall, 2002). On the issue of causation, it is important to note that a sponsor bears the burden of properly leveraging the value of the sponsorship and the event organizers also have a responsibility to protect sponsors and to keep 'clutter' to a minimum (Séguin et al., 2008). Failures by event organizers or sponsors to properly manage an event or their rights may be wholly or partly to blame for any diminution of the value of the sponsorship (Crompton, 2004; Garrigues, 2002).

It is difficult to conclude that particular instances of ambush marketing have negatively affected the value of sponsorships as so many other factors may influence their value. In the case of events such as the Olympic Games, high profile doping scandals, corruption, and human rights abuse may also result in a diminution of the value of sponsorships (Séguin et al., 2008). The actual impact on sponsorship value of ambush marketing activities is difficult to quantify; it is worth noting that even in an environment where ambush marketing is not restrained by special laws, the value of sponsorships for major events continues to increase (Vancouver Organizing Committee, 2008). In the New Zealand *Telecom* case, the court considered arguments that if the conduct of *Telecom* were not enjoined, the official sponsor would be "forced to seriously review future involvement" (*New Zealand Olympic and Commonwealth Games Association Inc. v. Telecom New Zealand*, 1996, p. 765). The court observed "Telecom's conduct certainly is of concern to the Olympic movement, but there is no proven inevitability of damage. These Olympic sponsorships are good sponsorships, as the behaviour of major corporations world-wide tends to

illustrate, even when beset by ambush marketing" (*New Zealand Olympic and Commonwealth Games Association Inc. v. Telecom New Zealand*, 1996, p. 765).

Ambush marketing often exploits opportunities provided by some failing on the part of organizers or sponsors. Kent and Campbell (2007, p. 119) note that "the best ambushing opportunities are properties where the event owner is not protecting its sponsors' interests and where the sponsor does not properly activate its sponsorship." This view is supported by other research as well (Meenaghan, 1996; Séguin & O'Reilly, 2008). Careful business practices can limit ambush marketing opportunities and can minimize the impact of ambush marketing campaigns (Hoek & Gendall, 2002). Further, legal tools such as contract law offer some assistance in protecting the value of sponsorships (Crompton, 2004).

Before the recent drive to deal with ambush marketing through legislation, marketing specialists analyzed the phenomenon from a business perspective noting, *inter alia*, the importance of properly valuing investments in sponsorship (Sandler & Shani, 1989), and developing guidelines for event organizers and sponsors so as to minimize the opportunities for ambush marketing (Meenaghan, 1996; Sandler & Shani, 1989). A variety of steps were taken to limit the potential for unpaid associations. In many cases, these steps were taken after ambush marketers had exploited an unguarded opportunity. It is now typical for tickets to major events to contain explicit contractual limitations on the ticketholder (*NCAA v. Coors Brewing Co.*, 2002). Olympic event tickets, for example, may not be used as prizes in contests or promotions. Tickets may also prohibit ticketholders from bringing outside food or drinks into venues where an official sponsor has the sole food and/or drink rights.

*National Hockey League v. Pepsi Cola Canada Ltd.* (1992) illustrates another gap in sponsorship and marketing practices that can be corrected without legal intervention. In that case, Coca-Cola had paid substantial sums of money to be the official sponsor of the NHL Playoffs. The NHL had independently sold the broadcast advertising rights to Molson Breweries Ltd., which in turn sold them to Coca-Cola's main competitor, Pepsi-Cola. Pepsi launched a television advertising campaign during the playoffs that, without using NHL logos or team names, promoted a hockey-related contest. The lawsuit by the NHL against Pepsi proved fruitless. The court noted that the NHL was, to some extent, the author of its own misfortune since its sale of the broadcast rights did not protect its official sponsor. The case is a clear lesson to event organizers with respect to sponsorship and broadcast rights.

