

Ambush Marketing: Law and Ethics

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Abbreviations

COC – Canadian Olympic Committee

CPC – Canadian Paralympic Committee

CSR - Corporate Social Responsibility

IOC – International Olympic Committee

OPMA – *Olympic and Paralympic Marks Act*

s. - section

TMA – *Trade Mark Act*

TOP – The Olympic Program

VANOC – Vancouver Olympic Committee

Introduction

In the 20th century major sporting events became extremely commercialised. This was partly due to the development of television.¹ At the beginning stages sporting event costs were only partly covered by private donations but nowadays sponsorship and television rights have become the main sources of financing.² This is because sponsoring a major event gives a company the exclusive right to associate itself with the event and thus to benefit from the event goodwill. However, together with the commercialisation of sports a phenomenon called “ambush marketing” began occurring which alters this association.

Ambush marketing was initially defined as “a company’s *intentional* effort to weaken - or ambush - its competitor’s “official” sponsorship. It does this by engaging in promotions and advertising that trade off the event or property’s goodwill and reputation, and that seek to confuse the buying public as to which company *really* holds official sponsor rights.”³ With the development of the practice other, much broader definitions have also been suggested. Some authors consider that ambushing is any attempt to promote one’s business during an event sponsored by a competitor.⁴

¹ Phil Schaaf, *Sports, Inc.: 100 Years of Sports Business: Event Evolution ...* (Amherst, N.Y.: Prometheus Books, 2004) at 36.

² Tony Meenaghan, “Ambush Marketing – A Threat to Corporate Sponsorship” (1996) 38:1 Sloan Management Review 103 at 105 [Meenaghan, “Threat to Corporate Sponsorship”].

³ Steve McKelvey, “Sans Legal Restraint, No Stopping Brash, Creative Ambush Marketers” *Brandweek* 35:16 (18 April 1994) 20.

⁴ Janet Hoek & Philip Gendall, “Ambush Marketing: More than Just a Commercial Irritant?” (2002) 1:2 Entertainment Law 72 at 74.

It is difficult to give a single, complete definition to ambush marketing because it is not a distinct practice and takes on various forms; there are numerous strategies that can be applied to ambush an event, including actual infringements of intellectual property rights of the event organisers or official sponsors. These latter cases have always been considered piracies and have clear-cut legal remedies. But some marketing tactics, such as the use of unprotected generic words and images that create association with the event, are more difficult to judge since they often don't include illegal actions. Consequently, in such cases the legal remedies are more ambiguous or may not even exist.⁵

Ambush marketing may occur during various events, such as artistic events or fashion shows,⁶ but due to length limitations this research will only discuss ambush marketing in sporting events with an emphasis on the Olympics.

Ambush marketing is believed to have first occurred at the 1984 Los Angeles Olympics where Fuji was the official sponsor of the Games, but Kodak sponsored the ABC broadcasting of the event and the official film of the US track team, thus ambushing Fuji.⁷ After that companies have often ambushed the Olympics. So, in order to prevent unauthorised association with the Olympics, the Olympic Charter now determines that in order to host the games, countries must provide sufficient protection for all Olympic properties (e.g. emblems and symbols) of the IOC.⁸

⁵ S. Townley, D. Harrington & N. Couchman, "The Legal and Practical Prevention of Ambush Marketing in Sports" (1998) 15:4 *Psychology and Marketing* 333 at 335.

⁶ Arul George Scaria, *Ambush Marketing: Game within a Game* (New Delhi: Oxford University Press, 2008) at 29.

⁷ Dennis M Sandler & David Shani, "Olympic Sponsorship vs. "Ambush" Marketing: Who gets the Gold?" (1989) 29:4 *Journal of Advertising Research* 9 at 10-11 [Sandler & Shani, "Who Gets the Gold?"]

⁸ *Olympic Charter*, International Olympic Committee 2007, Bye-laws to Rules 7-14 at point 1.

This is the reason why in 2007 Canada adopted the *Olympic and Paralympic Marks Act*⁹ which protects certain marks, names and expressions from unauthorised use, as well as prohibits any unauthorised business association with the Olympic and Paralympic events. This specific legislation enacted solely for the Olympics and Paralympics contrasts with the *Trade-marks Act*, the *Copyright Act* and the *Competition Act*, which also provide legal remedies for piracy and unfair competition, but which are of general use.

The first part of this research discusses the abovementioned legislation in order to provide a general overview of how different acts can be used to challenge ambush marketing. The Olympic and Paralympic Marks Act is analysed in detail, pointing out the negative effects of enacting such event-specific legislation. For the purposes of this analysis at times parallels will be drawn with the Australian Olympic legislation since it has been subjected to considerable research.

A separate chapter discusses case law on ambush marketing which, unfortunately, is scarce. One of the reasons for this is that court proceedings are costly and time-consuming, so parties involved in an alleged ambush marketing case prefer to settle the dispute through negotiations.¹⁰ Accordingly there is only one Canadian case that treats ambush marketing directly: the *National Hockey League (NHL) v. Pepsi-Cola Canada Ltd.* in which Pepsi-Cola was allegedly ambushing Coca-Cola's official sponsorship of the NHL games. The Supreme Court of British Columbia held that, although aggressive, Pepsi-Cola's advertisement was not unlawful. Therefore, the case was decided in favour of Pepsi-Cola.¹¹ In an attempt to demonstrate the overall legal standing of

⁹ *Olympic and Paralympic Marks Act*, S.C. 2007, c. 25 [OPMA]

¹⁰ Barbara Ettore, "Ambush Marketing: Heading Them Off at the Pass" (1993) 82:3 Management Review 53 at 56.

¹¹ *National Hockey League v. Pepsi-Cola Canada Ltd.*, [1992] 70 B.C.L.R. (2d) 27 [*National Hockey League*]

ambush marketing activities this research also identifies non-Canadian, more specifically US, Indian and New Zealand cases which have discussed ambush marketing.

Besides the legal implications, ambush marketing has an ethical dimension to it as well; some find that it is just smart business, such as Jerry C. Welsh, a former head of worldwide marketing at American Express. According to him, a company does not have a moral obligation to remain inactive when there is an official sponsor and thus to let the latter gain all the benefit from the event.¹² Nonetheless, some strategies of ambush marketing are evidently morally unacceptable, such as, engaging in congratulatory advertising for teams that are sponsored by one's competitors. This strategy is mentioned by Tony Meenaghan as being ethically "questionable".¹³ Some authors have even identified ethical theories that can be applied in deciding whether ambush marketing is an ethical practice or not.¹⁴ Hence, the second part of this research will present and discuss some of the opinions in the existing literature and will draw a relevant conclusion.

Lastly, even though there are some legal remedies available for ambush marketing cases, it is certainly better to prevent a problem from occurring than to take legal action once it has occurred. It is for this reason that many authors have suggested practical solutions that can help avoid ambush marketing, such as educating the public about the negative effects of the practice

¹² Meenaghan, "Threat to Corporate Sponsorship", *supra* note 2 at 109.

¹³ Tony Meenaghan, "Point of View: Ambush marketing: Immoral or imaginative practice?" (1994) 34:81 *Journal of Advertising Research* 77 at 82 [Meenaghan, "Point of View"].

¹⁴ Paul O'Sullivan & Patrick Murphy, "Ambush Marketing: The Ethical Issues" (1998) 15:4 *Psychology & Marketing* 349 at 358.

and policing events so as to find and stop ambush incidences.¹⁵ The concluding part of this research identifies and discusses these and other practical steps that can be taken by event organisers and official sponsors in order to prevent ambush marketing.

Definition of “indicia”

The term “indicia” which is often used throughout this research should be understood as “signs, indications, or distinguishing marks”.¹⁶

¹⁵ E. Vassallo, K. Blemaster & P. Werner, “An International Look at Ambush Marketing” (2005) 95:6 The Trademark Reporter 1338 at 1354.

¹⁶ Oxford Dictionaries Online: <http://www.oxforddictionaries.com/page/askoxfordredirect> [Oxford Dictionaries]

Part 1: Ambush Marketing and the Law

The first chapter of this part concentrates on defining and explaining the practice of ambush marketing. The second chapter discusses the legal aspect of ambush marketing, providing an overview of relevant legislation, supported by case law.

Chapter 1: What is Ambush Marketing?

The present chapter attempts to find a definition for ambush marketing and to explain the different strategies that companies use in their ambush marketing campaigns. The second section discusses the reasons why companies engage in ambush marketing and presents the impact of this practice.

Section 1: Defining Ambush Marketing and the Strategies Used

This section discusses the term “ambush marketing” and some of the definitions given to the practice. It also identifies some of the numerous tactics companies use in their ambush marketing campaigns.

A brand sponsors an event in return for various rights connected with the use of the event’s intellectual property, as well as to be able to associate itself with the event.¹⁷ However, sometimes a competitor of the sponsor might come into play and attempt to create association

¹⁷ Scaria, *supra* note 6 at 18.

with the event and divert the audience's attention to its business. This is called ambush marketing.¹⁸

There have been many attempts to define ambush marketing, but there is no single complete definition. The reason for this is that it is not a distinct practice but is rather a marketing approach that can be carried out through various means and combinations of practices.

The term "ambush" means "a surprise attack by people lying in wait in a concealed position", which derives from old French *embusche*: 'to place in a wood'.¹⁹ Interestingly, it was Jerry C. Welsh; American Express' former head of worldwide marketing and an advocate of ambush marketing himself who came up with the term "ambush marketing".²⁰ Ambush marketing is sometimes also called "parasite marketing".²¹

Authors have suggested both narrow and rather broad definitions for ambush marketing. In the narrow sense it is a marketing approach that aims to weaken a competitor's connection with an event which has been created as a result of sponsoring that event.²² But a broader definition characterises it as "the unauthorised association by businesses of their names, brands, products or services with a sports event or competition through one or more of a wide range of marketing activities... to achieve maximum commercial impact either by undermining the 'official'

¹⁸ Meenaghan, "Point of View", *supra* note 13 at 77.

¹⁹ Oxford Dictionaries

²⁰ Meenaghan, "Threat to Corporate Sponsorship", *supra* note 2 at 109.

²¹ S. McKelvey & J. Grady, "An Analysis of the Ongoing Global Efforts to Combat Ambush Marketing: Will Corporate Marketers "Take" the Gold in Greece?" (2004) 14 *Journal of Legal Aspects of Sport* 191 at 193.

²² Jason K. Schmitz, "Ambush Marketing: The Off-Field Competition at the Olympic Games" (2005) 3:2 *Northwestern Journal of Technology and Intellectual Property* 203 at 205.

competitor's exposure and/or to boost the ambusher's own brand awareness."²³ With the development of the practice even broader definitions have been given to ambush marketing, so nowadays merely promoting your product can be seen as ambush marketing if the timing coincides with a sponsored event.²⁴

As mentioned above, the difficulty of defining ambush marketing is due to the numerous marketing strategies that can be applied in order to ambush an event. Some of these strategies are directly linked to and made possible due to the structural system through which the Olympics are financed. Such is the media coverage of an event. American Express, famous for using this strategy, used it in 1994 to ambush Visa at the Norwegian Winter Olympics. They used the following ingenious slogan: "If you're travelling to Norway, you'll need a passport, but you don't need a visa".²⁵ Meenaghan states that television coverage attracts an audience bigger than the on-site audience and is completely legal. Another good example is the 1984 ambushing of the Olympic sponsor Fuji by Kodak through television broadcasting of the event.²⁶ However, at the next Olympics Fuji ambushed that year's official sponsor Kodak by sponsoring the US swimming team and actively associating itself with the Olympics by using its sponsorship rights.²⁷ This in itself is another strategy of ambushing, where a sponsor finances a relatively small category but uses this to promote itself aggressively.²⁸

²³ Townley, S. *Ambush/Parasitic Marketing and Sport* (London: Professional Direction Ltd., 1992) cited in Michael Payne, "Ambush Marketing: The Undeserved Advantage" (1998) 15:4 *Psychology & Marketing* 323 at 324.

