

The Legal and Practical Prevention of Ambush Marketing in Sports

Stephen Townley, Dan Harrington, and Nicholas Couchman
Townleys Sports Lawyers

ABSTRACT

Ambush marketing has emerged in recent years as an effective, if controversial, weapon in the arsenal of marketing departments seeking to associate themselves with sports events without the official authorization or endorsement of the event organizer. This article highlights the dangers posed by ambush marketing to owners of commercial rights in these events and examines the legal mechanisms available to prevent and minimize the likelihood of suffering damage to marketing campaigns by third-party ambush tactics. © 1998 John Wiley & Sons, Inc.

AMBUSH MARKETING—WHAT IS IT?

Ambush marketing, or parasitic marketing, consists, in the sports context, of the unauthorized association by businesses of their names, brands, products, or services with a sports event or competition through any one or more of a wide range of marketing activities. The association is unauthorized in the sense that the controller of the commercial rights of such an event, usually the relevant governing body, has neither sanctioned nor licensed it, either itself or through its commercial agents. The term *ambush* has been applied because of the tendency for such activities to be devised by competitors of official sponsors or suppliers

of sports events and to take place during the build up to or during the event itself; thus maximum commercial impact is achieved. The activity is often carefully planned to take advantage of inadequacies in an event's commercial program and real or apparent loopholes in the legal protection available to event owners and sponsors.¹ The global sponsorship market is continuing to expand rapidly² and rights fees for events like the Olympics, Soccer World Cup, NBA, NFL, Formula 1, and the Rugby World Cup are measured in millions and sometimes billions of dollars.³ Therefore, any activity that diminishes the value of association with the official commercial program of an event becomes increasingly material to existing and potential sponsors. On the other hand, the attraction of getting something for nothing through unofficial association becomes almost inevitable with prestige events.

Exclusivity is therefore the key requirement for all major sponsors of sports—if they are going to devote their marketing resources to a particular event they do not want their competitor undertaking a similar promotional program. To this end sponsors will look to the controllers of commercial rights in sports events to protect their interests.

As the integrity of the sponsor's exclusive rights is eroded, so the likelihood increases that they will withdraw support or demand reduced rights fees. In the short term, the sponsor's investment, often the result of a long period of negotiation, is undermined. The extent of the damage will often be intangible, but will nevertheless clearly influence the way marketing departments perceive sponsorship value for the future.⁴

There will often be other adverse repercussions, including loss of revenue to sports bodies, diminution in the ability to assert legal proprietorship of such rights at a later date, and the distribution of substandard merchandise associated with the event. The image of an otherwise prestigious or quality event will suffer if it becomes widely perceived as a commercial free-for-all. It is even conceivable that the chances of suc-

¹The effect has been proved to create uncertainty and confusion among consumers regarding who is the actual sponsor. At the 1994 Winter Olympics, McDonald's were the official sponsor in their brand category. However, Wendy's launched a sophisticated ambush program. A subsequent national poll indicated that, although only 37% of the sample knew of the status of McDonald's 57% believed Wendy's was actually the official sponsor. "Wendy's ran ads set in Olympic locations. They looked, smelled and tasted like Olympic sponsors, but they weren't" [Darby Coker, Atlanta Committee for the Olympic Games (ACOG), communications director, marketing].

²Worldwide sponsorship spending will reach US\$15.3 billion in 1997, according to IEG Sponsorship Report's 13th Annual Projections. Sponsorship currently accounts for 40% of the revenue of the Olympic movement, according to the IOC's Marketing Matters Winter 1996/97.

³The ten "Top Tier" sponsors for Atlanta 1996 paid \$40m each for their exclusive rights. It was reported in the December 6, 1996 edition of *Marketing Week* that ISL, in association with Kirsch Group, have paid FIFA US\$2.3 billion for the European rights to the 2002 and 2006 Soccer World Cups.

⁴In an address to the USOC and Official Sponsors in 1992, Michael Payne, IOC Director of Marketing stated, "Ambush marketing is not a game. It is a deadly serious business and has the potential to destroy sponsorship. If ambush marketing, or as it is increasingly being referred to, "parasite marketing" is left unchecked, then the fundamental revenue base of sport will be undermined."

ceeding in bids to host international events could be prejudiced by the failure of a nation and its sporting bodies to deal both practically and legally with ambush marketing.

For the purposes of this article, the term *sponsor* includes sponsors, suppliers, and merchandisers—the whole range of licensees within a sports commercial program. Likewise the term *event* is interchangeable with *competition*, *team*, or *club*.