Antiambush marketing legislation represents the point at which organizations recruit the coercive power of the state to reinforce their sponsorship agreements. The regulation of ambush marketing by intrusion offers a clear illustration. Event organizers have long used contract law to restrict ambush marketing by intrusion by controlling elements such as what fans can wear or bring into the stadium, what products can be sold on venue grounds,

as well as what types of ads may be placed in and around the venue (Gallu, 2008; Scherer, Sam, & Batty, 2005). Indeed, the IOC now requires organizing committees to acquire, well in advance, all outdoor advertising space within a certain radius of event venues, and to make that space available only to official sponsors of the Olympic Games (Curthoys & Kendall, 2001). These practices are now typically achieved through the enactment of laws ranging from municipal by-laws to provisions embedded in broader antiambush marketing legislation. The results are controversial. Indeed, the British Columbia Civil Liberties Association protested the extent of such measures taken in relation to the Vancouver Games (BCCLA, 2009). Specific measures to combat ambush marketing by intrusion have been directly incorporated into laws like MEMA.

The need for antiambush marketing legislation is not clearly established. Even if it were accepted that some additional protection is necessary, it is not clear that the very sweeping protections available in the new laws are warranted. Such protection amounts to a kind of corporate subsidy that may relieve organizers and sponsors of some of the responsibility they have traditionally borne for managing their brands and advertising campaigns, as well as for appropriate event management. At the same time, it removes from the community some of the benefits of hosting the event. Further, such legislation limits the range of expression available to corporate entities of all sizes who are not sponsors. It constrains the ability of individual athletes, teams, and national sport organizations to generate their own revenues to support their activities.

### The Propertization of Events

Antiambush marketing legislation seeks to address another perceived weakness of existing recourses. Passing off and trademark law give a right of action trademark owners who suffer injury to the goodwill associated with their marks. These recourses are not easily used by event organizers when ambush marketing takes place without using the protected marks associated with the event. Antiambush marketing legislation creates a right of association with the event itself, and the right to sue for infringement is generally controlled by the event organizers.

The recognition of a property right in an event is something the common law has long resisted. The classic case of *Victoria Park Racing & Recreation Grounds Ltd. v. Taylor* (1938) illustrates that while one can own and control the premises where a sport event takes place, it has not been possible to own the event itself. In that case, the plaintiff, Victoria Park Racing, objected to the defendant having built a platform that overlooked the plaintiff's racecourse. From the platform, the defendant Taylor was able to broadcast the results of the races. Latham J. rejected the plaintiff's arguments that the defendant's conduct was tortious, stating: "mere competition (certainly if without any motive of injuring the plaintiff) is

not a cause of action" (*Victoria Park Racing & Recreation Grounds Ltd. v. Taylor*, 1938, p. 493). A party who objects to others looking onto his or her property can, in the words of the Court, "erect a higher fence" (*Victoria Park Racing & Recreation Grounds Ltd. v. Taylor*, 1938, p. 494). Latham J. went on to state:

At sports grounds and other places of entertainment it is the lawful, natural and common practice to put up fences and other structures to prevent people who are not prepared to pay for admission from getting the benefit of the entertainment. In my opinion, the law cannot by an injunction in effect erect fences which the plaintiff is not prepared to provide (*Victoria Park Racing & Recreation Grounds Ltd. v. Taylor*, 1938, p. 494).

The protection of the exclusivity of the event itself is a matter for the organizers and not the law.

The court's response to the plaintiff in *Victoria Park* was to "erect a higher fence," something that organizations such as the IOC has been metaphorically doing for some time. The manifestations of this 'fence' are now legion. The fence is both a set of physical barriers (controlled entrance to venues, events, and facilities), as well as other barriers of private law ordering. Tickets to events contain detailed limitations on what can be done with the ticket, and on what can be worn or brought to the stadium. Event organizers are required to acquire and strictly control all advertising space within a certain radius of venues, and host cities may be required to limit certain advertising uses of private property close to venues. Flyovers may be prohibited, and other restrictions may be imposed by by-law or regulation on property use, permits to sell merchandise near venues, and a wide range of other activities (Bearby, 2002). The fence gets higher, but it is apparently not high enough. In addition to these rights to control the physical space around an event, the new right of association has dramatically shifted the paradigm and created a kind of property right in the event itself.

One of the difficulties in assigning property rights in events may be due in part to the collective nature of such events. The 2nd Circuit Court of the United States rejected the idea that sport events can be 'authored' (*National Basketball Association v. Motorola, Inc.*, 1997) when it considered the issue of whether copyright could be claimed in an event. The Court observed that one of the problems in attributing any form of ownership to a sport event is that "the league, the teams, the athletes, umpires, stadium workers and even fans ... all contribute to the 'work'" (*National Basketball Association v. Motorola, Inc.*, 1997, para 23). The multifaceted contributions to events are a large part of what makes it problematic to place excessive controls over expressive activity that occurs in and around the event in the hands of a single party.