²⁴ Meenaghan, "Point of View", *supra* note 13 at 81.

²⁵ Scaria, *supra* note 6 at 31.

²⁶ Meenaghan, "Threat to Corporate Sponsorship", *supra* note 2 at 106.

²⁷ Sandler & Shani, "Who Gets the Gold?", *supra* note 7 at 11.

²⁸ Meenaghan, "Threat to Corporate Sponsorship", *supra* note 2 at 106.

Joint promotions are also a means for ambushing whereby official sponsors enter into contract with non-sponsors who have not paid any sponsorship fees. This enables the non-sponsors to associate themselves with the event through the joint promotion.²⁹

The above mentioned are only a few common strategies. Many other creative tactics can also be adopted by ambushers, such as using images that create association with the event (e.g. photos of sports gear), contracting with athletes to feature in promotion materials or using media time for advertisement during event-related television programmes.³⁰ An ingenious method uses helicopters and planes to fly posters over the event stadium.³¹ Nowadays even cyberspace is being used to engage in ambush marketing.³² Besides direct advertisement, any tactic that makes a brand's name heard or its trademarks known can be regarded as ambushing, such as, for example, the giving away of branded products to the spectators in a stadium being used for the event. For instance, at the 1996 Atlanta Olympics Nike had handed out paper flags to the audience before they entered the stadium. The flags featuring the Nike logo were caught on camera and thus served as advertisement.³³ Even tattooing company indicia on athletes during sporting events is a tactic ambushers sometimes use!³⁴

²⁹ Simon Gardiner *et al.*, *Sports Law*, 3d ed. (Abingdon, Oxon: Routledge-Cavendish, 2006) at 460.

³⁰ Meenaghan, "Threat to Corporate Sponsorship", *supra* note 2 at 106-107.

³¹ Michael A., Lisi. "Ambush Marketing: Here to Stay?" 12:1 *Intellectual Property Strategist* 3 (2005), online: http://www.lawjournalnewsletters.com/issues/ljn_intproperty/12_1/ at 3.

³² Scaria, *supra* note 6 at 41.

³³ Cristina Garrigues, "Ambush Marketing: Robbery or Smart Advertising?" (2002) 24:11 *European Intellectual Property Review* 505 at 506.

³⁴ John Vukelj, "Post No Bills: Can the NBA Prohibit its Players from Wearing Tattoo Advertisements?" (2005) 15 *Fordham Intellectual Property, Media & Entertainment Law Journal* 507 at 508-509.

It is noteworthy that the classification of practices as ambush marketing keeps changing with time. Some of the practices that were once considered ambush marketing are now regarded as acceptable legitimate activities, such as financing a team squad in sports like soccer and rugby.³⁵

Section 2: Reasons and Effects of Ambush Marketing

This section discusses a few reasons why companies began ambushing the Olympics and why they continue to do so. Ambush marketing is often viewed as a negative practice, but is it really as harmful as is alleged? In order to demonstrate the true impact ambush marketing has on the ambushed event and consumers, some scholarly research and surveys are also presented.

Ambush marketing is a quite new and heated topic, because of the specific importance sponsorship plays in sporting events, mainly, the Olympics. At the beginning it did not play this role. The term “sponsorship” can be defined as “[t]he provision of resources (e.g., money, people, equipment) by an organization directly to an event or activity in exchange for a direct association to the event or activity. The providing organisation can then use this direct association to achieve either their corporate, marketing, or media objectives.”³⁶

Although the Olympics has a history of almost 3000 years, the first modern Olympics was held in Athens in 1896 and this was when the Olympic brand image began developing, including the

³⁵ Meenaghan, “Threat to Corporate Sponsorship”, *supra* note 2 at 106.

³⁶ Sandler & Shani, “Who Gets the Gold?”, *supra* note 7 at 10.

creation of the rings logo.³⁷ Revenues for the event came mostly from attendance and commemorative stamps. Sponsorship in the Olympics was mostly limited to the printed media.³⁸ After the beginning of the 20th century sporting events quickly became much commercialised. This commercialisation was firmly linked to the development of television, which enables brands to buy commercial time on television for advertisement.³⁹

Another turning point was 1985 when the IOC established TOP which created 12 product categories. The sponsor of each category receives privileges such as the exclusive use of Olympic symbols and indicia.⁴⁰ Besides the rights Olympic sponsors acquire in return for financing, people consider them innovative and modern and have the impression that they are socially responsible.⁴¹ This is due to the association with the valuable Olympic goodwill. Thus, there are considerable benefits to sponsoring the Olympics. However, as these benefits of sponsorship multiplied, competition amongst brands also increased and it became harder to associate oneself with the Olympics. This in turn became a reason for ambush marketing to occur with ambushers trying to find ways to create and benefit from association with the event.⁴²

According to Sandler and Shani the reason why companies ambush the Olympics is the extensive commercialisation of the event which makes it similar to any other “commercial battleground”.

Moreover, when the IOC began making companies bid for broadcasting rights, network costs

³⁷ Elizabeth L. R. Elam & Curt L Hamakawa, “International Sport Marketing: Branding and Promoting the 2006 Olympic Winter Games” (Fall 2008) 1 *The Journal of Business Cases and Applications* 1 at 1-2.

³⁸ Schaaf, *supra* note 1 at 19-20.

³⁹ *Ibid.* at 36.

⁴⁰ Dennis M Sandler & David Shani, “Ambush Marketing: Is Confusion to Blame for the Flickering of the Flame?” (1998) 15:4 *Psychology and Marketing* 367 at 370 [Sandler & Shani, “Is Confusion to Blame?”].

⁴¹ Meenaghan, “Threat to Corporate Sponsorship”, *supra* note 2 at 105.

⁴² Crow, Dean & Hoek, Janet. “Ambush Marketing: A Critical Review and Some Practical Advice” (2003) 14 *Marketing Bulletin* 1 at 2.

began increasing. This in turn obliged television networks to create more advertising space to pay off their own costs. The advertising space can be bought by non-sponsor companies. As a result this situation gives companies the possibility to ambush the event by legally advertising during the broadcasting.⁴³

But does ambush marketing actually cause any harm?

As mentioned above, in return for sponsoring an event a company is given the possibility to directly access the audience of the event. This connection between the sponsor and the audience may be altered if an ambusher starts using the event to give its own message and to divert the audience's attention on its business. And this creates false association with the event. As a result the official sponsor cannot benefit from its link with the event as it would have otherwise.⁴⁴

According to Meenaghan, for sponsors, especially those carrying out their business in fields that are normally not open to advertisements, such as alcohol and tobacco industries, Olympic sponsorship is an important involvement and investment; therefore ambush marketing is likely to harm especially these sponsors. Furthermore, according to him ambush marketing damages the integrity of the Olympics and is thus harmful to the IOC as well.⁴⁵

Some authors find that ambush marketing causes financial harm to events because it damages the exclusivity of the official sponsor's sponsorship resulting in loss in the value of sponsorship.

⁴³ Sandler & Shani, "Is Confusion to Blame?", *supra* note 40 at 372-373.

⁴⁴ O'Sullivan & Murphy, *supra* note 14 at 355.

⁴⁵ Meenaghan, "Point of View", *supra* note 13 at 79.

This in turn damages the financing of the Olympics since brands will not be willing to invest in an event which is going to be ambushed and their sponsorship diluted.⁴⁶ However, according to others, in reality ambush marketing helps determine the true value of sponsorship. It cannot damage the event financing as global sponsors will not stop supporting the Olympics because of possible ambushing. On the contrary, ambush marketing makes organisers put more effort into protecting the event's intellectual property.⁴⁷

Another issue is the effect of ambush marketing on consumers. In this regard research and surveys have been carried out by various researchers.

In 1988 Sandler and Shani conducted a survey on the Calgary Winter Olympics. The survey results showed that 20% of those questioned correctly recalled the official sponsors of the event and 39% correctly recognised them. According to the survey official sponsors gained higher scores in consumer awareness of their sponsorship status. Ambushers did not have considerably better results even compared to non-ambushing companies who were not sponsors. Only in recalling brand names did some of the ambushers have higher scores than the regular non-ambushing companies.⁴⁸ Another similar study was carried out by the same researchers in 1992 and the results were similar. The only difference was that the percentage for recalling and recognising official sponsors was higher than that in 1988.⁴⁹

⁴⁶ See e.g. Lori L. Bean, "Ambush Marketing: Sports Sponsorship Confusion and the Lanham Act" (1995) 75 B.U. L. Rev. 1099 cited in Scaria, *supra* note 6 at 44.

⁴⁷ See e.g. Schmitz, *supra* note 22 at 208.

⁴⁸ Sandler & Shani, "Who Gets the Gold?", *supra* note 7 at 13-14.

⁴⁹ S. R. McDaniel & L. Kinney, "Ambush Marketing Revisited: An Experimental Study of Perceived Sponsorship Effects on Brand Awareness, Attitude Toward the Brand and Purchase Intention" (1996) 3:1/2 Journal of Promotion Management 141at 147.

The above surveys showed that ambush marketing is usually not very beneficial for ambushers. However, according to Meenaghan, at the 1992 Winter Olympics Wendy's was identified as the official sponsor by the majority of the public even though McDonald's was the official sponsor of the US team. Wendy's had featured Kristi Yamaguchi, a champion figure-skater, in its fast-food advertisement and ended up being identified by 57% of the public surveyed as the official sponsor. McDonald's was correctly identified by only 37%.⁵⁰

Another survey carried out with regards to the 1994 Winter Olympics' electronic media audience proved that in four product categories only 1 official sponsor scored higher in brand attitude than its ambusher. Three ambushers actually had higher purchase intention scores than official sponsors. Accordingly, this study found ambushing to be cost-effective.⁵¹

Interestingly, in 1997 the IOC conducted a research of its own which showed that consumers have a negative attitude towards ambushers. 80% of those questioned found that only official sponsors should use messages related to the Olympics in their promotions. Irrespective of this fact Meenaghan finds that this study did not ascertain whether consumers actually care about the practice of ambush marketing or not.⁵²

“Consumer Attitudes of Deception and the Legality of Ambush Marketing Practices” was another interesting study carried out in 2005 which showed that consumers are by and large

⁵⁰ Meenaghan, “Threat to Corporate Sponsorship”, *supra* note 2 at 108.

⁵¹ McDaniel & Kinney, *supra* note 49 at 165.

⁵² Tony Meenaghan, “Ambush marketing: Corporate strategy and consumers' reactions” (1998) 15:4 *Psychology and Marketing* 305 at 314-315 [Meenaghan, “Corporate strategy”]

indifferent to the practice. At the same time it revealed that consumer attitude towards the practice changes, depending on the type of ambush marketing in question and on the age and gender of the consumer.⁵³

As seen above, the results of the various studies carried out thus far are not entirely consistent with each other. However, they give an overall idea about consumer attitude. They also prove that there is no single answer and that different factors have to be taken into account when assessing the effects of ambush marketing.

⁵³ Anita M. Moorman & T. Christopher Greenwell, “Consumer Attitudes of Deception and the Legality of Ambush Marketing Practices” (2005) 15:2 Journal of Legal Aspects of Sport, 183 at 203.

Chapter 2: The Legal Dimension of Ambush Marketing

This chapter presents the main body of legislation applicable to ambush marketing cases. More specifically, the first section discusses the relevant Canadian intellectual property and competition legislation, including the *Olympic and Paralympic Marks Act* enacted specifically for the Olympics. The second section focuses on relevant case law, with examples from Canada, the US, New Zealand and India in an attempt to provide an overview of how courts have treated ambush marketing thus far.