TYPES OF AMBUSH MARKETING

Ambush activity can vary enormously in scale and seriousness and can be domestic or international in scope. However, the underlying objective will invariably be either to persuade consumers that the ambusher's product or service has been authorized, sanctioned, endorsed, or is otherwise associated with an event, or to undermine a competitor's activities.⁵

To properly analyze the nature of the beast, consider the many forms ambush activity can take. In most cases, they can be divided into two distinct groups:

1. Activities traditionally considered piracies—these will usually have a clear-cut remedy in law. They are activities that clearly constitute infringements of the proprietary rights in an event, for example, unauthorized use of a registered event logo on merchandise, or false claims to be official suppliers to a particular team.
2. Other activities—more subtle practices for which the remedy is less clear-cut or may not even exist.

The activity group of most concern in commercial and legal terms is the second (2), for in most relevant territories there will exist clear remedies to the proprietor of the rights referred to in (1) to combat infringements, as well as preventative measures that can be employed. These issues are dealt with in more detail later in of this article.

The real danger in the longer term will come from those activities we have defined in (2) as “other activities.” The ambusher who employs the tactics set out under this heading is likely to be a more sophisticated and commercially wily animal than the simple merchandise bootlegger. Typical examples include

- Unauthorized or unofficial merchandise.⁶

⁵On this, Jerry Welsh of Welsh Marketing Associates: “The Olympic sponsor from a marketing point of view is spotting his competitor \$40m. I would rather not have the five rings and have the \$40m in my pocket to chase the guy who does have them.”

⁶The judgement in *Boston Athletic Association v. Sullivan* 867 F2d 22 (1st Cir. 1989) has a classic discussion on the legal prevention of unauthorized sports merchandise.

- Unauthorized or unofficial publications.⁷
- Unauthorized sales promotion activity.⁸
- Unauthorized broadcasts/virtual advertising⁹/Web sites/live screenings/films/video/photography/telephone commentary/information lines/pager services.¹⁰
- Unofficial corporate hospitality.¹¹

These types of activities may be carried out as one-off stunts or may be part of an orchestrated marketing campaign around an event. They may or may not involve any clear and direct breach of the proprietary rights in an event, such as trademark infringement. The questions that arise therefore are:

1. How can they be stopped—short term?
2. How can they be prevented—long term?

PRACTICAL AND LEGAL PREVENTION OF AMBUSH MARKETING IN THE SHORT TERM

The legal remedies available to sports bodies to protect their events, commercial programs and sponsors vary from one territory to another, but will largely be governed by the following factors:

1. The extent to which emblems/logos/mascots, photographs, film, TV material, images of participants and other material capable of in-

⁷These often include programs, guides, magazines, maps, newspapers, supplements, books, diaries, and calendars. In a French case on this point in 1992, American Express issued 400,000 copies of its magazine *Expressions* in France. These included an advertisement for AmEX in which the Olympic rings were used. Visa sued successfully to prevent continuation of this practice but was only awarded 200,000 French francs—hardly a serious disincentive to a company of this size. Often ambushers will allege reproduction of logos and words in unauthorized publications is for journalistic purposes in an attempt to fall within the various fair use provisions in national copyright laws.

⁸These include publicity stunts.

⁹Technological developments allowing image manipulation and insertion of virtual advertising within both unauthorized and licensed broadcasts, which may even be licensed broadcasts, may prove harder to police against. See the section on minimizing damage caused by ambushing.

¹⁰Recently, the U.S. Circuit Court of Appeals in Manhattan rejected the decision of a lower Court which had found that Motorola could not provide a pager service transmitting NBA scores and statistics live, relating to games in progress. The decision is based on copyright of the scores and the action of misappropriation of the commercial value of a competitor's information.

¹¹During the Rugby World Cup 1995 problems experienced by the organizers in relation to corporate hospitality included a number of tour operators offering all-in luxury packages including tickets to games, and hospitality packages in halls featuring giant screens, seating for up to 1,000 viewers and unlimited alcoholic beverages.

intellectual property protection including, possibly, the event itself¹² are protected in law and controlled by the sports body itself;

2. The availability of alternative legal measures, other than trademark/copyright law, to deal with instances of unfair competition, misleading advertising, false trade descriptions, street vending, and appropriation of goodwill;
3. The ability of the governing body to control contractually or otherwise the activities of those participating in the event, including the sportsmen and women, their associations/federations; the media, including TV, press, and photographers; and the venue, surrounding areas, and airspace.