The right of association belongs to the event organizers. Yet major international sport events require the efforts and participation of many stakeholders—public

and private, corporate and individual—for their operation and success. These events are heavily subsidized by the public purse, and their success depends on the support and participation of a wide range of entities and individuals going far beyond official sponsors. The events take place in real time, within real communities. They require a host country, a host city, a great deal of local organization and participation, the participation of a large number of nations, the involvement of national sport organizations from around the world, and the hard, and often unrewarded efforts of thousands of individual athletes. Nevertheless, with antiambush marketing legislation, event organizers alone may exercise an extraordinary monopoly over an extremely broad concept of association with the event (Orr, 1997), and may exercise this right against other stakeholders.

### Freedom of Expression

To date, the antiambush marketing statutes considered in this paper have not been challenged in the courts with respect to their impact on freedom of expression. This is partly due to the fact that they are relatively new statutes. It must also be noted, however, that the class of defendants most likely to be unfairly silenced by this legislation may not have the resources to launch challenges, or even necessarily to defend themselves in infringement actions brought against them. Nevertheless, these statutes do raise issues about their impact on freedom of expression, and this is the focus of this section. It is beyond the scope of this paper to explore the extent to which constitutional or other rights will impact on each statute considered here. The broader point is that in all jurisdictions that enact antiambush marketing legislation, issues of freedom of expression may arise. This section offers a brief outline of what these issues may be, and what particular features of antiambush marketing legislation may be most problematic.

In considering the impact of antiambush marketing legislation on the freedom of expression, it is important to focus first on the kinds of expression constrained by these laws. It should be noted that the Sydney Act (1996, s. 25), the London Act (2006, s. 8), the OPMA (2007, s. 3), and the MEMA (2007, s. 12) all contain exceptions for the communication of information by the news media or for the use of certain representations in artistic or literary works, although the scope of these exceptions varies from one statute to another. These exceptions acknowledge the potential impact of these laws on noncommercial expression and limit their application in this regard. Yet the laws also limit any commercial expression that suggests association with the event. In some cases, targeted commercial expression may include what individuals are permitted to wear or carry in or near venues. It also includes a wide range of otherwise legitimate commercial expression by small and medium-sized businesses.

Limiting how individuals interact with brands may unduly limit their freedom of expression. The brand is a reputation that transcends the family of trademarks

associated with the brand—it represents the intangible goodwill that is built by the brand owner. Increasingly, and in many contexts, brands are built by encouragement of public participation in their creation, manifestation, and articulation. Individuals are encouraged to wear clothing items bearing corporate logos and trademarks; they are encouraged to display brands on a wide range of other consumer goods. In many cases, the individual is encouraged to make the corporate brand an aspect of their individual image and identity (Schroeder, 2008). The brand is thus a highly interactive space. Antiambush marketing legislation suppresses nonsponsor brands, and in doing so it may impact the freedom of expression of individuals. Indeed, in the context of the Vancouver Games, the British Columbia Civil Liberties Association raised concerns about restrictions on ambush marketing by intrusion and their impact on freedom of expression (BCCLA, 2009).

Antiambush marketing laws may have other effects on expression. Assume, for a moment, the existence of a fictional sole-proprietor diner in Vancouver that decided to offer a choice of breakfast specials during the Olympic Games as well as in the period leading up to the Vancouver Games. Their ‘Gold,’ ‘Silver,’ and ‘Bronze’ breakfast specials might well fall foul of s. 4 of the OPMA (2007). Despite assurances from the Vancouver Organizing Committee (VANOC) that they would enforce their rights with sensitivity, this restaurant might well have been compelled to return to offering specials ‘A,’ ‘B,’ and ‘C,’ or some other bland and neutral option. This could occur notwithstanding the fact that no one would be misled into thinking that the restaurant is an official sponsor of the Games, and notwithstanding the fact that it is difficult to conceive of a sensible reason why a local business should not refer to or acknowledge a major public event taking place in its community. This is a normal part of life in a community. Shops in campus towns put up signs and banners congratulating graduates during convocation season. They may hope to profit from this show of enthusiasm, but it is hard to see how the community would benefit from prohibiting the mention of convocation without paying the university for the right to do so. Similarly, businesses in cities with major league sport teams also get into the spirit of a team’s run for the playoffs. Shops and restaurants may feature banners, logos, and messages of support. While such activities are no doubt driven at least in part by a desire to benefit from association with a popular team or event, local enthusiasm is also of value to the team or event. Antiambush marketing legislation does not only deal with high profile battles between a top exclusive sponsor and their corporate rivals. The laws capture a whole gamut of individual and corporate expression in a variety of contexts.