Section 1: Legislative responses

The present section discusses the general regime for intellectual property protection which is applicable for ambush marketing cases in Canada. The second paragraph of the section examines the *Olympic and Paralympic Marks Act* in detail and raises the question of the necessity of enacting such event-specific legislation.

§1. General Regime

This paragraph provides an overview of the legal remedies available for ambush marketing cases by presenting relevant Canadian intellectual property and competition acts. The emphasis is put on trademark legislation and the common law remedy of passing-off.

The unauthorised use of Olympic marks and indicia can create liability because all Olympic property, which includes Olympic logos, emblems and symbols, belongs exclusively to the

IOC.⁵⁴ However, in classical ambush marketing cases the trademark of another is not used, but rather the company uses its own trademark and associates itself with the event through various creative tactics.⁵⁵ Nonetheless intellectual property and competition statutes are available for any ambush marketing case they can be applied to.

In Canada such legislation includes:

- A. The *Copyright Act*⁵⁶
- B. The *Industrial Design Act*⁵⁷
- C. The *Trademark Act*⁵⁸ and common law remedy of passing-off
- D. The *Competition Act*⁵⁹

A. The Copyright Act

The *Copyright Act* protects “... original, literary, dramatic, musical and artistic work...”⁶⁰ If any Olympic indicia were to be protected under this act then it would have to meet the originality test set by the Supreme Court of Canada in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*.⁶¹ In the case the Court held that

an “original” work under the *Copyright Act* is one that originates from an author and is not copied from another work. ... In addition, an original work must be the product of an author’s exercise of skill and judgment. The exercise of skill and judgment

⁵⁴ *Olympic Charter*, *supra* note 8 at s.7.2.

⁵⁵ Nancy A. Miller, “Ambush Marketing and the 2010 Vancouver-Whistler Olympic Games: A Prospective View” (2007) 4:2 *International Legal News*, online: *International Legal News* http://www.imakenews.com/iln/e_article000867643.cfm

⁵⁶ *Copyright Act*, R.S.C. 1985, c. C-42.

⁵⁷ *Industrial Design Act*, R.S., 1985, c. I-9.

⁵⁸ *Trade-marks Act*, R.S.C. 1985, c. T-13.

⁵⁹ *Competition Act*, R.S.C. 1985, c. C-34.

⁶⁰ *Copyright Act*, *supra* note 56 at article 5.1.

⁶¹ *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, 2004 SCC 45 [*Society of Composers, Authors and Musical Publishers*].

required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. While creative works will by definition be “original” and covered by copyright, creativity is not required to make a work “original”.⁶²

This requirement means that generic words such as “winter” cannot be protected under copyright due to lack of originality. Furthermore, copyright protection is limited in time and includes only the life of the author plus 50 years.⁶³ This does not seem very practical for such a continuing event as the Olympics.

Article 27 of the *Copyright Act* specifies that “[i]t is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.” Accordingly, only the owner has the right “to produce or reproduce the work or any substantial part thereof in any material form whatever ...”⁶⁴ In some cases there can also be secondary infringement, for instance, when a copy of a work is sold or rented out.⁶⁵ This means that for a remedy under the *Copyright Act* to exist firstly it has to be proven that the Olympic organisers have copyright over the indicia and then it has to be proven that the indicia or a substantial part of it has been directly used in an ambusher’s campaign.⁶⁶ Whether or not the part used was substantial depends on the quality of that part and should include the main features of the work that make it original.⁶⁷ Even if only certain words from the work are used there might still be an infringement. A successful copyright infringement case took place in 2002 at Salt Lake City, where a print store was using “The 2002 Olympic Mascots”

⁶² *Ibid.* at para 25.

⁶³ *Copyright Act*, *supra* note 56 at article 6.

⁶⁴ *Ibid.* at article 3.1.

⁶⁵ *Ibid.* at article 27.2.

⁶⁶ Kevin Garnett, Gillian Davies & Gwilym Harbottle, *Copinger and Skone James on Copyright*, (London: Sweet and Maxwell, 2005) at 373.

⁶⁷ *Ibid.* at 384-385.

and “2002 Winter Olympics” in a print campaign. “Proud not to be sponsors of the 2002 Winter Olympics” was the slogan used and pictures similar to the Olympic mascots were also used. The Olympic organisers succeeded in halting the company’s use of the advertisement.⁶⁸

B. The Industrial Design Act

The *Industrial Design Act* provides protection for “... shape, configuration, pattern or ornament and any combination of those features...” that are in an article, which is defined as a thing “made by hand, tool or machine”.⁶⁹ This means that Olympic symbols as such cannot be protected under this act, unless they take a shape in an article. Furthermore, there is the same originality requirement for industrial designs as under copyright legislation. In fact, as the Court established in *Bata Industries Ltd. v. Warrington Inc.*, for industrial designs “jurisprudence demands a higher degree of originality than is required with regard to copyright. It seems to involve at least a spark of inspiration on the part of the designer either in creating an entirely new design or in hitting upon a new use for an old one...”⁷⁰ A basic search in the Canadian Industrial Designs Database does not find any industrial design owned by an Olympic committee.⁷¹ For the Sydney 2000 Games the Australian Olympic Committee was unable to register any Olympic design under the Australian Design Act because of the new and originality requirement.⁷² Since, according to article 3 of the act registration is a necessary precondition for design protection,

⁶⁸ Scaria, *supra* note 6 at 65-66.

⁶⁹ *Industrial Design Act*, *supra* note 57 at article 2.

⁷⁰ *Bata Industries Ltd. v. Warrington Inc.* [1985] F.C.J. No. 239.

⁷¹ Canadian Industrial Designs Database online: Canadian Intellectual Property Office <http://www.ic.gc.ca/app/opic-cipo/id/bscSrch.do?lang=eng> accessed 12.08.2010.

⁷² Jane Sebel & Dominic Gyngell, "Protecting Olympic Gold: Ambush Marketing and Other Threats to Olympic Symbols and Indicia" (1999) 22:3 University of New South Wales Law Journal 691 at 695.

then it is logical to conclude that the same situation would occur in Canada, unless the registrar were to adopt a milder approach with regard to the originality requirement.

C. The Trademark Act and Passing-off

No one is allowed to adopt in connection with a business a mark or trademark “adopted and used by any public authority, in Canada as an official mark for wares or services”. The same concerns marks that are very similar and therefore “likely to be mistaken for” such official marks.⁷³ Thus, if Olympic marks are registered as official marks they cannot be used by any other entity. An interesting example occurred in 2003 when a company called “See You In” Canadian Athletes Fund Corporation (SYI) applied for the registration of “See You in Vancouver”. The COC applied to register the same as an official mark much later but in accordance with the existing case law the SYI application was rejected. At this occasion other marks were also claimed to have been used by COC as official marks.⁷⁴

Other than official marks there are also marks that the Olympic organisers can register in Canada as trademarks. A trademark is a “mark that is used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others.”⁷⁵ Event organisers usually register the event symbols and logos as trade marks in countries where the event is taking

⁷³ *Trade-marks Act*, *supra* note 58 at s. 9.1) n. iii.

⁷⁴ It is worth noting that when SYI applied to the Federal Court, it was proven that COC had not been using the official mark as it had declared for the purposes of protection under s. 9 of the TMA. Daniel R., “The Olympic and Paralympic Marks Act” *Bereskin and Parr Trade Mark Group Newsletter* (Spring 2008), online: Bereskin and Parr LLP <http://www.bereskinparr.com/ENG/News/NewsletterArticles/newsletter-TM-Spring-2008.html>

⁷⁵ *Supra* note 40 at section 2.

place.⁷⁶ This way Olympic organisers will have the exclusive right to use the Olympic trademarks in Canada.⁷⁷

Importantly, as mentioned above, ambush marketing usually doesn't involve direct trademark infringement. However, an ambush marketer might use a confusing trademark or trade name in order to create association with the event. If this occurs, according to s. 20 of the TMA such use of confusing trademarks or trade names will be an infringement of the Olympic organizers' exclusive right. S. 20 will thus be applicable to ambush marketing cases that, for instance, use confusing trademarks in their advertisements.

In some countries there is a specific regime for well-known marks. However, in Canada the notion of "well-known marks" does not exist. Nonetheless, when assessing confusion, the reputation of the trade mark is important to the courts and they take it into account.⁷⁸ Interestingly the Olympic five-ring symbol is very famous with a 93% brand awareness score.⁷⁹

The TMA also provides a remedy for cases of depreciation of goodwill. More specifically it states that "[n]o person shall use a trade-mark registered by another person in a manner that is likely to have the effect of depreciating the value of the goodwill attaching thereto."⁸⁰ As the Court held in *Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée* "the onus of proof to establish

⁷⁶ Scaria, Arul George. *Ambush Marketing: Game within a Game* (New Delhi: Oxford University Press, 2008) at 57.

⁷⁷ *Trade-marks Act*, *supra* note 58 at s.19.

⁷⁸ *The Protection of Well-Known Marks In the European Union, Canada and the Middle East*, A Country and Regional Analysis, INTA EU, Canada, Middle East Dilution Subcommittee, October 2004 at 16.

⁷⁹ Anne M. Wall, "The Game Behind the Games" (2001) 91 *Trademark Reporter* 1243 at 1244.

⁸⁰ *Trade-marks Act*, *supra* note 58 at s.22.1).

the likelihood of such depreciation rested on the appellant. Despite the undoubted fame of the mark, the likelihood of depreciation was for the appellant to prove, not for the respondents to disprove, or for the court to presume.”⁸¹ Thus, in such a case the IOC will have to prove that there is likelihood of depreciation of the Olympic goodwill.

Although ambush marketing tends to make use of the event goodwill, it is interesting to know what cases the courts will consider having a depreciating effect. For instance, if Coca Cola were the official sponsor would Pepsi by ambushing automatically depreciate the Olympic goodwill? Couldn't it be the case that quite the opposite happens with the ambusher's involvement being beneficial to the event instead of depreciating its goodwill due to the fact that the ambusher itself is a famous company with considerable goodwill of its own?

On the other hand, even if the trademarks are not registered, there is the common law remedy of passing-off. In *Consumers Distributing Co. v. Seiko* the Supreme Court of Canada held that passing-off exists when business is carried out “...under such a name, mark, description, or otherwise in such a manner as to mislead the public into believing that the merchandise or business is that of another person...” and this “is a wrong actionable at the suit of that other person.”⁸² Importantly, in *Kirkbi AG v. Ritvik Holdings Inc.* the Supreme Court established that a passing off action protects the goodwill of the trademark owner and was codified in s. 7 of the Trademark Act.⁸³ Especially s. 7.e. states that it is illegal to “do any other act or adopt any other business practice contrary to honest industrial or commercial usage in Canada.”

⁸¹ *Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée* [2006] 1 S.C.R. 824 at para 15.

⁸² *Consumers Distributing Co. v. Seiko* [1984] 1 S.C.R. 583 at 597 [*Seiko*].

⁸³ *Kirkbi AG v. Ritvik Holdings Inc.* [2005] 3 S.C.R. 302, 2005 SCC 65 at para 35 [*Kirkbi*].

Thus if an ambusher uses a mark or a description or carries out its promotion in such a manner that creates association with the Olympics, then the IOC will have recourse to the abovementioned common law remedy of passing off. However, in *Ciba-Geigy Canada Ltd. v. Apotex Inc.* the Supreme Court set a three component test for establishing passing off. Accordingly, the following conditions are needed to establish this tort:

1. The existence of goodwill
2. Deception of the public due to a misrepresentation
3. Actual or potential damage to the plaintiff.⁸⁴

Without any of these three conditions a passing-off claim will not be successful.