Dealing with 1 first, most emblems and logos will be capable of copyright protection under English, U.S., and most other nations' laws as original artistic works. The initial ownership of this copyright depends on the territory but may be the original artist.¹³ Civil and/or criminal proceedings for infringement of copyright can generally be brought in most relevant territories by the copyright owner where the emblem or logo has been substantially reproduced on any item for commercial gain. Similarly, and usually more expediently, proceedings for trademark infringement can be instituted where part or all of the logo has been applied without authority to goods in territories for which the sports body has a valid trademark registration.

In both cases, however, there may be less protection available if there has simply been an unauthorized commercial use of the event title or words associated with the event, for example, "Soccer World Cup" as such titles/words are not usually protected by copyright¹⁴ and will often be difficult to register as trademarks on the basis that they are insufficiently distinctive in a trademark sense.¹⁵ Increasingly, however, governments of nations seeking to host major sporting events are enacting specific legislation giving increased protection to the logos and key de-

¹²Some jurisdictions, for example, Spain and Brazil, recognize limited quasiproperty rights in the sports event as a whole.

¹³In the U.S., logos will almost certainly be considered, works made for hire, and ownership will vest in the commissioner. This is unlikely to be the case, however, in the U.K. (unless the work is made in the course of employment) or continental Europe, and assignments of the copyright to the relevant governing body or event owner will therefore be necessary.

¹⁴Certainly not in the U.K. and continental Europe and highly unlikely in the U.S. However, in South Africa, immediately prior to the Rugby World Cup 1995, the legislature approved in principle legislation designed to prevent any party other than an international sport federation rights owner from using descriptive terms such as "World Cup."

¹⁵Whether or not the name of an event can be registered will be dependent largely on how capable it is of distinguishing goods or services. However, the trend globally is toward a relaxation of the criteria for registration. The U.K. Trade Marks Act 1994 is a good example of this. ISL, who have an agreement with FIFA to prepare the commercial rights to the Soccer World Cup, are currently attempting to register the words, "World Cup" worldwide.

scriptive words relating to these events. Such acts can only be properly interpreted as creating rights for the protection of event titles.¹⁶

Where trademark or copyright law is of no real assistance, alternative legal measures mentioned in 2 above must be examined and employed. Passing off and/or unfair competition laws in the U.K. most commonwealth countries,¹⁷ and the U.S.,¹⁸ will protect against situations where goodwill (the intangible commercial value) of a sports event is appropriated or damaged by the misrepresentation of a third party. Similarly, most civil law states have general unfair competition provisions.¹⁹

Although these are generally much more complex and onerous procedures than pursuing trademark or copyright infringements,²⁰ to claim or imply without authority that one's product or service is officially associated with a sports event, whether or not the official emblems or mascots are used, can amount to a misrepresentation damaging the goodwill in a sports event commercial program, giving rise to a claim under passing off or unfair competition.²¹

Decisions in a number of territories²² have granted relief where sufficient evidence exists to show that a substantial number of the buying public now expect that where an event title or logo is reproduced on goods, or is otherwise used commercially, that reproduction is the result of a license granted by the owner of that title or logo. Therefore, the more sports bodies promote and advertise the existence of their commercial programs, the likelier it becomes that the law will grant protection for them.

¹⁶Notable examples include the Olympic trademark legislation that exists in the U.S., the U.K., Canada, and Austria; the registration of Rugby World Cup 1995 indicia under the South African Merchandise Marks Act, and the legislation in Australia in relation to the Sydney Millennium Games. The Sydney 2000 Games (Indicia and Images) Protection Act 1996 gives the Sydney Organising Committee for the Olympic Games the exclusive right to commercially use and license any of the designated protected Olympic marks and logos including the words, Millennium Games, Sydney Games, Olympiad, Olympic, and the official Olympic logos of the Games.

¹⁷Notable protective regimes include the Trade Practices Act 1952 (Australia) and the Fair Trading Act 1986 (New Zealand).

¹⁸Both at common law and under S. 43 of the Lanham Act.

¹⁹In France, Article 1382 of the civil code relating to "Concurrence Déloyale" and in Germany the General law of unfair competition (UWG 1909) will be of similar application.

²⁰It can be difficult to prove a genuine risk of confusion in many cases. For example, in the recent decision, *The New Zealand and Commonwealth Games Association v. Telecom New Zealand Limited* [1996] FSR 757, the High Court of New Zealand found that, despite a clear intent to cash in on Olympic symbolism, an advertiser who used the word *ring* five times in the same colours and relative positions as the Olympic rings, escaped being enjoined by establishing that there was no significant likelihood of confusion among consumers that the advertiser was associated in some way with the Olympic movement. Indeed, the IOC bidding conditions for hosting Olympic events include minimum standards of protection for Olympic symbols and their use by the IOC and its sponsors.