In constitutional democracies, the freedom of expression or freedom of speech is typically enshrined in a constitutional bill of rights (Canadian Charter of Rights and Freedoms of 1982, s. 2(b); Constitution of the United States of America, 1st Am.). Even democracies without a constitutional bill of rights—for example,

the United Kingdom or Australia—have recognized the freedom of expression as being a cornerstone of democratic society (*Nationwide News Pty Ltd. v. Wills*, 1992; *Lange v. Australian Broadcasting Corp.*, 1997; *Reynolds v. Times Newspapers Ltd.*, 1999). Without the freedom to express oneself and one's ideas—to exchange viewpoints, to criticize, and to comment, there can be no democracy.

At first blush, it might not be obvious that commercial speech is among the forms of expression protected by the freedom of expression. Yet courts have consistently found that corporations have the right to express themselves freely, including through commercial advertising (*Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989; *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 1980). Courts have been more reticent about extending the freedom of expression to permit unrestricted use of the trademarks of others. This is likely due to the fact that trademarks are considered a form of private property, and the freedom of expression does not generally go so far as to permit the use of another person's property without their consent (*Dallas Cowboys Cheerleaders Inc. v. PussyCat Cinema Ltd.*, 1979; *Source Perrier SA v. Fira-Less Marketing*, 1983). Nevertheless, this rationale has been challenged (Denicola, 1982).

Existing trademark law and laws around false and misleading advertising already limit speech by preventing others from using a trademark owner's mark, or by limiting certain types of statements. Yet there are significant differences between these laws and antiambush marketing legislation. Democratic societies accept that some limits on the freedom of expression are permissible because they serve a legitimate and important public purpose. The limits must, however, be capable of justification. In other words, the purpose of the limitation must be clear and well-defined (*R. v. Oakes*, 1986), and the public policy objective must be "pressing and substantial" (*R. v. Oakes*, 1986). With trademark law, the law of passing off, and laws against false and misleading advertising, it is not just the private rights of companies that are protected; these laws also serve clear public policy objectives around consumer protection. This added public policy dimension serves as a powerful justification for these laws, but this dimension is largely absent from antiambush marketing legislation. There is an argument that antiambush marketing laws protect national, state, and local investments in an event, but the causal link between the laws and the achievement of these objectives is more remote and more difficult to demonstrate. This may be even more the case where the enactment of a law is driven by the dictates of an unaccountable international sport organization. The MEMA tries to bolster its public interest dimension by specifically requiring the Minister of Economic Development, before recommending designation as a major event, to take into account a range of characteristics of the event, including some which relate to the benefits of the event which will flow to New Zealand and New Zealanders (Major Events Management Act of 2007, s. 7(4)). In

a similar vein, the amendments to the South African Merchandise Marks Act of 1941 (Merchandise Marks Amendment Act of 2002) limit protected event status to those events which contribute to the public interest. Nevertheless, such broad and general references to the public interest, in a context that lacks any means of measuring or evaluating that interest, will likely be of little weight in a constitutional analysis.

Laws restricting civil liberties must also avoid vagueness: a law that is unduly vague will create an uncertain standard that makes it impossible for individuals to know what conduct will or will not fall afoul of the law. Not only do vague laws force citizens to err on the side of caution, thus suppressing more expression than necessary, they set uncertain standards that may lead to arbitrary application by authorities (*R. v. Nova Scotia Pharmaceutical Society*, 1992; *Raz*, 1979; *Joseph Burstyn Inc. v. Wilson*, 1952). Vagueness will undoubtedly be a problem with antiambush marketing legislation. The laws are drafted in a deliberately open-ended manner (House of Commons Standing Committee D, 18 October 2005) and their enforcement is left largely to the discretion of heavily invested organizing committees.