According to Sebel and Gyngell the tort of passing-off cannot be invoked by the IOC because it is not a trader, therefore, the use of an Olympic logo or indicia does not indicate that the goods or services originate from a specific trader.⁸⁵ However, in *Consumers Distributing Co. v. Seiko* the Court established that

[t]he role played by the tort of passing off in the common law has undoubtedly expanded to take into account the changing commercial realities in the present-day community. The simple wrong of selling one's goods deceitfully as those of another is not now the core of the action. It is the protection of the community from the consequential damage of unfair competition or unfair trading.⁸⁶

Moreover, in the *National Hockey League (NHL) v. Pepsi-Cola Canada Ltd* the court established that passing off cases fall into two categories. It stated that

nowadays perhaps more common type of passing off, is where it is alleged that a defendant has promoted his product or business in such a way as to create the false impression that his product or business is in some way approved, authorized or endorsed by the plaintiff or that there is some business connection between the

⁸⁴ *Ciba-Geigy Canada Ltd. v. Apotex Inc.*, [1992] 3 S.C.R. 120 at 132.

⁸⁵ Sebel & Gyngell, *supra* note 72 at 696.

⁸⁶ *Seiko*, *supra* note 82 at 598.

defendant and the plaintiff. By these means a defendant may hope to "cash in" on the good will of the plaintiff.⁸⁷

Therefore, the IOC in fact could have a passing-off claim against a trader.

Because of jurisdictional differences, the remedy of passing off does not exist in Quebec but in *Sport Maska Inc. v. Canstar Sports Group Inc.*, the Quebec Superior Court held that passing-off corresponds to confusion, which is a category of "concurrency déloyale"⁸⁸ Thus in Quebec the alternative of the common law tort of passing off will be the "concurrency déloyale". Also, in Quebec there are rules for extra-contractual responsibility which can be used in ambush marketing cases if appropriate. More specifically article 1457 of the Quebec Civil Code states that "[e]very person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another. Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature."

Importantly, for s. 7 to be applicable there has to be a trademark, but passing off or the Quebec Civil Code remedies can be applied even if there is no trademark but some other indicia. This means that there might be a valid claim against a trader who is misleading the public by using Olympic indicia that are not trademarks.

⁸⁷ *National Hockey League*, *supra* note 11.

⁸⁸ *Sport Maska Inc. v. Canstar Sports Group Inc.*, [1994] 57 CPR (3d) 323 (Que.S.C.) at para 53-54.

D. The Competition Act

The *Competition Act* does not directly refer to ambush marketing but since ambush marketing occurs in commercial activities and an ambusher is competing with its competitors in the marketplace, then the deceptive practices and misleading representation provisions of the Act can be applicable to ambush marketing cases.⁸⁹ There are both criminal and civil regimes under this act.

As to the civil regime, s. 74.01.1 states that it is a reviewable conduct if a person “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, makes a representation to the public that is false or misleading in a material respect.” In *Maritime Travel Inc. v. Go Travel Direct.Com Inc.*,⁹⁰ the first Canadian case that awarded damages for misleading advertisement, the Court confirmed the trial judge’s decision that “[m]ateriality is defined in terms of the effect it would have upon a consumer's buying decision. It must be “so pertinent, germane or essential” (quoting from [Apotex Inc. v. Hoffman La-Roche Ltd., [2000] O.J. No. 4732 (OCA)]) that it would have an effect upon that decision”.⁹¹ Reviewable conduct means that the court can order the publishing of a corrective notice to the public or payment of administrative penalties.⁹² A false or misleading representation is deemed to be made to the public if any material or thing that contains the representation is supplied to a wholesaler, retailer

⁸⁹ Vassallo, Blemaster & Werner, *supra* note 15 at 1346.

⁹⁰ *Maritime Travel Inc. v. Go Travel Direct.Com Inc.* [2009] N.S.J. No. 177.

⁹¹ *Ibid.* at para 5.

⁹² *Competition Act*, *supra* note 59 at s.74.1.1.

or other distributor for the purpose of promoting the supply or use of a product or a business interest.⁹³

Article 52 sets out the criminal regime by making the abovementioned conduct a criminal offence if it is done knowingly or recklessly. In such cases a civil remedy is also provided under s. 36(1) which determines that a person who has suffered loss or damage as a result of false or misleading representation may “sue for and recover from the person who engaged in the conduct ... an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow...”

It is important that in both regimes it is not necessary to prove that any person was actually deceived or misled but it is rather the general impression that is taken into account.⁹⁴ In *Bell Mobility Inc. v. Telus Communications Co.*⁹⁵ the Court set out the following two step test:

First, the trial judge must determine the general impression conveyed to consumers, based only on the representations actually made in the advertisements. This is the impression formed by consumers upon seeing the advertising in its intended form. Once assessed in light of the information presented to the consumer in the body of the advertisement, the impression is fixed as the impression of the average consumer. ... [T]he trial judge [must] also examine the literal meaning of the representation in determining whether the advertisement is false or misleading. [T]he giving of a particular impression is only unlawful if the impression is false or misleading in a material respect. The second step of the test requires the court, having regard to extraneous facts if necessary, to gauge whether the impression conveyed to consumers by the representations is false or, alternatively, misleading in a material respect. Only at this stage is extraneous evidence considered, not to alter the general impression, but to gauge whether the impression is false or misleading.⁹⁶

⁹³ *Ibid.* at s.74.03.3.

⁹⁴ *Ibid.* at s.52.1.1, 52.1.4., s.74.03.4-5.

⁹⁵ *Bell Mobility Inc. v. Telus Communications Co.* [2006] B.C.J. No. 3333.

⁹⁶ *Ibid.* at para 16-18.

§2: Event-specific Legislation

In order to provide an overview of the regime under OPMA, this paragraph discusses some of its provisions in detail and identifies some loopholes in the act. Part B. scrutinises overly strict event-specific legislation. In this paragraph the Australian experience is also considered, since the Australian event-specific legislation has been subjected to considerable research by state bodies.

A. The Olympic and Paralympic Marks Act

When choosing a host city the IOC requires that the city enact specific legislation for the protection of Olympic indicia.⁹⁷ For this reason many countries including Japan, the USA, Korea, Norway and Australia have enacted such special legislation for the protection of the Olympic brand.⁹⁸

For the 1976 Montreal Olympics Canada passed the *Olympic Act* which protected words like “Olympic” and “Montreal”. This act also allowed bringing an action together with the *Trademark Act*, in which case there was an additional relief for plaintiffs.⁹⁹ Much later, for the Winter 2010 games in Vancouver, Canada enacted the OPMA¹⁰⁰ which states that “[n]o person shall adopt or use in connection with a business, as a trade-mark or otherwise, an Olympic or Paralympic mark or a mark that so nearly resembles an Olympic or Paralympic mark as to be

⁹⁷ *Olympic Charter*, *supra* note 8 at s.14.1.2.

⁹⁸ Sebel & Gyngell, *supra* note 72 at 694. (In the USA there is the *Amateur Sports Act* of 1978 and the *Trademark Counterfeiting Act* of 1984 which provides protection for Olympic words. In Japan it is Article 10 of the *Unfair Competition Prevention Act*. In Korea the *Seoul Olympic Organising Assistance Act* was enacted in 1981 and in Norway it is the *Provisional Act relating to the Protection of the Olympic Symbols and the Olympic Emblem* 1993).

⁹⁹ *Ibid.*

¹⁰⁰ *OPMA*, *supra* note 9.

likely to be mistaken for it.”¹⁰¹ The wording of this provision is similar to that of article 9 of the Trademark Act, which provides that “[n]o person shall adopt in connection with a business, as a trade-mark or otherwise, any mark consisting of, or so nearly resembling as to be likely to be mistaken for...” and since OPMA s. 2.2. determines that the words and expressions used in this Act have the same meaning as in the *Trademark Act*, then the same test would be applied to these two articles. This test was established in *Big Sisters Assn. of Ontario v. Big Brothers of Canada*¹⁰² by Mr. Justice Gibson and is in fact a “resemblance test” (“almost the same as, or substantially similar”).¹⁰³

OPMA sets out some exceptional cases where a protected mark can be used without authorisation, more specifically, according to s. 3.5 the use of such marks and their translations for news reports, criticism or parody is not forbidden. Similar to Australia, these exceptions have surely been included for the protection of freedom of speech. There, initially the Olympic legislation did not provide for such an exception, but after the recommendation of an official report¹⁰⁴ carried out in 1995 s.25 was added to the *Sydney 2000 Games (Indicia & Images) Protection Act* 1996 which now allows use of Olympic indicia for the purposes of information and criticism.¹⁰⁵ It is interesting that OPMA does not clarify what the regime is in case parody is used for business purposes.¹⁰⁶

¹⁰¹ *Ibid.* at s.3.1.

¹⁰² *Big Sisters Assn. of Ontario v. Big Brothers of Canada*, [1997] F.C.J. No. 627.

¹⁰³ *Ibid* at para 74.

¹⁰⁴ *Cashing in on the Olympics: protecting the Sydney Olympic Games from Ambush Marketing*, Senate Legal and Constitutional Committee, The Parliament of the Commonwealth of Australia, March 1995.

¹⁰⁵ Sebel & Gyngell, *supra* note 72 at 701.

¹⁰⁶ Geist, Michael. “Should the Vancouver Olympic Organizers own “Winter”?” *Michael Geist Blog* (3 March 2007), online: Michael Geist <http://www.michaelgeist.ca/content/view/1777/125/> accessed 05.07.2010.

Another interesting section is s. 3.6 of the Act which specifies that “... the inclusion of an Olympic or Paralympic mark or a translation of it in any language in an artistic work, within the meaning of the Copyright Act, by the author of that work, is not in itself a use in connection with a business if the work is not reproduced on a commercial scale.” Complex situations are possible under this section. For example, if during the Olympics a photographer takes pictures of a child in the audience wearing or holding something which has an Olympic mark on it and then decides to reproduce and sell this picture, will he not be able to do so, since it might be considered “reproduction on a commercial scale”? Here, the mark will not have been used for business purposes per se and might even be very small compared to the size of the picture, but it will be featured in a photograph to be sold commercially. It is interesting to see how the courts will interpret such instances.

S. 4.1. forbids promoting or otherwise directing public attention to one’s business, wares or services “in a manner that misleads or is likely to mislead the public into believing that (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.” Upon application made by an organising committee or by any person who is using such a mark with authorisation, the court can order recovery of damages, injunction, publication of corrective advertisement or destruction or exportation of offending material.¹⁰⁷ According to the regime set by OPMA s. 4.2, when deciding whether such conduct has occurred the court should take into account the combination of protected words that have been used. These words

¹⁰⁷ *OPMA*, *supra* note 9 at s.5.2.

are set out in the OPMA and include “Games”, “2010”, “Winter”, “Medals” etc. These generic words evidently do not satisfy the non-descriptiveness requirement in order to be protected as trademarks. This kind of specific legislation, however, cannot cover all the cases of ambush marketing through word and idea association simply because it protects certain words only, while there are certainly many other words and phrases that can create association with the Olympics.

As L. Leone truthfully points out, the protection of generic words sometimes makes it impossible to refer to the event and creates a situation where simple phrases such as “Watch the Games here this Winter” are infringements. She even talks about monopolisation of generic words and goes so far as to say that the pressure the IOC puts on European host cities for enacting similar Olympic legislation might even be a violation of European Community competition law.¹⁰⁸ Such legislation does in fact seem to monopolise generic words for a certain period of time. For example, a shop-keeper cannot put “Winter 2010 sale” on the store window because the words in the phrase are protected during the Olympic season.

Thus, event-specific legislation has been enacted in many countries because of the requirements set by the IOC. However, such strict legislation has been scrutinised by some authors as being unnecessary and giving the IOC too much power during the Olympic season. This question will be discussed in the following subsection.