²¹*Boston Athletic Association v. Sullivan* 867 F2d 22 (1st Cir. 1989).

²²In the U.K. the watershed came with the *Ninja Turtles* case, *Mirage Studios v. Counter-Feat Clothing Co.* [1991] FSR 145.

In both trademark/copyright infringements, passing off, and unfair competition actions, the most helpful remedy is usually an injunction ordering the perpetrator to cease and desist from its pirate activity and to remove all infringing items from circulation. Other remedies include damages, accounts of profits, and, where liability is very serious, search and seizure orders (or in the U.S. recall and destruction orders).

There is additional assistance under U.K. copyright law in relation to infringing articles that may be on sale in public near venues whereby such items can be seized by the copyright owner or persons authorized by it without the need for legal proceedings provided certain procedural requirements are followed. The help of private merchandise security specialists can be valuable for seizure operations of this nature.

Further local trades description legislation²³ may prevent false representations in relation to goods and services. The support of local trading standards officers will be required, the disadvantages here being that, once the matter is put in the hands of the authorities, there is little possibility of the rights owner being able to drop it (in particular, to drop it if it has come to some sort of arrangement with the ambusher). Also, the relatively minor criminal penalties do not deter persistent infringers as effectively as awards of damages and injunctions with much more severe criminal penalties for contempt of court in the event of disobedience.

There are a variety of other legal and practical measures that can be utilized in appropriate cases in various territories, including actions for defamation, injurious falsehood, unjust enrichment and conspiracy to defraud and complaints to the relevant advertising authority such as the advertising and broadcasting regulators. It is also of great importance that local laws prohibiting street vending,²⁴ ticket scalping, advertising billboards, or aerial advertising also are examined.

In relation to factor 3 raised at the beginning of this section, the contractual control of commercial rights relating to sporting events is fast becoming the most important area in the fight against ambush marketing. Certainly in relation to the long-term development of strategies to protect these commercial rights it is at least as important, if not more so, than the effective protection of an events' intellectual property.

If, for example, a sports event organizer enters into agreements with participating bodies (a participation agreement), who in turn exert some form of contractual control over their individual members, perhaps in the form of eligibility requirements, it should in theory be possible to prevent their participation or acquiescence in promotional activity in conflict with the commercial program of the event itself. As recent con-

²³For example, in the U.K., the Trade Descriptions Act 1968.

²⁴In Atlanta street trading laws were of great value in shutting down unauthorized operations selling merchandise at or in the vicinity of the venue.

troversies over the U.S. basketball Dream Team²⁵ clearly demonstrate, the theory can be difficult to implement and/or enforce.

Other contractual controls that may help stop an ambush marketing situation from developing include the control of accreditation for photographers, and access to the venue generally for any commercial purposes that may conflict with existing categories of license. These are dealt with in greater detail in the next section, but it is important to stress here that their effectiveness is contingent upon the ability to control access to a private geographical area. Problems can arise in some territories for political reasons, however. In some situations, there may have been promises for rights protection in contracts with host territories. But in some areas, such as certain middle eastern states, for example, the terms of these contracts may not be honored.

The clear conclusion drawn from experience in combating ambush marketing from a legal perspective is that only by taking practical and legal preventative measures beforehand can a sports body feel confident that it will be able to deliver exclusivity to its sponsors. For this reason, it is imperative that a long-term strategy is developed and tailored to suit the requirements and budgets of each sport, incorporating realistic and achievable objectives.

DEVELOPING A STRATEGY TO PREVENT/MINIMIZE THE IMPACT OF AMBUSH MARKETING

It is of the utmost importance that a coherent and cohesive commercial rights protection program be developed, the provisions of which will be agreeable to all parties who will ultimately be involved in the facilitation of any part of an event. The IOC has for many years advocated just such an approach in creating its TOP program, which seeks to coordinate and unify the many various rights relating to the Olympics. However, although this program has undoubtedly been of great value, there have been some suggestions since Atlanta that TOP as a business model is too top heavy and is perhaps no longer sustainable in its present form. In comparing the relative levels of investments with the level of returns of both the TOP sponsors and ACOG's own sponsors, the ACOG sponsors appear to have fared better.