Laws that infringe on rights are expected to do so as little as possible to achieve the valid legislative objective. In other words, they must be tailored so as to achieve the purpose of the law without capturing conduct that lies outside their purpose (*R. v. Heywood*, 1994; *Board of Airport Commissioners v. Jews for Jesus*, 1987). Assuming such an objective exists, courts will scrutinize the legislation to ensure that the protected rights are impaired only to the extent necessary. This will prove challenging for antiambush marketing laws that are crafted so as to capture a very broad and open-ended range of conduct. For example, in the case of the London Act, the extreme breadth of the 'right of association' was justified on the basis that it needed to respond to whatever the IOC might consider to be objectionable as the event proceeded (House of Commons Standing Committee D, 18 October 2005). The uncertainty created by such broad provisions will necessarily limit a wide range of commercial expression. By not limiting their application only to ambush marketing between competitors, or by not giving more scope for the recognition of competing interests, such as those of teams and athletes with their own commercial sponsorship arrangements, such laws may be found to extend beyond what is necessary to address any genuine problems posed by ambush marketing.

Antiambush marketing legislation is problematic on a constitutional level in part because it strays from the solid footing of protecting consumers into the far murkier area of controlling 'associations.' Such laws are drafted to capture all possible associations, and they are thus both extraordinarily broad and impermissibly vague. Vagueness is not cured by handing discretion to interpret and apply the law in a reasonable manner to heavily invested organizing committees. In short, antiambush marketing legislation and the emergent right of association are difficult to reconcile with a robust freedom of expression.

## Conclusions

There is no doubt that event organizers, perhaps under pressure from sponsors irritated by past ambush activity, have been troubled for many years by ambush marketing activities. However, these activities often exploited opportunities created by organizers or sponsors who failed to take all necessary steps either to protect the sponsor or to leverage the sponsorship rights. Further, activities considered to be ambush marketing tended to fall across a broad spectrum from those activities already captured by trademark law or passing off to activities which, though irritating, were what one might expect in a competitive commercial environment. Only a small portion of ambush marketing conduct actually crossed the lines of unfair competition as laid down by law.

In this context, it is fair to question whether legislation that creates a new right of association was appropriate or even necessary as a response. Even were it to be argued that such laws were needed, there is much in the enacted legislation that suggests that these laws are overbroad, creating a right that far exceeds what was needed to address hard-core ambush marketing.

Antiambush marketing legislation will have an impact on businesses both large and small. Local businesses will be prevented from referencing an event taking place in their community, and a wide range of businesses that cannot compete for sponsorship rights will face a threat of legal action for any attempt to reference a major public event. Some of these companies will be sponsors of individual athletes, teams, and amateur sport associations. The right to associate themselves with the athletes, teams, or associations they have supported is stifled to the extent that such associations connect the dots in any way with the major event in which the athlete or team is competing. There is likely to be an impact on individual athletes, teams, and amateur sport organizations as their ability to obtain sponsors may be affected by the limits imposed on the rights of those sponsors (Maki, 2009).

There is a cost to creating a 'right of association' in public events that can be used to ban all unpaid associations. This cost is borne largely by the public, whose participation and involvement in the event is ironically necessary to its success. To appreciate the nature of this cost, it is important to step outside of the paradigm that sees every form of commercial association with an event as an infringement of a right of ownership. It is normal for people to reference events occurring in their community—particularly if the events are of an international scale and organizers have worked hard to draw their attention to the events. Local businesses are members of the community as well, and there is a fine line between policing unfair competition and prohibiting any references to public events. In addition, many businesses support individual athletes, as well as local and national sport activities and events.

It is conceivable that some of the expression silenced by antiambush marketing legislation might actually have

served to enhance the value of sponsorships. Leaving aside the negative press coverage that might tarnish an event if the public is too constrained in its ability to express itself in relation to the event, associations such as that described in the fictional diner example might simply encourage enthusiasm for the event and create a sense of community support and engagement that has an overall effect of enhancing the value of sponsorship for those corporations that clearly identify themselves as official sponsors of the event.

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