¹⁰⁸ Luisa Leone, “Ambush Marketing: Criminal Offence or Free Enterprise?” (July 1, 2008) The International Sports Law Journal, online: The Free Library
<http://www.thefreelibrary.com/Ambush+marketing:+criminal+offence+or+free+enterprise%3F-a0212546228>

B. Is Event-specific Legislation Necessary?

Since there are traditional legal measures that can be used to fight against harmful ambush marketing, the question of the necessity of enacting strict event-specific legislation arises. The present subsection presents some scholarly opinions and discusses this issue in an attempt to demonstrate that strict event-specific legislation is unnecessary and has negative aspects to it.

According to the Olympic organisers there are a few reasons to protect the Olympic brand from ambush marketing. To take the example of the Vancouver Winter Olympics, these reasons include the necessity to secure sufficient funds for the games and to assist Canadian athletes. The Vancouver Olympic Committee had agreements with the official sponsors that they would help the Canadian government in supporting Canadian athletes. For this reason and because all the funds needed for organisational purposes come from sponsorship, broadcast, tickets and merchandise, there is a necessity to protect sponsor investments.¹⁰⁹ Allegedly 35% of the revenues of sporting events are covered by sponsorship.¹¹⁰ Interestingly however, Luisa Leone insists that this is not true, at least not for all the Olympics and that only a small part of the financing necessary for the Games comes from sponsorship. She states that for example the London 2010 Games will be financed only 10% through sponsorship and that the rest will come from taxes.¹¹¹

In general there has been much criticism of the Olympic organisers going too far in protecting the Olympic brand. For instance at one occasion the Olympic organisers were criticised when

¹⁰⁹ *Real 2010 Protecting the Brand, 2010 Olympic/Paralympic Brand Management Guidelines* online: Vancouver 2010 http://www.vancouver2010.com/dl/00/08/91/real2010protectingthebrand_00d-Is.pdf at 4.

¹¹⁰ Scaria, *supra* note 6 at 16.

¹¹¹ Leone, *supra* note 108.

they accused a Vancouver gay men's chat line called "Interactive Male" of having a logo similar to a wrestling design used in the 1976 Olympics in Montreal.¹¹²

The author of "Ambush Marketing: Game within a Game" writes "the established or traditional legal measures are ineffective to a great extent in fighting ambush marketing. Therefore... the best possible way of combating the menace of this deceitful marketing would be event-specific legislation."¹¹³ But is event-specific legislation indispensable and if so, how far should it stretch? South Africa, for instance, was the first country to actually criminalise ambush marketing by setting fines and imprisonment for false association with an event that is protected (until up to 1 month after the event) under the *Merchandise Marks Act* No. 17 (1941).¹¹⁴ Criminalisation of ambush marketing seems to be too protective, especially since it does not apply to specific actions but rather gives authorities the discretion to decide which cases are ambush marketing and should therefore be prosecuted. Such an approach, of course, is likely to create much uncertainty and confusion especially amongst businesses engaged in promotion during an event.¹¹⁵

As opposed to the above criticism in 1995 in Australia the official report on the country's Olympic legislation recommended new and stronger protection for the Olympic brand. At the time the existing legislation was the *Olympic Insignia Protection Act* of 1987 which gave a four year protection to artwork but indefinite protection to the Olympic ring symbol. A 1994

¹¹² "Ambush Marketing: How Close is Too Close?" *Learning Legacies from the 2010 Games* (2010) online: e Legacies http://elegacies.ca/userfiles/files/D1_4_4_AMBUSH_MARKETING.pdf at 1.

¹¹³ Scaria, *supra* note 6 at 4.

¹¹⁴ Vassallo, Blemaster & Werner, *supra* note 15 at 1349.

¹¹⁵ Leone, *supra* note 108.

amendment to that act had granted protection to the torch and flame design. After examining the available protection under intellectual property statutes and common law, the Senate Legal and Constitutional Committee reported¹¹⁶ that more protection was necessary for Olympic indicia. This led to the adoption of the *Sydney 2000 Games (Indicia and Images) Protection Act* (hereinafter, Sydney Act) in 1996.¹¹⁷ An official review conducted in 2007 concluded that the ambush marketing legislation, which included Chapter 3 of the *Olympic Insignia Protection Act*¹¹⁸ and the *Melbourne 2006 Commonwealth Games (Indicia and Images) Protection Act 2005* (the Sydney Act wasn't examined), had been rather effective.¹¹⁹ This suggests that event-specific legislation is effective. However, when it comes to the latest act enacted for the Olympics (the Sydney Act), opinions seem to vary. It is considered that even though Sydney protected Olympic sponsors more than any other host city ever had, the Sydney 2000 Act was still not as successful as it was expected to be. Evidently this suggests that similar legislative solutions are incomplete and other strategies should be adopted.¹²⁰ Interestingly, some major sporting events such as the 2006 World Cup and 2008 European Cup did not even have such specific legal protection and were still successfully organised.¹²¹

An important argument against event-specific legislation is that it can easily cross the limits of legitimacy and be challenged in court as unconstitutional due to freedom of speech restrictions.

¹¹⁶ *Cashing in on the Olympics: protecting the Sydney Olympic*, *supra* note 104.

¹¹⁷ Sebel & Gyngell, *supra* note 72 at 700.

¹¹⁸ Chapter 3 ("Protected Olympic Expressions") includes the main provisions of the act (general provisions, objectives and subject matter protected by the legislation).

¹¹⁹ *Ambush Marketing Legislation Review*, Australian Government, IP Australia, Department of Communications, Information Technology and the Arts, October 2007 at 72.

¹²⁰ C. Kendall & J. Curthoys "Ambush Marketing and the Sydney 2000 Games (Indicia and Images) Protection Act: A Retrospective" online: (2001) 8:2 E-Law: Murdoch University Electronic Journal of Law 14 http://www.murdoch.edu.au/elaw/issues/v8n2/kendall82_text.html at para 79.

¹²¹ Leone, *supra* note 108.

Moreover, if in their fight against ambush marketing event organisers abuse the dominant position conferred to them by event-specific legislation, then competition authorities can use competition law to restrict their actions. However, these issues haven't yet been raised by competition authorities, nor have they been challenged in court.¹²²

Thus, event-specific legislation has incited much discussion with both positive and negative comments. Overall, it seems that traditional intellectual property and competition legislation provides sufficient measures to fight against ambush marketing. At any rate, one thing is certain, event-specific legislation, even if necessary to some extent, can easily cross the line of legitimacy and can harm free competition. It often gives the IOC an unlimited monopoly over the Olympics by monopolising even generic words and phrases. Moreover, a commercial monopoly is given to only a handful of official sponsors, neglecting the rest of the stakeholders, including small businesses who are not official sponsors.

¹²² Scaria, *supra* note 6 at 127.

Section 2. Judicial Responses

There is not much case law directly treating ambush marketing. The existing case law covers intellectual property infringements, false advertisement, interference with contractual relations and breach of contract. This section presents the existing case law with cases from Canada, the US, New Zealand and India in order to provide an overview of how courts have treated ambush marketing so far.

The only Canadian case that treats ambush marketing directly is *National Hockey League (NHL) v. Pepsi-Cola Canada Ltd.*¹²³ In this case the National Hockey League Services Ltd. (NHLS) had a licensing agreement with Coca Cola Ltd. as an official sponsor of the NHL. The broadcasting rights, however, were licensed to Molsons which granted Pepsi-Cola Canada the exclusive right to advertise soft drinks during the broadcasting of the games. One of the programmes sponsored by Pepsi-Cola was “Coach’s Corner” with Mr. Don Cherry; a well known public character and former coach himself. Pepsi-Cola organised a contest called “Diet Pepsi \$4 000 000 Pro Hockey Playoff Pool” for which people were to collect bottle cap liners or special cups of the brand. On these were statements saying “If “name of a team’s home city” wins in X number of games you win”. A winner would then have to fill in a form which included a test question. All bottles had hangers that had a picture of a hockey goalkeeper with the Pepsi logo on his shirt. The reverse side of the hanger, however, contained a disclaimer stating that Pepsi-Cola was neither associated with nor a sponsor of the NHL or its teams. Moreover, the contest was advertised on television with the participation of Mr. Don Cherry and men dressed as hockey players. The advertisement was accompanied by the same disclaimer displayed on the screen.

¹²³ *National Hockey League, supra* note 11.

NHL sued for passing off but the action failed because the Court did not accept the survey carried out by the plaintiff as evidence on the basis that the people surveyed were not the right target group. The Court also held that there was no infringement of registered marks or interference with business relations. More specifically “... the N.H.L.S. – Coke agreement obliges N.H.L.S., so far as it is able, to protect the rights of Coke from “ambush marketing”. Such an obligation cannot, however, impose on a third party a duty to refrain from engaging in advertising its products in a manner which, although aggressive, is not, by the law of Canada, unlawful.”

This case shows that, at least in Canada ambush marketing is accepted per se if it does not include actual intellectual property infringement. This is understandable as ambush marketing is not a legal term but is rather a marketing phenomenon, which can only be qualified legally through existing legislation, mainly intellectual property and competition legislation. If no infringement has taken place then there is no legal ground for condemnation of the practice. As one author put it “a true ambusher presently is immune from legal attack in Canada.”¹²⁴

The situation is the same in the USA where ambush marketing is not understood to involve illegal practices.¹²⁵ Ambush marketing cases typically involve breach of contract, dilution and false advertisement. In the *NCAA v Coors Brewing Co*¹²⁶ Coors was accused of breach of revocable license (the tickets) and unfair competition because it gave out tickets as prizes during the Men’s Basketball Final Four tournament. These tickets, however, had disclaimers banning

¹²⁴ Davis, Robert N. “Ambushing the Olympic Games” (1996) 3 Sports and Entertainment Law Journal 423 at 441.

¹²⁵ Vassallo, Blemaster & Werner, *supra* note 15 at 1340.

¹²⁶ *NCAA v Coors Brewing Co* [2002] U.S. Dist. LEXIS 21059 (S.D. Ind. October 25, 2002).

the giving away of tickets in promotions or sweepstakes without authorisation which Coors did not have. Also, the National Collegiate Athletic Association (NCAA) argued that Coors was misleading the public that it was associated with NCAA. Even though the case was settled between the parties, it was the first that dealt with such use of tickets in ambush marketing.¹²⁷

Another controversial case is the *MasterCard Int'l, Inc. v. Sprint Communications Co.*¹²⁸ Here MasterCard had the exclusive right to use the “World Cup ‘94” Trademark on “card-based payment and account access devices”. Sprint also had the right to use the trademark because it was the official long-distance telephone carrier of the World Cup. However, Sprint used the trademark on telephone cards which became the basis for the action. Even though the Court admitted that confusion was possible, since consumers could think that Sprint was authorised to use the trademark on telephone cards, it concluded that consumers were probably not confused since they would only be so if they actually thought about who was the official sponsor, but most probably it was not important to them at all. Nonetheless, the Court ended up applying §43 (a) of the *Lanham Act* to the case in order to protect MasterCard and held that Sprint was trying to mislead the public into thinking that it was authorised to use the trademark on calling cards.

When discussing this case Schmitz seems to suggest that in the USA the *Lanham Act* is best applicable to ambush marketing cases.¹²⁹ However, as the authors of “An International Look at Ambush Marketing” point out *MasterCard Int'l, Inc. v. Sprint Communications Co.* is not a

¹²⁷ Vassallo, Blemaster & Werner, *supra* note 15 at 1341.

¹²⁸ *MasterCard Int'l, Inc. v. Sprint Communications Co.*, [1994] WL 97097 (S.D.N.Y. 1994), *aff'd*, 23 F.3d 397 (2d Cir. 1994) [*MasterCard Int'l*].