Notwithstanding this, whatever model is adopted, it cannot be emphasized strongly enough that wherever possible, nations and other parties bidding to host major events must be made to guarantee to commit themselves, as part of the bidding procedure, to the terms of a commer-

²⁵The latest installment in this long-running saga concerned Shaquille O'Neal, who was initially barred by PepsiCo, with whom he has an exclusive sponsorship deal, from signing an agreement and thereby joining the U.S.A. team because it was sponsored by rivals McDonald's and Coca-Cola. The situation has now been settled and O'Neal was on the team.

cial rights protection program. The minimum standards of any such program should therefore be included in the event owner's bid documentation.

To be even considered for a bid, any potential host should therefore guarantee to adopt and implement a preset event strategy for rights protection. In designing such a strategy the three essential areas, a sort of holy trinity of commercial rights protection, must be covered:

1. Control of the intellectual property.
2. Control of the event environment.
3. Control of the event partners.

Property: Protect Event Mascots and Logos via Trademark Registrations

The optimum level of protection for event logos and titles is achieved, as mentioned earlier, by specifically enacted legislation, such as the various Olympic insignia protection acts that exist in various territories internationally.²⁶ The more heavyweight event owners will be able to secure promises to enact such legislation from governments seeking to reap the benefits attendant upon hosting a major world spectacle. However, where this is not possible and in any event, in order to protect the logos and mascots outside the host territory, other avenues of legal protection must be explored.

As discussed above, an original logo or device will often attract copyright protection as an artistic work. Copyright, however, can be subject to challenge, for example, as to its originality or ownership by third parties, which can have perilous results. Further, copyright does not usually protect names or slogans, and internationally some foreign courts may not recognize copyright in simple graphic designs. For these reasons it can be difficult to protect an international licensing program by copyright alone.

If the size of the commercial program warrants it, a domestic or international trademark program is an effective tool in restricting the more direct forms of ambush marketing as it provides a relatively straightforward mechanism to prevent misuse of a logo and serves as a warning to others. In certain territories, for example, in South America or South Africa, where first registration rather than first use is regarded as proof of ownership of a mark, in order to avoid pirates from claiming rights, defensive registrations should be promptly made. This form of trademark piracy is becoming increasingly prevalent and should not be underestimated as a potential source of major headaches.

Other considerations shaping the nature and extent of any international trademark registration program will include the life expectancy

²⁶See footnote 15.

of a mark, the time required to effect registration, and the identification of the important markets, product categories, and potential licensees.

To maintain proprietorship, the marks once adopted should be continuously used in accordance with set and immutable procedures ideally set out in a good practice manual. These procedures should include the use of the appropriate trademark notice (and copyright notice) wherever the mark is used, together with indications of the relevant official status, for example "Official Product" or "Officially Licensed Product" whenever appropriate.

The registrations, for longer-term marks, will need to be maintained and updated periodically to take account of new categories of licensing opportunity as and when they are developed.

Environment: Control the Venues and Locality

An essential point for inclusion in any successful strategy is that the event owner must be guaranteed delivery of a completely clean venue. The definition of *venue* is one which is continually changing and should not be thought of as simply, for example, a single stadium. Indeed the IOC's definition of venue is now a clean City and it is essential that local authorities are brought within the fold of any sponsor protection programme.²⁷

Thus to achieve a clean venue two areas need to be controlled:

1. The stadia themselves and any other field of play should be free of all signage, advertising, promotions, and concessions either on the field of play, the perimeters, stands, public areas, bars and eating areas or elsewhere, including the airspace above²⁸ and, if possible, any mobile or static objects/buildings visible from within the venue by spectators or TV cameras.²⁹ The support of the stadium owner is clearly needed for this. Indeed, the venues need to

²⁷The City of Atlanta had no direct role in organizing the games, resulting in conflicts during the event between the privately funded and officially sanctioned ACOG and the City which persisted in implementing its own commercial program often in conflict with the IOC and ACOG. The plethora of stalls that resulted led Reuters to comment on 5 August 1996: "The stadiums were full of drama and the streets were full of junk." The IOC has resolved to address this failure in Nagano in 1998 and Sydney in 2000 by entering into direct agreements with local authorities.

²⁸In the run up to the Atlanta Games for example, the FAA, under pressure from ACOG, banned all unauthorized flights within the city limits for the duration of the Games to prevent aerial ambush advertising.

²⁹For example, in *Victoria Park Racing and Recreation Grounds Co Ltd v. Taylor* [1938] S8 CLR 479, the High Court of Australia ruled that the owner of a racecourse was unable to prevent the erection of a platform outside the venue from which broadcasts of the race took place. Indeed there was some concern during the Atlanta Games over plans by a local property developer (ex-athlete Tazwell Anderson) to construct a 123-ft "Centennial Tower" overlooking the Olympic village, with a 16-foot flickering flame at its summit, complete with a sponsor identification hoarding. ACOG succeeded in persuading Mr. Anderson to drop Centennial from the proposed name of the tower and refrain from facilitating ambush advertising.

be patrolled to enforce the prohibition of on-site competitive promotional activity. Terms of admission should be carefully drafted and printed on all tickets and accreditation passes, reserving the right to refuse admission or to eject offenders.

2. Also for a truly clean venue, the extent of control should be maximized geographically so that ambush activity outside the stadium itself can be dealt with.³⁰ It must be stressed that for certain types of events, for example, marathons³¹ and yacht races³² this can be difficult to achieve. Where this is attempted, the assistance of trading standards officers and the local police, both of whom must be properly and fully briefed on the ambushing issues, is required.³³ Further, the assistance of the local authority in enforcing or even possibly implementing bylaws to prohibit the erection of billboards or other promotional items near to the venue may be sought in appropriate cases.³⁴ Announcements over public address systems and local radio and television stations regarding pirate products may assist in informing and directing people to the licensed merchandise concessionaires. Local radio and television stations as well as news agencies should be informed by proactive correspondence of the details of any sponsor protection program in place and the need for their acquiescence in these programs.³⁵ Further, local customs officers should be briefed in seminars and lectures to prevent unauthorized goods from overseas from entering the event environment.

Unfortunately, the laws of many jurisdictions will not protect against the use of images of venues in advertisements, although images of individuals are potentially protectable under the laws of passing off and/or defamation, and/or the laws of privacy and publicity in some other territories, including France, Germany and the U.S.

³⁰The need for a long-term strategy is highlighted by the actions of American Express, a nonsponsor, who as early 1992 had bought up prime billboards around the proposed site of the Olympic Stadium in Atlanta.

³¹Take, for example, Nike's ambushing of the New York marathon. Although Adidas were sponsors of the official broadcast, Nike placed huge models of their shoes at strategic points along the route of the race. It was also held in *WCVB v. Boston Athletic Association* (90-10873 N) D Mass [1990] that organizers of sporting events appear in public forums have no right to control unauthorized broadcast for news purposes.

³²Control, however, can be achieved in a negative sense through contract, for example, by inserting a condition in the membership rules of a yacht club that no member will during a race sail within 5 miles of the competitor yachts. Privity of contract is of course the limiting factor in this.

³³During Euro96, a high street sex products store, Ann Summers, was targeted by vigilant event managers, ISL, for running an in-store promotion featuring two scantily clad models under the slogan, "Score with Euro96."

³⁴Nike Park, an 82,000-sq.-ft advertising extravaganza situated near the Olympic village and Samsung's \$10m 96 Expo were successful ambush marketing tools in the vicinity of the event in Atlanta.

³⁵In Atlanta some 1,600 such letters were sent.

Partners: Control the Participants, Sponsors, and Media

The entire network of participants in an event must be made aware of the antiambush program and contractually bound to adhere to it. We have already mentioned the news media and local authorities—the other participants who need to be involved in this process may include:

Licensed Broadcasters. Broadcasters covering the event must be required to screen advertising material in the run up to and during the event for ambush material. In particular, they should be required to prevent the unauthorized use of images associated with the event, allow official sponsors first refusal or rights of first negotiation of program sponsorship and advertising airtime around broadcasts of the event, and/or prevent any brand competitor of an official event sponsor becoming a programme sponsor.³⁶ Further there should be strict prohibitions on broadcasters adding virtual advertisements by computer-generated image manipulation techniques to alter the clean feed.³⁷ Breaches of these provisions could be penalized by cancellation of broadcaster's representatives' accreditation and/or denial of the television signal to offending broadcasters.

As a strategic measure, a sports body should, where possible, buy up all photographs, films and/or TV material of past events in order to develop and control an archive of material for licensing purposes. It is also advisable that event owners reserve the copyright in all broadcast, video, film, and indeed music contracts entered into by it or its agents, and require full copyright notices at the beginning and end of broadcasts/videos, et cetera.