¹²⁹ Schmitz, *supra* note 22 at 207.

classical ambush marketing case because in traditional ambush marketing cases there usually isn't any illegal use of a trademark. Therefore, this case is rather one of breach of contract.¹³⁰

A very interesting case that treats ambush marketing is the Indian case *ICC Development (International) Ltd. v. Arvee Enterprises and Anr.*¹³¹ Here, during the 2003 Cricket World cup the defendants were using the following slogans in their advertisement: "Philips: Diwali Manao World Cup Jao" and "Buy a Philips Audio System win a ticket to the World Cup". It also had a picture of a ticket with a seat and gate number saying "Cricket World Cup 2003." They were accused of misrepresenting an association with the ICC's (International Cricket Council) and ambushing the official sponsors of the Cricket World Cup by violating the exclusive rights those sponsors had obtained over the event intellectual property. Interestingly the court established that

[s]o far as plea of "ambush marketing" is concerned, the phrase "ambush marketing" is used by marketing executives only. It is different from passing off. In the passing off action, there is an element of overt or covert deceit whereas the ambush marketing is opportunistic commercial exploitation of an event. The ambush marketer does not seek to suggest any connection with the event but gives his own brand or other insignia, a larger exposure to the people, attached to the event, without any authorization of the event organizer.¹³²

The Court held that there was no trademark infringement. The depiction of a seat saying "Cricket World Cup 2003" was merely to show that the winners of the contest could win World Cup tickets. There was no passing off or unfair competition and the likelihood of confusion was not proven. Moreover, such giving away of tickets was forbidden by the contract between the ICC and the official sponsors, therefore the defendants were accused of trying to breach that contract. But the court held that it had not been proven that the defendants knew of the existence of the

¹³⁰ Vassallo, Blemaster & Werner, *supra* note 15 at 1342.

¹³¹ *ICC Development (International) Ltd. v. Arvee Enterprises and Anr.*, [2003] (26) PTC 245.

¹³² *Ibid.* at para 10.

contracts or of such prohibiting conditions and the official sponsors themselves had not presented a claim. This decision was very similar to that in the NHL case.

Another interesting case occurred in New Zealand in 1996. *New Zealand Olympic and Commonwealth Games Ass'n., Inc. v. Telecom New Zealand*¹³³ concerned a newspaper advertisement by Telecom New Zealand that feature the word “ring” in the following way:

RING RING RING

RING RING

The words had the same arrangement and colouring as the actual rings of the Olympic symbol. There was a text beneath the depiction saying “With Telecom mobile you can take your own phone to the Olympics”. The claim was that of passing off, unfair trading and trade mark forgery. The Court held that there was a possibility of damage caused by the advertisement, including loss of financing opportunities, but that it had not been proven. In assessing the overall situation the Court concluded that newspaper readers were unlikely to pay so much attention to the advertisement as to actually think that Telecom New Zealand had a connection with the Olympics or was a sponsor. Justice McGechan held that:

[C]ourts must hesitate to finally prohibit conduct where evidence is slender. ... I warn that this should not be misunderstood as some licence to all and sundry to caricature the Olympic symbol. Each case turns on its own facts, and this is not precedent legitimising other designs. The present, indeed, comes near the borderline. It would not have taken very much in the way of changes to result in a different outcome. It may be this outcome also illustrates the need for additional protection by way of legislation. That is

¹³³*New Zealand Olympic and Commonwealth Games Association Inc v Telecom New Zealand Ltd*, [1996] 35 IPR 55.

a matter for others, who no doubt would bear in mind Bill of Rights considerations relating to freedom of speech.¹³⁴

It seems that the Court wanted to leave space for different interpretations in the future. Interestingly the Court appears to be suggesting enacting additional legislation for the protection of Olympic symbols. On the other hand, as in the Canadian case, establishing the likelihood of confusion is left to the discretion of the Court in the absence of sufficient evidence. It will be interesting to see how the courts will decide an ambush marketing case where there is no trademark infringement but there is actual evidence (acceptable research or survey) that proves the confusion caused by the ambushers.

¹³⁴ *Ibid.* at 61-62.

Part 2: Ethical Issues and Practical Solutions

The previous part discussed the legal implications of ambush marketing. However, ambush marketing also raises some ethical questions. This part will use scholarly opinions to present the ethical issues related to the practice. As opposed to legislative solutions, the second chapter will identify some practical steps that can be taken to prevent ambush marketing from occurring.

Chapter 1. Ambush Marketing: an Unethical Practice?

Some authors consider ambush marketing to be an unethical practice. However, a lot of scholars and marketing professionals have a different point of view and consider ambushing creative marketing. In this chapter some of these opinions are presented in an attempt to identify the ethical concerns that the practice raises. The chapter also discusses problems the term “ambush marketing” creates when used without thorough consideration of its negative implication.

Two ethical theories have been suggested as applicable to ambush marketing: utilitarianism and Kantian moral theory, in other words, the duty to fulfil one’s obligations. According to the latter theory, actions are moral if they are motivated by obligation. And when applied to ambush marketing this means that a company has a duty to its shareholders to engage in ambush marketing since it is a business decision and company executives have a duty towards shareholders to maximise profit.¹³⁵ As opposed to this, according to utilitarianism a decision should create the greatest good for as many as possible. Only in this case will it be an ethical decision. Inevitably though, this theory will be detrimental to a minority.¹³⁶ If it were to be

¹³⁵ Meenaghan, “Threat to Corporate Sponsorship”, *supra* note 2 at 109.

¹³⁶ O’Sullivan & Murphy, *supra* note 14 at 359.

applied to ambush marketing, the public with their right to choice of product and services, as well as the many non-sponsor companies, might be considered the benefitting majority, whereas the event organisers and the official sponsors would probably be considered the minority. A more detailed analysis is necessary to be able to answer all of these questions. Some other theories have also been suggested, from which the stakeholder analysis theory can be pointed out. According to this theory a decision maker should have in mind the many stakeholders and the effects the decision will have on them when making the decision. These stakeholders include the public.¹³⁷ The notion of Corporate Social Responsibility is somehow similar to the theory of stakeholder analysis. As A.G. Scaria explains, ambushers have an ethical responsibility towards society and when they create false association with the event this responsibility is violated. He insists that a company's CSR should hold companies back from engaging in ambush marketing altogether, since ambushing also harms the event organisers and the official sponsors.¹³⁸

According to Meenaghan the qualification of ambush marketing as ethical or unethical depends on what view is taken of the practice: broad or narrow. He finds that if no payment is made to the event organisers by the ambusher then the practice is unethical.¹³⁹ This can be the case for some strategies where the ambusher has not made any payment whatsoever not only to event organisers but also to broadcasting networks or teams in return for the opportunity it receives to promote its business.

Some others have gone so far as to compare ambushers to thieves. According to Michael Payne, the former director of the IOC, ambushers are "thieves knowingly stealing something that does

¹³⁷ *Ibid.* at 360.

¹³⁸ Scaria, *supra* note 6 at 46.

¹³⁹ Meenaghan, "Point of View", *supra* note 13 at 86.

not belong to them? ... Parasite? Feeding off the goodwill and value of the organisation they are trying to deceive the public into believing they support? Like leeches they suck the lifeblood and goodwill out of the institution...”¹⁴⁰ As to the official IOC opinion of ambush marketing, Dick Pound, a former vice president of the IOC, explained that the Committee finds ambush marketing wrong not only because an ambusher does not pay the necessary fees, but also because “someone appropriated something that didn’t belong to them”¹⁴¹ It seems that this could also refer to the possible use of the event’s intellectual property or other property rights over the event. However, according to the authors of “Ambush Marketing: the Ethical Issues” using property rights in a manner ignorant of others’ rights is wrong. Therefore judging the practice of ambush marketing only on the basis of who owns the property rights is not correct. They emphasise especially the fact that events that have become part of the popular culture do not belong to a single person or entity, but rather have many stakeholders: the public. In such cases property rights have to be disposed of in a considerate manner.¹⁴² Interestingly however, the Olympic Charter states that “the Olympic Games are the exclusive property of the IOC.”¹⁴³ This being said it has to be repeated that the Olympics have a history of centuries, even though the modern Olympic movement started just over a century ago.¹⁴⁴ So the Olympics certainly have a historical and cultural significance and this has undoubtedly created an interconnection between the public and the Games. Therefore it seems illogical that official sponsors should be the only ones to commercially benefit from the Games. Even though it goes without saying that

¹⁴⁰ Payne, M. R. “Ambush marketing: Immoral or imaginative practice” (Paper presented to the Sponsorship Europe ’91 Conference, Barcelona, Spain, 1991 October) [unpublished] as cited in O’Sullivan & Murphy, *supra* note 14 at 353.

¹⁴¹ Cited in Ettore, Barbara. “Ambush Marketing: Heading Them Off at the Pass” (1993) 82:3 Management Review 53 at 55.

¹⁴² O’Sullivan & Murphy, *supra* note 14 at 356-357.

¹⁴³ *Olympic Charter*, *supra* note 8 at s.7.1.

¹⁴⁴ Elam & Hamakawa, *supra* note 37 at 1-2.

intellectual property rights must be exploited only by those authorised by the IOC because it owns these rights, the mere fact of using the opportunity created by the event for one's own commercial benefit seems to be a logical business approach. According to Sandler and Shani after all the Olympics have become just another commercial opportunity and marketplace for businesses.¹⁴⁵ If so, then why should a company that is not an official sponsor not be able to have access to the Olympic audience?

To prevent monopolisation in 1996 the British Parliament, for example, went so far as to declare some events as having a special status, which made them impossible to be monopolised by the media.¹⁴⁶ Jerry C. Welsh once explained that "there is a weak-minded view that competitors have a moral obligation to step back and allow an official sponsor to reap all the benefits from a special event."¹⁴⁷ He even went so far as to say "[a]ll this talk about unethical ambushing is so much intellectual rubbish and posturing by people who are sloppy marketers".¹⁴⁸

It is nonetheless unarguable that deliberate attempts to mislead the public must not be accepted. A free market can function efficiently only if ethical behaviour persists within the market.¹⁴⁹ Some strategies of ambush marketing are evidently morally unacceptable. For instance, at the 1992 Barcelona Olympics Pepsi (not an official sponsor) featured Magic Johnson in an advertisement which stated: "From all of us at Pepsi to our friend and partner Earvin Johnson:

¹⁴⁵ Sandler & Shani, "Is Confusion to Blame?", *supra* note 40 at 372-373.

¹⁴⁶ O'Sullivan & Murphy, *supra* note 14 at 357-358.

¹⁴⁷ Meenaghan, "Threat to Corporate Sponsorship", *supra* note 2 at 109.

¹⁴⁸ Brewer, Geoffrey. "Be like Nike?" *Sales and Marketing Management* 145:11 (September 1993) 66 at 68.

¹⁴⁹ Dickson, P.R. *Marketing management* (Orlando, FL: The Dryden Press 1994) as cited O'Sullivan & Murphy, *supra* note 14 at 358.

Go get ‘em, Magic”.¹⁵⁰ Such congratulatory advertisements for athletes and teams that are sponsored by one’s competitors are mentioned by Meenaghan as being ethically “questionable”.¹⁵¹

Another question arises regarding the use of the term “ambush marketing”; is it fair to call brands that are sponsoring subcategories “ambushers”? This way they are being compared to companies who are intentionally misleading the public and possibly even infringing on intellectual property rights. It is this intention to mislead that plays the most important role in assessing ambush marketing. According to Payne, the most fundamental issue is that ambushers violate the ethical principles of truth in advertising and business communications when they try to deceive the public in relation to their status and their role in supporting the event.¹⁵² Truth is a principle of ethics to be respected in all business undertakings and it is impossible to justify any ambush marketing strategy that is based on false or misleading information. But what if a company actually sponsors a team or the broadcasting of the event and does not deceive the public as to its status and role? Since there are various strategies of ambushing, when assessing a case the fundamental issue that creates uncertainty is the definition of the term “ambush marketing”. When should a promotion campaign be considered ambushing? If “ambush marketing” were a neutral term, then there would be no danger in qualifying any promotion during a sponsored event as “ambushing”. However, the term has been given a negative connotation. This is confirmed by the fact that the Olympic organisers are fighting against the

¹⁵⁰ Scaria, *supra* note 6 at 37.