Sponsors/Suppliers/Merchandisers. Official licensees within a sports commercial program must be prevented from, themselves, purposefully or inadvertently acquiescing or assisting in nonlicensees' marketing activities by, for example, providing official merchandise to ambushers for distribution as prizes in competitions, participating in joint promotions that give credence to an ambusher's attempts to imply official association with an event, allowing misleading advertising by am-

³⁶For example, at the Lillehammer 1994 Winter Games, CBS was licensed to use a composite logo featuring its own logo with the Olympic rings. It sold a billboard as part of its broadcast that featured this composite alongside the Sprint logo, together with the voice-over, "Sprint—a proud sponsor of the Olympic broadcast." Sprint, however, was not an Official Sponsor. Likewise, at Atlanta, Official Sponsors AT&T were successfully ambushed by MCI, who sponsored a daily segment of U.S. TV-coverage. The temptation for broadcasters in Europe to engage in such activity has been increased by European Union legislation that effectively states that broadcasters have the right to seek sponsorship of their broadcasts. As premium service satellite and cable broadcasters grow in influence, it is likely to prove more difficult to get broadcasters to commit themselves to contractual restraints as to program sponsorship.

³⁷During the Games in Atlanta the IOC monitored all international broadcasts to ensure that clean images sent around the globe were ultimately broadcast with advertisements superimposed.

businesses in official publications, and using legitimate rights to market products or services not included in the contractual brand category.³⁸

Preventative contractual provisions should therefore be placed in all licence agreements, therefore, including, where appropriate,

- Prohibitions on distribution of licensed merchandise as premiums.
- Rights of prior approval over all licensees' promotional material.
- Absolute prohibitions on joint promotion of any kind connected with the event (save with other licensees).
- Prohibitions against sublicensing, sharing, or assignment of licensed rights.
- Rights of first refusal for sponsors/suppliers to advertise in official publications.
- Prohibition on licensees advertising in pirate event publications as designated by the licensor.
- Requirement for licensees to use official corporate hospitality facilities only.
- Reprohibition on licensees selling or distributing ticket allocations other than to employees and bona fide guests of licensees.

Particular care is needed to prevent general retail or restaurant licensees, from attempting to associate individual products or services that they sell in house with the event and vice versa. For example, were fast food shop, X to sponsor an event, it is conceivable that the soft drink they sell in house, Y (a distinct company and a nonsponsor) would advertise by stating "Drink Y at X—the official sponsor of (the event)."

A radical preventative measure that could be used before any license agreements are even signed, would be to, in a sense, ambush the ambushers by imposing obligations on all bidders for commercial rights not to engage in ambush activity should their bids be rejected. The extent to which such restrictions would be legally enforceable is debatable and could be subject to the applicability of antitrust and competition laws, including, for example, Articles 85 and 86 of the Treaty of Rome for a European Event. Nevertheless, such a device potentially serves as advance warning to potential ambushers as to the legal risks that they will face and the prejudice they may suffer in relation to official association with future events. At least, it imposes a strong moral obligation on rejected bidders not to succumb to sour grapes and spoiling activities.

³⁸It is important to ensure in any program that all licensees receive relative parity in the rights they are granted, in order that they feel they all have an equal slice of the cake. During Euro96, however, ISL was unsuccessful in its legal action against official licensee, Mars, which it deemed had overstepped the bounds of its license. At the Atlanta Games, the U.S. Postal Service was licensed the right to design and market commemorative stamps. However, when it licensed these designs to a T-shirt manufacturer that planned to manufacture T-shirts featuring Olympic athletes and the words "Atlanta" and "USA 96," USOC initiated legal proceedings against it.

Sports Federations, Teams, Clubs, Individuals. Quite clearly, the endorsement by individual athletes and teams of particular products is an entirely legitimate activity. However, when such sponsorships or endorsements conflict with the global marketing program of an event, problems can arise.

The ability to avoid this conflict will very much depend upon the relative bargaining positions of the parties and the constitutional and financial structure of the event. Notwithstanding this, however, event owners should always seek to enter some form of contractual arrangement by way of a participation agreement. Ideally it will contain the following provisions, where appropriate:

- Restrictions on participants wearing branded clothing/footwear.³⁹
- Restrictions on reselling or transferring tickets to prohibited agents.
- Prohibitions on all contracts or arrangements in exchange for cash or benefits in kind in the run up to and during the event.
- Prohibitions on allowing names, images, or likenesses to be used for advertising, or production of any publication or broadcasts relating to the event without the event owner's consent.⁴⁰ The event owner will clearly allow media interviews and may require attendance at press conferences and other media events.
- Obligations on participants to use specific products and services of official sponsors/suppliers, where relevant.
- Obligations, where ambush activity is carried out by an organization with whom a participating team, for example, has an existing relationship, to bring pressure on that organization.
- Prohibition on the creation or use of a mascot or symbol by individual players of teams.
- Restriction on filming or videotaping events and the use to which any such recordings may be applied.
- Requiring attendance at workshops to manage and coordinate the antiambush program.

The Commercial Partners. The commercial participants in the administration of a major sports event and its commercial program will often include rights brokers, subbrokers, commercial and legal advisors, and PR agencies, in addition to the organizing committees and marketing staff of the event owner and its affiliated sports bodies. To maintain

³⁹This can be very difficult to achieve. The Atlanta Games were, for example, notable for Michael Johnson's distinctive gold Nike running shoes and Linford Christie's attendance at a press conference sporting contact lenses emblazoned with the Puma logo.

⁴⁰The problem is highlighted by an example from Euro96, when the English football team had an exclusive deal with Burger King. However, team member and former captain, David Platt, had a deal with McDonald's and appeared in television advertisements throughout the tournament.

consistency in the commercial program it is essential that the right hand knows what the left is doing; that one element of the marketing team is not busy doing deals, granting rights, and/or confirming authorities that conflict with the global rights strategy developed by the event owner.

This may appear self-evident. Nevertheless, failure to comply with this simple rule can have potentially far-reaching and destructive results. An illustration could be an inadvertent conflict between an isotonic drinks sponsor and an official medical products supplier, perhaps contracted by a separate broker, whose isotonic drink product range was not restricted to the sponsor's brands.

To avoid this kind of situation arising it is clearly imperative that the commercial rights program be properly coordinated and that lines of communication are rapid and effective. It is also important to make the event owner the final arbiter in any disputes relating to contractual language.

To achieve any real impact through legal action against ambushers, there are additional requirements and responsibilities that need to be clarified among the commercial partners at the outset of any anti-ambush programme.

Legal action in an ambush marketing context will principally involve two routes:

1. Legal letters requiring ambushers to cease and desist ambush or infringing activity.
2. Applications for injunctions, as discussed previously to stop activities and/or obtain the immediate withdrawal of infringing products.

The effective and cost-efficient implementation of this requires the rapid collection and delivery of full details of the relevant ambush activity and evidence to support the claims of infringement. Standing instructions for lawyers to pursue certain types of offenders are therefore essential. It is also tactically important for the lawyers to pick a weak defendant whenever possible to ensure that a successful result is achieved that can then be publicized to deter other, perhaps more substantial ambushers.

Finally, it should always be borne in mind that resolving a dispute with an ambusher, for example, by granting a license might be a commercially preferable solution to pursuing legal proceedings.

A Positive PR and Media Strategy. Major event owners should insist on support from the whole network of organizations and businesses, which have some form of involvement with the event, to assist in identifying and dealing with ambush marketing, and to educate the public at large as to the problem. This network will include the commercial

partners as well as bodies that one might not automatically identify as being directly involved—such as advertising agencies, media buyers, the press, important retail outlets, local government, and trading standards departments. It is an extremely useful exercise to alert the whole range of participants in this network to the issue of ambush marketing, to the fact that the event organizer has a defined and active strategy to deal with it, and to the relevant participants' role in supporting this strategy.

One word of warning in regard to the publicizing of ambush activity—the event owner and its agents must be aware of the laws relating to trade libel, injurious falsehood, and interference with contracts when citing individual cases to the press or indeed any third party, including contractors, for example, suppliers or distributors of ambush products, to avoid risking liability for the resulting loss to ambushers. An event owner has to be very sure of its legal position, we would submit, before it publicly attacks individual ambushers, for example, through press conferences or the publication of “black lists”.⁴¹

A further and vital component of such a PR strategy is the reporting of the results of the antiambush program to official sponsors and licensees, in order to satisfy them that steps are being taken to protect their brand category exclusivity and to assist in establishing a long-term relationship.

Licensees should accordingly be encouraged generally, and obliged under their contracts, to report suspected ambush or pirate activity. They, after all, are the persons most likely to be aware of the activities of others in their sector. Although licensees should not take unilateral action, they should be informed that the event owner will take legal action whenever possible and cost-effective, and will update the licensees on results. Whenever legal or other action is not feasible, the reasons and repercussions should be discussed with the relevant licensee.

Correspondence regarding this article should be sent to: D Harrington, Townley's Solicitors, Dalby House, 396-398 City Road, London, EC1V 2QA 32/33 Sekforde Street, London EC 1ROHH, U.K. (dan@townleys.co.uk).

⁴¹Organizers should also be aware of the PR pitfalls from targeting noncommercial or charitable ambushers. ACOG suffered widespread negative publicity following its actions against the producers of a press release stating that Olympic team members would be attending a Baptist church in a deprived community in Atlanta.