¹⁵¹ Meenaghan, “Point of View”, *supra* note 13 at 82.

¹⁵² Payne, *supra* note 23 at 326.

practice by explaining that “ambush marketing”, in general, is unfair.¹⁵³ This means that when qualifying a case attention should be paid to all of its characteristics in order not to label it with the term “ambush marketing” without enough grounds. For the same reason, it is exaggeration to say that any promotion activity during a sponsored event with official sponsors is ambush marketing.

It is true that the timing of a promotion is an important factor. Evidently well organised promotion campaigns during a major event will automatically influence the public to some extent and create some kind of an association with the event even if only due to the fact that it was during the event that the product or services were introduced to the public. Nonetheless, it is only logical that in a situation where so many people have gathered around an event, a company will try and divert their attention towards its products or services. It is a marketing decision, just like those made in any other case of promotion. Therefore, qualifying all and every promotion activity during a sponsored event as ambush marketing seems illogical and unfounded, if only for the reason that, as mentioned above, ambush marketing is usually seen as a negative practice and is fought against through legislative and other means. And since it is possible for any active promotion campaign during an event to have some degree of influence on the public as to the brand’s connection to the event due to the fact that the consumer sees the company’s trademark or hears its name during the event, probably the best way to qualify a case as ambush marketing is to establish that the company has actually taken specific steps or put effort into trying to heighten the “natural” association created in the public’s mind. As Meenaghan explains, basically, an ambush marketer creates confusion in the mind of the public by associating itself

¹⁵³ *Real 2010 Protecting the Brand, 2010 Olympic/Paralympic Brand Management Guidelines, supra* note 109 at 9.

with the event.¹⁵⁴ So, the active role of the company is an important factor. In other words, the intention to confuse the public should be proven however difficult it may be.

It is very difficult to give a clear-cut answer to whether ambush marketing is an ethical practice or not. A case by case qualification is necessary given the fact that ambush marketing is a very large term that covers numerous strategies and marketing practices. There are varying opinions and there will always be such when the discussion is in the ethical field. For this reason Paul O'Sullivan's and Patrick Murphy's suggestion to draft an international code of conduct for businesses seems to be worth more consideration since such a code will set certain rules for companies to follow in the course of their business.¹⁵⁵

¹⁵⁴ Meenaghan, "Threat to Corporate Sponsorship", *supra* note 2 at 106.

¹⁵⁵ O'Sullivan & Murphy, *supra* note 14 at 365.

Chapter 2. Some Practical Solutions

Besides legislative solutions, there are some practical steps that can be taken both by event organisers and by official sponsors in order to prevent ambush marketing or to find and halt attempts in ambushing. It is better to prevent ambush marketing from happening and to minimise its effects beforehand, than to fight against companies that have already started their ambushing campaign. For this reason, the present chapter identifies and discusses some of the practical solutions suggested by various scholars.

“Companies will always find creative and legal ways to do ambush marketing if they feel they can benefit from it. The Olympic Games organizers, together with the sponsors, must realise that ambush marketing is a symptom of a problem, not the problem.”¹⁵⁶ As is the case with every problem, it is better to prevent ambush marketing than to repair the damages afterwards. Although legal action can sometimes be effective, as in the case of *MasterCard Int'l, Inc. v. Sprint Communications Co* where the court decided in favour of MasterCard, waiting to act after the ambushing has occurred is not wise since the damage will already have been caused. Moreover, as discussed above, some ambush marketing strategies do not involve intellectual property infringements or any other illegal act, and without such basis a successful action is impossible.

As an important rule to start with, official sponsors should anticipate potential ambush marketing by competitors and be more vigilant. Pre-planning and identifying potential competitors can help

¹⁵⁶ Sandler & Shani, “Is Confusion to Blame?”, *supra* note 40 at 381.

carry out a more effective campaign.¹⁵⁷ The contractual relations between the sponsors and the organisers are equally important. As one author suggests, contracts between these two should be stricter and clarify all the rights and responsibilities of the parties which will allow the sponsors to have correct expectations and do appropriate planning.¹⁵⁸ As a necessary continuation to this many authors have pointed out that official sponsors need to exploit their investment if they want to achieve positive results and fight ambushers.¹⁵⁹ According to Meenaghan, a company spends about the same amount of money on promoting the brand's association with the event as it does to become a sponsor.¹⁶⁰ Although very costly, this has to be done in order to minimise exposure to ambushing. It is obvious that if a sponsor pays the necessary fees to associate itself with an event but does not actually work on actively exploiting its connection with the event then various loopholes are going to be created through which ambushers can step in. An official sponsor should work on sending its message to the public and letting them know that it has the status of an exclusive sponsor.¹⁶¹ Studies carried out by Shani and Sandler also proved that those sponsors who actively exploited their sponsorship had better results than those who failed to do so.¹⁶²

Ambush marketing cannot be effective if consumers are well informed about the official sponsors, about what sponsorship and ambush marketing are and about the negative impact of ambushing. For this reason first and foremost Olympic organisers must put some effort into educating the public.¹⁶³ The IOC seems to have already started working on this. It reported that

¹⁵⁷ Meenaghan, "Point of View", *supra* note 13 at 84.

¹⁵⁸ Shui "You've been ambushed!" (2002) 1:5 Asian IP as cited in Crow & Hoek, *supra* note 42 at 10.

¹⁵⁹ See e.g. J. Tripoldi & M. Sutherland, "Ambush Marketing An Olympic Event", (2000) 7:6 Journal of Brand Management 412 at 418.

¹⁶⁰ Meenaghan, "Point of View", *supra* note 13 at 78.

¹⁶¹ Jerry C. Welsh cited in Brewer, *supra* note 148 at 68.

¹⁶² Meenaghan, "Point of View", *supra* note 13 at 83.

¹⁶³ Sandler & Shani, "Is Confusion to Blame?", *supra* note 40 at 370.

at the 2002 Winter Olympics in Salt Lake City the committee had an educational programme besides closely monitoring venues and registering all trademarks at national and international levels.¹⁶⁴ It is important that event organisers protect the event and their sponsors.¹⁶⁵ In 1994 the IOC did start a programme for the protection of official sponsors: within 48 hours of the first ambushing advertisement the Olympic organisers would find and warn the ambushers to stop. If the ambushing continued, however, then they would make the case public, humiliating the ambushing company.¹⁶⁶ Thus the IOC does have a special campaign, as well as guidelines for prospective host cities in order to prevent ambush marketing. The campaign includes preventive measures such as offering exclusivity to sponsors in their respective product categories and prohibition of third-party contracts (joint promotions) in order to prevent non-sponsors from associating themselves with the event.¹⁶⁷

Another way to ensure that official sponsors receive maximum benefit from their sponsorship is to secure all the advertising space (locations, advertising time on television) for the official sponsors so that their competitors cannot buy and use this space to their own benefit. It seems that the IOC is trying to use this method; in 1997 the committee decided that host cities must secure all the advertisement opportunities and spots within the city for the Games so that the Olympic organisers can make use of them as necessary. In other words this was a way to prevent ambush marketing by reserving all advertisement opportunities for official sponsors.¹⁶⁸ A good example is the Sydney Olympics four years prior to which the organisers had reserved all the

¹⁶⁴ Crow & Hoek, *supra* note 42 at 11.

¹⁶⁵ Meenaghan, "Threat to Corporate Sponsorship", *supra* note 2 at 110.

¹⁶⁶ Kendall & Curthoys, *supra* note 120 at para 77.

¹⁶⁷ Tripoldi & Sutherland, *supra* note 159 at 418.

¹⁶⁸ Kendall & Curthoys, *supra* note 120 at para 76.

advertising space in central Sydney in order to prevent ambush marketing.¹⁶⁹ There are other practical ways to handle advertising by competitors once it has occurred. As Batel, the Chief Executive of the London Marathon recalls, Nike's attempts on ambushing the Marathon were handled by arranging with the broadcaster to shoot from angles not showing Nike's advertisement posters, as well as putting mobile advertising boards and balloons in front of the posters where needed. Of course this was done only temporarily, in order not to show Nike's posters in the broadcasting material.¹⁷⁰

Some authors have suggested another solution for strategies involving television adverts during broadcasting whereby the costs for television broadcasting should be reduced for networks. In return for this event organisers will be able to better control the advertising time during the broadcasting and who uses it.¹⁷¹ It is true that event owners are not always the owners of the media coverage of the event, which creates a situation where there are different sponsors for the event and its broadcasting. This necessitates further coordination between the event owners and the media so as to eliminate advertisement opportunities for non sponsors, for example, arrange for sponsors to be offered "first options" for advertisement time during the broadcasting.¹⁷² Also, broadcasters pay for the television rights of the event. Therefore, to prevent ambush marketing, event owners or sponsors can do so themselves, demanding advertisement time in return.¹⁷³ For

¹⁶⁹ Gardiner *et al*, *supra* note 29 at 469.

¹⁷⁰ *Ibid.* at 467.

¹⁷¹ Sandler, Dennis M & Shani, David. "Counter attack: heading off ambush marketers" *Sports Marketing* (18 January 1999) 10 at 10 [Sandler & Shani, "Counter attack"]

¹⁷² Crow & Hoek, *supra* note 42 at 9.

¹⁷³ Tripoldi & Sutherland, *supra* note 159.

example, at the Atlanta Olympics in 1996 McDonald's paid NBC to be the only advertiser of fast food during the broadcasting of the Olympics.¹⁷⁴

Interestingly a survey carried out around the Olympics showed that 1/3 of people thought that only official sponsors could advertise during the broadcasting of the event.¹⁷⁵ As mentioned above, the need to reserve advertising space for official sponsors has often been pointed out by authors writing on ambush marketing. It is clearly a problem to be considered and solved by event organisers. Nevertheless, care should be taken to find the best solution in order not to create monopolies for sponsors during the Games.

Buying advertising space during the event is considered a strategy of ambush marketing. However, especially in the case of event broadcasting, the buyer of advertisement time is actually sponsoring the broadcasting and is not doing anything illegal.¹⁷⁶ For this reason it is probably better to consider this problem together with the need to educate the public about sponsorship and ambush marketing in which case there might be a considerable difference between the opinions of the audience before and after the awareness-raising campaign. If consumers were to know that advertisement during the broadcasting does not mean sponsorship of the event then the potential harm caused to official sponsors' status would be minimised.

As another practical step some authors suggest that the various categories and levels of sponsorship should be more limited in number in order to help prevent ambush marketing

¹⁷⁴ Vassallo, Blemaster & Werner, *supra* note 15 at 1354.

¹⁷⁵ Sandler & Shani, "Counter attack", *supra* note 171.

¹⁷⁶ Meenaghan, "Threat to Corporate Sponsorship", *supra* note 2 at 106.

possibilities. Survey results have shown that 67% of those questioned were actually confused by the many levels of sponsorship and did not know the actual degree of commitment from each sponsor.¹⁷⁷ Although this is true, it is not a very easy question to handle, since there are objective reasons why such categories of sponsorship exist. Firstly, the costs of an event are too high for a single sponsor. Secondly, not all the property rights are owned by the IOC. The national committees and athletes also have some rights and can independently contract with sponsors.¹⁷⁸ On the other hand, fewer categories will create fewer possibilities for different companies to be involved in sponsorship.

As to strategies such as giving away products at stadiums or sponsoring individual athletes, then these can be dealt with by ticket and event participation terms.¹⁷⁹ More specifically, tickets to the event should have special provisions that prohibit entering the stadium while having in possession products that are branded by non-sponsors, as well as advertising material. As to participants of the event (including teams), they should sign participation agreements with similar provisions.¹⁸⁰ This way, athletes will not be able to participate wearing clothing displaying logos or indicia of non-sponsors. Such an incident happened at the Barcelona 1992 Olympics where Nike sponsored athletes Michael Jordan and Charles Barkley but Reebok was the official team sponsor. After a big controversy, the two athletes had to cover the Reebok logo with an American flag in order to be able to participate in the medal ceremony.¹⁸¹ A recent incident at the FIFA World Cup in South Africa is a good example of this strategy. 36 girls

¹⁷⁷ Sandler & Shani, "Counter attack", *supra* note 171.

¹⁷⁸ Meenaghan, "Corporate strategy", *supra* note 52 at 308-309.

¹⁷⁹ Leone, *supra* note 108.

¹⁸⁰ F. Reid. "Combating Traditional and "New Age" Ambush Marketing" (2001) 4:4 Sports Law Bulletin 10 as cited in Gardiner *et al*, *supra* note 29 at 469.

¹⁸¹ Sebel & Gyngell, *supra* note 72 at 693.

wearing orange mini-dresses were arrested at the Netherlands v Denmark football match because they were allegedly part of an ambush marketing campaign by Bavaria beer who is not a sponsor of the World Cup. Interestingly, however, the logos on the dresses were not visible on the television broadcasting of the game.¹⁸² This incident would not have happened if the girls had not been allowed to enter the stadium in the first place. On the other hand however, such protection should not be exaggerated. For example, it will be disproportionate to forbid a person from entering the stadium if (s)he is drinking Pepsi-Cola and has the bottle in his/her hand, while Coca-Cola is an official sponsor. Such a case is not far-fetched. Something similar happened at the 2003 Cricket World Cup where before entering the stadium for a game a group of students were obliged to scrap off all Coca-Cola logos on the drink bottles in their lunchboxes because Pepsi-Cola was the official sponsor.¹⁸³ Therefore, to avoid such extreme cases protection strategies should be well thought of and proportionate.

Finally, none of the above practical steps will be complete if the Olympic organisers don't police the event well. They should do so in order to monitor and handle ambush marketing cases.¹⁸⁴ For example, VANOC policed the Vancouver Olympics and used a special system with different scoring categories to assess ambush marketing cases. A case would be handled as ambush marketing only after such assessment was done by the organisers and a case of ambushing was confirmed.¹⁸⁵

¹⁸² Bond, David. "Fifa Cracks Down After Beer Stunt" *BBC News* (17 June 2010) online: BBC News http://www.bbc.co.uk/blogs/davidbond/2010/06/fifa_cracks_down_on_beer_stunt.html

¹⁸³ Vassallo, Blemaster & Werner, *supra* note 15 at 1349.

¹⁸⁴ Meenaghan, "Threat to Corporate Sponsorship", *supra* note 2 at 110.

¹⁸⁵ *Real 2010 Protecting the Brand, 2010 Olympic/Paralympic Brand Management Guidelines*, *supra* note 109 at 10.

Thus, there are many practical steps that both event organisers and sponsors can take in order to prevent ambush marketing from taking place, as well as to minimise its harmful effects. Some of these steps have already been taken by the IOC during recent Olympics, but it still remains important for the organisers and for the sponsors to remain actively involved in protecting the event and the investments in order not to leave room for ambushers to step in. However, caution should always be taken not to step outside of the limits of proportionality.

Conclusion

It is difficult to define “ambush marketing” because of the many strategies and tactics that companies use to ambush a competitor. However, most definitions recognise that ambush marketing is the attempt of a company to associate itself with an event without paying sponsorship fees. This often damages the official sponsorship and weakens its positive results.¹⁸⁶

Ambush marketing includes but is not limited to:

1. sponsoring the broadcasting of an event when the sponsor of the event is a competitor
2. sponsoring individuals and teams participating in a sponsored event
3. distributing free branded products in stadiums during a sponsored event etc.

Generally speaking ambush marketing can be carried out through any promotion or campaign that makes one’s brand name heard and/or trademark seen at a sponsored event. This, naturally, creates confusion in the minds of the public as to who is the official sponsor of the event. Not much research has been done in the field of sponsorship in general and ambush marketing in particular. But, with the growth of the sports industry and the ever-present ambushing of official sponsorship, research has become necessary in order to be able to better evaluate sponsorship, its effectiveness and image creation.¹⁸⁷ The existing research, a considerable part of which was carried out by D. Shani and D. M. Sandler shows that usually ambushers do not do much better than official sponsors.¹⁸⁸ However, some other surveys have found ambush marketing to be cost-

¹⁸⁶ O’Sullivan & Murphy, *supra* note 14 at 351.

¹⁸⁷ Meenaghan, “Point of View”, *supra* note 13 at 86.

¹⁸⁸ Sandler & Shani, “Who Gets the Gold?”, *supra* note 7 at 13-14.

effective.¹⁸⁹ Overall, it is evident that the public can often be confused about who the official sponsor is. For this reason there are both legal and practical solutions to ambushing.

Legal solutions mostly concentrate on event-specific legislation and protection of the Olympic brand in order to prevent ambush marketing. Such legislation has been enacted in many countries that have hosted the Olympics, including Canada. Here the *Olympic and Paralympic Marks Act* protects some generic words, such as “winter” and “2010” from unauthorised use during the Olympic season. Although courts have to take into consideration the combination of protected words used by an ambusher, it still seems that such protection is monopolistic. In other words, generic words that could not otherwise be protected under existing intellectual property regimes have been given protection to the benefit of the Olympic organisers. Some authors have also raised this concern pointing out that Olympic organisers can make use of trademark and competition statutes instead of requiring host cities to enact such extreme legislation for the Olympics.¹⁹⁰ As opposed to this, the Olympic organisers, such as the Vancouver Olympic Committee justify such strict protection on the basis that ambush marketing threatens the future financing of the Olympics.¹⁹¹ This justification has been challenged by Schmitz who argues that ambush marketing cannot be as harmful to the event as to seriously threaten such global sponsorship as is the case for the Olympics.¹⁹²

Besides specific legislation enacted in Canada for the protection of Olympic properties, the intellectual property and competition legislation can also be applicable in ambush marketing

¹⁸⁹ McDaniel & Kinney, *supra* note 49 at 165.

¹⁹⁰ See e.g. Leone, *supra* note 108.

¹⁹¹ Vancouver Olympics Official Website www.vancouver2010.com

¹⁹² Schmitz, *supra* note 22 at 208.

cases. In Canada the general intellectual property regime that can be used includes the *Trademark Act*, the *Copyright Act* and the *Industrial Design Act*. Nonetheless it seems that there is little possibility that the Olympic organisers can actually receive protection under the *Copyright Act* or be able to register any Olympic property as an industrial design. The reason for this is because for both cases there is an originality requirement to satisfy which will not be easy to do for Olympic indicia, more specifically for generic words such as “Games” which are protected under the *Olympic and Paralympic Marks Act*. Furthermore, both statutes will only provide limited protection in time. Therefore, the most appropriate tools seem to be the *Trademark Act* as well as the common law remedy of passing-off. Nonetheless it must be reaffirmed that in ambush marketing cases, traditionally, there is no trademark infringement but rather there is false association with the event using various tactics, including making misleading statements. For this reason the “Deceptive Marketing Practices” provisions in the *Competition Act* can also be used where appropriate.

On the other hand, there is little case law on ambush marketing that actually puts the above legislation into perspective. The first case in the world to treat a typical ambush marketing case directly was *National Hockey League (NHL) v. Pepsi-Cola Canada Ltd* (1992),¹⁹³ where the Supreme Court of British Columbia held that even though on the basis of its agreement with sponsor Coca Cola Ltd. the National Hockey League Services Ltd. was obliged to protect the sponsors from ambush marketing, third parties did not have an obligation not to promote their own businesses “in a manner which, although aggressive, is not, by the law of Canada,

¹⁹³ Vassallo, Blemaster & Werner, *supra* note 15 at 1345.

unlawful”¹⁹⁴ Hence, ambush marketing is allowed per se in Canada, unless it contains any unlawful activity.

Case law on ambush marketing from other countries shows more or less the same approach. In the Indian case *ICC Development (International) Ltd. v. Arvee Enterprises and Anr* the Court’s decision was very similar to that in the Canadian case: since there was no trademark infringement or any other illegal action, confusion was not found to be proven. Similarly, in a New Zealand case *New Zealand Olympic and Commonwealth Games Ass’n., Inc. v. Telecom New Zealand* where there was imitation of the Olympic ring symbol through use of the word “ring” instead of the actual rings, the Court took into account all the circumstances of the case and decided that confusion was unlikely. Other case law does not directly treat traditional ambush marketing. For instance, the American case *MasterCard Int’l, Inc. v. Sprint Communications Co.* saw MasterCard’s protection under the *Lanham Act* which prohibits false advertising and false association.¹⁹⁵ But this is not considered to be a typical ambush marketing case, since there was unauthorised use of a trademark which doesn’t occur in traditional cases.¹⁹⁶

It is important that in the Canadian case mentioned above the Court did not accept the survey carried out by the plaintiff. This could have been a decisive factor in the case. Therefore, this case law leaves much space for future ambush marketing instances. It is yet to be found out what a Canadian (or any other) court will decide in a case where there is acceptable and clear evidence of confusion caused by the ambusher.

¹⁹⁴ *National Hockey League*, *supra* note 11.

¹⁹⁵ *Lanham (Trademark) Act* (15 U.S.C.), 1946 at §43 (a).

¹⁹⁶ Vassallo, Blemaster & Werner, *supra* note 15 at 1342.

Besides legal implications, ambush marketing has an ethical perspective to it which is also important: is ambush marketing ethically correct or not? Some authors have even suggested ethical theories such as the duty-based ethical theory or utilitarianism that can be applied to assess ambush marketing.¹⁹⁷ But so far these theories have not been subjected to much in-depth research.

Whatever the case may be it is necessary to evaluate each instance separately because the term “ambush marketing” seems to have a negative connotation to it. There are various strategies of ambushing, some of which don’t include any illegal action. To qualify all cases as ambush marketing when the term itself is not neutral creates more uncertainty as to the ethics of the practice. There is a threat of monopolisation if all ambushing strategies are treated the same way. If all ambush marketing instances are automatically considered unethical then event sponsors will have the full benefit of the event and a heightened goodwill in the eyes of consumers. For this reason, besides the necessity of carrying out more research as to the ethical implications of ambushing, consumers have to be educated about the practice in order for them to be able to treat the various ambushing strategies and ambushers accordingly.

Other than educating the public, it is important that event owners protect their event and its official sponsors.¹⁹⁸ Instead of pushing for ever stricter event-specific legislation, they can register all their trademarks and take more practical steps to prevent ambushing. These include

¹⁹⁷ O’Sullivan & Murphy, *supra* note 14 at 359-360.

¹⁹⁸ Meenaghan, “Threat to Corporate Sponsorship”, *supra* note 2 at 110.

policing the event, drafting sponsorship agreements carefully with provisions prohibiting joint-promotions, securing as much advertising space for sponsors as possible etc. But most importantly sponsors themselves have to exploit their sponsorship in order not to leave loopholes for competitors to exploit in their ambushing campaigns. Nonetheless, one thing that needs more consideration is the proportionality of practical solutions. As with legislative solutions, there is often a threat of monopolisation, this time, of the commercial rights over the Olympics. Solutions should not be so extreme as to grant only a handful of companies the opportunity to benefit from the event (which event-specific legislation threatens to do). After all the Olympics is a cultural heritage and should not “belong” only to the Olympic organisers.

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